BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

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Application of California-American Water Company (U 210 W) to Decrease Revenues for Water Service in its Coronado District by ($73,100) or (0.46%) in 2008 and Increase Revenues by $266,200 or 1.67% in 2009 and $260,900 or 1.61% in 2010	A.07-01-036
Application of California-American Water Company (U 210 W) to Increase Revenues for Water Service in its Larkfield District by $1,272,000 or 61.91% in 2008, $134,300 or 3.94% in 2009 and $129,900 or 3.67% in 2010 Under the Current Rate Design or Decrease Revenues by ($742,200) or (36.12%) in 2008 and Increase Revenues by $50,000 or 3.72% in 2009 and $63,500 or 4.55% in 2010 Under the Proposed Rate Design	A.07-01-037
Application of California-American Water Company (U 210 W) to Increase Revenues for Water Service in its Sacramento District by $8,966,900 or 33.89% in 2008, $1,905,700 or 5.36% in 2009, and $1,860,700 or 4.97% in 2010 Under the Current Rate Design or by $10,981,000 or 41.50% in 2008, $1,925,900 or 5.11% in 2009, and $1,845,600 or 4.66% in 2010 Under the Proposed Rate Design	A.07-01-038
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AMENDED VERSION OF CALIFORNIA-AMERICAN WATER COMPANY'S CONSOLIDATED REPLY TO THE RESPONSES OF THE MARK WEST AREA COMMUNITY SERVICES COMMITTEE TO THE MOTION TO STRIKE THE OPENING BRIEF AND THE MOTION TO STRIKE THE REPLY BRIEF

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July 30, 2007

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of California-American Water Company (U 210 W) to Decrease Revenues for Water Service in its Coronado District by ($73,100) or (0.46%) in 2008 and Increase Revenues by $266,200 or 1.67% in 2009 and $260,900 or 1.61% in 2010	A.07-01-036
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I. INTRODUCTION

In accordance with Rules 1.12 and 11.1 of the Commission's Rules of Practice and Procedure ("Rules") and the permission of Administrative Law Judge Linda Rochester granted telephonically,[1] California-American Water Company ("California American Water")

[1] On July 30, 2007, Administrative Law Judge (ALJ) Linda Rochester telephonically granted California American Water's request to file this amended version of the Consolidated Reply to the Responses of the Mark West Area Community Services Committee to the Motion to Strike the Opening Brief and the Motion to Strike the Reply Brief. ALJ Rochester granted California American Water leave to file a reply to the July 17th Response on Tuesday, July 17, 2007 at approximately 5:00 p.m. On Tuesday, July 24, 2007 at approximately 9:30 a.m., ALJ Rochester also

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hereby files this amended version of the consolidated reply to the *Response of Mark West Area Community Services Committee (MWACSC) to the Motion to Strike the Opening Brief of MWACSC* (filed July 17, 2007) ("July 17th Response") and MWACSC's *Response to the Motion to Strike the Reply Brief of MWACSC* (filed July 20, 2007) ("July 20th Response"). As set forth in California American Water's *Motion to Strike the Opening Brief of MWACSC* and *Motion to Strike the Reply Brief of MWACSC*, MWACSC's Briefs are procedurally improper, contravene the Commission's procedural rules and practice, improperly attempt to introduce new information into the record, and rely upon opinions rather than the facts in the proceeding. As such, the MWACSC Briefs should be stricken in their entirety.

In both its July 17th Response and July 20th Response, MWACSC alleges that California American Water (1) made false statements for the purpose of concealing information in the proceeding; (2) asked the Commission to ignore evidence concerning the safety of the design and construction of the North Wikiup Tank No. 2; and (3) mischaracterized the number of settlement meetings that took place between California American Water, DRA and MWACSC. These claims have absolutely no merit. Even though MWACSC is not represented by counsel in this proceeding, the Commission must apply the Rules of Practice and Procedure evenhandedly, particularly when MWACSC has repeatedly violated the same Commission Rules in this proceeding. There is no reason to allow MWACSC to disregard the Commission's procedure and practice for submitting evidence in a proceeding. Moreover, MWACSC's Opening Brief and Reply Brief contribute little to the case and only confuse the record in the proceeding.

