

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 No. 12-04-019
(Filed April 23, 2012)

**OPENING BRIEF OF THE DIVISION OF RATEPAYER
ADVOCATES ON PREEMPTION AND WATER RIGHTS ISSUES**

I. INTRODUCTION

Pursuant to Administrative Law Judge (“ALJ”) Gary Weatherford’s June 1, 2012 Ruling (“ALJ Ruling”), which requested that the parties address two threshold legal issues in this proceeding, the Division of Ratepayer Advocates (“DRA”) hereby files its opening brief. More specifically, the ALJ Ruling requested that the parties brief the question of whether Monterey County Code of Ordinance, Title 10, Chapter 10.72, subsection 10.72.030(B) (“Monterey Ordinance”) applies to the proposed Monterey Peninsula Water Supply Project (“MPWSP”), and the extent, if any, to which the California Public Utilities Commission’s (“Commission”) authority preempts the Ordinance in part or in its entirety.¹ Further, the ALJ Ruling also requested that the parties brief the question of whether California-American Water Company (“Cal-Am”) or another entity participating in Cal-Am’s separate Groundwater Replenishment (“GWR”) and Aquifer Storage and Recovery (“ASR”) projects for replacement water, possess adequate rights to the slant intake well water, GWR water and to the requisite outfall for purposes of project feasibility.²

¹ ALJ Ruling, at 3.

² *Id.* at 4.

II. ARGUMENT

A. **The Monterey Ordinance Applies to the Monterey Peninsula Water Supply Project (“MPWSP”) but is Preempted by the Commission’s Regulatory Authority Over Investor-Owned Water Utilities Operating in California.**

1. **The California Constitution and Public Utilities Act Give the Commission Broad Regulatory Authority over Investor-Owned Utilities.**

As explained by the California Supreme Court, the Commission “is a state agency of constitutional origin with far-reaching duties, functions and powers.” *San Diego Gas & Electric Co. v. Superior Court* (“*Covalt*”) (Cal. 1996) 13 Cal. 4th 893, 914. Article XII of the California Constitution (“Constitution”) “establishes the [Commission] and gives it broad regulatory power over public utilities, ‘including the power to fix rates, establish rules, hold various types of hearings, award reparation, and establish its own procedures.’” *Wise v. Pac. Gas & Elec. Co.* (1999) 77 Cal. App. 4th 287, 293 (quoting *Covalt*, 13 Cal. 4th at 915); *see* Cal. Const., art. XII, §§ 1-4, 6. However, the Commission’s powers are not restricted to those stated in the Constitution. *Covalt*, 13 Cal. 4th at 915. The Constitution also gives the Legislature “plenary power . . . to confer additional authority and jurisdiction upon the [C]ommission. . . .” Cal. Const., art. XII, § 5. *See Consumers Lobby Against Monopolies v. Public Utilities Com.* (“*CLAM*”) (1979) 25 Cal. 3d 891, 905.

Pursuant to this constitutional provision, the Legislature enacted the Public Utilities Act (“Act”), Public Utilities Code Sections 201, *et seq.*,³ which grants the Commission numerous specific powers, *e.g.*, to make orders governing the services, equipment, physical property, and safety devices used by public utilities. *See Re Rules, Procedures and Practices Applicable to Transmission Lines Not Exceeding 200 Kilovolts*, 1994 Cal. PUC LEXIS 453, *11 (*citing* Pub. Util. Code §§ 761, 762, 768).

³ All further statutory references are to the Public Utilities Code unless otherwise specified.

