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SAN DIEGO COUNTY WATER AUTHORITY

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SAN FRANCISCO

SAN DIEGO COUNTY WATER AUTHORITY,

Petitioner and Plaintiff,

v.

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

Respondents and Defendants.

Case No. CPF-10-510830

SAN DIEGO COUNTY WATER AUTHORITY'S MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF ITS MOTION TO COMPEL RESPONSES TO DISCOVERY REQUESTS SERVED ON METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA

Date: April 23, 2013
Time: 9:00 a.m.
Dept.: 304
Judge: Hon. Curtis E.A. Karnow

Date Filed: June 11, 2010

Trial Date: Not Set

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I. INTRODUCTION

This lawsuit is about unlawful rates set by Metropolitan Water District ("MWD"), which uniquely disadvantage one MWD member agency, the San Diego County Water Authority ("SDCWA"), forcing SDCWA to subsidize the services MWD provides to its other member agencies. The heart of SDCWA's claims is that the rates MWD charges for its services do not reflect the actual and proportionate costs MWD incurs in providing those services. In particular, MWD overcharges for transportation by setting rates that recover far more than MWD pays in transportation costs, and undercharges for water supply by setting rates that fail to recover the costs MWD actually pays to obtain and make available a water supply to its member agencies. In imposing rates untethered to its costs, MWD violates myriad established provisions of California constitutional, statutory, and common law. MWD also punishes SDCWA for buying third-party water in violation of the express requirements of California's Wheeling Statutes.

SDCWA is moving to compel responses to discovery related directly to these issues. SDCWA seeks information related to MWD's failures (1) to impose rates that meet statutory and constitutional cost-of-service requirements; and (2) to provide benefits to its member agencies that are proportionate to its charges to those agencies. MWD has already admitted that it makes no effort, at the end of its fiscal year or at any other time, to reconcile or "true up" the revenues it collects from each of its rates to its actual expenditures.

Because the lack of congruence between MWD's rates and its costs is the pivotal liability issue in this case, for more than a year now, SDCWA has been attempting to discover information about the costs included in each of MWD's rates—*e.g.*, System Access Rate ("SAR"), System Power Rate ("SPR"), Water Stewardship Rate ("WSR"), Supply Rate ("SR")—the sales volume upon which those costs were based, and how MWD reconciles, if at all, its various water rates with its actual costs in providing the services associated with those rates. On the guidance of the discovery referee in this case, the Hon. James L. Warren (Ret.), SDCWA began with document requests. SDCWA asked, and this Court ordered, MWD to produce documents concerning MWD's development and analysis of its 2011 and 2012 rates, MWD's allocation of costs to its different rates, and the specific costs recovered through each MWD rate.

Unfortunately, document discovery has proven unable to answer these critical questions. Although MWD now claims it has produced forward-looking projections of its estimated costs and charges, MWD has never contended that these documents establish a cost-of-service basis for its individual rates—*e.g.,* the SAR, SPR, or SR described above—as opposed to an aggregate analysis of the total revenues needed to cover MWD's total costs. Obviously, in this case, where the central issue is how costs have been allocated among MWD's various rates, aggregate information is not helpful. Indeed, with respect to what it calls "retrospective" cost-of-service analyses, MWD has consistently said that it does not track the actual revenues it receives against the rates it has charged. Given all of this, it appears that MWD simply does not know whether any of its individual rates recover the actual cost of the particular services it provides, in a manner that is proportionate to the benefits its member agencies receive and the amounts they pay. If this is true, it is the strongest possible evidence that MWD's rates are arbitrary and capricious.

