

**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 (U 210 W) 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)

**MARINA COAST WATER DISTRICT'S COMMENTS ON  
PROPOSED DECISION (PREEMPTION)**

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## **I. INTRODUCTION AND STATEMENT OF POSITION.**

In accordance with Rule 14.3 of the Commission's Rules of Practice and Procedure, Marina Coast Water District ("MCWD") respectfully submits its comments to the Proposed Decision Declaring Preemption of County Ordinance and the Exercise of Paramount Jurisdiction filed on September 21, 2012 (the "PD"). MCWD urges that the PD be revised to reflect solely the Commission's decision that it has the authority to preempt the Monterey County ordinance requiring public ownership and operation of desalination facilities (the "Ordinance"), if the Commission should find at a later time that the present or future public convenience and necessity requires approval of the proposed Monterey Peninsula Water Supply Project ("MPWSP") and the MPWSP, in the form approved by the Commission, engenders a direct and irreconcilable conflict with the Ordinance. MCWD's proposed changes to the Findings of Fact, Conclusions of Law and Ordering Paragraphs of the PD are set forth in the attached Appendix.

The Commission cannot lawfully preempt the Ordinance and find a conflict between its regulation and the prohibition contained in the Ordinance unless and until it approves a project that violates the Ordinance. The Commission potentially has before it many outcomes to this application that would not result in any conflict whatsoever with the Ordinance, including, but not limited to, the No Project Alternative, ownership and/or governance of the MPWSP by a public agency, the People's Desal Project, the Deep Water Desal Project, a combination of the groundwater replenishment ("GWR") project proposed by California American Water Company ("Cal-Am") and the Monterey Regional Water Pollution Control Agency and the water conservation measures proposed by the Planning and Conservation League at the recent workshop in this proceeding, as well as the purchase of water from the State or a public agency. A decision preempting the Ordinance without an actual conflict is the sort of impermissible advisory opinion that the Commission and the courts have repeatedly and consistently refused to

issue on ripeness grounds. Moreover, preempting the Ordinance at this juncture in the proceedings constitutes an unlawful prejudgment without a hearing of the merits of the application. MCWD thus believes that a final determination of preemption at this preliminary stage of the application is premature. It is the Commission's determination of the "present or future public convenience and necessity" under Public Utilities Code section 1001 that will determine whether a preemption issue is presented in this proceeding, and whether there is an irreconcilable conflict that will necessitate preemption of the Ordinance.

## **II. DISCUSSION.**

### **A. The PD Goes Too Far.**

MCWD is gratified that the Commission found its briefing on the issue of preemption to be useful. (PD, pp. 12-13.) The PD reaches much the same conclusion as MCWD reached, that the Commission *can* preempt the Ordinance if it conflicts with an exercise of the Commission's regulatory jurisdiction. (PD, p. 13 ("the Commission can preempt the Desal Ordinance.")) Unfortunately, the PD goes one step too far and actually decides that the Ordinance is preempted (PD, pp. 18-21, p. 22-24), before considering the merits of Cal-Am's pending application for a Certificate of Public Convenience and Necessity ("CPCN") to build and operate its proposed MPWSP and determining whether an irreconcilable conflict with a project approved by the Commission exists.

The PD's criminal law analogy suggesting that MCWD proposes deferring findings on jurisdiction pending the outcome of a trial (PD, p. 20) misses the point. Rather, MCWD's position is that a finding on jurisdiction may not serve to pre-determine the outcome of a case before it has been tried. MCWD agrees with the Commission that it has the authority to decide the preemption issue in rendering its final decision on the CPCN application after considering all relevant factors if that final decision conflicts with the Ordinance. (MCWD's Opening Brief, pp.

8-9, citing *Northern California Power Agency v. Public Util. Com.* (1971) 5 Cal.3d 370, 378-380 (“*NCPA*”) (order granting CPCN annulled due to Commission’s failure to give adequate consideration to relevant factors bearing on public convenience and necessity, in that case “anticompetitive factors”); *Ventura County Waterworks v. Public Util. Com.* (1964) 61 Cal.2d 462, 465-66 (“*Ventura*”) (order granting CPCN annulled due to Commission’s exclusion at hearing of evidence that a public entity could provide better and more economical service than the regulated utility, preventing the public agency from receiving a fair hearing on its protest, which “in effect delegated [the Commission’s] power to decide the question of public convenience and necessity.”))

