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' REPLY BRIEF

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

Of the Public Utilities Commission of the State of California

*Joseph M. Karp (SBN: 142851)
Christine A. Kolosov (SBN: 266546)
Robert J. Stumpf, Jr. (SBN: 72851)
John D. Ellis (SBN: 269221)
SHEPPARD, MULLIN, RICHTER & HAMPTON LLP
Four Embarcadero Center, 17th floor
San Francisco, CA 94111
Telephone: (415) 434-9100
Facsimile: (415) 434-4947
Email: JKarp@sheppardmullin.com
Ckolosov@sheppardmullin.com
RStumpf@sheppardmullin.com
Attorneys for Golden State Water Company

*Lori Anne Dolqueist (SBN: 218442)
Willis Hon (SBN: 309436)
NOSSAMAN LLP
50 California Street, 34th Floor
San Francisco, CA 94111
Telephone: (415) 398-3600
Facsimile: (415) 398-2438
Email: ldolqueist@nossaman.com
whon@nossaman.com
Attorneys for California-American Water Company, California Water Service Company

Sarah E. Leeper (SBN: 207809)
CALIFORNIA-AMERICAN WATER COMPANY
555 Montgomery Street
Suite 816
San Francisco, CA 94111
Telephone: (415) 863-2960
Facsimile: (415) 863-0615
Email: sarah.leeper@amwater.com
Attorney for California-American Water Company

*Martin A. Mattes (SBN: 63396)
Alexander J. Van Roekel (SBN: 342478)
NOSSAMAN LLP
50 California Street, 34th Floor
San Francisco, CA 94111
Telephone: (415) 398-3600
Facsimile: (415) 398-2438
Email: mmattes@nossman.com
avanroekel@nossman.com
Attorneys for California Water Association

*Victor T. Fu (SBN: 191744)
Joni A. Templeton (SBN: 228919)
PROSPERA LAW, LLP
1901 Avenue of the Stars, Suite 480
Los Angeles, CA 90067
Telephone: (424) 239-1890
Facsimile: (424) 239-1882
Email: vfu@prosperalaw.com
jtempleton@prosperalaw.com
Attorneys for Liberty Utilities (Park Water) Corp., and Liberty Utilities (Apple Valley Ranchos Water) Corp.

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INTRODUCTION

Nothing in Respondent's answer changes the fact that the assigned Commissioner for LIRA I[1] failed to issue a scoping memo indicating that modification of the Water Revenue Adjustment Mechanism (WRAM) and Modified Cost Balancing Account (MCBA)—much less their revocation—was an issue that would be considered by the California Public Utilities Commission in LIRA I. Yet the California Public Utilities Code and the Commission's own Rules required such a scoping memo for the Commission to modify or revoke the WRAM/MCBA in LIRA I.[2] Although Decisions 20-08-047 and 21-09-047 (Decisions) are rife with legal errors, enumerated below, virtually all of those errors stem from or relate to this fundamental failure. None of Respondent's seven contrary arguments has merit.

First, Respondent argues that the Petitions are moot because of the enactment of Senate Bill (SB) 1469. (Respondent's Brief (RB) 20-35.) This is not correct. The legislation affords only an alternative and less effective remedy than the Court can and should provide. (*Van't Rood v. County of Santa Clara* (2003) 113 Cal.App.4th 549, 560 [recognizing that subsequent legislation does not render a pending appeal moot when the court can provide effective relief with respect to the remedy pursued before the court].) The Petitions also raise unresolved issues of statutory compliance

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[1] "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*.

[2] Unless otherwise stated, all statutory references are to the California Public Utilities Code. References to "Rules" are to the Commission's Rules of Practice and Procedure.

and due process of broad public importance, and Respondent's pleadings in this case demonstrate that it is likely, absent direction from the Court, to repeat the errors it made during LIRA I regarding those topics. (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."].)

Second, Respondent continues to argue that the WRAM/MCBA was included within the scope of LIRA I because it is "inextricably linked" to water sales forecasting. (RB 36-46.) This, too, is incorrect. Although Petitioners use water sales forecasts in implementing their WRAM/MCBA mechanisms, they (and other water utilities that do not employ the WRAM/MCBA and were parties to LIRA I) also use water sales forecasts in non-WRAM/MCBA contexts as part of their ratemaking methodologies. An inquiry into water sales forecasting can be completely independent of the WRAM/MCBA. And modification or discontinuance of the WRAM/MCBA does not "improve or standardize water sales forecasting", which was the stated purpose of the water sales forecasting questions in the scoping memo. (1JA 208-209.) The plain language of the scoping memo, the context of the quasi-legislative proceeding in which it was issued, the Commission's historical practice of identifying the WRAM/MCBA with specificity in every proceeding in which their continuance was under review, and the fact that no Petitioner[3] submitted any evidence supporting

[3] 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 "WRAM Utilities."

continuance of the WRAM/MCBA demonstrate that continuance of the WRAM/MCBA was neither identified as within the scope of LIRA I nor incorporated into the scope of LIRA I through the scoping memo questions regarding water sales forecasting.

Third and fourth, Respondent argues that Petitioners had ample opportunity to be heard or that they waived their rights to a hearing. (RB 46-52.) Neither proposition is true. By failing to provide notice that the Commission would consider eliminating the WRAM/MCBA in LIRA I, the Commission denied Petitioners their rights to be heard under sections 1708 and 1708.5 and the California and United States Constitutions. Nothing in the record supports a finding that Petitioners waived these rights. Nor could they do so in connection with a topic that they did not know was under consideration.

Fifth, Respondent argues that its order eliminating the WRAM/MCBA (Revocation Order) is supported by "ample record evidence." (RB 52-54.) It is not. One graph, introduced at the eleventh hour in a way that gave Petitioners no opportunity to respond, does not suffice. Nor is there any other evidence in the record that supports the Revocation Order.

Sixth, Respondent argues that it considered the consequences, including the economic effect, of eliminating the WRAM/MCBA as required by section 321.1(a). (RB 55-56.) It asserts that the statute "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." (RB 55.) But here, the Commission did absolutely nothing to consider the effects of the Revocation Order on any customers, let alone the low-income customers that LIRA I was expressly intended to assist.

