

COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

APPLICATION OF NORTHERN KENTUCKY )  
WATER DISTRICT FOR AN ADJUSTMENT OF ) CASE NO. 2010-00094  
RATES, ISSUANCE OF BONDS, AND TARIFF )  
CHANGES )

NOTICE OF FILING

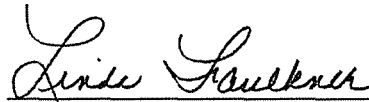
Notice is given to all parties that the following materials have been filed into the record of this proceeding:

- The digital video recording of the evidentiary hearing conducted on October 27, 2010 in this proceeding;
- Certification of the accuracy and correctness of the digital video recording;
- All exhibits introduced at the evidentiary hearing conducted on October 27, 2010 in this proceeding;
- A written list of the exhibits introduced at the evidentiary hearing conducted on October 27, 2010 in this proceeding;
- A written log listing, *inter alia*, the date and time of where each witness' testimony begins and ends on the digital video recording of the evidentiary hearing conducted on October 27, 2010.

Pursuant to the Commission's Order of April 27, 2010, an electronic copy of this Notice, the certification of the digital video record, exhibit list, exhibits, and hearing log have been placed into the Commission's electronic file depository and an electronic mail message has been transmitted to all persons listed on this Notice advising of this action. Parties desiring an electronic copy of the digital video recording of the hearing in

Windows Media format may download a copy at [http://psc.ky.gov/av\\_broadcast/2010-00094/2010-00094\\_27Oct10\\_Inter.asx](http://psc.ky.gov/av_broadcast/2010-00094/2010-00094_27Oct10_Inter.asx). Parties wishing an annotated digital video recording may submit a written request by electronic mail to [pscfilings@ky.gov](mailto:pscfilings@ky.gov). A minimal fee will be assessed for a copy of this recording.

Done at Frankfort, Kentucky, this 1<sup>st</sup> day of November 2010.



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COMMONWEALTH OF KENTUCKY  
BEFORE THE PUBLIC SERVICE COMMISSION

In the Matter of:

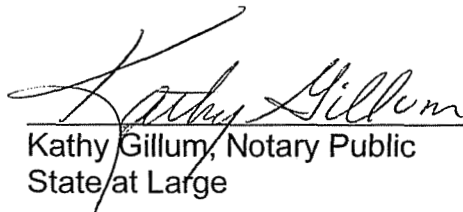
APPLICATION OF NORTHERN KENTUCKY )  
WATER DISTRICT FOR AN ADJUSTMENT OF ) CASE NO. 2010-00094  
RATES, ISSUANCE OF BONDS, AND TARIFF )  
CHANGES )

CERTIFICATE

I, Kathy Gillum, hereby certify that:

1. The attached DVD contains a digital recording of the hearing conducted in the above-styled proceeding on October 27, 2010;
2. I am responsible for the preparation of the digital recording;
3. The digital recording accurately and correctly depicts the hearing;
4. All Exhibits introduced at the hearing of October 27, 2010 are attached to this Certificate, as well as the "Exhibit List", which correctly lists all exhibits introduced at the hearing of October 27, 2010.
5. The "Hearing Log" attached to this Certificate accurately and correctly states the events that occurred at the hearing of October 27, 2010 and the time at which each occurred.

Given this 1st day of November, 2010.

  
Kathy Gillum, Notary Public  
State at Large

My commission expires: Sept 3, 2013



# Case History Log Report

Case Number: 2010-00094\_27Oct10

Case Title: Northern Kentucky Water District

Case Type: General Rates

Department:

Plaintiff:

Prosecution:

Defendant:

Defense:

**Date: 10/27/2010**

Location: Default Location

Judge: David Armstrong, Jim Gardner, Charles Borders

Clerk: Kathy Gillum

Bailiff:

Event Time	Log Event	
10:06:32 AM	Case Started	
10:07:06 AM	Preliminary Remarks	
10:09:16 AM	Introductions	
	Note: Kathy Gillum	John Hughes, NKWD; David E. Spenard, OAG; Dennis Howard, OAG; Todd Osterloh, PSC; Gerald Wuetcher, PSC; Duane Skavdahl, Tea Party.
10:10:06 AM	Housekeeping Issues Discussed	
10:10:23 AM	Public Comments	
	Note: Kathy Gillum	Call for public comments
10:10:57 AM	Public Comment by Jim Dugan	
	Note: Kathy Gillum	Comment regarding rates being too high in his opinion. Also discussed purification process (Agenda 21)
10:14:34 AM	Public Comment by Terry Donoghue	
	Note: Kathy Gillum	Stated that he represents the tax payers. Wanted to know why public was not allowed to ask questions at public hearing. Also asked if NKWD had a Plan B in case they did not get the rate increase.
10:16:45 AM	Public Common by Tom Wurtz	
	Note: Kathy Gillum	Discussion about quality of water improvement. Asks if water needs quality improvement, is the current water harmful
10:19:21 AM	Public Comment by Mark Hunter	
	Note: Kathy Gillum	Small business owner in Kenton County. Discussion regarding economy. Wanted to know why NKWD wanted to increase rates in hard economy times.
10:21:36 AM	No more public comments	
10:22:09 AM	Witness Roger Peterman	
	Note: Kathy Gillum	Witness called to testify by John Hughes (NKWD). Witness adopts pre-filed testimony.
10:23:17 AM	Examination by Duane Skavdahl (Tea Party)	
	Note: Kathy Gillum	Questions regarding Bonds
10:23:47 AM	Examination of witness by Todd Osterloh (PSC)	
	Note: Kathy Gillum	Witness explains bond issuance. Questions regarding bond resolution preparation.