The trouble is that the PD as written goes beyond the threshold legal feasibility question of determining whether or not the Commission has authority to determine preemption, to instead finally, and prematurely, reach judgment on the issue of preemption concerning the pending application, before the Commission has determined that it will grant the application. Notwithstanding the Commission’s unquestioned broad authority over public utilities, preemption is a legal principle that is to be applied narrowly. (See MCWD’s Opening Brief, pp. 1-2, citing *Big Creek Lumber Co. v. County of Santa Cruz* (2006) 38 Cal.4th 1139, 1149-1150; *San Diego Gas & Electric Co. v. City of Carlsbad* (1998) 64 Cal.App.4th 785, 793 (“*Carlsbad*”), citing *People ex rel. Deukmejian v. County of Mendocino* (1984) 36 Cal.3d 476, 484 (“[I]n view of the long tradition of local regulation and the legislatively imposed duty to preserve and protect the public health, preemption may not be lightly found.”)) The party seeking preemption bears the burden of establishing preemption. (*Big Creek Lumber Co.*, *supra*, 38 Cal.4th at 1149.) In order to establish preemption here, Cal-Am must do more than simply demonstrate the Commission’s broad powers; it must also demonstrate the necessity for invoking those powers to

approve the proposed MPWSP. (Pub. Util. Code §§ 1001, 1005.) At this early stage in the proceeding, the Commission cannot make such a determination. The PD admits as much. (PD, p. 21 (“this Commission *could* approve the proposed Cal-Am project, but it does not in any way pre-judge whether this Commission will approve the proposed project.”) *emphasis in original*.) Reaching out unnecessarily to invalidate the Ordinance before approving the proposed project would violate the cautious approach to the principle of preemption that is required by the Supreme Court. (*Big Creek Lumber Co.*, *supra*, 38 Cal.4th at 1149-1150; *People ex rel. Deukmejian v. County of Mendocino*, *supra*, 36 Cal.3d at 484.)

The PD complains that MCWD insists on findings of necessity and issuance of a CPCN before the Commission may invoke its powers of preemption to actually invalidate the Ordinance. (PD, pp. 18-19.) But that is the law on the question of preemption as it stands before the Commission on this application concerning a desalination project, an issue of statewide interest, and at this juncture, exactly as MCWD has briefed it. (*See* MCWD’s Opening Brief, pp. 1-12, *citing, e.g. Big Creek Lumber Co.*, *supra*, 38 Cal.4th at 1149-50, 1160-62; *Garcia v. Four Points Sheraton LAX* (2010) 188 Cal.App.4th 364, 374; *Leslie v. Superior Court* (1999) 73 Cal.App.4th 1042, 1047-48, 1050-53.)

**B. Preemption Requires Resolution of Water Rights and Other Legal Issues.**

There is nothing illogical or mysterious about MCWD’s position. The MPWSP desalination plant is indeed the proposed “source” of Cal-Am’s supply water under General Order (“GO”) 103-A, section II.2. B.(1). (*See* PD, pp. 15-16.) Thus, assuming that other legal feasibility issues can be overcome, if the Commission were to grant the instant application then its statutory authority under section 1001 could preempt the Ordinance in this case. Other legal feasibility issues, particularly water rights, are therefore inextricably linked to the final

preemption analysis.<sup>1</sup> Since a legally infeasible project cannot be “necessary,” there would be no point in declaring the Ordinance preempted before the MPWSP has even been determined to be legally feasible. Again, such a procedure would be contrary to the Supreme Court’s command that preemption is to be applied narrowly, and not “lightly found.” (*Carlsbad, supra*, 64 Cal.App.4th at 793, *citing People ex rel. Deukmejian v. County of Mendocino, supra*, 36 Cal.3d at 484.) Moreover, if the proposed MPWSP proves to be practically or legally infeasible, it cannot be certificated by the Commission, and there can be no conflict between the Commission’s decision and the Ordinance.