One of the most important regulatory powers conferred upon the Commission by the Legislature is the power to issue a certificate of public convenience, or (“CPCN”), authorizing construction of utility facilities. More specifically, Section 1001⁴ provides that investor-owned public utilities must obtain a CPCN from the Commission prior to constructing a “line, plant, or system, or of any extension thereof.” Significantly, Section 1005, subdivision (a) provides that the Commission “may attach [to the CPCN] terms and conditions, including provisions for the acquisition by the public of the franchise or permit and all rights acquired thereunder *and all works constructed or maintained by authority thereof*, as in its judgment the public convenience and necessity require.” (Italics added). Thus, the Legislature has given the Commission express statutory authority to include provisions concerning public acquisition, or ownership, in any CPCN that it issues for a project to be constructed by an investor-owned public utility. *Id.*

In addition, to the powers identified in the Act, section 701 further authorizes 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 investor-owned public utilities. (Italics added). See *Covalt*, 13 Cal. 4th at 915 (*quoting* Pub. Util. Code § 7). Accordingly, the Commission’s regulatory authority has been “liberally construed.” *Covalt*, 13 Cal. 4th at 915; see also *Southern California Edison Co. v. Peevey* (2003) 31 Cal. 4th 781, 792; *CLAM*, 25 Cal. 3d at 905.

⁴ Although Section 1001 does not expressly refer to public utilities, but instead, identifies specific entities, *e.g.*, “water corporation[s],” that must obtain a CPCN from the Commission, Section 216, subdivision (a), broadly defines “Public utility” to include “every common carrier, toll bridge corporation, pipeline corporation, gas corporation, electrical corporation, telephone corporation, telegraph corporation, water corporation, sewer system corporation, and heat corporation, where the service is performed for, or the commodity is delivered to, the public or any portion thereof.”

2. The Constitution and Public Utilities Act Confirm that Notwithstanding Comprehensive Statewide Regulation of Investor-Owned Public Utilities by the Commission, Local Government Entities Retain Certain Municipal Powers.

The Constitution and the Act confirm that notwithstanding comprehensive statewide regulation of investor-owned public utilities by the Commission, local government entities retain a limited ability to regulate the utilities in matters of strictly local concern. The general authorization for local government entities' police power is found in Section 7 of Article XI of the Constitution: “[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.*” *San Diego Gas & Elec. Co. v. City of Carlsbad* (1998) 64 Cal. App. 4th 785, 795 (*quoting* Cal. Const., art. XI, § 7) (*italics added*). The more specific grant of power to local government entities vis-à-vis public utilities is found in Section 9 of Article 11 of the Constitution, which “permits municipalities to prescribe conditions and regulations for the operation of public utility works by private entities.”⁵ *Id.* (*citing* Cal. Const., art. XI, § 9). Section 8 of Article 12 of the Constitution provides that “as to matters over which the [Commission] has been granted regulatory power, the [Commission’s] jurisdiction is exclusive,” *Southern Cal. Gas Co. v. City of Vernon* (1995) 41 Cal. App. 4th 209, 215, but also confirms that local entities retain certain municipal powers,

A city, county, or other public body may not regulate matters over which the Legislature grants regulatory power to the Commission. *This section does not affect* power over public utilities relating to the making and enforcement of police, sanitary, and other regulations concerning municipal affairs pursuant to a city charter . . . or the right of any city to grant

⁵ Cal. Const., art. XI, § 9 ((b) (“Persons or corporations may establish and operate works for supplying those services upon conditions and under regulations that the city may prescribe under its organic law.”)).

franchises for public utilities or other businesses on terms, conditions, and in the manner prescribed by law.

(Italics added).

Finally, Section 2902 provides that the Public Utilities Act,

[S]hall not be construed to authorize any municipal corporation to surrender to the [C]ommission its powers of control to supervise and regulate the relationship between a public utility and the general public in matters affecting the health, convenience, and safety of the general public, including matters such as the use and repair of public streets by any public utility, the location of the poles, wires, mains, or conduits of any public utility, on, under, or above any public streets, and the speed of common carriers operating within the limits of the municipal corporation.

Again, Section 2902 “does not confer any powers upon a municipal corporation but merely states that certain existing municipal powers are retained by the municipality.”

Southern Cal. Gas Co., 41 Cal. App. 4th at 217.

3. Local Government Entities May Not Enforce Local Legislation that Conflicts with General Law, Such as the Commission’s Rules and Regulations, Or that Relates to Matters of State-wide Rather than Strictly Local Concern.