10:26:48 AM	Data Request by Todd Osterloh (PSC) Note: Kathy Gillum	Requests that the 1985 Bond Resolution be provided to the Commission.
10:28:05 AM	No further questions by Todd Osterloh (PSC)	
10:28:12 AM	Questions by Chairman Armstrong Note: Kathy Gillum	Questions regarding marketing of bonds, ratings, and the 1985 documents.
10:29:37 AM	Questions by Commissioner Gardner Note: Kathy Gillum	Questions regarding Bond Note(s).
10:31:04 AM	Questions by Commissioner Borders Note: Kathy Gillum	Questions regarding witness' firm being bond counsel.
10:32:22 AM	Statement by John Hughes (NKWD)	
10:32:43 AM	Witness Excused (Roger Peterman)	
10:32:51 AM	Witness Adam Davey Note: Kathy Gillum	Witness called to testify by John Hughes (NKWD). Witness adopts pre-filed testimony
10:33:42 AM	Examination of witness by Duane Skavdahl (Tea Party) Note: Kathy Gillum	Questions regarding services provided by witness, and questions regarding financial information.
10:36:33 AM	Examination of witness by Todd Osterloh (PSC) Note: Kathy Gillum	Questions regarding debt service requirements, and components used to calculate,
10:38:39 AM	Data Request by Todd Osterloh (PSC) Note: Kathy Gillum	Contribution in aid of construction and tap on fees. Also explain if they should be included, why they should be included.
10:39:56 AM	No further questions by Todd Osterloh (PSC)	
10:40:06 AM	Questions by Commissioner Gardner	
10:41:31 AM	Questions by Chairman Armstrong Note: Kathy Gillum	Questions regarding presentation of audit
10:41:55 AM	Re-direct examination by John Hughes (NKWD)	
10:42:16 AM	Witness Excused (Adam Davey)	
10:42:26 AM	Witness, Paul Herbert Note: Kathy Gillum	Witness called to testify by John Hughes (NKWD). Change to Exhibit N, page 46. The footnote should be "average quarterly"; and same correction on page 58. Witness adopts pre-filed testimony as corrected.
10:44:20 AM	Examination of witness by David Spenard (OAG) Note: Kathy Gillum	Questions regarding allegation process and cost of service study.
10:47:19 AM	No further questions by David Spenard (OAG)	
10:47:26 AM	Examination by Duane Skavdahl (Tea Party)	
10:49:26 AM	No further questions by Duane Skavdahl (Tea Party)	
10:49:31 AM	Examination of witness by Todd Osterloh (PSC) Note: Kathy Gillum	Questions regarding Schedule C, page 11. Page 13 of Schedule C also discussed. Questions asked regarding Response to Data Request No. 2, Item 23. Questions regarding Schedule O of Cost of Service Study, page 2. Questions regarding Schedule N, column 3.
10:59:34 AM	Data Request by Todd Osterloh (PSC) Note: Kathy Gillum	Provide data used in calculations in Schedule N. (Witness had misunderstood and had testified regarding Schedule M). Request for data is regarding Schedule N, not M.

11:03:39 AM Examination by Todd Osterloh (PSC) continues  
Note: Kathy Gillum Questions regarding Schdule F.

11:04:49 AM Statement by John Hughes (NKWD)  
Note: Kathy Gillum Document is also listed as Item 6 of documents filed Monday.

11:05:51 AM Examination by Todd Osterloh continues  
Note: Kathy Gillum Questions regarding Schedule E.

11:06:33 AM Question by David Spenard (OAG)  
Note: Kathy Gillum Question directed toward Todd Osterloh "Is that from the Application or from the Update?"

11:07:04 AM Statement by Todd Osterloh (PSC)  
Note: Kathy Gillum From the Update filed Monday.

11:10:07 AM No further questions by Todd Osterloh (PSC)

11:10:19 AM Statement by Chairman Armstrong  
Note: Kathy Gillum Chairman Armstrong asked Todd Osterloh to clarify data request of witness. Osterloh stated he was asking for work papers regarding (Schedule N). Chairman Armstrong advised that the data requested was due by 10th of November.

11:11:08 AM Questions by Commissioner Gardner  
Note: Kathy Gillum Questions regarding differences between monthly charges and quarterly charges.

11:18:39 AM Questions by Commissioner Borders  
Note: Kathy Gillum Questions regarding cost differences in residential and industrial usage.

11:21:33 AM Examination of witness by David Spenard (OAG)  
Note: Kathy Gillum Questions regarding Schedule C. Questions regarding tables in M-1. Questions regarding Cost of Service Study, Quarterly Customer Charge Amount.

11:23:56 AM No further questions by David Spenard (OAG)

11:24:02 AM Examination of witness by Todd Osterloh (PSC)

11:24:15 AM Exhibit introduced by Todd Osterloh (PSC)  
Note: Kathy Gillum Document titled "Principles of Water Rates, Fees, and Charges" Introduced by Todd Osterloh marked as PSC Exhibit 1.

11:24:22 AM Examination by Todd Osterloh (PSC) continues

11:29:14 AM No further questions by Todd Osterloh (PSC)

11:29:20 AM Examination by Duane Skavdahl (Tea Party)

11:29:32 AM No further questions by Duane Skavdahl (Tea Party)

11:29:37 AM Witness Excused (Paul Herbert)

11:29:45 AM Witness, Keith Brock  
Note: Kathy Gillum Witness called to testify by John Hughes (NKWD). Witness adopts pre-filed testimony.

11:30:30 AM Examination of witness by David Spenard (OAG)  
Note: Kathy Gillum Questions regarding bond rating. Questions regarding the metrics used to rate the bonds.

11:33:35 AM No further questions by David Spenard (OAG)

11:33:41 AM Examination of witness by Duane Skavdahl (Tea Party)  
Note: Kathy Gillum Questions regarding how long the witness had been financial advisor

11:35:43 AM No further questions by Duane Skavdahl (Tea Party)

11:35:56 AM Examination of witness by Gerald Wuetcher (PSC)  
Note: Kathy Gillum Questions regarding debt service requirements of bond ordinance.

11:43:26 AM No further questions by Gerald Wuetcher (PSC)

11:43:31 AM Re-direct examination by John Hughes (NKWD)

11:44:15 AM Questions by Commissioner Gardner  
Note: Kathy Gillum Questions regarding bond anticipation notes. Questions regarding Schedule A and interest and coupon rates.

11:50:49 AM Questions by Commissioner Borders  
Note: Kathy Gillum Questions regarding bond anticipated notes v. issuance of bonds.

11:54:10 AM Re-Cross Examination by Gerald Wuetcher (PSC)  
Note: Kathy Gillum Questions regarding timing of bond issuance.

11:55:18 AM No further questions by Gerald Wuetcher (PSC)

11:55:24 AM Cross Examination by Duane Skavdahl (Tea Party)

11:55:38 AM No further questions by Duane Skavdahl (Tea Party)

11:55:44 AM Witness Excused (Keith Brock)

11:56:16 AM Case Recessed

12:58:25 PM Case Started

12:58:58 PM Witness, Richard Harrison  
Note: Kathy Gillum Witness called to testify by John Hughes (NKWD). Witness adopts pre-filed testimony.

12:59:44 PM Cross Examination by David Spenard (OAG)  
Note: Kathy Gillum Questions regarding pre-filed testimony: Structure (entities) of NKWD, and distribution system. Treatment process discussed. Questions regarding Safe Drinking Water Act. Questions regarding Surface Water Treatment Rule. Questions regarding PSC case 2010-00038. Questions regarding PSC Case No. 2010-00093. Questions regarding disinfectants and by-products.

1:15:41 PM Incorporation of Document into Record by David Spenard (OAG)  
Note: Kathy Gillum David Spenard asks that PSC Case Nos. 2010-00038 and 2010-00093 Memorandum be incorporated into the record.

1:16:01 PM Examination by David Spenard (OAG) continues

1:21:11 PM Question by John Hughes (NKWD)  
Note: Kathy Gillum Mr. Hughes asks Mr. Spenard for clarification of what he was asking regarding comparing performance.