Neither is MCWD’s reference to the proposed desalination plant as a “source” of utility water supply under GO 103-A at odds with its analysis of groundwater issues related to the brackish sourcewater required to feed the desalination plant intake. (*See* PD, pp. 15-16; MCWD Opening Brief, pp. 5-8 and 12-14; MCWD Reply Brief, pp. 1-3 and 4-6.) A desalination plant is different from a water utility’s permitted source of supply from a stream or a groundwater well, in that the desalination plant must in turn be supplied with brackish or salt water in order to operate. All of these sources are subject to GO 103-A’s basic requirements of safety, legality and sufficiency, as MCWD pointed out in its opening brief on legal feasibility. (MCWD Opening Brief, p. 5 at fn. 1.) The Commission noted, in referring the water rights question in this application to the State Water Resources Control Board (“SWRCB”), that Cal-Am’s claim that it may legally extract the required sourcewater for the proposed MPWSP desalination plant is an issue in question. (*See* Letter of September 26, 2012 from Paul Clanon to Thomas Howard (“Clanon Letter”), served on parties to A.12-04-019 on October 3, 2012, p. 1.)

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<sup>1</sup> Such other issues include, but are not limited to, outfall capacity, availability of recycled water for GWR, Agency Act compliance, CEQA compliance and land acquisition.

Section II.2.B.(1) of GO 103-A identifies three possible categories of public utility water sources: (1) a permitted source; (2) a reasonably adequate, reliable source; and (3) a source described in the utility’s most recently-reviewed Urban Water Management Plan (“UWMP”). Section 4.7 of Cal-Am’s current (2010) UWMP proposes to use “ocean desalination” in its future water supply sources, and it does not reference any use of groundwater or some combination of ocean and groundwater for its desalination plans.<sup>2</sup> Cal-Am’s MPWSP application, on the other hand, proposes to extract the sourcewater for the desalination plant from coastal slant wells, which Cal-Am acknowledges are likely to yield some as-yet unknown proportion of groundwater. (Application, p. 7. *See also* Clanon Letter, p. 1 (sourcewater may contain “potentially a small amount of groundwater”).)

Unless the sourcewater is ocean water that requires no permit for extraction through slant wells, it appears that Cal-Am’s application does not comport with the supply categories of GO 103-A. Therefore it is equally unclear that GO 103-A could legitimately serve as a basis for a final finding of preemption in this case. If the proposed sourcewater is groundwater, or contains some component of groundwater, Cal-Am would need the legal right to extract it in a sufficient amount, as a “permitted source.” Based on the parties’ legal feasibility briefing, Cal-Am has not provided evidence it has that right or will obtain it, and so the first of GO 103-A’s three source categories does not appear to apply here. A source that is not legal cannot be reasonably adequate and reliable, which eliminates the second GO 103-A source category. Finally, groundwater is not described in Cal-Am’s current UWMP as a source for its future desalination project.<sup>3</sup> If testing or a SWRCB decision or both should determine that there is indeed a

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<sup>2</sup> Cal-Am’s Final 2010 UWMP for Central Division – Monterey County District (“Monterey UWMP”), pp. 4-15 through 4-16, available at [http://www.water.ca.gov/urbanwatermanagement/2010uwmps/Cal-Am%20Water%20-%20Monterey%20District/2010%20UWMP\\_Monterey%20District\\_Final.pdf](http://www.water.ca.gov/urbanwatermanagement/2010uwmps/Cal-Am%20Water%20-%20Monterey%20District/2010%20UWMP_Monterey%20District_Final.pdf)

<sup>3</sup> Monterey UWMP, pp. 4-15 through 4-16.

groundwater component to the sourcewater for the MPWSP desalination plant, GO 103-A cannot operate to leapfrog over the water rights issue and invoke the Commission's authority to save the legal feasibility of Cal-Am's application as it is presented. Again, if Cal-Am does not possess water rights it needs to lawfully extract sourcewater from the ground, the project is infeasible and cannot be certificated, and there can be no conflict with the Ordinance.

**C. The Commission Must Consider Feasible Public Alternatives.**

In this application, several public entities have put forth desalination project proposals for consideration. (*See, e.g.*, proposals filed Oct. 1, 2012 by Monterey Peninsula Regional Water Authority; City of Pacific Grove; Monterey Peninsula Water Management District.) Under both *NCPA* and *Ventura*, the Commission must consider all relevant factors and all feasible, mutually-exclusive project alternatives before deciding whether “the present or future public convenience and necessity require or will require” preemption of the Ordinance. (Pub. Util. Code §§ 1001, 1005; *NCPA, supra*, 5 Cal.3d at 378-380; *Ventura, supra*, 61 Cal.2d at 465-66.) Without the Commission's having conducted the required CPCN inquiry and concluded that there is not a public entity capable of supplying desalinated water to replace Cal-Am's current illegal use of Carmel River water, the “local ordinance ‘does not prohibit what the statute commands or command what it prohibits’.” (*Big Creek Lumber Co., supra*, 38 Cal.4th at 1161, *citing Sherwin-Williams Co. v. City of Los Angeles* (1993) 4 Cal.4th 893, 902.) Finding preemption prior to making a determination that the MPWSP as proposed would better serve the public convenience and necessity than any public entity alternative would “in effect delegate[] [the Commission's] power to decide the question of public convenience and necessity.” (*Ventura, supra*, 61 Cal.2d at 465-66.)

