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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
Case No. CPF-12-512466

SAN DIEGO COUNTY WATER AUTHORITY'S OBJECTIONS TO TENTATIVE DETERMINATION AND PROPOSED STATEMENT OF DECISION ON RATE SETTING CHALLENGES

Dept.: 304
Judge: Hon. Curtis E.A. Karnow

Date Filed: June 11, 2010
June 8, 2012

Trial Date: December 17, 2013

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San Diego submits the following objections to the Court's Tentative Determination and Proposed Statement of Decision on Rate Setting Challenges ("Decision"), filed on February 25, 2014, under California Rule of Court 3.1590 and Code of Civil Procedure Section 634. San Diego recognizes the limited purposes of objections under these rules, and restricts its objections here to (1) raising evidentiary issues and apparent inconsistencies between the Court's intended ruling and the Decision expressing it, and (2) as Section 634 mandates, requesting that the Court resolve certain ambiguities in the Decision and make express factual findings on essential issues. *See* Decision at 4 n. 2; *Heaps v. Heaps*, 124 Cal. App. 4th 286, 292 (2004); Code Civ. Proc. § 634.

San Diego has only a few objections to the Decision, which fall into two categories: 1) objections and requests for clarification concerning the Court's conclusions with respect to dry-year peaking; and 2) miscellaneous objections aimed at clarifying issues for the Court of Appeal. In addition, to limit future disputes and controversy between the parties (and the resulting delays and expenditure of public funds), San Diego also renews its request that the Court's final statement of decision include a concluding order summarizing the specific relief to be granted, and retaining continuing jurisdiction consistent with *San Luis Coastal Unified Sch. Dist. v. City of Morro Bay*, 81 Cal. App. 4th 1044, 1051 (2000).[1]

I. CLARIFICATIONS AND CORRECTIONS RE "DRY-YEAR PEAKING"

A primary purpose of objections to a proposed statement of decision is to "bring to the court's attention inconsistencies between the court's ruling and the document that is supposed to embody and explain that ruling." Decision at 4 n. 2; *Heaps*, 124 Cal. App. 4th at 292. With

[1] San Diego will not reargue here, but reserves for appeal, its objections on the merits of all legal issues that the Court has resolved against it in the Decision and in various pre-trial rulings. San Diego incorporates by reference here its positions and arguments on all such issues, as previously presented to the Court in pre-trial and post-trial briefing. For example, San Diego reserves its challenges on legal questions including (but not limited to) the Court's denial of San Diego's motion for summary adjudication, and granting of Met's motion for summary adjudication, regarding Met's Rate Structure Integrity provision; the Court's ruling that San Diego's Proposition 26 claims are limited to the administrative record; the Court's determination that Proposition 26 applies only to the 2012 rate-setting (not 2010); and the Court's rulings that Proposition 13, Government Code section 66013, and the Met Act do not apply to Met's challenged rates.

respect to the Court's tentative decision on dry-year peaking, San Diego urges the Court to clarify the burden of proof applied by the Court to the dry-year peaking issue under Proposition 26; to account for evidence that the Decision does not address; and to make additional factual findings, consistent with the Court's statement of the burden of proof, that will eliminate ambiguity and be helpful to the parties going forward, as well as on appeal.

Burden of Proof under Proposition 26 and Related Factual Findings

San Diego's dry-year-peaking challenge to Met's Transportation Rates is based on, among other statutes and provisions, Proposition 26, Cal. Const. art. XIII C § 1. The Decision's conclusion with respect to dry-year peaking states:

> San Diego has not made a preliminary showing that this is a problem. That is, there is no substantial evidence that some member agencies reap a benefit for "dry year peaking" or that they do so at the expense of other member agencies such as San Diego.

Decision at 64. San Diego requests that the Court clarify this conclusion in light of the burden of proof imposed by Proposition 26. Elsewhere in the Decision, the Court held that Met—not San Diego—bears the burden of proof under Proposition 26. Decision at 18-19. Met has not identified, nor is San Diego aware of, any authority suggesting that San Diego should bear any burden of production or proof under Proposition 26—and the law's plain language places that burden squarely on Met. *See* Cal. Const. art. 13C, §1. Thus, San Diego requests that the Court clarify (1) the nature and extent of any burden of production or proof assigned to San Diego on its dry-year peaking claim under Proposition 26, and (2) how San Diego has or has not carried that burden on the factual record before the Court.

