

BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF CALIFORNIA



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Application of Great Oaks Water Company (U162W) for Authority to Establish its Authorized Cost of Capital Pursuant to the Rate Case Plan for Water Utilities.

A.09-05-007  
(Filed May 4, 2009)

**RESPONSE OF THE DIVISION OF RATEPAYER ADVOCATES  
TO GREAT OAKS WATER COMPANY'S MOTION TO STRIKE THE  
WRITTEN TESTIMONY OF RAYMOND CHARVEZ**

**I. INTRODUCTION**

Pursuant to Rule 11.1(e) of the California Public Utilities Commission's ("Commission") Rules of Practice and Procedures ("Rules") and the direction given by presiding Administrative Law Judge ("ALJ") Long, the Division of Ratepayer Advocates ("DRA") files this response to Great Oaks Water Company's ("Great Oaks") motion to strike the written testimony of Raymond Charvez on behalf of DRA on Cost of Capital for Great Oaks.

Great Oaks' motion to strike the entirety of Mr. Charvez's written testimony mischaracterizes DRA's testimony and seeks to bar DRA from making a cost of capital recommendation based on the traditional approach the Commission uses to determine the rate of return for all Class A water companies, i.e., setting a return on equity.<sup>1</sup> Moreover, Great Oaks' motion to strike the entirety of DRA's written testimony is frivolous, without merit and should be denied. The Company relies on the Evidence Code as the sole

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<sup>1</sup> Great Oaks' testimony consists of a request that the Commission embrace its proposed 'rate of margin methodology' to determine the company's rate of return which the Commission uses for non-Class A water. As such, Great Oaks has failed to submit a cost of capital application for a Class A water company and to include anything in the record that the Commission can evaluate to establish Great Oaks' return on equity.

authority to support its motion to strike. Great Oaks requests that the entirety of Mr. Charvez's prepared written testimony be stricken from the record without citing Commission precedent or authority to support the notion that the Evidence rules are strictly applied in the Commission's administrative hearings. The Company attempts to support its motion to strike on three grounds.<sup>2</sup> DRA addresses each one separately below.

**I. GREAT OAKS' MOTION TO STRIKE SHOULD BE DENIED BECAUSE MR. CHARVEZ'S WRITTEN TESTIMONY IS NOT BARRED BY THE HEARSAY RULE**

The Commission has stated that "hearsay is admissible in an administrative hearing and may be relied upon if supported by other credible evidence."<sup>3</sup> Regardless of its possible inadmissibility in court trials, "hearsay evidence is admissible in Commission proceedings."<sup>4</sup> Furthermore, the Commission has ruled that the technical rules of evidence, such as the hearsay rule, need not to be applied in Commission proceedings.<sup>5</sup> Public Utilities Code § 1701 (a) provides that "the technical rules of evidence need not be applied" in "any hearings, investigations, and proceedings" before the Commission.<sup>6</sup> Similarly, the Commission Rules of Practice and Procedure ("Rule") 13.6(a) provides that "technical rules of evidence ordinarily need not be applied in hearings before the Commission" provided "the substantial rights of the parties shall be preserved."<sup>7</sup>

In light of statutory law, the Commission's decisions and rules, the Commission has more latitude to consider hearsay evidence than trial courts. The Commission allows hearsay evidence if a responsible person would rely upon it in the conduct of serious affairs.<sup>8</sup> If the evidence is objectionable on the grounds of hearsay, the Commission

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<sup>2</sup> See Great Oaks Water Company Motion to Strike the Written Testimony of Raymond Charvez ("Great Oaks' Motion"), filed on February 1, 2010.

<sup>3</sup> In re Landmark Communications, Inc., (1999) 84 CPUC 2d 698, 1999 Cal. PUC LEXIS 137, 7 [D.99-01-029] *citing* In re North Shuttle Service, Inc., (1998) 80 CPUC2d 223, 1998 Cal. PUC LEXIS 348 [D.98-05-019].

<sup>4</sup> *Id.* at 7-8.

<sup>5</sup> *Id.* at 8.

<sup>6</sup> Public Utilities Code § 1701(a) (2009).

<sup>7</sup> California Public Utilities Commission Rules of Practice and Procedure ("Rules") 13.6 (August 2009).

<sup>8</sup> D.99-01-029 *citing* D.98-05-019, 1998 Cal. PUC LEXIS 348, 18.

weighs it accordingly when all of the evidence in the case is reviewed.<sup>9</sup> Hence, for the reasons explained below, ALJ Long should deny Great Oaks' motion to strike and instead determine the weight of the contents in DRA's written testimony after considering all of the evidence.

