

1 Superior Court of California
2 County of San Bernardino
3 247 W. Third Street, Dept. S23
4 San Bernardino, CA 92415-0210

FILED
SUPERIOR COURT
COUNTY OF SAN BERNARDINO
SAN BERNARDINO DISTRICT

MAY 07 2021

By Eric Ashe
Deputy

7 SUPERIOR COURT OF CALIFORNIA
8 COUNTY OF SAN BERNARDINO, San Bernardino DISTRICT

10 TOWN OF APPLE VALLEY, a municipal
11 corporation,
12 Plaintiff,

Case No.: CIVDS1600180

13 v

TENTATIVE STATEMENT OF DECISION

14 APPLE VALLEY RANCHOS WATER
15 COMPANY, a California corporation;
16 DOES 1-100; AND ALL PERSONS
17 UNKNOWN CLAIMING AN INTEREST IN
18 THE PROPERTY,

Defendants

19
20 This matter came before the court for a lengthy 67 day bench trial. Upon the
21 conclusion of the trial the parties engaged in an extensive post trial briefing schedule
22 and ultimately closing oral arguments. The matter was taken under submission. The
23 court now renders its Tentative Statement of Decision which will be deemed to be the
24 Final Statement of Decision unless a specific and timely request for a formal and Final
25 Statement of Decision is requested by the parties pursuant to the Code of Civil
26 Procedure.

27 **THE DISPUTE**

28 This is a right to take proceeding under California's Eminent Domain Law. In this
case, the Town of Apple Valley seeks to acquire the Apple Valley Water System, owned

1 and operated by Liberty Utilities (Apple Valley Ranchos Water) corp., an investor owned
2 water utility, and includes the assets used by Liberty to deliver water to subscribers in
3 the Apple Valley service area and to use those assets to operate a water system owned
4 by the Town in the same service area. Liberty objects to the Town's right to take its
5 water system by eminent domain.

6 In this condemnation endeavor, while the court does understand and appreciate
7 the motivation and aspirational goals of the Town generally, for more local control of its
8 water delivery system and corresponding rate structure, the court also recognizes that
9 its ultimate decision must be tethered to the applicable statutory scheme relevant to
10 this condemnation proceeding – to this end the court's analysis follows.

11 **General Overview of Town's Action**

12 Defendant Liberty is an investor-owned, PUC-regulated water utility that is the
13 sole provider of water to subscribers (or service connections) within the Town as well as
14 subscribers outside the Town itself. The subscribers or customers include, but are not
15 limited to, residences, businesses, institutions, churches, other organizations and
16 governmental agencies.

17 The Town has initiated this legal action to take by eminent domain the assets
18 owned by Liberty that are used to provide water to the Town and some areas outside its
19 borders. The assets the Town seeks to acquire from Liberty include such things as
20 water wells, water rights, reservoirs, tanks, pumps, underground pipelines, other
21 infrastructure, real property and systems used to deliver water.

22 If the Town is successful in acquiring the Liberty water assets it intends to use
23 the assets to operate a municipally-owned water system to sell water from the same
24 sources and infrastructure to subscribers in the same service area. The Town itself
25 does not have any experience in operating a water system and would initially seek to
26 hire the same Liberty employees to continue to operate the system assuming such
27 employees would be willing to stay on with a new owner which at best is uncertain and
28 speculative at this time.

1 **THE PROJECT**

2 **General Overview of Legal Arguments**

3 The Town filed this eminent domain action against Liberty on January 7, 2016, to
4 obtain the company's water supply and distribution system ("Assets") within the
5 boundaries of the Town and County of San Bernardino.

6 In Liberty's post-trial brief, it asserts it has met its burden of rebutting the
7 applicable presumptions to three of the four required findings, the three being:

- 8 1) The public interest and necessity do not require the Town's project (Code of Civil
9 Procedure, section 1240.030, subd. (a)).
- 10 2) The Town's project is not planned in the manner most consistent with the
11 greatest public good and least private inquiry (Code of Civil Procedure, section
12 1240.030, subd. (G)); and
- 13 3) The Town's proposed use is not a more necessary use than continued use of the
14 system by Liberty (Code of Civil Procedure, section 1240.650, subds. (a) and (c)).

15 In order to frame these issues, Liberty asserts that the "project" to be evaluated
16 is that as set forth in the Resolutions of Necessity. Contrary to Town's argument, it
17 does not appear Liberty is asserting there is no right to take because the Town has not
18 defined the "project". Instead, Liberty is arguing that under City of Stockton v. Marina
19 Towers LLC (2009) 171 Cal. App. 4th 93 (Marina Towers), the "project" is defined as
20 that set forth in the Resolutions of Necessity. Liberty argues that with this limitation,
21 the Town cannot rely on post-resolution asserted needs to upgrade or construct
22 improvements as reasons for its taking. Liberty appears to be correct that the court is
23 to consider the project as contained in the project description at the time the
24 Resolutions of Necessity were approved.

25 In Resolutions of Necessity no. 2015-43 and no. 2015-44 the Town stated the
26 proposed public project is "for the public ownership, operation and maintenance of the
27 Apple Valley Water System to provide water service to the public".

28 In its complaint, the Town alleges that it seeks to acquire Liberty's water supply
and distribution system (water system"). (compl. Section 6) "The Town's proposed

1 public project is the public ownership, operation and maintenance of the water system
2 to provide water service to the public. (“the project”). (Ibid.)

3 The Town alleges it began exploring acquisition in response to a number of
4 factors including but not limited to such things as public concern about escalating water
5 rates and the lack of local control and decision making over water rates, service and
6 expenditures although curiously, at trial, the Town’s own evidence acknowledged it was
7 unlikely water rates would be reduced even if the taking was successful.

8 In any case, it appears the relevancy of Marina Towers to this case is that the
9 proposed project is considered in terms of that set forth in the Resolutions of Necessity,
10 because it is in that context findings of necessity are made and objections to the right
11 to take are evaluated (Marina Towers, supra, 171 Cal. App. 4th pp 108-109, k113). Post
12 resolution events cannot be used to support the required findings of necessity. (Id. At
13 pp 113-114).

14 Again, as noted, the Resolutions of Necessity here set forth that the project is
15 “the public ownership, operation and maintenance of the Apple Valley Water System to
16 provide water service to the public”. Additional evidence that the project only proposed
17 to take over the existing water system without changes in or expansion of existing use
18 is found in this courts acceptance of the Town’s argument under CEQA, the Class 1
19 “Existing Facilities exemption applied. Even though the Town had completed an
20 Environmental Impact Report (“EIR”) for its taking, in the face of Liberty’s challenge to
21 the EIR, the Town argued that the Class 1 exemption applied. This court accepted the
22 Town’s argument that it only proposes taking over the existing operations and is not
23 proposing any expansions of use or facilities. (*Apple Valley Rancho’s Water Co. v. Town*
24 *of Apple Valley*, Case No. CIVDS1517935, Ruling on Writ Petition, filed Feb. 9, 2018, pp.
25 16:4-17; 4, 21:6-25:15 (hereinafter Ruling).)¹ In the ruling, this court discussed that
26 the Amended Initial Study and the final EIR described the project as “only to acquire
27 and operate the existing system”, and not “proposing changes or expansion to the
28

¹ In its post-trial brief, Liberty requests the court take judicial notice of the file from the CEQA lawsuit. The court can take judicial notice of its ruling on the writ petition.

1 physical AVR system or to the associated water rights”, nor was Town “proposing any
2 changes to the manner of operation of the AVR System or the exercise of the
3 associated water rights”.² (ID. at p. 21: 18-12)

4 While Liberty discusses the doctrine of judicial estoppel in its post-trial brief, it
5 really may be unnecessary for the court to make a formal finding that judicial estoppel
6 applies. Instead, in considering the scope of the project and Liberty’s objections to the
7 right to take, the project is treated as that described in the Resolutions of Necessity and
8 CEQA documents which is the acquisition and operation of an existing water system
9 without any proposed changes or expansions to the physical water system or manner of
10 operation. Liberty makes this point by its citation to Marina Towers to preclude
11 consideration of post-resolution improvements or deficiencies in the system to the
12 extent the Town asserts such exist and is reason the required findings are supported.

13 According to Liberty it is in this framework that the evidence directed to the
14 three findings at issue must be viewed; (the three being: 1) the public interest and
15 necessity do not require the project; 2) the project is not planned in a manner most
16 consistent with the greatest public good and least private inquiry; and 3) the Town’s
17 proposed use is not a more necessary use than the use to which the property already
18 has been appropriated.)³

19 The Town cites to *City of Oakland v. Oakland Raiders* (1982) 32 Cal. 3d 60, 69,
20 in support of its contention that “public use “is” a use which concerns the whole
21 community or promote the general interest in its relation to any legitimate object of
22

23 ² The Amended Initial Study stated:

24 “The Town is proposing only to acquire and operate the existing system, and is not proposing changes or expansion to
25 the physical AVR System or to the associated water rights, nor is the Town proposing any changes to the manner of operation of
26 the AVR System or the exercise of the associated water rights. “The Town would operate and maintain the system out of AVR’s
27 existing operations and maintenance facility, which is located at 21760 Ottawa Road, approximately half a mile south of Highway
28 18 and 300 feet east of the intersection of Navajo Road and Ottawa Road.” “The AVR System is a stand-alone system...” “The
Town’s acquisition of AVR’s water rights would entitle Town to the currently established allocations assigned to AVR and would
require the Town to meet the same standards in terms of replenishment if it were to exceed established limits on withdrawals.”
“The underlying purpose of the proposed project is for the Town of Apple Valley to acquire, operate and maintain the existing
AVR System”. (Ruling p 16:14-27, emphasis on original). The Final EIR included the same basic description (ID at pp 16:28-
17:4.)

³ As for more necessary use, under CCP 1240.650(a), given the property already has been appropriated to public use by
Liberty “the use thereof” by the Town “for the same use... is a more necessary use than the use to which such property has already
been appropriated” under section 1240.650 the presumption of a more necessary use established under subdivision (a) is a
rebuttable presumption.

1 government." [Citation]" But there is no dispute that the operation of the project as a
2 water utility is a public use, the issue is Liberty's objections to the Town's findings.

3
4 The Town argues that "operation and maintenance" is part of the project and the
5 FEIR contemplated future improvements and upgrades (Town's Post Trial Brief p.
6 25:17-25 and fn.8). But the Town acknowledges the FEIR stated no improvements are
7 proposed as part of this project. (Id. At p. 25, fn.8) In partially quoting the FEIR the
8 Town leaves out that it also acknowledged that any improvements would exist
9 regardless of who owns the system. The FEIR stated:

10
11 Although none are proposed as part of this Project nor are any specific
12 improvements reasonably foreseeable at this time, the AVR System and
13 O&M facility may require construction improvements and upgrades at an
14 unknown future date. Such upgrades may include pipeline replacements,
15 building improvements, or other activities. The need for these types of
16 future projects would remain the same as those currently required for the
17 AVR system, regardless of who owns the system. Therefore, there would
18 be little to no change to the physical environmental setting in terms of the
19 needs of the system and supporting facilities. Moreover, any future
20 upgrades of the system or facilities are not conditions caused by the Project
21 but would exist, regardless of the ownership. Finally, any such
22 improvements would be subject to CEQA and would comply with any
23 associated environmental review and documentation requirements.
24 Therefore, these types of future improvements are not considered in this
25 analysis.

26
27 In light of the above, no improvements were contemplated as part of the
28 project. Therefore testimony regarding such improvements should not be considered
as part of the project or to the extent such evidence is offered by the Town in support
of the required findings. In its post-trial brief the Town argues that expert testimony of
system problems and deficiencies are offered in response to Liberty's case in chief. The
Town argues the testimony demonstrated serious major problems not being addressed
or disclosed to the Town or public. (Town's Post-Trial Brief, p. 26:4-23.) But the
Town's argument concedes improvements were not considered as part of the taking

1 and were not taken into account in approving the Resolutions of Necessity. To the
2 extent any such evidence by the Town is considered it would seem it could only come in
3 for the limited purpose of responding to Liberty's evidence directed to rebutting the
4 presumptions. Also, the evidence would seem to be irrelevant to the Town's right to
5 take because the newly asserted required post-resolution improvements to the system
6 were not part of the project.

7 Against this background and overview of the "Project", the court in this
8 statement, will more specifically address the issues to be decided and to apply the
9 statutory requirements for eminent domain to the circumstances of this case as follows:

10 **I. OVERVIEW OF THE ISSUES TO BE DECIDED AND THE APPLICABLE**
11 **STANDARD OF PROOF.**

12 Under the applicable eminent domain statutes, the Court must decide four issues to
13 determine whether the Town is permitted to take the water system:

14 First. Do the public interest and necessity require the Town's Project?
15 (Code Civ. Proc. §1240.030(a).)

16 Second. Is the Town's Project planned in the manner that will be most
17 compatible with the greatest public good and the least private injury? (Code Civ.
18 Proc. §1240.030(b).)

19 Third. Is the property sought to be acquired by the Town necessary for the
20 Town's Project? (Code Civ. Proc. §1240.030(c).)

21 Fourth. Is the use for which the Town seeks to take Liberty's property a more
22 necessary public use than the use to which Liberty's property is presently
23 devoted? (Code Civ. Proc. §1240.610.)

24
25 In its Opening Post-Trial Brief, Liberty stated that it does not contest the third
26 item; only the first, second, and fourth issues are contested. Liberty challenges the first
27 and second issues by objections under Code Civ. Proc. §§1250.370(b) and (c), and it
28 challenges the fourth issue by objection under Code Civ. Proc. §1250.360(f).

1 The Court previously considered the parties' arguments and laid out the legal
2 framework applicable to this right to take trial in the Court's "Ruling on Motion Re:
3 Standard of Review" filed on October 31, 2018 ("October 31, 2018 Ruling"). On the
4 three public necessity elements that must be established under Section 1240.030, the
5 presumption in Code Civ. Proc. §1245.250(a) usually applies:

6
7 Except as otherwise provided by statute, a resolution of necessity
8 adopted by the governing body of the public entity pursuant to this article
9 conclusively establishes the matters referred to in Section 1240.030.

10 On the "more necessary public use" question, the presumption in Code Civ. Proc.
11 §1240.650(a) usually applies:

12 Where property has been appropriated to public use by any person other
13 than a public entity, the use thereof by a public entity for the same use
14 or any other public use is a more necessary use than the use to which
15 such property has already been appropriated.

16 However, these ordinary presumptions do not apply in this case. Senate Bill
17 1757, which was signed into law by Governor Pete Wilson on September 21, 1992,
18 amended the prior versions of both Section 1245.250 and Section 1240.650. SB 1757
19 changed the law by granting the owner of "electric, gas or water public utility property"
20 (Code Civ. Proc. §1235.193) the right to rebut the presumptions that formerly were
21 "conclusively established" in favor of the public entity. Here, Liberty's property is
22 "water public utility property" because it is appropriated to a public use by a water
23 corporation as defined in Pub. Util. Code §241.⁴

24
25
26 ⁴ Liberty's property is "appropriated to public use" under Code Civ. Proc. §1235.180 because Liberty
27 is a regulated public utility. *Slemons v. Southern California Edison*, 252 Cal. App. 2d 1022, 1026 (1967). *See also*,
28 *South Bay Irr. Dist. v. Cal. American Water Co.*, 61 Cal.App.3d 944, 957 (1976) ("Property owned by a public utility
water company is impressed with a public use."); *Patel v. Southern Cal. Water Co.*, 97 Cal.App.4th 841, 845 (2002)
("Providing water is a public use."). The Town cites authority on what constitutes a public use (Town's Brief, at p. 19)
which would be relevant if public use were contested. Here, however, there is no dispute that providing water to Apple
Valley's customers is a public use, regardless of whether the water were to be provided by Liberty or by the Town.
The question is not the *existence* of a public use, but whether provision by the Town is a "*more necessary* public use"
than continued provision by Liberty.

1 As amended by the 1992 legislation, Code Civ. Proc. §1245.250(b) now provides:

2
3 (b) If the taking is by a local public entity . . . and the property is
4 electric, gas, or water public utility property, the resolution of necessity
5 creates a rebuttable presumption that the matters referred to in Section
6 1240.030 are true. This presumption is a presumption affecting the
7 burden of proof. (Emphasis added.)

8 And, as amended by the 1992 legislation, Code Civ. Proc. §1240.650(c) now
9 provides:

10 (c) Where property which has been appropriated to a public use is
11 electric, gas, or water public utility property which the public entity
12 intends to put to the same use, the presumption of a more necessary use
13 established by subdivision (a) is a **rebuttable presumption** affecting the
14 burden of proof, unless the acquiring public entity is a sanitary district
15 exercising the powers of a county water district pursuant to Section
16 6512.7 of the Health and Safety Code. (Emphasis added.)

17 As the Court previously explained in its October 31, 2018 Ruling:

18 As a result of the 1992 amendments to sections 1240.650 and 1245.250,
19 in an eminent domain proceeding initiated by a public entity to obtain a
20 public utility from a non-public utility, such as here, the conclusion that
21 the use by a public entity is a more necessary use is rebuttable. Similarly,
22 the resolution of necessity creates a rebuttable presumption that the three
23 necessity elements of section 1240.030 are true. (See October 31, 2018
24 Ruling, at p. 7:18-22.)

25 The Enrolled Bill Report from the Governor's Office of Planning and Research for
26 SB 1757, issued on September 1, 1992, explains the context in which the bill was being
27 considered:

28 The purpose of eminent domain takings is to allow government to seize
private property for a future use that is in the best interest of the
community as a whole. For example, a typical eminent domain
procedure would involve the taking of private homes to allow
development of a new freeway. However, under current law, local
governments may seize private utility properties by eminent domain

1 authority and use those properties for the same use as their current use.
2 This office believes there is a clear difference between taking property
3 because the community needs it for a more important use, and taking
4 property because the local government wants it under its own
5 management.

6 * * *

7 Generally, this office does not support legislation that could add more
8 litigation to an already ridiculously litigious society. However, we believe
9 this bill's protection of private property rights would outweigh the
10 potential adverse impact of any increase in court actions.

11 The reality of this bill is that it would strengthen private utilities' hand in
12 negotiating, and probably dissuade some public acquisitions. This office
13 believes that would be a good thing. The private sector can provide
14 utility services more efficiently than the public sector. The whole world
15 round, utilities are being privatized. California should not be marching in
16 the opposite direction. (Enrolled Bill Report, SB 1757, pp. 4-5 [Liberty's
17 July 13, 2018 Request for Judicial Notice, Exh. 2].)⁵

18 Enrolled Bill Reports, which are prepared by a responsible agency
19 contemporaneous with passage and before signing of a bill, are instructive on matters
20 of legislative intent. *Eisner v. Uveges*, 34 Cal. 4th 915, 934 n. 19 (2004) The Enrolled
21 Bill Report for SB 1757 notes the position of the California Water Association, the bill's
22 sponsor:

23 [W]hile some condemnations involve utilities which have fallen into
24 disrepair or which fail to meet health and safety standards, other
25 condemnations involve healthy, responsive utilities which provide excellent
26 service to their ratepayer at the lowest possible rate. In such cases, CWA
27 contends that a public entity might just desire to take a utility because of
28 the potential income it may generate. . . . [¶] [M]aking the presumption
of a public necessity and a more necessary use rebuttable would allow
reasonable challenges to condemnation that may be in the best interest of
the ratepayer. (Enrolled Bill Report, SB 1757, p. 3, internal quotation
marks omitted [Liberty's July 13, 2018 Request for Judicial Notice, Exh.

⁵ The legislative history of SB 1757 was provided to the Court by Liberty's Request for Judicial Notice Re: Legislative History of Senate Bill 1757, filed on July 13, 2018. As requested by Liberty, the Court again takes judicial notice of the same materials.

1 2].)

2
3 This legislative history indicates that the quality of service and the health and
4 safety record of the targeted utility are factors that should be taken into account in
5 assessing whether the proposed condemnation is in the public interest.

6 The 1992 legislation made the issues of necessity *judicial* issues to be decided by
7 the Court after trial – not issues decided *legislatively* by the Town when it adopted the
8 Resolutions of Necessity. *See* October 31, 2018 Ruling, at pp. 15:25-16:4. As the
9 Court explained in its October 31, 2018 Ruling:

10
11 The issue regarding litigation of Liberty's objections under sections
12 1250.370 and 1250.360, subdivision (f), as they relate to the rebuttable
13 presumptions applicable to public utilities, is not a question of the
14 standard of review as the Town asserts. Instead, it is an issue of the
15 burden of proof. With respect to such objections, Liberty bears the
16 burden of demonstrating the nonexistence of such presumed facts by a
preponderance of the evidence. If Liberty cannot make such a showing
by a preponderance of the evidence, the presumed facts continue to exist.
(*See* October 31, 2018 Ruling, at p. 15:18-24.)

17
18 The rebuttable presumptions in Sections 1245.250(b) and 1240.650(c) are
19 presumptions affecting the burden of proof. Thus, under Evid. Code §606, at trial
20 Liberty had the burden to show, by a preponderance of the evidence, the nonexistence
21 of: (1) one or more of the public necessity elements in Section 1240.030; or (2) the
22 more necessary public use element under Section 1240.650(c). If the preponderance
23 of the evidence at trial disproved any of these prerequisites to condemnation – whether
24 it be either of the two public necessity elements contested here, or the more necessary
25 public use element – the Town's eminent domain action must be dismissed. *See* Code
26 Civ. Proc. §1260.120(c).

27 By adopting SB 1757 in 1992, the Legislature made the policy decision that
28 objections to attempted condemnations of utility property are to be treated differently
than those same objections would be treated where non-utility property is involved.

