2

Case No. S S208838

IN THE SUPREME COURT OF THE

STATE OF CALIFORNIA

Monterey Peninsula Water Management District,

Petitioner,

v.

California Public Utilities Commission,

Respondent,

California-American Water Company,

Real Party in Interest

SUPREME COURT
FILED

FEB 25 2013

Frank A. McGuire Clerk

Deputy

The California Public Utilities Commission, Decisions No. 11-03-035 and No.13-01-040 in Proceeding No. Application 10-01-012
The Honorable Maribeth A. Bushey, Administrative Law Judge Presiding
Commissioner Michael R. Peevey, Assigned Commissioner

PETITION FOR REVIEW

David C. Laredo,
Bar No. 66532
dave@laredolaw.net
DeLay & Laredo
606 Forest Avenue
Pacific Grove, CA 93950

Thomas J. MacBride, Jr.,
Bar No. 066662
tmacbride@goodinmacbride.com
Suzy Hong,
Bar No. 239489
Megan Somogyi,
Bar No. 278659
Goodin, MacBride, Squeri,
Day & Lamprey, LLP
505 Sansome Street, Suite 900
San Francisco, California 94111
Telephone: (415) 392-7900
Facsimile: (415) 398-4321

Attorneys for Petitioner
Monterey Peninsula Water
Management District

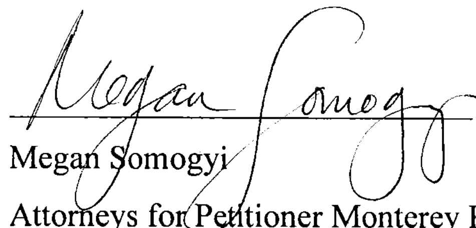
CERTIFICATE OF INTERESTED ENTITIES

Pursuant to California Rules of Court, Rules 8.208 and 8.496, Petitioner Monterey Peninsula Water Management District hereby states that the following entities or persons have either (1) an ownership interest of 10% or more in the party or parties filing this Certificate (CRC 8.208(e)(1)), or (2) a financial or other interest in the outcome of the proceeding that the Justices should consider in determining whether to disqualify themselves (CRC 8.208(e)(2)):

1. Monterey Peninsula Water Management District: A municipal water management district located in Monterey, California.
2. The California Public Utilities Commission: An independent administrative agency organized under Article XII of the California Constitution responsible for overseeing and regulating public utilities in the State of California.
3. California-American Water Company: A privately-owned public utility that provides water service in Monterey, Placer, Ventura, Los Angeles, and San Diego Counties in California.

Dated: February 22, 2013.

GOODIN, MACBRIDE, SQUERI,
DAY & LAMPREY, LLP



Megan Somogyi
Attorneys for Petitioner Monterey Peninsula Water Management District

TABLE OF CONTENTS

Page

I. ISSUE PRESENTED FOR REVIEW 1

II. GROUNDS FOR REVIEW 2

III. STANDARD OF REVIEW 6

A. Petitions for Writ of Review Presenting Important Questions of Law 6

B. Review of Acts in Excess of The Commission's Jurisdiction 6

IV. STATEMENT OF FACTS AND PROCEDURAL HISTORY 8

V. ARGUMENT 15

A. Petitioner Possesses Express Legislative Authority to Levy Taxes and Fees and to Collect User Fees through Utility Bills Issued by Cal-Am 15

1. A Government Entity May Impose Taxes and Fees So Long as It Meets Applicable Constitutional and Statutory Requirements 15

2. Petitioner Is Vested With Express Authority to Adopt the User Fee at Issue Herein and to Collect It Through a Utility Bill 16

B. The Commission Has No Jurisdiction Over Petitioner 17

C. Public Utilities Code Section 451 Does Not Vest the Commission With Jurisdiction to Review and Reject Charges Imposed By Government Entities and Collected Through a Utility Bill 19

1. The Advent of "Section 451 Review" of Government Taxes and Fees 19

2. Commission Construction of Statutes Affecting its Own Jurisdiction is Not Entitled to Deference 20

3. The Commission ignores the plain language of Section 451 21

TABLE OF CONTENTS
(continued)

Page

a. Section 451 Is Devoid of Any Reference to the Commission 21

b. The "Charges" to Which Section 451 Makes Reference Are "Demanded or Received" By Petitioner, Not a Public Utility 21

4. Section 451 Cannot Be Deemed An Express Authorization By the Legislature for the Commission to Exercise Authority Over Petitioner's Fee 23

5. The Commission's construction of Section 451 conflicts with the relevant statutory scheme 24

6. The Rules of Statutory Construction Appropriate to This Dispute Require that the More-Specific Terms of the District Law Supersede the Broad Terms of Section 451 25

a. The Legislature Was Presumed to Be Aware of Section 451 When it Enacted the District Law in 1977 26

b. The More-Specific Provisions of District Law Take Precedence over the Broad Rule in Section 451 26

7. Any Conflict Between District law and Section 451 must be Resolved in Favor of the Later-Enacted Statute 27

VI. THE COMMISSION'S INTERPRETATION OF SECTION 451 IS ABSURD AND IMPERMISSIBLY EXPANDS THE COMMISSION'S JURISDICTION 28

VII. IN THE ALTERNATIVE, GRANTING REVIEW AND TRANSFERRING THE MATTER TO THE SIXTH DISTRICT COURT OF APPEAL IS AN APPROPRIATE WAY TO ADDRESS THE COMMISSION'S UNLAWFUL DECISION 30

TABLE OF CONTENTS
(continued)

Page

VIII. CONCLUSION 32

TABLE OF AUTHORITIES

Page

Statutes

20 Cal. Code Regs. § 3.2 29
20 Cal. Code Regs. § 1.3, subd. (e) 29
California Rule of Court, Rule 8.500, subd. (b) 2
California Rule of Court, Rule 8.500, subd. (b)(1) 2
California Rule of Court, Rule 8.500, subd. (b)(2) 2
California Rule of Court, Rule 8.500, subd. (b)(4) 5, 30, 31
Gov. Code § 53750 *et seq*. 10
Pub. Res. Code §§ 21000-21178 9
Pub. Util. Code §§ 201-2113 24
Pub. Util. Code § 216 22
Pub. Util. Code § 309.5, subd. (a) 3
Pub. Util. Code § 451 .....passim
Pub. Util. Code § 454 12
Pub. Util. Code § 532 23
Pub. Util. Code § 1701.1 29
Pub. Util. Code § 1731 12
Pub. Util. Code § 1756, subd. (d) 30, 31
Pub. Util. Code § 1756, subd. (f) 30, 30
Pub. Util. Code § 1756, subd. (a) 30
Pub. Util. Code § 1757, subd. (a)(1) 6
Stats. 1911 (1st Ex. Sess.), ch. 14, § 1 24
Stats. 1915, ch. 91, § 1 24
Stats. 1915, ch. 91, § 13 24
Stats 1977, ch. 527, § 2, Deering's Water-Uncod. Acts (2008 Supp.)
Act 5065, p. 98-99 8
Stats. 1998, ch. 886 (SB 960), § 1.5, subd. (a) 30

Cases

California Manufacturers Ass'n. v. Public Utilities Com. (1979)
24 Cal.3d 836 28
Carlsbad Municipal Water Dist. v. QLC Corp. (1992)
2 Cal.App.4th 479 15
City of Modesto v. Modesto Irr. Dist. (1973) 34 Cal.App.3d 504 15
City of Pasadena v. AT&T Communications of California, Inc. (2002)
103 Cal.App.4th 981 21
City of San Jose v. Donohue (1975) 51 Cal.App.3d 40 15
County of Inyo v. Public Utilities Com. (1980)
26 Cal.3d 154 .....17, 18, 23, 24

TABLE OF AUTHORITIES
(continued)

Page

Eastern Mun. Water Dist. v. City of Moreno Valley (1994) 31 Cal.App.4th 24 15
Garcia v. McCutchen (1997) 16 Cal.4th 469 21
Hassan v. Mercy American River Hospital (2003) 31 Cal.4th 709 22
Keller v. Chowchilla Water Dist. (2009) 80 Cal.App.4th 1006, ... 15
Los Angeles Met. Transit Authority v. Public Utilities Com. (1959) 52 Cal.2d 655 18
Los Angeles Metropolitan Transit Authority v. Public Utilities Com. (1963) 59 Cal.2d 863, 866 23
McCarther v. Pacific Telesis Group (2010) 48 Cal.4th 104 .... 24, 28
Pacific Bell Wireless, LLC v. Public Utilities Com. (2006) 140 Cal.App.4th 718 20
Paland v. Brooktrails Township Community Services District Bd. of Directors (2009) 179 Cal.App.4th 1358 15
People ex rel. Public Utilities Commission v. City of Fresno (1967) 254 Cal.App.2d 76 26
PG&E Corp. v. Public Utilities Com. (2004) 118 Cal.App.4th 1174 20
Prospect Medical Group Inc. v. Northridge Emergency Medical Group (2009) 45 Cal.4th 497 24
San Leandro Teachers Ass'n v. Governing Bd. of San Leandro Unified School Dist. (2009) 46 Cal.4th 822 24
Santa Clara Valley Transportation Authority v. Public Utilities Com. (2004) 124 Cal.App.4th 346 .... passim

Decisions of the California Public Utilities Commission

Baird v. California-American Water Company (March 9, 1994) 53 C.P.U.C.2d 324,1994 Cal. PUC LEXIS 186 10
Decision No. 09-07-021 .... 10, 11
Decision No. 12-06-020 13
Decision No. 13-01-040 2
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 (May 26, 1989) Decision No.89-05-063, 1989 Cal. PUC LEXIS 890 12
Order Instituting Investigation on the Commission's Own Motion into the Rates, Operations, Practices, Services and Facilities of Southern California Edison Company, etc. (October 25, 2012) Investigation No. 12-10-013, 2012 Cal. PUC LEXIS 483 17

Page

Order Instituting Rulemaking to continue Implementation and Administration of California Renewables Portfolio Standard Program (May 5, 2011) D.12-05-035, 2012 Cal. PUC LEXIS 233 17

Other Authorities

Lakusta, *Operations in an Agency Not Subject to the APA: Public Utilities Commission* (1956) 44 Cal. L. Rev. 218 24

I. ISSUE PRESENTED FOR REVIEW

May the well-established statutory authority of cities, counties, municipal utility districts, and other government entities to levy and collect taxes and fees be restricted by the California Public Utilities Commission ("Commission"), despite the Commission's lack of jurisdiction over government entities or their properly-imposed fees?

II. GROUNDS FOR REVIEW

Pursuant to California Rule of Court, Rule 8.500, subdivision (b), this case presents the following grounds for review:

This case requires the court to settle an important question of law. (CRC 8.500, subd. (b)(1).) This case further warrants review because the Commission exceeded its jurisdiction in issuing Decision No.11-03-035 and Decision No. 13-01-040. (CRC 8.500, subd. (b)(2).)

This case presents an important issue of law for any public entity upon which the Legislature has conferred the authority to levy taxes or fees[1] and collect those taxes or fees through public utility bills. The question is whether Section 451 of the Public Utilities Code ("Section 451") authorizes the Commission to (1) pass judgment on the reasonableness of a tax or fee lawfully promulgated by a government entity over which the Commission has no jurisdiction and (2) prohibit or restrict the government entity's collection of such tax or fee through a utility bill.

Monterey Peninsula Water Management District ("Petitioner" or "District"), is a governmental entity that the Commission concedes is not subject to Commission jurisdiction. Petitioner was established by the Legislature thirty-five years ago for the purpose of managing scarce and environmentally sensitive water resources in the Monterey Peninsula area. The Legislature vested Petitioner with the traditional powers available to government entities to fulfill their statutory purposes. In the case of Petitioner, these include the power to impose fees to fund Petitioner's services and facilities and to contract with a "private or public utility" to collect the fee on utility bills.

---

[1] There is no legal or factual distinction between taxes and fees under the contested issue of law raised in this matter.

Thirty years ago, pursuant to this authority, Petitioner adopted an ordinance[2] imposing a user fee within its boundaries and engaged California-American Water Company ("Cal-Am"), a public utility subject to Commission jurisdiction, to collect the user fee on behalf of Petitioner. Cal-Am collected the fee and remitted it to Petitioner without incident until the instant matter arose.

In 2010, at the direction of the Commission, Cal-Am filed an Application with the Commission requesting authority to continue collecting the user fee on behalf of Petitioner. All parties to the ensuing proceeding, including the Commission's Division of Ratepayer Advocates,[3] urged the Commission to permit Cal-Am to continue to collect the fee on behalf of Petitioner, as it had for decades.

The Commission refused to do so. Ignoring the century-old limitation on its jurisdiction to "private persons or corporations," the Commission relied on a single sentence in a statute devoid of any reference to the Commission, to declare that it possessed jurisdiction over any "charge," including a tax or fee promulgated by a government entity, appearing on a utility bill. The Commission stated that any such charge "regardless of the originator" was subject to "Section 451 Review" by the Commission.[4]

The Commission has never heretofore scrutinized a government tax or fee collected through a utility bill. In the past, the Commission accepted the authority of a governmental entity to impose or levy any form of tax or

---

[2] Ordinance No. 10 (July 26, 1983) (available at http://www.mpwmd.dst.ca.us/ordinances/final/pdf/Ordinance%20010.pdf, last visited February 21, 2013).

[3] The Division of Ratepayer Advocates is a statutorily created division of the Commission staff charged by law with representing "the interests of public utility customers and subscribers within the jurisdiction of the commission." (Pub. Util. Code § 309.5, subd. (a).)

[4] See pp. 19-20, *infra*.

fee upon utility customers. The Commission has only directed that the fee or tax be included as a separate item or items on bills, and that the bills be rendered only to customers residing within the boundaries of the government entity imposing the tax or fee.

Here, however, the Commission required Cal-Am to discontinue collecting the fee for Petitioner, effectively proscribing Petitioner from collecting its user fee through the lawful and statutorily-authorized means of a charge on Cal-Am's bills to customers within the District. The Commission thereby unlawfully asserted jurisdiction over Petitioner.

The Commission's newly-asserted jurisdiction over a fee imposed by Petitioner will affect other government entities that are authorized to levy taxes and fees, and collect those taxes and fees through the bills of public utilities. Cities, for example, are empowered to, and do, levy utility users taxes that are collected through utility bills.[5] Under the Commission's newly-heralded expansion of its own jurisdiction, the Commission may subject any tax or fee to Commission review, "Section 451 Review," examining the purpose, structure and level of the tax or fee,[6] and restrict or prohibit its collection simply because the tax or fee is collected ministerially, as it has been for decades, through a public utility bill.

The Commission's construction of its own jurisdiction exceeds that conferred upon it by the Legislature and is wholly at odds with long-standing precedent holding that the Commission does not have power or authority over public entities except where such authority is expressly conferred by the Legislature.

---

[5] See, e.g., the Communications Users Tax imposed on residents of the City of Los Angeles. The 9% tax is authorized by the Utility Users Tax ordinance, and collected through telephone bills. (Information available at http://finance.lacity.org/content/cutfaq.htm, last visited February 21, 2013.)
[6] See fn. 18, *infra.*

Because the Commission lacked jurisdiction, Decision No.11-03-035 and Decision No. 13-01-040 are unlawful, and this case warrants review. Alternatively, review is appropriate for the purpose of transferring the matter to the Sixth District Court of Appeal for such proceedings as the Supreme Court may order. (CRC 8.500, subd. (b)(4).)

III. STANDARD OF REVIEW

A. Petitions for Writ of Review Presenting Important Questions of Law

Pursuant to Public Utilities Code section 1756, subdivision (f), the Supreme Court is vested with the exclusive jurisdiction to review Commission decisions pertaining to water corporations, except in a complaint or enforcement proceeding. The Commission decisions of which review is sought here pertain to Cal-Am, a water corporation. Accordingly, Petitioner seeks review under this court's original jurisdiction.

This case presents an important question of law for any government entity upon which the Legislature has conferred the authority to (1) levy taxes or fees and (2) collect those taxes or fees through utility bills. The question is whether the Commission may pass judgment on the reasonableness of the level or purpose of a lawfully-imposed government tax or fee, and, if dissatisfied, prohibit or restrict collection of such tax or fee through the statutorily-authorized means of a charge on a utility bill.

