

City of Brisbane

Agenda Report

TO: Honorable Mayor and City Council

FROM: Randy Breault, Director of Public Works/City Engineer via City Manager

SUBJECT: Granting BAWSCA Limited Authority to Resolve Cost Allocation Disputes with the City and County of San Francisco

DATE: July 17, 2014

City Council Goals:

To promote intergovernmental opportunities that enhances services and/or reduces cost of operations and services to city residents. (#10)

Purpose:

To obtain Council's approval of resolutions that would authorize the Bay Area and Water Supply Conservation Agency (BAWSCA) to represent the City and the Guadalupe Valley Municipal Improvement District (GVMID) in matters related to the Water Supply Agreement with the City and County of San Francisco (CCSF).

Recommendation:

That the City Council acting on behalf of itself and in its capacity as the Board of Directors of the Guadalupe Valley Municipal Improvement District approve City Resolution No. 2014-30 and GVMID Resolution No. 2014-02 authorizing the Bay Area Water Supply and Conservation Agency to initiate, defend and settle arbitration related to the Water Supply Agreement with the City and County of San Francisco.

Background:

The City of Brisbane and GVMID receive 100% of their water supply from the CCSF via the Water Enterprise of the San Francisco Public Utilities Commission (SFPUC). Both districts are members of BAWSCA, and are referred to as one of SFPUC's "Wholesale Customers".

The City's water districts previously entered into a Water Supply Agreement (WSA) with the CCSF and Wholesale Customers in Alameda County, San Mateo County and Santa Clara County. The WSA sets forth the terms by which the twenty six Wholesale Customers will purchase water from the San Francisco Regional Water System.

One of the many important functions that BAWSCA performs on behalf of its member agencies is the regular ongoing review of the methodology used by SFPUC to determine adjustments to annual water rates. In very simple terms, the annual rates are calculated by SFPUC looking at their previous year's actual costs, obtaining an estimate of next year's purchases from BAWSCA member agencies, and then dividing this "wholesale revenue rate requirement" across the volume of water estimated to be purchased.

A significant portion of the review BAWSCA performs for us is an analysis to confirm or deny that previous costs used in SFPUC's calculations should in fact be paid by BAWSCA members. As examples; a significant part of the "upcountry" Regional Water System is dedicated solely to the hydrogeneration of electricity, which is all to the benefit of CCSF. Additionally, while BAWSCA members do share in the costs of operating those portions of SFPUC administrative buildings directly related to delivery of water to us, there are definitely portions of those facilities that provide no benefit to BAWSCA members (i.e., the childcare facility and coffee lounge in the new SFPUC headquarters building).

In both of the previous two examples, no cost should be assigned to BAWSCA members. Hydrogeneration is only to the benefit of CCSF and should not be any part of the base calculation. The mentioned portions of the new building provide no service to us, and they should not be included in the cost calculation (which is normally shared as 2/3 BAWSCA, 1/3 SFPUC based on the relative volume of water consumed).

The majority of the issues raised by BAWSCA staff on our behalf are typically resolved without resorting to arbitration; since 1984, BAWSCA (and its predecessor, BAWUA) discovered \$27 million in credits due to the wholesale customers.

The most current WSA (circa 2009) recognized that the BAWSCA members might wish to delegate arbitration authority to BAWSCA, but did not specifically grant that authority. As noted in the attached letter from the BAWSCA Chair, the BAWSCA Board believes that it is now time to delegate this authority to BAWSCA.

Discussion:

BAWSCA staff and consultants clearly have the expertise to fulfill the authority which they are requesting. City and GVMID staff do not have this capability; therefore, no analysis has been made regarding the impacts of a no vote on the attached resolutions.

Fiscal Impact:

There is no direct immediate fiscal impact anticipated as a result of the requested action. If the BAWSCA Board did utilize this authority, it is presumed that action would be taken to secure a significant credit to BAWSCA members as part of a dispute over calculations used in a wholesale revenue rate requirement. The action could be funded by BAWSCA reserves, by temporary increases in member fees, or some other yet to be determined action.

Measure of Success

Effective administrative oversight of the Water Supply Agreement with the City and County of San Francisco, particularly in regards to calculation of water rates to be paid by the wholesale customers.

