No. A146901

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT, DIVISION THREE

SAN DIEGO COUNTY WATER AUTHORITY,
Respondent and Cross-Appellant,
v.
METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA,
Appellant and Cross-Respondent.

Appeal From Judgments And Peremptory Writs of Mandate After Court Trials
Superior Court for the County of San Francisco, Nos. CFP-10-510830 and CFP-12-512466
The Honorable Richard A. Kramer and Curtis E.A. Karnow

APPLICATION OF UPPER SAN GABRIEL VALLEY MUNICIPAL WATER DISTRICT FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF; [PROPOSED] AMICUS CURIAE BRIEF OF UPPER SAN GABRIEL VALLEY MUNICIPAL WATER DISTRICT IN SUPPORT OF APPELLANT METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA

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APPLICATION OF UPPER SAN GABRIEL VALLEY MUNICIPAL WATER DISTRICT FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF

I. Introduction

Pursuant to rule 8.200(c) of the California Rules of Court, the Upper San Gabriel Valley Municipal Water District ("Upper District") hereby applies for the Court's permission to file the attached Amicus Curiae Brief in support of Appellant and Cross-Respondent, Metropolitan Water District of Southern California ("MWD"). Upper District's proposed Amicus Curiae Brief addresses the unforeseen negative effects that the Superior Court's invalidation of MWD's transportation rates and wheeling rate has on the equitable and efficient operation of MWD's vital system of water provision.

The Superior Court's holding that MWD cannot recover the costs MWD pays for the State Water Project ("SWP") transportation facilities from all parties who benefit from the delivery of water through the use of MWD's integrated network system is both legal and economic error. The decision reveals that the Superior Court failed to apprehend the inequitable and unfair effect this holding will have on member agencies other than the San Diego County Water Authority ("San Diego").

Established principles of fairness, equity, and reasonableness substantiate MWD's allocation of the SWP transportation costs to the System Access Rate and the System Power Rate (two of MWD's transportation rates,[1] referred to

[1] MWD recovers its transportation costs through three components of its water rates: (1) the System Access Rate, (2) the System Power Rate, and (3) the Water Stewardship Rate. The latter is not addressed in this amicus brief.

collectively as "MWD transportation rates") and recovery of those costs from those who use its system. Upper District, like the other 25 MWD member agencies, enjoys the benefits of MWD's entire system and the operational integration of that system. As a voluntary cooperative of 26 member agencies, the very purpose of MWD's existence is the integration and management of large complex regional facilities that could not be achieved by any one individual member. Thus, MWD's system integration, operationally and for purposes of rate-setting, is reasonable and not uncommon. It is consistent with the commonly accepted and long standing rate setting practices applied in other utility sectors (e.g., electricity, gas, telecommunications, etc.).

The MWD cost structure is consistent with those used by electricity providers and authorized by the Federal Energy Regulatory Commission ("FERC"), which has found that customers should share the cost of the entire transmission system where they enjoy the benefits of reliable service by their association with an integrated system. (*Niagara Mohawk Power Corp.*, Opinion No. 296, 42 FERC ¶ 61,143, at 61,531 (1988).) Indeed, because those benefits exist regardless of the particular area/section being used by each user, "[t]here is no need to identify further actual benefits in order to include the costs of network transmission facilities in transmission rates." (*City of Anaheim, Cal.* 113 FERC¶ 61,091 at p. 58 (2005), *reh'g denied*, 114 FERC ¶ 61,311 (2006).)

Should the ruling be affirmed in this case, San Diego will no longer pay a reasonable share of the total costs of MWD's integrated network water conveyance

system that makes water exchanges possible under its Exchange Agreement with MWD. MWD will then, by necessity, shift the burden of these costs to other member agencies that purchase their water supplies from MWD. The other member agencies will thus be subsidizing San Diego's benefit and use of the MWD network.

II. Upper San Gabriel Valley Municipal Water District

The Upper District is a municipal water district[2] that was formed by voters of 22 different cities and unincorporated areas of Los Angeles County in 1959 to address groundwater depletion and to provide a reliable, sustainable, diversified, and affordable portfolio of high-quality water supplies to the San Gabriel Valley.[3] In 1963, the residents of the Upper District voted to join MWD to ensure a reliable imported supply of potable water from the Colorado River and from the State Water Project. Upper District is one of 26 MWD "member agencies." Its service area includes the cities of Arcadia, Baldwin Park, Bradbury, City of Industry, Covina, Duarte, El Monte, Glendora, Hacienda Heights, Irwindale, La Puente, Monrovia, Rosemead, San Gabriel, South El Monte, South Pasadena, Temple City and West Covina. There are approximately 850,000 people in the service area of the Upper District. The Upper District imports approximately 20,000 to 50,000 acre feet of

[2] Under California Water Code § 71000 et seq.