The Decision correctly finds that "some members agencies in some years buy more water for various reasons, including drought"; that "Met incurs costs for this sort of contingency storage"; that "this contingency capacity is significant, and designed to meet unexpected needs"; that "Met does impose charges for the cost of this contingency capacity"; and "that the record does not tell us that all these charges are sufficient to account for all of the costs of providing what I have called contingency capacity." Decision at 63-64. Although the Court, as already noted, remains unconvinced "that this is a problem," apparently because drought is not the sole

cause of variations in demand, *id.*, San Diego respectfully submits that, under Proposition 26, it was ***Met's burden*** to make a clear record sufficient to prove that the way it recovers such costs, regardless of their causes, is ***not*** a problem—*i.e.*, that it charges "no more than necessary to cover the reasonable costs of the governmental activity, and that the manner in which those costs are allocated to a payor bear a fair or reasonable relationship to the payor's burdens on, or benefits received from, the governmental activity." Cal. Const. art. 13C, § 1. San Diego submits that, under the Court's findings discussed above, and taking the Court's reservations into account, Met has not carried its Proposition 26 burdens. *See id.*

If the Court is allocating to San Diego some kind of *prima facie* burden—and, if so, the Court should make the nature of that burden explicit, and explain how that is consistent with Proposition 26's allocation of the burden of proof to Met—San Diego submits that it carried any such burden, requiring Met to carry its own burdens under Proposition 26, which Met failed to do. At trial and in its papers, San Diego identified significant differences among Met member agencies in the amounts and proportions of their year-to-year variation in demand for water. For example, Met documents, in the administrative record, detail the different purchasing behavior of member agencies depending on whether it is a "normal year" or a "dry year":

> Some agencies depend on Metropolitan to supply 100 percent of their water needs, regardless of the weather. Other agencies, with local surface reservoirs or aqueducts that capture rain or snowfall, rely on Metropolitan more in dry years than in years with heavy rainfall, while others, with ample groundwater supplies, purchase Metropolitan water only to supplement their local supplies or to recharge groundwater basins."

AR2012-16429 at 16521 (2012 bond statement); *see also* AR2012-16288_2114 at 2189-92* (1999 Raftelis report); AR2010-1520 at 1591 (IRP) (Met must incur additional conveyance, and storage, costs to satisfy member agencies' "[d]ry year water demands"). Putting aside the extra-record charts presented by the parties at trial (Decision at 62-63), record documents confirm that the water purchases of a single member agency, the City of Los Angeles, may swing by as much as 250,000 acre-feet per year depending on hydrological conditions (wet year vs. dry year) in the Owens Valley, where Los Angeles gets much of its water. AR2012-16429 at 16522-23.

Moreover, the Engineer's Report supposedly supporting Met's Readiness-to-Serve (RTS) charge—which is intended to "ensure[] that agencies that only occasionally purchase water from Metropolitan but receive the reliability benefits of Metropolitan's system pay a greater share of the costs to provide that reliability"—***acknowledges that Met recovers less than half*** of the amount that, even under Met's analysis, it could recover for that purpose, with the remainder recovered through Met's other rates, including its Transportation Rates. *See* AR2010-11443 at 11512 (RTS recovers only $123 million of $330 million in capital costs associated with standby); AR2012-16594 at 16805-07 (same for 2012 rates). When Met follows the "recommend[ation]" of its General Manager "that the RTS charge only recover a portion of the total potential benefit," AR2012-16594 at 16807, Met is electing—arbitrarily—to recover those standby costs instead through its volumetric rates, including the Transportation Rates. *See* AR2010-11443 at 11510; AR2012-16594 at 16805-06 (relevant standby costs not recovered include "conveyance and distribution" and "demand management programs"). San Diego submits, therefore, that Met has failed to carry its burden under Proposition 26, not least because it ***admittedly*** under-collects its costs for meeting peak demands through its RTS charge, and instead collects these costs from its other rates. In doing so, Met's non-RTS volumetric rates necessarily exceed the cost of providing the distinct services those other rates were designed to cover, and Met has failed to demonstrate the constitutionally-required relationship between member agencies' burdens on and benefits received from the charges that, as the Court rightly acknowledged, Met imposes "for the cost of this contingency capacity." *See* Decision at 64; Cal. Const. art. 13C, § 1.

