



**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

Application 12-04-019
(Filed April 23, 2012)

**APPLICATION OF THE COUNTY OF MONTEREY
FOR REHEARING OF DECISION NO. 12-10-030**

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Dated: November 30, 2012

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Pursuant to Public Utilities Code Sections 1731 and 1732 and Rules 16.1 and 16.2 of the Rules of Practice and Procedure of the California Public Utilities Commission (“Commission”), the County of Monterey (“County”) urge the Commission to grant rehearing of Decision No. 12-10-030 (“the Decision”), issued on October 31, 2012. Under Rule 16.1(a), this Application for Rehearing is timely filed.

The County’s Application is based on the grounds that the Decision is unlawful and legally erroneous. Specifically, rehearing of the Decision is warranted because the issue of the Monterey County desalination ordinance is not ripe for decision and thus the Decision is an advisory opinion, under the California Constitution the Commission may not declare that Ordinance unenforceable, and even if preemption is in some fashion proper, the Decision’s preemption determination is overly broad.

I. BACKGROUND

At its core, the Decision arises from the fact that California-American Water Company (“Cal-Am”) is under a state mandate to stop using a significant amount of water from the Carmel River to serve its Monterey District and must find a supplemental water supply for its Monterey customers. See Decision, *slip op.*, p. 2 n. 2.

In the Decision, the Commission purports to preempt a Monterey County ordinance, adopted in 1989, that addresses desalination facilities. Monterey County Code of Ordinances, Chapter 10.72 (“the Ordinance”), and to exercise paramount jurisdiction over the Superior Court of San Francisco County. Decision, *slip op.*, pp. 1 & 25 Ord. ¶¶ 1 & 2.

The Decision summarizes the Ordinance on pages 3 through 5. It seems clear the most important issue is Section 10.72.030(B), requiring “assurances that [the] facility will be owned and operated by a public entity.” See Decision, *slip op.*, p. 4 (“significantly for our decision here” is the language of Ordinance, §10.72.030(B).) It is arguable that provision would prevent Cal-Am, a private albeit heavily-regulated investor-owned utility, from owning a desalination plant in Monterey County.

In December 2010, in Decision No. 10-12-016, the Commission approved a Settlement Agreement and Water Purchase Agreement which were to lead to the development of the “Regional Desalination Project” (“RDP”). D.10-12-016, *slip op.*, p. 203, Ord. ¶ 1. The RDP solution avoided the public ownership issue raised by the Ordinance through ownership of the desalination facility by a public agency, Marina Coast Water District (“District”). D.10-12-016, *slip op.*, pp. 58-59. However, various difficulties led to the failure of the RDP, and in Decision No. 12-07-008, the Commission concluded as a matter of law that it was not “reasonable to force Cal-Am to pursue the” RDP, D.12-07-008, *slip op.*, p. 24, Concl. of Law 2, and closed Application No. 04-09-019, the proceeding in which D.10-12-016 had been issued. D.12-07-008, *slip op.*, p. 26, Ord. ¶ 8.

On April 23, 2012, Cal-Am filed this application, Application No. 12-04-019 (“Application”), seeking a certificate of public convenience and necessity for the Monterey Peninsula Water Supply Project (“MPWSP”). The MPWSP consists of three proposed components, one of which is a desalination plant to be owned and operated by Cal-Am. Application, p. 5. That proposal set up the possibility of a dispute over whether Section 10.71.030(B) of the Ordinance could prevent Cal-Am from owning such a facility.

On June 26, 2012, the County filed a declaratory relief action in San Francisco County Superior Court seeking a judicial interpretation of whether the Ordinance applied to the MPWSP. *County of Monterey vs. California-American Water Company*, San Francisco County Superior Court Case No. CGC-12-521875. See Decision, *slip op.*, pp. 6-7.

