BEFORE THE PUBLIC UTILITIES COMMISSION

OF THE STATE OF CALIFORNIA

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Application of California-American Water Company (U210W) for Approval of the Monterey Peninsula Water Supply Project and Authorization to Recover All Present and Future Costs in Rates.	A.12-04-019 (Filed April 23, 2012)

REPLY COMMENTS OF CALIFORNIA-AMERICAN WATER COMPANY ON THE PROPOSED DECISION DECLARING PREEMPTION OF COUNTY ORDINANCE

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I. INTRODUCTION

Pursuant to Rule 14.3 of the Rules and Practice of Procedure of the California Public Utilities Commission ("Commission"), California-American Water Company ("California American Water") hereby submits its reply comments in support of the proposed *Decision Declaring Preemption of County Ordinance and the Exercise of Paramount Jurisdiction* ("Proposed Decision"), issued in the above-captioned proceeding on September 21, 2012.

II. BACKGROUND

The Proposed Decision finds that the Commission's authority, exercised through General Order ("GO") 103-A, preempts the Monterey County Desalination Ordinance ("Ordinance"), Title 10, Chapter 10.72. The Proposed Decision directs California American Water to expeditiously seek dismissal, summary judgment or other favorable disposition of *County of Monterey vs. California American Water Company*. The County of Monterey and the Monterey County Water Resources Agency ("MCWRA"), Marina Coast Water District ("MCWD"), and Water Plus submitted opening comments on the Proposed Decision on October 10-11, 2012. The County of Monterey and MCWRA note that they "have not submitted substantive legal

comment concerning the PD";[1] therefore, California American Water will limit its reply to the issues raised by MCWD and Water Plus.

MCWD concedes that the Commission can preempt the Ordinance if it conflicts with an exercise of the Commission's regulatory jurisdiction, but asserts that Commission cannot find the Ordinance preempted until it issues a Certificate of Public Convenience and Necessity ("CPCN"). Water Plus argues that the Commission has no authority to declare a local ordinance preempted unless it issues a CPCN and that the Commission is overreaching by regulating sources of supply. California American Water addresses these arguments below.

III. THE PROPOSED DECISION CORRECTLY FINDS THE ORDINANCE PREEMPTED

The Proposed Decision correctly finds that the Commission's authority preempts the Ordinance. As California American Water previously demonstrated, the Ordinance is preempted under all three theories of preemption: express preemption, field preemption, and conflict preemption.[2] It conflicts with state law because it conflicts with GO 103-A, encroaches upon the Commission's exclusive jurisdiction of public water utilities and water utility facilities, and conflicts with the Commission's authority to permit and certificate water utility facilities. It is further preempted because it encroaches on a field of regulation fully occupied by the Commission's jurisdiction as defined in the California Constitution and the Public Utilities Code.[3]

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[1] *Comments of County Of Monterey and The Monterey County Water Resources Agency on Proposed Decision Declaring Preemption of County Ordinance and The Exercise of Paramount Jurisdiction*, filed October 11, 2012 ("Comments of Monterey County and MCWRA"), p. 2.

[2] For an overview of preemption as applied to the Ordinance refer to California American Water's briefs on threshold legal issues. *California-American Water Company Opening Brief on Legal Issues for Early Resolution*, filed July 11, 2012, pp. 1-10; *California-American Water Company Reply Brief on Legal Issues for Early Resolution*, filed July 25, 2012 ("California American Water Legal Issues Reply Brief"), pp. 1-7.

[3] Indeed, the Commission indicated its intent to fully occupy the field of California American Water's water supply for Monterey nearly forty years ago, beginning with Case 9530. *See e.g.* D.81443, *Investigation on the Commission's own motion into the operations, practices, service, equipment, facilities, rules, regulations, contracts, and water supply of the Monterey Peninsula District Of California-American Water Company*, 75 CPUC 231 (1973).

Notably, both MCWD and Water Plus concede that the Commission may preempt the Ordinance through the issuance of a CPCN.[4] Nevertheless they dispute the Proposed Decision's preemption findings here. MCWD argues that the Commission's finding of preemption is premature. MCWD argues that, while the Commission has authority to preempt the Ordinance, it may only do so "in rendering its final decision on the CPCN application after considering all relevant factors *if that final decision conflicts* with the Ordinance."[5] MCWD identifies a number of legal and factual issues that it contends must be resolved prior to the issuance of a CPCN.[6] MCWD further argues that because there is no conflict between Commission orders and the Ordinance until the issuance of a CPCN, "the ultimate question of actual, rather than theoretical, preemption is not yet ripe."[7] MCWD proposes modifications to the findings and ordering paragraphs that would postpone a finding of preemption to the conclusion of this proceeding. Similarly Water Plus argues that "without a CPCN, [the Commission] does have the authority to [preempt the Ordinance]."[8]

MCWD and Water Plus are incorrect with respect to the need for a CPCN. MCWD's proposed modifications to the Proposed Decision's findings and ordering paragraphs are inappropriate and should be rejected. As the Proposed Decision explains, the Ordinance has

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[4] *Marina Coast Water District's Comments on Proposed Decision (Preemption)*, filed October 11, 2012 ("MCWD Comments"), p. 2; *Response by Water Plus to Proposed Decision Declaring Preemption of Monterey County Ordinance*, filed October 10, 2012 ("Water Plus Comments"), p. 6.

