IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

Golden State Water Company, Petitioner, v. Public Utilities Commission of the State of California, Respondent,	Case No. S269099 Commission Decisions 20-08-047 and 21-09-047
California-American Water Company, California Water Service Company, California Water Association, and Liberty Utilities Corp., Petitioners, v. Public Utilities Commission of the State of California, Respondent.	Case No. S271493 Commission Decisions 20-08-047 and 21-09-047

REPLY TO OPPOSITION TO MOTION TO DISMISS

CHRISTINE HAMMOND, SBN 206768
DALE HOLZSCHUH, SBN 124673
*DARLENE M. CLARK, SBN 172812

Attorneys for Respondent
California Public Utilities Commission

505 Van Ness Avenue
San Francisco, CA 94102
Telephone: (415) 703-1650
Facsimile: (415) 703-2262
Email: darlene.clark@cpuc.ca.gov

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I. INTRODUCTION

Respondent California Public Utilities Commission (Commission) submits this reply to *Petitioners' Opposition to Respondent's Motion to Dismiss Petitions or, in the Alternative Reconsider the Issuance of the Writ* (Petitioners' Opposition) filed jointly by Petitioners Golden State Water Company (Golden State), California-American Water Company (Cal. Am.), California Water Service Company (CWS or Cal Water), Liberty Utilities Corp. (Park Water and Apple Valley Ranchos Water, collectively, Liberty), and the California Water Association (CWA) (collectively, Petitioners) on November 9, 2022.

Although there are many statements and allegations in Petitioners' Opposition with which the Commission does not agree, most of those are refuted by the assertions in the Commission's motion to dismiss. This Reply largely focuses on how Petitioners claims of harm are overstated and inaccurate based on Commission law and procedure. In addition, this filing will address misinterpretations of caselaw in Petitioners' Opposition.

As demonstrated in the Commission's motion to dismiss, the writ petitions should be dismissed because the California Legislature has enacted legislation that moots the relevant issue in the petitions, such that it is impossible for the Court to grant Petitioners any effective relief.

In the alternative, should any residual matters remain, the Court should change its grant of review to denial as the issuance of the writ of review was based on pre-Senate Bill (SB) 1469 facts. (Sen. Bill No. 1469, approved by Governor, Sept. 30, 2022

(2021-2022 Reg. Sess.) §2 (SB 1469).) In light of this subsequent legislation any residual issues are of no import.

II. PETITIONERS' ASSERTION OF HARM IS UNFOUNDED AND GROUNDLESS

Petitioners' Opposition alleges certain of the Petitioners have been harmed as a result of filing their General Rate Case (GRC) Applications without requesting Water Revenue Adjustment Mechanism/ Modified-Cost Balancing Accounts (WRAM/MBCAs). Petitioners further argue about potential harm in future proceedings. However, Petitioners fail to identify any specific harm caused by D.20-08-047 (Decision).[1]

A. Petitioners' Opposition identifies no harm experienced by any petitioner.

Their allegations are mere speculation; nowhere in their response do they identify any specific harm incurred by any petitioner. This is likely because none of the water utilities are operating under rates that do not include a WRAM/MBCA or a similar mechanism that provides revenue protections for the utilities. The two Liberty utilities are the only petitioners that currently have expired WRAM/MBCAs. However, each utility filed an Advice Letter with the Commission on December 8, 2021 requesting authorization to establish a Water Conservation Memorandum Account (WCMA) to replace its WRAM protection before it expired. Those Advice Letters were accepted on January

[1] Unless otherwise noted, citations to Commission decisions issued since July 1, 2000 are to the official pdf versions, which are available on the Commission's website at: http://docs.cpuc.ca.gov/DecisionsSearchForm.aspx.

24, 2022. (Exhibits A and B, Respondent's Request for Judicial Notice.) As discussed in D.20-08-047, the WCMA was authorized for water utilities without WRAM/MCBAs to track lost revenues due to reductions in water use, due to conservation, during any Governor-declared drought emergencies.[2] (Decision, p. 74-75.)

Further, although both Cal Water and Cal. Am. have filed GRC applications, there are no proposed or final decisions in either proceeding. (See Petitioners' Opposition, pp. 14-15.) As evidenced by Exhibit B in Petitioners' motion for judicial notice, Cal Water's new rates are expected to become effective in 2023, so their WRAM/MCBAs would expire at the end of 2022. And, as evidenced by Exhibit C in Petitioners' motion for judicial notice, Cal. Am's new rates are expected to become effective in 2024, so their WRAM/MCBA would expire at the end of 2023.[3] Currently, Cal Water and Cal. Am. are operating under the benefit of their respective WRAM/MCBAs and will do so until SB 1469 becomes effective on January 1, 2023. As discussed below, they have options they can exercise before their new GRC decisions are issued.

