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 Approval of the Monterey Peninsula Water Supply Project and Authorization to Recover All Present and Future Costs in Rates.	A.12-04-019 (Filed April 23, 2012)

MARINA COAST WATER DISTRICT'S MOTION TO DISMISS A.12-04-019

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I. INTRODUCTION.

In accordance with Article 11 of the Commission's Rules of Practice and Procedure, Marina Coast Water District ("MCWD") respectfully moves the Commission for an order dismissing the Application of California-American Water Company ("CAW") for Approval of the Monterey Peninsula Water Supply Project and Authorization to Recover All Present and Future Costs in Rates (the "Application" or "A.12-04-019") because the Application is inconsistent with clear, recently-articulated Commission policy and the Commission chooses not to reexamine that policy at this time. MCWD's Motion for Leave to Intervene is filed concurrently herewith.

This Motion to Dismiss presents the Commission with a crucial decision point in its fifteen-year effort to secure a replacement supply of water for the ratepayers of the Monterey Peninsula. The Application is absolutely contrary to the Commission's existing policy and raises one of the primary issues that the Commission decided in establishing that policy – the comparative merits of the Regional Desalination Project ("RDP") and the North Marina Alternative ("North Marina"). The Application need not and should not be entertained at this time.

Matters have reached a pivotal juncture, and the Commission must act firmly and decisively in response to the Application. Processing the Application would take many months, if not years, of contested proceedings. Moreover, the Commission's processing of the Application would communicate to the world that the Commission is considering changing its existing policy and would most assuredly destroy the very project the Commission chose in D.10-12-016 as the best and only feasible solution to the long-standing water supply crisis on the Monterey Peninsula.

In D.10-12-016, the Commission identified and approved the RDP as its policy choice for providing a replacement supply of water to the Monterey Peninsula, concluding that the RDP is the least-cost project alternative, the only project alternative that can meet the State Water Resources Control Board's ("SWRCB's") Cease and Desist Order ("CDO") deadline, and the project alternative that best serves the public interest. The Commission approved the RDP as reasonably certain to produce the "lowest cost, viable, and timely solution" for Cal-Am's

ratepayers[1]. The Commission said that the RDP is the "only feasible project" likely to timely solve the Monterey Peninsula's "long-standing, contentious, and bitterly disputed" water problems.[2] The Commission stated that due to "myriad social, economic, and legal issues" the project is the "only feasible alternative."[3] The Commission concluded that the RDP should "be financed, permitted, and constructed as soon as practicable."[4] To carry out its policy, the Commission ordered that the RDP settlement and implementing agreements and the RDP itself be approved, adopted its 90-page CEQA Findings of Fact and Statement of Overriding Considerations for the RDP in compliance with Public Resources Code section 21081, and certified the addendum to its EIR.[5]

Since the issuance of D.10-12-016, nothing has changed. CAW, as a regulated utility, is bound to follow the Commission's orders. Yet, over the sixteen months that followed the Commission's decision, CAW has actively worked to defeat the RDP instead, in violation of the Commission's orders and sections 1702, 2107 and 2108 of the Public Utilities Code as well as its contractual obligations to its RDP partners. The Commission must act decisively to uphold the policy that it so carefully and correctly crafted in D.10-12-016. The Commission must, again, direct CAW to immediately and fully comply with D.10-12-016.

The Application states no facts that justify a change in the Commission's policy. It is merely a thinly-veiled request for the Commission to directly reverse its own policy and to endorse CAW's unlawful actions. In reality, the Application is, as it states, a request for a Certificate of Public Convenience and Necessity ("CPCN") for CAW to construct a project that is for all intents and purposes its North Marina Alternative.[6] North Marina was reviewed, considered and rejected by the Commission as inferior to the RDP in D.10-12-016.[7] The project described in the Application is *not* the Commission's policy choice – it is a recently-rejected,

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[1] D.10-12-016, p. 6.
[2] *Id.* at 33.
[3] *Id.* at 54.
[4] *Id.* at 203, Conclusion of Law ("COL") 65.
[5] *Id.* at 203-205,Ordering ¶¶ 1, 7, 9-10.
[6] Application, p. 22 (the proposed project is "a modified version of the North Marina Project. The main modifications are the locations of the intake slant wells and the desalination treatment plant."). *See* Direct Testimony of Kevin Thomas, pp 6-7 ("CPUC's Final EIR addresses" the project's effects on recreation, parks historic and aesthetic values; "the CPUC has previously certified an EIR for a desalination facility near Marina"); Direct Testimony of Richard Svindland, pp. 7-8 ("the proposed location changes can be accommodated by preparing a Supplemental EIR").
[7] *See, e.g.* D.10-12-016, p. 174, Finding of Fact ("FOF") 104 ("litigation related to private ownership . . . and compliance with the Agency Act could ensue" with the North Marina alternative).

mutually- exclusive alternative to the Commission's policy choice.

Neither CAW's submissions in A.04-09-019, nor its new Application present any actual facts to refute the Commission's determination that only its existing policy, the RDP, can meet the 2016 deadline and achieve the project objectives at the lowest cost. Instead, CAW simply continues to insist that the Collins conflict of interest and the *Ag Land Trust* lawsuit present insurmountable obstacles. But that is not the case. It is only CAW's opinion, and it is an unfounded opinion, as MCWD will explain below.

Moreover, because the Application relies on the Commission's Environmental Impact Report ("EIR") to support the new project proposal, any obstacle presented by the *Ag Land Trust* case will not be resolved merely by removing MCWD from the project. Perhaps most ominously, the Application utterly fails to address how extraction of brackish desalination source water from wells in the North Marina area will be accomplished legally without the participation of a party – such as MCWD – that holds sufficient existing water rights in the Salinas Valley Groundwater Basin.[8] This very issue was one of the key reasons that the Commission found North Marina to be infeasible in D.10-12-016.[9] The Commission noted "significant concerns regarding the legality of [the North Marina] option" that were raised during the public comment period of the environmental review.[10] In addition, D.10-12-016 found that the North Marina alternative would not be capable of supplying the required volume of desalinated water while also complying with the Agency Act at all times.[11]

Therefore, as MCWD similarly urged in response to CAW's now-withdrawn petition to modify D.10-12-016, the Presiding Administrative Law Judge should promptly prepare a Proposed Decision in A.12-04-019, and the Commission should promptly sign out its Commission Decision:

1) Dismissing the Application as being inconsistent with clear, recently-articulated Commission policy which the Commission chooses not to change at this time;
2) Finding that the Application presents no reasonable basis for altering the Commission's findings in D.10-12-016 that the RDP is the only viable replacement water supply project for the Monterey Peninsula, as demonstrated in