The instant petition shows the Commission erred in finding Section 451 vests it with the power to undertake such review. The Commission's granular examination of Petitioner's fee and proscription of its collection through Cal-Am's utility bills exceeds the powers and jurisdiction conferred upon the Commission by the Legislature.

B. Review of Acts in Excess of The Commission's Jurisdiction

The scope of the Court's review of Commission decisions is set out in Public Utilities Code section 1757, which allows the Court to determine, among other things, whether "the commission acted without, or in excess of, its powers or jurisdiction." (Pub. Util. Code § 1757, subd. (a)(1).)

In this case, the Commission has acted well in excess of its powers and jurisdiction by (1) subjecting to "Section 451 Review" the lawfully

imposed user fee of Petitioner, a government agency not subject to Commission jurisdiction, and (2) prohibiting Petitioner from collecting the user fee through Cal-Am's utility bills to customers, as authorized by the Legislature.

IV. STATEMENT OF FACTS AND PROCEDURAL HISTORY

Residents and businesses in the Monterey Peninsula have been struggling with water constraints since the 1940s. This shortage has been due to frequent drought conditions on the semi-arid peninsula, which obtains its water supply solely from rainfall. (Appendix ("App")-I 166.) Cal-Am, the principal retail water provider on the Monterey Peninsula, supplies its Monterey District with surface water and groundwater from the Carmel River System and the coastal subarea of the Seaside Groundwater Basin. (App-I 166.)

The Legislature created Petitioner in 1977 for the purposes of "conserving and augmenting the supplies of water by integrated management of ground and surface water supplies, for control and conservation of storm and wastewater, and for the promotion of the reuse and reclamation of water." (Stats 1977, ch. 527, § 2, Deering's Water-Uncod. Acts (2008 Supp.) Act 5065, p. 98-99 ("District Law").) Petitioner is a governmental body with the authority to levy fees and taxes for services, facilities, and water furnished, and is authorized to "exercise the powers which are expressly granted by [the District Law], together with such powers as are reasonably implied from such express powers and necessary and proper to carry out the objects and purposes of the district." (*Id.* at §§ 133, 301, 326.)

Petitioner is governed by a seven-member Board of Directors ("Board"). Five Directors are elected by voter divisions within the District; one Director is a member of the Monterey County Board of Supervisors and is appointed by the Board of Supervisors; and one Director is a mayor, member of the governing body, or chief executive officer of a city that is wholly within the District boundary, and is appointed by the City Selection Committee of Monterey County. (App-II 286.)

In 1981, Petitioner enacted the Monterey Peninsula's first standby water rationing plan, limiting Cal-Am's appropriations from the Carmel River. (App-I 10.) In 1990, to address the environmental consequences of Cal-Am's water production from the Carmel River and the Seaside Groundwater Basin, and as required by statute, Petitioner adopted mitigation measures referred to herein as Petitioner's Mitigation Program. (Pub. Res. Code §§ 21000-21178; App-I 10.)

Prior to the adoption of the Mitigation Program, Petitioner had (1) enacted Ordinance No. 10, a user fee ordinance to provide funding for Petitioner's exercise of its responsibilities under District Law, and (2) collected that user fee through Cal-Am. Petitioner began collecting the user fee through Cal-Am in 1983. (App-II 289.) Revenues from the user fee supported the Mitigation Program, conservation efforts, and water supply projects.[7] (*Id.* at p. 290.) The authorizing ordinance provides that the user fee is a percentage of each water user's total bill from either Cal-Am or the Seaside Municipal Water System.[8] The user fee is currently set at 8.325% of all monthly and volume based water charges. (*Id.* at p. 289.) The Board of Directors revisits the fee annually during the District's budget review process and examines whether the fee is still required and whether the amount is still appropriate. (*Id.* at p. 340.)

The Commission has long recognized the propriety of Cal-Am's collection of Petitioner's user fee. (See, e.g., *Baird v. California-American Water Company* (March 9, 1994) 53 C.P.U.C.2d 324, 326, 1994 Cal. PUC

[7] One principal water supply project is known as the Aquifer Storage and Recovery project ("ASR"). The ASR project, in very simple terms, seeks to divert seasonally excess winter flows from the Carmel River Basin to artificially recharge the Seaside Basin to increase the availability of water in low flow seasons. (App-II 258.)

[8] Seaside Municipal Water System, which is not subject to the jurisdiction of the Commission, continues to collect the user fee on behalf of Petitioner.

LEXIS 186 [recognizing propriety of Cal-Am's assessment of fee set at level fixed by Petitioner and deferring to Petitioner on any question regarding application of fee to vacant lots].)

In 1996, California voters approved Proposition 218, which added Articles XIII C and XIII D to the California Constitution. Proposition 218 requires a majority vote of affected property owners before a new or increased assessment can be levied. (App-II 339.) The changes made under Proposition 218 were implemented by the Proposition 218 Omnibus Implementation Act. (Gov. Code § 53750 *et seq.*) Following implementation of these changes, Petitioner conducted notice and majority protest proceedings for the portion of the user fee allocated to the ASR program. (App-II 339-340.)

In July 2009, the Commission issued Decision No. 09-07-021 ("D.09-07-021") in response to an application by Cal-Am to increase its rates for water service in its Monterey District. D.09-07-021 did not authorize Cal-Am to continue to collect the user fee on Petitioner's behalf. Instead, the Commission "directed the parties to provide evidence to support the proposed User Fee" in a subsequent docket. (Decision No.13-01-040, at p. 3 [attached hereto as Exhibit 2].) Ordering Paragraph No. 25 of D.09-07-021 directed Cal-Am to develop and submit for Commission approval a program to fund the projects then currently performed by Petitioner that were properly the responsibility of Cal-Am, and authorized Cal-Am to file an advice letter creating a memorandum account in which to record its costs of such funding. (App-I 165.)

In response, Cal-Am (1) created the Monterey Peninsula Water Management District User Fee Memorandum Account ("Memorandum Account") and (2) continued to make payments to Petitioner to fund the Mitigation Program and the ASR, so these two projects would continue to receive funding; the payments were recorded in the Memorandum Account.

(App-I 165.) On January 5, 2013, in compliance with D.09-07-021, Cal-Am filed Application No.10-01-012 ("A.10-01-012") seeking an order authorizing Cal-Am to continue collecting the user fee and remitting it to Petitioner. The Commission's Division of Ratepayer Advocates ("DRA"), a filed a protest on January 18, 2010, objecting to issues raised by the Application not relevant here, but supporting the Application in all other respects.

During the pendency of A.10-01-012, DRA, Cal-Am and Petitioner, the only parties to the proceeding at that time,[9] reached agreement with regard to the user fee. They executed a settlement ("All-Party Settlement") stipulating that: (1) Petitioner's Mitigation Program is non-duplicative, reasonable, and prudent; (2) Petitioner's ASR is non-duplicative, reasonable, and prudent; and (3) Cal-Am should be authorized to collect Petitioner's user fee at a rate set by Petitioner and remit the sums collected to Petitioner. (App-I 167-168.)

On May 18, 2010, DRA, Cal-Am and Petitioner filed a motion asking the Commission to approve the All-Party Settlement.

On December 21, 2010, an Administrative Law Judge ("ALJ") at the Commission issued a Proposed Decision ("PD") denying the motion, denying the Application, and closing the proceeding, which the Commission directed Cal-Am to initiate in the first place. DRA, Cal-Am and Petitioner submitted comments on the PD. In their comments, all parties stated the PD erred because the PD, if adopted by the Commission, would impermissibly exercise jurisdiction over the user fee and directly contravene Commission precedent and Commission guidelines for equitable treatment of revenue-producing mechanisms imposed by

[9] The Sierra Club was accorded party status in late 2011.

government entities on public utilities.[10] (App-I 108-109, 128-129, 143-144.)

On March 25, 2011, the Commission issued Decision No.11-03-035 ("D.11-03-035" [attached hereto as Exhibit 1]). Notwithstanding the unanimous opinion of the affected parties that the PD impermissibly exercised jurisdiction over the user fee, the Commission, relying on Pub. Util. Code § 451 and 454,[11] governing rates charged by a public utility, found the All-Party Settlement "does not demonstrate that the... District's user fee meets the Commission's standards." (D.11-03-035, at p. 14.) The decision instructed Cal-Am to file an amended application and directed it to close the Memorandum Account within 60 days. (*Id.* at pp. 17-18.)

On April 25, 2011, Petitioner filed an application for rehearing of D.11-03-035 pursuant to Public Utilities Code section 1731. The rehearing application alleged numerous jurisdictional and procedural defects in D.11-03-035, including the Commission's lack of jurisdiction over Petitioner and its user fee.

On August 26, 2011, as directed by D.11-03-035, Cal-Am filed an Amended Application, proposing a joint program with Petitioner to perform the Mitigation Program and the ASR project. (App-I 216.) Petitioner protested the Amended Application on the grounds the Commission

---

[10] *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* (May 26, 1989) Decision No.89-05-063, 1989 Cal. PUC LEXIS 890, at p. *36 ("This Commission does not dispute or seek to dispute the authority or right of any local governmental entity to impose or levy any form of tax or fee upon utility customers or the utility itself, which that local entity, as a matter of general law or judicial decision, has jurisdiction to impose, levy, or increase. Any issue relating to such local authority is a matter for the Superior Court, not this Commission.").

[11] Ultimately, in Decision No.13-01-035 ("Rehearing Decision"), the Commission abandoned its reliance on Section 454.

impermissibly exercised jurisdiction over the user fee. (App-I 246.) DRA filed a general protest to the amended application. (*Id.* at pp. 249-251.)

On June 26, 2012, the Commission issued Decision No. 12-06-020 authorizing Cal-Am to enter into an agreement with Petitioner to fund Carmel River mitigation measures. Pursuant to Decision No. 12-06-020, District activities found reasonable by the Commission would be funded by a *Cal-Am* surcharge on its customer's bills. (App-III 577-579.) The net effect of the decision was to partially replace the user fee revenues denied Petitioner by D.11-03-035 with revenues from Cal-Am squarely under the control of the Commission. The change in the source of funding left the Commission, rather than Petitioner's Board, with the authority to make judgments regarding whether the need and costs for *Petitioner's* mitigation projects in Monterey County warranted funding by water users in Monterey County.

On October 14, 2011, while the Amended Application was before the Commission, Petitioner filed a Petition for Modification of D.11-03-035 in order to provide the Commission with a procedural vehicle for revisiting its rejection of the user fee while Petitioner's rehearing application was pending. The Petition for Modification sought to amend D.11-03-035 by modifying it to find the All-Party Settlement was reasonable. (App-II 253-255.) The Commission has never taken any action with respect to the Petition for Modification; the Rehearing Decision, however, affirmed the Commission's initial ruling that the All-Party Settlement was not reasonable and should not be adopted. (Rehearing Decision, at pp. 23-24.)

On January 25, 2013, the Commission issued Decision No.13-01-040 ("Rehearing Decision"), denying Petitioner's application for rehearing of D.11-03-035. The Rehearing Decision denied that the Commission either asserted jurisdiction over Petitioner or "negate[d] any lawful authority [Petitioner] may have to impose a User Fee that would be

collected by Cal-Am from the utility's customers." (Rehearing Decision, at p. 5.) Stating that it "has consistently held that it will not pass judgment on the authority of any local entity to impose taxes, fees or charges on utilities or their customers" and "recognize[s] that local taxing authority is properly the domain of the Superior Court," the Commission "presumed the District's authority [to levy taxes and fees] is sound." (*Ibid.*)

After those acknowledgements, however, the Commission framed the issue now before this Court:

> That said, it is within our jurisdiction to protect the public interest in matters pertaining to utility regulation. That jurisdiction includes exclusive authority over public utility rates and cost recovery, and the duty to ensure those rates and costs are just, reasonable, and nondiscriminatory. *Because Cal-Am would be recovering the proposed [District] User Fee from its customers, it was within the Commission's jurisdiction and responsibility to review the proposed User Fee costs.*
>
> . . .
>
> *(T)he "charge," regardless of the originator, was properly subject to the Section 451 review.*

(Rehearing Decision, at pp. 5, 20 [italics added].)

Petitioner believes the emphasized statements of law are incorrect and now seeks review in this court.

V. ARGUMENT

A. Petitioner Possesses Express Legislative Authority to Levy Taxes and Fees and to Collect User Fees through Utility Bills Issued by Cal-Am.

1. A Government Entity May Impose Taxes and Fees So Long as It Meets Applicable Constitutional and Statutory Requirements

Government entities have a well-established right to levy and collect taxes and fees so long as they comply with the applicable constitutional and statutory requirements for imposition of those taxes and fees. (See, e.g., *Paland v. Brooktrails Township Community Services District Bd. of Directors* (2009) 179 Cal.App.4th 1358, 1362, 1365-1366 [holding that the Community Services District properly imposed monthly water and sewer base rates fees]; *Keller v. Chowchilla Water Dist.* (2009) 80 Cal.App.4th 1006, 1008 [holding that the Water District properly imposed a standby charge for the purchase of water]; *Carlsbad Municipal Water Dist. v. QLC Corp.* (1992) 2 Cal.App.4th 479, 491 [holding that the Water District properly imposed a development fee].) The Commission does not dispute this authority. [12]

The power to impose a tax or fee includes the power to collect it. (See *Eastern Mun. Water Dist. v. City of Moreno Valley* (1994) 31 Cal.App.4th 24, 30 ["[A] charter city has the implied authority to require collection of a utility user's tax by the provider of the service."]; *City of San Jose v. Donohue* (1975) 51 Cal.App.3d 40, 47 [stating the power to tax carries with it the power to effect collection]; *City of Modesto v. Modesto Irr. Dist.* (1973) 34 Cal.App.3d 504, 508 ["It is basic that the power to tax

[12] See fn. 10, *supra*; see also Rehearing Decision, at p. 5, and fn. 18 ["This Commission has consistently held that it will not pass judgment on the authority of any local entity to impose taxes, fees or charges on utilities or their customers."].

carries with it the corollary power to use reasonable means to effect its collection; otherwise, the power to impose a tax is meaningless."].)

2. Petitioner Is Vested With Express Authority to Adopt the User Fee at Issue Herein and to Collect It Through a Utility Bill

The Legislature created Petitioner in 1977, declaring that:

> [W]ithin the Monterey Peninsula area, there is need for conserving and augmenting the supplies of water by integrated management of ground and surface water supplies, for control and conservation of storm and wastewater, and for promotion of the reuse and reclamation of water……
>
> . . .
>
> (District Law, *supra*, § 2.)

District Law vests Petitioner with express authority to levy taxes and fees and to collect user fees through utility bills issued by Cal-Am. As relevant here, Petitioner is expressly authorized to: (1) "levy and collect taxes and assessments upon land and improvements to land within the district for the purposes of carrying on the operations and paying the obligations of the district" (District Law, *supra*, § 306; see also *id.* at §§ 501 and 701); (2) "fix, revise, and collect rates and charges for the services, facilities, or water furnished by it" (*id.* at § 326, subd. (b)); and (3) "provide that charges for any of its services or facilities may be collected together with, and not separately from, the charges for other services or facilities rendered by it, *or it may contract that all such charges be collected by any other private or public utility, and that such charges be billed upon the same bill and collected as one item.*" (*Id.* at § 326, subd. (d) [italics added].) The Legislature further vested Petitioner with authority to

"exercise the powers which are expressly granted by [District Law], together with such powers as are reasonably implied from such express powers and necessary and proper to carry out the objects and purposes of the district." (*Id.* at § 301; see also *id.* at § 133.)

The Commission acknowledged the express, broad authority conferred upon Petitioner by the Legislature, stating:

> This Commission has consistently held that it will not pass judgment on the authority of any local entity to impose taxes, fees or charges on utilities *or their customers*. We recognize that local taxing authority is properly the domain of the Superior Court. Thus, for purposes of D.11-03-035, we presumed the District's authority is sound.

(Rehearing Decision, at p. 5 [footnotes omitted; italics added].)

Petitioner exercised its undisputed authority to assess the user fee at issue here when it enacted Ordinance No. 10.