Seventh, Respondent makes a brief (two-page) argument that it properly characterized LIRA I as quasi-legislative. (RB 56-58.) This conclusory argument has no merit. That the Commission issued the Revocation Order in a quasi-legislative proceeding does not make it a quasi-legislative action. And by taking a ratemaking action in a quasi-legislative proceeding, the Commission denied parties procedural rights available only in ratesetting proceedings. (See 4JA 659-665.) Moreover, the Commission's failure to identify that it was considering whether to order discontinuance of the WRAM/MCBA prevented Petitioners from challenging its "quasi-legislative" categorization for LIRA I on a timely basis, and the Commission's claim that Petitioners waived that objection is without merit.

ARGUMENT

I. The Petitions Are Not Moot.

A. SB 1469 Does Not Render This Case Moot.

Respondent argues that the Court can offer no relief that is not provided through SB 1469. (RB 21-24.) Respondent is wrong. The new legislation permits the WRAM Utilities to apply for the WRAM, but it is a less complete and less effective remedy than vacating the Revocation Order. Therefore, the Court should not dismiss the Petitions. (See *Eye Dog Foundation v. State Bd. of Guide Dogs for Blind* (1967) 67 Cal.2d 563, 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"]; *Van't Rood v. County of Santa Clara* (2003) 113 Cal.App.4th 549, 560 [although subsequent legislation can moot an appeal, it does not when the court can provide effective relief with respect to the remedy pursued before the court].)

Equi v. San Francisco (1936) 13 Cal.App.2d 140, relied on by Respondent, is inapposite because the court in that case concluded that its issuance of an opinion would have no practical effect. (*Id.* at 142.) The same is not true here. As Petitioners explained in their opposition to Respondent's motion to dismiss the Petitions as moot (Petitioners' Opposition), the Court can provide meaningful relief to all the WRAM Utilities that seek approval to implement WRAM/MCBA mechanisms under the new legislation, and to Cal Water and Liberty in their efforts to restore their WRAM/MCBA mechanisms prior to their next triennial general rate cases (GRCs).

If the Court vacates the Revocation Order, the Commission and other parties in future proceedings will not be able to rely on the erroneous factual findings and reasoning regarding the WRAM/MCBA included in the Decisions to support that order. Respondent argues that the only relief Petitioners requested is that the Court vacate the Revocation Order. (RB 21-23.) If the Court does so however, the Commission's reasoning and findings supporting the Revocation Order would have been determined to be invalid. As such, they would not be conclusive in collateral actions or proceedings. (§ 1709 ["In all collateral actions or proceedings, the orders and decisions of the commission which have become final shall be conclusive."].) Nor would they carry any weight in any other, future Commission proceedings.

Respondent argues that Petitioners' concern regarding the use of the LIRA I findings to deny or oppose water revenue decoupling mechanisms in future proceedings is speculative "because Commission holdings do not have precedential effect and are not binding on future Commissions. . . ." (RB 28.) The issue is not whether the Commission is technically required to follow prior Commission orders but that it regularly relies on statements

and findings from prior proceedings to support new decisions, as the Decisions and Respondent's arguments to this Court demonstrate. (See, e.g., 1JA 61 and RB 40 [relying on findings and statements from past proceedings regarding revenue under-collections].)

If this Court does not vacate the Revocation Order, the Commission and other parties may hereafter rely on the Commission's flawed finding that the WRAM/MCBA is not an effective mechanism for promoting water conservation to deny or oppose requests to implement the WRAM/MCBA, notwithstanding the new legislation authorizing applications for water revenue decoupling mechanisms. This is not a speculative concern, as the Public Advocates Office at the California Public Utilities Commission has already relied on this finding in Cal-Am's currently ongoing GRC. (See Petitioners' Opposition at 17-18.) As Petitioners apply for revenue decoupling mechanisms in future cases, there are two alternatives. Either they will do so encumbered by the Commission's finding in the Decisions that the WRAM/MCBA mechanisms are not an effective means of promoting water conservation or they will do so free of that finding. The outcome of this case will determine whether such encumbrance will apply.

With regard to Cal Water and the Liberty utilities, the new legislation affords no relief in their current GRCs that were submitted to the Commission before the law took effect because the legislation only requires the Commission to consider revenue decoupling mechanisms as part of triennial rate case filings. (§ 727.5, subd. (d)(2)(D).) An order from this Court vacating the Revocation Order would provide an opportunity for those utilities to seek approval of the WRAM/MCBA by application before their next triennial rate case filings, and thus would render relief that the new legislation does not. In fact, the Commission acknowledges that this relief is available from the Court. (RB 25 ["the only remedy the Court

could provide is to order the Commission to permit utilities to file applications for prospective rates that include requests for WRAM/MCBAs"].)

Respondent's claim that Cal Water and Liberty can obtain relief by filing a petition for modification of the decisions issued in their respective GRCs or submitting advice letters requesting Water Conservation Memorandum Accounts (WCMAs) (RB 27, 35) demonstrates that the remedy the new legislation provides is less complete and effective than the relief the Court can provide. The Commission may reject a petition for modification for reasons unrelated to the substantive merits of the request, and there is no required timeline for issuing a decision on a petition for modification. (Rule 16.4.) Moreover, a petition for modification does not provide an opportunity for submitting testimony or holding evidentiary hearings. (Rule 16.4(b) [requiring that factual allegations be supported by the existing record and any new or changed facts set forth in a declaration or affidavit].)

Respondent's claim regarding the WCMA is without factual support in the record before this Court. Respondent concedes there are significant differences between the WCMA and the WRAM. (Commission's Reply to Opposition to Motion at 6, fn. 2 [noting that, unlike the WRAM, the WCMA requires an earnings test before amounts included in the account can be recovered and includes no offsetting mechanism like the MCBA to adjust for cost savings].) Another critical difference is that a WCMA is available only during an officially declared drought emergency. (See Resolution W-5210, 2019 Cal. PUC LEXIS 904, **9-10 [denying recovery for amounts accrued in the WCMA of San Jose Water Company when the local wholesale water district had requested voluntary water conservation but had lifted mandatory rationing].) The WRAM/MCBA, on the other

hand, support water conservation efforts at all times. In short, Respondent's claim regarding the WCMA raises more questions than it answers and is of no probative value.

