

**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)

**APPLICATION OF MARINA COAST WATER DISTRICT
FOR REHEARING OF DECISION 12-10-030**

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I. INTRODUCTION

In accordance with Rule 16.1(c) of the Commission's Rules of Practice and Procedure, Marina Coast Water District ("MCWD") respectfully submits this application for rehearing of the Commission's Decision Declaring Preemption of County Ordinance and the Exercise of Paramount Jurisdiction issued on October 31, 2012 ("D.12-10-030" or "the Decision"). By its application, MCWD seeks to alert the Commission to legal error in the Decision so that the Commission may promptly correct such error.

The Decision purports to preempt a Monterey County Ordinance, Monterey County Code of Ordinances, Title 10, Chapter, 10.72, "concerning the construction, operation and ownership of desalination plants," which it terms the "Desal Ordinance." (Decision, pp. 1, 3.) However, the Decision's reasoning impliedly acknowledges that the Commission's ability to preempt the Desal Ordinance, Chapter 10.72, *in its entirety* is derived solely from and rests solely on the Commission's ability to preempt the narrow ownership provision in the Desal Ordinance, which requires that a desalination plant in Monterey County be owned by a public entity. That provision, section 10.72.030(B), requires a party seeking to construct and operate a desalination plant under the Desal Ordinance to "[p]rovide assurances that each facility will be owned and operated by a public entity." (Decision, p. 4.)

If the Commission cannot preempt the ownership provision in section 10.72.030(B) of the Desal Ordinance, it cannot preempt the remainder of the Desal Ordinance because it has no authority over the construction, operation, and other requirements and standards applicable to a desalination plant owned by a public entity. The Commission has repeatedly acknowledged that it has no authority over public entities. (*See, e.g.*, D.10-12-016, p. 17.) Conversely, if the Commission can preempt section 10.72.030(B) because that provision intrudes on the

Commission's authority over public utilities, then the Commission can preempt the entire Desal Ordinance to the extent it applies to public utilities. Thus, the precise question before the Commission is not whether it can preempt the Desal Ordinance in its entirety but whether it can preempt the ownership provision contained in section 10.72.030(B). As will be demonstrated below, the Commission may not lawfully do so on the record and under the circumstances presently before it.

In addition, MCWD wishes to note that if the Commission seeks to preempt the ownership provision of section 10.72.030(B), it should clarify that its preemption does not extend to private persons or entities that are not public utilities. The Commission clearly has no authority to preempt the County of Monterey from applying section 10.72.030(B) to private individuals or corporations seeking to own a desalination plant that are not public utilities. An example of such a private entity might be Poseidon Corporation.

II. LEGAL ERRORS ASSERTED

1 The Decision erroneously determines that the question of whether it may preempt §10.72.030(B) and hence the Desal Ordinance is ripe for adjudication.

2. The Decision erroneously determines that §10.72.030(B) and hence the Desal Ordinance is preempted based upon a facial challenge to §10.72.030(B) in circumstances where it cannot be said that there is no set of hypothetical conditions that could be placed on the Commission's ultimate CPCN ruling that would not be in conflict with the provision.

3. The Decision erroneously determines that §10.72.030(B) and hence the Desal Ordinance is preempted by express preemption.

4. The Decision erroneously determines that §10.72.030(B) and hence the Desal Ordinance is preempted by field preemption.

5. The Decision erroneously determines that §10.72.030(B) and hence the Desal Ordinance is preempted by conflict preemption.

6. Assuming arguendo that the Decision is correct that that §10.72.030(B) and hence the Desal Ordinance addresses a matter of statewide concern, the Decision erroneously determines that §10.72.030(B) and hence the Desal Ordinance is preempted, because the matter of statewide concern that §10.72.030(B) and the Desal Ordinance implicate falls outside of the Commission's jurisdiction.

As will be discussed more fully herein, the Decision commits the legal error of resolving a controversy that is not ripe for adjudication, in violation of the Supreme Court's two-prong test for ripeness set forth in *Pacific Legal Foundation v. California Coastal Com.* (1982) 33 Cal.3d 158, the criteria for ripeness stated by the Court of Appeal in *California Water & Telephone Company v. County of Los Angeles* (1967) 253 Cal.App.2d 16, and the Commission's own longstanding principle that it will not issue advisory opinions. The Decision reaches its conclusion on erroneous grounds of (1) express preemption; (2) conflict preemption; and (3) field preemption. The Decision also errs in failing to recognize that the preemption challenge to section 10.72.030(B) and hence the Desal Ordinance is a facial one, and that preemption may not be found because it cannot be said that there is no set of circumstances that would ever exist whereby the application could be granted without conflicting with those provisions.