Administrative Law Judge Gary Weatherford, the assigned administrative law judge, issued a ruling on June 1, 2012, calling for briefs on two questions, one of which inquired: “Is the County Ordinance Governing Desalination and Limiting Desal Plant Ownership and Operation to Public Agencies Preempted by Commission Authority?” Administrative Law Judge’s Ruling issued June 1, 2012, p. 3. Numerous parties filed opening and reply briefs on the issue. See Decision, *slip op.*, p. 6. Among the issues addressed were whether the Ordinance was preempted and whether decision at this time on the preemption issue was premature. Cal-Am and the Division of Ratepayer Advocates argued

the Ordinance is preempted. See, e.g., California-American Water Company Opening Brief on Legal Issues for Early Resolution, dated July 11, 2012, pp. 1-7; Opening Brief of the Division of Ratepayer Advocates on Preemption and Water Rights Issues, dated July 11, 2012, pp. 2-11. The District argued the Ordinance is not preempted and a decision on the preemption issue would be an impermissible advisory opinion. Marina Coast Water District's Opening Brief on Legal Issues Regarding the Feasibility of the Application, dated July 11, 2012, pp. 1-11; Marina Coast Water District's Reply Brief on Legal Issues Regarding the Feasibility of the Application, dated July 25, 2012, pp. 1-4. The Salinas Valley Water Coalition and WaterPlus also argued the Ordinance is not preempted. Opening Brief on Selected Legal Issues of Salinas Valley Water Coalition, dated July 11, 2012, pp. 2-7; Reply Brief of WaterPlus in Response to California-American Water Company's Opening Brief of Legal Issues on the Issue of the Preemption [sic], dated July 25, 2012, pp. 1-3. The County and Agency attached a copy of the complaint in San Francisco County Superior Court, noted the uncertainty of preemption in light of California Constitution Article III, Section 3.5 (which prohibits the Commission from finding statutes unenforceable or unconstitutional), and urged the Commission to allow the court litigation in San Francisco to "run its course as the surest and most effective means of dealing with the Desal Ordinance issue, and as the most efficient use of the Commission's resources." Opening Brief of the County of Monterey and Monterey County Water Resources Agency on Legal Issues in Accordance with Administrative Law Judge's Ruling Dated June 1, 2012, filed July 11, 2012, pp. 1-2.

On September 21, 2012, Administrative Law Judge Weatherford's proposed decision, entitled "Decision Declaring Preemption of County Ordinance and the Exercise of Paramount Jurisdiction," was issued, stating in the first paragraph:

This decision determines that the authority of the Commission in regard to this application preempts Monterey County Code of Ordinance, Title 10, Chapter 10.72, concerning the construction, operation and ownership of desalination plants. This decision further determines that the findings, conclusions and orders herein are an exercise of jurisdiction that is paramount to that of a county Superior Court concerning the same subject.

Proposed Decision, p. 1; see also p. 23, proposed Ord. ¶¶ 1 & 2.

Various parties commented on the proposed decision. See Decision, *slip op.*, pp. 20-21. The District urged that the preemption issue was not ripe for decision and that any decision would constitute an advisory opinion. Marina Coast Water District's Comments on Proposed Decision (Preemption), dated October 11, 2012, pp. 1-4, 8. Citizens for Public Water also argued that deciding the issue was premature. Reply Comments by Citizens for Public Water on Proposed Decision of ALJ Weatherford Declaring Preemption of County Ordinance and the Exercise of Paramount Jurisdiction, and in Support

of Marina Coast Water District’s Comments on Proposed Decision (Preemption), dated October 15, 2012, pp. 2-3. The County and Agency pointed out that the lawsuit in San Francisco County Superior Court “was intended as a vehicle to resolve issues regarding application of the County’s Ordinance to California-American Water Company . . . in a fashion that would strike an appropriate balance between the Commission’s jurisdiction and the County’s interest in certain exclusively local matters” and noted diligent efforts by the parties to reach a resolution of that action. 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, dated October 11, 2012, pp. 1-2. Noting their focus on resolution, the County and Agency nonetheless stated that focus did not mean they agreed with all legal analysis in the proposed decision and reserved their rights to raise substantive legal issues in an application for rehearing. *Id.*, p. 2. In reply comments, Cal-Am continued to argue the Ordinance is preempted. Reply Comments of California-American Water Company on the Proposed Decision Declaring Preemption of County Ordinance, dated October 16, 2012, pp. 2-5.

