

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.

**APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF
OF NATIONAL ASSOCIATION OF WATER COMPANIES IN
SUPPORT OF PETITIONERS**

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

Of the Public Utilities Commission of the State of California

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TO THE HONORABLE PRESIDING JUSTICE PATRICIA GUERRERO AND TO THE HONORABLE ASSOCIATE JUSTICES OF THE CALIFORNIA SUPREME COURT:

Pursuant to Rule 8.520(f) of the California Rules of Court, the National Association of Water Companies (“NAWC”) requests leave to file an *amicus curiae* brief (“amicus brief”) in support of Petitioners in this petition for writ of review proceeding challenging two decisions of the California Public Utilities Commission (the “CPUC” or the “Commission”). NAWC has a substantial interest in the outcome of the statutory compliance, fair notice, and due process issues in this case to ensure its ability to meaningfully participate in future CPUC proceedings. NAWC requests leave to file its *amicus* brief to share its unique, broad-based perspective on these issues, to assist the Court in a just resolution of this matter.

Pursuant to Rule 8.520(f)(4)(A), NAWC confirms that no party or counsel for a party on the pending appeal “authored the proposed amicus brief in whole or in part,” or “made a monetary contribution intended to fund the preparation or submission of the brief.” In addition, other than NAWC, its members, or its counsel in this pending appeal, no person or entity “made a monetary contribution intended to fund the preparation or submission of the brief.”¹

As detailed in the amicus letter that NAWC submitted to this Court on December 9, 2021 (“NAWC Amicus Letter”) and the reply amicus letter replying to portions of the CPUC’s Answer, which was accepted by this Court on April 1, 2022 (“NAWC Reply Amicus Letter”),² NAWC is a

¹ (California Rule of Court 8.520(f)(4)(B).)

² On November 16, 2022, NAWC also filed an Application for Permission to File Letter in Support of Petitioners' Opposition to Respondent's Motion to Dismiss Petitions or, in the Alternative Reconsider the Issuance of the

national trade association that represents regulated water utilities, wastewater companies, and entities engaging in partnerships with municipal utilities. NAWC is comprised of 42 members nationwide that provide water service to 73 million Americans in 37 states across the country. Its members share a deep understanding of the importance of uninterrupted delivery of quality water and wastewater services. NAWC also brings a unique, broad-based perspective to water resource conservation challenges and tools that are effective in promoting efficient uses of scarce water resources.

This proceeding concerns the CPUC's disposition of two ratemaking mechanisms referred to as the Water Revenue Adjustment Mechanism ("WRAM") and Modified Cost Balancing Account ("MCBA") that are of critical importance for NAWC and its member companies. The CPUC's proposal to eliminate these important ratemaking mechanisms in California was not identified as part of the scope of the underlying administrative proceeding in which they were ultimately prohibited, thus preventing interested parties like NAWC from participating in the CPUC's consideration of this issue when they could have been heard. The statutory compliance, fair notice, and due process issues previously raised in the NAWC Amicus Letter and Reply Amicus Letter are not mooted by the Legislature's adoption of SB 1469. NAWC seeks the Court's permission to file an amicus brief supporting Petitioners to demonstrate that this case presents an issue of broad public importance that is likely to recur and that this Court should, therefore, exercise its discretion to decide the material questions raised in the Petitions that directly impact NAWC's and its members' rights to effectively participate in CPUC proceedings. NAWC's

Writ, which was denied as moot by this Court on November 30, 2022 in light of the rejection of the motion to dismiss.

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Respondent.

**PROPOSED *AMICUS CURIAE* BRIEF ON THE MERITS OF
NATIONAL ASSOCIATION OF WATER COMPANIES IN
SUPPORT OF PETITIONERS**

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

Of the Public Utilities Commission of the State of California

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Pursuant to California Rule of Court 8.520(f), the National Association of Water Companies (“NAWC”) submits this amicus brief in support of Petitioners’ Opening Brief on the Merits in the above-captioned consolidated matters. The statutory compliance, fair notice, and due process concerns at issue here directly impact NAWC’s ability to effectively participate in CPUC proceedings and these errors are not mooted by the Legislature’s adoption of Senate Bill (“SB”) 1469.

I. THE STATUTORY COMPLIANCE AND DUE PROCESS ISSUES RAISED IN THE PETITION AND NAWC’S AMICUS LETTERS ARE OF BROAD PUBLIC IMPORTANCE AND THE HARM SUFFERED BY NAWC IS LIKELY TO RECUR ABSENT A RULING FROM THE COURT.