If the Court disagrees, San Diego respectfully requests—and submits that the law requires—that the Court make explicit factual findings explaining how, with respect to dry-year peaking, Met carried its burden of proof that it charges "no more than necessary to cover the reasonable costs of the governmental activity, and that the manner in which those costs are allocated to a payor bear a fair or reasonable relationship to the payor's burdens on, or benefits received from, the governmental activity." Cal. Const. art. 13C, § 1; *see also Cal. Farm Bureau Fed'n v. State Water Res. Control Bd.*, 51 Cal. 4th 421, 442 (2011) (holding, even under

Proposition 13, that a trial court is required "to make detailed findings focusing on the Board's evidentiary showing that the associated costs of the regulatory activity were reasonably related to the fees assessed on the payors," and "must determine whether the statutory scheme and its implementing regulations provide a fair, reasonable, and substantially proportionate assessment of all costs related to the regulation of affected payors"). Alternatively, and because San Diego is not seeking any monetary relief on this issue, San Diego submits that based on the Decision's factual findings that the record on dry-year peaking is unclear, the Court could simply direct Met to assess and quantify the costs and burdens of dry-year peaking (bearing in mind its burden under Proposition 26) as part of its process of re-evaluating its cost of service and re-setting the rates that the Court has invalidated for other reasons.

Connection between Dry-Year Peaking Costs and Transportation Rates

As the Court is aware, San Diego's claims at trial challenged only Met's Transportation rates. To the extent that San Diego wishes to challenge the validity of other Met rates (such as its Supply Rates or Readiness-to-Serve Charge) for failure to properly account for what the Court called "the cost of contingency capacity," that is a dispute for another day.

However, as to the issue of whether any dry-year peaking costs are recovered through the Met Transportation Rates challenged in this case, the Decision tentatively finds that "[i]t remains unclear exactly how these costs are part of the wheeling rate." Decision at 61. If San Diego's presentation on this issue was unclear, San Diego hopes that citation to a few documents in the record and presented at trial can clarify this issue for the Court. In fact, Met admitted in interrogatory responses that it recovers costs associated with dry-year peaking through various rates, including the *System Access Rate*—which is a Transportation Rate, and part of Met's wheeling rate. *See* PTX-235A at 14-15 (Response to SI No. 15); San Diego Proposed Statement of Decision at 48. Furthermore, evidence from the administrative record that was discussed at trial—and undisputed by Met—demonstrated that at least some dry-year peaking costs are recovered through the System Access Rate. In particular, Met's "flexible storage" rights associated with the terminal reservoirs where Met receives State Water Project water provide "a

dry year supply benefit," as Met's own documents concede, yet these costs are admittedly recovered through the System Access Rate. AR2010-10756, 58 (SWP flexible storage "[c]osts recovered in SAR and RTS Charge"); AR2010-10779 at 10786 (rejecting proposal to shift "flex storage" costs to Met's supply rate); *see also* San Diego Proposed Statement of Decision at 30; San Diego Post-Trial Brief at 3 (failure to re-allocate costs). With this evidence in mind, San Diego respectfully requests that the Court clarify that Met does, in fact, recover some dry-year peaking costs through its Transportation Rates. And, to the extent the Decision with respect to dry-year peaking turned on the Court's uncertainty about whether dry-year peaking costs are part of Met's Transportation Rates, San Diego urges the Court to re-visit that determination.

