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BEFORE THE PUBLIC UTILITIES COMMISSION

OF THE STATE OF CALIFORNIA

Application of California-American Water Company (U210W) for Approval of the Monterey Peninsula Water Supply Project and Authorization to Recover All Present and Future Costs in Rates.	A.12-04-019 (Filed April 23, 2012)

CALIFORNIA-AMERICAN WATER COMPANY MOTION TO STRIKE THE TESTIMONY OF LLOYD W. LOWREY, JR. SUBMITTED ON BEHALF OF THE MARINA COAST WATER DISTRICT AND REQUEST FOR EXPEDITED TREATMENT

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I. INTRODUCTION

Pursuant to Rule 11.1 of the Rules of Practice and Procedure of the California Public Utilities Commission ("Commission"), California-American Water Company ("California American Water") hereby moves to strike portions of the *Testimony of Lloyd W. Lowrey, Jr. Submitted on Behalf of Marina Coast Water District*, served February 22, 2013 ("Lowrey Testimony"). As discussed in more detail below, Mr. Lowrey's testimony is actually a thinly disguised legal brief on water rights issues. The parties to this proceeding, including Marina Coast Water District ("MCWD"), have already had the opportunity to brief these issues, and will be able to do so again in the post-hearing briefs. Moreover, testimony consisting of legal opinions and conclusions is generally inadmissible. California American Water therefore requests that the portions of Mr. Lowrey's testimony identified in the attached appendices be stricken. Additionally, due to the looming rebuttal testimony deadline, California American Water requests a ruling on this Motion no later than Friday, March 1, 2013, one week before rebuttal testimony is due.

II. MR. LOWREY'S TESTIMONY INAPPROPRIATELY INCLUDES LEGAL ARGUMENTS, OPINIONS AND CONCLUSIONS

Mr. Lowrey does not disguise the fact that his testimony consists mainly of legal opinions. In describing the purpose of his testimony, he states that it is to address "the legal basis for MCWD to protect its statutory rights, its property rights, its contractual rights and its water rights in the Salinas River Groundwater Basin."[1] Mr. Lowrey further notes that his testimony discusses the "existing contractual, property and water rights of MCWD."[2] Finally, Mr. Lowrey states, "Some of my testimony expresses my professional opinion."[3]

Among other legal issues, Mr. Lowrey discusses MCWD's statutory authority, MCWD's purported prescriptive water rights under California case law, and the alleged seniority of MCWD's claims pursuant to certain contractual agreements.[4] Mr. Lowrey's testimony covers the same issues, makes the same arguments, and even cites the same cases as MCWD did in its briefing on water rights issues. For example, in its reply brief, MCWD discussed its water rights in the Salinas River Groundwater Basin, citing *City of Barstow v. Mojave Water Agency* (2000) 23 Cal.4th 1224 and *City of Pasadena v. City of Alhambra* (1949) 33 Cal.2d 908.[5] Mr. Lowrey repeats these claims, *citing the exact same cases*.[6] This recycled material is not appropriate testimony.

III. TESTIMONY CONSISTING OF LEGAL OPINIONS AND CONCLUSIONS IS INADMISSIBLE

Both state and federal courts have confirmed that a witness may not offer legal opinions and conclusions as testimony. For example, in a case involving a marital settlement and the transfer of property, the California Court of Appeal held that testimony on the issue of whether the transfer constituted deferred compensation or a gift was properly excluded because the California Code of Evidence does not authorize testimony on legal conclusions.[7] The Court

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[1] Lowrey Testimony, p. 3.
[2] *Id.*, p. 12.
[3] *Id.*, p. 3. Since Mr. Lowrey is an attorney by profession, this indicates that MCWD is not offering his testimony as that of a layperson but as a legal expert.
[4] *Id.*, pp. 3-12.
[5] MCWD Reply Brief, p. 5.
[6] Lowrey Testimony, p. 7.
[7] *Downer v. Bramet* (Cal. App. 4th Dist. 1984) 152 Cal. App. 3d 837.

