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16 SUPERIOR COURT OF THE STATE OF CALIFORNIA

17 COUNTY OF SAN FRANCISCO

18 SAN DIEGO COUNTY WATER AUTHORITY,

Nos. CPF-10-510830 & CPF-12-512466

19 Petitioner and Plaintiff,

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
METROPOLITAN WATER
DISTRICT OF SOUTHERN
CALIFORNIA'S MOTION TO STAY
SAN DIEGO COUNTY WATER
AUTHORITY'S 2012 ACTION
PENDING A DISPOSITIVE MOTION
ON THE 2010 RATE CHALLENGE,
OR IN THE ALTERNATIVE FOR
COORDINATED CASE
MANAGEMENT**

20 v.

21 METROPOLITAN WATER DISTRICT OF
22 SOUTHERN CALIFORNIA; ALL PERSONS
INTERESTED IN THE VALIDITY OF THE
23 RATES ADOPTED BY THE METROPOLITAN
WATER DISTRICT OF SOUTHERN
24 CALIFORNIA ON APRIL 13, 2010 TO BE
EFFECTIVE JANUARY 2011; and DOES 1-10,

25 Respondents and Defendants.

26 Date: November 9, 2012
27 Time: 1:30 p.m.
Dept.: 304
28 Judge: Hon. Richard A. Kramer

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1 **I. INTRODUCTION**

2 On June 8, 2012, Petitioner and Plaintiff San Diego County Water Authority
3 (“SDCWA”) filed its Petition for Writ of Mandate and Complaint for Determination of
4 Invalidation, Damages, and Declaratory Relief, docketed in this Court as No. CPF-12-512466 (the
5 “2012 Action”). The above-captioned case, No. CPF-10-510813 (the “2010 Action”), has been
6 pending since June 2010. The 2010 Action consists of both a rate challenge contained in the first
7 three causes of action (the “2010 Rate Challenge”), and three additional causes of action added
8 in late 2011. Respondent and Defendant Metropolitan Water District of Southern California
9 (“MWD”) respectfully requests that the Court:

- 10 (1) stay the 2012 Action until this Court issues a ruling on a dispositive motion on the
11 2010 Rate Challenge;
- 12 (2) or alternatively, coordinate the 2010 and 2012 Actions in a manner that does not
13 slow down resolution of the 2010 Rate Challenge, such as allowing discovery
14 and dispositive motions in the 2010 Action to proceed without having to wait
15 for the same in the 2012 Action, and holding joint Case Management
16 Conferences.

17 MWD submits that either alternative will allow the cases to be managed efficiently and in
18 a manner that enables adjudication of the merits of the long-pending 2010 Rate Challenge as
19 soon as possible. Either alternative will satisfy the requirement that a validation action is entitled
20 to preference “to the end that [it] shall be speedily heard and determined.” Code Civ. Proc.
21 § 867. Consolidation, as SDCWA seeks, raises numerous problems, including a potential
22 revolving door of new rate challenges, each of which would perpetually postpone validation of
23 MWD’s water rates.

24 **II. ARGUMENT**

25 **A. Background**

26 One of MWD’s statutory responsibilities is to provide wholesale water service to its 26
27 member agencies throughout Southern California. MWD Act § 130. MWD’s water rates are a
28 foundational aspect of this service because, pursuant to its enabling statute, MWD recoups the

1 costs it incurs providing water through its water rates. *Id.* §§ 133-34. Thus, it is vitally
2 important to MWD’s operation as a municipal water district that the validity of its cost-
3 recoupment method (its water rates) be determined as soon as possible.

4 When SDCWA filed the 2010 Action in June 2010, the single issue before this Court was
5 the legality of the water rates MWD’s Board adopted in April 2010 (the “2011-2012 water
6 rates”). Specifically, SDCWA alleged that MWD had improperly allocated costs recovered
7 through its System Access Rate and System Power Rate to, and included its Water Stewardship
8 Rate in, its transportation charges. Complaint ¶¶ 26-27. On these grounds, SDCWA sought to
9 invalidate the 2011-2012 water rates under the California Code of Civil Procedure Section 860 *et*
10 *seq.* (the “Validation Statute”).