1 More specifically, the owners of utility property have been given greater rights than the
2 owners of non-utility property to challenge eminent domain actions. "SB 1757 would
3 allow private utilities to argue the necessity of certain eminent domain takings in court."
4 (Enrolled Bill Report, SB 1757, p. 3 [Liberty's July 13, 2018 Request for Judicial Notice,
5 Exh. 2].) Having granted these greater rights to owners of public utility property, it is
6 evident the Legislature intended that at least some legal challenges to utility takings
7 made possible by SB 1757 will deserve to be sustained; otherwise the legislation would
8 be without purpose. As addressed further below, if generic concepts such as "local
9 control" or a municipality's interest in "controlling its water future" or satisfying its
10 "vision statement" were enough to defeat the objections, the 1992 legislation would be
11 rendered meaningless – because such generic arguments could *always* be asserted by
12 *every* public entity that sought to acquire utility property by eminent domain. It follows
13 that the issue of whether the statutory presumptions have been rebutted is more
14 properly focused on specific attributes of the particular targeted utility. In this manner,
15 courts can carry out the legislative policy behind SB 1757 by separating out those
16 utilities whose condemnations would be in the public interest from those whose
17 condemnations would not be.⁶

18 By a preponderance of the evidence introduced at trial and reviewed below,
19 Liberty disproved that (1) the public interest and necessity require the Town's Project
20 (Code Civ. Proc. §1240.030(a)); (2) the Town's Project is planned in the manner that
21 will be most compatible with the greatest public good and the least private injury (Code
22 Civ. Proc. §1240.030(b)); and (3) the use for which the Town seeks to take Liberty's
23 property is a more necessary public use than the use to which Liberty's property is
24 presently devoted (Code Civ. Proc. §1240.610).

25 ///

26 ///

28

⁶ 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.

1 **II. THE TOWN'S "PROJECT" IS ESSENTIAL TO THE ISSUES**
2 **THE COURT MUST DECIDE.**

3 **A. In Order to Determine The Public Necessity Elements, A Clear**
4 **Statement of What Constitutes "the Project" is Essential.**

5 The three requirements imposed by Code Civ. Proc. §1240.030 are commonly
6 referred to as "the public necessity elements." *SFPP, L.P. v. The Burlington Northern &*
7 *Santa Fe Railway Co.*, 121 Cal. App. 4th 452, 468 (2004). Each of the public necessity
8 elements specifically uses the term "the Project." Consequently, in order for the Court
9 to determine whether these elements have been rebutted by the evidence, the Town
10 must clearly and unequivocally state and define its "Project."

11 The Court in *City of Stockton v. Marina Towers LLC*, 171 Cal. App. 4th 93 (2009)
12 explained why a proper description of "the Project" is so critical in an eminent domain
13 case:

14
15 There are many reasons why a failure to identify sufficiently the proposed
16 project in a resolution of necessity must have fatal consequences to a
17 public entity's right to take. First . . . [i]t is both a physical and legal
18 impossibility for legislators to make a determination that public interest
19 and necessity require "the project," that "the project" is located or
20 planned in a manner consistent with the greatest public good and least
21 private injury, and that the property sought to be acquired is necessary
22 for "the project" (§1240.030, subds. (a)-(c)) if the resolution contains no
23 intelligible description of what the project is.

24
25 Second, our case law recognizes that compliance with CEQA is mandatory
26 before a public entity may condemn property for a proposed project.
27 Thus, if the public entity fails to prepare a valid EIR or negative
28 declaration for the proposed project prior to condemning the property,
the trial court is authorized to dismiss the action

29
30 Third, identification of the project is an integral component of the
property owner's right to procedural due process. A governing body of a
public entity may not adopt a resolution of necessity until it has given the
owner proper notice and an opportunity to be heard on all matters that
are the subject of the resolution of necessity . . . If the governing body
does not have before it a definable project for which the property is
sought to be taken, any discussion of the pros and cons of the

1 condemnation would be an empty gesture and the necessity findings
2 rendered at the conclusion of the hearing would be devoid of real
3 meaning.

4 Fourth, and finally, an adequate project description is essential to enable
5 judicial resolution of several right-to-take defenses authorized by eminent
6 domain law.

7 *Marina Towers*, 171 Cal. App. 4th at 108-109, citations omitted.

8 The Town argues that *Marina Towers* has no bearing here, but it misconstrues
9 the applicability of the decision. Liberty has not argued that the Town's acquisition "is
10 not a project" or that "the Town has no project," as the Town asserts in its post-trial
11 brief. (Town's Brief, pp. 20, 24.) Liberty relies on *Marina Towers* for a simpler point –
12 that "the Project" proposed by the Town is established by its Resolutions of Necessity.
13 This does not mean that all post-resolution of necessity conduct is "irrelevant," as the
14 Town suggests. (Town's Brief, p. 95.) What it means is that "the Project" cannot be a
15 moving target; Liberty's due process rights would be violated if it were. The Court
16 agrees that *Marina Towers* establishes these important points and the rationale for why
17 "the Project" is critical to evaluating Liberty's objections.

18 **B. The Town's "Project" Here Is To Acquire The Water System and**
19 **Make No Changes To It Or To Its Manner of Operation.**

20 Here, the Town adopted two Resolutions of Necessity on November 17, 2015.
21 Resolution No. 2015-43 addressed those portions of the water system located within
22 the Town's boundaries (Exh. 3651-1), and Resolution No. 2015-44 addressed those
23 portions of the water system that were located outside of the Town's boundaries (Exh.
24 3652-1). The Town's adopted Resolutions of Necessity define "the Project" as "*the*
25 *public ownership, operation and maintenance of the Apple Valley Water System to*
26 *provide water service to the public.*" (Exh. 3651-1; Exh. 3652-1, emphasis added.)
27
28

1 When the Town adopted its Resolutions of Necessity on November 17, 2015, it
2 also (1) referenced its certified Environmental Impact Report; and (2) incorporated its
3 Staff Report regarding the Resolutions. (Exh. 3651-1, §§1, 2; Exh. 3652-1, §§1, 2.)

4 The Town's certified EIR recognized repeatedly that *"[t]he Town is proposing*
5 *only to acquire and operate the existing system, and is not proposing changes or*
6 *expansion to the physical [Water] System or to the associated water rights, nor is the*
7 *Town proposing any changes to the manner of operation of the [Water] System or the*
8 *exercise of the associated water rights."* (Exh. 165-42. emphasis added; see also Exh.
9 165-8 to 165-9, 165-14, 165-261, 165-301, 165-307.)

10 The Town's Staff Report (incorporated into its Resolutions of Necessity) also
11 defined "the Project" as *"public ownership, operation and maintenance of the Apple*
12 *Valley Water System to provide water service to the public."* (Exh. 891-2, emphasis
13 added.) The incorporated Staff Report further provides: "The Project as described in
14 the Resolutions of Necessity is consistent with the Project as described in the Final
15 Environmental Impact Report." (Exh. 891-6.)

16 And finally, the Town's Complaint in this action filed on January 7, 2016 likewise
17 describes "the Project" as:

18 The Town's proposed public project is *the public ownership, operation,*
19 *and maintenance of the Water System* to provide water service to the
20 public ("the Project"). (Complaint In Eminent Domain, ¶ 6; emphasis
21 added).

22 The testimony from Town employees at trial was consistent with these
23 documents. Town Manager Doug Robertson testified that the Town has no current plan
24 to make any changes to the water system. (11/4/19 Robertson 109:19-22.) As Mr.
25 Robertson told the Town Council on July 23, 2019: "We don't have any beef with any
26 of the employees of Liberty Utilities, and we hope to simply bring them on, change the
27 logo on the door of their truck, change the logo on their polo shirt and have 'em keep
28 right on working." (Exh. 159-1.) Assistant Town Manager Lori Lamson testified that

1 there are no proposals to expand or modify operations in any substantial way.
2 (2/13/20 Lamson 27:2-16.) And the Town's Interim Public Works Manager Michael
3 Molinari agreed that "the plan is to have the same employees pumping the same water
4 from the same sources and delivering that same water through the same distribution
5 pipes to the same customers." (10/24/19 Molinari 101:15-25.)

6 **C. The Town's Right to Take Must Be Decided Based on the Town's**
7 **Project, Not Subsequent Attempts to Modify the Project.**

8 At trial, the Town introduced extensive expert testimony by Craig Close about
9 the condition of the water system. Mr. Close inspected the system over Labor Day
10 weekend 2019 (Exh. 4334-8) – less than two months before the start of trial – and
11 presented a series of "inspection reports" and testimony highly critical of the water
12 system. By way of example, according to Mr. Close, the Bell Mountain Tank is "in
13 poor/severe condition" and needs to be rehabilitated or replaced (Exh. 3871-2); Wells
14 17R, 34, and 25 are all in "poor condition" and should be replaced (Exh. 3899-3; Exh.
15 3916-3; Exh. 3908-3); and the Jess Ranch Booster Station is also in "extremely poor
16 condition and needs to be replaced" (Exh. 3880-4). Mr. Close also showed a multitude
17 of photographs of peeling paint and criticized the appearance of several components of
18 the water system.

19 Mr. Close's opinions regarding supposed defects or shortcomings in the system
20 are diametrically opposed to the Town's Project as reviewed above – to acquire the
21 water system *and make no changes to it*. Not only was Mr. Close's testimony
22 inconsistent with the Town's Project, he also made no effort to determine how much it
23 would *cost* the Town to make any of the changes he opined were needed. (6/22/20
24 Close 86:19-22.) Likewise, the Town's financial expert, Shawn Koorn, did not include
25 any earmarked costs to repair any of the system changes Mr. Close recommended.
26 (6/30/20 Koorn 89:4-7, 90:14-18.)
27

28 The Town argues that Mr. Close's testimony may be considered to rebut Liberty's
evidence that the system is well-run operationally. (Town's Brief, at p. 26.) The Court

1 agrees, and has considered Mr. Close's testimony for this purpose. However, Mr.
2 Close's myriad criticisms of the water system cannot be used to affirmatively support
3 the Town's right to take the system because the Town's Project does not include any
4 changes to the system or its operation, and the Town cannot modify its Project based
5 on Mr. Close's eve-of-trial system inspection. The Town could have undertaken a
6 thorough inspection of the Apple Valley Water System and compiled a list of any system
7 changes it believed were needed *before* it filed this action. The Eminent Domain Law
8 includes extensive procedures for a condemnor like the Town to "enter upon property
9 to make photographs, studies, surveys, examinations, tests, soundings, borings,
10 samplings, or appraisals or to engage in similar activities" *before* filing an eminent
11 domain lawsuit. *See* Code Civ. Proc. §§1245.010 *et seq.*⁷ The Town did retain an
12 engineering consulting firm *before* it adopted its Resolutions of Necessity in November
13 2015. (Exh. 891-5.) Everything Mr. Close did over Labor Day weekend 2019 could have
14 been done by the Town *before* it filed its Complaint more than three years earlier.
15 Then, if it chose to, the Town could have included the repair of any alleged system
16 deficiencies in its "Project" and analyzed them in its EIR. Having eschewed that
17 opportunity, the Town cannot engage in a post-hoc attempt to change its Project.

18 The Town also cannot justify its right to take the system based on the possibility
19 of a *future* plan to modify the system or its operations. That stratagem was attempted
20 and rejected in *Marina Towers*. There, the Court held it was incumbent upon the City
21 to define its project, and "[t]o define is to limit, and that which is left unlimited, and is
22 to be determined only by such future action as the [c]ity may hereafter decide upon, is
23 not defined." *Marina Towers*, 171 Cal.App.4th at 112 (emphasis added; quoting
24 *Cincinnati v. Vester*, 281 U.S. 439 (1930)). What is at issue in this case is the Project
25

26
27
28

⁷ The Town argues that the inspection statute was unavailable to it because the constitutionality of
the statute was under review by the Supreme Court in *Property Reserve, Inc. v. Superior Court*, 1 Cal. 5th 151 (2016).
The argument is unavailing, as the only questions before the Supreme Court involved whether certain invasive or
destructive testing required the government to pay compensation, and if so, whether the statute has adequate
processes for determining the amount of compensation. (1 Cal 5th at 167.) The pendency of that litigation would not
have prevented the Town from inspecting the water system at any time, including in 2015, before it adopted its
November 17, 2015 Resolutions of Necessity. (Exh. 3651; Exh. 3652.) From the record, it appears that the Town
never demanded inspection of the system at any time before adopting its Resolutions and filing this action.

1 now proposed by the Town, not some other unknown Project that the Town may or
2 may not seek to pursue at some point in the future.

3 **III. LIBERTY HAS REBUTTED THE PRESUMPTIONS THAT THE PUBLIC**
4 **INTEREST AND NECESSITY REQUIRE THE PROJECT AND THAT THE**
5 **PROJECT IS A MORE NECESSARY PUBLIC USE OF LIBERTY'S**
6 **PROPERTY.**

7 Most of the evidence introduced at trial applies to multiple prongs of the three
8 legal issues to be decided by the Court. The Court begins by considering together the
9 rebuttable presumptions under Code Civ. Proc. §§1240.030(a) and 1240.650(c).

10 Code Civ. Proc. §1240.030(a) states that the power of eminent domain may be
11 exercised only if it is established that "[t]he public interest and necessity require the
12 project." As noted in the Legislative Committee Comment to Section 1240.030, "public
13 interest and necessity" is an exceedingly broad concept: " 'Public interest and necessity'
14 include all aspects of the public good including but not limited to social, economic,
15 environmental, and esthetic considerations." Notably, the statutory language doesn't
16 say that the public interest and necessity may *support* the Project, or *allow for* the
17 Project, or even *favor* the Project – the public interest and necessity must *require* the
18 Project.

19 Code Civ. Proc. §1240.650(c) creates a rebuttable presumption that water public
20 utility property that a public entity intends to put to the same use as a private owner is
21 a "more necessary" public use than the private owner's use of the property. The
22 determination of "more necessary public use" presumes that the future operation of the
23 system by *both* the Town and Liberty can be deemed "necessary" – and then requires
24 the Court to balance the necessity of each to determine which one is *more* necessary.⁸
25 This legal standard is a lesser one than that which applies under Section 1240.030(a);
26 while Section 1240.030(a) *requires* the Project to be necessary, Section 1240.650(c)

27 _____
28 ⁸ Just as the Court in *SFPP* stressed that the words "most," "greatest" and "least" in Section
1240.030(b) are "comparative terms" that require a consideration of different options, so too is use of the word "more"
in Section 1240.650 in the phrase "more necessary public use" a comparative term that requires a comparison of the
necessity of continued operation of the water system by Liberty with operation of the system by the Town. (*SFPP*, 121
Cal. App. 4th at 469-470.)

1 *presumes* the Town's Project is necessary, and balances that necessity against the
2 necessity of continued operation by Liberty to determine which scenario is *more*
3 necessary. If the two are found to be equally necessary, the requirement of Section
4 1240.650 is not satisfied and the power of eminent domain may not be exercised by the
5 Town. Code Civ. Proc. §1240.610.

6 Liberty objects to the Town's right to take Liberty's property under Code Civ.
7 Proc. §1250.370(b) – asserting that "[t]he public interest and necessity do not require
8 the proposed project." (Emphasis added.) Liberty further objects to the Town's right
9 to take under Code Civ. Proc. §1250.360(f) – asserting that the Town's Project "does
10 not satisfy the requirements" for "condemnation for more necessary public use."

11 The Court sustains Liberty's objections. The preponderant evidence at trial
12 shows that the public interest and necessity do not "require" the Town's Project – *i.e.*,
13 the acquisition and operation of the Apple Valley Water System, with no changes to it.
14 The nonexistence of the first public necessity element is demonstrated by evidence in
15 three broad areas: (1) Liberty has operated a safe and reliable water system, while the
16 Town has no experience, but only a hope, of doing so; (2) the regulatory oversight
17 provided by the California Public Utilities Commission is more stringent than the
18 oversight that would apply to Town ownership of the system; and (3) there is a
19 substantial risk that the water system will be imperiled and the ratepayers will be
20 harmed if the Town were permitted to take over the system and supplant regulation by
21 the Public Utilities Commission.

22
23 The same evidence also demonstrates the nonexistence of the requirement of
24 "more necessary public use." Because the Town's Project is *not* necessary under
25 Section 1240.030(a), it is not "*more necessary*" under Section 1240.650(c).

26 Even separately analyzing the evidence as to the "more necessary" use element,
27 Liberty has met its burden of proof by proving that the Town's operation of the water
28 system is not "*more necessary*" than continued operation of the system by Liberty. The
Town's plan is "to have the same employees pumping the same water from the same

1 sources and delivering that same water through the same distribution pipes to the same
2 customers." (10/24/19 Molinari 101:15-25.) Town Manager Robertson testified that he
3 "can't imagine" that anyone could run the system better than the Liberty employees are
4 currently operating it. (11/4/19 Robertson 110:20-25.) It is not "more necessary" for
5 the Town to *try* to hire Liberty's employees and "change the logo on their polo shirts"
6 (Exh. 159-1) to operate the water system with no contemplated changes.

7 As addressed further below, much of the evidence offered by the Town on the
8 issues of whether the Project is required by the public interest and necessity, and
9 whether it is a more necessary use of Liberty's property, seems to be rooted in
10 disagreements with existing law. For example, the Town has advanced a litany of
11 arguments as to why it believes that regulation of Liberty by the Public Utilities
12 Commission is ineffective and lacking; or why CEQA does not (in the Town's view)
13 adequately apply to actions of an investor-owned utility like Liberty; or why the service
14 duplication law (Pub. Util. Code §1501) that provides certain protections to investor-
15 owned utilities is unfair or improper; or whether the fire flow standards established by
16 Apple Valley Fire Protection District Ordinance 42 are appropriate for the Town. Such
17 legal criticisms of existing law are not a proper basis for justifying the use of eminent
18 domain, which has been described as government's "most awesome grant of power."
19 *City of Oakland v. Oakland Raiders*, 174 Cal. App. 3d 414, 419 (1985). To exercise this
20 awesome power against a private utility *which is following the law as written* would be
21 unfair, and would certainly not rise to the level of being "required" by the public
22 interest. Properly adopted statutes or regulations represent policy choices by the
23 Legislature or entities created by it. The Town is certainly entitled to have its opinion
24 on the wisdom of the law and advocate for changes to it. But it is a very different
25 matter for the Town to seek to use its disagreement with existing law as a basis for
26 using its power of eminent domain, as it has tried to do here.

1 **A. Liberty Has Operated a Safe and Reliable Water System; Allowing**
2 **the Town to Acquire It Would Create Substantial Risks to**
3 **Continued Effective Operations.**

4 **1. Liberty Has a Highly Skilled Work Force That Has Operated**
5 **The System With a Perfect Water Quality Record**

6 Over the past 30 years, the Apple Valley Water System has had zero water
7 quality violations. (11/6/19 Thomas-Keefer 36:16-37:17.) This achievement differs
8 markedly from many of the water systems that serve adjacent communities. (Exh. 920-
9 57; Exh. 994-1.) The superior record on water quality violations has been accomplished
10 by what appears to be a highly skilled contingent of employees, many of whom have
11 worked on the system for decades. The evidence showed:

- 12 • The system is rated D5, the category that applies only to the largest and
13 most complex water systems in the state, whether publicly or privately
14 owned (11/6/19 Thomas-Keefer 14:23-15:11);
- 15 • 55% of the staff have 10 or more years of experience (Exh. 993-4); and
- 16 • Four employees hold a D5 certification – the highest distribution
17 certification issued by the State – and 15 employees hold a T2 certification
18 in treatment, the level needed for the system. (Exh. 203; 11/6/19
19 Thomas-Keefer 18:1-13; 12/4/19 Lent 101:16-19.)

20 Town Manager Robertson conceded that he "can't imagine" that anyone could
21 run the system better than the Liberty employees are currently operating it. (11/4/19
22 Robertson 110:20-25.) Mr. Robertson was designated in the litigation as the person at
23 the Town "most knowledgeable" about operating the water system. (11/4/19
24 Robertson 6:4-11.)

25 Faced with the system's perfect record on water quality, the Town's response
26 was to try to suggest that water quality violations are "self-reported," implying that the
27 record was somehow manipulated or unreliable. (12/4/19 Dalton 73:7-17.) But
28 Jeanne-Marie Bruno explained that water quality samples are given to an independent

1 lab that reports the test results directly to the State's database, in addition to providing
2 copies to Liberty. The State then advises the water system of violations, not the other
3 way around; and Liberty has no ability to hide or withhold water quality information
4 from the State. (1/15/20 Bruno 73:18-75:3; 1/27/20 Bruno 113:3-8.) An example of
5 an independent laboratory report on the result of water quality tests is Exh. 548, which
6 includes careful documentation of the chain of custody of the water samples. (1/15/20
7 Bruno 73:18-74:5, 77:18-78:17; Exh. 548-9.) The Court rejects the Town's effort to call
8 into question the water system's perfect water quality record.

9 Supplying water to the community is an important matter of public health and
10 safety. Health & Safety Code §116270(d) (when present in drinking water, toxic
11 chemicals "may cause cancer, birth defects, and other chronic diseases"); Federal Safe
12 Drinking Water Act (Pub. Law 104-182, Sec. 3: congressional finding that "safe drinking
13 water is essential to the protection of public health"). In this regard, water is different
14 from other utilities. As the PUC's statewide Water Action Plan provides: "Water is the
15 only utility that is ingested by consumers; therefore, water quality is vital to the health
16 of consumers." (Exh. 270-5.) By proving its *perfect* record on water quality, Liberty has
17 proven that the Town could not possibly operate the system with a *better* record on
18 water quality. On the critical issue of water quality, Liberty has proven that the public
19 interest and necessity do not require the Town's acquisition of the water system, and
20 the acquisition would not be a "more necessary" public use of Liberty's property.