B. The Court Should Not Penalize Petitioners for Seeking Alternative Legislative Relief.

Respondent relies on *Paul v. Milk Depots, Inc.* (1964) 62 Cal.2d 129 ("*Milk Depots*") and *La Mirada Avenue Neighborhood Assn. of Hollywood v. City of Los Angeles* (2016) 2 Cal.App.5th 586 ("*La Mirada*") to argue that the Court should dismiss the Petitions because Petitioners are essentially disgruntled litigants who sought legislative fixes after losing at the Commission, thus mooting their own case. (RB 31-33.) Respondent's argument fails for two reasons.

First, under *Milk Depots* and *La Mirada*, dismissal is appropriate only if "there is neither any 'actual controversy' upon which judgment could operate nor 'effectual relief' which could be granted any party." (*Milk Depots*, *supra*, 62 Cal.2d 129, 132; *La Mirada*, *supra*, 2 Cal.App.5th 586, 591 (citing *Milk Depots*).) Here, obvious controversies remain concerning the impact of the Commission's findings in LIRA I on future proceedings and the extent of the relief afforded by the new legislation. And the Court can grant effectual relief for the reasons discussed above. As a result, Petitioners obtained from the Legislature only a portion of the relief that they seek.

Second, due to the predetermined schedules on which the Petitioner utilities are required to file their triennial rate cases, time was of the essence for mitigating the adverse effects of the Revocation Order. Cal Water and the two Liberty utilities have already been harmed because their GRCs were submitted without including the WRAM/MCBA mechanism. Respondent's argument that any harm to Cal Water or Liberty is

speculative because "not having a WRAM/MCBA could provide a windfall for the utility" (RB 34) ignores that the "harm" of not having a WRAM/MCBA is not limited to the utilities' inability to recover revenue shortfalls due to reduced sales. Just as Cal Water predicted in its comments on the proposed decision (2JA 503-507), due to the loss of the WRAM/MCBA, the modified rate design proposed in its currently pending GRC will recover a higher proportion of Cal Water's fixed costs through monthly service charges rather than usage charges. Thus, the loss of the WRAM/MCBA likely will reduce its customers' ability to lower their monthly water bill through water conservation; this harms the customers and the utility. Given the impact of the Revocation Order on the progressive rate designs that the WRAM Utilities use to maintain affordable rates for low-usage customers, it was entirely appropriate and for the benefit of customers that the Petitioner utilities pursued all reasonable courses of action for mitigating the Commission's unlawful conduct in LIRA I.

Respondent faults Petitioners for not seeking a stay of the Revocation Order if they wanted to prevent the harms of its implementation (RB 25), notwithstanding the exceedingly high bar for obtaining stays of Commission decisions. (*North Shuttle Serv., Inc. v. Public Utilities Com.* (1998) 67 Cal.App.4th 386, 395 [holding that to obtain a stay, a party must demonstrate "immediate and irreparable injury, loss, or damage" and provide specific evidence of injury, loss or damage beyond that "inherent in any adverse decision by the Commission"].) This argument is beside the point. Petitioners' decision not to expend resources seeking a stay has no bearing on whether the Court can and should provide as complete a remedy as possible in this case.

C. This Case Raises Issues of Broad Public Importance, and the Harm Suffered by Petitioners is Likely to Recur.

The notice and due process concerns raised by this case impact all stakeholders who appear before the Commission, including in proceedings addressing topics of statewide importance, such as the water conservation and water affordability policies at issue in this case. The Commission's position that its actions in LIRA I comply with the Public Utilities Code and its own Rules demonstrates that the public interest will be served by the Court's issuance of an opinion regarding the procedures to which the Commission must adhere to comply with the law.

Respondent argues that LIRA I was categorized as a quasi-legislative proceeding in which it was "updating program rules and establishing new programs" and that when acting in its legislative capacity it has broad discretion. (RB 52-53.) It is the Commission's discretion to establish rules with broad public impact in quasi-legislative proceedings that makes it imperative for scoping memos to identify issues with sufficient specificity to alert potentially interested parties of the topics under consideration. Without such notice, affected persons do not know that they need to participate in the proceedings and thus are denied an opportunity to be heard.

This was the case for the National Association of Water Companies (NAWC) in LIRA I, as shown by its motion for reconsideration of the ruling by the presiding administrative law judge (ALJ) that denied NAWC party status in LIRA I.[4] NAWC attempted to become a party to the entire rulemaking docketed as R.17-06-024 and to file comments on the proposed

[4] Simultaneously with this brief, Petitioners are filing a motion seeking judicial notice of (1) NAWC's motion for party status, (2) the ALJ's ruling on that motion, (3) NAWC's motion for reconsideration of the ALJ's ruling, and (4) NAWC's comments on the proposed decision in LIRA I.

decision in LIRA I. Those comments would have expressed its concerns regarding the Revocation Order, including that the Commission's failure to identify the WRAM/MCBA as within the scope of the proceeding prevented it and other interested parties from participating in the Commission's consideration of the issue. The ALJ, however, granted party status only with respect to the second phase of the rulemaking, thereby preventing consideration of NAWC's comments in LIRA I.

Two Court of Appeal cases have addressed the Commission's obligation to provide notice of the topics to be considered in a proceeding through the scoping memo: *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 as unlawful the Commission's failures to provide notice of the issues that the Commission would consider and an adequate opportunity to be heard on those issues. But the Commission's statements in Decision 21-09-047 (1JA 126) and its pleadings submitted to this Court (see RB 46) evidence its belief that under the later-issued *BullsEye*, it has discretion to consider other topics tangential to the issues actually included in its scoping memos. An opinion from the Court will result in a unified interpretation of the law that will be binding in all future proceedings. Without such an opinion, the Commission's errors in LIRA I regarding its failure to identify issues in a proceeding's scoping memo are likely to recur.

II. Respondent's Claim that Eliminating the WRAM/MCBA Was Within the Scope of LIRA I Has No Support in the Record.

Respondent argues that the questions about water sales forecasting in the scoping memo included consideration of revoking the WRAM/MCBA because the two issues are "inextricably linked" (RB 37-39), and Petitioners knew that revocation of the WRAM/MCBA was in the scope of LIRA I (RB 40-42) but nonetheless failed to ask for hearings,

make any effort to develop a record demonstrating that the WRAM/MCBA are effective mechanisms for promoting water conservation, or request that the proceeding be recategorized as ratesetting. Neither assertion is correct.

