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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN BERNARDINO

TOWN OF APPLE VALLEY, Plaintiff, v. APPLE VALLEY RANCHOS WATER COMPANY, et al, Defendants.	Case No. CIVDS1600180 Assigned for All Purposes to: Hon. Donald R. Alvarez Date: July 23, 2021 Time: 10:00 a.m. Dept: S23 Complaint Filed: January 7, 2016 Trial Date: October 22, 2019 to July 15, 2020

LIBERTY'S RESPONSE TO TOWN OF APPLE VALLEY'S OBJECTIONS TO TENTATIVE STATEMENT OF DECISION

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I. INTRODUCTION

By filing its 52-page Objections to the Court's Tentative Statement of Decision and Request for Findings and Statement of Decision, the Town of Apple Valley has made the record it deems appropriate. The Town, however, misconstrues the nature of a Statement of Decision and what does and does not need to be included in one. The Court need only address ***ultimate issues*** in its Statement of Decision, not ***evidentiary facts***. Following the lengthy 67-day bench trial at which the Court heard testimony from 31 witnesses and received into evidence more than 800 exhibits, the Court's 84-page Tentative Statement of Decision fully discloses its determination as to the ultimate facts and material issues in the case. Nothing more is required.

The Town's Objections include 105 questions lobbed at the Court. These all involve disputes over subsidiary evidentiary facts, and the law is clear that the Court's Statement of Decision need not address such disputes. If the law were otherwise, the Court's task following a trial like this one that consumed over 8,000 pages of transcript would be virtually endless. Similarly extraneous are the Town's repeated objections that passages of the Tentative Statement of Decision are "not supported by substantial evidence" or constitute "gross abuse of discretion." These objections lack merit and are of the type to be made to an appellate tribunal; the Town has adequately preserved its ability to do so if it pursues an appeal.

This was a lengthy and hard-fought trial. Liberty presented its evidence, and the Town presented conflicting evidence. Following extensive post-trial briefing and closing argument, the Court weighed the conflicting evidence, found Liberty's evidence sufficiently compelling to carry its burden of proof, and tentatively ruled in Liberty's favor. Aside from just a few minor typographic errors and one suggested addition relating to submission of a proposed judgment – set forth below – the Court's Tentative Statement of Decision does not deserve to be disturbed.

Liberty respectfully requests that the Court make only the minor changes requested below and issue its final Statement of Decision in accordance with the

Tentative Statement of Decision.

II. LIBERTY'S REQUESTED CHANGES

Liberty requests the following minor modifications to the Tentative Statement of Decision (TSOD):

1. TSOD p. 3 line 12: change citation from "1240.030, subd. (G)" to "1240.030, subd. (b)".

2. TSOD p. 83 line 26: change citation from "1240.030(G)" to "1240.030(b)".

3. TSOD p. 83 line 28: change citation from "1250.370(G)" to "1250.370(b)".

4. TSOD p. 84 line 5: add new final sentences to provide for entry of judgment:

> "Liberty is ordered to prepare and submit a proposed judgment/order of dismissal within 10 days. The Town shall file objections, if any, to the proposed judgment/order of dismissal within 10 days of its service."

III. NONE OF THE TOWN'S OBJECTIONS REQUIRE CHANGES TO THE TENTATIVE STATEMENT OF DECISION, WHICH FAR EXCEEDS THE REQUIREMENTS FOR A STATEMENT OF DECISION

The Town's Objections are presented under two primary headings: "Objections as Matter of Law" (Obj., p. 2:22), and other claimed defects in the content of the Tentative Statement of Decision (Obj., p. 22:10). The objections overlook the clear law regarding what is required in a Statement of Decision. Thus, while the Town has been afforded the chance to make the record it believes is appropriate, none of the Town's objections require that changes be made to the Tentative Statement of Decision.

As the Court explained in *Muzquiz v. City of Emeryville*, 79 Cal. App. 4th 1106, 1124-1125 (2000):

> A statement of decision need not address all the legal and factual issues raised by the parties. Instead, it need do no more than state the grounds

> upon which the judgment rests, without necessarily specifying the particular evidence considered by the trial court in reaching its decision. . . . . In other words, a trial court rendering a statement of decision is required only to set out ultimate findings rather than evidentiary ones.

Accord, In re Marriage of Williamson, 226 Cal. App. 4th 1303, 1318 (2014).

The Court in *Thompson v. Asimos*, 6 Cal. App. 5th 970, 983 (2016) collected other authorities and wrote:

> The court's statement of decision is sufficient if it fairly discloses the court's determination as to the ultimate facts and material issues in the case. When this rule is applied, the term "ultimate fact" generally refers to a core fact, such as an essential element of a claim. Ultimate facts are distinguished from evidentiary facts and from legal conclusions. Thus, a court is not expected to make findings with regard to detailed evidentiary facts or to make minute findings as to individual items of evidence. [Internal quotation marks and citations omitted.]

See also People v. Casa Blanca Convalescent Homes, Inc., 155 Cal. App. 3d 509, 524 (1984)[1] (a trial court's statement of decision "is required only to state ultimate facts rather than evidentiary facts."); *Altavion v. Konica Minolta Systems*, 226 Cal. App. 4th 26, 45 (2014) (statement of decision "is deemed adequate if it fairly discloses the determinations as to the ultimate facts and material issues in the case." [internal quotation marks omitted])

"Ultimate" facts or findings are those which are "an element of a claim or defense." *Almanor Lakeside Villa Owners Assn. v. Carson*, 246 Cal. App. 4th 761, 770 (2016). *See, e.g., Yield Dynamics, Inc. v. TEA Systems Corp.*, 154 Cal. App. 4th 547, 559 (2007) (in trade secret case, statement of decision adequately disclosed plaintiff's failure to prove independent economic value and injury); *Muzquiz*, 79 Cal. App. 4th at 1119 (in age

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[1] *Casa Blanca* was disapproved on other grounds in *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.*, 20 Cal. 4th 163, 184-185 (1999). However, its discussion of statements of decision remains good law and continues to be cited by cases subsequent to *Cel-Tech*. *See, e.g., Muzquiz*, 79 Cal. App. 4th at 1125; *In re Marriage of Williamson*, 226 Cal. App. 4th at 1318.

discrimination case, the "ultimate issue" was "whether [plaintiff] had borne her burden of proving that the City discriminated against her because of her age.")

