

**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)

**RESPONSE OF CALIFORNIA-AMERICAN WATER COMPANY
TO APPLICATION OF THE COUNTY OF MONTEREY FOR REHEARING OF
DECISION 12-10-030**

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I. INTRODUCTION

Pursuant to Rule 16.1(d) of the California Public Utilities Commission’s (“Commission”) Rules of Practice and Procedure, California-American Water Company (“California American Water”) files this response to the *Application of the County of Monterey for Rehearing of Decision No. 12-10-030* (“Application for Rehearing”) filed and served on November 30, 2012. The County of Monterey (“Monterey County” or “County”) avers that Decision (“D.”) 12-10-030 is “unlawful and legally erroneous.”¹ Specifically, the County argues that a rehearing of D.12-10-030 is needed because the preemption of Monterey County Code of Ordinances, Title 10, Chapter 10.72 (“Desalination Ordinance”) is not ripe, the Commission is prohibited from declaring that the ordinance is unenforceable, and “even if preemption is . . . proper, . . . [D.12-10-030’s] preemption determination is overly broad.”²

¹ *Application of the County of Monterey for Rehearing of Decision No. 12-10-030* (“Application for Rehearing”), dated Nov. 30, 2012, p. 1.

² Application for Rehearing, p. 1.

California American Water respectfully disagrees with Monterey County and asks the Commission to deny the Application for Rehearing. The issue of preemption is not only ripe but the Commission was correct in determining that the subject matter which the Desalination Ordinance attempts to regulate is clearly within the Commission's exclusive jurisdiction. The Commission's authority, in this situation, preempts the County's authority.

II. THE ISSUE OF PREEMPTION IS RIPE FOR CONSIDERATION BY THE COMMISSION

In its Application for Rehearing, Monterey County claims that the Commission commits legal error because the issue of preemption is not ripe for adjudication and that D.12-10-030 is an advisory opinion.³ The County is right in citing *Abbott Laboratories v. Gardner*⁴ and other State and Commission decisions to illustrate the "ripeness doctrine" and demonstrate that the Commission adheres to it.⁵ However, the issue of preemption of the Desalination Ordinance is ripe because the Commission is currently considering, in the above-captioned proceeding, whether it will authorize California American Water's request to build a desalination plant. Indeed, the County itself recognized the ripeness of the issue when it filed **on June 26, 2012** a declaratory relief action in San Francisco County Superior Court seeking a judicial interpretation of whether the Ordinance applied to the MPWSP.⁶ In its Complaint for Declaratory Relief, the County noted that California American Water had filed its April 23, 2012 application to the Commission for a certificate of public convenience and necessity to construct a desalination plant and related facilities, and asked the court to ***promptly*** resolve the issue of whether the

³ See *Id.* at 4.

⁴ See *Abbott Laboratories v. Gardner* (1967) 387 U.S. 136, 148-149 (stating that the issue of ripeness is "best seen in a twofold aspect, requiring us to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration.").

⁵ See Application for Rehearing, pp. 7-8.

⁶ See Application for Rehearing, p. 2 (citing to *County of Monterey vs. California-American Water Company*, San Francisco County Superior Court, Case No. CGC-12-521875).

Desalination Ordinance applies to California American Water.⁷ The County now claims in its Application for Rehearing that the finding on the issue of preemption is not yet ripe for decision. The County cannot have it both ways.

The County cites D.99-08-018 in order to support its claim that D.12-10-030 amounts to an advisory opinion which are only issued by the Commission in “extraordinary circumstances.”⁸ The facts surrounding D.99-08-018, however, are markedly different than the facts in the above-captioned proceeding. Unlike in the above-captioned proceeding – where the parties disagree over an issue that is pending before the Commission – the parties in D.99-08-019 did not have a disagreement over an issue that was pending before the Commission. The Commission noted that “the pleadings, themselves, reveal that the parties’ actual disagreement concerns a siting dispute that is not pending before us.”⁹ The County is mistaken in suggesting that the issue of preemption is not ripe and that D.12-10-030 amounts to an advisory opinion. The issue of whether or not to approve California American Water’s proposed desalination project is pending before the Commission and must be resolved accordingly.

