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

SUPPLEMENTAL REPLY OF PETITIONER MONTEREY PENINSULA WATER MANAGEMENT DISTRICT

David C. Laredo, Bar. No. 66532
De Lay & Laredo
606 Forest Avenue
Pacific Grove, CA 93950
Telephone: (831) 646-1502
Facsimile: (831) 646-0377

Thomas J. MacBride, Jr., Bar No. 066662
tmacbride@goodinmacbride.com
Suzy Hong, Bar No. 239489
shong@goodinmacbride.com
Megan Somogyi, Bar No. 278659
msomogyi@goodinmacbride.com
Goodin, MacBride, Squeri,
DAY & Lamprey, LLP
505 Sansome Street, Suite 900
San Francisco, California 94111
Telephone: (415) 392-7900
Facsimile: (415) 398-4321

Attorneys for Petitioner
Monterey Peninsula Water Management District

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

Pursuant to the September 11, 2013 Order of this Court, Petitioner Monterey Peninsula Water Management District ("District") respectfully submits its Supplemental Reply responding to new arguments made by Respondent California Public Utilities Commission ("Commission") in the Supplemental Answer submitted by the Commission on August 14, 2013.

I. INTRODUCTION

On June 26, 2013, this Court granted the petition for writ of review in the above-listed matter. On the Court's website, the issue is described as follows:

Does the Public Utilities Commission have the authority to review and regulate a user fee imposed by a local government entity that is collected through the bills of a regulated public utility?

While the website disclaims any official import with regard to the summary,[1] it does fairly reflect the issue raised by the Petition. The District, through its Petition and in all of its filings before the Commission and this Court, stated that the answer to the question posed was "no." In its Supplemental Answer, the Commission now also answers the question in the negative, stating that a " 'Government Fee' which a utility collects

[1] "NOTE: The statement of the issues is intended simply to inform the public and the press of the general subject matter of the case. The description set out above does not necessarily reflect the view of the court, or define the specific issues that will be addressed by the court."

solely as an agent for a government entity . . . is free from Commission regulation." (Supplemental Answer ("Supp. Ans."), at p. 3.)

If the Court agrees with the District and the Commission that the question must be answered in the negative, then the Commission Decisions before the Court—Decision No. 11-03-035 ("Decision") and Decision No. 13-01-040 ("Rehearing Decision")—should be set aside so the District may again collect its User Fee through the bills of Real Party in Interest California American Water Company ("Cal-Am") as it had for decades. (Pub. Util. Code, § 1758.)

The Commission, remarkably, asks instead that the two Decisions under review here be affirmed. While the Supplemental Answer is devoid of any textual reference to either Decision, the Commission represents that they are not inconsistent with legal principle the Commission now adopts—that the Commission may not "review and regulate a user fee imposed by a local government entity that is collected through the bills of a regulated public utility."

As set forth below, the two Commission Decisions could not possibly be read in such a fashion.

II. THE LEGAL POSITION ADOPTED BY THE COMMISSION IN ITS SUPPLEMENTAL ANSWER CONFIRMS THE TWO COMMISSION DECISIONS SHOULD BE REVERSED

There is no meaningful distinction between (1) a charge "Cal-Am would merely collect . . . for the District, but that it is the District which

originates the charge" (Rehearing Decision, Petition Exhibit ("Pet. Exh.") 2, at p. 20), and (2) a charge "which a utility collects solely as an agent for a government entity." (Supp. Ans., at p. 3.)

The Decisions before the Court state that such a charge is subject to Commission regulation under Section 451 of the Public Utilities Code ("Section 451").[2] (Decision, Pet. Exh. 1, at p. 14; Rehearing Decision, Pet. Exh. 2, at p. 20.) The Commission adhered to that view until this Court granted review. Post-grant, however, the Commission states (correctly) that such a charge is "free from Commission regulation." (Supp. Ans., at p. 3.)

Were the Court to affirm the Decisions, as the Commission requests, the Decisions' claim of jurisdiction over the User Fee, made under color of Section 451, would be construed as a proper application of California law. Both the Commission and the District agree, however, that a charge "which a utility collects solely as an agent for a government entity . . . is free from Commission regulation." (Supp. Ans., at p. 3.) If the Court concurs, it could hardly affirm Decisions embracing precisely the opposite view.

The Supplemental Answer argues in favor of this counterintuitive outcome by introducing a new term into this years-long proceeding: Utility

[2] All further undesignated statutory references are to the Public Utilities Code.

Surcharge.[3] (Supp. Ans., at p. 3.) The Commission states that "[u]pon further review of the pleadings now before this Court, the Commission recently realized that the parties have used the term 'User Fee' to refer to two different things[, and accordingly,] the Commission's position as to what it can, and cannot, lawfully do may be unclear in the pleadings before the Court." (*Id.* at p. 2.) There is nothing "unclear," however, about the charge the Decision rejected. The Decision did not review a "Utility Surcharge;" it reviewed and rejected a "Government Fee."