11 Before the 2010 Rate Challenge could be heard and the validity of MWD’s 2011-2012
12 water rates could be determined, however, SDCWA filed an amended complaint that added
13 several new causes of action to the 2010 Action, two of which were ultimately dismissed. *See*
14 *First Amended Petition for Writ of Mandate and Complaint for Damages and Declaratory Relief*
15 ¶¶ 82-120 (adding breach of contract, breach of covenant (demurrer sustained without leave to
16 amend), fiduciary duty (same), preferential rights, and Rate Structure Integrity claims). SDCWA
17 then filed a second amended complaint, which added numerous allegations that MWD
18 improperly set its 2011-2012 water rates under the influence of a “shadow government.” *See,*
19 *e.g., SAC* ¶¶ 35-40.

20 After months of disputes over the allegations in SDCWA’s FAC and SAC, and the
21 permissibility and scope of discovery, the final operative pleadings in the 2010 Action are filed
22 and the document production process is underway. *See Order Re: Motions for De Novo Review*
23 *of Discovery Management Recommendation #1, at 13 (“Discovery Order”)* (setting a deadline of
24 December 3, 2012 for completion of all responding parties’ document productions). Once
25 MWD’s and the other responding parties’ document productions are completed, MWD could file
26 a dispositive motion as to the 2010 Rate Challenge and this Court could proceed to determine the
27 validity of MWD’s 2011-2012 water rates, based on the documents in the administrative record
28

1 and “all other relevant” evidence that has been produced pursuant to the Wheeling Statute. *See*
2 Water Code § 1813.

3 But a recent development in SDCWA’s litigation strategy threatens to delay a
4 determination of validity of the rates adopted in April 2010. On June 8, 2012, SDCWA filed the
5 2012 Action. This petition/complaint challenges the water rates MWD’s Board adopted in 2012
6 (the “2013-2014 water rates”). It alleges new bases for challenging MWD’s rates than are at
7 issue in the 2010 Action. The 2012 Action was recently transferred from the Los Angeles
8 County Superior Court to this Court, upon stipulation of the parties. *See* Notice of Entry of
9 Order, Case No. BS137830.

10 The first Case Management Conference in the 2012 Action will occur on November 9,
11 2012. MWD has not yet answered the petition/complaint in the 2012 Action. No administrative
12 record exists yet in the 2012 Action. Yet, SDCWA already propounded document requests in
13 the 2012 Action to MWD and the ten member agency parties, with a purported response and
14 production deadline in October 2012. (SDCWA refused to grant a two-week extension on
15 written responses to the new document requests.) SDCWA informed MWD it will seek to
16 consolidate the 2010 and 2012 Actions for all purposes, including trial.

17 **B. The Court Has Broad Discretion to Manage the 2010 and 2012**
18 **Actions**

19 This Court has the inherent power to control, order, and regulate the proceedings before
20 it. *See Cottle v. Super. Ct.*, 3 Cal. App. 4th 1367, 1378 (1992) (“Every court has the inherent
21 power to regulate the proceedings of matters before it and to effect an orderly disposition of the
22 issues presented.”); *Lucas v. County of Los Angeles*, 47 Cal. App. 4th 277, 284-85 (1996) (“A
23 court has inherent equity, supervisory and administrative powers, as well as inherent power to
24 control litigation and conserve judicial resources[,]” and courts can also “formulate rules of
25 procedure where justice so demands.”); Code Civ. Proc. § 128(a)(8) (every court shall have the
26 power to amend and control its process and orders so as to make them conform to law and
27 justice); *cf.* Code. Civ. Proc. § 1048(b) (courts have the power to order a separate trial of claims
28 or issues when separation would be “in furtherance of convenience or to avoid prejudice,” “or

1 when separate trials will be conducive to expedition and economy”).¹

2 Accordingly, this Court has the authority to manage the 2010 and 2012 Actions in a way
3 that allows the 2010 Rate Challenge to be promptly determined, whether that management is
4 through a stay or coordinated oversight that does not delay adjudication of the 2010 Rate
5 Challenge.

6 **C. The Validation Statute Mandates That the 2010 Rate Challenge Be**
7 **Decided Promptly**

8 The Validation Statute mandates that validation actions “shall be given preference over
9 all other civil actions” to the expressly stated end that “such actions shall be speedily
10 determined.” Code Civ. Proc. § 867.

