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Date of Issuance
March 28, 2011

Decision 11-03-049 March 24, 2011

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of California-American Water Company for an Order Authorizing the Transfer of Costs Incurred in 2008 for its Long-Term Water Supply Solution for the Monterey District to its Special Request 1 Surcharge Balancing Account.	Application 09-04-015 (Filed April 16, 2009)

ORDER DENYING REHEARING OF DECISION (D.) 10-08-008

I. INTRODUCTION

In this Order, we dispose of the application for rehearing of Decision (D.) 10-08-008 (or "Decision") filed by the Division of Ratepayer Advocates ("DRA") and the Monterey Peninsula Water Management District ("MPWMD") (collectively, "Joint Parties").

The Decision approved a Partial Settlement Agreement entered into by California-American Water Company ("Cal-Am") and the DRA, which provided for Cal-Am to recover approximately $5.1 million in preconstruction costs associated with the Coastal Water Project. The Decision also approved a separate Reimbursement Agreement, under which Cal-Am would advance approximately $4.3 million to the Marina Coast Water District ("MCWD") and the Monterey County Water Resources Agency ("MCWRA") (collectively, "Local Agencies") to allow their continued participation in pursuing the related Regional Desalination Project Alternative ("Regional Project") at issue in Application (A.) 04-09-019.[1]

[1] On December 2, 2010, the Commission approved the Regional Project in *In the Matter of the Application of California-American Water Company for a Certificate of Public Convenience and*

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Of the $4.3 million authorized under the Reimbursement Agreement, roughly $1.5 million would cover time-critical costs associated with the permitting and design of test wells, property acquisition, and environmental document preparation to comply with the California Environmental Quality Act ("CEQA") and National Environmental Policy Act ("NEPA").[2] The remaining $2.7 would cover the Local Agencies' administrative, consultant, and legal costs expended to conduct those activities. Some portion of that $2.7 million would also cover litigation costs incurred to support the Regional Project.[3]

Under the terms of the Reimbursement Agreement, if the Regional Project is approved, the Local Agencies will repay Cal-Am for all funds advanced, with interest, when the project receives bonding or other financing. (D.10-08-008, at pp. 7 & 20.)[4] Should the Regional Project not be built, all advanced costs would remain the responsibility of Cal-Am's ratepayers. (D.10-08-008, at pp. 8 & 20.)

The Joint Parties filed a timely application for rehearing of D.10-08-008. Their challenge pertains only to the ratepayer funding of the Local Agencies' litigation costs to support the Regional Project.[5] As to that funding they contend the Decision is

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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 ("*Decision Approving Regional Project*") [D.10-12-016] (2010) __ Cal.P.U.C.3d __ .

[2] See Exhibit B Scope of Work included with the Joint Motion of Cal-Am, MCWD and MCWRA for Expedited Approval of Reimbursement Agreement and for an Order Shortening Time to Respond, dated February 16, 2010.

[3] *Id.* at p. 14. The Decision provides that the ultimate recovery of legal costs will be determined in A.04-09-019. (D.10-08-008, at pp. 21 & 22.)

[4] See also Joint Motion of Cal-Am, MCWD, and MCWRA for Expedited Approval of Reimbursement Agreement and for an Order Shortening Time to Respond, dated February 26, 2010, Exhibit A, at p. 4, para. 6.

[5] DRA and joined by MPWMD in their joint rehearing application, generally support the Regional Project. (See Comments of DRA on the Proposed Settlement, dated April 30, 2010, at p. 2, filed in A.04-09-019.) The Joint Parties also support ratepayer funding of the majority of expenses under the Reimbursement Agreement, including litigation costs other than those specifically to support the Local agencies' support of the Regional Project. (Comments of DRA on Proposed Decision Approving Partial Settlement Agreement, and Without Modification, Reimbursement Agreement, dated August 2, 2010, at p. 5.)

unlawful on the grounds that: (1) it violates the ratepayers' constitutional right to be free from compelled speech; (2) there was not adequate evidence to support a conclusion that the Local Agencies had cash flow concerns; (3) the Decision contravenes the intervenor compensation statutes under Public Utilities Code section 1801 *et seq.*;[6] and (4) the Decision is inconsistent with Commission and U.S. Supreme Court precedent. A joint response was filed by Cal-Am and the Local Agencies.