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[2] Unlike the WRAM, the WCMA requires a 20-basis-point reduction in a utility's return on equity to account for shifting the risk from shareholders to ratepayers. (Standard Practice U-40-W, para. 36.) However, there is no MCBA-like mechanism to offset the revenue recovery with the associated cost savings. (See discussion *infra*, p. 10.)

[3] D.20-08-047 allowed the utilities to continue their WRAM/MCBA mechanism until their next GRC rate cycle. (Decision, pp. 72-73.)

B. Petitioners Can Mitigate any Potential Harm.

Petitioners' claims of harm are speculative because the statute does not require the Commission to approve the WRAMs, only to consider a utility's requests to continue its WRAM or establish a similar decoupling mechanism. Moreover, those mechanisms track *both* over- and under-collections. In a situation where the WRAM/MCBA would have been over-collected, not having a WRAM/MCBA could provide a windfall for the utility. Accordingly, there is no basis to conclude that the utilities are harmed simply by filing a GRC application without including a request for a WRAM/MCBA. The Commission regulates many water companies that do not have a WRAM/MCBA. Regardless of whether a water utility has a WRAM/MCBA or not, the Commission has a statutory obligation to set rates to afford utilities "an opportunity to earn a reasonable rate of return on its used and useful investment, to attract capital for investment on reasonable terms and to ensure the financial integrity of the utility." (Pub. Util. Code, § 701.10.[4])

Moreover, Petitioners have the right to file a petition for modification of their GRC decisions to include WRAM/MBCAs as a result of SB 1469 (Cal. Code of Regs., tit. 20, § 16.4.) or file an Advice Letter requesting authorization for a WCMA, as both Liberty utilities have done. (Decision, p. 74.) Likewise, Cal. Am. has filed a motion in its current GRC proceeding to include a

[4] All section references are to the Public Utilities Code, unless otherwise noted.

request for a decoupling mechanism. (Petitioners' Opposition, p. 10.)

III. THE COURT CANNOT PROVIDE EFFECTIVE RELIEF

Because Petitioners did not seek a stay of the Decision, the relief that the Court can provide at this point in time is limited. Petitioners' implication that this Court is in a position to provide more relief than the Commission will, is not accurate. Moreover, Petitioners overstate the relief available to them, especially in light of the fact that they initiated the event that rendered this case moot.

A. Without a stay of D.20-08-047, Petitioners' relief is limited.

Petitioners claim that the new legislation does not restore them to their position before the Commission issued D.20-08-047 and that only action by the Court can do that. (Petitioners' Opposition, p. 12.) This claim is incorrect. First, Petitioners cite no authority that authorizes them to be in their original position. Further, it they wanted to prevent the implementation of the orders in the Decision, they would have had to seek a stay of those orders from the Commission or the Court. (Pub. Util. Code, §§ 1761-1762.) They did not.

Moreover, the Court cannot take any action that would refund the rates the Commission has set in Petitioners' rate case proceedings:

> If a commission order or decision authorizing any increase or decrease in rates, or changing any rate classification, is set aside by the Supreme Court or court of appeal, the matter shall be referred back to

> the commission for further action consistent with the order of the court. The commission, in taking this further action, shall not authorize refunds, and any relief ordered by the commission that shall have the effect of increasing or decreasing rates shall be prospective only.

(Pub. Util. Code, § 1766, subd. (b).) If the Court were to set aside any part of the Decision and send it back to the Commission, the Commission may consider new rates prospectively only, in response to the Court order. (*Ibid.*) Consistent with this statute, the only remedy the Court could provide is to order the Commission to permit the utilities to file applications for prospective rates that include requests for WRAM/MCBAs. Due to the briefing schedule, this could not happen until after the new year. At that time, SB 1469 would be effective and Petitioners would have the right to petition the Commission for WRAM/MCBAs, as mentioned above, (as Cal. Am. already has), so the matter would be moot. The Court could not provide effective relief that the legislation had not already provided.

B. Petitioners claim that the legislation does not grant them full relief is disingenuous.

Petitioners argue that the new legislation does not expressly codify a right for Petitioners to request an MCBA. (Petitioners' Opposition, p. 9.) While this statement is true, their implication that any harm would result from that omission is disingenuous.

