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' OPPOSITION TO RESPONDENT'S MOTION TO DISMISS PETITIONS OR, IN THE ALTERNATIVE RECONSIDER THE ISSUANCE OF THE WRIT

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

Of the Public Utilities Commission of the State of California

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INTRODUCTION

Petitioners Golden State Water Company (Golden State), California-American Water Company (Cal-Am), California Water Service Company (Cal Water), Liberty Utilities (Park Water) Corp. and Liberty Utilities (Apple Valley Ranchos Water) Corp. (collectively, Liberty), and the California Water Association (CWA) respectfully request that the Court deny the *Respondent's Motion to Dismiss Petitions or, in the Alternative Reconsider the Issuance of the Writ* (Motion) filed by the California Public Utilities Commission (Commission). The Commission requests that the Court dismiss the petitions or reconsider its issuance of the writ because the Commission contends that Senate Bill (SB) 1469, approved by Governor Newsom on September 30, 2022, renders the petitions moot. The Commission is wrong.

The Court can provide effective, concrete and meaningful relief in this case because the new legislation merely provides an alternative remedy that is less complete than that sought by the petitions. Cal-Am, Cal Water, and both Liberty utilities have already suffered material harm as a result of the Commission decisions that are the subject of this proceeding; that harm is not remedied by the new legislation but can be remedied, at least in part, by the Court. In addition, by vacating the improper findings and conclusion purporting to support the unlawful order in the underlying Commission decisions, which are the result of substantial procedural and due process violations, the Court can prevent the Commission and other parties from relying on these erroneous findings and conclusion in future Commission proceedings that result from the new legislation. In fact, a party already has relied on these findings in a recent pleading before the Commission. Absent action by the Court, there is a material likelihood that the Petitioners will

suffer prejudice as a result of the Commission's decisions in ongoing and future proceedings.

Finally, separate from the new legislation, this case raises issues of statutory compliance and fundamental due process that are of broad public importance and impact all regulated utilities and other stakeholders who appear before the Commission. In fact, CWA's petition is based solely on the Commission's failure to comply with procedural laws and its own rules, and the likelihood that those failures will recur absent a ruling from the Court in this case. A decision from the Court holding the Commission's failures unlawful would address those issues; nothing in the new legislation does so.

For all the foregoing reasons, the Commission's Motion should be denied. Alternatively, to avoid affirming the unlawful portions of the Commission's decisions and allowing those portions to prejudice Petitioners in the future, if the Court grants the Motion, the Court should vacate the unlawful order and the findings and conclusion that purport to support it.

STATEMENT OF FACTS AND BACKGROUND

The Commission order challenged by the Petitioners (Revocation Order), issued in Decision 20-08-047 and affirmed by the Commission in Decision 21-09-047 (Decisions), prohibits the Petitioner utilities from including in their next general rate case (GRC) applications any request to continue using two ratemaking mechanisms referred to as the Water Revenue Adjustment Mechanism (WRAM) and the Modified Cost Balancing Account (MCBA). As set forth in the petitions, the Commission

(1) violated section 1701.1(c) of the California Public Utilities Code[1] and its own Rule 7.3[2] by issuing the Revocation Order without first identifying the continued use of the WRAM and MCBA as an issue under consideration in the underlying proceeding, (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 ratemaking decision, in a quasi-legislative proceeding, (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 its consequences on low-income customers or any other customers.

The WRAM and MCBA mechanisms are critically important to setting water rates that promote water conservation. The WRAM is a mechanism that tracks under- or over-collections in utility revenues due to fluctuations in water sales, 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 the revenues lost as a result of lower sales may be offset by associated cost savings.

