Case No. 208838

IN THE SUPREME COURT OF THE

STATE OF CALIFORNIA

SUPREME COURT
FILED

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Deputy

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

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I. INTRODUCTION AND SUMMARY OF REPLY

The Commission asserted jurisdiction over Petitioner, Monterey Peninsula Water Management District ("MPWMD"), a government body, notwithstanding this Court's holding in *County of Inyo v. Public Utilities Com.* ((1980) 26 Cal.3d 154, 166 (*"County of Inyo"*)) that the Commission may not do so unless the Legislature has "expressly" so provided. As a result, environmental mitigation programs previously administered by the elected Board of Directors of MPWMD, are now under the supervision of the Commission. The actions undertaken by the Commission to achieve this result were under color of a statute that (1) makes no reference to the Commission, and (2) has never heretofore been applied to subject a tax or fee lawfully adopted by a government body to Commission review.

A. The Commission Exercised Jurisdiction Over MPWMD's User Fee.

The Commission's Answer shows that the Commission, despite its denials, did assert jurisdiction over the MPWMD User Fee, one imposed through an ordinance duly adopted by MPWMD's elected Board of Directors ("Board"). But for the Commission decisions at issue here, MPWMD would today be collecting its User Fee through California-American Water Company ("Cal-Am"), as it has for three decades. The revenues from that fee would support MPWMD, a government body, and its programs.

The Answer does not assert to the contrary, claiming only that Petitioner could have pursued some other means to recover the revenues lost as a result of the Commission's decisions,[1] an observation devoid of any legal relevance to this Courts' determination of the Commission's jurisdiction.

[1] Answer of the Respondent to Petition for Writ of Review ("Answer"), p. 14.

Notwithstanding its heralding of alternatives, the Answer does not contest the means of collection chosen by the MPWMD Board of Directors; the Answer concedes that the District may lawfully collect its User Fee from water users in the District through Cal-Am as it has since 1983. (Answer of the Respondent to Petition for Writ of Review ("Answer"), pp. 6, 13.) The Answer candidly affirms that the Commission terminated the continued collection of the User Fee by Cal-Am, not because that means of collection was improper, but rather because the Commission believed the MPWMD Board, elected by the voters of the District, had set the fee at a level the Commission believed to be too high. (Answer, pp. 5-6; Decision 11-03-035, pp. 11-13, attached to Petition for Review as Exhibit 1.)

Thirty-three years ago, this Court explained why the Commission cannot exercise such dominion over the actions of elected government bodies. *County of Inyo* held that the Commission may breach the jurisdictional wall between "private persons and corporations" and government entities, such as MPWMD, only pursuant to an "express" legislative enactment.[2] Section 451, a statute devoid of any reference to the Commission, but on which it relies here, does not meet that description.[3]

The Commission, having conceded that Petitioner, a government body, has the lawful right to collect its User Fee through Cal-Am, may not invoke Section 451 to pass upon the level of the fee or reject it outright.

B. <u>By Terminating MPWMD's Revenues From The User Fee, The Commission Effectively Assumed Authority Over Programs Previously Administered by MPWMD's Elected Board of Directors.</u>

A critical omission in the statement of facts contained in the Answer brings the dispute before the Court into sharp focus.

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[2] *County of Inyo v. Public Utilities Com.* (1980) 26 Cal.3d 154, 166.

[3] See Section I.B.2 and 3, *infra*

The Commission states that the State Water Resources Control Board ("SWRCB") obligated Cal-Am (an entity unquestionably subject to the jurisdiction of the Commission) to remediate impacts [on the Carmel River] by implementing a Mitigation Program and Aquifer Storage and Recovery Program (Answer, pp. 3-4.) In fact, that obligation was conditional. SWRCB ordered that Cal-Am was only obligated to perform those programs if MPWMD (which even the Commission agrees is not subject to the Commission's jurisdiction) ceased to do so. (State Water Resources Control Board, Order No. WR 95-10, Ordering Paragraph 11 (July 6, 1995), Petitioner's Appendix of Exhibits in Support of Petition for Review, Appendix ("App")-II 432.)

The omission in the Answer is significant because the Commission can point to nothing suggesting that MPWMD had any intention of discontinuing, abrogating or retrenching from the programs (MPWMD's Mitigation Program for the District's Water Allocation Program Environmental Impact Report ("Mitigation Program") and Aquifer Storage and Recovery ("ASR") project). Indeed, every active party in the Commission proceeding which led to the instant Petition for Writ of Review (Cal-Am, the Commission's Division of Ratepayer Advocates ("DRA") and MPWMD) supported continuing to allow MPWMD to collect the User Fee at the level set by the MPWMD's elected Board of Directors so that funding would continue. (App-I 53, 61.)

The Commission, however, disagreed with the fashion in which the MPWMD Board had employed revenues from the MPWMD User Fee. (Answer, pp. 5-6; Decision 11-03-035, pp. 11-13.) Because the Commission could not directly order MPWMD, a government body, to modify its Mitigation or ASR programs or any other aspect of MPWMD's operating budget, the Commission elected to simply terminate MPWMD's

principal source of revenue, its long-standing, previously wholly non-controversial User Fee.