The goal of SDCWA's current discovery is to put these issues to rest and obtain definitive answers to these simple questions. The requests at issue here are aimed at understanding what, if any, information MWD has (in documentary form or otherwise) regarding how it sets its individual rates, whether and to what extent it compares those rates to its projected costs, and whether and to what extent it subsequently reconciles its charges with its actual costs. If MWD has such information, SDCWA is entitled to know it. If MWD has no such information, it should admit that. If this information exists in MWD's self-selected administrative record or its document production, as MWD claims, it can easily identify it. SDCWA has not been able to locate any such information. Earlier in this case, MWD definitively stated, albeit without any support, that its rates were designed only to recover its costs. But last week, in its reply brief supporting its pending demurrer, it announced for the first time that it ***has no obligation*** to set rates equal to its costs. MWD's positions on its own rate-setting powers and processes remain a moving target.

MWD's refusal to provide information on these issues is no surprise. Admitting it has not meaningfully evaluated cost of service in setting its rates, or the proportionate benefit provided to

its members from its various rates and charges, would be an admission of liability that would end this case. But MWD has no basis to refuse to provide this information. Even today, MWD relies on objections to discovery that this Court long ago rejected. For example, MWD continues to object that no discovery is appropriate in this case at all under *Western States Petroleum Ass'n v. Superior Court*, 9 Cal. 4th 559, 565 (1995)—the same argument that this Court has twice rejected, most recently and explicitly in this Court's September 17, 2012 discovery order. Likewise, MWD's claims of burden ring hollow. These issues are at the heart of this case, and if, as MWD has asserted, it does not actually reconcile its costs with its revenues, there is no information to identify or produce. For all these reasons, the Court should compel MWD to provide complete, substantive responses to all the discovery requests at issue.

II. BACKGROUND

SDCWA's entitlement to take discovery is a settled issue in this case. Indeed, the parties spent almost a year litigating that issue, first with Judge Warren and then before this Court. *See* Declaration of Daniel Purcell In Support of SDCWA's Motion to Compel ("Purcell Decl."), Ex. 16 at 5-7, 31-32; Ex. 17 ("September 17 Order").[1] Both Judge Warren and this Court recognized that the central liability issue in this case, and accordingly the single most appropriate subject of discovery, is whether MWD's rates reflect the actual and proportional costs of providing its services. As Judge Warren said at the May 21, 2012 discovery hearing:

> if we look at the key here being the allegation that there are transportation—that their supply costs that are being funneled into transportation issues, thereby inflating transportation costs and reducing the cost of supply, those types of documents are relevant, and ***I think they go to the crux of what is being asserted,*** whether it's under the first three rate claims or under the breach of contract claim.

Purcell Decl. Ex. 18 at 37:16-23 (emphasis added). Judge Warren followed up by recommending that MWD should produce documents sufficient to show precisely what costs MWD recovered through each of the rates charged to its member agencies—*e.g.*, the SAR, SPR, and WSR. *Id.*,

[1] Unless otherwise stated, "Ex." refers to exhibits to the Purcell Declaration. The Court has also issued a separate order controlling discovery in the related case pertaining to MWD's 2013-14 rates, *San Diego County Water Authority v. Metropolitan Water District of Southern California, et al.*, CPF-12-512466, which the Court is coordinating with this case.

Ex. 19 at 7, Requests 21-24. This Court agreed with Judge Warren's reasoning and conclusion in its September 17 order. *See* September 17 Order at 2-4.

While MWD has produced thousands of pages of documents in response to the September 17 Order, when it comes to documents comparing MWD's specific transportation or supply costs with its rates and revenues, SDCWA has seen nothing. MWD has been inconsistent in its statements, both to SDCWA and the Court, as to whether it has documents of this sort. First, in its formal responses to SDCWA's document requests, MWD told SDCWA that the information is either already available in documents that have already been produced; that SDCWA has equal access to the documents, "to the extent the information exists;" or that the responses "would require considerable review of documents or preparation of analyses that do not already exist to answer." *See* Purcell Decl. Exs. 14, 31. In an August 23, 2012 meet-and-confer session, MWD told SDCWA that it did not prepare "retrospective" comparisons of its actual revenues from its individual rates with its costs of providing services; instead, it reconciled costs and revenues on only an agency-wide level. Accordingly, it stated that it had no documents comparing its revenues with its costs at the level of its individual rates. *Id*., ¶ 2. When SDCWA raised this issue before the Court as part of an informal discovery conference on December 14, 2012, MWD repeated to the Court that it had no such ***documents.*** *Id*., Ex. 20 at 57:19-23. The Court suggested to MWD—just as Judge Warren had before—that, if it had this information, it ought to produce it: "what you're saying is that they ought to do it, for God's sake. If they can, they ought to, ***because that is what this case is all about***." *Id.* at 56:4-7 (emphasis added).

