

September 6, 2017

Felicia Marcus, Chair and Co-Hearing Officer  
Tam Doduc, Member and Co-Hearing Officer  
State Water Resources Control Board  
1001 I Street  
Sacramento, CA 95814

Via electronic mail: [CWFhearing@waterboards.ca.gov](mailto:CWFhearing@waterboards.ca.gov)

Re: California WaterFix Hearing – Request for Reconsideration of Ruling Denying City of Stockton’s Request to Move Cross Examination Exhibits Into Evidence

Dear Hearing Officers Doduc and Marcus:

The City of Stockton (“Stockton” or “City”) respectfully requests that you reconsider your August 31, 2017 ruling denying Stockton’s request to move into evidence for Part 1 three exhibits relied on by the City in its June 15, 2017 sur-rebuttal cross examination of Department of Water Resources (DWR) expert witness Dr. Parviz Nader Tehrani. These exhibits, identified as STKN-51, STKN-52 and STKN-53, and related cross examination questions were the subject of objections and a motion to strike by the Department of Water Resources (DWR). At the Hearing Officer’s direction, Stockton (along with Local Agencies of the North Delta) on June 20, 2017 submitted a written opposition to the DWR objections and motion to strike that demonstrated Stockton’s intent that the three contested exhibits be accepted into evidence. (See June 20, 2017 Joint Opposition of the City of Stockton and Local Agencies of the North Delta to California Department of Water Resources’ Motion to Strike Sur-Rebuttal Cross-Examination and Objection to Entry into the Record or Admission into Evidence.)

At the close of Stockton’s sur-rebuttal case, on June 22, 2017, Co-Hearing Officer Doduc asked whether the City wished to move its sur-rebuttal exhibits into evidence, and in posing the question added:

And I emphasize that because there are some outstanding objections to your cross examination exhibits that was used, and at this time we’re not accepting

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Re: California WaterFix Hearing – Request for Reconsideration of Ruling Denying City of Stockton's Request to Move Cross Examination Exhibits Into Evidence

September 6, 2017

Page 2

cross-examination exhibits, anyway. So please move your surrebuttal exhibits.  
(June 22, 2017 Hearing Transcript at p. 147: 4-8.)

Based on this direction, Stockton moved into evidence its sur-rebuttal exhibits but not its three sur-rebuttal cross-examination exhibits that were the subject of the pending objections. (June 22, 2017 Hearing Transcript, p. 147:10-12.) From Co-Hearing Officer Doduc's statements at the June 22 hearing, Stockton understood that it should not move those exhibits into evidence until the Hearing Officers ruled on DWR's objection to those exhibits. Prior to leaving the country on vacation on July 2, I informed other counsel in my office that there would be a need to move the exhibits after the Co-Hearing Officers had ruled on DWR's objections.

Subsequently, at the July 11 hearing, Co-Hearing Officer Doduc announced:

I've directed to parties to wait until the end of surrebuttal to move into evidence any exhibits that were used for cross-examination. So parties who wish to offer cross-examination exhibits into evidence must submit a written motion and an updated exhibit identification index to the California WaterFix Hearing mailbox and copy the current service list no later than noon on Monday, July 17th. (July 11, 2017 Hearing Transcript at p. 4:1-8)

At the close of the hearing that day, after discussion of outstanding motions that could affect the need for additional hearing dates in Part 1, Hearing Officer Doduc announced:

All right. So given that we are still taking under consideration the Sac Valley Users' motion and that I've given people until July 19th to file responses to DWR's possible objection, I think we can say at this time that the hearing dates noticed for the rest of this week as well as next week are vacated. But I would ask that for now you maintain the remainder of the noticed hearing dates for July through 15 August -- I believe it's the 10th, in case we need to re-adjourn -- to reconvene. (July 11, 2017 Hearing Transcript at p. 231:6-12.)