[8] *See* Application, pp. 22-24; Appendix H.
[9] D.10-12-016, CEQA Findings, pp. 84-85.
[10] *Ibid.*
[11] *Id.* at 85.

its California Environmental Quality Act ("CEQA")[12] Findings of Fact for the RDP, and that D.10-12-016 remains the Commission's policy;

3) Finding that the statute of limitations has now run on any court action to invalidate the RDP contracts due to a possible violation of Government Code section 1090 in the Monterey County Water Resources Agency's ("MCWRA's") approval of those contracts;

4) Directing CAW, MCWD and MCWRA to expeditiously perform their contractual obligations in connection with the RDP; and

5) Finding that if MCWRA cannot or will not perform its contractual obligations in connection with the RDP, it must either assign its interests pursuant to Section 18.2 of the Water Purchase Agreement ("WPA") to a party that will perform those obligations, or face legal action by the Commission.[13]

If, on the other hand, the Commission decides to change its policy and consider the Application, the Commission should immediately declare an RDP "Project Cessation" within the meaning of Section 7.4 of the WPA. The RDP parties could then address remaining financial matters, as provided in section 7.4 of the WPA, in proceeding A.04-09-019.

Unless the Commission grants MCWD's Motion to Dismiss, it will be changing its policy, endorsing CAW's multiple, ongoing and blatant violations of D.10-12-016, and delivering an unnecessary *coup de grâce* to the RDP. In so doing, it would be turning its back on the project that it has determined to be the only feasible means of complying with the deadline. Therefore, MCWD urges the Commission to immediately and unequivocally uphold its current policy and grant MCWD's motion to dismiss. The Commission must act now.

II. BACKGROUND.

In response to the Legislature's 1998 directive in A.B. 1182,[14] after many years of proceedings and a full environmental review of project alternatives, the Commission identified

[12] Pub. Resources Code §§21000-21177.

[13] The Commission has the power to enforce the conditions of its decisions and its approved contracts, notwithstanding its lack of jurisdiction over the non-utility parties to such contracts. (*See Henderson v. Oroville-Wyandotte Irr. Dist.* (1931) 213 Cal. 514, 530-532 (holding that the Commission could enforce conditions in Commission-approved contracts against non-regulated entities. *See also PG&E Corp. v. Public Utilities Commission* (2004) 118 Cal.App.4th 1147, 1207 (Commission properly held that it could enforce conditions against non-regulated entities imposed in utility restructuring investigation).

[14] Stats. 1998, ch. 797 (Keeley).

the RDP as its policy for CAW's Monterey Peninsula service area.[15] In D.10-12-016, the Commission granted CAW a CPCN to build and operate certain RDP facilities in conjunction with certain other RDP facilities to be owned and operated by MCWD and MCWRA, in accordance with the WPA and other RDP-related contracts.[16]

The Commission's policy in approving CAW's participation in the RDP was a response to the need to find a replacement water supply for CAW's Monterey Peninsula service district, as directed by the Legislature in A.B. 1182.[17] The project that will provide such a replacement supply of water for CAW's Monterey Peninsula district must be fully operational in advance of the 2016 deadline imposed in October of 2009 by the SWRCB's CDO.[18] The CDO requires CAW to gradually cease illegal and unsustainable pumping of Carmel River water, achieving full compliance no later than December 31, 2016.[19] As CAW's Application notes, failure to meet the deadline "could have harmful consequences for [CAW], its customers, and the community."[20] In fact, failure to implement a replacement water supply by the CDO deadline would, conservatively, result in the loss of 6,000 jobs and $1 billion per year to the economy of the Monterey Peninsula.[21] Many of the affected workers would be MCWD's own constituents and others from communities less affluent than the Monterey Peninsula Cities.

The Commission, in D.10-12-016, found that the RDP was the only water supply project that can meet the 2016 CDO deadline and also fulfill the project objectives that were stated in the Final EIR.[22] CAW recites those objectives in the Application.[23] The Commission directed that D.10-12-016 be effective immediately so that the RDP could "be financed, permitted, and constructed as soon as practicable."[24] The Commission's findings in D.10-12-016 under CEQA included the finding that none of the other alternatives reviewed in the Final EIR for the project were feasible.[25] In fact, CAW's President earlier testified before the Commission under oath that

[15] D.10-12-016, p. 205, Ordering ¶¶ 7-11.
[16] *Ibid*., *id.* at Ordering ¶ 7.
[17] D.10-12-016, p. 203, COL 65.
[18] SWRCB Order WR 2009-0060 ("CDO"), pp. 57-58.
[19] CDO, pp. 57-58; *see* Application at 2.
[20] Application, p. 28.
[21] D.10-12-016, CEQA Findings, p. 46.
[22] D.10-12-016 at 36-41, 160-161 at Findings of Fact 29-30; Final EIR at §§ES.2; 3.1.2; 5.1.2.
[23] Application, Appendix H, p. 4.
[24] D.10-12-016, p. 203, COL 65.
[25] D.10-12-016, CEQA Findings, pp. 77-86.

Cal-Am itself determined the RDP is "the only alternative" analyzed "that could successfully be developed."[26]

In D.10-12-016 the Commission directed CAW to keep it informed about the RDP's progress through quarterly status reports.[27] The Commission expected CAW to alert it to any impediments to the project that might arise, including aspects of the RDP related to MCWD and MCWRA.[28] It expressed "no doubt that Cal-Am will petition for additional relief, if the Regional Project appears to be infeasible."[29]

But during the course of 2011, CAW never alerted the Commission to any difficulties or the appearance that the RDP was infeasible. CAW did apparently meet with Commissioner's Advisors during June, July and August of 2011.[30] However, each of these meetings related only to CAW's protest concerning the low interest rate to be utilized in the RDP pre-construction cost memorandum.[31]

It appears that CAW did not inform the Commission of MCWRA's supposed contract repudiation in July of 2011 or of CAW's own unilateral termination of the RDP in September of 2011.[32] It appears that CAW did not alert the Commission to MCWRA's position that the contracts were invalid, or attempt to refute that position in defense of the Commission's policy. Instead of explaining the circumstances, seeking the Commission's support, and attempting to defend the Commission-approved project, CAW purported to terminate the RDP contracts without informing the Commission or seeking its approval, and it filed a petition for modification of D.10-12-016.[33] Finally, in a belated compliance filing on January 18, 2012, CAW informed the Commission of its public announcement the previous day that it was withdrawing its support for the RDP.[34]

In response to CAW's petition for modification, MCWD presented specific facts to the Commission, using CAW's own data, to demonstrate that the RDP and only the RDP is still capable of meeting the CDO deadline and the project objectives that are identified in the

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[26] Rebuttal Testimony of Robert G. MacLean, May 27, 2010 at 7:7-9.
[27] D.10-12-016 at 203-204, ordering paragraph 2.
[28] D.10-12-016 at 204, ordering paragraph 3.
[29] D.10-12-016 at 120.
[30] A.04-09-019 docket, CAW Notices of Ex Parte Communication dated June 23, 2011, July 27, 2011 (2 notices) and August 2, 2011.
[31] *Ibid*.
[32] Application, pp. 4-5.
[33] *Ibid*; *see* October 14, 2011 Petition for Modification filed in A.04-09-019.
[34] CAW Compliance Filing, January 18, 2012, p.1, filed in A.04-09-019.

