

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

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

I. INTRODUCTION

Pursuant to Rule 16.1 of the California Public Utilities Commission's ("Commission") Rules of Practice and Procedure, California American Water Company ("California American Water") submits the following response to the *Application of Marina Coast Water District for Rehearing of Decision 12-10-030*, filed November 30, 2012 ("Application for Rehearing"). As California American Water explains below, the Application for Rehearing should be denied. Contrary to Marina Coast Water District's ("MCWD") assertions, Decision ("D.") 12-10-030 does not err in finding that Monterey County Code of Ordinances, Title 10, Chapter 10.72 ("Desal Ordinance") is preempted and invalid. All of the arguments raised by MCWD in its Application for Rehearing were raised in prior submissions in A.12-04-019. These arguments were addressed and refuted by California American Water and were properly rejected by the Commission in D.12-10-030.

II. MCWD'S APPLICATION FOR REHEARING SHOULD BE DENIED

In D.12-10-030 the Commission correctly found that the Commission's authority, exercised through General Order ("GO") 103-A in A.12-04-019, preempts the Desal Ordinance.¹

¹ 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*, 2012 Cal. PUC LEXIS 471 ("D.12-10-030, 2012 Cal. PUC LEXIS 471"), Ordering ¶ 1.

The Desal Ordinance is preempted under all three theories of preemption: express preemption, field preemption, and conflict preemption.² The Desal Ordinance is expressly preempted by GO 103-A. In addition, it is preempted under the theory of conflict preemption because it conflicts with GO 103-A and with the Commission's authority to permit and certificate water utility facilities. It is preempted under the theory of field preemption because it encroaches upon the Commission's exclusive jurisdiction of public water utilities and water utility facilities, a field of regulation fully occupied by the Commission's jurisdiction as defined in the California Constitution and the Public Utilities Code.³ As such, MCWD's Application for Rehearing should be denied.

A. Resolution of the Preemption Question is Ripe.

MCWD argues that the question of preemption is not ripe unless and until the Commission authorizes, by issuance of a certificate of public convenience and necessity ("CPCN"), a project that would violate the Desal Ordinance. MCWD reasons that "[t]he 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."⁴ MCWD is incorrect. California American Water refuted this argument in prior pleadings and it is correctly disposed of in D.12-10-030.⁵

As D.12-10-030 explains, while the Commission has yet to issue a CPCN in A.12-04-

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

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

⁴ Application for Rehearing, p. 9.

⁵ *Reply Comments of California-American Water Company on the Proposed Decision Declaring Preemption of County Ordinance*, filed October 16, 2012 ("California American Water Reply Comments"), pp. 3-4.

019, the Desal Ordinance is *expressly* preempted by GO 103-A, which states: “local agencies acting pursuant to local authority are preempted from regulating water production, storage, treatment, transmission, distribution, or other facilities...”⁶ In its lengthy discussion regarding why the preemption question is not yet ripe, MCWD conveniently ignores the fact that the Desal Ordinance is expressly preempted by GO 103-A.⁷

MCWD also argues that “by preempting the Deal 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...” and that “leaving the Decision unchanged might be construed by some as an impermissible predetermination of the outcome of Cal-Am’s application.”⁸ MCWD is incorrect. Finding the Desal Ordinance preempted removes one significant potential legal impediment to California American Water’s application, which the Commission had determined is a legal threshold issue that should be resolved before the Commission should review the merits of the application. As ALJ Weatherford noted, “the issue of preemption is critical to this proceeding.”⁹ Because the Desal Ordinance would prohibit public utilities from constructing and owning desalination plants, if it were not preempted, it would be dispositive of California American Water’s application. Deferring resolution of this issue, therefore, would be grossly inefficient since the Commission could, in theory, find the application reasonable and in the public interest but nevertheless conclude that it is prohibited by the Desal Ordinance. Furthermore, nothing in D.12-10-030 prejudices the outcome in A.12-04-019 or relieves California American Water of meeting its burden.

B. The Desal Ordinance Conflicts with GO 103-A and Is Facially Invalid.

MCWD asserts that the Decision’s preemption analysis constitutes an unmeritorious

⁶ D.12-10-030, 2012 Cal. PUC LEXIS 471, *16; GO 103-A, Section I.9, *available at* <<http://docs.cpuc.ca.gov/PUBLISHED/Graphics/107118.PDF>> (as of December 17, 2012) (“GO 103-A”).

