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

In the Matter of the Application of California-American Water Company (U 210 W) for a Certificate of Public Convenience and Necessity to Construct and Operate its Coastal Water Project to Resolve the Long-Term Water Supply Deficit in its Monterey District and to Recover All Present and Future Costs in Connection Therewith in Rates.

Application 04-09-019
(Filed September 20, 2004;
Amended July 14, 2005)

**REBUTTAL TESTIMONY OF LLOYD W. LOWREY, JR.
ON BEHALF OF MARINA COAST WATER DISTRICT**

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May 27, 2010

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EXHIBITS

LWL-32: Resolution No. 2010-20 – Resolution of the Board of Directors of Marina Coast Water District Adopting Findings and Mitigation Monitoring and Reporting Plan, and Conditionally Approving Regional Desalination Project dated April 5, 2010

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

3
4 In the Matter of the Application of California-
5 American Water Company (U 210 W) for a
6 Certificate of Public Convenience and
7 Necessity to Construct and Operate its Coastal
8 Water Project to Resolve the Long-Term Water
9 Supply Deficit in its Monterey District and to
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12 **REBUTTAL TESTIMONY OF LLOYD W. LOWREY, JR.**
13 **ON BEHALF OF MARINA COAST WATER DISTRICT**

14
15 Q1. Please state your name and business address.

16 A1. My name is Lloyd W. Lowrey, Jr. My business address is 333 Salinas Street,
17 Salinas, CA 93901.

18 Q2. By whom are you employed and in what capacity?

19 A2. I am a member of the law firm of Noland, Hamerly, Etienne & Hoss, a California
20 professional corporation (NHEH), employed as an attorney. NHEH has served
21 since 1986 as General Counsel to the Marina Coast Water District (MCWD), and I
22 have during that time been the principal attorney from NHEH representing and
23 advising MCWD as District Counsel.

24 Q3. Are you the same Lloyd Lowrey whose Direct Testimony was served on the parties
25 in this proceeding on June 24, 2009.

26 A3. Yes, I am.

27 Q4. What is the purpose of this additional piece of testimony?

28 A4. The purpose of this testimony is to update my earlier testimony in light of the
events that have transpired since June 24, 2009, and to rebut some of the assertions

1 and positions taken by the Division of Ratepayer Advocates (“DRA”) and the
2 Monterey Peninsula Water Management (“MPWMD”), the two primary opponents
3 of the Regional Desalination Project, in their testimony and comments served
4 and/or filed on April 30, 2010.

5
6 Q5. What events have transpired relevant to your earlier testimony?

7 A5. Subsequent to the Commission’s certification of the Final Environmental Impact
8 Report (“FEIR”) in this proceeding, the MCWD Board of Directors and the Board
9 of Supervisors of the Monterey County Water Resources Agency (“MCWRA”)
10 each conditionally approved the Settlement Agreement (“SA”) and the Water
11 Purchase Agreement (“WPA”) contained in the record of this proceeding. The
12 MCWD Board of Directors conditionally approved the SA and WPA in their
13 Resolution 2010-20, a true copy of which is attached hereto as Exhibit LWL-32.
14 An action was filed and is pending in Monterey County Superior Court (Ag Land
15 Trust v. Marina Coast Water District, Case No. M105019) challenging the action
16 by the MCWD Board of Directors as violative of the California Environmental
17 Quality Act (“CEQA”) and of the water rights of the petitioners and plaintiffs.
18

19 Q6. Do these actions cause you to change your earlier testimony?

20 A6. No. My earlier testimony concerning the legal status and authority of MCWD,
21 including the testimony on water rights, remains valid. I further believe that the
22 provisions of the WPA as conditionally approved by MCWD and MCWRA
23 confirm the validity of my testimony. With respect to the approval of the WPA, in
24 the answers to questions 24 and 29 in my earlier testimony I testified that
25 cooperation between MCWD and the MCWRA would be legally useful to the
26 Regional Project and that water developed by the MCWRA was a factor in the
27 analysis of the right to use brackish water for the Regional Project. The WPA
28

1 adopts a positive, cooperative approach to the exercise of MCWRA’s statutory
2 authority and maximizes the coordinated and conjunctive use of water developed
3 by the MCWRA and water from seawater-intruded areas to provide brackish
4 source water for the Regional Desalination Project described in the WPA.
5 MCWRA’s ownership and control of the wells and extraction facilities for the
6 brackish source water under the WPA facilitates MCWRA’s exercise of its
7 statutory authority over water from the Salinas River Groundwater Basin. The
8 WPA provides a cooperative framework for ongoing technical testing and physical
9 solutions to potential water rights issues, mitigating the need for court action to
10 establish such a framework and such solutions. The WPA is designed to balance
11 the respective constitutional, statutory and common law authority and rights of the
12 Commission, the public agency parties, land owners and water users in this
13 proceeding, and to avoid or minimize protracted and expensive court proceedings
14 over such authority and rights. With respect to the Ag Land Trust suit, the Petition
15 for Writ of Mandate under CEQA addresses a subject outside the scope of my
16 earlier testimony and the causes of action for declaratory relief do not raise any
17 issues not addressed in my earlier testimony. The second cause of action alleging
18 violation of the MCWRA Act underscores the benefit of the cooperative approach
19 with MCWRA embodied in the WPA.
20