In this eminent domain proceeding, Liberty objected to the Town's right to take the Apple Valley Water System. The Court's Tentative Statement of Decision (at p. 7) clearly sets forth the ultimate issues that needed to be determined:

> First. Do the public interest and necessity require the Town's Project? (Code Civ. Proc. §1240.030(a).)
>
> Second. Is the Town's Project planned in the manner that will be most compatible with the greatest public good and the least private injury? (Code Civ. Proc. §1240.030(b).)
>
> * * * *
>
> Fourth. Is the use for which the Town seeks to take Liberty's property a more necessary public use than the use to which Liberty's property is presently devoted? (Code Civ. Proc. §1240.610.)

The Tentative Statement of Decision goes leagues beyond the requirement of "fairly disclos[ing] the court's determination as to the ultimate facts and material issues in the case." The Tentative Statement of Decision provides the Court's analysis and ruling on each of the ultimate issues in great detail, *including* extensive citations to the record of evidence before the Court. The Court's analysis of the First and Fourth ultimate issues spans 57 pages (TSOD, at pp. 18:3 – 74:17) and its analysis of the Second ultimate issue spans 10 pages (TSOD, at pp. 74:20 – 83:17). While the Town naturally disagrees with the Court's disposition of these ultimate issues, it cannot be seriously doubted that the Court went far beyond the law's requirements for an adequate Statement of Decision. Nothing more is required.

The Town's Objections include a total of 105 different questions posed to the

Court.[2] The Court need not respond to the Town's barrage of questions. In *Casa Blanca*, the defendant's request for a statement of decision asked the trial court to respond to over 75 questions. The 4th District Court of Appeal rejected this tactic:

> Such a requirement cannot be made of the court. Casa Blanca seeks an inquisition, a rehearing of the evidence. The trial court was not required to provide specific answers so long as the findings in the statement of decision fairly disclose the court's determination of all material issues. (*Casa Blanca*, 155 Cal. App. 3d at 525 [citation omitted].)

See also, Muzquiz, 79 Cal. App. 4th at 1126 (trial court "was *not* required to address how it resolved intermediate evidentiary conflicts, or respond point by point to the various issues posed in appellant's request for a statement of decision" [emphasis by the Court]); *Yield Dynamics*, 154 Cal. App. 4th at 558 (plaintiff posed 32 questions most of which "are intolerably compound, argumentative, tendentious, or vague, reading more like interrogatories of the 'when did you stop beating your wife' variety than like specifications of principal controverted issues as to which an express ruling is sought."); *In re Marriage of Williamson*, 226 Cal. App. 4th at 1319 (trial court not required to provide answers to 147 questions when the statement of decision fairly disclosed the determination of the controverted issues).

The Court need go no further. Its 84-page Tentative Statement of Decision goes far beyond the law's requirements. No changes are necessary in response to the Town's argumentative questions and its Objections.

IV. EVEN IF THE COURT WERE TO CONSIDER THE TOWN'S MULTITUDE OF OBJECTIONS, NO CHANGES TO THE TENTATIVE STATEMENT OF DECISION WOULD BE REQUIRED

While the Court need not address or respond to the Town's Objections for the reasons stated above, Liberty nonetheless provides responses in this section to the

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[2] The Town's questions are found on pages 10, 25, 26, 27, 29, 32, 33, 34, 35, 36, 37, 38, 39, 41, 48, 49, and 51 of the Town's Objections.

principal matters raised by the Town.

A. There Is No Basis To Reconsider the Court's October 31, 2018 Ruling Regarding Justiciability and Burden of Proof

Many of the Town's objections amount to a request for the Court to reconsider and reverse its "Ruling on Motion Re: Standard of Review," filed October 31, 2018 ("October 31, 2018 Ruling"). The Tentative Statement of Decision describes and quotes from the October 31, 2018 Ruling in explaining the framework applicable to the right to take trial. (TSOD, at p. 8:1-11:26.)

As to the three public necessity elements that must be "established" under Code Civ. Proc. §1240.030 for condemnation of property, the Legislature has created very different rules for **Conclusive Presumption Cases** under Code Civ. Proc. §1245.250(a) and **Non-Conclusive Presumption Cases,** such as extra-territorial takings under Code Civ. Proc. §1245.250(c) and – as in this case – water public utility takings under Code Civ. Proc. §1245.250(b).

The Town asserts that "[a] right to take action is a writ proceeding," citing Code Civ. Proc. §1245.255(a)(1). (Obj., 10:24-26.) But this action was not a writ proceeding. The statute cited by the Town is limited by its terms to situations where the owner seeks "judicial review *of the validity of the resolution*." (Code Civ. Proc. §1245.255(a).) Here, Liberty did *not* contest the validity of the Town's Resolutions of Necessity, as the Court's October 31, 2018 Ruling recognized. (October 31, 2018 Ruling, at p. 13:15-22.)

Instead, Liberty accepted the rebuttable presumptions created by the validly adopted Resolutions of Necessity (Code Civ. Proc. §1245.250(b)) and, at trial, met its burden to disprove two of the necessity elements. The Legislature is empowered to make issues such as necessity *judicial issues* to be resolved by the Court. *People v. Chevalier*, 52 Cal. 2d 299, 306 (1959); October 31, 2018 Ruling, at p. 16:2-4. This is

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precisely what the Legislature has done.[3] In **Non-Conclusive Presumption Cases** like this one, the public necessity elements are determined ***by the Court*** following a full evidentiary trial, with witnesses and exhibits. *See, e.g., City of Carlsbad v. Wight,* 221 Cal. App. 2d 756 (1963) (**Non-Conclusive Presumption Case**; full evidentiary trial held on the merits); *City of Los Angeles v. Keck,* 14 Cal. App 3d 920 (1971) (**Non-Conclusive Presumption Case**; same); *San Bernardino County Flood Control Dist. v. Grabowski,* 205 Cal. App. 3d 885 (1988) (**Non-Conclusive Presumption Case**; same); *City of Hawthorne v. Peebles,* 166 Cal. App. 2d 758 (1959) (**Non-Conclusive Presumption Case**; same); *People v. Van Gorden,* 226 Cal. App. 2d 634 (1964) (**Non-Conclusive Presumption Case**; same).