1:21:41 PM Examination by David Spenard (OAG) continues  
Note: Kathy Gillum Mr. Spenard clarifies previous question regarding comparing performance. Questions regarding compliance, Stage One. Spenard refers to Federal Register Vol. 63, 241 page 69437, and page 69447. Summary of Bin Classification.

1:32:15 PM Data Request by David Spenard (OAG)  
Note: Kathy Gillum Spenard asks for a Summary of NKWD's Bin Classification associated with LT-2. Chairman Armstrong stated that data is due by November 10th.

1:32:22 PM Examination by David Spenard continues

1:36:09 PM No further questions by David Spenard (OAG)

1:36:15 PM Cross Examination by Duane Skavdahl (Tea Party)  
Note: Kathy Gillum Questions regarding EPA regulation. Questions regarding public meeting. Questions regarding application filed with the PSC and preparing for the application. Questions regarding Cost Benefit Study. Questions regarding funding for bonding. Questions regarding Question\Answer No. 14 of Pre-Filed Testimony of Witness.

1:53:11 PM No further questions by Duane Skavdahl (Tea Party)



1:53:22 PM	Examination of witness by Gerald Wuetcher (PSC) Note: Kathy Gillum	Questions regarding intervenors to prior applications. Questions regarding disinfectants. Questions regarding public meetings and public comment. Questions regarding witness' membership in water associations.
1:57:20 PM	No further questions by Gerald Wuetcher (PSC)	
1:57:30 PM	Questions by Chairman Armstrong Note: Kathy Gillum	Questions regarding Board of Commissioners for NKWD.
1:59:12 PM	Questions by Commissioner Gardner Note: Kathy Gillum	Questions regarding bond issue. Questions regarding Exhibit O. Witness stated that two types of financing is used, bonds and low-interest loan thru Kentucky infrastructure. Questions regarding Exhibit R. Questions regarding CPCNs for 2010-00038 and 2010-00093.
2:09:20 PM	Questions by Commissioner Borders Note: Kathy Gillum	Questions regarding costs.
2:14:36 PM	Re-Direct Examination by John Hughes (NKWD) Note: Kathy Gillum	Questions regarding options reviewed.
2:16:36 PM	No further questions by John Hughes (NKWD)	
2:16:43 PM	Cross Examination by David Spenard (OAG) Note: Kathy Gillum	Questions regarding 2010-00038 and 2010-00093. Questions regarding Safe Drinking Water Act. 42 USC 6A
2:21:03 PM	No further questions by David Spenard (OAG)	
2:21:08 PM	Cross Examination by Duane Skavdahl (Tea Party)	
2:23:11 PM	No further questions by Duane Skavdahl (Tea Party)	
2:23:23 PM	Witness Excused (Richard Harrison)	
2:23:32 PM	Witness, Jack Bragg Note: Kathy Gillum	Witness called to testify by John Hughes. Witness adopts pre-filed testimony.
2:24:09 PM	Cross Examination by David Spenard (OAG) Note: Kathy Gillum	Questions regarding pre-filed testimony. Questions regarding testimony given by Paul Herbert. Questions regarding third party billing. Questions regarding testimony given by Keith Brock. Questions regarding potential credit rating. Questions regarding tap on fees. Questions regarding PSC Case No. 2002-105, Order dated April 30, 2003. Questions regarding financial accounting v. rate-making.
2:34:57 PM	No further questions by David Spenard (OAG)	
2:35:07 PM	Cross Examination by Duane Skavdahl (Tea Party) Note: Kathy Gillum	Questions regarding public advertising of rate application, and public meeting. Questions regarding testimony of Richard Harrison.
2:38:55 PM	No further questions by Duane Skavdahl (Tea Party)	
2:39:02 PM	Examination of witness by Gerald Wuetcher (PSC) Note: Kathy Gillum	Questions regarding KIA Loan. Questions regarding projects related to KIA loan. Questions regarding Exhibit O of NKWD Application. Questions regarding drawing on KIA loan for projects. Questions regarding Responses to PSC 1st Data Request, No. 5. Page 8, Page 12, Page 18 (2 items), Page 22 (2 items), Page 31, Page 32, Page 34, Page 36, Page 40 (2 items), Page 44, Page 50, Page 60, Page 63, Page 68, Page 71, Page 76 (2 items), Page 78,
3:03:10 PM	Case Recessed	

3:15:29 PM	Case Started	
3:15:40 PM	Data Request by Gerald Wuetcher (PSC)	
	Note: Kathy Gillum	Mr. Wuetcher requested that Item 5 of Data Response be in Excel format.
3:19:07 PM	Examination by Gerald Wuetcher continues	
	Note: Kathy Gillum	Questions regarding Item No. 8 to Response to PSC Data Request regarding employees compensation.
3:19:33 PM	Data Request by Gerald Wuetcher (PSC)	
	Note: Kathy Gillum	Mr. Wuetcher requested that witness provide as to whether the total compensation listed for employee #87 includes the \$18,000.00 annual automobile allowance.
3:21:30 PM	Data Request by Gerald Wuetcher (PSC)	
	Note: Kathy Gillum	Question regarding the automobile allowance. Provide date it was authorized.
3:25:22 PM	Data Request by Gerald Wuetcher (PSC)	
	Note: Kathy Gillum	Data Requested by Mr. Wuetcher regarding Item 1 of Commission's 3rd Information Request related to automobile allowance. Witness asked to provide the date the automobile allowance was authorized and whether or not a compensation study was done
3:25:32 PM	Examination by Gerald Wuetcher continues	
	Note: Kathy Gillum	Questions regarding failure to meet the debt service requirements. Questions regarding 2nd Response to 10-21-10 conference.
3:29:19 PM	Data Request by Gerald Wuetcher (PSC)	
	Note: Kathy Gillum	Mr. Wuetcher requests a listing of the Capital Account that was closed out
3:29:30 PM	Examination by Gerald Wuetcher continues	
	Note: Kathy Gillum	Questions regarding reasons IRR account increased.
3:31:36 PM	No further questions by Gerald Wuetcher	
	Note: Kathy Gillum	Mr. Wuetcher stated that the PSC would provide a listing of requested documents to NKWD for their responses.
3:31:48 PM	Questions by Commissioner Gardner	
	Note: Kathy Gillum	Questions regarding Exhibits O and R. Commissioner Gardner stated that he would recall a witness to answer question asked of this witness regarding CPCNs. Questions regarding bond anticipation notes for 2007. Questions regarding meter readers and reduction of employees.
3:40:38 PM	Questions by Commissioner Borders	
	Note: Kathy Gillum	Questions regarding breaking up a project into smaller portions to avoid getting a CPCN.
3:42:50 PM	Questions by Commissioner Gardner	
	Note: Kathy Gillum	Questions regarding Capital Projects.
3:45:03 PM	Data Request by Gerald Wuetcher (PSC)	
	Note: Kathy Gillum	Cost of rate case expense and invoices.
3:46:13 PM	Witness Excused (Jack Bragg)	
3:46:22 PM	Witness, Richard Harrison (NKWD)	
	Note: Kathy Gillum	Called back to stand by Commissioner Gardner. Questions regarding which projects in Exhibit R will require CPCNs. Witness stated that PSC Reference #136; #56; #58; and added some have not been bid yet.
3:49:15 PM	Witness Excused (Richard Harrison)	
3:49:26 PM	Witness, Ronald Lovan	
	Note: Kathy Gillum	Witness called to testify by John Hughes. Witness adopts pre-filed testimony.

