Nos. A146901 and A148266

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. CPF-10-510830 and CPF-12-512466
The Honorable Richard A. Kramer and Curtis E.A. Karnow

SAN DIEGO COUNTY WATER AUTHORITY'S RESPONSE TO UPPER SAN GABRIEL VALLEY MUNICIPAL WATER DISTRICT'S AMICUS CURIAE BRIEF

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I. INTRODUCTION

The Upper San Gabriel Valley Municipal Water District ("Upper District") argues in its amicus brief that this Court should reverse the trial court's judgment in this case because, according to Upper District, the judgment is somehow inconsistent with electricity-rate regulations adopted and enforced by the Federal Energy Regulatory Commission ("FERC"). But the trial court never considered FERC regulations because nobody, including Upper District, ever suggested it should, and for good reason. This case is about water transportation rates imposed by the Metropolitan Water District of Southern California ("Met"), which are governed by California law; it has nothing to do with federal electricity regulations, which are not only inapplicable, but are walled off from California law by the filed-rate doctrine.[1] In any event, federal cases requiring FERC to adhere to the fundamental principle of cost causation, as well as FERC's own most recent cost-causation-based regulations, confirm that the trial court correctly invalidated Met's transportation rates, which unlawfully disregard cost causation, as the trial court rightly held based on overwhelming evidence.

[1] Under the filed-rate doctrine, "state law may not be used to invalidate a rate that a federal agency has reviewed and filed." *Madrid v. Perot Sys. Corp.*, 130 Cal. App. 4th 440, 450 (2005).

II. ARGUMENT

A. Upper District waived its arguments by failing to present them to the trial court.

This Court "generally does not consider new arguments raised on appeal by amicus curiae." *Am. Indian Model Sch. v. Oakland Unified Sch. Dist.*, 227 Cal. App. 4th 258, 275 (2014); *accord*, *e.g.*, *Bullock v. Philip Morris USA, Inc.*, 198 Cal. App. 4th 543, 572 (2011).[2] Neither Met nor any of its member agencies—several of whom are represented by Upper District's counsel, *see* Amicus App. at 4-5—asked the trial court to consider, much less rely upon, FERC decisions or federal appellate cases reviewing those decisions. Moreover, as a Met member agency with an undisputed interest in this validation action, *see id.*, Upper District was required to appear "not later than the date specified in the summons." Cal. Code Civ. Proc. § 862. Having failed to do so, Upper District waived any right to challenge the judgment, and certainly cannot raise arguments never before presented in this case.[3]

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[2] Amici may present new arguments for affirmance, or new jurisdictional issues, *see*, *e.g.*, *Costa v. Workers' Comp. Appeals Bd.*, 65 Cal. App. 4th 1177, 1188 (1998), but neither of those exceptions applies here.

[3] Note also that Upper District makes no argument that this case will, for example, affect electricity providers or customers in any way. Rather, Upper District belatedly attempts to advance its own narrow self-interest as a Met member agency, which is not the appropriate role of an amicus, and is procedurally improper. *See*, *e.g.*, Cal. Code Civ. Proc. § 862.

B. To the extent FERC decisions are relevant at all, they support the trial court's judgment.

In any event, if this Court is inclined to consider FERC regulations and cases, it should not be misled by Upper District's inaccurate and outdated discussion of them. FERC is moving toward stricter adherence to cost causation. Indeed, that trend is illustrated by the first decision Upper District cites: *Pinnacle West Capital Corp.*, 131 FERC ¶ 61143 (2010). The electrical district there, like Upper District here, argued that FERC "favors the roll-in of costs where any degree of integration can be shown." *Id.* at 61618-19 (internal quotation marks omitted). But FERC rejected the proposed rates as contrary to "the fundamental principle of cost causation that costs should be recovered in the rates of those customers who utilize the facilities and thus cause the costs to be incurred." *Id.* at 61622 (internal quotation marks omitted).

The word "integration," moreover, has a highly-specific definition in the context of electricity transmission, which does not apply to the transportation of water. *See, e.g.*, *id.* at 61621-23. In *Sierra Pacific Power Co. v. FERC*, 793 F.2d 1086 (9th Cir. 1986), on which Upper District also mistakenly relies, the Ninth Circuit explained what an "integrated" electrical power delivery system is:

> Lower voltage transmission facilities are "integrated," … when, *in addition to being connected* with higher voltage facilities, the lower voltage facilities are themselves interconnected and *designed to operate in parallel*. This is

> also referred to as "looping," that is, the lower voltage transmission facilities form *parallel paths for electric energy* with the higher voltage transmission facilities. The existence of two or more parallel transmission paths from sources of power to receiving points establishes integration…. "[W]hen … a higher voltage line goes out of service, power is automatically rerouted … because of this 'looping' or integration *in accordance with the laws of physics*."

