SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

CITY OF CLAREMONT, a general law city, Plaintiff, vs. GOLDEN STATE WATER COMPANY, a California corporation; DOES 1-1000; and ALL PERSONS UNKNOWN CLAIMING AN INTEREST IN THE PROPERTY, Defendants.	Case No. BC 566125 **STATEMENT OF TENTATIVE DECISION**

Defendant Golden State Water Company ("Golden State") is an investor-owned, PUC-regulated water utility that is the sole provider of water to 11,000 subscribers (or service "connections") within the City of Claremont and to about 300 subscribers outside the City. The water service serves over 35,000 people. Its subscribers include residences, businesses, educational institutions, churches and charitable non-profit organizations, and governmental agencies.

The City of Claremont ("City") has initiated this legal action to take by eminent domain the assets owned by Golden State that are used to provide water in Claremont (and to the 300 subscribers outside its borders). The assets that the City seeks to acquire from Golden State include water wells, contractual water rights, 10 reservoirs, tanks, booster

pumps, 150 miles of underground pipelines, other infrastructure, real properties, and business systems used to deliver water (collectively referred to as "the Claremont Water Assets").

The City, if it is successful in acquiring the Claremont Water Assets, intends to use the Assets to operate a municipally-owned water system to sell water from the same sources to subscribers in the same service area. The City itself does not have experience in operating a water system, so the City has entered into a contract with the City of La Verne, an adjacent city and the operator of its own municipal water system, to manage the water system for Claremont for five years. Claremont will pay to La Verne all expenses plus a ten percent fee for its operation of the Claremont water system.

The City offered Golden State the sum of $56,335,000 for its Claremont Water Assets before it filed this action. (Exh. 228-1.) Golden State rejected the offer. Golden State filed its answer to the Complaint in Eminent Domain raising objections to the City's right to take Golden State's property. Where the right to take is contested, the court is to "hear and determine all objections to the right to take." CCP section 1260.120(a).

The court conducted a bench trial over 21 days to take evidence on the eminent domain issues, receiving evidence on June 14-16, 20, 21, 23, 24, 27-30, July 1, 6-8, 11-15, 2016 and hearing final arguments on August 11. Twenty-six witnesses gave testimony (two by deposition), and more than a hundred documentary exhibits were received into evidence.

If the City prevails in this trial, there will be a second phase trial to determine the fair compensation the City must pay to Golden State to acquire the Claremont Water Assets.

At this trial, attorneys Kendall MacVey, John H. Holloway and Christopher M. Pisano, of the law firm Best Best & Krieger LLP, represented plaintiff City of Claremont, and attorneys George M. Soneff, Edward G. Berg and Dinesh R. Badkar, of the law firm Manatt, Phelps & Phillips, LLP, represented Golden State Water Company.

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STATUTORY REQUIREMENTS FOR PUBLIC TAKING OF PRIVATE WATER UTILITY:

The court in this Statement seeks to apply the statutory requirements for eminent domain to the circumstances of this case.

The case is governed by California's Eminent Domain Law, Code of Civil Procedure (herein "CCP") sections 1230.010 through 1273.050. "The power of eminent domain may be exercised to acquire property only for public use." CCP section 1240.010. The court must make four findings to uphold a public entity's claim to exercise eminent domain powers. Three of the findings are required by CCP section 1240.030, providing:

> **The power of eminent domain may be exercised to acquire property for a proposed project only if all the following are established:**
>
> **(a) The public interest and necessity require the project.**
>
> **(b) The project is planned or located in a manner that will be most compatible with the greatest public good and least private injury.**
>
> **(c) The property sought to be acquired is necessary for the project.**

And, additionally, the statutory scheme provides that a governmental taking of property that is already "appropriated to the public use" must be "a more necessary public use." CCP section 1240.610 provides:

> **[A public entity]… may exercise the power of eminent domain to acquire property appropriated to the public use if the use for which the property is sought to be taken is a more necessary public use than the use to which the property is appropriated.**

That presumption is rebuttable if the public entity seeks to take property from a water public utility and intends to use the property for the same purpose. CCP 1240.650(c) provides:

> **Where the property which has been appropriated to a public use is … water public utility property which the public entity intends to put to the same use, the presumption of a more necessary use established by subdivision (a) is a rebuttable presumption affecting the burden of proof…**

The parties agree that Golden State is a water public utility. (A water public utility is defined in CCP section 1235.193.) The parties agree that the City intends to use the Water Assets that it takes from Golden State for the same use, namely, to deliver water to subscribers in the Claremont service area. Golden State, therefore, may offer evidence to rebut, and may prevail against, the City's assertion that its use of eminent domain to take the Claremont Water Assets is "a more necessary public use" for those Assets.

Nonetheless, the statutory presumption favoring the City's exercise of eminent domain affects the parties' proof burdens. Evidence Code section 606 provides: "The effect of a presumption affecting the burden of proof is to impose upon the party against whom it operates the burden of proof as to the nonexistence of the presumed fact." The burden of proof thus imposes on Golden State the duty to introduce competent evidence to show—by a preponderance of the evidence—the nonexistence of the presumed fact. Evid. Code section 502. Golden State's burden to overcome the presumptions favoring the City, therefore, is to show that it is more likely true than not true that the City's acquisition of the Claremont Water Assets is not "require[d]" by "public interest and necessity" and is not "a more necessary public use."

The order of proof is also altered by the statutory presumptions. Because Golden State has the burden of rebutting the presumptions, Golden State at trial presented its evidence first, after which the City presented its case.

In 1992, the Legislature added CCP sections 1240.650 (c) and1240.610 to require that the condemnation of a private electric, gas or water utility be for "a more necessary public use" (and to make that presumption rebuttable), and the legislative history indicates the provisions were intended to strengthen with statutory authority the ability of private utilities to oppose public acquisition through eminent domain. (The court takes judicial notice of the legislative history of the 1992 amendment, adopted as Senate Bill 1757, as requested in Golden State. See, Golden State RJN, filed July 19, 2016.)

The statutes do not provide guidance to interpret the phrase "a more necessary public use" as used in CCP sections 1240.610 and 1240.650(c). The phrase obviously

implies the court must make a comparison between Golden State present operation of the Claremont water system and the City's proposed operation of the same water system, and requires the court to make findings to uphold the statutory presumptions if the City's operation would provide significant benefits over Golden State's present operation of the water system. That the benefits from municipal operation must be significant over the present operation of the water system is implied from the statutory phrase that the City's use be "a more necessary public use."

The court, therefore, in this Statement has considered whether the City's acquisition of the Claremont Water Assets holds the prospect of improvements in water service; of better water pricing; or of other significant public benefits to water subscribers in the Claremont service area.

COURT'S RULING ON CITY'S FIRST AMENDED COMPLAINT IN EMINENT DOMAIN:

This is a right-to-take proceeding filed under California's Eminent Domain Law. The City of Claremont seeks to acquire from Golden State Water Company, an investor-owned water utility, those assets used by Golden State to deliver water to subscribers in the Claremont service area in order to replace Golden State with a City owned water system in the same service area.

The court finds that Golden State, through evidence introduced at a 21-day bench trial, has rebutted the statutory assumptions that "the public interest and necessity require" the taking and that the City's taking is "a more necessary use."

The court shall dismiss the City's complaint in eminent domain. CCP section 1260.120(c)(1).

CITY COUNCIL FAILS TO STATE FACTUAL REASONS FOR EMINENT DOMAIN:

The City wants to appropriate Golden State's assets so that the City can be the water provider in the Claremont service area.