A. Questions about Water Sales Forecasting in the Scoping Memo Did Not Incorporate Elimination of the WRAM/MCBA as an Issue in LIRA I.

The scoping memo questions about water sales forecasting refer only to guidelines or mechanisms that can be put in place to improve or standardize water sales forecasting for Class A water utilities. (1JA 208-209.) They make no mention of changing or eliminating any existing guidelines or mechanisms and, in any case, the WRAM/MCBA are not water sales forecasting mechanisms or guidelines, nor does modification or discontinuance of the WRAM/MCBA improve or standardize water sales forecasting. Although Respondent contends that "[w]ater sales forecasting was an issue in this proceeding because of its effect on WRAM balances and the negative effect of those balances on customer rates" (RB 37), this claim lacks merit. Were this true, the original order instituting the rulemaking or the scoping memo would have mentioned the WRAM so that parties could know what the proceeding was about and could address the relevant issues. Neither the original order nor the scoping memo, however, even mentions the WRAM.

In evaluating whether the questions about water sales forecasting mechanisms provided notice that the Commission would consider eliminating the WRAM/MCBA in LIRA I, the Court should consider the Commission's historical practice. The Commission has always identified the WRAM/MCBA specifically in every proceeding in which their continuance was under consideration. (4JA 818, 824, 833; 1JA 193-196). The parties to LIRA I had every reason to expect that if the Commission

intended to consider changes to or revocation of the WRAM/MCBA in LIRA I, it would have identified the issue in a scoping memo.

Another fact that belies Respondent's interpretation of the scoping memo questions about water sales forecasting is the reference in the questions to Decision 16-12-026. Just six months before LIRA I began, the Commission issued that decision in a different proceeding, Rulemaking (R.) 11-11-008 (Balanced Rates Proceeding). In the Balanced Rates Proceeding, the Commission undertook an in-depth evaluation of the WRAM/MCBA. Specifically, 9 of 16 questions posed in the statutorily required scoping memo for that rulemaking related directly to whether the WRAM Utilities should continue to use the WRAM/MCBA. (1JA 193-196.) Decision 16-12-026, which closed R.11-11-008, approved continued use of the WRAM/MCBA by all the WRAM Utilities. (D.16-12-026, 2016 Cal. PUC LEXIS 682, **62-64.)

The LIRA I scoping memo questions related to water sales forecast refer specifically to the prior rulemaking:

> 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 208-209 (emphasis added).) There was also an ordering paragraph in Decision 16-12-026 that required all Class A and Class B water utilities regulated by the Commission to propose improved forecasting

methodologies (2016 Cal. PUC LEXIS 682, **132 (Ordering Paragraph #2)), and the "Goals and Objectives for Balanced Rate Design" that arose from R.11-11-008 included to "Improve sales forecasting methodology." (*Id.* at **138.)

When Petitioners read the questions related to water sales forecasting, they did so in the context of the Commission very recently having closed a five-year proceeding in which the Commission had conducted an in-depth review of the WRAM/MCBA and concluded that the mechanisms should continue to be used, but that water sales forecasting mechanisms needed to be improved. Thus, no reasonable party would read the question asking "What guidelines or mechanisms can the Commission put in place to improve or standardize water sales forecasting for Class A water utilities" (1JA 209) to mean that the Commission was also planning to re-examine whether the Commission should discontinue the WRAM. The Commission had just determined after five years of litigation that the WRAM/MCBA should be continued and, referring to that proceeding, stated that it would "examine how to improve water sales forecasting as part of this phase of the proceeding."

In addition, in each of the prior proceedings in which continuance of the WRAM/MCBA was under consideration, the Commission developed an extensive record about their effectiveness after including their consideration in the scoping memos (4JA 818, 824, 833; 1JA at 193-196). By contrast, the paucity of information in the LIRA I record regarding the WRAM/MCBA confirms they were not within the scope. Respondent's position, that the WRAM Utilities (after spending years in multiple proceedings establishing and defending the value of and need for the WRAM/MCBA) knew that elimination of the WRAM/MCBA was under

consideration in LIRA I, yet offered no evidence to prove that the mechanisms continue to be valuable and necessary, is not plausible.

B. Neither Questions by the ALJ Nor Comments of Parties Expanded the Scope of LIRA I.

Respondent also argues that a question in the ALJ's September 2019 ruling put Petitioners on notice that the Commission was considering discontinuing the WRAM/MCBA in LIRA I. (RB 45.) But in making this claim, the Commission includes only the first half of the ALJ's question. The complete question was: "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 275 (Question #6) (emphasis added).) The first half asked "should the Commission consider converting to Monterey-style WRAM" and not "should the Commission convert to Monterey-style WRAM." And the second half asked about the proper type of proceeding for such consideration. The manner in which this question was asked, and the fact that consideration of the WRAM/MCBA had never been identified as an issue that the Commission would consider in LIRA I, made clear this was a topic the Commission might consider taking up in future proceedings, not in LIRA I.

Respondent also points to comments made by CWA recommending that WRAM/MCBA balances be folded into base rates to argue that this demonstrates "CWA's clear understanding of the Commissioners' intent at the initiation of the rulemaking and that the issue articulated in the Scoping Memo contemplated changes to the WRAM." (RB 38.) This is not correct. Respondent's block quote from CWA's comments omits the broader context of the paragraphs from which they were extracted. At the outset of

its response, CWA expressly stated that a question related to rate design issues was not connected to water sales forecasting methodologies and therefore not within the scope of LIRA I. (Ex. 1 to Answer of Respondents to Petitions for Writ of Review (Answer) 7.) After then discussing water sales forecasting issues (*id*. at 7-8), CWA made three minor suggestions, two that would adjust the sales forecast employed in setting rates to increase its accuracy and one (the one cited by the Commission) that would affect the manner in which WRAM balances would be recovered. (*Id*. at 8-9.) Although only tangential to the question asked by the Commission in the scoping memo, CWA's proposal reflects that CWA understood that the WRAM would continue to be used, as WRAM balances would need to be recovered, and that continuation of the WRAM was not at issue in LIRA I.

In any case, no statement CWA or any other party made on an out-of-scope topic changed the scope of LIRA I; nor did any ruling issued by the ALJ. Only the assigned Commissioner can modify the scope of a proceeding, by amending the 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"]; Rule 7.3.) The assigned Commissioner in LIRA I never amended the scoping memo to include consideration of whether the WRAM/MCBA should be eliminated, as the law requires.