Attachments:

- June 16, 2014 letter from BAWSCA Chair O'Connell to Mayor Conway
- City of Brisbane Resolution No. 2014-30
- GVMID Resolution No. 2014-02



Director of Public Works/City Engineer



City Manager



June 16, 2014

By Electronic and Regular Mail

Mr. W. Clarke Conway, Mayor
City of Brisbane and GVMID
50 Park Place
Brisbane, CA 94005

Re: Request to Authorize BAWSCA to Initiate, Defend and Settle Arbitration Related to the Water Supply Agreement to Protect Your Agency's Financial Interests

Dear Mayor Conway:

The City of Brisbane and GVMID purchase water from the San Francisco Regional Water System (RWS) and is one of the 26 members of the Bay Area Water Supply and Conservation Agency (BAWSCA). In 2009, the City and District approved the Water Supply Agreement between San Francisco and the Wholesale Customers (WSA) as well as Amendment No. 1 to the WSA, in Spring of 2013, which prohibited changes to Hetch Hetchy Reservoir unless there is an amendment to the WSA.

As Chair of the BAWSCA Board, the agency that represents your interests and administers the WSA, **I am writing you today to request that your agency now consider delegating to the BAWSCA Board the authority to initiate, defend and settle arbitration related to the WSA.**

The BAWSCA Board of Directors directed me to request this delegation of authority at its May 15, 2014 meeting. This action will allow BAWSCA to protect the financial interests of the Wholesale Customers by ensuring they pay no more than their fair share of RWS costs. Delegation of this authority was specifically anticipated in the WSA (WSA Section 8.04(c)). To facilitate this action, enclosed is a sample resolution prepared by BAWSCA's Legal Counsel.

Scope of Arbitration Limited to Cost Allocation Issues.

The WSA requires that disputes related to the calculation of the capital and operating costs owed by the Wholesale Customers to San Francisco (the Wholesale Revenue Requirement) be resolved through mandatory binding arbitration. This requirement includes disputes related to San Francisco's adherence to accounting and auditing practices, as well as the classification of new assets for cost allocation. (WSA Section 8.01(A)) All other questions or disputes related to the WSA, such as water supply, may be presented to a court and are excluded from this request for delegated authority.

Since 1984, almost every financial dispute with San Francisco has been settled before resorting to arbitration. The Wholesale Customers have only filed a demand for arbitration in the early 1990s, on two related matters. The parties ultimately settled all issues, save one technical accounting issue, prior the arbitrator imposing a final determination.

Contract Administration Already Delegated to BAWSCA.

When the prior agreement, the 1984 Master Contract and Settlement Agreement (1984 Agreement) was negotiated, there was no durable, representative organization that could be delegated responsibility to act as agent for contract administration on behalf of the Wholesale Customers. BAWSCA's predecessor, the Bay Area Water Users Association (BAWUA), was at that point simply an unincorporated association, governed entirely by city and water agency staff. For that reason, the 1984 Agreement provided for initiation of arbitration as well as a variety of administrative decisions to be made by five "Suburban Representatives" -- agencies to be chosen by all BAWUA members or, absent a selection, the five largest agencies.

With BAWSCA's formation in 2002 and the adoption of the new WSA in 2009, the Wholesale Customers have had a superior alternative to attend to the many technical but important matters related to the contract administration which continue to require oversight and decisions each year. The WSA specifically assigned a number of administrative tasks to BAWSCA, most of which were previously handled by the Suburban Representatives. However, at the time the WSA was adopted, it did not specifically delegate arbitration authority to BAWSCA, although it recognized that the Wholesale Customers may choose to do so.

BAWSCA is Prepared to Assume Responsibility for Arbitration.

The BAWSCA Board believes that it is timely and appropriate to implement the delegation of arbitration authority that was provided for in the WSA. As a regional government agency, in existence for more than a decade, whose Board of Directors is comprised largely of elected officials, and with a capable professional staff, BAWSCA is both durable and well prepared to assume the increased responsibility required to determine whether to initiate or settle arbitration required under the WSA.

Since 1984, BAWSCA staff and consultants have demonstrated success in contract administration, uncovering more than \$27 million in credits owed to the Wholesale Customers. This delegated arbitration authority will not be exercised by BAWSCA in a vacuum. The Wholesale Customers each have representation on the BAWSCA Board of Directors through their individual representatives. In addition, the BAWSCA Chief Executive Officer (CEO) plans to create an advisory Wholesale Customer Committee, composed of senior staff of each agency, to advise the agency on these matters.

New Wholesale Customer Committee will be Created.

In a few days, the BAWSCA CEO, Nicole Sandkulla, will be sending a separate letter to your City Manager, to request appointment of an agency representative to a committee of Wholesale Customer representatives. A similar structure used during the negotiation of the WSA from 2006 to 2009 was very successful. Such a committee could also serve a useful purpose in resolving cost allocation issues that might require arbitration. For example, presently, BAWSCA is disputing how San Francisco is allocating costs related to certain power assets of the RWS.