Local government entities may not enforce local legislation that conflicts with general law or that relates to matters of state-wide rather than strictly local concern.

California Water & Telephone Co. v. County of Los Angeles (1967) 253 Cal. App. 2d 16, 28; see *Sherwin-Williams Co. v. City of Los Angeles* (1993) 4 Cal. 4th 893, 897 (citations omitted) (internal quotation omitted) (“If otherwise valid local legislation conflicts with state law, it is preempted by such law and is void.”); *Orange County Air Pollution Control Dist. v. Public Utilities Com.* (1971) 4 Cal. 3d 945, 950 (affirming, “local ordinances are controlled by and subject to general state laws and the regulations of statewide agencies regarding matters of statewide concern.”). As noted, Section 8 of Article XII of the Constitution states that local government entities “may not regulate matters over which the Legislature grants regulatory power to the Commission,” thus

endowing the Commission with “exclusive” jurisdiction as to matters within its regulatory purview. *Southern Cal. Gas Co.*, 41 Cal. App. 4th at 215.

a) Local Government Entities May Not Enforce Local Legislation that Conflicts with General Law, Such as the Commission’s Rules and Regulations.

In *Sherwin-Williams Co.* the California Supreme Court explained the general principles governing preemption analysis, as follows:

If otherwise valid local legislation conflicts with state law, it is preempted by such law and is void. A conflict exists if the local legislation duplicates, contradicts, or enters an area fully occupied by general law, either expressly or by legislative implication. Local legislation is duplicative of general law when it is coextensive therewith. Similarly, local legislation is contradictory to general law when it is inimical thereto. Finally, local legislation enters an area that is fully occupied by general law when the Legislature has expressly manifested its intent to fully occupy the area or when it has impliedly done so [identifying three indicia of intent].

4 Cal. 4th at 897-898 (citations omitted) (internal quotation omitted). In *Leslie v. Superior Court*, the California Court of Appeal succinctly applied the principle that local legislation in conflict with state law is void to the rules and regulations of the Commission.

Counties may not make and enforce laws conflicting with general state laws. The powers granted by the [Commission], including its rules and regulations, constitute general state laws. Accordingly, counties may not enforce local regulations that conflict with rules and regulations of the [Commission].

(1999) 73 Cal. App. 4th 1042, 1046 (citations omitted). “It follows that in any conflict between action by a municipality and a lawful order of the [C]ommission, the latter prevails.” *Harbor Carriers, Inc. v. City of Sausalito* (1975) 46 Cal. App. 3d 773, 775 (citations omitted).

For example, in *Harbor Carriers, Inc.* the Court of Appeal held that the City of Sausalito’s (“City”) interpretation of a zoning ordinance to prohibit construction of a

downtown ferry terminal was contradictory or inimical to the Commission’s issuance of a CPCN to a ferry service operator. 46 Cal. App. 3d at 775. In *Harbor Carriers, Inc.*, the City appealed from a trial court’s judgment directing it to make a downtown site available for use as a ferry terminal after the Commission issued a CPCN authorizing Harbor Carriers, Inc. (“Harbor”) to operate ferry service between San Francisco and Sausalito. *Id.* at 774. The City denied Harbor’s use permit application based upon a zoning ordinance, citing the concern that a downtown terminal would unduly increase tourist traffic and interfere with the operation of a yacht club. *Id.* at 775. The *Harbor Carriers, Inc.* Court concluded that a downtown site for the ferry terminal “was necessarily contemplated” by the CPCN authorizing ferry service, primarily for tourists, to Sausalito. *Id.* Accordingly, with one minor exception, the Court of Appeal affirmed the trial court’s judgment, stating, “[t]o the extent that the city’s zoning ordinance is applied to prevent establishment of any terminal in Sausalito, it must give way to the [C]ommission’s grant of the right to operate a service to and from Sausalito.” *Id.* Otherwise, the Court of Appeal reasoned, the City’s asserted justifications for denying Harbor’s use permit application “would necessarily bar any downtown terminal, and thus, completely negate the [C]ommission grant of the certificate.” *Id.* (italics added).