All this left SDCWA no option but to seek more information on this critical issue through written interrogatories and requests for admission. After all, if MWD has no documents, only interrogatories can unearth information in MWD's possession that may or may not be maintained in documentary form. And if MWD has no information regarding how its rates and costs line up, the most efficient way to develop admissible evidence of MWD's failure is through request for admission. Accordingly, on February 5, 2012, SDCWA propounded 49 requests for admission ("RFAs"), along with Form Interrogatory No. 17.1; 22 special interrogatories ("SIs"); and five

requests for production ("RFPs"). *See* Purcell Decl. Exs. 1-4. With only a few exceptions, this discovery relates to the issues discussed above: (1) MWD's comparison (if any) of its estimated or actual charges for each of its rates to its estimated or actual costs, and (2) MWD's analysis (if any) of the proportionate benefit its member agencies receive in exchange for rate payments.[2]

MWD made clear within days that it had no intention of responding to this discovery. *See* Purcell Decl. Ex. 9 at 3. The parties then exchanged email correspondence about MWD's refusal to answer. *Id.*, Ex. 10. On March 11, 2013, as it had signaled it would, MWD responded to these requests by providing only a laundry list of form objections to each and every one of SDCWA's requests, but offering no substantive responses to any of the requests. *Id.*, Exs. 5-8. At the informal discovery conference on March 13, 2012, MWD stated its intention to stand on its objections and conceded the issue is ripe for decision by the Court. *Id.*, ¶ 3.

In further meet and confers since the March 13 discovery conference, MWD has modified its position, but only slightly. At MWD's request, SDCWA provided two detailed letters laying out the basis on which it is entitled to substantive responses to this discovery. Purcell Decl. Exs. 11, 12. In response, MWD reiterated its various objections but agreed to provide responses to 22 of the RFAs, "subject to" various objections. *Id.*, Ex. 14 at 4.[3] But MWD has not committed to a date by which it will provide those responses, and its reservation of rights to object suggests the responses it eventually provides will be non-substantive. Moreover, MWD also said it would "further evaluate responses" to other unspecified RFAs and SIs, leaving open the possibility it would not respond at all. In a separate letter, MWD has also reiterated its objections to

[2] MWD originally objected to the last fourteen of these requests because they exceed the number permitted under the Code of Civil Procedure. As was explained to MWD during the meet and confer process, when SDCWA served its discovery requests on February 5, it inadvertently failed to attach the Declaration for Additional Discovery specified in Code of Civil Procedure 2033.040. It provided this declaration to MWD on March 15, 2013. Purcell Decl. Ex. 11. If MWD maintains this objection, the Water Authority respectfully asks the Court to excuse this inadvertent omission. This is a complex case, with numerous causes of action and factual issues in dispute; the RFAs are focused and not sent to harass MWD; and they could just as easily have been served in the 2013-14 case (where SDCWA has not served RFAs yet). MWD will suffer no prejudice if it is required to respond to these 49 RFAs.

[3] MWD agreed to answer RFA Nos. 1-16 and 44-49. Purcell Decl. Ex. 14, at 4. If it has not done so by the date of this hearing, the Court should explicitly order MWD to provide those answers.

SDCWA's RFPs, but has stated that it will agree to produce documents in response to some of these requests, but only after it has "completed the current discovery." *Id*., Ex. 15.