At the Commission’s October 25, 2012 meeting, the Commission adopted the Decision without substantive modification from the proposed decision (including the first paragraph and the first two ordering paragraphs). However, the date of issuance was not until October 31, 2012. Decision, *slip op.*, p. 1. This application for rehearing is filed within 30 days of the Decision’s mailing date and is thus timely under Public Utilities Code Section 1731(b)(1).

II. ARGUMENT

A. The Decision commits legal error because the issue of preemption is not ripe for adjudication and thus the Decision amounts to an advisory opinion.

In issuing the Decision, the Commission rejected arguments that preemption of the Ordinance was not ripe for decision. Despite finding it “correct that if the Commission does not approve the project, then there would be no actual conflict with the Desal Ordinance,” the Commission nonetheless decided the preemption question. Decision, *slip op.*, p. 19. The Commission stated: “Considerations of certainty, efficiency, and fairness to all parties indicate that the Commission should make its determination of preemption now, rather than later.” *Id.*; see also *id.*, p. 22.

But certainty, efficiency, and fairness do not trump the law, and the law requires a finding that the issue of preemption of the ordinance is not yet ripe for decision.

1. To be ripe for decision, the issue of preemption must involve a concrete dispute and hardship to the parties if the decision is not made now.

“[A] basic prerequisite to judicial review of administrative acts is the existence of a ripe controversy.” *Pacific Legal Foundation v. California Coastal Commission* (1982) 33 Cal.3d 158, 169. The ripeness doctrine “is rooted in the fundamental concept that the proper role of the judiciary does not extend to the resolution of abstract differences of legal opinion.” *Id.* at 170.

The Commission has held a two-prong analysis applies to determinations of ripeness. The first prong involves the concreteness and immediacy of the dispute such that the issuance of relief is warranted, and the second concerns the hardship to the parties if the matter is not immediately addressed. Decision No. 02-10-065 (Oct. 24, 2002) *slip op.*, p. 3. This is the same analysis adopted in *Pacific Legal*. See *PG&E Corp. v. Public Utilities Commission* (2004) 118 Cal.App.4th 1174, 1217.

First, for a controversy to be ripe, it must be determined “that the issues raised are sufficiently concrete to allow judicial resolution even in the absence of a precise factual context.” *Pacific Legal, supra*, 33 Cal.3d at 170. Concreteness requires ““a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.”” *Pacific Legal, supra*, 33 Cal.3d at 170-171, quoting *Aetna Life Ins. Co. v. Haworth* (1937) 300 U.S. 227, 240-241.

Mere adversity of interests is not sufficient for concreteness. In *Pacific Legal*, despite the parties’ starkly differing views of the law, the California Supreme Court found the plaintiffs’ situation to lack “the urgency and definiteness necessary to render declaratory relief appropriate.” *Pacific Legal, supra*, 33 Cal.3d at 171; see also *PG&E Corp., supra*, 118 Cal.App.4th at 1217 (mere fact that parties had adverse positions regarding “first priority condition” from holding company cases did not “render the issues appropriate for immediate judicial resolution”). The Court in *Pacific Legal* specifically noted that “a difference of opinion” as to the validity of certain Coastal Commission regulations was “obviously not enough by itself to constitute an actual controversy.” *Pacific Legal, supra*, 33 Cal.3d at 173. More recently in *PG&E Corp.*, the Court of Appeal found a lack of concreteness “[b]ecause the PUC has yet to apply its interpretation of the first priority condition to a concrete set of facts,” meaning “the dispute petitioners would like this court to resolve is abstract.” *Id.* at 1217.