The court would expect to receive into evidence in an eminent domain trial to decide whether the City's ownership is "a more necessary public use" a list of reasons considered by the City Council expressing the City's priorities for a water system and justifying the City's acquisition of the assets of the existing water operator. That list, the court would assume, would be complete and available to the City Council before it voted on the Resolutions of Necessity. However, so far as the court can discern, the City did not prepare any report that provides a complete list of reasons for its exercise of eminent domain powers to acquire the Claremont Water Assets.

The City Council adopted Resolutions of Necessity on November 25, 2014 (Exhs. 2000, 2001) and, again, on June 23, 2015 (Exhs. 2002, 2003). The Resolutions recite the necessary findings for eminent domain required by statute. See, CCP section 1240.030. The Resolutions do not offer any factual findings for a taking of a privately-owned and operated water public utility.

None of the City Council members who voted for the Resolutions of Necessity (the votes were unanimous) testified at trial (although several were introduced from the audience). No elected City official testified to any reasons for the City's exercise of its eminent domain power.

The City's original complaint, filed on December 9, 2014, did not list any reasons to support its taking of the Claremont Water Assets. Only in the First Amended Complaint (the operative complaint), filed June 24, 2015, did the City list reasons for the City's taking. The FAC gives these reasons:

> 7. In response to a number of factors, including longstanding public concern about GOLDEN STATE's escalating water rates, the significantly higher water rates paid by ratepayers in the Claremont Water System as compared to neighboring jurisdictions (including rates as much as four times the rates of the lowest neighboring provider), lack of local control over water rates, service, expenditures, and policy; lack of responsiveness and accountability of GOLDEN STATE to concerns of the inhabitants and constituents with the Claremont

community; the lack of transparency in the operation of the Claremont Water System, the CITY OF CLAREMONT began exploring the potential acquisition of the Claremont Water System.

Even this enumeration is not represented to be a complete list of reasons for the City's acquisition of the Claremont Water Assets. The City's attorneys in the course of this litigation discovered facts that they added at trial to the reasons for eminent domain. Golden State in discovery produced the ALDA Report (Exh. 440), a consultant's report hired by Golden State that recommended the company undertake infrastructure improvements, for instance, to increase reservoir capacity, and the City's attorneys (and its witnesses) then argued those recommendations as among the reasons for the City's exercise of eminent domain powers to take the Claremont Water Assets.

The City, in its post-trial brief, offered a list of 12 "project objectives" for eminent domain, saying such were "outlined" in the City's 2006 General Plan (Exh. 1016-326), the City's EIR (Exh. 229-009) "and as testified to by City officials and experts." See, City's Proposed Statement at 3:11-14. These sources do not inform the court of any factual findings upon which the City Council relied—and which Golden State is required to rebut—in adopting the Resolutions of Necessity. The trial testimony given by the City's experts and officials cannot tell the court what were the priorities of the City Council. The EIR does not speak to what the City Council sought in the Resolutions of Necessity. The 2006 City Plan provides a baseline description for the City's infrastructure in 2006, devoting a half dozen of its 623 pages to describing the water system operated by Golden State.

A city in adopting resolutions of necessity to condemn private property for public benefit is engaging in a legislative act, and, for that reason, its governing body is not required to make factual findings to support its exercise of eminent domain. *Santa Cruz Redevelopment Agency v. Izant* (1995) 37 Cal.App.4th 141.

However, this is a somewhat different case. Here, Golden State is authorized by statute to offer evidence that rebuts the presumptions favoring the City's taking of Golden

State's property for the same use by eminent domain. The statutory right given to Golden State should imply an obligation on the City's part to disclose the specific factual reasons upon which the City's elected Council relied to enact the Resolutions of Necessity. That is, said more broadly, when a private utility is given a statutory right to rebut the presumptions favoring the public ownership, there is (or should be) a requirement, implied by the statutory right, that the governing body of the public entity shall make factual findings to support the taking so that the private utility may know what case it must rebut. The court's examination of the eminent domain statutes and case law, however, do not appear to require that disclosure, and the court, therefore, will endeavor to address the diverse reasons offered by the City in its operative complaint and at trial for the taking of Golden State's property.

THE "PROJECT" DOES NOT INCLUDE POSSIBLE WATER SYSTEM IMPROVEMENTS:

The City's witnesses testified that, if the City acquired the Claremont Water Assets by eminent domain, it would have the opportunity to make capital investments to improve the water system. The City's witnesses testified that the following capital improvements could be possible once the City exercised eminent domain to acquire the Claremont Water Assets: improved fire flow pressure in Claremont's Claraboya area; increased reservoir capacity; getting more water from existing wells and new wells; reducing the number of pressure zones; creating facilities for use of recycled water; and improving rainwater catchment at Thompson Creek Spreading Grounds.

These proposals for improvements (and any others) are irrelevant because they are not part of the "project" that the City seeks to acquire by eminent domain. The statutory scheme requires the public agency to define the "project" that it seeks to take. CCP sections 1240.030(a), (b) and (c). The City has defined the project in its Resolutions of Necessity as the "public ownership, operation and maintenance of the Claremont Water System to provide water to the public (hereinafter, the Project)." Exh. 1002. The City's final EIR states that no new facilities or expansion of operations are proposed as part of the Project (Exh. 229-89, -125, -233, -236, -237 and -224) and that "the City intends to step into

the shoes of Golden State and to provide the same exact service to all connections that Golden State currently serves." (Exh. 229-249.) The City, thus, defines the "project" to be acquired as the water system "as is."

Any consideration that the City might invest public funds to improve the service, if it is not contained in the project description, would bias the issue to be determined—that the taking of the "project" is for "a more necessary public use"—in favor of the public entity to the detriment of the private interest. See, *City of Stockton v. Marina Towers LLC* (2009) 171 Cal.App.4th 93.

The City appears to be arguing that the water system will be improved because public ownership will assure greater investment in the water system. The City officials, however, disavow making any such promise. The record is uncontradicted that the City is not promising any new investment in the water system. The City Manager testified that the City, if successful in this eminent domain action, does not intend to build new facilities or change operations of the water system. (Ramos, 6/15/16, 176:21-21; 177: 7-14.) And the City, while highlighting its support for sustainability projects, like making greater use of recycled water, did not indicate it has any plans to expend public funds to bring such projects into existence.

The City's attorney argued that, after the City takes over the water system, and operates it for a while to learn how it functions, then the City will decide what improvements to make in the system to further the City's goals. (MacVey arg., 8/10/16.) This argument is antithetical to the finding the court must make under CCP section 1240.650, subd. (c) because it does not argue on the basis that City ownership of the Claremont Water Assets "as is" will be "a more necessary public use" than continuing Golden State's stewardship of those Assets.

The court, therefore, in deciding this case must disregard the testimony from City witnesses that municipal ownership of the water system would trigger investment that might advance the City's goals. Such evidence, in the court's view, is irrelevant to the issues the

court must decide, especially whether the City's taking of the existing water system will serve "a more necessary public use."

DEFENDANT ESTABLISHES THAT THE CITY'S OWNERSHIP DOES NOT ASSURE THE DELIVERY OF SAFE AND RELIABLE WATER IN THE CLAREMONT SERVICE AREA:

Golden State challenges the City's right-to-take on the basis that Golden State's operation of the Claremont water system is demonstrably superior to the City's planned operation with respect to water safety and reliability. Golden State argues that the "public interest and necessity" does not "require" the City's exercise of eminent domain to take Golden State's property; nor that the City's taking is "a more necessary public use."

Should this eminent domain action succeed, the City will hire the City of La Verne to operate the Claremont water system. (Exh. 330.) The City's contract with the City of La Verne to operate the Claremont water system assigns to La Verne operational control over all aspects of "water system operation, maintenance, finance and capital investments."

Therefore, with respect to safe and reliable water, a comparison can be made: Golden State's operation of the Claremont water system can be compared to La Verne's prospective operation of the same system. And, because La Verne operates its own municipal water system, an objective comparison can be made: Golden State's actual record in Claremont can be compared with La Verne's actual record in operating its neighboring municipal water system.