NAWC’s Amicus Letter and Reply Amicus Letter describe the CPUC’s failure to comply with its own scoping rules and the deprivation of adequate notice and due process protections that these actions inflicted on NAWC and other interested parties, who were prevented from participating in the underlying proceeding at a time that would have been meaningful to the CPUC’s unexpected curtailment of the WRAM/MCBA mechanisms. Contrary to the misstatements in the CPUC’s Answer Brief, these issues are not merely “residual” or “academic” issues of little import.³ If the Court does not annul the decisions prohibiting these ratemaking options, the CPUC would be permitted to follow a constitutionally defective procedure, such as what led to the adoption of the challenged decisions. Had the CPUC clearly stated in the order initiating the rulemaking (“OIR”)—or in any of the scoping memos in the proceeding—that it was considering eliminating these mechanisms, NAWC could have become a party and shared its unique perspective on the substantive ratemaking issues based on its work in a variety of states and jurisdictions. Because it received no

³ (*CPUC Answer Brief* at 28-30.)

advance notice until there was already a proposed decision issued on these subjects, NAWC was denied this opportunity, contrary to the requirements of Public Utilities Code Section 1701.1(c) and complementary constitutional due process protections.

A. The CPUC Did Not Provide NAWC With Sufficient Notice in the OIR or Scoping Memos and Its Alleged Notice Via Other Means Is Irrelevant and Insufficient as a Matter of Law.

The underlying OIR was issued on June 29, 2017 to review “the low-income rate assistance programs of the Class A water utilities under the Commission’s jurisdiction to assess the feasibility of achieving program consistency across the Class A water utilities,” “investigate assistance to low-income customers of the Class B, C, and D water utilities,” and “consider water affordability”⁴ The preliminary scoping issues in the OIR did not reference or implicate the WRAM or MCBA ratemaking mechanisms.⁵ Nor did any of the three Scoping Memos issues in the underlying proceedings, which retained a focus on LIRA program-related issues.⁶ The proceeding spanned over three years from the issuance of the OIR through the July 2020 issuance of the Proposed Decision, including numerous workshops, staff reports, and extensive comments in response to

⁴ (See Petitioners’ Appendix of Exhibits to Petition for Writ of Review (“Appendix of Exhibits”), Exhibit M (Rulemaking 17-06-024) at 53.)

⁵ (See Appendix of Exhibits, Exhibit M at 61-64 (identifying issues focused exclusively on low-income rate assistance (“LIRA”) programs, including monthly discounts, cost recovery and funding for LIRA programs, and implementation issues).)

⁶ (See Appendix of Exhibits, Exhibit N (*Scoping Memo*) at 77 (“The issues to be addressed in this proceeding relate to a review of low-income rate assistance programs for water utilities under the Commission’s jurisdiction.”); Exhibit O (*Amended Scoping Memo*) at 94-96; Exhibit V (*Second Amended Scoping Memo*) at 134-137.)

six Administrative Law Judge Rulings.⁷ Given the significant duration, complexity, and extent of the underlying OIR, it would be unreasonable to expect non-parties such as NAWC to scour through all of these documents to attempt to identify whether the OIR might address material issues of concern to NAWC. For this reason, Commission Rule 7.3 requires that the Scoping Memo “shall determine . . . issues to be addressed,” in Commission proceedings.⁸

Contrary to CPUC’s assertions in its Answer Brief, the issue of water sales forecasting is not “inextricably linked” to the WRAM and MCBA ratemaking mechanisms.⁹ Based on the Scoping Memo, NAWC had no notice that the Commission was considering discontinuing these ratemaking water conservation accounting measures; the Scoping Memo’s general references to “water sale forecasting” cannot be construed as sufficient notice.¹⁰ As noted above, the OIR was focused on issues for low-income customers, so it was not reasonably apparent that these ratemaking mechanisms would fall within the scope of this proceeding, particularly for non-parties like NAWC who do not regularly practice before the CPUC. In fact, the CPUC itself has recognized that “water sale forecasting” and the WRAM and MCBA ratemaking mechanisms are distinct issues by separately defining them in its prior rulemaking addressing the Commission’s Water Action Plan objectives.¹¹ As Petitioners note in their

⁷ (Joint Appendices to the Opening Brief on the Merits (“Joint App.”), Vol. I, App. A (D.20-08-047) at 7-14 (summarizing the extensive procedural history of OIR, including three scoping memos, six ALJ Rulings prior to the issuance of the Proposed Decision, and five workshops).)