In sum, although Respondent's brief focuses on elements of the WRAM that benefit utilities (RB 13-14) and ignores that the WRAM also protects customers when water sales forecasts turn out to be too low, this is all beside the point. The issue before the Court is not whether Petitioners should have a WRAM/MCBA; rather, the issue is procedural. Because elimination of the WRAM/MCBA was not in the scope of LIRA I, there was no opportunity to develop a record regarding these topics and no notice

of the need to seek such an opportunity. Petitioners are not challenging the Commission's policy determination, as the Commission claims. (RB 19.) Petitioners are challenging the Commission's failure to comply with the law by making policy on an issue that was outside the scope of LIRA I and without affording Petitioners an opportunity to be heard on the new policy.

III. The Commission Denied Petitioners Their Statutory and Constitutional Rights to Notice and Hearing.

Respondent argues that section 1708[5] did not afford Petitioners any right to be notified that the Commission was considering revoking the WRAM or to be heard on the issue prior to revocation, because the Revocation Order "does not rescind, alter or amend any prior decision." (RB 47.) This is wrong.

During the Balanced Rates Proceeding, the Commission conducted an in-depth review of whether the WRAM/MCBA are effective at encouraging conservation or whether it should adopt another mechanism. (1JA 14-15). Just six months before LIRA I commenced, the Commission issued Decision 16-12-026, concluding that the WRAM/MCBA should be continued (D.16-12-026, 2016 Cal. PUC LEXIS 682, **62-64.)[6]

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[5] Section 1708 requires 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."

[6] Respondent's statement that Decision 16-12-026 "retained the mechanisms for that three-year rate cycle" (RB 15) is misleading; there is no text in Decision 16-12-026 stating that the retention was only for a single three-year rate cycle. To the contrary, the Commission stated: "There is a continuing need to provide an opportunity to collect the revenue requirement impacted by forecast uncertainty, the continued requirement for conservation, and potential for rationing or moratoria on new connections in some districts. These effects will render uncertainty in revenue collection and support the need for the WRAM mechanism to (footnote continued)

Accordingly, there is no merit to Respondent's claim that just because the Revocation Order did not require the WRAM utilities to stop using their WRAM/MCBA in the ongoing rate cycle, the Commission did not rescind a prior Commission order. By prohibiting the WRAM Utilities from including WRAM/MCBA proposals in their next GRC applications and reversing course on its findings and policy determinations in the Balanced Rates Proceeding, it did precisely that.

Respondent argues that it has "long interpreted Section 1708" to apply only when it is exercising discretion to reopen prior proceedings. (RB 47.) That claim is belied by Decision 04-02-063, in which the Commission's reasoning demonstrates that section 1708 requires the Commission to provide interested parties notice and an opportunity to be heard before making changes to policy that would have broad impacts, even if the Commission is not reopening a prior proceeding.

At issue there was whether a certain resolution the Commission previously issued in connection with a utility's request for authority to adopt a specific accounting rule and other accounting changes had resulted in the abandonment of long-established flow-through tax accounting policies. (2004 Cal. PUC LEXIS 55, **214, **286.) In concluding that it did not, the Commission explained that determining otherwise would not be reasonable:

> We are not persuaded by Pacific's argument that the provisions in § 1708 that require the Commission to provide notice and an opportunity for hearing prior to modifying a previously issued decision were satisfied because, as stated in

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support sustainability and attract investment to California water IOUs during this drought period *and beyond*." (2016 Cal. PUC LEXIS 682, **63 (emphasis added).) This statement demonstrates that the Commission's conclusions regarding the WRAM were not limited to the three-year rate cycle then-in-effect.

> Resolution F-634, Pacific's Advice Letter (AL) 17024 was noticed in the Commission's Daily Calendar and mailed to interested parties. AL 17024 did not state that Pacific sought to replace the Commission's flow-through policy with normalized tax accounting. Rather, AL 17024 stated that SFAS 109 and the related amendments . . . established new accounting requirements for "items accounted for under the flow through method." . . . . [I]t is highly likely and easily foreseeable that switching from flow-through accounting to normalized tax accounting would have affected income statement accounts. In sum, AL 17024 cannot be reasonably construed as having provided notice that Pacific sought to replace the Commission's flow-through policy with normalized tax accounting.

(*Id*. at **215-216 (footnotes omitted).) If section 1708 applied only when the Commission reopens a prior proceeding (which AL 17024 did not do), this reasoning in Decision 04-02-063 would make no sense.

It also cannot be the case that section 1708 applies only when the Commission reopens a prior proceeding because that would mean that the Commission has discretion to modify any prior order without affected parties being afforded notice and an opportunity to be heard, so long as the Commission issues the order in a new proceeding and applies the order prospectively. This would mean that the Commission could, for example, modify the Rate Case Plan for Class A Water Utilities that was adopted in Decision 07-05-062 in R.06-12-016 (4JA 743-813) in any manner—even changing the GRC cycle from three to ten years and not allowing the utilities to change rates during the ten-year period (which would greatly increase customer and shareholder risk)—without providing notice and an opportunity to be heard. Under the Commission's reasoning, so long as it did so in a new proceeding and applies the change in policy prospectively, rather than by reopening R.06-12-016, section 1708 would not apply. Were this true, the Commission would have unchecked authority to impose new

rules on parties subject to its jurisdiction without providing notice and an opportunity to be heard.

Respondent's statement that it "has exercised its discretion under section 1708 in order to ensure that settled expectations remain undisturbed" (RB 47) is ironic. In every other proceeding in which the Commission considered whether the WRAM/MCBA should be continued it specifically identified the WRAM/MCBA as an issue under consideration (4JA 818, 824, 833; 1JA 193-196). By contrast, the Commission failed even to mention the WRAM or water revenue decoupling in the scoping memo for LIRA I. Thus, the Revocation Order disturbed Petitioners' expectations and is contrary to an exercise of discretion that preserves expectations.