11 The policy behind this statutory preference is to promptly resolve disputes over agency
12 actions so that agencies are not prohibited from “operat[ing] and carry[ing] out [their] statutory
13 purpose” as a result of protracted litigation, and so an agency may carry out its purpose without
14 the impairment of uncertainty hanging over its decisions. *Graydon v. Pasadena Redev. Agency*,
15 104 Cal. App. 3d 631, 646 (1980).

16 Courts have recognized that the goal of speedy determination is important for both the
17 agency being challenged and the public that it serves. *See McLeod v. Vista Unified Sch. Dist.*,
18 158 Cal. App. 4th 1156, 1166 (2008) (describing the Section 867’s goal of “speedy
19 determination” as an “important public policy”) (quoting *Embarcadero Mun. Improvement Dist.*
20 *v. County of Santa Barbara*, 88 Cal. App. 4th 781, 790 (2001)). One significant reason why
21 prompt resolution of challenges to agency action is vital to the agency and the public is because
22 drawn out litigation “impair[s] a public agency’s ability to operate financially.” *Friedland v.*
23 *City of Long Beach*, 62 Cal. App. 4th 835, 843 (1998) (describing the goal of minimizing delay
24 in litigation as “[a] key objective of a validation action”) (citing *Graydon v. Pasadena Redev.*

25 ¹ California Code of Civil Procedure Section 865 governs consolidation where multiple contests
26 are filed challenging the same agency action. This section is inapplicable here because SDCWA
27 has challenged two different MWD Board votes based on entirely different records in lawsuits
28 filed two years apart. In any event, courts applying Section 865 look to case law interpreting
Section 1048 for principles governing consolidation. *See Comm. for Responsible Planning v.*
City of Indian Wells, 225 Cal. App. 3d 191, 196 (1990).

1 *Agency*, 104 Cal. App. 3d 631, 644-45 (1980)). Another “important objective” behind limiting
2 delay in litigation over an agency’s action is “to facilitate a public agency’s financial transactions
3 with third parties by quickly affirming their legality.” *Friedland*, 62 Cal. App. 4th at 843.

4 **D. The Court Should Stay the 2012 Action Until a Decision on a**
5 **Dispositive Motion As to the 2010 Rate Challenge**

6 This Court should stay the 2012 Action until it rules on a dispositive motion as to the
7 2010 Rate Challenge – the first three causes of action in the 2010 Action. A stay is within this
8 Court’s power and discretion to manage the cases before it in a way that promotes judicial
9 economy. *Cottle*, 3 Cal. App. 4th at 1378. It would achieve the Legislature’s goal through the
10 Validation Statute of speedily determining the validity of MWD’s 2011-2012 water rates, and
11 would allow for the most efficient adjudication of the long-pending 2010 Rate Challenge, as well
12 as the 2012 Action.

13 *First*, a stay of the 2012 Action pending a dispositive motion will allow the 2010 Action
14 to continue moving along the trajectory that the parties have worked so long to establish. Indeed,
15 MWD has been actively trying to obtain a dispositive determination on its 2011-2012 water rates
16 since SDCWA first brought its challenge nearly two and a half years ago, and SDCWA has also
17 often expressed a desire to push the litigation forward in its pleadings and correspondence.

18 Once MWD’s and the other responding parties’ document productions are complete,
19 MWD intends to bring a motion to determine the merits of the 2010 Rate Challenge. This means
20 that soon after the parties’ December 3, 2012 final production deadline, the parties could obtain a
21 determination of the crux of SDCWA’s litigation: the propriety of allocating certain costs to, and
22 the inclusion of the Water Stewardship Rate in, MWD’s transportation rate.

23 *Second*, precisely because the propriety of MWD’s transportation rate is central to both
24 the 2010 and 2012 Actions, prompt determination of the 2010 Rate Challenge will promote a
25 more efficient resolution of the 2012 Action, as this Court will have already adjudicated any
26 overlapping issues between the two rate challenges and can thus focus on the other claims in the
27 2010 and 2012 Actions.

28 *Third*, because many documents that will be relevant to SDCWA’s 2012 Action will have

1 already been produced through the current discovery for the 2010 Action, the parties will benefit
2 from time and cost savings. Moreover, if MWD prevails on a dispositive motion as to the 2010
3 Rate Challenge, that will limit the areas that could be reasonably calculated to lead to the
4 discovery of admissible evidence in the 2012 Action.

