Supreme Court of California
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IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

CALIFORNIA WATER SERVICE COMPANY
Petitioner,

v.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA
Respondent.

Decisions No. 20-08-047 and 21-09-047

Of the Public Utilities Commission of the State of California

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APPENDIX OF EXHIBITS

TO PETITION FOR WRIT OF REVIEW

File 2 of 2 – Vol. II – Exhibits BB-CC – Pages 278-378

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TABLE OF CONTENTS

Volume I – Exhibits A-AA – Pages 1-277

Volume II – Exhibits BB-CC – Pages 278-378

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EXHIBIT BB

R.17-06-024, *Application of California Water Service Company for Rehearing of Decision 20-08-047* (October 5, 2020)

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BEFORE THE PUBLIC UTILITIES COMMISSION

OF THE STATE OF CALIFORNIA

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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.	Rulemaking 17-06-024 (Filed June 29, 2017)

APPLICATION OF CALIFORNIA WATER SERVICE COMPANY FOR REHEARING OF DECISION 20-08-047

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October 5, 2020

TABLE OF CONTENTS

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

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APPLICATION OF CALIFORNIA WATER SERVICE COMPANY
FOR REHEARING OF DECISION 20-08-047

I. INTRODUCTION

Pursuant to Rule 16.1 of the Rules of Practice and Procedure ("Rules") of the California Public Utilities Commission ("Commission"), California Water Service Company ("Cal Water") hereby submits this Application for Rehearing of Decision ("D.") 20-08-047, which the Commission adopted during the August 27, 2020 Commission business meeting and issued on September 3, 2020. As explained in further detail below, D.20-08-047's elimination of the Water Revenue Adjustment Mechanism/Modified Cost Balancing Account ("WRAM/MCBA" or "decoupling WRAM") is unlawful and erroneous because of numerous procedural and substantive errors.

The decoupling WRAM is vital to furthering Commission and State policies with respect to balancing conservation, affordability, and infrastructure investment.[1] As California deals with the escalating effects of climate change, including the likelihood of more frequent and longer-

[1] One of the six objectives established in the Commission's Water Action Plan is to "set rates that balance investment, conservation, and affordability." 2005 Water Action Plan, p. 5. The Commission then committed to the following: "The CPUC will ensure that the established rates will provide recovery of reasonable and prudently incurred costs and a fair and equitable return to shareholders. The CPUC will develop rates and ratemaking mechanisms to further the above goals of affordability, conservation, and investment in necessary infrastructure." *Id.*

lasting droughts, eliminating such a crucial tool should not have occurred through a process that was riddled with legal errors. Therefore, for the reasons outlined below, Cal Water respectfully requests the Commission to grant this Application for Rehearing, vacate the portions of D.20-08-047 addressing the decoupling WRAM and direct it to be considered in a separate ratesetting categorized phase or proceeding with an opportunity for hearings.

II. PROCEDURAL HISTORY

The Commission initiated this proceeding in July 2017. In the Order Instituting Rulemaking ("OIR"), the Commission stated that it would be reviewing the existing low-income customer assistance programs of the Class A water utilities in order to examine the feasibility of developing a consistent program, and investigating the possibility of low-income assistance to smaller Commission-regulated water utilities.[2] The Commission also stated that it would consider water affordability, including whether there are public revenue sources that could be used to assist affordability efforts, such as revenue from bottled water companies.[3] Finally, the Commission stated that it would "examine standardizing water sales forecasting" in a subsequent phase.[4]

The initial scoping memo, issued January 9, 2018, stated, "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."[5] As discussed in more detail below, the initial scoping memo did not mention the decoupling WRAM at all, let alone that elimination of it was part of

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[2] *Order Instituting Rulemaking evaluating the Commission's 2010 Water Action Plan Objective of Achieving Consistency between the Class A Water Utilities' Low-Income Rate Assistance Programs, Providing Rate Assistance to All Low-Income Customers of Investor-Owned Water Utilities, Affordability and Sales Forecasting* (July 10, 2017), p. 2

[3] *Id.*

[4] *Id*, p. 8.