It appears that the Hearing Officers did not issue a written ruling or post on the WaterFix hearing website, or otherwise notify the service list, of the direction that parties wishing to offer cross-examination exhibits into evidence must submit a written motion and an updated exhibit identification index to the California WaterFix Hearing mailbox and copy the

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Re: California WaterFix Hearing – Request for Reconsideration of Ruling Denying City of Stockton’s Request to Move Cross Examination Exhibits Into Evidence

September 6, 2017

Page 3

current service list no later than noon on July 17, 2017. Stockton’s lead counsel was out of the country between July 2 and July 20, 2017 and was not aware that sur-rebuttal had closed on July 11, 2017 or of the July 11, 2017 verbal ruling by Hearing Officer Doduc setting a July 17, 2017 deadline to move sur-rebuttal exhibits into evidence.

On July 27, 2017, the Hearing Officers issued a written ruling denying a request by the Sacramento Valley Water Users to hold open Part 1 of the hearing and stated, “The August 3-4 and 8-10 hearing dates are cancelled. We will address the schedule for Part 2 of the hearing, outstanding objections to sur-rebuttal evidence, and requirements for Part 1 closing briefs in a forthcoming ruling to be issued in the near future.” (Ruling Denying Sacramento Valley Water Users’ Request to Hold Open Part 1 of the Hearing, at p. 2.). As of July 27, 2017, the Hearing Officers had not formally closed Part 1 of the hearing nor had they ruled on DWR’s objections to Exhibits STKN-51, STKN-52, and STKN-53.

On August 10, 2017, the Hearing Officers issued a ruling (Ruling Regarding Part 1 Evidentiary Objections and Admission of Sur-Rebuttal Exhibits (August 10 Ruling).) That ruling announced the closure of Part 1 of the hearing, stating:

Part 1 of the hearing on the water right change petition for the California WaterFix Project (WaterFix) has been completed. This ruling addresses outstanding evidentiary objections to sur-rebuttal evidence and other procedural issues raised during Part 1. (August 10 Ruling at p. 1.)

This ruling overruled DWR’s outstanding objections to Stockton’s sur-rebuttal Exhibits STKN-51 through STKN-53, but did not address the question of whether the three exhibits were accepted into evidence. The Hearing Officers having thus ruled on the admissibility of the exhibits, on August 14, 2017, Stockton wrote the Hearing Officers to move that the exhibits be admitted into evidence, providing an updated exhibit identification list including those exhibits. As noted, the August 31, 2017 ruling denied this request that the exhibits be moved into evidence.

Stockton believes that the record demonstrates it intended that its exhibits STKN-51, STKN-52, and STKN-53 should be moved into evidence, and that Stockton’s failure to formally move them into evidence by July 17 is excusable considering the totality of the circumstances. These circumstances include (1) the Hearing Officer’s statements at the June 22 hearing, which Stockton interpreted to preclude a motion to move the City’s sur-rebuttal cross-examination

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Re: California WaterFix Hearing – Request for Reconsideration of Ruling Denying City of  
Stockton’s Request to Move Cross Examination Exhibits Into Evidence

September 6, 2017

Page 4

exhibits into evidence until the Board ruled on DWR’s pending evidentiary objections; (2) the apparent lack of a written ruling or direction provided to the service list setting a one week deadline from July 11, 2017 for moving sur-rebuttal exhibits into evidence; (3) the fact that Stockton’s lead counsel was out of the country and thus unaware of the July 11 verbal direction and July 17 deadline; and (4) Stockton’s sur-rebuttal cross-examination exhibits were not ruled admissible until after the July 17 deadline. For these reasons, and the fact that no party can reasonably claim prejudice if the Hearing Officers admit the three exhibits into evidence at this time, Stockton respectfully requests that the Hearing Officers accept into evidence for these proceedings Exhibits STKN-51, 52 and 53.

Sincerely,



Kelley M. Taber

KMT:mb

Enclosures: Stockton Exhibit Identification List  
Exhibit STKN-51  
Exhibit STKN-52  
Exhibit STKN-53

cc: See attached Statement of Service