Respondent's contentions regarding the inapplicability of section 1708.5(f)[7] are also at odds with its other positions in this case. It claims that Golden State did not have a right to an evidentiary hearing under section 1708.5(f) by claiming that the WRAM/MCBA is not a regulation. (RB 48-50.) But Respondent's other arguments are based on its contention that the WRAM/MCBA is precisely that, i.e., a generally applicable regulatory mechanism that it has discretion to authorize or revoke in a quasi-legislative proceeding. (RB 19-20, 47-48, 53-54, 57-58.) It cannot be the case that the WRAM/MCBA mechanisms are regulations for purposes of determining whether the Commission can revoke a utility's authority to apply for them but not regulations for purposes of determining whether a utility has a right to hearing when the Commission does precisely that.

[7] Section 1708.5 provides 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".

Although the Commission has typically treated the WRAM/MCBA as ratesetting mechanisms, it has also treated them as regulations.[8] And there is nothing wrong or unusual in doing just that. Specifically, the order initiating the proceeding in which the WRAM/MCBA were first adopted ("*Order Instituting Investigation to Consider Policies to Achieve the Commission's Conservation Objectives for Class A Water Utilities*") consolidated applications from multiple utilities to establish conservation rate designs. (4JA 816.) In the first phase of that proceeding, categorized as "ratesetting," the Commission considered rate-related conservation proposals from all of the applicants, which proposals included the WRAM (4JA 816), and Decision 08-08-030 resulting therefrom, authorized use of the WRAM/MCBA by multiple utilities. (2008 Cal. PUC LEXIS 320, **23-24.) In 2010, those utilities jointly filed Application 10-09-017 in order to request changes to the WRAM mechanics and to amortize their WRAM balancing accounts. (See discussion at 4JA 649.) In Decision 12-04-048, resulting from that joint application, the Commission directed the utilities to provide testimony in their next GRCs addressing, among other issues related to the WRAM, whether the Commission should adopt Monterey-style WRAMs[9] rather than decoupling WRAMs and whether decoupling WRAMs should be eliminated (the exact issue addressed by the Revocation Order). (*Id.*)

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[8] Pursuant to the text of Assembly Bill 301 quoted by Respondent, regulations are "rules of general applicability and future effect" (RB 60 (quoting Assembly Bill 301 (1999), Stats. 1999, c. 568, Section 1(b)).

[9] The Monterey-style WRAM is a revenue adjustment mechanism permitting a water utility to true-up revenue recovered under tiered quantity rates with revenue that the utility would have collected by a uniform quantity rate. (2JA 443, fn. 97.)

Golden State provided testimony regarding the WRAM in its 2012 GRC as a result of the Commission's order in Decision 12-04-048. As detailed in Golden State's comments on the proposed decision in LIRA I, what differentiates Golden State from the other four Petitioner utilities for purposes of section 1708.5 is that in the other utilities' GRCs in which they submitted testimony responding to the very same questions, the Commission authorized the continued use of the WRAM/MCBA mechanisms through settlement agreements. (3JA 551-552.) But Golden State's continued use of the WRAM was fully litigated and affirmed after an evidentiary hearing analyzing whether the WRAM/MCBA was achieving its stated purposes. (2JA 444 (Conclusion of Law #72), 447 (Conclusion of Law #88).)

Accordingly, the Commission held the evidentiary hearing in Golden State's GRC, but this was in connection with its broader evaluation of whether the WRAM/MCBA should be continued or replaced by other mechanisms—an evaluation that resulted in upholding the WRAM/MCBA for all the WRAM Utilities. In other words, Golden State's 2012 GRC included the Commission's evaluation of a regulation, a ratesetting regulation, but a regulation nonetheless.

Even if the Court were to conclude that sections 1708 and 1708.5 do not apply to the Revocation Order, the WRAM Utilities still had a right to notice and due process under the California and United States Constitutions before the Commission eliminated their use of the WRAM/MCBA. (Petitioners' Opening Brief 41-42.) Respondent fails to address this issue.

IV. Petitioners Did Not Waive Their Rights to a Hearing.

Respondent argues that if any of the Petitioners had a right to a hearing before the Commission issued the Revocation Order, they waived it because no one asked for a hearing. (RB 50-52.) Respondent is wrong.

Under California law, "[w]aiver is the intentional relinquishment of a known right after knowledge of the facts," and "always rests upon intent." (*Southern Cal. Edison Co. v. Public Utilities Com*. (2000) 85 Cal.App.4th 1086, 1107.) "The burden, moreover, is on the party claiming a waiver of a right to prove it by clear and convincing evidence that does not leave the matter to speculation, and 'doubtful cases will be decided against a waiver.'" (*Id*. (citations omitted).) "The waiver doctrine applies in the administrative context 'if the administrative record shows that the applicant has made a knowing, intelligent, and voluntary waiver in circumstances where the applicant might reasonably anticipate some benefit or advantage from the waiver.'" (*Id*. at 1107-1108 (citations omitted).)

To have waived its rights to a hearing, each Petitioner would have needed to do so knowingly, intentionally, and believing that there was some advantage in doing so. That waiver must be clearly and convincingly reflected in the administrative record for each Petitioner. (*Id.* at 1107.) If there is ambiguity about whether a waiver occurred, there is not clear and convincing evidence. (*Id*. at 1109 [where it was "at least arguable" that party had not intentionally waived its rights, the court "cannot find a clear and convincing showing of intentional relinquishment of a known right"]; see also *Jovine v. FHP, Inc.* (1998) 64 Cal.App.4th 1506, 1527; *City of Ukiah v. Fones* (1966) 64 Cal.2d 104, 108 ["very necessity of such speculation demonstrates that [] proof of waiver is not 'clear and convincing.'"].)

Thus, to accept the Commission's waiver argument, the Court would need to find clear and convincing evidence showing: (1) that each Petitioner had intuited from the two questions about sales forecasts in the original scoping memo and the two-part question in the ALJ's final ruling (asking whether the Commission should "consider converting to Monterey-style

WRAM with an incremental cost balancing account" and whether "this consideration occur in the context of each utility's GRC" (2JA 275 (Question #6)) that the Commission was considering revoking the WRAM/MCBA during LIRA I, and (2) with this knowledge, each Petitioner decided not to request evidentiary hearings in order to achieve some strategic advantage. There is no such evidence. Nor did the Commission make any finding of fact or conclusion of law in either Decision supporting a waiver by Petitioners.