B. The Commission Has No Jurisdiction Over Petitioner

Petitioner is not a public utility governed by the Commission. The Commission has long acknowledged that it is not vested with jurisdiction over government entities such as Petitioner. (See, e.g., *Order Instituting Investigation on the Commission's Own Motion into the Rates, Operations, Practices, Services and Facilities of Southern California Edison Company, etc.* (October 25, 2012) Investigation No. 12-10-013, 2012 Cal. PUC LEXIS 483, at p. *3, fn. 1 ["The City of Riverside is a municipal utility not under [Commission] jurisdiction."]; *Order Instituting Rulemaking to continue Implementation and Administration of California Renewables Portfolio Standard Program* (May 5, 2011) D.12-05-035, 2012 Cal. PUC LEXIS 233, at p. * 143 [holding the Commission has no jurisdiction over the tariffs of publicly-owned utilities].) This Court so held in *County of*

Inyo v. Public Utilities Commission, which affirmed the Commission's dismissal of a complaint before it against the Los Angeles Department of Water and Power ("LADWP"). (*County of Inyo v. Public Utilities Com.* (1980) 26 Cal.3d 154, 1966 ("*Inyo*").) "The commission has no jurisdiction over municipally owned utilities unless expressly provided by statute" (*Id.* at p. 166 [internal quotation marks omitted].) Since the Legislature had enacted no statute pertaining to municipal utilities such as LADWP, "it is plain . . . the Legislature has not granted the PUC jurisdiction over rates charged by municipally owned utilities to municipal residents." (*Id.* at pp. 166-167.) Similarly, the Legislature has not given the Commission statutory authority over Petitioner; the Commission therefore has no jurisdiction over Petitioner's user fee. As this "Court has recognized, '[e]stablished doctrine declares that, [i]n the absence of legislation otherwise providing, the [PUC's] jurisdiction to regulate public utilities extends only to the regulation of privately owned utilities.'" (*Santa Clara Valley Transportation Authority v. Public Utilities Com.* (2004) 124 Cal.App.4th 346, 356 ("*Santa Clara*") [quoting *Los Angeles Met. Transit Authority v. Public Utilities Com.* (1959) 52 Cal.2d 655, 661 (internal quotation marks omitted)].)

The Commission disclaims any assertion of jurisdiction over Petitioner. Instead, the Commission asserts that because Petitioner's user fee appears on a public utility bill, the user fee, and presumably any other tax or fee appearing on the bill "regardless of the originator," is subject to review by the Commission to determine whether the user fee is "just and reasonable." The Commission refers to this scrutiny as "Section 451 review." (Rehearing Decision, at p. 20.).

Section 451, however, provides the Commission no such authority.

C. Public Utilities Code Section 451 Does Not Vest the Commission With Jurisdiction to Review and Reject Charges Imposed By Government Entities and Collected Through a Utility Bill

1. The Advent of "Section 451 Review" of Government Taxes and Fees

Despite the undisputed fact the Commission has no jurisdiction over Petitioner or the user fees Petitioner lawfully adopted, the Commission nevertheless purports to have jurisdiction to review the user fee if Petitioner collects it, as permitted by law, through Cal-Am.

The Commission's rationale is simply stated: because "Cal-Am would be recovering the proposed User Fee from its customers, it was within the Commission's jurisdiction and responsibility to review the proposed User Fee costs." (Rehearing Decision, at p. 5.) Public Utilities Code Section 451[13] ("Section 451") serves as the sole justification for this claim.[14] The Rehearing Decision states that "[w]hat the District ignores is that the fee is still a charge that would be billed and recovered from Cal-Am customer [*sic*]. As such, the 'charge,' regardless of the originator, was properly subject to the Section 451 review." (Rehearing Decision, at p. 20.)

---

[13] Section 451 provides, as relevant here:

> All charges demanded or received by any public utility, or by any two or more public utilities, for any product or commodity furnished or to be furnished or any service rendered or to be rendered shall be just and reasonable. Every unjust or unreasonable charge demanded or received for such product or commodity or service is unlawful.

[14] D.11-03-035 made reference to section 454 which plainly applies only to "public utilities" and, in the Rehearing Decision, the Commission abandoned any reliance on Section 454.

The Commission offers no authority or analysis to support its construction of Section 451 and none exists. Its broad view of the reach of the statute makes no distinction between taxes, fees or any other type of charge "regardless of the originator." The Commission's interpretation transforms Section 451from a broadly-stated standard governing the rates of public utilities into a rare exception to the fundamental legal principle that the Commission's jurisdiction extends only to private public utilities, not to government bodies. The Rehearing Decision announces that if a government body seeks to collect a tax or fee through a utility bill, the predicate to doing so is to submit the tax or fee to "Section 451 review"– a phrase that does not appear in any previous decision of the Commission.

Assuming the Commission had jurisdiction over public entities, which it does not, Section 451 Review of government taxes and fees cannot survive application of the customary rules of statutory construction.

2. Commission Construction of Statutes Affecting its Own Jurisdiction is Not Entitled to Deference

At the outset, the Commission's construction of statutes delimiting its own jurisdiction is not entitled to the level of deference required with regard to the Commission's construction of other statutes. (*Pacific Bell Wireless, LLC v. Public Utilities Com.* (2006) 140 Cal.App.4th 718, 729 ("*PacBell Wireless*"); *Santa Clara, supra,* 124 Cal.App.4th at p. 359; *PG&E Corp. v. Public Utilities Com.* (2004) 118 Cal.App.4th 1174, 1194.)

In addition, even were the Court to find the statute to be of a class where deference was appropriate, deference to the Commission's construction may not be afforded where Commission's interpretation of a particular statute "fails to bear a reasonable relation to statutory purposes and language." (*PacBell Wireless, supra,* 140 Cal.App.4th at p. 736.) Here, the Commission's construction of Section 451 bears no relationship to the statute's purpose, which is to ensure that the rates of public utilities

are "just and reasonable," or the language of the statute, which is devoid of any reference to the Commission.

3. The Commission ignores the plain language of Section 451

When interpreting statutes, courts first look to the plain language of the statute and give the words their ordinary, everyday meaning. If the meaning is unambiguous, the plain language controls. (*Garcia v. McCutchen* (1997) 16 Cal.4th 469, 476.) Courts have further held that "[w]hen the words are unambiguous, we presume the lawmakers meant what they said . . . . The courts may not, under the guise of statutory construction, rewrite the law or give the words an effect different from the plain and direct import of the terms used." (*City of Pasadena v. AT&T Communications of California, Inc.* (2002) 103 Cal.App.4th 981, 984 [italics added; internal citations and quotation marks omitted]; Code Civ. Proc. § 1858.). The Commission's interpretation of Section 451 is inconsistent with the plain language of the statute.

a. Section 451 Is Devoid of Any Reference to the Commission

At the outset, *Section 451 makes no reference to the Commission.* The plain language of the statute sets a broad standard requiring that the rates of public utilities be "just and reasonable." No language in the statute authorizes the Commission to review taxes or fees of government entities such as Petitioner. (Pub. Util. Code § 451.)

b. The "Charges" to Which Section 451 Makes Reference Are "Demanded or Received" By Petitioner, Not a Public Utility

Section 451 applies the "just and reasonable" standard to "*all charges demanded or received by any public utility* ." (Pub. Util. Code § 451 [italics added].) The plain language of Section 451 displays the

Legislature's intent that the "just and reasonable" standard apply to charges demanded or received by a *public utility* for itself. In this case, the user fee is not demanded or received by Cal-Am, a public utility, for its own account; it is demanded and received by Petitioner, the government body that imposed the fee by ordinance. Cal-Am collects the user fee as a purely ministerial function through its utility bills, as authorized pursuant to District Law. (District Law, *supra*, at § 326 [user fee may be *collected by any other private or public utility, and . . . such charges be billed upon the same bill and collected as one item*] [italics added].)

Even where the statute makes reference to a second entity "demanding or receiving" charges, the second entity must be a "public utility." (Pub. Util. Code § 451.) Petitioner is not a "public utility" as the term is used in the Public Utilities Code. (See Pub. Util. Code § 216.)

Finally, reference to the final sentence of Section 451 affirms that the "charges" subject to the "just and reasonable" test in the first sentence are those of the public utility. Section 451 concludes by requiring: "All *rules* made by a public utility affecting or pertaining to its charges or service to the public shall be just and reasonable." (Italics added.) Can the Legislature have intended that all "charges" on the bill "regardless of the originator" be subject to "Section 451 review" to determine whether they are "just and reasonable," but that with respect to "rules" Section 451 Review applies only to those "made by a public utility"? The rules of statutory construction reject that outcome. A word given a particular meaning in one part of a statute should be given the same meaning throughout. (*Hassan v. Mercy American River Hospital* (2003) 31 Cal.4th 709, 715.) If "charges," as used throughout the statute, mean the charges originating with the public utility itself, the final sentence of Section 451 is consistent with the balance of the Public Utilities Code. (See, e.g., Section 454 [showing required before public utility changes any rule resulting in

new rate]; Section 532 [public utility proscribed from extending any "rule" unless the rule is extended to all uniformly].) By contrast, if "charges" embraces anything on the utility bill "regardless of the originator," Section 451 Review extend not only to taxes and fees collected through the utility bill, but to any "rule affecting or pertaining to its charges." The Legislature cannot possibly have intended to subject government bodies to such scrutiny.

4. Section 451 Cannot Be Deemed An Express Authorization By the Legislature for the Commission to Exercise Authority Over Petitioner's Fee.

In the absence of "express authority" from the Legislature, the Commission may not regulate the activities of non-public utilities. (*Inyo, supra*, 26 Cal.3d at p. 166.) The Commission accepts this premise but nevertheless argues that Section 451 provides it with authority to scrutinize taxes or fees imposed by government entities if they are collected through a public utility bill. (Rehearing Decision, at p. 5.) While this court has recognized statutes found to provide the Commission the requisite "express authority" to regulate an activity of government,[15] Section 451, by contrast, makes no reference at all to the Commission. The absence of any such reference makes it impossible to characterize Section 451 as "expressly authorizing" the Commission to exercise jurisdiction over Petitioner's collection of its user fee.

---

[15] See *Los Angeles Metropolitan Transit Authority v. Public Utilities Com.* (1963) 59 Cal.2d 863, 866 [stating the Los Angeles Metropolitan Transit Authority Act expressly gave the Commission jurisdiction over safety rules and regulations].

5. The Commission's construction of Section 451 conflicts with the relevant statutory scheme

The rules of statutory construction ask whether a particular construction of the statute is consistent with the balance of a relevant statutory scheme. (*McCarther v. Pacific Telesis Group* (2010) 48 Cal.4th 104, 110 [statutes or statutory sections relating to the same subject must be harmonized, both internally and with each other, to the extent possible]; *San Leandro Teachers Ass'n v. Governing Bd. of San Leandro Unified School Dist.* (2009) 46 Cal.4th 822, 831 [courts do not consider statutory language in isolation, but instead examine the entire substance of the statute in order to determine the scope and purpose of the provision, construing its words in context and harmonizing its various parts]; *Prospect Medical Group Inc. v. Northridge Emergency Medical Group* (2009) 45 Cal.4th 497, 506 [courts do not consider statutory language in isolation, but in context of the statutory framework as a whole in order to harmonize the various parts of the enactment].)

Here, the Commission's constriction of Section 451 is inconsistent with both the Public Utilities Act[16] governing the Commission and the District Law governing Petitioner. The central jurisdictional tenet of the Public Utilities Act and Article XII, section 3, of the State Constitution is the limitation of the Commission's authority to private persons or corporations. (*Inyo*, *supra*, 26 Cal.3d at p 164; *Santa Clara*, *supra*, 124 Cal.App.4th at p. 356.) The Commission's assertion of "Section 451

---

[16] The Public Utilities Act (Pub. Util. Code §§ 201-2113) was first enacted in 1911 (Stats. 1911 (1st Ex. Sess.), ch. 14, § 1), and was reenacted in 1915 (Stats. 1915, ch. 91, § 1). (See Lakusta, *Operations in an Agency Not Subject to the APA: Public Utilities Commission* (1956) 44 Cal. L. Rev. 218, 219, fn. 8.) Section 451 is derived from section 13 of the 1915 enactment. (Stats. 1915, ch. 91, § 13.)

Review" over a government tax or fee appearing on a utility bill directly conflicts with this principle.

The Commission's construction is also inconsistent with District Law, pursuant to which Petitioner is expressly vested with the power to impose the user fee (District Law, § 326, subd. (b),) and collect it through the bill of a public utility. (*Id.* at § 326, subd. (d).) District Law does not authorize or direct Petitioner to seek approval from the Commission prior to imposing and collecting the user fee. Indeed, as is the case with respect to Section 451, the Commission is never mentioned.

The Commission's interpretation of Section 451 is therefore incompatible with both the Public Utilities Act and District Law, the two statutory schemes implicated by the Commission's new "Section 451 Review" of government taxes and fees.

6. The Rules of Statutory Construction Appropriate to This Dispute Require that the More-Specific Terms of the District Law Supersede the Broad Terms of Section 451

In *Santa Clara, supra*, the Sixth District Court of Appeal summarized the applicable rules of statutory construction to be employed where, as here, one statute is advanced to support the lawfulness of a Commission act while another statutory scheme is advanced to support the contrary conclusion: "If conflicting statutes cannot be reconciled, later enactments supersede earlier ones, and more specific provisions take precedence over more general ones. . . . The courts assume that in enacting a statute the Legislature was aware of existing, related laws and intended to maintain a consistent body of statutes." (*Santa Clara, supra*, 124 Cal.App.4th at p. 360 [internal quotation marks and citations omitted].)

Application of the rules articulated in *Santa Clara* dispels any notion that Section 451 can be applied to preclude Petitioner from exercising its powers under District Law.

a. The Legislature Was Presumed to Be Aware of Section 451 When it Enacted the District Law in 1977

When the Legislature enacted the District Law in 1977, authorizing Petitioner to collect fees through a public utility, it was presumed to be aware of Section 451. (Cf. *Santa Clara*, *supra*, 124 Cal.App.4th at p. 360.) The rules of statutory construction presume that if the legislature intended to subject fees enacted by the new District to Section 451 Review, it would have so provided.

In *Santa Clara*, the Court was required to determine whether Sections 1201 and 1202 of the Public Utilities Code applied to a public transit district. It noted the obvious, "[i]f the Legislature had wanted sections 1201 and 1202 to apply to transit districts, it could simply have said so." (*Santa Clara, supra*, 124 Cal.App.4th at p. 365 .) The same logic applies here.

It cannot be presumed that when the Legislature created Petitioner in 1977, and authorized Petitioner to impose a user fee "collected by [a] private or public utility" (District Law, *supra*, at § 326), the Legislature also intended to relegate that newly-created authority to Commission review under a broadly-worded statute enacted many years earlier to govern privately owned public utilities. (Cf. *Santa Clara*, *supra*, 124 Cal.App.4th at p. 360.)

b. The More-Specific Provisions of District Law Take Precedence over the Broad Rule in Section 451.

It is the rule that "a specific provision of a statute controls a general provision." (*People ex rel. Public Utilities Commission v. City of Fresno* (1967) 254 Cal.App.2d 76, 84.) District Law specifically enumerates the powers and duties of Petitioner; Section 451 only states a general rule that charges demanded or received by public utilities be "just and reasonable."

The more-specific terms of the District Law govern. (*Ibid.* [holding specific provisions of the Code of Civil Procedure governing eminent domain took precedence over general provisions of the Public Utilities Code such that the Commission was without authority to review a municipality's acquisition of a public utility water system by condemnation].)

7. Any Conflict Between District law and Section 451 must be Resolved in Favor of the Later-Enacted Statute.

Where in conflict, the terms of a later enacted statute govern over those of an earlier enactment. (*Santa Clara*, *supra*, 124 Cal.App.4th at p. 360.) Section 451 was enacted in its current form in 1951 but is derived from legislation enacted in 1911 after the creation of the original California Railroad Commission.[17] District Law was enacted in 1977, and established a detailed statutory framework for Petitioner's operations. Assuming, *arguendo*, Section 451 established some form of Commission authority over non-utility charges on a utility bill, that authority, at least with respect to Petitioner, was abrogated by the later-enacted District Law expressly authorizing Petitioner to impose a user fee and provide for its collection by a public utility. The later-enacted statute effectively repeals any limitation on Petitioner's authority that might arise out the broadly-stated, century-old Section 451, which simply provides that public utility rates be "just and reasonable." (Cf. *Santa Clara*, *supra*, 124 Cal.App.4th at p. 360.)