3:50:03 PM Cross Examination of Witness by David Spenard (OAG)  
Note: Kathy Gillum Questions regarding Safe Drinking Water Act. Questions regarding testimony of Mr. Harrison. Questions regarding posting and mailing to public, water quality report. Questions regarding Paragraph 11 of the Petition.

3:57:45 PM No further questions by David Spenard (OAG)

3:57:51 PM Cross Examination of witness by Duane Skavdahl (Tea Party)  
Note: Kathy Gillum Questions regarding complying with EPA regulations. Questions regarding safety of water. Questions regarding the public meeting in this case. Questions regarding informal conference of last week.

4:05:49 PM No further questions by Duane Skavdahl (Tea Party)

4:05:55 PM Cross Examination of witness by Todd Osterloh (PSC)  
Note: Kathy Gillum Clarifies that minutes of IC have not been completed yet and not given to the parties. Questions regarding potential penalties if NKWD does not comply with regulations. Questions regarding 1985 Bond Resolution.

4:11:58 PM Data Request by Todd Osterloh (PSC)  
Note: Kathy Gillum 1987 Amendment to Bond Resolution

4:12:22 PM Examination by Todd Osterloh (PSC) continues  
Note: Kathy Gillum Questions regarding supplemental documents filed on Monday the 25th.

4:14:46 PM Data Request by Todd Osterloh (PSC)  
Note: Kathy Gillum Mr. Osterloh asks for information as to whether or not the District will be asking for approval of the increased amounts in the updated documents filed with the PSC.

4:15:05 PM No further questions by Todd Osterloh (PSC)

4:15:12 PM Questions of witness by Commissioner Gardner  
Note: Kathy Gillum Questions regarding disinfectants and by-products.

4:20:13 PM Re-Cross Examination by Duane Skadahl (Tea Party)

4:21:02 PM No further questions by Duane Skadahl (Tea Party)

4:21:07 PM Witness Excused (Richard Harrison)

4:21:21 PM Procedural Schedule by Chairman Armstrong  
Note: Kathy Gillum Data Requests due by November 10th. Post Hearing Brief by November 24th.

4:22:25 PM Statement by Todd Osterloh (PSC)  
Note: Kathy Gillum Other public comments will be accepted thru November 24th.

4:22:45 PM Statement by Duane Skadahl (Tea Party)  
Note: Kathy Gillum Asked for Brief time to be November 30

4:23:58 PM Case Recessed

4:23:39 PM Statement by Chairman Armstrong  
Note: Kathy Gillum Advised that all briefs will be due November 30th.

4:27:57 PM Case Stopped



Case Title: Northern Kentucky Water District  
Department:  
Plaintiff:  
Prosecution:  
Defendant:  
Defense:

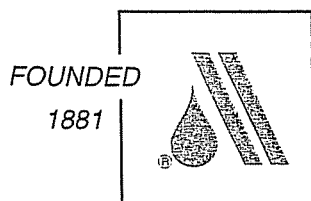
<b>Name</b>	<b>Description</b>
PSC Exhibit 1	Document titled "Principles of Water Rates, Fees and Charges"

# Principles of Water Rates, Fees, and Charges

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**AWWA MANUAL M1**

*Fifth Edition*



American Water Works Association

MANUAL OF WATER SUPPLY PRACTICES—M1, Fifth Edition  
Principles of Water Rates, Fees, and Charges

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manual. Such cash needs must be met by the utility as a whole. However, when that utility serves outside-city, non-owner customers, it is most appropriate to measure the costs of such service on a utility basis; that is, to assign costs to outside-city customers for O&M expense, depreciation expense, and an appropriate return on the value of property devoted to serving them. The inside-city customers are then responsible for all remaining cash requirements not derived from outside-city customers. Thus, if total utility revenue requirements are relatively low, perhaps as a result of retiring a major part of the bonded indebtedness and thus having a large amount of paid-up equity, the inside-city customers have relatively low rates. Thus the inside-city customers benefit from having invested in and owning paid-up equity in the system. The reverse situation could also occur. If the rate of return is properly set, the utility basis of allocating cost of service is fair to both the supplier and the outside-city customer.

In some instances, as a matter of policy, a government-owned utility might choose to waive the distinction between owner and non-owner customers and consider the utility to be metropolitan in nature. In such a case, differences in costs between owners and non-owners are not recognized in cost allocation and rate making. This generally would require the owner customers to subsidize the non-owner customers to some degree. Such a policy is a choice to be made by the governing body of the utility.

## UNITS OF SERVICE

As a step toward rate design, component costs may be distributed among customer classes in the proportion that the respective class responsibility for those costs bears to the total cost responsibility of all customer classes served by the system. This applies for each of the component costs of service. Responsibility for each component may be expressed in terms of the number of units of service required by each class of customer. The sum of all component costs attributable to a customer class is the total cost of service to be recovered from it.

The total cost of each component, such as base cost, may be divided by appropriate total customer requirements or units of service to express a unit cost for each component. The unit costs of each component serve as a basis for designing rates. As a basis for distributing component costs to customer classes, the units of service attributable to the respective classes must be established for the test year. To do so, the utility must determine or estimate the total quantity of water to be used by each class in the test year and the peak rates of use by the class, usually for both maximum-day and maximum-hour rates of use. (In some systems maximum-week or other periods may be appropriate.) In addition, the utility must determine the number of equivalent meters and services by class, as well as the number of bills by class.

Maximum rates of use may be expressed in terms of capacity factor—that is, a percentage relationship of the class maximum rate of use to average annual rate of use. Thus, if a customer class maximum-day rate of use is 2.5 times its average rate, it is said to have a maximum-day capacity factor of 250 percent.

To estimate customer-class capacity factors, utilities need to investigate and study all pertinent sources of information. Such data should include daily and hourly pumpage records, recorded rates of flow in specific areas of the system, studies and interviews of large users regarding individual and group characteristics of use, special demand metering programs, and experience in studies of other utilities exhibiting like characteristics. Sound and logical inferences can be drawn from

customer metering information, provided billing periods are sufficiently short to reflect seasonal differences, usually not to exceed three-month periods. Appendix A of this manual provides some techniques that can be used to determine reasonable estimates of the maximum day and maximum hour capacity factors for each customer class using available system demand data for the utility and customer class billing records.

The total annual quantity of water attributable to fire service is usually negligible, at least in relation to that of other classes; however, peak requirements for fire service can be quite significant. The Insurance Services Office periodically defines desired rates of flow for fire service, which is a good source of maximum-capacity requirements for fire service. Such data must be applied judiciously to achieve practical cost allocations.

