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April 1, 2022

Honorable Tani Cantil-Sakauye, Chief Justice
Honorable Associate Justices
Supreme Court of California
350 McAllister Street
San Francisco, California 94102

Re: Reply Letter of Amicus Curiae National Association of Water Companies in Support of Petition for Review: *California-American Water Company, California Water Association California Water Service Company, Liberty Utilities (Park Water) Corp Liberty Utilities (Apple Valley Ranchos Water) Corp, Petitioners v. Public Utilities Commission of the State of California, Respondent*, Case No. S271493

Dear Chief Justice Cantil-Sakauye and Associate Justices of the Court:

Pursuant to California Rule of Court 8.500, subdivision (g)(1), the National Association of Water Companies (“NAWC”) submits this letter in response to the Answer of Respondent to Petitions for Writ of Review filed by the California Public Utilities Commission (“Commission,” “CPUC,” or “Respondent”), in Case No. S269099 and Case No. S271493, challenging CPUC Decision Nos. 20-08-047 and 21-09-047.

Interest of NAWC in the Petitions for Review Before the Court

As set forth in the amicus letter that NAWC submitted to the Court on December 9, 2021 (“NAWC Amicus Letter”), NAWC is national trade association that represents regulated water and wastewater companies, as well as those engaging in partnerships with municipal utilities. NAWC is comprised of 42 members that provide water service to 73 million Americans in 37 states across the country. Its members share a deep understanding of the importance of uninterrupted delivery of quality water and wastewater services and, accordingly, seek to advance both the conservation of water and the economic stability of water providers.

This proceeding and the issue of the water revenue adjustment mechanism/modified cost balancing account (“WRAM/MCBA”) are of critical importance for NAWC and its member companies, as other states often look towards

California for leadership on innovative water conservation policies. NAWC is concerned with the CPUC's proposal to eliminate the WRAM/MCBA because the issue was not identified as part of the scope of this proceeding, thus preventing interested parties like NAWC from participating in the CPUC's consideration of this issue.

Background

On December 9, 2021, NAWC filed the NAWC Amicus Letter in support of the Petitions for Review filed by the California-American Water Company, the California Water Association, the California Water Service Company, the Liberty Utilities (Park Water) Corp., and the Liberty Utilities (Apple Valley Ranchos Water) Corp. (collectively, "Petitioners"). NAWC urged the Court to grant the Petitions for Review arguing that, without providing the notice and hearing required by law, the CPUC rescinded a fifteen-year-old rate adjustment mechanism that advanced water conservation by California water users while protecting the financial stability of the regulated water utilities providing that water. The NAWC Amicus Letter pointed out that:

Both the Petitioners and NAWC are caught between (1) the limited access to judicial review embraced in Section 1756, subdivision (f) and (2) the absence of the "traditional CPUC regulation" that formed the predicate for the enactment of Section 1756, subdivision (f) in 1998. (See also, Pub. Util. Code, §§ 1757, subd. (c) and 1757.1, subd. (b) [establishing a scope of review of Commission decision related to water companies that differs from that applicable to Commission decisions affecting other water companies].) (NAWC Amicus Letter at p. 6.)

On January 28, 2022, the CPUC filed an answer addressing the Petitions for Review ("CPUC Answer"). The Answer stated that it was submitted with respect to the above captioned Petitions for Review. (Answer, pp. 7-8.) Four pages of the CPUC Answer, however, are devoted to the NAWC Amicus Letter (Answer, pp. 34-37). The Answer concluded that "NAWC . . . has failed to show that it was prejudiced by that decision [to limit NAWC's participation only to Phase II]." (CPUC Answer at p. 37.) NAWC files this reply letter to narrowly respond to the portions of the Answer that reference the NAWC Amicus Letter.

By Law, NAWC's Understanding Of What Is At Issue In The Proceeding Is To Be Derived From The Text Of The Scoping Memo, And Not Based on Assumptions About Communications Between NAWC And Its Members.

The CPUC Answer states that because "NAWC's members were participants in the proceeding . . . [NAWC] should have been well aware that the September 2019 ALJ Ruling Inviting Comments had requested comments on the Commission's discontinuation of the WRAM." (CPUC Answer at p. 34.) The CPUC argues that NAWC could have requested party status at that time, instead of one year later after the

issuance of the Proposed Decision. (*Ibid.* [referencing the *Proposed Decision of Commissioner Guzman Aceves* (July 6, 2020)].)

While Petitioners are members of NAWC, it is incorrect to characterize NAWC and the Petitioners as essentially the same party, charged with concurrent notice and knowledge of proceedings before the CPUC. The fact that an NAWC member is a party to a state regulatory proceeding does not compel an assumption that NAWC itself shares the same understanding about the proceeding, or even has the same interest in the proceeding as the member utility.