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

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

SB 1469 becomes effective January 1, 2023 and authorizes the Petitioner utilities and other Class A water utilities (those with more than 10,000 service connections) to propose decoupling mechanisms in their triennial rate case applications. The Commission objected to the legislation. (Senate Third Reading Analysis for SB 1469 at 1.)[3]

After the Decisions were issued in LIRA I[4] and prior to the enactment of the new legislation in September of 2022, each of Cal-Am, Cal Water and both Liberty utilities filed their triennial GRC applications. The Revocation Order prohibited the four utilities from proposing in those filings to continue their existing WRAM and MCBA mechanisms. The GRCs for Cal Water and the Liberty utilities have already been submitted to the Commission for decision, and the records in those proceedings are closed. On October 10, 2022, citing the new legislation, Cal-Am filed a motion in its ongoing GRC requesting a procedural schedule that would allow consideration of a decoupling mechanism and explained therein the importance of its WRAM and MCBA mechanisms to its conservation rate design. On October 25, 2022, the Public Advocates Office at the California

[3] Simultaneously with this opposition, the Petitioners are filing a motion asking the Court to take judicial notice of (1) the Senate Third Reading Analysis for SB 1469 that identifies the Commission's objection to being required to consider authorization of decoupling mechanisms for water corporations, (2) the facts that Cal Water, Cal-Am and the two Liberty utilities filed applications for their ongoing triennial rate cases after the Commission's issuance of the Revocation Order, and (3) Cal Advocates' Opposing Response (defined below).

[4] "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*.

Public Utilities Commission (Cal Advocates),[5] which opposed SB 1469 (See Exhibit B to Motion at 6), filed a response opposing Cal-Am's motion (Cal Advocates' Opposing Response). Cal Advocates' Opposing Response provides practical examples demonstrating the reasons this case is not moot.

The Commission argues in its Motion that the Petitioner utilities could have waited to seek legislation addressing water sales revenue decoupling until the Court decided this case. (Motion at 13.) The Commission's contention ignores that the Petitioner utilities need to manage their response to the ongoing drought in real time and to act in accordance with the legislative process. The deadline for introducing bills for consideration in the current legislative session was February 18, 2022, well before the Court decided to hear the petitions. Moreover, unless the case before the Court were to conclude in early 2023, waiting for the Court's decision would have meant legislation could not be introduced until 2024 and would not become effective until January 1, 2025. Given the requirements of SB 1469 and the statutory GRC cycle under which utilities submit applications every three years, waiting for the Court's decision likely would have resulted in certain Petitioners being prohibited from filing for decoupling mechanisms until 2027. Meanwhile, the loss of the WRAM and MCBA is highly detrimental to the rate designs used by those utilities to balance water conservation objectives with efforts to keep water rates affordable for low-use customers (who tend to be low-income customers). Due to the urgency of the issue, the Petitioner utilities did not delay in asking the State Legislature to codify rights to propose revenue decoupling mechanisms, ultimately resulting in enactment of SB 1469.

[5] Cal Advocates are the consumer advocates at the Commission.

The Legislature's recognition of the importance of decoupling mechanisms as tools for implementing water conservation policies and enactment of the new legislation are positive developments. But the ability to file for decoupling mechanisms under the new legislation does not restore the Petitioner utilities to their position before the Commission issued the Revocation Order. Only action by the Court can do that.

ARGUMENT

I. SB 1469 Does Not Render the Petitions Moot Because It Provides for an Alternative Remedy that Is Less Complete than that Sought in the Petitions

The modifications to section 727.5 resulting from SB 1469 authorize the Petitioner utilities to propose decoupling mechanisms in triennial rate case applications. The new legislation does not address, much less remedy, the harm suffered by the four Petitioner utilities who had to file their GRCs before the effective date of the new legislation without their existing WRAM and MCBA mechanisms. The new legislation also does not address the prejudice likely to be suffered by the Petitioner utilities due to the Commission's flawed findings and conclusion included in the Decisions, which are the result of substantial procedural and due process violations. Because the Court can grant relief that rectifies these defects of the Decisions, the petitions are not moot.

A. The New Legislation Does Not Remedy the Harm Suffered by the Petitioners Who Filed Triennial Rate Cases with No WRAM or MCBA Mechanisms

The Revocation Order prohibits the continued use of WRAM and MCBA mechanisms by the Petitioner utilities. The Petitioners have asked the Court to eliminate that prohibition. By authorizing the Petitioner

utilities to include in their triennial GRC applications a request to implement a mechanism that separates the water corporation's revenues and water sales, the new legislation provides an alternative remedy. But that remedy falls short of the remedy that the Court still can and should grant.