Clarification Concerning Scope of Ruling

Finally, if the Court overrules these objections, or sustains the objections but still rules in Met's favor on the dry-year peaking claim under Proposition 26, San Diego requests that the Court clarify the scope of its ruling to avoid any ambiguity in future disputes between the parties. Specifically, San Diego asks that the Court specify (1) that San Diego's challenge here, and the Court's Decision, addressed the impact of dry-year peaking on Met's Transportation Rates only; and (2) that the Court's determination was based on the specific record the parties presented in these actions. San Diego believes that these limitations already appear implicitly in the Decision, but specific language on these points will limit future disputes by making it even more clear that the Court is not deciding or precluding a challenge to Met's other rates, or otherwise validating Met's approach to recovering the costs of what San Diego referred to at trial as dry-year peaking costs and the Court has referred to as the costs of maintaining contingency capacity.[2]

II. MISCELLANEOUS CLARIFICATIONS AND OBJECTIONS TO EVIDENCE

The Decision also invited the parties "to reiterate their objections to any evidence relied

[2] In addition to the items discussed above, San Diego incorporates by reference its previous submissions explaining the relevant evidence and essential findings of fact related to peaking, and directs the Court's attention specifically to the following: San Diego's Post-Trial Brief, at pages 30-36 and 53-58, and San Diego's Proposed Statement of Decision, at pages 17-19 and 30-32. San Diego hereby renews its request that the Court make all additional findings of facts set forth in San Diego's Proposed Statement of Decision.

on here, and to suggest corrections in sections that both favor and disagree with their positions." Decision at 4. To that end, San Diego submits the following suggested clarifications and evidentiary objections:

Suggested Clarification # 1 (Page 36)

The Decision includes a thorough discussion of Met Board Resolution 8520, the January 1997 resolution in which Met adopted its "postage stamp" wheeling rate. Decision at 36-39; *see* AR2010-2446 at 2449-50. But, while the Parties understand the relevance of Resolution 8520, the Decision does not specifically state why these 1997 factual findings bear on Met's wheeling rates set in 2010 and 2012. For clarity, San Diego requests that the Court also include in the first paragraph of this discussion, at pages 36 and 37 of the Decision, a statement that Met has identified Resolution 8520 as its "written findings" supporting its wheeling rates set in 2010 and 2012. *See* San Diego's Post-Trial Brief at 4:22-28 (citing Met's repeated admissions that Resolution 8520 constitutes its written findings); 12/19/13 Tr. at 476:21-478:18 (identifying it as Met's written findings); *see also* Water Code § 1813 (agency "shall support its determinations by written findings"). A brief explanation of why the Court looked to this 1997 resolution, at Met's insistence, in evaluating Met's 2011-2014 wheeling rates will likely be helpful to the Court of Appeal.

Suggested Clarification # 2 (Page 57)

In the last paragraph on page 57, the Decision states: "To accommodate this reference to 'conveyance facilities,' Met argues that its conveyance facilities are the state's (DWR's) conveyance facilities." San Diego submits that this formulation of Met's argument is ambiguous, insofar as it could be read to suggest that Met thinks its own conveyance facilities are part of DWR's system. As the Court knows, Met's argument was that its rights in the State Water Project render the State Water Project part of Met's "conveyance system." *See* AR2010-2446 at 2449; Met Pretrial Brief at 34:6-14; 12/17/13 Tr. at 19:3-13. San Diego suggests that Met's position might be more clearly stated by modifying the sentence above as follows: "To accommodate this reference to 'conveyance facilities,' Met argues that the state's (DWR's)

conveyance facilities are part of Met's conveyance facilities."

Suggested Clarification # 3 (page 60)

In the section addressing the Water Stewardship Rate, the Decision states: "While I cannot fault Met for not providing a transportation benefit number for *each* of the demand management programs, the best we can do with this record is to conclude that to some unspecified extent, some portion of the WSR is causally linked to some avoided transportation costs." Decision at 60 (emphasis in original). San Diego has two concerns.