Second, ripeness analysis requires consideration of the immediate hardship to the parties of withholding consideration. *Pacific Legal, supra*, 33 Cal.3d 158 at 172, citing *Abbott Laboratories v. Gardner* (1967) 387 U.S. 136, 148-149. Relying upon the federal approach to ripeness analysis, in assessing the hardship prong, the Court stated “Coastal landowners are not **immediately faced** with the

dilemma of either complying with the guidelines or risking penalties for violating them; that situation will not arise unless and until they apply for a development permit **and suffer the imposition of invalid dedication conditions.**” *Pacific Legal, supra*, 33 Cal.3d 158 at 172-173 (bold font added).

The Supreme Court found support in a prior decision, *Selby Realty Co. v. City of San Buenaventura* (1973) 10 Cal.3d 110, in which the Court found the only action of the county there, adoption of a general plan showing a street to be located on plaintiff’s land, was not sufficient for an action for declaratory relief. In *Selby*, the Supreme Court “instructed [plaintiff] to await implementation of the plan through the institution of condemnation proceedings against him.” *Pacific Legal, supra*, 33 Cal.3d at 173. The Court in *Pacific Legal* emphasized that in *Selby* “the challenged plan had not been implemented at all” and that whether any part of the *Selby* plaintiff’s land would be taken in the future depended “upon unpredictable future events.” *Pacific Legal, supra*, 33 Cal.3d at 173-174; see also *PG&E Corp., supra*, 118 Cal.App.4th at 1217 (“Even when parties have clearly adverse positions, the posture of a case may require a court to speculate about unpredictable future events in order to evaluate the parties’ claims”).

2. There is neither a concrete, immediate dispute nor imminent hardship to the parties.

In this case, the issue to be resolved by preemption is far from concrete. Cal-Am has not yet suffered the imposition of the Ordinance, which was adopted in 1989 and to date has not been implemented as to Cal-Am at all, and might never be. *Pacific Legal, supra*, 33 Cal.3d at 173; *PG&E Corp., supra*, 118 Cal.App.4th at 1217. Harm to Cal-Am and its customers from enforcement of the ordinance is at this point only speculative and will remain so until the Commission approves the MPWSP, at the earliest. *Pacific Legal, supra*, 33 Cal.3d at 173. Even then it is not clear a dispute will arise as it is as yet unknown exactly how the County will apply the Ordinance to the proposed desalination plant if the Commission approves the MPWSP. Rather, the situation here is quite similar to those in *Pacific Legal* and *Selby*. Various parties to the proceeding disagree over whether the Ordinance is preempted, but no action requiring a decision about preemption has yet been taken. In *Selby*, the California Supreme Court required the plaintiff to wait to be sued in condemnation before the dispute there would be considered ripe. *Selby, supra*, 10 Cal.3d 110 at 120; see *Pacific Legal, supra*, 33 Cal.3d at 173. It is at this point not clear that such a level of concreteness will ever arise here.

Further, the parties will face no hardship from waiting to resolve the preemption issue. Whether the Ordinance is found preempted or not now will not matter. The Commission was careful to point out in the Decision that the “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.” Decision, *slip op.*, p. 20 (underscoring in original). There is still much work to be done by the Commission, Cal-Am, and the other parties to the Application before the Commission can even address the question of whether it “will approve the proposed project.” That work includes the EIR process, which in turn includes evaluation of other feasible alternatives to the MPWSP. Public Resources Code §§ 21002, 21002.1(a), 21100(b)(4). The Commission must also consider statutorily mandated factors as part of determining whether a certificate of public convenience and necessity will be granted to Cal-Am. Public Utilities Code § 1002. All that work would be required whether or not the Commission makes the preemption determination at this point.