Commission's EIR and articulated in D.10-12-016.[35] Rather than refute MCWD's position with concrete facts to the contrary, CAW merely claimed that MCWD's project comparison was flawed and speculative because *CAW* – not the Commission – had yet to select one specific alternative project.[36]

In opposing CAW's petition to modify D.10-12-016, MCWD speculated that CAW might aim to build the North Marina alternative so that it could add the full capital cost of the desalination plant and all the project facilities to its rate base.[37] Attempting to understand CAW's actions, MCWD propounded data requests concerning the petition for modification.[38] But CAW refused to answer MCWD's data requests. On April 23, 2012 it withdrew its petition for modification.

Meanwhile, on March 15, 2012, CAW filed an advice letter with the Commission that stated it had advised the Commission on January 17, 2012 that it created a new affiliate, "AW Contract Services Holding, Inc." which would be a privately-held affiliate not subject to Commission jurisdiction.[39] As of April 26, 2012, no such entity appeared to be listed with the Secretary of State as a corporation doing business in California.[40]

CAW apparently obtained a non-binding, informal opinion from the Commission's General Counsel that the Monterey County ordinance that prohibits private ownership of desalination plants would be preempted if it interfered with the Commission's statewide regulation of water utilities.[41] While such an informal opinion may be correct, it has not been adopted as the Commission's opinion in this case and it is likely to be hotly contested by a community in which almost all stakeholders believe that desalination facilities should not be owned by a private company, let alone a company whose sole shareholder is a New Jersey mega-corporation without ties to the region.[42]

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[35] MCWD's March 1, 2012 Separate Status Report of MCWD, filed in A.04-09-019, pp. 15-16, Appendices A (timelines), B (cost analysis).
[36] CAW's March 15, 2012 Response to MCWD's Separate Status Report, p. 9.
[37] MCWD's January 23, 2012 Prehearing Conference Statement filed in A-04-09-019, p. 11; MCWD March 1, 2012 Separate Status Report, pp. 15-16.
[38] MCWD's March 9, 2012 Data Request #1 to CAW.
[39] Advice Letter 936, filed March 15, 2012.
[40] *See* http://kepler.sos.ca.gov/cbs.aspx (last searched April 26, 2012).
[41] Direct testimony of Richard Svindland, Attachment 7.
[42] The issue of preemption of local ordinances by Commission policy is typically one that is resolved by the courts. (*San Diego Gas & Elec. Co. v. City of Carlsbad* (1998) 64 Cal. App. 4th 785, 805 (holding that a city's permit requirement was preempted because it "unreasonably interfere[d]" with essential public utility functions, on the specific facts presented in that case).)

Now, without regard for the continuing and controlling force and effect of D.10-12-016, CAW brings a new Application to build a project that is the very same CAW-only North Marina project that the Commission rejected as infeasible in D.10-12-016.[43] True, the Application states facts that raise the future *possibility* of incorporating a public agency element into the North Marina water supply, *if* the concerned agencies' Groundwater Replenishment ("GWR") recycled wastewater project is operational and acceptable to CAW at a future date.[44] CAW's nod to a potential future GWR element operated by local agencies is a feel-good public relations tactic, not an existing fact that the Commission may consider in deciding the Motion to Dismiss. CAW's Application plainly couches the GWR element in the speculative language of "if" that public project has achieved CAW's required milestones by some time in the year 2014 CAW will *consider* adding it to the project.[45] The Application does not provide any facts to demonstrate that the GWR element is likely to be successful or timely, or that it will undergo concurrent environmental review. Instead, the Application plainly states that CAW will build its new version of the North Marina alternative.[46]

CAW continues to cite alleged violations of Government Code section 1090 by former MCWRA Board of Directors member Stephen Collins as the basis for its unlawful termination of the RDP.[47] Like CAW's petition to modify D.10-12-016, the Application does not explain why the RDP should not still be implemented in the public interest to carry out the Commission's policy, with or without MCWRA. At the Prehearing Conference on CAW's petition for modification on January 24, 2012, Presiding Administrative Law Judge ("ALJ") Angela Minkin asked CAW to explain its position. Judge Minkin said:

> . . . I think the Commission needs to have these answers in order to understand how to move forward. If there are overdraft penalties, would Cal-Am's ratepayers be expected to bear those overdraft penalties? If the Regional Project is to go forward, how can it go forward effectively?
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> If Cal-Am were to reconsider withdrawing its support [for the RDP], what would be - what does it require? If the Commission ordered Cal-Am to go forward, what - what are the sticking points . . . . I need to understand

[43] Application, pp. 7-8, 22.
[44] Application, pp. 5-6.
[45] *Ibid.*; Application, Appendix A, *see especially* p. 3, Recital L (CAW and the GWR parties "reserve their discretion to evaluate and determine the feasibility or viability"of the GWR proposal).
[46] Application, p. 22; Appendix H.
[47] Application, p. 4; Direct Testimony of Richard Svindland, p. 15.

what the tipping point was for Cal-Am.[48]

CAW responded to the ALJ by listing seven conditions that would have to be satisfied so that it "might consider supporting" the RDP.[49] MCWD's March 15, 2012 Consolidated Response provided the Commission with a means to address CAW's concerns and to save the RDP.[50] But CAW never gave the Commission an opportunity to say whether or not it was interested in overlooking CAW's violations and changing the operative Commission policy that was set forth in D.10-12-016.

Instead, CAW withdrew its petition and filed the Application. Testimony submitted in support of the Application states that the proposed project "will be the single largest capital project in the history of [CAW]" and that CAW should "be afforded the opportunity to earn a fair return on the capital it has invested on behalf of customers."[51] The approximately $400 million capital cost of the proposed project stands in stark contrast to the RDP which provides for purchase of desalinated water at cost from MCWD and a still-valid $106 million in capital cost expense for CAW facilities, as approved in D.10-12-016[52].