First, the introductory, dependent clause of the above sentence is dictum. Having decided that the record fails to justify Met's allocation of 100% of its WSR rates to transportation, the Court need not decide what level of evidence might be sufficient, or how granular the evaluation of burdens and benefits must be. Some of Met's demand-management programs provide subsidies worth tens of millions of dollars, and generate many thousand acre-feet of new water supplies. The Court was not asked to decide, and need not decide here, whether Met could impose rates to fund large, individual demand-management programs without giving any consideration to who stands to benefit from them, and who will pay the costs. The Court's tentative language may lead to another fight about its meaning. San Diego requests that the Court remove that clause entirely, or rewrite it to state: "While I do not decide today whether Met must provide a transportation benefit number for *each* of the demand management programs . . ."

Second, San Diego objects to the tentative finding that "some portion of the WSR is causally linked to some avoided transportation costs." The Court will recall Met's binding judicial admission that it has not calculated the regional benefit to MWD created by the aggregate group of demand management projects in the challenged rate years, including but not limited to any additional transportation or conveyance capacity benefits or additional water supply benefits. *See* PTX-237A (responses to RFA Nos. 38, 40, 42). Just one sentence earlier, the Court correctly finds that "the record does not show correlation between those avoided costs and water stewardship rates." San Diego requests that the Court clarify the second clause to read: "the best we can do with this record is to conclude that some portion of the WSR might be causally linked

to some avoided transportation costs, but Met has not established or quantified such a causal link." By the same token, San Diego also suggests modifying the first sentence of the same paragraph to make clear that, consistent with the Court's finding that Met has not established a causal link between demand management programs and reduced transportation costs, the relationship between reduced supply needs and reduced transportation capacity needs is a possibility but not a categorical certainty. Specifically, San Diego suggests changing the first part of that sentence to read: "It is certainly possible that transportation capacity needs may be reduced . . .."

Suggested Clarification # 4 (Page 60)

Also on page 60, the Decision states: "The Raftelis 1999 report suggests 50-50 allocation, but that suggestion was made simply out of frustration that no data supported any other allocation; the number is wholly arbitrary, as is the allocation of 100% of these costs to the WSR." San Diego believes that the concluding clause could be clarified, for the benefit of the parties and the Court of Appeal. The basis for San Diego's challenge is not that Met recovers 100% of these costs through a Water Stewardship Rate, but rather that the Water Stewardship Rate is a *de facto* Transportation Rate, with 100% of Met's demand-management costs treated as "transportation costs." A more accurate formulation of the clause following the semicolon, conforming to the Decision's overall discussion of this issue, would be that "the number is wholly arbitrary, as is the allocation of 100% of these WSR charges to transportation."

Objection to Evidence #1 (page 63)

In the last paragraph on page 63, the Court relied on the extra-record testimony of June Skillman that "there are many reasons member agencies seek additional water, such as changes in the local economy." San Diego objects to the Court's reliance on this extra-record evidence with respect to any claim other than San Diego's challenge under the Wheeling Statutes. While San Diego broadly reserves for appeal its prior argument that the Court's review under at least Proposition 26 should *not* be confined to the administrative record,[3] the Court has confined its

[3] *See* Post-Trial Brief at 12-13; Amended First Pre-Trial Brief at 24-31.

review to the administrative record for all claims other than the Wheeling Statutes. *See* Nov. 5, 2013 Pretrial Rulings at 10-21. Thus, the Court's Decision should not rely on extra-record evidence to address any of those other claims, including San Diego's challenge based on Proposition 26.

III. CONTINUING JURISDICTION

In its post-trial submissions, San Diego requested that the Court retain jurisdiction over these cases to ensure that, going forward, Met complies with the Court's rulings. *See* San Diego Proposed Statement of Decision at 57; *Morro Bay*, 81 Cal. App. 4th at 1051. The Decision does not address this issue, and neither grants nor denies San Diego's request. San Diego renews its request that this Court retain jurisdiction, as the Court of Appeal directed the trial court to do in *Morro Bay*. *Id.* Given that Met is currently engaged in the process of setting new rates, and will have to set new rates again in light of the Court's Decision once the Decision is finalized, it is particularly "prudent that the trial court retain continuing jurisdiction to assure compliance with its order." *Id.* (citing *Wilson v. City of Laguna Beach*, 6 Cal. App. 4th 543, 561 (1992)).