Golden State is a subsidiary of American States Water Company, a public company traded on the New York Stock Exchange. Golden State has a single business: delivering safe and reliable water to subscribers in the water systems it owns (at a profit). Golden State owns 17 water systems in Southern California (and 29 state-wide). Golden State's water systems that are nearest to Claremont are San Dimas, San Gabriel, Arcadia and four water systems in Orange County. (Exh. 1416-0002.) Golden State's headquarters office in Southern California is in San Dimas, 10 miles west of Claremont. Golden State has 14

employees working in Claremont and serving the Claremont water system; and it maintains an office in Claremont staffed by two employees that is responsible for handling bill payments and dealing with customer inquiries and complaints. Golden State also maintains a call center in Anaheim that is available around the clock 365 days a year to respond to water system emergencies.

Golden State because of its size and its specialized and regulated business has personnel who provide specialized services and training to each of its water systems. Golden State provides training to its personnel in monitoring, testing, and maintaining safe water standards. Golden State requires that its quality control employees receive 35 hours of training each year in water safety and water testing. Water safety is a critical issue: contaminated water is a health hazard.

The City does not assert, and does not offer evidence to show, that Golden State's performance in delivering safe and reliable water to Claremont subscribers is deficient in any way. Golden State, therefore, has rebutted any presumption that the delivery of safe and reliable water makes condemnation of the Claremont Water Assets is "a more necessary public use."

But Golden State challenges the City of La Verne's track record with respect to water safety in two particulars: its performance of water quality testing as required under the State-mandated Lead and Copper Rule (LCR); and its reporting of lead exceedance results in the Consumer Confidence Reports. The evidence, as summarized below, is not disputed.

Lead may be introduced into the body through household drinking water. Lead may leach into the drinking water as it passes through corroded pipes in older homes to household facets. Lead is a neurotoxin that is retained in the body and is a particular risk to children and pregnant women. The State mandates that water utilities test for the presence of lead in houses built before 1986 (in which year lead-containing water pipes were outlawed). The lead test requires that tap water samples be taken from a certain number of connections in older residences. The samples are measured for the presence of lead. The test is failed if the lead content from the lowest 90th percentile sample exceeds 15 parts per

billion. The California Department of Public Health ("CDPH") may then require the public water company to take various corrective actions including adding anti-corrosives in the water supply, testing more frequently, and conducting a public education campaign to advise subscribers of the health risk.

Lead Tests. Evidence offered at trial described La Verne's difficulties in obtaining acceptable lead test results over the last ten years. The evidence at trial, which the court will only summarize here, is that La Verne passed the lead test in 2006 by invalidating 11 from the total number of samples; passed the lead test in 2009 only by submitting resamples in 2010; and failed the lead test in 2012. The CDPH issued a notice of violation to La Verne, ordering La Verne to complete a public education program, to conduct a corrosion control study and to test more frequently. (Exh. 287.) La Verne hired an outside consultant and learned from the consultant that low pH levels in reservoirs was suspected to contribute to lead leaching into drinking water. (Exh. 290-2.) La Verne was taken off the "watch list" by the State Water Resources Control Board in June of 2016 (on the first day of the trial). (Exh. 1438-0001.)

Golden State proposed this finding in a post-trial brief: "Given La Verne's selective resampling of lead test results from various sites in 2006 (which allowed La Verne to pass the lead test in 2006) and in 2010 (which allowed La Verne to pass the lead test in 2009/2010), and the failures to pass the lead test in 2009 and twice in 2012, residents of La Verne [in houses built before 1986] were exposed to unsafe levels of lead in drinking water from August 31, 2006 through June 24, 2013, nearly seven years." (Golden State Proposed Findings, filed 8/5/16.) The court agrees to that finding.

On water safety, there is a dramatic difference between Golden State and La Verne. Golden State operates 29 water systems state-wide. Golden State has never failed or been cited for failing a lead exceedance test in any water system it operates. The website maintained by the California Department of Public Health (CDPH) shows that La Verne has never had lead test (measuring lead results at the lowest 90th percentile) as good as Golden State's worse result in testing Claremont water. (Exh. 608 [Claremont] v. Exh. 609 [La

Verne].) As stated in Claremont's 2006 General Plan: "Potable water provided by Golden State to Claremont has consistently met federal and state standards." (Exh. 1016-0328.)

Consumer Confidence Reports. State regulations require water companies to mail annual water quality reports to all customers in their service area. (Exh. 605-11; Vagnozzi 6/16/16, p. 172.) The state regulations contain detailed requirements for the contents of the consumer confidence reports and require the water systems file a separate certification with the State attesting that the information in the distributed consumer report is correct and consistent with the compliance monitoring data that was submitted to the State. (22 CCR section 64483(a) and (c); Exh. 605-110.) There were material misrepresentations in La Verne's consumer confidence reports for 2010, 2011, 2012, 2013 and 2015.

La Verne's 2010 consumer confidence report inaccurately reported the 90th percentile results (at 13 parts per billion, that is under the legal action level of 15 parts per billion, while the actual submitted results were 24 parts per billion). Moreover, the number of sites that exceeded the action level of 15 parts per billion was seven but the consumer confidence report advised that no sites had exceeded the action level. (See, summary of 2009 tests and 2010 retests of La Verne Lead Results, Exh. 677-2 and La Verne 2010 Consumer Confidence Report, Exh. 267-2.)

La Verne's submission to the State in 2011 showed that three sites had results that exceeded the action level for lead of 15 parts per billion, while the 2011 consumer confidence report advised that no sites had exceeded the action level. (Vagnozzi letter dated February 17, 2011 and La Verne Lead Test Results, Exh. 284; and La Verne 2011 Consumer Confidence Report, Exh. 268-2.) The 2012 consumer confidence report advised the residents of La Verne that no sites had exceeded the action level for lead, but in fact three sites exceeded the lead action level. (Vagnozzi letter dated February 17, 2011 and La Verne Lead Test Results, Exh. 284; and La Verne 2011 Consumer Confidence Report, Exh. 292-2.)

La Verne's 2013 consumer confidence report told the residents that zero sites exceeded the action level for lead when in fact La Verne's most recent lead test results

conducted in December, 2012 showed a 90th percentile lead level of 28 parts per billion and showed that 13 sites exceeded the action level for lead of 15 parts per billion. (Vagnozzi letter dated January 28, 2013 and La Verne 2013 Lead Test Results, Exh. 289-6; and La Verne 2013 Consumer Confidence Report, Exh. 270.) La Verne's 2015 consumer confidence report incorrectly represented that 19 sites had exceeded the action level for lead; and, separately, misrepresented the action level for lead as 2 parts per billion. (La Verne 2015 consumer confidence report, Exh. 272-2; and La Verne Consumer Confidence Report Certification Form, Exh. 276.)

E. coli and Consumer Confidence Reports. Test results disclosed E.coli, the most dangerous fecal coliform, in La Verne's drinking water supplied to 180 households in February, 2011. La Verne issued notices to the affected residents to boil their water. The CDHP's notice of violation cited two violations: (1) more than 5% of the samples taken from the La Verne water system in February, 2011 were coliform positive; and (2) two repeat samples taken in February, 2011 were E. coli positive. (Exh. 301-1, 2.) This was a violation of the State drinking water regulations. La Verne personnel believed that its water had been stored in certain reservoirs and mains for too long, leading to nitrification of the drinking water. La Verne conducted tests in-house but a consultant discovered that more than 15% of the nitrate tests were inaccurate because they reported negative values (an impossibility). La Verne corrected the problems with the water nitrate levels in July, 2011. La Verne, however, misreported the E. coli episode in its 2012 consumer confidence report. The report should have stated that there were two positive samples for E. coli, not one, and that the presence of E.coli was a Maximum Contaminant Level (MCL) violation. (E. coli has never been found in any water system operated by Golden State.)