---

[17] See fn. 16, *supra*.

VI. THE COMMISSION'S INTERPRETATION OF SECTION 451 IS ABSURD AND IMPERMISSIBLY EXPANDS THE COMMISSION'S JURISDICTION.

Where a statute is theoretically capable of more than one construction, courts choose that which most comports with the intent of the Legislature. Words must be construed in context, and statutes must be harmonized, both internally and with each other, to the extent possible. Interpretive constructions which render some words surplusage, defy common sense, or lead to mischief or absurdity, are to be avoided. (*McCarther v. Pacific Telesis Group* (2010) 48 Cal.4th 104, 110; *California Manufacturers Ass'n. v. Public Utilities Com.* (1979) 24 Cal.3d 836, 844.)

The Rehearing Decision announces the application of "Section 451 Review," which is nothing short of granular scrutiny, to government taxes and fees collected through a utility bill.[18] Neither the Rehearing Decision, nor any other Commission decision, however, explain how a government entity is to seek such review so that it may collect its tax or fee through a utility bill. No provision of the Public Utilities Code fixes substantive or procedural requirements for Commission review of government taxes and

---

[18] Here, Section 451 Review included determining that (1) Petitioner's inclusion of both the ASR project and the Mitigation Program in the user fee is "not consistent with the Commission's ratemaking standards" (D.11-03-035, at pp. 11-12); (2) Petitioner had failed to justify the percentage increase in annual collections of the user fee since 2006 (*id.* at p. 12); (3) Petitioner did not include certain itemized costs in its Mitigation Program report, such as the rebate program, project expenditures for "ordinance enforcement", and salaries for the Conservation Office Staff (*id.* at pp. 12-13); and (4) it was not explained how costs related to endangered species are divided between the National Oceanic and Atmospheric Administration steelhead mitigation activities and Petitioner's activities that also focus on steelhead fisheries. (*Id.* at p. 13.)

fees. While § 454, for example, establishes a customer notice requirement for rate increases, it only applies to public utilities.

Nor do the Commission's Rules of Practice and Procedure provide for Commission review of fees or taxes imposed by public entities. The rules governing rate applications plainly apply only to public utilities already regulated as such by the Commission. (20 Cal. Code Regs. § 3.2.) Were the Commission to "categorize" the government entity's request, as required by Public Utilities Code Section 1701.1, subdivision (a), the closest applicable category is defined by Rule 1.3, subdivision (e), which states: "'Ratesetting' proceedings are proceedings in which the Commission sets or investigates rates for a specifically named utility (or utilities), or establishes a mechanism that in turn sets the rates for a specifically named utility (or utilities)." (20 Cal. Code Regs. § 1.3, subd. (e).) Government entities, however, are not public utilities.

The Public Utilities Code and the Commission's Rules do not provide the mechanism or jurisdiction for Section 451 Review of government taxes and fees. Requiring such review despite this deficiency would lead to enormous practical and jurisdictional confusion. The Commission has no jurisdiction over such taxes or fees, and has never sought to exercise jurisdiction over such taxes or fees, even when included, as they have been for decades, on a public utility bill.

VII. IN THE ALTERNATIVE, GRANTING REVIEW AND TRANSFERRING THE MATTER TO THE SIXTH DISTRICT COURT OF APPEAL IS AN APPROPRIATE WAY TO ADDRESS THE COMMISSION'S UNLAWFUL DECISION

California Rule of Court, Rule 8.500, subdivision (b)(4) ("Rule 8.500(b)(4)") provides that this court may grant review for the purpose of transferring the matter to the Court of Appeal for such proceedings as this court deems necessary.

But for the provisions of Public Utilities Code section 1756, subdivision (f) ("Section 1756(f)"), which gives this Court original jurisdiction over Commission decisions pertaining to water corporations (except in complaint or enforcement proceedings), this matter would be brought before the Sixth District Court of Appeal. (Pub. Util. Code § 1756, subds. (a), (d).)

The legislative history of Section 1756(f) indicates the Legislature differentiated between the competitive energy, telecommunications and transportation markets and the traditional monopoly market served by water corporations. (Stats. 1998, ch. 886 (SB 960), § 1.5, subd. (a).) The Legislature believed expanded appellate review with regard to that monopoly water utility market was inappropriate and, accordingly, original jurisdiction remained vested in the Supreme Court. (*Ibid.*) The provisions of Section 1756(f) apply here as a matter of form because the public utility bill at issue is that of Cal-Am, a water corporation.

The substance of the matter for which review is sought, however, is not of the nature the Legislature envisioned when it retained original jurisdiction over water corporations for the Supreme Court. The issue presented here is not informed by the nature of the market served by the utility. The user fee at issue could have been lawfully imposed and collected via the bills of a gas or electric utility or transportation provider. The outcome here is neither affected by whether Cal-Am operates in a

monopoly or competitive market nor would it affect Cal-Am's status in that market.[19]Rule 8.500(b)(4) allows this Court to exercise its original jurisdiction over this case by granting review, but also provides a mechanism for a reasonable allocation of judicial resources by allowing the matter to be transferred to a District Court of Appeal with instructions for further proceedings. Petitioner is cognizant of this Court's crowded docket, and in light of the *pro forma* nature of this Court's original jurisdiction, believes the strained resources of our State's judicial system would be best allocated by transferring this matter to a District Court of Appeal. The Sixth District encompasses Monterey County. Petitioner is situated in Monterey County, and the disputed user fee was assessed on residents and businesses in Monterey County. The Sixth District is, therefore, the proper Court of Appeal to review the Commission's unlawful decision. (Pub. Util. Code § 1756, subd. (d).) Petitioner therefore respectfully requests that this Court, in the alternative, grant review and transfer to the Sixth District Court of Appeal for further proceedings.

[19] For example, the Los Angeles Telecommunications User Tax, *supra* fn. 5, applies to any customer of myriad carriers in the very competitive telecommunications market.

VIII. CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the Court grant this Petition for Review. Alternatively, Petitioner respectfully requests that the Court grant review and transfer to the Court of Appeal for further proceedings.

Dated: February 22, 2013

GOODIN, MACBRIDE, SQUERI,
DAY & LAMPREY, LLP
505 Sansome Street, Suite 900
San Francisco, CA 94111
Suzy Hong
Megan Somogyi

DeLAY & LAREDO
David C. Laredo
606 Forest Avenue
Pacific Grove, CA 93950

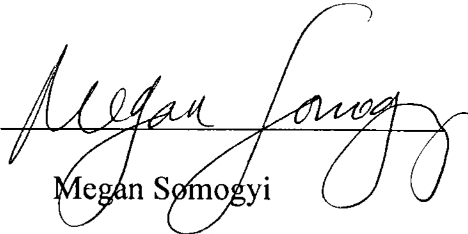
By: ______________________

Thomas J. MacBride, Jr.
Attorneys for Petitioner
Monterey Peninsula Water
Management District

CERTIFICATE OF WORD COUNT

Counsel certifies that under California Rules of Court, Rules 8.204(b) and 8.504(d), this Petition is produced using 13-point Times New Roman type and contains 8,018 words, exclusive of Tables, Indices, Exhibits, and Certifications, as counted by Microsoft Word, the program used to create this document.

Dated February 22, 2013.



By_________________________

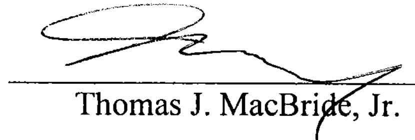
Megan Somogyi

VERIFICATION

I, Thomas J. MacBride, Jr., declare that as counsel for the Petitioner, I am familiar with the proceedings giving rise to the Petition for Writ of Review relief from the California Public Utilities Commission's decisions at issue.

I have read the foregoing Petition, and it is true of my own knowledge, except as to those matters stated on information and belief, and as to those matters, I believe them to be true. If called as a witness, I could and would testify competently thereto.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this verification was executed in San Francisco, California on February 22, 2013.



Thomas J. MacBride, Jr.

3465/001/X149235.v1

ALJ/MAB/jyc **Date of Issuance 3/25/2011**

Decision 11-03-035 March 24, 2011

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of California-American Water Company (U210W) for an Order Authorizing the Collection and Remittance of the Monterey Peninsula Water Management District User Fee.	Application 10-01-012 (Filed January 5, 2010)

DECISION DENYING APPROVAL OF SETTLEMENT AGREEMENT AND AUTHORIZING AMENDMENT TO APPLICATION

Summary

This decision finds that the settlement agreement fails to meet the Commission's standards for approving settlement agreements and denies approval of the settlement agreement. It also authorizes the applicant to amend the application consistent with this decision.

Background

In Decision (D.) 09-07-021, the Commission authorized California-American Water Company (Cal-Am) to increase water rates in its Monterey district by over 40% for the three-year rate case cycle. In that Decision, the Commission also considered the user fee that Cal-Am had been collecting on behalf of the Monterey Peninsula Water Management District (Management

District). The user fee was set at 8.325% of all meter and water charges billed by Cal-Am in the Monterey district.[1]

The Commission began its analysis by noting that the substantial rate increase in Cal-Am's Monterey District imposed "significant financial burdens on residential and business customers" and required that all "proposed expenditures be demonstrably necessary for reliable service and provide value to customers." With this context of closely scrutinizing increased customer charges, the Commission expressed concern that "Cal-Am's customers may be paying user fees to the Management District for projects that may not be necessary or cost effectively performed by the Management District." The Commission noted that the "Management District has a variety of funding mechanisms at its disposal over which this Commission has no jurisdiction," specifically:

> The Management District is authorized to issue bonds, assess charges for groundwater enhancement facilities, levy assessments on real property and improvements, and fix, revise, and collect rates and charges for the services, facilities, or water furnished by it. For general administrative costs and expenses, as well programs of general benefit, the Management District is authorized to levy a second property tax of up to $0.10 per $100 in assessed value.[2]

Turning its attention to the Management District's user fee, the Commission observed that the "Management District's choice of a percentage assessment, rather than a fixed amount, has the effect of substantially increasing the total amount collected by the Management District for the identified projects

---

[1] The Commission's discussion of the Management District's fee proposal is found at 116 through 123 of mimeo version of D.09-07-021. All quotations in this section are to those pages.

[2] D.09-07-021, *mimeo* at 117, quotations and citations omitted.

as Cal-Am's rates increase." The Commission noted that the user fee generated $1,860,000 in revenue during fiscal year 2006. With approximately $42 million in operating revenues adopted in D.09-07-021 for test year 2009, at the level of 8.325%, the fee would generate about $3,500,000 for the Management District, an 88% increase from 2006.

The Commission next expressed concern with the incomplete explanation offered by the Management District for all components of the user fee. The Commission stated that of the current 8.325% fee, 7.125% is attributed to Carmel River mitigation measures, which was explained, but the Management District offered no explanation for the remaining 1.2% which is for the Aquifer Storage and Recovery project costs.

In light of these concerns with Management District's user fee, the Commission pointed to an alternative approach that Cal-Am and the Management District have previously used to ensure cost-effective coordination on a joint project for water conservation programs. This joint project approach, which included recovery of the Management District's costs from Cal-Am's customers by a surcharge placed on the customers' bills, was approved by the Commission in D.06-11-050.

The Commission concluded its discussion of the Management District's user fee by emphasizing that to the extent Cal-Am and its ratepayers are legally responsible for Carmel River Mitigation or Aquifer Storage Projects, the Commission expected Cal-Am to meet that "responsibility in an efficient and effective manner either by its own actions or as a joint project with the Management District." To achieve this objective, the Commission directed Cal-Am to (1) meet and confer with the Management District regarding "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" and to particularly discuss the possibility of implementing them as joint projects, and to then (2) file an application setting forth any new method of collecting funds to support Management District program costs properly assignable to Cal-Am, whether performed by Cal-Am or the Management District.
The Commission also authorized Cal-Am to file an Advice Letter for a Memorandum Account to record costs that are Cal-Am's responsibility on an interim basis.

Cal-Am filed Advice Letter No. 785-A that established the Monterey Peninsula Water Management District User Fee Memorandum Account.
The Memorandum Account tracks costs for projects which Cal-Am has proper responsibility for and has funded, and that are performed by the Management District. The Memorandum Account was made effective July 20, 2009.

Description of the Application

On January 5, 2010, Cal-Am filed this application seeking Commission approval of "a program to fund projects currently performed by the District that are properly the Company's responsibility" by authorizing Cal-Am to "collect funds required by the [District] to carry out projects on behalf of the Company and which the Company would otherwise have to carry out."[3] The application specified that stated Cal-Am would "collect from the Company's Monterey District customers and remit to the Monterey Peninsula Water Management District the Monterey Peninsula Water Management District User Fee at the rate set by the Monterey Peninsula Water Management District's Board of

[3] Application at 2 – 3.

Directors."[4] The application also sought Commission authorization to collect from its Monterey District customers all amounts recorded in its Monterey Peninsula Water Management District Memorandum Account, which it estimates will total over $5 million if the application is pending for 18 months. In support of its application, Cal-Am provided testimony from its Director of Rates and Regulation and its Vice President of Engineering.

In the application, Cal-Am contended that the proposed "percent of revenue" basis for calculating the user fee will not impose "a significant financial burden" on its customers because the Management District adopts it budget in a "transparent public process" and that the California Constitution prohibits the Management District from collecting more than it spends on a project.[5] Cal-Am also argued that the Commission should abstain from reviewing the Management District's user fee, as it does with other local government fees and taxes, or should only review it to ensure "that utility customers are not paying for duplicative work" or activities that "run counter to the Commission's comprehensive scheme for regulating utilities."[6]

In its application, Cal-Am stated that the State Water Resources Control Board has imposed a "contingent obligation" on Cal-Am to implement the Management District's Carmel River Mitigation Program, should the Management District ever cease doing so.[7] Cal-Am stated that in its 1995 decision, the Board expressed "accolades" for the Management District's

---

[4] Application at 19.

[5] Application at 6.

[6] Application at 12.

[7] Application at 10.

Fisheries Mitigation Program, and the Riparian Vegetation and Associated Wildlife Mitigation Program.

The Management District also supplied supporting testimony for Cal-Am's application. The testimony of the Management District's General Manager explained the legislative creation of the Management District and its various powers.

The General Manager's testimony also described the 1990 process that produced the Carmel River Mitigation Program. The testimony included the 2007-2008 Annual Report for the Mitigation Program, dated September 2009. This report included the only cost data presented for the Mitigation Program. In the Executive Summary section, the report states that:

> "a trend analysis shows that the overall costs remained fairly constant (about $1.3 - $1.7 million) for many years, except for FY 2000, when an additional $981,786 was added to the capital expense program to fund one half of the acquisition cost of the District's new office building, bringing the expenditure total over $2.6 million for that year. More recently, expenditures continue to trend upward: FY 2005-06 expenditures were $3.17 million; and FY 2006-07 were $3.29 million. . . . The Mitigation Program Fund Balance as of June 30, 2008, was $999,898."[8]

Section XIII of the annual report is entitled "Summary of Costs for the Mitigation Program – July 2007 through June 2008" and consists of one page of text followed by one table showing the "cost breakdown." The table states that: "This report does not include the Rebate Program, salaries for the Conservation

[8] Darby testimony at Exhibit 3, at I - 14.

Office Staff or the project expenditures for 'Ordinance Enforcement' even though they were booked as part of the Mitigation Program."

The table shows seven cost components, broken down into "personnel costs," "operating expenses," "project expenses" and "fixed asset acquisitions." The total expenditure amount shown is $3,671,996, with personnel comprising the largest amount, $1,660,034. The second largest amount shown is just under $1 million for unspecified "project expenses" for "water supply." Setting aside that $1 million expenditure, the most expensive cost component is "administrative" at $689,235. Chapter VI discusses the specific program elements for "water supply" and adopts two specific goals: (1) determine and participate in long-term water supply solutions, which focuses on participation in the various forums for the Coastal Water Project and Community Outreach; and (2) the Aquifer Storage and Reclamation Project, specifically to complete Phase I and continue work on the next Phase.