The Commission's termination of the User Fee brings SWRCB Order 95-10 into play. SWRCB Order 95-10 directs Cal-Am to perform any mitigation activities Petitioner ceases to perform. Accordingly, as the funding available for MPWMD programs shrinks, Cal-Am's responsibility for the mitigation programs is enlarged. Programs previously conducted by MPWMD under the direction of its elected Board became the responsibility of Cal-Am, effectively placing the programs under the supervision of the Commission through its pervasive regulation of Cal-Am.[4]

Because it is uncontested that Petitioner has the authority to undertake the programs itself and fund them through the User Fee, the bare jurisdictional issue presented in the Petition can also be reframed as a broader question regarding the division of authority under the laws and constitution of California: does any provision of California law permit the Commission to substitute its judgment for that of MPWMD's locally elected Board with regard to the scope of the Mitigation and ASR

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[4] On June 26, 2012, the Commission issued Decision No. 12-06-020 (App-III 571) authorizing Cal-Am to enter into an agreement with MPWMD to fund Carmel River mitigation measures. Pursuant to Decision No. 12-06 020, District activities found reasonable by the Commission would be funded by a *Cal-Am* surcharge on its customer's bills. (App-III 577-579.) The net effect of the decision was to partially replace the user fee revenues denied Petitioner by Decision 11-03-035 with revenues from Cal-Am squarely under the control of the Commission. The change in the source of funding left the Commission, rather than Petitioner's Board, with the authority to make judgments regarding whether the need and costs for *Petitioner's* mitigation projects in Monterey County warranted funding by water users in Monterey County.

programs?[5] The Answer points to no statute "expressly" supporting an answer in the affirmative.

C. No Express Statutory Authority Permits the Commission To Terminate MPWMD's Collection of the User Fee Through Cal-Am.

The Commission's Answer acknowledges that Petitioner may lawfully collect its User Fee through Cal-Am's' bills.[6] Moreover, the Commission has never previously fixed or restricted the level of a tax or fee collected by a government entity through a utility bill. Accordingly, the Commission's action here is fairly characterized as a jurisdictional reach of some moment.

The Commission's search for a jurisdictional support for its action faces an insurmountable obstacle: notwithstanding the Commission's passing, and very inaccurate, reference to the User Fee as "a component of Cal-Am's cost recovery"[7], it is beyond dispute that the revenues from the User Fee accrue to MPWMD, not Cal-Am. Because the Commission

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[5] The District electorate and the persons who pay the User Fee at issue in this matter are essentially the same individuals. (Cal. Water Code, Appendix § 118-203 (Stats 1977, ch. 527, p. 1682, § 203) ("District Law").)

[6] "The District Law also specifically provides that the District may contract with a public or private utility to collect its fees, taxes, or charges on utility bills. (District Law, Cal. Water Code, Appendix, Chapter 118-1 to 118-901 (Stats. 1977, ch. 527.).) The District accurately states that this Commission has consistently found that the District legitimately possesses such authority unless or until there is a contrary determination by the Superior Court." (Answer, pp. 12-13.)

[7] Answer, p. 6. Later in its Answer (p. 15) , the Commission again employs the term "cost recovery" to justify its review and rejection of the User Fee. Again, the "costs" are those of the District, not Cal-Am. As Petitioner notes at p. 10, *infra,* permitting Petitioner to continue to collect its User Fee and fund the Mitigation and ASR programs through it would have had no effect on the ability of the Commission to ensure that Cal-Am does not recover in Cal-Am's rates costs recovered by the District through the District User Fee.

concedes that it has no jurisdiction over any of Petitioner's charges[8] it is left with recourse to a century old statute (Public Utilities Code Section 451) that is devoid of any reference to the Commission and has never been heralded in the past (by anyone) as conferring the Commission with jurisdiction over any of the myriad government taxes and fees that appear on utility bills.

Section 451 cannot pass muster as the "express" legislative provision required by *County of Inyo*. The Commission points to no other. It has exceeded its jurisdiction (Pub. Util. Code § 1757(a)(1)) and its decisions doing so should be set aside. (Pub. Util. Code § 1758.)

II. ARGUMENT

A. The Commission Unquestionably Exercised Jurisdiction Over MPWMD's Imposition of the User Fee.

1. The Commission Denies, then Admits to Exercising Jurisdiction Over MPWMD's User Fee.

The Commission argues that it did not assert jurisdiction over Petitioner. It states that it did not (1) refute MPWMD's authority to levy a User Fee, (2) question MPWMD's right to collect it through Cal-Am's bills or (3) attempt to direct or control MPWMD's project activities in implementing the Mitigation Program and ASR project. (Answer, pp. 12-14.)

In fact, the Commission exercised pervasive authority over the User Fee and the projects funded by it as its own Answer acknowledges:

[8] Answer, p. 13; Decision 13-01-040, p. 5, attached to Petition for Review as Exhibit 2.

a. The Commission Rejected a Settlement Which Would have Permitted Cal-Am to Continue to Collect the User Fee for MPWMD.

In Decision (D.) 11-03-035, the underlying Decision at issue herein, the Commission rejected the proposal of its Division of Ratepayer Advocates ("DRA"), Cal-Am and MPWMD, that MPWMD be permitted to continue to collect the User Fee through Cal-Am's bills at it had for years.[9] Nothing in D.11-03-035, D.13-01-040 (the "Rehearing Decision") or the Answer suggests or even hints that Cal-Am was free to collect the User Fee for MPWMD following the issuance of D.11-03-035. But for the actions of the Commission at issue herein, MPWMD would today be collecting the User Fee set by its elected Board through Cal-Am's bills (a means of collection the Commission agrees is entirely lawful).

b. The Commission Refused to Permit MPWMD to Collect the User Fee Through Cal-Am Because the Commission Disagreed With MPWMD's Administration of Mitigation Activities and the User Fee.

