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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,

Petitioner and Plaintiff,

v.

METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA; ALL PERSONS INTERESTED IN THE VALIDITY OF THE RATES ADOPTED BY THE METROPOLITAN WATER DISTRICT OF SOUTHERN CALIFORNIA ON APRIL 8, 2014 TO BE EFFECTIVE JANUARY 1, 2015 AND JANUARY 1, 2016; and DOES 1-10,

Respondents and Defendants.

Case No. CPF-14-514004

SAN DIEGO'S REPLY IN SUPPORT OF MOTION FOR PARTIAL LIFTING OF STAY TO REQUIRE MET TO LODGE THE ADMINISTRATIVE RECORD

Date: December 21, 2015
Time: 3:00 p.m.
Dept.: 304
Judge: Hon. Curtis E.A. Karnow

Date Filed: May 30, 2014

Trial Date: Not Yet Set

I. INTRODUCTION

Met has failed to present any credible reason to delay lodging the administrative record in this case. San Diego has challenged Met's 2015-2016 rates, and is entitled to be presented with the administrative record so that it may evaluate the basis for Met's rates and Met's assertions that the 2014 record is meaningfully different from the prior records.

All Met offers in its Opposition is a series of baseless and contradictory arguments. Met contends that it should not have to lodge the administrative record because it won't know what to include until after the Court of Appeal rules in the 2010 and 2012 cases. Opp'n at 5. But, at the same time, Met claims that everyone, including San Diego, already knows what is in the administrative record because it is limited to "those documents before [Met] at the time it made its decision." *Id.* at 12 (internal quotations omitted). Met argues that it would be "burdensome" to lodge the record now, *id.* at 7, but also that preparing the record will be a straightforward exercise because all of the documents are "being preserved" and are "available on Met's website." *Id.* at 10-11. Met argues against lodging the administrative record because this lawsuit presents "many of the same legal and factual arguments" as in the prior cases, *id.* at 3, but simultaneously claims that "the 2014 rate-setting involved a different rate-setting process, a different Cost of Service Report, and . . . a different administrative record." *Id.* at 3-4 n.3. Met is talking out of both sides of its mouth.

But Met's doublespeak does not justify its refusal to perform the basic ministerial task required of a governmental agency when its actions are legally challenged—lodging the administrative record. Met's litigation strategy could not be more transparent: Met wants to wait to lodge the record until after the appeals in the 2010 and 2012 cases are resolved, so that it may fabricate a post-hoc justification for its unlawful cost allocations, and try to include those documents in the record. Met's plan is contrary to law, this Court's rulings, Met's own prior positions, and even the second half of Met's brief, which recognizes that the record is comprised of the documents "created as of April 2014" that were "before [Met] at the time it made its decision." Opp'n at 11-12 (internal quotations omitted).

The Court should order Met to lodge the 2014 administrative record now.

II. ARGUMENT

A. Met should lodge the record now and should not be permitted to concoct a litigation-driven record after the appeals in the 2010 and 2012 cases.

In its Opposition, Met doubles-down on the argument, first proffered at the October 30, 2015 hearing, that it should not have to lodge the administrative record until after the Court of Appeal rules in the 2010 and 2012 cases, because that ruling "informs the appropriate contents of the 2014 administrative record." Opp'n at 4. Met's position is that the administrative record is not the actual documents presented to or before the Board prior to or at the time it adopted the 2015-2016 rates, but is instead, an ex post facto litigation-driven compilation of records. Met concedes as much, arguing that an administrative record is not a "static set of documents," but rather, something that may "evolve" throughout the course of litigation. *Id.* at 5.