21 a. **The Town's Plan for Operating the Water System**
22 **Presents Potential Risks To Public Health And Safety**

23 The Town tacitly concedes the high quality of the system's current operations by
24 its "plan" to hire all of Liberty's current staff to run the system. (11/4/19 Robertson
25 110:5-9.) But there is a substantial risk that the Town's plan will not be successful,
26 which creates a consequent risk to public health and safety and to the ongoing reliable
27 delivery of water to the system's customers.

28 Mr. Molinari, a 14 ½ year employee in the Town's Public Works department,
acknowledged there is no one at the Town competent to operate a water system, and

1 Mr. Robertson admitted that it is "undetermined" who would run the system if the Town
2 were to acquire it. (10/24/19 Molinari 77:11-15, 88:4-9; 11/5/19 Robertson 9:15-21.)
3 Mr. Close, the Town's expert, prepared a document that actually listed Liberty's Greg
4 Miles as "Town Engineer," but Mr. Miles testified he "would not work for the Town."
5 (6/23/20 Close 11:5-20; Exh. 1163-2; 3/3/20 Miles 103:4-14.) And several other key
6 Liberty employees similarly testified they were not interested in working for the Town.
7 (12/5/19 Lent 45:13-47:6; 12/5/19 Garcia 117:10-22; 1/14/20 Phillips 91:10-19; 2/3/20
8 Vogel 22:9-23.) On the other hand, the Town failed to present evidence of even a
9 single Liberty employee who has expressed a willingness to become an employee of the
10 Town.

11 The Town suggests that Liberty employees may have stated their intention to
12 not work for the Town only because they feared reprisal from Liberty management if
13 they said otherwise. But the evidence revealed several reasons why they could be
14 reluctant to become Town employees. For example, Liberty employees who elect to
15 join the Town would be required to restart the clock on their retirement benefits.
16 (3/11/20 Busch 78:26-79:3.) Any current Liberty employee who would go to work for
17 the Town would face a new five-year waiting period before they would be eligible for
18 any retirement benefits under PEPRRA, the Public Employees Pension Reform Act.
19 (3/11/20 Busch 78:2-79:15.) Older more experienced workers who are closer to
20 retirement would be less likely to accept such a five-year suspension on earning
21 retirement benefits. More broadly, the Town has not investigated how the salaries of
22 Liberty employees compare to the salaries of Town employees. (11/5/19 Robertson
23 9:12-14.) And the Town presented a proposed "zero-based budget" from its expert
24 Craig Close that indicates that the Town would cut the salary of the average AVR
25 employee by about \$25,000. (6/25/20 Close 55:9-13.)

26 The evidence also established that the Town fails to account for the overall labor
27 force that currently runs the system. Liberty's Apple Valley organizational chart includes
28 42 employees who are *physically located in Apple Valley*. (12/10/19 Sorensen 59:21-

1 26; Exh. 202.) But there are many other employees located elsewhere (including in
2 Downey and Oakville) who help to run the water system. (12/10/19 Sorensen 60:1-6,
3 99:3-101:2.) For example, Rick Dalton, the Director of Engineering who has worked on
4 the system for 31 years, is employed by Liberty Park Water and officed in Downey.
5 (11/14/19 Dalton 83:15-84:8.) Mr. Dalton also testified that he would "definitely not"
6 go to work for the Town if it were to take over the water system. (12/4/19 Dalton
7 12:6-10.) Greg Sorensen, Liberty Apple Valley's corporate president, explained that
8 Liberty uses a "shared services" model to operate the system, with numerous tasks
9 such as IT, payroll, and human resources performed on a company-wide basis. Other
10 specialized tasks are performed by Liberty Park Water corporate employees like Mr.
11 Dalton who are officed in Downey. (12/10/19 Sorensen 60:25-62:5; Exh. 484.)

12 But the Town's plan for the system only contemplates hiring the employees *who*
13 *are located in Apple Valley*. Mr. Robertson testified that the Town will add 40 to 45
14 employees if it succeeds in acquiring the system (11/5/19 Robertson 40:14-16; 52:14-
15 23.) This is equivalent to just the 42 Apple Valley-based employees, and does not
16 include any employees in Downey or Oakville. The Town's notion that it can simply
17 squeeze the direct work done by *non*-Apple Valley based employees onto the plates of
18 existing Town employees is infeasible.

19 In July 2019, a few months before the start of trial, the Town unveiled a new
20 Transition Plan suggesting that it might hire an unnamed consulting firm to operate part
21 or all of the system on a contract basis. (Exh. 156-8.) Even if this 2019 plan could be
22 considered part of the Town's "Project" that was defined back in 2015 before this action
23 was filed, the 2019 plan would create a substantial risk to ongoing operation of the
24 system. S&P, one of the ratings agencies, considers reliance on external consultants to
25 be a "vulnerable" management practice. (Exh. 735-18.) Moreover, the Apple Valley
26 water system is one of nine Class A regulated water utilities in the State – the Class
27 consisting of the largest and most complex water systems regulated by the PUC.
28 (12/17/19 Jackson 41:2-42:2; Exh. 284.) No evidence was presented at trial of an

1 outside consulting firm operating such a large water system in California. Outside
2 consulting firms would need to balance services they might provide to the Town with
3 services they would provide to other firm clients. And there is no evidence that outside
4 consultants would be likely to achieve the longevity, water quality success, and pride of
5 ownership that Liberty's current workforce has achieved.

6 In sum, the Court finds that a skilled and experienced workforce has operated
7 the water system in a manner that has protected public health and safety for many
8 decades. Liberty proved that the Town has no in-house capability to run a complex
9 water system, and is banking on the unlikely scenario that it will be able to hire nearly
10 all of Liberty's Apple Valley employees to continue to run the system successfully.
11 Given the Town's desire to have the same workforce operate the system and its
12 concession that no one could do a better job running the system, there appears to exist
13 a substantial risk to public health, safety, and the continued reliable delivery of water
14 under the Town's plan of operation. It does not appear in the public interest to allow
15 the Town to acquire a well-run water system.

16 b. **Liberty Has Operated and Maintained the System**
17 **Effectively and Efficiently.**

18 Liberty proved that the Apple Valley water system has been operated and
19 maintained both effectively and efficiently. The Town's proposed acquisition is not
20 "required" by public interest and necessity and would not be a "more necessary" public
21 use than the use to which Liberty's property is appropriated. The evidence has
22 revealed no substantial problems with the operation or maintenance of the Apple Valley
23 water system.

24
25 **Water Conservation.** The effective operation of the system is demonstrated in
26 part by its ability to meet or exceed critical conservation goals established by the State.
27 Water is a scarce and precious resource which must be conserved. (Exh. 270-5.) To
28 promote water conservation, beginning in 2009 the PUC adopted tiered conservation
rates for the investor-owned utilities it regulates; tiered rates encourage conservation

1 by charging water users more on a per-CCF basis as consumption increases. (1/6/20
2 Jackson 55:19-56:1; Exh. 309-27.)

3 While tiered rates were in place, on January 17, 2014, Governor Brown declared
4 a State of Emergency to exist in California due to severe drought conditions. (Exh. 913-
5 1). And on April 1, 2015, Governor Brown issued an Executive Order mandating a 25%
6 reduction in water consumption throughout the state. (Exh. 912.)

7 In response to the Governor's mandates, and in conjunction with the PUC, an
8 array of conservation programs designed to reduce water consumption were
9 implemented. (2/3/20 Penna 80:5-84:3, 84:26-86:26; Exh. 347; Exh. 349; Exh. 350).
10 The conservation efforts, in conjunction with tiered rates, were effective; average
11 monthly residential consumption in Apple Valley has decreased significantly since 2009.
12 The vast majority of Apple Valley's approximately 20,000 connections are, and always
13 have been, residential customers. (Exh. 974-1.) Edward Jackson, Liberty's Director of
14 Rates and Regulatory Affairs, testified that in 2009 the average residential consumption
15 in Apple Valley was 20.0 CCF per month; ten years later, in 2019, it was 11.7 CCF per
16 month – a 41.5% decrease. (1/6/20 Jackson 85:16-88:24; Exh. 975.)

17
18 During Governor Brown's conservation mandate, from June 2015 through
19 December 2017, Apple Valley conserved more water than did any of the surrounding
20 publicly-owned systems in Victorville, Hesperia, or Adelanto. (2/3/20 Penna 99:16-
21 100:6; Exh. 946-7.)

22 **Water System Revenues**. Although residential consumption dropped 41.5%
23 from 2009 to 2019, most of the water system's costs are fixed, not variable. In other
24 words, a water system operator cannot remove 41.5% of its pipes, or only repair
25 41.5% of its leaks, or only answer 41.5% of its customer calls, or only do water quality
26 testing on 41.5% of its wells when consumption drops by 41.5%. Variable costs – such
27 as the cost of chemicals to treat water – *will* drop as consumption drops; but the
28 system's fixed costs do not diminish when consumption reduces. Critically, the Apple

1 Valley system's costs are 95% fixed and only 5% variable. (1/9/20 Hanemann 25:2-
2 26:9.)

3 This combination of factors – substantial conservation and a high percentage of
4 fixed costs – requires that rates on a per-CCF basis must be increased as consumption
5 decreases in order to meet the fixed costs needed to operate the system.⁹ Indeed, the
6 Town presented data showing that the system's revenue per unit of water sold has
7 increased substantially from 2000 to 2018 (although minimally during Liberty's
8 ownership since 2016). (3/9/20 DeShazo 74:18-75:11; Exh. 4284.) But efficient
9 operation of the water system is shown by the fact that the *total revenues* collected
10 from Apple Valley customers for water service have remained relatively flat over many
11 years – and actually *diminished* slightly based on inflation-adjusted dollars. (12/11/19
12 Sorensen 45:17-24; Exh. 969-1.)

13 The generally flat revenues from 2012 through 2018 indicate that the water
14 system is being operated efficiently. By contrast, the revenue needed to operate the
15 Town has increased substantially. From 2011 through 2020, the Town's budgeted
16 general fund revenues increased by *105.5%* (Exh. 867-1.) Focusing on just the period
17 from 2012 to 2018, the Town's budgeted general fund revenues increased by *34.6%* in
18 nominal dollars (from \$23.4 million to \$31.5 million), while total revenues collected for
19 water service in Apple Valley increased by just *7.3%* in nominal dollars. (Exh. 969-1.)

20 **Water System Expenses.** Operating efficiency is also shown by the overall
21 trend in operating expenses for the water system. In nominal dollars, the total
22 operating expenses for the Apple Valley water system *decreased* from \$11,418,458 in
23 2012 to \$11,024,080 in 2018. (Exh. 969-3.) When the dollars are adjusted for inflation,
24 the decrease is even greater: in 2018 dollars, operating expenses *decreased* from
25 \$12,478,179 in 2012 to \$11,024,080 in 2018. (Exh. 969-3.) Notably, while total
26 operating expenses over that period have decreased, the number of customers (water
27

28 ⁹ The PUC recognized this economic fact in the face of consumer frustration: "This leads many customers to puzzled exasperation 'We did what you asked, we conserved, yet we have to pay more.' It is an unfortunate fact that even without overhanging WRAM balances, lower consumption combined with unchanging or even escalating fixed and variable costs necessarily means that future rates may need to be higher." (Exh. 987-11.)

1 connections) served has increased. On a per-connection basis, operating expenses
2 have *decreased* by 12.81% since Liberty acquired the system in January 2016. (Exh.
3 970.)

4 At trial, the Town repeatedly attacked the amount of corporate charges to
5 ratepayers since Liberty acquired the system. (Town's Brief, at p. 36.) But the overall
6 reduction in per-account operating expenses since Liberty assumed ownership *includes*
7 *all indirect charges (i.e., overhead) and all direct charges* allocated to the Apple Valley
8 water system *from all other Liberty corporate entities*. (12/11/19 Sorensen 55:16-
9 57:12.) In other words, while the *source* of the expenses may have changed since
10 Liberty acquired the system – based on its shared services model – the *total* expenses
11 on a per-connection basis have *decreased*. That shows the economies of scale and
12 efficiencies from Liberty's shared services model.

13 **Operational Standards.** In addition to operating the system efficiently from a
14 financial perspective, Liberty has also operated and maintained the system
15 professionally and appropriately. Liberty complies with the PUC's General Order 103-A,
16 which sets rules governing the operation, maintenance, design, and construction of
17 water systems. (11/6/19 Thomas-Keefer 55:11-56:3; 1/21/20 Sandoval 63:20-66:5;
18 Exh. 204.) Liberty proved that:

- 19 • It meets recommended operational standards for evaluating water
20 systems' operations and management, including system pressure,
21 backflow prevention, water losses, valve exercising and replacement, fire
22 hydrant maintenance and testing, meter maintenance, and energy
23 management. (Exh. 993-7 to 993-11.)
- 24 • All reported leaks are investigated immediately, on a 24/7 basis. (12/5/19
25 Lent 38:4-39:8.) Liberty repairs main leaks, which are typically
26 significantly larger than service line leaks, in less than 12 hours on
27 average. (12/5/19 Lent 23:5-24.)
- 28 • The latest technology is used to improve the system's reliability, efficiency
and security. Its top-of-the-line SCADA (Supervisory Control and Data

1 Acquisition) system enables Liberty to monitor the water system remotely,
2 and respond to problems quickly and effectively. (12/3/19 Dalton 34:11-
3 35:22; 11/6/19 Thomas-Keefer 91:16-23; Exh. 920-96 to 920-99.)

- 4 • The GIS (Geographic Information System) enables the company to map
5 and track all of the water system's facilities and to catalogue every capital
6 improvement, repair, or maintenance project in a single repository,
7 accessible at any hour to any employee who needs it. (12/5/19 Garcia
8 83:14-85:21; Exh. 707-3 to 707-4.)¹⁰

8 **Water System Safety.** The Town contends that Liberty's water system is "a
9 deficient and unsafe water system," but the evidence does not support this serious
10 charge. The Town asserts that the system fails to comply with various standards
11 adopted by the American Water Works Association ("AWWA"), yet the evidence clearly
12 established that the AWWA standards are entirely voluntary. (11/7/19 Thomas-Keefer
13 92:26-93:2; Exh. 1178-2, Exh. 4119-2.)

14 Launching from the AWWA recommendations, the Town argues that "[o]ne of
15 the most concerning safety issues is that the majority of the tanks do not meet AWWA
16 seismic standards." (Town's Brief, p. 53.) But Mr. Close performed only a visual
17 inspection of the tanks, and no evidence was presented of any physical, metallurgical,
18 or other professional testing performed to support a showing of safety threats. Mr.
19 Close acknowledged that compliance with the AWWA D100 standard regarding water
20 tanks is entirely voluntary, and that he is not aware of any tanks that fail to comply with
21 any applicable law or regulation. (6/23/20 Close 29:21-30:12, 41:1-11.) While Mr.
22 Close opined that Liberty should retrofit its tanks, he acknowledged that there is no
23 requirement for retrofitting, and he conceded that Liberty has not acted imprudently
24 with respect to its tanks. (6/23/20 Close 30:4-12, 32:2-23.) If Liberty were to retrofit
25

26 ¹⁰ The Town repeatedly objected at trial to testimony regarding the GIS and SCADA systems, asserting
27 that it was not permitted to inspect the systems during discovery. (11/6/19 Thomas-Keefer 14:3-9, 28:20-25; 6/16/20
28 Close 67:1-20.) But later it appeared that the Town never pursued inspection concerning the details to which it
objected at trial. Neither the Town's discovery request (Exh. 1172) nor its counsel's letter listing the facilities to be
inspected (Exh. 1173) mentioned the GIS or SCADA systems, and Mr. Close was not aware of any written request for
the data. (6/24/20 Close 42:3-45:13.) The Town did conduct depositions of witnesses to testify about how the GIS
and SCADA systems were used by Liberty, and never filed any subsequent motion seeking to compel additional
information on those topics. (6/25/20 Close 62:5-14, 65:12-67:16.)

1 its tanks, it would require a substantial capital investment, which would in turn lead to
2 higher rates than those the Town objects to now. Mr. Dalton testified that all of
3 Liberty's tanks are already equipped with some sort of earthquake protection (12/2/19
4 Dalton 22:14-23:8); on balance, the evidence does not support the Town's charge that
5 Liberty's water tanks "are potential time bombs waiting to explode." (Town's Brief, at
6 p. 53.)¹¹

7 **Water System Capacity to Meet Demand.** Mr. Close further opined that the
8 Apple Valley system has operated "on [the] edge for a long time" with respect to its
9 ability to meet maximum day demand. (6/25/20 Close 45:24-46:8.) At the same time,
10 Mr. Close conceded that he is not aware of any evidence that the system has ever run
11 dry of water. (6/23/20 Close 79:23-80:22.) Mr. Close testified that he had not seen
12 evidence to substantiate a significant drop in consumption since 2009 (6/23/20 Close
13 66:20-67:2), but such evidence was in fact abundant. Using Exh. 513 as an exemplar,
14 Mr. Jackson testified in detail exactly how the annual PUC reports contained all of the
15 data necessary to calculate average monthly consumption for residential customers
16 since 2009 – total annual consumption for both low-income and non-low income
17 residential customers, divided by the total number of residential connections for each
18 year, divided by 12 for the per-month calculation. (1/6/20 Jackson 85:16-88:24; Exh.
19 975) Each of the annual reports were received into evidence and were available to Mr.
20 Close to confirm the significant drop in consumption. (Exh. 3521-57, 3521-95 to 3521-
21 96 [data for 2009 and 2010]; Exh. 502-55, 502-96 to 502-97 [data for 2011 and 2012];
22 Exh. 504-57, 504-99 to 504-100 [data for 2013 and 2014]; Exh. 506-55, 506-97 to 506-
23 97 [data for 2015 and 2016]; Exh. 513-68, 513-113 to 513-114 [data for 2017 and
24 2018].)

25
26
27 ¹¹ The Town argues that the two Desert Knolls tanks overlook numerous homes and "the results would
28 be catastrophic" if the tanks were to rupture. (Town's Brief, at p. 53.) But the evidence showed that the tanks were
there first: the Desert Knolls tanks were constructed in 1949 and 1988, and most of the homes below the tanks were
built after 1994. (6/23/20 Close 44:24-45:7; Exh. 1179.) The Town was incorporated in 1988 (2/10/20 Lamson 28:18-
19), meaning it was the Town that approved the construction of most of the homes built below the tanks after 1994.
Having approved the homes below the tanks, the Town's speculative argument of a "catastrophe" if the tanks were to
fail is entitled to little weight.

1 Mr. Dalton testified that actual maximum day demand for the system in calendar
2 year 2018 was 14.4 million gallons per day (MGD). (12/2/19 Dalton 79:22-25.) The
3 Large Water System 2018 Annual Report for the system filed with the Division of
4 Drinking Water shows the maximum day demand in 2018 was 18,782 CCF on July 27,
5 2018, which, as Mr. Close conceded, equates to 14.04 MGD. (6/23/20 Close 73:19-
6 75:15; Exh. 1186-7.)

7 Excluding the system's largest source (as required by 22 CCR §64554(c) [Exh.
8 885]), the system's capacity is 35.4 MGD. (12/2/19 Dalton 60:20-61:6; Exh. 875-2.) So
9 the capacity, excluding the system's largest source (35.4 MGD), is slightly more than 2
10 ½ times the 2018 maximum day demand of 14.04 MGD.

11 The applicable regulations require comparing system capacity (again, excluding
12 the largest source) with the highest system demand *over the previous 10 years*,
13 thereby avoiding short-term aberrations in demand and creating a conservative margin
14 of safety. 22 CCR §64554(b)(1) [Exh. 885]. Because overall consumption has dropped
15 substantially over the last ten years, the highest annual maximum day demand figure
16 from 2009 through 2018 was ten years ago, in 2009 – 29.5 MGD. (12/2/19 Dalton
17 56:21-57:5; Exh. 180-15.) The system's source capacity excluding its largest source –
18 35.4 MGD – more than exceeds this. (12/2/19 Dalton 60:20-61:6; Exh. 875-2.) The
19 system also meets maximum day demand for each pressure zone. (12/2/19 Dalton
20 57:19-58:5; Exh. 875-1.) And the system meets Peak Hour Demand over four hours for
21 every pressure zone in the system. (12/2/19 Dalton 61:13-26; Exh. 875-3.)¹²

22
23 It appears Mr. Close's analysis of system capacity and demand was flawed. He
24 did not know that the 29.5 MGD maximum day demand figure was based on 10-year
25 old data from 2009. (6/23/20 Close 65:14-21, 73:17-18.) He claimed not to have the
26 last 10 years' data available, although the data for each calendar year could have been
27 obtained from the system's Division of Drinking Water annual reports, which are public

28
¹² Even Mr. Close conceded that the system and its pressure zones satisfied Peak Hour Demand. (Exh. 4295-6.) Notably, Mr. Close's testimony was based on an inflated maximum day demand figure of 30.9 MGD rather than 29.5 MGD. (6/23/20 Close 78:8-79:16.)

1 records. (6/23/20 Close 77:13-23; Exh. 4668-2.) Mr. Close's supply analysis took *two*
2 wells out of service, although the applicable regulations call for exclusion of just the
3 largest one. (Exh. 4295-4 n. 1; Exh. 885 [22 CCR §64554(c)].) And Mr. Close also
4 incorrectly assumed that water could not be supplied to the Jess Ranch pressure zone
5 from the Main Zone; in fact, Mr. Dalton explained that it can be so transmitted through
6 two separate paths. (Exh. 4295-4 n. 2; 7/14/20 Dalton 33:7-34:8.) The
7 preponderance of the evidence proved that the water system satisfies the regulatory
8 requirements of meeting Maximum Day Demand and Peak Hour Demand.