In addition, full evidentiary trials are even required in **Conclusive Presumption Cases** when the owner has shown a gross abuse of discretion and the burden shifts to the condemnor to establish the necessity elements. *Redevelopment Agency v. Norm's Slauson,* 173 Cal. App. 3d 1121, 1128 (1985). And full evidentiary trials are likewise required when statutory challenges other than to the necessity elements (like Liberty's "more necessary public use" challenge) are raised. *See, e.g., City of Oakland v. Oakland Raiders,* 32 Cal. 3d 60, 63 (1982) (public use challenge; Supreme Court remanded "for a full evidentiary trial of the issues on the merits"); *Santa Cruz County Redevelopment Agency v. Izant,* 37 Cal. App. 4th 141, 152-153 (1995) (on statutory challenges under Code Civ. Proc. §1250.360, owners "are clearly entitled to a trial on their objections, and are entitled to introduce evidence in support of those claims.").

This law also disposes of the Town's objection that the Court should have considered the Town's "Administrative Record." (Obj., 4:16-18.) The Court's October 31, 2018 Ruling determined that no administrative record was required. (October 31, 2018 Ruling, at p. 19:15-19.) Nonetheless, the Town filed a Notice of Lodging of its 53,848-page "Certified Administrative Record" on October 17, 2019, and Liberty filed objections to the lodging on October 21, 2019. The matter was again argued to the Court

[3] The 1975 Legislative Committee Comment to Section 1245.250 made clear that the statute, in extra-territorial **Non-Conclusive Presumption Cases**, continued prior law by "mak[ing] the question whether the proposed project is necessary a justiciable question in such a condemnation proceeding."

at trial and the Court again ruled it was not needed. (7/14/20 3:3-8:7.) In this **Non-Conclusive Presumption Case**, the Town's administrative record served no purpose because the issue of necessity was to be determined judicially by the Court, unconfined by an administrative record. *Izant*, 27 Cal. App. 4th at 150-151. The Town was afforded the full opportunity to offer in evidence whatever contents of its "administrative record" it wished to offer.[4]

The Town's objection that the Court "shifted the burden of proof to the Town" (Obj., 5:19-26) is not borne out. The Court's October 31, 2018 Ruling was clear that Liberty would bear the burden of proving the non-existence of one or more of the rebuttable presumptions (regarding the necessity elements and the more necessary public use objection), by a preponderance of the evidence. (October 31, 2018 Ruling, at p. 15:18-24.) The Tentative Statement of Decision clearly restates Liberty's burden of proof. (TSOD at p. 11:10-26.) Because Liberty bore the burden of proof, Liberty was required to present its evidence first. The Court found that Liberty had ***met*** its burden of proof. (TSOD at pp. 12:18-24, 83:20-84:2.) Meeting one's burden of proof is not "shifting" the burden of proof, as the Town erroneously contends.

There is no basis for the Court to reconsider its October 31, 2018 Ruling, and the Town's objections urging such reconsideration are not well-taken.

B. The Town Willingly Introduced Post-November 2015 Evidence And Did Not Object to Liberty's Introduction of Post-November 2015 Evidence

The Town adopted its Resolutions of Necessity (RON) on November 17, 2015. (TSOD at p. 14:20.) The Town repeatedly objects that the Tentative Statement of Decision erroneously relies on post-RON evidence. (Obj., 6:18-7:14; 7:17-8:4; 8:17-19.) The Town now says that, although the trial began on October 23, 2019 and the

[4] The Town's objections that the Court somehow abdicated its role to determine the admissibility of evidence (*e.g.*, Obj., 3:15-18, 4:7-14) is entirely unsupported. When the Court wrote in its October 31, 2018 Ruling that "[i]t is up to Liberty to decide what evidence it believes is relevant to meeting its burden of proof," the Court was not granting some special privilege to Liberty. *Any* party with the burden of proof decides what evidence it *believes* is relevant; but the Court remains (and remained here) the ultimate arbiter of what offered evidence is admissible.

presentation of evidence concluded on July 15, 2020, the evidence at trial should have been restricted to only facts that existed years earlier, on or before November 17, 2015. In other words, the entirety of Liberty's ownership and operation of the water system was entirely irrelevant, says the Town.

This is a startling and erroneous attempt to rewrite history.

The Town's new-found objection is belied by numerous factors, including: (1) the Town knew when it adopted its RONs that Liberty would soon become the owner of the system; (2) at trial, the Town did not object to any of the post-RON evidence relied on by the Court in its Tentative Statement of Decision; (3) the Town itself presented *and even explicitly invited* the presentation of post-RON evidence; and (4) no applicable law or public policy supports the Town's objections.

The Town made the strategic decision that it would be advantaged by introducing evidence related to Liberty's ownership and operation of the system. It is improper for the Town to now say, "Never mind" after receipt of an unfavorable Tentative Statement of Decision.

1. The Town Was Fully Aware of Liberty's Impending Purchase of the Water System When It Adopted Its Resolutions of Necessity

The Town tries to claim some unfairness because its councilmembers could only rely on existing facts when it adopted the RONs on **November 17, 2015**. Actually, the unfairness would be suffered by Liberty if the Town were allowed to manipulate relevancy by deliberately adopting the RONs when it knew of Liberty's purchase.