Met attempts to support this proposition by alleging that San Diego was allowed to supplement the 2012 record during litigation. *Id.* at 4. But Met is wrong on the facts. When San Diego moved to augment the 2010 and 2012 administrative records in October 2013, to include, among other things, "earlier studies, reviews, and reports," Met successfully opposed that motion, arguing that under the California Supreme Court's decision in *Western States Petroleum Association v. Superior Court*, 9 Cal. 4th 559 (1995), the administrative record is limited to "the evidence 'that was before the agency at the time it made its decision.'" Reply Declaration of Nicholas S. Goldberg ("Goldberg Reply Decl.") Ex. A (Oct. 28, 2013 Opp'n to Mot. to Augment the Record) at 1 (quoting *Western States*, 9 Cal. 4th 574 at n.4). The Court agreed with Met and held that "[i]n general, the administrative record consists of documents considered by the agency in making its decision." *Id.*, Ex. B (Nov. 5, 2013 Order) at 6 (citing *Evans v. City of San Jose*, 128 Cal. App. 4th 1123, 1144 (2006)). Met's newfound position that it should be entitled, 3-4 years after the 2014 hearings when Met adopted its 2015-2016 rates, to go back and "include documents in the administrative record outside of those specifically presented to [the Board] during the rate-setting process," *see* Opp'n at 8, is diametrically opposed to Met's prior, successful argument in the 2010 and 2012 cases, and this Court's ruling. *See* Goldberg Reply Decl., Ex. B at 6-9. No one disputes that historical documents may be part of an administrative

record; but the time for submitting those records is prior to the agency's action, not during the course of subsequent litigation challenging the action.

Nothing in *City of Santa Cruz v. Local Agency Formation Commission*, 76 Cal. App. 3d 381 (1978) sanctions Met's new strategy. Indeed, as Met previously argued, the court in *Santa Cruz* only considered an earlier study part of the administrative record "because it was 'initially produced at the hearings' at which the agency made the decision at issue in the case." Goldberg Reply Decl. Ex. A at 6 (quoting *Santa Cruz*, 76 Cal. App. 3d at 391-92). The Court agreed with Met and held that *Santa Cruz* does not support "a loophole which threatens to swallow the usual rules on the scope of an administrative record." *Id.*, Ex. B at 8. As the Court explained, all "*Santa Cruz* tells us [is] that an objector cannot remove items from [the] administrative record because they were not literally discussed or presented at a board meeting; it is not authority to *add anything* not literally discussed or presented at a board meeting." *Id.* (emphasis in original).[1]

Met's reliance on San Diego's motion to ***correct*** the 2012 administrative record, which Met ultimately stipulated to and the Court summarily granted, is a red herring. The historical documents at issue in that motion—including the 1969 Brown and Caldwell Study and the 1993 Raftelis textbook—were not, as Met claims, "late added" documents included in the 2012 administrative record "on the eve of trial." Opp'n at 4 & n.5. San Diego submitted those documents to Met's Board members and the Clerk of the Board in March and April 2012, ***at the time Met adopted its 2013-2014 rates***, with the express request that they be included in the 2012 administrative record. Goldberg Reply Decl. Ex. C (Nov. 21, 2013 Mot. to Correct the 2012 Record) at 1-4. Met acknowledged that those documents "had inadvertently been omitted" from the 2012 record and stipulated to include them in the record. *Id.*, Ex. D (Dec. 10, 2013 Stip. & Order) at 1. The parties' stipulation to correct the 2012 record does not at all support Met's

[1] Met's citation to the *California Civil Writ Practice* treatise also fails to support Met's argument. *See* Opp'n at 5. That treatise merely says that the extent of the record may "vary depending on the nature of the ***underlying proceedings*** and the issues presented in the ***writ petition***." Continuing Education of the Bar, *Cal. Civ. Writ Prac.*, § 7.7 (4th Ed.) (emphases added). Met has already set its rates, so the underlying proceedings here are complete, and San Diego has presented its writ petition. Nothing in that treatise supports the notion that the contents of the record depend on the outcome of ***future*** appellate proceedings decided years after the underlying proceedings were completed and the writ petition was filed.

current position that, years in the future, it may bolster the 2014 record with documents that were never presented to the Met Board in connection with the adoption of the rates at issue.