9 **Customer Service.** The evidence further established that Liberty's customer
10 service is responsive and effective. The company maintains a 24-hour call center that
11 meets the PUC's requirement of answering at least 80% of customer calls within 30
12 seconds. (2/3/20 Vogel 2:18-4:1; Exh. 204-54; Exh. 822; Exh. 823.) Liberty has met
13 or exceeded PUC-set performance requirements for billing accuracy, billing timeliness,
14 scheduling appointments, misapplied payments, and service orders. (2/3/20 Vogel
15 7:18-13:12; Exh. 1012.) Customer complaints to the PUC are well below the PUC's limit
16 of 1/10th of 1% of the number of customers. (12/17/19 Jackson 43:26-46:10; Exh.
17 923-219.) Mr. Robertson testified he was not aware of Liberty failing to respond to
18 leaks or other water problems when contacted by Town residents. (11/5/19 Robertson
19 26:10-13.) Mr. Robertson further conceded he is satisfied with Liberty's customer
20 service, and that residents should not expect faster responses to phone calls if the
21 Town acquires the system. (11/5/19 Robertson 26:14-21, 106:23-107:4.) The Town
22 introduced testimony by one customer, Joseph Szobonya, who complained that his calls
23 following a water leak were not promptly answered on one day in December 2018.
24 (3/12/20 Szobonya 50:17-51:15.) But Mr. Szobonya also testified this was a one-time
25 occurrence. (3/12/20 Szobonya 87:20-88:12.) Liberty offered evidence proving that it
26 had responded in a timely manner to occurrences at Mr. Szobonya's residence, had
27 repaired all property damage, and replaced the water main that was the source of the
28 problem. (7/13/20 Lent 36:3-6, 38:22-39:19, 40:7-24.) The testimony of a single
witness regarding a single episode does not in the court's view, call into question the

1 overall customer service Liberty provides to its more than 20,000 customers. The
2 Town's evidence does not seriously contest that introduced by Liberty, and the
3 preponderance of the evidence establishes that Liberty provides prompt and responsive
4 customer service.

5 In sum, it appears to the court that Liberty has proven that the Town's Project is
6 not required in order to remedy ineffective operations or maintenance of the system.
7 The evidence at trial supports Town Manager Robertson's testimony that he "can't
8 imagine" that anyone could run the system better than the Liberty employees are
9 currently operating it. (11/4/19 Robertson 110:20-25.) If no one could run the system
10 better, acquisition by the Town would constitute an experiment posing a risk to public
11 health, safety, and the continued effective system operation by a long-term work force.
12 The public interest and necessity do not appear to require taking the water system that
13 Liberty has expertly operated and maintained to see whether the Town can do the
14 same. Nor would it be a "more necessary" public use of Liberty's property to transfer it
15 to the Town in the hopes the Town will be able to operate the system as effectively as
16 has Liberty.

17
18 c. **There is a Substantial Risk That the Town Would Fail**
19 **to Commit the Needed Level of Capital**
20 **Improvements and Maintenance to the System.**

21 The evidence showed that water systems are extremely capital intensive. The
22 majority of the capital assets in a water system consists of buried pipe, out of sight to
23 customers but constantly degrading. (1/8/20 Hanemann 17:13-20:3; Exh. 1001-8.) The
24 failure of many water systems to adequately invest in and replace their capital assets is
25 a recognized national infrastructure crisis. (1/16/20 Bruno 2:23-3:13; Exh. 998-3, 998-
10; Exh. 1001-8 to 1001-10, 1001-17.)

26 The Apple Valley water system has 470 miles of underground distribution and
27 transmission mains, which are in constant need of maintenance and replacement.
28 (11/6/19 Thomas-Keefer 13:19-21; Exh. 920-11.) When Park Water acquired the
system from Texaco in 1987, 80% of the system's mains were comprised of old, poor-

1 quality salvaged steel oil surplus pipes. (11/14/19 Dalton 102:25-104:14.) Since 1987,
2 the company has replaced or installed 282.6 miles of water pipes in Apple Valley. (Exh.
3 1184-24.)

4 Taking into account all capital improvements to the system, the company-funded
5 annual expenditures from 2010 through 2018 ranged from \$2.5 million to \$10 million
6 per year, averaging \$6.4 million in inflation-adjusted 2019 dollars. (12/4/19 Dalton
7 10:11-18; Exh. 888; Exh. 423-7.) A significant part of the total capital investment is for
8 pipeline replacement, which has steadily reduced the system's leak rate by 90%, from
9 nearly 3,200 leaks per year in 1995 to 319 leaks in 2018. (11/14/19 Dalton 110:24-
10 111:6; Exh. 179.)

11 The evidence established that the Town has no plans to change Liberty's history
12 of pipeline replacement or the level of capital improvements to the system. (11/4/19
13 Robertson 104:22-106:16; Exh. 165-183.) Thus, it appears the acquisition is not
14 "required" by public interest or necessity in order for the Town to upgrade the system
15 or make needed capital improvements that would not otherwise be made under
16 continued Liberty ownership. Nor is the acquisition a "more necessary" public use on
17 this basis either.

18 While the Town does not plan to change the level of investment, there is a
19 substantial risk that it will not be able to match the capital expenditure level made
20 under private ownership. The system continues to have a number of pressing
21 engineering needs that require capital investment; and Mr. Dalton expressed concern
22 that the Town, if it were to acquire the system, would not continue to make the
23 appropriate level of investment. (12/4/19 Dalton 10:19-12:5.) Because the Town has
24 not operated a water system, there is no track record of Town capital expenditures on
25 such a system. However, based on the evidence at trial, the Court finds that Liberty
26 proved that Mr. Dalton's concern is justified.

27 The evidence demonstrated that owners of nearby municipally-owned water
28 systems have invested far less than Liberty in their systems. From 2012 through 2018,

1 Victorville averaged only \$3.1 million per year in capital improvements, while Hesperia
2 averaged a mere \$600,000 per year. (Exh. 427-10.) While this straight dollar
3 comparison may not account for differences between the systems, there is more.
4 Victorville's Water Master Plan called for \$7.5 million in annual capital expenditures
5 between 2010 and 2020, but in fact Victorville spent less than half of that. (1/15/20
6 Hanemann 14:15-15:20; Exh. 4176-189.) And between 2008 and 2018, Victorville
7 budgeted a total of \$19,228,550 for capital improvements to its water system but
8 actually spent only \$4,575,581. (Exh. 901-2; Exh. 922-2.) Thus, according to
9 Victorville's own Water Master Plan and budget documents, the Victorville water system
10 required significantly more capital improvement work than it received.

11 When the "Great Recession" hit in 2008, Victorville essentially halted *all* capital
12 improvements to its system between 2008 and 2013. (Exh. 861.) The pipes in the
13 ground continue to deteriorate when the economy is bad; suspension of capital
14 improvements in hard times just exacerbates the serious national problem of deferred
15 investment in buried water infrastructure.

16 During the 2008-2018 period, Victorville replaced 42,204 linear feet of water
17 mains, or a total of 7.99 miles (out of 694 miles of water mains in the system), while
18 44.52 miles of water main (out of 470 miles in the system) were replaced in the Apple
19 Valley system – 5 1/2 times more. (Exh. 862; Exh. 928.) This equates to a 955-year
20 replacement rate for Victorville and a 116-year replacement rate for Apple Valley over
21 that time period. (Exh. 862; Exh. 928; Exh. 920-11.)

22 As Dr. Michael Hanemann testified, a water system must spend *more* on capital
23 improvements than the system is depreciating in order to keep the system functioning
24 properly. Depreciation is based on the *original* cost of an improvement, but the
25 improvement has to be replaced based on *current replacement* cost, factoring in
26 inflation. So a system that is investing only at the rate of depreciation (or less) is an
27 aging system that is not being kept up-to-date. (1/8/20 Hanemann 38:12-39:18.)
28 Fitch, one of the independent ratings agencies, "compares a utility's annual capital

1 expenditures in relation to depreciation" to gauge ongoing capital investment. And
2 Fitch recognizes that when annual spending "regularly falls below the amount of annual
3 depreciated assets," the system may require "substantial upgrades over time to
4 maintain regulatory compliance." (Exh. 743-5.)

5 From 2012 to 2018, capital investment in the Apple Valley system was twice
6 (202%) the system's depreciation. In contrast, the nearby municipally-owned systems
7 (Victorville, Hesperia, Adelanto, and Helendale Community Service District) made capital
8 investments of just 20% to 48% of the systems' depreciation. (Exh. 427-10.) That is
9 the hallmark of an aging system—one that will eventually require significant and
10 mounting future improvements to catch up (1/8/20 Hanemann 26:14-25) —and is
11 characteristic of the publicly owned water systems surrounding Apple Valley.

12 Again, the Town itself has no track record of capital expenditure levels on a
13 water system. But the Town's record with its own sewer system shows the same
14 pattern of investment *below* the rate at which the assets are depreciating, like the
15 water systems in neighboring communities. From 2011 through 2018, the value of the
16 Town's sewer capital assets, net of depreciation, dropped from \$32.6 million to \$22.5
17 million. (Exh. 868-1.) Thus, there is a marked difference in the level of investment
18 committed by Liberty to its water system as compared to that committed by the Town
19 to its sewer system. While the value of the water system's capital assets, net of
20 depreciation, was *increasing* by 24.7%, the value of the Town's sewer system capital
21 assets was *decreasing* by 28.2%. (1/9/20 Hanemann 62:20-63:22; Exh. 427-22.)
22

23 In sum, the evidence shows that Mr. Dalton's concern of insufficient investment
24 under Town ownership is well-founded. If the Town were to acquire the water system,
25 there is a risk that its capital investments will not keep up with the system's
26 depreciation, similar to the performance of the other nearby municipally-owned systems
27 and the Town's own performance with its sewer system. Such under-investment would
28 cause the system to degrade, to the detriment of the system and, ultimately, the
detriment of its customers.

1 2. **Replacing Systematic and Skilled Regulatory Oversight By**
2 **the Public Utilities Commission With Politically Motivated**
3 **Control by the Town Council Is Not In the Public Interest.**

4 As an investor-owned utility, Liberty Apple Valley is subject to thorough
5 regulation by the California Public Utilities Commission. If the Town's proposed Project
6 were to proceed, the water system would be overseen by the Town Council rather than
7 the PUC. The parties both presented evidence regarding the comparative merits of PUC
8 regulation and Town Council oversight. The Court finds that Liberty met its burden of
9 proving that the Town's plan to jettison PUC oversight and replace it with Town Council
10 oversight is not "required" by the public interest and necessity and would not be a
11 "more necessary" public use.

12 On the issue of oversight, the Town is really objecting to existing California law
13 and the regulatory scheme created by it. Liberty did not write the current regulatory
14 scheme; it is following the California constitution and laws enacted by the Legislature
15 and carried out by the PUC. The Court finds that Liberty's mandatory compliance with
16 State law is not an appropriate basis to permit the Town to use its power of eminent
17 domain, regardless of whether the Town disagrees with the wisdom or implementation
18 of the law. If the Town wants to change the law, its course is to go to Sacramento and
19 convince the Legislature to do so. The public interest and necessity do not require a
20 Project grounded in a fundamental distaste for existing law; nor does such distaste
21 provide a basis for a "more necessary public use."

22 a. **As a "Class A" Investor-Owned Utility, Liberty is**
23 **Subject to Thorough and Extensive Regulatory**
24 **Oversight by the PUC**

25 Liberty Apple Valley (and its parent, Liberty Utilities Park Water) are Class A
26 investor-owned utilities regulated by the PUC. (12/17/19 Jackson 38:2-17, 39:22-42:2.)
27 There are nine Class A water utilities in California, each with over 10,000 connections.
28 The PUC also regulates smaller privately-owned systems (Classes B through D), adding
up to 98 total systems. (Exh. 284.)

1 The PUC exerts complete oversight over Liberty: "[A]ny activity that the
2 company wishes to engage in requires the approval and permission of the California
3 Public Utilities Commission." (12/17/19 Jackson 42:25-43:6.) The PUC keeps a close
4 watch on the operations, finances, and capital investment in the AVR system.

5 Ultimately, through an adversary process, the PUC weighs competing factors and
6 sets water rates that are required by statute to be "just and reasonable." Pub. Util.
7 Code §451 (Exh. 982-10). Accordingly, because it is acknowledged that Liberty has
8 collected money based only upon water rates set by the PUC, the amount charged to
9 Apple Valley customers are deemed just and reasonable as a matter of law.

10 The Public Utilities Commission is a constitutional body under Article XII of
11 California's constitution, with powers granted by the Legislature. The PUC may
12 establish its own procedures, and "may fix rates, establish rules, examine records, issue
13 subpoenas, administer oaths, take testimony, punish for contempt, and prescribe a
14 uniform system of accounts for all public utilities subject to its jurisdiction." *See* Cal.
15 Const., Art. XII, Sections 2, 6. A city "may not regulate matters over which the
16 Legislature grants regulatory power to the Commission." *See* Cal. Const., Art. XII,
17 Sec. 8.

18 Pursuant to these constitutional provisions, the Legislature enacted the Public
19 Utilities Act, as codified in California's Public Utilities Code. The PUC has plenary power
20 to supervise and regulate utilities and "do all things . . . which are necessary and
21 convenient in the exercise of such power and jurisdiction." Pub. Util. Code §701 (Exh.
22 982-18). Regulated public utilities like Liberty must "obey and comply with every order,
23 decision, direction, or rule made or prescribed by the commission." Pub. Util. Code
24 §702. Liberty must furnish to the PUC whatever reports the PUC requests, and must
25 answer all questions propounded by the PUC. Pub. Util. Code §584 (Exh. 982-16). In
26 addition, the PUC has a plenary right to inspect Liberty's books, records, and facilities,
27
28

1 including those of any parent or affiliate of Liberty. Pub. Util. Code §314 (Exh. 982-8;
2 1/21/20 Sandoval 24:17-26:26).¹³

3 The Legislature has established detailed policies underlying the PUC's setting of
4 water rates. Pub. Util. Code §701.10 (Exh. 982-19). As former PUC Commissioner
5 Catherine Sandoval explained, the PUC is required to oversee the provision of facilities
6 and service "necessary to promote the safety, health, comfort, and convenience" of the
7 utility's patrons and the public. (1/21/20 Sandoval 14:23-16:9.) Liberty bears the
8 burden of justifying its expenses to the PUC before any such expenses may be included
9 in rates. (3/10/20 DeShazo 36:17-37:4.)

10 Toward meeting its constitutional and statutory duties, the PUC issues extensive
11 regulations and policies. *See, e.g.*, General Order 103A (Exh. 204); 2010 Water Action
12 Plan (Exh. 270). The PUC prioritizes water quality and utilizes water quality experts to
13 assist the Commission in making specific findings and recommendations concerning
14 water quality compliance. (1/21/20 Sandoval 52:19-54:8; Exh. 267-25 to 267-27.) The
15 PUC's strict oversight on water quality issues helps explain the Apple Valley water
16 system's superior water quality record versus municipally-owned systems, as reviewed
17 above.

18
19 b. **The PUC's Rate-Setting Process is Handled Like**
20 **Complex Adversarial Litigation in Which the Interests**
21 **of the Ratepayers Are Vigorously Represented By The**
22 **Public Advocates Office.**

23 Setting water rates that are "just and reasonable" and promote the health and
24 safety of the public is one of the PUC's primary tasks. Rates are set prospectively for a
25 three-year period in a general rate case. General rate cases are complex and lengthy
26 adversarial proceedings, with a multitude of filings akin to complex litigation in courts.
27 (12/17/19 Jackson 55:24-56:7, 57:17-58:14; Exh. 270-22.)

28
¹³ A regulated utility cannot be sold without the approval of the PUC. (2/20/20 Schilling 33:14-16.)
After lengthy proceedings, the PUC approved the sale of the Apple Valley system to Carlyle in 2011 (2/20/20 Schilling
44:8-18; Exh. 3566-1) and the subsequent sale of the system to Liberty in 2015 (Exh. 3573-23).

1 As part of the general rate case, Liberty's rates and operations are scrutinized by
2 the Public Advocates Office (PAO), which represents the interests of Liberty's Apple
3 Valley customers. The PAO – formerly called the Office of Ratepayer Advocates (ORA)
4 – employs a battery of highly-skilled professionals who balance the system's proposed
5 revenue requirements and the interests of ratepayers. The PAO is an independent
6 office within the PUC created by statute. Pub. Util. Code §309.5(a) (Exh. 982-5). Its
7 mission is to "obtain the lowest possible rate for service consistent with safety,
8 reliability and the state's environmental goals." (Exh. 302-3.) Former Commissioner
9 Sandoval found the PAO to be extremely rigorous and very effective advocates for the
10 ratepayers. (1/21/20 Sandoval 37:5-16.)

11 In Liberty's current rate case, the PAO assembled an experienced team of eight
12 professionals that included engineers, regulatory analysts, an MBA, an accountant, and
13 a tax specialist to review and analyze Liberty's application to raise rates. (Exh. 923-243
14 to 923-250; Exh. 923-253.) Following a thorough review of each of the components of
15 Liberty's application, PAO issued a 253-page report responding to specific requests in
16 the application. (1/7/20 Jackson 120:2-13; Exh. 923-1 to 923-2; Exh. 923(a)-3 to
17 923(a)-13.) PAO's vigorous representation of Apple Valley's ratepayers is shown by, for
18 example:

- 19 • Liberty's application sought a total revenue increase of 3.96% for 2019 –
20 but PAO recommended an overall revenue decrease of 14.5% (Exh.
21 923(a)-15);
- 22 • Liberty's application included a proposal to build a new 1.5-million gallon
23 tank at Bell Mountain – but PAO opposed the request (12/17/19 Jackson
24 87:25-88:16);
- 25 • Liberty's application included a proposal to transition to AMI meters that
26 automatically transmit data to the home office – but PAO opposed the
27 request (12/17/19 Jackson 89:4-15); and
- 28 • Liberty's application included General Office Allocations of \$3.3 million as
part of total revenue – but PAO recommended \$2.0 million (Exh. 305-19).

1 While the ultimate decision is up to the PUC, PAO has vigorously represented the
2 Apple Valley customers to keep rates as low as possible. The technical expertise and
3 ratepayer advocacy of PAO would be lost if the Town were permitted to acquire the
4 system. Under Town ownership, the PUC would have no regulatory role in the
5 oversight of the system. (1/22/20 Sandoval 1:18-2:2.) There would be no skilled
6 independent body like the PAO to advocate for ratepayers – just as there is no similar
7 independent body to advocate for ratepayers when the Town considers rate increases
8 for its sewer system. (1/6/20 Jackson 28:13-21; 11/7/19 Bishop 121:17-24.)

9 The PUC has adopted procedures for General Rate Cases that mirror procedures
10 in adversarial litigation in courts. (Exh. 267-36.) Liberty's current rate case was
11 commenced by the filling of an application (like a complaint in litigation). (Exh. 277.)
12 The application was accompanied by thousands of pages of back-up reports and work
13 papers. (*See, e.g.*, Exh. 279-1 through 279-3; Exh. 294-1; Exh. 295-1; Exh. 296-1;
14 Exh. 299-1; Exh. 300-1.) After the application was filed, PAO (formerly ORA) filed its
15 responsive report to the application, like a detailed answer with pinpoint objections.
16 (Exh. 923-1 to 923-2; Exh. 923(a)-3 to 923(a)-13.) PAO submitted 56 separate data
17 requests, like discovery, to which Liberty responded. (Exh. 293.) Two sessions of
18 noticed Public Participation Hearings (one during the day and the other in the evening)
19 were held in Apple Valley on October 25, 2018, where ratepayers could learn details
20 about and present testimony regarding their views on the proposed rate increase.
21 (1/6/20 Jackson 14:18-16:5; Exh. 288.) Evidentiary hearings before the assigned
22 Administrative Law Judge, similar to trial testimony, were held in October/November
23 2018 in Los Angeles. (1/6/20 Jackson 18:5-24, 103:11-22.) Exhibit lists were
24 prepared, and exhibits were marked and introduced into evidence, just as they were in
25 this case. (1/6/20 Jackson 18:25-19:9; Exh. 289.) Lengthy opening and reply briefs
26 were filed by both Liberty and PAO. (Exh. 290-1; Exh. 291-1; Exh. 303-1; Exh. 304-1.)
27 The parties prepared a Joint Comparison Exhibit showing the issues that were resolved
28 and those that remained in dispute. (Exh. 305-1.)

1 The adversary process used to protect ratepayers and set water rates is a
2 strength of the PUC rate-setting system, not a justification to take Liberty's system, as
3 the Town has urged in this case. The loss of such an extensive and skilled system of
4 oversight would not appear to be in the public interest.

5 The PUC's rate-setting process is transparent and provides ample opportunities
6 for participation and involvement. In addition to the Public Participation Hearings held
7 in Apple Valley, anyone can become a party to a General Rate Case proceeding and all
8 parties may file testimony, write briefs, and submit evidence. (1/6/20 Jackson 5:21-
9 6:5.) The Town intervened and participated as a party in AVR's previous 2015 rate
10 case, but chose not to participate in Liberty's current rate case. (1/6/20 Jackson 6:6-
11 7:16; Exh. 44.) The PUC is subject to the Public Records Act and routinely receives and
12 responds to such requests. (1/21/20 Sandoval 39:23-40:2.)

13 Control by the Town Council leaves the water system vulnerable to political
14 pressure to keep rates low, regardless of whether it is prudent in the short run or the
15 long run. (1/9/20 Hanemann 59:2-61:17.) Town oversight is inclined toward short-
16 term decision making because Town councilmembers must run for re-election every few
17 years. Naturally, voters want to pay less for water service, not more; and Town Council
18 regulation is focused more on the short-term interest of voters than the long-term
19 interest of water infrastructure. (1/15/20 Hanemann 37:25-38:19.) The pressure to
20 keep rates low increases the likelihood that the water system's buried capital assets will
21 be run to failure, thereby creating risks to water reliability, water quality, and public
22 safety. (1/22/20 Sandoval 9:24-12:17.) PUC regulation takes the politics out of rate
23 setting, focusing instead on prudent investments in the system. (1/16/20 Bruno 45:16-
24 46:4.)