La Verne under its contract with the City of Claremont will be required to hire, train and supervise employees to operate the Claremont Water Assets should the City succeed in this action. La Verne is to "[m]anage and supervise all Operator employees and contractors who provide services in connection with the Claremont Water System." La Verne, significantly, will "[c]onduct all required water quality testing and submit test results to

the appropriate Government Authorities" and "[p]repare and distribute Consumer Confidence Report as required by Applicable Law." (Exh. 330-7.)

La Verne is not as qualified as Golden State to maintain the safety and reliability of water provided in the Claremont service area. The City did not at trial offer evidence to explain La Verne's errors in testing and reporting lead exceedances and the E. coli episode in La Verne's drinking water nor any practices that La Verne has put in place to avoid such mishaps in the future. The court is particularly concerned about the misreporting on the consumer confidence reports because the repeated failure to accurately report bad results suggests concealment and that in turn suggests inattention by supervisory personnel to accurate reporting to the public.

The court is further concerned that two water systems, serving adjacent communities, as do Golden State in Claremont and La Verne, and obtaining water from the same sources, can have such divergent readings on lead exceedance tests. The court would expect that, if water quality were its top priority, La Verne would have investigated and discovered why its lead test results are so border line under state standards; and have corrected that problem long ago.

Possibly the quality problems experience in the La Verne water system will not spread into Claremont should the La Verne personnel assume operational control of the Claremont Water Assets. However, the persons who were in charge in La Verne will be responsible for hiring, training and supervising the La Verne employees who will operate the Claremont water system.

Golden State is the superior operator of the Claremont water system compared to La Verne with respect to water quality, safety and reliability. This is true, even apart from La Verne's recent test and reporting discrepancies, because Golden State has greater expertize in water management, familiarity with the Claremont water system and provides continuing training to its personnel on water quality issues.

The court will dismiss the complaint because the City's plans for operation of the Claremont water system do not provide adequate assurance that it will maintain water

quality, safety and reliability in the Claremont service area at the level now provided by Golden State.

DEFENDANT REBUTS ANY PRESUMPTION THAT PUBLIC OWNERSHIP WILL LOWER THE WATER RATES IN THE CLAREMONT SERVICE AREA:

The City designated its City Manager as the "person most knowledgeable" regarding any plans the City has for providing water service to water users of the Claremont Water District if the Claremont Water Assets were acquired by eminent domain. (Ramos 6/15/16, p. 73.)

The City Manager testified at trial that the possibility of lower water rates under municipal ownership did not make the City's acquisition of Claremont Water Assets "a more necessary public use."

"Q. My question is, is an expected decrease in water rates a factor that makes it necessary for the City to acquire the water system.

"A. No." (Id. p. 116, also 153.)

The City Manager testified that lower water rates were not likely to be realized from the City's exercise of eminent domain over the Claremont Water Assets. He said that he had never represented to the Council or the public that water rates would be reduced as a result of the City's taking of the Claremont Water Assets. (Id., pp. 75-77.)

Golden State, therefore, has rebutted any statutory presumption that lower water rates make condemnation of the Claremont Water Assets "a more necessary public use."

The City, nonetheless, appears to make the argument that eminent domain is required because Golden State's water rates, when compared to those in neighboring cities with municipally-owned water systems, are unreasonably high. That is alleged in the First Amended Complaint, wherein the City said that a factor favoring eminent domain was a "longstanding public concern [about] the significantly higher water rates paid by ratepayers in the Claremont Water System as compared to neighboring jurisdictions…." The City's counsel, in his opening statement, told the court that eminent domain was justified, in part,

because Golden State charged its Claremont subscribers more than did neighboring municipally operated water systems. Mr. MacVey displayed a chart that showed for five cities the "average customer cost (20 CCF) in 2014-2015" as follows: Claremont ($88.96); La Verne ($65.96); Pomona ($52.68); Upland Water Company ($46.10); and San Antonio Water Company ($20.20). (Exhs. 1284-0009; also, 1285-0001.)

The court is uncertain as to the intended relevance of the customer cost comparisons. Golden State's water rates are set by the PUC for all water systems operated by Golden State in Region 3. (Claremont is one of nine water systems that Golden State operates in Region 3.) Rates charged to Claremont subscribers are set, in part, to permit a return on the investment that Golden State has made in all of its service areas in Region 3. Claremont subscribers, it could be argued, are paying water rates that allow Golden State to earn a return on its capital investment in service areas outside of Claremont. (That argument is rebutted by Exh. 1242-0003, as discussed later.)

But, if that is the City's argument, the City should disclose other factors that may affect the water price differentials even between even neighboring cities.

The City's comparison ignores the fact that water consumption in Claremont per average customer historically has been higher than in neighboring cities (and in Region 3). (Exh. 692 and 504; Ramos test., 6/16/16.) If Claremont customers receive more water on average, their water costs on average will be higher.

The City's comparison also ignores that the fact that the water systems will have different cost structures and, for that reason alone, different water rates. Golden State, for instance, replaces underground pipeline on a schedule, spending an average of $1.3 million over the last ten years for pipeline replacement, which is reimbursed through its rate structure. (Exh. 135-203 to 135-207.) The City of La Verne does not replace its underground pipeline except upon wear-out, so its costs for pipe replacement alone are about $1.3 million less per year than Golden State's. The City's comparison water rate chart is unreliable and, thus, irrelevant in an eminent domain trial unless comparison cost data is also provided for the lower-priced water districts.

The City, in any event, appears to be making an argument that is inconsistent with the testimony of its City Manager, to wit., that lower rates are not predicted and are not a factor to support a finding that the exercise of eminent domain is "a more necessary public use." But, whatever the relevance of the average cost per water customer, the City does not identify and quantify the factors that affect the differential in water rates to make an apples-to-apples comparison.

DEFENDANT REBUTS ANY PRESUMPTION THAT PUBLIC OWNERSHIP WILL RESULT IN GREATER CAPITAL INVESTMENTS IN THE CLAREMONT WATER SYSTEM:

The City, according to its City Manager, has no plans to make capital improvements in the water system if the City is successful in acquiring the system through eminent domain. (Ramos, 6/16/16, pp. 125, 134-136, 138.) A need for capital investment, therefore, does not "require" the acquisition of the water system nor make public acquisition "a more necessary public use."

The City, nonetheless, called Michael Thornton to testify as an expert witness. Thornton testified that, if the City acquired the water system, he would recommend that the City invest $6.9 million over two or three year period to improve the performance of the water system. To be specific, Thornton recommended installing pumps at the Pomello Reservoir, making improvements at the Mountain Avenue Pump Station and upgrading the Claraboya booster pump, and constructing a reservoir in the northeast area of the City and another at Johnson Pasture. (Thorton test., 7/11/16.) Thornton suggested that the funds, or a portion of the funds, needed to finance the investments could be borrowed at low interest rates from the State of California. It is difficult for the court to determine how Thornton's testimony is relevant. He is suggesting capital improvements that the City Manager testified that the City has no plans to undertake and is implying that the cost of such improvements can be funded by further borrowing that can be repaid through higher water rates charged to Claremont's subscribers. (Thorton testified he had no knowledge

about how the capital improvements he recommended would affect the water rates. Nor did any other witness provide that information.)

The improvements recommended by Thornton are not within the "project" as defined by the Resolutions of Necessity (and as required by CCP section 1240.030). The improvements do not exist and, therefore, are not among the assets the City seeks to take (or pay compensation for) by eminent domain right. The improvements, according to the City Manager's testimony, are not a reason that City ownership of the water system is "a more necessary public use." The court finds Thornton's testimony, and similar testimony by other witnesses, has no relevance to the legal issues to be decided on the Complaint in Eminent Domain.

