CASE NO. S269099 (CONSOLIDATED WITH S271493)

In the Supreme Court
of the State of California

GOLDEN STATE WATER COMPANY,
CALIFORNIA-AMERICAN WATER COMPANY,
CALIFORNIA WATER SERVICE COMPANY,
LIBERTY UTILITIES CORP.
AND CALIFORNIA WATER ASSOCIATION
Petitioners,

v.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA
Respondent.

PETITIONERS' OPENING BRIEF ON THE MERITS

After Decisions Nos. 20-08-047 and 21-09-047

Of the Public Utilities Commission of the State of California

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ISSUES PRESENTED

The Petitions for writ of review and the answer of the California Public Utilities Commission present the following issues:

1. Whether the Commission may revoke two previously approved water conservation ratemaking mechanisms without first identifying the continued use of those mechanisms as an issue in the scoping memo for the proceeding, to the prejudice of the parties;
2. Whether the Commission complied with statutory and constitutional requirements for notice and hearing when it first disclosed through the issuance of a proposed decision, after the record had closed, that it was considering the continued use of two previously approved water conservation ratemaking mechanisms as part of such proceeding;
3. Whether the Commission may revoke two previously approved water conservation ratemaking mechanisms in a quasi-legislative proceeding, thereby denying the Petitioners due process rights available only in ratesetting proceedings;
4. Whether the Commission may revoke two previously approved water conservation ratemaking mechanisms in reliance on a single piece of record evidence, without affording parties any opportunity to refute that evidence; and
5. Whether the Commission may revoke two previously approved water conservation ratemaking mechanisms without assessing the economic effects of its order on low-income or any other customers.

The Petitioners and the Commission phrased the foregoing issues in varied language. Therefore, Appendix A hereto quotes the issues as presented in each Petition and in the Commission's answer.

INTRODUCTION

The Petitioners[1] seek judicial review of Commission Decisions 20-08-047 and 21-09-047 (Decisions) with regard to one order in D.20-08-047. That order unlawfully prohibits the WRAM Utilities from continuing to use two ratemaking mechanisms referred to as the Water Revenue Adjustment Mechanism (WRAM) and Modified Cost Balancing Account (MCBA) that are critical elements of the tiered rate designs that those utilities use to promote water conservation (Volume 1 of Joint Appendices (1JA) at 109 (Ordering Paragraph #3) (Revocation Order)).

The Commission (1) violated section 1701.1(c) of the California Public Utilities Code[2] and its own Rule 7.3[3] by issuing the Revocation Order without first identifying the continued use of the WRAM/MCBA as an issue under consideration in the underlying proceeding, to the prejudice of the parties, (2) violated section 1708, section 1708.5, and the United States and California Constitutions by issuing the Revocation Order without providing the Petitioner Utilities notice and an opportunity to be heard, (3) violated section 1701.1, subdivision (d), and its own Rule 1.3 by issuing the Revocation Order, a ratesetting decision, in a quasi-legislative proceeding (ignoring the statutory distinction between the two types of

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[1] The Petitioners are California-American Water Company (Cal-Am), California Water Service Company (Cal Water), Golden State Water Company (Golden State), Liberty Utilities (Park Water) Corp. and Liberty Utilities (Apple Valley Ranchos Water) Corp. (collectively, Liberty), and the California Water Association (CWA). Cal-Am, Cal Water, Golden State and Liberty are referred to herein collectively as the "Petitioner Utilities" and as the "WRAM Utilities."

[2] Unless otherwise stated, all statutory references are to the California Public Utilities Code.

[3] References to "Rules" are to the Commission's Rules of Practice and Procedure.

proceedings), (4) failed to regularly pursue its authority by issuing the Revocation Order in reliance on a single piece of record evidence, without affording parties any opportunity to refute that evidence, and (5) violated section 321.1, subdivision (a), by issuing the Revocation Order without assessing the economic effects of the revocation on low-income or any other customers.

These are violations of the procedural statutes and rules that help ensure that the Commission makes informed, evidence-based decisions and formulates sound public policy. The Commission's violation of the Petitioners' due process rights denied them an opportunity to present evidence that would have demonstrated the peril that the Revocation Order poses both to California's water conservation objectives and to low-income water customers.

For all of these reasons and as established below, the Court should vacate the Revocation Order.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

Background and Purpose of the WRAM/MCBA

Since 2008, with drought conditions recurring across California, the WRAM Utilities have used two regulatory mechanisms approved by the Commission that encourage water conservation by decoupling utility revenues from the amount of water sold—the WRAM and the MCBA. These ratemaking mechanisms address a conflict that can arise between two important policy objectives: (1) if water sales are lower than anticipated, protecting a utility against falling short of the revenue required to provide safe and reliable service to customers and a fair return on investment to utility shareholders, and (2) promoting water conservation (i.e., reducing water sales to customers).

The WRAM tracks under- or over-collections in utility revenues due to fluctuations in actual water sales to customers as compared with the forecasted water sales used by the Commission in setting customer rates. The MCBA tracks savings or increases in water supply operating costs against forecasted amounts that the Commission used in setting customer rates. The WRAM and MCBA amounts are netted against each other so that reduced utility revenues from lower sales to customers are offset by associated cost savings. The result of that calculation is recovered through a surcharge on customer bills for an under-collection or returned to customers via a surcredit for an over-collection. By "decoupling" revenues from the quantity of water sold, the WRAM/MCBA removes a disincentive for the WRAM Utilities to encourage conservation by their customers. California gas and electric utilities have long used similar revenue decoupling mechanisms to promote energy conservation.[4]

The use of the WRAM/MCBA arose from the Commission's Investigation 07-01-022, begun in 2007 to address policies to achieve water conservation objectives for Class A[5] water utilities. In their Petitions, several WRAM Utilities included detailed histories regarding how the Commission approved their WRAM and MCBA mechanisms and repeatedly affirmed their continued use after rigorous, evidence-based review. (1JA at 152-153, 157-159, 162-165 [discussing at 164, ¶ 22 that in

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[4] (See, e.g., *Matter of Cal. Energy Efficiency Strategic Plan* Cal. P.U.C., Sept. 18, 2008, D.08-09-040, 2008 Cal. PUC LEXIS 417, *37-38 ["Over the years, successive CPUC decisions have created a policy framework to motivate [investor-owned utilities] to develop and continuously expand energy efficiency . . . including . . . decoupling of sales from revenues for electric and gas utilities. . . ."].)

[5] "Class A" is the Commission's designation for water utilities subject to its regulation that have 10,000 or more service connections.

Golden State's 2012 general rate case,[6] the Commission held evidentiary hearings solely addressing the WRAM].)

In December 2016, just seven months before commencement of the proceeding in which the Commission issued the Revocation Order, the Commission issued Decision 16-12-026, which approved continued use of the WRAM/MCBA by all the WRAM Utilities. (D.16-12-026, 2016 Cal. PUC LEXIS 682, **62-64.) The Commission issued that decision after soliciting detailed input concerning the WRAM/MCBA. Specifically, nine of 16 questions posed in the statutorily required scoping memo[7] for that prior rulemaking related directly to whether the WRAM Utilities should continue to use the WRAM/MCBA. (1JA at 193-196.)

Scoping of LIRA I

In July 2017, an Order Instituting Rulemaking (OIR) commenced LIRA I.[8] Per that OIR, the Commission would evaluate "the Commission's 2010 Water Action Plan objective of achieving consistency between the Class A water utilities' low-income rate assistance (LIRA) programs, providing rate assistance to all low-income customers of investor-owned

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[6] General rate case (GRC) proceedings address the costs of operating and maintaining a utility's system and the allocation of those costs among customer classes.

[7] Subsection (c) of section 1701.1 and Rule 7.3 require that for each proceeding at the Commission, the assigned Commissioner issue either an order or a ruling that describes the issues to be considered during the proceeding. (§ 1701.1(c); Rule 7.3.)

[8] "LIRA I" refers to Phase I of Rulemaking 17-06-024, *Order Instituting Rulemaking Evaluating the Commission's 2010 Water Action Plan Objective of Achieving Consistency between Class A Water Utilities' Low-Income Rate Assistance Programs, Providing Rate Assistance to All Low – Income Customers of Investor-Owned Water Utilities, and Affordability*.

water utilities, affordability, and sales forecasting." (1JA at 204.) The Original Scoping Memo,[9] established the issues to be considered in LIRA I:

1. Consolidation of at-risk water systems by regulated water utilities [. . . .][10]

2. Forecasting Water Sales

a. How should the Commission address forecasts of sales in a manner that avoids regressive rates that adversely impact particularly low-income or moderate income customers?

b. In Decision (D.)16-12-026, adopted in Rulemaking 11-11-008, the Commission addressed the importance of forecasting sales and therefore revenues. The Commission, in D.16-12-026, directed Class A and B water utilities to propose improved forecast methodologies in their GRC application. However, given the significant length of time between Class A water utility GRC filings, and the potential for different forecasting methodologies proposals in individual GRCs, the Commission will examine how to improve water sales forecasting as part of this phase of the proceeding. What guidelines or mechanisms can the

[9] The Commission issued three scoping memos prior to the issuance of Decision 20-08-047: (i) the original scoping memo issued on January 9, 2018 (Original Scoping Memo), (ii) the first amended scoping memo issued on July 9, 2018 (Amended Scoping Memo), and (iii) the second amended scoping memo issued on June 2, 2020 for a subsequent phase of the rulemaking addressing issues related to the COVID-19 pandemic. The first two scoping memos are referred to herein as the "Scoping Memos."

[10] Text of the two-sub-issues under item 1 omitted.

Commission put in place to improve or standardize water sales forecasting for Class A water utilities?