**A. The Recommendations In Mr. Charvez's Written Testimony Are Based On Mr. Charvez's Analysis And Are Not Solely Based On Dr. Woolridge's Draft**

Great Oaks argues that the entirety of Mr. Charvez's written testimony should be stricken on the grounds that it is either hearsay or based on hearsay. On pages 6 to 7, Great Oaks states as follows:

By Mr. Charvez' [sic] own admissions, the Charvez Written Testimony was not his own. First, it was drafted by Dr. Woolridge, and then it was reviewed and revised by Mr. Charvez, DRA's counsel, and Mr. Charvez' supervisor. The attachments to the Charvez Written Testimony – all the attachments – were prepared by Dr. Woolridge. Mr. Charvez did not perform the calculations that formed the basis of the Charvez Written Testimony. Some of the Charvez Written Testimony was even copied word-for-word from Dr. Woolridge's testimony in the prior cost of capital proceedings. As a result, all of the Charvez Written Testimony is either pure hearsay or based on hearsay and, therefore, inadmissible in this proceeding.<sup>10</sup>

Great Oaks's motion misrepresents what Mr. Charvez's actually stated during his cross-examination. Mr. Charvez never stated or represented that the testimony he submitted was not his own. There is no basis in the record to conclude that Mr. Charvez is not an author of DRA's testimony on cost of capital for Great Oaks and that Mr. Charvez's written testimony is "pure hearsay." During cross-examination, Mr. Charvez stated that he "was the manager in charge of the overview of this cost-of-capital report"<sup>11</sup> and that "he reviewed" and "made changes to the document."<sup>12</sup> The fact that DRA hired

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<sup>9</sup> *Id.* citing Veytsman v. Pacific Bell (1995) 61 CPUC 2d 25, 1995 Cal. PUC LEXIS 621, 8 [D.95-08-015].

<sup>10</sup> Great Oaks' Motion *supra* note 2 at 6-7.

<sup>11</sup> Reporter's Transcript (January 19, 2010), Great Oaks Water Company, Application 09-05-007 ("Transcript") at 168.

<sup>12</sup> Transcript at 169.

Dr. Randall Woolridge as a consultant to provide a draft<sup>13</sup> does not mean that Mr. Charvez did not develop DRA's written testimony and make the recommendations contained therein. In fact, as Great Oaks admits,<sup>14</sup> DRA's written testimony is not the original draft that Dr. Woolridge provided. Instead, DRA's written testimony is the product of changes and revisions made by Mr. Charvez to make recommendations that were specific for Great Oaks.<sup>15</sup> As Mr. Charvez stated during his cross-examination, this is a common procedure for filing DRA's report.<sup>16</sup> Therefore, Great Oaks's argument that Mr. Charvez's written testimony is not his own and is pure hearsay should be rejected.

Hearsay evidence is evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the matter.<sup>17</sup> In his written testimony, Mr. Charvez has recommended an imputed capital structure, cost of debt, and return on equity for Great Oaks that is based on his analysis and not solely based on Dr. Woolridge's draft. As such, Mr. Charvez's written recommendations are not hearsay. Furthermore, as discussed below, sections in Mr. Charvez's written testimony developed by Dr. Woolridge are not inadmissible hearsay because these sections have been relied upon by responsible persons in prior cost of capital proceedings. Therefore, Great Oaks' argument that Mr. Charvez's written testimony is based on inadmissible hearsay should be rejected.

**B. Hearsay Included In Mr. Charvez's Written Testimony Is Admissible And Should Be Relied Upon Because It Is Supported By Other Credible Evidence**

Great Oaks also argues that Mr. Charvez's written testimony is inadmissible hearsay because "Mr. Charvez did not perform the calculations that were the basis of the Charvez Written Testimony."<sup>18</sup> Furthermore, in its Motion, Great Oaks points out that

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<sup>13</sup> *Id.* at 168.

<sup>14</sup> Great Oaks' Motion *supra* note 2 at 3.

<sup>15</sup> Transcript *supra* note 11 at 169.

<sup>16</sup> *Id.*

<sup>17</sup> Cal. Evidence Code § 1200 (a) (2010).

<sup>18</sup> Great Oaks' Motion *supra* note 2 at 6.