5 *Fourth*, staying the 2012 Action and allowing an adjudication of the 2010 Rate Challenge
6 on the merits would permit the non-prevailing party to most quickly seek appellate review of the
7 decision on MWD's 2011-2012 water rates. Such finality, as soon as possible, on the validity of
8 the rates benefits all parties and the public.

9 If the 2012 Action is not stayed, adjudication of MWD's 2011-2012 water rates will be
10 inevitably delayed. While both the 2010 and 2012 Actions contain a challenge to MWD's water
11 rates in the first three causes of action, many of the claims and issues in the 2010 and 2012
12 Actions are different. The 2012 Action contains challenges to the validity of MWD's water rates
13 that are not in the 2010 Action: allegations of violation of Proposition 26 and allegations
14 regarding MWD's standby service. *See* Petition for Writ of Mandate and Complaint for
15 Determination of Invalidity, Damages, and Declaratory Relief, filed June 8, 2012 ¶¶ 51, 55-59.
16 Two new parties have joined the 2012 Action that are not part of the 2010 Action. And, the
17 2010 Action contains claims concerning the Rate Structure Integrity provision and MWD's
18 calculation of preferential rights that are not part of the 2012 Action. *Cf.* SAC ¶¶ 4-5.

19 If the 2010 Action must wait for the 2012 Action to catch up – such as if the two rate
20 challenges must be adjudicated together – the 2010 Rate Challenge will have to be dormant
21 while the following occurs:

22 1. Preparation of the administrative record as to the 2012 rate adoption, either as a
23 submitted administrative record or as part of MWD's required document production in response
24 to SDCWA's pending requests in the 2012 Action. Compilation of this record will be time-
25 consuming and MWD is already fully occupied with complying with this Court's Discovery
26 Order in the 2010 Action.

27 2. Collection and production of other documents as to the rate-setting process in
28 2011 and 2012 leading to the 2012 rate adoption, the 2012 rate adoption itself, and the 2013-

1 2014 rates, and other matters requested in SDCWA's document requests in the 2012 Action.
2 This will be time-consuming and, again, MWD is already fully occupied with complying with
3 the Discovery Order.

4 3. Resolution of discovery disputes unique to the 2012 Action, particularly the new
5 claims.

6 4. Resolution of any early dispositive motions unique to the 2012 Action's new
7 claims. The 2012 Action raises unique and novel issues, particularly given how recently
8 Proposition 26 was enacted and the lack of any appellate case law interpreting it.

9 On the other hand, if this Court were to allow the 2010 Rate Challenge to go forward
10 first, the Court will be honoring MWD's statutory rights and SDCWA will suffer no prejudice in
11 its 2012 Action. In fact, the 2012 Action will benefit from a more efficient determination
12 because this Court will have already adjudicated the overlapping issues between the two rate
13 challenges in its decision on the 2010 Rate Challenge.

14 In sum, not only is a stay of the 2012 Action pending a dispositive motion on the 2010
15 Rate Challenge the more economic, expedient way to manage both the 2010 and 2012 Actions,
16 but it also satisfies the statutory preference the Legislature has given validation actions over all
17 other actions so that they can be speedily determined. MWD seeks here a prompt determination
18 of the validity of its 2011-2012 water rates. SDCWA should not be permitted to postpone such a
19 determination by adding new challenges following every successive rate-setting cycle.

20 **E. Alternatively, the Court Should Coordinate Management of the**
21 **Two Actions in a Way That Does Not Delay Resolution of the 2010**
22 **Rate Challenge**

23 MWD is mindful that the Court has in the past stated an unwillingness to issue formal
24 stays, given the five-year rule applicable to civil litigation. In the alternative to a stay of the
25 2012 Action, MWD asks that the Court manage the 2010 and 2012 Actions in a way that does
26 not delay the progress and resolution of the 2010 Rate Challenge.

27 To this end, this Court can use its inherent organization and management powers to
28 ensure that both the 2010 and 2012 Actions are allowed to move forward. Coordinated
management of both actions will still provide for the speedy determination of the 2010 Rate

1 Challenge, which MWD is entitled to by law. If a dispositive motion on the 2010 Rate
2 Challenge is allowed to progress unhampered by the 2012 Action, MWD can proceed with its
3 plan to adjudicate the 2011-2012 water rates on the merits in short order. This Court would then
4 be free to rule on MWD's dispositive motion, finally bringing resolution to the 2010 Rate
5 Challenge.

