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SAN DIEGO COUNTY WATER AUTHORITY

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SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SAN FRANCISCO

SAN DIEGO COUNTY WATER AUTHORITY,

Plaintiff(s),

v.

METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA, et al.,

Defendant(s)

Case No. CPF-12-512466

SAN DIEGO COUNTY WATER AUTHORITY'S REPLY IN SUPPORT OF ITS MOTION TO COMPEL RESPONSES TO DISCOVERY REQUESTS SERVED ON METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA

Date: April 23, 2013
Time: 9:00 a.m.
Dept.: 304

Judge: Hon. Curtis E.A. Karnow
Date Filed: June 8, 2012

Trial Date: Not Set

MWD's opposition to SDCWA's motion to compel in the 2012 rate case is as meritless as its opposition in the 2010 case, and for the same reasons. With respect to both cases, MWD has essentially answered SDCWA's discovery requests, after forcing SDCWA to expend the time and effort to file motions to compel. MWD's responses make clear, as SDCWA asked it to admit, that it "has no documents or existing information that allocates actual expenditures to rate components" retrospectively, and that its "[r]evenues ... are not tracked by rate component," either. Declaration of June Skillman ("Skillman Decl.") ¶ 13. MWD literally does nothing to understand, after the fact, whether any of its rates—for water supply, system access, system power, "water stewardship," or anything else—actually recover the costs it incurs in providing each of its services. Neither does MWD contend that it does any prospective analysis estimating whether any of its rates will recover its costs.

In this case, MWD incorporates by reference its arguments against discovery in the 2010 case—but none of those arguments are valid grounds for opposing ***discovery***, as opposed to (wrongly) asserting purported legal defects with SDCWA's underlying claims. MWD is free to make those objections at trial, but for now those issues are in the case and SDCWA is entitled to discovery. In any event, MWD is wrong about the applicable legal standard. Its arguments reveal a breathtakingly radical view of its own power that is inconsistent both with decades of California statutory, constitutional, and case law, and with common sense.

According to MWD, its power to set rates is nearly limitless and effectively immune from review. MWD contends that the only thing that imposes any limitations on its power is its own enabling statute, and that it is exempt from all other generally applicable California statutes and even the California Constitution. MWD asserts that it is required only to impose uniform rates that "so far as practicable" recover sufficient revenue to cover its operating expenses. Skillman Decl. ¶ 4. Beyond that, MWD denies that any of its individual rates need to have any relationship to its actual costs of service, or that it has any obligation to deliver services to any member agency reasonably proportionate to what that agency pays. If MWD—a public agency and state-authorized monopolist—were right about this, it would be free to gouge ratepayers by charging rates that far exceed its costs and to punish disfavored agencies by denying them and their

customers benefits they have already paid for—exactly as it has been doing to SDCWA for years. This is a gross mischaracterization of the applicable legal standard and cannot be right.

MWD also continues to fight a battle it has repeatedly lost, arguing again that discovery is forbidden in this case under the *Western States* case, which the Court long ago held was inapplicable when it ordered discovery on other independent bases. The Court should reject MWD's latest attempt to revive that argument.

This motion does not require the Court to decide the precise standard it will apply at trial to review SDCWA's claims. All SDCWA must show is that its requests are reasonably calculated to lead to the discovery of admissible evidence. SDCWA easily meets this standard with respect to all the requests at issue. As explained in SDCWA's motion, MWD's admitted failure to do ***anything*** to meaningfully track how it recovers its costs through rates is strong evidence that (1) MWD violates the Wheeling Statute by stacking onto its transportation rate various supply-related costs that burden and discourage "the voluntary sale, lease, or exchange of water"; (2) MWD violates its contract with SDCWA by setting rates that are not compliant with any aspect of applicable California law; and (3) MWD's sets rates that (as MWD now admits) are unrelated to the services that they purport to fund and are therefore arbitrary and capricious. Finally, MWD cannot be serious in asserting a burden objection. It has effectively answered the discovery already. The Court should order it to do so formally, and also should sanction MWD for forcing SDCWA to draft and file the motion in the 2012 case.