stated, "legal conclusions do not constitute substantial evidence."[8] Similarly, in an earlier decision, the Court of Appeal annulled an order of the Workmen's Compensation Appeals Board, explaining that the "manner in which the law should apply to particular facts is a legal question and is not subject to expert opinion."[9] More recently, the Court of Appeal held that a trial court acted inappropriately in admitting the testimony of an attorney on issues of law in a wrongful death case.[10] In its decision, the Court noted, "The prohibition against expert opinion on an issue of law has been applied in many contexts."[11] The Court also recognized that "California is not alone in excluding expert opinions on issues of law" and that federal courts have "uniformly held" that testimony in the form of an opinion on law is inadmissible.[12]

For example, a United States District Court in California granted a plaintiff's motion to exclude a witness's testimony with respect to the application of law to the facts of the case, stating, "testimony consisting of legal conclusions is generally inappropriate."[13] Notably, the District Court found that such testimony was inappropriate even in non-jury setting. Moreover, in its decision, the District Court remarked that the witness's report "read more like a legal brief."[14] Along similar lines, the United States Court of Appeals for the Second Circuit reversed and remanded a breach of contract judgment because the plaintiffs' witness improperly opined as to conclusions of law in construing a contract.[15] The Court held that not only was it inappropriate for a witness to testify as to the applicable principles of law, legal opinions as to the meaning of the contract terms should also have been excluded.[16]

In his testimony, Mr. Lowrey offers his professional opinion on legal issues and discusses the legal rights that he believes derive from various contracts. His testimony consists largely of legal conclusions and, as in *CFM Communications*, "reads more like a legal brief." As in the

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[8] *Id.* at 841.
[9] *Ferreira v. Workmen's Comp. Appeals Bd.* (Cal. App. 5th Dist. 1974) 38 Cal. App. 3d 120, 126.
[10] *Summers v. A. L. Gilbert Co.* (Cal. App. 5th Dist. 1999) 69 Cal. App. 4th 1155.
[11] *Id.* at 1179.
[12] *Id.* at 1181.
[13] *CFM Communs., LLC v. Mitts Telecasting Co.* (E.D. Cal. 2005) 424 F. Supp. 2d 1229, 1233.
[14] *Id.* at 1235.
[15] *Marx & Co., Inc. v. Diners' Club, Inc.* (2d Cir. 1977) 550 F.2d 505.
[16] *Id.* at 508-509.

cases discussed above, Mr. Lowrey's testimony does not constitute evidence and should be excluded.

While California American Water acknowledges that that Commission is not required to follow the technical rules of evidence,[17] it is still instructive to look to the courts on the issue of whether certain testimony should be admitted or excluded. Although other witnesses may have touched on water rights issues, Mr. Lowrey's testimony consists almost exclusively of legal opinions and conclusions. As such, only an attorney would be able to respond to his testimony. The fact that it would be necessary to have another attorney provide rebuttal testimony is an indication that a significant portion of Mr. Lowrey's testimony is inappropriate and should be stricken.

IV. TESTIMONY TO BE STRICKEN

California American Water has attached to this Motion two appendices identifying the portions of Mr. Lowrey's testimony to be stricken. At this point in time, California American Water is limiting its Motion to Mr. Lowrey's legal arguments, conclusions, and opinions, and is not including in its Motion any of the exhibits included with Mr. Lowrey's testimony. California American Water is not waiving its opportunity to challenge the admissibility of these documents and specifically reserves the right to do so at a later date.

The attached Appendix A identifies the portions of Mr. Lowrey's testimony that consist of legal briefing, analysis, and conclusions regarding water rights law and the validity of the water rights claims of MCWD and California American Water. The attached Appendix B identifies the portions of Mr. Lowrey's testimony in which he sets forth legal claims and opinions regarding the water rights conferred by certain contractual terms. As discussed above, all of this content is inappropriate for testimony and should be stricken.

V. REQUEST FOR EXPEDITED TREATMENT

On Friday, February 22, 2013, twelve parties served testimony from more than twenty-five individual witnesses, consisting of thousands of pages of statements and supporting exhibits.

[17] Commission Rule 13.6(a).

The current procedural schedule gives California American Water two weeks to respond to this material.[18] Under these circumstances, time is of the essence, since the ruling on this Motion will determine to what extent California American Water must respond to Mr. Lowrey's testimony. Not only is California American Water operating under severe time constraints, but, as discussed above, it would also be necessary for California American Water to identify an attorney to rebut Mr. Lowrey's legal conclusions. This presents its own challenges, since California American Water is not generally in the practice of using attorneys as witnesses.