B. None of Met's other arguments justify its refusal to lodge the administrative record.

Met offers a barrage of other arguments, but none provides any legitimate basis for Met's refusal to lodge the 2014 administrative record at this time.

Met argues that the February 2015 stipulation to stay this case supports its refusal to lodge the administrative record until after the Court of Appeal rules in the 2010 and 2012 cases. *See* Opp'n at 1, 3. But the parties never stipulated—and the Court never ordered—that this action would be stayed until the appeals in the 2010 and 2012 cases are resolved. To the contrary, San Diego specifically "reserv[ed] its right to move to lift the stay at a later date." Goldberg Reply Decl. Ex. E (Feb. 19, 2015 Joint Stip. & Order) at 1. At the time the stipulation was entered, a limited stay made sense given that the Phase II trial in the 2010 and 2012 cases was set to commence in less than six weeks, and Met had refused to stipulate to judgment in this action so that it could be appealed alongside the 2010 and 2012 cases. However, now that judgment has been entered in the 2010 and 2012 cases, and Met has taken the position that "there will be matters to litigate" in this case because the 2014 administrative record contains "additional material that the 2010 and 2012 records did not contain," *id.*, Ex. F (Oct. 23, 2015 Met Stmt.) at 1, San Diego is entitled to know what this additional material is, in order to decide how best to proceed from a case management perspective. Accordingly, the stay should be partially lifted to require Met to lodge the administrative record.

Met further contends that it should not have to lodge the administrative record now because doing so would be a "burdensome, costly and time-intensive process." Opp'n at 7. Far from making the factual showing required to demonstrate that the purported burden will "result in injustice," *see West Pico Furniture Co. v. Super. Ct.*, 56 Cal. 2d 407, 417-18 (1961), Met's evidence establishes the exact opposite. Met says that the documents comprising the 2014 administrative record are "being preserved," have been "archived," and are "publicly available on [Met's] website." Opp'n at 10-11 (citing Chin and Miller Declarations). The only evidence of

burden that Met offers is its counsel's assertion that Met had to review "well over a thousand documents" to lodge the 2010 and 2012 records. *Id.* at 7; West Decl. ¶¶ 3-4. But San Diego requested the documents Met was relying on to support its 2015-2016 rates back in 2014, and Met told San Diego they had been provided. *See* Mot. at 2-5. Any historical documents should already be part of the 2014 administrative record because San Diego submitted the 2010 and 2012 administrative records to the Met Board at the time of the 2014 hearings.[2] If Met believed that it needed to include additional documents in the 2014 administrative record, it had ample time—and was required—to do so at the time of the 2014 hearings. Moreover, Met's claim that there may be litigation over the "contents of the 2014 administrative record," *see* Opp'n at 7, counsels ***in favor*** of requiring Met to lodge that record now, so that the parties can resolve those issues while the appeal in the 2010 and 2012 cases are pending.

Met also speculates that "[t]here may never be a need for an administrative record" because if Met is "successful in appealing this Court's ruling" in the 2010 and 2012 cases, then the Court of Appeal's decision "could moot" San Diego's claims entirely. Opp'n at 3-4 & n.4. But even if the Court of Appeal were to reverse the judgment in the 2010 and 2012 cases, those cases would most likely be remanded "to the trial court for further proceedings," at which point Met would still need to lodge the administrative record so that this case could proceed as well. *See Metro. Water Dist. of S. Cal. v. Imperial Irrigation Dist.*, 80 Cal. App. 4th 1403, 1437 (2000). Under virtually every conceptual scenario, Met will need to lodge the 2014 administrative record and there is no legitimate reason for Met to delay this task any longer.