25
26 The Town offered testimony by Steven Weissman, a former PUC administrative
27 law judge, who was critical of the PUC. However, Mr. Weissman did not offer an
28 opinion that the Town's residents would be better off if the system were taken by
eminent domain. (3/2/20 Weissman 88:5-10.) The public interest and necessity do not

1 require exchanging a regulatory scheme that is technically sophisticated and properly
2 focused on the long-term viability of the water system with one that is more focused on
3 short-term political expediency.

4 c. **The Economic Incentive to Invest in the Capital**
5 **Assets of the Water System Could Be Lost If PUC**
6 **Regulation Were to be Replaced by Town Regulation.**

7 PUC regulation encourages the needed level of capital investment in water
8 systems which, as noted above, are highly capital intensive. Capital investment is
9 incentivized by allowing Liberty the opportunity to earn a return on its invested capital
10 by way of a return on rate base. (12/17/19 Jackson 55:3-7.) The revenue requirement
11 formula that the PUC uses to set rates is:

$$12 \text{Revenue} = (\text{Rate of Return} \times \text{Rate Base}) + \text{Expenses} +$$
$$13 \text{Depreciation} + \text{Taxes}$$

14
15
16
17 (1/8/20 Hanemann 33:21-34:21; Exh. 276-7.)

18
19 Following careful scrutiny and objections by the PAO and the PUC, Liberty's
20 approved *Expenses* and *Taxes* are mere pass-throughs to its customers. The other two
21 components – *Rate of Return x Rate Base* and *Depreciation* – are both based on the
22 capital investment and capital assets of the water system. In economic terms, *Rate of*
23 *Return x Rate Base* represents a return *on* investment and depreciation represents a
24 return *of* investment. What both have in common is what PUC regulation clearly
25 incentivizes – *investment in the system*. By statute, the PUC is to afford utilities "an
26 opportunity to earn a reasonable return on its used and useful investment, to attract
27 capital for investment on reasonable terms and to ensure the financial integrity of the
28 utility." Pub. Util. Code §701.10(a) (Exh. 982-19).

1 *Rate Base* is essentially the company's depreciated book value of its own money
2 invested in the system – original investment minus depreciation. (12/11/19 Sorensen
3 47:24-49:24; 7/1/20 Koorn 48:9-49:8; Exh. 971.) Liberty does not earn a return on
4 assets that are paid for by someone else, as those assets are deducted in the
5 calculation of Rate Base. (12/17/19 Jackson 62:11-63:9.) Rate Base constantly
6 changes over time: it increases as new company investments are made in the system,
7 but it also concurrently decreases as the investments in the system depreciate. (1/8/20
8 Hanemann 33:4-13; 1/15/20 Hanemann 26:19-28:1; 12/11/19 Sorensen 50:7-16.)

9 *Return on Rate Base* is an authorized return determined by the PUC in "cost of
10 capital" proceedings. The cost of capital is determined by weighing two components –
11 the cost of debt and the cost of equity. In its most recent cost of capital decision for
12 Liberty (issued December 20, 2018), the PUC set Apple Valley's cost of debt at 4.71%
13 and its cost of equity at 9.35%. Weighing those rates using a capital structure of 43%
14 debt and 57% equity produced a total authorized Rate of Return of 7.35%. (1/6/20
15 Jackson 38:17-39:22; Exh. 292-1, 292-24.) Because of Liberty's superior access to the
16 capital markets, the authorized rate of return set by the PUC for Liberty was the *lowest*
17 of all of California's Class A water utilities. It is noteworthy that the authorized rate of
18 return for the Apple Valley water system *before* Liberty acquired it had been the *highest*
19 (or, in some years, second highest) of all of the Class A water utilities. (Exh. 972.) In
20 other words, Apple Valley customers benefited from Liberty's acquisition of the system,
21 as the authorized Return on Rate Base that was included in rates was reduced
22 substantially.

23 *Depreciation* is the value by which the Company's capital assets wear out over
24 the course of a year. (1/8/20 Hanemann 32:17-23.) For example, if an asset was
25 originally installed at a cost of \$1 million and is depreciated on a straight-line basis over
26 40 years, the annual depreciation over the asset's 40-year life would be \$25,000 per
27 year.
28

1 Because a utility's Revenue Requirement includes *Rate of Return x Rate Base*
2 and *Depreciation*, the utility is incentivized to invest in the system, as greater
3 investments will increase Rate Base and increase Depreciation. However, not *all*
4 company-funded investments are included in Rate Base or Depreciation – only those
5 that are "used and useful" and approved by the PUC are included, by statute (Pub. Util.
6 Code §701.10(a)) as quoted above. (12/11/19 Sorensen 51:17-23; 1/21/20 Sandoval
7 16:24-18:26.) Here, the PAO and the PUC play a critical role in determining which
8 investments are "used and useful" in the system. All of Liberty's proposed capital
9 investments are submitted as part of its general rate case, and the proposed
10 investments are heavily scrutinized by the PAO and ultimately the PUC. (12/17/19
11 Jackson 88:17-89:3, 89:16-18; 3/10/20 DeShazo 82:13-19.)

12 The Town argued at trial that the "Averch-Johnson effect" encourages utilities to
13 over-invest in the system by "gold-plating" them in order to increase the utility's return.
14 (3/9/20 DeShazo 25:17-26:2.) But the professional staff of the PAO and the PUC
15 provide the regulatory check to prevent such theoretical over-investment. (1/8/20
16 Hanemann 20:26-21:11.) The PAO's 256-page Report (Exh. 923-1) shows that it is
17 clearly up to the task of scrutinizing Liberty's application in order to protect the interests
18 of Apple Valley ratepayers.

19 If the Town were permitted to acquire the system, the regulatory incentive to
20 make reasonable investments in the system would be lost. The Town has no
21 comparable financial incentive to invest in the system; in fact, its incentive is just the
22 opposite, because ratepayers are always clamoring for lower rates. (1/8/20 Hanemann
23 21:12-21.) Even worse, that lack of financial incentive is compounded because Town
24 ownership, as opposed to Liberty ownership, does not involve any independent expert
25 oversight of capital decisions, budget decisions, or other operational decisions by the
26 Town. (1/6/20 Jackson 28:13-21.) Rather, the Town proposes that the Town will
27 oversee itself in the operation of the Apple Valley Water System, subject to citizen
28

1 oversight through the political process. In terms of substantive oversight, that is a far
2 cry from independent oversight by subject matter experts from the PUC and the PAO.

3 Apart from the issue of financial incentives or disincentives to invest in the water
4 system, the evidence at trial established that the Town has experienced and is
5 experiencing financial difficulties that would create pressures to maximize transfers of
6 administrative overhead away from the water system and into the Town's General
7 Fund. The General Fund is the chief operating fund of the Town. (Exh. 238-30.) It
8 receives all the Town's revenue from taxes and other sources of general income like
9 fees for licenses and permits. (11/12/19 Harris 41:10-16.) The Town's financial policy
10 is to maintain a balanced budget, meaning any increase in General Fund expenditures
11 must be matched with an increase in General Fund revenues. (11/12/19 Harris 41:23-
12 42:11; Exh. 925-244.)

13 The Town's fiscal year runs from July 1 through June 30. The fiscal year from
14 July 1, 2019 through June 30, 2020 was referred to as fiscal year 2020. (11/12/19
15 Harris 36:25-37:7.) The Town's current fiscal year, fiscal year 2021, began on July 1,
16 2020. (7/1/20 Robertson 69:13-15.) From FY 2011 to FY 2020 the Town's budgeted
17 General Fund expenditures increased by 102%; consequently, its budgeted General
18 Fund revenues increased by 105% over that same time period. (Exh. 867-1.) The
19 massive increase in General Fund expenditures to run the Town required a similar
20 increase in revenues to feed the General Fund and meet the Town's balanced budget
21 policy. But *current* revenues for each year were not sufficient to meet *current*
22 expenditures for each year, forcing the Town to find alternative revenue sources to
23 keep the General Fund afloat and the Town functional. These alternative sources
24 included: (1) drawing down General Fund operating reserves; (2) extracting
25 "administrative overhead" from its enterprise funds; and, finally (3) simply borrowing
26 money on a \$10 million line of credit from J.P. Morgan.

27 The Town's General Fund "operating reserves" consists of the "committed" and
28 "unassigned" portions of its General Fund balance. (11/13/19 Hildreth 104:16-26; Exh.

1 925-19.) The Town's General Fund operating reserves have been depleted over many
2 years. From FY 2012 through FY 2018, the Town's current expenditures exceeded its
3 current revenues by more than \$5 million per year on average. (11/13/19 Hildreth
4 108:1-19; Exh. 470-3.) During that time, the Town's General Fund operating reserves
5 *decreased* by 80%, while the Town's General Fund expenditures *increased* by 36.5%.
6 (11/13/19 Hildreth 106:15-107:23; Exh. 470-2, 470-14.) By the time Mr. Robertson
7 assumed the Town Manager position in January 2018, he knew that the Town was
8 having financial problems due to budget deficits that had been depleting the General
9 Fund and its reserves. (11/4/19 Robertson 73:12-74:6.)

10 The Town's 2019 CAFR was released during the suspension of the trial due to
11 COVID-19, in March or April 2020. (7/1/20 Robertson 82:3-20.) Although the Town's
12 2019 CAFR showed a \$3.7 million improvement in the Town's General Fund balance,
13 that improvement came mostly from borrowed money. Specifically, \$3 million of the
14 \$3.7 million were funds that the Town drew on its \$10 million line of credit in FY 2019
15 and included as a credit to the General Fund.¹⁴ (Exh. 4315-44.) Through FY 2020, the
16 Town had borrowed \$6 million on its line of credit, and the Town has budgeted to
17 borrow another \$2 million in FY 2021. (7/2/20 Robertson 84:19-85:9; Exh. 4337-34.)
18 Thus, it appears to the court that the Town has attempted to prop up its General Fund
19 by putting millions on its municipal credit card with J.P. Morgan – with its residents
20 required to pay interest on the borrowed funds and ultimately pay off the debt. The
21 Town's use of borrowed money to shore up its General Fund raises alarm bells because
22 it shows the Town cannot pay its current bills out of current revenue. (11/14/19
23 Hildreth 7:1-16.)

24 The last source of funds that the Town has used to attempt to rescue its General Fund
25 is perhaps most relevant to the Town's proposed Project at issue here. If the Town
26

27 ¹⁴ The Town argues that "only \$1.8 million" of the \$3 million should count because "[t]he remainder
28 had been spent." (Town's Brief, at p. 89.) This is illogical. The entirety of the borrowed \$3 million is shown as a
credit on the Town's 2019 CAFR in calculating the \$3.7 million bottom line "Net Change in Fund Balance" for the General
Fund. (Exh. 4315-44.) Other revenue that was "spent" is still fully counted as revenue – that's exactly how "Net
Change in Fund Balance" is calculated. The Town's argument is akin to a taxpayer urging the IRS it should not have
to pay income tax because all of its income has been spent.

1 were to prevail in this action, it would operate the water system as an Enterprise Fund,
2 like the Town's sewer fund, solid waste fund, and Choice Energy fund. (11/12/19
3 Harris 49:19-23.) For many years, the Town has siphoned off millions of dollars from
4 its Enterprise Funds in the form of "administrative overhead" and "franchise fees" and
5 transferred those millions to the General Fund as General Fund revenue. From FY 2011
6 through FY 2018 the total amounts transferred were:

7 **Administrative Overhead Transfers to General Fund:**

8 **From Sewer Enterprise Fund 5010** **\$11,897,755**

9 **From Solid Waste Fund 5510** **\$12,417,543**

10 **Franchise Fee Transfers to General Fund:**

11 **From Solid Waste Fund 5510** **\$10,012,233**

12 **Total Transfers** **\$34,327,531¹⁵**

13
14
15 While these annual transfers of administrative overhead and franchise fees from
16 the Town's Enterprise Funds to the Town's General Fund have been massive, they are
17 actually less today than they were prior to 2016. (Exh. 864.) After the Town was sued
18 for violating Proposition 218, it reduced the annual transfers in settlement of those
19 lawsuits. (11/13/19 Hildreth 121:24-122:6.) As the Town's budget documents show,
20 the administrative overhead and franchise fee transfers were 21.8% of total budgeted
21 General Fund revenues in FY 2011, but only 10.0% of total budgeted General Fund
22 revenues in FY 2018. (Exh. 867-1.) In other words, while the Town's General Fund has
23 needed more and more money to match budgeted expenditures, it has been getting

24
25
26 ¹⁵ These numbers are the totals of the annual figures that are shown on Exh. 864-1. After that exhibit
27 was prepared, the Town transferred additional funds to the General Fund in FY 2019 as follows: Administrative
28 Overhead from Sewer Fund 5010, \$748,400; Administrative Overhead from Solid Waste Fund 5510, \$789,400; and
Franchise Fee from Solid Waste Fund 5510, \$1,044,900. (Exh. 4337-142, 4337-144.) In addition, Administrative
Overhead transfers were made from the Apple Valley Choice Energy Enterprise Fund 5810 to the General Fund in the
following amounts: FY 2017, \$275,625; FY 2018, \$946,300; and FY 2019, \$900,000. (Exh. 925-81, Exh. 4337-35.)
These updates bring the total above – from FY 2011 through FY 2019 – to **\$39,032,156**. This is \$39 million that was
charged to and collected from the Town's ratepayers and then transferred to the Town's General Fund.

1 less and less money from its Enterprise Funds – exacerbating the Town's financial
2 stress and increasing the need to raise more revenue from other sources.

3 As is to be expected, the COVID-19 pandemic has made the Town's financial
4 condition even worse. Mr. Robertson testified that the Town is currently "struggling"
5 financially, and it would be seeking voter approval of a proposed sales tax increase to
6 try to make ends meet. (7/1/20 Robertson 71:3-13, 73:16-74:19.) Apart from the
7 reduction in tax revenues resulting from the pandemic, the Town's contract for police
8 service with the County sheriff has created "tremendous budgetary constraints" for the
9 Town. (7/1/20 Robertson 72:5-11.) Between the police contract and COVID-19, Mr.
10 Robertson estimated a General Fund impact of \$3 million for this calendar year.
11 (7/1/20 Robertson 73:3-15.) The Town's FY 2021 budget calls for total General Fund
12 revenue of \$32.9 million, which includes transfers and borrowings of \$5.6 million, as
13 follows: (1) budgeted administrative overhead transfers of \$2,617,922; (2) budgeted
14 franchise fee transfers of \$1,050,950; and (3) budgeted borrowing on the line of credit
15 of \$2 million. (Exh. 4337-34 to 35, 4337-144.)

16 The evidence establishes that the Town has an increased need for General Fund
17 revenues to meet its increased level of General Fund expenditures. If the Town's
18 Project were to proceed, it would acquire a water system that has produced constant
19 revenues in the range of \$23 million to \$25 million per year (adjusted for inflation) since
20 2012. (Exh. 969-1.) This revenue would become another source of funds that would be
21 available to the Town to use to bolster its General Fund.
22

23 Like the other Town Enterprise Funds, the Town expects to transfer
24 "administrative overhead" from the Water Enterprise Fund to the General Fund.
25 (11/12/19 Harris 88:3-22.) With the stressed condition of the General Fund, the Town's
26 financial incentive will be to maximize administrative overhead transfers from the Water
27 Enterprise Fund to the General Fund to help keep the General Fund afloat. (11/14/19
28 Hildreth 9:13-21; 76:3-15.) The General Fund thus would compete with the Water
Fund for revenues.

1 If the Town is faced with a choice of reducing the level of police services from
2 the County Sheriff or replacing a stretch of water main, there is a substantial risk that
3 the water system improvement will be deferred. Positioning the Water Fund to
4 compete with the General Fund over revenues – deciding whether to retain money in
5 the Water Fund to be spent on the water system, or transfer more money to the
6 General Fund as administrative overhead – would create financial tension that is
7 contrary to the public interest, not a necessity, and not a "more necessary" public use
8 of Liberty's property.

9 d. **The PUC's Regulatory Emphasis on Conservation**
10 **Serves the Public Interest and Would Be Lost If PUC**
11 **Oversight Were to be Replaced by Town Oversight.**

12 The PUC's Water Action Plan emphasizes strengthening water conservation
13 programs as a critical policy goal. (Exh. 270-5.) The Water Action Plan "Changed [the]
14 Utility Business Model from *selling* water to *conserving* water." (Exh. 282-14, emphasis
15 added.) To implement this fundamental policy shift, the PUC decoupled sales from
16 revenues in order to encourage conservation. "Decoupling" means that a water
17 company like Liberty doesn't make more money when it sells more water, and doesn't
18 make less when it sells less water – so it is not disincentivized from encouraging
19 conservation. (12/17/19 Jackson 67:14-70:8; Exh. 987-5.) Liberty doesn't make money
20 by producing water at a cost and then marking up the water and selling it at a profit to
21 the public; the PUC-approved expenses incurred in producing water are merely passed
22 through to customers. (12/10/19 Sorensen 89:5-90:6.)

23 The policy of decoupling sales from revenue is nowhere mentioned in the Town's
24 eve-of-trial transition plan (Exh. 156), and there is no indication that the Town can or
25 will adopt such a policy. The transition plan says only that the Town Council will
26 consider hiring an as-yet unidentified firm to create a Water Master Plan that will
27 "assess" and "make recommendations" on matters such as conservation. (Exh. 156-15,
28 156-16.)

1 The Town has conceded that its effort to acquire the water system is based in
2 part on "longstanding public concern about AVR's escalating water rates." (Exh. 891-4.)
3 But if water rates are reduced, the incentives for consumers to conserve water will
4 diminish accordingly. In short, trading the existing statewide public policy so geared
5 toward conservation for a Town policy that is unknown is a regulatory gamble – one
6 that would not be in the public interest.

7 e. **Proposition 218 Does Not Cure the Regulatory**
8 **Deficiencies That Would Exist Under Town Ownership**
9 **of the System.**

10 The Town has argued that the virtues of Proposition 218 would put in place a
11 system of regulation that would be superior to PUC regulation. The Court does not
12 agree.

13 Proposition 218 requires that notice be given to ratepayers before a public
14 hearing is held to raise water rates. (6/29/20 Koorn 99:24-100:4.) Under PUC
15 regulation, notice of an application to raise water rates is also required to be provided
16 to ratepayers, and the notice must be approved in advance by the PUC. (Exh. 984-32;
17 Exh. 267-58.) So there is no effective difference regarding notices of proposed rate
18 increases.

19 Proposition 218 also requires that a public hearing be held before a rate increase
20 is instituted, where the Town Council would accept comments from customers.
21 (6/29/20 Koorn 100:5-11.) Under PUC regulation, Public Participation Hearings in Apple
22 Valley are also part of the rate setting proceedings, where customers may provide
23 comments to the Administrative Law Judge. (1/6/20 Jackson 14:18-16:5; Exh. 288.)

24
25 One area where the Proposition 218 process does differ from the PUC process is
26 in the mechanism provided to prevent a rate increase. As discussed above, the PUC
27 model enlists the Public Advocates Office to rigorously scrutinize every element of
28 Liberty's rate application to ensure that a rate increase is justified. In lieu of the PAO,
Proposition 218 provides a right to object to a rate increase if 50% plus one of the

1 ratepayers file a written protest with the Town. (6/29/20 Koorn 100:5-21.) That is
2 very different from the standard that applies to elections, where 50% plus one of the
3 voters *who show up to the polls* must approve or disapprove of a ballot measure.
4 Proposition 218 requires 50% plus one *of all of the ratepayers* to file written protests in
5 order to halt a rate increase. This is such a high standard that the Town's own expert
6 Shawn Koorn has *never* seen it accomplished in any of the 150 utility rate increases in
7 which he has been involved in California. (7/1/20 Koorn 7:26-9:1.) During the Town's
8 most recent invocation of the Proposition 218 process – when it sought to raise sewer
9 rates – the Town sent out 8,651 written notices to its sewer customers and received 16
10 written protests, a protest rate of .18%, or far less than 1%. (Exh. 126-2.) The
11 evidence shows that Proposition 218's "right to object" to proposed rate increases is
12 more of a theoretical paper right, rather an actual one in practice.

13 In addition, the Town's track record with regard to Proposition 218 creates
14 questions as to the Town's true level of commitment under it. The Town was sued for
15 violating Proposition 218 regarding transfers of administrative overhead from *both* its
16 Sewer Enterprise Fund and its Solid Waste Enterprise Fund, and settled both lawsuits.
17 (11/5/19 Robertson 58:1-12; 11/13/19 Hildreth 121:24-122:6.) However, the evidence
18 showed that, notwithstanding those settlements, the Town still came out far ahead
19 financially. After the settlements, the Town recalculated the "proper" administrative
20 overhead charges to be assessed to the Town's sewer and solid waste funds. Using the
21 corrected figures, the Town's previous overcharges to those funds amounted to \$13
22 million from 2012 through 2018. (11/13/19 Hildreth 125:13-126:6.) But the total
23 payback from the Prop 218 lawsuit settlements was just \$3,948,000. (11/13/19
24 Hildreth 128:7-22 [\$798,000 payback for sewer fund]; 129:20-25 [\$3,150,000 payback
25 for solid waste fund].)

26 Worse still, although the Town was alleged to have overcharged its Solid Waste
27 Enterprise Fund by transferring excess cash from that fund to the General Fund –
28 excess cash that was paid by the Town's residents in solid waste fees – the Town did

1 not use its General Fund to refund the excess back to the Solid Waste Fund. Instead,
2 the Town charged *the Solid Waste Fund* \$3.15 million to settle the allegations of
3 overcharging *that same fund*. (11/13/19 Hildreth 129:20-130:24; Exh. 925-14.) In
4 other words, the Town's ratepayers who were alleged to have paid excessive Solid
5 Waste charges were charged a second time to settle claims that they had been
6 previously overcharged. The Town never explained this unusual arrangement, which
7 creates doubt as to the Town's faithful implementation of Proposition 218.