“[a]s manager, Mr. Charvez provided Dr. Woolridge with Great Oaks’ cost of capital application and documentation and ‘asked him based on that do the review and determine what kind of return of equity and rate of return for Great Oaks would be.’”<sup>19</sup> Again, the fact that Dr. Woolridge prepared the original written draft and made calculations does not render DRA’s written testimony inadmissible hearsay. Instead, the test is whether any hearsay testimony included in Mr. Charvez’s written testimony can be relied upon because it is supported by other credible evidence.<sup>20</sup>

Great Oaks’s motion notes that Dr. Woolridge’s original written draft and calculations in this proceeding are based on his testimony on behalf of DRA for the consolidated cost of capital proceeding that involved five of the six small Class A water companies.<sup>21</sup> In that consolidated cost of capital proceeding, ALJ Long admitted into the record Dr. Woolridge’s testimony on behalf of DRA, including calculations and analysis of the Discounted Cash Flow (“DCF”) and Capital Asset Pricing Model (“CAPM”) analysis to recommend a return on equity for the other smaller Class A water companies.<sup>22</sup> Therefore, Dr. Woolridge’s previously admitted calculations that Mr. Charvez relied upon in his testimony in this proceeding are credible and admissible evidence.

Great Oaks also argues that “the attachment to Charvez Written Testimony...were prepared by Dr. Woolridge,” and “some” sections of the Charvez Written Testimony were “copied” “from Dr. Woolridge’ testimony in the prior cost of capital proceedings.”<sup>23</sup> However, as stated above, the Commission allows hearsay evidence if a responsible person would rely upon it in the conduct of serious affairs.<sup>24</sup> ALJ Long relied on Dr.

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<sup>19</sup> *Id.* at 3.

<sup>20</sup> *See* D.99-01-029.

<sup>21</sup> Transcript *supra* note 11 at 172-173.

<sup>22</sup> Reporter’s Transcript (filed August 28, 2009), San Jose Water Company Cost of Capital Application (“A.”)09-05-001, Valencia Water Company A.09-05-002, Park Water Company A.09-05-003, San Gabriel Valley Water Company A.09-05-004, and Suburban Water Systems A.09-05-005. *See also* Testimony of Dr. J. Randall Woolridge on Behalf of the Division of Ratepayer Advocates, Cost of Capital Applications A.09-05-001, A.09-05-002, A.09-05-003, A.09-05-004, and A.09-05-005, July 10, 2009.

<sup>23</sup> Great Oaks’ Motion *supra* note 2 at 6.

<sup>24</sup> *See* D.99-01-029.

Woolridge’s testimony on behalf of DRA in the proposed decision that resolved the consolidated cost of capital proceeding for the three large multi-district Class A water companies.<sup>25</sup> In fact, even Great Oaks recognizes the credibility of Dr. Woolridge’s calculations by seeking to include GO Exhibit 6, which are attachments from Dr. Woolridge’s testimony for the consolidated cost of capital proceeding for the five small water companies, into the record of Great Oaks’ cost of capital proceeding.<sup>26</sup> DRA notes that its intention has always been to apply the same cost of capital analysis to all California Class A water companies.<sup>27</sup> Given that Great Oaks is the only remaining Class A water company to undergo a cost of capital proceeding, DRA has used the same proxy group and the same DCF and CAPM analysis to determine a fair and reasonable return on equity for Great Oaks as it did for all other California Class A water companies.<sup>28</sup> As such, Mr. Charvez did not need to repeat the same exact analysis conducted in two prior consolidated cost of capital proceedings. Thus, the attachments and sections of Dr. Woolridge’s testimony that were included in Mr. Charvez’s written testimony are reliable and admissible evidence.

**C. Allowing Mr. Charvez’s Written Testimony Will Not Deny Great Oaks’ Substantial Rights In This Proceeding**

Great Oaks argues that “allowing [Mr. Charvez’s written testimony] would deny Great Oaks its substantial rights in this proceeding.”<sup>29</sup> However, Great Oaks provides nothing to support its contention that its rights have been prejudiced in this proceeding. In fact, the facts show the opposite. First, Great Oaks cross-examined Mr. Charvez, the sponsor and witness for DRA’s written report. Second, long before the scheduled hearing, Great Oaks knew that Mr. Charvez had relied on Dr. Woolridge’s testimony

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<sup>25</sup> Decision on Base Year 2009 Cost of Capital For the Three Large Multi-District Class A Water Utilities: California Water Service Company A.08-05-002, California American Water A.08-05-003, and Golden State Water Company A.08-05-004, 2009 Cal. PUC LEXIS 585 [Decision 09-05-019].

<sup>26</sup> Transcript *supra* note 11 at 183.