Customer-related costs for meters and services may be properly distributed among customer classes by recognizing factors that are generally responsible for those costs being incurred. As an example, one method for distributing meter-and-service costs to customer classes is in proportion to the investment in meters and services installed for each customer class, based on the number of equivalent meters. Distribution of customer costs by equivalent meter-and-service ratios recognizes that meter-and-service costs vary, depending on considerations such as size of service pipe, materials used, locations of meters, and other local characteristics for various sized meters as compared to  $\frac{5}{8}$ -in. meters and services. In this example, typical customer meter-and-service equivalent ratios based on investment are as follows:

Meter Size (in.)	Equivalent Meter and Service Ratio
$\frac{5}{8}$	1.0
$\frac{3}{4}$	1.1
1	1.4
$1\frac{1}{2}$	1.8
2	2.9
3	11.0
4	14.0
6	21.0
8	29.0

Appendix B of this manual further discusses how to develop the meter and service cost ratios shown above, as well as equivalent meter ratios based on factors such as meter capacity.

Costs related to billing and collecting may be distributed among customer classes based on the total number of bills rendered to the respective classes in a test year. In some instances, billing ratios show that billing and collecting for larger services incurs more cost than for smaller services.

Table 8-1 illustrates the development of the test-year units of service for the hypothetical utility, using the base-extra capacity method of cost allocation and distribution. Test-year units of service reflect the prospective average annual customer water use requirements during the test-year study period considered in this example.

For the example, it is assumed that retail service and fire-protection service are provided inside the city to residential, commercial, and industrial classes. Outside-city service is provided on a wholesale basis.



Table 8-1 Units of service—Base-extra capacity method (test year)

Customer Class	Base			Maximum Day			Maximum Hour		
	Annual Use thous gal	Average Rate thous gpd	Capacity Factor %	Total Capacity thous gpd	Extra Capacity thous gpd	Capacity Factor %	Total Capacity thous gpd	Extra Capacity thous gpd	Equivalent Meters and Services Bills
Inside-City:									
Retail Service	968,000	2,652	250	6,630	3,978	400	10,608	3,978	15,652
Residential	473,000	1,296	200	2,592	1,296	325	4,212	1,620	1,758
Commercial	1,095,000	3,000	150	4,500	1,500	200	6,000	1,500	251
Industrial									
Fire-protection service				960	960		5,760	4,800	17,661
Total inside-city	2,536,000	6,948		14,682	7,734		26,580	11,898	200,820
Outside-City:									
Wholesale service	230,000	630	225	1,418	788	375	2,363	945	34
Total system	2,766,000	7,578		16,100	8,522		28,943	12,843	200,868

\*Maximum-hour demand in excess of maximum-day demand.

Table 8-2 Units of service—Commodity-demand method (test year)

Customer Class	Commodity			Maximum Day			Maximum Hour		
	Annual Use thous gal	Average Rate thous gpd	Capacity Factor %	Total Capacity thous gpd	Extra Capacity thous gpd	Capacity Factor %	Total Capacity thous gpd	Extra Capacity thous gpd	Equivalent Meters and Services Bills
Inside-City:									
Retail Service	968,000	2,652	250	6,630	3,978	400	10,608	3,978	15,652
Residential	473,000	1,296	200	2,592	1,296	325	4,212	1,620	1,758
Commercial	1,095,000	3,000	150	4,500	1,500	200	6,000	1,500	251
Industrial									
Fire-protection service				960	960		5,760	4,800	17,661
Total inside-city	2,536,000	6,948		14,682	7,734		26,580	11,898	200,820
Outside-City:									
Wholesale service	230,000	630	225	1,418	788	375	2,363	945	34
Total system	2,766,000	7,578		16,100	8,522		28,943	12,843	200,868

\*Maximum-hour demand in excess of maximum-day demand.

UNIT

Table 8-1 shows, under the heading "Base," the total annual water use in thousand gallons for each customer class, as well as the average rate in thousand gallons per day. Maximum-day capacity factors are applied to average-day rates of flow to develop total capacity by class. Extra capacity is the difference between total capacity and average rate of use. Fire-protection service is considered to require negligible flow on an average basis but 960 thous gpd on a maximum daily basis. Maximum-hour extra capacity is developed similarly. Maximum-hour fire-protection service assumes that flow for fires is concentrated in a four-hour period.

Equivalent meters and services are derived by applying equivalent meter and service cost ratios to the number of meters of each size by class. The number of bills is simply the total number of bills rendered annually for each class.

Table 8-2 shows the development of the units of service that apply to the commodity-demand method of cost allocation. Table 8-2 differs from Table 8-1 only in that the maximum-day extra capacity column is excluded.

The maximum total capacity on both a maximum-day and maximum-hour basis for the total system (shown in Tables 8-1 and 8-2) is the estimate of the sum of noncoincidental peaking requirements on the system; that is, it is the sum of the peaks for each class, regardless of the day or hour in which such peaks may occur. Thus, the total system capacity shown, as related to the average rate, is not to be confused with the coincidental maximum-to-average ratio used in system design.

A test of the reasonableness of the estimated maximum day and maximum hour capacity factors assigned to the various customer classes, the system-wide diversity ratio should generally fall in the range of 1.10 to 1.40. The diversity ratio is defined as

$$\frac{\text{System Noncoincidental Demand, Less Fire Protection Demand}}{\text{System Coincidental Demand, Less Fire Protection Demand}} \quad (8-1)$$

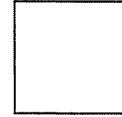
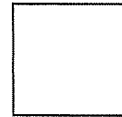
## UNIT COSTS

Component costs can be directly distributed to respective customer classes in proportion to the respective units of service applicable to each class. For instance, costs of service are distributed among customer classes by applying unit costs of service to respective service requirements. Unit costs of service are based on total costs previously allocated to functional components and the total number of applicable units of service for the test year. The development of unit costs of service for the base-extra capacity method is presented in Table 8-3.

Unit costs are determined simply by dividing the test-year functionally allocated O&M and capital costs by the respective total system units of service requirements in the test year. For example, under the base-extra capacity method, the base unit cost for O&M expense of \$0.3887 per thous gal may be derived by dividing the allocated base O&M expense of \$1,075,200 by the total base-component units of service of 2,766,000 thous gal. Similar computations are made to determine unit costs for all other O&M expense and depreciation expense. Under the utility-basis method of cost allocation, the resulting average unit costs for O&M expense and depreciation expense apply to all customers, both inside and outside the city. Allocation of O&M expense and depreciation expense to functional cost components is presented in chapter 7 of this manual.

Unit return on rate base is determined by first calculating unit rate base. The functionally allocated total rate base is divided by respective total system units of service to yield unit rate base. Subsequently, unit return on rate base is derived by applying appropriate inside- and outside-city rates of return to the unit rate base.