8 Even were it to be faithfully implemented, Proposition 218 does nothing to
9 address any of the numerous major differences between PUC regulation and municipal
10 regulation:

- 11 • Proposition 218 does not provide for a contested hearing process for
12 proposed rate increases, nor for a technically skilled independent body like
13 the PAO to review rate increase applications;
- 14 • Proposition 218 does not provide for rate decisions to be made by a body
15 with broad experience in utility issues instead of by elected officials with
16 individual interests and motivations;
- 17 • Proposition 218 does not encourage or incentivize capital investment in
18 the Apple Valley Water System;
- 19 • Proposition 218 does not provide for an independent review of proposed
20 capital projects in order to determine whether they would be used and
21 useful for the water system;
- 22 • Proposition 218 does not require that rates be set to achieve conservation
23 of scarce water resources; and
- 24 • Proposition 218 does not prevent "administrative overhead" from being
25 charged to ratepayers and then transferred to the General Fund to
26 alleviate financial distress being experienced by the General Fund.
27
28

1 In short, in the court's view, municipal control over the water utility, even with
2 Proposition 218, is inferior to the regulatory scheme under PUC oversight. The PUC's
3 systematic and thorough regulatory oversight of the Apple Valley water system would
4 be lost if the Town were to acquire the system. (12/17/19 Jackson 42:18-20.) The
5 skilled and detailed oversight of the water system provided by the PUC promotes
6 responsible utility operation and is itself in the public interest. Removing that oversight
7 and replacing it with less skilled oversight by the Town Council is not required by the
8 public interest and necessity, and is not a "more necessary" public use.

9 **3. Acquisition of the System Would Not Be in The Best**
10 **Interests of Ratepayers.**

11 The Town's Project definition includes nothing about lowering water rates.
12 (Complaint In Eminent Domain, ¶ 6.) Quite to the contrary, the Town's certified EIR
13 stated that the reduction of water rates would be an "*unlikely event*." (Exh. 165-124,
14 emphasis added.) And the Staff Report that the Town incorporated into its Resolutions
15 of Necessity stated that "*the Town does not expect to be able to decrease rates*." (Exh.
16 891-14; Exh. 3651-1, §1; Exh. 3652-1, §1, emphasis added.) Thus, the Town's
17 acquisition of the water system is not required by the public interest and necessity, nor
18 is it a more necessary public use, in order to lower water rates – because that is not a
19 component of the Town's Project.

20 A related question is whether *future* water bills for customers of the Apple Valley
21 water system are likely to be higher or lower under Town ownership than they would
22 be under continued Liberty ownership. Both sides presented competing models
23 regarding revenue requirements associated with future costs of operation of the system
24 (which would translate into future water bills to customers) under the different
25 ownership scenarios.

26 Liberty's expert, Dr. Michael Hanemann, opined that the water system's total
27 annual costs will be *higher* under Town ownership (Exh. 978-2; Exh. 978-4; Exh. 978-
28 6), and thus Apple Valley ratepayers will be forced to pay higher water rates in order to
produce the additional revenue that will be needed for the Town to operate the system.

1 (1/8/20 Hanemann 101:14-18; 1/9/20 Hanemann 5:14-24; 7:6-14.) Dr. Hanemann is
2 an economist on the faculty of Arizona State University and an Emeritus Professor at UC
3 Berkeley. (1/8/20 Hanemann 2:17-25.) He has taught courses on the economics of
4 water at both universities, and has been a prolific author in his area of expertise.
5 (1/8/20 Hanemann 5:5-26, 12:15-13:4; Exh. 397.) He was elected to the National
6 Academy of Sciences in 2011. (1/8/20 Hanemann 4:3-18.) Dr. Hanemann designed
7 water rates for the City of Los Angeles; he served as economic staff to the State Water
8 Resources Control Board; and he gave an invited presentation to the Water Division of
9 the PUC regarding economic aspects of investor-owned utilities and municipal-owned
10 utilities. (1/8/20 Hanemann 7:3-19, 8:12-26, 11:24-12:14.)

11 The Town's expert, Mr. Shawn Koorn, opined the opposite – that the total costs
12 would be *lower* under Town ownership, resulting in lower water rates. (6/29/20 Koorn
13 31:14-33:7; Exh 4333-19 to 24.) Mr. Koorn is an Associate Vice-President at HDR
14 Engineering, where he heads the firm's utility rates and finance group. (6/29/20 Koorn
15 4:9-12.) He holds bachelor's degrees in business administration and managerial
16 economics from Central Washington University. (6/29/20 Koorn 3:26-4:8.) He has
17 completed over 150 rate studies in California under Proposition 218, which applies only
18 to municipally-owned utilities; no testimony was presented of any rate studies he has
19 prepared for California investor-owned utilities regulated by the PUC. (6/29/20 Koorn
20 8:26-9:20.)¹⁶

21 The Court finds that Dr. Hanemann provided a more thorough and accurate
22 economic analysis. The Town's acquisition is not required by the public interest and
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24 ¹⁶ To undertake a comparison of future water rates that would be charged by the Town and by Liberty
25 requires an understanding of how rates would be set under both scenarios. Mr. Koorn was unfamiliar with numerous
26 aspects of the PUC rate-setting process that is applicable to Liberty, including its currently pending rate case. For
27 example, even though a Joint Comparison Exhibit is required in every PUC rate case, Mr. Koorn had never heard of
28 one and did not use it in preparing his economic model. (6/29/20 Koorn 124:20-125:1, 126:21-24; Exh. 267-48.)
Notwithstanding the mountains of financial data and information submitted by Liberty to the PUC, Mr. Koorn reviewed
and relied on only one single document from the current rate case in reaching his opinions – ***a superseded 2018
Revenue Requirement Report.*** (6/29/20 Koorn 121:4-122:1.) He did not review any of Liberty's detailed work
papers and was not aware they existed. (6/29/20 Koorn 128:14-20.) He was not aware that the PAO (formerly ORA)
undertook a detailed review of Liberty's application on behalf of ratepayers, and he reviewed no reports by PAO or
ORA. (6/29/20 Koorn 128:21-129:9.) Likewise, before reaching his opinions Mr. Koorn did not review the Public
Participation Hearing transcript, any data requests, or any briefs filed by Liberty or PAO/ORA in the pending rate case.
(6/29/20 Koorn 129:10-130:1.)

1 necessity, nor is it a more necessary public use, when future economic impacts to the
2 system's customers are considered.

3 a. **The Experts Agree That The Respective Revenue**
4 **Requirements Under Continued Liberty Ownership**
5 **and Town Ownership Each Have Different**
6 **Components.**

7 Both Liberty and the Town will need a certain amount of revenue each year to
8 operate the Apple Valley Water System, known as the "Revenue Requirement." The
9 experts agreed that two different accounting methods must be used to compare the
10 Revenue Requirements under continued Liberty operations with Town operations. The
11 utility basis of accounting applies to Liberty ownership, while the cash needs basis of
12 accounting would apply to Town ownership. (1/8/20 Hanemann 30:10-14, 35:9-15;
13 6/29/20 Koorn 144:18-147:3.) The comparison of the two systems is shown in Exh.
14 977:

Utility Basis Accounting (Liberty Ownership)	Cash Needs Accounting (Town Ownership)
Water Supply Expenses	Water Supply Expenses
O&M + A&G Expenses	O&M + A&G Expenses
Taxes	Taxes and Transfers
Depreciation	Rate-Funded Capital Expenditures
Authorized Return on Rate Base	Debt Service

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27 Under both Liberty ownership and Town ownership, Water Supply Expenses and
28 O&M (Operations & Maintenance) and A&G (Administrative & General) expenses will be

1 incurred to operate the system. Liberty will incur Taxes, and the Town will incur certain
2 Taxes and Transfers.

3 The major differences between the two accounting methods are the last two
4 items. Liberty's revenue requirement will include Depreciation and Authorized Return
5 on Rate Base, while the Town's revenue requirement will not include these components.
6 On the other hand, the Town's revenue requirement will include Rate-Funded Capital
7 Expenditures and Debt Service on the acquisition debt to acquire the system, while
8 Liberty's revenue requirement will not include these components.

9 The Town has argued that the Town's revenue requirement is "Cost," while
10 Liberty's revenue requirement is "Cost Plus." It is more accurate to say that *both*
11 Liberty and the Town will require revenues consisting of "Cost Plus," but the "Plusses"
12 are different – Depreciation and Authorized Return on Rate Base for Liberty, and Rate-
13 Funded Capital Expenditures and Debt Service for the Town. While the Town seeks to
14 portray all of Liberty's "Plusses" as going to line the pockets of APUC and corporate
15 executives, this is not correct. Liberty does not directly charge its Apple Valley
16 customers for the cost of capital expenditures, which is money reinvested into the
17 system from revenues received as Depreciation and Authorized Return. These two
18 components of revenue – Depreciation and Authorized Return – are the sources from
19 which Liberty must fund: (1) company-funded approved capital expenditures on the
20 system (Exh. 423-7); (2) debt service payments on capital provided by borrowed funds
21 (Exh. 3589-7); (3) dividends to shareholders to attract equity capital¹⁷; (4) refunds to
22 developers for advances that funded new infrastructure for new development (Exh.
23 513-47); and (5) retained earnings, if any.

24 Both Liberty and the Town will incur significant "Plusses" that will be included in
25 their respective revenue requirements. In fact, the cost model prepared by the Town's
26 own expert, Mr. Koorn, shows that the "Plusses" attributable to Town ownership will
27 actually *exceed* the "Plusses" attributable to Liberty ownership. The annual and total
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¹⁷ Since Liberty acquired Park Water in 2016, neither Liberty Park Water nor Liberty Apple Valley have paid any dividends to their shareholders. (1/6/20 Jackson 53:15-54:18; Exh. 3589-15.)

1 figures for 2020 (when Town debt service payments begin in Mr. Koorn's model)
 2 through 2027 (when Mr. Koorn's model ends), using his middle purchase price of \$110
 3 million, are:

	PLUSSES UNDER TOWN OWNERSHIP (Exh. 3999-32)		PLUSSES UNDER LIBERTY OWNERSHIP (Exh. 3999-13)	
	<u>Rate- Debt Service</u>	<u>Rate- Funded Cap Ex</u>	<u>Return on Depreciation</u>	<u>Return on Rate Base</u>
2020	6,533,320	6,162,000	4,337,960	5,438,902
2021	6,533,320	6,328,374	4,958,547	6,037,827
2022	6,533,320	6,499,240	5,117,734	6,231,662
2023	6,533,320	6,674,720	5,279,691	6,428,871
2024	6,533,320	6,854,937	5,444,584	6,629,655
2025	6,533,320	7,040,020	5,612,580	6,834,217
2026	6,533,320	7,230,101	5,783,844	7,042,758
2027	<u>6,533,320</u>	<u>7,425,314</u>	<u>5,958,541</u>	<u>7,255,479</u>
Subtotals	52,266,560	54,214,706	42,493,481	51,899,371
Total		<u>\$106,481,266</u>		<u>\$94,392,852</u>

24 Thus, simply labelling Town ownership as "Cost" and Liberty ownership as "Cost
 25 Plus" does not capture all of the revenue requirement components that will be needed
 26 by each ownership. Both the Town and Liberty have significant "Plusses" in their
 27 revenue requirements, though the components of the "Plusses" differ.

1 if the likely purchase price were in fact \$30 million less.¹⁸ Moreover, Mr. Koorn testified
2 that the \$70 million figure "was reflective of the current value of the rate base."
3 (7/1/20 Koorn 33:5-7.) But Rate Base is book value of *some* of Liberty's assets –
4 original cost minus depreciation. (7/1/20 Koorn 48:9-22.) Under the Eminent Domain
5 Law, the Town would be required to compensate Liberty for the *fair market value* of all
6 of its property, not its *book value*. See Code Civ. Proc. §1263.310.¹⁹ Therefore, the
7 Court gives little weight to Mr. Koorn's \$70 million purchase price scenario.

8 c. **Economies of Scale That Apply to Liberty's**
9 **Operations Would be Lost Under Town Ownership.**

10 For Liberty, Dr. Hanemann opined that economies of scale apply to Liberty's
11 continued operations, but would be lost if the Town were to take over the system and
12 operate it as a standalone 20,000-connection system. (1/8/20 Hanemann 89:2-6.) For
13 the Town, Mr. Koorn, acknowledged and understood the concept of economies of scale,
14 but chose not to apply it in his cost model. (6/30/20 Koorn 21:24-23:13.) The Court
15 finds the testimony of Dr. Hanemann on this point to be more persuasive.

16 Economies of scale means that the costs of operating a company rise less than
17 proportionately as the scale of the operation expands. If production increases ten-fold,
18 costs of operations will go up – *but less than ten-fold*. As costs are spread across a
19 higher number of customers, costs are reduced on a per-unit (*i.e.*, per customer) basis.
20 In addition, larger operations have economic leverage to negotiate volume discounts,
21 which also reduce per-unit costs. (1/8/20 Hanemann 78:11-80:22.)

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24 ¹⁸ The evidence at trial was that Carlyle purchased three water systems (including the Apple Valley
25 system) for \$102 million in December 2011. (2/20/20 Schilling 124:23-25; Exh. 3566-1.) Four years later, the value
26 of the three systems (including Apple Valley) had more than tripled when they were sold to Liberty for \$327 million in
27 January 2016. (12/10/19 Sorensen 50:10-12; Exh. 3571-12.) Nearly five years have passed since January 2016, and
28 if the Apple Valley system were to be valued in a compensation phase in this case, it would be valued as of the future
date of the compensation trial. See Code Civ. Proc. §1263.130.

¹⁹ The United States Supreme Court has long recognized that original cost is not the proper standard
for compensation in eminent domain. Almost 100 years ago, the Supreme Court wrote: "It is property and not the
cost of it that is protected by the Fifth Amendment." *Brooks-Scanlon Corp. v. United States*, 265 U.S. 106, 123 (1924).
Later the Supreme Court hurled blunt criticism at the original cost approach: "**Original cost is well termed the**
'false standard of the past' where, as here, present market value in no way reflects that cost." *United States v.*
Toronto, Hamilton & Buffalo Navigation Co., 338 U.S. 396, 403 (1949).

1 Significantly, the Legislature itself has found and declared that "[s]cale
2 *economies are achievable in the operation of public water systems.*" Pub. Util. Code
3 §2719(c), emphasis added.²⁰ The Apple Valley water system has about 20,000
4 connections. When considered together with its parent, Park Water, the two systems
5 have 47,000 connections, a scale increase of 2.3. Nationally, Liberty has about 164,000
6 water and wastewater connections, a scale increase of about 8.0 over Apple Valley's
7 20,000 connections. And Liberty has about 768,000 total connections nationally, a
8 scale increase of approximately 37.4 over Apple Valley's 20,000 connections. (1/8/20
9 Hanemann 82:14-83:23; Exh. 423-5.) Thus, Liberty can spread certain of its costs of
10 operation across many more customers than the Town could, resulting in lower per-
11 customer expenses.

12 The benefits of cost-spreading and economies of scale applicable to Liberty's
13 operation of the system are clearly demonstrated by the evidence. Mr. Sorensen
14 testified that Liberty is able to negotiate volume discounts from vendors, who want to
15 attract Liberty as a high-volume purchaser. (12/11/19 Sorensen 25:20-26.) Examples
16 include a 10-15% discount from material suppliers like Grainger, a 10-15% discount on
17 AMI meters, a 10-15% discount on Ford vehicles, and other discounts that drive
18 efficiencies. (12/11/19 Sorensen 26:1-22, 30:19-31:25, 32:3-20; Exh. 963-6; Exh. 964-
19 11.) The economies of scale and concomitant efficiencies in operations that apply to
20 Liberty ownership are reflected in the total operating expenses incurred on a per-
21 customer basis. Since Liberty acquired the Apple Valley water system at the beginning
22 of 2016, annual operating expenses on a per-connection basis have been *reduced by*
23 *12.81%*. (Exh. 970.)

24 These economies of scale would be lost were the Town to operate the water
25 system on a standalone basis. (1/8/20 Hanemann 89:2-6.) Based on five published
26 studies as well as interviews with Liberty employees who provide key services across-
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²⁰ Additionally, the Enrolled Bill Report for SB 1757 similarly states: "The private sector can provide utility services more efficiently than the public sector." (Enrolled Bill Report, SB 1757, p. 5 [Liberty's July 13, 2018 Request for Judicial Notice, Exh. 2].)

1 the-board to all Liberty-owned utilities, Dr. Hanemann applied appropriate economies of
2 scale factors in his economic model. (1/8/20 Hanemann 80:25-82:1, 84:6-25, 86:19-
3 89:1; Exh 423-4.)

4 The five studies Dr. Hanemann relied on are listed and summarized on Exh. 423-
5 4. Each study found elasticity of cost values of less than 1, which indicates the
6 existence of economies of scale. (1/15/20 Hanemann 3:4-4:15.) Dr. Hanemann
7 explained precisely how he took the data from each study and incorporated it into his
8 chart (Exh. 423-4) to show elasticity of cost values applicable to increases in the
9 number of customers served. (1/13/20 Hanemann 122:25-125:6 [use of data in Aubert
10 study, Exh. 4505], 125:7-126:3 [use of data in Torres study, Exh. 4511], 128:1-129:9
11 [use of data in Garcia study, Exh. 4509], 129:10-131:8 [use of data in Destandeanu
12 study, Exh. 4507].)

13 The Town did not, as the court recalls, dispute any of the data relied on by Dr.
14 Hanemann in determining economies of scale or his use of that data. Instead, the
15 Town focused on sentences extracted from the articles which did not disprove the data
16 or Dr. Hanemann's reliance on it. For example, the Town cited two sentences from the
17 Garcia study which addressed economies of vertical integration, but Dr. Hanemann
18 explained that there is no issue of changes to vertical integration in this case because
19 the Town would both supply and distribute water to Apple Valley customers, just like
20 Liberty does. (1/13/20 Hanemann 20:6-21:6; 126:4-127:26.) The Town also cited a
21 single sentence from the Shih study that public systems have lower costs than private
22 ones. (1/13/20 Hanemann 26:24-26; Exh. 4506-8.) But Dr. Hanemann explained that
23 public systems are generally far larger than private systems, so the Town's wrenched
24 sentence actually proves the existence of economies of scale rather than disproving
25 them. (1/15/20 Hanemann 16:10-17:19, 18:17-19:21.) And the Shih study itself
26 concluded: "By quantifying the economies of scale, it appears that doubling a system's
27 production would lower unit costs between 10 and 30%, depending on the model and
28 the cost component." (Exh. 4506-8.) The evidence Dr. Hanemann relied on seems to

1 support the existence of economies of scale, just as the California Legislature has
2 declared in Pub. Util. Code §2719(c). The economies of scale applicable to operation by
3 Liberty would be lost were the Town seek to operate the Apple Valley system on a
4 standalone basis.

5 By contrast, Mr. Koorn reviewed no studies regarding economies of scale in the
6 utility industry because he didn't believe it "pertained to my analysis." (6/30/20 Koorn
7 26:11-23.) He did no research to determine what cost elasticities applied to the
8 operation of water systems. (6/30/20 Koorn 27:12-14.) He did not know whether
9 Liberty is able to negotiate volume discount contracts with its suppliers due to its size.
10 (6/30/20 Koorn 27:15-17.) He did not know how many connections Liberty served
11 nationally. (6/30/20 Koorn 24:6-22.) He did not know how many connections Park
12 Water served in total, and did not know that Park Water had employees in Downey who
13 provided services to the Apple Valley system. In fact, Mr. Koorn had never even heard
14 of Park Water when he did his study. (6/29/20 Koorn 112:16-113:6; 6/30/20 Koorn
15 25:22-25.) Mr. Koorn understated the costs of operation under Town ownership by
16 failing to take into account the economies of scale that exist under Liberty ownership
17 but would be lost under Town ownership.²¹

18 d. **The Town Expert's Calculation of an Administrative**
19 **Overhead Savings in the Financial Analysis of**
20 **Operating Expenses Under Town Ownership Does Not**
21 **Appear to be Supported by the Weight of the**
22 **Evidence**

23 As noted, Mr. Koorn concluded that the Town's revenue requirement to operate
24 the water system would be less than Liberty's. In reaching that conclusion, Mr. Koorn

25 ²¹ At the same time, Mr. Koorn overstated revenues because he based his analysis on Liberty's Revenue
26 Requirements Report (Exh. 279), which was filed with its Application on January 2, 2018. (1/6/20 Jackson 23:25-
27 24:12, 25:10-16; 6/29/20 Koorn 122:2-6.) The Town concedes that, in Mr. Koorn's model, Liberty's "revenue
28 requirements for 2019 and 2020 are taken directly from its revenue requirements report and then escalated after
2020." (Town's Brief, at p. 72.) But the January 2018 Revenue Requirements Report was superseded by the Joint
Comparison Exhibit filed a year later, on January 25, 2019. (1/6/20 Jackson 33:24-34:7; Exh. 305.) The 2019 Joint
Comparison Exhibit sought *less* revenue than the 2018 Report; the 2018 Report had sought a 3.19% increase in
residential rates, while the 2019 Joint Comparison sought a rate increase of just .17%, less than 1 percent. (1/6/20
Jackson 27:7-19; Exh. 305-19.) By using the (superseded) higher revenue figure as the starting point in his revenue
analysis, and then escalating revenues from there, Mr. Koorn's opinions regarding the Town's ability to lower water
rates was likewise faulty. Dr. Hanemann properly used the most recent data from the Joint Comparison Exhibit in
preparing his economic model. (1/8/20 Hanemann 47:2-4, 48:5-10, 53:7-15, 63:6-16.)