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telephonically granted California American Water leave to file a consolidated reply responding to both the July 17th Response and July 20th Response.

MWACSC's blatant disregard for the Commission's procedural rules in this proceeding has forced the Commission and the other parties to repeatedly and unnecessarily expend resources in addressing MWACSC's multiple offenses. MWACSC's efforts in this proceeding will have the consequence of driving up rates for customers and work at cross purposes to the interests of Larkfield District customers and should not be tolerated by the Commission.

II. DISCUSSION

MWACSC has failed to show that the offending portions of its Briefs should not be stricken. As discussed in more detail below, MWACSC's Responses are riddled with inaccuracies, contain a multitude of serious accusations with no supporting facts, and are plagued with misunderstandings of Commission law and practice. Moreover, when stating facts, MWACSC either misstates actual facts on the record or fails to reference supporting evidence. Without any evidentiary support, MWACSC continues to make baseless allegations regarding the settlement process utilized by DRA and California American Water in this proceeding and the safety of the design and construction of California American Water's North Wikiup Tank No. 2. The Commission should disregard these baseless contentions and strike MWACSC's Opening and Reply Briefs as procedurally improper. California American Water takes the opportunity of this Consolidated Reply to address the baseless allegations, errors and omissions, and gross mischaracterizations in MWACSC's Responses.

A. The Commission Should Strike the MWACSC Briefs as Procedurally Improper.

Without any rational explanation, MWACSC claims that California American Water's objection to the MWACSC Briefs is an attempt to conceal facts in the proceeding.[2] This is simply untrue. The Commission cannot bend the rules for MWACSC to allow it to introduce new testimony at this late phase of the proceeding when parties are unable to respond to MWACSC's new factual claims. MWACSC should not be allowed to introduce information and opinions that amount to nothing more than speculation and conjecture. Additionally, MWACSC should not be allowed to violate the Commission rules prohibiting the disclosure the communications of its settlement negotiations simply because DRA and California American Water successfully reached a settlement agreement. Disclosing the communications of any party participating in a settlement negotiation would provide a strong disincentive for utilities to vigorously pursue settlement discussions because of the risk that such communications would later be disclosed.

1. MWACSC Has Failed to Provide Any Justification to Introduce New Information.

MWACSC fails to rebut that its Opening Brief and Reply Brief are improper attempts to introduce information that is not part of the record and should therefore be stricken. By way of example, MWACSC does not dispute that its recalculations to California American Water's water supply analyses in the MWACSC Opening Brief are not part of the record. Similarly, MWACSC does not dispute that its Reply Brief injects new factual claims regarding

[2] July 17th Response, p. 3; July 20th Response, p. 11.

those recalculations.[3] MWACSC does not dispute that its proposed modifications to California American Water's 2004 Operations Plan for California American Water's four current wells in the Larkfield District are not part of the record. Nor does MWACSC dispute that California American Water has had no opportunity to test this information through cross-examination. A post-hearing brief is not the proper forum to introduce untested factual claims. The Commission should strike these portions of the Opening and Reply Briefs, particularly in light of the fact that MWACSC had the opportunity to present evidence during the evidentiary hearings and chose not to do so.

While MWACSC is candid in acknowledging that it has introduced new information that is not part of the record,[4] MWACSC provides no persuasive arguments why it should be free to introduce such information into the record at this late juncture. For example, in its July 17th Response, MWACSC wrongly claims that new evidence regarding the type and quality of construction of houses in Larkfield should be admitted because it "falls under the provisions of Section 452, Permissive Judicial Notice, of the California Evidence Code." This claim is incorrect. The Commission cannot take judicial notice of information that is not "of such common knowledge … that they cannot reasonably be the subject of dispute," as required by California Evidence Code § 452(g). It would be inappropriate for the Commission to take judicial notice of MWACSC's disputed conclusions that the type and quality of construction of houses in Larkfield would produce "better than average results" in water conservation.[5]

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[3] *See* Motion to Strike the MWACSC Reply Brief, pp. 3-4.

[4] *See e.g.,* July 17th Response, p. 6 (arguing that the Commission should take judicial notice of MWACSC's statements concerning the quality of homes in Larkfield).