III. ARGUMENT

California's liberal discovery rules require parties to provide discovery of information on "any matter, not privileged, that is relevant to the subject matter involved in the pending action." Cal. Civ. Proc. Code § 2017.010. Moreover, "[i]n the context of discovery, evidence is 'relevant' if it might reasonably assist a party in evaluating its case, preparing for trial, or facilitating a settlement." *Glenfed Dev. Corp. v. Superior Court*, 53 Cal. App. 4th 1113, 1117 (1997). Doubts about discoverability are resolved in favor of disclosure. *See Kirkland v. Superior Court*, 95 Cal. App. 4th 92, 97 (2002); *see also Pratt v. Union Pacific Railroad Co.*, 168 Cal. App. 4th 165, 180 (2008) ("California rules of civil discovery are liberally construed in favor of disclosure."). As is demonstrated below, all of SDCWA's discovery requests amply satisfy this standard.

A. MWD's general objections to answering all RFAs and interrogatories should be overruled.

Incredibly, given the procedural history of this case, MWD maintains its objection to each of SDCWA's RFAs and interrogatories on the grounds that *Western States* and other cases bar consideration of any information beyond the administrative record, and accordingly prohibit any discovery. *See* Purcell Decl. Exs. 5, 14. This Court has already rejected that argument twice. The *Western States* line of cases was MWD's front-line argument opposing IID's motion to take discovery in December 2011. *See* Purcell Decl. Ex. 21 at 4-6. The Court held otherwise, declaring that the Wheeling Statute expressly, and in its legislative history, authorized discovery and consideration of "all relevant evidence" in addressing challenges like this one. This past summer, MWD again argued that *Western States* prohibited *all* the discovery in Judge Warren's recommendation. Purcell Decl. Ex. 22 at 10-11. Again, the Court said no, holding that both the Wheeling Statute and SDCWA's contract claim entitled the parties to pursue "normal civil discovery." September 17 Order at 2.

MWD has respected this Court's rulings only when it suits its purposes. Last year, when MWD unsuccessfully sought writ relief to reverse this Court's discovery rulings, MWD told the

Court of Appeal that this Court's January 6, 2012 discovery order constituted "a final and decisive rejection of *Western States* as a matter of law" and that "[a]ll further trial court proceedings will assume the inapplicability" of *Western States*. Purcell Decl. Ex. 23 at 2-3. This is the right approach to follow. Because SDCWA's RFAs and interrogatories are narrowly focused on cost of service, and other discrete factual issues of critical importance to resolving the claims in this case, the Court should once more overrule MWD's blanket objections to discovery under its misreading of *Western States*.

B. The Court should order MWD to respond to RFAs and interrogatories concerning MWD's cost of providing services and how they align with MWD's rates and revenues (SI Nos. 1-7, 15-19, 21-22).

More than two dozen of the requests for admission and interrogatories at issue involve a single issue, which Judge Warren described as "the crux of what is being asserted" and Judge Kramer reiterated was "what this case is all about." Purcell Decl. Ex.18 at 37:16-23; Ex. 20 at 56:4-7. That issue is whether MWD's particular rates, like the SAR, the SPR, and the WSR, recover more than the costs of providing the services for which they are nominally collected. This is the fundamental basis underlying SDCWA's claims in this case—that MWD, as a public agency and government-authorized monopolist, is barred from charging its ratepayers more than its costs of service. Numerous provisions of California law clearly impose that limitation:

- Government Code 54999.7(a) requires that a public agency's rates "shall not exceed the reasonable cost of providing the public utility service." Cal. Govt. Code § 54999.7(a).
- The Wheeling Statute, likewise, requires that MWD not charge more than "fair compensation" for wheeling, defined in the law as the "reasonable charges incurred by the owner of the conveyance system" to accomplish the wheeling transaction. Cal. Water Code § 1811.
- The California Constitution, as amended by Proposition 13 and Proposition 26, defines MWD's rates as taxes, which must be passed by a two-thirds majority popular vote, unless MWD can establish that its rates are set at an amount "no

more than necessary to cover the reasonable costs of the government activity." Cal. Const., art 13A, § 4; art 13C, § 1.