3. What regulatory changes should the Commission consider to lower rates and improve access to safe quality drinking water for disadvantaged communities?

4. What, if any, regulatory changes should the Commission consider that would ensure and/or improve the health and safety of regulated water systems?

(1JA at 208-209.)

The Original Scoping Memo confirmed the OIR's categorization of LIRA I as a quasi-legislative proceeding. (1JA at 210.)

The Amended Scoping Memo added two issues to LIRA I:

1. How best to consider potential changes in rate design such that there is a basic amount of water that customers receive at a low quantity rate; and

2. Whether the Commission should adopt criteria to allow for sharing of low-income customer data by regulated investor-owned energy utilities with municipal water utilities.

(1JA at 227.)

Post-Scoping Memo Treatment of the WRAM/MCBA in LIRA I

Neither Scoping Memo mentioned the WRAM/MCBA, revenue decoupling or anything remotely related thereto. Notwithstanding the absence of any reference to the WRAM/MCBA in the Scoping Memos, the Commission's Public Advocates Office (PAO) attempted to insert the continued use of the WRAM/MCBA into the proceeding via comments filed two years after LIRA I's commencement. PAO did so after the

Administrative Law Judge (ALJ), prior to the final workshop to be held in LIRA I, issued a ruling that solicited comments on questions relating to water sales forecasting. Although that ruling included no questions on the WRAM/MCBA (1JA at 244-245), PAO submitted comments recommending that the Commission order conversion of WRAMs to Monterey-style WRAMs (M-WRAMs)[11] and then explore eliminating any and all decoupling mechanisms. (1JA at 252.)

CWA filed reply comments on behalf of its members (including the Petitioner Utilities) objecting to PAO's proposal. (1JA at 263.) CWA stressed that PAO's "arguments regarding WRAMs and other decoupling mechanisms go well beyond the scope of the question asked and are therefore outside the scope of issues appropriate for these comments and the upcoming workshop." (1JA at 269.) CWA described PAO's proposal to convert existing WRAMs to M-WRAMs during LIRA I as "a procedurally improper method for seeking to modify several final Commission Decisions." (1JA at 263.) CWA urged that "[i]f the Commission chooses to re-open consideration of the merits of these established mechanisms for the utilities previously authorized to employ them, the Commission must carefully evaluate the arguments relating to these WRAMs, review the specific circumstances of each utility, and provide a fair opportunity for each utility to respond." (1JA at 269.)

The August 2019 workshop addressed the Low Income Rate Assistance Program, drought forecasting mechanisms, and consolidation of small water systems. (Volume 2 of Joint Appendices (2JA) at 281.) The

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[11] The M-WRAM is not a revenue decoupling mechanism like the WRAM. It is a revenue adjustment mechanism permitting a water utility to true-up revenue recovered under tiered quantity rates (intended to encourage conservation) with revenue that the utility would have collected by a uniform quantity rate. (2JA at 443, fn. 97.)

Commission staff report issued after the workshop did not mention elimination of the WRAM/MCBA. But the ALJ's final ruling, in September 2019, sought comment on the following questions:

> For utilities with a full Water Revenue Adjustment Mechanism (WRAM)/Modified Cost Balancing Account (MCBA), should the Commission consider converting to Monterey-style WRAM with an incremental cost balancing account? Should this consideration occur in the context of each utility's GRC?

(2JA at 275 (Question #6).)

In CWA's response to this question, CWA explained that the M-WRAM with an incremental cost balancing account (M-WRAM/ICBA) does not fulfill the same purpose as the full WRAM/MCBA and reiterated that these mechanisms have nothing to do with providing assistance to low-income customers and fall outside the scope of LIRA I.[12] (2JA at 465-467.) PAO's response to this question asserted the superiority of M-WRAMs over WRAMs, but included no evidence supporting its position. (2JA at 484.)

CWA submitted reply comments objecting to PAO's recommendation to convert WRAMs to M-WRAMs, calling the proposal "a step backwards that eliminates the benefits that full WRAMs offer in contrast to [M-WRAMs]." (2JA at 487.) PAO also submitted reply

[12] As an association that includes both water utilities that rely on the WRAM/MCBA and others that do not, CWA takes no position on the merits of the WRAM/MCBA in relation to other ratemaking mechanisms, but is concerned primarily about the flawed procedures followed by the Commission as addressed in this joint opening brief.

comments, which included a graph that, according to PAO, showed that the M-WRAM was as effective in promoting conservation as the WRAM. (2JA at 493.) The WRAM Utilities concluded that PAO's submission was deeply flawed and misleading for reasons subsequently set forth in their comments on the Proposed Decision. (2JA at 508-509; Volume 3 of Joint Appendices (3JA) at 537-539, 554-557, 569-570.) Because PAO submitted its graph in the final set of reply comments before the assigned Commissioner issued her Proposed Decision, however, neither CWA nor any other party had an opportunity to provide comments responding to PAO's graph or its asserted conclusion.

Other than PAO's graph, there is nothing in the record of LIRA I purporting to address the effectiveness of the WRAM for promoting conservation. Further, although the Commission discusses WRAM dollar balances of the Petitioner Utilities as purported support for the Revocation Order, the LIRA I record lacks any information regarding current WRAM dollar balances. Instead, the Commission relies on stale (and effectively irrelevant) references to 10-year-old old WRAM dollar balances from a past proceeding. (1JA at 64, fn. 42, citing to D.12-04-048.[13])

Issuance of the Proposed Decision and the Decision

In July 2020, the assigned Commissioner issued her Proposed Decision for LIRA I. (3JA at 579.) Whereas the ALJ's final ruling had asked whether the Commission "should consider" converting WRAM/MCBAs to M-WRAM/ICBAs and whether this consideration should occur "in the context of each utility's GRC," the Proposed Decision summarily ordered the WRAM Utilities to abandon their WRAMs/MCBAs

[13] Decision 12-04-048 relied on WRAM balance data from 2010-2012, as noted in Golden State's comments on the Proposed Decision. (3JA at 558 (citing to D.12-04-048 at Appendices B and C).)

and, if they so choose, to propose using M-WRAMs/ICBAs, in their next GRC applications. (3JA at 580 (Ordering Paragraph #3).) Only then, *three years* after the OIR, and *after the LIRA I record was closed*,[14] did the Commission first disclose an intention to order revocation of the WRAM/MCBA during LIRA I.

In late July and early August 2020, the WRAM Utilities filed comments and reply comments on the Proposed Decision demonstrating that (1) none of the OIR, the Original Scoping Memo or the Amended Scoping Memo identified water conservation mechanisms or modifications to or abandonment of the WRAM/MCBA as issues to be considered in LIRA I, (2) before the assigned Commissioner issued her Proposed Decision, the WRAM Utilities had no notice that the continued use of the WRAM/MCBA was under consideration in LIRA I, and (3) nothing in the record assessed the economic effects of revocation on low-income or any other customers. (2JA at 497-523; 3JA at 526-577, 583-616.)

On August 26, 2020, the assigned Commissioner revised her Proposed Decision to add language contending that continued use of the WRAM fell within the ambit of the "Forecasting Water Sales" item in the Original Scoping Memo. (3JA at 620-622.) The next day, the Commission issued the final Decision that included the Revocation Order prohibiting the WRAM Utilities from proposing to continue their existing WRAM/MCBAs in future GRCs, as follows:

> California-American Water Company, California Water Service Company, Golden State Water

[14] The Commission's Rules prescribe that "[a] proceeding shall stand submitted for decision by the Commission after the taking of evidence, the filing of briefs, and the presentation of oral argument as may have been prescribed." (Cal. Code Regs., tit. 20, § 13.15, subd. (a).) Thus, the evidentiary record is closed prior to issuance of a proposed decision.

> Company, Liberty Utilities (Park Water) Corporation, and Liberty Utilities (Apple Valley Ranchos Water) Corporation, in their next general rate case applications, shall not propose continuing existing Water Revenue Adjustment Mechanisms/Modified Cost Balancing Accounts but may propose to use Monterey-Style Water Revenue Adjustment Mechanisms and Incremental Cost Balancing Accounts.

(1JA at 109 (Ordering Paragraph #3).)

Applications for Rehearing and Denial of Rehearing

Each Petitioner filed a timely application for rehearing of the Decision on numerous grounds, including that the Commission (1) violated statutory and constitutional due process rights of the WRAM Utilities by failing to provide adequate notice and a meaningful opportunity to be heard concerning the Revocation Order (Volume 4 of Joint Appendices (4JA) at 650-655, 686-690, 694-697), (2) failed to comply with the Public Utilities Code and its own rules concerning the scope of issues to be considered in LIRA I (4JA at 634-646, 713-716), (3) failed to consider all facts that might bear on its exercise of discretion (4JA at 673-676, 718-731), (4) failed to provide sufficient support for eliminating the WRAM/MCBA (4JA at 730-737), (5) mischaracterized LIRA I as a quasi-legislative proceeding rather than as ratesetting, thereby denying parties procedural rights available only in ratesetting proceedings (4JA at 659-664), and (6) abused its discretion by issuing the Revocation Order without adequate evidentiary support, failing to allow an opportunity for parties to present contrary evidence, and failing to assess the economic effects of the Revocation Order on low-income or

any other customers as required by subdivision (a) of section 321.1 (4JA at 697-705).