Liberty contracted to acquire the Apple Valley Water System on **September 19, 2014** – over a year before the Town adopted its RON. (Exh. 4151.) It applied to the PUC for approval of the acquisition on **November 24, 2014**. (Exh. 3571.) After negotiating 26 regulatory commitments with the Office of Ratepayer Advocates, the parties submitted a written settlement agreement to the PUC for review and approval on **May 29, 2015**. (Exh. 3573a-25, 3573a-28.) The Town intervened in the PUC proceeding and opposed

the proposed transfer to Liberty on **July 26, 2015**. (Exh. 4535; 1/22/20 Sandoval 60:19-21.) Liberty's acquisition was approved by the PUC on **December 28, 2015** (Exh. 3573, 3573a), and Liberty's purchase then closed on **January 8, 2016**. (12/10/19 Sorensen 50:10-12.)

When the Town adopted its Resolutions of Necessity on November 17, 2015, its Staff Report indicates that it was fully aware of Liberty's pending purchase:

> Now, Park Water Company is the subject of a proposed acquisition by Liberty Utilities Company, a subsidiary of Algonquin Power & Utilities Corporation of Oakville, Canada. (Exh. 891-2.)

It would be unfair and violative of Liberty's due process rights to allow the Town to "freeze" the facts, rendering Liberty's ownership and operation of the system irrelevant, when the Town well knew that Liberty was under contract to become the new owner of the system. Under the Eminent Domain Law, *any* person who claims an interest in the property to be taken may appear as a defendant and raise objections to the right to take. (Code Civ. Proc. §§1250.230, 1250.350.) It is ***Liberty's property*** that the Town sought to acquire in this case, and it would be improper under these facts to require Liberty to defend its property as if it were still owned by somebody else.

2. <u>The Town Did Not Object to Any of The Evidence It Now Argues Was Inadmissible.</u>

The Town's Objections fail to cite to anywhere in the transcript where the Town specifically objected to post-RON evidence that the Court relied on in the Tentative Statement of Decision. Not only did the Town *not* object to such evidence, it actually *welcomed* the introduction of it, as shown below.

There was no "unequal treatment" between Liberty and the Town, as the Town asserts. (Obj., 9:13.) The Court went out of its way to let both sides put on their cases, and hardly any evidence offered over a 67-day trial was rejected. For example, the Court may recall that it heard argument on and *overruled* Liberty's objection regarding

witnesses related to Missoula's water system and allowed the Town to present such evidence. (2/24/20 1:13-18:16.)[5] The very next day, the Town announced it would *not* be proceeding with the Missoula witnesses it had vigorously fought to present after all. (2/25/20 1:19-2:1.)

3. The Case Was Prepared And Tried – By Both Sides – on the Theory That Post-RON Facts Would Be Considered By The Court

The Town's post-RON objection is a futile attempt to change the entire theory of the case presented to the Court – by both sides.

Trial commenced nearly four years after the Town adopted its RONs on November 17, 2015. Extensive discovery had been undertaken by both sides after the Town filed its complaint on January 7, 2016. The Town deposed (among others) Greg Sorensen, Liberty's President, who never had any responsibilities for the system before the Town adopted its RONs. The Town designated its Town Manager Doug Robertson – who did not join the Town until January 2018 – as its "person most knowledgeable" about operating the water system. (TSOD, 21:22-24.) When discovery disputes required court intervention, the Town never claimed that "post-RON" evidence was somehow improper or irrelevant.[6]

As trial approached, the Town filed eight motions *in limine*. If it truly believed that all post-RON evidence should be barred at the trial, one would have expected the Town to file a motion *in limine* on this point. It did not.

The parties filed their exhibit lists on October 17, 2019. The Town's exhibit list included 227 ***exhibits dated after November 17, 2015.*** Clearly, there was no hint that

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[5] As the Court stated at the conclusion of the argument on the Missoula evidence: "I want the Town to get in what they think, as much within reason that they think they need for their case. Similarly, Liberty to be able to get what they think they need to get in. Much of this stuff I might not allow in a jury trial, but because it's to the Court, I can allow a little bit of latitude, which I have." (2/24/20 18:4-9.)

[6] For example, Liberty filed a motion to compel production of the Town's draft transition plan, which the Town prepared in 2017. (*See* Town's Opposition to Liberty's Motion to Compel, filed January 10, 2018, at p. 3:2-3.) The Town never claimed that the document was not subject to production because it was created after the Town's November 2015 RONs; instead, it claimed that the document was privileged. The Court granted Liberty's motion to compel in its February 28, 2018 "Ruling on Motion to Compel Production of Town's Transition Plan."

post-RON evidence should be barred.

The Town also filed its Trial Brief on October 17, 2019. The Town took direct aim at Liberty, attacking its corporate charges,[7] its Canadian parent,[8] and its customer satisfaction surveys.[9] And the Town made it clear that it intended to contest ***Liberty's*** operation of the water system:

> In this trial, the Town will present expert testimony and evidence on Liberty Utilities' mismanagement of the Water System relating to operations, water supply, capital projects, efficiency, master planning, public safety, and other matters. (Town's Trial Brief, at p. 14:17-19.)

Trial arrived. In Opening Statement, the Town's counsel replayed many of the same themes reflected in the Town's Trial Brief, including substantial post-RON evidence. The Town's counsel attacked the ownership and operation of the water system ***by Liberty and its parent Algonquin***. The corporate charges imposed on Apple Valley Ranchos were detailed and criticized. (10/24/19 Opening Statement ["OS"] 43:9-10, 43:15-19.) Algonquin's July 2019 target goals to investors were reviewed. (10/24/19 OS 42:7-11.) The June 2017 affiliate service agreements were displayed and discussed, as was Liberty's January 1, 2017 Cost Allocation Manual. (10/24/19 OS 44:19-21, 48:11-12.) Numerous other post-RON facts were presented to the Court by the Town's counsel, including the Town's 2018/2019 budget (10/23/19 OS 87:6-8), the Town's then-current website (10/23/19 OS 87:18-21), Liberty's January 2018 Annual Report to the PUC (10/23/19 OS 92:22-24), Liberty's January 2018 rate case (10/24/19 OS 17:25-18:8), Liberty's June 2019 customer satisfaction survey (10/24/19 OS 55:17-22), and the Town's July 2019 transition plan (10/24/19 OS 65:22-23).