⁷ Application for Rehearing, pp. 7-12.

⁸ Application for Rehearing, pp. 10, 12.

⁹ *Administrative Law Judge’s Ruling*, filed June 1, 2012, p. 3.

facial challenge to the Desal Ordinance. MCWD reasons that the facial challenge must fail because “there has been no determination by the Commission that there is ‘no set of circumstances’ under which MPWSP can be implemented without violating the Desal Ordinance.”¹⁰ MCWD concludes that “it is error 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.” MCWD’s argument as to facial invalidity is misleading and incorrect.

Because D.12-10-030 finds that the Desal Ordinance is preempted under both express preemption and field preemption theories, the Commission need not reach the question of whether the Desal Ordinance is invalid on its face or as applied. Whether a preemption claim is a facial challenge or an as applied challenge is only relevant within the context of conflict preemption claims.¹¹

Nevertheless, the Desal Ordinance is facially invalid because it cannot be harmonized with the GO 103-A or the Commission’s broad authority over water utility facilities. By asserting that the Commission could condition approval of the Application in such a way that it does not conflict with the Desal Ordinance, MCWD has its analysis backwards. The question is not whether there is a set of circumstances in which a CPCN, if granted, could be made consistent with the Desal Ordinance, but whether there is a set of circumstances in which the Desal Ordinance would not be in conflict with the GO 103-A and the Commission’s general authority. MCWD again selectively ignores the fact that the Desal Ordinance both conflicts with and is expressly preempted by GO 103-A. Because GO 103-A prohibits local regulation of

¹⁰ Application for Rehearing, p. 13.

¹¹ *Miami County Bd. of Comm’rs v. Kanza Rail Trails Conservancy Inc.* (Kan. 2011) 292 Kan. 285 (“the United States Supreme Court has identified two varieties of conflict preemption. One of the subcategories focuses on a facial or per se conflict where ‘it is impossible for a private party to comply with both state and federal requirements.’ English, 496 U.S. at 79. The other subcategory arises even if the state law is not facially in conflict with federal law if the ‘state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.’”

public utility water production and water facilities, there is, in fact, no set of circumstances in which the Desal Ordinance's prohibition on public utility ownership of desalination facilities is not in conflict with the GO 103-A.

Cal. Coastal Com. v. Granite Rock Co., (1987) 480 US 572, which MCWD relies upon in support of its argument that the preemption finding constitutes an unmeritorious facial challenge, is distinguishable. In *Cal. Coastal Com.*, a mining company asserted that a state agency permitting requirement was preempted by the Mining Act of 1872 and various federal regulations.¹² The Court found that there was no evidence that Congress had intended to occupy the field of state environmental regulation, that there was no law or regulation expressly preempting the state statute in question, and that, therefore, the mining company's challenge was limited to a conflict preemption facial challenge.¹³ The Court found that the state agency's permit requirement was not facially invalid because, in part, (1) the federal regulations contemplated compliance with state law; (2) Congress specifically disclaimed any intent to preempt pre-existing state authority; and, (3) where no specific conditions had been imposed on the permit, the state agency only needed to identify "a possible set of permit conditions not in conflict with federal law."¹⁴

None of the circumstances present in *Cal Coastal Com.* are present here. The conflict between the Desal Ordinance and Commission regulations is not speculative or dependent upon subsequent Commission action. By prohibiting private corporate ownership of desalination plants, the Desal Ordinance conflicts directly with GO 103-A and the Commission's general authority over water utility infrastructure.

C. The Desal Ordinance is Expressly Preempted.

MCWD argues that the Desal Ordinance is not expressly preempted by GO 103-A. MCWD concedes that GO 103-A prohibits local agencies from regulating the facilities of water

¹² *Cal. Coastal Com. v. Granite Rock Co.* (1987) 480 U.S. 572.

¹³ *Id.*, at 584.

