

1 ATKINSON, ANDELSON, LOYA, RUUD & ROMO
A Professional Corporation
2 Wesley A. Miliband State Bar No. 241283
Wes.Miliband@aalrr.com
3 2485 Natomas Park Drive, Suite 240
Sacramento, California 95833-2937
4 Telephone: (916) 923-1200
Fax: (916) 923-1222

5 Attorneys for City of Sacramento

6 [Additional counsel below]

8 BEFORE

9 CALIFORNIA STATE WATER RESOURCES CONTROL BOARD

10
11 CALIFORNIA WATER FIX HEARING

12 Hearing in the Matter of California
13 Department of Water Resources' and United
14 States Bureau of Reclamation's Petition for
Change in Points of Diversion for the Central
15 Valley Project and the State Water Project

**AMERICAN RIVER WATER AGENCIES'
OBJECTION AND MOTION TO STRIKE
PORTIONS OF DOI-43 AND DOE-44
(PROPOSED TESTIMONY AND SLIDES
OF NANCY PARKER) AS OUTSIDE
SCOPE OF PART 2 REBUTTAL**

1 **INTRODUCTION**

2 The American River Water Agencies (“ARWA”) object to, and move to strike, portions of
3 Nancy Parker’s proposed modeling testimony in petitioner Department of Interior’s (“DOI”)
4 rebuttal exhibits DOI-43 and DOI-44. Rebuttal evidence is limited to evidence that is responsive
5 to evidence presented in connection with another party’s Part 2 *case-in-chief*. (Hearing Officers’
6 Ruling dated June 18, 2018, pp. 1, 3.) Evidence beyond the proper scope of Part 2 rebuttal must
7 be stricken from the hearing record. (*Id.* at p. 3.) Ms. Parker’s proposed testimony on pages five
8 and six of exhibit DOI-43, and slide eight in exhibit DOI-44, explicitly are further responses to the
9 Part 2 *cross-examination* of Erik Reyes, a witness for petitioner Department of Water Resources
10 (“DWR”), by an attorney for several ARWA protestants. Despite Ms. Parker being on the witness
11 panel when the relevant cross-examination occurred, Ms. Parker did not seek to amplify or clarify
12 Mr. Reyes’ responses and is simply seeking to provide further responsive testimony. Nor did legal
13 counsel for DOI – or any other counsel – take the opportunity to conduct re-direct examination of
14 their witnesses, as counsel could have, and should have rather than now improperly seek to
15 introduce supplemental responses as rebuttal evidence. Ultimately, Ms. Parker’s relevant
16 proposed testimony is beyond the proper scope of Part 2 rebuttal and the hearing officers should
17 grant this motion to strike in order to advance the hearing’s efficiency for the hearing officers,
18 their staff and the parties.

19 **BACKGROUND**

20 On March 2, 2018, during the Part 2 case-in-chief, Ms. Parker presented testimony on a
21 witness panel with ten other witnesses, including DWR’s modeler Mr. Reyes. Ryan Bezerra, an
22 attorney for several protestants in the ARWA group, cross-examined Mr. Reyes and Ms. Parker.
23 (Hearing Transcript for March 2, 2018, pp. 132:20-149:10, pp. 208:6-216:2, pp. 224:18-232:21.)
24 During the cross-examination, Mr. Bezerra requested that Ms. Parker provide any clarifications
25 she had for questions that were directed to Mr. Reyes. (*Id.* at p. 209:4-5.) Ms. Parker did so on
26 occasion. (See, e.g., *id.* at p. 210:6-9.)

27 On July 10, 2018, DOI submitted its exhibits for Part 2 rebuttal. Exhibit DOI-43 is the
28 proposed rebuttal testimony of Ms. Parker and exhibit DOI-44 contains presentation slides to
accompany Ms. Parker’s proposed testimony. On pages five and six of exhibit DOI-43, Ms.

1 Parker provides proposed testimony that responds to Mr. Bezerra’s March 2, 2018 cross-
2 examination of Mr. Reyes. Slide eight of exhibit DOI-44 provides matter related to pages five and
3 six of Ms. Parker’s proposed testimony.

4 **ARGUMENT**

5 The hearing officers’ June 18, 2018 ruling describes the limited scope for admissible
6 evidence in Part 2 rebuttal:

7 We remind parties that rebuttal evidence is limited to evidence that is responsive to
8 evidence presented in connection with another party's Part 2 case-in-chief, and it
9 does not include evidence that should have been presented during the case-in-chief
10 of the party submitting rebuttal evidence.

11 [. . .]