IV. ORDER CLARIFYING RELIEF GRANTED

The Decision tentatively invalidates all of Met's challenged transportation rates (Met's System Access Rate, System Power Rate, Water Stewardship Rate, and its wheeling rates), for the four rate years at issue (*i.e.*, in both the 2010 and 2012 cases). Decision at 65. However, while the Decision notes the specific Transportation Rates that are challenged (Decision 1-2, 52), and notes that these "transportation rates" "violate Proposition 26, the Wheeling statute, Govt. Code § 54999[.]7(a) and the common law" (Decision at 65), San Diego believes that a clearer concluding statement of which rates are declared unlawful under which statutes could avoid any ambiguity for the Court of Appeal. Accordingly, San Diego requests that the Court modify the next-to-last paragraph on page 65 to read: "These rates—the System Access Rate, System Power Rate, Water Stewardship Rate, and Met's wheeling rate—therefore violate Proposition 26 (2013 and 2014 rates only), the Wheeling Statute, Govt. Code § 54999.7(a), and the common law. The Court invalidates each and every one of these rates, for both the 2011-2012 and 2013-2014 rate

cycles."[4]

In addition, and for the same reasons, San Diego renews its request that the Court include in its final statement of decision an express Order granting the specific relief that flows from the Court's Decision:

(1) invalidating and vacating Met's System Access Rate, System Power Rate, Water Stewardship Rate, and wheeling rates for 2011 and 2012, pursuant to the Wheeling Statute, Govt. Code § 54999.7(a), and the common law;

(2) invalidating and vacating Met's System Access Rate, System Power Rate, Water Stewardship Rate, and wheeling rates for 2013 and 2014, pursuant to Proposition 26, the Wheeling Statute, Govt. Code § 54999.7(a), and the common law; and

(3) requiring Met to set new rates consistent with the Decision.

The specific form of Order that San Diego requests is set forth at pages 55-57 of San Diego's Proposed Statement of Decision, which San Diego incorporates herein by reference.

In its Proposed Statement of Decision, San Diego also requested an order requiring Met to "refund the money it has collected from San Diego in excess of the reasonable costs of the services provided," or alternatively, to "follow the procedure of Government Code section 66016(a) and reduce San Diego's fees going forward to return the revenues it collected from San Diego in excess of actual cost." San Diego Proposed Statement of Decision at 56. San Diego interprets the Decision's silence on the refund issue as the Court's recognition of the fact that issues surrounding San Diego's entitlement to a non-contractual financial refund may overlap with the Court's consideration of contractual damages in Phase II. San Diego does not object to the Court deferring consideration of these issues for Phase II, but reserves its right to seek a

[4] The parenthetical and all language limiting Proposition 26 to the 2011 and 2012 rates is suggested purely for the sake of clarity; again, San Diego preserves its right to challenge on appeal the Court's determination that Proposition 26 does not apply in the 2010 case.

refund independent of the contract, while recognizing that properly-awarded contractual damages should obviate the need for, or limit the amount of, a separate refund.

Respectfully submitted,

Dated: March 27, 2014

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SAN DIEGO COUNTY WATER AUTHORITY

PROOF OF SERVICE BY ELECTRONIC TRANSMISSION AND EMAIL VIA PDF FILE

I am employed in the City and County of San Francisco, State of California in the office of a member of the bar of this court at whose direction the following service was made. I am over the age of eighteen years and not a party to the within action. My business address is Keker & Van Nest LLP, 633 Battery Street, San Francisco, CA 94111-1809.

On March 27, 2014, I served the following documents described as:

SAN DIEGO COUNTY WATER AUTHORITY'S OBJECTIONS TO TENTATIVE DETERMINATION AND PROPOSED STATEMENT OF DECISION ON RATE SETTING CHALLENGES

by serving a true copy of the above-described documents in the following manner:

BY LEXIS NEXIS® FILE & SERVE

On the date executed below, I electronically served the documents described above via Lexis Nexis® File & Serve on the recipients designated on the Transaction Receipt located on the via Lexis Nexis® File & Serve website.

Executed on March 27, 2014, at San Francisco, California.

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

Maureen L. Stone