<sup>27</sup> Testimony of Raymond Charvez on behalf of the Division of Ratepayer Advocates on Cost of Capital for Great Oaks (December 9, 2009), Application 09-05-007 at 3, line 13 to 17. (“Mr. Charvez’s Written Testimony”).

<sup>28</sup> *Id.*

<sup>29</sup> Great Oaks’ Motion *supra* note 2 at 6.

regarding the consolidated cost of capital proceeding for the five small Class A water companies but failed to request that Mr. Woolridge be available for cross-examination. DRA notes that in Mr. Charvez's written testimony served on Great Oaks on December 9, 2009, Mr. Charvez stated that "I relied on the updated analysis performed by Dr. Woolridge, who was DRA's witness in the recent Class A California Water Utility cost of capital hearings."<sup>30</sup> Moreover, on January 11, 2010, DRA provided Great Oaks with Dr. Woolridge's testimony prepared for the last consolidated cost of capital proceeding.<sup>31</sup> As such, Great Oaks had ample opportunity to request that Dr. Woolridge be made available during hearing for cross-examination.

In its Motion, Great Oaks states that during the hearing, its counsel asked Mr. Charvez "if Dr. Woolridge was available to be cross-examined on the work Dr. Woolridge did that was involved in Mr. Charvez's testimony."<sup>32</sup> In response, DRA's counsel stated that Dr. Woolridge was not available for cross-examination and not necessary for this proceeding. This response was based on the fact that Great Oaks made no attempt to request that Dr. Woolridge be made available for cross-examination despite knowing for more than 40 days that Mr. Charvez had relied on Dr. Woolridge's work and despite having had a copy of Dr. Woolridge's testimony for more than a week. Throughout this time, Great Oaks could have sent DRA a data request requesting more information regarding Dr. Woolridge's involvement in DRA's testimony and could have requested that Dr. Woolridge be made available for cross examination. Great Oaks failed to make any such request. As such, Great Oaks' claim that its rights in this proceeding have been substantially denied lacks merit. Great Oaks' request is nothing more than a frivolous tactic to have DRA's written testimony stricken and should be denied.

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<sup>30</sup> Mr. Charvez's Written Testimony *supra* note 27 at 3.

<sup>31</sup> E-mail from Linda Barrera, DRA's Legal Counsel, to Mr. Tim Guster, Great Oaks Water Company's General Counsel (January 11, 2010, 12:43 PT) (on file with author).

<sup>32</sup> Great Oaks' Motion *supra* note 2 at 4.

## II. GREAT OAKS' MOTION TO STRIKE SHOULD BE DENIED BECAUSE GREAT OAKS FAILED TO PROPERLY OBJECT TO MR. CHARVEZ'S QUALIFICATION AS AN EXPERT WITNESS

Great Oaks argues that “despite being advised that a question existed regarding whether Mr. Charvez was being offered as an expert witness or a lay witness, no effort was made to qualify Mr. Charvez as an expert witness in any filed of experience relevant to this proceeding.”<sup>33</sup> Moreover, Great Oaks quotes Evidence Code § 720(a) regarding expert witnesses, but failed to include the entire text of this section of the evidence code. Evidence Code § 720(a) states:

A person is qualified to testify as an expert if he has the special knowledge, skill, experience, training, or education sufficient to qualify him as an expert on the subject to which his testimony relates. **Against the objection of a party, such special knowledge, skill, experience, training, or education must be shown before the witness may testify as an expert.** (Emphasis added).<sup>34</sup>

Furthermore, the court has held that foundation requirements for admission of expert testimony need not be established in the absence of **specific objection** or unless the court, in its discretion requires it.<sup>35</sup>

Great Oaks' motion to strike on the ground that Mr. Charvez was not an expert witness and that he was not qualified as an expert witness is based on the false premise that Great Oaks objected to Mr. Guster being presented as an expert. During the direct-examination of Mr. Charvez the following exchange took place between the parties:

Ms. Barrera (to Mr. Charvez): Do the opinions contained in your testimony represent your best professional judgment?

Mr. Charvez: Yes.

Mr. Guster: Objection, your Honor. I have a point of clarification. Is Mr. Charvez being presented as an expert witness or as a lay witness here? It relates to the question of whether he is entitled to give opinions.

ALJ Long: Interesting point.

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<sup>33</sup> *Id.*

<sup>34</sup> Cal. Evidence Code § 720(a) (2010).

<sup>35</sup> People v. Rodriguez (App. 5 Dist. 1969) 274 Cal.App.2d 770.

Ms. Barrera: He is our expert, your Honor.

ALJ Long: Fair enough.