In contrast, in *Pacific Legal*, no hardship was found even in the presence of a current impact on the plaintiff property owners. Despite the fact that the “presence of the guidelines” being challenged “may tend to inhibit property owners from planning improvements on their land because of the possibility that they will have to comply with access conditions, should they apply for a development permit,” the Court held “the hardship inherent in further delay is not imminent or significant enough to compel an immediate resolution of the merits of plaintiffs’ claims, at least under the federal standards.” *Pacific Legal*, *supra*, 33 Cal.3d at 173.

The issue of preemption of the Ordinance by the Commission is not yet ripe for resolution.

3. The Decision is an advisory opinion that was not issued in extraordinary circumstances.

In the absence of a ripe controversy, a Commission determination of an issue, such as whether the Ordinance is preempted by the Commission’s authority, amounts merely to an advisory opinion. D.02-10-065, *slip op.*, p. 3, *citing Hayward Area Planning Assoc., Inc.* (1999) 72 Cal.App.4th 95, 103. The Commission’s general policy is not to issue advisory opinions. Decision No. 00-06-002 (June 8, 2000), *slip op.*, p. 4. Only in “extraordinary circumstances” will the Commission depart from its general policy, which “is not unique to the CPUC nor other administrative agencies but is a policy long-adopted by the courts . . .”. Decision No. 99-08-018 (August 5, 1999), *slip op.*, pp. 3-4. “‘Extraordinary circumstances’ may exist where a matter is of widespread public interest or another governmental agency would benefit from a timely expression of the Commission’s views.” D.00-06-002, *slip op.*, p. 4.

In D.00-06-002, the Commission declined to depart from its general policy. There, matters of widespread public interest concerning distribution competition and the continued viability of Service Area Agreements between electricity providers were **not** before the Commission. In addition, the other

governmental agency in question, Turlock Irrigation District, was not “clamoring for ‘a timely expression of the Commission’s views’” but instead opposed the application in question. *Id.* at 5. Further, the Commission cited multiple other options available to the utility to pursue its issues. *Id.*

The Decision is an advisory opinion of the Commission on the issue of preemption of the Ordinance, issued in the absence of extraordinary circumstances in contravention of the Commission’s general policy against issuing such opinions. First, as already demonstrated above, the issue of preemption of the Ordinance is not ripe for determination. Second, as important as the Ordinance and the Cal-Am supplemental water supply are to Cal-Am’s Monterey customers and the County (see § II.C, *infra*), the issue is not one of “widespread public interest” (such as statewide issues of distribution competition in D.00-06-002). Third, like the utility in D.00-06-002, Cal-Am has multiple other options that the Commission will consider as part of the EIR process and otherwise before finally determining whether to grant Cal-Am’s application for the MPWSP.

4. Conclusion

Neither judicial nor Commission precedent support issuance of the Decision, and in fact, both weigh against its issuance. The Commission committed legal error in issuing the Decision and should correct that legal error by either withdrawing the Decision completely, or revising it to address only the issue of the Commission’s authority to preempt the Ordinance should the need arise.

B. The Commission is Not a Court and Has Limited Judicial Powers.

The Commission is “not a judicial tribunal” but is authorized to exercise judicial powers. *People v. Western Airlines* (1954) 42 Cal.3d 621, 632. Its authority extends to administrative, legislative and judicial powers. *San Diego Gas and Electric Co. v. Superior Court* (1996) 13 Cal.4th 893, 912.

However, its judicial powers are limited. Article III, Section 3.5 of the California Constitution prohibits the Commission from declaring a statute unenforceable, refusing to enforce a statute, or declaring a statute unconstitutional.

This constitutional provision was placed on the ballot by unanimous vote of the California Legislature and adopted by the people of California in response to the decision of the California Supreme Court in *Southern Pacific Transportation Co. v. Public Utilities Commission* (1976) 18 Cal.3d 308. *Reese v. Kizer* (1988) 46 Cal.3d 996, 1002. In *Southern Pacific*, a majority of the Supreme Court held the Commission did have the power to declare a statute unconstitutional, even though it disagreed with the Commission’s decisions. *Southern Pacific, supra*, 18 Cal.3d at 313-314; *Reese, supra*, 46 Cal.3d at 1002.