NAWC sought party status in this CPUC proceeding because it brings a unique perspective to the proceeding. Decoupling mechanisms, like the WRAM/MCBA, are viewed by NAWC as a national best practice for water utilities and a valuable tool to aid customers and protect the environment. The CPUC's decision to eliminate the WRAM/MCBA in California could have national ramifications. Other states look to California as a leader in water conservation policy and the CPUC's discontinuance of the WRAM/MCBA could influence other state utility commissions decisions to discontinue or not adopt similar mechanisms. NAWC, through its work in a variety of states and jurisdictions, can speak to this and share a fresh viewpoint that is different from that of the Petitioners.

As soon as NAWC learned from the Proposed Decision that the CPUC was considering rescinding the WRAM/MCBA, it sought to participate in the manner provided by the Legislature in Section 1701.1 *et seq.* of the Public Utilities Code, statutory provisions the Petitioners submit were contravened by CPUC Decision Nos. 20-08-047 and 21-09-047. Had the Commission clearly stated in the order initiating the rulemaking, or in one of the three scoping memos in the proceeding, that it was considering eliminating the WRAM/MCBA, as is required by Public Utilities Code Section 1701.1, subdivisions (b)–(c), NAWC would have become a party earlier and this point would be moot. However, as the Petitioners have accurately pointed out, such was not the case. Instead, the CPUC is attempting to cure its failure by arguing that NAWC should be charged with knowledge—“should have been well aware”—of rulings issued to NAWC members long after the scoping memos were issued. (CPUC Answer at p. 34.) But given that, by law, scoping memos dictate the issues in a proceeding, it is irrelevant what NAWC did (or did not) know based on communications with its members.

Indeed, the CPUC's argument that NAWC “should have been well aware” of the September 2019 ALJ ruling is not only irrelevant, but also reflects a substantial misunderstanding of how national trade associations function. NAWC works diligently to stay apprised of the proceedings before various state public utility commissions in which its members participate. However, NAWC is a national association comprised of

42 regulated utilities and contract operators that operate in 37 states across the country.¹ The California chapter of NAWC is one of 11 state chapters.² At any one time, NAWC members are involved numerous proceedings before state public utility commissions and other bodies across the country. It is impossible for NAWC to have intimate and detailed knowledge of every proceeding in every state in which NAWC members participate.

This rulemaking proceeding has been ongoing on since June 2017 and was one of a dozen initiated by the CPUC the same year. It is not reasonable for the CPUC to expect non-parties to proceedings—particularly complex rulemakings such as this one—to follow every CPUC issuance just in case a new issue of import may emerge. (Cf. *Southern California Edison v. Cal. Pub. Util. Comm.* (2006) 140 Cal.App.4th 1085 [noting that the Legislature sharply limited the emergence of new issues late in a proceeding when it enacted Section 1701.1, subds. (b)–(c)].) When the CPUC launched the rulemaking, the Order Instituting Rulemaking (“OIR”) stated that its purpose was “to evaluate the Commission’s objective of achieving consistency between Class A water utilities’ low-income rate assistance programs, evaluate affordability, and providing rate assistance to all low-income customers of investor-owned water utilities.” (Proposed Decision at p. 4.) The OIR divided Phase I “into two sub-phases: a) consolidation of low-income water assistance programs; and b) Commission jurisdiction over other water companies.” (Rulemaking 17-06-024 (June 29, 2017) at p. 13.) It was devoid of any reference to the WRAM/MCBA.

NAWC did not intervene in the rulemaking upon its initiation because the stated issues, while extremely important, were California-focused and not ones that had ramifications for the majority of NAWC members.

During the three-year course of this rulemaking, the Assigned Commissioner and CPUC staff issued three scoping memos, multiple ALJ rulings and staff reports, and held a series of workshops on discrete issues. Various parties submitted numerous sets of comments addressing the issues presented. (Proposed Decision at p. 4 [summarizing the extensive procedural history of Rulemaking 17-06-024 and noting the three scoping memos in this rulemaking: January 9, 2018 Scoping Memo; July 9, 2018 Amended Scoping Memo; and June 2, 2020 Second Amended Scoping Memo; *id.* at pp. 4–10 (noting the five workshops held between August 2017 and August 2019)].) The CPUC suggests that if NAWC wanted to provide input on the future of the WRAM/MCBA—an issue that was not clearly set forth in *any* of the scoping memos—NAWC should have, or (through its members) simply must have, remained abreast of all developments in the rulemaking (including the 2019 ALJ Ruling) *after the issuance of the scoping memos.*

¹ NAWC website at <https://nawc.org/about-2/our-members/active-members/>. At page 36 of its Answer, the “Commission respectfully requests that the Court take judicial notice of NAWC’s website pages identified above, as permitted under Evidence Code section 452, subdivision (h).”