The Town's counsel even ***explicitly invited*** consideration of issues related to

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[7] "Five corporate layers above Ranchos ultimately owned and controlled by Algonquin in Ontario, Canada now charge Ranchos millions of dollars each year." (Town's Trial Brief, at p. 9:14-16.)

[8] "[B]udgets and profit targets for Ranchos are subject to review and approval by executives in Canada." (Town's Trial Brief, at p. 9:28-10:1.)

[9] "In the meantime, Algonquin/Liberty's own customer satisfaction surveys by JD Power show that customer satisfaction at Ranchos is at rock bottom." (Town's Trial Brief, at p. 10:7-8.)

Algonquin's corporate charges:

> One of the questions that I have tried to ask in depositions and I haven't gotten an answer to is, is this, ***and I do invite this question to be discussed at trial***, is that we see that this money with these charges goes all the way up the corporate chain, all the way up to Canada, all the way up to APUC. (10/24/19 OS 54:3-8, emphasis added.)

When Liberty called Michael Molinari as its first witness, the Town asked Mr. Molinari about his then-current satisfaction with Liberty's water service and the amount of his most recent **2019** water bill. (10/24/19 Molinari 97:2-26.)[10] When Liberty next called Town Manager Robertson, the Town did not object to examination regarding the Town's **July 2019** transition operations plan, the Town's **2018/2019** and **2019/2020** budgets, the Town's $10 million line of credit for fiscal year **2018/2019** nor the amount the Town had drawn as of **August 19, 2019** – to name just a few examples of post-RON evidence. (11/4/19 Robertson 7:13-18, 72:2-11, 88:19-89:1, 93:9-12, 100:17-25.)

And so it went. The Town questioned Mike Lent, the long-time head of Distribution for the water system, about a prior day's leak that had occurred *while he had been on the stand testifying* on **December 4, 2019**. (12/5/19 Lent 64:25-73:5.) The Town called a local resident, Joseph Szobonya, to testify about pipe breaks including occurrences in **October 2017**, **December 2018**, and **March 2019**. (3/12/20 Szobonya 49:16-23, 50:14-26, 56:14-18.) The Town's expert witness Craig Close testified for days regarding his opinions of the water system as it existed during his site inspections over **Labor Day weekend 2019**, less than two months before the start of trial. (TSOD, at p. 16:8-18.)[11] The Town's bonding expert, Robert Porr, prepared bond-sizing models based on interest rates as of **December 2018** and **July 2019**. (3/5/20 Porr 54:10-14.) The Town's

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[10] The Town later also asked its Finance Director, Sydnie Harris, the amount of her most recent 2019 water bill. (11/13/19 Harris 59:7-12.) After it was shown that Ms. Harris had used 203 CCF during the two months covered by her most recent bill – almost ten times the average use (11/13/19 Harris 86:6-21) – the Town stopped asking its employees about their recent water bills.

[11] As stated in the Tentative Statement of Decision, the Court agreed with the Town that Mr. Close's testimony was admissible to rebut Liberty's evidence that the system was well-run, and the Court fully considered the evidence for that purpose. (TSOD, at p. 16:28-17:1.)

financial expert Shawn Koorn presented an economic model that was based on Liberty's **January 2018** Revenue Requirement Report (even though the Report was superseded by the January 2019 Joint Comparison Exhibit). (TSOD at pp. 55 n. 16, 71:8-10.) When the trial recommenced, the Town elicited testimony from Town Manager Robertson about the recent 0impact of COVID on the Town, as well as a lease for a planned train project from Apple Valley to Las Vegas that had been announced "yesterday, or maybe the day before" his testimony. (7/1/20 Robertson 71:3-73:15; 7/2/20 Robertson 10:22-12:9.)

At trial, ***141 exhibits listed on the Town's exhibit list and dated <u>after</u> November 17, 2015*** were admitted into evidence.

The Town's objection that evidence presented at trial was not included in Liberty's answer (Obj., 8:5-19) is also meritless. "It is settled law that where the parties and the court proceed throughout the trial upon a theory that a certain issue is presented for adjudication, both parties are thereafter estopped from claiming that no such issue was in controversy even though it was not actually raised by the pleadings." *Miller v. Peters*, 37 Cal. 2d 89, 93 (1951).

The Town proposes that the matter should be "remanded" to the Town Council for consideration of post-RON evidence. (Obj., 11:21-13:15.) Nothing in the Eminent Domain Law allows for such a "remand," and the Town does not cite any authority supporting this request because there is none. As noted above, this was *not* a writ case – it was a **Non-Conclusive Presumption Case**, in which the necessity elements were to be *judicially determined* by the Court.

4. <u>The City's Objection is Not Supported by Applicable Law or Policy</u>

The Town's argument against post-RON evidence is really a replay of its argument to reconsider the Court's October 31, 2018 Ruling, discussed above. In this **Non-Conclusive Presumption** Case, the issues of public necessity and more necessary public use were fully justiciable after the Legislature enacted SB 1757 in 1992. Nothing

in SB 1757 limited the justiciability of these issues to facts existing as of the date the condemnor adopted its Resolution of Necessity.

The only case cited by the Town, *City of Los Angeles v. Koyer*, 48 Cal. App. 720 (1920), is clearly distinguishable. In *Koyer*, the City filed an eminent domain case in September 1910 to acquire property for public wharves as well as warehouses several blocks away from the wharves. When the case was filed, Code Civ. Proc, §1238 allowed eminent domain to be used to acquire land for wharves, but not for distant warehouses. *Koyer*, 48 Cal. App at 723. The trial court nonetheless allowed the City to condemn property for the warehouses and entered a final judgment in November 1912. On appeal, the Court rejected the City's argument that its city charter could allow it to exercise eminent domain for purposes beyond those permitted by state law. Although Code Civ. Proc. was amended in 1913 to allow condemnation to be used for "warehouses" – after entry of the judgment – the Court declined to consider that change in the law to uphold the City's condemnation action filed in 1910. *Koyer*, 48 Cal. App. at 727. Here, there is no post-filing change in the law regarding the Town's power of eminent domain (or the public necessity elements or the more necessary public use rule), so *Koyer* is clearly distinguishable. That the *Koyer* court declined to consider a post-judgment change in *the law* says nothing about this Court's ability to consider post-RON *facts* in its Tentative Statement of Decision.

