



**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 a Certificate of Public Convenience and Necessity to Construct and Operate Its Coastal Water Project to Resolve the Long-Term Water Supply Deficit in Its Monterey District and to Recover All Present and Future Costs in Connection Therewith in Rates

A.04-09-019
(Filed September 20, 2004,
amended July 14, 2005)

**REPLY COMMENTS OF
MONTEREY COUNTY WATER RESOURCES AGENCY
TO MCWD COMMENTS ON
PROPOSED DECISION CLOSING PROCEEDING**

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Pursuant to Rule 14.3(d) of the Commission’s Rules of Practice and Procedure, the Monterey County Water Resources Agency (“MCWRA”) hereby replies to the “MCWD Comments on Proposed Decision Closing Proceeding” (“MCWD Comments”) filed by the Marina Coast Water District (“MCWD”).

The Proposed Decision (“PD”) indicates the Commission’s disinclination to become involved in contractual disputes between the three parties to the Water Purchase Agreement (“WPA”) approved in D.10-12-016.¹ MCWD urges the Commission to take actions that would do just the opposite, and in fact that would have the Commission choose sides – specifically, MCWD’s side – with respect to the parties’ rights and obligations under the WPA and other project agreements. First, without regard to niceties such as evidence or trial before a tribunal with jurisdiction, MCWD urges the Commission to essentially lay the cessation of the Regional Desalination Project at MCWRA’s feet. MCWD Comments, p. 1-2. Second, MCWD urges the Commission to declare the parties are still required to comply with the various contract obligations with respect to the Regional Desalination Project. In essence, again without bothering with evidence or a trial, MCWD asks for the Commission to declare specific performance of those contractual obligations.

In support of the second position, MCWD incorrectly relies on two appellate cases to urge the Commission to reverse the PD’s disinclination to involve the Commission in the contractual dispute.

MCWD cites *Henderson v. Oroville-Wyandotte Irrigation District* (1931) 213 Cal. 514 as standing for the proposition “Commission could enforce conditions in Commission-approved contracts against non-regulated entities.” MCWD Comments, p. 4. In *Henderson*, the Commission approved the transfer of water rights and irrigation systems of two water utilities regulated by the Railroad Commission to an irrigation district under former Public Utilities Code section 51(a). *Henderson*, 213 Cal. at 523. The irrigation district’s board of directors had adopted two resolutions, one applicable to each water utility, stating the terms under which the irrigation district would furnish water to water users outside the boundaries of the transfer if the transfer were approved by the Commission. *Id.* at 518. The Commission approved the transfer in essence requiring that the terms of the resolutions would govern service to such users after the transfer. *Id.* at 522. After the transfer, the irrigation district acted in a way certain water users asserted violated those conditions. *Id.* at 523. Those users did *not*, as

¹ PD p. 2 n. 1 (“jurisdiction to resolve claims or causes of action under the WPA appears to lie with the judiciary rather than the Commission”); p. 19 (“We decline to address here positions being taken by parties concerning rights and obligations under the Water Purchase Agreement. MCWD’s related contentions and requests will not be dealt with here. We are not inclined to address alleged or potential breaches of contracts.”)

MCWD implies, seek or obtain enforcement of the Commission order *from the Commission*. Rather, they brought two actions in the Butte County Superior Court. *Id.* at 515, 516, 523. The California Supreme Court stated:

The purpose of the two actions, as set forth in said complaints, was to have the court adjudge, declare and determine the rights and duties of plaintiffs and those similarly situated and the duties of the defendant district *under the contracts and written instruments by virtue of which the defendant district acquired the two irrigation systems from the former owners*. The real issue presented by the pleadings of the parties to this action is whether the district may lawfully impose upon the outside water users a charge for water in excess of that charged by the district for water supplied to users within the district. *The actions were tried by the court*, and at the conclusion of the trial the court made findings and entered judgments in favor of the plaintiffs.

Id. at 523-24 (italics added).