Id. at 1088 (emphases added) (citation omitted). Even accepting, for argument's sake, Upper District's premise that this concept of "integration" in an electrical power transmission system is relevant to water transportation—which it plainly is not—Upper District does not and cannot point to any record evidence of "integration" in an even remotely analogous sense, but instead merely asserts that the trial court "described MWD's system as a 'network.'" Amicus Br. at 1 (citing 27-AA-7459). In fact, the cited page of the trial court's decision does not even contain that word; more importantly—and directly contrary to Upper District's suggestion that the trial court found that Met's distribution system is "integrated" with the California Department of Water Resources ("DWR") State Water Project ("SWP")—the trial court *rejected* Met's counterfactual and legally erroneous assertion that "the state's (DWR's) conveyance facilities are a part of Met's conveyance facilities." 27-AA-7508. In any event, *Pinnacle West* makes clear that passing references to a "system" or a "network" are *not* "findings on the question of integration." 131 FERC ¶ 61143, at 61622.

Pinnacle West followed the Seventh Circuit's seminal decision in

Illinois Commerce Commission v. FERC, 576 F.3d 470 (7th Cir. 2009) (Posner, J.) ["*ICC I*"], which held that "FERC is not authorized to approve a pricing scheme that requires a group of utilities to pay for facilities from which its members derive no benefits, or benefits that are trivial in relation to the costs sought to be shifted to its members." *Id.* at 476. There, FERC had approved transmission rates imposing the costs of new transmission facilities on all participating utilities regardless of individual benefits, on the theory that such benefits were difficult to quantify, and that all of the utilities benefitted to some degree. *See id.* at 475. But cost causation requires "comparing the costs assessed against a party to the burdens imposed or benefits drawn by that party." *Id.* at 475-76 (citations omitted). "No doubt there will be *some* benefit to the midwestern utilities just because the network *is* a network, and there have been outages in the Midwest. But enough of a benefit to justify the costs that FERC wants shifted to those utilities?" *Id.* at 477 (emphases in original). The case was remanded for an evidence-based answer to that question. *See id.* at 477-78.

Meanwhile, in 2011, FERC adopted new Cost Allocation Principles expressly based on cost causation. *See* Order No. 1000, *Transmission Planning and Cost Allocation by Transmission Owning and Operating Public Utilities*, 136 FERC ¶ 61051, FERC Stats. & Regs. ¶ 31,323 (2011), *order on reh'g*, Order No. 1000-A, 139 FERC ¶ 61132, *order on reh'g and clarification*, Order No. 1000-B, 141 FERC ¶ 61044 (2012), *aff'd sub nom.*

S.C. Pub. Serv. Auth. v. FERC, 762 F.3d 41 (D.C. Cir. 2014). FERC now recognizes that cost causation "precludes an allocation where the benefits received are trivial in relation to the costs to be borne." Order No. 1000 ¶ 639 (citing *ICC I*). And FERC now requires that the "transmission planning process be open to customers, competitors, and state commissions"; that "key assumptions and data underlying transmission plans be made available to customers"; and that the "planning and cost allocation processes be aligned." *Id.* ¶¶ 9, 17. Because proper planning will "involve the identification of expected beneficiaries, either explicitly or implicitly, establishing a closer link between transmission planning and cost allocation will ensure that rates for Commission-jurisdictional service appropriately account for benefits associated with new transmission facilities." *Id.* ¶ 500.

Even with these reforms—all of which, it should be noted, correspond to reforms San Diego has advocated, but Met has refused to adopt[4]—FERC needs further improvement in applying the principles of cost causation, as Judge Posner reiterated in rejecting FERC's attempt to comply with *IIC I*. *See ICC v. FERC*, 756 F.3d 556 (7th Cir. 2014) ["*ICC*

[4] To take just one example, San Diego has repeatedly asked Met to disclose its rate model, but Met refuses on the basis that the method by which it sets its public rates is "proprietary material and constitutes trade secrets." 2-RA-384:17-25. FERC rejected a similar contention as "counter to the requirement that regional transmission planning processes be open and transparent." Order No. 1000 ¶ 157.

II"]. In *ICC II*, FERC asserted that the transmission facilities provided "a broad range of benefits, including reduced congestion, reduced outages, reduced operating reserve requirements, and reduced losses," and that those benefits were "spread throughout" the system. *Id.* at 558. But that does not imply that the benefits are spread "equally, or even approximately equally." *Id.* Even if every utility receives "some" benefits from new transmission lines, "'some' is not a number and does not enable even a ballpark estimate of the benefits of the new transmission lines" to particular utilities. *Id.* at 560. In the same way, "repairing a major pothole in a city would incidentally benefit traffic in the city's suburbs, because some suburbanites commute to the city," but their share of the costs must be "proportionate to their use of the street with the pothole rather than proportionate to their population. The incidental-benefits tail mustn't be allowed to wag the primary-benefits dog." *Id.* at 564.