III. LEGAL STANDARD TO DISMISS AN APPLICATION.

The Commission decides whether or not to grant a motion to dismiss by "assuming that the facts alleged in the application are true" and "that the applicant will be able to prove everything alleged in its application to the Commission in order to gain a CPCN."[53] Accepting the facts as true, the Commission then "looks to its own law and policy" to decide:

> whether the Commission and the parties would be squandering their resources by proceeding to an evidentiary hearing when the outcome is a foregone conclusion under the current law and policy of the Commission.[54]

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[48] January 24, 2012 Prehearing Conference Transcript, pp. 140:21-141:7
[49] CAW March 1, 2012 Compliance Filing in A.04-09-019, p. 6.
[50] MCWD March 15, 2012 Consolidated Response filed in A.0409-019, pp. 6-12, 17-18.
[51] Direct Testimony of Jeffrey T. Linam, p. 10.
[52] Direct Testimony of Mark Schubert, P.E., pp. 12-13 (citing D.10-12-016 discussion of cost cap for CAW-only facilities).
[53] *Re Pacific Gas and Electric Company* (Cal. P.U.C. 2008) 2008 WL 4948590 ("D.08-11-004"), *Decision Granting Motion to Dismiss of Western Power Trading Forum* at *2.
[54] *Ibid.*, citing *Application of Western Gas Resources-California, Inc., for a Certificate of Public Convenience and Necessity to Provide Public Utility Gas Transmission and Distribution Services Through the Use of Certain Existing Facilities and to Construct Additional Interconnection Facilities* (Cal. P.U.C. 1999) 199 WL 1957792 ("D.99-11-023"), *Opinion Dismissing Without Prejudice Western Gas Resources-California, Inc.'s Application for a CPCN* at *3-4.

The legal standard is akin to the standard for measuring the sufficiency of a complaint, that is, "whether, taking the well-pleaded factual allegations of the complaint as true, the defendant is entitled to prevail as a matter of law."[55]

In the *Western Gas Resources-California* ("*WGRC*") case, the Commission decided that it would be a waste of its time to consider an application that requested a CPCN for competitive local transmission and distribution of natural gas, a type of business that its current policy had determined would not be conducted in California.[56] Therefore, the Commission granted a motion to dismiss the application without giving it further consideration, because the application was not in line with existing policy.[57]

More recently, PG&E applied for expedited approval of its application for a CPCN for approval of non-competitive contracting for construction of a combined-cycle generating station.[58] The application alleged that the circumstances justified the Commission departing from its established policy that utilities must obtain long-term power through "competitive procurements rather than through preemptive actions" by the regulated utility.[59] However, a group of energy industry entities brought a motion to dismiss the application on the grounds that it did not comply with Commission policy, and the Commission granted the motion, finding that hearing the application would require the Commission and the parties to "squander" their resources since existing Commission policy made the result "a foregone conclusion."[60]

When the Commission decides a motion to dismiss, it may also properly take judicial or official notice of court and Commission files and proceedings.[61] Judicial or official notice may properly encompass not only the fact that certain documents were filed with the courts or the Commission, but also the "*truth* of facts asserted in documents such as orders, findings of fact and conclusions of law, and judgments."[62]

Under the *Ashbacker* doctrine, two mutually-exclusive project proposals – such as the RDP and North Marina – must receive a competitive hearing on the merits of the project before

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[55] D.99-11-023 at *3, *citing MCI Telecommunications Corp. v. Pacific Bell* (1995) 59 CPUC 2d 665.
[56] D.99-11-023 at *15.
[57] *Ibid.*
[58] D.08-11-004 at *1.
[59] *Ibid.*
[60] *Id.* at *2, *9.
[61] D.99-11-023 at *3, *citing Upper Kern Island Water Assn. v. Kern Delta Water Dist.* (1991) 40 CPUC 2d 65.
[62] *Calico Solar, LLC v. BNSF Railway Co.* (Cal. P.U.C. 2011) 2011 WL 5110499 ("D.11-10-025") at *10-11, *citing Sosinsky v. Grant* (1992) 6 Cal.App.4th 1548, 1564-69, *emphasis* in original.

the Commission can select the project that will fulfill its policy going forward.[63] Mutual exclusivity is construed under economic standards, meaning that where, for example, the market service area will support service by only one airline, as in D.78276, or consumption demand requires only one 10 mgd desalination plant, the two projects are mutually exclusive and must receive a competitive hearing.[64] That is what occurred in A.04-09-019. The result was the Commission's order in D.10-12-016 to implement the RDP immediately, because it is the only feasible solution to the problem that the Legislature directed the Commission to solve in A.B. 1182.[65]

A. In considering a motion to dismiss, the Commission does not take as true the Applicant's conclusions, or ultimate facts.

Although the Commission accepts the facts of the Application as true, the Commission does not accept the "ultimate facts, or conclusions, that the Applicant alleged" as true.[66] The Applicant's allegation that its application would be in the public interest is the type of ultimate fact that the Commission does not accept as true.[67]

The facts stated in the Application itself must demonstrate that the Application meets the criteria of the Commission's stated policy.[68] In D.08-11-004, the Commission found it reasonable to dismiss PG&E's application and close the proceeding because the application had "not sufficiently demonstrated" that an alternative was infeasible.[69]

B. The Commission may decline to consider an Application that is contrary to Commission policy.

The Commission may certainly hear utilities' applications, but it is not compelled to do so, particularly where "the effort would be fruitless."[70] Likewise, the Commission may change its policy, but it is up to the Commission to decide if it wishes to do so.[71] The Commission may make the decision whether or not to change its policy upon a motion to dismiss.[72]

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[63] *See Applications of Air California and Pac. Southwest Airlines* (Cal. P.U.C. 1971) 71 CPUC 798 ("D.78276"), *Order Continuing Hearing; Consolidating Applications; and Setting Prehearing Conference* at *2-3, *citing Ashbacker Radio Corp. v. Federal Communications Comm.* (1946) 326 U.S. 327.
[64] *Ibid.*
[65] D.10-12-016, p.54.
[66] D.99-11-023 at *3.
[67] *Ibid.; see also* D.08-11-004 at *2.
[68] D.08-11-004 at *9.
[69] *Ibid*.
[70] D.99-11-023 at *15.
[71] D.99-11-023 at *3.
[72] *Ibid.*

Where as here, the Commission has a current policy that it has found to be in the public interest, it may find that hearing an application contrary to its current policy would be "fruitless" and the application may be dismissed.[73] In D.99-11-023, for example, the Commission found the WGRC application and the project to be out of compliance with its policy for natural gas transmission.[74] The Commission dismissed the application because "resources will be wasted if this CPCN application" went to hearing.[75] The Commission also found in D.08-11-004 that it was pointless to consider the utility's application because the application was against Commission policy requiring a competitive power procurement process.[76]

IV. THE APPLICATION SHOULD BE DISMISSED BECAUSE IT IS CONTRARY TO CLEAR, RECENTLY-ARTICULATED COMMISSION POLICY AND FAILS TO ALLEGE FACTS SUFFICIENT TO WARRANT A CHANGE IN THAT POLICY.