#### **D. Final Determination of Preemption is Not Yet Ripe.**

Just like Monterey County's suit against Cal-Am in San Francisco Superior Court to uphold the Ordinance, the ultimate question of whether or not the Ordinance is preempted is not ripe here. (See MCWD's Reply Brief, p.4, citing *Pacific Legal Found. v. California Coastal Com.* (1982) 33 Cal.3d 158, 171-173 (to be justiciable, a case must present both an actual controversy and an imminent danger of harm).) Here, there can be no imminent danger of harm unless the Commission first completes its CPCN inquiry. (Pub. Util. Code § 1001.) MCWD agrees that the Commission has the authority to decide whether or not the Ordinance is preempted. But unless and until the Commission determines that "the present or future public convenience and necessity require" Cal-Am's proposed MPWSP (*ibid.*), the ultimate question of actual, rather than theoretical, preemption is not yet ripe. (*Pacific Legal Found. v. California Coastal Com., supra*, 33 Cal. 3d at 171-73.) To reach the ultimate question and determine that the Ordinance is preempted without first conducting a full CPCN inquiry, including the requisite California Environmental Quality Act review, would be to impermissibly issue an advisory opinion and to pre-judge the outcome of the utility's application. (*Id.* at 170. See also *California Coastal Com. v. Granite Rock Co.* (1987) 480 U.S. 572, 593-594 ("we apply the traditional preemption analysis which requires an actual conflict . . . we hold only that the barren record of this facial challenge has not demonstrated any conflict.")) This Commission has long maintained that it does not issue advisory opinions.

#### **III. CONCLUSION.**

MCWD respectfully requests modification of the PD to state the Commission's decision at this juncture as finding only that it has authority to preempt the Ordinance, but that the Commission is not yet making a finding of preemption, because the Commission has not concluded its critical evaluation of Cal-Am's application for a CPCN to construct and operate the

MPSWP and has not determined that the public convenience and necessity require the construction of a project that irreconcilably conflicts with the Ordinance. MCWD's proposed changes to the PD's Findings of Fact, Conclusions of Law and Ordering Paragraphs are set forth in the attached Appendix.

DATED: October 11, 2012

Respectfully submitted,  
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## APPENDIX

MCWD's recommended changes to the text of one of the PD's Findings of Fact and Conclusions of Law are set forth in **bold** text below.

### Conclusion of Law 1

1. The Commission should declare that its authority, exercised through GO 103-A in A.12-04-019, **may preempts** the Monterey County Desalination Ordinance, Title 10, Chapter 10.72, which purports to govern the issuance, suspension and revocation of permits for the construction and operation of desalination treatment facilities, **if the Commission should find that the MPWSP is required for the present or future public convenience and necessity and that the MPWSP, as approved, irreconcilably conflicts with the Ordinance. (Pub. Util. Code § 1001.)**

MCWD's recommended changes to two of the PD's Ordering Paragraphs are set forth in **bold text** below.

### Ordering Paragraphs 1, 5

1. The Commission's **has the authority pursuant to section 1001 of the Public Utilities Code**, exercised through General Order 103-A in Application 12-04-019, **to preempts** the Monterey County Desalination Ordinance, Title 10, Chapter 10.72, **if the Commission should find that the MPWSP is required for the present or future public convenience and necessity and that the MPWSP, as approved, irreconcilably conflicts with the Ordinance.**

5. **Authority to preemption of** Monterey County Desalination Ordinance, Title 10, Chapter 10.72 by Commission authority shall not prevent the Commission or California-American Water Company from taking into account related concerns and interests of the County of Monterey and from cooperating with the County of Monterey in regards to the Monterey Peninsula Water Supply Project proposed in Application 12-04-019.