BOND FINANCING TO ACQUIRE THE WATER SYSTEM WILL INCREASE WATER RATES, ASSUMING THE SAME LEVEL OF CAPITAL INVESTMENT IN THE WATER SYSTEM:

If this eminent domain action succeeds, the City intends to finance its purchase of the Claremont Water Assets through the issuance of 30-year revenue bonds "payable only from the water system's revenues." Claremont voters approved this finance mechanism by passing advisory Measure W on the ballot on November 4, 2014. Measure W (Official Sample Ballot, Exh. 1425) reads:

> **Shall the City of Claremont be authorized to issue water revenue bonds up to $135 million to pay for acquisition of the Claremont Water System and incidental expenses payable only from the water system's revenues?**

With 52% of Claremont voters voting, Measure W passed with 71.9% of the vote. (The 300 subscriber households in the Claremont service area but outside the City did not vote on Measure W.) The Impartial Analysis of Measure W provides, in part, as follows:

> **The City Council … is considering the acquisition of a water enterprise system and intends to use the revenue generated by the system to issue bonds to pay the acquisition price. The City's analysis shows that the system may generate**

enough revenue to issue bonds up to $80 million. [] [If the bond amount is $135 million] the estimated increase to a fixed capital charge of the water rate on the average single family residence within the service area of the Claremont Water System would be approximately $28 per month, or $336 annually. [] After bonds are issued, actual future water rates and charges could increase or decrease during the repayment period beyond the City estimate. These charges could occur as a result of several factors, including the cost of water, infrastructure repairs and costs of operation and maintenance of the system. Water rates and charges will also vary on consumer consumption.

Arguments for and against Measure W were also included on the ballot. (Exh. 1425.)

Both parties called expert witnesses at trial to project the cost of revenue bond financing over a 30 year period and, thus, the impact the debt financing would have on water rates paid by subscribers in the Claremont service area through the year 2046. But the City argued that the financial feasibility of using debt financing for the acquisition is not an issue and is irrelevant, saying "The financial feasibility, i.e. the City's ability to finance the acquisition of the Claremont Water System through the issuance of bonds, is irrelevant to whether the City has a right to take the property." The City argued that the impact of the debt service on water rates is irrelevant because the purchase price for the Claremont Water Assets is unknown at present and will be determined only in a subsequent jury trial; and because the City retains the right to decline to proceed with the acquisition if it considers the price fixed by the jury as too high. CCP section 1268.510. (City's Brief re Financial Feasibility Opinions, filed 6/27/16, p.2.)

Golden State argues, to the contrary, that the issue of whether water rates must be increased to retire the bond financing for the City's acquisition goes to the determination of whether the acquisition is "a more necessary public use."

Just compensation is not an issue that is to be considered or decided in a right-to-take trial. CCP section 1260.110. The cost of acquiring the Claremont Water Assets is raised here because, under the unique circumstances of this case, the proposed bond

financing will throw the burden of paying for the acquisition on the water rate payers rather than on the City's taxpayers. The parties—the City and Golden State both—argue that the impacts of the acquisition on the rate payers is a significant determinant to whether the acquisition through eminent domain serves the "public interest and necessity" and "a more necessary public use."

The evidence in this case is that a majority of the City's voters approved bond financing and expressed their willingness, as rate payers, to pay significantly more in water rates to fund an acquisition of the Claremont Water Assets through eminent domain. The court concludes, based on that evidence, that it cannot find that a projected increase in water rates to pay for the public acquisition of the water utility in itself rebuts a presumption that the acquisition is "a more necessary public use."

The court can make several findings based on the extensive evidence that it heard regarding the financial feasibility of the City's use of bond financing to fund the acquisition of the Claremont Water Assets.

The expert evidence offered at trial establishes that the City can feasibly use revenue bond financing to fund the acquisition of the Claremont Water Assets.

The bond financing will increase the water rates in the Claremont service area beyond their current level, even if the acquisition price is not more than the $56,300,000 previously offered by the City. The court is persuaded by the testimony and analysis given by Stephen Peters and Dr. Michael Hanemann that the debt service cost, even assuming a $56.3 million purchase price, will require increased water rates over 30 years.

The court's conclusion that bond financing will increase water rates depends in part on the assumption that the City, as the owner of the municipal water system, will continue Golden State's level of investment in the water system including replacing depreciated facilities and making new investments as needed.

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DEFENDANT REBUTS ANY PRESUMPTION THAT A "SPECTRUM OF BENEFITS" SUPPORTS ACQUISITION OF AN INVESTOR-OWNED UTILITY BY EMINENT DOMAIN:

There is, the City contends, "a broad spectrum of benefits that can be realized … through the City acquisition and operation of the Claremont Water System." (City's Proposed Statement, filed 8/5/16, 17:21-23.) The City describes these benefits under the rubric "local control" and idealizes such "local control" as providing greater transparency, local accountability, greater responsiveness, etc. The City's specification of what such benefits are varies, and the court, to obtain a definitional structure, has relied on the allegations in the Complaint in Eminent Domain that list the problems the City seeks to address through eminent domain. The problems that local control will mitigate are alleged in the FAC, para. 7 (quoted ante p. 5) as follows:

"escalating water rates";

"lack of local control over water rates, service, expenditures, and policy";

"lack of responsiveness and accountability of GOLDEN STATE to concerns of the inhabitants and constituents with the Claremont community";

"the lack of transparency in the operation of the Claremont Water System."

The court has considered the evidence as to whether any such problems exist, and, if so, to what degree, and, for significant problems, whether Golden State has introduced evidence sufficient to rebut a presumption that existence of such problems makes condemnation "a more necessary public use."

Many of the problems identified by the City stem from the PUC's regulation of Golden State's operations. The City thus complains of "the lack of local control over water rates, services, expenditures and policy." The City's argument seems to contrast "local control" with the procedures of the California Public Utilities Commission (PUC) in exercising regulation over Golden State.

The PUC is an independent agency of the State of California. Golden State must apply to the PUC to establish rates that it may charge to subscribers and must justify its rate application by identifying assets that are used and useable to deliver water in specific

service areas. The PUC authorizes rates to permit a return on investment and to cover operational expenses. The PUC, for its administrative convenience, requires a rate application to include all water systems operated by an investor-owned utility in identified geographical regions. The City of Claremont is located in Region 3, and, as a result, the PUC sets a rate structure to provide a return on investment for the nine water systems owned by Golden State in Region 3. The current allowed rate of return is 8.34 percent, but Golden State, through operational efficiencies, may earn a higher return. Golden State's rate applications are processed at the PUC's offices in San Francisco and hearings on rate applications are usually held before a hearing officer or one of the commissioners sitting in San Francisco. The paperwork submitted in support of rate applications are public documents, and the hearings are public hearings. The City of Claremont has authorized its attorneys to intervene in the rate setting process for Golden State's Region 3 for the past 15 years. The rate applications submitted by private utilities may be challenged by the Office of Ratepayer Advocates (ORA), an internal division of the PUC staffed by experts in the various types of utilities. ORA's mission is to create an informed opposition to applications for rate increases. The City's experts agree that ORA is effective in challenging rate applications that are not justifiable.

Utility rates that are approved by the PUC are defined by statute as "just and reasonable charges." Public Utilities Code section 451.

California has experienced a state-wide drought over the past decade. The PUC and local water districts, including cities with municipally owned water systems, have responded with various measures to reduce water usage, and these measures have been successful in reducing water consumption substantially in many communities. The PUC has an ability to encourage water reduction by a means that is not available to municipal water systems. The PUC can allow water utilities that it regulates to impose a metered water usage charge so that large water consumers pay more for water after exceeding specified volumetric levels.