As stated in the Answer, the Commission decided to prohibit MPWMD from collecting the User Fee through Cal-Am because: (i) the Commission believed that there was an apparent overlap in program

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[9] DRA was created by the Legislature in 1996 though the enactment of Public Utilities Code Section 309.5, which provides in relevant part that:

> "(a) There is within the commission a Division of Ratepayer Advocates to represent and advocate on behalf of the interests of public utility customers and subscribers within the jurisdiction of the commission. The goal of the division shall be to obtain the lowest possible rate for service consistent with reliable and safe service levels. For revenue allocation and rate design matters, the division shall primarily consider the interests of residential and small commercial customers.
> (b) The director of the division shall be appointed by, and serve at the pleasure of, the Governor, subject to confirmation by the Senate…." (Emphasis added.)

activities and costs between Cal-Am and MPWMD; (ii) the Commission disagreed with MPWMD's continued employment of a User Fee set as a fixed percent of Cal-Am's total revenue rather than "a fixed amount"; and (iii) the Commission perceived a "significant increase in User Fee costs over past levels." (Answer, pp. 5-6; Decision 11-03-035, pp. 11-13.)[10] Accordingly, the Commission determined that it would only allow a (1) joint Cal-Am/MPWMD mitigation program or (2) a mitigation program implemented directly by Cal-Am, if MPWMD ceased to fund mitigation measures, *in either case to be approved by the Commission.* (Decision 11-03-035, p. 22.) By proscribing collection of MPWMD's User Fee by Cal-Am, the Commission did exactly what it attempts to argue it did not do. Namely, it (1) negated Petitioner's authority to levy the fee by prohibiting Petitioner's collection of the fee[11] (through a method the Commission concedes is lawful), and (2) passed judgment on Petitioner's direction and control of its Mitigation Program and ASR project. By cutting off Petitioner's funding, and determining to only allow either a joint Cal-Am/MPWMD or sole Cal-Am mitigation program, the Commission unlawfully assumed control and oversight over Petitioner's mitigation activities by forcing Cal-Am to undertake those activities, previously being

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[10] The Commission also states that there was a lack of evidence explaining program costs. However, the Commission never held hearings regarding the evidence presented before deciding to disallow the User Fee. It is inherently unfair for the Commission to assert that there was a lack of evidence supporting program costs when the Commission, after explicitly stating that it would hold hearings regarding the evidence (App-I 31), failed to hold evidentiary hearings, at which additional evidence could have been presented.

[11] *City of Modesto v. Modesto Irr. Dist.* (1973) 34 Cal.App.3d 504, 508 ("It is basic that the power to tax carries with it the corollary power to use reasonable means to effect its collection; otherwise, the power to impose a tax is meaningless.").

performed by Petitioner subject to control of its Board and, ultimately, the voters.[12]

If the citizens of Monterey County have concerns regarding the management of MPWMD's activities and costs, the law governing MPWMD (Cal. Water Code, Appendix, Chapter 118 (Stats 1977, ch. 527) ("District Law")) provides them, not the Commission, with direct recourse against MPWMD's Board through the electoral process and recourse to the Superior Court. (District Law, *supra*, at §§ 203, 411.) The Commission points to nothing in the District Law vesting the Commission with any oversight role with respect to Petitioner's statutorily-authorized programs or costs managed by Petitioner's elected Board.

2. The Commission's Rationale for Refusing to Permit Cal-Am to Collect MPWMD's User Fee Does Not Cure the Jurisdictional Bar to the Commission's Exercise of Authority Over the User Fee.

While initially attempting to argue that it did not exercise jurisdiction over Petitioner's imposition of the User Fee, the Commission eventually admits to and attempts to justify its exercise of jurisdiction over Petitioner's User Fee. The Commission's justifications, however, do not

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[12] As explained in the Petition for Review, Petitioner is governed by a seven-member Board of Directors elected by voters, including Cal-Am ratepayers. Five Directors are elected by voter divisions within the District; one Director is a member of the Monterey County Board of Supervisors and is appointed by the Board of Supervisors; and one Director is a mayor, member of the governing body, or chief executive officer of a city that is wholly within the District boundary, and is appointed by the City Selection Committee of Monterey County. (App-II 286.) Petitioner began collecting the User Fee through Cal-Am in 1983 to support the Mitigation Program, conservation efforts, and water supply projects, including the ASR project. (*Id.* at pp. 289-290.) The Board of Directors revisits the fee annually during the District's budget review process and examines whether the fee is still required and whether the amount is still appropriate. (*Id.* at p. 340.) The portion of the User Fee allocated to the ASR program is also governed by California Constitution Articles XIII C and XIII D. (*Id.* at pp. 339-340.)

satisfy this Court's requirement that "express" legislative authority support any Commission action governing the actions of a government body. (*County of Inyo, supra* , 26 Cal.3d at p. 166.) In *County of Inyo*, this Court rejected justifications far more compelling than any advanced by the Commission here. *Id* at p. 167.

a. The Commission is Fully Vested with the Authority to Redress Its Concerns Over Duplication or "Overlap" by Adjusting the Rates of Cal-Am Rather than Restricting the Revenues of District.

The Commission's assertion that there was "an apparent overlap" in program activities and costs between Cal-Am and MPWMD does not vest the Commission with jurisdiction over MPWMD. If the Commission were legitimately concerned with overlap or duplication between activities performed by Cal-Am and MPWMD, it could have examined the activities and costs of Cal-Am, an entity over which it has unquestioned jurisdiction, and made any appropriate adjustments to Cal-Am's rates rather than restricting the revenues of MPWMD, a governmental entity over which the Commission admits it has no jurisdiction.[13] (Decision 13-01-040, p. 5, attached to Petition for Review as Exhibit 2 ("This Commission has consistently held that it will not pass judgment on the authority of any local entity to impose taxes, fees or charges on utilities or their customers. We recognize that local taxing authority is properly the domain of the Superior Court.").)