Further, the *Harbor Carriers, Inc.* Court also held that the right to operate ferry service among cities, is “clearly within the power vested in the [Commission],” as it involves a matter of statewide concern. *Id.*

b) Local Government Entities May Not Enforce Local Legislation that Relates to Matters of Statewide Rather than Strictly Local Concern.

As explained by the California Supreme Court, “[o]n many occasions a matter which is local in geographical effect has been declared one of statewide concern, vesting paramount jurisdiction in the [C]ommission.” *Orange County Air Pollution Control Dist.*, 4 Cal. 3d at 951, fn. 5. Thus, California courts have held that issues involving utilities, such as the provision of telephone service, *Pacific Tel. & Tel. Co. v. Los Angeles* (1955) 44 Cal. 2d 272, 280, the construction and maintenance of telephone lines within a

city, *Pacific Tel. & Tel. Co. v. San Francisco* (1959) 51 Cal. 2d 766, 768, the control of city streets at railroad crossings, (e.g., *City of Union City v. Southern Pac. Co.* (1968) 261 Cal. App. 2d 277, 279 (citations omitted), and the provision of electricity service, *City of Los Angeles v. Tesoro Refining and Marketing Co.* (2010) 188 Cal. App. 4th 840, 848-849, are all matters of statewide concern under the Commission's exclusive jurisdiction. Significantly, any doubt whether a matter is a municipal affair or a broader state concern must be resolved "in favor of the authority of the state and the [Commission]." *City of Los Angeles v. Tesoro Refining and Marketing Co.* (2010) 188 Cal. App. 4th 840, 849 (quoting *Cox Cable San Diego, Inc. v. City of San Diego* (1987) 188 Cal. App. 3d 952, 962) (internal quotation omitted).

Of particular relevance here, in *California Water & Telephone Co.*, the California Court of Appeal held that the design, construction, operation, and maintenance of investor-owned water utilities is a matter of state-wide concern within the purview of the Commission's exclusive jurisdiction. 253 Cal. App. 2d at 30-31. *California Water & Telephone Co.* involved a Los Angeles County Water Ordinance ("Water Ordinance") that required all suppliers of domestic water to obtain a certificate or authorization from the County as a condition precedent to the construction of any portion of a water system. *Id.* at 20-21. The asserted purpose of the Water Ordinance was to ensure that water supply facilities had a minimum level of fire protection. *Id.* at 20. Among other things, the Water Ordinance prescribed "detailed requirements for service, design, and construction of water facilities." *Id.* at 21. Investor-owned water utilities challenged the Water Ordinance as unconstitutional as applied to them. *Id.* at 20.

As noted, the Court of Appeal held that the Water Ordinance impermissibly purported to regulate a matter of a state-wide concern, stating,

Moreover, the construction, design, operation and maintenance of public water utilities is a matter of state-wide concern. Of course, the county is vitally interested in the adequacy of the water supply available for fire protection. But the interest is not so parochial. All of the citizens . . . within the County of Los Angeles and in the neighboring counties are affected by the adequacy of water supply, not only for fire

protection but also for other domestic and industrial uses.
*Under such circumstances, the control of these aspects of
water utilities is not a municipal affair subject to a
checkerboard of regulations by local governments.*

Id. at 30-31 (emphasis added).

Further, after reviewing the broad scope of the Commission’s regulatory authority over investor-owned water utilities, as reflected in specific Public Utility Code sections, *e.g.*, Sections 701, 761, 762, and 1001, and other Commission regulations, the Court of Appeal concluded that the Water Ordinance, as applied to investor-owned water utilities, “conflicts with general law,” insofar as it covered “substantially identical” subject matter, *i.e.*, the construction, design, operation and maintenance of such utilities. *Id.* at 30.

