



VIA EMAIL AND U.S. MAIL

December 18, 2019

Mr. Keene Simonds  
Executive Officer  
San Diego Local Area Formation Commission  
9335 Hazard Way, Suite 200  
San Diego, CA 92123  
[Keene.simonds@sdcounty.ca.gov](mailto:Keene.simonds@sdcounty.ca.gov)

RE: Comments on Item No. 3 | Request for Committee Recommendation | Leucadia Wastewater District's Authority to Provide Retail Recycled Water

Dear Mr. Simonds:

Please accept the following comments from the Carlsbad Municipal Water District (Carlsbad MWD) on the above-referenced item on the Special District Advisory Committee's (Committee) Dec. 20, 2019 meeting agenda.

The Committee previously referred this item to a Subcommittee for further study and recommendation. The Subcommittee found Leucadia Wastewater District's (Leucadia WWD) direct provision of recycled water service to the Omni La Costa Resort & Spa (Resort) between 1961 and 1991 gave Leucadia WWD grandfathered retail class rights. Consequently, the Subcommittee concluded Leucadia WWD did not require a latent service authorization from the San Diego Local Area Formation Commission (San Diego LAFCO) when Leucadia WWD began providing retail recycled water service to the Resort in 2018. The Subcommittee further recommended San Diego LAFCO amend the functions and services classification matrix in Rule 4.4 to include recycled water as a standalone function with both wholesale and retail services.

**Factual Clarifications**

While Carlsbad MWD greatly appreciates the Subcommittee's work on these issues, Carlsbad MWD believes some of the facts underlying the Subcommittee's report require clarification. Specifically, the Subcommittee's report characterizes the 1991 Agreement between Carlsbad

MWD and Leucadia WWD as “a shared retail agreement” because of the recycled water delivery method. However, under the terms of the agreement, Carlsbad MWD paid Leucadia WWD to deliver recycled water to the Resort, for which Carlsbad MWD then charged the Resort. In Carlsbad MWD’s view, this arrangement created a classic retailer-wholesaler relationship between Carlsbad MWD and Leucadia WWD and both parties consistently characterized the relationship as such.

Additionally, Leucadia WWD’s submission states Carlsbad MWD has developed plans to shut down Leucadia WWD’s Gafner Water Recycling Facility. Carlsbad MWD has no such plans and its decisions to end its wholesale supply agreements with Leucadia WWD were not prompted by such a desire. As explained in Carlsbad MWD’s submission, Carlsbad MWD’s 2012 Recycled Water Master Plan studied Carlsbad MWD’s recycled water supply and distribution options, including continuing to use Leucadia WWD as a wholesale supplier. The plan concluded Carlsbad MWD’s most cost-effective course was to stop buying recycled water from Leucadia WWD and begin producing and distributing more recycled water from the Carlsbad Water Recycling Facility. Carlsbad MWD has invested millions of dollars to implement this plan and the wisdom of doing so is validated by the financial information included in Leucadia WWD’s submission. This financial information indicates Leucadia WWD’s current cost of producing recycled water at the Gafner Facility is \$1,889 an acre foot. This is \$238 an acre foot more than Carlsbad MWD’s current cost and \$489 an acre foot more than Leucadia WWD is currently charging the Resort.

Relatedly, the Resort’s submission estimates it would cost the Resort \$80,000 more annually (based on a worst-case purchase of 500 acre feet) to purchase recycled water from Carlsbad MWD. However, this estimate assumes Leucadia WWD will continue selling recycled water to the Resort at less than Leucadia WWD’s cost to produce it. If Leucadia WWD charged the Resort enough to cover Leucadia WWD’s actual production cost, the Resort would save money by purchasing recycled water from Carlsbad MWD. Carlsbad MWD estimates the annual savings would be between \$62,000 (based on an historical average purchase of 260 acre feet) and \$119,000 (based on a worst-case purchase of 500 acre feet). Connecting to Carlsbad MWD’s recycled water pipeline in front of the Resort would also alleviate the Resort’s concerns about power costs and equipment life expectancy. The connection would provide the Resort with more flexibility in addressing the Resort’s irrigation needs and the connection’s pressure psi would allow the Resort to reduce power costs and extend equipment life expectancy. Consequently, Carlsbad MWD believes Carlsbad MWD is better positioned than Leucadia WWD to provide long-term, cost-effective recycled water service to the Resort.

### **Legal Position**

Carlsbad MWD also believes the Subcommittee’s finding, conclusion, and recommendation are inconsistent with applicable law. More particularly, Carlsbad MWD believes Leucadia WWD’s direct provision of recycled water service to the Resort between 1961 and 1991 has no bearing on whether Leucadia WWD was required to obtain a latent service authorization from San

Diego LAFCO in 2018. Rather, Carlsbad MWD believes the need for a latent service authorization depends on the nature and extent of the recycled water service Leucadia WWD was providing at the time San Diego LAFCO completed its most recent Sphere of Influence/Municipal Service Review (SOI/MSR) report.