We have carefully considered the arguments raised in the application for rehearing and are of the opinion that good cause has not been established to grant rehearing. Accordingly, we deny the application for rehearing of D.10-08-008 because no legal error has been shown.

II. DISCUSSION

A. The United States and California Constitutions

The First Amendment of the United States Constitution and Article 1, Section 3 of the California Constitution operate to, among other things, prevent the government from compelling individuals to subsidize speech they oppose.[7] The Joint Parties contend that requiring ratepayers to subsidize the Local Agencies' litigation costs runs afoul of those provisions because: (1) the Decision failed to address the legal test necessary to support such funding; and (2) DRA represents Cal-Am's ratepayers under Section 309.5, and had opposed certain positions taken by the Local Agencies. (Rhg. App., at pp. 5-23.) These arguments are discussed below.

1. The Legal Test Under Relevant Case Law

The Joint Parties assert the Decision erred because it failed to address the legal test applied to First Amendment claims. (Rhg. App., at pp. 17-13, relying on

[6] All subsequent section references are to the Public Utilities Code, unless otherwise stated.

[7] U.S. Const., 1st Amend.; Cal. Const. art I, § 3.

Abood v. Detroit Board of Education ("*Abood*") (1977) 431 U.S. 209; *Keller v. State Bar of California* ("*Keller*") (1990) 496 U.S. 1; *Smith v. Regents of the University of California* ("*Smith v. Regents*") (1993) 4 Cal.4th 843, cert. denied (1993) 510 U.S. 863; and *United States Department of Agriculture v. United Foods* ("*United Foods*") (2001) 533 U.S. 405.)[8]

Contrary to the Joint Parties contention, the authorized funds do not support activities considered to be speech within the meaning of the law. It was reasonable and proper for the Decision to consider such costs as business expenses. (D.10-08-008, at pp. 17, 28 [Conclusion of Law Number 6], relying on D.09-07-021 and D.09-07-038 [Authorizing ratepayer funding of certain utility litigation costs].)[9] That conclusion is consistent with our intervenor compensation statutes, which allow for ratepayer funding of the litigation costs incurred by third parties in connection with their participation in Commission proceedings.[10]

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[8] See also *Wooley v. Maynard* (1977) 430 U.S. 705, and *West Virginia Board of Education v.* Barnette (1943) 319 U.S. 624. The Joint Parties also reference *Consolidated Edison Company of New York, Inc. v. Public Service Commission of New York* ("*Consolidated Edison*") (1980) 447 U.S. 530. However, *Consolidated Edison* offers no guidance here. The issue here is compelled speech, while *Consolidated Edison* involved restricted speech. As the Joint Parties acknowledge, this facts at issue in this proceeding have never been addressed by the Court. (Rhg. App., at p. 11.)

[9] See *Application of California-American Water Company for Authorization to Increase its Revenues for Water Service in its Monterey District by $24,718,200 or 80.30% in the Year 2009; $6,503,900 or 11.72% in the Year 2010; and $7,598,300 or 12.25% in the Year 2011 Under the Current Rate Design and to Increase its Revenues for Water Service in the Toro Service Area of its Monterey District by $354,324 or 114.97% in the Year 2009; $25,000 or 3.77% in the Year 2010; and $46,500 or 6.76% in the Year 2011 Under the Current Rate Design, And Related Matters* [D.09-07-021] (2009) __ Cal.P.U.C.3d __ , at pp. 90-91 (slip op.) [Litigation costs related to obtaining water rights]. See also and *In the Matter of the Application of San Jose Water Company for Authority to Determine its Cost of Capital and to Apply that Cost of Capital in Rates for the Period From January 1, 2010 Through December 31, 2012, And Related Matters* [D.09-07-038] (2009) __ Cal.P.U.C.3d __ , at pp. 5-6 (slip op.) [Litigation costs associated with the Cost of Capital proceeding].