[3] Under California Water Code § 71610: "…a district may acquire, control, distribute, store, spread, sink, treat, purify, recycle, recapture, and salvage any water, including sewage and storm waters, for the beneficial use or uses of the district, its inhabitants, or the owners of rights to water in the district."

imported water per year to replenish the groundwater basin relied on by these communities.[4]

III. Interests of Prospective Amicus Curiae Upper District in the Present Appeal

As a member agency, Upper District votes for and pays MWD's rates, and makes decisions in light of MWD's rate structure. MWD's rate structure was designed to meet several policy objectives including customer equity and fairness. The rate structure design was achieved through a three-year participatory process that involved MWD and all member agencies.

If the Superior Court's ruling is affirmed, Upper District is likely to incur a significant increase in costs for water delivered by MWD and bear a disproportionate share of SWP costs. Upper District will be required to recover these costs from its own retail ratepayers, along with Upper District's own operational costs. Upper District's customers would now be required to subsidize San Diego's customers by paying to build, operate, and maintain an integrated system that would be available for San Diego to use for water exchanges at discounted rates. As a member agency, Upper District also has a direct interest in the efficiency and sustainability of the MWD system.

In addition, pursuant to rule 8.200(c)(3) of the California Rules of Court, please note that the undersigned attorney is also counsel for the following parties in

[4] http://upperdistrict.org/about/

the pending appeal: appellants Las Virgenes Municipal Water District, Eastern Municipal Water District, Western Municipal Water District, Foothill Municipal Water District, and West Basin Municipal Water District, who are not signatories to this amicus brief.

Dated: November 11, 2016

Respectfully submitted,

LEMIEUX & O'NEILL

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

MISCELLANEOUS

I. THE SUPERIOR COURT'S DECISION FAILS TO ACCOUNT FOR AND FAIRLY ALLOCATE THE FULL COST OF OPERATING AN INTEGRATED NETWORK WATER CONVEYANCE SYSTEM

The Superior Court's decision (AA,[5] Vol. 27, p. 07459) described MWD's system as a "network." MWD does operate an integrated network of facilities that provides the supply, conveyance, pumping, storage, treatment, and distribution of water required by its member agencies. MWD operates these essential facilities via a regional network that is comparable to those in other utility sectors such as natural gas and electricity. Such network providers offer both "bundled" service that includes the commodity and its transportation, and "unbundled" service where customers purchase transportation service separate from the commodity which they obtain from a party other than the network provider. Similarly, MWD offers full-service water service, by which it supplies and delivers its own imported water supplies to its member agencies, and "wheeling" service, by which it transports non-MWD water through its network. MWD also has separate unique agreements for services, such as the Exchange Agreement with San Diego for the exchange of water.

MWD's integrated network and its reliable and efficient operation benefit all MWD's member agencies. The cost of the integrated network is recovered from MWD's member agencies through MWD's rate structure. MWD sets rates and

[5] "AA" refers to Appellants Index and Appendix, Vols. 1-35, filed in support of Appellants' Opening Brief.

charges using methods consistent with the basic principles underlying cost-based rates on other networks, such as electricity transmission.

The efficacy of the MWD rate structure to equitably recover and allocate costs is illustrated by comparison to the rate structure of an electricity provider. In the electricity industry, federal policy as set forth in the National Energy Policy Acts of 1992 and 2005[6] established that both the costs of contracted-for transmission facilities and the costs of the network itself are properly recovered through the rates and charges of the entity providing the transmission (i.e., conveyance) service. In the electricity context, a "network" transportation service is one where the purchased energy is transferred from anywhere on the network to the customer. Once electricity is "injected" into the network at Point A, it is indistinguishable from other energy at any other point on the network. The customer at Point B is not actually receiving delivery of "its" energy injected at Point A. The rates charged for integrated network service are therefore based on the total costs of the integrated transmission network that the customer benefits from.