Adoption of Article III, Section 3.5 eradicated whatever power the Commission had enjoyed in that regard. *Reese, supra*, 46 Cal.3d at 1002. It is settled the Commission no longer has the powers that were revoked by adoption of that provision. *Lockyer v. City and County of San Francisco* (2004) 33 Cal.4th 1055, 1087.

There is no substantive difference between a state statute and a county ordinance. Both are “laws” legislatively enacted by duly elected representatives. See, e.g., *In re Johnson* (1920) 47 Cal.App. 465, 467. The rationale for according ordinances the same dignity as that bestowed on statutes was explained by Justice Mosk in his dissent in *Southern Pacific* – a dissent that was validated by the enactment of Article III, Section 3.5.

Justice Mosk wrote it was incongruous for the will of the people, as reflected in the actions of their elected representatives, to be thwarted by governmental institutions that are presumably also charged with the task of implementing the popular will. *Southern Pacific, supra*, 18 Cal.3d at 315 (Mosk, J. dissenting). Ordinances are enacted by elected local legislators just as state statutes are enacted by elected state legislators.

The Decision acknowledges the Commission “cannot on its own declare a state statute unenforceable or unconstitutional” but asserts “the Commission is not finding a state statute unenforceable or unconstitutional, but rather is preempting a purely local county ordinance.” Decision, *slip op.*, p. 17. There is no legal basis for distinguishing the popular will embodied in an ordinance enacted by local legislators from that embodied in a statute enacted by state legislators – and the Decision provides none. Both “laws” express the popular will. The fact that a statute operates statewide and an ordinance operates locally does nothing to defeat the importance of the popular will expressed in each.

Rather than offering either an explanation or authority why an ordinance commands less constitutional deference than a statute, the Decision concludes the Commission simply has the authority to preempt a purely local ordinance. *Id.* That bare assertion, unsupported by analysis or authority, hearkens to the bygone era before the relevant provision was added to the California Constitution.

When the issue is the scope of an agency’s jurisdiction, the Commission is not the arbiter of its own authority. That is the exclusive province of the courts. *PG&E Corp., supra*, 118 Cal.App.4th at 1198, quoting *Kaiser Foundation Health Plan, Inc. v. Zingale* (2002) 99 Cal.App.4th 1018, 1028. The Decision ignores these authorities.

Dissenting in *Southern Pacific*, Justice Mosk also observed that published opinions on the issue were “sparse” because administrative agencies are understandably reluctant to hold statutes unconstitutional. *Southern Pacific, supra*, 18 Cal.3d at 315. Implicit in his observation is the restraint expected of unelected administrators to resist interference with policies endorsed by the people.

Under our nation’s (and State’s) notions of separation of powers, it is the judicial branch of government that adjudicates the propriety of legislative acts. (As Justice Mosk noted, this heritage traces from *Marbury v. Madison* in 1803.)

In issuing its Decision, the Commission held the Ordinance unenforceable. On its face, the Decision violates the administrative restraint mandated by Article III, Section 3.5. It is not possible to harmonize the Commission’s decision with the Constitution.

It makes no difference that “preemption” is the justification for the Decision. The rationale does not matter. The result of the Decision is a finding by the Commission the Ordinance cannot be enforced, a finding expressly prohibited by Article III, Section 3.5(a).

Similarly, it does not matter if the Ordinance is, in fact, preempted by the Commission’s authority. The point is that, under the Constitution, a court – and not the Commission – is the proper tribunal to adjudicate issues of the enforceability or constitutionality of the Ordinance.

There are many published appellate court opinions on the question of the Commission’s preemption of local regulations that conflict with its authority. These disputes were *all* resolved by the judicial branch of government, consistent with our respect for the separation of powers inherent to our system of governance.

No authority gives the Commission the authority to adjudicate its own jurisdiction. No authority allows the Commission to adjudicate the enforceability of the Ordinance and the Decision, because it does both, commits legal error and must be set aside.