Additionally, California American Water notes that while the judicial decisions cited by the County are instructive as to how the “ripeness doctrine” is applied, the facts surrounding these decisions are not at all similar to the facts in the above-captioned proceeding. The judicial decisions cited by Monterey County in support of its “ripeness” claim involve situations where a government entity has not adjudicated an issue or taken any significant actions that may cause the aggrieved party harm.

⁷ Complaint for Declaratory Relief, dated June 26, 2012, *County of Monterey vs. California-American Water Company*, San Francisco County Superior Court, Case No. CGC-12-521875

⁸ See D.99-08-018, *The City of St. Helena v. Napa Valley Wine Train, Inc.*, 1999 WL 703034 (Cal. PUC), p. 2.

⁹ D.99-08-018, p. 2. While D.99-08-018 and other related Commission decisions were subsequently overturned on judicial appeal, the California Appeals Court stated that the decisions were annulled only, “to the extent they deem the Wine Train a common carrier providing transportation subject to regulation as a public utility. *City of St. Helena v. Public Util. Com.* (2004) 119 Cal.App.4th 793, 804 (footnote omitted).

In *Pacific Legal Foundation v. California Coastal Commission*, the Supreme Court of California refused to consider the challenge to the public access guidelines as the action was a facial challenge to the guidelines.¹⁰ The Court reasoned that the issue was not ripe because the guidelines were quasi-legislative and had not been applied to the peculiar facts of an individual case.¹¹ In *Selby Realty Co. v. City of San Buenaventura*, the Supreme Court of California found that the plaintiff could not sustain an action for declaratory relief against the county because the county's adopted general plan did not amount to a taking. The general plan contained a proposed extension of a street that ran through the plaintiff's land.¹² The Court reasoned that a general plan was tentative in nature and did not amount to a taking.¹³ In *PG&E Corp. v. Public Utilities Commission*, the Court of Appeal refused to adjudicate a point of contention because the Commission had yet to apply its interpretation. The Court reasoned that the Commission's definition of the "first priority condition" had not been applied to a concrete set of facts.¹⁴

The facts in these decisions significantly contrast the facts in the above-captioned proceeding. As previously discussed, the issue is before the Commission, in a formal proceeding that is currently underway. This is not an abstract exercise. The County would be right if the parties sought a Commission opinion prior to the filing of an application. In the above-captioned proceeding, the question of preemption is sufficiently concrete¹⁵ as a request to construct a desalination plant is currently pending before the Commission. Moreover, unlike the parties in the County's cited cases, California American Water will face significant and immediate

¹⁰ See *Pacific Legal Foundation v. California Coastal Commission* (1982) 33 Cal.3d 158, 172.

¹¹ See *Pacific Legal Foundation* 33 Cal.3d at 168-170.

¹² See *Selby Realty Co. v. City of San Buenaventura* (1973) 10 Cal.3d 110, 115.

¹³ See *Selby Realty Co.* 10 Cal.3d at 118.

¹⁴ See *PG&E Corp. v. Public Util. Com.* (2004) 118 Cal.App.4th 1174, 1217.

¹⁵ See *Pacific Legal Foundation* 33 Cal.3d at 170-71 (citing *Aetna Life Ins. Co. v. Haworth* (1937) 300 U.S. 227, 240-241 which states, "[t]he controversy must be definite and concrete, touching the legal relations of parties having adverse legal interests. It must be 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.").

hardship if the issue of the applicability of the Desalination Ordinance is not adjudicated at this point. It would be counter-intuitive to wait until a whole matter is adjudicated in order to determine a jurisdictional issue. The courts realize this and have indicated that an issue does not have to be completed adjudicated, as is suggested by the County, in order to be ripe.¹⁶