California American Water therefore respectfully requests a ruling on this Motion by Friday, March 1, 2013. The Commission's Rules of Practice and Procedure allow the Commission or an Administrative Law Judge to rule on a motion before responses are filed.[19] Nonetheless, to the extent that the assigned Administrative Law Judge wishes to provide an opportunity for responses to this Motion, California American Water requests that all such responses be filed by Thursday, February 28, 2013. This expedited schedule is necessary to provide California American Water with sufficient time to respond to Mr. Lowrey's testimony, if necessary, while avoiding spending time and resources responding to Mr. Lowrey that could be allocated elsewhere if the Motion is granted.

VI. CONCLUSION

MCWD is attempting to enter into evidence a legal brief disguised as testimony. This abuse of the established process should not be condoned. For the reasons stated above, California American Water request that the portions of Mr. Lowrey's testimony identified in Appendix A and Appendix B be stricken from the record.

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[18] *Administrative Law Judge's Directives to Applicant and Ruling on Motions Concerning Scope, Schedule and Official Notice*, filed August 29, 2012, p. 9.
[19] Commission Rule 11.1(g).

February 26, 2013

Respectfully submitted,

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By: */s/ Lori Anne Dolqueist*
Lori Anne Dolqueist

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California-American Water Company

Appendix A

Testimony to Be Stricken – Water Rights Law

Lowrey Testimony p. 5, lines 1-15

Q18. What statutory authority does MCWD have to provide water and sewer services?

A18. MCWD is authorized to provide such services by the County Water District Law, Division 12 of the California Water Code, sections 30000 through 33901.

Q19. Does MCWD have authority to cooperate and enter into agreements with other public entities and private entities?

A19. Yes. MCWD has authority under Water Code section 31001 to perform all acts necessary to carry out fully the provisions of the County Water District Law. MCWD has more specific authority under Water Code sections 31048 and 31049 to cooperate with other agencies and to contract with public agencies and any public or private corporation of any kind, and persons. As a public entity, MCWD may obtain a permit for a desalination facility, in compliance with Chapter 10.72 of the Monterey County Code. As a public agency, MCWD also has authority under other provisions of law, including Government Code sections 5956 and following, relating to infrastructure financing.

Lowrey Testimony, p. 6, lines 5-12

Q23. What is MCWD's statutory authority for the rights that it seeks to protect?

A23. MCWD has the statutory authority discussed earlier in this testimony. For example, Water Code section 31042 gives MCWD the power to construct, purchase, lease or otherwise acquire works, water rights, land, rights, and privileges useful or necessary to convey, supply, store, or otherwise make use of water for any purposes authorized by the County Water District Law. For example, under Water Code section 31041, MCWD may acquire property within or without the district necessary to the full exercise of its powers.

Lowrey Testimony, p. 7, line 5 – p. 8, line 9

Q25. What water rights does MCWD have in the Salinas River Groundwater Basin, which is also sometimes referred to as the Salinas Valley Groundwater Basin?

A25. Under decisions by California courts, notably Katz v. Walkinshaw (1903) 141 Cal. 116, City of Pasadena v. City of Alhambra (1949) 33 Cal. 2d 908 and Barstow v. Mojave Water Agency (2000) 23 Cal. 4th 1224, a person or entity like MCWD pumping groundwater from a basin to supply that water for use on property owned by other persons or for use on property outside of the basin is deemed to be an appropriator. MCWD is an overlying user to the extent it uses water on property owned by MCWD.

Appropriators include virtually all cities, municipal water companies and public districts involved in the function of supplying water to homes and businesses. An appropriator only may pump groundwater which is useable for municipal, industrial or agricultural use if such water is available within the basin's safe yield and is surplus to the demands of water producers who pump water from land overlying the groundwater basin which they own and who put that water to beneficial use on their land overlying the basin (overlyers). Safe yield is the quantification of the amount of water available annually to be produced for beneficial uses and is the maximum amount of water that can be withdrawn from a groundwater basin on an annual basis without causing an undesirable result. Pumping in excess of safe yield results in overdraft of the basin. If an appropriator pumps non-surplus groundwater from a basin, the appropriator is trespassing against the rights of water producers who pump water from land overlying the groundwater basin which they own who put that water to beneficial use on their land overlying the basin, and in such circumstances the appropriator may be enjoined by Court order. An appropriator's open and invasive production of useable, nonsurplus groundwater for five consecutive years may convert his appropriative right to a prescriptive right as against overlying rights not dedicated to a public use by a public utility or dedicated to or owned by the state or any public entity.

