



BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

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In the Matter of the Application of  
California-American Water Company  
(U210W) for an Order Authorizing the  
Transfer of Costs Incurred in 2008 for  
its Long-Term Water Supply Solution  
for the Monterey District to its Special  
Request 1 Surcharge Balancing  
Account.

Application 09-04-015  
(Filed April 16, 2009)

**REPLY BRIEF OF THE DIVISION OF RATEPAYER ADVOCATES  
OPPOSING CERTAIN ASPECTS OF THE PROPOSED  
REIMBURSEMENT AGREEMENT**

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June 4, 2010

In the Matter of the Application of California-American Water Company (U210W) for an Order Authorizing the Transfer of Costs Incurred in 2008 for its Long-Term Water Supply Solution for the Monterey District to its Special Request 1 Surcharge Balancing Account.

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**I. BACKGROUND**

Pursuant to the Joint Amended Scoping Memo and Ruling of March 10, 2010 and Rule 13.11 of the Commission's Rules of Practice and Procedure, the Division of Ratepayer Advocates (DRA) files this Reply Brief responding to the Opening Brief filed on May 21, 2010 by California-American Water Company (Cal Am) and the Joint Brief filed by Marina Coast Water District (Marina Coast), and the Monterey County Water Resources Agency (Monterey County WRA) (together Parties).

The Parties seek Commission approval of a Reimbursement Agreement whereby Cal Am would loan up to \$4.3 million to Marina Coast and Monterey County WRA (together Local Agencies) to reimburse them for their expenses incurred between February and December 2010 to pursue development of a regional water supply solution to Cal Am's Monterey District water supply deficit (Regional Project). Under the Reimbursement Agreement, if the CPUC does not approve the Parties' proposed Regional Project, which is being litigated in A. 04-

09-019, Cal Am will forgive the loans to the Local Agencies and instead seek recovery of the loaned money from its own ratepayers. In that event, Cal Am would further (above the amounts projected in the Reimbursement Agreement) pay the Local Agencies for their litigation costs to support Cal Am's recovery of the loaned monies from its ratepayers.<sup>1</sup>

DRA supports many aspects of the Reimbursement Agreement. However, it opposes those aspects of the Reimbursement Agreement that would require Cal Am ratepayers to pay the Local Agencies' litigation costs, and it opposes the extension or modification of the Reimbursement Agreement absent Commission approval. Contrary to the Parties' assertions in their briefs, third party litigation costs are *not* the kinds of costs that "would be recoverable from the utility's ratepayers in the ordinary course."<sup>2</sup> Instead this category of costs is routinely *disallowed* by the Commission. Consequently, the Local Agencies' costs related to litigation should be tracked and excluded from the Coastal Water Project Memorandum Account. Further, the Commission should clarify: (1) that the Parties may not extend or modify the Reimbursement Agreement without prior Commission approval, including any increase in the current \$4.3 million cost cap;<sup>3</sup> and (2) that the provision in Section 6 of the Reimbursement Agreement requiring Cal Am to pay the Local Agencies' litigation costs to support Cal Am's request for rate recovery of certain costs is rejected.

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<sup>1</sup> See Reimbursement Agreement at Sec. 6, attached as Exhibit A to the February 26, 2010 Joint Motion of California-American Water Company, Marina Coast Water District and Monterey County Water Resources Agency for Expedited Approval of Reimbursement Agreement and for an Order Shortening Time to Respond (Joint Motion for Expedited Approval of Reimbursement Agreement).

<sup>2</sup> Local Agencies' Opening Brief at 5 and similar at 2 ("These are the sort of costs incurred in developing a significant capital project that would routinely be recoverable by a Commission-regulated utility"); see also Cal Am Opening Brief at 4 and 11-12 (arguing that these types of costs have been approved in prior Commission decisions regarding the Regional Project).

<sup>3</sup> Section 1 of the Reimbursement Agreement provides that the \$4.3 million cap could be increased as "agreed to by the Parties in writing, which agreement shall not be unreasonably withheld."

## II. DISCUSSION

### A. It Is Not Standard Practice For Regulated Utilities To Reimburse Third Party Litigation Costs

Both the Cal Am and Local Agencies' briefs argue that "[t]here is little if any issue that these very kinds of costs, involved in the development of any significant capital project and incurred by a regulated utility, would be recoverable from the utility's ratepayers in the ordinary course."<sup>4</sup> While applicant litigation expenses are routinely approved by the Commission, the Parties are incorrect in arguing that it is standard practice for a regulated utility to use ratepayer funds to pay the litigation costs of a third party. To the contrary, it is well-settled Commission policy that similar costs, such as costs related to legislative advocacy and charitable contributions, are not charged to ratepayers,<sup>5</sup> and the California Supreme Court expressed its approval of this policy in a 1965 review of a Commission decision.<sup>6</sup>

In a Pacific Telephone and Telegraph Company (Pacific) rate case from the 1960s the Commission disallowed these expenses,<sup>7</sup> and the California Supreme Court upheld the disallowance, quoting extensively from the Commission's decision. With regard to legislative advocacy costs, the Supreme Court adopted the Commission's logic that Pacific's ratepayers should not have to pay for legislative advocacy that they cannot make their own judgments about:

“[When Pacific] claims benefits to its ratepayers from such activities, it is presuming to determine without consent or prior knowledge of such

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<sup>4</sup> See Note 2, above.