The testimony of the Management District's Chief Financial Officer explains the history and derivation of the user fee. The Chief Financial Officer stated that the Management District and Cal-Am agreed that the "device of a water user fee was the most equitable" means to fund the District's Mitigation Program, and Cal-Am required that any such revenue collection means "would not put the utility at risk."[9] The testimony states that the Management District Board set the current user fee amount of 7.125% for the Mitigation Program in a 1992 Ordinance, and that the Board set the Aquifer Storage Project user fee at an additional 1.2% in 2005 based on the Board's determination that the Aquifer

---

[9] Dickhaut Testimony at 3.

Storage Project would be "funded on a pay-as-you go basis rather than via debt financing."

Although not included in the testimony, the Management District's Ordinance No. 67, adopted December 8, 1992, with a purpose to "increase user fee revenue available for the Five Year Mitigation Program" retains the total 7.125% fee but also includes within that amount 1.11% that was reallocated from conservation programs. The ordinance states that the total 7.125% user fee "shall not be exclusively dedicated to a single activity or program, but instead may be allocated at the discretion of the Board provided that all such expenses shall confer benefit and/or service to existing water users."[10]

Similarly, the Management District's Ordinance No. 123, adopted September 13, 2005, sets an additional user fee component of 1.2% to fund Aquifer Storage and Recovery Project and related water supply expenses. That ordinance, like the Mitigation Program ordinance, retains the Board's discretion to "allocate" the proceeds from this user fee to any endeavor that "confers benefit and/or service" to Cal-Am customers.[11]

Cal-Am provided testimony from its engineer and the Management District's engineer showing that the Aquifer Storage and Recovery Project is a joint project between the two entities to store excess winter Carmel River water in the Santa Margarita aquifer for use during the summer. Generally, Cal-Am is providing improvements to its water main distribution system to enable the conveyance of water through its system to wells owned by the Management

---

[10] Management District Ordinance 67, Section 3.C. (December 8, 1992.)

[11] Management District Ordinance 123, Section 2.

District for injection into the aquifer and then for the extraction and conveyance of the water back into Cal-Am's system.[12]

The Management District submitted testimony showing that it owns certain water rights that are essential to the Aquifer Storage and Recovery Project and that it has constructed two wells and related facilities that comprise Phase I of the Aquifer Storage and Recovery Project.[13] The testimony also explained that the entire project is operated and managed pursuant to an agreement between Cal-Am and the Management District dated March 28, 2006. The testimony included cost data showing that Phase I testing and construction costs were $4,176,931, exclusive of staff time and permitting costs, with $1,620,300 in costs remaining, and that the projected costs for Phase II are $5,042,400.[14] The projected firm yield of Phase I is 920 acre-feet/year, with Phase II estimated to yield an additional 1,000 acre-feet/year.[15]

With approximately $42 million in operating revenues adopted in D.09-07-021 for test year 2009, at the requested level of 1.2%, the Aquifer Storage and Recovery Project component of the user fee would generate about $504,000 per year for the Management District.

Description of the Settlement Agreement

On May 18, 2010, Cal-Am, the Management District and the Division of Ratepayer Advocates filed their joint motion to approve settlement agreement. The settlement agreement stated that the parties agreed that:

---

[12] Testimony of Schubert at 4 - 8.

[13] Testimony of Oliver at 4 - 11.

[14] *Id.* at Oliver Exhibits 6, 7, and 11.

[15] *Id.* at 7 and 13.

1. The Management District's Carmel River Mitigation Program is non-duplicative, and reasonable and prudent.
2. The Management District's Aquifer Storage and Recovery Program is non-duplicative, and reasonable and prudent.
3. The Commission should authorize Cal-Am to collect and remit the user fee to the Management District at the rate set by the Management District.

The settlement agreement also stated that the interest rate to be assessed on the Memorandum Account balance should be 5%. The parties also agreed that the Commission should receive into evidence all testimony that has been served in this matter.

Discussion

Standard of Review – Settlement Agreement

In this application, Cal-Am bears the burden of proof to show its requests are just and reasonable and the related ratemaking mechanisms are fair. In order for the Commission to approve any proposed settlement, the Commission must be convinced that the parties have a sound and thorough understanding of the application, the underlying assumptions, and the data included in the record. This level of understanding of the application and development of an adequate record is necessary to meet our requirements for considering any settlement.[16] These requirements are set forth in Rule 12.1 of the Commission's Rules of Practice and Procedure, which states, in pertinent part:

[16] In the Matter of the Application of Park Water Company for Authority to Increase Rates Charged for Water Service by $1,479,580 or 5.99% in 2010, $503,371 or 1.91% in 2011, and $643,923 or 2.40% in 2012, D.09-12-001, mimeo at 19 -20.

> The Commission will not approve settlements, whether contested or uncontested, unless the settlement is reasonable in light of the whole record, consistent with law, and in the public interest.

For the reasons stated below, we are unable to find that the provisions of the settlement agreement are consistent with Rule 12.1.

Reasonable in Light of the Record as a Whole

The record consists of Cal-Am's application with supporting testimony.

In its application, Cal-Am seeks Commission authorization for "the device of a user fee" that will be "collected at rates set by the District's Board of Directors" for the Management District to fund any endeavor that the Management District determines will confer "benefit and/or service" to Cal-Am's customers. Cal-Am justifies this request as "an appropriate means to fund projects, (i.e., the Aquifer Storage and Recovery Program and Mitigation Program) currently performed by the District but properly or ultimately the responsibility of the Company."[17]

As described above, however, Cal-Am's user fee proposal is not based on the costs of these two programs and includes no ratemaking or programmatic limitations. Consequently, the record in this proceeding is not sufficient for settling parties to meet their burden of justifying the Commission's ratemaking approval of the settlement agreement.

Specifically, the record shows that the Management District's presentation on the Aquifer Storage and Recovery Project includes this Project in both the Mitigation Program for which it seeks an assessment of 7.125%, and as a separate component for another 1.2%. The Management District's Chief Financial Officer

[17] Application at 5.

stated that the Management District Board has decided to fund this project on a "pay-as-you-go" basis rather than incurring debt. While the Management District's decision has the advantage of avoiding debt costs, such a decision results in current customers paying the full costs of a project that is expected to provide service for many years. This is not consistent with the Commission's ratemaking standards.

Turning to the Carmel River Mitigation Program, Cal-Am's presentation does little to respond to the issues identified by the Commission in D.09-07-021. Cal-Am continues to seek a percentage assessment but offers no cost-justification for the proposed 88% increase in annual collections since 2006. The Management District's own report shows that annual costs were stable at $1.3 to $1.7 million for "many years" but in recent years have more than doubled that, without explanation. The exception to the stable cost levels was in 2000 when the Management District used nearly a million dollars of Mitigation Program revenues to fund half its new office building.

Cal-Am's application raises several issues, most notably several instances where duplication in effort and accounting may occur. In addition to the apparent double-counting of the Aquifer Storage and Recovery Project as both a part of the user fee Mitigation Program costs and also to substantiate a stand-alone additional component of the user fee, "water supply augmentation" is a major cost component of the Management District's Mitigation Program which largely focuses on the Coastal Water Project. Cal-Am, however, is actively involved in the Coastal Water Project, such that the Management District need not act on Cal-Am's behalf. The Management District's Mitigation Program report also indicates that it does not include the "rebate program, salaries for the Conservation Office Staff or project expenditures for 'ordinance enforcement'"

even though such costs are "booked as part of the Mitigation Program." The Commission, however, has approved and separately funded a joint conservation program with the Management District which would appear to include at least some conservation costs. Finally, Cal-Am asserts that National Oceanic and Atmospheric Administration (NOAA) steelhead mitigation activities[18] focus on impacts to steelhead, and that these activities have no "overlap" with the Management District's activities which also focus on the steelhead fishery but the record shows no analytical explanation for how endangered species costs for steelhead are divided between the two agencies or any evidence that Cal-Am is in any way managing these costs for ratepayers. With the total costs for the two programs approaching $5 million a year, Cal-Am must demonstrate necessity and cost-effectiveness of both components before the Commission can approve a joint program of the kind we requested Cal-Am to propose to use in D.09-07-021. Our goals are to ensure cost control by these two agencies.

To find a settlement agreement reasonable in light of the record, the Commission must conclude that the parties used their collective experience to produce appropriate, well-founded recommendations. As set forth above, the record contains insufficient cost justification, several instances of apparent double-counting, and ratemaking treatment at odds with our standards. Accordingly, we are unable to conclude that the settlement agreement is reasonable in light of the record.

---

[18] In Resolution W-4836, Cal-Am obtained Commission authorization to recover from customers $3.5 million paid to the NOAA for "Endangered Species Act mitigation activities on the Carmel River."

Consistent With Law and Prior Commission Decisions

The parties assert that the Mitigation Program component of the User Fee is consistent with applicable law because "the Mitigation Program . . . is required by the California Environmental Quality Act."[19] The parties offered no justification for the other components of the proposed user fee.

The Commission is charged with the responsibility of ensuring settlement agreements are consistent with other applicable law and prior Commission decisions. The Public Utilities Code requires that all rates received by a public utility be just and reasonable: "no public utility shall change any rate . . . except upon a showing before the Commission, and a finding by the Commission that the new rate is justified."[20]

In D.09-07-021, the Commission indicated its willingness to include in the Monterey District revenue requirement all costs of the Carmel River Mitigation Program and Aquifer Storage and Recovery Project that are properly Cal-Am's responsibility. The Commission required, however, that such costs must be shown to be necessary and cost-effectively performed by the Management District. As presented in the application and carried forward in the settlement agreement, Cal-Am's justification for assessing these costs to its ratepayers does not demonstrate that the Management District's user fee meets the Commission's standards.

As set forth above, the Commission explained its concerns regarding the Management District's proposed "percent of revenue" basis for its user fee. Nevertheless, Cal-Am has presented an application which persists with such a

---

[19] Joint Motion to Approve Settlement Agreement at 6.

[20] Pub. Util. Code §§ 451 and 454.

proposal and offers no compelling justification. Cal-Am's contention that the Management District's "transparent" budgetary process somehow obviates the Commission's concerns with a non-cost-based user fee is not persuasive.

Therefore, we conclude that the settling parties have failed to demonstrate that the settlement agreement is consistent with D.09-07-021.

The Public Interest

For the reasons set forth above, we find that the user fee proposal as described in the application and settlement agreement is not in the public interest. The settling parties' motion for approval of the settlement agreement should, therefore, be denied.

Cal-Am's Responsibilities under Order No. WR 95

The State Water Resources Control Board imposed the responsibility on Cal-Am to implement all measures in the "Mitigation Program for the District's Water Allocation Program Environmental Impact Report" not implemented by the Management District.[21] The 1990 Environmental Impact Report (EIR) document referenced in the Board's decision is attached to the Management District's General Manager's testimony in this proceeding, and was adopted by the Management District's Board in November 1990. The adopted mitigation measures are summarized at Exhibit 1 to that EIR and the following page, Exhibit 2 Table, contains cost estimates for each measure. The Mitigation Program summary in Exhibit 1 is substantially similar to the list set forth in the Board's Decision 95-10 in Section 6.2 "Water Allocation Mitigation Program," so

[21] State Water Resources Control Board Decision 95-10 at Ordering Paragraph 11.

we conclude that this is the Mitigation Program which the State Water Resources Control Board has made a contingent obligation of Cal-Am.

The three headings for the mitigation measures are: fisheries, riparian vegetation and wildlife, and lagoon vegetation and wildlife. Exhibit 2 Table contains cost estimates for each measure, broken down into capital, $442,700, and annual expenses, $323,100.[22]

The EIR Exhibit 2 Table provides an ideal beginning point to prepare a budget for the Mitigation Program that is Cal-Am's responsibility, and is attached to today's decision for ease of reference. One way for Cal-Am to justify the amount of funding required to perform these three mitigation program elements is for Cal-Am to obtain up-to-date cost and budget data from the Management District specific to these three mitigation measures which are Cal-Am's contingent responsibility. Those data can then be used to update the Exhibit 2 Table as the basis for justifying a forward-looking rate mechanism to fund the three mitigation measures, should the Management District cease to implement these mitigation measures.

In D.09-07-021, the Commission emphasized that to the extent Cal-Am and its ratepayers are legally responsible for Carmel River Mitigation, the Commission expected Cal-Am to meet that "responsibility in an efficient and effective manner either by its own actions or as a joint project with the Management District." If the Management District ceases to perform these mitigation measures, then Cal-Am must prepare and implement a plan to meet this responsibility.

[22] The table also includes $6,000 for "aesthetics" which is not referenced in Order 95-10 as a Cal-Am obligation.

Next Steps

The findings and conclusions in today's decision address many of the substantive issues raised by Cal-Am's application.

As discussed above, Cal-Am's application sought Commission approval of "a program to fund projects currently performed by the District that are properly the Company's responsibility" by authorizing Cal-Am to "collect funds required by the [District] to carry out projects on behalf of the Company and which the Company would otherwise have to carry out."[23] As also set forth above, the parties to the settlement agreement represented that the application met the Commission's ratemaking standards by being "non-duplicative, and reasonable and prudent." For reasons set forth in D.09-07-021 and reiterated above, we decline to approve the ratemaking proposal in the application as filed. Similarly, we repeat our support for the joint project approach to funding the Carmel River Mitigation program and the Aquifer Storage and Recovery Project.

Therefore, to ensure that Cal-Am fully discharges its responsibilities for the Carmel River Mitigation Program, we will authorize Cal-Am to amend its application within 60 days of the effective date of today's decision by filing and serving one of the following;

1. a joint program proposal for the District to perform the Carmel River Mitigation measures based on an updated version of the budget set out in Attachment 1, and to fund the District's portion of the Aquifer Storage and Recovery Project, or
2. implementation plan for Cal-Am to assume direct responsibility for the Carmel River Mitigation measures, should the District cease to implement these measures.

---

[23] Application at 2 - 3.

As noted above, Cal-Am has been recording payments to the District in a memorandum account, and the District has been performing all Carmel River mitigation measures since July 2009. Under the unique circumstances and history of the District's user fee and mitigation program, including particularly that the funds have been remitted to a government agency, we find that it is reasonable to allow Cal-Am to recover the amount recorded in the memorandum account. We will also require that the account be closed in 60 days to bring the unique circumstances to an end.

The Monterey Peninsula Water Management District User Fee Memorandum shall close 60 days after the effective date of this order. Cal-Am is authorized to file a Tier 2 advice letter to amortize the amounts recorded in that account over 12 months with interest to be calculated based on the 90-day commercial paper rate.

Comments on Proposed Decision

The proposed decision of the Administrative Law Judge (ALJ) in this matter was mailed to the parties in accordance with Section 311 of the Public Utilities Code and comments were allowed under Rule 14.3 of the Commission's Rules of Practice and Procedure. Cal-Am, DRA, and the District filed comments in opposition to the proposed decision on January 10, 2011.

In its comments on the proposed decision, Cal-Am disavowed all responsibility for the District's Carmel River mitigation and Aquifer Storage programs and contended that these were "local government programs funded by a utility users' tax."[24] Specifically, Cal-Am stated that the proposed decision is premised on a "factual error" in accepting that the District's mitigation and

aquifer storage programs are Cal-Am obligations with no evidence to support that conclusion.[25] Instead, Cal-Am explained that as a result of the meet and confer process ordered in D.09-07-021, the parties reached "agreement between the Company and [the District] (and ultimately DRA) that neither the Mitigation Program nor [the District's] [aquifer storage project] activities were California American Water's responsibility."[26]

The District, however, took the opposite position and, citing to Cal-Am's application, explained that "[b]y its Application, [Cal-Am] seeks authorization to collect funds required by the Water Management District to carry out projects on behalf of [Cal-Am], and which [Cal-Am] is mandated to carry out."[27]

DRA agreed with Cal-Am.[28]

The parties showed a similar divergence of opinion on the exact nature of the fee. Cal-Am declared that the District's user fee "is a utility user tax" within the meaning of D.89-05-063 and that the Commission has no jurisdiction to determine the validity of such taxes.[29]

DRA and the District were more circumspect and contended that the "Commission has limited authority to question a local government agency's

---

[24] Cal-Am Comments at 12.