1 deleted the "Allocations" charges he used for Liberty's continued operation –
2 approximately \$3,350,000 – and replaced it with a far smaller amount of \$1,064,807 for
3 "Administrative Overhead" under Town ownership. (6/30/20 Koorn 30:13-33:8; Exh.
4 3999-12; 3999-31.) This paper "savings" of \$2.2 million was equal to the *entire*
5 difference between Mr. Koorn's assessment of Liberty's operating expenses and his
6 assessment of the Town's operating expenses for 2019. (6/30/20 Koorn 33:13-19; Exh.
7 1047.)

8 But Mr. Koorn's methodology, it appears, used an unjustified assumption. He
9 assumed that the Town's administrative overhead charges would be 12% of the water
10 system's total O&M and A&G expenses, amounting to an annual overhead charge to the
11 Water Enterprise Fund of \$1,064,000. (6/30/20 Koorn 37:7-39:9.) Mr. Koorn's basis
12 for his 12% overhead figure was a single page of numbers (with no back-up) from
13 seven different systems, including two in Washington. (6/30/20 Koorn 41:20-42:10;
14 Exh. 3996-8.) His single page of numbers included 10 years' of data from four cities and
15 six years' of data from three other cities. (6/30/20 Koorn 40:22-41:1; Exh. 3996-8.) He
16 calculated averages for each of the seven cities and then averaged the averages to
17 reach a "result" of 12.2% as the administrative overhead percentage to apply to total
18 O&M and A&G under Town ownership. (6/30/20 Koorn 42:11-14; Exh. 3996-8.)

19 What Mr. Koorn failed to consider, however, was data about the administrative
20 overhead *that the Town of Apple Valley has actually charged to and extracted from its*
21 *other existing Enterprise Funds.* The historical data for the Town's Sewer and Solid
22 Waste Enterprise Funds show the Town has charged an average administrative
23 overhead percentage of 37.9%. (Exh. 1049-5.) And omitting the large payments to
24 third-party contractors who treat the Town's sewage and collect its garbage – as Mr.
25 Koorn did in arriving at the overhead charge for the City of Santa Maria (Exh. 3996-8) –
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1 increases the Town's average administrative overhead percentage to 109.9%. (Exh.
2 1051-1.)²²

3 The number of employees who work for the Town's existing Enterprise Funds
4 also demonstrates that Mr. Koorn's determination that the Town would extract only
5 \$1,064,807 in administrative overhead from its Water Enterprise Fund is unreasonably
6 low. The Town's budget for FY 2020 shows the number of full time equivalent
7 employees, and associated charges for administrative overhead, for each of its existing
8 Enterprise Funds:

<u>Enterprise Fund</u>	<u># of FTEs</u>	<u>Admin. Overhead</u>	<u>Source</u>
Sewer 5010	6.35	\$748,400	Exh. 925-193
Solid Waste 5510	4.67	\$789,400	Exh. 925-195
Choice Energy 5810 ²³	1.00	\$946,500	Exh. 925-201
<hr/>			
TOTAL	12.02	\$2,484,300	

19 The Town's witnesses did not agree on how many employees its Water
20 Enterprise Fund would require. Mr. Robertson testified the Town would add 40 to 45
21 employees if it takes the Water System. (11/5/19 Robertson 40:13-16.) Mr. Close
22 testified the Town would need 51.2 full-time employees working 2,080 hours a year or
23 62.6 full-time employees working 1,700 hours a year to run the water system.

25 ²² The higher percentage is the most appropriate. As the Town's Finance Director Harris admitted in
26 her testimony, the Town incurs *no overhead* on its large garbage contract payment to Burrtec, the firm that actually
collects the Town's garbage. (11/12/19 Harris 54:2-5; 87:12-23.)

27 ²³ When the Town started its newest Enterprise Fund, Apple Valley Choice Energy, it decided to extract
28 \$946,500 in administrative overhead in 2018 from a department that had one employee based on nothing but an
"estimate" by Kofi Antobam, the Town's previous Finance Director. Mr. Robertson testified that he saw no
documentation to support the \$946,500 transfer but accepted it because he had "great trust in Mr. Antobam." (7/2/20
Robertson 70:23-71:13, 71:25-73:16.) This evidence shows the Town's financial incentive to extract substantial
"administrative overhead" transfers from new enterprise funds; and the Town's Project seeks to make the water system
its newest enterprise fund.

1 (6/23/20 Close 17:11-15.) Mr. Koorn did not know how many employees it would take
2 for the Town to operate the water system. (6/29/20 Koorn 109:22-110:5.)

3 But using the *lowest* number (which would be most favorable to the City for this
4 analysis) – Mr. Robertson's 40-employee estimate – the Town's Water Enterprise Fund
5 would be *more than three times larger than its three other Enterprise Funds combined*,
6 in terms of number of employees. To suggest that the Town would charge the Water
7 Fund only \$1,064,807 in administrative overhead when the Town charges its other
8 three Enterprise Funds nearly \$2.5 million in administrative overhead – with only 12
9 total employees – is not reasonable. The Town is charging its other three Enterprise
10 Funds over \$200,000 per employee in administrative overhead (as shown in the table
11 above: \$2,484,300 in total overhead divided by 12.02 total employees) but, according
12 to Mr. Koorn, the Town would only charge its Water Enterprise Fund about \$26,500 per
13 employee (\$1,064,807 divided by 40 employees). Especially in light of the poor
14 financial condition of the Town's General Fund discussed above, the Town's financial
15 incentive would be to extract more in administrative overhead from the water fund, not
16 less.

17 Mr. Koorn's opinion that the Town would extract only \$1,064,807 in
18 administrative overhead from the Water Enterprise Fund appears to be an
19 understatement of the revenue requirement under Town ownership. Mr. Koorn's model
20 used a low level of revenue under Town ownership, which affects all of his comparisons
21 of Town ownership versus continued Liberty ownership.

22
23 e. **Mr. Koorn's Projection of Future Water Bills Does Not**
24 **Appear to be Accurate Because It Is Based On An**
25 **Erroneous Assumption.**

26 As noted, Dr. Hanemann's model shows that the system's revenue requirements
27 will be higher under Town ownership, for each of the purchase prices analyzed. (Exh.
28 978-2; Exh. 978-4; Exh. 978-6.) This revenue need will translate into higher water
rates: under Town ownership, the Town's ratepayers will have to pay higher water
rates in order to produce the additional revenue that will be needed for the Town to

1 operate the system rather than Liberty. (1/8/20 Hanemann 101:14-18; 1/9/20
2 Hanemann 5:14-24, 7:6-14.)

3 Mr. Koorn performed an erroneous analysis in an attempt to show otherwise.
4 His first step was trying to determine how the "average monthly customer bill" would
5 increase in the future under continued Liberty ownership. (Exh. 4333-48.) He
6 purported to calculate Liberty's "historical average monthly customer bill" from January
7 1, 2011 through July 1, 2019 and concluded that the annual increase over that period
8 was 4.82% per year. (Exh. 4333-46, 4333-47, 4333-48.) But Mr. Koorn's calculation of
9 "historical average monthly customer bills" was erroneous because *he assumed that the*
10 *average customer consumed 11.6 CCF of water every month from January 1, 2011*
11 *through July 1, 2019* – what he referred to as the "constant consumption assumption."
12 (6/30/20 Koorn 107:14-108:3, 113:3-5.)

13 Mr. Koorn's "constant consumption assumption" appears to be erroneous; and
14 from that it follows that his projection of future Liberty rate increases was likewise
15 flawed. In fact, the evidence showed that the average residential customer in Apple
16 Valley consumed *17.0 CCF of water per month in 2011, not 11.6 CCF.* (Exh. 975;
17 1/6/20 Jackson 85:16-88:4.) And the evidence also showed that the average
18 residential customer in Apple Valley consumed *17.3 CCF of water per month in 2012,*
19 *not 11.6 CCF.* (Exh. 975.) Exh. 975 also shows all of the other average monthly
20 consumption amounts by residential customers since January 1, 2011. There was no
21 contrary evidence.

22 Because water bills include quantity rates *based on consumption*, Mr. Koorn's
23 graphs (Exh. 4333-46, 4333-47) do not show anything about "Historical Average
24 Monthly Customer Bills,"— all they show is what a hypothetical customer *who happened*
25 *to use 11.6 CCF of water constantly over the years would have paid for water.*
26 (6/30/20 Koorn 109:25-110:23.)

27
28 The Town tries to defend Mr. Koorn's approach by arguing, "The point is to
measure the difference in rates, not consumption." (Town's Brief, at p. 44.) But Mr.

1 Koorn was *not* purporting to measure differences in rates – his graphs clearly state in
2 their headings that he was trying to determine "Historical Average Monthly Customer
3 Bills," not differences in rates. (Exh. 4333-46, 4333-47, emphasis added.) And he then
4 used his data to make projections about the "Average Monthly Customer Bill" (Exh.
5 4333-48, 4333-51, 4333-52, emphasis added) – Mr. Koorn's own words – not
6 projections about future differences in *rates*, as the Town argues. Using Mr. Koorn's
7 own methodology but correcting for his erroneous assumption that the average monthly
8 residential customer used 11.6 CCF of water in 2011 instead of 17.0 CCF of water in
9 2011 produces a very different result – an average annual increase of 1.49%, not
10 4.82%. (Exh. 1180-5.)

11 In short, Mr. Koorn's attempts to compare "projected monthly customer bills"
12 under Liberty ownership versus Town ownership used an erroneous analysis. (Exh.
13 4333-52.) His red line for "Liberty Utilities" shows bills increasing at the erroneous rate
14 of 4.82% per year instead of 1.49% per year. And his other lines for Town ownership
15 are all based on understated annual revenue requirements – generated by ignoring lost
16 economies of scale, and by including the too-low 12% administrative overhead factor,
17 as the Court has already addressed. The evidence shows that, adjusting for inflation
18 and considering the actual average monthly consumption, residential water bills in
19 Apple Valley – including surcharges and other monthly charges – have *decreased by*
20 *6.8%* from 2009 through 2019. (Exh. 976.)

21 Dr. Hanemann's conclusion that Apple Valley customers will face higher water
22 bills under Town ownership was more compelling and the Court accepts it. Accordingly,
23 insofar as future water bills are concerned, the Town's Project is not required by public
24 interest and necessity and is not a "more necessary" public use than continued
25 ownership and operation of the system by Liberty.

27 f. **The Town's Avoidance of Property Taxes and Income**
28 **Taxes is Not a True Cost Savings.**

If the Town were to acquire the water system, it would not pay income taxes or
property taxes, as Liberty does. This tax avoidance is not properly considered a

1 "savings" of Town ownership. As Dr. Hanemann testified, the Town's tax avoidance
2 just creates holes in the budgets of other public entities, which must be replaced by
3 other taxpayers. The tax revenues needed to operate those other public entities would
4 not be reduced by the Town's acquisition of the Apple Valley water system. Thus, "tax
5 avoidance" is not a savings at all, but a shifting of the tax burden from Liberty to other
6 taxpayers. (1/8/20 Hanemann 36:9-37:6, 98:9-99:3.)

7 Mr. Koorn, however, listed the Town's tax avoidance of \$764,345 in property
8 taxes and \$2,256,636 in income taxes as a "Year 1 Reduction under Town Ownership."
9 (Exh. 4333-32.) Saying that reducing other public entities' tax revenues by \$3 million is
10 a "savings" or a "benefit" of Town ownership is an economic falsehood. It is actually a
11 *cost* of Town ownership, and Dr. Hanemann was correct to treat it as such. (1/8/20
12 Hanemann 98:9-99:3; Exh. 425-24 Row 66.)

13
14 g. **Dr. Hanemann's Economic Model Appears to be More Thorough and Accurate Than Mr. Koorn's Model.**

15 Both Dr. Hanemann and Mr. Koorn created models of financial pro formas in
16 order to compare the performance of the system under continued Liberty ownership
17 versus under Town ownership.
18

19 Dr. Hanemann's model covers 31 years, in order to include the entire life of the
20 acquisition debt (30 years), plus one year after the debt is paid off. (1/8/20 Hanemann
21 40:13-24; Exh. 425.) He began with an analysis of how much water would be
22 consumed by all classes of the system's customers, adding a water loss factor in order
23 to determine how much total water the system would need to produce to serve its
24 customers. Dr. Hanemann relied on agreed-upon data from the Joint Comparison
25 Exhibit in the pending rate case for this analysis. (1/8/20 Hanemann 50:22-51:25; Exh.
26 425-120.) He used agreed-upon water production data to determine water supply costs
27 for the system. (Exh. 425-114.) Dr. Hanemann testified in detail about all of his *input*
28 data for O&M, A&G, taxes, return on rate base, capital expenditures, and acquisition
debt payments. (Exh. 425-6 to 425-7.) Only after doing so did he present the *output*

1 from his model: comparative graphs of total revenue requirement under continued
2 Liberty ownership vs. under Town ownership at the three different purchase prices.
3 (Row 76 at Exh. 425-7, 425-9, 425-11, 425-13, 425-15, 425-17, 425-19, and 425-21
4 [Liberty ownership]; Row 83 at Exh. 425-24 *et seq.*[\$100 million purchase price], Row
5 83 at Exh. 425-47 *et seq.* [\$122.3 million purchase price], Row 83 at Exh. 425-70 *et*
6 *seq.* [\$243.8 million purchase price]; Exh. 978-1 to 978-6.) Under each purchase price,
7 the revenue requirement under Town ownership would be *more* than the revenue
8 requirement under continued Liberty ownership. (1/8/20 Hanemann 101:14-18; 1/9/20
9 Hanemann 5:14-24, 7:6-14; Exh. 978-2, 978-4, 978-6.)

10 Dr. Hanemann recognized that, in 2049, the Town's acquisition debt would be
11 paid off and the Town would own the system free and clear. He analyzed the
12 discounted present value under the two ownerships in 2049 and beyond, which
13 demonstrated that, even after the debt is paid off, the ratepayers would still come out
14 worse financially by needing to wait 31 years to own the system debt-free. The
15 discounted present value for each year is included in the model. (Exh. 425-7 *et seq.*
16 Row 83 [Liberty ownership]; Exh. 425-24 *et seq.* Row 90 [\$100 million purchase price];
17 Exh. 425-47 *et seq.* Row 90 [\$122.3 million purchase price]; Exh. 425-47 *et seq.* Row
18 90 [\$243.8 million purchase price].) The results of Dr. Hanemann's discounted present
19 value analysis is shown at Exh. 425-93. Even though the Town will someday pay off the
20 debt, the community is better off financially under continued Liberty ownership rather
21 than Town ownership, at any purchase price. (1/9/20 Hanemann 12:25-15:4.)²⁴

22
23
24
25 ²⁴ Dr. Hanemann used a discount rate of 7% in his present value analysis. The Town contends that
26 Dr. Hanemann "offered no testimony to justify his 7% discount rate" (Town's Brief, at p. 81), but in fact Dr. Hanemann
27 offered precisely that testimony. (1/15/20 Hanemann 24:19-26:18.) He explained that his 7% discount rate was
28 conservative, as he was trying to assess whether *ratepayers* would come out ahead or behind by paying off the
acquisition debt after 30 years. The issue is therefore what rate the *ratepayers* would pay, on average, if they were
required to squeeze more out of their personal monthly budgets to pay more to operate the water system for 30 years.
Some ratepayers might come up with the additional cash needed by withdrawing from bank accounts paying 1%,
others would potentially lose higher stock market returns, and others would incur 18% in credit card interest to fund
their increased personal expenses. (1/15/20 Hanemann 25:4-26:18.) This is very different from the interest rate *the*
Town would pay on municipal debt to finance the acquisition. The Town offered no contrary evidence as to the
appropriate discount rate. Further, of note, the Town itself uses a discount rate of 7.15% to measure its total pension
liability. (Exh. 238-79.)

1 Mr. Koorn's model did not reflect the level of careful analysis that Dr.
2 Hanemann's did:

- 3
- 4 • Mr. Koorn's model covered nine years, from 2019 through 2027, even
5 though the Town would not be operating the system in 2019 and Mr.
6 Koorn assumed the Town would acquire the system "in 2020 at some
7 point." (6/30/20 Koorn 14:25-15:26.)
- 8 • Mr. Koorn did no analysis of the system's water consumption or
9 production. As noted above, he rooted his model in superseded data from
10 Liberty's 2018 Revenue Requirement Report, rather than the 2019 Joint
11 Comparison Exhibit. (6/29/20 Koorn 127:1-6.)
- 12 • Mr. Koorn failed to analyze or apply the economies of scale that Liberty
13 enjoys and the Town would lose by operating the system on a standalone
14 basis. (6/30/20 Koorn 21:26-23:13.)
- 15 • Mr. Koorn used an inappropriate administrative overhead factor of 12%
16 that produced an unrealistically low revenue requirement under Town
17 ownership, as discussed above.
- 18 • Mr. Koorn used an inappropriate "constant consumption assumption" to
19 compare future water bills under Town ownership versus Liberty
20 ownership. And,
- 21 • Mr. Koorn did not compare the present value of revenue requirements
22 over time, including after the Town's acquisition debt is paid off.
- 23

24 Overall, Dr. Hanemann did a more thorough and accurate assessment of the
25 economic consequences to Apple Valley customers from a Town acquisition of the water
26 system. The preponderance of the evidence on this issue proves that the Town's
27 Project is not required by the public interest and necessity, and is not a "more
28 necessary" public use of Liberty's property that the Town seeks to acquire.

1 4. **When Properly Analyzed, Liberty's Water Rates Compare**
2 **Favorably to Water Rates Charged by Nearby Municipally**
3 **Owned Water Systems.**

4 Both sides presented evidence comparing the nominal rates for water usage
5 charged by Liberty versus other water systems. For Liberty, Dr. Hanemann adjusted
6 the data based on different attributes of the water systems – for example,
7 consumption, alternate revenue sources, and capital expenditures. For the Town, Dr.
8 DeShazo did not control for such differences between water systems. Making such
9 adjustments is an appropriate step in seeking to compare apples-to-apples data. In a
10 similar vein, when real estate appraisers value property using the comparable sales
11 approach, they typically adjust the raw sales price to account for differences between
12 the properties. *Emeryville Redevelopment v. Harcros Pigments, Inc.*, 101 Cal. App. 4th
13 1083, 1094 (2002) (appraisers "typically adjust[] the price to reflect such matters as
14 material differences between the properties and differences in market forces between
15 the time and location of the comparable sale and that of the property being valued.").

16 Some key differences in the water rates charged by Liberty versus those charged
17 by other nearby water system were addressed by the California State Auditor in its April
18 2015 report entitled "Apple Valley Area Water Rates." (Exh. 68.) The State Auditor –
19 an arm of the State, independent of any of the parties to this lawsuit – found that
20 operational and accounting differences between investor-owned utilities like Liberty and
21 municipally-owned utilities explain some of the differences between the nominal rates
22 they charge. For example, publicly owned utilities receive revenues from other sources
23 like property taxes and connection fees that do not appear on customer's bills, whereas
24 investor-owned utilities derive all of their revenue from rates. (Exh. 68-7.)²⁵ In
25 addition, the State Auditor found that Hesperia provided financial assistance to its water
26 system to help it keep its rates lower and subsidized rates by declining to collect the full
27 amount of services provided by the City to its water utility. (Exh. 68-36; Exh. 1130-2.)
28

²⁵ The Town argues that Exh. 68-7 "refutes [Dr. Hanemann's] thesis that connection fees are a revenue source." (Town's Brief, at p. 43.) In fact, the State Auditor's Report, Exh. 68-7, clearly says that "public utilities may receive revenues such as property taxes and connection fees"

1 Victorville kept its rates low by deferring routine maintenance and scheduled asset
2 replacements. (Exh. 68-37.)

3 Given those differences, Dr. Hanemann explained that looking solely at nominal
4 rates charged to customers does not fully capture the true charges of the systems.
5 (1/9/20 Hanemann 33:9-34:21.) He performed a comparative analysis of the rates
6 charged by Liberty and four nearby government-owned systems that the Town itself
7 had selected as comparators, including Victorville, Hesperia, Helendale Community
8 Service District, and County Area 64. (Exh. 386.) In a manner similar to the
9 adjustment process an appraiser would use to account for differences between
10 properties, Dr. Hanemann controlled and adjusted for important differences between
11 the systems, including:

12
13 (1) Consumption levels. Dr. Hanemann analyzed the actual average
14 consumption of the systems' customers rather than pretending that each system's
15 water users consumed identical quantities of water (Exh. 429-1);

16
17 (2) Capital spending. Dr. Hanemann recognized that a water system can
18 keep rates artificially low by deferring capital spending and letting the system
19 deteriorate. For a fair comparison, he adjusted for different rates of capital
20 expenditures between different systems (Exh. 427-10); and

21 (3) Revenues derived from sources other than water rates, such as property
22 tax revenues, connection fees, subsidies from the general fund, and investment income
23 received by the municipal systems but not by Liberty (Exh. 429-6, 429-7, 429-8).

24 After controlling for these factors (Exh. 429-3 to 429-5), Dr. Hanemann's analysis
25 showed what average monthly rates would be for each of the systems if they operated
26 on equal footing – and Liberty's average residential monthly charges compare favorably
27 to – in fact, are *less than* – the average residential monthly charges for each of the
28 other systems. (1/9/20 Hanemann 53:15-54:19; Exh. 426.)