[13] DRA, the Commission division responsible for protecting ratepayers, agreed that there was no duplication between Cal-Am and MPWMD activities and costs. (App-I 55, 61.)

b. <u>That MPWMD Has Alternative Means to Collect Fees From Water Users in its Boundaries Does Not Inform the Jurisdictional Issue Before the Court.</u>

The Commission also argues that Petitioner could have chosen other means to collect the User Fee. (Answer, p. 14.) However, the Commission fails to explain why that fact is relevant to the jurisdictional question before the Court. The Commission does not dispute that Petitioner has the statutory authority to manage mitigation and ASR activities or that Petitioner has the statutory authority to impose and collect fees for such program activities through utility bills. (Answer, p. 6 ("The Commission has consistently expressed support for the User Fee programs, and has never objected to the notion that the District may legitimately collect such a fee . . .").) The mere fact that Petitioner could have chosen a means other than that employed by myriad other government bodies (utility bills) to impose or collect its User Fee does not vest the Commission with jurisdiction over the User Fee. No "express" legislative enactment supports such a claim and it cannot be reasonably argued that the Legislature contemplated that the Commission would have jurisdiction over Petitioner's activities and related fees depending on how Petitioner chose to collect those fees (Answer, pp. 14, 26). Any such suggestion is dispelled by the fact that the Legislature expressly provided, in a statute devoid of any reference to the Commission, for Petitioner's collection of the fee through utility bills. (District Law, *supra*, at § 326.) The Commission's argument finds no support in California Constitution Articles XIII C and XIII D or the District Law, which do not contemplate different means of approval and oversight of the calculation of taxes and fees depending on

how they are collected.[14] (MPWMD addresses Section 451, *infra*, at pp. 19-23.) Petitioner's unsurprising election to employ the statutorily-authorized means of collecting the User Fee through Cal-Am utility bills, does not, as the Commission argues, subject the User Fee to all of the trappings of utility rate regulation and "cost recovery." (Answer, pp. 15, 22.)

c. The Commission's Authority Over Utility "Cost Recovery" Provides No Legal (Or Even Logical) Justification for the Commission's Restriction on MPWMD's Collection of Its User Fee.

The Commission touts its authority over "cost recovery" as justification for its actions at issue here. (Answer, p. 15.) The authority it cites in support, however, refer to the Commission's authority over "costs"

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[14] The Commission cites to *AB Cellular LA, LLC v. City of Los Angeles* ("*AB Cellular*") ((2007) 150 Cal.App.4th 747, 763-764) for the proposition that the Commission has jurisdiction over Petitioner's User Fee based on the manner in which it was collected. (Answer, p. 15, fn. 21.) *AB Cellular* stands for no such thing. *AB Cellular* merely states that:

> In most instances, the equation [for calculating taxes] will be established by legislative action, such as the enactment of an ordinance. But if a local tax law is ambiguous, or is ostensibly restricted by state, federal or other local laws, and the local taxing entity develops a policy regarding how those local taxes shall be calculated in light of the ambiguity, or it interprets the limits of the local tax law in light of ostensible restrictions imposed by state, federal, or other local laws, then the methodology is the equation the local taxing entity adopts as a uniform compromise of its legal dilemma.

First, this language refers to acts of a local taxing entity. Petitioner, not the Commission, would be the local taxing entity. Thus, this language is inapplicable to the Commission's actions in this case. Second, this language only applies where local tax law is ambiguous, or is ostensibly restricted by state, federal or other local laws. This language is not applicable to state, federal or local laws, such as Public Utilities Code Section 451, that have absolutely no bearing on the calculation of taxes by a local taxing entity.

being "recovered" by a Commission regulated utility (here, Cal-Am) from the utility's (Cal-Am's) ratepayers through utility rates (here, Cal-Am's rates). For example, the Commission cites to its Decision (D.) 89-05-063 ((1989) 32 Cal. P.U.C.2d 60, 69 (emphasis added)), which states that "the sole authority to determine and regulate the rates and charges of a public utility for services by it rests with this Commission." Petitioner's User Fee, however, is not a "rate or charge" of Cal-Am and it is not for a service provided by Cal-Am.

d. The Commissions May Regulate the Fashion by which a Public Utility Passes on to its Ratepayers Government Taxes and Fees Imposed on the Utility; it May Not Regulate the Level of the Government Tax or Fee Itself.

In D.89-05-063, the Commission on goes to note that "[t]he Commission does have jurisdiction over the ratemaking treatment of the costs of local taxes and fees imposed on public utilities, as well as over the ratemaking treatment of the costs incurred by public utilities in the administration and collection of utility users taxes which the utility is required to bill and collect." (See Answer, p. 15, fn. 24.) Petitioner does not dispute either proposition in the slightest; neither, however, have anything to do with the issue before the Court. Decision 89-05-063 involved how local taxes and fees paid by a public utility should be recovered from that utility's ratepayers through that utility's rates; i.e., how that utility "cost" (local fees and taxes paid by the utility) should be "recovered" in the rates charged by the utility to its ratepayers. Like the other cases cited by the Commission, (e.g. *Consumers Lobby Against Monopolies v. Public Utilities Com.* (1979) 25 Cal. 3d 891), D. 89-05-063 addresses charges assessed, collected and retained by a public utility to recover costs incurred by the public utility. It has no bearing on the utility's collection of a tax or fee on behalf of a government entity.

D. 89-05-063 does address "local utility users' taxes" that are "merely collected for the governmental entity by the utility" and authorizes the utility, "in its discretion" to place a separate item on its bill. (D.89-05-063, *supra*, 32 Cal. P.U.C.2d at pp. 70, 73 (Ordering Paragraph 4).) The decision also affirmed that the Commission "does not dispute or seek to dispute the authority or right of any local governmental entity to impose or levy any form of tax or fee upon utility customers or the utility itself, which that local entity, as a matter of general law or judicial decision, has jurisdiction to impose, levy or increase. *Any issue relating to such local authority is a matter for the Superior Court, not this Commission.*" (*Id.* at p. 69 (emphasis added).)

e. Cal-Am's Obligation to Undertake Mitigation Measures if MPWMD Fails to do so, Does Not Vest the Commission with the Authority to Ensure that Failure by Abrogating MPWMD's Ability to Collect its User Fee through Cal-Am's Bills.