Like the application of WGRC that was before the Commission in D.99-11-023, the Application is contrary to the Commission's existing policy as that policy was stated in D.10-12-016, and therefore the Application would be "fruitless."[77] CAW has provided insufficient facts to serve as a basis for the Commission to find that the Application would better satisfy the Legislature's charge to the Commission in A.B. 1182 than would the RDP. CAW has provided insufficient facts to serve as a basis for the Commission to find that the RDP it approved in D.10-12-016 is infeasible and therefore no longer in the public interest as it claims.[78] The Application's statement to the Commission that the RDP is "no longer viable" still appears to be based primarily on the Collins matter.[79] That statement is simply CAW's conclusion on the ultimate fact, which the Commission does not take as true in evaluating the motion to dismiss.[80] Moreover, as discussed at greater length below, the Commission's making a finding that a court challenge to the validity of the Commission-approved RDP contracts is barred by the statute of limitations would put that concern to rest.

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[73] *Ibid.*
[74] *Id.* at *1, *15 at Finding of Fact 4 ("business for which the CPCN is requested in the Application does not comport with the Commission's policy").
[75] *Id.* at *15 at Finding of Fact 5.
[76] D.08-11-004 at *2, *9.
[77] *Id.* at *3.
[78] Application, p. 4.
[79] *Ibid*.
[80] D.99-11-023 at *3; *see also* D.08-11-004 at *2.

A. D.10-12-016 is the Commission's stated policy response to A.B. 1182.

The RDP meets the project objectives identified in D.10-12-016 and in the Commission's certified EIR.[81] Despite CAW's purported termination of the RDP, D.10-12-016 remains in force as the Commission's policy to address the long-standing water crisis on the Monterey Peninsula and the environmental devastation of the Carmel River.

In its Application, CAW mentions additional matters as justification for its conclusion that the RDP is no longer viable or feasible or capable of meeting the CDO deadline: test well permits, water rights litigation, financing and the Superior Court's EIR decision.[82] All of CAW's concerns are surmountable within far less time and at less cost than carrying out its Application to build the rejected CAW-only North Marina project. CAW's concerns with each of these supposed impediments may readily be resolved.

First, the water rights litigation portion of the *Ag Land Trust* case against MCWD was dismissed on March 5, 2012, and there is presently no pending water rights litigation against MCWD.[83] Ag Land Trust's only remaining active claim against MCWD is its EIR litigation, which is now before the Court of Appeal, Sixth Appellate District, on MCWD's writ petition. Next, as MCWD explained at length in its submissions in A.04-09-019, MCWD qualifies for low-interest State Revolving Fund ("SRF") financing from the SWRCB under the federal Clean Water Act, and it submitted its SRF financing application long ago.[84] The only current impediment to moving forward with SRF funding for the RDP is that MCWRA has still not submitted an application for its portion of the project, and the SWRCB will not process the RDP funding request until applications are submitted for all RDP public agency facilities.[85]

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[81] D.10-12-016, pp. 160-61, FOFs 29-30.
[82] Application at 5.
[83] Request for Dismissal, entered March 5, 2012 in Monterey Superior Court Case No. M105019, *attached to MCWD's Request for Official Notice*, filed concurrently herewith, as Appendix A.
[84] MCWD March 1, 2012 Separate Status report, p. 10.
[85] Appendix E to MCWD's March 1, 2012 Separate Status Report. In opposing CAW's petition to modify D.10-12-016, MCWD speculated that CAW might aim to build the North Marina alternative so that it could add the $260 million capital cost of the desalination plant to its rate base. (*Id.* at 15-16; MCWD's January 23, 2012 Prehearing Conference Statement, p. 11.) CAW now hedges against this scenario in its Application, hiding its desalination plant behind smoke and mirrors by claiming that it will have access to low cost SRF financing and noting that SRF-assisted assets are not typically included in a utility's rate base assets. (Application, p. 21.) But CAW does not cite to any written confirmation from the SWRCB to support its contention. If the Application relies on Appendix E to MCWD's March 1 Separate Status Report, that letter is addressed to MCWD solely in regard to MCWD's *already-submitted and still-valid application for SRF assistance with the RDP*. It is of no help to CAW. CAW's statement that its plant may be financed with SRF support appears to be an erroneous conclusion, not a fact that the Commission may consider. That is because, based on the specific requirements for SRF eligibility in California as published by the SWRCB, no privately-owned desalination plant will be eligible for SRF loans. "Eligible

As to the Coastal Development Permit ("CDP") for the test wells, as CAW well knows, that is not an issue within the Commission's purview. Instead, the CDP may be granted by the Coastal Commission after the Commission has certified an EIR and approved a project under CEQA.[86] Consideration of the CDP application for test wells for the RDP was continued at the August, 2011 Coastal Commission meeting due to the pending CEQA litigation that is now before the Court of Appeal, and due to concerns related to the Collins allegations, which CAW noted in its March 1, 2012 Compliance Filing.[87] As described below, the Commission may resolve those concerns relating to the Collins matter promptly, well in advance of the next Coastal Commission hearing that is scheduled in the Monterey area.[88]

In contrast, even assuming that the aggressive ten-month proceeding schedule CAW proposes for the Application[89] would result in the Commission's certifying an EIR and approving a project by February of 2013 as CAW projects, the CDP for either test wells or for the full project[90] could not be granted until, at the earliest, a later Coastal Commission meeting in 2013. Such a schedule also assumes that land acquisitions for the North Marina alternative's wells and desalination plant could be carried out equally swiftly and without litigation.[91]

Applicants" for SRF funds in California are: "Any city, town, district, or other public body created under state law[;] A Native American tribal government or an authorized Native American tribal organization having jurisdiction over disposal of sewage, industrial wastes or other waste[; and] Any designated and approved management agency under Section 208 of the Clean Water Act." (SWRCB SRF page, http://www.waterboards.ca.gov/water_issues/programs/grants_loans/srf/.) The Application does not state one fact that establishes CAW could qualify as any one of these types of entities, or that CAW will build the proposed North Marina desalination plant in cooperation with an eligible agency. To the extent that either MPWMD or MRWPCA may be an "Eligible Applicant" for SRF loans, the Application establishes to the contrary that those agencies will only be involved with the possible GWR and ASR aspects of the project, not CAW's desalination plant. (Application, p. 8.) Thus, the facts of the Application demonstrate that any ability to obtain low-interest financing for matters discussed in the Application would not extend to CAW's desalination plant. As a result, CAW would be able to add the $260 million capital cost of the desalination plant to its asset base for purposes of rate calculation, exactly as MCWD predicted.