As discussed in chapters 1 through 6 of this manual, for the government-owned utility to meet total cash revenue requirements under the utility approach, the level



## Appendix B

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# Equivalent Meter Ratios

In the overall rate setting process, there is often the need to establish a minimum threshold or "base" level of cost or demand for service, against which the costs or demands of larger customers can be measured. A convenient and readily available parameter for this purpose is the size of the customer's water meter. Typically the meter size, which is generally used as the "base," is the smallest available. The  $\frac{5}{8}$ -in. meter is the most prevalent meter size found in many water utilities, and is also the size most often used for single-family residential customers. However, this varies by location, with some utilities using  $\frac{3}{4}$ -in. meters as the minimum size. Accordingly, care should be taken to select that meter size for the "base" that is most relevant to the particular utility. In the overall rate setting process, residential user characteristics are often used as the measure of the base level of service or upon which service equivalency units are measured.

There are different ways in which to measure or compute equivalent ratios for larger meters as compared to a  $\frac{5}{8}$ -in. meter, or whatever the "base" size meter is appropriate. The two most commonly used ratios in the water rate making industry are equivalent meter cost ratios and equivalent meter capacity ratios. Generally, equivalent meter cost ratios should be used when assigning elements of costs specifically related to meters among the various sizes of meters used by the customers in the system. The allocation of customer-related costs associated with meters in conjunction with a cost of service study is an example of a use of equivalent meter cost ratios. Meter capacity ratios, on the other hand, are most often used when estimating potential capacity or demand requirements for customers on the basis of the size of their water meter. The determination of system development charges or impact fees for meters greater than  $\frac{5}{8}$ -in., where potential customer demand is assumed to be proportional to meter size, is an example of the use of meter capacity ratios. Meter capacity ratios may also be appropriate in the design of the service charge portion of the general rate schedule when such charges include some recovery of fixed capacity related costs or readiness-to-serve related costs.

## EQUIVALENT METER COST RATIOS

In determining the ratio of the cost of installing various sizes of meters relative to the cost of installing a  $\frac{5}{8}$ -in. meter, it is important to include all of the costs involved in such installations. This includes the direct cost of the various categories of labor involved in the installation, fringe benefit related overheads and other appropriate administrative overheads applicable to the labor costs, all direct materials and supplies costs, and the cost of equipment used in the installation.

In the cost allocation examples in chapter 8 of this manual, the costs of meters and services were combined in the cost allocation procedure. This is an appropriate consideration when it is the responsibility of the utility to install both a portion of the customer service line (generally from the main in the street to the customer's property line), as well as the meter itself. Accordingly, the example derivation of the cost ratios shown in this appendix, and used in chapter 8, are related to the combined cost of meter and service installations for various sizes of connections.

Based, in part, on information developed in section VI of this manual, the following are the total costs of meter installations for  $\frac{5}{8}$ -,  $\frac{3}{4}$ -, 1-, and  $1\frac{1}{2}$ -in. meters and the associated services. Dividing the total costs of installing the meter and service installations of the larger meter sizes by the total cost of the  $\frac{5}{8}$ -in. meter and service connection yields the cost ratios shown. The development of these ratios, along with the applicable ratios for larger size meters, are the basis for the tabulation shown in chapter 8 of this manual.

Cost Item	$\frac{5}{8}$ -in.	$\frac{3}{4}$ -in.	1-in.	$1\frac{1}{2}$ -in.
Service Connection	\$322.38	\$322.38	\$345.66	\$358.80
Meter Installation	<u>162.55</u>	<u>195.66</u>	<u>337.36</u>	<u>488.61</u>
Total Cost	\$484.93	\$518.04	\$683.02	\$847.41
Ratio to $\frac{5}{8}$ -in.	1.00	1.07	1.41	1.75
Ratio Used	1.0	1.1	1.4	1.8

## EQUIVALENT METER CAPACITY RATIOS

The safe operating flow, or capacity, of a particular size of meter is essentially the limiting factor in terms of the demand that can be exerted on the water system through the meter. In establishing a schedule of system development charges, the potential demand or capacity requirements placed on the water system by a new customer is generally an accepted basis for determining the level of charge applicable to the customer. Accordingly, when the base system development charge is established for a single-family residential customer with a  $\frac{5}{8}$ -in. meter (as is often the case), the ratio of the safe operating capacity of various sizes of meters, relative to the capacity of a  $\frac{5}{8}$ -in. meter, may be used to determine appropriate charges for the larger meter sizes.

In section VI of this manual, the maximum safe flow or capacity of  $\frac{5}{8}$ -, 1-,  $1\frac{1}{2}$ -, 2-, and 3-in. meters are tabulated, based on AWWA Manual M6, *Water Meters—Selection, Installation, Testing, and Maintenance*. The ratios of these capacities, relative to that of a  $\frac{5}{8}$ -in. meter, are computed, and range from 2.5 for a 1-in. meter up to 15.0 for a 3-in. meter. As pointed out in that chapter, while capacity ratios for larger than 3-in. meters can be computed, the use of such ratios for larger meters may or may not provide a true indication of the potential demand requirements of the larger meters.

It is important to understand and recognize the types of costs that are to be recovered, using equivalent meter ratios in order to develop the appropriate meter

equivalency factors. As discussed in section VI of this manual, developing equivalent capacity ratios specific to a particular utility and its system characteristics may be appropriate, as opposed to using a "standardized" table of meter equivalencies. For example, a water utility may have significant investment in impounded reservoir source of supply facilities (designed on the basis of annual average day demands), as well as treatment plant, pumping, and transmission facilities (designed on the basis of maximum day and/or hour demands). In this instance, the utility would need to recognize both annual usage requirements, as well as peak demand requirements, for each of its sizes of meters in establishing relevant equivalent capacity ratios appropriate for system development charge determination.

## SUMMARY

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The selection of equivalent meter ratios is dependent upon the purpose for which the ratios are to be used. In certain instances it may be necessary to develop ratios that are applicable to an individual utility's particular circumstances and facilities. The purpose of this appendix is to clarify the various types of equivalent meter ratios that may be used in rate making, and the general applicability of each of the measures of equivalency. Selection of the appropriate measures for distributing costs should be considered on an individual utility basis.

Public Service Commission----October 2010

Northern Kentucky Water District rate hike

I am here to represent the rate payers, the people who are working to pay your salaries. I am appalled by the increasing rates we see in water and sewerage that are caused by more and more stringent EPA regulations.

We are here because the EPA has decided that our water is not pure enough. The Northern Kentucky Water District does not have one case of anyone getting sick or dying from any waterborne illness. I'd say that is a great record. With this record, then we must ask the question, why do we need to go to a more stringent purification process? Especially when the process is described as trying to find a grain of salt in an Olympic size swimming pool.

The reasons for the tighter regulations are the people at the EPA need to justify their jobs and many of the same people are proponents of U.N. agenda 21. I would try to explain agenda 21 to you but you would never believe me. This is something you need to see for yourselves. Google agenda 21 when you have a lot of time to wade through amazing and hair raising material.