⁸ (*See also* Pub. Util. Code § 1701.1(c); *Southern California Edison v. Cal. Pub. Util. Comm.* (2006) 140 Cal. App.4th 1085.)

⁹ (*Answer Brief* at 37.)

¹⁰ (*Id.*)

¹¹ (*See NAWC Motion for Judicial Notice*, Exhibit 4 (R.11-11-008, *Order*

Opening Brief, in each prior proceeding addressing these ratemaking mechanisms, the CPUC has complied with its own rule and Public Utilities Code section 1701.1(c) by specifically identifying the WRAM and MCBA ratemaking mechanisms in the governing scoping memo.¹²

The CPUC failed to do so here, which deprived NAWC of its right to meaningfully participate in Phase 1 of the OIR. As explained further in its Amicus Reply Letter, as soon as NAWC became aware that the continuation of the WRAM and MCBA ratemaking mechanisms were at issue with the issuance of the July 3, 2022 Proposed Decision, NAWC took prompt action, and sought to participate.¹³ Despite this swift action, the Commission denied NAWC’s request for party status in Phase 1 of the proceeding, removed already-filed comments on the Proposed Decision from the record, and disregarded its request for reconsideration.¹⁴

The CPUC’s alleged claims of notice through parties’ comments,

Instituting Rulemaking Addressing the Commission’s Water Action Plan Objectives, Third Amended Scoping Memo (April 30, 2015)) at 47 (“In particular, Phase II will evaluate current policies and potential improvements in policies related to: (1) rate structures, including conservation rate design, tiered rates, and other rate-design issues including forecast mechanisms especially in light of the recently issued Executive Order; (2) accounting mechanisms such as the Water Revenue Adjustment Mechanisms (WRAMs) and Modified Cost Balancing Account (MCBAs)”.)

¹² (*Opening Brief* at 30-32.)

¹³ (*See NAWC Reply Amicus Letter* at 3; *see also NAWC Motion for Judicial Notice*, Exhibit 1 (*NAWC Motion for Party Status* (July 22, 2020).)

¹⁴ (*NAWC Motion for Judicial Notice*, Exh. 2 (ALJ Ruling granting NAWC Motion for Party Status only as to Phase II), Exh. 3 (NAWC Motion for Reconsideration of ALJ Ruling), Attachment A (NAWC Comments on Proposed Decision), Attachment B (NAWC Reply Comments on Proposed Decision), Attachment C (CPUC email limiting NAWC’s party status to Phase II and clarifying NAWC’s Comments on Proposed Decision are removed from the record).)

informal workshop discussions or the September 2019 ALJ Ruling¹⁵ do not cure its failure to comply with its own rule and Public Utilities Code section 1701.1(c), which require that issues in a proceeding to be specifically identified in the Scoping Memo. Although NAWC's actual knowledge is irrelevant given these clear mandates that the Commission refused to follow, NAWC did not obtain notice through these other means. Although Petitioners are members of NAWC, it is incorrect to assume, as the CPUC does in its Answer, that NAWC would have the same knowledge, understanding of, or interests in, the proceeding as the Petitioners themselves.¹⁶ As explained in its Reply Amicus Letter,¹⁷ NAWC is a national trade association comprised of 42 regulated utilities and contract operators that operate in 37 states across the country.¹⁸ The California chapter of NAWC is one of 11 state chapters.¹⁹ Although NAWC stays generally apprised of the proceedings before many state public utility commissions in which its members participate, NAWC members are involved in numerous proceedings before state public utility commissions and other bodies across the country. As a result, it is impossible for NAWC to have intimate and detailed knowledge of each proceeding; the statutory and administrative notice requirements surrounding Scoping Memos are designed to avoid exactly this kind of surprise action without proper notice.

¹⁵ (See *Answer Brief* at 37-38, 40-42, 45-46.)

¹⁶ (See *CPUC Answer* at 34; see also *NAWC Reply Amicus Letter* at 2-3.)

¹⁷ (*NAWC Reply Amicus Letter* at 4.)

¹⁸ (*NAWC Motion for Judicial Notice*, Exh. 5 (NAWC Active Members Web Page).)

¹⁹ (*NAWC Motion for Judicial Notice*, Exh. 6 (NAWC Chapters Web Page).)

The CPUC's assertion that the WRAM/MCBA was a pilot program is also misplaced.²⁰ This characterization does not provide fair notice that the Commission would be considering discontinuing these conservation ratemaking measures in the underlying proceeding.

B. The Commission's Implication that It May Depart from the Issues in the Scoping Memo is Inconsistent With the Public Utilities Code, Its Own Rule and Appellate Precedent.