Subsections (d)(2)(A) and (D) of the amended section 727.5 provide:

> (2) (A) Upon application by a water corporation with more than 10,000 service connections, the commission shall consider, and may authorize, the implementation of a mechanism that separates the water corporation's revenues and its water sales, commonly referred to as a "decoupling mechanism." [. . .]
>
> (D) The water corporation may only submit an application to the commission pursuant to this paragraph as part of its triennial general rate case application described in Section 455.2, unless the commission and the water corporation mutually agree for the application to be otherwise submitted.[6]

The Revocation Order provides:

> California-American Water Company, California Water Service Company Golden State Water 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.[7]

As a preliminary matter, the Petitioners note that the new legislation requires the Commission to consider authorization of a mechanism that

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[6] Sen. Bill No. 1469 (2021-2022) at §2 (amending Section 727.5(d) of the Public Utilities Code).

[7] 1JA at 109 (Ordering Paragraph #3).

separates a water utility's revenues from its sales. But it does not expressly require the Commission to consider allowing the five Petitioner utilities to continue their existing WRAM together with their existing MCBA, the two mechanisms that the Revocation Order states these five Petitioner Utilities may *not* apply for in their next GRC applications. In fact, because the MCBA does not separate the water utility's sales from its revenues (rather, it tracks differences between the costs actually incurred by the utility to provide water service and the costs forecasted to be incurred), the new legislation does not expressly codify a right for the Petitioners to request an MCBA.

The Commission, however, set forth its interpretation of the new legislation in its Motion, stating that the Petitioners may, in fact, request to continue both their existing WRAM and MCBA mechanics. For example, the Commission stated: "As a result of SB 1469, the water companies are now authorized to file for WRAM/MCBA protection in their future rate case applications and the Commission must consider that request." (Motion at 9-10.) The Petitioners intend to rely on the Commission's statements to the Court if they request continuation of their existing WRAM and MCBA mechanisms under SB 1469.

Nonetheless, there is a material difference between the alternative remedy afforded by SB 1469, which becomes effective on January 1, 2023, and the remedy that can and should be afforded by the Court. For those Petitioners that already filed their triennial GRC applications while prohibited by the Decisions from requesting the continued use of their WRAM and MCBA mechanisms, the new legislation does not remedy the harm already caused by the Revocation Order.

As noted above, Cal Water and the Liberty utilities have already submitted their GRCs to the Commission for decision and the records in

those proceedings are closed. If the Court determines the Revocation Order is unlawful, they would no longer be subject to the prohibition that prevented them from requesting implementation of their WRAM and MCBA mechanisms in this GRC cycle. Therefore, such a ruling would provide a tangible benefit should they seek to restore the use of their WRAM and MCBA mechanisms before their next triennial GRC filings (which will not occur until 2024 and 2025).

Even for Cal-Am, which filed its triennial rate case application on July 1, 2022 such that its proceeding is only at an early stage, Cal Advocates' Opposing Response raises a potential timing issue that demonstrates that the Court can provide effective relief in this case. Arguing that the Commission should reject Cal-Am's motion to permit consideration of a decoupling mechanism in its current rate case, Cal Advocates states: "Cal Am's testimony shows an interest and preference to continue the WRAM/MCBA in the current GRC—*something Cal Am is not permitted to request under current law*." (Cal Advocates' Opposing Response at 3 (emphasis added).) Again, if the Court determines the Revocation Order is unlawful, Cal Advocates would have no basis for taking this position.

B. SB 1469 Does Not Guard Against Future Prejudice As Would a Ruling by the Court Holding the Revocation Order and Associated Portions of the Decisions Unlawful

Even if all the Petitioner utilities were allowed to seek to continue their existing WRAM and MCBA mechanisms in their current (or next) GRCs, the Court still should deny the Commission's Motion. The petitions describe in detail the notice and due process violations that occurred in LIRA I and that resulted in a grossly one-sided record. The relief provided by SB 1469 is more limited than that requested in the Petitions because the

Commission's findings and conclusion in LIRA I, which are the result of substantial procedural and due process violations, can still be used to prevent water utilities from continuing their existing WRAM and MCBA mechanisms or implementing new decoupling mechanisms, unless those findings and conclusion are annulled.

