

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of the Application of SAN JOSE WATER COMPANY (U 168 W) for an Order authorizing it to increase rates charged for water service by \$25,793,000 or 18.20% in 2004; by \$5,434,000 or 3.24% in 2005; and by \$5,2100,000 or 3.01% in 2006.

Application 03-05-035
(Filed May 23, 2003)

**REPLY BRIEF OF THE OFFICE OF RATEPAYER ADVOCATES ON
SANTA CLARA VALLEY TRANSPORTATION AUTHORITY'S
REQUEST FOR RATEBASE ADJUSTMENT**

Pursuant to Rule 75 of the California Public Utilities Commission's (Commission) Rules of Practice and Procedure, the Office of Ratepayer Advocates (ORA) files this Reply Brief in the above captioned proceeding.

Santa Clara Valley Transportation Authority's (VTA) Opening Brief incorrectly interprets Commission precedent and case law to justify a pro rata sharing of its relocation costs based on alleged benefits from VTA's requested relocation of San Jose Water Company's (SJWC) facilities. VTA also fails to disprove SJWC's rebuttal of VTA's alleged ratepayer benefits. The record shows that ratepayers have received no meaningful benefit from the relocation work, and precedent shows that VTA must bear the associated costs.

**I. AS THE PRIMARY BENEFICIARY, LEGAL PRECEDENT
REQUIRES VTA TO BEAR THE RELOCATION COSTS**

**A. Commission and Case Law Precedent Do Not Permit
Allocation of the Costs on a Pro Rata Basis.**

VTA and ORA agree that the Commission should look to primary beneficiary test of *Reclamation District No. 2042 v. PG&E, Decision 01-07-010 (Reclamation District)*

for guidance. However, VTA argues that this should lead the Commission to a pro rata division of the costs (see VTA Post-Hearing Opening Brief (VTA OB), p.10), whereas ORA and Commission precedent state that whomever is the primary beneficiary must pay all the relocation costs (see ORA Opening Brief (ORA OB), pp. 6-7).

VTA's brief discusses "relative responsibility" and "equitable distribution" but the cases it cites do not divide the costs between the parties. (See VTA OB, pp. 6-10.) In none of the cited cases was a pro rata division of the expenses discussed. While the cited cases address interesting legal questions of various governmental entities' rights, the question of how to divide the expenses other than all-or-nothing was simply not an issue discussed. As such, there is no precedent to divide the costs based upon a division of alleged benefits, as VTA requests.

The Commission, in *Reclamation District*, denied in full the request of a reclamation district to have Pacific Gas & Electric (PG&E) reimburse it for relocation costs. (See *Reclamation District No. 2042 v. PG&E*, D.01-07-010, Ordering Paragraph No. 1.) There is no assessment of the relative benefits to PG&E versus the Reclamation District, and no provision for assigning costs on a pro rata basis.

B. VTA Is Not Exempt From The Primary Beneficiary Test By Virtue Of Its Particular Authority And Rights.

Although VTA does not claim that it is exempt from bearing any costs by virtue of its political status, it nevertheless cites to various cases that stand for the proposition that certain political entities are exempt from bearing utility relocation costs. VTA does not fall within the class of political entities so entitled.

Prior to discussing the primary beneficiary test, which states that, "where a franchise is not determinative, a court may look to the primary beneficiary to absorb the costs of a public works," the Commission in *Reclamation District* addressed the issue of the district's authority and rights. (Id., mimeo, at 13.)

The Commission found "[s]pecial districts, like reclamation districts, are not 'municipalities,' that is, they are not general purpose governments and can only exercise the powers granted by statute." (Id. at 11.) The Commission also did not accept the

district's argument that its police power created an implied obligation by PG&E to relocate its facilities at its own expense. The Commission stated,

“To accept it [the district's argument] would mean that a reclamation district through exercise of its police power would have the franchise rights that the Legislature has bestowed only upon cities and counties. Had the Legislature intended to grant such authority to reclamation districts, it would have done so directly, rather than by implication [. . .].” (Id. at 15.)

Therefore the Commission has found that in order for an entity, like VTA, to have franchise like authority, which VTA claims to have from its enabling act, there must be an express legislative grant – which is absent in VTA's enabling act.

The California Court of Appeals (Appeals Court), in *Pacific Telephone and Telegraph Company v. Redevelopment Agency of the City of Redlands (Pacific Telephone)*, affirmed a lower court ruling that the utility must relocate facilities at its own expense, without any sharing of the cost. (See *Pacific Telephone*, 75 Cal.App.3d 957, 1977 Cal. PUC LEXIS 2072, p.***1-2.) The court found that a franchise “is subject to an implied obligation to relocate the facilities when necessary to make way for a proper governmental use of the streets.” (Id. at ***7.) *Pacific Telephone* unsuccessfully argued that the action fell outside the franchise agreement because it was done for non-governmental use. (See id. at ***5.)