[86] *See* Application, Appendices D, H (Appendix H references a list of permits in Attachment 1, but there does not appear to be an Attachment 1 to Appendix H); Direct Testimony of Richard Svindland, pp. 28, 34-36.

[87] March 1, 2012 Compliance Filing at p. 4. However, CAW described the CEQA litigation as "alleging the public agencies violated the CEQA" without mentioning that the alleged violation arose from relying on the validity of the Commission's certified EIR. (*Ibid.*) Notwithstanding the Superior Court's erroneous ruling, the public agencies did nothing to violate CEQA.

[88] The Coastal Commission's next Monterey Bay area hearing is set for August 8-10, 2012 in Santa Cruz. (*See* http://www.coastal.ca.gov/meetings/mtgdates.html.) There are no other hearings scheduled in the area for the remainder of 2012. (*Ibid.*)

[89] Application, p. 26.

[90] Incredibly, the Application appears to question the necessity of obtaining a CDP for the desalination plant element of the project from the Coastal Commission. (*See* Appendix D.)

[91] However, the Application presents no written confirmation of the necessary land acquisitions. Supporting testimony reveals that CAW contemplates the possible use of eminent domain proceedings for acquisition of either or both locations (Direct Testimony of Richard Svindland, p. 9.) The Application also assumes that CAW will

Testimony submitted in support of the Application reveals that, even under CAW's aggressive schedule, the project will not complete construction until January of 2017, missing the CDO deadline and allowing no time for system testing.[92]

1. The Commission can and should find that the statute of limitations for seeking to invalidate the RDP contracts has run.

The Application states that CAW terminated the WPA on September 28, 2011 because of "MCWRA's repudiation of those agreements resulting from the alleged conflict of interest concerning Stephen Collins."[93] In July of 2011 MCWRA took the position that Mr. Collins' alleged violation of Government Code section 1090 rendered the RDP contracts invalid.[94] Neither the Application nor CAW's previous submissions in A.04-09-019 present any facts that in any way refute MCWD's consistent position that the RDP contracts remain valid and enforceable, despite any conflict of interest on the part of Mr. Collins.

As MCWD explained in detail in its A.04-09-019 filings, the RDP contracts are subject to the Validating Act's sixty-day statute of limitations (e.g., Code Civ. Proc. §§860-870.5), as well as the Agency Act (Water Code App., ch. 52, §39) and the Public Utilities Code (Pub. Util. Code, §§1709, 1731, 1732, 1756 and 1759).[95] The longer, less specific catch-all statute of limitations set forth in section 1092 of the Government Code is not necessarily applicable to each and every type of 1090 conflict of interest.[96] Applying the shorter Validating Act statute of limitations in cases concerning complex, multi-million-dollar public works projects to Collins' alleged conflict on the facts of this particular case is appropriate.[97] This approach supports the

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begin permitting, design, driller procurement for the test well facilities and contractor procurement for desalination facilities prior to Commission approval. (Application, Appendix B.)

[92] Direct Testimony of Jeffrey T. Linam, p. 4 ("2017, the first year of operation"); Attachment B. ("Construction Start Date, July 2015"; "Construction Length (months), 18)". Eighteen months from July, 2015 is January, 2017. CAW's schedule also fails to take into account the likelihood of protracted proceedings at the Coastal Commission in order to obtain a CDP, if even possible, for well facilities that appear to be located in the coastal dune area, seaward of the 50-year erosion line. (*See* Application, Appendix C; Appendix H, pp. 5-10 at figs. 1-9.)

[93] Application, p 4.

[94] *Ibid.*; *see* Appendix D to MCWD March 1, 2012 Separate Status Report.

[95] MCWD's March 1, 2012 Separate Status Report, pp. 13-15; MCWD's March 15, 2012 Consolidated Reply, pp. 7-10.

[96] *See*, e.g. *Brandenburg v. Eureka Redevelopment Agency* (2007) 152 Cal.App.4th 1350, 1363-65 (one-year statute of limitations applied on specific facts of 1090 violation, barring contract challenge). *See also Okasaki v. City of Elk Grove* (2012) 203 Cal. App. 4th 1043, 1049 (90-day zoning and planning statute of limitations applied to preclude neighbors' untimely challenge to the city's approval of a variance permitting a swimming pool).

[97] *McLeod v. Vista Unified Sch. Dist.* (2008) 158 Cal.App.4th 1156, 1168-71; *Friedland v. Long Beach* (1998) 62 Cal.App.4th 835, 851; *Graydon v. Pasadena Redevel. Agency* (1980) 104 Cal.App.3d 631, 645-46.

purpose of protecting the public agency, while still allowing for punishment of the interested official's offending acts, as discussed in *Brandenburg*.[98]

The two actions of Mr. Collins that have been raised as possible conflicts of interest occurred in February and April of 2010. The WPA and other RDP contracts became effective on January 11, 2011. By any calculation, the deadline to challenge the validity of the RDP contracts has now long passed. As MCWD pointed out in its March, 2012 filings with the Commission, the Commission may determine and apply the appropriate statute of limitations for the Commission-approved contracts of regulated utilities.[99]

MCWD is not suggesting that the Commission conduct an inquiry into the merits of the matter. It is simply requesting that the Commission determine the statute of limitations that applies. The issue of which statute of limitations applies to the project contracts of a regulated utility that were approved in the Commission's decision is without question "cognate and germane" to the Commission's regulation of CAW.[100] Furthermore, D.10-12-016 approved the RDP as the Commission's current policy on a matter that was specifically delegated to it by the Legislature.[101] The Commission's resolution of this purely legal issue will remove the first of the two primary roadblocks to the RDP that have been alleged.

2. <u>The Superior Court's decision violates Public Utilities Code section 1759, subdivision (a), and is the subject of a writ proceeding</u>.