When the Commission first authorized the pilot program for the utilities to implement both the WRAM and the MBCA mechanisms, it described the purpose of each mechanism:

> The goals for both CalWater's and Park's WRAMs and MCBAs are to sever the relationship between sales and revenue to remove the disincentive to implement conservation rates and conservation programs, **to ensure cost savings are passed on to ratepayers**, and to reduce overall water consumption.

(D.08-02-036, pp.25-26, emphasis added.) As Petitioners' Opposition explains, the WRAM tracks the revenues and the MCBA tracks the costs. Petitioners further explain that "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." (Petitioners' Opposition, p. 9.) D.08-02-036 explicitly states that the MCBA is designed to "ensure cost savings are passed on to ratepayers." (*Ibid*.) Therefore, there is no reason the Commission would approve WRAMs in the future, but refuse to allow Petitioners to request a MCBA. In fact, the Commission likely will *require* it.

Notably, Petitioners initiated legislation that only required the Commission to consider a mechanism to decouple revenues to protect their profits, but omitted from that legislation, the mechanism to ensure cost savings are passed on to ratepayers. Petitioners now attempt to use the omission they created to convince the Court that they would suffer harm because the legislation did not provide full relief.

Petitioners further argue that a Court ruling finding the Decision unlawful would "provide a tangible benefit should [Cal Water and Liberty] seek to restore the use of their WRAM and MCBA mechanisms before their next triennial GRC filings . . . ."

(Petitioners' Opposition, p. 15.) However, as discussed above, such Court-ordered relief is moot, because Petitioners already have the right to file a petition for modification of their GRC decisions to include WRAM/MBCAs as a result of SB 1469 (Cal. Code of Regs., tit. 20, § 16.4.) or file an Advice Letter requesting authorization for a WCMA, as both Liberty utilities have done. (Decision, p. 74.)

Finally, Petitioners claim that the legislation does not grant them full relief because the findings and conclusions in the Decision may prejudice them in the future. They speculate that other parties or the Commission may rely on those findings and conclusions in future proceedings to the detriment of Petitioners. Based on this speculation they argue this case is not moot because the court can vacate the order to prevent this potential prejudice in future cases. (Petitioners' Opposition, p. 15-19.)

As the Commission noted in its Motion to Dismiss, in *Equi v. San Francisco*, after declaring the case moot based on one issue, the court held that the remaining questions had become "abstract, academic and dead issues which no longer present any actual controversy between the parties. It therefore appears that the only issues presented by this appeal have become moot and that 'the appeal should not be entertained solely for the purpose of entering an academic discussion of the legal questions presented.' [Citations.]" (*Equi v. San Francisco* (1936) 13 Cal.App.2d 140, 142.) (Motion to Dismiss, p. 10.) The actual controversy in this case has been addressed by SB 1469 and the case is now moot.

Moreover, as stated in the Motion, Commission precedent is not binding on the Commission and can be changed (Pub. Util. Code § 1708), unlike a Court opinion.

C. Petitioners misinterpret the relevant caselaw.

Two caselaw matters from Petitioners' Opposition require clarification. Petitioners argue that if the Court concludes that SB 1469 renders the petitions moot and that the case should be dismissed, the Court should still vacate the Decision and its findings and conclusions. (Petitioners Opposition, pp. 26-27.) They base this argument on *Paul v. Milk Depots, Inc.* (*Milk Depots)* (1964) 62 Cal.2d 129, 134. Petitioners' reliance on this case is misplaced. *Milk Depots* holds that once the subject ordinance was modified and the basis for the judgment in the trial court has disappeared, to avoid impliedly affirming that judgment, the Court should reverse the judgment to restore the matter to the superior court, with directions to the lower court to dismiss the proceeding. However, *Milk Depots* is not applicable here because, unlike this case, in *Milk Depots* the petitioner was not the cause of the change in the ordinance that rendered the case moot:

> It is settled that "the duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it. It necessarily follows that when, pending an appeal from the judgment of a lower court, and **without any fault of the defendant**, an event occurs which renders it impossible for this

> court, if it should decide the case in favor of plaintiff, to grant him any effectual relief whatever, the court will not proceed to a formal judgment, but will dismiss the appeal. [Citations.]". [Citations.] In the present status of the case before us there is neither any "actual controversy" upon which a judgment could operate nor "effectual relief" which could be granted to any party.

(*Milk Depots,* 62 Cal.2d 129, 132, emphasis added.)