The court will now turn to a discussion of the evidence relating to the "spectrum of benefits" that the City believes supports its acquisition of the Claremont Water Assets by eminent domain.

A. WATER PRICES PAID BY CLAREMONT SUBSCRIBERS:

"Escalating Water Rates".

Water rates in the Claremont service area have, in fact, escalated in the past 10 years. What are the reasons? There is no evidence that Golden State did, or did not do, something that caused the price escalation. The price escalations were caused, so far as the evidence reveals, by extrinsic factors.

Golden State purchases nearly 40% of the water it supplies in the Claremont service area from the Metropolitan Water District ("MWD"). MWD's charges for water have doubled in the last ten years. (See, Exh. 1284-0006, from $453 per acre foot in 2006 to $942 in 2016.) Water that Golden State obtains from local wells is considerably less expensive than MWD water, and Golden State obtains 60% of its water from local wells. Golden State has maximized the water it can obtain from well sources, given the adjudicated rights that apply (see Exh. 626) and the operating safe yield needed to protect future availability. Ben Lewis, General Manager for the Foothill Region, testified:

> **Q. Does Golden State have any practice with regard to the amount of groundwater versus imported water that's used in Claremont?**
>
> **A. Yes. We have a general practice in terms of how we operate the system.**
>
> **Q. And what is that, sir?**
>
> **A. What we do is that we maximize the groundwater system first. So the system is designed such that it will employ any well that's available and put that into the system first to meet the customer's demand. [] Imported water supplements that supply.** (Lewis, 6/24/16, pp. 67-68.)

The City did not offer contrary evidence; the City Manager testified he does not know whether the City will use more well water if the City should acquire the Claremont Water Assets. (Ramos, 6/16/16.)

Another cause for price escalation may be surcharges that are authorized by the PUC to even out revenues in periods of falling water consumption. Such surcharges are known as rate adjustment mechanisms (RAM); the surcharge imposed on water rates is known as WRAM (water rate adjustment mechanism). The additional burden of WRAM surcharges on a typical water bill is minimal. A water bill for a Claremont subscriber for the billing period September 17-October 16, 2013, was entered into evidence as Exh. 515. (The court assumes the water bill is typical; no other water bill was introduced.) Exh. 515 showed the following charges:

Service Charge	$16.15
Tier 1 – Water Usage –	$15.58
CARW Prog Adm Surcharge	$0.41
2011 WRAMMCBA Surcharge	$1.49
2012 WRAMMCBA Surcharge	$1.43
GRC Surcharges	$0.40
CPUC Fee – 1.5% of $35.46	$0.53
City Tax – Claremont 5.5% of $35.46	$1.95
TOTAL CURRENT CHARGES	$37.94

The City, should it operate a municipal water system, could eliminate the surcharges, but their elimination would not significantly reduce the average water rate. The surcharge, in any event, is not intended to be permanent. Its purpose, according to the City's expert witness, Steven Weissman, is so "revenue will be the same regardless of level of sales." (Weissman, 7/8/16 p.m., p. 84.)

The City mischaracterizes the WRAM surcharge as a "penalty" which is imposed because the particular customer has reduced water usage. WRAM more accurately is described as a temporary fee that is assessed against all customers when falling water

usage reduces the system revenues below that deemed appropriate by the PUC. The surcharges would not likely cause "escalating prices" because the WRAM is relatively small and would be more than offset, for most customers, by falling water consumption and, thus, lower total charges for water usage.

Another cause for price escalation may be tiered rates that are authorized by the PUC to discourage high consumption of water during drought periods. Tiered rates increase the unit price of water for consumption amounts that exceed specified levels. Golden State, with PUC authorization, has imposed three tiered pricing in the Claremont water system, and the tiered rates, and other conservation measures, appear to have reduced water consumption substantially. Should the City acquire the water system, tiered rates would end because cities are not allowed to impose differential rates for utility services. However, the significant point is that the City at trial did not criticize tiered rates nor argue that it wanted to acquire the Claremont Water Assets to end tiered rates.

There is no evidence that Golden State has been enriched through escalating prices. Golden State's authorized rate of return from the Claremont water system has remained in the 8-9% range over the past decade. Golden State's profit comes from earning an allowed rate of return on invested capital, and operating efficiencies, rather than directly from price increases.

Golden State has rebutted any presumption of "a more necessary use" because the City's acquisition will cause an end of escalating water price increases. And, as noted elsewhere, the City's acquisition through eminent domain will necessarily increase subscriber water rates from today's level in order to service and pay down the bond indebtedness that the City will incur to purchase the Claremont Water Assets.

High Water Prices.

Golden State's water system serving Claremont has been built from a collection of separate water systems that Golden State acquired (even into the 1980s) and then integrated together. (Gisler, 6/21/16 a.m., pp.18-27.) The system needs and can be improved through targeted capital investment. (See, Exh. 440.) The cost of capital

improvements is passed on to the subscribers through higher water rates. Golden State through computer modelling can predict the likelihood of pipeline fatigue but it has chosen to maintain rather than replace some older pipelines to avoid imposing a higher burden on rates. (Gisler, 6/21/16 a.m., pp 40-53; Exh. 135-003, Pipeline Management Program.) There has been a high number of pipeline leaks in Claremont due to the age and condition of buried pipe. (Exh. 16; Traffas 6/23/16, pp. 18-20.) And pipeline leaks will cause some water loss.

The City is correct that Golden State's water rates are higher than those in nearby municipal water systems. The City's acquisition plans, however, do not include a reduction in the water rates. A principal cause for the high water rates is the level of Golden State's investment in the Claremont water system, particularly its investment in replacing older underground pipeline. Golden State has invested $23 million in the Claremont system in the past ten years, with half of that amount, an average of $1.3 million per year, being used to replace underground pipeline. (Exh. 675 shows the dramatic difference between Golden State's investment in the Claremont system and La Verne's investment in its system over a ten year period.) Golden State replaces one percent (about 1.5 miles) of its pipeline each year, basing its decisions on a computer modeling program (known as KANEW). (The Los Angeles Department of Water and Power replaces four percent of its underground pipe each year.) La Verne, a neighboring municipal system, does not replace underground pipeline as maintenance, and thus does not need to pass on that cost in its water rates. The City has not argued that a reason for eminent domain is its intention to reduce water rates by skipping pipeline replacement in the Claremont water system. Capital improvements will be required in the years ahead to maintain optimal efficiency in the Claremont water system.

The evidence suggests two other reasons for higher water rates. Claremont residents have had higher water usage (now curbed by drought restrictions), so its water rates have been, historically, higher than its neighbors. And, in 2011, the PUC authorized

metered water rates to discourage high water consumption, thus impacting water rates in Claremont users. (Claremont, the court was told, has reduced its water usage by 36%.)

The City does not argue that municipal ownership will reduce the water rates, and, therefore, Golden State has rebutted any assumption that the City's acquisition is "a more necessary use" to obtain lower subscriber rates.

Confusion about Water Bills.

Several City witnesses testified that Claremont subscribers have complained to City employees that they do not understand the Golden State bills, particularly as to the surcharges. The PUC has authorized Golden State to impose a WRAM surcharge due to the fact that reduction in water usage has affected the rate of return on the fixed costs dedicated to the Claremont water system. The court, however, does not believe that confusion about bills, without documentation of the number of complaints or specification of the nature of the problem, is a factor that supports the City's use of eminent domain to acquire a private water company.

Customer service likely will decline should the City acquire Golden State. The City intends that customer calls outside business hours shall be routed to the police call desk. Golden State, in contrast, maintains a 24 hour customer call center, staffed by trained, U.S. based employees, in Anaheim 365 days a year.