[10] See e.g., Pub. Util. Code, § 1801 *et seq.*, and specifically §1803. The Joint Parties acknowledge that ratepayers routinely fund utility litigation costs, under a theory of a "regulatory compact" with ratepayers., which Joint Parties argue does not exist with the Local Agencies. (Rhg. App., at p. 21.) We reject this theory. Ratepayers fund utility litigation costs because these costs are incurred for their benefit.

In addition, our Decision is consistent with the test articulated under the relevant case law.[11] While we did not expressly reiterate the test, we did provide a rationale to show a compelling State interest, and explain why the funding was germane to that purpose. Specifically, regarding a compelling state interest the Decision identified the long-standing water supply deficit on the Monterey Peninsula. (D.10-08-008, at pp. 3-4.) We may not have discussed the matter in great depth; however, the importance of the State's interest in solving the deficit problem is a matter of public record that is well established. It is evidenced by 1998 legislation that specifically directed this Commission to pursue a long-term water supply solution for the Monterey Peninsula. (Assembly Bill ("AB") 1182 (Stats. 1998, ch. 797).) And numerous Commission decisions have thoroughly discussed the issue.[12]

We also explained that the funding is germane to our statutory obligation to pursue a long-term water supply solution. Any solution at this juncture is dependent on the Coastal Water Project and Regional Project Alternative. The Local Agencies will play an integral role in the development of the Regional Project. (D.10-08-008, at pp. 9-12, 14, 17, 19.) We note that the Joint Parties have themselves supported the Regional Project, and agreed that Local Agency participation is essential. The Joint

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[11] The Joint Parties also claim the Decision was not narrowly tailored to minimize infringement on the ratepayer's constitutional rights. (Rhg. App., at p. 19, relying on *Smith v. Regents, supra*, 4 Cal.4th at p. 858.) That is incorrect. We limited use of the funds, placed a cap on the amount of funds authorized, and prohibited funding of costs the Local Agencies incur in the normal course of business (D.10-08-008, at pp. 21-22.). We also required costs to be segregated, tracked, recorded in a memorandum account, subject to later reasonableness review. (D.10-08-009, at pp. 22-23.)

[12] See e.g., *In the Matter of the Application of California-American Water Company for a Certificate that the Present and Future Public Convenience and Necessity Requires Applicant to Construct and Operate the 24,000 Acre Foot Carmel River Dam and Reservoir in its Monterey Division and to Recover All Present and Future Costs in Connection Therewith in Rates* ("*Decision Resolving Motions by California-American Water Company Regarding Designation of Lead Agency and Ratemaking Issues*") [D.03-09-022] (2003) __ Cal.P.U.C.3d __ , at pp. 1-3 (slip op.). See also *In the Matter of the Application of California-American Water Company 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* ("*Decision Certifying Final Environmental Impact Report*") [D.09-12-017] (2009) __ Cal.P.U.C.3d __ , at pp. 1-8, 12 (slip op.).

Parties now seem to disagree with our rationale. However, that does not constitute legal error and does not negate the fact that the Decision did adequately address the required test.

The Joint Parties also disregard aspects of the case law which would otherwise suggest the Decision is lawful. For example, government authorized funds are generally viewed with more latitude.[13] Funding may be lawful if it imposes no restraint on the freedom of an objecting party to communicate its own message, does not compel an objecting party to express a view it disfavors, does not compel the expression of political or ideological speech.[14]

Here, these factors were met because nothing in the Decision would prevent any Cal-Am ratepayer from communicating their own view regarding the Regional Project, nothing in the Decision would compel any Cal-Am ratepayers to express a view they opposed, and nothing in the Decision would compel Cal-Am ratepayers express political or ideological speech.