We have been going along with federal mandates with the attitude that "you can't fight city hall." I tell you it's past time to refuse to go along with mandates that violate our Constitution. The Supreme Court has found in a number of cases that the EPA is restricted by the tenth amendment and does not have the authority they claim.

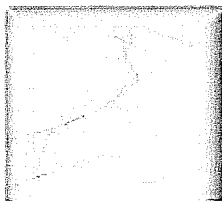
*Will*  
The regulations ~~will~~ become more and more restrictive as the EPA continues to push water and clean air rules.

The NKWD plans to spend 163 million dollars over the next five years, I think they said about half of that will be spent on upgrades to comply with the EPA. This in just one water district. I don't know how many water districts we have in Kentucky, but if their cost is anything like NKWD, we are looking at a humungous cost without any benefit.

We need the Attorney Generals office to get involved now. We can use the same tactics the progressives use. That is, find a friendly Judge and secure

an injunction against the EPA. That will take all fines and other threats off the table. Challenging the EPA should not be that tough. The Supreme Court has already ruled that the Tenth amendment protects us, that the EPA does not have the authority to mandate their orders. This is a National problem and we should be able to get other states involved.

I would like to submit a report by Christopher Foster and Albert ~~C~~ohen that outlines the court decisions I referenced.



**S M I L A N D**  **KHACHIGIAN**  
FOR THE PRACTICE OF PUBLIC AND PRIVATE LAW

**THE CLEAN AIR ACT:  
COOPERATIVE OR CO-OPTIVE FEDERALISM**

By Christopher G. Foster and Albert M. Cohen

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Over the past three decades, Congress has enacted numerous statutes dealing with environmental problems such as air pollution, water pollution, and hazardous waste. Many of these laws have required state and local authorities to promulgate and enforce regulations. This has resulted in a complex overlay of federal, state and local laws which have (1) severely limited the flexibility of states and localities to deal with environmental problems, (2) led to gross inefficiencies which have had a negative impact on business, and (3) impaired the accountability of federal, state, and local officials.

Until recently, few seemed to question the right of the federal government to impose these mandates on state and local governments. However, two years ago Congress enacted the Unfunded Mandates Reform Act of 1995, 2 U.S.C. § 1501, et seq., to deal with certain aspects of the problem. And, now, a recent decision by the United States Supreme Court, which draws upon a long line of Supreme Court and appellate court decisions, calls into question the constitutionality of some of the most significant pieces of federal environmental legislation imposing such mandates on state and local agencies. In light of that decision, it is an appropriate time to question the tripartite structure of these complex regulatory schemes.

Take the case of clean air regulation. For over 25 years, the federal government has mandated how state and local authorities are to manage and deal with the problem of air pollution. Pursuant to the Clean Air Act, 42 U.S.C. § 7401, et seq., Congress and the



Environmental Protection Agency direct how state agencies, such as the California Air Resources Board, and local agencies, including the South Coast Air Quality Management District, shall regulate emissions of various materials including hundreds of so-called "volatile organic compounds," some of which can at some times and places contribute to the formation of ozone pollution.

Certain of the federal mandates originate with the Congress and are self-executing. Section 110(a)(1) mandates:

"Each State shall . . . adopt and submit to the [EPA] . . . a plan which provides for implementation, maintenance, and enforcement of [the federal] primary standard in each air quality region . . . within such State.

42 U.S.C. § 7410(a)(1). Section 110(a)(2)(A) mandates that the state implementation plan "shall . . . include . . . control measures, means, or techniques . . . , as well as schedules and timetables for compliance, as may be necessary or appropriate to meet the applicable requirements" of the CAA. 42 U.S.C. § 7410(a)(2)(A). Section 110(a)(2)(H) mandates "revision" of the SIP from time to time. 42 U.S.C. § 7410(a)(2)(H). Section 172(c)(1) mandates that SIP revisions for nonattainment areas, such as the South Coast AQMD, "shall provide for the implementation of all reasonably available control measures as expeditiously as possible . . . and shall provide for attainment" of the federal standard. 42 U.S.C. § 7502(c)(1). Section 182 (e) requires that any extreme ozone nonattainment area, of which South Coast AQMD is the only one, "shall . . . make the submissions . . . and shall also submit the revisions" described elsewhere in Section 182. 42 U.S.C. § 7511a(e). In particular, Section 182(b)(1)(A)(i) mandates that by 1993 "the State shall submit a revision to the [SIP] to provide for volatile organic compound emissions reductions" by 1996 of 15%. 42 U.S.C. § 7511 a(b)(1)(A)(i).

These direct and self-executing commands by Congress to ARB and South Coast AQMD are supplemented by other delegations of authority to EPA to make further, more specific, commands. For example, CAA Section 110(k)(5) provides that, whenever EPA finds that a SIP is substantially inadequate, EPA "shall notify the state of the inadequacies . . . ," and EPA "shall require the state to revise the [SIP] as necessary to correct" them. *Id.* at § 7410(k)(5). And CAA Section 172(d) provides that any SIP revision "required to be submitted in response to a finding" by EPA under Section 110(k)(5) "must correct the plan deficiency (or deficiencies) specified by" EPA. *Id.* at § 7502(d).

In light of these federal mandates it is not at all surprising that representatives of South Coast AQMD and ARB frequently state on the public record that they adopt or enforce a particular regulation which may produce dubious environmental benefits but severe economic costs because "the feds made me do it." Perhaps this justification will be heard no more.

On June 27, 1997, the Supreme Court decided the important case of *Printz v. U.S.*, 117 S.Ct. 2365 (1997). That case involved the constitutionality of the Brady Gun Control Act. It directed state law enforcement officers to participate in the federally mandated program by requiring them to conduct background checks on prospective handgun purchasers. Petitioners, the chief law enforcement officers for counties in Montana and Arizona filed actions challenging the constitutionality of this provision. Specifically, they contended that Congressional action compelling state officers to execute federal laws was unconstitutional under the Tenth Amendment to the U.S. Constitution, which reads:

"The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

After conducting a detailed analysis of the Tenth Amendment and its history, the majority concluded,

categorically: "The Federal Government may neither issue directives requiring the States to address particular problems, nor command the States' officers, or those of their political subdivisions, to administer or enforce a federal regulatory program." 117 S.Ct. at 2384. Under this principle, the Brady Act provision at issue was invalidated. *Id.*

Significantly, the Court in *Printz* relied heavily upon *Brown v. EPA*, 521 F.2d 827, 838-842 (9th Cir. 1975) ("*Brown I*"). That case involved former Section 110(a) of the 1970 amendments to the CAA which mandated that California regulators submit an ozone SIP including land use and transportation controls. After California regulators chose not to do so, EPA sought to impose certain sanctions. At issue was whether the CAA authorized such sanctions. The Ninth Circuit held it did not because of the canon requiring interpretation of a statute to avoid its being unconstitutional. 521 F.2d at 831, 832, 839, 840, 842. California regulators argued that federal power "does not extend to requiring a state to undertake such governmental tasks as might be assigned to it." (Emphasis omitted.) *Id.* at 838. The Ninth Circuit quoted one Supreme Court case for the following proposition: ". . . Congress may not exercise power in a fashion that impairs the States' integrity or their ability to function effectively in a federal system." *Id.* at 842.