Nearly a year after the Petitioners filed their applications for rehearing, the Commission issued Decision 21-09-047 (Rehearing Denial) that denied rehearing. Therein, the Commission claimed that "[t]he issue of the decoupling WRAM was included in the Original Scoping Memo as part of the water sales forecasting issue" and asserted that the WRAM "is inextricably tied to water sales forecasting." (1JA at 118, 119.) The Commission also claimed in the Rehearing Denial that it revoked the WRAM/MCBA because the mechanism "had proven to be ineffective in achieving its primary goal of conservation" (1JA at 115.) The Commission apparently reached that conclusion based on the single graph in PAO's last set of reply comments regarding the purported effectiveness of the WRAM in achieving conservation.

This Court has exclusive jurisdiction to review decisions of the Commission arising from rulemaking or ratemaking proceedings pertaining solely to water utilities. (§ 1756, subd. (f).) Golden State filed its original Petition with this Court in May 2021, because the Commission neither granted rehearing of the Decision within 60 days nor extended the effective date of the Decision. (See § 1733, subd. (b).) In June 2021, this Court approved the Commission's request to hold Golden State's Petition in abeyance pending resolution of the applications for rehearing. Within 30 days after the Commission's issuance of the Rehearing Denial, Golden State filed its Amended Petition in the docket for Case Number S269099. Each of the other Petitioners concurrently filed Petitions, which the Court collectively assigned Case Number S271493.

In early November 2021, the Commission asked the Court to consolidate Case Numbers S269099 and S271493 and to authorize the

Commission to file a single answer. The Commission filed its answer in late January 2022.

In late March 2022, CWA filed a reply in the docket for Case Number S271493, and the other Petitioners filed a joint reply in the dockets for both Case Numbers S269099 and S271493. In May 2022, the Court issued writs granting review of the Decisions in both dockets and thereafter consolidated the two cases. In June 2022, the Court issued an order that the record under review will consist of (1) the exhibits submitted by all parties in connection with the petitions for writ of review, answer to the petitions, and replies to the answer; and (2) the LIRA I Docket Card. The Court also took judicial notice of the filings made in Rulemaking 17-06-024 on or before July 3, 2020. (Evid. Code § 452, subds. (c), (h).)

STANDARD OF REVIEW

The Court reviews decisions of the Commission arising from all quasi-legislative proceedings and ratemaking proceedings applicable to water corporations pursuant to section 1757.1. For "decisions pertaining solely to water corporations, the review shall not be extended further than to determine whether the commission has regularly pursued its authority, including a determination whether the order or decision under review violates any right of the petitioner under the Constitution of the United States or this state." (§ 1757.1, subd. (b).)

The Court "exercise[s] independent judgment on the law and the facts" when determining whether the Commission regularly pursued its authority and whether the Commission's decision violated a party's constitutional rights. (§ 1760.) Although in certain contexts there may be a "strong presumption of validity of the commission's decisions" (*Greyhound Lines, Inc. v. Public Utilities Com.* (1968) 68 Cal.2d 406, 410-411), that presumption does not apply when the issue is whether the Commission's

procedures failed to comply with due process. (*SFPP, L.P. v. Public Utilities Com.* (2013) 217 Cal.App.4th 784, 794.) The "strong presumption of validity" is implicated only "when no constitutional issue is presented." (*Pac. Gas & Elec. Co. v. Public Utilities Com.* (2015) 237 Cal.App.4th 812, 838, citations omitted.) The Court has explained that even in cases where "the commission's findings and conclusions on matters of fact are final and its decisions are presumed to be valid . . . [the Court may determine] . . . whether the commission's decisions are supported by the evidence and whether the utility has been afforded due process." (*Southern Cal. Gas Co. v. Public Utilities Com*. (1979) 23 Cal.3d 470, 484.)

Jurisprudence pre-dating the 1998 enactment of section 1757.1, subdivision (b), confirms that the "regularly pursued its authority" standard that governed review of all Commission decisions prior to 1998 was broad, covering, *inter alia*, the Commission's failure to comply with statutory procedural requirements governing modification of prior Commission decisions (*Cal. Trucking Assoc. v. Public Utilities Com.* (1977) 19 Cal.3d 240) and the Commission's adoption of rate mechanisms in the absence of appropriate findings and evidentiary support (*Cal. Manufacturers Assoc. v. Public Utilities Com.* (1979) 24 Cal. 3d 251).

SUMMARY OF ARGUMENT

The Petitions raise five questions, namely, whether the Commission failed to regularly pursue its authority when it (1) revoked the WRAM/MCBA without first identifying the continued use of those mechanisms in a scoping memo for the proceeding, to the prejudice of the parties, (2) failed to provide notice and an opportunity to be heard, in accordance with section 1708, section 1708.5, and the United States and California Constitutions, when the assigned Commissioner first disclosed the possible revocation of the WRAM/MCBA during LIRA I in her

proposed decision after the record had closed, (3) revoked the WRAM/MCBA in a quasi-legislative proceeding, depriving the Petitioners of due process rights afforded only in ratemaking proceedings, (4) revoked the WRAM/MCBA in reliance on a single piece of record evidence, without affording parties any opportunity to refute that evidence, and (5) revoked the WRAM/MCBA without assessing the economic effects of the revocation on low-income or any other customers. Consistent with applicable statutes, the Court's jurisprudence, due process, well-established Commission practice, and sound public policy, the answer to all of these is yes, and the Court should vacate the Revocation Order.

Scoping Memo Violation

The Commission's legal errors in LIRA I stem from its failure to identify, in either Scoping Memo, that it would consider any change to the WRAM/MCBA. The assigned Commissioner must define a proceeding's scope in a scoping memo (§ 1701.1(c) ["The assigned commissioner shall prepare and issue by order or ruling a scoping memo that describes the issues to be considered"]; Commission Rule 7.3). Because neither Scoping Memo included consideration of the WRAM/MCBA, the Revocation Order violates the Public Utilities Code and the Commission's Rules.

The Commission has asserted that the WRAM/MCBA were included within the Original Scoping Memo because that Scoping Memo "identified water sales forecasting as an issue to be addressed in the proceeding." (1JA at 119.) This claim is belied by (1) the Original Scoping Memo, which does not mention the WRAM/MCBA, and the Commission's contrived efforts to equate water sales forecasts with the WRAM/MCBA, (2) the Commission's well-established practice of explicitly addressing the WRAM/MCBA in the scoping memo for any proceeding in which they were to be considered, (3) the minimal information about the

WRAM/MCBA in the LIRA I record, and (4) the Commission's errant claim that parties' comments and the final ALJ's ruling issued 19 months after the Original Scoping Memo dictated LIRA I's scope.

Violation of Rights to Notice and Hearing

The absence of the WRAM/MCBA as an issue in any scoping memo led to violations of the statutory and constitutional rights to notice and hearing of the Petitioners. Because the Commission failed to identify the continued use of the WRAM/MCBA as an issue in either Scoping Memo, the Commission denied the Petitioners the notice and opportunity to be heard on these issues required under section 1708 and under the California and U.S. Constitutions. (§ 1708 [requiring the Commission to provide "notice to the parties, and with opportunity to be heard as provided in the case of complaints" before the Commission may "rescind, alter, or amend any order or decision made by it."].) Further, because Golden State's authority to use the WRAM/MCBA was granted after an evidentiary hearing, Golden State had a right to an evidentiary hearing before the Commission could revoke that authority. (§ 1708.5 [providing a right to an evidentiary hearing in "any proceeding to adopt, amend, or repeal a regulation . . . with respect to a regulation being amended or repealed that was adopted after an evidentiary hearing."]. The Commission's failure to provide notice and opportunity to be heard before issuing the Revocation Order was prejudicial to all the Petitioners and is grounds for annulling the Revocation Order. (*Southern Cal. Edison Co. v. Public Utilities Com.* (2006) 140 Cal.App.4th 1085 (*Edison*).)

Improper Quasi-Legislative Categorization

The Commission's failure to identify the WRAM/MCBA as issues in either Scoping Memo resulted in the improper categorization of the proceeding as quasi-legislative, rather than as ratesetting. This resulted in

the denial of due process rights available in a ratesetting proceeding, including rights to evidentiary hearings and oral argument. (§ 1708.5, subd. (f); § 1701.3, subd. (a).) The Commission categorized LIRA I as quasi-legislative in the OIR, and the parties had ten days after issuance of the Original Scoping Memo to challenge that categorization. (1JA at 210.) Because the Commission did not identify the WRAM/MCBA among the issues that would be considered, the Petitioners had no notice of the need to challenge, and did not challenge, the categorization. Eliminating the WRAM/MCBA mechanisms used by five specific companies (Cal-Am, Cal Water, Golden State and the two Liberty utilities) is, nonetheless, a ratesetting action and contrary to the quasi-legislative categorization of LIRA I. (§ 1701.1, subd. (d)(1) ["Quasi-legislative cases . . . are cases that establish policy, including, but not limited to, rulemakings and investigations that may establish rules affecting an entire industry."]; § 1701.1, subd. (d)(3) ["Ratesetting cases . . . are cases in which rates are established for a specific company, including . . . ratesetting mechanisms."]; Commission Rule 1.3(e) and (f).)

Failure to Establish a Record Supporting the Revocation Order

The only items of evidence on which the Decisions relied to support the Revocation Order were (1) a single graph that the Petitioners had no opportunity to refute because the Commission failed to comply with the requirements of due process, and (2) outdated data from a decision the Commission issued in 2012 that was not in the record of LIRA I. This is unlawful because the Commission must proceed based on findings of fact (§ 1705 [decisions must "contain, separately stated, findings of fact . . . on all issues material to the order or decision"]), but the only record evidence purporting to support the Commission's findings regarding the Revocation Order is unreliable because of due process violations. By revoking the

WRAM Utilities' authority to use the WRAM/MCBA based on a single piece of evidence that the Commission denied the Petitioners any opportunity to refute, the Commission failed to regularly pursue its authority. (§ 1757.1, subd. (b).)