² *Id.* at <https://nawc.org/chapters/>.

(CPUC Answer, at p. 34). That is precisely the level of engagement of which the Legislature sought to relieve parties when it statutorily required scoping memos. The CPUC's suggestion that NAWC should have known the WRAM/MCBA was at issue by communicating with its members is irrelevant to, and does not cure, the CPUC's failure to clearly state as much in the scoping memo.

NAWC Was Not Required To Identify a Specific Phase To Which it Sought to be a Party

The CPUC Answer argues it was not clear that NAWC sought to be a party to Phase I of the proceeding. (CPUC Answer at p. 35.) The CPUC states that NAWC's motion for party status never mentioned Phase I, filing comments on the Proposed Decision, or the issue of the WRAM/MCBA and that NAWC's references to Covid-19 indicated it was interested in participating in Phase II. (*Ibid.*)

The CPUC is correct that NAWC did not specify which phase of the proceeding it wanted to join in its request for party status. (*The National Association of Water Companies' Motion for Party Status* (July 21, 2020).) However, there was no reason NAWC should have known that it needed to identify a particular phase when filing its request for party status, nor is there any statutory requirement that it do so. (See, e.g., Sections 1706, 1708, and 1731, subd. (b)(1) [other statutory requirements setting forth the rights of "parties" are devoid of any reference to phases].) Phasing proceedings is not a uniform practice by the CPUC. Generally, an entity interested in a CPUC proceeding files a request for formal party status in that proceeding and doing so provides notice to the CPUC and other parties that the entity would like to participate in the entire proceeding. NAWC is not aware of any CPUC communications in this proceeding stating that parties needed to identify in which phase they sought to participate when filing a request for party status. Thus, there is no way NAWC could have known this was a prerequisite to having its position heard on the future of the WRAM/MCBA.

Any uncertainty about in which phase NAWC wished to participate is resolved by reference to the procedural schedule. When NAWC filed its request for party status on July 21, 2020, shortly after the issuance of the Proposed Decision, the next deadline in the proceeding called for comments on the Proposed Decision by July 27, 2020. (Rule 14.3 of the Commission's Rules of Practice and Procedure [stating that "Parties may file comments on a proposed or alternate proposed decision within 20 days of the date of its service on the parties."].) It does not make sense that NAWC would request party status in a proceeding, only to not participate in the next major milestone in the case.

Additionally, it became abundantly clear that NAWC's intent was to participate in Phase I when NAWC timely filed initial comments to the Proposed Decision on July 27, 2021, six days after it filed a request for party status, and the same date as all other commenters and parties to Phase I. (*Comments of the National Association of Water Companies on the Proposed Decision of Commissioner Guzman Aceves* (July 27, 2020).) The fact that the CPUC accepted NAWC's timely filed initial comments on the Proposed

Decision (“Comments”)—which was part of Phase I—demonstrates the CPUC clearly understood that NAWC intended to participate in Phase I of the proceeding.

It was not until August 27, 2020, a month after NAWC timely filed its Comments and over three weeks after NAWC timely filed its Reply Comments, that the CPUC issued a ruling titled “E-Mail Ruling Granting Party Status To National Association Of Water Companies” but textually only granting NAWC “party status to participate in Phase II of this proceeding.” Two weeks later, September 8, 2020, the CPUC’s Administrative Law Judge Division advised NAWC, by email, that its Comments and Reply Comments “should not have been accepted and . . . [are] . . . therefore REMOVED from the filing record. The Comments and Reply Comments on the Phase I Proposed Decision are not accepted for filing and are not a part of the record in the Proceeding.”

By way of explanation, the CPUC now states that when NAWC filed its request for party status, “Phase I of the proceeding had been submitted and the Proposed Decision had been issued.” (CPUC Answer at p. 35.) It is difficult to understand how the issuance of the Proposed Decision stood as a bar to party status. Only two weeks prior to NAWC’s request for party status, the CPUC granted party status to the Eastern Municipal Water District (“EMWD”) and the Natural Resources Defense Council (“NRDC”). Nothing of note happened in the proceeding in the intervening two weeks that would distinguish NAWC from EMWD or NRDC. All three applicants were granted party status after the issuance of the Proposed Decision. Both the NRDC and NAWC filed Opening and Reply Comments on the Proposed Decision.³ However, only NAWC received notice from the CPUC that it was denying NAWC party status for Phase I and rejecting its opening comments and reply comments.

The Proposed Decision on which NAWC sought to comment was not a final decision, but a *proposed* decision, the publication of which is intended to seek comments with respect to its content, desirable input since no public evidentiary hearings were held in this rulemaking. At no point did NAWC request an extension of time to file comments, or ask for the CPUC to set aside submission and open the record on prior issues or rulings in this proceeding. Rather, NAWC timely filed its opening and reply comments on the Proposed Decision on the same day as all other parties to the proceeding, causing no undue prejudice or delay.