Since the 1980s, the natural gas and electricity industries have experienced significant regulatory and institutional changes that have led to the offer of unbundled common carrier transportation service. Customers that earlier paid for bundled services now have the option to purchase unbundled services. Electricity providers have had to unbundle not only the service, but also the costs and rates

[6] EPACT92 Pub.L. 102-486 Oct. 24, 1992 and EPACT2005 Pub.L. 109–58 AUG. 8, 2005.

charged. This unbundling has supported the development of intra- and interstate markets for electricity since other parties that generate electricity can access these networks to reach buyers. The costs of the integrated transmission network used to move electricity from the point at which it is generated to the point at which it is used are carefully separated from the costs of the electricity commodity itself. The policy and practice of electricity providers to recover these system costs is comparable to MWD's recovery of its entire system costs – a rate structure the trial court has struck down.

For example, the Federal Energy Regulatory Commission ("FERC") recognizes the practice of "rolling" the costs of transmission facilities into a single rate when the facilities are part of an integrated system, regardless of legal ownership of any particular facility or the use of any particular segment of the network in a transaction. The FERC's policy is that "when facilities are integrated and thus provide system-wide benefits, facilities' costs are generally rolled-in and charged to all customers served." (*Pinnacle West Capital Corp.*, 131 FERC ¶ 61,143, at p. 42, *reh'g denied*, 133 FERC ¶ 61,034 (2010); *see also Sierra Pacific Power Co. v. FERC*, 793 F.2d 1086, 1088 (9th Cir. 1986) ("FERC favors rolled-in cost allocation when a system is integrated.").) In making that determination, "a showing of any degree of integration is sufficient." (*Northeast Texas Electric Coop., Inc.*, Opinion No. 474, 108 FERC ¶ 61,084, at P 48 (2004), *order denying reh'g*, Opinion No. 474-A, 111 FERC ¶ 61,189 (2005).)

The analogy to rate setting in the electricity industry is well illustrated by the court's analysis in *California Department of Water Resources v. F.E.R.C.* (9th Cir. 2007) 489 F.3d 1029, upholding FERC's approval of the pricing method of the utility Pacific Gas and Electric Company ("PG&E"), which included the costs of facilities previously classified as generation in their transmission charges. (*Id.* at 1037.) FERC was obliged to determine whether the proposed method was *just and reasonable* – which corresponds to the standard of review applicable to the trial court's review of MWD's rate-setting methodology. FERC also reviewed a mandate similar to the Wheeling Statute[7] in that the utility was required to provide non-discriminatory access to its transmission networks.[8] PG&E is a utility that owns many high-voltage electricity transmission lines in California. PG&E is required to allow anyone to transmit power over these lines and may recover costs associated with transmission by charging users a tariff, subject to FERC approval. FERC determined that, because all the facilities at issue perform some transmission

[7] Water Code, §1810

[8] Public utilities that own, control, or operate transmission facilities are required to file open access tariffs under which they agree to provide non-discriminatory access to their transmission networks in addition to the point-to-point service the utilities had been offering. Order No. 888, *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities,* F.E.R.C. Stats. & Regs. ¶ 31,036, 61 Fed.Reg. 21,540, 21,541 (May 10, 1996) (codified as revised at 18 C.F.R. pts. 35, 385).

function, PG&E can include those costs in its tariff and "roll in"[9] the facilities' costs equally to all transmission users.

The Court determined that the facilities at issue were properly classified as "transmission" by FERC although the bulk of them served a generation function because they essentially serve the functions of *both* generation and transmission. (*Id*. at 1036-37.) This benchmark is referred to as the "exclusive use" test because it classifies facilities as "generation" for costing purposes only if the facilities were used exclusively to generate power, step up power, or transmit power from the generator to the grid. (*Id.* at 1036.) As stated in FERC Opinion No. 466-B, "any degree of integration is sufficient to establish that the costs of the facilities should be treated as transmission." (108 F.E.R.C. ¶ 61,297, at 62511.) In upholding the FERC determination, the court also quoted FERC policy favoring "rolled in" transmission pricing in an integrated network system:

> The principal reason behind the adoption of this methodology is that an integrated system is designed to achieve maximum efficiency and reliability at a minimum cost on a system wide basis. Implicit in this theory is the assumption that all customers, whether they are wholesale, retail, or wheeling customers, receive the benefits that are inherent in such an integrated system. (12 F.E.R.C. ¶ 61,169, at 61,420 (internal citations omitted). *Id.* at 1038.)