Nor is the Town's objection supported by public policy. By the time trial commenced in October 2019, Liberty had operated the water system for nearly four years. To pretend otherwise, and force Liberty to try the case based on stale facts that existed under a prior owner, would not fairly adjudicate the Town's right to take Liberty's property interests at issue.

Moreover, the principal facts relied on by the Court in resolving the ultimate issues would not have been significantly different had the Court only considered pre-RON facts. The water system would still have had a perfect record on water quality; it would still have been run by a highly-skilled and experienced set of employees; the

differences between Town oversight and PUC regulation would still have been the same, etc.

In short, *both sides* prepared and tried the case with the intent to introduce evidence of facts, occurrences, and conditions that arose or existed *after* November 17, 2015. The Town made the deliberate strategic choice that it would benefit from evidence about Liberty's corporate charges, its affiliate services agreements, and its customer satisfaction surveys, to name just a few items of post-RON evidence. The Tentative Statement of Decision does not need to be modified after the Court properly considered the evidence presented at trial by both parties.

C. The Tentative Statement of Decision Does Not Speculate That the Town Will Violate Proposition 218

The Town's objection that the Tentative Statement of Decision "improperly speculates that the Town will violate the law" is not well-taken. (Obj., 16:26-17:10.)

From its Opening Statement onward, the Town sought to focus on what it perceived to be the benefits of the Town operating the water system under Proposition 218. (10/24/19 OS 57:22-59:21.) Many of its experts testified about Proposition 218. (3/2/20 Weissman 122:11-16; 3/9/20 DeShazo 12:20-13:12; 3/11/20 Busch 123:8-15 & Exh. 4285-11.) Town witness Mr. Koorn was offered as an expert on Proposition 218 and opined about it in detail. (6/29/20 Koorn 8:26-9:7, 11:21-25, 96:17-97:18, 100:5-101:24; Exh. 4333-57 to 4333-61.)

The evidence showed, however, that the Town had been sued twice for violating Proposition 218 and had settled both lawsuits with substantial payments. (11/5/19 Robertson 58:1-12; 11/13/19 Hildreth 121:24-122:6.) After the settlements, the Town recalculated the proper amounts it could transfer from its enterprise funds to its general fund, and the transfer amounts were reduced substantially. (Exh. 864.) Dr. Hildreth testified that the amounts paid back by the Town in its settlements were far less than the

amounts the Town determined were justified as overhead transfers. (11/13/19 Hildreth 125:13-126:6, 128:7-22.)

The Court properly cited this evidence in its Tentative Statement of Decision as raising questions concerning the reliability of Proposition 218 as a check against financial manipulation of enterprise funds. (TSOD, at p. 48:25-49:19.) In light of the Town's own reliance on Proposition 218, it was fair game for the Court to recite evidence of the Town's history and performance under it. The Court did not "speculate" that the Town would violate Proposition 218 in the future. To the contrary, the Court discussed the numerous shortcomings of Proposition 218 oversight as compared to PUC regulation "[e]ven were [Proposition 218] to be faithfully implemented." (TSOD, at pp. 49:20-50:27.)

D. The Tentative Statement of Decision Does Not Rely on "Irrelevant" Conduct of Other Public Entities

The Town objects that the Court relied on "irrelevant" evidence about other entities' operations of their water systems. (Obj., 17:11-21.) A major dispute at trial was whether the public interest and necessity were better served by a utility subject to strict regulation by the PUC or a municipally-owned utility overseen by councilmembers.

It is disingenuous for the Town to object that evidence regarding nearby municipally-owned water systems was irrelevant; after all the Town itself invited comparisons to other nearby systems when it presented rate comparisons of the Apple Valley system versus those charged by other municipal owned systems. (Exh. 891-13.) At trial, it presented a detailed rate comparison by Dr. DeShazo, comparing Liberty's rates with those of numerous other water systems, including comparator systems that had been selected by the Town as well as other comparator systems selected by Dr. DeShazo. (3/9/20, DeShazo 75:12-22, 81:26-82:15, 82:16-24; Exh. 4276-6.) In addition, the Town relied on Mr. Robertson's experience at the City of Victorville to establish he had the "skill set that's needed to integrate a water system into a public entity" (11/5/19 Robertson, 76:8-77:1), opening the door to evidence about Victorville's water system in

light of Mr. Robertson's claimed expertise.

E. **The Court Adequately Considered The Town's Objectives For the Project.**

The Town objects that the Tentative Statement of Decision did not address the Town's project objectives "in any systematic manner." (Obj., 21:18-23, 22:16-23:3.)

While these are evidentiary facts that the Court was not required to address – "systematically" or otherwise – the Court *did* in fact consider the Town's project objectives. (TSOD at pp. 2:6-10, 12:1-17.) The Court said so explicitly: "This is not to say that arguments about the attributes of local control or the Town's broader goals and policies are irrelevant. They are not. As explained below, much evidence on these topics was introduced at trial and has been considered by the Court." (TSOD at p. 12 n. 6.)

The Town's list of "specific project objectives" and "policy issues" (Obj., 21:25-22:4, 22:20-23:3) all boil down to a desire for local control. The Town's Mission Statement (adopted in 2012) is: "To provide a better way of life through local control of public safety, development, services and amenities; enhancing our residents' lives and providing for our community's future." (Exh. 3616.) Assistant Town Manager Lori Lamson defined "local control" as:

> The control of our own destiny. Meaning, that we have the ability to control decisions that are made in the future and the development of our Town and not putting it in the hands of public entities or private entities of that nature. Public entities being the federal government, the state government, the county government. And private industries that – like the one we're here today for. (2/6/20 Lamson 64:17-65:3.)