The Decision prematurely declares that the Desal Ordinance *is* preempted because the Desal Ordinance conflicts with the Commission's authority to entertain California American Water Company's ("Cal-Am's") Application for a Certificate of Public Convenience and Necessity ("CPCN") to construct its proposed Monterey Peninsula Water Supply Project ("MPWSP"), including a Cal-Am-owned and operated desalination facility. Under the doctrine

of preemption, a local ordinance is preempted by conflict with state law and must yield to the state law if the local ordinance “mandate[s] what state law expressly forbids, [or] forbid[s] what state law expressly mandates.” (*Big Creek Lumber Co. v. County of Santa Cruz* (2006) 38 Cal.4th 1139, 1161, *citing Sherwin-Williams Co. v. City of Los Angeles* (1993) 4 Cal.4th 893, 902.) Here, however, the Decision would require the Desal Ordinance to yield in the face of a conflict not with a final Commission decision requiring Cal-Am to carry out a project that includes a privately-owned and -operated desalination facility in Monterey County but simply in the face of a conflict with a mere request in a public utility’s application, which the Commission may deny, change or condition in ways that are not presently known.¹

The application is pending, the Commission’s subsequent environmental review is in its early stages, and multiple parties have submitted alternate project proposals for consideration, including proposals for public partnerships and governance requirements that might allow the project to proceed without any conflict with the Desal Ordinance. The final configuration of the project that will be approved by the Commission – if any – is far from settled. Nor is it clear how the Ordinance’s ownership requirement language would be construed if it were measured against a concrete ownership or governance variation imposed by the Commission. There is presently no CPCN or other Commission rule or order that engenders an actual conflict with the Desal Ordinance. Therefore, insofar as the Decision declares preemption. rather than simply clarifying that the Commission has the authority to preempt if it issues a CPCN that conflicts

¹ D.12-10-030 states that “[t]here is an actual conflict between Cal-Am’s Application and the Desal Ordinance.” (D.12-10-030, p. 19.) That sentence lies at the heart of the legal error in D.12-10-030. It appears in a paragraph that states MCWD’s preemption argument makes no “legal, procedural or common sense” to the Commission. (*Ibid.*) The paragraph also states, quite correctly, that the Commission could authorize or order Cal-Am to construct facilities with which the Desal Ordinance would be in direct conflict. A situation where the Commission “could” do something, rather than where it “does” do something is a perfect example of the lack of a ripe controversy.

with the Desal Ordinance, the Decision unnecessarily and unlawfully reaches out to resolve an unripe controversy and render an impermissible advisory opinion.

MCWD does not disagree with the Commission’s conclusion that in theory it *could* preempt the Desal Ordinance, as it is applied to the instant application, *if* the Commission should find the MPWSP, including a privately-owned desalination facility in Monterey County, is required by the present or future public convenience and necessity and grant Cal-Am the requested CPCN. In addition, the Commission’s ability to preempt the Desal Ordinance assumes that no conflicting state-level regulatory scheme for desalination facilities is enacted in the interim.² Such a potential outcome would also necessitate resolution of other critical issues, including groundwater rights and compliance with the Monterey County Water Resources Agency Act’s prohibition on exportation of groundwater from the Salinas Valley Groundwater Basin.³ Without resolution of such issues, the project proposed by Cal-Am would be infeasible and could not possibly be certificated or be in conflict with the Desal Ordinance. At this relatively early juncture in the proceeding, when some form of public entity participation – potentially obviating a need for preemption – remains an option⁴ and environmental review is underway,⁵ determination that the Commission may under certain circumstances have the *ability to preempt* pursuant to its authority under Public Utilities Code section 1001 sufficiently resolves the threshold legal question of preemption so as to facilitate an efficient and thorough CPCN process.

² The Commission agrees that it cannot pre-empt state-level regulations. (D.12-10-030, p. 17, *citing Leslie v. Superior Court* (1999) 73 Cal.App.4th 1042.)

³ As MCWD pointed out, General Order 103-A does not confer authority to leapfrog over determination of water rights and other feasibility issues. (MCWD Comments on Proposed Decision, Oct. 11, 2012, p. 9.)