The genesis of the Decision was Cal-Am's Application No. 10-01-012 ("A. 10-01-012"), which was captioned: "In the Matter of the Application of California-American Water Company (U 210 W) for an Order Authorizing Collection and Remittance of the Monterey Peninsula Water Management District User Fee." (App-I 1.)

A. 10-01-012 included as exhibits declarations describing the three decade history of the District's User Fee, which clearly stated that since the User Fee was a Government Fee, the Commission should permit Cal-Am to collect it on the District's behalf on an unfettered basis. The testimony shows unequivocally that the User Fee was presented to the Commission as a Government Fee. (App-II 289-291 [discussing the origination of the User Fee in 1983, and the Commission's prior recognition that the User Fee was

[3] A Utility Surcharge is, as the Commission provides, a charge "collected by a utility as part of its revenue requirement," and the reasonableness of such a surcharge is subject to Commission review. (Supp. Ans., at p. 5.)

properly administered by the District]; App-I 313-314 [discussing the history and administration of the User Fee as a Government Fee, and the Commission's established practice of leaving regulation of the User Fee to the District].)

Shortly after A. 10-01-012 was filed, the three principal parties to the Commission proceeding—Cal-Am, the District , and the Commission's Division of Ratepayer Advocates ("DRA")—presented a joint proposal ("All-Party Settlement") pursuant to which Cal-Am would simply collect the District's User Fee on the District's behalf, as it had for many years. In that proposal, the User Fee is clearly described as a Government Fee. (App-I 52-53, 55.)

Seven months later, the Commission issued a Proposed Decision which (1) scrutinized the User Fee and the use of its proceeds in detail (App-I, Exh. 6, in particular pp. 83-87), and (2) rejected the User Fee proposal stating, "we do not authorize Cal-Am to collect and remit the . . . District's proposed user fee[.]" (*Id.* at p. 87.)

Cal-Am, the District, and DRA each submitted comments on the Proposed Decision pursuant to the Commission's Rules of Practice and Procedure. (Cal. Code Regs., tit. 20, § 14.3, subd. (a).) Each set of comments again pointed out to the Commission that the User Fee was a Government Fee lying beyond the scope of the Commission's jurisdiction. (App-I 98-100, 103-105, 108-109, 112; App-I 128-129, 135, 137; App-I

144.) Notwithstanding the comments, the Decision, like the Proposed Decision, rejected the proposal to permit Cal-Am to collect the User Fee on behalf of the District. (Decision, Pet. Exh. 1, Ordering Paragraph No 1, at p. 23.)

The All-Party Settlement rejected by the Decision did not propose a "Utility Surcharge." The parties to the agreement, in the clearest of terms, presented the charge as the same Government Fee the District had included in Cal-Am's bills for many years. How the Commission now—years later—characterizes the charge it thought or wished was before it in A. 10-01-012 is of no moment. The charge that was before it, as the Commission later acknowledged in the Rehearing Decision, was a charge that "Cal-Am would merely collect . . . for the District, but that it is the District which originates the charge." (Pet. Exh. 2, at p. 20.)

The District sought rehearing of the Decision pursuant to Section 1731, subdivision (b) and again pointed out to the Commission that the User Fee in A. 10-01-012 was a Government Fee over which the Commission had no jurisdiction. (App-I 171-180.) The application for rehearing also noted that certain statutory authority cited in the Decision "seems premised on an assumption that the User Fee is charged by Cal-Am, a privately owned public utility, when, in fact, the User Fee, is charged (lawfully) by a governmental entity, [the District]." (App-I 205.) When it denied the District's application for rehearing, the Commission was quick

to respond to the District's suggestion that the Commission failed to comprehend the nature of the charge, stating:

> 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.* (Rehearing Decision, Pet. Exh. 2, at p. 20 [emphasis added].)

Leaving no doubt that it understood the User Fee to be a Government Fee, the Commission then advanced the legal position it now asks this court to affirm:

> 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.* (Rehearing Decision, Pet. Exh. 2, at p. 20 [emphasis added].)

The Commission well understood the distinction between a Utility Surcharge and Government Fee; it simply found it to be of no concern until this Court granted review.

Because the two Decisions assert Section 451 vests the Commission with jurisdiction over any charge on a utility bill "regardless of the originator," they must be set aside. As even the Commission now agrees, a

" 'Government Fee' which a utility collects solely as an agent for a government entity . . . is free from Commission regulation." (Supp. Ans., at p. 3.)

III. THE LEGAL SUFFICIENCY OF THE DECISIONS DOES NOT TURN ON WHAT PROPOSAL THE COMMISSION HOPED THE PARTIES WOULD PRESENT TO IT FOR APPROVAL

The Commission's semantic recasting of the entire history of this proceeding begs the jurisdictional question at issue. In this docket, the Commission is required to defend its actions with respect to the proposal submitted to it, not some other proposal it would have preferred.