[25] *Id.*

[26] *Id.* at 11, *but see*, Application at 5, "In this application, California American Water – with the support of MPWMD – describes the user fee as the appropriate means to fund projects (i.e., the Aquifer Storage and Recovery Program and Mitigation Program) currently performed by the District but properly or ultimately the responsibility of the Company."

[27] District Comments at 7.

[28] DRA Comments at 2.

[29] Cal-Am Comments at 12 -13.

collection of a fee or tax," without specifying the precise legal nature of the District's user fee.[30] The District carefully stated that (1) it was "a government agency," (2) it has the authority to "impose taxes, fees, and other assessments," and (3) "the Commission lacks authority to contest the District's lawful exercise of its authority."[31] In contrast to Cal-Am, the District did not argue specifically that the user fee was a utility user tax or that the District was authorized by the Legislature to levy such a tax.

All parties agreed that the proposed decision was premature in dismissing the application without further proceedings after rejecting the settlement. As set forth above, the proposed decision has been modified to authorize Cal-Am to amend its application.

Assignment of Proceeding

Michael R. Peevey is the assigned Commissioner and Maribeth A. Bushey is the assigned ALJ in this proceeding.

Findings of Fact

1. 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.

2. 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.

---

[30] District Comments at 5; DRA Comments at 2.

[31] District Comments at 6.

3. 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.

4. The Management District's 2007-2008 Annual Report for the Mitigation Program shows the Aquifer Storage and Recovery Project as a component of the user fee Mitigation Program costs and also as a stand-alone additional user fee.

5. 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.

6. 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.

7. The testimony supporting the application shows accounting treatment inconsistent with Commission ratemaking standards.

8. The user fee and Carmel River mitigation program have a unique history, including particularly that the funds have been remitted to a government agency, that render reasonable Cal-Am's request to recover the amounts recorded in the account.

Conclusions of Law

1. The testimony supporting the application should be received into evidence.

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. California American Water Company should be authorized to amend this application within 60 days of the effective date of today's decision by filing and serving one of the following;

A. Joint program proposal for the District to perform the Carmel River Mitigation measures based on an updated version of the budget set out in Attachment 1, and to fund the District's portion of the Aquifer Storage and Recovery Project, or

B. Implementation plan for Cal-Am to assume direct responsibility for the Carmel River Mitigation measures, should the District cease to fund the measures.

The Monterey Peninsula Water Management District User Fee Memorandum should close 60 days after the effective date of this order. Cal-Am should be authorized to file a Tier 2 advice letter to amortize the amounts recorded in that account over 12 months with interest to be calculated based on the 90-day commercial paper rate.

5. Pub. Util. Code § 451 requires all charges or rules pertaining to charges demanded or received by a public utility to be just and reasonable.

ORDER

IT IS ORDERED that:

1. The motion to approve the settlement agreement among California-American Water Company, the Monterey Peninsula Water Management District and the Division of Ratepayer Advocates is denied.

2. California American Water Company is authorized to amend Application 10-01-012 within 60 days of the effective date of this order by filing and serving one of the following:

   A. Joint program proposal for the Monterey Peninsula Water Management District to perform the Carmel River Mitigation measures based on an updated version of the budget set out in Attachment 1, and to fund the Monterey Peninsula Water Management District's portion of the Aquifer Storage and Recovery Project, or

   B. Implementation plan for California-American Water Company to assume direct responsibility for the Carmel River Mitigation measures, should the Monterey Peninsula Water Management District cease to fund the measures.

Absent such an amendment, the Executive Director is authorized to dismiss this application without prejudice to refiling.

3. The Monterey Peninsula Water Management District User Fee Memorandum Account shall close 60 days after the effective date of this order. California-American Water Company is authorized to file a Tier 2 advice letter to amortize the amounts recorded in that account over 12 months with interest to be calculated based on the 90-day commercial paper rate.

4. The testimony submitted in support of the application is received into evidence.

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

L/cdl

Date of Issuance
January 25, 2013

Decision 13-01-040 January 24, 2013

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of California-American Water Company (U210W) for an Order Authorizing the Collection and Remittance of the Monterey Peninsula Water Management District User Fee.	Application 10-01-012 (Filed January 5, 2010)

ORDER MODIFYING DECISION (D.) 11-03-035 AND DENYING REHEARING, AS MODIFIED

I. INTRODUCTION

In this Order, we dispose of the application for rehearing of Decision (D.) 11-03-035 (or "Decision") filed by the Monterey Peninsula Water Management District ("the District" or "MPWMD").

For several years California-American Water Company ("Cal-Am") has diverted water from the Carmel River to help provide adequate water supply to its Monterey Peninsula customers. In 1995, the State Water Resources Control Board ("SWRCB") determined that Cal-Am has no legal right to that water, and that its actions were adversely affecting public trust resources within the river.[1] Accordingly, Cal-Am was ordered to cease and desist the water diversions,[2] and remediate river impacts by implementing a Mitigation Program and Aquifer Storage and Recovery Program ("ASR

[1] See e.g., SWRCB Order No. WR 95-10 ("Order 95-10"), dated July 6, 1995, at pp. ii, 39 [Conclusion Numbers 2 & 3], & p. 40 [Ordering Paragraph Number 2].
[2] Order 95-10, at p. 40 [Ordering Paragraph Number 1].

Program").[3] Although Cal-Am is legally responsible for the programs,[4] the District currently performs most of the program functions and it has historically collected its costs to do so via a User Fee that is recovered from Cal-Am's ratepayers.

On January 5, 2010, Cal-Am filed an application seeking authorization for collection and remittance of the District's current proposed User Fee.[5] Subsequently, on May 18, 2010, Cal-Am, the District, and the Division of Ratepayer Advocates ("DRA") filed a proposed settlement.[6] Both the application and settlement proposed approval of a User Fee set at 8.325% of Cal-Am's total revenues, approximately $3.5 million.[7]

In reviewing the application and settlement, we were guided by D.09-07-021.[8] (D.11-03-035, at pp. 1-4, 11-17.) That decision had also considered the District's proposed User Fee, and deferred approval citing concerns including: a lack of evidence explaining program costs;[9] the District's choice to set the User Fee as a percent of Cal-Am's revenue (8.325%) rather than using a cost-based methodology; and the

[3] Order 95-10, at pp. 30-32, 39 [Ordering Paragraph Number 3]. See also, SWRCB Order No. WR 2009-0060 ("Order 2009-0060") at pp. 118-120 [Ordering Paragraph Number 3(c)]; and *Application of California-American Water Company 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* [D.09-07-021] (2009) __ Cal.P.U.C.3d __, at pp. 116-118 (slip op.).

[4] Order 95-10, at p. 43 [Ordering Paragraph Number 11].

[5] See In the Matter of the Application of California-American Water Company for an Order Authorizing the Collection and Remittance of the Monterey Peninsula Water Management District User Fee, dated January 5, 2010 ("Cal-Am Application").

[6] Motion to Approve Settlement Agreement Between the Division of Ratepayer Advocates, the Monterey Peninsula Water Management District and California-American Water Company ("Motion to Approve Settlement Agreement"), filed May 18, 2010.

[7] The 8.325% User Fee would be split as 7.125% for the Mitigation Program and 1.2% for the ASR Program. (D.11-03-035, at pp. 1-3; MPWMD/Dickhaut, at p. 4.) Cal-Am's current test year 2009 operating revenues are approximately $42 million, resulting in the total User Fee charge of approximately $3.5 million. (D.11-03-035, at p. 3; MPWMD/Dickhaut, at p. 6.)

[8] D.09-07-021, *supra*, at pp. 116-123 (slip op.).

[9] D.09-07-021, *supra*, at p. 120 (slip op).

increase in costs over past User Fee levels.[10] Accordingly, in D.09-07-021, we directed the parties to provide evidence to support the proposed User Fee in this proceeding.[11]

Despite expressing support for the User Fee programs, the Decision challenged here found that the application and proposed settlement still failed to adequately justify the proposed costs. Accordingly, we authorized Cal-Am to amend its application to submit either: (1) a joint program proposal based on an updated version of the budget; or (2) an implementation plan for Cal-Am to assume direct responsibility for program measures should the District cease to perform program activities. (D.11-03-035, at pp. 11-17, 22 [Conclusion of Law Numbers 3 & 4]; & p. 23 [Ordering Paragraph Number 2].)

The District filed a timely application for rehearing, challenging the Decision on the grounds that the Commission: (1) unlawfully interfered with the District's statutory authority to impose a User Fee; (2) failed to adhere to established procedural requirements; (2) failed to provide adequate findings of fact and conclusions of law on all material issues pursuant Public Utilities Code Section 1705,[12] (3) failed to support its findings with sufficient evidence; and (5) failed to adequately weigh the evidence. No responses were filed.

We have carefully considered the arguments raised in the application for rehearing and are of the opinion that while the Decision is lawful, it would benefit from modifications to more closely conform the formal findings of fact and conclusions of law with the Decision text. We will modify the Decision as set forth in the Ordering Paragraphs below. However, good cause has not been established to grant rehearing. Accordingly, we deny the application for rehearing of D.11-03-035, as modified herein, because no legal error has been shown.

[10] D.09-07-021, *supra*, at pp. 120-121 (slip op.).

[11] D.09-07-021, *supra*, at pp. 119-123 (slip op.).

[12] All subsequent section references are to the Public Utilities Code, unless otherwise stated.

II. DISCUSSION

A. Alleged Interference with the District's Collection of the User Fee

1. District Authority

The District states it has independent and express statutory authority to set and collect a User Fee under the Monterey Peninsula Water Management District Law ("District Law").[13] Pursuant to that authority, the District argues it may fix rates and charges for its services,[14] and collect those charges via public utility bills.[15] The District reasons that rejection of the settlement unlawfully interfered with its authority to collect a User Fee because Commission jurisdiction extends only to the regulation of investor-owned public utilities. (Rhg. App., at pp. 13-17, citing *Los Angeles Metropolitan Transit Authority v. Public Utilities Commission* (1959) 52 Cal.2d 655, 661; *County of Inyo v. Public Utilities Commission* (1980) 26 Cal.3d 154, 167; *Santa Clara Valley Transportation Authority v. Public Utilities Commission* (2004) 124 Cal.App.4th 346, 356, 364.)[16]

---

[13] See District Law (Cal. Water Code Appendix, Chapter 118-1 to 118-901 (Stats. 1977, ch. 527.). See e.g., Sections 118-325. See also D.09-07-021, at p. 117 (slip op.). The District's purpose is generally to conserve and augment peninsula water supply, control and conserve storm and waste water, and promote the reuse and reclamation of water. (See e.g., D.09-07-021, *supra*, at p. 117 (slip op.).)

[14] District Law, Section 118-326(b) stating:

> Sec. 326. The district shall have the power:
>
> (b) To fix, revise, and collect rates and charges for the services, facilities, or water furnished by it.

[15] District Law, Section 118-326(d) stating:

> Sec. 326. The district shall have the power:
>
> (d) To provide that charges for any of its services or facilities may be collected together with, and not separately from, the charges for other services or facilities rendered by it, or it may contract that all such charges be collected by any other private or public utility, and that such charges be billed upon the same bill and collected as one item.

[16] Also citing *Sullivan v. Delta Airlines* (1997) 15 Cal.4th 288, fn. 9; and *PG&E Corporation v. Public Utilities Commission* ("*PG&E Corp.*") (2004) 118 Cal.App.4th 1174, 1194-1195. The principles referenced in these cases are valid. However, as explained herein, we did not attempt to assert jurisdiction over the District.

The District's claim is premised on the notion that the Decision asserted jurisdiction over the District. It did not. Nor did the Decision contest or negate any lawful authority the District may have to impose a User Fee that would be collected by Cal-Am from the utility's customers.[17] This Commission has consistently held that it will not pass judgment on the authority of any local entity to impose taxes, fees or charges on utilities or their customers.[18] We recognize that local taxing authority is properly the domain of the Superior Court.[19] Thus, for purposes of D.11-03-035, we presumed the District's authority is sound.

That said, it is within our jurisdiction to protect the public interest in matters pertaining to utility regulation. That jurisdiction includes exclusive authority over public utility rates and cost recovery,[20] and the duty to ensure those rates and costs are just, reasonable, and nondiscriminatory.[21] Because Cal-Am would be recovering the proposed User Fee from its customers, it was within the Commission's jurisdiction and responsibility to review the proposed User Fee costs.

Even the District concedes this point, stating: "[T]he Commission may ensure that Cal-Am is not charging 'unreasonable' rates by insuring that Cal-Am is not

[17] The District argues: "the net effect of the revised PD [Decision] was to leave MPWMD without a practical means of collecting its User Fee..." (Rhg. App., at p. 11.) That is not correct. As evidenced by its passage of local Ordinance Number 152 on June 27, 2012, the District does have an independent means of collecting a User Fee. (See Ordinance No. 152, Exhibit 4-A, located at: http://www.mpwmd.dst.ca.us/asd/board/boardpacket/2012/20120627/04/item4.htm).

[18] See e.g., *Packard. v. PG&E Co.* [D.77800] (1970) 71 Cal.P.U.C. 469, 472; *Re Guidelines for the Equitable Treatment of Revenue-Producing Mechanisms Imposed by Local Government Entities on Public Utilities* [D.89-05-063] (1989) 32 Cal.P.U.C.2d 60, 69 ["This Commission does not dispute the authority or right of any local government entity to impose or levy any form of tax or fee upon utility customers or the utility itself, which that local entity, as a matter of general law or judicial decision, has jurisdiction to impose...."], & pp. 71-72 [Findings of Fact Numbers 9 & 10].)

[19] D.77800, *supra*, 71 Cal.P.U.C. at p. 472; D.89-05-063, *supra*, 32 Cal.P.U.C.2d at p. 69. The District's authority to collect the User Fee at issue in this proceeding is currently a question before the Superior Court. (See *California-American Water Company v. Monterey Peninsula Water Management District,* Monterey Superior Court Case No. M113336.)

[20] Cal. Const., art. XII, §§ 1-6. See also *Consumers Lobby Against Monopolies v. Public Utilities Commission* ("*CLAM*") (1979) 25 Cal.3d 891, 905-906.

[21] D.89-05-063, *supra*, 32 Cal.P.U.C.2d at pp. 69, 71-72.

recovering . . . costs borne not by Cal-Am but by MPWMD (and funded through the User Fee)." (Rhg. App., at p. 17.) For these reasons, it was a legitimate exercise of our authority to review the proposed User Fee and determine whether the evidence was sufficient to establish the proposed costs were reasonable.[22]

2. Conflict of Law

The District contends that a conflict of law and authority would arise here "*if* the Commission purports to pass on the wisdom of its [the District's] expenditures." In that event, the District asserts that statutory interpretation principles establish that its authority under the later enacted and more specific District Law, would prevail.[23] (Rhg. App., at pp. 17-20, citing *Orange County Air Pollution District v. Public Utilities Commission* ("*Orange County*") (1971) 4 Cal.3d 945, 954, fn. 8; *People ex rel. Public Utilities Commission v. City of Fresno* ("*City of Fresno*") (1967) 254 Cal.App.2d 76.)

This issue is moot because as the District itself acknowledges, there is no actual statutory conflict in this case. (Rhg, App., at p. 17.) The District merely speculates that the Decision could be interpreted to reject outright the amount of the User

[22] The District contends we should have presumed the proposed User Fee costs were reasonable because its budget is subject to a local public process. In addition, the District argues the Decision failed to identify Commission ratemaking requirements. (Rhg. App., at p. 18, fn. 67.) Our statutory obligation to ensure utility rates and cost recovery are just and reasonable is independent of any public notice and/or vetting process the District may have to follow. Further, the fundamental ratemaking requirement applicable to utility rates and charges is long-standing and well established. Authorized rates and charges must be demonstrably based on the actual cost of service. (See e.g., *Southern California Gas Company v. Public Utilities Commission* (1979) 23 Cal.3d 470, 474-475, 476-478; *City and County of San Francisco v. Public Utilities Commission* (1971) 6 Cal.3d 119, 129.)

[23] The Public Utilities Code was first enacted in 1911, and later recodified in 1951 (Stats. 1951, ch. 764.) The District Law was enacted in 1967.