4. The Monterey Ordinance is Unconstitutional as Applied to Investor-Owned Water Utilities.

Monterey County Code of Ordinance, Title 10, Chapter 10.72, subsection 10.72.030(B) (“Monterey Ordinance”) appears to require all applicants for a permit to operate a desalination plant in Monterey County to “[p]rovide assurances that each facility will be owned and operated by a public entity.”⁶

Similar to the subject local legislation in *Harbor Carriers, Inc.* and *California Water & Telephone Co.*, the Monterey Ordinance is unconstitutional as applied to investor-owned water utilities regulated by the Commission, like Cal-Am, for two reasons: it is contradictory or inimical to general law; and, it purports to regulate a matter that has been declared to be of statewide concern in California.

⁶ See Monterey County Counsel Memorandum, from David Nawi, Acting County Counsel to Honorable Chair and Members of the Board of Supervisors, April 1, 2003, titled, “Proposed Desalination Facility at Moss Landing,” at 4-5 (identifying a facial inconsistency in Chapter 10.72 of the Monterey Ordinance insofar as “the section of the ordinance that sets forth the basic permit requirement, section 10.72.010, does not restrict potential permittees to public entities,” but, instead, includes such terms as “firm, water utility, association, corporation, [and] organization.” Thus, the Acting County Counsel advised that the question of whether Section 10.72.030(B) should be read to require a public entity to own and operate a proposed desalination plant is subject to the Board’s interpretation). The memorandum is attached to California-American Water Company Reply to Protests, A.12-04-019, June 4, 2012, and available at Cal-Am’s website at <http://www.watersupplyproject.org>.

The Monterey Ordinance is contradictory or inimical to rules and regulations of the Commission. For example, as noted, Public Utilities Code Section 1001 provides that investor-owned public utilities must obtain a CPCN from the Commission prior to constructing a “line, plant, or system, or of any extension thereof,” and Section 1005 authorizes the Commission to include, at its discretion, provisions concerning public acquisition, or ownership, in any CPCN that it issues. The Monterey Ordinance purports to require the Commission to exercise its discretion in the direction of requiring proposed desalination projects in Monterey County to be publicly owned, and thus, contradicts the language of Section 1005, subdivision (a), which states that “provisions for the acquisition by the public of the franchise or permit and all rights acquired thereunder and *all works constructed or maintained by authority thereof*,” should be included in the CPCN if, in the Commission’s judgment, “the public convenience and necessity require.” Pub. Util Code § 1005(a) (italics added). Thus, the Monterey Ordinance conflicts with general law by purporting to prohibit the exercise of the Commission’s legislatively authorized discretion by local fiat, and thus, is void. *Sherwin-Williams Co.*, 4 Cal. 4th at 902 (a local ordinance conflicts with general law if it “prohibits what the statute commands or command[s] what it prohibits.”).

In addition, analogous to the conclusion reached by the *Harbor Carriers, Inc.* Court, were the Commission to issue a CPCN to an investor-owned water utility like Cal-Am for a proposed desalination plant in Monterey County, such as the MPWSP, which did not require public ownership of the facility, enforcement of the Monterey Ordinance would render Cal-Am ineligible for a permit to operate the facility, which would also bar the utility from commencing construction,⁷ completely negating the Commission’s grant of the CPCN. *See* 46 Cal. App. 3d at 775.

⁷ *See* Monterey County Code of Ordinance, Title 10, Chapter 10.72, subsection 10.72.010 (stating that no eligible entity “shall commence construction of or operate any Desalination Treatment Facility [defining term] without first securing a permit to construct *and* a permit to operate said facility.”) (Italics added).

The Monterey Ordinance is also unconstitutional insofar as it purports to regulate a matter of statewide concern within the purview of the Commission’s exclusive jurisdiction: the construction and operation of plant facilities by investor-owned water utilities. See *California Water & Telephone Co.*, 253 Cal. App. 2d at 30-31. As explained by the *California Water & Telephone Co.* Court, the construction and operation of plant facilities by investor-owned water utilities “is not a municipal affair subject to a checkerboard of regulations by local governments” such as Monterey County. *Id.* at 30. Thus, as the Constitution and Public Utilities Act give the Commission broad authority to regulate investor-owned water utilities, “paramount jurisdiction” vests in the Commission, and, accordingly, the Monterey Ordinance is preempted and void as applied to the utilities. See *Orange County Air Pollution Control Dist.*, 4 Cal. 3d at 951, fn. 5.