[5] MCWD Comments, p. 2 (emphasis added).

[6] *See e.g.* MCWD Comments, pp. 7, 8.

[7] MCWD Comments, p. 8.

[8] Water Plus Comments, p. 6. Water Plus argues that a CPCN will not be issued because it is unlikely that the Monterey Peninsula Water Supply Project will succeed. In support of this argument, Water Plus claims that the Technical Advisory Committee ("TAC") of the Monterey Peninsula Regional Water Authority ("MPRWA") concluded "that the Pacific Grove project has a much greater likelihood of success than the Cal Am project." (Water Plus Comments, p. 5.) A review of the preliminary analysis conducted for the TAC, however, shows no such conclusion. The TAC's consultants, Separation Processes, Inc. ("SPI"), concluded that "each project has attendant risk, with none considered to be disqualifying at this juncture," and recommends that each be included in the MPRWA review. Furthermore, SPI noted that lack of information regarding the Pacific Grove project hindered its analysis of the project's risks. Specifically, SPI stated, "the lack of specificity in the [Pacific Grove] treatment approach is a concern," "it is difficult to make an assessment of treatment process risk without a defined intake strategy," and "the [Pacific Grove] proposal does not propose a milestone for design so it is left to conjecture." (*See* MPRWA TAC Agenda Packet, Attachment A, Monterey Desalination Study - Initial Scoping and Constraints Analysis, Separation Processes, Inc., August 30, 2012 ["SPI Analysis"], *available at* <http://www.isearchmonterey.org/meeting.aspx?cabinet=published_meetings&docid=35448>) Although Water Plus notes that its comments were not drafted by an attorney, that is no excuse for its mischaracterization.

already been expressly preempted by GO 103-A and D.09-09-004.[9] GO 103-A states that "[l]ocal agencies acting pursuant to local authority are preempted from regulating water production, storage, treatment, transmission, distribution or other facilities…constructed or installed by water or wastewater utilities subject to the Commission's jurisdiction."[10] Because the Ordinance regulates water utility facilities, it is in direct conflict with GO 103-A. In addition, the Ordinance encroaches on the Commission's exclusive authority over water utility facilities. As such, it is preempted and invalid.

MCWD's argument that the Commission cannot find the Ordinance preempted until it determines that California American Water possesses water rights sufficient to operate the desalination plant and until completion of environmental review is similarly flawed.[11] While there are a number of legal, factual, and procedural issues that must be addressed prior to the issuance of the CPCN, the provision in GO 103-A preempting municipal regulation operates independently of these requirements. As the Proposed Decision notes, the Commission's regulation of water utility facilities is expansive and exclusive. Even if the Commission were to reject California American Water's application on other grounds, the Ordinance would still be in conflict with GO 103-A and would still be encroaching on the Commission's exclusive jurisdiction. As such, the Ordinance is preempted and invalid.

Water Plus argues that the Proposed Decision overreaches by extending the Commission's authority to include sources of water supply.[12] This argument is already adequately addressed and rejected in the Proposed Decision. [13] The proposed desalination facility at issue in this proceeding is a water utility facility and is therefore subject to the exclusive jurisdiction of this Commission.[14] The Ordinance cannot be saved by the fact that it may also relate to source of water supply. The ultimate question in determining field preemption

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[9] Proposed Decision, p. 11.
[10] Proposed Decision, p. 11.
[11] MCWD Comments, p. 7.
[12] Water Plus Comments, p. 5.
[13] Proposed Decision, p. 16.
[14] California American Water Legal Issues Reply Brief, p. 2.

is not a law's intended purpose but whether the law *in effect* regulates in the same field of regulation occupied by the state.[15]

Both Water Plus and MCWD completely disregard the actual text of the Ordinance. Even if the purpose of the Ordinance is to promote health and safety or conservation of groundwater resources, the *effect* of the Ordinance is to regulate the ownership, permitting, construction and operation of water utility facilities. As such, the subject matter of the Ordinance and the subject matter of the Commission's jurisdiction are substantially identical.[16] For example, the Ordinance establishes a certification process that must be followed prior to commencing construction and operations and requires that applicants submit contingency plans to ensure adequate service, demonstrate financial capability, and submit maintenance and operating plans prior to commencing operations.[17] These requirements mirror the Commission's CPCN process and the requirements of GO 103-A. As such, the Ordinance encroaches on a field of regulation fully occupied by the Commission. There is no room for local regulation and the Ordinance is therefore preempted.

IV. CONCLUSION

For the foregoing reasons, California American Water supports the Proposed Decision, as drafted, and opposes to modifications proposed by MCWRA and Water Plus.

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[15] *Id*.

[16] *California Water & Telephone Co. v. County of Los Angeles* (1967) 253 Cal. App. 2d 16 (Invalidating County Ordinance on grounds of both conflict and field preemption where it interfered with Commission's comprehensive jurisdiction over utility facilities under Pub. Util. Code §§ 781, 798, 1001 and GO 103-A)

[17] Monterey County Ordinance 10.72.020; 10.72.030.

October 16, 2012

Respectfully submitted,

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