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There is, of course, one important distinction between this 2012 case and the earlier-filed 2010 case: SDCWA has asserted a claim under Proposition 26 in the 2012 case. Under Proposition 26, MWD has the burden of proving that the rates it imposes on SDCWA "bear a fair or reasonable relationship to the payor's burdens on, or benefits received from, the governmental activity." Cal. Const., art. XIIIC, § 1. MWD claims this proportionality requirement is lacking from SDCWA's claims in the 2010 case, but MWD's own cited cases prove it wrong. MWD relies on *California Farm Bureau Fed. v. State Water Res. Control Bd.*, 51 Cal. 4th 421 (2011), but despite the fact that Proposition 26 was not at issue in that case, the Supreme Court applied a

standard nearly identical to the Proposition 26 requirement, even in the more deferential context of evaluating the validity of a regulatory fee. *See Sinclair Paint Co. v. State Bd. of Equalization*, 15 Cal. 4th 866, 874-75 (1997) (distinguishing regulatory fees from fees charged for particular services). Specifically, the Court directed the trial court on remand to "make detailed findings focusing on the Board's evidentiary showing that the associated costs of the regulatory activity were ***reasonably related to the fees assessed on the payors.***" *Id.* at 442 (emphasis added). Likewise, another of MWD's cases, *Equilon Enters. v. State Bd. of Equalization*, 189 Cal. App. 4th 883 (2010), makes equally clear that a fees are valid only if they "do not surpass the costs of the regulatory programs they support ***and the cost allocations to individual payors have a reasonable basis in the record.***" *Id.* at 865 (emphasis in original). In any event, there is no dispute that this standard is expressly present in Proposition 26, or that Proposition 26 is at issue in the 2012 case.

All of SDCWA's discovery from the 2010 case is equally relevant to the 2012 case, so the Court ought to overrule MWD's relevance objections to ***all*** SDCWA's interrogatories on that basis. For example, although SDCWA formally served its requests regarding MWD's cost-of-service basis, if any, for its 2011-12 rates in the 2010 case, it easily could have served those requests in the 2012 case. MWD's cost-of-service basis, or lack thereof, for its 2011-12 water rates is still relevant evidence in the 2012 case of MWD's misconduct in setting the same type of unlawful water rates for 2013-14. To the extent the absence of Proposition 26 from the 2010 case matters—which it shouldn't, given the basic congruence of the cost-of-service standards in both cases—the Court should deem the requests served in the 2010 case served in this 2012 case and direct MWD to answer all of them. This would be the most efficient course of action, particularly given the Court's stated intention to decide the two coordinated cases together at a single trial. Alternatively, though it would create unnecessary and avoidable delays, SDCWA could re-issue its requests regarding MWD's 2011-12 water rates in the 2012 case, where their relevance is undisputed given Proposition 26's explicit proportionality standard.

Respectfully Submitted,

Dated: April 12, 2013

KEKER & VAN NEST LLP

By: */s/ Daniel Purcell*
DANIEL PURCELL

Attorneys for Plaintiff
SAN DIEGO COUNTY WATER AUTHORITY

PROOF OF SERVICE BY ELECTRONIC TRANSMISSION, FEDERAL EXPRESS AND EMAIL VIA PDF FILE

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 April 12, 2013, I served the following documents described as:

SAN DIEGO COUNTY WATER AUTHORITY'S REPLY IN SUPPORT OF ITS MOTION TO COMPEL RESPONSES TO DISCOVERY REQUESTS SERVED ON METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA

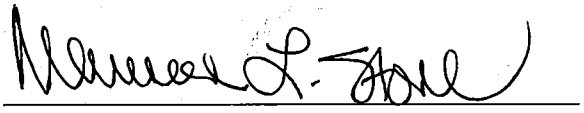
by serving a true copy of the above-described documents in the following manner:

BY LEXIS NEXIS® FILE & SERVE

On the date executed below, I electronically served the documents via Lexis Nexis® File & Serve described as on the recipients designated on the Transaction Receipt located on the via Lexis Nexis® File & Serve website.

Executed on April 12, 2013, 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.



MAUREEN L. STONE