Thus, MCWD either misstates or misapprehends *Henderson*, which has nothing to do with *Commission enforcement* of conditions in Commission-approved contracts. The enforcement of the conditions imposed by the Commission in the underlying section 51(a) proceeding occurred in California Superior Court.

MCWD also improperly relies on *PG&E Corporation v. Public Utilities Commission* (2004) 118 Cal.App.4th 1174, characterizing it as holding “Commission properly held that it could enforce conditions against non-regulated entities.” MCWD Comments, p. 4. At issue in *PG&E* was whether the Commission had jurisdiction over holding companies for three public utilities for the purpose of enforcing conditions that the Commission imposed when approving the reorganization of the public utilities under the holding company structures. *PG&E*, 118 Cal.App.4th at 1181. The Commission previously had granted the applications for reorganization and imposed the holding company conditions under Public Utilities Code sections 818 and 854. *Id.* at 1195-96. The purpose of the conditions was to protect ratepayers and to address the potential for abuse arising from the holding company structure. *Id.*

The Commission later initiated investigations during the height of the California energy crisis and asserted jurisdiction over both the public utilities and the holding companies. *Id.* at 1181. The holding companies did not dispute the Commission’s authority to impose the conditions at the time of approving the public utilities’ reorganization, but asserted that the Commission lacked authority to enforce those conditions against the holding companies. *Id.* The holding companies filed motions to dismiss for lack of jurisdiction, which the Commission denied, and the holding companies sought writs of mandate. *Id.* at 1182, 1192.

The Court of Appeal affirmed the Commission's denial of the holding companies' motions to dismiss. *Id.* at 1182. The Court of Appeals determined that the Commission did not have direct authority over the holding companies because the holding companies were not public utilities, but it held that the Commission had limited jurisdiction over the holding companies for the purpose of enforcing the reorganization conditions because such jurisdiction was "cognate and germane to [the Commission's] regulation of a public utility, namely the utility subsidiary of the holding company." *Id.* at 1201. The court explained that the basis for such jurisdiction was *not* the "mere fact that the holding companies do business with their utility subsidiaries" because the relationship between the holding companies and the utilities was far deeper. The court specifically stated: "We do not suggest that the PUC has enforcement authority over entities other than public utilities *simply because it has the power to approve certain transactions involving public utilities subject to conditions.*" *Id.* (italics added). Instead, the utilities were wholly-owned subsidiaries of the holding companies and, thus, "[c]oncerns about potential abuses in the relationship between a holding company and its utility subsidiary led to the imposition of holding company conditions. Those concerns remain[ed] ongoing." *Id.*

In addition to emphasizing the relationship between the holding companies and the Commission-regulated utilities, the Court of Appeals rejected the holding companies' reliance on case law limiting Commission jurisdiction over non-regulated entities where the Commission's actions would conflict with other express legislative directives. *Id.* at 1199 (citing *Pacific Tel. & Tel. Co. v. Public Util. Com.* (1965) 62 Cal.2d 634, 635 & *Assembly v. Public Utilities Com.* (1995) 12 Cal.4th 87). The Court of Appeals explained that there was no statutory mandate or directive that would have interfered with the Commission enforcing the holding company conditions and, thus, the holding companies' arguments on this point were irrelevant. *Id.*

PG&E is very different from the case at hand. First, the relationship between CalAm and MCWRA is vastly different from the relationships between the holding companies and regulated utilities in *PG&E*. There, the holding companies owned the regulated utilities. By contrast, here CalAm is not a wholly owned subsidiary of MCWRA (or vice versa) and, thus, the concerns about abuses stemming from the close relationships of subsidiaries and their parent holding companies do not exist here. *Id.* at 1201. Indeed, the tripartite contractual relationship between MCWRA, CalAm, and MCWD is instead simply that of entities doing business together, which the *PG&E* court declined to find as a sufficient basis for the Commission to assert jurisdiction over a non-regulated entity. *Id.* at 1201.