Failure to Consider the Economic Effects of the Revocation Order

In LIRA I, the Commission's stated intention was to consider affordability and assisting low-income customers, but it failed to assess the economic effects of revoking the WRAM/MCBA on low-income or any other customers. By not doing so, the Commission violated its statutory obligation to assess the consequences, including economic effects, of its decisions. (§ 321.1, subd. (a) ["It is the intent of the Legislature that the commission assess the consequences of its decisions, including economic effects . . . as part of each ratemaking, rulemaking, or other proceeding."].) This is legal error and grounds for vacating the Revocation Order. (*U.S. Steel Corp. v. Public Utilities Com.* (1981) 29 Cal.3d 603, 615 [annulling decision where the Commission failed to assess the economic impact of its action].)

ARGUMENT

I. The Commission Failed to Comply with Section 1701.1, Subdivision (c), and Commission Rule 7.3, which Require a Scoping Memo to Describe the Issues to Be Considered in a Commission Proceeding

For the Court to conclude that the Commission complied with section 1701.1, subdivision (c), and Commission Rule 7.3, which require that a scoping memo for a Commission proceeding describe the issues to be considered in that proceeding, the Court would need to accept the

Commission's contention that "[t]he issue of the decoupling WRAM was included in the Original Scoping Memo as part of the water sales forecasting issue." (1JA at 118.) This foundational premise is without merit for four reasons.

A. The Two Scoping Memo Questions Regarding Water Sales Forecasting Provided No Notice that Any Change to the WRAM/MCBA Would Be Considered in LIRA I

The Commission contended that "Water sales forecasting was included in this proceeding *because of its effect on WRAM balances and the effect of those balances on customer rates*." (1JA at 119, emphasis added.) Were this so, the Original Scoping Memo's two questions about water sales forecasting would have mentioned the WRAM, WRAM balances or the effect of WRAM balances on customer rates. They did not. The complete text of those two questions was:

> 2. Forecasting Water Sales
>
> a. How should the Commission address forecasts of sales in a manner that avoids regressive rates that adversely impact particularly low-income or moderate income customers?
>
> b. In Decision (D.)16-12-026, adopted in Rulemaking 11-11-008, the Commission addressed the importance of forecasting sales and therefore revenues. The Commission, in D.16-12-026, directed Class A and B water utilities to propose improved forecast methodologies in their GRC application. However, given the significant length of time between Class A water utility GRC filings, and the

> potential for different forecasting methodologies proposals in individual GRCs, the Commission will examine how to improve water sales forecasting as part of this phase of the proceeding. What guidelines or mechanisms can the Commission put in place to improve or standardize water sales forecasting for Class A water utilities?

(1JA at 208-209.) Neither of the above two questions mentioned the WRAM, WRAM balances, or the effect of WRAM balances on customer rates, and there was no other question in either Scoping Memo that did. Therefore, the Commission's assertion—that the reason forecasting was included in the Original Scoping Memo was because of the WRAM—is not credible.

These two questions not only failed to mention the WRAM/MCBA in particular, neither question referred to the general concept of "decoupling" revenues from sales. They referred only to water sales forecasting methodologies and to guidelines or mechanisms for improving or standardizing water sales forecasts. The WRAM and MCBA are none of those; they are ratesetting mechanisms that support the WRAM Utilities' conservation rate designs. Moreover, under the Commission's preferred water sales forecasting methodology, water sales are forecasted based only on weather and time. (4JA at 802, fn.4.) The WRAM/MCBA, revenue-decoupling, or other rate-design mechanisms are not considered. Nothing in these questions indicated that the Commission had any intention to consider the WRAM/MCBA during LIRA I.

The second question further demonstrated that changes to the WRAM/MCBA were not included within the water sales forecasting issue because it referred to new rather than existing mechanisms. Again, that

question asked: "What guidelines or mechanisms *can the Commission put in place* to improve or standardize water sales forecasting for Class A water utilities?" (1JA at 209 (emphasis added).) The question did not ask what guidelines or mechanisms the Commission can "modify" or "remove" or "revoke" to improve or standardize water sales forecasting. Had the Commission intended to consider whether there should be any modification of the WRAM/MCBA in order to "improve or standardize water sales forecasting," the Commission would not have narrowly written this question to refer to mechanisms that might be "put in place."

Likewise, neither of these two questions reflected any intention of the Commission to consider the WRAM/MCBA in LIRA I because water sales forecasting mechanisms are used both by utilities that employ the WRAM/MCBA and by those that do not. The Commission regulates over 100 water utilities,[15] all of which use water sales forecasts in their ratemaking. But there are only five WRAM Utilities. Interested parties thus had no reason to believe that the Commission intended to address changes to the WRAM/MCBA for five companies based on two questions of much wider, general application about water sales forecasting mechanics.

The Commission's central premise that "the WRAM and water sales forecast are inextricably linked" (1JA at 121) is without any merit. Neither the WRAM or MCBA is a component of any water sales forecasting methodology, mechanism or guideline. Instead, these water conservation ratemaking mechanisms provide protections to both the WRAM Utilities and their customers when the actual amount of water sold is less than, or greater than, the utility's applicable revenue forecast used by the Commission to determine customer water rates.

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[15] Water Division facts, (available at https://www.cpuc.ca.gov/about-cpuc/divisions/water-division).

The Commission's issuance of the Revocation Order in LIRA I is akin to banning an anti-malarial drug in a proceeding about methods of reducing mosquito populations. Although the reduction in mosquito populations might reduce the need for anti-malarial drugs, no reasonable person would expect that a proceeding considering how to reduce mosquito populations would result in a ban on a medicine for a mosquito-borne illness. Therefore, providing notice to interested persons that the reduction of mosquito populations would be considered would not provide notice that banning the medication would be considered. This is also true for a proceeding considering mechanisms for making water sales forecasts more accurate to have resulted in a ruling eliminating the WRAM/MCBA. There is no reasonable link—much less an "inextricable link"—between considering sales forecasting and revoking the WRAM/MCBA.

B. The Commission's Practice Has Always Been to Identify the WRAM/MCBA with Specificity in the Scoping Memo for Any Proceeding in Which Their Continuance Was under Consideration and the WRAM/MCBA Is Not a Pilot Program

The Commission argued that "the parties had notice that, as a pilot program, the continuation of the WRAM and MCBA was regularly under consideration" and, therefore, within the scope of LIRA I. (1JA at 122.) This argument is also without merit. The Commission's consistent past practice when it has considered the WRAM/MCBA shows why including water sales forecasting in the original Scoping Memo was not sufficient to provide notice that the WRAM/MCBA would be considered in LIRA I. In the earlier proceedings in which the Commission considered the WRAM/MCBA, the mechanism was specifically listed in the scoping memo as under review:

- *Assigned Commissioner's Ruling and Scoping Memo* (Mar. 8, 2007) in docket I.07-01-022 *et al.* (4JA at 818) ("The first phase of this proceeding will address rate-related conservation measures, including the parties' increasing block rate and Water Revenue Adjustment Mechanism (WRAM) proposals.");
- *Assigned Commissioner and Administrative Law Judge's Ruling and Scoping Memo* (June 8, 2011) in docket A.10-09-017 (4JA at 824) (identifying examination of WRAM/MCBA balances and whether the mechanisms comport with the Commission's expectations and objectives as issues to be considered);
- *Scoping Memo and Ruling of Assigned Commissioner and Administrative Law Judge* (Nov. 2, 2011) in docket A.11-07-017 (4JA at 833) ("we will consider whether the WRAMs/MCBAs are achieving their stated purpose . . . and if not, what changes are needed to ensure the WRAMs/MCBAs achieve their stated purpose");
- *Assigned Commissioner's Third Amended Scoping Memo and Ruling Establishing Phase II* (Apr. 30, 2015) in docket R.11-11-008 (1JA at 193-196) (listing nine of 16 questions directly related to whether the WRAM/MCBA should be maintained, modified, or replaced).

In light of the Commission's well-established practice, the Petitioners reasonably expected that if the Commission were again to consider the efficacy of the WRAM/MCBA, it would expressly identify that issue in the Scoping Memo, as it had done in the past, and as section 1701.1, subdivision (c) and Commission Rule 7.3 require.

Further, the Commission's efforts to cast the WRAM/MCBA as a "pilot program" and thereby to create the impression that the mechanisms were merely an experiment, subject to revocation at any time, must be

rejected. It is inaccurate to characterize as a "pilot program" mechanisms that have been fundamental elements of the WRAM Utilities' conservation rate designs for more than a decade. In fact, back in 2016, the Commission specifically ordered that "[t]he pilot conservation rate design that has been in effect for California Water Service since 2008 shall be permanent, without limiting the possibility of future modifications and improvements." (D.16-12-042, 2016 Cal. PUC LEXIS 746 at *103 (Ordering Paragraph #7).) Per the settlement adopted by the Commission in that 2016 decision, two of the five elements comprising that conservation rate design are the WRAM and MCBA. (*Id*. at *161.)

C. The Paucity of the Record Regarding the WRAM/MCBA Also Demonstrates that the Mechanism Was Outside the Scope of LIRA I

The fact that none of the five WRAM Utilities proffered any record evidence on the need to continue the WRAM/MCBA demonstrates that the two questions on water sales forecasting in the original Scoping Memo failed to provide notice that the Commission would consider eliminating the WRAM/MCBA in LIRA I. Had they known that the Commission intended to address these issues, the WRAM Utilities, who spent years in multiple proceedings establishing and defending the value of and need for the WRAM/MCBA, certainly would have offered evidence to prove that the mechanisms continue to be valuable and necessary. Every WRAM Utility filed comments on the Proposed Decision, applications for rehearing, and petitions for writ of review regarding the Revocation Order, demonstrating that this issue is extremely important to them. No evidence supports the Commission's contention that the WRAM Utilities knew, or should have known, that revocation of the WRAM/MCBA was under consideration but chose to remain silent.