However, in that case the redevelopment agency was a city created agency and *Pacific Telephone* had a franchise agreement. (See id. at ***2.) By contrast, VTA is not a city agency but a state agency like that in *Reclamation District*, nor does VTA have a franchise agreement. (See VTA OB, p. 5.) As explained in ORA's opening brief, VTA's enabling act did not grant it the powers that cities have under the Franchise Act. (See ORA OB, pp. 3-5.) And as quoted above, the Commission has stated that the legislature has only bestowed franchise rights to cities and counties and if the legislature intends to grant such power to a state created entity it will do so expressly. (See *Reclamation District*, p. 15.)

The Appeals Court, in *County of Contra Costa v. Central Contra Costa Sanitary District*, affirmed in full a lower court decision to have a flood control district reimburse the complete cost of a sewer district's facilities relocation. (See *County of Contra Costa v. Central Contra Costa Sanitary District*, 182 Cal.App.2d 176, 1960 Cal. PUC LEXIS 2095, p.***6-7.) The court found that the case "is merely a situation in which the sanitary district's right and easement to use Grayson Creek for its sewer line was prior in time to the right of the two other public bodies and therefore prior in right." (See *id.* at ***3.)

In *Northern Sacramento County Sanitation District v. Northridge Park County Water District of Sacramento County*, the Appeals Court agreed with trial court that a sanitation district must fully compensate a water district for the relocation of its facilities. (See *Northern Sacramento County Sanitation District v. Northridge Park County Water District of Sacramento County*, 247 Cal.App.2d 317, 1966 Cal. PUC LEXIS 967, p.***1.) The court found that both districts had statutory rights to build facilities on public land, both had the right to tax local persons, both were equally independent of the county government, and both were equally important in the services they provide; therefore, "each district when performing the identical type of function – the laying of pipe lines in a public street – should pay its own way." (*Id.* at ***17.)

As discussed in Part A, above, in none of the above cases did the court discuss a pro rata division of the expenses based upon the division of benefits. In addition, none of the cases provide authority for exempting VTA from bearing the costs by virtue of its political status. The Commission should allocate the costs at hand in kind and require VTA to cover the all the expenses of the relocation work under the primary beneficiary test of *Reclamation District*.

If the Commission does divide the costs, then it must recognize the unsupportable nature of VTA's claim of large ratepayer benefits, as fully discussed in ORA's opening brief. Therefore, even a pro rata division of costs would have VTA paying the relocation costs.

C. Under the Primary Beneficiary Test only Discrete Beneficiaries Should be Recognized.

VTA's Opening Brief seems to argue that the primary beneficiary test needs to be tweaked when dealing with dispersed benefits. (See VTA OB, p. 9-10.) VTA argues that its light rail transit system benefits the entire bay area, and thus "one cannot pinpoint discreet groups of 'primary beneficiaries'." (Id. at 10.)

ORA acknowledges that it is arguable that VTA's light rails do provide indirect benefits to the greater bay area. It is also arguable that it provides indirect benefits to the inland valleys of California by contributing to the reduction of bad air quality, or, taken to the extreme, it is arguable that it provides indirect benefits to all of America by lessening our dependence on foreign oil.

But the cost of producing these dispersed benefits should not be borne by the customers of SJWC. The parties against whom the benefits must be measured are the customers of VTA and the customers of SJWC. And the direct benefits to both those parties are quantified in the record and were subject to cross-examination, with the result showing only an incidental benefit to SJWC ratepayers.

To the extent that some other parties benefit from such externalities, the proper place to address who should pay for these benefits is in the state legislature. In fact the legislature has noted the benefits in VTA's enabling act, and accordingly given VTA the power to levy use and transaction taxes, and issue bonds. (See PU Code §§100000, et al.) If the legislature desired those outside of VTA's geographical authority to pay for indirect benefits it would have given VTA the power to tax them too.

Furthermore, if the Commission wanted, as a matter of equity, to spread the relocation costs in the widest circle to match the alleged bay area wide indirect benefits, then it should request that VTA charge its riders.