This Court's opinion holding the Revocation Order and the findings and conclusion that purport to support it unlawful would have a tangible effect by eliminating the ability of the Commission and other parties (including Cal Advocates) to rely on those portions of the Decisions in future rate cases in which the Petitioner utilities request to implement their existing WRAM and MCBA mechanisms, or in future rulemaking proceedings in which all the Petitioners may participate. Because the Court may grant "effectual relief" to the Petitioners, the Court should not dismiss the Petitions. (See *Eye Dog Foundation v. State Bd. of Guide Dogs for Blind* (1967) 67 Cal.2d 536, 541 ["[A]n appeal will not be dismissed where, despite the happening of the subsequent event, there remain material questions for the court's determination."])

Referring to "changed circumstances" arising from the new legislation, the Commission contends: "In their general rate cases, parties will present their cases and on the basis of the record evidence, the Commission will issue its decision." (Motion at 12.) The Motion suggests, however, that the Commission views the new legislation as rendering only the Revocation Order moot—not the findings or flawed reasoning that purport to support it. The Commission has yet to address the conclusiveness of its findings in collateral actions or proceedings under section 1709. (§ 1709 ["In all collateral actions or proceedings, the orders and decisions of the commission which have become final shall be conclusive."].) As such, although the new legislation requires the Commission to consider

authorizing a "decoupling mechanism," the Decisions already prejudice the Petitioners with regard to future requests to implement their existing WRAM and MCBA mechanisms. That is, the Decisions discuss and include an erroneous finding that those two ratesetting mechanisms are not achieving the Commission's water conservation objectives—a finding that was used to justify revoking the WRAM and MCBA mechanisms and may be used again for the same or a similar purpose.

As detailed in the Petitioners' Opening Brief, those portions of the Decisions are based on a single piece of evidence. And the Commission's violation of constitutional and statutory notice and due process requirements denied the Petitioners an opportunity to refute that evidence and to develop a record demonstrating the effectiveness of the WRAM and MCBA for promoting conservation. Were the Court to dismiss this case as moot, the Revocation Order and those unlawful statements and finding would remain intact as support for future Commission orders.

In weighing this issue, the Court should consider that it is the Commission's practice to extract evidence and findings from its prior decisions to support new orders. In LIRA I, for example, to support the Revocation Order, the Commission cited decade-old data regarding WRAM dollar balances from a prior proceeding and a finding regarding "intergenerational transfers" associated with the WRAM from a prior proceeding. (See Opening Brief at 49.) Unless the Court finds the Decisions unlawful with regard to the Revocation Order and the associated findings and conclusion, the Commission similarly may rely on those portions of the Decisions to deny requests for authorization to implement the WRAM and MCBA in future proceedings to the prejudice of the Petitioners.

Cal Advocates' Opposing Response filed in Cal-Am's currently ongoing rate case provides a practical example of precisely why the Court

should not dismiss this case as moot. In arguing against Cal-Am's motion requesting consideration of a decoupling mechanism in its current GRC, Cal Advocates state: "In the decision discontinuing the WRAM/MCBA (D.20-08-047), the Commission noted that WRAM balances since utilities implemented that mechanism 'have continued to be significantly large and under-collected.'" (Cal Advocates' Opposition Response at 6.) This statement from Decision 20-08-047 is one of the passages challenged in the Petitions, because there was no evidence taken in LIRA I regarding any current WRAM balances; the Commission merely cited to decade-old data as a justification for the Revocation Order. If the Decisions are allowed to stand, however, the Commission and Cal Advocates would be able to rely on the erroneous assertion cited by Cal Advocates as a fact, proven and established. This would be highly prejudicial to the Petitioners despite the new legislation.