- California common law likewise has always limited utilities to imposing rates that recover no more than the utility's costs.

These cost-of-service issues were always central to this case, but their importance is becoming even more obvious with every document MWD files. Last week, in its reply brief supporting its demurrer, MWD advanced the radical argument that it is free to charge whatever it wants, without regard to its costs of service.[4] This baseless position is an invention of this litigation. MWD is a state-authorized monopolist selling water—the ultimate necessity of life—and other critical utility services to all of Southern California. It is inconceivable that MWD has the leeway to gouge ratepayers with predatory rates far above its costs. To the contrary, MWD has previously conceded, including in this case, its obligation to set rates that recover no more than its costs. Purcell Decl. Ex. 24 at 24. MWD's admission that it makes no effort, after the fact, to reconcile its charges with its costs for any given year is equally inconsistent with logic and commercial reality. If that were so, MWD would be perhaps the only business in the world that refuses to look at its past performance in setting its budget and rates in the coming year. Indeed, industry standards for water agencies expressly require reconciliation of past charges and costs as a part of the ratemaking process, *see* American Water Works Association Manual, *id*., Ex. 25, and the California Public Utilities Commission likewise requires such reconciliation as part of the process of approving future rate increases. *See* Cal. Pub. Util. Code § 792.5 (Purcell Decl. Ex. 26).

SI Nos. 1-7 and 15-19, therefore, seek information that demonstrates, or would allow, a comparison between MWD's specific costs for providing services—such as the maintenance,

[4] In other words, MWD, as a monopolist supplying water and other critical utility services to Southern California, is arguing with a straight face that it could charge twice, or ten times, its cost of service, exploiting captive and vulnerable ratepayers, and nobody would have any recourse as long as those inflated and predatory rates were "uniform." This position ignores the plain text of the statutory and constitutional provisions above, and decades of case law interpreting those provisions. In any event, MWD can make these arguments at trial, but they are no basis for denying discovery. *See* Purcell Decl. Ex. 27 at 5-9.

power, and infrastructure costs to transport water, or water supply, storage and facility costs needed to meet peak demands—with the revenue from specific rates like the SAR and SPR. For example, SI No. 4 asks MWD to identify "documents, data, calculations, analyses, studies or other information that constitute, or enable a reconciliation" of MWD's revenues from each particular rate with the expenditures MWD sought to recover through that rate. SI No. 17 asks MWD to identify all documents, data or calculations that "constitute, comprise or describe" MWD's "rate model," which SDCWA has been told is the tool MWD uses in planning and calculating its rates. MWD has repeatedly said it does not have documents retrospectively reconciling its rate revenues with the costs it incurs to provide the services associated with those rates, but has refused to state whether, in setting the rates, it prospectively compares its estimated rates with its estimated costs or prospectively takes into account actual revenues received in the prior year. SDCWA is entitled to a straight answer as to whether MWD has information—in the form of either prospective estimates or retrospective reconciliation, or data from which such estimates could be made—that compares MWD's individual rates with its costs. For example, SDCWA is entitled to know what information MWD has comparing estimated transportation, water supply, and peaking charges with its actual costs of providing those services.[5]

Relatedly, in SI Nos. 21-22, SDCWA seeks documents revealing the amount of revenue—collected through any MWD rate—that MWD transfers to its "Rate Stabilization Fund." As part of its failure to reconcile its revenue with costs incurred from providing the corresponding service, SDCWA believes MWD is over-collecting revenues under some rates, then transferring the excess revenue to a general reserve fund, the "Rate Stabilization Fund." MWD then uses this Fund to subsidize other services, and by extension, the rates associated with those services. This practice would clearly violate cost-of-service principles requiring that MWD set each of its rates such that it recovers no more than the costs of the service related to that particular rate. Accordingly, SDCWA seeks documents in MWD's possession reflecting this practice.

[5] Obtaining information about MWD's actual costs and revenues, including the information that comprises MWD's "rate model," is also critical for calculating SDCWA's damages pursuant to its breach of contract claim.