[5] MWACSC Opening Brief, p. 10 (describing the type and quality of houses in Larkfield to conclude that "a good conservation program has the potential of producing better than average results in Larkfield.").

MWACSC's contentions are based upon opinions that can reasonably be the subject of dispute and thus cannot be the object of judicial notice.

In its July 20th Response, MWACSC contends that it has proven that California American Water's water supply analysis should be recalculated utilizing a different factor than what was used by California American Water. Not only has MWACSC failed to provide such proof, but its argument misses the point. The Commission should not accept untested information that would enable MWACSC to avoid having to substantiate its claims.

MWACSC argues that the California American Water is trying to hide the amount of water to be treated and the capacity of the treatment plant record to justify the Larkfield Water Treatment Plant Improvements. The fact of the matter is that California American Water has demonstrated that the production improvements are necessary to insure that 1,200 gallons per minute of treatment capacity is available and adequate to meet the current and future well capacity. MWACSC's contention that the purchased water from the Sonoma County Water Agency does not pass through the treatment plant is irrelevant.[6] Neither the testimony of Mr. Andrew Soule nor the Coastland Engineering Report introduced by MWACSC provides evidence of MWACSC's claim.

2. The Commission Should Strike MWACSC's "Non-Expert" Opinions and Speculation.

MWACSC appears to believe that its witness, who has testified that he has no professional experience with water projects, is qualified to opine on California American Water's technical water planning analysis, the construction and design of the North Wikiup Tank

[6] July 17th Response, pp. 6-7.

No. 2, the operation and pumping capacity of California American Water's wells and other complex technical issues addressed by experts retained by California American Water in this proceeding.

MWACSC wants it both ways. On the one hand, MWACSC states that its witness, Mr. James Bouler, has not rendered any expert opinions, and on the other hand, it asserts that Mr. Bouler is qualified to provide opinions as an engineer licensed in the State of California on water supply issues. MWACSC claims that its witness "has not held himself out to be 'Expert' on any subject,"[7] yet MWACSC contends that Mr. Bouler is qualified to assess California American Water's technical water supply analysis and planning because "Water Supply" is one of the areas in which a Civil Engineer could specialize. In reality, MWACSC is attempting to provide expert opinions by a non-expert who has no experience in water supply planning and as such, they should not be given any weight in this proceeding. Furthermore, Mr. Bouler testified at the evidentiary hearing that he had no professional experience that would qualify him to testify about water projects.[8]

Even though MWACSC's witness showed no qualifications whatsoever to be deemed an expert on the effects of water conservation efforts on the Larkfield District water supply deficit, MWACSC insists that the water supply deficit can be "significantly reduced or eliminated through conservation."[9] MWACSC's claim that the Annual and Overall Water Savings Analysis provides evidence that the water deficit can be eliminated through conservation efforts is belied by the fact that the estimates contained in that analysis cannot be relied upon for

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[7] July 20th Response, p. 4.

[8] RT 521:25-522:9 (Bouler/MWACSC).

water supply purposes because such estimates are **not reasonably accurate**.[10] The record amply demonstrates that the Larkfield District faces complicated water production issues, that water conservation does not generally reduce water supply needs during peak water demand periods, that it would be imprudent and impossible for California American Water to rely upon conservation to address the existing deficit, and that the development of a new well supply requested in this proceeding is warranted.[11] In sum, the opinions rendered by MWACSC's non-expert witness regarding California American Water's technical water planning and supply issues have no value in this proceeding and should be stricken.

In its July 17th Response, MWACSC claims for the first time that its opinions regarding the North Wikiup Tank No. 2 are based upon MWACSC's consultation with Mr. Peter J. Lescure, a civil engineer. In the July 20th Response MWACSC repeats many of the same arguments contained in the July 17th Response. In addition to the fact that MWACSC is again improperly attempting to introduce new information into the record, the opinions in the Briefs on the North Wikiup Tank No. 2 should be disregarded in their entirety because Mr. Lescure was never identified as a witness sponsoring MWACSC's testimony and was never made available for cross-examination. Moreover, there is no support for MWACSC's contention that a lay person should opine on the complex seismic and environmental issues involved in the construction and design of North Wikiup Tank No. 2.