Further, Cal Advocates argue that although Cal-Am's motion "avoids use of the term WRAM in favor of "decoupling mechanism," Cal Am's Application and testimony indicate a strong preference for continuing the full WRAM/MCBA already in place." (Cal Advocates' Opposing Response at 2.) Cal Advocates then argue: "it seems unlikely that Cal Am's 'proposed decoupling mechanism' would be anything new or substantially different from the existing WRAM/MCBA" (*id*. at 3). Referring to the unlawful findings and conclusions from Decision 20-08-047, Cal Advocates then complains "that the new law does not address any of the problems resulting in the Commission's discontinuance of the full WRAM" and asserts that "[g]iven the amount of data accumulated by the Commission to-date about the impacts and effectiveness of the WRAM/MCBA mechanisms the Commission should require utilities seeking to continue or adopt a WRAM/MCBA to demonstrate that the

proposal is an improvement from previous iterations." (*Id*. at 6.) Cal Advocates' filing thus leaves little doubt that when the Petitioners file applications under the new legislation requesting to continue implementing their existing WRAM and MCBA mechanisms, or even new decoupling mechanisms, they will be required to overcome the Revocation Order and the Commission's findings and conclusion associated therewith, even though those portions of the Decisions are unlawful.

In contrast, if the Court rules that the Revocation Order and the findings and conclusion supporting it are unlawful, none of the Commission, Cal Advocates, or any other party to Commission proceedings will be able to cite the Decisions (including the Commission's finding that the WRAM and MCBA "had proven to be ineffective in achieving its primary goal of conservation" (1JA at 115)) to oppose future requests by the Petitioners to continue or restore their existing WRAM and MCBA mechanisms or to implement new decoupling mechanisms. Accordingly, the Commission's contentions that the Revocation Order is the only "relevant issue" raised by the petitions, and that any "residual matters" are "academic" and "of no import" (Motion at 1 and 10) are wrong. The Court's issuance of a decision in this case would provide tangible relief to the Petitioners.

C. When New Legislation Provides a Remedy that Is Less Effective than that Sought by Petitioners, a Case Is Not Moot

Given the above facts, the new legislation at best provides an alternative and incomplete remedy as compared to that requested by the Petitioners. The existence of an alternative remedy that provides less comprehensive relief than that sought from the Court is insufficient to render a case moot. *Van't Rood v. County of Santa Clara* (2003) 113

Cal.App.4th 549, 560 recognizes that "[s]ubsequent legislation can render a pending appeal moot," but holds that the appeal is not moot where the remedy provided by the legislation merely provides an alternative remedy. *Van't Rood* involved a petitioner who sought to divide his property into three parcels pursuant to a provision of the Subdivision Map Act allowing landowners to petition in court for exclusion from the subdivision map. On appeal, the question was whether the petitioner met the statutory requirements for exclusion from the applicable parcel map. The respondent county argued the petitioner's appeal was moot because a new statute reduced the minimum size of parcels applicable to the petitioner's property; that statute permitted the petitioner to apply for a new subdivision into two lots but precluded a subdivision into three lots as sought by the petitioner. The court rejected the county's position, describing the new legislation as "an alternative remedy" to exclusion from the subdivision map, and holding that "the existence of an alternative remedy does not preclude us from granting van't Rood effective relief with respect to the remedy he pursued in this proceeding. That being so, the appeal is not moot." (*Id. at 561*.)

Similarly, the petitions are not moot in the present case because the new legislation, which provides the Petitioner utilities the ability, as of January 1, 2023, to include a decoupling mechanism in their triennial rate cases, is a less effective remedy than a ruling by the Court that the Revocation Order and associated findings and conclusion are unlawful. The alternative remedy is clearly not sufficient for the four Petitioner utilities who have already been required to file triennial rate case applications without any decoupling mechanism. And the new legislation does not remedy the improper findings and flawed reasoning that can be (and are being) cited to support denial of WRAM and MCBA mechanisms in future proceedings under the new legislation (or currently ongoing proceedings)

for any of the Petitioner utilities. A ruling by this Court holding the Revocation Order and the findings and conclusion that purport to support it unlawful would address each of these issues. Accordingly, the case is not moot and the Court should deny the Commission's Motion.