The Commission also argues that its exercise of jurisdiction over Petitioner's User Fee is justified because Cal-Am is "legally responsible" for Petitioner's mitigation and ASR activities (Answer, pp. 4, 16-17, 32), which creates a "unique nexus" between Cal-Am and Petitioner's mitigation and ASR activities. (Answer, pp. 15, 32.) The Commission does not provide any explanation of the relevance of this assertion. Cal-Am is only "legally responsible" for Petitioner's mitigation activities if MPWMD discontinues them.[15] That contingency does not vest the Commission with jurisdiction to ensure that outcome (the discontinuance

[15] SWRCB Order 95-10 provides that Cal-Am is only responsible for mitigation measures pertaining to the Carmel River that are not implemented by Petitioner. (App-II 432.)

of MPWMD directed programs). Decisions regarding the continuation of Petitioner's Mitigation and ASR programs lie with its elected Board.[16]

f. MPWMD's Employment of Revenues from the User Fee is Irrelevant to the Question of Whether the Commission May Prevent MPWMD from collecting it Through Cal-Am.

The Commission concedes that the Legislature granted Petitioner the authority to implement the Mitigation and ASR programs and fund the programs through fees collected on utility bills. (Answer, pp. 6, 13.) However, the Commission states that it has the authority to restrict Petitioner's collection of the fee because "[t]he costs in question are not those which the District incurs for activities taken on its own behalf, and/or for the public generally to support general local revenue needs." (Answer, pp. 15-16.) The Commission fails to explain how Petitioner's employment of User Fee revenues informs the jurisdictional issue before the Court. So long as Petitioner is (1) acting within its statutory authority in promulgating the fee and (2) collecting the fee in a manner permitted by law, its specific employment of the revenues is of no consequence with regard to the jurisdictional question before the Court. The Commission has conceded

[16] As fully acknowledged by the Commission, Petitioner is attempting to continue its implementation of its Mitigation Program and ASR project. (Answer, p. 4.) The tenuous link between Cal-Am's supposed responsibility for Petitioner's mitigation and ASR activities is clearly illustrated by the fact that any responsibility for mitigation and ASR activities on the part of Cal-Am will likely be due to the curtailment of Petitioner's mitigation and ASR activities resulting from the Commission's extra-jurisdictional determination to cut off Petitioner's funding for such activities. (Decision 11-03-035, p. 22, states that the Commission will only consider a joint Cal-Am/MPWMD mitigation program or an implementation plan for Cal-Am to assume direct responsibility for the Carmel River Mitigation measures, should the District cease to fund the measures.)

points (1) and (2) so its characterization of Petitioner's use of fee revenues is of no relevance.[17]

B. The Commission Erroneously Asserts That Its Jurisdiction is Without Limits In The Absence of a Specific Statutory Limit on its Power.

1. The Broad Scope of Commission Jurisdiction Described in Myriad Appellate Decisions Applies to Its Regulation of Public Utilities.

The Commission asserts that "the Commission's inherent and broad authority to act will be upheld *unless the Legislature places a specific statutory limit on its power.*" (Answer, p. 19.) This statement greatly overstates the import of the case cited in support, *Southern California Edison Co. v. Peevey* (which held only that the Commission was vested with the power to enter into a settlement). (*Southern California Edison Co. v. Peevey* (2003) 31 Cal.4th 781, 787.) Derived from jurisprudence arising out of Public Utilities Code Section 701, it only approaches an accurate assessment of the Commission's jurisdiction as it applies to public utilities. The Commission's jurisdiction over public utilities is indeed broad but its precise scope need not be determined here. This Court has established a quite different standard with respect to Commission action related to government entities and it is precisely the opposite of the test described in the Answer.

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[17] Moreover, the purpose of the District's mitigation and ASR activities is to minimize environmental impacts associated with water production from the Monterey Peninsula Water Resource System, including the Carmel River. (App-II 419.) It is difficult to understand the Commission's argument that addressing environmental impacts associated with water production through a mitigation program (cited with approval by the SWRCB) is not for the public benefit.

2. The Commission Lacks Jurisdiction Over The Acts of Government Entities "Unless Expressly Provided By Statute."

California Constitution, Art. XII, Section 3 provides that only certain "private corporations and persons" are "public utilities." The Legislature may, however, vest the Commission with jurisdiction over entities that are not public utilities pursuant California Constitution, Art. XII, Section 5. (*County of Inyo, supra,* 26 Cal.3d at pp. 163-164.) The "task . . . [of appellate courts is] . . to determine whether the Legislature has enacted a statute conferring jurisdiction . . ." (*Id.* at p. 164.) Unless "expressly provided by statute," the Commission may only exercise jurisdiction over "privately owned utilities." (*Id.* at p. 166.)

The applicable test here, therefore, is <u>not</u> whether the Legislature has enacted a specific statutory limit on the Commission's exercise of power; that test arguably applies to actions of the Commission with respect to a privately owned public utility. With respect to government entities, however, the test is whether the Legislature has "expressly provided by statute" (*Id.*) for the Commission to regulate the act of the government entity. (The "task . .[is] . . to determine whether the Legislature has enacted a statute conferring jurisdiction . . ." (*Id.* at p. 164.)) (Also see, *Santa Clara Valley Transportation Authority v. Public Utilities Com.* (2004) 124 Cal.App.4th 346, 356 ("*Santa Clara*").)

The Commission states that it acquired jurisdiction over Petitioner's User Fee because Petitioner chose to collect the User Fee through Cal-Am's utility bills. (Answer, pp. 14, 26.) What "express legislative provision" supports that view? The only "express" legislative enactment addressing collection of the User Fee (1) permits MPWMD to collect the fee through Cal-Am (District Law, *supra*, at § 326) and (2) is devoid of any reference to the Commission.