⁴ See Oct. 26, 2012 Cal-Am Compliance Progress Report Filing, p. 1 (proposals were submitted by the Monterey Peninsula Regional Water Authority and County of Monterey; the Monterey Peninsula Water Management District; the City of Pacific Grove; and the City of Pacific Grove together with the Moss Landing Commercial Park, LLC (for the “People’s Project”).

⁵ See *Scoping Report for the Environmental Impact Report*, A.12-04-019, served Nov. 28, 2012, and CEQA Process Schedule, available at <http://www.cpuc.ca.gov/Environment/info/esa/mpwsp/index.html>.

MCWD also agrees with the conclusion in the Decision that *County of Monterey v. California-American Water Company*, Case No. CGC-12-521875, pending in the San Francisco Superior Court, should promptly be dismissed or otherwise concluded on grounds of (1) lack of ripeness under *Pacific Legal Foundation* and (2) the inappropriateness under Public Utilities Code section 1759 of a superior court entertaining issues that are actively being considered by the Commission. Resolution of the application will make plain whether or not any decision-maker needs to reach the ultimate question of preemption. Superior court action in the interim would impermissibly interfere with the Commission's exercise of authority to resolve the application. (*San Diego Gas & Electric Co. v. Superior Court ("Covalt")* (1996) 13 Cal.4th 893, 913-916.) Furthermore, to the extent that the litigants before the Superior Court (Cal-Am and MCWRA) are not truly adverse – and MCWD fears they are not – MCWD believes the suit could be collusive and a fraud on the court and could be dismissed on that ground as well.⁶ The Commission should promptly instruct Cal-Am to secure a dismissal of the Superior Court action on ripeness and section 1759 grounds.

Deferring the Commission's *final* determination of preemption pending its resolution of the CPCN proceeding, as MCWD believes is legally required, would injure no one, would not delay the proceeding, and would avoid an unnecessary and unlawful Commission conflict with local authority, not to mention the broad array of Monterey County stakeholders that believe that public agency transparency in the ownership and control of a local desalination plant is preferable to ownership by a private company that is solely-owned and controlled by a New Jersey corporation. It would also help to vitiate any perception that the Commission has prejudged the merits of the application and is conducting a hollow process that seeks merely to rubber stamp Cal-Am's requests as expeditiously as possible. Moreover, if the Commission

⁶ See MCWD's Reply to Comments on the PD, Oct. 16, 2012, pp. 1-2.

should ultimately approve a project configuration that does not conflict with the Desal Ordinance,⁷ the over-broad scope of the Decision will have been not only unlawful but entirely unnecessary.

III. ARGUMENT

The Commission sought briefing on the applicability of the Desal Ordinance to Cal-Am's application as part of its effort to address purely legal issues related to project feasibility at the earliest possible stage.⁸ However, the Commission has stepped beyond its original inquiry into the extent of the Commission's authority to preempt the Desal Ordinance. The Decision actually and prematurely purports to *exercise* the Commission's preemption authority. The Decision should be withdrawn, or modified as MCWD suggested in its Comments.⁹ Doing so would not impede the progress of this proceeding, and would ensure that the Commission's evaluation of the applicant's proposed project and alternatives was not tainted by a legally improper determination.

A. The Question of Preemption is Not Ripe

The doctrine of ripeness requires the courts and this Commission to refrain from consideration of those controversies that are not "definite and concrete" and that present no imminent danger of harm. (*Pacific Legal Foundation v. California Coastal Com.*, *supra*, 33 Cal.3d at 170-71 (hypothetical and speculative declaratory relief claims unripe); *compare California Water & Telephone Company v. County of Los Angeles*, *supra*, 253 Cal.App.2d at 26-28 (local ordinance regulating water facilities preempted, as applied, on account of the

⁷ The Nov. 20, 2012 Notice of Ex Parte Communications filed by the City of Pacific Grove, in particular, emphasizes conservation and recycling strategies that could reduce considerably the amount of desalinated water that might be required from the MPWSP; other Peninsula cities could propose or adopt similar measures which, if widely undertaken, would significantly impact the volume of replacement water Cal-Am must bring on line in order to comply with the directives of the State Water Resources Control Board ("SWRCB") as set forth in WR 95-10 and WR 2009-0060.

⁸ D.12-10-030, p. 9 fn 21, *citing* June 1, 2012 ALJ Ruling (requesting briefing), p. 3.

⁹ MCWD's Comments on PD, Appendix.