¹⁴ *Id.*, at 589, 594.

utilities subject to the Commission’s jurisdiction.” MCWD further states that “there is not presently any private desalination facility subject to Commission jurisdiction in Monterey County, or any final Commission order or decision authorizing the construction, ownership or operation of such facility” and that “GO 103-A expressly prohibits nothing at this juncture.”¹⁵

MCWD appears to be arguing that GO 103-A only applies to existing water facilities. This is incorrect. As the Decision notes, GO 103-A preempts local authorities from regulating water production and facilities *including the location* of such facilities.¹⁶ GO 103-A further states that, notwithstanding the previous prohibition, in locating such projects, the utility should consult with local agencies regarding land use matters.¹⁷ The location of facilities is reviewed and authorized as part of the CPCN application process. It would be nonsensical to preempt local authorities from regulating the location of facilities only after the facilities have already been constructed. Here again GO 103-A and the Desal Ordinance are in direct conflict insofar as the Desal Ordinance would restrict the location of water utility facilities by prohibiting privately owned desalination facilities in Monterey County.¹⁸

D. The Desal Ordinance is Preempted by Field Preemption.

MCWD asserts that the Decision errs in finding that the Desal Ordinance impermissibly encroaches on a field of regulation that “has been fully occupied by the state.”¹⁹ MCWD asserts that the field of regulation in question, is not the regulation of water utility facilities but “the emerging field of desalination facility regulation.”²⁰ MCWD is incorrect.

As California American Water has previously explained, the Desal Ordinance is preempted under the theory field preemption because it encroaches upon the Commission’s

¹⁵ Application for Rehearing, p. 15.

¹⁶ D.12-10-030, 2012 Cal. PUC LEXIS 471, *16; GO 103-A, Section I.9.

¹⁷ *Id.*

¹⁸ D.12-10-030, 2012 Cal. PUC LEXIS, *16; *Reply Brief of The Division of Ratepayer Advocates on Preemption*, filed July 25, 2012 (“DRA Reply Brief”), pp. 3-4; California American Water Reply Comments, pp. 2-4.

¹⁹ Application for Rehearing, p. 16.

²⁰ *Id.*

exclusive and expansive jurisdiction over public water utilities and water utility facilities.²¹ Relying on the breadth of the Public Utilities Code, courts have consistently held that local or municipal regulation of public utilities is preempted by the Commission’s jurisdiction.²² The California Constitution prohibits cities, counties and other public bodies from regulating matters “over which the Legislature grants regulatory power to the Commission.”²³ The California Legislature, via the California Public Utilities Code, already authorizes and obligates the Commission to regulate all aspects of utility facilities, and the water system, in order to ensure safe and reliable service.²⁴ The Commission’s authority over water utility facilities is expansive in scope and encompasses all facilities and potential sources supply, including desalination facilities.

MCWD’s attempt to redefine the field as the regulation of desalination facilities is contrary to applicable law. The ultimate question in determining the relevant field for the purposes of field preemption analysis is whether the law in effect regulates in the same field of regulation occupied by the state.²⁵ The effect of the Desal Ordinance at issue here is to prohibit the ownership, permitting, and construction of water utility facilities, an area within the exclusive jurisdiction of the Commission.

California Water & Telephone Co. v. County of Los Angeles (1967) 253 Cal.App.2d 16, is on point. There the court found preempted a county ordinance that required any person that

²¹ California American Water Legal Issues Reply Brief, p. 2-4.

²²*Public Utilities Com. v. Energy Resources Conservation & Dev. Com.* (Cal. App. 1st Dist. 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.

²³ Cal. Const., art. XII, § 8.

²⁴ See Pub Util. Code §§ 281, 761 – 768; “Water system” is defined broadly to include “structures...and fixtures...owned, controlled, operated, or managed in connection with or to facilitate the diversion, development, storage, supply, distribution, sale, furnishing...of water.”

²⁵ *California Grocers Assn. v. City of Los Angeles* (Cal. 2011) 52 Cal. 4th 177, 190 (“Purpose alone is not a basis for concluding a local measure is preempted. While we and the Courts of Appeal have occasionally treated an ordinance’s purpose as relevant to state preemption analysis, we have done so in the context of a nuanced inquiry into the ultimate question in determining field preemption: whether the effect of the local ordinance is in fact to regulate in the very field the state has reserved to itself.”), citing *Lancaster v. Municipal Court* (1972) 6 Cal.3d 805, 809–810; *Bravo Vending v. City of Rancho Mirage* (1993) 16 Cal.App.4th 383, 404–409).

supplied domestic water to more than one customer to obtain a permit as a condition precedent to the construction of any portion of the water system.²⁶ Despite the fact that the purported purpose of the ordinance was to promote fire safety, an area otherwise within a municipality's authority over health and safety, the court found that "the construction, design, operation and maintenance of public water utilities is a matter of state-wide concern."²⁷ The court reasoned that the control of design and construction of water utility facilities "is not a municipal affair subject to a checkerboard of regulations by local governments" and is within the exclusive statewide jurisdiction of the Commission.²⁸

The subject matter of the Desal Ordinance and the subject matter of the Commission's jurisdiction are substantially identical.²⁹ The Ordinance establishes a certification process that prior to commencing construction and operations would require applicants submit contingency plans to ensure adequate service, demonstrate financial capability, and submit maintenance and operating plans prior to commencing operations.³⁰ These requirements mirror the Commission's CPCN process and the requirements of GO 103-A. As such, the Ordinance encroaches on a field of regulation fully occupied by the Commission and is therefore preempted.