La Mirada Avenue Neighborhood Assn. of Hollywood v. City of Los Angeles (2016) 2 Cal.App.5th 586 (*La Mirada*) is on point. There, the Court found that because the plaintiff initiated the event that mooted the case, it was appropriate to dismiss the appeal:

> In the *Milk Depots*, *City of Yucaipa* and *City of Los Angeles* cases, however, **the events that mooted the underlying controversies were not initiated by the appellants**. Here, in contrast, after six of the eight exceptions to SNAP it had sought were invalidated by the superior court in the underlying administrative mandate proceeding, Target requested the City amend SNAP for the very purpose of removing the question of the exceptions' validity from further litigation. Under these circumstances dismissing the appeal, rather than reversing the judgment with directions to the superior court to dismiss the case, is the proper disposition. (See *Ringsby Truck Lines, Inc. v. Western Conference of Teamsters* (9th Cir. 1982) 686 F.2d 720, 721 [distinction between litigants who are and are not responsible for rendering their case moot at the appellate level is significant; if the case has become moot as the result of actions by the appellant (the losing party below), proper course is to dismiss the appeal, not to vacate the trial court's judgment]. . . .)

(*La Mirada, supra*, 2 Cal.App.5th 586, 591, emphasis added.)

Likewise, *Van't Rood v. County of Santa Clara* (2003) 113 Cal.App.4th 549, 560 (*Van't Rood*) can be distinguished. Petitioners argue that the instant case is not moot because the remedy provided by the legislation merely provides an alternate remedy. (Petitioners' Opposition, pp. 19-20.) In *Van't Rood* the petitioner had filed a petition to exclude the petitioners' properties from the 1970 parcel map so he could divide it three ways and not have to meet the minimum lot sizes under the parcel map. The County argued the case was moot because the zoning ordinance had changed and petitioner could legally divide his property into two parcels, without an exclusion. (*Van't Rood, supra,* 113 Cal.App.4th 558-560.) These were two very different remedies. In the instant case, Petitioners procured the very remedy from legislation that they seek from this Court, to effectively reverse the Commission's order eliminating Petitioners' authority to request WRAM/MCBAs in future GRCs. Because it is not an "alternate remedy," this case is moot.

Petitioners claim that the Court should find the remaining procedural issues are matters of broad public importance because 1) the Commission's decisions affect their rate design which affects their low-income customers and 2) because there are many stakeholders who appear before the Commission. (Petitioners' Opposition, pp. 21-22.) If the Court were to do so, it would effectively eliminate the mootness doctrine as it relates to Commission proceedings.

IV. CONCLUSION

Petitioners' Opposition fails to rebut the motion to dismiss because no actual controversy exists on which the Court can provide effective relief, and no exceptions apply that would require judicial discretion. Accordingly, the Court should dismiss the writ petitions. In the alternative, if the Court does not dismiss the writ petitions, the Commission requests that it reconsider its issuance of the writ of review because the issues originally presented are no longer of import.

November 15, 2022 Respectfully submitted,

CHRISTINE HAMMOND, SBN 206768
DALE HOLZSCHUH, SBN 124673
*DARLENE M. CLARK, SBN 172812

By: /s/ *DARLENE M. CLARK*
DARLENE M. CLARK

505 Van Ness Avenue
San Francisco, CA 94102
Telephone: (415) 703-1650

Attorneys for Respondent
California Public Utilities Commission

STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

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John Ellis Sheppard, Mullin, Richter & Hampton LLP 269221	jellis@sheppardmullin.com	e-Serve	11/15/2022 12:36:41 PM
Joseph Karp Sheppard, Mullin, Richter & Hampton LLP 142851	jkarp@sheppardmullin.com	e-Serve	11/15/2022 12:36:41 PM
Rocio Ramirez Winston & Strawn LLP	RERamirez@winston.com	e-Serve	11/15/2022 12:36:41 PM
Dale Holzschuh California Public Utilities Commission 124673	dah@cpuc.ca.gov	e-Serve	11/15/2022 12:36:41 PM
Willis Hon Nossaman LLP 309436	whon@nossaman.com	e-Serve	11/15/2022 12:36:41 PM
Joseph Karp Winston & Strawn, LLP 142851	JKarp@winston.com	e-Serve	11/15/2022 12:36:41 PM
Darlene Clark California Public Utilities Commission 172812	Darlene.clark@cpuc.ca.gov	e-Serve	11/15/2022 12:36:41 PM
Rachel Gallegos	rachel.gallegos@cpuc.ca.gov	e-	11/15/2022 12:36:41

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Clark, Darlene (172812)

Last Name, First Name (PNum)

California Public Utilities Commission

Law Firm