In its Tentative Statement of Decision, the Court acknowledged "the motivation and aspirational goals of the Town generally, for more local control of its water delivery system and corresponding rate structure." (TSOD, 2:6-8.) But the strength of the Town's desire to acquire the system does not alter the preponderance of the evidence as to

whether acquisition is required by the public interest and necessity, or whether the acquisition is a more necessary public use than the use to which Liberty's property is presently devoted. By definition and self-selection, any city or town that would undertake the complex effort of acquiring a private utility by eminent domain must *really* want the system in order to proceed. Giving substantial weight to the strength of the municipality's desire to acquire the water system provides no discernible guidance for separating those attempted condemnations that should be permitted to proceed from those that should not be, in the face of asserted objections to the right to take.

The desire for local control is an aspirational goal that could be cited by *any* public entity that desires to condemn a private utility. If mere desire were to be given substantial weight in making the determinations of public interest and necessity, more necessary public use, or greatest public good/least private injury, *every* attempt to condemn a private utility could be upheld based on desire alone, and the Legislature's enactment of SB 1757 would be rendered a nullity. The same holds true for the Town's stated desire to control its "water future," and its reliance on the Town's organization chart showing the "Citizens of Apple Valley" at the top. (Exh. 16.) These are generic statements and platitudes that could be advanced by every municipality. The Court gave due consideration to the Town's project objectives and properly found that Liberty met its burden of proof on the ultimate issues to be decided.

V. PART IV OF THE TOWN'S OBJECTIONS SIMPLY REARGUES THE EVIDENCE AND REQUESTS UNNECESSARY DISCUSSION OF EVIDENTIARY FACTS

In Part IV of the Town's objections (beginning at p. 22), the Town resorts to rearguing its view of the evidence and hurls a boatload of argumentative "questions" at the Court. As explained above, the Court need not respond to objections regarding discrete evidentiary facts, and it need not be drawn into the "inquisition" launched by the Town. *Casa Blanca*, 155 Cal. App. 3d at 525.

The Town also argues repeatedly that the Tentative Statement of Decision

"misstates the evidence," "is not supported by substantial evidence," is "an abuse of discretion," is "arbitrary and capricious" or is "inherently not credible." *See, e.g.*, Obj., 22:12-14, 26:7, 27:9-10, 29:10, 45:28. These are attacks to be made, if at all, in an appellate court. The Tentative Statement of Decision carefully and repeatedly cites evidence from the trial (admitted without objection) in support of the Court's reasoning and findings on the ultimate issues. The Town is certainly free to disagree with the Court's rulings, but such disagreement does nothing to show that the Court's tentative decision requires modification to comply with the legal requirements applicable to statements of decision.

In short, the Tentative Statement of Decision does not need to be revised to respond to the Town's rearguing of the evidence. Even were the Court inclined to engage the Town's re-argument, the substance of the objections is not well-taken. In many instances, the Court *did* address the issue. Liberty responds to a few of the Town's "objections" below.

Recycled Water. The Town's objection about recycled water (Obj., 23:16-24) is much ado about nothing. The Town's own General Plan identifies Victor Valley Water Reclamation Agency (VVWRA) and the Town's Public Works Division – not the water company – as the agencies responsible for meeting the Town's reclaimed water goals. (Exh. 4174-190.) The wastewater that flows into the Town's sewer system *after* it is used by Liberty's customers and may be recycled is owned by the Town or VVWRA, not by Liberty. (2/10/20 Lamson 44:14-21.) The Town's only current plan for use of recycled water is VVWRA's subregional facility in Apple Valley. (11/5/19 Robertson 70:8-13.) Mr. Robertson is not aware of any request by the Town to Liberty regarding recycled water. (11/5/19 Robertson 70:1-7.) And Assistant Town Manager Lamson testified that nothing Liberty has done stopped the recycled water facility from being built, nor did Liberty impair the construction of the facility in any way. (2/13/20 Lamson 76:5-20.)

Transparency. The Town's objection about "transparency" (Obj., 23:25-24:2) is not

well-taken. A wealth of documents concerning Liberty's operation of the Apple Valley water system is publicly available, including: detailed annual financial reports filed with the PUC (Exh. 513; 12/12/19 Sorensen 37:21-26); annual operational reports filed with the Division of Drinking Water (Exhs. 1186, 4668-2); tariff sheets describing all of Liberty's authorized charges (1/6/20 Jackson 62:2-13); pleadings in the current rate case (Exh. 4563); information about the system's facilities, monitoring schedules, and water quality record (Exh. 920-45 to 920-51); lengthy Urban Water Management Plans (Exh. 225); and annual Consumer Confidence Reports about the system's water quality (Exh. 543; 11/6/19 Thomas-Keefer 41:8-42:7). As for the "transparency" of the Town itself: after telling its residents in 2015 that it would present monthly "transparency reports" about the attempted acquisition, the Town prepared only three such reports, and Finance Director Harris testified that the reports "pretty much just slipped through the cracks." (11/13/19 Harris 46:11-47:8.)

Corporate Overhead Charges. The Town objects that the Tentative Statement of Decision does not address the application of overhead charges from corporate layers above Apple Valley. (Obj., 28:11-24.) In fact, the Court did address the corporate overhead charges, in its discussion of Liberty's shared services model. (TSOD, at p. 28:4-12.)

Fixed vs. Variable Costs. The Town objects that the Tentative Statement of Decision "is not supported by substantial evidence" in saying that the system's costs are 95% fixed and only 5% variable. (Obj., 31:13-17.) In fact, the Tentative Statement of Decision cites Dr. Michael Hanemann's testimony where he stated this. (TSOD, at p. 26:28-27:2, citing 1/9/20 Hanemann 25:2-26:9.)[12] There is not a "lack of substantial evidence" even if this evidence were "contradicted" by other evidence, as the Town

[12] Dr. Hanemann testified: "[A]s I mentioned yesterday, Apple Valley is really one extreme because less than 5 percent of the cost of water operation is a variable cost." (1/9/20 Hanemann 25:6-8.)

asserts (without specifically citing the conflicting evidence). (Obj., 31:15-17.)