The CEO's letter will identify who was appointed to the previous committee formed for contract negotiations. These persons, primarily City Managers, Finance Directors and water district General Managers, were kept informed of developments and provided input on agreement provisions. If an agency wishes to appoint a BAWSCA Board member, they can do so, but the committee must include less than a quorum of Board members to ensure it does not constitute a legislative body subject to the Brown Act.

Request to Adopt Attached Resolution.

I respectfully ask that your agency adopt a resolution delegating authority to the BAWSCA Board of Directors to initiate, defend, and settle arbitration related to the WSA. The accompanying resolution has been drafted to minimize the amount of editing needed to be suitable for your agency. However, your agency is free to modify it so that it is consistent with your agency's preferred format. In particular, the heading at the top of the first page and the layout of the material following the last "Resolved" clause may need to be tailored to match your traditional practice.

Please submit this resolution to your agency's governing body as soon as possible. It would be most helpful to have these resolutions adopted by **September 1, 2014**. The next possible date to determine whether or not to initiate arbitration on the disputed costs set forth above is September 30, 2014. Once adopted, please forward the resolution to Ms. Allison Schutte, BAWSCA's Legal Counsel.

If your legal counsel has any questions about the attached resolution, they are welcome to contact BAWSCA Legal Counsel at the address listed below:

Allison Schutte, Esq.
Hanson Bridgett, LLP
425 Market Street, 26th Floor
San Francisco, CA 94105

Email: aschutte@hansonbridgett.com
Tel: 415-995-5823

If you have any non-legal questions related to this issue, please contact Nicole Sandkulla, BAWSCA CEO, at nsandkulla@bawsca.org or at 650-349-3000.

Sincerely,



Irene O'Connell
Chair, BAWSCA Board of Directors

Enclosure: Sample Agency resolution

CC: *(Via Electronic Mail Only)*
Clay Holstine, City Manager
Sepi Richardson and Randy Breault, BAWSCA Board Members
Randy Breault and Jerry Flanagan, Water Management Representatives
Nicole Sandkulla, CEO
Allison Schutte, Legal Counsel

RESOLUTION NO. 2014-30

**A RESOLUTION OF THE CITY COUNCIL OF THE CITY OF BRISBANE
AUTHORIZING THE BAY AREA WATER SUPPLY AND CONSERVATION AGENCY
TO INITIATE, DEFEND AND SETTLE ARBITRATION RELATED TO
THE WATER SUPPLY AGREEMENT
WITH THE CITY AND COUNTY OF SAN FRANCISCO**

WHEREAS, in April 2003, the City of Brisbane (City) and other water suppliers in Alameda, San Mateo and Santa Clara counties established the Bay Area Water Supply and Conservation Agency (BAWSCA) as authorized by Water Code Section 81300 *et seq.* pursuant to State legislation enacted in 2002 (AB 2058); and

WHEREAS, the City is represented on the BAWSCA Board of Directors; and

WHEREAS, the City Council has previously approved the Water Supply Agreement between the City and County of San Francisco and Wholesale Customers in Alameda County, San Mateo County and Santa Clara County (Agreement); and

WHEREAS, the Agreement specifically delegates, pursuant to Section 8.04.A., Wholesale Revenue Requirement review to BAWSCA; and

WHEREAS, all questions and disputes related to the Agreement are subject to judicial determination, except for the following matters, specified in Section 8.01.A., which are subject to mandatory, binding arbitration: (1) the determination of the Wholesale Revenue Requirement, (2) San Francisco Public Utilities Commission's (SFPUC's) adherence to accounting practices and conduct of the Compliance Audit, and (3) the SFPUC's classification of new assets for the purposes of determining the Wholesale Revenue Requirement and

WHEREAS, the Agreement, pursuant to Section 8.04.C., provides that the Wholesale Customers may, with the consent of BAWSCA, delegate the authority to initiate, defend and settle arbitration of the matters provided for in Section 8.01.A. set forth above; and

WHEREAS, the BAWSCA Board of Directors has requested that the City delegate this authority to initiate, defend and settle arbitration solely for those limited matters in the Agreement that must be resolved through binding arbitration in order to protect the financial interests of the Wholesale Customers by ensuring they pay no more than their fair share of regional water system costs; and

WHEREAS, BAWSCA has the capabilities required to serve in this capacity by virtue of the expertise and qualifications of BAWSCA staff and consultants in relevant disciplines including civil engineering, water supply planning, finance, economics, accounting, and law; and

WHEREAS, BAWSCA will also finance the costs associated with such binding arbitration.

