Case No. S208838

IN THE SUPREME COURT OF THE

STATE OF CALIFORNIA

Monterey Peninsula Water Management District,

Petitioner,

v.

California Public Utilities Commission,

Respondent.

California-American Water Company,

Real Party in Interest

The California Public Utilities Commission, Decisions No. 11-03-035 and No. 13-01-040 in Proceeding No. Application 10-01-012.
The Honorable Maribeth A. Bushey, Administrative Law Judge Presiding
Commissioner Michael R. Peevey, Assigned Commissioner

OPPOSITION TO MOTION OF RESPONDENT FOR LEAVE TO FILE SUPPLEMENTAL ANSWER

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To the Honorable Chief Justice Tani G. Cantil-Sakauye and Associate Justices of the California Supreme Court:

Pursuant to California Rule of Court, Rule 8.54, subdivision (a)(3), Petitioner Monterey Peninsula Water Management District ("District") respectfully submits its Opposition to Respondent California Public Utilities Commission's ("Commission") Motion for Leave to File Supplemental Answer ("Motion"). Rule 8.54, subdivision (a)(3) provides any opposition to a motion must be filed and served within 15 days after the motion is filed; this Opposition is timely filed.

On June 26, 2013, the Court granted a petition for writ of review in the above-listed matter. On July 17, 2013, the Court ordered that no further briefs, other than *amicus* briefs filed with leave from the Court, be submitted in this matter. The time period for seeking leave to file an *amicus* brief pursuant to the July 17, 2013 order has expired. No such request has been served on the District or submitted to the Court. No subsequent order has issued from the Court ordering the parties to submit additional briefs or authorizing any other person to do so.

On August 14, 2013, the Commission filed its Motion for Leave to File Supplemental Answer, and included the proposed Supplemental Answer. The Commission had previously taken the position that Section 451 of the Public Utilities Code permitted it to review any charge on a utility bill "regardless of the originator" (Petition Exhibit 2, p. 20) and that Section 451 applied to the District's

User Fee "regardless of the fact that the District originates the fee and that Cal-Am [the utility] would eventually remit the fee to the District." (Respondent's Answer, p. 17.) The Supplemental Answer, however, states that, while the Commission has jurisdiction over "Utility Surcharges," "a Government Fee, which a utility collects solely as an agent for a government entity . . . is free from regulation." (Supplemental Answer, p. 3.)

The Motion asserts that "there is an unintended ambiguity regarding the use of the term 'User Fee'" (Motion, pp. 1-2), one the Commission apparently decided not to dispel until after review was granted by this Court. Given the unusual nature of the Commission's pleading, the fact that it was submitted after the Court granted review, and the fact that the Motion and Supplemental Answer are procedurally and substantively deficient, the District submits two requests to the Court. First, for the reasons set forth below, the District respectfully requests the Court deny the Commission's Motion for Leave to File Supplemental Answer. Second, alternatively, if the Motion is granted, the District asks that it be allowed to submit a response to the Supplemental Answer.

I. ARGUMENT

A. Rule 8.520(d) does not authorize the Commission to file a "Supplemental Answer"

The Motion cites Rule 8.520, subdivision (d) ("Rule 8.520(d)") as the authority under which the Commission is able to file its Supplemental Answer. Rule 8.520(d), however, provides no such authority. Rule 8.520(d) provides

authority for supplemental *briefs*; an answer, which is properly submitted by the respondent prior to a grant or denial of review by the Court, is a distinct document from a brief on the merits. The Commission does not contend that its Supplemental Answer is a brief, and provides no authority to support submission of a Supplemental Answer.

B. If the Supplemental Answer is deemed a "Supplemental Brief," it was filed in contravention of the Court's order proscribing further briefing by the parties.

The Commission's Motion does not contain any reference to the Court's July 17, 2013 order directing that no briefs be filed by the parties, absent an order from this Court; no such order authorizing or directing the parties to file additional briefs has been issued. The Supplemental Answer, if deemed in some fashion to constitute a "Supplemental Brief" within the meaning of Rule 8.520(d), contravenes the July 17, 2013 order. Furthermore, while the July 17, 2013 order authorized *amici* to seek leave to file briefs and set a time limit for such requests, it did not authorize parties to seek leave to file additional briefs.

C. The Commission's Motion does not meet the requirements for a motion set forth in Rule 8.54

Rule 8.54, subdivision (a)(2) provides that a motion must be accompanied by a memorandum. The Commission's Motion is not accompanied by a memorandum supporting the submission of additional material to the record, nor any citation to any legal authority supporting its position, and therefore fails to satisfy the requirements for a motion.

D. The Supplemental Answer does not meet the substantive requirements of Rule 8.520(d)

Rule 8.520(d) provides in pertinent part: "A party may file a supplemental brief limited to new authorities, new legislation, or other matters that were not available in time to be included in the party's brief on the merits." Assuming, *arguendo*, the Supplemental Answer could be filed as a supplemental brief, nothing in it meets the requirements of Rule 8.520(d). The Commission has presented no "new authorities, new legislation, or other matters that were not available" at the time the Commission submitted its Answer. Instead, the Supplemental Answer essentially recasts the entire history of the dispute before the Court under the guise of "clarify[ing] an unintended ambiguity regarding the use of the term 'User Fee.'" (Motion, pp. 1-2). The Supplemental Answer is devoid of any argument or representation that could not have been expressed much earlier.