C. The Entire Ordinance is Not Preempted.

Even assuming parts of the Ordinance are preempted by the Commission’s authority, it is indisputable other parts are not.

It is well-documented over several decades that Monterey County suffers from seawater intrusion into its freshwater aquifers. See, e.g., D.10-12-016, *slip op.*, p. 18. Protecting the freshwater aquifers, guarding against further seawater intrusion, monitoring the extraction of groundwater and maintaining the quality and quantity of freshwater sources in the County are local issues of high importance. The Monterey County Board of Supervisors, as the locally elected legislative body, shares

responsibility with other agencies for a safe, potable, and stable source of water for the County's residents.

The Ordinance addresses these exclusively local concerns. The Ordinance contains provisions that provide for the study of impacts caused by groundwater extraction, Ordinance, §10.72.020(D); for the submission of feasibility studies for the disposal of brine and other by-products of desalination, Ordinance, §10.72.020(E); for monitoring and testing under the direction of the County's Director of Environmental Health, Ordinance, §10.72.030(C); and for inspection of any water treatment facility Ordinance, §10.72.040(B)).

The Ordinance, in other words, represents a legislatively formulated tool to assist in the protection of Monterey County's freshwater aquifers. Not only are these exclusively local issues of high importance, they have nothing to do with the Commission's regulation of public utilities. Nothing in General Order 103-A, Sections I.1.A or 19, relied upon by the Decision at pages 10-11, purports to regulate local groundwater.

In deciding the Ordinance, in its entirety, is preempted the Commission unnecessarily – and inappropriately – eviscerates the County's ability to exercise appropriate local control over the exclusively local issue of water management.

The legion of published opinions on preemption is clear that preemption only exists to the extent local regulation conflicts with statewide regulatory schemes. *IT Corp. v. Solano County Board of Supervisors* (1991) 1 Cal.4th 81; *People ex rel. Deukmejian v. County of Mendocino* (1984) 36 Cal.3d 476; *Orange County Air Pollution Control Dist. v. Public Util. Com.* (1971) 4 Cal.3d 945; *In re Lane* (1962) 58 Cal.2d 99; *Pac. Tel. & Tel. Co. v. City and County of San Francisco* (1959) 51 Cal.2d 766; *Southern California Gas Co. v. City of Vernon* (1995) 41 Cal.App.4th 209, 215-217; *Harbor Carriers, Inc. v. City of Sausalito* (1975) 46 Cal.App.3d 773, 775-776; *California Water & Telephone Co. v. County of Los Angeles* (1967) 253 Cal.App.2d 16. Assuming the siting of a desalination plant as a “water production” and “treatment . . . facilit[y]” does so, see General Order 103-A, Section 19, management of local water resources does not.

No published opinion supports the proposition that the baby has to be thrown out with the bath water. No published opinion finds preemption where local regulation is limited to exclusively local issues that do not conflict with any statewide regulatory scheme.

The Commission's Decision is overbroad. It goes further than is necessary to protect the Commission's jurisdiction. It is legally erroneous and must be set aside.

III. CONCLUSION

The Commission's Decision suffers from three substantial flaws. First, it is premature because it finds preemption despite the fact no project has been approved. Without an approved project, there is nothing for the Ordinance to interfere with and the finding of preemption is merely advisory. Second, in holding the Ordinance cannot be enforced, the Decision squarely violates Article III, Section 3.5 of the California Constitution which expressly prohibits exactly that sort of administrative decision. The Commission is not a court and may not constitutionally adjudicate the enforceability of county ordinances. Third, the Decision is overbroad because it purports to preempt the entire Ordinance despite provisions in the Ordinance that apply to exclusively local issues of water management that are unrelated to any aspect of the Commission's authority.

For these reasons, the County of Monterey requests rehearing be granted in order to set the Decision aside.

Dated: November 30, 2012

Respectfully submitted,
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