“continuing effect upon the conduct” of utility business) and 29-30 (local ordinance conflicted with Pub. Util. Code § 1001 “present or future public convenience and necessity” requirement).) Neither prong of the Supreme Court’s two-prong test for ripeness is met by the question of whether the Desal Ordinance is preempted by Commission authority for Cal-Am’s proposed MPWSP. Unless and until the Commission determines that “the present or future public convenience and necessity require” a project that violates section 10.72.030(B) and hence the Desal Ordinance (Pub. Util. Code § 1001), the ultimate question of actual, rather than theoretical, preemption is not yet ripe.

First, no actual controversy regarding the Desal Ordinance presently exists. (*Pacific Legal Foundation v. California Coastal Com.*, *supra*, 33 Cal.3d at 170-71; *Stonehouse Homes v. City of Sierra Madre* (2008) 167 Cal.App.4th 531, 542 (“[c]ourts may not render advisory opinions on disputes which . . . might arise but which do not presently exist”); *PG&E Corp. v. Public Utilities Commission* (2004) 118 Cal.App.4th 1174, 1217.) Making a final decision on preemption at this juncture in A.12-04-019 requires the Commission to hypothetically and impermissibly assume, without further inquiry, that the public convenience and necessity will require the Commission’s grant of a CPCN for Cal-Am’s MPWSP exactly as proposed, and that none of the public entity ownership or governance proposals will equally or better permit it to serve its ratepayers and achieve compliance with the SWRCB’s orders. This is not a case like *California Water & Telephone* where a local ordinance clearly has a “continuing effect” on existing water service, in conflict with Commission authority under section 1001 and General Order (“GO”) 103-A. (*California Water & Telephone Company v. County of Los Angeles*, *supra*, 253 Cal.App.2d at 26.) Rather, a duly-enacted ordinance of many years’ standing *may* come into conflict with the Commission’s paramount jurisdiction – as the Decision correctly

found – but only *if* the Commission grants a CPCN for the applicant’s proposed project. The mere existence of a conflict between an *application*, rather than a CPCN, and an otherwise valid local ordinance is not a proper basis for a Commission finding of preemption. There is presently no Commission act that contravenes the Desal Ordinance. There is simply a pending application – an application protested by many parties – submitted by a public utility.

The Commission faced a similar scenario in Cal-Am’s previous application, A.04-09-019. Cal-Am proposed, as its initially-preferred project option, to construct a completely privately-owned project featuring an open-ocean intake desalination facility at Moss Landing.¹⁰ In that proceeding, the Commission conducted its environmental review and certified a final Environmental Impact Report (“EIR”) that reviewed three project alternatives in detail: (1) Cal-Am’s privately-owned, preferred project, (2) a completely privately-owned alternative project at North Marina with subsurface slant well intake for the desalination facility, and (3) a public-private partnership Regional Desalination Project alternative where the subsurface well intake and the desalination facility would be entirely publicly owned and operated, in clear compliance with the Desal Ordinance.¹¹ When the Commission certified its EIR in that proceeding, it did not take the premature and unnecessary step of addressing preemption of the Desal Ordinance. Its EIR certification decision, D.09-12-017, did not address the Desal Ordinance in any manner, even though the proponent’s preferred project, if granted a CPCN, would have required preemption. Later, the Commission addressed the issue of the Desal Ordinance in its decision granting a CPCN and approving the public-private alternative instead of the privately-owned

¹⁰ *In the Matter of the Application of California-American Water, etc.* (Cal. P.U.C. 2009) 2009 WL 5014046 (“D.09-12-017”) at *7.

¹¹ *Id.* at *7-8.

project originally proposed by Cal-Am. The Commission concluded that “private ownership of a desalination plant is prohibited” by the Desal Ordinance.¹²

Second, the question of preemption of the Desal Ordinance does not present an imminent danger of harm to anyone, without the Commission’s prior or concurrent grant of a CPCN for a facility that could potentially violate the Desal Ordinance. (*Pacific Legal Foundation v. California Coastal Com., supra*, 33 Cal.3d at 172-73.) That is because a CPCN is an absolute prerequisite to construction and operation of any public utility facility. (Pub. Util. Code § 1001.)