E. The Desal Ordinance is Preempted by Conflict Preemption.

MCWD asserts that the Desal Ordinance is not preempted under the theory of conflict preemption.³¹ Importantly, MCWD concedes that if the Commission were to approve the Application and issue a CPCN it would preempt the Desal Ordinance.³² Nevertheless, MCWD argues that until the Commission does so, there is no conflict and, therefore, no preemption.

²⁶ *California Water & Telephone Co. v. County of Los Angeles* (1967) 253 Cal.App.2d 16, 21.

²⁷ *Id.* at 30.

²⁸ *Id.* at 31.

²⁹ *California Water & Telephone Co. v. County of Los Angeles* (1967) 253 Cal. App. 2d 16 (Invalidating County Ordinance on grounds of both conflict and field preemption where it interfered with Commission's comprehensive jurisdiction over utility facilities under Pub. Util. Code §§ 781, 798, 1001 and GO 103-A).

³⁰ Monterey County Ordinance 10.72.020; 10.72.030

³¹ Application for Rehearing, p. 17.

³² Application for Rehearing, p. 5.

MCWD argues the “water production” language in GO 103-A does not appear to support a finding of conflict preemption here unless and until California American Water demonstrates that its production source for the facility is exclusively seawater.³³ MCWD strains to make the claim that there is no preemption because California American Water cannot overcome alleged obstacles related to water rights and the Agency Act.³⁴ As California American Water has previously demonstrated in legal briefs and other pleadings, however, MCWD’s water rights claims do not affect the feasibility of the project. MCWD's claims are without merit and, moreover, do not affect the Commission's preemption of the Desal Ordinance.³⁵ While there are a number of legal and factual issues that must be reviewed prior to the issuance of the CPCN, the provision in GO 103-A preempting local regulation operates independently of these issues.³⁶ As California American Water previously explained, even if the Commission were to reject the Application, the Ordinance would still be in conflict with GO 103-A. As such, the Ordinance is preempted and invalid.

F. Adequate Water Supply is a Matter of Statewide Concern and Within the Jurisdiction of the Commission.

MCWD argues that to the extent that regulation of desalination facilities is a matter of statewide concern, it falls outside the Commission’s jurisdiction.³⁷ MCWD reasons, “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 proposed projects.”³⁸ To the contrary, as California American Water has previously shown, the State has long recognized the importance and potential of desalination and expressly recognized that the private sector can

³³ *Id.*

³⁴ Application for Rehearing, p. 17.

³⁵ California American Water Legal Issues Opening Brief, p. 10.

³⁶ *See* California American Water Reply Comments, p. 4.

³⁷ Application for Rehearing, p. 18.

³⁸ *Id.*

and should be involved in desalination.³⁹ The MPWSP is in furtherance of current State water policy and is consistent with relevant laws and regulations of agencies other than the Commission.⁴⁰

In addition, MCWD cites nothing in support of its contention that the Commission cannot preempt local ordinances where a matter of statewide concern is at issue. In fact, relevant case law indicates that the opposite is true: matters of statewide concern relating to public utilities are within the exclusive jurisdiction of the Commission, not municipalities.⁴¹ To the degree that other State agencies also have regulatory responsibilities with respect to desalination facilities, their jurisdiction is concurrent with that of the Commission.⁴²

III. CONCLUSION

For the foregoing reasons, the Commission should deny the Application for Rehearing.

December 17, 2012

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³⁹ California American Water Legal Issues Opening Brief, p. 9; Wat. Code §§ 12946, 12948.

⁴⁰ California American Water Legal Issues Opening Brief, pp. 17-18.

⁴¹ *California Water & Telephone Co. v. County of Los Angeles* (1967) 253 Cal.App.2d at 30.

⁴² California American Water Legal Issues Reply Brief, p. 6; *See also Orange County Air Pollution Control District v. Public Utilities Commission* (1971) 4 Cal. 3d 945.