Carlsbad MWD's position is supported by the following authorities:

1. The statute defining "latent service," which refers to a service authorized by the principal act under which a special district is formed, but which the special district is not exercising, as determined by the SOI/MSR report. (Gov. Code, §§ 56050.5; see also Gov. Code, § 56425, subd. (i).)
2. The statute and rule requiring San Diego LAFCO to determine the nature and extent of a special district's services in the SOI/MSR report. (Gov. Code, 56425, subd. (i); San Diego LAFCO Rule 4.8.)
3. The statutes and rule governing latent service authorizations, which apply whenever a special district seeks to exercise a new or different service than the services identified in the SOI/MSR report. (Gov. Code, § 56824.10; San Diego LAFCO Rule 4.9; see also Sen. Rules Com., Off. Sen. Floor Analyses, 3d reading analysis of Assem. Bill No. 948 (2001-2002 Reg. Sess.) as amended Sept. 4, 2001, p. 2 [explaining Gov. Code, §§ 56824.10-56824.14 allow a special district "to apply to a LAFCO to provide new or different services than the special district currently provides."])

The Subcommittee's finding, conclusion, and recommendation did not consider these authorities. Instead, the Subcommittee implicitly relied on the functions and services classification matrix in Rule 4.4 and recommended updating the rule to address future similar circumstances. However, San Diego LAFCO has no power to update the rule. The Government Code sections that previously authorized the rule's adoption and amendment (former Gov. Code, §§ 56820-56820.7) were repealed in 2001 as part of the same legislation that created the latent service authorization process (Gov. Code, §§ 56810-56824.14). (See Stats. 2001, ch. 667 (A.B. 948), §§ 5-7, 13.5). Presently, San Diego LAFCO's only power to act on the rule is to repeal it. (Gov. Code, § 56821, subd. (b).)

Indeed, because San Diego LAFCO may no longer adopt or amend a classification rule, the Legislature just clarified the definition of "service" to eliminate any reference to the obsolete classification authority. (See Sen. Rules Com., Off. Sen. Floor Analysis, 3d reading analysis of Assem. Bill No. 1822 (2019-2020 Reg. Sess.) as amended Apr. 8, 2019, p. 1) As clarified, "service" now simply refers to "a specific governmental activity established within, and as part of, a function of a local agency." (New Gov. Code, § 56074; Stats. 2019, ch. 20, § 1, eff. Jan. 1, 2020.)

Mr. Keene Simmonds  
San Diego Local Area Formation Commission  
December 18, 2019  
Page 4

Here, the specific governmental activity at issue is retail recycled water service. Because Leucadia WWD was not providing retail recycled water service when San Diego LAFCO completed its most recent SOI/MSR report, the service is a “new or different” service for Leucadia WWD and before Leucadia WWD may begin providing the service, Leucadia WWD must obtain a latent service authorization from San Diego LAFCO.<sup>1</sup> (See Gov. Code, § 56824.10; San Diego LAFCO Rule 4.9; see also, *South San Joaquin Irrigation Dist. v. Superior Court* (2008) 162 Cal.App.4<sup>th</sup> 146, 157-158.) Accordingly, Carlsbad MWD respectfully requests the Committee decline to adopt the Subcommittee’s finding, conclusion and recommendation and instead adopt a recommendation for the Executive Director to find Leucadia WWD is not currently authorized to provided recycled water service to the Resort.

Sincerely,



Celia A. Brewer  
General Counsel

cc (by email only):

Scott Chadwick, Executive Manager, Carlsbad Municipal Water District  
Gary Barberio, Deputy City Manager, Community Services, City of Carlsbad  
Paz Gomez, Deputy City Manager, Public Works, City of Carlsbad  
Vicki Quiram, General Manager, Carlsbad Municipal Water District  
Cindie K. McMahon, Assistant General Counsel, Carlsbad Municipal Water District  
Eric Sanders, Utilities Manager, Carlsbad Municipal Water District  
Paul Bushee, General Manager, Leucadia Wastewater District  
Wayne Brechtel, General Counsel, Leucadia Wastewater District  
Brian Hughes, General Manager, Omni La Costa Resort & Spa  
Michael Colantuno, General Counsel, San Diego Local Area Formation Commission  
Aleks R. Giragosian, Assistant General Counsel, San Diego Local Area Formation Commission

---

<sup>1</sup> Leucadia WWD must also obtain Carlsbad MWD’s authorization. (Water Code, § 13580.5, subd. (b).)