<sup>5</sup> D. 07-03-044, 2007 Cal. PUC LEXIS 173, \*223 (“Long-standing Commission policy prohibits rate recovery of any costs for political lobbying or advocacy.”); D. 84-05-039 at Finding of Fact 9, 1984 Cal. PUC LEXIS 1325, \*57 (“The Commission has consistently disallowed for ratemaking purposes such expenses as donations, dues, and contributions to charitable, social and political organizations, as well as expenses for legislative advocacy and certain types of advertising.”); and D. 80073, 1972 Cal. PUC LEXIS 1062 \*6 (“As we have stated on occasions too numerous to mention, the expenses of political activity such as indulged in by defendant cannot be charged to the ratepayer, but must be paid for from earnings.”).

<sup>6</sup> *Pacific Telephone and Telegraph Co. v. CPUC*, 62 Cal. 2d 634, 668-671 (1965) (*PT&T v. CPUC*).

<sup>7</sup> CPUC Decision No. 67369, 62 CPUC 775 (1964).

ratepayers what pending legislation is or is not beneficial to them. Even conceding that such activity in a given instance may prove to be beneficial to . . . ratepayers, we hold that they should not be required to pay for costs of such legislative advocacy without having the opportunity to make their own judgments on what legislative proposals they would or would not favor and to designate who, if anyone, should advocate their interests before the Legislature.”<sup>8</sup>

With regard to donations, contributions, and service club dues, the Supreme Court upheld the Commission’s significant disallowance of those costs, again relying on the Commission’s own language that pass through of such costs to ratepayers would constitute an “involuntary levy”:

"Dues, donations and contributions, if included as an expense for rate-making purposes, become an involuntary levy on ratepayers, who, because of the monopolistic nature of utility service, are unable to obtain service from another source and thereby avoid such a levy. Ratepayers should be encouraged to contribute directly to worthy causes and not involuntarily through an allowance in utility rates. [Pacific] should not be permitted to be generous with ratepayers' money but may use its own funds in any lawful manner."<sup>2</sup>

While not articulated by the Supreme Court in *PT&T v. CPUC*, the decision rests on the same constitutional principles discussed in DRA’s Opening Brief – the First Amendment rights to free speech, including the right to be free from involuntary association with speech that a ratepayer may not support.

The same principles articulated in *PT&T v. CPUC* regarding legislative advocacy and donations apply to third party litigation costs.

The Local Agencies will use the monies provided under the Reimbursement Agreement to represent and protect their own interests. This is confirmed in the minutes from the April 26, 2010 Monterey County WRA Board of Directors meeting, where the General Manager explained to a member of the public who

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<sup>8</sup> *PT&T v. CPUC* at 670, quoting from CPUC Decision No. 67369.

<sup>2</sup> *PT&T v. CPUC* at 668 quoting from CPUC Decision No. 67369.

questioned the need for legal services that “Counsel is needed to make certain Agency interests are represented in the Settlement and Water Purchase Agreements.”<sup>10</sup> And because of the current structure proposed for the Regional Project – which DRA objects to – it is unlikely that the interests of the Local Agencies will be consistent with the interests of Cal Am’s ratepayers. In fact, while Cal Am’s ratepayers would benefit from conservation of litigation resources, at least Monterey County WRA appears to be willing to spend freely at Cal Am ratepayer expense. At the same meeting, the Monterey County WRA Board of Directors voted to approve a *fourth* amendment to its legal services agreement, thereby authorizing a total of \$500,000 in legal expenses. “Finance Committee Chair Collins advised board members that the Agency is billing Cal Am for these monies, which will be reimbursed 100 per cent.”<sup>11</sup>

As the Commission held in the Pacific rate case, with California Supreme Court approval, the utility “should not be permitted to be generous with ratepayers’ money but may use its own funds in any lawful manner.”<sup>12</sup> Thus, while Cal Am shareholders are welcome to reimburse the Local Agencies for their litigation costs, *PT&T v. CPUC* and long settled Commission policy do not support this cavalier expenditure of ratepayer funds to finance third party speech inconsistent with ratepayer interests.