B. Cal-Am Should be Ordered to Supplement its Application to Include Contingency Plans for Source Water and Brine Disposal.

1. Factual Uncertainties and Legal Disagreements Surrounding Cal-Am’s Proposal to Extract Brackish Water from the Salinas Valley Groundwater Basin Underscore the Need for Cal-Am to Supplement its Application to Include a Contingency Plan for Source Water.

Factual uncertainties and legal disagreements surrounding Cal-Am’s proposal to extract brackish water from the Salinas Valley Groundwater Basin (“SVGB”) via the intake wells of the MPWSP⁸ underscore the need, as previously recommended by DRA,⁹ for the company to supplement its application to include a contingency plan for source water.

More specifically, significant factual determinations that may be relevant to the question of whether Cal-Am currently possesses, or can timely secure, adequate groundwater rights for the MPWSP, such that it would be entitled to pump brackish water

⁸ A.12-04-019, Appendix H, at 10 (explaining that the feedwater for the proposed slant intake wells would be a mixture of seawater and intruded groundwater from the SVGB).

⁹ Protest of Division of Ratepayer Advocates, A.12-04-019, at 5 (referred to below as “DRA’s Protest”).

from the SVGB via the intake wells for the project, have not yet been made. For example, the actual percentage of groundwater from the SVGB that will be extracted by slant wells is not yet known; according to Cal-Am, data from the test slant well and more groundwater modeling are necessary to confirm the company's operating assumption that 97% of the water extracted from the SVGB will be seawater.¹⁰

Further, Cal-Am's interpretation of applicable groundwater law principles that govern its proposal to extract brackish water from the SVGB via the intake wells for the MPWSP is contested. In Cal-Am's Reply to Protests, the company asserts that the MPWSP "does not require water rights for the pumping, treatment and beneficial use of ocean water. To the extent that the Project may capture native groundwater, there is no 'appropriation' of water from the [SVGB] and no water rights are required because the Project will return any groundwater that originates in the [SVGB] to the [SVGB] for the benefit of water users in the [SVGB]."¹¹ By contrast, in Opening Briefs filed in response to the ALJ Ruling, LandWatch Monterey County suggests that Cal-Am's extraction of groundwater from the SVGB would constitute an impermissible appropriation,¹² and the Monterey County Farm Bureau states that "should Cal-Am pursue an appropriative right

¹⁰ *Id.* (stating, "the *assumed* percentage of seawater in the feedwater is approximately 97 percent. Therefore, freshwater in the feedwater, which would be returned to Salinas Valley, is approximately three percent.") (italics added); Direct Testimony of Richard C. Svindland, April 23, 2012, p. 10 (stating that the groundwater modeling used to determine the referenced seawater/freshwater mix to be extracted from the SVGB was based on a location south of the currently proposed site for slant wells, and thus, further modeling should be performed "as part of the [Supplemental Environmental Impact Report] to confirm results."); *id.* at 28 (stating that data from the test slant well will "help assess the levels of salinity.").

¹¹ California-American Water Company Reply to Protests, A.12-04-019, June 4, 2012, at 6. Notably, Cal-Am states that it will discuss the legal theory supporting its proposal in "greater detail in its briefs." *Id.*

¹² Opening Brief of Landwatch Monterey County Regarding Groundwater Rights and Public Ownership, A.12-04-019, at 2-3 (suggesting that Cal-Am's proposed pumping of brackish groundwater from the SVGB would constitute an impermissible appropriation, and questioning the validity of applying the developed or salvage water rights doctrines to "bootstrap" developed or salvaged water rights by either returning "an otherwise unlawful appropriation" to the SGVB, or claiming that the desalination of brackish water can properly be characterized as "saving water that would otherwise be lost.").

for freshwater withdrawals from the [SVGB], a costly adjudication for total water rights would be required basin-wide.”¹³

Given the factual uncertainties and legal disagreements surrounding Cal-Am’s proposal to extract brackish water from the SVGB via the intake wells of the MPWSP, the implicated groundwater rights issues may ultimately need to be resolved in court. Any such litigation could significantly delay the construction of the project, and potentially prevent Cal-Am from replacing the water supply reductions required by the State Water Resources Control Board (“SWRCB”) in its Cease and Desist Order (“CDO”) by December of 2016.¹⁴ Thus, DRA reiterates its recommendation that Cal-Am be ordered to supplement its application to include a contingency plan for source water.