B. COORDINATION WITH THE CITY'S SUSTAINABILITY GOALS:

1. City's Efforts to Increase Re-Used Water.

The City of Claremont has had a long-term commitment to sustainability, and, as that concept applies to water, has developed a comprehensive plan to return used water into the ground to recharge the groundwater. The City has encouraged creating permeable ground surfaces, replacing plants requiring frequent watering and promoting the use of water saving devices in homes.

Golden State has participated in efforts to conserve water. It implemented a turf program (to replace grass) (Viers, 7/1/16 p.m., p.27) and distributed water saving devices at

schools and community meetings. Its employees, Alice Shiozawa and Tom Traffas, were active on the Claremont Sustainable City Plan Task Force, and Ben Lewis is a member of the City's Water Action Group. (Id., pp. 35 and 85, 63.)

A goal of the Sustainable City Plan is to "support development of small-scale wastewater reclamation plants in the City, starting with sites on college campuses." (Viers, 7/116 p.m., p. 52; Exh. 1232, Claremont Sustainable City Plan Update.)

Wastewater is treated effluent, effluent that is recycled through a reclamation (or scalping) plant. Recycled water by state law must be separated from potable water, and, therefore, its use requires a separate pipe system (known as purple-pipe). Recycled water may be used for agriculture and, in an urban setting, to water plants or wash outside surfaces. Wastewater reclamation requires (1) source(s) of effluent, (2) a purple pipe delivery system and (3) the funding for the treatment plant, the separate pipe system and the operating expense. The cost of a small scale treatment plant is estimated to be $5 million. (Viers, 7/1/16 p.m., p. 58.)

Funding a treatment plant presents a fairness issue if the funding is to be paid by rater payers. Because the cost of the separate purple pipe restricts the delivery of waste water to limited areas for watering purposes, it can be argued that its cost should not be imposed on the entire water system through higher rates. The Claremont Colleges are investigating the construction of a wastewater treatment plant on campus property, getting the effluent from college facilities, and using the treated wastewater to irrigate campus grounds. Interested parties at the Colleges are investigating the concept; at this point, the Colleges have not approved plans to proceed with a wastewater plant.

The City's interest in developing sources of wastewater does not "require" the City to spend millions to acquire the Claremont Water Assets. The City may proceed independently to develop treatment plants, just as the Colleges are able to proceed with their proposal without owning the water system providing potable water to the Colleges. The City, at this point, has no plans, either proposed or approved, and no funding sources to build a purple pipe wastewater system.

The City, at trial, suggested that PUC Order 103-A could be read to preclude the City from constructing a wastewater facility. Order 103-A, para. 9 (Exh. 1015) provides: "Local agencies acting pursuant to local authority are preempted from regulating water production … or other facilities (including the location of such facilities) constructed or installed by water or wastewater utilities subject to the Commission's jurisdiction." The court's view is that Order 103-A does not constrain the City in any way from building a wastewater facility because the City is not subject to the Order because the City is not subject to PUC jurisdiction.

The City has two other programs to promote the secondary use of water purchased from Golden State. Gray water is water used for non-toilet household purposes, for instance, laundry or dish washing, and it may be captured for outdoor uses. The capture requires the retrofitting of the plumbing system so that the gray water is diverted to a holding tank until used, for instance, for gardening. The City has an ordinance that permits the capture and use of gray water. The City does not need to acquire the Claremont Water Assets to encourage greater use of gray water. Gray water use is already occurring in Claremont.

Storm drains may be used to capture rainwaters for secondary use. The City owns the storm drains and, therefore, can use them to capture and divert rainwater without the need to own the Claremont Water Assets. Storm drain capture is already occurring in Claremont.

The evidence does not support a conclusion that the City "requires" the acquisition of the Claremont Water Assets to improve its means of capturing and making use of wastewater, gray water or storm drain waters.

2. Golden State's Interaction with City Officials.

One of the City's themes at trial was that Golden State employees have not been communicative with City officials. This appears to be mistaken. Tom Traffas, the Claremont superintendent, meets regularly with various City officials, and Ben Lewis, the Foothill general manager, also meets occasionally with the City Manage. Both Traffas and Lewis

are active on the City's sustainability committees, as mentioned above. Golden State has participated with the City in various water conservation programs, as mentioned above. Golden State has not shared its water capital improvement plan with the City (McVicker, p. 35), but the gas and electrical utilities serving Claremont also have not shared their capital plans with the City. Golden State maintains a business office in Claremont. Relations between the parties have been strained after the City's mailings to its residents blaming Golden State for high water rates. Hopefully productive relations can be restored between the parties. The court does not find that the relations between the parties supports the City's exercise of eminent domain in this right-to-take trial.

3. Coordination with the Operation of the City's Public Works Department.

Among the "spectrum of benefits" the City argued from the acquisition there could be "coordination of System repairs with City services and City street repairs." (City's Proposed Statement, p. 15.) No evidence was offered to support that suggestion. The City could have called witnesses from La Verne or any other city with a municipal water system to testify about any close interaction and cost savings realized by the city through direct supervision over public works and the water system. Such economies are improbable: if Golden State is replacing only 1.5 miles of pipeline each year, it is unlikely its schedule will match up with street work undertaken by the City.

4. Meeting County Fire Code Standards.

The City criticizes Golden State for not addressing a need for greater fire flow in Claremont's Claraboya area (located in the mountainous area in northwest Claremont). A wild fire known as the Grand Prie Fire destroyed or damaged 29 homes in that area in October, 2003. The fire chief who was on the scene testified that the hydrant pressures were inadequate to sustain the fire fighting teams. (Hokanson, 7/14/16, pp. 14-17.) Golden State addressed the problem in 2008 by obtaining PUC approval for the construction of an above-ground water tank in Claraboya, but the project, when submitted locally, was opposed on the ground the tank would be better if put underground. The project was not built because of that opposition. (Kruger, 6/30/16 p.m., p. 26; Thorton, 7/11/16, p.m., pp.

63-64.) However, the fire flow in Claraboya does meet Los Angeles County Fire Department standards for the single family residences that exist or may be permitted in Claraboya.

C. CITY'S CLAIMS THAT MUNICIPAL OWNERSHIP IS NECESSARILY SUPERIOR:

The court has reviewed the evidence offered re Golden State's performance with respect to water quality, reliability, service, rates and levels of capital investment. Golden State has rebutted any statutory presumption that the City's acquisition of the Claremont Water Assets is "a more necessary public use" as to those measures.

The City, however, is arguing, or seems to be arguing, that municipal control of the water company is per se superior to private ownership regulated by the PUC. That is a dubious proposition because it implies that any investor-owned utility, no matter how well run, can be obtained by eminent domain, assuming the public entity will pay fair compensation, because "local control" is inherently better than the process that the Legislature has imposed to regulate the rates, practices and investment decisions of investor-owned utilities.

This is, at bottom, a political question and not one that can be framed and decided on a statutory basis of whether municipal ownership is always "a more necessary public use" than private ownership of a water company regulated by the PUC.

The court will nonetheless make limited comments to address the City's contentions.

1. Transparency and Competency in Water System Decision-Making.

The City makes the argument that the acquisition of an investor-owned utility is "a more necessary public use" because the water rates and level of capital investment decided in a public forum by an elected City Council is "more transparent" than the decisions that are made by the professional managers of the investor-owned utility regulated by the PUC.

There will be greater transparency as to water issues, the City argues, because final decisions will be made in Claremont by the City Council sitting in public session. The Ralph M. Brown Act (Gov. Code section 54950.5, et seq.) requires the City Council to allow public

comment before it makes its final decisions. And water system investments improvements having land use impacts will be analyzed under the California Environmental Quality Act (CEQA) (Pub. Res. Section 21000 et seq.). And rate setting decisions are subject to Prop. 218 (Cal. Const. Art. XIII D, section 6(b)(1) ("Revenues derived from the fee or charge shall not exceed the required to provide the property related service."). (The City's case is not helped by the testimony of its expert that local decision-making in Claremont is particularly appropriate because the City has a "high percentage of people with analytical skills and high-level degrees." Weissman, 7/8/16 a.m., p. 81.)