[9] "When a utility uses the rolled-in allocation method for transmission costs, all customers share proportionately in the ownership, operation, and maintenance costs of all transmission facilities." (*Sierra Pac. Power Co. v. FERC*, 793 F.2d 1086, 1088 (9th Cir.1986).) Rolled-in pricing of transmission facilities is the method traditionally used in the industry. (*See Pac. Gas & Elec. Co.,* 53 F.E.R.C. ¶ 61,146, at 61,521 (1990) (Opinion No. 356). *California Department of Water Resources v. F.E.R.C*. (9th Cir. 2007) 489 F.3d 1029, 1035.)

The benefits of MWD's integrated system are shared in a similar manner. One inherent aspect of network service is that the entire network is being used to convey and deliver water, a fact explicitly recognized by the 2003 Exchange Agreement between San Diego and MWD (22-AA-06126). Moreover, the SWP and the Colorado River Aqueduct are operated in a coordinated fashion, and are also used to coordinate the water transfers MWD engages in along each of those aqueducts, thereby ensuring reliable and high-quality water service. (See, e.g., 2012 AR, Vol. 9, pp. 002455-56; 2012 AR, Vol. 58, pp. 016583-87.) Thus, MWD's inclusion of SWP transportation costs in its transportation rates and in its wheeling rate recognizes the efficiency and reliability also deemed valid and beneficial in the electricity industry and is a reasonable rate setting practice.

II. THE SUPERIOR COURT FAILED TO ANTICIPATE THE DAMAGE DONE TO OTHER MEMBER AGENCIES FROM SHIFTING MWD'S SWP TRANSPORTATION COSTS SOLELY TO FULL-SERVICE WATER PURCHASERS

The Superior Court's decision is based on a fundamental misconception of MWD's cost structure and how that cost structure relates to the establishment of reasonable and equitable rates. The Superior Court focused on whether the water exchanged under San Diego and MWD's Exchange Agreement *needs* the SWP and whether MWD *owns* the SWP. Neither is relevant for the just and reasonable recovery of costs associated with an integrated network.

The same principles that apply in electricity and gas apply to the system the 26 member agencies, through their voluntary cooperative (MWD), have formed to

ensure consistent, reliable, and flexible water delivery. As stated above, "[W]hen facilities are integrated and thus provide system-wide benefits, facilities' costs are generally rolled-in and charged to all customers served." (*Pinnacle West Capital Corp*. 131 FERC ¶61,143, at p. 42, *reh'g denied*, 133 FERC ¶16,034 (2010); *see also, Sierra Pacific Power Co. v. FERC*, 793 F.2d 1086 (9th Cir. 1986) ("FERC favors rollin-in cost allocation when a system is integrated.") To determine integration, "a showing of any degree of integration is sufficient." (*Northeast Texas Electric Corp., Inc.*, Opinion No. 474, 108 FERC ¶61,084, at p. 48 (2004), *order denying reh'g*, Opinion No. 474-A, 111 FERC ¶61,189(2005).) And "[t]here is no need to identify further actual benefits in order to include the costs of network transmission facilities in transmission rates." (*City of Anaheim, Cal.*, 113 FERC ¶61,091, at p. 58 (2005) ("*City of Anaheim*"), *reh'g denied,* 114 FERC ¶61,311 (2006) ("*City of Anaheim Rehearing Order*").)

The proper question here is not whether MWD *needs* the SWP to exchange water for San Diego. The proper question is whether the portions of the SWP that MWD pays for is an integrated part of its network system. MWD delivers water to San Diego that has been blended with SWP water, not out of convenience, but out of operational flexibility, efficiency, and necessity.

The Court's discounting of the integrated system *because* MWD does not "own" the SWP facilities it pays for, is not supported by any law and is contrary to the practices of the analogous electricity and gas transmission rates. In *City of Anaheim*, 113 FERC ¶61,091, FERC determined that the cost of contract

entitlements (as opposed to facilities owned directly by a utility) should be rolled in-to-a-system-wide rate because they met its "any degree of integration" test and are integrated network transmission facilities. (*Id*., at p. 34.) "The record show[ed] that these entitlements are rights to use high voltage lines that are designed to and do carry bulk power," and "[i]t also show[ed] these lines are interconnected with other utilities and other transmission systems . . .." (*Id*., at p. 48.) Thus, FERC concluded that "the evidence shows that entitlements can be used to transmit power from other generators." (*Id*.) The fact that the entitlements allowed all participants, like the State Water Contractors, to use the facilities by simply requesting scheduling of the entitlements, as is allowed under the State Water Contract, showed that the entitlements were integrated into the entire grid. (*City of Anaheim Rehearing Order*, 114 FERC ¶61,311 at p. 46.)