2. DRA's Role Under Public Utilities Code Section 309.5

The Joint Parties contend that pursuant to section 309.5, DRA acted in this proceeding to represent Cal-Am's ratepayers. Accordingly, they argue requiring Cal-Am's ratepayers to fund the challenged litigation costs forced the ratepayers to subsidize speech they opposed since DRA objected to certain positions taken by the Local Agencies. (Rhg. App., at pp. 12-17.)

Section 309.5 provides in pertinent part:

> (a) There is within the commission a Division of Ratepayer Advocates to represent and advocate on behalf of the interests of public utility customers and subscribers within the jurisdiction of the commission. The goal of the division shall be to obtain the lowest possible rate for

[13] *Keller, supra,* 496 U.S. at p. 11.)

[14] *United Foods, supra,* 533 U.S. at pp. 411-413

> service consistent with reliable and safe service levels. For revenue and rate design matters, the division shall primarily consider the interests of residential and small commercial customers.

(Pub. Util. Code, § 309.5, subd. (a).)

Section 309.5 provides that DRA's purpose is to represent utility customer interests. However, the Joint Parties argument also implies that Section 309.5 establishes DRA as the only legitimate representative of ratepayer (here Cal-Am ratepayer) interests. There is nothing in the plain language of the statute to support that notion.[15]

Even if the plain language were ambiguous, it must be viewed in context and harmonized with the overall statutory scheme.[16] Section 309.5 is in part of the Code, which merely provides an outline of the Commission's general organizational structure and the respective functions of certain divisions and individuals.[17] And when harmonized with other statutes such as the intervenor compensation statutes, it is clear that any number of entities can participate in any given proceeding on behalf of ratepayers.[18] In addition, those statutes show that we may lawfully authorize ratepayer funding of such third party litigation costs.[19] If it were true that funding the Local Agencies' litigation costs gave rise to a constitutional violation, then the same would be true any time DRA opposed a position taken by the third parties that receive funding under the intervenor compensation statutes.

The Joint Parties also unconvincingly suggests that the Local Agencies' participation in this proceeding is contrary to interest of Cal-Am's ratepayers. It is true that as a utility district serving the City of Marina and Fort Ord, MCWD generally

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[15] See e.g., *People v. Canty* (2004) 32 Cal.4th 1266-1276-1277; *Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735.

[16] See e.g., *Walnut Creek Manor v. Fair Employment & Housing Commission* (1991) 54 Cal.3d 245, 268. See also *Halbert's Lumber v. Lucky Stores* (1992) 6 Cal.App.4th 1233, 1239.)

[17] Pub. Util. Code, Chapter 2, § 301 *et seq.*

[18] Pub. Util. Code, § 1801 *et seq.*

[19] Pub. Util. Code, § 1803.

represents mainly those constituents. Similarly, MCWRA has county-wide groundwater basin responsibilities which go beyond Cal-Am's ratepayers. However, that does not prove the Joint Parties claim that the Local Agencies' goal was to reduce costs to their own constituents by shifting them to Cal-Am's ratepayers. (Rhg. App., at pp. 13-14.)

MCWRA will drill and operate the Regional Project source wells, and MCWD will own and construct the desalination plant itself. (D.10-08-008. at p. 17.) Yet, Cal-Am's ratepayers will derive the greatest benefit from the Local Agencies' actions, because they will receive the majority of water from those facilities. (D.10-08-008, at p. 14.) Even if DRA did disagree with some of the Local Agencies' views, at least a good portion of the Local Agencies' participation was for the direct benefit Cal-Am's ratepayers.

B. Evidence To Support The Local Agencies' Cash Flow Concerns

The Joint Parties contend the Decision erred because there was insufficient evidence to conclude the Local Agencies had cash flow problems. (Rhg. App., at pp. 23-25.) Their contention has no merit.