D. Neither Occasional Mentions of the WRAM/MCBA by Parties nor the ALJ's Final Ruling Put the WRAM/MCBA Within LIRA I's Scope

In both the Rehearing Denial and its answer filed with this Court, the Commission has attempted to substantiate that the WRAM/MCBA mechanisms are inextricably linked to water sales forecasting, and thus within the scope of LIRA I, by identifying a handful of occasions in which a party mentioned the WRAM/MCBA during the 27 months between issuance of the OIR and filing of comments on the ALJ's September, 2019 ruling (ALJ's Final Ruling). The Commission's position is legally erroneous and factually inaccurate.

Comments made by parties, or even a ruling by an assigned ALJ, do not determine the scope of a proceeding. The assigned Commissioner must define the proceeding's scope in a scoping memo. (§ 1701.1, subd. (c) ["The assigned commissioner shall prepare and issue by order or ruling a scoping memo that describes the issues to be considered"]; Commission Rule 7.3.) In July 2018, when the Commission determined that the scope of LIRA I required expansion to incorporate two additional issues, the assigned Commissioner, together with the ALJ, issued the Amended Scoping Memo. The assigned Commissioner never issued any such amendment to bring the WRAM/MCBA within LIRA I's scope.

As a matter of law, the ALJ's Final Ruling that asked a single two-part question about the WRAM/MCBA does not constitute a scoping memo issued by the assigned commissioner. Pursuant to section 1701.1, subdivision (c) and Rule 7.3, that question was not sufficient to bring revocation of the WRAM/MCBA within LIRA I's scope.

As to the facts, the manner in which the ALJ presented this question indicated this was a topic the Commission would consider taking up in a

future proceeding, not in LIRA I. The ALJ asked, "For utilities with a full Water Revenue Adjustment Mechanism (WRAM)/Modified Cost Balancing Account (MCBA), should the Commission consider converting to Monterey-style WRAM with an incremental cost balancing account? Should this consideration occur in the context of each utility's GRC?" (2JA at 275 (Question #6).) The Petitioners understood the ALJ to be asking whether this was a change the Commission should consider implementing at some future time. The first part of the question asked "should the Commission *consider converting* to Monterey-style WRAM" (emphasis added), as opposed to "should the Commission convert to Monterey-style WRAM." And the second part of the question asked about the proper type of proceeding for such consideration; that is, whether it should be done in each utility's GRC (as opposed to a subsequent phase of the instant proceeding or a future rulemaking).

Further, isolated excerpts from proceeding materials mentioning the WRAM did not change the issues actually included in LIRA I's scope. In the Rehearing Denial, the Commission cited to three such excerpts, which actually were excerpts from Decision 20-08-047 (Original Decision) setting forth the Commission's *post hoc* rationalization for the Revocation Order. (1JA at 120-121.) There were approximately 2,150 pages of documents filed during LIRA I. (4JA at 856.) Given the importance of the WRAM/MCBA to the rate design used by the WRAM Utilities to promote water conservation and maintain affordable rates for low-usage customers, it is not surprising that, in a few instances, parties mentioned the WRAM among topics tangential to issues actually included within LIRA I's scope. A few terse comments over the course of a proceeding, even in response to an ALJ's question regarding an out-of-scope topic, did not have the legal effect of bringing any new issue within the scope of LIRA I.

E. In Accordance with *Edison*, the Court Should Vacate the Revocation Order

Edison, supra, 140 Cal.App.4th 1085, demonstrates the unlawfulness of the Commission's issuance of the Revocation Order without identifying the WRAM/MCBA as within the scope of LIRA I. In that case, the Commission initiated a proceeding to consider rules governing utility contracting. The *Edison* scoping memo addressed issues related to "bid shopping" and "reverse auctions" and sought comments on specific proposals related to these topics.

Thirteen months into the proceeding, the Southern California District Council of Laborers filed comments offering new proposals tangential to the scoping memo proposals and 400 pages of supporting materials. (*Edison, supra,* at pp. 1105-06.) Although some parties argued the preliminary scoping memo was "sufficiently broad to encompass the…[new] proposal," and the ALJ "apparently amended the scope of issues to include the new proposals" and provided another opportunity for the parties to address the associated issues, the *Edison* court concluded that the Commission erred in adopting the new proposals, considering the new issue, and providing insufficient time for the parties to respond. (*Ibid.*) Citing section 1757.1, it annulled portions of the decision, and held that the Commission had "failed to proceed in the manner required by law and that the failure was prejudicial." (*Id*. at p. 1106.)

The same is true in this case. As in *Edison*, revocation of the WRAM/MCBA was introduced as a new proposal late in the proceeding (even later than in *Edison*), more than two years after the OIR. In *Edison*, the party making the new proposal submitted 400 pages of evidence and other parties at least had three business days to respond; here, the only evidence in the record supporting revocation of the WRAM/MCBA is a

single graph submitted by PAO that the WRAM Utilities had *no* opportunity to refute. In the Rehearing Denial, the Commission tried to distinguish *Edison* by claiming that possible revocation of the WRAM/MCBA was included in the Original Scoping Memo as part of the water sales forecasting issue. (1JA at 121.) Per above, this was not so. As a result, the Revocation Order is unlawful, and the Court should set it aside.

F. *BullsEye* is Inapposite

To justify the Revocation Order, the Commission also attempted to characterize the facts of LIRA I in such a way that they would fall within the court's reasoning in *BullsEye Telecom, Inc. v. Public Utilities Com.* (2021) 66 Cal.App.5th 301 (*BullsEye*). The *BullsEye* scenario was very different. There, the underlying proceeding addressed whether local telephone exchange carriers impermissibly charged higher rates for certain services provided to one long-distance carrier, Quest Communications Company (Quest), versus its competitors, and the scoping memo identified whether "there was a rational basis for different treatment" as an issue to be considered. (*Id*. at p. 306.) In its decision, the Commission concluded that the only relevant factor that could justify different treatment was a difference in cost-of-service, and the petitioners argued that the Commission erred by limiting the "rational basis" analysis to that single factor. (*Id*. at p. 318.)

The *BullsEye* court held that because the scoping memo did not specify any particular factors that would be considered, the Commission did not violate the requirement that the scoping memo identify the issues to be considered when it concluded that certain factors were not relevant to whether there was a rational basis for the higher rates charged to Quest. (*Id.* at pp. 317-18, 325.) In short, the scoping memo in *BullsEye* expressly

stated that whether a rational basis existed to treat Quest differently was within the scope of that proceeding.

In the instant case, by contrast, the Commission never identified elimination of the WRAM/MCBA, revenue decoupling, or even water conservation as issues in LIRA I. Nor was the Revocation Order even responsive to the Scoping Memo questions about forecasting or any other question in either Scoping Memo. The Petitioners thus had no notice that the Commission might consider any of these issues.

Moreover, the *BullsEye* court concluded the petitioners were not prejudiced by the Commission's narrowing of the scoped "rational basis for different treatment" issue to the cost-of-service factor because they "identif[ied] no evidence they could have or would have presented had they been aware that the Commission would ultimately conclude the exemplary factors . . . did not constitute a rational basis for different treatment . . . ." (*Id.* at pp. 325-326.) The court emphasized that the petitioners knew before the hearings that Quest's position was that the differing rates could be justified only "where the provider . . . establishes that the relevant economic cost . . . varies between customers," and that there was "nothing that prevented them from countering Quest's evidence that there was no cost difference . . . ." (*Ibid*.)

Here, however, the Commission's failure to include the WRAM/MCBA in the Scoping Memos resulted in the Petitioners not having notice of any need to provide evidence supporting continued use of the WRAM/MCBA. In their comments on the Proposed Decision, the WRAM Utilities identified evidence that they would have presented had they been aware that revocation of the WRAM/MCBA was under consideration. (2JA at 503-507; 3JA at 539-540, 554-557, 569-570.) As the Commission admitted, however, it afforded the Petitioners' comments on the Proposed Decision "no weight" because they were not "record

evidence." (1JA at 179.) The inability to submit evidence before the LIRA I record closed prejudiced the Petitioners and renders *BullsEye* inapplicable.

In sum, the Commission violated section 1701.1, subdivision (c), and its own Rule 7.3 by adopting the Revocation Order without identifying the continued use of the WRAM/MCBA as an issue that would be considered in LIRA I.

II. The WRAM Utilities Had Statutory and Constitutional Rights to Notice and an Opportunity to Be Heard Before the Commission Revoked the WRAM/MCBA

Under *California Trucking Association v. Public Utilities Commission* (1977) 19 Cal.3d 240, the Commission should annul the Revocation Order because it was issued in violation of the WRAM Utilities' statutory rights to notice and opportunity to be heard, as well as their constitutional rights to due process.[16] The Revocation Order prohibits the WRAM Utilities from future use of the WRAM/MCBA. Under section 1708, the WRAM Utilities were entitled to notice and a hearing before the Commission could issue such an order.

A. The Commission Violated the WRAM Utilities' Rights under Section 1708

Under section 1708, before the Commission may "rescind, alter, or amend any order or decision made by it," it must give parties notice and an "opportunity to be heard as provided in the case of complaints." (§ 1708.) The Commission asserted in the Rehearing Denial that the Revocation

[16] In *California Trucking*, the Court did not need to consider the petitioner's assertion that it was entitled to hearing under constitutional due process guarantees because there was no dispute that the petitioner had a statutory right to hearing under section 1708. (*Id.* at p. 245.) The facts in the present case support the same conclusion.