[5] *Scoping Memo and Ruling of the Assigned Commissioner* ("Scoping Memo") (January 9, 2018), p. 2.

the scope of this proceeding. Later, the assigned Commissioner issued an amended scoping memo, which likewise made no mention of the decoupling WRAM.[6]

The Commission held the first of several workshops in this proceeding on November 13, 2017.[7] This joint workshop with the State Water Resources Control Board ("SWRCB") focused on access and affordability of safe, clean, reliable drinking water. The Commission held a second joint workshop on January 14, 2019, focusing on rising drought risk and forecasting.[8] Commission staff prepared a report for the January 14, 2019 workshop, and the assigned Administrative Law Judge invited parties to file comments.[9] California Water Association ("CWA") was the only party to file comments on the workshop report, in which it noted that the correct focus was on accurate forecasts, not whether forecasts are high or low.[10] The assigned Administrative Law Judge also provided notice of two additional workshops: a workshop on data sharing between Commission-regulated energy companies and municipal water companies to be held on April 12, 2019, and a workshop on rate design to be held on May 2, 2019.

Commission staff prepared a report on the May 2, 2019 workshop and the assigned Administrative Law Judge again invited parties to file comments.[11] In its opening comments on the workshop report, the Public Advocates Office made several recommendations, including

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6 *Amended Scoping Memo and Ruling of Assigned Commissioner and Administrative Law Judge* ("First Amended Scoping Memo") (July 9, 2018).

7 *Administrative Law Judge's Corrected Ruling Noticing Joint Workshop of the California Public Utilities Commission and the State Water Resources Control Board* (November 8, 2017).

8 *Administrative Law Judge's Amended Ruling Correcting Day for Workshop and Noticing Joint Workshop on Water Sales Forecasting and Rising Drought Risk* (December 19, 2018).

9 *Administrative Law Judge's Ruling Inviting Comment on Water Division's Staff Report on Joint Agency Workshop; and Noticing Additional Proceeding Workshops* (March 20, 2019).

10 *Comments of California Water Association on Water Sales Forecasting and Rising Drought Risk Staff Report* (April 5, 2019), p. 2.

11 *Administrative Law Judge's Ruling Inviting Comments on Water Division Staff Report and Modifying Proceeding Schedule* (June 21, 2019).

elimination of the decoupling WRAM.[12] In reply comments, CWA noted that this was beyond the scope of issues identified for consideration in this proceeding.[13]

The Commission held its final workshop in Phase I of this proceeding on August 2, 2019.[14] The staff report for that workshop does not mention elimination of the decoupling WRAM or conservation performance, although the accompanying ruling from the assigned Administrative Law Judge ("ALJ") sought comment on whether the Commission should consider ordering companies with decoupling WRAMs to convert to Monterey-style WRAMs in their next General Rate Case ("GRC").[15] It is important to note that this issue was originally framed by the ALJ in this ruling as being introduced for consideration in future GRCs, not as elimination of the decoupling WRAM in this proceeding.

In its opening comments, CWA again noted that this issue was outside of the scope of the proceeding.[16] Public Advocates Office argued that the Commission should "provide the clear and unambiguous policy direction in this Rulemaking that utilities should convert full WRAMs to Monterey-Style WRAMs," which would be implemented in subsequent GRCs.[17]

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[12] *Comments of the Public Advocates Office On Administrative Law Judge Ruling Inviting Comments on Water Division Staff Report and Modifying Proceeding Schedule* (July 10, 2019), p. 13.

[13] *Reply Comments of California Water Association Responding to Administrative Law Judge's June 21, 2019 Ruling* (July 24, 2019), p. 2.

[14] *Administrative Law Judge's Ruling Providing Notice of New Date for Workshop on Low-Income Rate Assistance Programs, Water Affordability, and Issues Presented in Proceeding* (July 3, 2019).

[15] *Administrative Law Judge's Ruling Inviting Comments on Water Division Staff Report and Responses to Additional Questions* (September 4, 2019), p. 3 ("6. 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?").

[16] *Comments of California Water Association Responding to Administrative Law Judge's September 4, 2019 Ruling* (September 16, 2019), pp. 13-15.

[17] *Comments of the Public Advocates Office on the Water Division's Staff Report and Response to Additional Questions* (September 16, 2019), p. 5.