3. The Test Stated in *County of Inyo* Was "Established Doctrine" in 1980 and has Not Been Abrogated by the Legislature.

The requirement that the Legislature "expressly" confer jurisdiction on the Commission to regulate the acts of government was characterized by this Court as "(e)stablished doctrine." (*County of Inyo, supra*, 26 Cal.3d at p. 166.) Notwithstanding the codification of Section 701 (Answer, p. 19) in 1951 and the early twentieth century genesis of the provisions of the California Constitution cited by the Commission (Cal. Const., art XII, § 6,[18] Answer, p.18), *County of Inyo* held that unless "expressly provided by statute," the Commission may only exercise jurisdiction over "privately owned utilities." (*County of Inyo, supra*, 26 Cal.3d at p. 166.) Since 1980, when *County of Inyo* was issued, the Legislature, presumably aware of the holding,[19] has neither (1) abrogated the test stated in *County of Inyo*, nor (2) enacted a statute which would meet its requirements in a fashion conferring the Commission with jurisdiction over MPWMD's User Fee.

Since no such statute has been enacted, the Commission attempts to rationalize its exercise of jurisdiction over Petitioner's User Fee based on the manner in which it was collected and the indirect link between Cal-Am and Petitioner's Mitigation Program and ASR project. Neither circumstance meets the terms of the test set forth in *County of Inyo.*

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[18] Section 6 of Article XII has no bearing on this matter. It simply provides that, "The commission may fix rates, establish rules, examine records, issue subpenas, administer oaths, take testimony, punish for contempt, and prescribe a uniform system of accounts for all public utilities subject to its jurisdiction." See *County of Inyo, supra*, 26 Cal.3d at p. 160, for the genesis of the relevant provisions of Article XII of the California Constitution.

[19] *Greene v. Amante* (1992) 3 Cal.App.4th 684, 689.

4. The Commission's Expansive View of Its Jurisdiction Presages an Exercise of Commission Jurisdiction Over Any Public Entity Charge, Fee or Tax Collected on a Public Utility Bill.

The Commission's assertions regarding its authority here are tantamount to an assertion of jurisdiction over any charge or fee appearing on a utility bill. This newly announced construction of Public Utilities Code Section 451 will affect any government entity that collects taxes or fees on utility bills. The power to collect a tax is central to the power to impose it in the first instance. (*Eastern Mun. Water Dist. v. City of Moreno Valley* (1994) 31 Cal.App.4th 24, 30; *City of San Jose v. Donohue* (1975) 51 Cal.App.3d 40, 47; *City of Modesto v. Modesto Irr. Dist.* (1973) 34 Cal.App.3d 504, 508 ("It is basic that the power to tax carries with it the corollary power to use reasonable means to effect its collection; otherwise, the power to impose a tax is meaningless.").)

5. The Commission's Interpretation of the Extent of Its Jurisdiction Should Not Be Granted Any Deference.

The Commission asks the Court to defer to the Commission's construction of Section 451. (Answer, pp. 11-12.) The Commission's construction of statutes delimiting its own jurisdiction, however, is not entitled to the level of deference required with regard to the Commission's construction of other statutes. (*PacBell Wireless, LLC v. Public Utilities Com.* (2006) 140 Cal.App.4th 718, 729 (*"Pac Bell Wireless"*), quoting *Pacific Gas & Electric Corp. v. Public Utilities Com.* (2004) 118 Cal. App.4th 1174, 1194-1995 ("[T]he general rule of deference to interpretations of statutes subject to the regulatory jurisdiction of agencies does not apply when the issue is the scope of the agency's jurisdiction."); also see *Santa Clara, supra,* 124 Cal.App.4th at 359.)

In addition, the Commission's interpretation of the Public Utilities Code should not be granted deference if it "fails to bear a reasonable relation to statutory purposes and language" (*PacBell Wireless*, *supra*, 140 Cal.App.4th at p. 736) or results in a "manifest abuse of discretion or an unreasonable interpretation of the statutes" in question. (*Southern Cal. Edison v. Public Utilities Com.* (2000) 85 Cal.App.4th 1086, 1105.)

In this case, the Commission has interpreted Public Utilities Code Section 451 of the Public Utilities Code, which applies to charges demanded and received by a public utility, in a manner that allows it to pass judgment on, and prohibit the collection of, a fee lawfully imposed by a local public agency. The Commission's interpretation of Section 451 is inconsistent with the plain language of Section 451, as discussed further in Section II.B.7, *infra.* The Commission's interpretation of Section 451 is also contrary to the regulatory scheme adopted by the Legislature expressly granting Petitioner broad powers to levy charges and fees and collect such charges and fees through utility bills. (District Law, *supra*, at § 326.)

6. Commission Decisions are As Susceptible To Error As Those of Other State Agencies.

It is true that the Commission is a constitutional body with broad legislative and judicial powers. (Answer, pp.12, 18.) It is not, however, shrouded with the cloak of near infallibility suggested by the Answer. Since the enactment of the Calderon-Peace-MacBride Judicial Review Act of 1998 (SB 779),[20] half of the matters heard in the Court of Appeal under the terms of that measure have resulted in decisions reversing the Commission decision in whole or in part.[21] Given the paucity of authority

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[20] Stats 1998, c. 866.

[21] See, *City of Huntington Beach v. Public Utilities Com.* (2013) 214 Cal.App.4th 566, portion of Commission decision purporting to preempt

advanced by the Commission to support its regulation of a government fee, the Court should also reverse the Commission decisions at issue here.

7. The Commission's Construction of the Scope of its Jurisdiction Pursuant to Public Utilities Code Section 451 Is Erroneous.

As noted in MPWMD's Petition for Review, Public Utilities Code Section 451 makes no reference to the Commission. The plain language of the statute sets a broad standard requiring that the rates of public utilities be "just and reasonable." No language in the statute authorizes the Commission to review taxes or fees of government entities such as Petitioner. (Pub. Util. Code § 451.)