There is no statutory requirement that a party identify a specific portion of a proceeding when its requests party status. NAWC’s exclusion from the proceeding cannot be justified on that basis and does not cure the Commission’s failure to, through a scoping memo, properly apprise NAWC, Petitioners, and the public of the issues to be resolved in the proceeding.

³ As required by Section 311.5, subd. (b)(5), the Docket card for R. 17-06-024 is found at:

<https://apps.cpuc.ca.gov/apex/f?p=401:57:0:::>

The Fact That Members of NAWC Were Parties to the Proceeding Does Not Cure the CPUC's Failure to Consider NAWC's Views

The CPUC states that regardless of the reason NAWC was not a party to Phase I of the proceeding, it has failed to show that it was prejudiced by that decision. (CPUC Answer at p. 37.)

NAWC was prejudiced in that it was not able to provide a national perspective on the importance of decoupling mechanisms in this rulemaking proceeding. Despite the CPUC's assertion, NAWC's interests in state regulatory proceedings, such as the one at issue here, are not duplicative of an individual utility's interests, even if the utility is an NAWC member. NAWC is a national association the focus of which extends beyond the day-to-day operations of a particular utility, and instead concentrates on the large-scale impact of proceedings, either state-wide or nationally. NAWC is advocating for the interests of America's water companies when it files comments in state regulatory proceedings, and those viewpoints should be considered by the CPUC, separate from any individual utility's comments.

The CPUC's failure to "describe . . . the issues to be considered" in the scoping memos, as statutorily required, prevented NAWC from participating in the rulemaking. There is no greater prejudice than to be entirely excluded from a proceeding and to not be heard. NAWC, the CPUC argues, should have known that the WRAM/MCBA was at issue because of what NAWC must have heard from its members. However, by law, what NAWC knew (or should have known) about the scope of the proceeding is to be derived from the text of the scoping memos, and not based on assumptions about communications between NAWC and its members.

As a result of the CPUC's failures—both with respect to the scoping memo and the decision to arbitrarily bar NAWC from this proceeding—the record did not contain the perspective of the water companies that are not a party to the proceeding and have an interest in encouraging decoupling mechanisms as a national best practice.

Finally, as noted at the outset, this Reply Letter is filed solely to respond to the CPUC's election to devote portions of its Answer to NAWC's Amicus Letter. NAWC is not a Petitioner. The CPUC's explanation of why it believes NAWC was not prejudiced, however, sheds considerable light on how the Petitioners were prejudiced. NAWC, the CPUC argues, should have known that the WRAM was at issue because of what NAWC must have heard from its members, rather than pointing to what NAWC would glean from reading the scoping memos. Yet the Legislature has left no room for misunderstanding. The scope of a CPUC proceeding is that formally set out in the scoping memo.

Conclusion

NAWC urges the Court to grant the Petitions for Writ of Review, set aside the decisions under review, and remand the matter to the CPUC for proceedings in which the affected water utilities may (1) introduce evidence in support of the retention of the WRAM/MCBA and (2) confront and rebut evidence proffered in support of a contrary outcome.

Respectfully submitted,



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PROOF OF SERVICE

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California Water Service Company, Liberty Utilities (Park Water) Corp
Liberty Utilities (Apple Valley Ranchos Water) Corp, Petitioners v. Public
Utilities Commission of the State of California, Respondent,
Case No.:S271493***

STATE OF CALIFORNIA, COUNTY OF SAN FRANCISCO

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of San Francisco, State of California. My business address is 455 Market Street, Suite 1500, San Francisco, CA 94105.

On April 1, 2022, I served true copies of the following document(s) described as **REPLY LETTER OF AMICUS CURIAE NATIONAL ASSOCIATION OF WATER COMPANIES IN SUPPORT OF PETITION FOR REVIEW** on the interested parties in this action as follows:

See Attached Service List

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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.

Executed on April 1, 2022, at San Francisco, California.

/s/ Rosa Gutierrez

Rosa Gutierrez

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STATE OF CALIFORNIA
Supreme Court of California

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STATE OF CALIFORNIA
Supreme Court of California

Case Name: **CALIFORNIA-AMERICAN WATER COMPANY v. PUBLIC UTILITIES
COMMISSION**

Case Number: **S271493**

Lower Court Case Number:

1. At the time of service I was at least 18 years of age and not a party to this legal action.
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This proof of service was automatically created, submitted and signed on my behalf through my agreements with TrueFiling and its contents are true to the best of my information, knowledge, and belief.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

4/1/2022

Date

/s/Thomas MacBride

Signature

MacBride, Thomas (66662)

Last Name, First Name (PNum)

Downey Brand LLP

Law Firm