Order did not rescind, alter, or amend a prior decision because it "specifically stated that the policy decision to discontinue the use of the decoupling WRAM would be implemented in the utilities' next GRCs." (1JA at 123-124.) But Ordering Paragraph #3 of the Decision precluded the five WRAM Utilities from proposing the continued use of the WRAM/MCBA in their next GRC applications, which means the Decision already determined that no WRAM/MCBA could be implemented in a future GRC. Earlier decisions authorized the WRAM Utilities to propose to employ WRAM/MCBAs in their future GRCs. The Decision revoked that authorization and thus rescinded those prior decisions.

In the Rehearing Denial, the Commission also claimed that the ALJ's Final Ruling provided the Petitioners an opportunity to provide substantive comments regarding the revocation of the WRAM/MCBA, (1JA at 126), but this is not correct. The Petitioners' ability to provide opening and reply comments in response to the ALJ's Final Ruling does not amount to notice and an opportunity to be heard regarding revocation of the WRAM/MCBA. The ALJ's Final Ruling asked about whether the Commission should consider revoking the WRAM/MCBA in a future proceeding, not whether the Commission should revoke the WRAM/MCBA in LIRA I. Had the Petitioners been given notice that the Commission was considering revoking the WRAM/MCBA in LIRA I, they would have produced very different comments than were produced in response to the ALJ's Final Ruling. This is evidenced by the Petitioners' filings after the Proposed Decision first disclosed that the Commission was considering revocation of the WRAM/MCBA in LIRA I. In those filings, the Petitioners promptly identified the need for hearings. (3JA at 541-542, 552A-552B, 563, 590.) Because the Commission failed to afford the WRAM Utilities notice and an opportunity to be heard before revoking

their authorization to use the WRAM/MCBA, the Court should set aside the Revocation Order.

Even if the ability to provide written comments in response to the ALJ's Final Ruling had been sufficient to satisfy the requirements of section 1708 with regard to the other Petitioners, the Commission could not revoke Golden State's authority to use the WRAM/MCBA without conducting an evidentiary hearing. Specifically, because Golden State's continued use of the WRAM/MCBA was approved following evidentiary hearings, under section 1708.5, subdivision (f), Golden State was entitled to an evidentiary hearing before the authorization to use its WRAM/MCBA could be revoked.

Section 1708.5 provides:

> Notwithstanding Section 1708, the commission may conduct any proceeding to adopt, amend, or repeal a regulation using notice and comment rulemaking procedures, without an evidentiary hearing, *except with respect to a regulation being amended or repealed that was adopted after an evidentiary hearing, in which case the parties to the original proceeding shall retain any right to an evidentiary hearing accorded by Section 1708*.

(§ 1708.5, subd. (f) (emphasis added).) Therefore, although the Commission may generally satisfy the due process requirements of section 1708 by providing parties notice and an opportunity to submit written comments, it may not repeal an authorization previously granted after evidentiary hearings, unless it has provided the parties to the earlier proceeding an opportunity to have an evidentiary hearing.

Golden State's authorization to use the WRAM was adjudicated and affirmed in its 2012 GRC after an evidentiary hearing analyzing whether the WRAM/MCBA was achieving its stated purposes. (2JA at 444 (Conclusion of Law #72), 447 (Conclusion of Law #88).) This made section 1708.5, subdivision (f) applicable, giving Golden State the right to an evidentiary hearing before the Commission could revoke the authorization to continue using the WRAM/MCBA that was granted during its 2012 GRC.[17]

B. The Commission's Failure to Provide Notice and an Opportunity to Be Heard Violated the Petitioners' Constitutional Due Process Rights

Although it empowers the Commission to "establish its own procedures," the California Constitution requires those procedures to comport with due process. (Cal. Const., art. XII, § 2; *Mullane v. Central Hanover Bank & Trust Co.* (1950) 339 U.S. 306, 314 ["An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."].) Applying these principles in the context of Commission proceedings, the Court has held that "[d]ue process as to the commission's initial action is provided by the requirement of adequate notice to a party affected and an opportunity to

[17] The Commission erroneously contended that Golden State's continued use of the WRAM resulted from a settlement rather than a Commission decision issued after evidentiary hearings. The Original Decision takes this position (1JA at 63, fn. 40) even though Golden State alerted the Commission to the error in comments on the Proposed Decision. (3JA at 3JA at 551-552.) The Commission also failed to correct the error in its Rehearing Denial, even though Golden State again raised the error in its application for rehearing. (4JA at 692-693.)

be heard before a valid order can be made." (*People v. Western Air Lines, Inc.* (1954) 42 Cal.2d 621, 632.)

As a result of its failure to provide notice in either Scoping Memo that revocation of the WRAM/MCBA would be considered in LIRA I, the Commission denied the WRAM Utilities the opportunity to be heard that constitutional due process requires. The Commission asserted in its Rehearing Denial that it included the WRAM/MCBA in the Original Scoping Memo because it "identified water sales forecasting as an issue to be addressed in the proceeding." (1JA at 119.) As discussed above, however, that claim has no merit.

III. The Commission's Issuance of the Revocation Order in a Quasi-Legislative Proceeding Was Legally Erroneous and Prejudicial

Because the WRAM is a mechanism that is intrinsic to setting the customer water rates of the WRAM Utilities, its elimination in a quasi-legislative proceeding constitutes legal error.[18] Section 1701.1, subdivision (d), defines the categorizations of Commission proceedings for the purposes of determining the applicable procedural mechanisms available in each type of proceeding, differentiating between quasi-legislative and ratesetting proceedings as follows:

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[18] In 1996, the Legislature adopted a detailed statutory scheme that established specific categories of Commission proceedings, adopted procedural rules specific to each, and required the Commission to provide the parties to each such proceeding notice of the specific issues that would be addressed. (Stats 1996, c. 856 (Senate Bill 960).) That 1996 statutory scheme, consistent with judicial review legislation adopted two years later, is designed to ensure that the Commission receives the evidence appropriate to making informed decisions, whether in a ratesetting proceeding or a true rulemaking proceeding. (Stats 1998. c. 886, sections 12 and 14 (establishing differing standards of review for ratemaking and rulemaking).)

> (1) Quasi-legislative cases . . . are cases that establish policy, including, but not limited to, rulemakings and investigations that may establish rules affecting an entire industry. . . .
>
> (3) Ratesetting cases . . . are cases in which rates are established for a specific company, including, but not limited to, general rate cases, performance-based ratemaking, and other ratesetting mechanisms.

(§ 1701.1, subds. (d)(1), (d)(3).)

The Commission's erroneous categorization of LIRA I as quasi-legislative prejudiced the Petitioners by depriving them of due process protections afforded in ratesetting proceedings, including rights to evidentiary hearings and to oral argument. Section 1708.5, subdivision (f) provides that "[n]otwithstanding Section 1708, the commission may conduct any proceeding to adopt, amend, or repeal a regulation using notice and comment rulemaking procedures, without an evidentiary hearing, except with respect to a regulation being amended or repealed that was adopted after an evidentiary hearing, in which case the parties to the original proceeding shall retain any right to an evidentiary hearing accorded by Section 1708." (§ 1708.5, subd. (f); see also § 1701.3, subd. (a) [right to oral argument applicable only in ratesetting proceedings].)

In its Rehearing Denial, the Commission asserted that LIRA I "is not a ratesetting proceeding and we did not set rates for any utility." (1JA at 142.) The Public Utilities Code and the Commission's own Rules show that this is incorrect. Section 1701.1, subdivision (d)(3) defines ratesetting cases to include not only general rate cases and performance-based ratemaking, but also "other ratesetting mechanisms." The Commission Rules define "Ratesetting proceedings" as "proceedings in which the Commission sets or investigates rates for a specifically named utility (or utilities), *or establishes*

a mechanism that in turn sets the rates for a specifically named utility (or utilities)." (4JA at 862; Cal. Code Regs., tit. 20, § 1.3, subd. (g), emphasis added.) The WRAM/MCBA is a mechanism that, when implemented, sets the rates for specific utilities. Its elimination is thus a ratesetting action that cannot properly be ordered in a quasi-legislative proceeding.

The Commission faulted the Petitioners for failing to challenge the categorization of the proceeding, claiming the Petitioners had the opportunity to do so when the ALJ issued her final ruling in September 2019. Specifically, the Commission asserted that in CWA's comments on the ALJ's Final Ruling, CWA "declined to seek rehearing on categorization within 10 days. The parties may not now challenge the categorization of the proceeding." (1JA at 145.)[19] The ALJ, however, is not authorized to expand the scope of the proceeding; only the assigned commissioner may do so by issuing an amended scoping memo. (§ 1701.1, subds. (b)(1), (c) [both expressly providing that the "assigned commissioner . . . shall prepare and issue by order or ruling a scoping memo that describes the issues to be considered"].) As such, CWA had no reason to think that the scope of the proceeding was being changed in a way that would conflict with the proceeding's categorization.