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[9] July 17th Response, p. 9.

[10] California American Water Opening Brief, pp. 58-59.

[11] California American Water Opening Brief, pp. 58-59.

B. The Commission Must Not Tolerate MWACSC's Blatant and Unlawful Disclosure of Confidential Settlement Communications.

Curiously, in its responses MWACSC does not dispute that it has disclosed confidential settlement communications in its briefs. Rather, MWACSC claims only that the confidential treatment of the settlement negotiations should not "endure[] forever."[12] While MWACSC correctly references the Commission's Rules of Practice and Procedure which strictly prohibits the introduction of evidence concerning a party's communications made in connection with a settlement negotiation, MWACSC appears to believe that it can disclose the substance of confidential settlement negotiations so long as an agreement is later reached between the parties. Again, MWACSC is incorrect. MWACSC's disclosure of the substance of the settlement negotiations between DRA, California American Water and MWACSC in this proceeding undermines the very purpose of settlement and the integral role that confidentiality plays in the settlement process. MWACSC's attempt to introduce information discussed in the prior settlement negotiations regarding the North Wikiup Tank No. 2 is wholly improper.

Similarly, MWACSC's disclosure of prior settlement communications regarding the conservation program is improper and should not be tolerated. MWACSC incorrectly cites Rule 12.5 for the proposition that the settlement position, voluntarily accepted by California American Water in the prior rate case, should be relevant in <u>this</u> proceeding. Rule 12.5 expressly states that the adoption of a settlement "does not constitute approval of, or precedent regarding, any principle or issue in the proceeding <u>or in any future proceeding</u>."[13]

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[12] July 17th Response, p. 5.

[13] Rule 12.5 (emphasis added).

C. The Commission Should Disregard MWACSC's Misleading and Unfounded Accusations.

1. MWACSC's Baseless Allegations Regarding the Design and Construction of the North Wikiup Tank No. 2 are Not Supported by the Record.

Without any supporting evidence, MWACSC contends that the Commission should launch an investigation to determine whether the North Wikiup Tank No. 2 is "safe as constructed."[14] MWACSC's criticism is nothing more than alarmist second-guessing of California American Water's design and construction of the tank. The Commission should wholly disregard MWACSC's baseless allegations regarding the safety of the North Wikiup Tank No. 2.

MWACSC further alleges that California American Water received and ignored warnings about the construction of the North Wikiup Tank No. 2 at the current location. MWACSC has grossly distorted the facts. Rather than ignoring the seismic condition of the existing site, as MWACSC alleges, California American Water took precautions above and beyond what was required under the most current engineering standards, including the investment of significant resources to assure that any risks associated with a seismic event at the North Wikiup Tank site were appropriately mitigated.[15] For instance, California American Water undertook a geotechnical investigation, performed a seismic shaking hazard analysis and took a number of measures to ensure that the design and construction were adequate to handle the seismic loading that the structure might experience on the site. Furthermore, the new tank

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[14] July 17th Response, p. 11.

[15] *See e.g.,* California American Water Reply Brief, pp. 56-59.

presently under construction is located at the site of the existing North Wikiup tank, which has been in operation for twenty years.

Additionally, MWACSC's alarmist concerns are belied by the tank failure analysis prepared by RBF at the request of California American Water.[16] This report provides additional assurances that even if both tanks failed due to catastrophic events (e.g., a large earthquake), the downstream properties would not be damaged by the tank failures.[17]

2. The Settlement Process Utilized by DRA and California American Water Was Entirely Consistent with the Commission's Settlement Practices Policy of Encouraging Settlement Between the Parties.

The settlement process utilized by DRA and California American Water was entirely consistent with the Commission's requirements for settlements. Rule 12.1 governs the requirements for settlement conferences and requires only that the settling parties (DRA and California American Water) "convene at least one conference with notice and opportunity to participate provided to all parties for the purpose of discussing settlements in the proceeding." DRA and California American Water met this requirement by meeting with MWACSC on May 25, 2007. Notice of the May 25th settlement meeting was provided to MWACSC and all other parties in the *Scoping Memo and Ruling of Assigned Commissioner and Administrative Law Judge*, issued on April 11, 2007, well in advance of the settlement meeting. In fact, over the course of the proceeding, DRA and California American Water held three separate settlement meetings attended by MWACSC, including the formal settlement meeting on May 25, 2007. MWACSC was provided advance notice of each of these three settlement meetings by email or

[16] Exh. 17, Rebuttal Testimony of Thomas Glover, P.E., p. 32.