Respondent's reliance on *Platt Pacific, Inc. v. Andelson* (1993) 6 Cal.4th 307 (*Platt*) to support its waiver argument is misplaced. In *Platt*, the parties entered into an agreement for alternative resolution of disputes, and the issue before the Court was whether a party waived the right to arbitration by failing to file a demand for arbitration by the deadline for doing so in that agreement. (*Id*. at 311.) The Court explained that "the term 'waiver' as used in the context of the failure to timely demand arbitration, refers not to a voluntarily relinquishment of a known right, but to the loss of a right based on a failure to perform an obligation." (*Id.* at 314.) It summarized its analysis as follows: "a contractual requirement that a party's demand for arbitration must be made within a certain time is a condition precedent to the right of arbitration." (*Id.* at 321.)

The contracting party in *Platt* could not claim lack of knowledge regarding the deadline for obtaining arbitration because the requirement was in the contract that it signed. Petitioners' case has nothing to do with a contract or Petitioners' failure to satisfy a contractual condition. Petitioners had no knowledge (from a contract term or otherwise) that elimination of the WRAM was under consideration in LIRA I. Without that knowledge, they also did not know that hearings would be needed. Petitioners are

asserting their statutory and constitutional due process rights to a hearing. *Platt* has no bearing on this case.

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

Respondent argues that the Revocation Order is supported by "ample record evidence." (RB 52.) But instead of identifying that evidence with any specificity, it argues that because the Revocation Order "is an exercise of its legislative power," it has freedom to consider a broader set of record evidence, including "legislative facts.'" (RB 52-53, Answer at 43-44.)

The only items of evidence on which the Decisions relied to support the Revocation Order were a single graph that Petitioners had no opportunity to refute because the Commission failed to comply with the requirements of due process, and outdated data from a decision the Commission issued in 2012 that was not in the record of LIRA I. (Petitioners' Opening Brief 46-51.) The Revocation Order was 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 claimed to support the Commission's findings regarding the Revocation Order was unreliable because of due process violations.

Even if the Commission has latitude to consider "legislative facts," those facts must be in the record and not simply retrieved out of context from other proceedings without parties having been provided any notice that the Commission would be considering those "legislative facts" as support for new policy. By revoking the WRAM Utilities' authority to use the WRAM/MCBA based on a single piece of evidence in the record and outdated data from a prior proceeding that Petitioners had no opportunity to

refute, the Commission failed to regularly pursue its authority. (§ 1757.1, subd. (b).)

VI. The Commission Failed to Develop Any Record Regarding the Effect that Revocation of the WRAM/MCBA Would Have on Utility Customers.

Respondent argues that it considered the consequences, including the economic effects, of the Revocation Order in compliance with section 321.1(a) because the statute "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." (RB 55.) The statute nonetheless requires that the Commission consider the effects of its orders. (§ 321.1, subd. (a).) It is apparent that the Commission did not do so in LIRA I. For example, among the many sets of questions it issued to parties, the Commission failed to ask even one question regarding the economic effects (or any other consequences) of revoking the WRAM/MCBA on low-income or any other customers. There is also no discussion in either of the Decisions on the effects of the Revocation Order on low-income or any other 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. Public Utilities 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. Pub. Util. 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].)

Respondent cites to the Decision for its assertion that "the appropriate place to address how each utility will provide for conservation and low-income customers, is in the water utilities' individual general rate cases, where rate designs can be tailored to the specific circumstances of each district, in the setting of rates" and claims that "CWA's comments, on behalf of water utilities, reflect a similar opinion." (RB 56.) This is misleading. Respondent's citation is to comments in which CWA answered specific questions from the ALJ regarding whether the Commission should adopt a single "Tier 1" water usage amount for residential customers that would be standardized across all utilities. (CWA Appx. 163.) CWA expressed concerns with that standardized approach and explained that, because circumstances in water districts vary greatly based on differences in climate, water supply and other factors, the issue is better addressed in individual utility GRCs. (*Id*. at 164-165.)

Because CWA's comments had nothing to do with revoking the WRAM/MCBA in LIRA I and only considering the effect of the revocation on customers and rate designs in future GRCs, the Court should give no weight to Respondent's claim that CWA's comments support the Commission's position. The Revocation Order eliminates one ratemaking tool for use in future proceedings, and the Commission did nothing to consider the effects that this action would have on customers.

VII. Respondent's Claim that Elimination of the WRAM/MCBA Was a Quasi-legislative Action Has No Basis in Law or Fact.

Contrary to the Commission's view, just because the Commission issued the Revocation Order in a *quasi-legislative proceeding* does not make it a *quasi-legislative action*. Eliminating the WRAM/MCBA mechanisms used by five specific companies (Cal-Am, Cal Water, Golden State, and the two Liberty utilities) is 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."]; Rule 1.3(e) and (f).) This is evident in the way the Commission categorized the Balanced Rates Proceeding, in which the Commission reaffirmed the WRAM/MCBA shortly before instituting LIRA I.

In particular, Rulemaking 11-11-008 was originally categorized as ratesetting but was later changed to quasi-legislative by the Third Amended Scoping Memo (which included the nine questions regarding the WRAM). (1JA 193-196.) In the categorization section of that scoping memo, the assigned Commissioner stated: "This phase of the proceeding will consider and may establish policies for Class A and Class B water utility rate and accounting mechanisms. *The application of policies adopted in this proceeding to any particular water utility will be considered through a separate phase or through separate proceedings such as GRCs*." *(Id.* at 196 (emphasis added).) The assigned Commissioner thus made clear that the Commission would establish general policies and guidelines in the quasi-legislative phase of R.11-11-008, and not do what the Commission did in LIRA I, i.e., issue binding orders directed at individual utilities that adopt (or revoke authority for) specific ratesetting mechanisms without providing an opportunity for those utilities to respond.

Finally, Respondent's argument that Petitioners had their opportunity to challenge the categorization after the ALJ issued her final ruling asking the two-part question about the WRAM/MCBA (RB 58) is meritless. The Commission's failure to identify that it was considering

discontinuing the WRAM/MCBA in the scoping memo for LIRA I prevented Petitioners from challenging the categorization, which they had to do within ten days after issuance of the scoping memo. (1JA 210.) Because the Commission did not identify the WRAM/MCBA among the issues that would be considered, Petitioners had no notice of the need to challenge the categorization.