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local ordinances reversed; *Ponderosa Telephone Co. v. Public Utilities Com.* (2011) 197 Cal.App.4th 48, Commission decision allocating proceeds of redemption of stock from the Rural Telephone Bank to ratepayers annulled as unconstitutional appropriation of property; *The Utility Reform Network v. Public Utilities Com.* (2008) 166 Cal.App.4th 522, Commission decision capping compensable rates for outside counsel reversed as abuse of discretion; *Southern California Edison Co. v. Public Utilities Com.* (2006) 140 Cal.App.4th 1085, Commission decision annulled in part because it departed sharply from the scoping memo and the Commission had therefore not proceeded as required by law; *Santa Clara Valley Transportation Authority v. Public Utilities Com.* (2004) 124 Cal.App.4th 346, Commission's interpretation of jurisdictional statutes accorded no deference and its assertion of jurisdiction over rail service of public agency set aside; *Southern Cal. Edison Co. v. Public Utilities Com.* (2004) 121 Cal.App.4th 1303, Commission order requiring public utility transmission providers to pay up front the cost of network upgrades deemed preempted by federal law; *City of St. Helena v. Public Utilities Com.* (2004) 119 Cal.App.4th 793, Commission decision deeming Napa Valley Wine Train to be common carrier set aside; *Burlington Northern & Santa Fe Railway Co. v. Public Utilities Com.* (2003) 112 Cal.App.4th 881, Commission order enforcing statute even though it had been impliedly repealed by successful statewide ballot initiative set aside; *Southern Cal. Edison v. Public Utilities Com.* (2000) 85 Cal.App.4th 1086, writ issued to require Commission to adhere to literal text of Section 455; *Pacific Gas & Electric Co. v. Public Utilities Com.* (2000) 85 Cal. App. 4th 86, Commission decision annulled as violating First Amendment to U.S. Constitution.

The Commission advances an extremely strained interpretation of Section 451, arguing that the reference to public utilities charges in the first paragraph of Section 451 should be read differently from the reference to public utilities charges in the last sentence of the statute. (Answer, pp. 23-24.) The Commission argues in favor of this interpretation despite stating that statutes must be construed in context. (*Id.*) Contrary to the Commission's interpretation, read in context, the reference to "[a]ll charges demanded or received by any public utility" in the first sentence of Section 451 can only refer to a public utility's own charges. The first paragraph of Section 451 states that all charges demanded or received by a public utility for products or services must be just and reasonable. The second paragraph elaborates on this requirement by adding that service provided by a public utility must be adequate, efficient, just, and reasonable. The last sentence of Section 451 ties these requirements together stating that "[a]ll rules made by a public utility affecting or pertaining to *its* charges or service to the public shall be just and reasonable." (Emphasis added.) There is no reasonable way to interpret Section 451 other than as referring to a public utility's own charges and service.

Tellingly, the Commission cites to no cases supporting its interpretation of Section 451. The Commission relies solely on Decision No. 09-07-021, a previous Commission decision regarding this matter. (Answer, p. 29.) The Answer tacitly confirms that prior to this case, the Commission has never interpreted Section 451 in the manner in which it proposes to interpret that section now. The Commission concedes as much, admitting that neither the Public Utilities Code nor the Commission's Rules

of Practice and Procedure apply to or set requirements for government entity fees and taxes.[22] (Answer, p. 30.)

The Commission further argues that Section 451 is not required to "enumerate all actions that may be allowed or prohibited, or all actions the Commission may take in exercising its authority." (Answer, p. 21.) First, a fair reading of *County of Inyo* compels precisely the contrary conclusion. To meet the requirements of *County of Inyo* , the statute must clearly state what "actions the Commission may take in exercising its authority" with respect to the government entity at issue. Section 451 does not do so. It does not expressly provide the Commission with jurisdiction of any sort over Petitioner, as required by *County of Inyo.*

Moreover, if the Legislature wished to authorize or direct the Commission to review Petitioner's (or any other government entity's) imposition of taxes or fees based on how those taxes or fees are collected, it could have simply so stated. California law offers several examples in which the Legislature explicitly grants the Commission jurisdiction over public entities.[23] In the case of Petitioner, however, the Legislature has created a scheme under the District Law and the Constitution (Articles XIII C and XIII D) that does not contemplate Commission review and oversight of Petitioner's activities, or fees or charges regardless of how those fees or charges are collected. The Commission cannot assign itself a role within the governance scheme of District Law and Articles XIII C and XIII where the text of those enactments supports no such role.

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[22] The Commission also cites to D.89-05-063. However, as already discussed above in Section II.2.d, *supra*, D.89-05-063 involved how local taxes and fees should be collected in rates, not whether local taxes and fees should be collected in rates.
[23] See, for example, Public Utilities Code Sections 100168 and 30646 (subjecting certain transit districts to Commission regulation relating to safety appliances and procedures).

Finally, the Commission argues that there is no conflict between Section 451 and the District Law. (Answer, pp. 27-28.) The Commission's interpretation of Section 451, however, creates the conflict between the Public Utilities Code and the District Law. Apart from the Commission's erroneous interpretation of Section 451, there would be no conflict between the Public Utilities Code and the District Law because the Public Utilities Code is not applicable to Petitioner unless expressly stated by the Legislature. The Commission states that nothing in the District Law requires the Commission to pass-through the District's costs on utility bills without any scrutiny whatsoever. (Answer, p. 31.) That is because neither the District Law nor Articles XIII C or XIII D of the Constitution contemplate any role for the Commission with regard to approval or oversight of Petitioner's activities, fees and charges. The Legislature has explicitly reserved approval and oversight of Petitioner's activities, fees and charges to Petitioner's elected Board and the voters. (District Law, *supra*, at §§ 201, 203, 301, 325, 326; Cal. Const., arts. XIII C and XIII D.)