The CPUC implies that it may depart from issues in the Scoping Memo because the parties had notice through other means and were not prejudiced.²¹ This claim is contrary to the CPUC's own rule and precedent.²² While the CPUC references *BullsEye*,²³ that case does not support the Commission's position as the Court of Appeal there concluded that "the Rehearing Decision did *not* resolve issues not encompassed by the Scoping Memo, and petitioners had adequate opportunity to provide evidence on the issues addressed in the Rehearing Decision."²⁴

Moreover, the CPUC's claim that "Petitioners were not prejudiced because they had ample opportunity to address" the Commission's

²⁰ (See *Answer Brief* at 43-44.)

²¹ (See *Answer Brief* at 29-31, 46.)

²² (See, e.g., 20 CCR § 7.3; *Southern California Edison v. Cal. Pub. Util. Comm'n* (2006) 140 Cal. App.4th 1085, 1105-1106 (annulling portions of the decision because the Commission had "failed to proceed in the manner required by law and that the failure was prejudicial" when it address new issues not included in the Scoping Memo); see also *Calaveras Telephone Company v. Pub. Util. Comm'n* (2019) 5 Cal App.5th 972 (annulling Commission resolution on the ground that the Commission abused its discretion by failing to follow its own rules); *Southern Cal. Edison Co. v. Pub. Util. Comm'n* (2000) 85 Cal.App.4th 1090, 1105 (annulling decision and resolution based on conflict with the requirements of a preexisting Commission General Order).)

²³ (*Answer Brief* at 46; see also *Answer* at 30-31, citing *BullsEye Telecom, Inc. v. Public Utilities Comm'n.* (2021) 66 Cal.App.5th 301.)

²⁴ (*BullsEye, supra*, 66 Cal.App.5th at 327 (emphasis in original).)

elimination of the WRAM/MCBA²⁵ is particularly untrue for NAWC because NAWC was deprived of an opportunity to participate in Phase 1 of the proceeding as a result of the Commission’s failure to comply with Public Utilities Code section 1701.1(c), its own rule governing scoping memos, and Commission precedent.²⁶ There can be no larger harm in a regulatory proceeding than improperly limiting who is able to participate in the matter due to lack of notice. NAWC’s ability to effectively participate in CPUC proceedings is essential because other state utility commissions and NAWC members often look to California for leadership since it is one of the largest states and has multiple investor-owned water utilities. In other words, if a rule is adopted in California without proper input from affected parties, that rule could easily become the blueprint for action in many other jurisdictions, thereby amplifying the harm without due process.

C. Two Exceptions to the Mootness Doctrine Acknowledged in the Commission’s Answer Brief Apply Here.

The CPUC’s Answer acknowledges two exceptions to the mootness doctrine that apply to the instant case: “1) when a material question remains for the court's determination; and 2) when the case presents an issue of broad public interest that is likely to recur.”²⁷ Here, the statutory compliance, notice, and due process issues are of broad public importance to NAWC, its members, other trade associations, and the public, and these concerns are not mooted by the Legislature’s adoption of SB 1469. Contrary to the CPUC’s claims that “[t]his case is a matter relevant only to

²⁵ (*Answer Brief* at 46; *see also id.* at 28-30 (mischaracterizing the statutory compliance, notice and due process issues as mere “procedural” or “academic” issues).)

²⁶ (*See Amicus Letter* at 5-6 (explaining that the CPUC’s failure to make clear in the scoping memos that recession of the WRAM/MCBA was under consideration deprived NAWC the ability to be a party to Phase 1 of the proceeding); *Amicus Reply Letter* at 3-4.)

²⁷ (*Answer Brief* at 28.)

the Class A water companies – whether the Commission improperly discontinued the WRAM Utilities’ ability to seek authorization for their WRAM/MCBAs,”²⁸ this Court’s resolution of the statutory compliance, notice, and due process issues is of broad public importance to NAWC, all utilities regulated by the CPUC, and other interested parties in CPUC proceedings.

Notwithstanding SB 1469, the Court may still grant “effective relief”²⁹ on these important issues, which are not simply “abstract or academic procedural issues.”³⁰ Unlike the *Newsom* case on which the CPUC relies where the requested relief “would have no remedial effect whatsoever,”³¹ the Court’s resolution of these issues will help ensure the CPUC’s compliance with its own rules and the Public Utilities Code in future proceedings and will help ensure that interested parties are afforded proper notice of material issues. If the Court clarifies these issues, and, as a

²⁸ (*Answer Brief* at 29.)