NOW THEREFORE BE IT RESOLVED:

1. City appoints BAWSCA, acting through its Board of Directors, or its authorized designee, as its authorized representative to initiate, defend and settle arbitration for the matters that are subject to mandatory, binding arbitration in the Water Supply Agreement between the City and County of San Francisco and Wholesale Customers in Alameda County, San Mateo County and Santa Clara County.
2. This appointment shall continue through the term of the Agreement, as extended or renewed, or until revoked by the City Council.

W. Clarke Conway, Mayor

I hereby certify that the foregoing Resolution No. 2014-30 was duly and regularly adopted at the regular meeting of the Brisbane City Council on _____ 2014, by the following vote.

AYES:

NOES:

ABSENT:

Sheri Marie Spediacci, City Clerk

APPROVED AS TO FORM:

David Kahn, City Attorney

RESOLUTION NO. 2014-02

A RESOLUTION OF THE BOARD OF DIRECTORS OF THE GUADALUPE VALLEY MUNICIPAL IMPROVEMENT DISTRICT AUTHORIZING THE BAY AREA WATER SUPPLY AND CONSERVATION AGENCY TO INITIATE, DEFEND AND SETTLE ARBITRATION RELATED TO THE WATER SUPPLY AGREEMENT WITH THE CITY AND COUNTY OF SAN FRANCISCO

WHEREAS, in April 2003, the Guadalupe Valley Municipal Improvement District (District) and other water suppliers in Alameda, San Mateo and Santa Clara counties established the Bay Area Water Supply and Conservation Agency (BAWSCA) as authorized by Water Code Section 81300 *et seq.* pursuant to State legislation enacted in 2002 (AB 2058); and

WHEREAS, the District is represented on the BAWSCA Board of Directors; and

WHEREAS, the District's Board of Directors has previously approved the Water Supply Agreement between the City and County of San Francisco and Wholesale Customers in Alameda County, San Mateo County and Santa Clara County (Agreement); and

WHEREAS, the Agreement specifically delegates, pursuant to Section 8.04.A., Wholesale Revenue Requirement review to BAWSCA; and

WHEREAS, all questions and disputes related to the Agreement are subject to judicial determination, except for the following matters, specified in Section 8.01.A., which are subject to mandatory, binding arbitration: (1) the determination of the Wholesale Revenue Requirement, (2) San Francisco Public Utilities Commission's (SFPUC's) adherence to accounting practices and conduct of the Compliance Audit, and (3) the SFPUC's classification of new assets for the purposes of determining the Wholesale Revenue Requirement and

WHEREAS, the Agreement, pursuant to Section 8.04.C., provides that the Wholesale Customers may, with the consent of BAWSCA, delegate the authority to initiate, defend and settle arbitration of the matters provided for in Section 8.01.A. set forth above; and

WHEREAS, the BAWSCA Board of Directors has requested that the District delegate this authority to initiate, defend and settle arbitration solely for those limited matters in the Agreement that must be resolved through binding arbitration in order to protect the financial interests of the Wholesale Customers by ensuring they pay no more than their fair share of regional water system costs; and

WHEREAS, BAWSCA has the capabilities required to serve in this capacity by virtue of the expertise and qualifications of BAWSCA staff and consultants in relevant disciplines including civil engineering, water supply planning, finance, economics, accounting, and law; and

WHEREAS, BAWSCA will also finance the costs associated with such binding arbitration.

NOW THEREFORE BE IT RESOLVED:

1. District appoints BAWSCA, acting through its Board of Directors, or its authorized designee, as its authorized representative to initiate, defend and settle arbitration for the matters that are subject to mandatory, binding arbitration in the Water Supply Agreement between the City and County of San Francisco and Wholesale Customers in Alameda County, San Mateo County and Santa Clara County.

2. This appointment shall continue through the term of the Agreement, as extended or renewed, or until revoked by the District Board of Directors.

W. Clarke Conway, President

I hereby certify that the foregoing Resolution No. 2014-02 was duly and regularly adopted at the regular meeting of the Guadalupe Valley Municipal Improvement District on _____ 2014, by the following vote.

AYES:

NOES:

ABSENT:

Sheri Marie Spediacci, District Secretary

APPROVED AS TO FORM:

David Kahn, District Counsel