Since April 5, 2010, MCWD has been defending the Commission's certified EIR in the Monterey County Superior Court.[102] The Application relies on that same EIR, which CAW says will be supplemented for its proposed project.[103]

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[98] *Brandenburg v. Eureka Redevelopment Agency, supra*, 152 Cal.App.4th at 1361-62.
[99] *See* MCWD's March 15, 2012 Consolidated Reply, pp. 7-10. The single court case that CAW cited to support its contention that the Commission should not address the issue (*Hempy v. Public Utilities Com.* (1961) 56 Cal. 2d 214) belongs to the narrow and readily-distinguishable line of cases directly descended from *Hanlon v. Eshleman* (1915) 169 Cal. 200, which hold that the Commission should not decide contract issues that are unrelated to its regulation of public utilities. (*Id.* at 8, fn. 33.)
[100] *Consumers Lobby Against Monopolies ("CLAM") v. Public Utilities Com.* (1979) 25 Cal. 3d 891, 905-06, *disapproved on a different point in Kowis v. Howard* (1992) 3 Cal.4th 888, 896, *citing Morel v. Railroad Commission (*1938) 11 Cal. 2d 488, 492 (finding that the Commission has many of the powers of the courts including, in that specific case, the power to award attorneys' fees); *City of Oakland v. Key System* (1944) 64 Cal.App.2d 427, 434-435 (Commission's powers "are unlimited if the matter is *cognate and germane* to the regulation of public utilities" (*emphasis added*)) and at 442 (Commission could elect to decide the validity of a railroad's franchise to operate on tidelands)).
[101] A.B. 1182.
[102] *Ag Land Trust v. Marina Coast Water District,* Monterey County Superior Court Case No. M105019.
[103] Application, pp. 22-23; Direct Testimony of Richard Svindland, pp. 8-9.

At trial on October 27, 2011, MCWD presented numerous affirmative defenses to the Ag Land Trust's frivolous collateral attack on the Commission's orders, and defended the adequacy of the EIR for the RDP on the merits. Nonetheless, the Superior Court entered an order on February 29, 2012 that adopted its February 2, 2012 Amended Intended Decision as final in all respects. The Amended Intended Decision found, in direct contravention of D.03-09-022, D.09-12-017 and D.10-12-016, that MCWD, not the Commission, was the lead agency under CEQA for the RDP and that the Commission's certified EIR was inadequate. The Superior Court made its findings despite having available the Commission's position as *amicus curiae*. The Commission's *amicus* letter stated that any decision that granted relief contrary to the Commission's prior, final decisions would impermissibly interfere with the Commission in violation of section 1759. (*See People ex rel. Orloff v. Pacific Bell* (2003) 31 Cal. 4th 1132, 1155 fn 12 (courts should consider and may solicit the Commission's position concerning preemption under section 1759, subd. (a)).)

MCWD believes that the Superior Court's decision was clearly in error in many respects. In addition to pursuing its traditional right of appeal upon entry of final judgment on all issues raised in the Superior Court, MCWD filed a Petition for Writ of Mandate in the Court of Appeal, Sixth Appellate District on April 12, 2012 (the "Petition"). The Petition presents just one issue, lack of jurisdiction under Public Utilities Code section 1759, subdivision (a). MCWD believes its Petition for Writ of Mandate is extremely strong, with a very good chance of expeditious success due to the clear error of the Superior Court's findings.

In addition, MCWD understands that, subsequent to Ag Land Trust's March 5, 2012 dismissal of its bifurcated declaratory relief claims against MCWD for water rights and Agency Act violations, final judgment was entered in the Superior Court on April 17, 2012. MCWD is preparing to file its Notice of Appeal. MCWD will appeal each of the errors in the Superior Court's decision, including the determination that the Commission's EIR was inadequate.

Nonetheless, MCWD has requested expedited treatment for its Petition for Writ of Mandate, due to the urgent need to remove the cloud on the project EIR, as well as the statutory preference for expedited treatment of CEQA matters in the courts and of matters concerning Commission orders. In addition, the Legislature's directive in A.B. 1182 that "an environmentally sound water source be secured as quickly as possible" to address the long-standing water supply crisis on the Monterey Peninsula mitigates in favor of expedited action on

the Petition for Writ of Mandate. While MCWD is certain that it will ultimately prevail on the merits in the Court of Appeal, it believes that the EIR challenge can and should be resolved promptly by a decision on the jurisdictional issue presented in its Petition for Writ of Mandate. It is difficult to imagine a Superior Court decision that more clearly interferes with the Commission's exercise of its jurisdiction and its performance of its official duties. The law is well settled that "no sensible person . . . should for a moment contend that there is an area within which the commission and the courts can legitimately reach exactly opposite and conflicting conclusions on a given set of facts."[104]

The Application assumes that CAW may rely on the Commission's existing EIR, with preparation of a Supplemental EIR.[105] This approach assumes that the possible addition of the GWR element without concurrent environmental review would not constitute impermissible "piecemealing" of the project.[106] Significantly, the Application neglects to explain how CAW will be able to rely on the Commission's EIR for *any project* without obtaining an appellate decision favorable to MCWD in the *Ag Land Trust* matter.

The facts of the Application state that the Superior Court found that the EIR "was not valid for use by MCWD as lead agency."[107] The Application does not mention the Superior Court's finding that the EIR was inadequate. The Superior Court did not condition its EIR inadequacy finding on which entity had acted as CEQA lead agency for the RDP. As MCWD explained to the Commission in A.04-09-019, the Superior Court made a separate finding that the discussion of water rights in the Commission's EIR was inadequate.[108] Therefore, until that

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[104] *Pratt v. Coast Trucking, Inc.* (1964) 228 Cal.App.2d 139, 149-150, *cited with approval in Waters v. Pacific Telephone* (1974) 12 Cal.3d 1, 11.

[105] Application, pp. 22-23. This assumption could be valid solely for the re-worked North Marina alternative, since that alternative was reviewed at a project level in the existing EIR. Unfortunately, D.10-12-016 found the North Marina alternative infeasible for numerous reasons. (D.10-12-016, CEQA Findings, pp. 84-85.) In order for the Commission to certify a Supplemental EIR for the new project proposed, the Supplemental EIR would have to thoroughly analyze any significant differences in environmental impacts and it would also have to explain why the North Marina alternative is now feasible, preferred, and in the public interest. (Pub. Resources Code § 21166.) In addition, MCWD does not believe that the existing EIR could be used for any aspect of the GWR elements of the project proposal. The Application does state that the GWR portion of the project would not be subject to Commission jurisdiction. (Application, p. 23-24.)

[106] *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 394-96. Environmental review must include an analysis of "future expansion or other action" where it would "change the scope or nature of the initial project or its environmental effects." (*Ibid.*) In order to avoid piecemealing, environmental review must encompass every potential significant aspect of the project's anticipated environmental impacts. (Pub. Resources Code § 21100)

[107] Application, p. 5; Direct Testimony of Richard Svindland, p. 7 .

[108] MCWD's March 15, 2012 Consolidated Response, p. 10, fn. 41; *id.* at pp. 10-12

erroneous decision is reversed, CAW cannot rely on the Commission's EIR for any of the three projects it evaluated, regardless of whether or not MCWD is involved in the project.[109] The Application states no facts that indicate otherwise.