II. This Case Raises Statutory Compliance and Due Process Issues of Broad Public Importance and the Harm Suffered by the Petitioners Is Likely to Recur Absent a Ruling from the Court

Whether or not the Court determines that the new legislation renders the petitions moot, the Court should nonetheless issue an opinion in this case, because this case raises statutory compliance and fundamental due process issues of broad public importance, and the harm suffered by the Petitioners is likely to recur. (See, *e.g.*, *In re William M.* (1970) 3 Cal.3d 16, 23 ["[I]f a pending case poses an issue of broad public interest that is likely to recur, the court may exercise an inherent discretion to resolve that issue even though an event occurring during its pendency would normally render the matter moot."]; *Los Angeles Internat. Charter High School v. Los Angeles Unified School Dist.* (2012) 209 Cal.App.4th 1348, 1354 ["[A]n exception to the mootness doctrine is the distinct possibility that the controversy between the parties may recur."]) In the instant case, all of these factors are present.

A. Protecting the Due Process Rights of the Petitioners and Requiring Compliance with the Law Are Issues of Broad Public Importance

The issues before the Court are of broad public importance because they involve fundamental rights to notice and due process, both statutory and constitutional, of public utilities who provide essential services throughout California. The Petitioners are critical participants in Commission proceedings addressing topics that impact the public broadly,

including water conservation and water affordability for low-income customers. Moreover, the due process concerns raised by this case impact all stakeholders who appear before the Commission. In its Motion, the Commission downplays the seriousness of its errors in the LIRA I proceeding, contending: "This case is a matter relevant only to the Class A water companies – whether the Commission improperly discontinued the WRAM utilities' ability to seek authorization for their WRAM/MCBAs, which is too fact specific to be of broad public interest." (Motion at 11.) The Commission's characterization is wrong for at least two reasons.

First, the reason discontinuance of the WRAM and MCBA matters to the Petitioner utilities is that those mechanisms are critical components of the progressive rate designs used by those utilities to maintain affordable rates for low-usage customers (who are often low-income customers). Therefore, if the Petitioner utilities are unable to implement the WRAM and MCBA in the future, the resulting rate design changes are likely to have far-reaching impacts on their customers and especially adverse impacts on their low-income customers. This is certainly not "a matter relevant only to the Class A water companies." To the contrary, it is an issue of broad public importance.

Second, the material questions for the Court to answer in this case have broad implications for all parties who participate in proceedings before the Commission. Although the Petitioners' specific request is for the Court to vacate the Revocation Order, a primary basis for that request is the Commission's failure to comply with statutory procedural requirements and constitutional requirements for notice and due process applicable to all Commission proceedings. A ruling from the Court on these issues will have a meaningful impact on future Commission proceedings and the utilities it regulates on issues of statewide importance.

There are currently two cases in which the courts of appeal have addressed the Commission's obligations to provide notice through the scoping memo for a proceeding of the topics to be considered in that proceeding: *Southern Cal. Edison Co. v. Public Utilities Com.* (2006) 140 Cal.App.4th 1085 (*Edison*) and *BullsEye Telecom, Inc. v. Public Utilities Com.* (2021) 66 Cal.App.5th 301 (*BullsEye*). The *Edison* court held that the Commission's failures to provide notice, through the Commission's scoping memo, of the issues to be considered in a proceeding, and an adequate opportunity to be heard on those issues, are grounds for annulling a Commission order. But the Commission's statements in Decision 21-09-047 and its Answer submitted to this Court evidence its belief that under the later-issued *BullsEye* decision, it has discretion to consider topics only tangentially related to the issues actually included in its scoping memos. A ruling from the Court in this case will result in a unified interpretation of the law that will be binding on all courts of appeal and on the Commission.