²⁹ (*See, e.g., Answer Brief* at 9, 20 (arguing that the CPUC may no longer grant “effective relief” in this proceeding).

³⁰ (*Answer Brief* at 30.)

³¹ (*Id.* at 23; *Newsom v. Super. Ct.* (2021) 63 Cal.App.5th 1099, 1110. The Commission’s reliance on *Equi v. San Francisco* (1936) 13 Cal.App.2d 140 is also misplaced. *Answer Brief* at 23-24.) That case was limited to unique circumstances where “the question of whether the license tax imposed by the repealed provisions of said ordinance was invalid upon the further ground that it was a license tax for revenue rather than for regulation and the question of whether the City and County of San Francisco had the power to impose such a license tax for revenue have become abstract, academic and dead issues which no longer present any actual controversy between the parties.” (*Equi, supra*, 13 Cal.App.2d at 141-142.) The parties there did not challenge the judgment declaring the license tax of the ordinance “upon the ground that the said tax was unreasonable, oppressive and discriminatory” and this finding was supported by the record. (*Id.* at 142.) In contrast, the statutory compliance, notice and due process issues have not been resolved on another ground and these issues are not “abstract, academic and dead.”

result, the CPUC more effectively abides by its own rules with respect to notice, all future regulatory proceedings before the CPUC will benefit from more robust participation. Therefore, these constitutional and statutory errors present a well-established exception to the “mootness” doctrine for issues that are “capable of repetition” but which would “evad[e] review” if not addressed.³² The Court has inherent power to provide relief because these issues are of broad public importance and likely to impact future Commission proceedings.³³

Indeed, the *Newsom* case upon which the CPUC relies supports this Court’s consideration of these types of issues. The *Newsom* appellate court found that even if the scope of the Governor’s “authority to make or amend statutory law by executive order, and the permanent injunction” were “technically moot,” it retained discretion to consider this issue “of broad public interest that is likely to recur” in connection with the Governor’s

³² (See *Conservatorship of Eric B.* (2022) 12 Cal.5th 1085, 1094, n.2 (“Because the case raises important issues capable of repetition but likely to evade review, we exercise our direction to decide this otherwise moot appeal”).)

³³ (See, e.g., *Cucamongans United for Reasonable Expansion v. City of Rancho Cucamonga* (2000) 82 Cal.App.4th 473, 479-480 (noting three discretionary exceptions to mootness rules, including “(1) when the case presents an issue of broad public interest that is likely to recur” and “(3) when a material question remains for the court's determination.”); *Bullis Charter School v. Los Altos School Dist.* (2011) 200 Cal.App.4th 1022, 1034-1035 (concluding that controversy relating to process by which charter schools must request facilities from the District was not mooted because it was likely to recur in connection with a future facilities requests and “the manner in which school district facilities are allocated to charter schools under Proposition 39” are of broad public importance.); *Vernon v. State of California* (2004) 116 Cal.App.4th 114, 121 (notwithstanding issuance of a provisional variance granted to the City, the appellate court exercised its discretion to address the merits of the appeal because “the constitutional issues of public interest presented by the case may recur between these parties or others.”).)

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Of the Public Utilities Commission of the State of California

COUNSEL'S CERTIFICATE OF WORD COUNT

In compliance with California Rules of Court, Rule 8.520(c), the undersigned counsel for *Amicus Curiae* National Association of Water Companies hereby certifies that, according to the computer software used to produce the foregoing Amicus Brief, including footnotes, but excluding this certificate, tables of contents and authorities, the cover page and captions, signature block, and the certificate of interested parties, the Amicus Brief contains 3,081 words.

So certified:

Dated: January 13, 2023

Respectfully submitted,

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Of the Public Utilities Commission of the State of California

PROOF OF SERVICE

I am a resident of the State of California. I am over the age of eighteen years, and not a party to this action. My business address is 436 14th Street, Suite 1205, Oakland, California 94612.

On January 13, 2023, I served the following document(s):

**APPLICATION FOR LEAVE TO FILE *AMICUS CURIAE* BRIEF
AND *AMICUS CURIAE* BRIEF IN SUPPORT OF PETITIONERS**

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BY ELECTRONIC SERVICE: On the date specified above, I caused the above-described documents to be delivered from my electronic service address (darren@brblawgroup.com) to the above recipients via TrueFiling and/or email.

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, at Oakland, California.

/s/ Darren Lee

Darren Lee

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**

Case Number: **S269099**

Lower Court Case Number:

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1/13/2023

Date

/s/Darren Lee

Signature

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