Fee, and/or a percent of revenue versus cost-based methodology. But it did not. The Decision merely found the evidence was not adequate to resolve the issues raised in D.09-07-021 and show that the proposed costs were reasonable.[24]

3. Commission Precedent

The District contends the Decision ran counter to established Commission precedent, which recognizes that the Commission cannot interfere with a local entity's authority to collect taxes, fees, and charges. (Rhg. App., at pp. 20-22, citing e.g., D.77800, *supra*, 71 Cal.P.U.C. at pp. 469 & 472)

Aside from the District's incorrect jurisdictional claim, it goes on to suggest it has authority under the District Law and Proposition 218 to impose charges and fees using any method it chooses, and regardless of cost.[25] However, the District points to nothing in the District Law that confers such unfettered authority. Moreover, Proposition 218 somewhat limits local government taxation by requiring voter approval to impose, extend, or increase taxes.[26] The law also contemplates that fee calculation methodologies chosen by local entities may be limited or restricted by other relevant state, federal, or local laws.[27]

Finally, the District suggests that even if there are duplicative costs as between Cal-Am and the District, our only recourse is to adjust Cal-Am's portion of approved rates. (Rhg. App., at p. 21.) The limitation the District suggests would mean that the Commission could only adjust Cal-Am's costs, even if were District's costs that were found to be unreasonable. Such a position cannot be reconciled with the District's

---

[24] The District also argues Commission authority to review third party charges on utility bills must be expressly granted by the Legislature. (Rhg. App., at p. 19, citing Section 2889.9(b).) Section 2889.9(b) offers no guidance here. The cited statute applies only to the authority to impose penalties in connection with third party billing of telephone customer/subscriber services. It has no bearing on our authority under Section 451.

[25] Proposition 218 amended Government Code Section 53750.

[26] *AB Cellular LA, LLC v. City of Los Angeles* (2007) 150 Cal.App.4th 747, 755-756, 760.)

[27] *Id.*, at pp. 763-764.

own admission that we have a statutory duty to ensure Cal-Am's rates (including the User Fee), are just and reasonable, and it would run afoul of our statutory obligations.

B. Procedural Requirements

The District contends the Decision failed to follow relevant procedural statutes and rules regarding: (1) scoping memos; (2) prehearing conferences; (3) the disposition of settlement agreements; (4) dismissal of motions/applications; (5) final oral arguments; (6) evidentiary hearings; and (7) the submission of proceedings. As discussed below, these allegations of error are without merit.

1. Scoping Memo

The District contends the Commission failed to issue a scoping memo as required under Section 1701.1(b) and Commission Rule of Practice and Procedure 7.3. (Rhg. App., at pp. 22-23.)

Section 1701.1(b) and Rule 7.3 state in relevant part that an assigned Commissioner for a proceeding shall prepare a scoping memo "that describes the issues to be considered."

The District's reliance on section 1701.1(b) and Rule 7.3 is misplaced because no scoping memo was required in this instance. A key purpose of a scoping memo is to provide notice of the issues to be considered. The District claims the lack of scoping memo in this case deprived it of proper notice of the issues to be considered.

That argument fails because Cal-Am's initial application was merely a compliance filing ordered by D.09-07-021.[28] That decision had already clearly identified the issues to be considered, and it identified the type of evidence the Commission required.[29] In addition, the parties (including the District), acknowledged their filings

[28] D.09-07-021, *supra*, at pp. 116-117, 151 [Conclusion of Law Numbers 48 & 49], & pp. 56-57 [Ordering Paragraph Numbers 24 & 25] (slip op.). See also, Cal-Am Application, dated January 5, 2010, at p. 1; and Motion to Approve Settlement, filed May 18, 2010, at pp. 2-3.

[29] D.09-07-021, *supra*, at pp. 119-123 (slip op.).

were made in compliance with D.09-07-021.[30] Thus, there is no credible claim that a scoping memo was needed in order for the District to have notice regarding the issues to be considered.[31]

The District similarly claims it was not afforded an opportunity to address or provide evidence concerning the relevant issues. (Rhg. App., at p. 23.) For the reasons discussed above, this argument is without merit. Further, the parties did in fact submit evidence intended to address the issues raised in D.09-07-021 and considered in this proceeding.[32] That the District did not expect that its evidence would be found lacking does not mean it had no notice and opportunity to address the relevant issues.

The District next suggests it was entitled to, and deprived of, an opportunity to submit briefs regarding the dispositive issues.[33] (Rhg. App., at p. 24.) No authority provides such an entitlement. The only Commission rule regarding briefs is Rule 13.11, which states in pertinent part: "[T]he Administrative Law Judge or presiding officer, as applicable, '*may* fix the time for filing briefs.'"

This language is arguably permissive, and establishes no set requirement or entitlement for briefing. Further, as a practical matter briefs are generally useful only

---

[30] Cal-Am Application, dated January 5, 2010, at p. 1; and Motion to Approve Settlement, filed May 18, 2010, at pp. 2-3.

[31] The District also claims rehearing is warranted here for the same reasons rehearing was granted in D.11-01-029. (Rhg. App., at p. 25, fn. 92, citing *Application of California Water Service Company, a California Corporation, for Authorization (i) to Require the Current or Future Owners of the Parcels Known as the "Trend Homes Properties" to Pay a $40,000 Developer Contribution; and (ii) to Reimburse Dwight Nelson with that $40,000 Payment* [D.11-01-029] (2011) __ Cal.P.U.C.3d __.) D.11-01-029 is not analogous. There, rehearing was warranted because the decision resolved an issue not previously identified for resolution. Thus, parties had no opportunity to comment prior to the proposed decision. The District did have notice of the issues to be addressed here and the District availed itself of the opportunity to do so.

[32] See e.g., MPWMD/Christensen; MPWMD/Urquhart; MPWMD/Prasad; MPWMD/Oliver; MPWMD/Hampson; MPWMD/Fuerst; Cal-Am/Stephenson; Cal-Am/Kilpatrick; Cal-Am/Schubert; and MPWMD/Dickhaut.

[33] The District asserts: "one presumes that in enacting SB 960, the Legislature expected the Commission to ask for briefing" before it acted in a matter. (Rhg. App., at p. 23, fn. 86.) Nothing in SB 960 (Stats. 1995, ch. 856) supports such a conclusion. The Bill clearly states that the Legislature's intent was merely to enhance Commissioner involvement in proceedings, and establish reasonable time frames for proceedings to be completed. (SB 960, Section 1.) The Bill is silent regarding briefs.

when points of law are dispositive. Here, the dispositive issues were evidentiary in nature.

Finally, the District wrongly argues that *Southern California Edison Company v. Public Utilities Commission* ("*Edison v. PUC*") (2006) 140 Cal.App.4th 1085 applies here to show that a scoping memo was required. (Rhg. App., at pp. 24-25.).

The issue in *Edison v. PUC* was that parties had been prejudiced by a decision which resolved an issue that was no included in the scoping memo, and thus, the parties had no notice that the issue would be decided. No similar violation occurred here because the parties did have adequate notice of the issues to be decided.

2. Prehearing Conference

The District contends the Commission failed to conduct a prehearing conference ("PHC") as required by Section 1701.1(b) and Rule 7.2. (Rhg. App., at pp. 25-27.)

Section 1701.1 states in relevant part that "upon initiating a hearing…the assigned commissioner shall schedule a prehearing conference…." Rule 7.2 similarly states that: "[I]n any proceeding in which it is preliminarily determined that a hearing is needed, the assigned Commissioner shall set a prehearing conference....the [prehearing conference] statements may address the issues to be considered…."

These provisions do contemplate that PHC's are generally required. However, like a scoping memo, a PHC serves primarily to identify the issues to be considered. As discussed above, that was not necessary in this case. The District's sole argument is that because there was no PHC, it was "left guessing" regarding the issues to be considered. T[hat claim is plainly without merit.

3. Disposition of Settlement Agreements

The District contends the Decision is unlawful because in rejecting the settlement, the Commission failed to propose an alternative enumerated under Rule 12.4. (Rhg. App., at pp. 27-28.) This argument is without merit.

Rule 12.4 provides that if the Commission determines that a proposed settlement is not in the public interest, it may reject the settlement and it also "may take various steps, *including*" to hold hearings, allow the parties time to renegotiate the settlement, or propose alternative terms to the parties to the settlement which are acceptable to the Commission.

Our Decision found that the proposed settlement was not in the public interest. (D.11-03-035, at pp. 15, 22 [Conclusion of Law Number 2].) Rather than choose an alternative under Rule 12.4, we determined it would be more useful to authorize Cal-Am to amend its application to provide specific information suited to moving forward in this matter. (D.11-03-035, at pp. 17, 23 [Ordering Paragraph Number 2].) That direction was both lawful and reasonable.

The plain language Rule 12.4 states only that the alternatives specifically listed are steps the Commission "may" take. The language is discretionary and affords the Commission flexibility to devise any other alternatives that are deemed appropriate. And that is all the Decision did.

4. Dismissal

The District contends the Decision failed to follow precedent regarding the handling of motions to dismiss pursuant to Code of Civil Procedure ("CCP") Section 437c. (Rhg. App., at pp. 28-31.)

Section 437c governs motions for summary judgment in civil court. CCP Section 437c is not controlling in Commission proceedings, except that the Commission can look to the statute as guidance. Furthermore, the statute is not applicable or relevant since even the District concedes, no motion for summary judgment was filed in this proceeding.[34] Even if such a motion had been filed, summary judgments are only relevant where the contested matter turns on questions of law rather than questions of

[34] The Commission's rules also provide for motions to dismiss a proceeding based on the pleadings. (Rule 11.2; Cal. Code of Regs., tit. 20, § 11.2.) However, no party filed such a motion in this proceeding.

fact.[35] The dispositive issues in this proceeding did not involve questions of law. Thus, the referenced procedure is simply not relevant.

In addition, the District's argument is based on speculation that we may have believed no facts were at issue, and so dismissed the matter "*sua sponte.*" Speculation concerning our belief or intent does not establish legal error.

The District also wrongly argues the matter was dismissed without explanation. As discussed herein, the Decision did explain why the application and proposed settlement were deemed inadequate. Thus, the Decision gave Cal-Am leave to amend its application. (D.11-03-035, at pp. 10-17, 23 [Ordering Paragraph Number 2].) Should Cal-Am decline to do that, the Decision stated that then the matter may be dismissed. The District fails to establish that dismissal at that juncture would be either inappropriate or unlawful in that event. (D.11-03-035, at p. 23 [Ordering Paragraph Number 2].)

Second, as discussed in part II.C. below, the Decision did explain why it was reasonable and necessary to reject the proposed settlement in this proceeding.

5. Oral Arguments

The District contends the Commission failed to hold final oral arguments as required by Rule 13.13 and Section 1701.3. (Rhg. App., at pp. 25, fn. 93, 31-33.)

Rule 13.13(a) provides in relevant part that "[T]he Commission may, on its own motion or upon recommendation of the assigned Commissioner or Administrative Law Judge, direct the presentation of oral argument before it. Rule 13.13(b) goes on to state that in a ratesetting or quasi-legislative proceeding "in which hearings were held, a party has the right to make a final oral argument before the Commission, if the party so requests…."

Rule 13.13 established no right to oral argument in this proceeding. The plain language of subdivision (a) is clearly discretionary. And subdivision (b)

[35] See e.g., *Crocker National Bank v. City and County of San Francisco* (1989) 49 Cal.3d 881, 889; *Omniphone, Inc. v. Pacific Bell* [D.91-10-040] (1991) 41 Cal.P.U.C.2d 495, 496.

contemplates oral arguments only when one is requested by a party. No timely request was made in this proceeding.

Section 1701.3 similarly provides that if the Commission has determined an evidentiary hearing is required, a party has a right to an oral argument if requested. No party timely requested oral argument in this matter. Thus, the circumstances contemplated by the statute never occurred here.

6. Evidentiary Hearings

The District contends it was prejudiced by a failure to hold evidentiary hearings, which it argues deprived it of the opportunity to "clarify and amplify" its position on the relevant issues. (Rhg. App., at pp. 33-36.)

No rule or statute requires the Commission to hold an evidentiary hearing. The District merely reargues evidence submitted in this proceeding in an attempt to achieve a different outcome. Rehearing is not afforded as an opportunity for a party to reargue the evidence or so that the Commission might reweigh the evidence. Rehearing applications are limited by Section 1732 to specifications of legal error, and the District identifies none.[36]

Further, even if we could have conducted such hearings on the proposed settlement, nothing suggests they would have resulted in any different outcome. The Decision determined that the record evidence was simply inadequate to support the requested costs or resolve the concerns raised in D.09-07-021. Evidentiary hearings to "clarify and amplify" what was deficient is not a substitute for the additional evidence deemed necessary to resolve this matter. And case law supports a conclusion that hearings are not required in such circumstances.[37]

---

[36] Pub. Util. Code, § 1732.

[37] See e.g., *Georgia Pacific Corporation v. United States Environmental Protection Agency* (1982) 671 F.2d 1235, 1241.

7. Submission of Proceedings

The District contends the proceeding was not "submitted for decision" as required by 13.14.[38] (Rhg. App., at p. 37.)

Rule 13.14 provides in relevant part that "[A] proceeding shall stand submitted for decision by the Commission after the taking of evidence, the filing of briefs, and the presentation of oral argument as may have been prescribed."

The District contends this proceeding was never properly submitted because there was no taking of evidence, filing of briefs, or presentation of oral argument. However, the occurrence of those actions is not required for a matter to be submitted. The plain language of the Rule merely states that those actions "may" have taken place and would naturally precede submission of a case.

Further, it is not unusual that after filing of a settlement, the Commission directly proceeds to issue its decision. Submission of a settlement may itself effectively act to submit the matter for decision. Here, we properly accepted the parties' evidence in order to render our determination. (D.11-03-035, at p. 23 [Ordering Paragraph Number 4].[39] It was also not unlawful, as the District suggests, that it was not explicitly notified the matter was submitted. There is no legal requirement for such notice and the Commission does not issue such notifications.

C. Findings of Fact and Conclusions of Law

The District contends the Decision: (1) it failed to provide adequate findings of fact and conclusions of law on all material issues as required by Section 1705;

---

[38] See also Pub. Util. Code, § 311, subd. (d) [Requiring, among other things, that a matter be "submitted for decision" before a proposed decision is issued.].

[39] The District argues when no evidentiary hearings occur, a motion is required to admit prepared testimony and the rules do not provide any other means to take evidence other than at such hearings. It appears to suggest no such motion was filed here. (Rhg. App., at p. 37, fn. 123, citing Rule 13.8(d).) However, the Motion to Approve Settlement did request that the Commission introduce into the record all the evidence that was offered by the parties. (Motion to Approve Settlement, dated May 18, 2010, at p. 2.) And even if no motion had been filed, nothing precludes the Commission from accepting evidence of its own accord.

and (2) failed to set forth adequate findings to explain the outcome. (Rhg. App., at pp. 38-44.)

1. Section 1705

Section 1705 requires that a Commission decision contain separately stated findings of fact and conclusions of law on all issues material to the decision.[40] Relevant case law also provides that a decision must:

> [A]fford a rational basis for judicial review and assist the reviewing court to ascertain the principles relied upon by the commission and to determine whether it acted arbitrarily, as well as assist the parties to know why the case was lost and to prepare for rehearing or review, assist others planning activities involving similar questions, and to service to help the commission avoid careless or arbitrary action.

(*Greyhound Lines, Inc. v. Public Utilities Commission* (1967) 65 Cal.2dd 811, 813.)[41]

The District argues the Decision failed to meet this standard because it failed to address or explain the Commission's legal authority (under Section 451) to prevent the District collecting a User Fee it is otherwise authorized to assess under the District Law. (Rhg. App., at p. 40.)

The District again misreads the Decision. It did not challenge or negate the District's statutory authority to assess and collect a User Fee.[42] The Decision did not address that question at all. As discussed above, the Commission presumes local entities such as the District have such authority. Thus, it was not a material issue which required

[40] Pub. Util. Code, § 1705, stating in relevant part: "...the decision shall contain, separately stated, findings of fact and conclusions of law by the commission on all issues material to the order or decision."

[41] See also *California Motor Transport Company v. Public Utilities Commission* (1963) 59 Cal.2d 270, 274-275.