MWD's vague claims of burden do not preclude this discovery. That it might take MWD some effort to compile or organize this information does not render the discovery oppressive. *See Columbia Broadcasting Sys., Inc. v. Sup. Ct.*, 263 Cal. App. 2d 12, 19 (1968). These interrogatories seek critically relevant information, and are narrowly tailored to address the costs and revenues related to particular MWD rates. Answering the discovery should place no burden on MWD—particularly if, as MWD has suggested, it does not have any information comparing rate revenues with associated costs. Accordingly, this Court should overrule MWD's objections and order MWD to provide substantive responses to the requests. If MWD cannot point to a single piece of evidence that supports its representations that its rates comply with cost-of-service obligations, MWD needs to admit it and face the consequences.

C. The RFA's and interrogatories concerning the Water Stewardship Rate, and the benefits that allegedly flow from the projects it funds, are reasonably calculated to lead to admissible evidence (RFA Nos. 17-43, SI Nos. 12-14).

MWD also violates California constitutional and statutory law in the way it collects and disburses money from its so-called "Water Stewardship Rate," which MWD uses to fund local water supply and conservation projects. For starters, MWD treats the WSR as a transportation charge, by including the WSR in its Wheeling Rate and in the price charged to SDCWA under the parties' Exchange Agreement. But the WSR has nothing to do with enabling transportation services. To the contrary, revenue from the WSR is used to fund ***water supply*** projects for certain favored MWD member agencies. Accordingly, the WSR should be treated as part of MWD's supply rate. Common law and the Wheeling Statute also require that MWD not impose the WSR on wheeling transactions, which by definition involve only transportation services—because there has been and can be no showing that projects funded by the WSR enable (or have anything to do with) water transportation service.

Moreover, MWD's disbursement to its member agencies of the money collected through the WSR does not bear any relationship to the contributions of each member agency to the WSR. As set forth more fully in SDCWA's Complaint, MWD must show that the WSR rates imposed by MWD on its member agencies "bear a fair or reasonable relationship to [the agencies']

burdens on, or benefits received from" the conservation and development projects funded by the WSR. Cal. Const., art 13C, § 1. MWD cannot make this showing as to any member agency, but it is particularly unable to do so as to SDCWA. In 2011 and 2012, SDCWA paid MWD ***$34,417,000*** in WSR charges, in spite of the fact MWD had already blackballed SDCWA from receiving any benefits from WSR funding, expressly in retaliation for SDCWA's filing of this lawsuit. *See* Purcell Decl. Ex. 28 at ¶ 50.

Because MWD must concede that SDCWA has received no direct benefit from the more than $34.4 million it paid through the WSR in 2011 and 2012, MWD instead defends the WSR on a different basis. In its answer to SDCWA's Second Amended Complaint, MWD alleged that "[a]ll member agencies benefit from each acre-foot of water developed through these programs, because it frees up capacity to convey water through Metropolitan's system, reducing the need to invest in development of additional expensive water delivery infrastructure, and provides additional water supplies to meet the region's demands." Purcell Decl. Ex. 29 at General Allegation No. 8. MWD also alleged that "SDCWA will continue to receive the benefits of Metropolitan's conservation and local resources programs regardless of whether the contracts to which it is a direct party continue." *Id*. at General Allegation No. 13. In other words, MWD claims that the projects it funds using WSR proceeds provide a generalized ***regional transportation benefit*** across the whole of MWD's service area, including to SDCWA, and that this supposed regional benefit is enough to satisfy its constitutional obligation to provide benefits proportionate to the charges it imposes.