3. The Commission can enforce the RDP contracts by directing MCWRA to either perform its obligations or assign them.

Finally, the Commission can resolve any uncertainty that may attend to MCWRA's continued participation in the project. Section 18.2 of the WPA permits MCWRA, and *only* MCWRA of the three RDP parties, to assign its rights under the contract. The Commission may require MCWRA to perform its obligations or assign its rights to a party that will perform the contract.[110] This would remove any remaining concern as to MCWRA's participation, whether related to the Collins matter or otherwise. Should MCWRA fail to follow the Commission's direction, it would expose itself to legal action by the Commission,[111] in addition to any other related risks.

The Commission may unquestionably enforce the provisions of Commission-approved contracts against non-regulated entities, such as MCWRA and MCWD.[112] Provided that the Commission's policy remains unchanged, it should direct MCWRA to perform or assign its interests to MCWD or another party that will perform, in order to uphold the policy the Commission adopted in D.10-12-016 and carry out the Legislature's directive in advance of the CDO deadline.

B. The Application does not demonstrate that the RDP is infeasible, and therefore it provides no basis for the Commission to change its policy.

The Application must inform the Commission why D.10-12-016 is no longer feasible and, therefore, why it should not remain Commission policy.[113] CAW's sole stated reason for its

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[109] *See Federation of Hillside & Canyon Assns. v. City of Los Angeles* (2004) 126 Cal. App. 4th 1180, 1205 (preclusion principles applied to a court's findings on a CEQA petition challenging the adequacy of an EIR).
[110] *Henderson v. Oroville-Wyandotte Irr. Dist., supra,* 213 Cal. at 530-532. (Commission could properly enforce water rate conditions imposed in Commission-approved contracts for sale of water system against non-regulated public water agencies.)
[111] *Ibid.*
[112] *Ibid.* (noting Commission's authority to impose and enforce contract provisions against non-regulated water district "in order to safeguard the rights of outside [water district] consumers"); *PG&E Corp. v. Public Utilities Commission* (2004) 118 Cal.App.4th 1147, 1207 (concluding Commission properly held that it could enforce the conditions it imposed on non-regulated holding companies in utility restructuring investigation, due to statutory authority implied from "its unchallenged statutory authority to impose them"). *See also* D.10-12-016, p. 97 fn. 108, *citing Southern California Edison v. Peevey* (2003)) 31 Cal. 4th 781, 781 (noting Commission's broad legislative and judicial powers).
[113] D.99-11-023 at *15.

purported termination of the RDP and subsequent submission of the Application remains MCWRA's position regarding the Stephen Collins conflict of interest allegations.[114] As discussed above, the Commission can resolve this impediment immediately.

Rather than attempting to defend the Commission's policy and refute MCWRA's supposed repudiation of the RDP contracts on the basis of the Collins allegations, CAW – without informing the Commission of any possible project impediments and in spite of its ongoing obligation to keep the Commission informed of the project status – seized on MCWRA's equivocation as an excuse to entirely abandon the public-private partnership approved by the Commission.

V. IF THE COMMISSION DOES NOT DISMISS THE APPLICATION, IT SHOULD DECLARE A PROJECT CESSATION OF THE RDP UNDER WPA SECTION 7.4.

Entertaining the Application would signal a radical change in the Commission's policy, such that the Commission had determined the RDP public-private partnership it approved in D.10-12-016 was no longer the project that can best satisfy the CDO and meet the project objectives. While it is clear that the Commission may change its policy, such a decision is for the *Commission* alone to make.[115] CAW's unjustified refusal to carry out the RDP is not determinative of whether or not the RDP will ultimately go forward. The Commission itself must decide whether or not to endorse CAW's defiance of existing Commission orders since at least June of 2011. It is solely the Commission's decision whether or not it wants to change its policy and entertain the Application.[116] And MCWD submits, most respectfully, that the time for the Commission to make that decision is now.

The facts presented in the Application do not support a change in policy in the public interest. Rather, the facts of Carmel River devastation and the Monterey Peninsula's long-term water crisis remain essentially unchanged since the Commission signed out D.10-12-016. But, if the Commission should decide in the public interest that the RDP as approved in D.10-12-016 is no longer the Commission's policy and, in the public interest, it will entertain the Application, the Commission should then immediately declare a Project Cessation under the WPA. Section 7.4 of the WPA provides that the public agencies may recover their reasonably incurred RDP-related costs if the project is not carried out due to a Project Cessation. The Commission would

[114] Application, p. 4.
[115] D.99-11-023 at *3
[116] *Ibid.*

then be able to oversee compliance with section 7.4 of the WPA in A.04-09-019 and address RDP cost reimbursement issues in that proceeding.

VI. CONCLUSION.

The Commission established its policy for the Monterey Peninsula's water supply crisis in D.10-12-016 by approving the RDP. The RDP has undergone a thorough environmental review and received Commission approval.

The Collins matter and EIR challenge were known to CAW well in advance of the Commission's decision in D.10-12-016, and section 14.2 of the WPA specifically provides for the parties' defense of the EIR. It is not unusual or surprising that it takes a certain amount of time to resolve these issues, particularly the EIR challenge. Provided that the Commission's policy continues to support the RDP, MCWD stands ready, willing and able to work with CAW and perform its obligations under the RDP agreements.

For all the reasons stated, MCWD respectfully submits that its motion to dismiss the Application should be granted. MCWD requests the Presiding ALJ promptly prepare a Proposed Decision, and the Commission promptly sign out a Commission Decision:

1) Dismissing the Application as being inconsistent with clear, recently-articulated Commission policy which the Commission chooses not to change at this time;
2) Finding that the Application presents no reasonable basis for altering the Commission's findings in D.10-12-016 that the RDP is the only viable replacement water supply project for the Monterey Peninsula, as demonstrated in its CEQA Findings of Fact for the RDP, and that D.10-12-016 remains the Commission's policy;
3) Finding that the statute of limitations has now run on any court action to invalidate the RDP contracts due to a possible violation of Government Code section 1090 in MCWRA's approval of those contracts;
4) Directing CAW, MCWD and MCWRA to expeditiously perform their contractual obligations in connection with the RDP; and
5) Finding that if MCWRA cannot or will not perform its contractual obligations in connection with the RDP, it must either assign its interests pursuant to Section 18.2 of the WPA to a party that will perform those obligations, or face legal action by the Commission.

If the Commission decides to change its policy and entertain the Application, MCWD respectfully requests the Commission immediately declare a Project Cessation for the RDP.

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Respectfully submitted,

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