[42] Similarly, the District contends the findings did not explain why restricting its authority was required to avoid a double collection of revenues. (Rhg. App., at p. 41.) The Decision did not restrict the District's authority. However, the Decision did reasonably explain that Section 451 requires all rates and charges received by a public utility to be just and reasonable. (D.11-03-035, at p. 14, fn. 20.) Because the User Fee was to be recovered from Cal-Am's ratepayers, those costs were inescapably subject to the just and reasonable requirement. Any duplication of costs leading to a double collection of revenues would quite obviously be unreasonable, contrary to, and impermissible under Section 451.

any explanation, finding or conclusion pursuant to Section 1705. The issue does not now become material because the District claims it was.[43]

Consistent with the requisite legal standard, the Decision properly identified the material issues necessary to resolve this matter (D.11-03-035, at pp. 1-4), and it explained the relevant criteria for evaluating settlement agreements. (D.11-03-035, at pp. 10-11.) The Decision also provided a rational basis for rejecting the proposed settlement. In particular, it explained the following evidentiary deficiencies and findings:

- a lack of identifiable ratemaking or programmatic limitations on User Fee costs, raising cost-effectiveness issues (D.11-03-035, at pp. 11-12.);
- no explanation of, or cost justification for, the substantial increase in annual User Fee costs since 2006 (D.11-03-035, at p. 12.);
- possible duplication of activities and costs as between Cal-Am and the District (D.11-03-035, at pp. 12-13.);
- no explanation for how endangered species costs (steelhead) are divided between the relevant agencies, and no evidence to show how Cal-Am is managing those costs for ratepayers (D.11-03-035, at p. 13.);
- no cost justification for certain components of the User Fee (D.11-03-035, at p. 14.);
- no explanation or evidence to show why a percent of revenue derived fee is more cost-effective than a cost-based fee (D.11-03-035, at pp. 11-12.)[44]

The District may disagree with these findings and conclusions. However, disagreement does not establish legal error.[45] The findings were sufficient to reasonably apprise a reviewing Court and the parties of the principles we relied upon in reaching our determination.

[43] Even the District concedes the Commission has discretion to determine what issues are material to a decision. (See also, *City of Los Angeles v. Public Utilities Commission* (1972) 7 Cal.3d 331, 337.)

[44] See also D.11-03-035, at p. 21 [Finding of Fact Numbers 6 & 7], & p. 22 [Conclusion of Law Number 2].

[45] *Southern California Edison Company v. Public Utilities Commission* (2005) 128 Cal.App.4th 1, 8.

That said, the relevant findings in this proceeding were mainly discussed in the Decision's text. However, for purpose of precision and clarity, we will modify the formal findings of fact and conclusions to more closely mirror the Decision text. The modifications appear in the ordering paragraphs of this Order.

2. Disputed Findings

The District contends the Decision was flawed in light of its objections to the Commission's specific formal findings of fact ("FOF"). (Rhg. App., at pp. 41-45.) The District's objections are discussed below.

FOF Number 1 states:

> 1. 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.

(D.11-03-035, at p. 20.)

The District objects to this finding by arguing that no evidence showed it is *not* implementing the Mitigation Measures. (Rhg. App., at p. 41.) That is not the point.

FOF Number 1 merely paraphrases Order 95-10, and nothing in the Decision suggested the District is not currently implementing those measures.[46]

FOF Numbers 2, 3 & 4 are challenged for similar reasons, and state:

> 2. 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.
>
> 3. 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.

[46] See Order 95-10, at p. 43 [Ordering Paragraph Number 11].

> 4. The Management District's 2007-2008 Annual Report for the Mitigation Program shows the Aquifer Storage and Recovery project as a component of the user fee Mitigation program costs and also as a stand-alone additional user fee.

(D.11-03-035, at pp. 20-21.)

The District argues these findings "imply" certain costs are too high or should not be recovered. It argues it would have justified those costs had the Commission held hearings on the matter. (Rhg. App., at pp. 42-43.)

The District's speculation as to an alleged hidden meaning or implication behind our statements does not establish legal error. Like FOF 1, these findings merely paraphrase and restate information contained in the record evidence. Evidentiary hearings were not necessary to simply restate the evidence.

FOF Number 5 states:

> 5. 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.

(D.11-03-035, at p. 21.)

The District objects to FOF 5 by arguing it is inaccurate to assert that its efforts are done solely on Cal-Am's behalf. (Rhg. app., at p. 43.)

FOF 5 merely reflects a point of view, and it was not material to rendering the ultimate determination. Nevertheless, to alleviate any confusion, we modify FOF Number 5 as set forth in the ordering paragraphs of this Order.

FOF Numbers 6 & 7 are challenged on the same ground, and state:

> 6. 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.

7. The testimony supporting the application shows accounting treatment inconsistent with Commission ratemaking standards.

(D.11-03-035, at p. 21.)

The District objects to these findings by arguing it would have presented evidence to support its cost requests if there had been evidentiary hearings. (Rhg. app., at pp. 43-44.) As already discussed, the District was aware of the evidentiary requirements in this proceeding and it is not error on the part of the Commission that the evidence the parties provided was inadequate. The District offers no authority which suggests in such circumstances we must allow evidentiary hearings so that a party can try and rehabilitate their evidence. Nevertheless, to complete the statement in FOF 7 and related text, we modify the Decision as set forth in the ordering paragraphs of this Order.

FOF Number 8 states:

8. The user fee and Carmel River Mitigation Program have a unique history, including particularly that the funds have been remitted to a government agency, that render reasonable Cal-Am's request to recover the amounts recorded in the account.

(D.11-03-035, at p. 21.)

The District objects to this finding by arguing its view that FOF 8 should have been applied broadly to approve the User Fee. It also points out that Cal-Am does not retain any User Fee "proceeds." (Rhg. App., at pp. 44-45.)

That Cal-Am has in the past remitted the User Fee to the District (a government agency) does not establish that the Commission should have concluded the proposed settlement here was reasonable. Further, the District's reference to "proceeds" is troubling. If the proposed User Fee would result in "proceeds" (i.e., profits), it would further support our conclusion that it was correct to question the settlement.

D. Sufficiency of the Record Evidence

The District asserts the Decision erred because the findings were not supported by the record evidence. (Rhg. App., at pp. 45-50, citing e.g., *City of Vernon v. Public Utilities Commission* (2001) 88 Cal.App. 4th 672, 678.)

The District argues the requirement was not met here because the record was never even completely established in this proceeding. To support that allegation, it reiterates its argument that it did not know of the relevant issues, it was deprived of the opportunity to present evidence and brief, and it had no opportunity to defend its proposal in hearings. For the reasons already discussed in this Order, this allegation is without merit.

The District also claims the Decision erred because it made certain inaccurate statements or assumptions. (Rhg. App., at pp. 47-50.) For example, the District suggests we wrongly presumed the User Fee is a "Cal-Am charge" rather than a "District charge." (Rhg. App., at p. 47.) That is incorrect. We clearly understood that distinction as evidenced by our statement that Cal-Am would merely collect fee for the District, but that it is the District which originates the charge. (D.11-03-035, at p. 1.)

What the District ignores is that the fee is still a charge that would billed and recovered from Cal-Am customer. As such, the "charge," regardless of the originator, was properly subject to the Section 451 review.[47]

The District next contends we ignored evidence establishing there was no improper duplication of efforts or costs.[48] To support this claim, it points to testimony which stated: "I have not observed any duplication of effort between the District and California American Water in achieving the stated goals for Phase 1 ASR." (Rhg. App., at p. 49, relying on Cal-Am/Shubert, at p. 12.)

We did not ignore that testimony. But we were not persuaded that no duplication existed based on that one observation when there were other evidentiary concerns noted in the Decision. (D.11-03-035, at pp. 12-13.)

---

[47] Section 451 states in pertinent part: "All charges demanded or received by a utility…" must be just and reasonable."

[48] The District also suggests that the Commission had the burden to prove the District's cost request was unreasonable. That is incorrect. The proponent of a request always carries the burden to prove its request is reasonable. (See e.g., *Re Southern California Edison Company* [D.83-05-036] (1983) 11 Cal.P.U.C.2d 474, 475.)

Similarly, the District claims we failed to recognize that escalation of the 1990 costs (as provided in the evidence) was necessary to justify the requested 2010-2011 levels. (Rhg. App., at pp. 49-50.)

Contrary to the District's claim, we were cognizant of the fact some escalation and updating of cots was necessary. For example, the Decision explicitly noted that "up-to-date cost and budget data" was required. (D.11-03-035, at p. 16.) And one of the things Cal-Am was directed to provide with any amended application was an updated version of the budget to support current cost levels. (D.11-03-035, at p. 17.)

The District also contends the Decision erroneously stated the 1990 Environmental Impact Report ("EIR") was attached to its District Manager's testimony. (Rhg. App., at p. 50.) That is not actually what the Decision said.

The Decision stated that the "1990 EIR document *referenced in the Board's decision*" [SWRCB Order No. WR 95-10] was attached to the District manager's testimony. The referenced document was a November 5, 1990, District document.[49] That document was in fact attached to the District Manager's testimony as Exhibit DF-1.

Finally, the District claims the Decision confused the EIR Mitigation Program with the Five-Year Mitigation Program. (Rhg. App., at p. 50.) It did not. The relevant discussion in the Decision merely mentioned the Water Allocation Mitigation Program measures that are Cal-Am's responsibility under Order 95-10, and noted that those measures were "similar to" those in the EIR Mitigation Program. (D.11-03-035, at p. 15.) It did not confuse the two or say they were one and the same.

E. Duty to Weigh the Relevant Evidence

The District contends the Commission failed to adequately weigh the evidence consistent with relevant case law. (Rhg. App., at pp. 47-50, relying on *Industrial Communications Systems, Inc. v. Public Utilities Commission* ("*Industrial*

[49] See Order 95-10, at p. 43, fn. 25.

Communications") (1978) 22 Cal.3d 572, 582-583; *United States Steel Corporation v. Public Utilities Commission* ("*U.S. Steel*") (1981) 29 Cal.3d 603, 609.)

It is well established that an agency's duty is to weigh the relevant evidence provided in a proceeding.[50] The District offers nothing to show we failed to consider all the relevant evidence in this proceeding. The District merely reargues evidence it deems dispositive and argues the Commission should have found differently. As previously noted, an application for rehearing is not a permissible vehicle to merely reargue the evidence or ask the Commission to reweigh that evidence. Nevertheless, we will address the District's specific challenges below.

First, the District asserts we relied largely on an old and out-of-date annual report, and that it should have been allowed to present more recent and relevant annual reports, budgets, and other evidence.

It is true we did reference an old annual report (2007-2008) that was among the evidence. (See e.g., D.11-03-035, at pp. 11-16.) However, as indicated above we also recognized certain updating of information was necessary, but was not available. Further, that *is* the information the parties chose to submit. Arguably, the District's current (2010-2011) fee request should have been supported by the most recent and relevant evidence the District had available. That it chose not to submit more recent information with the settlement does not mean we erred by considering what was provided.

The District also suggests the Commission failed to consider evidence showing there was effective collaboration between the parties, which it argues would help support a conclusion that the proposed costs were cost-effective. (Rhg. App., at p. 51, fns. 156-158, citing Cal-Am/Schubert, at pp. 4, A 17; MPWMD/Fuerst, at p. A 8.)

The District fails to establish how effective collaboration, even if true, equates to proof that specific program costs are cost-effective. It simply means the

[50] See also *Bixby v. Pierno* (1971) 4 Cal.3d 130, 149; *County of San Diego v. Assessment Appeals Board No 2 of San Diego County* (1983) 148 Cal.App.3d 548, 554-555.

parties work well together. Further, the evidence the District cites to was not particularly insightful. The referenced evidence merely identified certain project activities and stated that they were cost-effective, and set out an overview of the District and its budget process. There was no actual corresponding cost data.

III. CONCLUSION

For the reasons stated above, D.11-03-035 is modified to reflect the clarifications specified below. The application for rehearing of D.11-03-035, as modified, is denied because no legal error has been shown.

Therefore **IT IS ORDERED** that:

1. D.11-03-035 is modified as follows:

a. Pages 21-22 are modified to add the following Findings of Fact:

> 9. Public Utilities Code Section 451 requires that all rates and charges demanded or received by a public utility be just and reasonable.
>
> 10. Commission Rule of Practice and Procedure 12.1 provides that a settlement agreement shall not be approved unless it is reasonable in light of the whole record, consistent with the law, and in the public interest.
>
> 11. Decision 09-07-021 identified the issues and evidence required to support approval of the District's User Fee as a component of California-American's rates.

b. Page 22, Conclusion of Law Number 2 is deleted and replaced as follows:

> 2. The evidence in this proceeding failed to: demonstrate the cost-effectiveness of the proposed program costs; explain the increase in annual program costs; resolve questions concerning possible duplication of certain costs and activities; explain certain User Fee cost components; and demonstrate that the calculation methodology derived a fee that represents the actual cost to implement the Mitigation and ASR programs.

c. Page 22, Conclusion of Law Number 3 is deleted and replaced as follows:

3. The evidence failed to establish the proposed settlement agreement is just and reasonable pursuant to Public Utilities Code Section 451.

d. Page 22, Conclusion of Law Number 4 is deleted and replaced as follows:

4. The evidence failed to establish the proposed settlement agreement is reasonable in light of the whole record, consistent with the law, and in the public interest pursuant to Rule of Practice and Procedure 12.1.

e. Page 22, Conclusion of Law Number 5 is deleted and replaced as follows:

5. California-American Water Company should be authorized to amend this application within 60 days of the effective date of today's decision by filing and serving one of the following:

A. A joint program proposal for the District to perform the Carmel River Mitigation measures based on an updated version of the budget set out in Attachment 1, and to fund the District's portion of the Aquifer Storage and Recovery Project, or

B. An implementation plan for Cal-Am to assume direct responsibility for the Carmel River Mitigation measures, should the District cease to fund the measures.

f. Page 22 is modified to add Conclusion of Law Number 6 as follows:

6. The Monterey Peninsula Water Management District User Fee Memorandum Account should close 60 days after the effective date of this Order. California-American should be authorized to file a Tier 2 advice letter to amortize the amounts recorded in that account over 12 months with interest to be calculated based on the 90-day commercial paper rate.

g. Page 22 is modified to add Conclusion of Law Number 7 as follows:

7. The proposed settlement agreement should not be approved.

f. Page 5, Finding of Fact Number 5 is modified as follows:

5. Cal-Am is actively pursuing water supply augmentation through its Coastal Water Project.

g. The last sentence of the first paragraph on page 12 is modified to state:

This does not appear to be consistent with the Commission's cost of service ratemaking standards.

h. Page 21, Finding of Fact Number 7 is modified to state:

7. The testimony supporting the application shows accounting treatment which appears to be inconsistent with the Commission's cost of service ratemaking standards.

This order is effective today.

Dated January 24, 2013, at San Francisco, California.

MICHAEL R. PEEVEY
President
MICHEL PETER FLORIO
CATHERINE J.K. SANDOVAL
MARK J. FERRON
CARLA J. PETERMAN
Commissioners

PROOF OF SERVICE

I, Wendy Peña, declare: I am a citizen of the United States and employed in San Francisco County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 505 Sansome Street, Suite 900, San Francisco, California 94111.

On **February 25, 2013**, I served a copy of the within document:

PETITION FOR REVIEW

by placing the document listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at San Francisco, California addressed as set forth below:

Paul Clanon
Executive Director
California Public Utilities Commission
505 Van Ness Avenue
San Francisco, CA 94102

Supreme Court of California
Clerk of the Court
350 McAllister Street, Room 1295
San Francisco, CA 94102

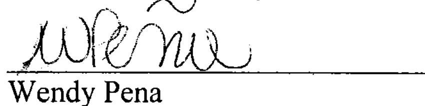
Frank Lindh
General Counsel
California Public Utilities Commission
505 Van Ness Avenue
San Francisco, CA 94102

Sarah E. Leeper
California-American Water Company
333 Hayes Street, Suite 202
San Francisco, CA 94102

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

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

Executed on **February 25, 2013**, at San Francisco, California



Wendy Pena

3465/001/X149274.v1