In reply comments, CWA explained that consideration of the issue of conversion from the decoupling WRAM to the Monterey-style WRAM in this proceeding was inappropriate.[18] In its reply comments, Public Advocates Office repeated its arguments in favor of elimination of the WRAM and included a graph purporting to show that "water utilities with and without full decoupling WRAM have shown almost identical trends in annual sales fluctuations," claiming that the graph was developed using data from Class A water utilities annual reports.[19] (The graph was created by the Public Advocates Office and did not appear in the annual reports.) The Public Advocates Office cited the graph for the incorrect proposition that lack of a decoupling WRAM does not adversely affect conservation efforts.

The schedule, however, provided no opportunity for the parties to dispute the graph's accuracy, the purported underlying data or otherwise respond to the materials that were only submitted in the reply comments by Public Advocates Office. The Public Advocates Office's introduction of this new information late in the proceeding in reply comments denied the parties the opportunity to address it, and made the Commission's reliance on this graph as justification for the elimination of the decoupling WRAM a prejudicial legal error.

The proposed decision of Commissioner Martha Guzman-Aceves, issued July 3, 2020 ("Proposed Decision"), prohibited companies with decoupling WRAMs from requesting to continue these WRAMs in their next GRCs and ordered them to transition to the Monterey-style WRAMs in those proceedings.[20] Cal Water filed comments on the Proposed Decision, pointing out that elimination of the decoupling WRAM is outside of the scope of this proceeding,

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[18] *Reply Comments of California Water Association Responding to Administrative Law Judge's September 4, 2019 Ruling* (September 23, 2019), pp. 2-3.

[19] *Reply Comments of the Public Advocates Office on the Water Division's Staff Report and Response to Additional Questions* (September 23, 2019), pp. 6-7.

[20] Proposed Decision, p. 87, Ordering Paragraph 3.

explaining taking such action would increase bills for many low-income customers and low water users, and noting that the Proposed Decision mischaracterized the Monterey-style WRAM. Cal Water also noted that the findings regarding the performance of the decoupling WRAM are not supported by substantial evidence and requested that the Commission consider the policy merits of decoupling more fully.[21] In its reply comments, Cal Water explained that the Proposed Decision's conclusions regarding sales forecasting incentives are flawed, and urged the Commission to reject to the proposal by the Public Advocates Office to transition Cal Water in its current pending GRC.[22]

The Commission opened this item for discussion at its August 6, 2020 meeting. Elected officials, representatives of public interest groups, and even two former Commissioners spoke at the meeting – discussing the benefits of the decoupling WRAM, the harm that would be caused by its elimination, and urging the Commission not to adopt the Proposed Decision.

Later that month, less than 24 hours before its scheduled vote on the matter at the August 27, 2020 meeting, the Commission issued a revised version of the Proposed Decision, which made substantive changes. In particular, the revision to the Proposed Decision deleted the minimal discussion regarding the decoupling WRAM's purported lack of impact on water savings, or conservation, by water utilities,[23] and added a few vague statements claiming, without record support, that continuing the decoupling WRAM for conservation purposes would

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[21] *Comments of California Water Service Company (U 60 W) on the Proposed Decision of Commissioner Guzman Aceves* (July 27, 2020), pp. 8-9.

[22] *Reply Comments of California Water Service Company (U 60 W) on the Proposed Decision of Commissioner Guzman Aceves* (August 3, 2020), pp. 2-3.

[23] As Cal Water noted in its opening comments on the Proposed Decision, the minimal discussion of the issue in the original version of the Proposed Decision was confusing and flawed because it contained multiple references to "Table A," which was not included in the Proposed Decision. *Comments of California Water Service Company (U 60 W) on the Proposed Decision of Commissioner Guzman Aceves* (July 27, 2020), p. 14. The entire discussion, including the references to "Table A" was deleted in the revised version of the Proposed Decision.

not benefit customers. Although the revised Proposed Decision still prohibited Cal Water and the other WRAM companies from requesting that the decoupling WRAM be continued in their next GRCs, it made requests to implement the Monterey-style WRAM instead optional.

Despite these significant changes, the Commission did not offer parties the opportunity to provide comments on this last minute substantive change, but instead voted to adopt the revised Proposed Decision at the August 27, 2020 meeting. The Commission then issued D.20-08-047 on September 3, 2020.

III. DISCUSSION

A. D.20-08-047 Unlawfully Addressed and Resolved the Issue of Whether to Continue to Permit Water Utilities to Implement the Full Decoupling WRAM, Which Was Never Identified as an Issue to Be Considered Under Any Scoping Memo in this Proceeding.