III. THE SUPERIOR COURT MISAPPLIED THE CONCEPT OF COST CAUSATION AND FAILED TO GRASP THE INTENT OF MWD'S RATE DESIGN

The legitimacy of MWD's rate structure is further reflected by its consistency with American Water Works Association ("AWWA")[10] rate setting guidelines. "Cost causation" as articulated by San Diego and as applied by the Superior Court, is not the only criterion that satisfies the standard of reasonableness applicable to

[10] Established in 1881, the American Water Works Association ("AWWA") is the largest nonprofit, scientific, and educational association dedicated to managing and treating water. http://www.awwa.org/about-us.aspx

MWD's rate-setting methodology.[11] MWD followed the rate methodology prescribed by the AWWA Manual M-1:12 a four-step cost of service process to set rates. This process: 1) forecasts MWD's revenue requirements for the given fiscal year; 2) functionalizes its costs (e.g. supply, conveyance, power, storage, treatment, and distribution); 3) categorizes those functionalized costs based on their *causes* (e.g., average demand, peak usage, or emergency standby needs) and behavioral characteristics (e.g., fixed or variable costs); and 4) allocates those categorized costs to volumetric rates (i.e., rates charged per acre-foot of water MWD delivered to the member agency) and fixed charges. (See, e.g., 2010 AR, Vol. 40, pp. 011467, 011470-89; 2012 AR, Vol. 59, pp. 016674, 016677-94.)13

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[11] MWD's ratemaking decisions must be upheld under the common law and Government Code section 54999.7, subdivision (a) if they are not arbitrary and capricious and under the Wheeling Statutes if they are supported by substantial evidence. Wat. Code, § 1813

[12] *Principles of Water Rates, Fees, and Charges* (5th edition, 2000) (See, e.g., 40-AR2010- 011321-23.) This Manual of Practice provides financial managers, water policymakers, and rate analysts with all relevant information needed to evaluate and select water rate structures, fees, charges, and pricing policies.

[13] According to the AWWA Manual M1, *Principles of Water Rates, Fees and Charges*, wheeling can involve various functions, the costs of which should all be considered in the determination of reasonable wheeling rates:

> [i]f a utility recovers transmission, distribution, and regulatory storage costs through either fixed charges or commodity charges, and water is conveyed for a wheeling party at a lower cost than what the utility's customers pay, then the utility's customers are most likely paying a portion of the cost of providing the wheeling service. This type of situation may cause utility customers to question their cost of service and can lead to economically inefficient resource investments on the part of the wheeling party. (2012 AR, Vol. 15, pp. 004148-4149.)

Cost causation refers to the function that is causing the cost and not to the individual user that is in any one particular transaction causing an incremental cost. For example, toll roads do not distinguish the costs between lanes on the road, between lanes and shoulders, or between lanes and overhead lighting. All users in all lanes pay the same fee and bear proportional costs.

Additionally, assigning the SWP network costs to the MWD transportation rates and wheeling rate is not a form of "protectionism" as alleged by San Diego (ROB 20). Rather the MWD transportation rates and wheeling rate serve to ensure that such fixed costs, incurred for the purpose of conveying water from a point of origin to a point of delivery within the network, are paid in an equitable manner relative to the benefit derived from the use of the integrated network system. As no supply costs are allocated to the wheeling rate or to the transportation rates on which the price terms of the Exchange Agreement between San Diego and MWD is based, MWD's transportation rates and wheeling rate are inherently *not* protectionist. Rather, as a matter of Board policy, all users of the integrated system pay these volumetric rates in relation to their voluntary use of the system.

Dated: November 11, 2016

Respectfully submitted,

LEMIEUX & O'NEILL

/s/ Steven P. O'Neill

By _____
Steven P. O'Neill
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PROOF OF SERVICE

STATE OF CALIFORNIA,)
) ss.
COUNTY OF VENTURA)

I am employed in the County of Ventura, State of California. I am over the age of 18 and not a party to the within action. My business address is 4165 E. Thousand Oaks Blvd., Suite 350, Westlake Village, CA 91362.

On November 11, 2016, I filed/served the following document(s) to the website www.truefiling.com, an efiling platform for the California Court of Appeal:

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California Supreme Court
Per Rule 8.212(c)(2)

[X] (BY MAIL) I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice, it would be deposited with U.S. postal service on that same day with postage thereon fully prepaid at Westlake Village, California, in the ordinary course of business, addressed as follows:

Honorable Curtis Karnow
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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on November 11, 2016, in Westlake Village, California.

KATHI MIERS