**B. There Is No Evidentiary Support That Up Front Ratepayer Funding Of The Local Agencies’ Litigation Costs Is Necessary or Appropriate**

According to Cal Am, the justification for paying the Local Agencies’ legal, consultant and administrative costs associated with litigating the

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<sup>10</sup>Monterey County WRA Board of Directors, April 26, 2010 meeting minutes at page 5, available at: [http://www.mcwra.co.monterey.ca.us/BOD/BOD/minutes/BOD%20Minutes%20April%2026%202010\\_mtg.pdf](http://www.mcwra.co.monterey.ca.us/BOD/BOD/minutes/BOD%20Minutes%20April%2026%202010_mtg.pdf).

<sup>11</sup> *Id.*

<sup>12</sup>*PT&T v. CPUC* at 668 quoting from CPUC Decision No. 67369.

Commission proceedings is that “cash flow issues” impede their ability to “fully participate” in the Commission proceedings regarding the Regional Project.<sup>13</sup>

These contentions are bald assertions with no evidentiary support. Among other things, the Local Agencies have presented no evidence to demonstrate their dire financial state, or that their controlling boards have denied them funding to represent their interests in the Regional Project before the Commission. Further, if money is so tight, it is fair to ask why the Parties’ aren’t prioritizing the funding and performance of the drilling and environmental work that *must* be done to advance the Regional Project, rather than engaging in expensive litigation battles to protect the proposed structure of the transaction? Finally, the Parties’ filings lack any cogent explanation of why Cal Am’s ratepayers are responsible for the Local Agencies’ alleged financial travails.

Juxtaposed against the Local Agencies’ claims of financial hardship is their express recognition of the importance of the Regional Project to the Monterey area economy and the absolute need for their participation in a Regional Project. In their Joint Brief the Local Agencies starkly explain that Cal Am’s failure to comply with the Cease and Desist Order could result in “economic catastrophe for the Monterey Peninsula” and that “there would not be enough water for basic health and safety needs, let alone support of the main source of commerce on the Peninsula, tourism.”<sup>14</sup> Marina Coast estimated in rebuttal testimony submitted in A.04-09-019 that Monterey County would lose 12% of industrial sales, 6% of commercial sales, 3% of industrial payroll, and 2% of commercial payroll, with corresponding levels of job losses, if no project is implemented.<sup>15</sup> Despite their contentions about the dire consequences that will occur in the Monterey area if a

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<sup>13</sup> See Cal Am Opening Brief at 8; Joint Motion for Expedited Approval of Reimbursement Agreement at 1-2.

<sup>14</sup> Local Agencies’ Opening Brief at 3.

<sup>15</sup> Rebuttal testimony of Mark P. Berkman and David L. Sunding on behalf of Marina Coast in A.04-09-019 at pp. 17-19. Marina Coast would likely experience some of the effects of such an economic downturn as the Cal Am and Maria Coast service territories are adjacent.

Regional Project is not implemented, the Local Agencies' Joint Brief suggests that their participation in the Regional Project is voluntary.<sup>16</sup>

The Local Agencies' benign characterization of their interest in this proceeding lacks credibility. While there is no question that the Local Agencies' participation in a Regional Project is necessary – which is why DRA supports reimbursement of the costs for many of the activities contemplated in the Reimbursement Agreement - the primary purpose of the Local Agencies' litigation before the Commission is to protect their own financial interests implicated by the Regional Project. As such, as noted in DRA's Opening Brief, with the exception of ratepayer representatives who must demonstrate hardship, it is standard practice that entities with an interest in a Commission proceeding represent themselves at their own cost.

The Local Agencies do not qualify for compensation under the Commission's intervenor compensation rules. No persuasive demonstration has been made here – supported either by facts or policy - that the Commission should deviate from this precedent and require ratepayers to fund the representation of parties who do not share their interests.

### **III. CONCLUSION**

For the reasons set forth in DRA's Opening Brief and above, the Local Agencies' costs related to litigation should be tracked and excluded from the Coastal Water Project Memorandum Account. Further, the Commission should clarify: (1) that the Parties may not extend or modify the Reimbursement Agreement without prior Commission approval, including any increase in the current \$4.3 million cost cap; and (2) that the provision in Section 6 of the Reimbursement Agreement providing that Cal Am will pay the Local Agencies' litigation costs to support Cal Am's request for rate recovery of certain costs is rejected.

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<sup>16</sup>Local Agencies' Opening Brief at 3.

Respectfully submitted,

/s/ TRACI BONE

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June 4, 2010

**CERTIFICATE OF SERVICE**

I hereby certify that I have this day served a copy of the foregoing document “**REPLY BRIEF OF THE DIVISION OF RATEPAYER ADVOCATES OPPOSING CERTAIN ASPECTS OF THE PROPOSED REIMBURSEMENT AGREEMENT**” in **A.09-04-015** by using the following service:

**E-Mail Service:** sending the entire document as an attachment to all known parties of record who provided electronic mail addresses.

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Executed in San Francisco, California, on the 4th day of June, 2010.

/s/ ALBERT HILL

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