Here, the record shows that the Local Agencies attested to the fact that immediate cash flow concerns could jeopardize their ability to continue to participate regarding the Regional Project.[20] It is reasonable to presume that any federal, state, or local agency that appears before the Commission does so in good faith an in an honest manner. And no party presented any facts or evidence to suggest that the Local Agencies' representation was untrue. Thus, based on the record before us a reasonable person would similarly conclude there was a legitimate cash flow issue. There is nothing to show that conclusion was arbitrary and capricious. The Joint may desire that we have required additional financial records. However, they do not establish that any other documents were required in this instance.

[20] Joint Motion of Cal-Am, MCWD, and MCWRA for Expedited Approval of Reimbursement Agreement and for an Order Shortening Time to Respond, dated February 26, 2010, at pp. 1-2.

In addition, as we noted in the Decision, the Joint Parties challenge of this issue is untimely. (D.10-08-008, at p. 21.) The Local Agencies expressed their cash flow concerns in February, 2010.[21] In March, the Administrative Law Judge ("ALJ") issued a ruling to notify parties that evidentiary hearings must be requested by May 7, 2010, if a party wished to test or dispute any material facts.[22] Whether the Local Agencies had immediate cash flow problems was a material fact that could have been disputed. However, the Joint Parties did not individually, or together, request evidentiary hearings on the issue.[23] The Joint Parties failed to preserve their right to challenge and thus waived their ability to do so.

Finally, the Joint Parties argue we unlawfully shifted the burden of proof to DRA to disprove the Local Agencies' claim. (Rhg. App., at p. 24.) We disagree. We recognize that the proponent of a request has the primary burden to make a prima facie case to support its position. However, any party opposing such a request then has a burden of going forward to present evidence to raise a reasonable doubt and show a different result was warranted.[24] The Joint Parties did not then or now present any evidence to raise a reasonable doubt as to the Local Agencies' representation. Accordingly, they did not meet their proper burden of going forward.

C. The Intervenor Compensation Statutes

The Joint Parties contend that because the Local Agencies do not fall within the parameters of Section 1801 *et seq.* governing intervenor compensation, ratepayer funding for the agencies violates the statutes. (Rhg. App., at pp. 25-28.)

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[21] See *ante,* fn. 4.

[22] Joint Amended Scoping Memo and Ruling of Assigned Commissioner and Administrative Law Judge, dated March 10, 2010, at p. 8.

[23] The Commission received no requests for evidentiary hearings regarding any issue.

[24] See e.g., *Environmental Defense Fund v. Environmental Protection Agency* (1976) 548 F.2d 998, 1004; *In the Matter of the Application of Pacific Bell, a Corporation, for Authority to Increase Certain Intrastate Rates and Charges Applicable to Telephone Services Furnished Within the State of California* [D.87-12-067] (1987) 27 Cal.P.U.C.2d 1, 35-37.

This argument wrongly presumes that the intervenor compensation statutes constitute the only lawful means for the Commission to authorize third party funding. Nothing in the statutes support such a conclusion. It is true that state, federal and local agencies are not considered utility customers for purposes of funding authorized under those provisions.[25] However, nothing in the statutes prohibits funding for such entities or restricts the Commission's authority to do so. As the Joint Parties recognize, the intervenor statutes simply don't apply. (Rhg. App., at p. 25.)

Our Decision acknowledged it is somewhat unusual for to authorize funding for other agencies. However, the nature of our authority is quite broad, and there is nothing that would prohibit our exercise of authority in this manner.[26] There is no applicable prohibition here, nor do the Joint Parties point to any. The fact is that the Commission can and has lawfully allowed ratepayer funds to be used to fund certain local agency costs in the past. In at least one instance, MPWMD was the recipient of such funds.[27] Finally, the Joint Parties argue the authorized budget for the Local Agencies' scope of work was too generous. (Rhg. App., at p. 27.) This is a somewhat disingenuous position, in that the Joint Parties supported the majority of Local Agency funding authorized by the Decision. Now, they offer no more than a broad and general assertion of inflated estimates. However, they do not show how any specific estimate was unreasonable. Further, our Decision guarded against overcompensation by adopting

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[25] Pub. Util. Code, § 1802, subd. (b)(2).