Met next contends that it would be "futile" to lodge the administrative record at this juncture because, even if Met did so, the Court procedurally could not resolve the 2014 case while the 2010 and 2012 cases are on appeal. *See* Opp'n at 6-7. Met's argument rests on the faulty premise that, under Code of Civil Procedure § 916(a), "the perfecting of an appeal" in one case precludes a trial court from adjudicating a later case if that later case could be "affected

[2] Indeed, Met's 2012 record, which San Diego submitted to Met for inclusion in the 2014 record, already contains hundreds of documents from 1960 through 2000. *See* Nov. 20. 2015 Goldberg Decl., Ex. B.

thereby." *Id.* at 7 (citing Code Civ. Proc. § 916(a)). But under section 916, taking an appeal only "stay[s] the proceedings in the trial court upon the judgment or order from which the appeal is taken," and "nothing in that code section can be interpreted to hold an order or judgment is rendered null and void by an appeal." *McFarland v. City of Sausalito*, 218 Cal. App. 3d 909, 912 (1990). Even if collateral estoppel does not yet apply because of Met's appeal, this Court is already well-versed in the factual and legal issues that that would be presented in this case, and the logic of the Court's prior rulings extends to San Diego's claims in this lawsuit. But those are issues for another day. San Diego's motion does not ask the Court to decide its claims on the merits at this stage. Today, San Diego is merely requesting a partial lifting of the stay, in order to assess what the record is.

Met also argues that the mandatory language in Code of Civil Procedure § 867 providing that validation actions "shall be entitled to preference over all other civil actions" and "shall be speedily heard and determined" does not support San Diego's motion. *See* Opp'n at 8-10.[3] But again, Met's current position is contrary to its prior arguments in the 2010 and 2012 cases that the Validation Statute compelled the Court to move forward promptly with validation claims. *See* Mot. at 6 & n.2 (collecting citations to Met's prior arguments). And as San Diego previously pointed out, given the mandatory language in the Validation Statute, there is a serious question whether the Court has discretion to maintain the stay upon a request to move forward with a validation claim. *See* Mot. at 6; *cf. Koch-Ash v. Super. Ct.*, 180 Cal. App. 3d 689, 692, 696 (1986).[4] In any case, that dispute is largely beside the point because, as Met recognizes, the Court certainly has discretion to lift the stay, and the Court should do so to require Met to lodge the administrative record. *See* Opp'n at 9 (the Court may "exercise its discretion").

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[3] Although Met's section heading reads "The Validation Statute Does Support SDCWA's Motion," Opp'n at 8, based on the text of Met's brief, San Diego assumes that this is a typo and that Met is arguing the opposite.

[4] Met's attempt to distinguish *Koch-Ash* on the basis that the Validation Statute, unlike the statute at issue in that case, is not "mandatory and absolute" is nonsensical. *See* Opp'n at 9. Just like the statute at issue in *Koch-Ash*, which provided that litigants over the age of 70 "***shall*** be entitled to preference," *see* 180 Cal. App. 3d at 694 (emphasis in original), the Validation Statute provides that validation actions "***shall*** be given preference over all other civil actions" and "***shall*** be speedily heard and determined." Code Civ. Proc. § 867(emphases added).

Finally, Met claims that it should not have to lodge the administrative record before Met's upcoming 2016 rate-setting cycle because "the mechanics of the 2016 rate-setting cycle is not currently before this court." Opp'n at 11. But San Diego is not seeking any relief regarding the "mechanics" of the 2016 rate-setting cycle. San Diego is simply requesting that the Court order Met to lodge the 2014 administrative record now to prevent Met from playing games with the record, to avoid confusion by ensuring that the 2014 record is kept separate from the records generated in Met's subsequent rate-setting cycles, and to allow San Diego to decide whether to submit the entire 2014 administrative record for inclusion in the 2016 record, as San Diego has done in prior rate-setting cycles.

III. CONCLUSION

For all of these reasons, San Diego respectfully requests that the Court partially lift the stay and order Met to lodge the administrative record by March 12, 2016, or 30 days before Met adopts its 2017-2018 rates, whichever comes earlier.

Dated: December 14, 2015

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