SDCWA's discovery requests regarding the WSR target these issues precisely. RFA Nos. 26-31 and 38-43 ask MWD to admit or deny that it has ever calculated or quantified the "regional benefit" associated with these water development and conservation programs. RFA Nos. 20-25 and 32-37 similarly ask MWD to admit or deny that it has ever calculated or quantified the proportional (member agency-by-member agency) benefits to SDCWA and its other member agencies from the programs funded by the WSR. RFA Nos. 17-19 ask MWD to admit that it does not disburse funds collected through the WSR in a manner proportional to the contributions by

each agency. The three special interrogatories on this topic area—SI Nos. 12-14—then ask MWD to identify facts and documents supporting its alleged defenses regarding its use of funds collected through the WSR. They seeks facts and documents that show the benefit to each member agency as well as the alleged "regional" benefit from these programs, and that demonstrate whether the costs associated with these projects relate to transportation or supply.

All these requests go to central issues raised by SDCWA's claims and MWD's defenses. The Wheeling Statutes require MWD to set rates "consistent with the requirements of law to facilitate the voluntary sale, lease, or exchange of water." Cal. Water Code § 1813. By imposing a supply cost—its program subsidies—on its transportation rate, MWD violates this requirement. Similarly, numerous California law provisions, including Proposition 26, require MWD to impose rates that merely recover its costs and to provide benefits to its member agencies proportionate to the charges it imposes on those agencies. By misallocating its rates, barring SDCWA from receiving any program funding, and limiting its defense of the WSR to an illusory "regional benefit," MWD likewise violates the law. MWD may not simply collect money from its member agencies and then dole it out among its member agencies without establishing that the benefits align with the costs—that would be the definition of an arbitrary and capricious action. MWD must be ordered to respond to this discovery; or concede that the WSR is invalid.

D. MWD should be required to articulate its basis for certain cost allocation decisions (SI Nos. 8-11, 20).

Five other interrogatories seek information concerning MWD's methodology (if any) for allocating its costs into different rate categories. For example, MWD pays the California Department of Water Resources ("DWR") for a water supply delivered to MWD through the State Water Project ("SWP"). But despite paying DWR for a water supply, MWD assigns the majority of these SWP costs to MWD's own System Access Rate and System Power Rate, which are transportation rates, not supply rates. The misallocation of these rates to transportation rather than supply inflates the costs to MWD's only real transportation customer—SDCWA—and reduces the costs of other customers who buy water and other services from MWD. SI No. 10 thus asks MWD to explain its basis for allocating SWP costs to its transportation rates. Similarly,

as discussed above, MWD includes the WSR in the bundled wheeling rate it charges to purchasers of third-party water, and in the price charged to SDCWA under the Exchange Agreement. But the WSR, which funds conservation and local water supplies, is plainly about increasing supply; by loading that rate onto the wheeling rate, MWD is inflating the wheeling rate and violating the express purpose of the Wheeling Statutes to facilitate third-party water transfers. *See* Cal. Water Code § 1813. This Court already held, in its September 17 Order, that information about MWD's cost allocations is reasonably calculated to lead to the discovery of admissible evidence. *See, e.g.*, September 17 Order at 3-4, 7-11. The Court should order MWD to respond to these interrogatories.[6]

E. SDCWA's additional document requests are targeted to plainly relevant information. (RFP Nos. 3-5)[7]

MWD also is refusing to produce documents in response to RFP No. 5, which pertains to SDCWA's sixth cause of action, for declaratory relief regarding MWD's calculation of "preferential rights" (the amount of water to which each MWD member agency is legally entitled to take according to a statutory formula). MWD calculates preferential rights based on a member agency's payments to MWD, excepting payments for the "purchase of water." For preferential rights purposes, MWD treats payments under SDCWA's Exchange Agreement, which governs MWD's transportation of water SDCWA obtains from IID and from the lining of the All-American and Coachella canals, as payments for the "purchase of water"—in other words, as supply charges rather than transportation charges. This is exactly the opposite of how MWD treats SDCWA under the Exchange Agreement, where MWD charges SDCWA a bundled transportation rate, not a supply rate. In other words, MWD categorizes the identical activity—

[6] MWD has now agreed to respond to RFA Nos. 44-47, which relate to the fact that MWD plays no role in operating the SWP or transporting water through the DWR system. If MWD has not already answered these interrogatories by the hearing date, the Court should order MWD to do so.