On review by the Supreme Court of *Brown I* and other similar cases, EPA "concede[d] the necessity of removing from the regulations all requirements that the state submit legally adopted regulations" and, based thereon, the Court vacated and remanded each decision, including *Brown I*. *EPA v. Brown*, 431 U.S. 99, 103 (1977) ("*Brown II*").

On remand, after the 1977 CAA amendments, the Ninth Circuit again stated that the claims "raise serious questions" under the Tenth Amendment which it would not "dismiss lightly." *Brown v. EPA*, 566 F.2d 665, 672 (9th Cir. 1977) ("*Brown III*").

Notwithstanding *Brown I*, *Brown II*, *Brown III*, and

related cases, Congress inserted more mandates to the states in the 1990 amendments to the CAA and EPA has continued to instruct South Coast AQMD as to what regulations to adopt and to dictate to ARB what SIP revisions to approve.

In *Printz*, the Supreme Court specifically approved *Brown I*, *Brown II*, and related cases, as follows:

"Finally, and most conclusively in the present litigation, we turn to the prior jurisprudence of this Court. Federal commandeering of state governments is such a novel phenomenon that this Court's first experience with it did not occur until the 1970's, when the Environmental Protection Agency promulgated regulations requiring States to prescribe auto emissions testing, monitoring and retrofit programs, and to designate preferential bus and carpool lanes. The Courts of Appeals for the Fourth and Ninth Circuits invalidated the regulations on statutory grounds in order to avoid what they perceived to be grave constitutional issues, see *Maryland v. EPA*, 530 F.2d 215, 226 (C.A.4 1975); *Brown v EPA*, 521 F.2d 827, 838-842 (C.A.9 1975); and the District of Columbia Circuit invalidated the regulations on both constitutional and statutory grounds, see *District of Columbia v. Train*, 521 F.2d 971, 944 (C.A.D.C. 1975). After we granted certiorari to review the statutory and constitutional validity of the regulations, the Government declined even to defend them, and instead rescinded some and conceded the invalidity of those that remained, leading us to vacate the opinions below and remand for consideration of mootness. *EPA v. Brown*, 431 U.S. 99 (1977).

"Although we had no occasion to pass upon the subject in *Brown*, later opinions of ours have made clear that the Federal Government may not compel the States to implement, by legislation or executive action, federal regulatory programs."

Id. at 2379-2380.

Significantly, *Printz* was not the first time that the Supreme Court had struck down federal environmental

legislation. Several years earlier, in *New York v. U.S.*, 505 U.S. 144, 161-66 (1992), the Court invalidated a statute which attempted to force states to regulate radioactive wastes by Congressional standards, or take title thereto. The Court ruled, as follows:

"[T]he Framers explicitly chose a Constitution that confers upon Congress the power to regulate individuals, not States .... [E]ven where Congress has the authority under the Constitution to pass laws requiring or prohibiting certain acts, it lacks the power directly to compel the States to require or prohibit those acts. [Citations.]"

Id. at 166. The Court held that Congress may not in that way command states or localities to regulate "according to the instructions of Congress." Id. at 175-76. The government, it said, may not "conscript" state and local governments as its agents. Id. at 178. This basic principle of federalism is designed to deter "the avoidance of personal responsibility" on the part of regulatory officials. Id. at 183.

The Ninth Circuit has recently followed *New York* in striking down federal timber conservation legislation which had mandated that states promulgate regulations implementing certain timber export bans. The statute contained "direct commands to the states to regulate according to Congress' instructions" and, therefore, violated the Tenth Amendment. *Board of Natural Resources v. Brown*, 992 F.2d 937, 947 (9th Cir. 1993).

One local U.S. District Court judge has recently dismissed a claim challenging the validity of certain South Coast AQMD rules and ARB SIP revisions under the Tenth Amendment, finding that federal actions merely "encourage [d]" the local and state regulations at issue, but did not "commandeer" the regulatory processes of ARB and South Coast AQMD. The Court's order did not discuss *Printz* nor its approval of *Brown I* and *Brown II*. Instead, the court cited the Fourth Circuit's pre-*Printz* decision in *Virginia v. Browner*, 80 F.3d 869 (4th Cir. 1996).

The *Virginia* court reviewed EPA's disapproval of Virginia's rules for judicial review of permit decisions. The court rejected Virginia's Tenth Amendment challenge, holding that the CAA sanctions at issue there (withholding highway funds, limiting new construction of emissions sources, and implementing a federal permit program) merely "induce" state action, but do not "coerce" it. 80 F.3d at 880-83.

*Virginia* drew a distinction where EPA approves, rather than disapproves, a SIP revision. *Id.* at 881 n. 6. It also suggested that a Tenth Amendment claim would ripen where EPA asserts power to enjoin or punish a state or local agency which does not bend to its will. *Id.* Prior case law holds that EPA may exercise such orthodox enforcement powers against states or localities where they disobey federal mandates. E.g., ..., *U.S. v. Ohio Department of Highway Safety*, 635 F.2d 1195, 1200-04 (6th Cir. 1980). Thus, the constitutionality of CAA provisions, EPA actions or inactions, and ARB and South Coast AQMD regulations may turn on the administrative posture in which the case arises and the remedies (mere encouragement or outright compulsion) available to or utilized by EPA.

Based on the foregoing, it is now clear that Congress and EPA do not have unfettered constitutional power to require states to implement federal regulatory programs. This calls into question the constitutionality of several key environmental statutes, in addition to the CAA.

For example, the Emergency Planning and Community Right-To-Know law, 42 U.S.C. § 11001, et. MM., requires states to establish emergency response commissions and emergency planning districts to facilitate preparation of emergency plans and to prepare emergency response plans. In light of *New York* and *Printz* the legality of these requirements is in question.

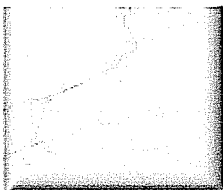
The Clean Water Act also requires states to implement federal standards. For example, it requires states, among other things, to adopt certain water quality

standards (33 U.S.C. § 1313(a)(3)(A)) applicable to intrastate waters and to prepare and submit management plans for nonpoint sources (id. at § 1329 (b)). The validity of these requirements must now be called into question.

Serious questions exist regarding the constitutionality and, indeed, the wisdom of environmental statutes imposing unfunded mandates on state and local regulators. Federal, state, and local "triplication" has greatly increased regulatory complexity, significantly reduced the flexibility of state and local governments to devise creative and effective solutions to environmental problems, and made it virtually impossible to direct to the appropriate level of government credit for regulations we respect or blame for those we condemn.

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