E. If the Supplemental Answer is accepted, the District should be permitted to reply

The Court's July 17, 2013 order provided that "the parties' exhibits will constitute the administrative record under review." Within that record, no "ambiguity" exists. While the District requests the opportunity to respond in greater detail if the Supplemental Answer is accepted, it will suffice to note here that the record shows that from January 5, 2010, the date Real Party in Interest California-American Water Company ("Cal-Am") filed Application 10-01-012

with the Commission, to June 26, 2013, the date this Court granted review, the User Fee has been described to the Commission at every phase of the proceeding as a government fee and evaluated by the Commission as a government fee.[1]

Application 10-01-012, the genesis of this matter, described the User Fee as a government fee. This is the same fee the District, a government body, had been collecting through Cal-Am for decades, and the same User Fee described in the Supplemental Answer (p.4) as the "Government Fee or tax" collected through 2009. (App-I 4, 6, 13-14.) The All-Party Settlement, the rejection of which led to the instant dispute, expressly described the User Fee as a government fee imposed by an ordinance enacted by the District's Board. (App-I 52-53, 55.)

The Commission expressed no confusion on the point in the past. When the District questioned whether the Commission understood that the User Fee was not a "Utility Surcharge" of Cal-Am, but was instead a fee imposed by the District, a government body, and collected by Cal-Am "solely as an agent" for the District, the Commission was quick to respond:

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[1] The User Fee was not referred to solely as a "Government Fee" as the Supplemental Answer frames it for the first time, but was universally understood by the parties to be a fee imposed by a government entity not subject to Commission jurisdiction. See App-I 55 (User Fee set by District Board); App-I 61 (parties agree with regard to the nature and origin of the User Fee); App-I 128-129 (characterizing the User Fee as a fee imposed by a government agency over which the Commission has no authority); App-I 143-144 ("The Commission has no jurisdiction over the District's User Fee."); Petition Exhibit 2, at p. 20 ("We clearly understood that distinction [between a utility surcharge and a fee imposed by a government entity] as evidenced by our statement that Cal-Am would merely collect fee [sic] for the District, but that it is the District which originates the charge.").

> The District also claims [Decision 11-03-035] erred because it made certain inaccurate statements or assumptions. For example, the District suggests we wrongly presumed the User Fee is a "Cal-Am charge" ["utility surcharge"] rather than a "District charge"["government fee"] That is incorrect. We clearly understood that distinction as evidenced by our statement that Cal-Am would merely collect fee [sic] for the District, but that it is the District which originates the charge.
>
> [¶]
>
> What the District ignores is that the fee is still a charge that would be billed and recovered from Cal-Am customer[s]. As such, the "charge," regardless of the originator, was properly subject to the Section 451 review. (Petition Exhibit 2, at p. 20 [D.13-01-040, at p. 20].)

In its Answer in this proceeding, the Commission states that the reach of Section 451 extends to the User Fee "regardless of the fact that the District originates the fee, and that Cal-Am would eventually remit the fee to the District." (Answer, p. 17.)

It is difficult to reconcile the record with the Commission's current position that (1) it has no jurisdiction over a government fee that appears on a utility bill, but (2) its decision rejecting Cal-Am's request to continue collecting the User Fee on behalf of the District was "reasonable and lawful." (Supplemental Answer, pp. 3, 7.) In the event this Court grants the Commission's Motion, the District should be given the opportunity to provide a detailed response to the analytical path the Commission travels to reach that entirely new and counterintuitive outcome.

II. CONCLUSION

The Commission had ample opportunity to address any perceived ambiguity regarding the use of the term "User Fee." It could have done so in the Rehearing Order, in its Answer, or at some other point in time while the Petition for Review was pending before the Court. It does not explain why it failed to do so. The Court's July 17, 2013 order deemed the administrative record complete and directed that the parties file no further briefs. Any ambiguities the Commission believes may exist are properly addressed at oral argument.

For the foregoing reasons, the District respectfully requests the Commission's Motion be denied. Alternatively, if the Motion is granted, the District requests the opportunity to submit a response to the Supplemental Answer.

Dated: August 22, 2013

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PROOF OF SERVICE

I, Sandie DiLuzio, declare: I am a citizen of the United States and employed in San Francisco County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 505 Sansome Street, Suite 900, San Francisco, California 94111.

On **August 22, 2013**, I served a copy of the within document:

OPPOSITION TO MOTION OF RESPONDENT FOR LEAVE TO FILE SUPPLEMENTAL ANSWER

by hand delivering the document listed above in a sealed envelope, to the addresses set forth below:

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I also served a copy of the within document:

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by placing the document listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at San Francisco, California addressed as set forth below:

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I am readily familiar with the firm's practice of collection and processing correspondence for mailing and hand delivery. Under that practice it would be hand delivered or deposited with the U. S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on **August 22, 2013**, at San Francisco, California

Sandie DiLuzio