Notwithstanding the Decision’s assertion to the contrary,¹³ absent the grant of a CPCN after inquiry into and consideration of all relevant factors, the Commission’s finding of actual preemption constitutes mere speculation that only the MPWSP as proposed will meet the requirements of the public convenience and necessity. (*Northern California Power Agency v. Public Util. Com.* (1971) 5 Cal.3d 370, 378-380 (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).) Such speculation is contrary to the Commission’s obligations to Cal-Am’s ratepayers and the public. (*In re San Diego Gas & Electric Company*, Order Denying Rehearing, (Cal. P.U.C. 2003) 2003 WL 21179852 (“D.03-05-038”) at *1, *7-8 (upholding order denying CPCN upon Commission’s independent assessment of need under Public Utilities Code section 1001, finding that approval of the application “would amount to rubber-stamping” in an “unlawful delegation” of Commission authority).)

Moreover, by preempting the Desal Ordinance in the Decision, the Commission appears to assume that the many other legal and practical hurdles to approval and implementation of the MPWSP as proposed will be overcome, including the apparent assumption, without evidence,

¹² *In the Matter of the Application of California-American Water, etc.* (Cal. P.U.C. 2010) 2010 WL 5033830 (“D.10-12-016”) at Conclusion of Law 28.

¹³ *See* D.12-10-030, p. 19.

that Cal-Am has or can acquire whatever groundwater rights it needs. Many issues, including water rights are still being determined in this proceeding. The Commission has indicated that it is consulting with the SWRCB concerning Cal-Am’s water rights arguments and claims in this case.¹⁴ Without determination on a fully-developed record that the proponent’s proposed project is otherwise legally and practically feasible (including requisite environmental review), the Commission’s finding of definite preemption is simply speculation on an issue that is not “definite and concrete” and that presents no imminent danger of harm. (*Pacific Legal Foundation v. California Coastal Com.*, *supra*, 33 Cal.3d at 170-71.)

Deferring a final determination on preemption has been the Commission’s previous practice. (*In the Matter of the Application of MHC Acquisition One, LLC* (Cal. P.U.C. 1998) 84 CPUC 2d 210, 1998 WL 988428 (“D.98-12-077”) at Conclusions of Law 3, 7, 8 (finding mobile home park water fees and charges subject to the Commission’s authority, not the local authority) and ordering ¶1 (granting CPCN to applicant). *See also California Water & Telephone Company v. County of Los Angeles*, *supra*, 253 Cal.App.2d at 26-28 (affirming trial court’s order granting declaratory relief that county ordinance regulating water facilities was preempted, as applied, on account of its “continuing effect upon the conduct of [regulated public utilities’] business”) and 29-30 (finding the local ordinance conflicted with the required finding of “present or future public convenience and necessity” under Public Utilities Code section 1001).)

MCWD has not located any prior decision of the Commission that reached out to decide a preemption question prior to issuance of a CPCN. Rather, the Commission’s procedure has been to address preemption issues in the CPCN decision, or where a utility is already operating facilities that would have been prohibited by the allegedly preempted ordinance. (*See D.98-12-*

¹⁴ Letter of Sept. 26, 2012 from Paul Clanon to Thomas Howard, served on parties to A.12-04-019 Oct. 3, 2012.

077, p. 27 (noting, in decision granting CPCN, that local authority over rents and utility fees for a Santa Cruz mobile home park could not preempt the Commission’s exclusive jurisdiction where the applicant had abandoned its safe harbor from Commission authority under Public Utilities Code section 2705.5); *see also California Water & Telephone Company v. County of Los Angeles, supra*, 253 Cal.App.2d at 26-28.)

Following Commission precedent here could avoid distrust and ill will among the various stakeholders in the community. In addition to the problem of lack of ripeness, leaving the Decision unchanged might be construed by some as an impermissible predetermination of the outcome of Cal-Am’s application. (*Northern California Power Agency v. Public Util. Com., supra*, 5 Cal.3d at 378-380, *Ventura County Waterworks v. Public Util. Com.* (1964) 61 Cal.2d 462, 465-66 (“*Ventura*”).) As MCWD noted in its Comments on the Proposed Decision prior to issuance of D.12-10-030, “[r]eaching out unnecessarily to invalidate the [Desal] Ordinance before approving the proposed project would violate the cautious approach to the principle of preemption that is required by the Supreme Court.”¹⁵ To reach the ultimate question and determine that the Desal Ordinance is preempted without first conducting a full CPCN inquiry, including the requisite CEQA review, would be to impermissibly issue an advisory opinion and to prejudge the outcome of the utility’s application. (*Pacific Legal Found. v. California Coastal Com., supra*, 33 Cal. 3d at 170; *see also California Coastal Com. v. Granite Rock Co.* (1987) 480 U.S. 572, 593-594 (“we apply the traditional pre-emption analysis which requires an actual conflict . . . [W]e hold only that the barren record of this facial challenge has not demonstrated any conflict.”).)