D.20-08-047 violated the Commission's duty to regularly pursue its authority and proceed in the manner required by law when it resolved the issue of whether to continue to permit water utilities to implement the full decoupling WRAM. The issue was never included under any of the issues to be considered in this proceeding, as identified in the three scoping memos. This was a clear violation of the Commission's own procedural rules concerning the scope of issues addressed in rulemaking proceedings and substantially prejudiced the parties in this proceeding supportive of the decoupling WRAM, including Cal Water. Among other prejudice, as more fully discussed below, the parties were not put on notice to allow them to dispute the categorization for the proceeding and to instead request a ratesetting categorization with a hearing.

1. The Commission May Not Decide an Issue That Has Not Been Identified in the Scoping Memo as an "Issue To Be Considered" in the Proceeding.

Public Utilities Code Section 1701.1(c)(1) mandates that the "assigned commissioner shall schedule a prehearing conference and shall prepare and issue by order or ruling a scoping memo that describes the issues to be considered…"[24] Citing this authority, Rule 7.3 in turn provides, "The assigned Commissioner shall issue the scoping memo for the proceeding, which shall determine the schedule (with projected submission date) and issues to be addressed."[25] These requirements for a formal scoping memo identifying the issues to be considered in a proceeding are intended to give fair notice to parties who may seek to substantively participate and be heard on that matter. Thus, the Commission may not unilaterally disregard its own established rules and procedures.[26]

In Southern California Edison Co. v. Pub. Utilities Com., the California Court of Appeal annulled a Commission decision where the Commission decided an issue outside the scope of the proceeding. The Court found that the Commission failed to proceed in a manner required by law when it failed to comply with its own rules regarding the scope of issues to be considered in a proceeding, and that failure was prejudicial.[27] Similarly, in City of Huntington Beach v. Pub. Utilities Com., the appellate court reversed and set aside a Commission decision because the

[24] Pub. Util. Code § 1701.1(c)(1).

[25] Rule 7.3.

[26] *See* Calaveras Tel. Co. v. Pub. Utilities Com., 39 Cal. App. 5th 972 (2019) ("We conclude the Commission failed to proceed in the manner required by law and abused its discretion because its resolution and decision do not conform with the CHCF-A implementing rules [which it established in its earlier decisions]."),

[27] Southern California Edison Co. v. Pub. Utilities Com., 140 Cal. App. 4th 1085 (2006) ("Edison") (annulling a Commission decision where it addressed an issue that was not previously encompassed within the issues to be considered in the proceeding set forth in the scoping memo).

Commission's consideration of an issue outside the scope of the proceeding was an abuse of discretion and violated the procedural rights of the parties.[28]

2. The Consideration of Whether to Discontinue the Use of the Decoupling WRAM was Never Formally Identified as an Issue to Be Considered in Any Scoping Memo in this Proceeding.

Here, none of the three scoping memos issued in this proceeding apprised the parties that the potential elimination of the decoupling WRAM or other matters relating to decoupling mechanisms were in fact "issue to be considered" in this rulemaking proceeding. The original scoping memo issued on January 9, 2018 identified several issues to be addressed in this proceeding relating to the various topics mentioned in the original OIR, but none of those issues includes the decoupling WRAM or even decoupling more broadly:[29]

> Phase I of the proceeding will address the following issues:
>
> 1. Consolidation of at risk water systems by regulated water utilities
>
> a. How could the Commission work with the SWRCB and Class A and B water utilities to identify opportunities for consolidating small non-regulated systems within or adjacent to their service territories that are not able to provide safe, reliable and affordable drinking water? Should the Commission address consolidation outside of each utility's general rate case (GRC)?
>
> b. In what ways can the Commission assist Class A and B utilities that provide unregulated affiliate and franchise services to serve as administrators for small water systems that need operations & maintenance support as proscribed by Senate Bill (SB) 552 (2016)?

[28] City of Huntington Beach v. Pub. Utilities Com., 214 Cal. App.4th 566. (2013) (annulling a Commission decision where it addressed an issue relating to preemption of a local ordinance that it had previously determined in a scoping memo to be outside the issue to be considered in this proceeding).

[29] Scoping Memo, pp. 2-3.