6 The Court can institute various efficient management practices, such as scheduling joint
7 Case Management Conferences for the 2010 and 2012 Actions; and if applicable, setting
8 hearings so that pending motions in both actions might be heard on the same date.

9 This approach would be different from formal consolidation for either pretrial or all
10 purposes, however, in that it would not require the 2010 Rate Challenge to slow down or occur
11 on the schedule (yet to be determined) of the 2012 Action, and it would not require that a
12 dispositive motion in the 2010 Rate Challenge be delayed until one can be filed in the 2012
13 Action.

14 While coordinated management may not achieve resolution of the 2010 Rate Challenge
15 as quickly as would a stay, it would still allow for forward movement of the 2010 Rate Challenge
16 and carries similar benefits to a stay; primarily, a decision on the long-pending rate challenge as
17 soon as possible.

18 **F. The Court Should Not Consolidate the Two Actions**

19 SDCWA has proposed that the 2010 and 2012 Actions be consolidated for all purposes,
20 both pre-trial and trial. If the Court were to consolidate the two actions, it would significantly
21 delay determination of the 2010 Rate Challenge, which, nearly two and one-half years from
22 initial filing, is finally nearly ripe for review.

23 *First*, consolidation would cause delay because the 2012 Action involves new claims that
24 are not in the 2010 Action, and which will necessitate further discovery, new and novel
25 dispositive motions, and new and novel issues for trial. As to discovery, MWD is already fully
26 occupied with collecting and producing documents in response to the pending Court Order. It is
27 not feasible for MWD to prepare an administrative record in the 2012 Action, and compile and
28 produce other documents for the 2012 Action at the same time.

1 *Second*, it appears that through consolidation SDCWA seeks to require the rate
2 challenges in both the 2010 and 2012 Actions to be adjudicated together. Depending on how
3 such a request were implemented, it could prevent MWD from filing a dispositive motion on the
4 2011-2012 rates at any point in the near future. Moreover, it appears that SDCWA may seek to
5 require that all six causes of action and all four causes of action in both the 2010 and 2012
6 Actions be tried together.² If so, the adjudication of the 2011-2012 water rates could be very far
7 off.

8 *Third*, it is arguable that when actions are consolidated for all purposes, the parties cannot
9 appeal until there is a single final judgment for the entire action. *See, e.g., Comm. for*
10 *Responsible Planning v. City of Indian Wells*, 225 Cal. App. 3d 191, 193, 195 (1990). If the
11 2010 and 2012 Actions were consolidated, it is possible that no party would be able to obtain
12 appellate resolution on the validity of MWD’s 2011-2012 water rates until there is “one final
13 judgment” in the consolidated action. *Indian Wells* at 195 (“review of intermediate rulings
14 should await the final disposition of the case.”); *Canandaigua Wine Co., Inc. v. County of*
15 *Madera*, 177 Cal. App. 4th 298, 302 (2009) (“a ruling on a petition for writ of mandate is not
16 appealable if other causes of action remain pending between the parties”, including consolidated
17 causes of action). This could be in the very distant future, and in the interim, MWD is operating
18 without any kind of assurance as to the validity of its source of revenue.

19 *Fourth*, MWD sets new water rates every other year, and SDCWA will likely challenge
20 each new rate-setting. Until there is a final decision on the issues presented by the 2010 Rate
21 Challenge, consolidation raises the problem of a potential revolving door of new rate challenges,
22 the addition of which would perpetually postpone validation of MWD’s water rates. Such delay
23

24 _____
25 ² SDCWA has taken the position in prior pleadings that all six causes of action in the 2010
26 Action should be tried together. Issues of consolidation aside, MWD disagrees that such a joint
27 trial is appropriate. In the causes of action challenging MWD’s water rates, the Court is
28 reviewing a quasi-legislative agency decision for legal sufficiency, and therefore there is no
“trial” in the traditional sense, i.e., except in narrow circumstances not present here, the Court
does not act as a finder of fact.