¹⁵ See MCWD’s Comments to PD, p. 4, *citing Big Creek Lumber Co. v. County of Santa Cruz, supra*, 38 Cal.4th at 1149-1150; *People ex rel. Deukmejian v. County of Mendocino* (1984) 36 Cal.3d 476, 484.

B. The Decision’s Preemption Analysis Constitutes an Unmeritorious Facial Challenge to the Desal Ordinance

As a related matter, the Decision fails to address the distinction between a *facial* challenge, which asserts that there is no set of circumstances under which the law in question (*i.e.*, the Desal Ordinance) could be upheld (*California Coastal Com. v. Granite Rock Co.*, *supra*, 480 U.S. at 593) and an *as applied* challenge, which does not seek to invalidate the law in question but simply asserts that the particular provision can not be applied to the specific circumstances at issue. (*In re Taylor* (2012) 209 Cal.App.4th 210, 226-227, *citing Tobe v. City of Santa Ana* (1995) 9 Cal.4th 1069, 1084.) For example, the Court of Appeal, in *California Water & Telephone*, *supra*, 253 Cal.App.2d 16, did not completely invalidate the ordinance at issue in that case, merely finding that the ordinance “as applied to the [public utilities] conflicts with the general law and relates to matters which are of state-wide rather than local concern.” (*Id.* at 28.) In other words, the challenge was not a facial one.

Here, however, the Decision appears, without discussion, to decide that – no matter what the outcome of the proceeding, and whether or not the MPWSP is approved exactly as Cal-Am proposes or as modified by one or more of the various public agency parties’ proposals regarding ownership, governance and control of the desalination facilities – the Desal Ordinance is preempted on its face. However, there has been no determination by the Commission that there is “no set of circumstances” under which the MPWSP can be implemented without violating the Desal Ordinance. (*California Coastal Com. v. Granite Rock Co.*, *supra*, 480 U.S. at 593.) The facial challenge must accordingly fail.

Furthermore, under Public Utilities Code sections 1001 and 1005, the Commission may attach conditions to the issuance of a CPCN, including where the public utility project would interfere with the water system of a public agency, or where a public agency claims injury.

Where, as here, there is adamant opposition by the public and numerous stakeholders to a particular aspect of a public utility’s application – for instance, private ownership and operation of a desalination facility¹⁶ – nothing in the Public Utilities Code or prior Commission decisions would prevent the Commission, in the public interest, from attaching a condition of public ownership, public operation, public governance, or all of them, to the grant of a CPCN for Cal-Am’s proposed MPWSP. In its reply to the parties’ opening briefs on legal issues, the Public Trust Alliance (“PTA”), citing the Public Trust Doctrine, cautioned against raising the appearance that the Commission was taking a “radical” step to “bend over backward to endorse” Cal-Am’s private ownership and operation of a new public water supply.¹⁷

The facial nature of the challenge to the Desal Ordinance here is further confirmed because the language of section 10.72.030(B), requiring “assurances that each [desalination] facility will be owned and operated by a public entity,” cannot presently be construed to determine whether a particular public-entity ownership proposal, operating agreement, or governance provision approved by the Commission satisfies that language of section 10.72.030(B). It cannot presently be determined whether, through statutory construction, a particular ownership or governance provision approved by the Commission may be harmonized with the language of section 10.72.030(B) to avoid a conflict and hence preemption.

The Commission and Cal-Am have been presented with a number of public-entity options in this application, and more may be forthcoming, which could well obviate the necessity of reaching the ultimate question of preemption, exactly as occurred in A04-09-019.¹⁸ It is error

¹⁶ No local Monterey County party to A.12-04-019 supported the Commission’s finding preemption of the Desal Ordinance. (*See* D.12-10-030, p. 6. The only party other than Cal-Am that argued for a finding of preemption was the Commission’s Division of Ratepayer Advocates. (*Ibid.*)

¹⁷ July 24, 2012 Reply of PTA to Opening Briefs on Threshold Legal Issues of Feasibility Described in Ruling Dated June 1, 2012, pp. 5-6, *citing* Water Code § 1392; Sax, Joseph L. *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 Mich. L. R. 489-491 (1970); *Ventura, supra*, 61 Cal. 2d 462.