2. Forecasting Water Sales

   a. How should the Commission address forecasts of sales in a manner that avoids regressive rates that adversely impact particularly low-income or moderate income customers?

   b. 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?

3. What regulatory changes should the Commission consider to lower rates and improve access to safe quality drinking water for disadvantaged communities?

4. What if any regulatory changes should the Commission consider that would ensure and/or improve the health and safety of regulated water systems?

Phase II of this proceeding will address the technical components of the Commission's low income water programs and jurisdictional issues. The following issues will be addressed in Phase II or if necessary a Phase III of this proceeding:

5. Program Name;

6. Effectiveness of LIRA Programs;

7. Monthly Discounts;

8. Program Cost Recovery;

9. Commission Jurisdiction Over Other Water Companies; and

10. Implementation of Any Changes to Existing LIRA Programs.

The amended scoping memo later issued on July 9, 2018 did not substantially alter the scope, but merely identified two more issues to be considered in this proceeding, neither of which included the decoupling WRAM or to decoupling:[30]

> We therefore include the following issues within the scope of this proceeding:
>
> 1. How best to consider potential changes in rate design such that there is a basic amount of water that customers receive at a low quantity rate; and
>
> 2. Whether the California Public Utilities Commission (Commission) should adopt criteria to allow for sharing of low-income customer data by regulated investor-owned energy utilities with municipal water utilities.

Finally, the second amended scoping memo issued relatively recently on June 2, 2020 was entirely related to "potential Commission response to the COVID-19 pandemic" and convers a phase of the proceeding not yet undertaken.[31]

Thus, none of the three Scoping Memos indicated that this proceeding would consider whether the decoupling WRAM or any other form of decoupling mechanism should continue to be available to the water utilities that presently employ a decoupling WRAM. By comparison, when the Commission previously addressed the decoupling WRAM in Rulemaking 11-11-008, Commissioner Sandoval's *Assigned Commissioner's Third Amended Scoping Memo and Ruling Establishing Phase II* in that previous proceeding devoted several pages the decoupling WRAM

[30] Amended Scoping Memo, p. 3.

[31] *Second Amended Scoping Memo and Ruling of Assigned Commissioner and Administrative Law Judge Directing Comments to Consider Potential Commission Response to COVID-19* (June 2, 2020) ("Second Amended Scoping Memo"), p. 1.

and the specific issues that the Commission intended to address with respect to it.[32] Indeed, neither the word "WRAM" nor the word "decoupling" appear in any the scoping memos, nor does it even appear in the original OIR. Therefore, it is clear from the face of each of the three scoping memos that the WRAM and decoupling were never properly noticed as an issue to be considered in this proceeding.

3. D.20-08-047's Contention that the Decoupling WRAM Issues "Is and Has Always Been Within the Scope of this Proceeding" is Flawed and Unsupported.

When the proposal to eliminate the decoupling WRAM was first raised in this proceeding, CWA objected to the discussion of that issue as outside the established scope of this proceeding.[33] Despite those objections, D.20-08-047 asserts to the contrary that the consideration of the decoupling WRAM "is and has always been within the scope of this proceeding."[34] This assertion is erroneous and unsupported by the record, as established below.

a. Neither a Party, an Administrative Law Judge, nor a Workshop Panel May Enlarge the Scope of a Commission Proceeding, Which Must Be Established by the Assigned Commissioner Through the Issuance of a Scoping Memo.

D.20-08-047 contends that the elimination of the decoupling WRAM has and is in within the scope of this proceeding based upon the discussion of the topic in comments, workshops, and rulings by the Administrative Law Judge:[35]

> In comments to this Scoping Memo the California Water Association, among other suggestions, called for folding the WRAM/MCBA recovery into base rates instead of surcharges while the Public Advocates Office of the Public Utilities Commission

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[32] *See* R.11-11-008, *Assigned Commissioner's Third Amended Scoping Memo And Ruling Establishing Phase II* (April 30, 2015), pp. 12-16 (setting forth the issues to be considered in Phase II of that proceeding), *available at* https://docs.cpuc.ca.gov/PublishedDocs/Efile/G000/M151/K340/151340564.PDF.

[33] *Reply Comments of California Water Association Responding to Administrative Law Judge's June 21, 2019 Ruling* (July 24, 2019), p. 2.

[34] D.20-08-047, p. 60.

[35] *Id.*, p. 54.