B. For One Petitioner, CWA, the New Legislation Is Irrelevant to the Reasons for Which It Filed Its Petition

CWA did not petition for review of the Decisions based on a particular interest in the WRAM and MCBA. Some of CWA's Class A water utility members rely on the WRAM and MCBA; others do not. For CWA's smaller water utility members, the mechanisms have never been available. CWA's concerns have always been—and remain—focused on

the faulty and unlawful procedures by which the Commission came to adopt the Revocation Order.[8]

The primary concern underpinning CWA's petition is that the Revocation Order exceeded the limited scope of the rulemaking proceeding in which it was proposed and adopted. As detailed in CWA's petition, from the time Cal Advocates first proposed that the Commission require utilities to cease using their WRAM and MCBA mechanisms, CWA objected that such proposals were "outside the scope" of the proceeding. CWA restated that objection when the presiding Administrative Law Judge presented a similar proposal as an issue for comments, and again when the Assigned Commissioner's Proposed Decision included the Revocation Order, at which point CWA raised notice and due process concerns. (CWA Petition at 32-33.) CWA concluded its petition with the following summary:

> Permitting [Cal Advocates] to inject an extraneous proposal to prohibit future use of the WRAM/MCBA into a rulemaking devoted to other issues, then treating that proposal as a topic of inquiry without revising the scoping memo to legitimize the inquiry, and finally adopting a version of the [Cal Advocates] proposal, the Commission departed improperly from the defined scope of the proceeding. This was contrary to the Commission's duty prescribed by Section 1701.1(c) and its own Rule 7.3 to work within the bounds of the assigned Commissioner's scoping memos. In so doing, the Commission failed to regularly pursue its authority. For these reasons, the [Revocation Order] must be annulled.

(CWA Petition at 40.)

[8] The amicus letter filed by the National Association of Water Companies raises similar issues, demonstrating that the Commission's unlawful actions in this case have caused concern beyond California.

CWA's concern about the Commission's failure to comply with its procedural scoping obligations as defined by the Public Utilities Code and its own Rules are not addressed or "mooted" by the Legislature's adoption of SB 1469. The Commission has indicated no intention to withdraw the Revocation Order or the faulty findings and reasoning on which it was premised. CWA remains concerned that if the Court does not issue an opinion holding that Commission's procedural violations during the underlying proceeding were unlawful and unconstitutional, the Commission will fail to comply with its procedural obligations in the ongoing proceeding and in future proceedings.

C. The Violations of Law that Occurred in LIRA I Are Likely to Recur Absent a Ruling from the Court

The Commission's contention that the violations of law that occurred in LIRA I are unlikely to recur because the "remaining procedural issues can be addressed in future Commission proceedings because SB 1469 requires the Commission to 'consider' the future WRAM proposals" (Motion at 12) should be rejected. If allowed to stand, the Decisions prejudice future Commission proceedings concerning requests to continue implementation of the WRAM and MCBA mechanisms or propose new decoupling mechanisms pursuant to SB 1469. Moreover, absent a ruling from the Court holding unlawful the Commission's failure in LIRA I to comply with statutory requirements and constitutional due process, those failures are likely to recur in other Commission proceedings and adversely impact other parties that appear before the Commission.

As discussed above, because the Commission's flawed findings and conclusion in the Decisions are likely to be used against the Petitioners in future proceedings and have already been used against Cal-Am in its

ongoing GRC, the Court should reject the Commission's claim that the questions before the Court in this case are unlikely to recur. Cal Advocates have shown their intention to use the Decisions to impede the Petitioner utilities' requests to continue their WRAM and MCBA mechanisms, whether in currently ongoing or future GRCs. In those proceedings, the Petitioners will have to overcome the Commission's disposition to reject their requests—while needing to show again the legal errors in the Revocation Order and associated portions of the Decisions. (See *Los Angeles Internat. Charter High School v. Los Angeles Unified School Dist.* (2012) 209 Cal.App.4th 1348, 1354 [explaining "an exception to the mootness doctrine is the distinct possibility that the controversy between the parties may recur" and deciding not to dismiss because the facilities request at issue would arise again in annual processes].) Similarly, the Commission's flawed reasoning and conclusions set forth in Decision 21-09-047 in respect of statutory and constitutional requirements for notice and due process can and likely will be used against regulated utilities and other stakeholders in other Commission proceedings, including other proceedings of statewide importance.