1 is contrary to the explicit purpose of the Validation Statute, to “speedily” hear and determine
2 actions challenging the validity of an agency action.³

3 And *fifth*, one of the main reasons why courts consolidate is absent here. Courts will
4 consolidate actions to avoid the risk of two inconsistent rulings in cases that are factually similar.
5 See, e.g., *Mercury Ins. Group v. Super. Ct.*, 19 Cal. 4th 332, 345 (1998) (courts employ
6 consolidation “in order to avoid conflicting rulings on a common issue of law or fact”). The risk
7 of inconsistent adjudications by different decision-makers does not exist here because this Court
8 will be presiding over both actions and will have an extensive background with the issues
9 involved. In fact, it is well-established that a court should not consolidate actions if there is a
10 risk of adversely affecting the rights of any party. See *State Farm Mut. Auto. Ins. Co. v. Super.*
11 *Ct.*, 47 Cal. 2d 428, 430 (1956) (finding that trial court abused its discretion in consolidating
12 actions, stating that consolidation may only be ordered if “it can be done without prejudice to a
13 substantial right”). If the 2010 and 2012 Actions were consolidated, MWD would be prejudiced
14 because its right under the Validation Statute to a speedy determination under Code of Civil
15 Procedure Section 867 will be adversely affected by delay in a dispositive ruling on its 2011-
16 2012 water rates.

17 The current status of the two actions has raised the potential for precisely what the
18 Legislature was concerned about when enacting the Validation Statute: delay in determining a
19 challenge to the validity of an agency’s action. If something is not done to streamline the
20 resolution of the challenge to MWD’s 2011-2012 water rates, MWD will be deprived of its
21

22 ³ To illustrate, the 2010 Action challenging the 2011-2012 rates has been pending for nearly two
23 and one-half years and is currently in the discovery phase. Consistent with the biennial rate-
24 setting schedule, in April 2012, MWD's Board adopted rates for 2013-2014. In June 2012,
25 SDCWA filed the 2012 Action challenging those rates. If the 2010 and 2012 actions are
26 consolidated and the 2012 Action proceeds similarly to its predecessor (which is possible given
27 the new and novel types of rate challenges added to the 2012 Action), then it may still be
28 pending in one and one-half years, at which point SDCWA will be seeking to consolidate a 2014
Action challenging rates set in April 2014 for 2015-2016. The consolidated action may still be
pending when the MWD Board sets rates in April 2016, and SDCWA seeks to consolidate a
2016 Action challenging rates for 2017-2018. If the actions are consolidated, it is difficult to
imagine how the parties will secure a definitive judgment on any of MWD's water rates, let alone
obtain a "speed[y]" determination of the rates' validity.

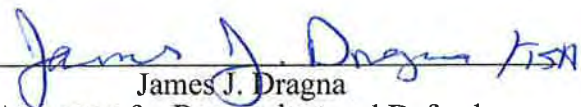
1 statutory right to obtain a prompt determination of that challenge, and its 26 member agencies –
2 all public entities – will continue to have to set budgets and rates in the shadow of uncertainty for
3 potentially additional years. As stated, MWD provides wholesale water services to its member
4 agencies, and the costs MWD incurs in providing that service are recouped through its water
5 rates. MWD Act § 130. SDCWA has challenged the cost allocation whereby MWD sets its
6 transportation water rates. Because MWD has in recent years set its rates on a biennial basis,
7 SDCWA will presumably continue to file new challenges to every rate setting MWD’s Board
8 conducts to preserve its ability to challenge the rates adopted in the new years. The only way
9 this revolving door of rate challenges will end is when there is finality on the legal issues in
10 dispute between the parties. Consolidating the 2010 and 2012 Actions would only prolong the
11 resolution of the validity of MWD’s transportation rate, in contravention of Code of Civil
12 Procedure section 867.

13 **III. CONCLUSION**

14 For the reasons stated above, MWD respectfully requests that the Court stay the 2012
15 Action pending a ruling on a dispositive motion as to the 2010 Rate Challenge (the first three
16 causes of action in the SAC); or, in the alternative, coordinate the management of the 2010 and
17 2012 Actions in a way that does not delay resolution of the validity of MWD’s 2011-2012 water
18 rates.

19 DATED: October 16, 2012

BINGHAM MCCUTCHEN LLP

20
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23 Attorneys for Respondent and Defendant
24 Metropolitan Water District of Southern California
25
26
27
28