1 The Town's water rate analysis by Dr. DeShazo did not control for any of the
2 relevant differences between the systems. He analyzed water rates based on a
3 standardized consumption of 11.555 CCF for all the systems, regardless of the actual
4 level of consumption in each community, and notwithstanding that both the Raftelis
5 rate study and the Environmental Protection Agency's guidance documents that he
6 referenced looked to actual levels of consumption. (3/10/20 DeShazo 115:7-15,
7 116:21-117:15, 118:4-16, 123:5-21.) Dr. DeShazo's water rate analysis also did not
8 consider the variable impacts of alternative sources of revenue like connection fees,
9 property taxes, and subsidies, or the massively different rates of capital expenditures
10 between systems. (3/16/20 DeShazo 23:23-25:6, 34:8-12, 47:16-49:7.) His approach
11 mirrored that taken by the Town itself when it adopted its Resolutions of Necessity in
12 November 2015. (Exh. 891-13.)

13 It is overly simplistic to say that Victorville or Hesperia charge X dollars per CCF
14 while Liberty charges Y dollars per CCF; a fulsome comparative analysis requires more
15 than that. The Court finds that the nominal water rates charged by Liberty and other
16 systems do not support the conclusion that the Town's proposed acquisition is required
17 by the public interest or is a "more necessary" public use of the water system.
18
19

20 **IV. LIBERTY HAS REBUTTED THE PRESUMPTION THAT THE TOWN'S**
21 **PROJECT IS PLANNED IN THE MANNER MOST CONSISTENT WITH THE**
22 **GREATEST PUBLIC GOOD AND THE LEAST PRIVATE INJURY.**

23 Code Civ. Proc. §1240.030(b) states that the power of eminent domain may be
24 exercised only if it is established that "[t]he project is planned or located in the manner
25 that will be most compatible with the greatest public good and the least private injury."
26 (Emphasis added.) The Town's Project is proper unless another plan or location "would
27 involve an equal or greater public good and a lesser private injury." Law Revision
28 Commission Comment to Section 1240.030.

Liberty objects to the Town's right to take Liberty's property under Code Civ.
Proc. §1250.370(c) – that "[t]he proposed project is not planned or located in the

1 manner that will be most compatible with the greatest public good and the least private
2 injury." (Emphasis added.) The Court sustains Liberty's objection. The preponderance
3 of the evidence at trial shows that the Town's Project does not meet the greatest public
4 good/least private injury standard.

5 The leading case on this factor is *SFPP, L.P. v. The Burlington Northern & Santa*
6 *Fe Railway Co.*, 121 Cal. App. 4th 452 (2004). Plaintiff SFPP was a pipeline company,
7 and defendant BNSF was a railroad company – so neither party was a public entity.
8 While both entities had statutory powers of condemnation, neither was required (or
9 entitled) to adopt a resolution of necessity (*SFPP*, 121 Cal. App. 4th at 472 n. 12), so
10 the elements of necessity under Section 1240.030 were subject to proof at trial, just as
11 in this case.

12 By agreement, the pipeline company had placed a gasoline pipeline within the
13 railroad's right of way. The railroad desired to add a second track within its right of
14 way and requested the pipeline company to relocate its pipeline to another location
15 within the right of way, pursuant to the parties' agreement. The pipeline company
16 refused to relocate its pipeline and, instead, filed an eminent domain action to condemn
17 a 5-foot easement that encompassed the location of its existing pipeline. The pipeline
18 company's "project" was thus keeping its pipeline in exactly its existing location within
19 the right of way, rather than moving it. The railroad objected to the pipeline company's
20 right to take the easement. (*SFPP*, 121 Cal. App. 4th 452, 456-8.)

21 The parties submitted the matter to a private referee who found the pipeline
22 company did not have the right to take the easement it sought by eminent domain. In
23 particular, the referee concluded that the pipeline company failed to prove the required
24 element of Code Civ. Proc. §1240.030(b) – that its project was planned or located in
25 the manner "most consistent with the greatest public good and the least private injury."
26 The trial court entered judgment consistent with the referee's ruling and the Court of
27 Appeal affirmed.
28

1 The Court stressed the *comparative nature* of the analysis under Section
2 1240.030(b):

3
4 The words "most," "greatest" and "least" are comparative terms that
5 relate to both the plans and the location of the project. Such comparative
6 terms cannot be applied in the abstract; instead, they unambiguously
7 show the Legislature's intent that the condemnor's proposed location be
8 compared with other potential locations to see how those other locations
compare in effect on the public good and private injury resulting from the
project. (*SFPP*, 121 Cal. App. 4th at 469-470.)

9
10 While *SFPP* involved the comparison of greatest public good and least private
11 injury of the location of the project, here the issue is not location but the plan for the
12 Town's Project. But these concepts have equal dignity under the statute – the issue to
13 be determined is whether the project is "*planned or located*" in the manner most
14 consistent with the greatest public good and least private injury. The same
15 comparative analysis undertaken by the *SFPP* Court regarding the location of the
16 proposed project in that case must be undertaken in this case regarding the Project's
17 plan. The comparative terms "most," "greatest," and "least" thus require the Court to
18 compare and contrast the Town's planned Project with alternative plans, including the
19 *status quo*.

20 The balance under Section 1240.030(b) requires an analysis of "public good" and
21 "private injury." The presumption may be overcome if another plan "would involve an
22 equal or greater public good and a lesser private injury." *SFPP*, 121 Cal. App. 4th at
23 470. The Court held that "all the facts and circumstances" are to be considered in
24 making the greatest public good/least private injury determination:

25
26 We, therefore, hold that a finder of fact inquiring into greatest public good
27 and least private injury should consider all the facts and circumstances,
28 and the preexisting location of an improvement is only one of the factors
relevant to that inquiry. (*SFPP*, 121 Cal. App. 4th at 473.)

1 Applied here, the Court is to consider "all the facts and circumstances," including
2 the *status quo* – continued operation by Liberty – which is the preexisting plan for
3 continued operation of the water system.

4 Risk and efficiency of a planned Project are elements to be analyzed in making
5 the greatest public good/least private injury determination. The Court in *SFPP* noted
6 that "the public good" in that case "takes the form of less risk and more efficient
7 performance of the rail system." *SFPP*, 121 Cal. App. 4th at 474 n. 14. Similarly here,
8 "the public good" includes an analysis of less risk and more efficient performance of the
9 water system if left in Liberty's hands, rather than taking a gamble on the Town's ability
10 to operate the system. The issues of risk and efficiency are already discussed above.
11 The continued *status quo* – *i.e.*, the continued operation of the water system by Liberty
12 – is an alternate project plan which involves less risk and greater efficiency in the
13 operation of the system than would be the case under the Town's Project, under which
14 the system would be transferred to the Town. Thus, the continued *status quo* involves
15 greater public good and lesser private injury than the Town's proposed Project.

16 In addition, there are other factors that show the Town's Project is not planned
17 in the manner most compatible with the greatest public good and the least private
18 injury. And these factors are, simultaneously, additional evidence disproving that the
19 Town's Project is required by the public interest and necessity, or that the Town's
20 Project constitutes a "more necessary public use" of Liberty's water system.

21
22 **A. Low-Income Customers Will Suffer Significant Private Injury**
23 **Because The Town's Project Does Not Include Providing**
24 **Discounted Rates To Them.**

25 Approximately 18% of Liberty's customers are low-income and qualify for
26 discounted water rates through the CARW (California Alternative Rates for Water)
27 program. (12/17/19 Jackson 55:12-18; 1/6/20 Jackson 72:8-10.) As stated in its
28 Water Action Plan, one of the PUC's primary objectives for the investor-owned utilities it
regulates is to provide assistance for low-income ratepayers. (Exh. 270-5.) Liberty
assists low-income customers through a special PUC-approved tariff that provides a bi-

1 monthly discount of \$16.76 (2 x \$8.38) from their water bills. (1/6/20 Jackson 70:4-
2 71:16; Exh. 309-47.) The low-income discounts are funded through a 69¢ per month
3 surcharge charged to the remaining customers. (1/6/20 Jackson 72:11-73:9; Exh. 309-
4 49.)

5 If the Town were to acquire the water system, it would not be able to provide a
6 low-income discount that is funded by a surcharge on the rest of the customers.
7 (1/9/20 Hanemann 15:19-25.) As the State Auditor noted: "Under Proposition 218,
8 however, a publicly run water district may not use revenue derived from water fees to
9 offer reduced rates to low-income ratepayers. Public utilities can offer such programs
10 but must fund them through other revenue sources, such as the city's general fund."
11 (Exh. 68-15.)

12 There is nothing in the Town's Project that indicates any intent to provide
13 discounts to low-income customers. Its Resolutions of Necessity say nothing about
14 such discounts. (Exhs. 3651; Exh. 3652.) Likewise, the Town's November 17, 2015
15 staff report incorporated into its Resolutions of Necessity says nothing about providing
16 such discounts. (Exh. 891; Exh. 3651-1 §1; Exh. 3652-1 §1.) Nor is there anything in
17 the Town's July 2019 Water Enterprise Transition Plan that indicates that the Town
18 intends to provide a low-income discount if it succeeds in acquiring the water system.
19 (1/15/20 Hanemann 8:23-10:17; Exh. 156-5.)
20

21 The issue was expressly brought to the Town's attention in a comment to its
22 draft Environmental Impact Report:

23 The DEIR fails to address whether the Town would continue AVRWC's
24 low-income discount program to needy individuals and seniors. Under
25 Proposition 218, the Town is prohibited from instituting such a program.
26 The lack of a low-income discount program will have a significant impact
27 on citizens in need, leading to potential population shifts and impacts on
social services. (Exh. 165-226.)

28 In response, the Town dismissed the comment as raising only "economic and
social impacts" which required no response. (Exh. 165-244.) The Town noted it had

1 "other options" for subsidizing water rates through "unrestricted revenue sources," but
2 stood conspicuously silent on the Town's intent to implement such subsidies. (Exh.
3 165-244.) While the Town could, if it chose to, fund a low-income discount by way of a
4 direct subsidy from its General Fund, the financial condition of the General Fund
5 (addressed above) calls into question the Town's ability and likelihood of doing so.

6 In sum, the evidence established no intent by the Town to continue low-income
7 discounts as part of its Project if it were to acquire the water system. If the low-income
8 residential customers were to lose their discount, they would pay substantially more for
9 water service. The current \$8.38 per month discount represents a 14% reduction in
10 the water bills of low-income customers. (1/9/20 Hanemann 16:21-17:11; Exh. 978-7
11 note 1.) In other words, low-income customers will be hit with an immediate 14%
12 increase in their water bills if they lose their discounts. Over the period of Dr.
13 Hanemann's model, low-income customers would pay an additional \$20.6 million in
14 water bills under Town ownership than they would under continued Liberty ownership,
15 with their low-income discounts intact. (1/9/20 Hanemann 17:12-18:13; Exh. 978-8.)

16 Low-income customers are likely to suffer substantial private injury if the Town
17 acquires the water system. Nothing in the Town's Project requires it to continue
18 providing the current low-income discount, and it cannot do so by the approved funding
19 mechanism currently employed by Liberty. The Town could have crafted a Project that
20 included continued assistance to low-income customers – with the funding source for
21 the assistance clearly spelled out – but it did not do so. Thus, the Town's current
22 Project is not planned in the manner *most consistent* with the greatest public good and
23 the least private injury.

24
25 **B. The Town's Project Would Cause Additional Private Injury To**
26 **Those Who Currently Rely on Tax Revenues That Would Be Lost**
27 **If the Town Were To Acquire the System.**

28 Liberty Apple Valley is the third largest payer of property taxes in the Town of
Apple Valley. (11/12/19 Harris 119:5-16; Exh. 238-139.) Some of the property tax
payments that are paid to the Town are distributed to other entities, like the Apple

1 Valley Unified School District and the County of San Bernardino. (11/12/19 Harris
2 120:19-121:15.) If the Town acquires the water system, it will not pay those property
3 taxes, and the revenue that is distributed to other entities will be lost. (1/8/20
4 Hanemann 36:9-16; 6/15/20 DeShazo 9:18-26.) See California Constitution Art. XIII,
5 Sec. 3(b). Mr. Koorn testified that the total lost property tax revenue would be
6 \$764,345 in the first year of Town ownership alone. (6/30/20 Koorn 4:3-11; Exh. 4333-
7 32.)

8 The entities that will lose property tax revenue if the Town acquires the water
9 system, as well as those that derive services from those tax revenues, will suffer
10 substantial private injury. The Town could have chosen to offset those private losses,
11 again, by using General Fund revenues to make up for the shortfall, but its Project
12 includes no plan to do so. There is nothing in the Town's Resolutions of Necessity, its
13 staff report, or its more recent transition plan that addresses any plan to make up these
14 lost revenues to other entities and members of the public that use their services. (Exh.
15 3651; Exh. 3652; Exh. 891; Exh. 156.) To the contrary, the Town's staff report that
16 was incorporated into its Resolutions of Necessity says only that "acquisition by the
17 Town would also save this expense." (Exh. 891-10.)

18 The Town could have structured a Project which backfilled these lost property
19 tax collections, but its proposed Project does not do so. Accordingly, the Town's Project
20 is not planned in the manner most consistent with the greatest public good and the
21 least private injury.

22
23 **C. Water Customers in Smaller (and Frequently Poorly Run) Nearby**
24 **Systems Will Suffer Private Injury Because Liberty Will Not Be**
25 **Available to Rescue Them.**

26 The PUC recognizes that many smaller water systems lack the resources and skill
27 to continue to provide healthy water to their customers, and encourages Class A water
28 companies like Liberty to take them over. As stated in the PUC's Water Action Plan:

Smaller water companies often do not have the resources or expertise to
operate in full compliance with increasingly stringent and complex water

1 quality regulations. Many water companies are too small to be viable in
2 the long-term, raising questions as to whether they will be able to
3 continue to provide clean and reliable water in the future. [Department of
4 Public Health] requests Class A utilities (over 10,000 connections) to
report on an annual basis which smaller utilities they might consider
purchasing. (Exh. 270-11.)

5 The PUC's concern is supported by the number of smaller systems that surround
6 Liberty's AVR system. (Exh. 920-57.) There are five smaller systems, each serving less
7 than 1,500 connections, that are adjacent to Liberty Apple Valley, and each of the
8 smaller systems have had multiple water quality violations (unlike Liberty's far larger
9 system with 20,000 connections, which has had zero). (Exh. 920-57.)

10 The Legislature has clearly recognized the greater public good that accrues when
11 larger water systems acquire and operate smaller ones. It adopted the Public Water
12 System Investment and Consolidation Act of 1997 to encourage such acquisitions. The
13 Legislature found and declared that economies of scale are achievable and "will provide
14 benefits to ratepayers" when larger systems acquire and operate smaller ones. *See*
15 *Pub. Util. Code §2719(c) and (d)*. The Act encourages such acquisitions by giving
16 favorable rate base treatment to regulated utilities when they acquire small systems.
17 (1/16/20 Bruno 51:2-13.)

18 Liberty has in fact complied with the policies of the PUC and the Legislature, as
19 demonstrated by the acquisition and operation of the Yermo water system. Yermo is a
20 small disadvantaged community in unincorporated San Bernardino County. Its water
21 system had fallen into utter disrepair and was put into receivership by Court order.
22 (11/6/19 Thomas-Keefer 42:8-23.) The Yermo system had 46 water quality violations
23 from 1993 through 2014. (11/6/19 Thomas-Keefer 42:24-43:9.) As found by the PUC:
24 "Yermo has had a long, troubled, and well-documented history of absentee ownership,
25 mismanagement, negligent operations, unsafe, inadequate and substandard water
26 service, including unsafe water supplies, service interruptions, contamination and other
27 operation problems that imperiled the public health and safety of Yermo customers."
28 (Exh. 918-2.)

1 Shortly before Liberty acquired the Apple Valley water system in January 2016,
2 Liberty's predecessor acquired the Yermo system. Liberty immediately began to make
3 the improvements necessary to cure the system's public health and safety problems.
4 For example, Liberty connected Yermo's two separate systems (operated by two
5 separate wells) in order to provide needed redundancy; it added chlorination
6 disinfection to the well sites that had not previously existed; it capped old abandoned
7 wells; it brought water quality monitoring into compliance; and it added a back-up
8 generator so the wells would work even if power was lost. (11/6/19 Thomas-Keefer
9 45:19-47:22; 7/15/20 Thomas-Keefer 19:3-10.) Yermo is operated as a separate
10 division of the Apple Valley system, and the PUC sets rates separately for Yermo.
11 (12/17/19 Jackson 56:11-22.) The public has benefited from Liberty's operation of a
12 safer and more reliable water system in Yermo.

13 If the Town were permitted to acquire the Apple Valley water system, the
14 policies of the PUC and the Legislature (as expressed in Pub. Util. Code §2719) to
15 encourage the consolidation of smaller systems with larger systems would be turned on
16 their head. Currently, Liberty is a good candidate to acquire some or all of the smaller
17 systems that are adjacent to the AVR system but outside the Town's boundaries – like
18 Apple Valley View MWC (275 connections), Thunderbird CWD (840 connections), Apple
19 Valley Foothill CWD (712 connections), Mariana Ranchos CWD (1,386 connections), and
20 Juniper-Riviera CWD (415 connections). (1/16/20 Bruno 54:19-55:4; Exh. 920-57.) For
21 example, consolidation studies for Liberty to operate the Apple Valley Foothill system,
22 which has experienced water quality problems, have already been submitted for review
23 by the State Water Resources Control Board and are presently pending. (2/3/20 Penna
24 54:15-55:1, 61:15-20; Exh. 1016.) The Apple Valley View system also approached
25 Liberty seeking assistance due to water quality problems, and is awaiting the outcome
26 of this case before proceeding. (2/3/20 Penna 60:7-61:9.)

27 The public good inherent in the opportunity for consolidation of such nearby
28 smaller systems with an experienced operator like Liberty would be lost if the Town's

1 Project were to proceed. The Town has shown its lack of interest in acquiring smaller
2 systems by its decision *not* to include acquisition of the Yermo system in its Project
3 because the Yermo facilities "do not provide any other benefit to the Town's residents."
4 (Exhs. 165-8; Exh. 891-3.) Moreover, it will be difficult for Liberty Park Water to
5 economically and efficiently serve the Yermo water system from 130 miles away, in
6 Downey, if the Town's Project is permitted to proceed. (1/16/20 Bruno 54:13-18.)

7 The Town's Project and its parochial interests will cause private injury to the
8 customers of nearby smaller systems because Liberty will no longer be a viable
9 candidate to acquire them, consistent with the policies of the PUC and the Legislature.
10 Residents of Yermo will also suffer private injury because Liberty's ability to operate the
11 system efficiently will suffer if Liberty no longer owns the Apple Valley system. In
12 short, the Town's acquisition creates a significant threat and damage to small-system
13 customers – precisely the customers that need the skill and resources of a Class A
14 water utility to serve the interests of public health and safety. Because the Town's
15 Project provides *no* public benefits to these customers – only private injury – its Project
16 is not planned in the manner most consistent with the greatest public good and the
17 least private injury.

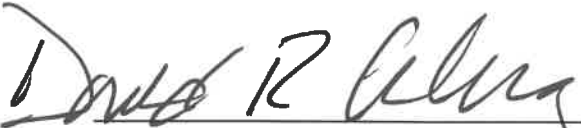
18 **DISPOSITION**

19 The court finds that Liberty, through evidence introduced during the court's
20 bench trial, has rebutted the presumptions established by Eminent Domain Law for the
21 taking of its property for use as a municipal water utility. In particular, Liberty has
22 disproved that 1) the public interest and necessity require the Town's Project (Code of
23 Civil Procedure section 1240.030(a)); 2) the Town's Project is planned in the manner
24 that will be most compatible with the greatest public good and the least private inquiry
25 (Code of Civil Procedure section 1240.030(G)); and 3) the use for which the Town
26 seeks to take Liberty's property is a more necessary public use than the use to which
27 Liberty's property is presently devoted (Code of Civil Procedure section 1250.370(G))
28

1 and (c) and section 1250.360(f). Therefore, Liberty's objections to the Town's right to
2 take the Apple Valley Water System are sustained.

3 Finally, the court shall find for Liberty and shall dismiss this action under Code of
4 Civil Procedure section 1260.120(c)(1).

5
6 Dated this 7 day of May, 2021

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9 
10 DONALD ALVAREZ
11 Judge of the Superior Court
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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF SAN BERNARDINO

SAN BERNARDINO DISTRICT, CIVIL DIVISION

TITLE OF CASE (ABBREVIATED): In the Matter of

TOWN OF APPLE VALLEY v. APPLE VALLEY RANCHO WATER COMPANY, et al,

CASE NUMBER: CIVDS1600180

DECLARATION OF SERVICE BY MAIL

My business address is: San Bernardino Superior Court, 247 West Third Street, San Bernardino, California 92415.

I hereby declare that I am a citizen of the United States, over the age of 18, employed in the above-named county, and not a party to nor interested in this proceeding. On May 7, 2021, I deposited in the United States mail at San Bernardino, California, a sealed envelope (postage prepaid) which contained a true copy of the attached:

NAME OF DOCUMENT:

TENTATIVE STATEMENT OF DECISION

Name and Address of Persons Served:

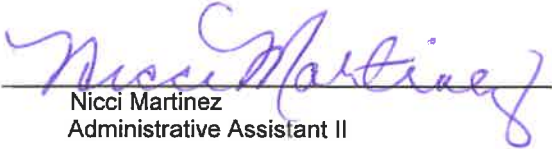
**BEST BEST & KRIEGER LLP
3390 University Avenue, 5th Floor
P.O. Box 1028
Riverside, CA 92502**

**MANATT, PHELPS & PHILLIPS, LLP
2049 Century Park East, Ste. 1700
Los Angeles, CA 90067**

At the time of mailing this notice there was regular communication between the place of mailing and the place(s) to which this notice was addressed.

I declare under penalty of perjury the foregoing to be true and correct.

DATED: May 7, 2021

by 
Nicci Martinez
Administrative Assistant II