Thus, if the Salinas River Groundwater Basin is and has been in overdraft, under the principles cited above MCWD has prescriptive rights based on its pumping from the Basin since its inception in the 1960's for Marina area lands and the Former Fort Ord area now served by MCWD.

Lowrey Testimony p. 13, lines 19-26

2. **Protection of Existing Users' Rights in the Salinas River Groundwater Basin**. As a holder of water rights in the Salinas River Groundwater Basin (see Exhibits MCD-2, MCD-5, MCD-6, MCD-7, MCD-9 and MCD-15), MCWD is concerned that, notwithstanding the draft staff report of the State Water Resources Control Board, operation of the MPWSP as proposed could result in additional withdrawals of groundwater from the basin which would constitute an illegal appropriation to the detriment of other users. The CPUC should not approve a project or an alternative that fails to protect existing users from any such illegal appropriation.

Lowrey Testimony p. 14, lines 1-5

...therefore, MCWD believes that Cal-Am does not have any prescriptive rights to pump water for Salinas River Groundwater Basin uses, much less a right to export any groundwater for use outside of the basin. The Monterey County Water Resources Agency Act prohibits groundwater exportation from the basin. (Water Code App., §§52-8, 52-9(u), 52-21.)

Appendix B

Testimony to Be Stricken – Water Rights and Contractual Terms

Lowrey Testimony p. 6, lines 17-19

That agreement commits MRWPCA to provide 12.7 mgd of "firm" senior outfall capacity for use by MCWD for a period of 34 years, and is subject to subsequent renewal.

Lowrey Testimony p. 8, lines 23-27

Q26. What right does MCWD have to use water from the Salinas River Groundwater Basin?

A26. In addition to prescriptive, statutory and overlying rights discussed elsewhere in this testimony, MCWD has contractual rights to use water from the Salinas River Groundwater Basin...

Lowrey Testimony p. 9, lines 4-10

This agreement sets forth MCWD's pumping rights in the Salinas River Groundwater Basin, including rights from its own prior use and its rights related to the Lonestar and Armstrong properties. The agreement also sets forth MCWD's existing rights of up to 9,350 acre-feet per year (AFY) of groundwater, based on its maximum capacity upon entry into the Annexation Agreement and Groundwater Mitigation Framework for Marina Area Lands.

Lowrey Testimony p. 9, lines 16-17

This agreement gives the former Fort Ord the right to Salinas River Groundwater Basin water from the Nacimiento and San Antonio reservoirs.

Lowrey Testimony p. 10, lines 4-7

The Agreement documents the United States Government's rights to withdraw up to 6,600 AFY, and its intent to transfer those rights to MCWD, subject to a retention for the Government's exclusive use of a specified quantity of water.

Lowrey Testimony p. 14, line 12 – p. 15, line 1

The March 1996 Annexation Agreement and Groundwater Mitigation Framework for Marina Area Lands (Exhibit MCD-6) limits pumping on that property to 500 AFY, all of which may be used only within the Salinas River Groundwater Basin. That Agreement also provides for annexation of the property into the MCWRA zones of benefit for the Nacimiento and San Antonio reservoirs after the property has been approved for prior or concurrent annexation into MCWD. After the property has been annexed to the zones, water withdrawn from the Basin may be used only to provide water to the property.

The purpose of the March 1996 Agreement (Exhibit MCD-6) is to help reduce seawater intrusion and protect the groundwater resource and preserve the environment of the Salinas River Groundwater basin, and to provide for the annexation of certain territory in the Marina area to the MCWRA's assessment zones as a financing mechanism providing additional revenues to the MCWRA to manage and protect the groundwater resource in the Salinas River Groundwater Basin and to reduce seawater intrusion. The parties to the March 1996 Agreement agreed that a coordinated and centralized water supply for the Marina Area will facilitate management and protection of the groundwater resource in the Marina Area.