CONCLUSION

For all these reasons, the Court should vacate the Revocation Order and require the Commission to authorize Cal Water and the two Liberty utilities to submit applications to implement water sales decoupling mechanisms prior to their next triennial GRC applications.

Respectfully submitted,

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SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

By: */s/ Joseph M. Karp*
Joseph M. Karp
Attorneys for Golden State Water Company

NOSSAMAN LLP

By: */s/ Lori Anne Dolqueist*
Lori Anne Dolqueist
Attorneys for California-American Water Company and California Water Service Company

NOSSAMAN LLP

By: */s/ Martin A. Mattes*
Martin A. Mattes
Attorneys for California Water Association

PROSPERA LAW, LLP

By: */s/ Victor T. Fu*
Victor T. Fu
Attorneys for Liberty Utilities (Park Water) Corp. and Liberty Utilities (Apple Valley Ranchos Water) Corp.

CERTIFICATE OF COMPLIANCE

Pursuant to California Rule of Court 8.520(c), I certify that the foregoing Reply Brief is proportionately spaced, has a typeface of 13 points, and contains 8,288 words, according to the word processing program with which it was prepared.

January 13, 2023

SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

By: */s/ Joseph M. Karp*
Joseph M. Karp
Attorneys for Golden State Water Company

NOSSAMAN LLP

By: */s/ Lori Anne Dolqueist*
Lori Anne Dolqueist
Attorneys for California-American Water Company and California Water Service Company

NOSSAMAN LLP

By: */s/ Martin A. Mattes*
Martin A. Mattes
Attorneys for California Water Association

PROSPERA LAW, LLP

By: */s/ Victor T. Fu*

Victor T. Fu
Attorneys for Liberty Utilities (Park Water) Corp. and Liberty Utilities (Apple Valley Ranchos Water) Corp.

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 January 13, 2023, I served a true and correct electronic copy of the above Petitioners' Reply Brief on all parties by electronically filing and serving the documents via True Filing and/or email:

Lori Anne Dolqueist
Willis Hon
Martin Mattes
Alexander J. Van Roekel
NOSSAMAN, LLP
50 California Street, 34th Floor
San Francisco, CA 94111
Tel: (415) 398-3600
Fax: (415) 398-2438
E-mail: ldolqueist@nossaman.com
whon@nossaman.com
mmattes@nossaman.com
avanroekel@nossaman.com

Counsel for California-American Water Company, California Water Service Company, and California Water Association

Victor T. Fu
Joni A. Templeton
PROSPEREA LAW, LLP
1901 Avenue of the Stars, Suite 480
Los Angeles, California 90067

Tel: (424) 239-1890
Fax: (424) 239-1882
E-mail: vfu@prosperalaw.com
jtempleton@prosperalaw.com
Counsel for Liberty Utilities (Park Water) Corp., and Liberty Utilities (Apple Valley Ranchos Water) Corp.

Sarah E. Leeper
CALIFORNIA-AMERICAN WATER COMPANY
555 Montgomery Street, Suite 816
San Francisco, CA 94111
Tel: (415) 863-2960
Fax: (415) 863-0615
E-mail: sarah.leeper@amwater.com
Counsel for California-American Water Company, California Water Service Company, and California Water Association

Darlene M. Clark
Dale Holzschuh
505 Van Ness Avenue
San Francisco, CA 94102
Tel: (415) 703-1650
Fax: (415) 703-2262
E-mail: darlene.clark@cpuc.ca.gov
dah@cpuc.ca.gov
Counsel for California Public Utilities Commission

I provided the document listed above electronically on the TrueFiling Website for electronic service to the persons on the above service list and/or sent the document to the persons on the above service list by e-mail.

I declare under penalty of perjury under the laws of the State of

California that the foregoing is true and correct.

Executed on January 13, 2023 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

Case Name: **GOLDEN STATE WATER COMPANY v. PUBLIC UTILITIES COMMISSION**
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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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Joni Templeton Prospera Law, LLP 228919	jtempleton@prosperalaw.com	e-Serve	1/13/2023 3:15:32 PM
Patrick Rosvall 217468	patrick@brblawgroup.com	e-Serve	1/13/2023 3:15:32 PM
John Ellis Sheppard, Mullin, Richter & Hampton LLP 269221	jellis@sheppardmullin.com	e-Serve	1/13/2023 3:15:32 PM
Joseph Karp Sheppard, Mullin, Richter & Hampton LLP 142851	jkarp@sheppardmullin.com	e-Serve	1/13/2023 3:15:32 PM
Rocio Ramirez Winston & Strawn LLP	RERamirez@winston.com	e-Serve	1/13/2023 3:15:32 PM
Dale Holzschuh California Public Utilities Commission 124673	dah@cpuc.ca.gov	e-Serve	1/13/2023 3:15:32 PM
Willis Hon Nossaman LLP 309436	whon@nossaman.com	e-Serve	1/13/2023 3:15:32 PM
Joseph Karp Winston & Strawn, LLP 142851	JKarp@winston.com	e-Serve	1/13/2023 3:15:32 PM
Arocles Aguilar California Public Utilities Commission	arocles.aguilar@cpuc.ca.gov	e-Serve	1/13/2023 3:15:32 PM

Darlene Clark California Public Utilities Commission 172812	Darlene.clark@cpuc.ca.gov	e-Serve	1/13/2023 3:15:32 PM
Rachel Gallegos CPUC	rachel.gallegos@cpuc.ca.gov	e-Serve	1/13/2023 3:15:32 PM
Lori Anne Dolqueist	ldolqueist@nossaman.com	e-Serve	1/13/2023 3:15:32 PM
Martin Mattes 63396	mmattes@nossaman.com	e-Serve	1/13/2023 3:15:32 PM
Alexander J. Van Roekel	avanroekel@nossaman.com	e-Serve	1/13/2023 3:15:32 PM
Victor T. Fu	vfu@prosperalaw.com	e-Serve	1/13/2023 3:15:32 PM
Sarah E. Leeper	sarah.leeper@amwater.com	e-Serve	1/13/2023 3:15:32 PM
Chris Kolosov	ckolosov@sheppardmullin.com	e-Serve	1/13/2023 3:15:32 PM

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.

1/13/2023

Date

/s/John Ellis

Signature

Ellis, John (269221)

Last Name, First Name (PNum)

Sheppard Mullin Richter & Hampton

Law Firm