12 To assist in our review, parties’ rebuttal witness testimony must clearly indicate the
13 case-in-chief evidence to which the rebuttal evidence is responsive. If an exhibit
14 does not clearly cite to another party’s Part 2 case-in-chief evidence as the basis of
15 rebuttal, that portion of the testimony or exhibit may be stricken.

16 (Hearing Officers’ Ruling dated June 18, 2018, pp. 1, 3.)¹

17 Ms. Parker’s proposed testimony on pages five and six of exhibit DOI-43 attempts to use
18 Part 2 rebuttal to submit additional case-in-chief testimony by responding to the earlier cross-
19 examination of a panel on which Ms. Parker testified. This is improper. Exhibits that do not
20 clearly cite to another party’s Part 2 *case-in-chief* evidence as the basis of rebuttal must be
21 stricken. (Hearing Officers’ Ruling dated June 18, 2018, p. 3.) Pages five and six of exhibit DOI-
22 43 not only fail to identify any other party’s Part 2 case-in-chief evidence as the basis for that
23 proposed testimony, but expressly identify ARWA’s *cross-examination* of Mr. Reyes as the basis.
24 Those pages therefore are beyond the scope of rebuttal testimony as defined by the hearing
25 officers.

26 The hearing officers have good cause to grant this motion and strike the disputed portions
27 of Ms. Parker’s testimony. Ms. Parker had an opportunity during DOI’s Part 2 case-in-chief to
28 respond to the cross-examination of Mr. Reyes. She and Mr. Reyes appeared on the same panel

1 The hearing officers’ June 18, 2018 ruling also states that the hearing officers may grant requests to submit objections to the admissibility of rebuttal evidence in writing. ARWA therefore respectfully requests leave to submit this objection and motion to strike.

1 when Mr. Bezerra cross-examined Mr. Reyes. Ms. Parker was even asked to clarify Mr. Reyes's
2 testimony on project modeling as needed. (Hearing Transcript for March 2, 2018, p. 209:4-5.)
3 Because she failed to do so, it would be improper and unduly prejudicial for the hearing officers to
4 not strike the identified portions of Ms. Parker's testimony now, thereby requiring protestants to
5 prepare to cross-examine Ms. Parker on issues that are clearly beyond the admissible scope of
6 rebuttal evidence. Witnesses cannot decline the opportunity to respond to cross-examination,
7 spend several months developing further responses and present those further responses as rebuttal.

8 Moreover, Ms. Parker's objectionable proposed testimony is part of an on-going pattern of
9 conduct by petitioners concerning the presentation of their CalSim modeling results. As the
10 Sacramento Valley Water Users have documented, petitioners' modelers often have claimed to
11 have insufficient knowledge about their own modeling results to respond to cross-examination,
12 only to seek to clarify points about that modeling that they have found problematic. (See
13 Response by Sacramento Valley Water Users to Objection by California Department of Water
14 Resources to Subpoena Duces Tecum, dated April 18, 2018, pp. 5-7.) Ms. Parker's objectionable
15 proposed testimony attempts to explain away cross-examination of Mr. Reyes in which Mr. Reyes
16 denied sufficient knowledge to answer questions about results from petitioners' own CWF H3+
17 modeling. Ms. Parker did not take the opportunity to do so at the time that Mr. Reyes denied
18 knowledge of those results and now seeks to present those results. In addition, legal counsel for
19 DOI and DWR did not conduct any redirect to allow Ms. Parker or Mr. Reyes to clarify Mr.
20 Reyes' testimony on cross-examination, despite those witnesses *and* legal counsel having already
21 had months to review petitioners' CWF H3+ modeling results that were the subject of that cross-
22 examination. Ms. Parker's proposed rebuttal testimony identified above therefore is not
23 appropriate rebuttal evidence and must be stricken.

24 **CONCLUSION**

25 Pages five and six of exhibit DOI-43 and slide 8 in exhibit DOI-44 respond only to the Part
26 2 cross-examination of petitioners' witness, Mr. Reyes. This testimony is beyond the proper scope

27 ///

28 ///

1 of Part 2 rebuttal and the hearing officers should grant this motion and strike the evidence
2 identified above so that the proffered evidence is not admitted into the hearing record.

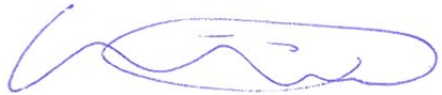
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Dated: July 12, 2018

Respectfully submitted,

ATKINSON, ANDELSON, LOYA, RUUD
& ROMO

BARTKIEWICZ, KRONICK &
SHANAHAN, P.C.

By: 
Wesley A. Miliband

By: /s/ Ryan S. Bezerra
Ryan S. Bezerra

Attorneys for City of Sacramento

Attorneys for Cities of Folsom and Roseville,
Sacramento Suburban Water District and San
Juan Water District