Voluntary AWWA Standards. The Town notes that the Tentative Statement of Decision finds that compliance with American Water Works Association (AWWA) standards is "voluntary," but objects that "voluntary" is vague and ambiguous. (Obj., 38:6-7.) The AWWA standards in evidence (and cited by the Court) state: ***"The use of AWWA standards is entirely voluntary."*** (Exhs. 1178-2, 4119-2, emphasis added.) The Tentative Statement of Decision can hardly be "vague and ambiguous" when it used the exact language from the admitted evidence. (TSOD, at p. 29:10-13.)

Water Rates. The Town objects to the Court's reference to the statement in the Town's own certified EIR that reduction of water rates would be an "unlikely event." (Obj., 42:3-5; TSOD at p. 54:12-14.) The Town says this "misstates the evidence," but there is no dispute that the reference is a direct quote from the Town's EIR. (Exh. 165-24.) And the Town overlooks the very next sentence of the Tentative Statement of Decision, which cites to the passage in the Town's Staff Report that "the Town does not expect to be able to decrease rates." (TSOD, at p. 54:14-16, citing Exh. 891-14.) Of course, quoting evidence is not "misstating" it. And the Court then proceeded to discuss in detail the conflicting evidence regarding whether *future* water bills would likely be higher or lower under Town ownership or continued Liberty ownership. (TSOD, at p. 54:20-25.)

The Town also claims that the Court "misstates the evidence" about economies of scale. (Obj., 43:12-17.) The Town entirely misconstrues the concept of economies of scale by arguing that such economies should already be reflected in Liberty's own pro formas. But the issue is whether there would be a *loss* of such economies of scale if *the Town* were to operate the system on a standalone basis. The Tentative Statement of Decision reviews the evidence on this point, including that (1) Dr. Hanemann testified there would be a *loss* of economies of scale under Town ownership; (2) the Legislature

itself has concluded that economies of scale are achievable in the operation of public water systems; and (3) Mr. Koorn gave no consideration to loss of economies of scale in his analysis. (TSOD, at pp. 60:8-63:17.) The Tentative Statement of Decision does not "misstate the evidence" by reaching a conclusion different from the one urged by the Town.[13]

Town's Financial Condition. The Town objects that its financial condition is "irrelevant" (Obj., 46:23-24), but it fails to point to anywhere in the record where it asserted such an objection. In any case, the connection between the financial condition of the Town and its enterprise funds was clear: the Town has relied on massive transfers from its enterprise funds to its general fund – over $39 million from FY 2011 through FY 2019 – to balance its general fund budget. (TSOD, 48:3-14 and n. 15.) It planned to also operate the water system as an enterprise fund and transfer "administrative overhead" from the Water Enterprise Fund to the general fund. (TSOD, p. 49:23-25.) The Town's need to transfer water revenues to its general fund made the overall financial condition of the Town's general fund, and its need for such transfers, relevant.

The Court did not find that "the Town would violate the law . . . if it were to acquire the water system," as the Town objects. (Obj., 47:28-48:1.) The issue was not whether the Town would "violate the law," but the competition that would be created between the general fund's need for transferred revenues and the water fund's need to retain revenues for the benefit of the water system. (TSOD, at p. 50:1-8.) Both side's experts – Dr. Hanemann and Mr. Koorn – anticipated that the Town would transfer administrative overhead from the water fund to its general fund. Neither expert contended such transfers would "violate the law." Their disagreement was over the

[13] It is the Town, not the Court, that misstates the evidence regarding quantity discounts that have benefited Liberty Apple Valley. The Town says "there is no evidence of actual consummated quantity discounts benefiting Ranchos." (Obj., 43:24-25.) Greg Sorensen testified that Apple Valley purchased under and obtained the benefit of the 10-15% discounts in the Grainger contract, Exh. 963. (12/11/19 Sorensen 26:1-9, 12/12/19 Sorensen 77:10-13.) Mr. Sorensen also testified that Liberty enjoys a volume discount for Ford trucks in the range of 10-15%. (12/11/19 Sorensen 32:3-11.)

amount of such transfers, not their legality. And the Court reviewed in detail the unreasonableness of Mr. Koorn's projection that the Town would transfer only $1,064,807 in administrative overhead from its water fund to its general fund. (TSOD, at pp. 63:19-66:21.)

None of the Town's litany of questions, nor its attempts to reargue the evidence, create any substantial issues that would require any changes to the Tentative Statement of Decision.

VI. CONCLUSION

This was a lengthy, hard-fought trial. The Court patiently allowed both sides the latitude to put on their evidence and try the case. Then it allowed lengthy post-trial briefing and closing arguments.

The Court's Tentative Statement of Decision thoroughly discloses the Court's resolution of the ultimate issues in the case and far exceeds the law's requirements for a proper Statement of Decision. The Court properly placed the burden of proof on Liberty and ruled that Liberty met its burden. The Town's objections primarily seek to reargue the evidence or rehearse arguments that belong in another forum. The Town has made the record it deems appropriate, but none of the Town's objections require modifications to the Tentative Statement of Decision.

Liberty respectfully requests that the Court make the minor revisions listed in Part II above and issue its final Statement of Decision in accordance with its Tentative Statement of Decision.

Dated: June 18, 2021

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By: Edward G. Burg

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LIBERTY UTILITIES (APPLE VALLEY RANCHOS WATER), CORP.

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PROOF OF SERVICE

I, Marla L. Chung, declare:

I am a citizen of the United States and employed in Los Angeles County, California. I am over the age of eighteen years and not a party to the within-entitled action. My business address is 2049 Century Park East, Suite 1700, Los Angeles, California 90067. On June 18, 2021, I served a copy of the within document(s):

LIBERTY'S RESPONSE TO TOWN OF APPLE VALLEY'S OBJECTIONS TO TENTATIVE STATEMENT OF DECISION

■ **by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, the United States mail at Los Angeles, California addressed as set forth below.**

■ **by transmitting via e-mail or electronic transmission the document(s) listed above to the person(s) at the e-mail address(es) set forth below.**

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

Executed on June 18, 2021, at Los Angeles, California.

/s/ Marla L. Chung
Marla L. Chung