21 Q7. What testimony or comments of the DRA and the MPWMD do you wish to rebut?

22 A7. The DRA and the MPWMD have in testimony and comments raised questions
23 about the fairness and transparency of the processes used by MCWD to establish
24 rates, fees and charges. MCWD is a local agency and is a “municipal corporation”
25 within the meaning of section 9 of article XI of the California Constitution. As a
26 local public agency, MCWD is subject to the Ralph M. Brown Act, commonly
27 referred to as the “Open Meeting Law” and the “Brown Act,” codified at sections
28

1 54950 and following of the Government Code, and the California Public Records
2 Act (“PRA”) codified at sections 6250 and following of the Government Code.
3 The Brown Act requires the governing bodies of local public agencies like
4 MCWD, MCWRA and the MPWMD to conduct business and make decisions in
5 open and public meetings, based upon agendas prepared and posted in advance of
6 the meetings, with certain exceptions not material to this testimony. The PRA
7 makes most records maintained by MCWD open to inspection by the public. In
8 my role as District Legal Counsel, I regularly review meeting agendas for
9 compliance with the Brown Act, and I review requests for inspection under the
10 PRA. In my experience, these laws provide a level of transparency and Public
11 access for public agencies that is not available with private entities. Additionally,
12 article XIII D, particularly Section 6, of the Constitution, and the provisions of the
13 Mitigation Fee Act codified at sections 66000 and following of the Government
14 Code, require MCWD to follow a public process involving notice and hearings in
15 adopting rates, fees and charges, and to fix water rates that are reasonable and fair
16 and related to costs. Under article XIII D, section 6, a fee or charge for service to a
17 parcel must meet the following requirements:

18
19 (1) Revenues derived from the fee or charge shall not exceed the
20 funds required to provide the property related service.

21 (2) Revenues derived from the fee or charge shall not be used for any
22 purpose other than that for which the fee or charge was imposed.

23
24 (3) The amount of a fee or charge imposed upon any parcel or
25 person as an incident of property ownership shall not exceed the proportional cost
26 of the service attributable to the parcel.
27
28

1 (4) No fee or charge may be imposed for a service unless that service
2 is actually used by, or immediately available to, the owner of the property in
3 question.
4

5 (5) No fee or charge may be imposed for general governmental
6 services.
7

8 MCWD's decisions to set rates, fees and charges are subject to challenge in the
9 courts.
10

11 As legal counsel for MCWD and other public agencies, I have seen the
12 public served by the agencies use the provisions of the Brown Act, the PRA, Article
13 XIII D and the Mitigation Fee Act to participate in, obtain information about and
14 challenge decisions to set rates, fees and charges. In my experience, these processes
15 provide assurance to those paying rates, fees and charges of the prudence and
16 reasonableness of rates and costs and the reasonable relation of rates to costs.
17 Article 7 of the *Water/Wastewater Facilities Agreement* (LWL-26) between
18 MCWD and the Fort Ord Reuse Authority ("FORA") requires additional procedures
19 and oversight by the FORA Board of Directors for rates, fees and charges to
20 customers on the former Fort Ord, including areas within the Cities of Marina,
21 Seaside, Del Rey Oaks and Monterey and the unincorporated portion of the former
22 Fort Ord. Because the WPA requires MCWD to pay the same as California
23 American Water Company (CAW) for permanently allocated water, CAW and its
24 customers will receive the benefits of the requirements applicable to MCWD rates,
25 fees and charges.
26

27 The WPA conditionally approved by the MCWD Board also contains
28 provisions to control costs. The proposed WPA requires costs charged by MCWD

1 under the Agreement to be reasonable and prudent, and provides no opportunity for
2 MCWD to obtain a “profit” or return on investment through such charges, as would
3 be the case if a Commission-regulated public utility were producing and selling the
4 product water. See the following WPA provisions: Section 1.3, Definitions,
5 “Project Administration and Oversight Expenses”; “Regional Desalination Project
6 Related Expenses”; Section 6.5(h) [the Parties shall review and consent to the
7 reasonableness and prudence of the O&M Costs for the coming Calendar Year];
8 Section 7.2 [Agencies to provide CAW with reasonable evidence of Replacement
9 cost]; Section 11.2(d) [All costs of the Parties pursuant to the WPA shall be
10 reasonably and prudently incurred]; Section 11.6 [MCWD’s proportional share of
11 O&M costs]; Section 11.14 [MCWD fees and obligations]. Deviations from these
12 requirements would be subject to correction by the procedures and remedies
13 provided in the WPA for breaches of the WPA: Section 19, Dispute Resolution, and
14 Section 20, Events of Default and Remedies.
15

16
17 Q8. DRA and MPWMD have requested changes in the WPA and the SA. What
18 process would be required for MCWD to approve changes?

19 A8. MCWD Board Resolution 2010-20 authorizes execution of the WPA and the SA
20 “substantially in the form presented to the Board at the April 5, 2010, meeting.”
21 Clarifying and non-substantive changes will not require further MCWD Board
22 action. Substantive changes will require Board approval.
23

24
25 Q9. Does this conclude your rebuttal testimony?

26 A9. Yes, it does.
27
28