Here, Upper District argues that cost causation "refers to the function that is causing the cost," as opposed to the "individual user," and that the "proper question here is not whether MWD *needs* the SWP to exchange water for San Diego" but "whether the portions of the SWP that MWD pays for is [sic] an integrated part of its network system." Amicus Br. at 7, 10 (emphasis in original). Upper District is wrong. Cost causation is evaluated "by comparing the costs assessed against a party to the burdens imposed or benefits drawn by *that party*." *IIC I*, 576 F.3d at 476 (emphasis

added). Cost causation, therefore, prohibits charging a customer for "greater generation capacity" when that customer does not "*need* additional generation capacity." *IIC II*, 756 F.3d at 562 (emphasis added). It is no excuse to argue that there must be "*some* benefit . . . just because the network *is* a network." *IIC I*, 576 F.3d at 477 (emphases in original).

Upper District relies heavily on *DWR v. FERC*, 489 F.3d 1029 (9th Cir. 2007), and *City of Anaheim*, 113 FERC ¶ 61091 (2005). *See* Amicus Br. at 4-8. In addition to being outdated, however, those decisions address FERC-approved transmission rates of an independent entity—the California Independent System Operator ("CAISO")—which *took over operational control of the electrical grid to ensure non-discriminatory access to it*. *See*, *e.g.*, *DWR*, 489 F.3d at 1031-33. Because Met sells water as well as transportation services, it is not analogous to the CAISO. *Cf.*, *e.g.*, AOB at 58. Nor is there any merit to Upper District's attempt to analogize the contracts at issue in *Anaheim* to Met's contract for a water supply from the SWP. In *Anaheim*, the participating transmission owners were required to "place the transmission lines and associated facilities to which [they had] entitlements *under the CAISO's operational control*." 113 FERC ¶ 61091, at 61351 (emphasis added). Met, in stark contrast, admitted that it "does not operate" the SWP. 9-AA-2331, Admission 45; *see also* 27-AA-7456 ("Met does not own or operate the SWP"); 2-AR2010-205, art. 13(b) (Met is not responsible for the "control, carriage,

handling, use, disposal, or distribution" of water on the SWP).

Upper District also argues that Met properly follows the rate-setting methodology in the American Water Works Association's "Manual M-1." Amicus Br. at 9. But the court in *Capistrano Taxpayers Ass'n, Inc. v. City of San Juan Capistrano*, 235 Cal. App. 4th 1493 (2015), held that the M-1 manual's "work-backwards-from-total-cost methodology" cannot "trump the plain language of the California state Constitution. The M-1 manual might show working backwards is reasonable, but it cannot excuse utilities from ascertaining cost of service now that the voters and the Constitution have chosen cost of service." *Id.* at 1514. As discussed in *Capistrano* and *Newhall County Water District v. Castaic Lake Water Agency*, 243 Cal. App. 4th 1430 (2016), among many other cases, California has moved toward ever-stricter compliance with cost causation—similar to FERC's progress in the same direction, except that, in California, it is mandated by the voters and enshrined in the California Constitution.

Finally, Upper District effectively concedes that Met's transportation rates are invalid if they include supply costs, but then simply asserts, with no factual basis, that "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 [sic] based." Amicus Br. at 10. The trial court, however, found the opposite. *See* 27-AA-7452-7517. As already demonstrated in San Diego's brief on appeal, the trial court's

findings were based on substantial—indeed, overwhelming—evidence, and its conclusions follow from well-established California law. *See* RB at 1-93. Upper District's arguments to the contrary, like Met's, have no merit.

III. CONCLUSION

Accordingly, this Court should reject Upper District's arguments.

Dated: January 23, 2017

Respectfully submitted,

KEKER & VAN NEST, LLP

By: /s/ *Dan Jackson*
DAN JACKSON
Attorneys for Respondent and Cross-Appellant
SAN DIEGO COUNTY WATER AUTHORITY

PROOF OF SERVICE

I am employed in the City and County of San Francisco, State of California in the office of a member of the bar of this court at whose direction the following service was made. I am over the age of eighteen years and not a party to the within action. My business address is Keker & Van Nest LLP, 633 Battery Street, San Francisco, CA 94111-1809.

On January 23, 2017, I served the following document(s):

SAN DIEGO COUNTY WATER AUTHORITY's RESPONSE TO UPPER SAN GABRIEL VALLEY MUNICIPAL WATER DISTRICT'S AMICUS CURIAE BRIEF

☑ by **ELECTRONICALLY POSTING** to TrueFiling the website of the State of California, Court of Appeal. The Court performed service electronically on all ECF-registered entities in this matter.

☑ by **FEDEX**, by placing a true and correct copy in a sealed envelope addressed as shown below. I am readily familiar with the practice of Keker & Van Nest LLP for correspondence for delivery by FedEx Corporation. According to that practice, items are retrieved daily by a FedEx Corporation employee for overnight delivery.

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Superior Court of California
County of San Francisco
Civic Center Courthouse
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San Francisco, CA 94102-4514

Executed on January 23, 2017, at San Francisco, California.

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

Maria S. Canales