Ms. Barrera: Mr. Charvez, do you adopt the exhibit as your sworn testimony in this proceeding?

Mr. Charvez: Yes, I do.

Ms. Barrera: Thank you. Your Honor, our witness is prepared for cross-examination.

ALJ Long: All right. Thank you. Mr. Guster.

CROSS EXAMINATION...<sup>36</sup>

As the transcript clearly shows, Great Oaks did not object to Mr. Charvez being presented as an expert witness **before** Mr. Charvez testified. Great Oaks' counsel merely objected to seek a clarification as to whether Mr. Charvez was presented as an expert witness or lay witness. After Mr. Charvez was presented as an expert witness, Great Oaks' counsel failed to lodge an objection requesting that Mr. Charvez's qualification be shown. Instead, Great Oaks' counsel presented his objection to Mr. Charvez's expert testimony at the conclusion of the hearing precluding DRA's opportunity to respond to this objection or request that Mr. Charvez detail all of his prior cost of capital experience during direct or redirect-examination. A question being raised regarding Mr. Charvez being offered as an expert witness is not the same as an objection to a witness' qualification as an expert witness. Therefore, Mr. Charvez's written testimony is admissible and should be considered because Great Oaks failed to request that further expert qualification be shown.

Mr. Charvez's written testimony sets forth his many years of experience working as a Financial Examiner for the Commission and he indicated during the hearing that he was the manager who reviewed Great Oaks' cost of capital application.<sup>37</sup> Thus, Mr. Charvez's qualification as an expert was established prior to and during the hearing. If Great Oaks' had lodged a timely objection, Mr. Charvez would have more fully detailed his special knowledge, training, and experience in cost of capital analysis and

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<sup>36</sup> Transcript *supra* note 11 at 167-168.

<sup>37</sup> Id. at 168. See also Mr. Charvez's Written Testimony *supra* note 27 at 1.

proceedings. DRA would have shown that, during the nearly 40 years that Mr. Charvez has worked for the Commission, Mr. Charvez managed numerous cost of capital proceedings and develop cost of capital testimony, including writing the “first and original draft” for Golden State Water Company’s 2003 cost of capital proceeding. Furthermore, if Great Oaks’ had lodged a timely objection, Mr. Charvez would have explained that he has worked with Dr. Woolridge since 2008 to develop DRA’s analysis and recommendations in the consolidated proceedings for the three large water companies and the five smaller water companies in California. Because Great Oaks failed to lodge a timely objection, its claim that admitting Mr. Charvez’s testimony would “constitute an outright denial of Great Oaks rights” lacks any merit. As such, Great Oaks’ claim should be denied.

### **III. GREAT OAKS’ MOTION TO STRIKE SHOULD BE DENIED BECAUSE MR. CHARVEZ’S TESTIMONY IS BASED ON HIS PERSONAL KNOWLEDGE**

Great Oaks wrongly asserts that “[b]y his own admission, Mr. Charvez has no personal knowledge of the information contained in the Charvez Written Testimony.”<sup>38</sup> Contrary to Great Oaks contention, Mr. Charvez demonstrated throughout his cross-examination that he had personal knowledge of the contents contained in DRA’s written testimony. For example, Mr. Charvez stated that as the project manager of this cost of capital report, he reviewed, made changes to, and updated DRA’s written testimony.<sup>39</sup> For this reason, and the reasons explained above, Great Oaks assertion is absurd and without merit.

### **IV. CONCLUSION**

For the reasons stated above, DRA respectfully requests that Great Oaks’ motion to strike be denied and that Mr. Charvez written testimony be considered in its entirety.

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<sup>38</sup> Great Oaks’ Motion *supra* note 2 at 6.

<sup>39</sup> Transcript *supra* note 11 at 169.

Respectfully submitted,

/s/ LINDA BARRERA

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February 5, 2010

**CERTIFICATE OF SERVICE**

I hereby certify that I have this day served a copy of “**RESPONSE OF THE DIVISION OF RATEPAYER ADVOCATES TO GREAT OAKS WATER COMPANY’S MOTION TO STRIKE THE WRITTEN TESTIMONY OF RAYMOND CHARVEZ**” to the official service list in **A.09-05-007** by using the following service:

**E-Mail Service:** sending the entire document as an attachment to all known parties of record who provided electronic mail addresses.

**U.S. Mail Service:** mailing by first-class mail with postage prepaid to all known parties of record who did not provide electronic mail addresses.

Executed on **February 5, 2010** at San Francisco, California.

/s/ HALINA MARCINKOWSKI

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