Moreover, the Commission's position would put the onus on the Petitioners to challenge the categorization of LIRA I before they were aware of the need to do so, because the ALJ's Final Ruling asked whether

[19] By contending it was the ALJ's Final Ruling that put a burden on the Petitioners to challenge the original categorization of LIRA I, the Commission essentially argued that it was the ALJ's Final Ruling that brought the WRAM/MCBA into LIRA I's scope. But this contradicts the Commission's claim that "[t]he issue of the decoupling WRAM was included in the Original Scoping memo as part of the water sales forecasting issue" (1JA at 118), and the ALJ's inclusion of a new issue in LIRA I would constitute an illegal expansion of the proceeding's scope.

the Commission should consider modifications to the WRAM/MCBA in some *future* GRC or other proceeding. (See Part I.D, *supra*.) Once a proceeding is characterized as quasi-legislative, the Commission is prohibited from taking specific ratesetting actions unless it first complies with the necessary procedural protections for such type of actions. Because the Commission categorized LIRA I as quasi-legislative, the parties reasonably understood it would *not* be resolving specific ratesetting actions in LIRA I. Thus, there was no reason to challenge the original categorization, either at the proceeding's outset or after the ALJ's Final Ruling.

Were it otherwise, the Commission could always circumvent due process protections by categorizing a proceeding as quasi-legislative and later (1) introducing ratesetting actions without prior notice after the time for challenging the categorization has passed, (2) failing to establish the evidentiary record required to support ratesetting actions, and (3) incorporating "legislative facts" as *post hoc* rationalizations for its orders, as it has done here. (1JA at 178.) Such a rule would violate the Commission's due process obligation to provide "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." (*Pac. Gas & Elec. Co. v. Public Utilities Com*. (2015) 237 Cal. App. 4th 812, 859.)

Nothing prevented the Commission from bifurcating LIRA I and recategorizing a subsequent phase as ratesetting, to afford the Petitioners due process and to develop an adequate record.[20] By issuing the Revocation

[20] In the Commission's original proceeding investigating policies to achieve water conservation objectives for Class A water utilities, after the OII preliminarily categorized the proceeding as ratesetting, the scoping memo (footnote continued)

Order in a quasi-legislative proceeding, the Commission failed to follow statutory requirements and its own Rules to the Petitioners' prejudice, and thereby failed to regularly pursue its authority. The Revocation Order should be vacated.

IV. By Revoking the WRAM/MCBA Without Establishing a Record that Supported Revocation, the Commission Failed to Regularly Pursue Its Authority

The Court should vacate the Revocation Order because an agency action lacking evidentiary support cannot stand. (*Cal. Hotel and Motel Ass'n v. Indus. Welfare Com.* (1979) 25 Cal.3d 200, 212.) The Court "must ensure that an agency has adequately considered all relevant factors, and has demonstrated a rational connection between those factors, the choice made, and the purposes of the enabling statute." (*Ibid*.) Because the Commission failed to provide the notice and opportunity for hearing that sections 1708 and 1708.5, subdivision (f) and Constitutional due process require, the record on which the Commission based the Revocation Order lacks the required evidentiary support.

A. The Commission Relied on a Single Piece of Evidence that the Petitioners Had No Opportunity to Refute

Although the Commission claimed that it "evaluated the sales forecasting processes used by water utilities and concluded that the WRAM/MCBA had proven to be ineffective in achieving its primary goal of conservation" (1JA at 115), the Commission's only finding that arguably

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subsequently set two phases for the proceeding. The first, categorized as ratesetting, would consider "rate-related conservation measures," and the second, categorized as quasi-legislative, would consider "non-rate design conservation measures." (4JA at 818-819.)

supports that assertion is Finding of Fact #14, which relied solely on the graph that PAO submitted in its last set of reply comments. Based on that graph, the Commission asserted that, "Conservation for WRAM utilities measured as a percentage change during the last 5 years (2012-2016) is less than conservation achieved by non-WRAM utilities, including Class B utilities as evidenced in water utility annual reports filed from 2008 through 2016." (1JA at 148 (Finding of Fact #14).) The Petitioners never had any opportunity to provide evidence refuting PAO's graph, which failed to include any data or underlying methodology (2JA at 493), because PAO inserted its graph into the record in their last set of reply comments before the Commissioner issued her Proposed Decision.[21]

In their comments on the Proposed Decision, the WRAM Utilities disputed that PAO's graph demonstrated that the WRAM/MCBA had proven to be ineffective in promoting conservation and explained that the graph misinterpreted their data. For example, Golden State's comments identified three fatal flaws in PAO's graph,[22] which evinced that the graph

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[21] The Rehearing Denial asserts that the Petitioners "could have filed a motion to strike the graph or a motion requesting the opportunity to respond to the graph." (1JA at 127.) Because changes to the WRAM/MCBA were not within LIRA I's scope, however, the Petitioners had no reason to know that any such action was warranted and cannot be faulted for not having done so.

The Court of Appeal stated in *Edison*, "We cannot fault the parties for failing to respond to the merits of proposals that were not encompassed in the scoping memo absent an order amending the scope of issues to include the new proposals." (*Edison*, *supra*, 140 Cal.App.4th at p. 1106.) The Court should conclude the same in this case.

[22] The three flaws identified by Golden State are as follow:

First, PAO's graph compared the annual rate of change without considering cumulative effects over time. During the most indicative six-year period covered by the graph, the reduction in usage per customer for (footnote continued)

did not support PAO's (and the Commission's) conclusions (3JA at 554-557). The last-minute injection of PAO's graph into the record meant that the Commission did not consider the flaws in PAO's graph prior to issuance of the Proposed Decision. And the Commission disregarded the WRAM Utilities' comments on the Proposed Decision as untimely.

The issue is not, as the Commission asserted, that the Petitioners "simply disagree with the way the Commission weighed the evidence" (1JA at 131), but that the Commission's statutory and constitutional due process violations prevented the Petitioners from presenting evidence to show the flaws in PAO's graph. When reviewing a Commission decision under subsection (a)(4) of Section 1757 (requiring that the Commission's findings be supported by substantial evidence in light of the whole record), the court of appeal has held that the Commission may not rely solely on disputed hearsay evidence to support a finding of fact. (*Utility Reform Network v. Public Utilities Com.* (2014) 223 Cal.App.4th 945, 962 (*TURN*).) The Commission's reliance on PAO's chart in LIRA I was akin to its improper reliance on hearsay evidence in *TURN* because neither was subject to cross-examination (*Id*. at 957).

WRAM utilities was almost 30% greater than for M-WRAM utilities. (3JA at 554-555.)

Second, for the two years in which M-WRAM customers significantly reduced consumption, they were subject to mandatory conservation orders; conservation outcomes of WRAM utilities were materially better than those of the M-WRAM Utilities once those orders were lifted. (3JA at 555-556.) PAO's graph, at best, showed only that mandatory conservation orders reduce water usage.

Third, during the two years when M-WRAM customers curtailed consumption, three of the four M-WRAM utilities used revenue decoupling mechanisms that effectively turned their M-WRAMs into full WRAMs. PAO's graph therefore provided no evidence of the relative effectiveness of M-WRAMs versus WRAMs for promoting conservation. (3JA at 556-557.)

In this case, the Court should follow the reasoning from *TURN* and hold that the Commission's reliance on a single piece of evidence that the Petitioners were denied any opportunity to refute constitutes a failure of the Commission to regularly pursue its authority under subdivision (b) of section 1757.1. Such a holding would be consistent with the legislature's determination that the Commission fails to regularly pursue its authority when it "violates any right of the petitioner under the Constitution of the United States or this state" (§ 1757.1, subd. (b)), because, but for the due process violations, there would be evidence in the record relevant to the Revocation Order other than PAO's chart. Such a holding would also be consistent with the jurisprudence pre-dating the 1998 enactment of section 1757.1, subdivision (b), when the "regularly pursued its authority" standard governed review of all Commission decisions and the Court concluded that the Commission's adoption of rate mechanisms in the absence of appropriate findings and evidentiary support violated that standard. (*Cal. Manufacturers Assoc. v. Public Utilities Com.* (1979) 24 Cal. 3d 251.)

B. The Decision Relies on Obsolete Data and Makes Findings that Have No Factual Basis in the Record

The problems with the Commission's purported factual basis for the Revocation Order go beyond the flawed PAO graph. To satisfy the requirement for findings of fact, the Commission also relied on outdated 2010-2012 WRAM balance data from a different proceeding to include in the Decision findings of fact that have no evidentiary basis in LIRA I's record. Specifically, the Commission attempted to justify its Revocation Order on "substantial under-collections" of the WRAM Utilities associated

with the WRAM/MCBA and related "intergenerational transfers."[23] (1JA at 55, fn. 28; 105-106.) But the underlying data cited for that finding was a decade old (See fn. 13, *supra*) and no longer accurate when the Commission issued the Decision.

In their comments on the Proposed Decision, several WRAM Utilities demonstrated that if the Commission had considered current WRAM balance data, that record would have demonstrated significant changes. For example, Liberty's comments included a table showing that, although there were significant under-collections recorded in the WRAM/MCBA from 2009 through 2014, they had dramatically diminished in recent years. Liberty's recent under-collections represented a small percentage of its revenues, and its balance for 2018 was an over-collection that it refunded to customers. (3JA at 567-568.) Similarly, Golden State's comments explained that its WRAM under-collections had generally declined, and in several years, it too had issued refunds to its customers. (3JA at 558.)

In its Rehearing Denial, the Commission attempted to justify its use of obsolete data by arguing the Decision "also cites to two later decisions, D.13-05-011 and D.16-12-026." (1JA at 128.) But those citations were to general statements about public perceptions and confusion about how the WRAM works, not to data about WRAM balances and under-collections.[24]

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[23] "Intergenerational transfers" may occur if customers move in or out of a utility's service territory, such that the customers paying WRAM surcharges or receiving WRAM surcredits were not customers during the associated water usage period.