¹⁸ *See* Oct. 26, 2012 Cal-Am Compliance Progress Report Filing, p. 1.

for the Commission to assume that there is no set of circumstances under which the Desal Ordinance and the Commission's authority could simultaneously be maintained and preserved before it has examined and rejected the project alternatives and proposals that do not require preemption. (*Coastal Com. v. Granite Rock Co.*, *supra*, 480 U.S. at 593; *see also Ventura*, *supra*, 61 Cal.2d at 465-66.)

C. The Desal Ordinance is Not Expressly Preempted

The Decision declares, in regard to Cal-Am's application for approval of the MPWSP, that the Desal Ordinance is preempted. (Decision, p. 25.) The Decision states that field preemption (*Id.* at 9, 16, 22), conflict preemption (*Id.* at 12-16, 22) and express preemption (*Id.* at 9-12, 22) are all presented by the conflict between Cal-Am's application and the Desal Ordinance. MCWD strongly disagrees.

The Decision finds express preemption in the general language of GO 103-A which prohibits local agencies from regulating the facilities of water utilities subject to the Commission's jurisdiction.¹⁹ The Desal Ordinance requires desalination plants in Monterey County to be publicly-owned and operated. But there is not presently any private desalination facility subject to the Commission's jurisdiction in Monterey County, or any final Commission order or decision authorizing the construction, ownership or operation of such a facility. There is simply a pending application for a CPCN to construct and operate such a facility. Many alternative solutions to the water supply project, with and without a privately-owned desalination plant, have been proposed for consideration. GO 103-A expressly preempts nothing at this juncture.

¹⁹ D.12-10-030, p. 12.

D. The Desal Ordinance is Not Preempted by Field Preemption

The Decision states that the Desal Ordinance attempts to regulate a field that “has been fully occupied by the state,”²⁰ referring to the field of regulation of the facilities of water utilities subject to the Commission’s jurisdiction. However, the Decision applies the doctrine of field preemption to the wrong field. Rather, as MCWD has pointed out, the applicable field is the emerging realm of desalination facility regulation, a field that is outside the Commission’s jurisdiction.²¹ The field is closely related to health and safety matters and sources of potable water, where there are well-established state policies preferring local control, often under the umbrella of state-wide regulation.

The governance scheme for desalination in California is in its infancy. Indications so far are that the Legislature intends agencies other than the Commission to have jurisdiction over desalination matters, as MCWD.²² Assembly Bill 2595, the Cobey-Porter Saline Water Conversion Law, was recently passed in the Senate Committee on Natural Resources and in the Senate Appropriations Committee.²³ Concurrently, the Department of Water Resources is preparing its Update 2013 to the California Water Plan.²⁴ Although the draft Desalination chapter of the Update’s water supply analysis is still not available for comment,²⁵ Update 2013’s draft Strategic Plan notes that desalination of brackish and sea water must be part of the state’s “strategic investments in many available resources management strategies” in the future.²⁶ Thus,

²⁰ D.12-10-030, p. 9.

²¹ MCWD’s Opening Brief on Legal Issues Regarding the Feasibility of the Application, pp. 7-8.

²² *Id.* at pp. 6-9.

²³ See <http://leginfo.legislature.ca.gov/faces/billTextClient.xhtml;jsessionid=28c2d96fba0dd76bd060b41f28ff>. The bill would add Section 35616 to the Public Resources Code, requiring review of current permitting processes and definition of the statewide regulatory scope for desalination facilities. (See bill text, available at <http://leginfo.legislature.ca.gov/faces/billStatusClient.xhtml>.)

²⁴ See Update 2013 draft index, available at <http://www.waterplan.water.ca.gov/cwpu2013/ac-draft/index.cfm>.

²⁵ *Ibid.*

²⁶ Draft Update 2013, Vol. 1, ch. 5, p. 16, available at http://www.waterplan.water.ca.gov/docs/cwpu2013/2012-ac-draft/Vol1_Ch05_ManagingUncertain_AdvisoryCommitteeDraft_jw.pdf.

it is unclear exactly what state-level regulations could be in place by the time the Commission has addressed the many the other aspects of this application, has concluded its environmental review, and has prepared to approve a project and grant a CPCN. One thing, however, is clear – the Commission does not occupy the field of desalination regulation.