[7] On March 25, two days before the date of this motion, MWD changed its position and agreed to produce documents in response to RFP Nos. 3 and 4, which, respectively, address further issues concerning MWD's Rate Structure Integrity provision and MWD's 1998-2002 process for unbundling its rates. *See* Purcell Decl. Ex. 15. MWD's agreement is subject to the parties agreeing on appropriate custodians and an appropriate date for production. To the extent the parties have not reached resolution on this by the date of this hearing, SDCWA requests the Court's assistance in resolving this issue.

payments by SDCWA for transportation of IID and canal-lining water through MWD's system—as either "transportation" or "supply," depending on the day of the week, and according to which definition will harm SDCWA (and benefit MWD's other member agencies) the most.

RFP No. 5 asks MWD to identify documents discussing its preferential rights calculation, including discussions of whether to include wheeled, transported or exchanged water in the calculation of member agencies' preferential rights. MWD has never disputed that SDCWA is entitled to take discovery on this cause of action. During the previous round of discovery last spring, Judge Warren recommended that preferential-rights discovery not be included in the first round of document production. But now that the Court has stated its intent to have a trial on all issues before the end of this year, this discovery should proceed. Having offered no meaningful objections other than that the Court "has not authorized discovery regarding preferential rights," an objection the Court can easily remedy, this Court should order MWD to produce the requested documents.

F. MWD must respond to Form Interrogatory 17.1 and produce documents it identifies in its interrogatories. (Form Interrogatory No. 17.1 and RFP Nos. 1, 3-5)

MWD also offers baseless to objections to Form Interrogatory 17.1, which requires a party responding to requests for admission to identify certain information when it does not provide an unqualified admission. Form Interrogatory 17.1 has long been approved for general use in California litigation by the Judicial Council. MWD's claim that Form Interrogatory 17.1 is too burdensome is nothing more than a beef with the Judicial Council's approach. Nor is there anything improper about asking, as SDCWA has done, that MWD produce any documents it identifies in response to interrogatories that it has ***not already produced in this litigation***. RFP No. 1 was included to avoid the situation where MWD identifies, in response to interrogatories, a host of documents that have not otherwise been requested or produced. If the Court grants SDCWA's motion to compel further interrogatory responses, and MWD identifies particular documents, it follows that the underlying documents are relevant and must be produced as well.

G. The Court should order MWD to respond to RFAs by April 30 and provide substantive responses to the interrogatories within 20 days.

SDCWA's RFAs are straightforward. Either MWD performs the analyses described in the requests or it does not. MWD has conceded this in part by agreeing to respond to RFA Nos. 1-16 and 44-49. SDCWA hopes and expects to have those responses before the date of the hearing on this motion. In any event, MWD should be able to answer all of these RFAs, and the corresponding Form Interrogatory No. 17.1, within a week of the hearing, by April 30, 2013.

While SDCWA does not object to allowing MWD some additional time to respond to the interrogatories, most of the interrogatories seek the identification of facts, documents and other information. Within 20 days, MWD should at least be able to identify facts and non-documentary evidence, even if it needs more time to finish producing documents. Given the Court's stated goal of completing discovery this summer, a shorter response date will help the parties clarify the issues for trial and determine whether and to what extent further discovery is necessary.

IV. CONCLUSION

Having first pursued document discovery for over a year only to learn that no responsive documents exist, SDCWA has turned to reasonable, narrowly-tailored written discovery to get at the fundamental issues in this case regarding how MWD allocates its costs to its various rates, and whether MWD can show that its rates are consistent with its actual costs of service and proportionate to the benefits provided to its member agencies. If MWD has no information supporting its practices, it will never be able to defend its rates. Because these requests go to the core issues in the case, SDCWA asks the Court to direct MWD to provide complete, substantive responses to all the discovery requests at issue within 20 days of the hearing on this motion.

Dated: March 27, 2013

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