III. If the Court Concludes SB 1469 Renders the Petitions Moot, It Should Nonetheless Vacate the Revocation Order and the Findings and Conclusion that Purport to Support It

If, notwithstanding all of the above, the Court concludes that SB 1469 renders the petitions moot and that the case should be dismissed, the Court should still vacate the Revocation Order and the portions of the Decisions that purport to support it to avoid impliedly affirming orders, findings and a conclusion rendered in violation of statutory and constitutional notice and due process requirements and other statutory requirements governing Commission proceedings. (See *Paul v. Milk*

Depots, *Inc.* (1964) 62 Cal.2d 129, 134 (*Milk Depots*) [when ordinance that was subject of appeal was rescinded, the basis for the trial court's judgment has "disappeared"; under those circumstances it was proper to reverse the judgment and remand with directions to the trial court to dismiss the proceeding rather than impliedly affirm by dismissing the appeal as moot].) Moreover, vacating these portions of the Decisions would be consistent with the Commission's statements made in support of its Motion that it will "reconsider its holdings." (Motion at 12.)

As the Court explained in *Milk Depots*, the purpose of ordering the proceedings in the trial court dismissed, instead of dismissing the appeal, is to avoid impliedly affirming a judgment when the reviewing court has not considered the merits. (*Milk Depots, supra*, at p. 134.) Likewise, in this case, the Court should avoid impliedly affirming the Revocation Order and associated findings and conclusion because the Commission's failure to comply with statutory and constitutional notice and due process requirements, and other statutory requirements governing Commission proceedings, renders those portions of the Decisions unlawful.

The Commission argues that because some of the Petitioners sought relief from the Legislature "before the Court had time to decide the issues in this case," the Court should simply dismiss their petitions as moot. (Motion at 13.) The Commission is wrong. Because of the predetermined schedules upon which the Petitioner utilities are required to file their triennial rate cases, time was of the essence with respect to mitigating the adverse effects of the Revocation Order. Indeed, as discussed above, four of the five Petitioner utilities have already been harmed because they were required to file rate case applications that did not include requests to continue implementing their WRAM and MCBA mechanisms. Given the impact of the Revocation Order on the progressive rate designs those

utilities use to maintain affordable rates for low-usage customers, it was entirely appropriate for the Petitioner utilities to pursue all possible courses of action for mitigating the Commission's unlawful conduct in LIRA I. The unlawful portions of the Decisions should not be allowed to stand simply because the Petitioner utilities did everything they could to maintain rate mechanisms that they believe to be in the best interests of their customers.

CONCLUSION

The Court should deny the Commission's Motion because: (1) the new statute merely provides an alternative, incomplete remedy that does not address the harm suffered by four utilities that have already been required to file rate case applications without their WRAM and MCBA mechanisms; (2) a ruling by the Court is necessary to guard against prejudice in future Commission proceedings; (3) this case raises fundamental issues regarding notice, due process, and statutory compliance that are of broad public importance; and (4) the violations of law that occurred in the underlying Commission proceeding are likely to recur absent action by the Court. In the alternative, if the Court concludes the new legislation renders the petitions moot, to avoid impliedly affirming an unlawful order, the Court should nonetheless vacate the Revocation Order and the portions of the Decisions that purport to support it.

November 9, 2022

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

I hereby certify that the foregoing Petitioners' Opposition to Respondent's Motion to Dismiss Petitions or, in the Alternative Reconsider the Issuance of the Writ contains 6,156 words, according to the word processing program with which it was prepared.

November 9, 2022

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CERTIFICATE OF SERVICE

I, John D. Ellis, am over 18 years old and not a party to this action. I am employed in the City and County of San Francisco, California. My business address is Four Embarcadero Center, 17th Floor, San Francisco, CA 94111-4109.

On November 9, 2022, I served a true and correct electronic copy of the above Petitioners' Opposition to Respondent's Motion to Dismiss Petitions or, in the Alternative Reconsider the Issuance of the Writ on all parties by electronically filing and serving the documents via True Filing and/or email:

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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 November 9, 2022 in San Francisco, California.

/s/ John D. Ellis
John D. Ellis

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

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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.

11/9/2022

Date

/s/John Ellis

Signature

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