[26] See e.g., *Consumers Lobby Against Monopolies v. Public Utilities Commission* (1979) 25 Cal.3d 891, 905-906.

[27] *In the Matter of the Application of California American Water Company for an Order Authorizing it to Increase Rate for Water Service in its Monterey District to Increase Revenues by $9,456,100 or 32.88% in the Year 2006; $1,894,100 0r 4.95% in the Year 2007; and $1,574,600 or 3.92% in the Year 2008; and for an Order Authorizing Sixteen Special Requests With Revenue Requirements of $3,815,900 in the Year 2006; $5,622,300 in the Year 2007; and $8,720,500 in the Year 2008; the Total Increase in Rates for Water Service Combined Within the Sixteen Special Requests Could Increase Revenues by $13,272,000 or 46.16% in the Year 2006; $7,516,400 or 17.86% in the Year 2007; and $10,295,100 or 20.73% in the Year 2008* [D.06-11-050] (2006)__ Cal.P.U.C.3d __ , at pp. 27-28 (slip op.) [Funding related to water conservation].

requirements to ensure that all compensable costs will be reasonably constrained. We placed a cap on total expenditures (D.10-08-008, at pp. 2, 30 [Ordering Paragraph Number 3(e)].), and required costs to be recorded and tracked in a memorandum account subject to later reasonableness review. (D.10-08-008, at pp. 12, 23.)

D. Commission And Supreme Court Precedent

The Joint Parties assert the Decision violated longstanding Commission policy, as affirmed by the California Supreme Court, which prohibits the use of ratepayer funds to support costs such as the Local Agencies' litigation expenses. (Rhg. App., at pp. 28-30, relying on *P.T.&T. Co.* [D.67369] (1964) 62 Cal.P.U.C. 775, 851-854; affirmed in part by *Pacific Telephone and Telegraph Company v. Public Utilities Commission of the State of California* ("*Pac. Tel. & Tel. v. PUC*") (1965) 62 Cal.2d 634, 668-671.)

The authorities relied on by the Joint Parties all involve the use of ratepayer funds to support charitable dues and donations, service club dues, and legislative advocacy. We have indeed consistently prohibited the use of ratepayer funds for such activities. However, the Decision did not authorize funds for any charitable dues or donations, service club dues, or legislative advocacy. And nothing in the case law suggests that the litigation costs in question would fit within the prohibited costs.

The cases reveal that the type of charitable dues and donations that are contemplated are those for service clubs or entities, such as the United Fund, the Red Cross, colleges or universities.[28] Such contributions are not analogous to litigation expenses to support the Regional Project.

Similarly, legislative advocacy expenses are those for activities such as tracking pending legislation, analyzing bills, and related discussions with legislative

[28] See e.g., *P.T.&T. Co* [D.67369], *supra,* 62 Cal.P.U.C. at p. 852; *Pac Tel. & Tel. v. PUC , supra,* 62 Cal.2d at pp. 668-679.

staff.[29] Nothing in the record suggests the funds here would be used for such purposes, and nothing in the case law pertains to the type of litigation costs at issue here.

III. CONCLUSION

For the reasons stated above, the application for rehearing of D.10-08-008 is denied because no legal error has been shown.

Therefore **IT IS ORDERED** that:

1. The application for rehearing of D.10-08-008 is denied.
2. This proceeding, Application (A.) 09-04-015 is closed.

This order is effective today.

Dated March 24, 2011, at San Francisco, California.

MICHAEL R. PEEVEY
President
TIMOTHY ALAN SIMON
MICHEL PETER FLORIO
CATHERINE J.K. SANDOVAL
MARK FERRON
Commissioners

[29] *P.T.&T. Co* [D.67369], *supra*, 62 Cal.P.U.C. at pp. 853-854.