II. RATEPAYER BENEFITS ARE ILLUSIVE

VTA argues that it has shown a great amount of ratepayer benefit. As shown in ORA's Opening Brief, the benefits that VTA claims must be discounted nearly 100% due to VTA's failure to account for mitigating circumstances, such as the time value of

money and the increase relocation expenses due to VTA's special needs. (See ORA Opening Brief, pp. 7-12.) Nothing in VTA's Opening Brief meaningfully rebuts the obvious failure of VTA to fully account for the extra ratepayer burdens addressed in SJWC's testimony.

For example, VTA rebuts the time value of money argument by stating that there is an immediate benefit of having a newer pipe in the ground because of enhanced reliability. (See VTA OB, pp. 13-14.) But VTA admits that it never looked at pipeline-by-pipeline leak history or examined any of the replaced pipe or pictures of the replaced pipe. (VTA/Christopher Volume 3 (3) Reporters Transcript (RT), 72:12-23.) On the other hand, SJWC asserts that the replaced facilities were in good condition. (Exhibit (Ex.) 21, p. 1.)

Moreover, VTA's argument misses the point. It claims a ratepayer benefit due to deferred pipe replacement. (Ex. 20, p. 3.) That is the main benefit to ratepayers that it asserts. (See VTA OB, p. 10.) Yet, that benefit is deferred until the distant future and nothing about having allegedly more reliable pipe in the ground today addresses the deferral of that benefit. The new pipe does not move forward in time the benefit of deferred pipe replacement. And as such, it does not negate the cost of deferring any alleged ratepayer benefit. Only moving forward in time the would-have-been replacement time on the removed pipes (e.g., showing the pipes were bad and would have had to be replaced soon) would mitigate the deferral of the benefits.

Another example of VTA's failure to rebut SJWC's testimony is VTA assertion that it balanced the additional construction costs of VTA's needs with not crediting ratepayers with a benefit when the replaced pipe was of shorter length. (See VTA OB, pp. 16-18.) But, unsubstantiated statements of benefits that it could have charged ratepayers but did not, does not equal evidence. VTA quantifies one example of the would-be benefit and then states that there are "well over 20 additional situations" where it could have charged ratepayers with a benefit but did not. (See *id.* at 17.) There is no summed up quantification of these would-be benefits, but there is evidence in the record

that states SJWC believes that the relocation costs were about 30% above normal due to VTA's special needs. (See Ex. 21, p. 3.)

III. VTA'S MONETARY REQUEST COULD NOT BE ADDRESSED AS A RATEPAYER BILL SURCHARGE

ORA agrees with SJWC that VTA's request to rate base the desired reimbursement is beyond the bounds of acceptable ratemaking. ORA also agrees with SJWC that regardless of how ratepayers would be charged there is no basis to charge them due to the lack of ratepayer benefits. However, ORA disagrees with the SJWC regarding the relevancy of two instances in which the Commission imposed a surcharge on ratepayers to reimburse a third party.

Rebutting VTA's position that the relocation costs must be ratebased, SJWC gives two examples of when a surcharge was added to ratepayers' bills in order to reimburse a third party. (See SJWC Opening Brief, p. 6.) The first example is loans from the Safe Drinking Water State Revolving Fund to pay for water quality compliance costs. The second example is Department of Water Resources surcharges used to pay for energy bought by the State of California in the midst of the energy crisis.

Both these examples deal with legislative mandates issued in response to grave situations: toxic contaminants in drinking water and the energy crisis. (See, respectively, Health and Safety Code §116760.10 & Water Code §80000.) There is no such public emergency in the case at hand. To compare a surcharge in this case with the examples that SJWC gives, is to compare apples and oranges. And to the extent that the legislature recognized a social situation in VTA's enabling act it also gave VTA the power to tax.

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IV. CONCLUSION

VTA seeks to reinterpret Commission precedent and case law so that relocation costs are pro rated based upon a benefits analysis. However, the precedent states that those who are the primary beneficiary pay all the costs. VTA also unpersuasively seeks to discount SJWC's analysis of the many negative factors that VTA did not take into account when it estimated ratepayer benefits. For those reasons VTA's request must be denied in full.

Respectfully submitted,

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April 6, 2004

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing document
“REPLY BRIEF OF THE OFFICE OF RATEPAYER ADVOCATES ON SANTA CLARA VALLEY TRANSPORTATION AUTHORITY’S REQUEST FOR RATEBASE ADJUSTMENT” in **Application 03-05-035**.

A copy was served as follows:

BY E-MAIL: I sent a true copy via e-mail to all known parties of record who have provided e-mail addresses.

BY MAIL: I sent a true copy via first-class mail to all known parties of record.

Executed in San Francisco, California, on the 6th day of April, 2004.

/s/ NELLY SARMIENTO

NELLY SARMIENTO