[24] With regard to Decision 13-05-011, the Commission cites to a statement that "customers perceive [the WRAM] as a punishment for conserving water." (1JA at 64, fn 43.) With regard to Decision 16-12-026, the page cited by the Commission discusses "problems with communicating with water utility customers about the WRAM/MCBA mechanism, its purposes, (footnote continued)

Moreover, in Decision 16-12-026, the Commission decided that the WRAM Utilities should continue to use the WRAM/MCBA. The Commission never explained in LIRA I how evidence that supported *upholding* the WRAM in 2016, somehow supported revoking it in 2020.[25]

In sum, the Commission's failure to include the WRAM/MCBA in LIRA I's Scoping Memos led the Commission to issue the Revocation Order without establishing a record that supported the revocation, despite the Commission's acknowledgment that revocation of the WRAM/MCBA would have significant implications for the WRAM Utilities and their customers. (1JA at 75.) In so doing, the Commission failed to regularly pursue its authority, such that the Court should vacate the Revocation Order.

V. The Commission Violated Section 321.1, Subdivision (a), by Failing to Consider the Impact of Revoking the WRAM/MCBA on Low-Income Customers

Section 321.1, subdivision (a) provides: "It is the intent of the Legislature that the commission assess the consequences of its decisions,

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methodology and why it is necessary" and that customers are frustrated and continue to ask why their bills do not decrease when they consume less water. (D.16-12-026, 2016 Cal. PUC LEXIS 682 at *56.)

[25] The Commission cites a 2016 decision for the statement that "[t]he record of substantial WRAM balances or surcharges imposed over months or years on Class A and B water IOUs customers due to mismatches between authorized revenue and sales demands action now to better align forecasted rates to recorded sales." (1JA at 119-120 (citing D.16-12-026 at p. 37).) But in that decision, the Commission concluded (after examining extensive evidence) that the solutions to the identified problem included improving water forecasting methodologies, which the Commission set out to do in LIRA I, *and that the WRAM/MCBA should continue to be used*. (D.16-12-026, 2016 Cal. PUC LEXIS 682 at *129-130 (Ordering Paragraph #2), *127 (Conclusion of Law #4).)

including economic effects . . . as part of each ratemaking, rulemaking, or other proceeding." The legislature's intent is evident from the statute's plain language; no special expertise is needed to understand its requirements. The Commission had a statutory duty under section 321.1, subdivision (a) to consider the economic effects of revoking the WRAM/MCBA. Even though the Commission was supposed to consider affordability and assisting low-income customers in LIRA I, it did not pose a single question about the economic effect of revoking the WRAM/MCBA on low-income, or any other, customers.

The Commission asserted in the Rehearing Denial that section 321.1, subdivision (a), "does not require the Commission to perform a cost benefit analysis or consider the economic effect of its decision on specific customer groups or competitors." (1JA at 140.) The issue is that the Commission did nothing to assess the economic effects of the Revocation Order on *any* customers. Although particularly troubling in the context of a proceeding in which the Commission was supposed to consider affordability and assisting low-income customers, the Commission's failure to consider the economic effects of revoking the WRAM/MCBA would be legal error in any proceeding. (See *U.S. Steel Corp. v. Pub. Util. Com.* (1981) 29 Cal.3d 603, 615 [annulling decision where the Commission failed to assess the economic impact of its action]; See also *Cal. Manufacturers Assoc. v. Public Utilities Com.* (1979) 24 Cal. 3d 251, 259-260 [annulling decision for lack of sufficient findings regarding the effect that the adopted plan for spreading a rate increase would have on gas conservation].)

Recognizing the Commission's failure to have considered the consequences of the Revocation Order, Commissioner Randolph warned that the order is likely to have negative economic effects on low-income customers. Specifically, she recognized that the WRAM Utilities would

need to change their rate designs to have higher services charges and flatter tiers or otherwise "face a very real risk of not meeting their revenue requirement," and that this outcome "is exactly opposite of this proceeding's intent by harming low-income customers." (1JA at 112.)

Because of the relationship between the WRAM's revenue decoupling and progressive rate designs that benefit low-income customers, stakeholders had raised these very issues,[26] but they only had an opportunity to do so in comments on the Proposed Decision, after the record was closed. Those stakeholders included former Commissioner Sandoval, who had been the assigned Commissioner for the rulemaking that resulted in Decision 16-12-026, which in 2016 approved continued use of the WRAM/MCBA. (JA1 at 202; D.16-12-026, 2016 Cal. PUC LEXIS 682, **62-64.) She identified the Commission's failure in LIRA I to litigate the impacts of the Revocation Order, noting that, with no opportunity to investigate the impacts on all affected customers, the Proposed Decision "lacks the record foundation to support its order to switch from a WRAM to a Monterey-Style WRAM and fails to investigate the affordability impacts of this proposal." (4JA at 868.) The WRAM Utilities and others filed comments on the Proposed Decision stating that, without the WRAM, rate design changes are unavoidable and likely to be detrimental to low-income customers for the very reasons Commissioner Randolph identified in her dissent.[27]

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[26] As noted above, CWA represents both water utilities that use the WRAM and utilities that use the M-WRAM and does not take a position on the relative merits of one mechanism versus the other.

[27] Cal Water stated, "If provided the opportunity, Cal Water can present data demonstrating that the rate designs of companies *without* decoupling currently collect a higher percentage of revenues from service charges, as compared to companies *with* decoupling."(3JA at 533, fn 9.) Golden State (footnote continued)

Dismissing these concerns, the Commission chose not to reopen the record to take evidence on the economic effects of the Revocation Order for low-income customers and merely asserted that "water utilities can and will propose rate structures in their next GRC applications where the Commission will ensure low-income and low-use customers are not adversely impacted." (1JA at 71.) Although the Commission need not reach any particular conclusion on the impact of revoking the WRAM/MCBA on low-income customers, it must establish a sufficient record before it makes its determination. In LIRA I, the Commission failed to do so.

In the Rehearing Denial, the Commission also asserted that it discharged its duty under section 321.1, subdivision (a), because there was no evidence in the record that eliminating the WRAM will raise low-income customers' rates. (1JA at 141.) The Commission thus claimed that it considered the economic effects on low-income customers because there was no evidence in the record that low-income customers will be harmed. But there was no such evidence in the record because the Commission conducted no inquiry regarding the consequences of the Revocation Order on low-income customers. The Commission's own failure to develop a record cannot release the Commission of its statutory obligation to assess the consequences, including economic effects, of its decisions on customers.

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discussed how elimination of the WRAM/MCBA would likely result in a higher cost of capital that would flow through to all utility customers, including low-income customers, and how converting to an M-WRAM/ICBA may be detrimental to low-income customers in particular, because an M-WRAM design typically includes higher monthly service charges and tiered rate structures that affect affordability for low-income customers, who tend to be low use customers. (3JA at 552A-552B.)

CONCLUSION

For all of the foregoing reasons, the Court should vacate the Revocation Order.

Respectfully submitted,

September 1, 2022

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Appendix A

Issues Presented

The complete text of the issues presented as set forth in the Petitions and the Answer are as follow:

1. Whether the Commission failed to follow the Public Utilities Code and its own rules concerning the scope of issues to be addressed in the proceeding to the prejudice of [the petitioners], and thereby failed to regularly pursue its authority.
2. Whether the Commission failed to consider all of the facts that might bear on its decision to eliminate the WRAM/MCBA, and thereby failed to regularly pursue its authority.
3. Whether the Commission failed to support its findings and conclusions with respect to the elimination of the WRAM/MCBA, and thereby failed to regularly pursue its authority.

(1JA at 151.)

4. Whether the Commission, by considering the [Commission's Public Advocates Office's] proposal to require the WRAM Utilities to discontinue use of the WRAM/MCBA and issuing the Prohibition Order, which adopted a modified version of that proposal, exceeded the defined scope of the Rulemaking in violation of Section 1701.1(c) and its own rules, and thereby failed to regularly pursue its authority.

(1JA at 171.)

5. Whether the Commission failed to regularly pursue its authority by not providing adequate notice and a meaningful opportunity to be heard (including an evidentiary hearing) before issuing the

Revocation Order in violation of [the utility petitioners'] right[s] to due process under the United States and California Constitutions.

6. Whether the Commission failed to regularly pursue its authority by miscategorizing this proceeding as a quasi-legislative proceeding instead of a ratesetting proceeding, depriving [the utility petitioners] of the procedural protections associated with that categorization in violation of [the utility petitioners'] right[s] to due process under the United States and California Constitutions.

(1JA at 156.)

7. Whether the Commission's failure to provide adequate notice and an opportunity to be heard, including an evidentiary hearing, before issuing the Revocation Order violated [the utility petitioners'] due process rights under the United States and California Constitutions (a failure of the Commission to regularly pursue its authority).

8. Whether the Commission abused its discretion by adopting the Revocation Order without developing an adequate evidentiary record, providing an opportunity for parties to present contrary evidence, or considering the impacts of that order on low-income customers (the subject of the proceeding), and thereby failed to regularly pursue its authority.

(1JA at 162, 168.)

9. Is the Commission's discontinuation of the WRAM/MCBA within the scope of the proceeding?

10. Did the Commission afford the parties due process?

11. Is the Decision supported by record evidence?

12. Did the Commission consider the impact of its decision on conservation and low-income customers?

13. Did the Commission properly characterize the proceeding as quasi-legislative?

(1JA at 174.)

CERTIFICATE OF COMPLIANCE

Pursuant to California Rule of Court 8.520(c), I certify that the foregoing Opening Brief on the Merits is proportionately spaced, has a typeface of 13 points, and contains 13,524 words, according to the word processing program with which it was prepared.

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Executed on September 1, 2022 in San Francisco, California.

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STATE OF CALIFORNIA
Supreme Court of California

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ADDITIONAL DOCUMENTS	Vol. 2 Appendices Q-W to Opening Brief 4894-8041-0672 v.3
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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

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