The Commission emphasizes that the District Law and Public Utilities Code are unrelated statutory schemes. The point of this argument is unclear since the Commission simultaneously argues that the Public Utilities Code is related to the District Law by virtue of Petitioner's collection of the User Fee on Cal-Am's utility bills.[24] The Commission relates the two statutory schemes by attempting to, by fiat, interject its

[24] Moreover, neither the *Santa Clara* nor the *City of Fresno* case cited by the Commission involved "related" statutory schemes. *Santa Clara* involved Public Utilities Code Sections 1201 and 1202 regarding rail crossings and the enabling legislation of the Santa Clara Valley Transportation Authority. The *City of Fresno* case involved the laws concerning eminent domain proceedings and Public Utilities Code Section 851, regarding the disposition of public utility property. *People ex rel. Public Utilities Com. v. Fresno* (1967) 254 Cal.App.2d 76 ("*City of Fresno*").

regulation of public utilities into the entirely separate statutory scheme governing Petitioner. Petitioner agrees that the two statutory schemes are unrelated because the Public Utilities Code is not applicable to Petitioner and the District Law does not contemplate any role for the Commission to oversee or approve Petitioner's activities, charges or fees. If the Commission believes that the two statutory schemes are unrelated, then one is at a loss to explain why the Commission is simultaneously arguing in this case that it may impose forms of regulation applicable to public utilities[25] on Petitioner, which, the Commission concedes, is governed by a statutory scheme entirely separate and unrelated to the Public Utilities Code.

C. <u>This Court May Properly Grant Review and Transfer to the Sixth District.</u>

The Commission and Cal-Am contend this court lacks the ability to grant a writ of review and transfer this matter to the Sixth District Court of Appeal for a determination on the merits. It is undisputed this Court has authority to grant and transfer matters on review from Court of Appeal decisions. (CRC 8.500, subd. (b)(4).) The question is whether the same authority exists regarding matters over which this court has original jurisdiction. The Commission and Cal-Am focus on the words "Court of Appeal" in Rule 8.500(b)(4) and the procedural mandates for petitions from Commission decisions in Rule 8.496.[26] Under the California Constitution and a decision of this Court postdating the enactment of Public Utilities

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[25] Answer, pp. 15, 22; D.11-03-035, pp. 11-13.

[26] Rule 8.496 dictates that petitions arising from CPUC decisions (1) must be served on the CPUC's Director and General Counsel, (2) are subject to extended filing deadlines, and (3) require certificates of interested entities. Rule 8.496 is procedural. Rule 8.500 provides the substantive grounds for granting a petition. Cal-Am's argument this petition is governed entirely by Rule 8.496, and that the substantive provisions of Rule 8.500 do not in any way apply, is without merit.

Code Section 1756(f), however, it is clear that Court is vested with the authority to pursue the suggestion advanced by Petitioner.

Article VI, section 12 of the California Constitution provides the Supreme Court may, "before decision, transfer a cause from itself to a court of appeal." This court broadly interprets the term "cause" to "include any matter coming before the court for consideration," and is "empowered to transfer all cases, matters, and proceedings of every description." (*In re Rose* (2000) 22 Cal.4th 430, 450 ("*Rose*"; internal quotation marks omitted.) The Commission and Cal-Am present no authority holding that petitions from Commission decisions fall outside this broad constitutional power. There is no such authority. *Rose* post-dates the enactment of Section 1756(f) on which Cal-Am relies but the case and the statute are not even in conflict. Section 1756(f) simply requires that matters described in it be brought to this Court in the first instance. The statute is silent with regard to the means by which the Court administers the proceeding. There is no conflict between it (or Article XII, Section 5, pursuant to which it was enacted) and the Court's authority under Article VI, Section 12.

To the extent the Commission and Cal-Am's semantic argument might be considered, this court has previously held "[t]he sole means provided by law for judicial review of a [PUC] decision is a petition to this court for writ of review, which thereby serves in effect the office of an appeal." (*In re Rose*, *supra*, 22 Cal.4th at 446; internal citation omitted.) The mere act of granting a petition for review is a valid exercise of this court's jurisdiction. (See *ibid.* [holding summary denial of a petition for review from a State Bar proceeding "amounts to an exercise of our jurisdiction and a judicial determination on the merits."].) Section 1756(f) vests original jurisdiction over this matter in this court, but does not require, once this court's jurisdiction has been exercised by granting a writ of review, that this court issue a decision on the merits. The act of granting a

petition completes the exercise of jurisdiction; the court is then free to dispose of the matter as it sees fit.

Petitioner therefore asks this court, in the alternative, to exercise its constitutional authority to grant this petition for writ of review and transfer the matter to the Sixth District Court of Appeal.

Dated: April 29, 2013

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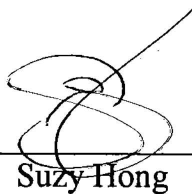
CERTIFICATE OF WORD COUNT

Counsel certifies that under California Rules of Court, Rules 8.204(b) and 8.504(d), this Petition is produced using 13-point Times New Roman type and contains 7,992 words, exclusive of Tables, Indices, Exhibits, and Certifications, as counted by Microsoft Word, the program used to create this document.

Dated April 29, 2013.



By______________________
Suzy Hong

PROOF OF SERVICE

I, Sandie DiLuzio, 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 **April 29, 2013**, I served a copy of the within document:

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:

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I also served a copy of the within document:

**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
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Coronado, CA 92116

I am readily familiar with the firm's practice of collection and processing correspondence for mailing and hand delivery. Under that practice it would be hand delivered or deposited with the U. S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

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

Executed on **April 29, 2013**, at San Francisco, California

Sandie DiLuzio