Golden State's decision-making, particularly about capital investments and water rates, are not made at the local level. They are proposed by the company's professional managers and reviewed and approved in accordance with the PUC procedures. The company's proposals are presented as applications for approval, are vetted by the PUC's staff and considered at hearings conducted by hearing officers or a Commission member meeting probably in San Francisco. The applications are scrutinized and often challenged by the Office of Ratepayer Advocates (ORA).

While the rate applications are public, and the hearings are open to the public, the PUC's procedures admittedly are not tailored for participation by individual rate payers. Claremont water users do not have an opportunity to provide effective input to PUC proceedings.

The Legislature rather than Golden State, however, put in place the PUC procedures, and those procedures are intended to regulate the monopolistic structure of utility service. The overriding concern for the Legislature was the effectiveness of the regulation rather than local participation in decision-making. The City has not demonstrated that Golden State's decisions in its management of the Claremont water system are less than competent. The issue is put in perspective by the testimony of John A. Bohn, a former PUC Commissioner, who was during his tenure the designated "Water Commissioner." Speaking of local decision-making, Bohn testified:

What happens is that in the case of the localities, the price of water becomes the all-consuming concern of the public. And whether or not it is …you've got to look into the future. [] And so it may well be that the prices are high locally, but that in the judgment of experts is necessary to protect the infrastructure going forward. And it may not be popular, but it may well be necessary. And the price is much more visible than the infrastructure, which tends to be hidden under the ground. (Bohn depo., p. 67.)

The court does not find that escaping from the procedures that are designed for the PUC regulation of investor-owned utilities supports the exercise of eminent domain power to acquire an investor-owned water utility.

2. Ex Parte Communications.

The City spent trial time describing complaints about and proposed legislation to require self-reporting of ex parte communications between utility lobbyists and PUC Commissioners. The City's expert, however, admitted that the complaints about the ex parte communications did not involve Golden State "or any of the water companies." (Weissman, 7/8/16 a.m., p. 55.)

The likelihood of ex parte communications are much greater at the City level. Council members are expected to be available outside of public hearings to discuss matters coming before the Council with residents. The Council members will also likely communicate frequently with the City employees who manage a municipally owned water system.

3. Rate Setting by Region.

The PUC has established Region 3 to include nine geographically separated water systems that are owned and operated by Golden State. Claremont is one of the nine water systems in Region 3. The PUC sets a single rate of return for Region 3, meaning that the basic water usage rates are the same in each of the nine water systems. The City argues that the rate of return that Golden State earns from operating the Claremont water system is

higher than the average return for Region 3 and that, therefore, Claremont rate payers are "subsidizing" other water systems in Region 3.

The court has examined the evidence to determine if this claim is true, and, if it is, to determine what is the degree of subsidy and whether the subsidy is always unfavorable to Claremont rate payers. The parties introduced during the trial numerous charts to summarize voluminous underlying business records. The court, to address this issue, has studied Exhibit 1242-0003. That Exhibit, a bar chart, purports to provide for the past five years the following: (1) the Commission authorized rate of return for Region 3; (2) the actual rate of return for Region 3; and (3) the rate of return for Claremont. Rate of Return refers to the undepreciated value of the used and useable assets that are devoted to operating a particular water system. Golden State typically outperforms the PUC authorized rate of return, so the actual rate of return is the appropriate comparison rather than the authorized rate of return. The court's calculation is provided in the following tabulation.

YEAR	Actual R of R: Reg. 3	R of R Claremont	Difference: 3-2
2014	10.41%	11.26%	0.85%
2013	14.69%	15.32%	0.63%
2012	11.55%	11.06%	(0.49)%
2011	12.08%	13.13%	1.05%
2010	10.55%	5.57%	(4.98)%

The tabulation exposes that, in the five year period 2010-2014, Claremont overall benefitted from the rate of return established by the PUC for Region 3. In three of the five years the Claremont water system earned a higher return than average in Region 3, but in the two remaining years the rate of return in Claremont significantly underperformed the average. Claremont had a net gain over the five years. The court cannot determine whether a monetary gain accrued to the Claremont water system because revenue figures are not provided on the exhibit. However, the City's argument that Claremont ratepayers subsidize

Golden State's investments made in other water districts in Region 3 does not appear to be supported by the evidence.

4. Water Rates and Income Taxes.

The City argues that the taking is "a more necessary public use" because the City as the owner of a municipal water system will not have to set water rates at a level to earn a profit, as does an investor-owned utility. Nor will the City have to pay state and federal income taxes, as would an investor-owned utility.

The court does not agree with the premise that an eminent domain acquisition of a private utility provides a benefit because the utility under municipal operation will not pay state or federal income taxes. The tax loss caused when income taxes are avoided is merely shifted to other taxpayers and they pay more in taxes; tax avoidance is a cost of the acquisition. (Hanemann 6/28/16 a.m., pp. 86-88; Exh. 708.) The same observation is true for property taxes that are avoided through a municipal acquisition of an investor-owned water utility.

The City also argues that the higher rates paid by water users, for the purpose of financing the eminent domain taking, is not a detriment because the water rates are being used to purchase a valuable asset. (City's Proposed Statement, pp. 36-37.) This is circular reasoning. Public acquisition by eminent domain cannot be justified by the fact that, after fair compensation is paid, the public entity will own a valuable asset. If that were the case, public acquisition could always be justified. The statutory scheme instead requires that the acquisition be "required" in "the public interest and necessity" and be "a more necessary public use." The public acquisition must provide a significant public benefit apart from the value of the assets that are paid for in the eminent domain process.

NO EVIDENCE WAS OFFERED TO ACQUIRE THE BILLING SYSTEM BY EMINENT DOMAIN:

In its answer Golden State alleged that its computerized billing system is not identified to the Claremont water system and, therefore, is not subject to being taken by

eminent domain. The City offered no proof that taking the billing system was "required" in the "public interest and necessity." The court adopts the following finding from Golden State's Proposed Statement, filed 8/5/16, p. 49:

> "The City's First Amended Complaint seeks to take Golden State's 'customer billing and record keeping software.' … Golden State's customer billing and record keeping software is one package for the entire company; it is not separable. [Kruger, 6/30/16 a.m., pp. 23-25.] The data concerning customers in the Claremont system could be printed out and provided to the City, rather the City taking Golden State's entire customer billing system. [Id., p. 27.]"

PREPARATION OF JUDGMENT:

The Court shall grant judgment for defendant Golden State Water on the First Amended Complaint for Eminent Domain.

The court requests that the Golden State's counsel prepare, serve, and lodge a form of Judgment that is consistent with this Statement of Tentative Decision within five court days. Petitioners shall have ten days to serve and file objections to the proposed Judgment. Petitioners, should they wish, may prepare an alternate form of Judgment.

The court will not sign or revise the proposed Judgment until the parties have had an opportunity within the next 15 days to suggest modifications and proposals to this Statement of Tentative Decision under CCP section 632 and CRC Rule 3.1590.

The parties are directed to retrieve (and retain in their offices for any post-judgment proceeding) the boxes and binders containing the exhibits that were delivered to the court for the trial once the Judgment is signed.

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The Clerk is directed to serve this STATEMENT OF TENTATIVE on the parties by U.S. Mail this date.

Dated: November 10, 2016

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RICHARD L. FRUIN, JR.
Superior Court of California
County of Los Angeles

RLF/ep
Claremont 26
Golden State
Water Co. tsd
11-10-16