III. THE COUNTY MISAPPLIES CONSTITUTIONAL PROVISIONS AND JUDICIAL PRECEDENT IN DECLARING THAT THE COMMISSION CANNOT PREEMPT ITS ORDINANCE

The County essentially argues that preemption of the Desalination Ordinance is tantamount to the Commission declaring that the Desalination Ordinance is unconstitutional.¹⁷ The County rightly cites, and D.12-10-030 concurs, that the Commission is barred from declaring a statute unenforceable or unconstitutional.¹⁸ However, as described in D.12-10-030¹⁹, the Commission has the constitutional authority²⁰ to preempt a purely local county ordinance where the state Legislature grants it regulatory power.²¹

The state Legislature, by way of the Public Utilities Code, has charged the Commission with far-reaching authority in the operations and facilities of public utilities that fall under its jurisdiction.²² This includes the regulation of the siting, construction, operation, and ownership

¹⁶ See *id.* at 171 (stating that “[i]n the same vein, the Court of Appeal has observed . . . ‘[a] controversy is ‘ripe’ when it has reached, but has not passed, the point that the facts have sufficiently congealed to permit an intelligent and useful decision to be made.’ (California Water & Telephone Co. v. County of Los Angeles (1967) 253 Cal.App.2d 16, 22 . . .)”).

¹⁷ See Application for Rehearing, pp. 8-10.

¹⁸ See Cal. Const., art. III, § 3.5.

¹⁹ D.12-10-030, *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*, dated October 25, 2012 (“D.12-10-030”), p. 17.

²⁰ See *Consumers Lobby Against Monopolies v. Public Util. Com.* (1979) 25 Cal.3d 891, 905 (stating that the Commission “is a state agency of constitutional origin with far-reaching duties, functions and powers . . . [with] board authority . . . to regulate utilities . . . The commission’s powers . . . are not restricted to those expressly mentioned in the Constitution: ‘The Legislature has plenary power, unlimited by the other provisions of this constitution but consistent with this article, to confer additional authority and jurisdiction upon the commission . . .’ (Cal. Const., art. XII, § 5.)”).

²¹ Cal. Const., art. XII, § 8 (stating that “[a] city, county, or other public body may not regulate matters over which the Legislature grants regulatory power to the [Public Utilities Commission].”).

²² See *San Diego Gas and Electric Company v. Superior Court of Orange County* (1996) 13 Cal.4th 893, 914-915 (stating that “the [Public Utilities Act] vests the commission with broad authority to ‘supervise and regulate every

of a facility proposed to be constructed by a water utility.²³ The California Constitution adds that local laws in conflict with general laws are void.²⁴

The County's suggestion that the Commission's action is somehow prohibited is not based on the California Constitution, case law, relevant statutes, or Commission policy. A local ordinance conflicts with general law if the ordinance duplicates, contradicts, or enters an area fully occupied by general law, either expressly or by legislative implication.²⁵ If the subject matter or field of the legislation is fully occupied by the State, there is no room for supplementary or complementary local legislation, even if the subject is otherwise an appropriate area of local concern.²⁶ If local legislation conflicts with general law or is a matter of statewide rather than strictly local concern, the local ordinance is void, whether or not the general law completely occupies the field, however defined.²⁷

IV. THE COUNTY IS MISTAKEN IN SUGGESTING THAT, DESPITE PREEMPTION, CERTAIN PORTIONS OF THE DESALINATION ORDINANCE SHOULD REMAIN APPLICABLE

As an alternative, the County argues that, "assuming parts of the Ordinance are preempted by the Commission's authority, it is indisputable other parts are not."²⁸ California American Water disagrees with this line of reasoning and agrees with D.12-10-030. The question is not whether there is a set of circumstances in which the desalination facilities, if granted, could be made consistent with the Desalination Ordinance, but whether there is a set of

public utility in the State' (§ 701) and grants the commission numerous specific powers for that purpose . . . however, the commission's powers are not limited to those expressly conferred on it: the Legislature further authorized the commission to 'do all things, whether specifically designated in [the Public Utilities Act] or in addition thereto, which are necessary and convenient' in the exercise of its jurisdiction over public utilities. (*Ibid.*, italics added.)").