[17] Exh. 17, Rebuttal Testimony of Thomas Glover, P.E., Att. G (May 14th Technical Memorandum from Paul Hegedus, RBF Consulting, to Jeff Szytal, California American Water.).

telephone. Moreover, California American Water and DRA made overt efforts to engage all parties, including MWACSC, in settlement discussions.

In its unfounded criticism of DRA's and California American Water's settlement process, MWACSC contends that it was excluded from the settlement process even though it recognizes in its Responses that it attended multiple settlement meetings. Although MWACSC now claims that it was dissatisfied with the settlement negotiations attended by its representatives on May 24, 2007, MWACSC does not dispute that it was provided ample opportunity to pursue good faith settlement discussions with the parties. MWACSC incorrectly contends that it was not notified of the final arrangements of the settlement conference on June 11, 2007, when in fact the meeting was scheduled to accommodate the schedule of MWACSC's representatives and in fact, its representatives attended the settlement conference on June 11, 2007 via teleconference. In any event, MWACSC's representatives had the contact information for each of the parties to the proceeding and could have initiated further negotiations with California American Water or DRA at any point in this proceeding and chose not to do so.

The settlement process utilized by DRA and California American Water was entirely consistent with the Commission's policy of encouraging settlements as an efficient use of parties' time and resources. MWACSC has no basis to argue that it was prejudiced because it was not involved in every settlement meeting that took place between California American Water and DRA. While it complains that DRA and California American Water met without representatives, MWACSC ignores the fact that it has an interest in only <u>one</u> of the <u>four</u> California American Water districts at issue in this proceeding. DRA and California American Water would naturally have held meetings regarding the Sacramento, Village and Coronado Districts that would not require MWACSC's attendance. It would be impractical to include

MWACSC in every settlement conversation and reach a reasoned settlement on many issues in this full proceeding. MWACSC and all parties were invited to participate in multiple settlement discussions relating to the Larkfield District, and MWACSC itself acknowledges that it participated in multiple meetings. Furthermore, MWACSC has been provided an opportunity to review the Settlement Agreement and has filed comments. MWACSC's suggestion that it was excluded from the settlement process or that "no negotiations took place" is completely without merit.

III. CONCLUSION

As discussed above, MWACSC's Responses are riddled with inaccuracies and misstatements of fact. The Commission should ignore MWACSC's Responses and grant California American Water's request to strike the MWACSC Briefs in their entirety.

Dated: July 30, 2007

Respectfully submitted,

By: *s/ Sarah E. Leeper*
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PROOF OF SERVICE

I, Michelle Chavez, declare as follows:

I am employed in the City and County of San Francisco, California. I am over the age of eighteen years and not a party to this action. My business address is STEEFEL, LEVITT & WEISS, One Embarcadero Center, 30th Floor, San Francisco, California 94111-3719. On July 30, 2007, I served the within:

Amended Version of California-American Water Company's Consolidated Reply to the Responses of The Mark West Area Community Services Committee to the Motion to Strike the Opening Brief and the Motion to Strike the Reply Brief

on the interested parties in this action addressed as follows:

See attached service list

☒ **(BY ELECTRONIC SERVICE)** By transmitting an electronic notice of the availability of such document(s) on a FTP (file transfer protocol) site electronically from Steefel, Levitt & Weiss, San Francisco, California, to the electronic mail addresses listed below. I am readily familiar with the practices of Steefel, Levitt & Weiss for transmitting electronic mail. Said practice also complies with Rule 1.10 of the Public Utilities Commission of the State of California and all protocols described therein.

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on July 30, 2007, at San Francisco, California.

/s/ *Michelle Chavez*

Michelle Chavez

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A. 07-01-036, A. 07-01-037, A. 07-01-038, A. 07-01-039
Updated 05/09/07

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