The contingency plan should investigate alternatives to the proposed slant well intake system for the MPWSP. Further, the viability of using slant wells still remains to be determined by a test slant well program, which will assess the feasibility of slant wells based on local conditions, including impacts to the SVGB and environmental concerns along the shore. Thus, in the event that slant wells cannot be used for any number of reasons, *e.g.*, their use is prohibited by a successful water rights challenge, they are shown to be impractical after the test well protocol is completed, they perform inadequately in the future, their operation results in problematic impacts, or Cal-Am reaches a capacity limit on the legal exercise of its rights, Cal-Am must be prepared to utilize alternate source water intake mechanisms. Accordingly, Cal-Am’s contingency plan for source water must analyze other intake systems that are capable of delivering the necessary amount of intake water over the lifespan of the proposed desalination plant. Cal-Am’s analysis of other intake systems should consider cost effectiveness, permitting requirements, operation, maintenance, legal risks and other feasibility issues.

¹³ Opening Brief of Various Legal Issues of Monterey County Farm Bureau, A.12-04-019, at 1 (unnumbered).

¹⁴ SWRCB Order 2009-0060, p.57, *available at* http://www.waterboards.ca.gov/waterrights/water_issues/programs/hearings/caw_cdo/docs/wro2009_0060.pdf.

DRA commends the ALJ for requesting briefing on this issue early in the proceeding and expects that the parties' respective briefs, and, in particular, Cal-Am's more detailed explanation of the legal theory it is relying on in support of its proposal, will help clarify whether the company's proposed use of brackish water from the SGVB as source water for the desalination plant is feasible. Thus, DRA is not taking an initial position on the legal merit of Cal-Am's proposal. However, DRA reserves the right to reply to other parties' opening briefs regarding this issue.

2. Cal-Am Should be Ordered to Supplement its Application to Include a Contingency Plan for Brine Disposal.

Cal-Am plans to utilize the existing outfall of the Monterey Regional Water Pollution Control Agency ("MRWPCA").¹⁵ As noted in DRA's Protest, the SWRCB is currently developing an amendment to the Ocean Plan to address issues associated with the disposal of brine discharges from desalination facilities and other sources.¹⁶ Thus, DRA reiterates its recommendation that Cal-Am be required to supplement its application to include a contingency plan that would provide an alternative for brine disposal if Cal-Am is unable to utilize MRWPCA's outfall due to new regulatory requirements, or for any other reason.¹⁷

III. CONCLUSION

As explained above, the Monterey Ordinance is unconstitutional as applied to investor-owned water utilities regulated by the Commission, like Cal-Am, for two reasons: it is contradictory or inimical to general law, *e.g.*, Public Utilities Code Sections 1001 and 1005, subdivision (a); and, it purports to regulate a matter of statewide concern within the purview of the Commission's exclusive jurisdiction, the construction and operation of plant facilities by investor-owned water utilities.

¹⁵ A.12-04-019, at 5-6.

¹⁶ DRA's Protest, at 5 (reference omitted).

¹⁷ *Id.*

Further, given the factual uncertainties and legal disagreements surrounding Cal-Am's proposal to extract brackish water via the intake wells of the MPWSP, and the consequent risk that protracted litigation in court may jeopardize compliance with the CDO's December 2016 deadline, DRA reiterates its recommendation that the company be ordered to supplement its application to include a contingency plan for source water.

Finally, DRA also reiterates its recommendation that Cal-Am be ordered to supplement its application to include a contingency plan for brine disposal.

Respectfully submitted,

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