²³ See General Order 103-A, § I.1.A.

²⁴ Cal. Const., art. XI, § 7 (stating that "[a] county or city may make and enforce within its limits all local, police, sanitary and other ordinances and regulations not in conflict with general laws.>").

²⁵ See *California Water & Telephone Company v. County of Los Angeles* (1967) 253 Cal. App. 2d 16, 18.

²⁶ See *California Water & Telephone Company* 253 Cal. App. 2d at 18.

²⁷ See *Id.*

²⁸ Application for Rehearing, p. 10.

circumstances in which the Desalination Ordinance would not conflict with the Commission’s authority. The Desalination Ordinance is facially invalid because it cannot be harmonized with General Order 103-A or the Commission’s broad authority over water utility facilities.

As discussed in the previous section, “[a] city, county, or other public body may not regulate matters over which the Legislature grants regulatory power to the [Public Utilities Commission].”²⁹ Furthermore, the California Constitution states that “[a] county or city may make and enforce within its limits all local, police, sanitary and other ordinances and regulations not in conflict with general laws.”³⁰ The Commission has the constitutional³¹ and legislative³² authority to regulate the siting, construction, operation, and ownership of a facility proposed to be constructed by a water utility.³³ As stated by General Order 103-A:

Local agencies acting pursuant to local authority are preempted from regulating water production, storage, treatment, transmission, distribution, or other facilities (including the location of such facilities) constructed or installed by water or wastewater utilities subject to the Commission’s jurisdiction. However, in locating such projects, the utility should consult with local agencies regarding land use matters.³⁴

The County further argues that even if parts of the Desalination Ordinance are preempted, other parts deal with exclusively local issues that have nothing to do with the Commission’s regulation of public utilities. However, the County fails to articulate the specific aspects of the Desalination Ordinance which are not preempted. As described herein and in prior comments submitted to the Commission, the subject matter that the Desalination Ordinance attempts to regulate falls under the Commission’s exclusive authority. The Commission has “paramount jurisdiction in cases where it has exercised its authority, and its authority is pitted against that of

²⁹ Const. Const., art. XII, § 8.

³⁰ *Id.* at art. XI, § 7.

³¹ See *Consumers Lobby Against Monopolies* 25 Cal.3d at 905.

³² See *San Diego Gas and Electric Company* 13 Cal.4th at 914-915.

³³ See General Order 103-A, § I.1.A.

³⁴ *Id.* at § I.9.

a local government involving a matter of statewide concern.”³⁵ In other words, there is *no room* for local regulation of public utilities. The Commission rightly notes that the Desalination Ordinance is preempted as it is an attempt by the County to regulate a water utility pursuant to its local authority.³⁶ If the County’s proposition is accepted, it would create a situation where local regulations would cause confusion by creating a patch work of local regulations over a matter that is of statewide concern.³⁷

V. CONCLUSION

The Commission should reject the County’s Application for Rehearing. As previously demonstrated, the issue of preemption was ripe for consideration by the Commission in D.12-10-030. Furthermore, the County’s insistence that the Commission was prohibited from preempting all, or only those parts that are not local in nature, has no support in State law. The Commission has full constitutional and legislative authority in regulating water production, storage, treatment, transmission, distribution, or other facilities constructed or installed by a water utility subject to the Commission’s jurisdiction.

Dated: December 17, 2012

Respectfully submitted,

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³⁵ *Public Utilities Com. v. Energy Resources Conservation & Dev. Com.* (1984) 150 Cal. App.3d 437, 451-452; *Harbor Carriers, Inc. v. City of Sausalito* (1975) 46 Cal.App.3d 773, 775; *Orange County Air Pollution Control Dist. v. Public Util. Com.* (1971) 4 Cal.3d 945, 953 at fn. 7.

³⁶ See D.12-10-030, p. 11.

³⁷ *California Water & Telephone Co.* 253 Cal.App.2d at 30-31.