E. The Desal Ordinance is Not Preempted by Conflict Preemption

As MCWD pointed out in its comments, the general “water production” language in section I.9 of GO 103-A does not even appear to support a finding of conflict preemption here, on account of Cal-Am’s apparent inability to comply with the more specific production or source criteria set forth in section II.2.B.(1) of GO 103-A.²⁷ Even if the Commission were to grant a CPCN that appeared to be in conflict with the Desal Ordinance, GO 103-A could only serve as the basis for preemption if Cal-Am demonstrated that its production source for the facility was exclusively “seawater” in compliance with section II.2.B.(1) based on Cal-Am’s Urban Water Management Plan, or if the related problems of water rights and Agency Act compliance were also otherwise resolved, such as through partnership with a public entity capable of providing such compliance, such as the Commission found with respect to MCWD in D.10-12-016. Needless to say, such a partnership could also obviate the need to address preemption.

In addition, as above noted, GO 103-A, which addresses standards for the water facilities of Commission-regulated water utilities, cannot be used to bootstrap preemption of the ownership provision of the Desal Ordinance contained in section 10.72.030(B). If the Commission cannot preempt the ownership provision in section 10.72.030(B), it cannot preempt the remainder of the Desal Ordinance because it has no authority over the construction, operation, and other requirements and standards applicable to a desalination plant owned by a public entity. The Commission has repeatedly acknowledged that it has no authority over public

²⁷ MCWD’s Comments on PD, pp. 4-7.

entities. (*See, e.g.*, D.10-12-016, p. 17.) Accordingly, preemption predicated on GO 103-A is unjustified and unlawful.

F. To the Extent that Regulation of Desalination May Be a Statewide Concern, it Falls Outside the Commission's Jurisdiction

The Commission's General Order 103-A generally requires that public utilities' water sources be safe, reliable and legal, but the Commission does not make water rights determinations. In A.04-09-019, the Commission pointedly avoided any interference with state or local water agencies' jurisdiction.²⁸ As noted above, the Commission indicated that it will consult with the SWRCB concerning water rights matters in this proceeding.²⁹

Meanwhile, other state-wide agencies are developing policy and regulations concerning desalination. Those developments may or may not allow or require public ownership and operation of desalination facilities, since such facilities could constitute a potentially significant part of the public's future water assets in California. The Commission should avoid creating any conflict with developing state-wide policy concerning desalination – developing policy that the Commission is without authority to dictate – as it simultaneously consults with the SWRCB concerning water rights for the proposed project.

IV. CONCLUSION

There is no reason for the Commission to violate its own well-settled precedents, as well as those of the California Supreme Court, to make a premature and speculative final determination concerning preemption of the Desal Ordinance, as it applies to this application at this point in time. The Commission cannot lawfully decide the preemption question until it determines that the present or future public convenience and necessity *requires* the MPWSP, in some form and with some as-yet unknown conditions, and issues a CPCN. Withdrawing the

²⁸ D.10-12-016, p. 17.

²⁹ Letter of Sept. 26, 2012 from Paul Clanon to Thomas Howard, served on parties to A.12-04-019 Oct. 3, 2012.

Decision or modifying it to make only a preliminary determination that the Commission has the authority to preempt the Desal Ordinance, *if necessary*, and deferring a final decision on preemption pending the Commission’s resolution of the CPCN proceeding, would injure no one, would preserve the integrity of the Commission’s CPCN process for this application, would adhere to Commission precedent, and would ensure the Commission’s compliance with the black-letter law governing ripeness as well as preemption.

The scope of the Decision is in error, and thus presents a real threat to the parties’ and the public’s trust in the legal integrity and transparency of the Commission’s process. It could give the appearance, despite the Commission’s statement to the contrary,³⁰ that the Commission has already pre-approved the utility’s proposal, when the Commission’s role in an application proceeding is that of a regulatory fact-finder and decision-maker, dedicated to service of the public interest and resting its determinations on a full and accurate evidentiary record. Hurrying to make a final preemption decision before there is a concrete controversy where an actual CPCN is in conflict with a local ordinance does not serve the public’s, the parties’ or the Commission’s interests in a fair hearing that does not “delegate[] its power to decide the question of public convenience and necessity.” (*Ventura, supra*, 61 Cal.2d at 464-66.)

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Respectfully submitted,
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³⁰ D.12-10-030, p. 20 – stating that the Decision does not “pre-judge” approval of the MPWSP. *See also ibid.*, fn 23, noting potential benefits from public participation and direction to Cal-Am to “consider seriously” feasible public agency proposals.