The Supplemental Answer claims "[t]he Decision under review [before this Court] evaluated the proposed User Fee as a Utility Surcharge within its lawful purview" because that was what the Commission wanted: for Cal-Am to submit a new method of collecting the User Fee in this proceeding. (Supp. Ans., at pp. 3-4). The Commission asserts that it "was concerned that a Government Fee imposed by the District might not be the most efficient method of funding programs that are Cal-Am's responsibility."[4] (Supp. Ans., at p. 5.) "[B]ecause the Commission had specifically asked for an alternative, it reviewed the proposal as a Utility Surcharge, not a Government Fee." (Supp. Ans., at p. 6.)

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[4] The Commission has repeated stated that Cal-Am is "legally responsible" for certain mitigation measures. This claim has no bearing on the jurisdictional question before the Court. (See Reply, at pp. 3-4, 14-15.)

Despite repeated opportunities to do so, the Commission advanced no such explanation prior to this Court's grant of review. More importantly, it is clear that, despite what the Commission may view as a clear directive to Cal-Am, A. 10-01-012 did not seek authority for a "Utility Surcharge." A. 10-01-012 sought authority to collect the District's User Fee, a Government Fee, as it had for decades, and authority to remit the proceeds to the District. (See discussion at pp. 4-5, *supra.*) The Commission denied that request under color of Section 451.

The Commission may prefer that it, rather than the District, be vested with the authority to determine whether the District's environmental mitigation projects in Monterey County warrant funding by water users in Monterey County. (See Petition, at p. 13; Reply, at pp. 3-4.) Supplanting the District's User Fee with a "Utility Surcharge" would achieve that end. The District, however, is a creature of the Legislature, not the Commission. The Legislature authorized the District to undertake certain activities, fund them through a User Fee, and collect that User Fee through Cal-Am's customer bills. (Petition, at pp. 2, 16-17.) The Commission does not argue to the contrary. (Answer, at pp.12-13.) The Commission may not abrogate the District's right to exercise its legislative mandate to pursue lawful activities simply because the Commission prefers that water users only fund such activities at the level found reasonable by the Commission.

IV. CONCLUSION

There was no confusion with regard to the nature of the User Fee. The Decision reviewed and rejected the User Fee even though the Commission understood "that Cal-Am would merely collect fee [sic] for the District, but that it is the District which originates the charge." The Decision and Rehearing Decision assert that the Commission possessed the authority to do so because Section 451 vests the Commission with authority to review any charge on a utility bill *regardless of the originator*.

Section 451 vests the Commission with no such jurisdiction and the Decisions should be set aside.

Dated: October 10, 2013

GOODIN, MACBRIDE, SQUERI,
DAY & LAMPREY, LLP
505 Sansome Street, Suite 900
San Francisco, CA 94111
Thomas J. MacBride, Jr.
Suzy Hong
Megan Somogyi

By: _____
Megan Somogyi
Attorneys for Petitioner
Monterey Peninsula Water
Management District

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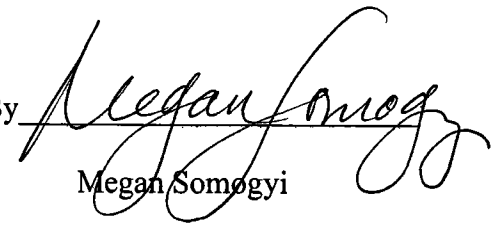
Dated October 10, 2013.

By 

Megan Somogyi

PROOF OF SERVICE

I, Wendy Peña, 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 **October 10, 2013**, I served a copy of the within document:

SUPPLEMENTAL REPLY OF PETITIONER MONTEREY PENINSULA WATER MANAGEMENT DISTRICT

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

Paul Clanon, Executive Director
Frank Lindh, General Counsel
Helen W. Yee
Pamela Nataloni
California Public Utilities
Commission
505 Van Ness Avenue
San Francisco, CA 94102

Benjamin G. Shatz
Lori Anne Dolqueist
Manatt, Phelps Phillips, LLP
One Embarcadero Center, 30th Floor
San Francisco, CA 94111

Counsel for Real Party in Interest
California-American Water
Company

Supreme Court of California
Clerk of the Court
350 McAllister Street, Room 1295
San Francisco, CA 94102

Stephen A. S. Morrison
Sarah E. Leeper
California-American Water
Company
333 Hayes Street, Suite 202
San Francisco, CA 94102

Jack Hawks
Executive Director
California Water Association
601 Van Ness Avenue, Suite 2047
San Francisco, CA 94102-6316

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SUPPLEMENTAL REPLY OF PETITIONER MONTEREY PENINSULA WATER MANAGEMENT DISTRICT

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:

Timothy Miller
California-American Water
Company
1045 B Street, Suite 200
Coronado, CA 92116

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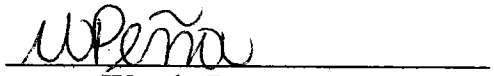
Executed on **October 10, 2013**, at San Francisco, California



Wendy Peña