> argued that the large variances in forecasted sales are exacerbated by the WRAM/MCBA process. Accordingly, the August 2, 2019, workshop included a panel on drought sales forecasting that identified a number of problems with the WRAM/MCBA mechanism. The September 4, 2019, Ruling specifically sought comment on whether the Commission should convert utilities with a full WRAM/MBCBA mechanism to a Monterey-Style WRAM with an incremental cost balancing account.

D.20-08-047 goes on to assert that these actions demonstrate that the consideration of the changes to the decoupling WRAM are within the scope of this proceeding:[36]

> As noted above, the September 4, 2019, assigned ALJ Ruling included a summary of the August 2, 2019, Workshop, where parties raised the issue of the WRAM during the discussion of mechanisms to improve sales forecasts during droughts. The scope of this proceeding includes consideration of "how to improve water sales forecasting." Thus, based on the discussion at the workshop on ways to improve water sales forecasting, the ruling specifically called for party input on whether the Commission should change all utilities to use Monterey-Style WRAMs with ICBA, and whether such a transition should occur in the context of the utilities' next GRC. Therefore, consideration of changes to the WRAM/MCBA is and has always been within the scope of this proceeding as part of our review of how to improve water sales forecasting.

Setting aside for the moment the fact that "improving sales forecasting" is an objective goal that hardly compels an examination of the decoupling WRAM, the rationale advanced in this portion of D.20-08-047 is completely contrary to law. No provision of the Public Utilities Code nor any one of the Commission's Rules of Practice and Procedure permit a party, a workshop panel or even an Administrative Law Judge to enlarge the scope of a proceeding. By statute, the authority to determine the scope of a proceeding is vested exclusively in the Assigned Commissioner who

[36] *Id.*, pp. 59-60.

exercises that authority by issuing "a scoping memo that describes the issues to be considered…"[37]

In this proceeding, the Assigned Commissioner did not expressly include the examination of the decoupling WRAM in any of the scoping memos. That is the extent of the relevant analysis on whether the Commission has complied with its procedures governing the issuance of a scoping memo. Therefore, these assertions regarding actions by parties, workshop panels, and even the Administrative Law Judge fail to cure the plain fact that D.20-08-047 considered and addressed an issue outside the established scope of the proceeding.

b. The Scoping Memo Issue of "Forecasting Water Sales" Did Not Apprise the Parties that the Potential Elimination of the Decoupling WRAM Would be an Issue to Be Considered in this Proceeding.

As mentioned above, D.20-08-047 contends that the consideration of the decoupling WRAM falls under the broader issue of improving water sales forecasting described in the original January 9, 2018 scoping memo.[38] This explanation is unsupported and unpersuasive. Water sales forecasting is a wholly distinct ratemaking issue from revenue decoupling and the decoupling WRAM. The purported connection between the two issues, if any, is never fully substantiated anywhere in D.20-08-047.

While D.20-08-047 identifies specific factors for water utilities to utilize when forecasting future water sales,[39] it does not explain how, if at all, these implicate the decoupling

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[37] Pub. Util. Code § 1701.1(c)(1) ("The **assigned commissioner** shall prepare and issue by order or ruling a scoping memo that describes the issues to be considered and the applicable timetable for resolution and that, consistent with due process, public policy, and statutory requirements, determines whether the proceeding requires a hearing.") (emphasis added); *see also* Rule 7.3 ("The **assigned Commissioner** shall issue the scoping memo for the proceeding, which shall determine the schedule (with projected submission date) and issues to be addressed.") (emphasis added).

[38] D.20-08-047, p. 60 ("Therefore, consideration of changes to the WRAM/MCBA is and has always been within the scope of this proceeding as part of our review of how to improve water sales forecasting.").

[39] *Id.*, pp. 49-51.

WRAM or other decoupling issues. Instead, only connection between the two issues found in the decoupling WRAM are the statement in Finding of Fact 19 that "Implementation of a Monterey-Style WRAM means that forecasts of sales become more significant in establishing test year revenues"[40] and in Conclusion of Law 4 that "Elimination of the WRAM/MCBA will provide better incentives to more accurately forecast sales while still providing the utility the ability to earn a reasonable rate of return."[41] As explained further in Section III.E.2 below, the rationale underlying both claims purporting to connect the decoupling WRAM and sales forecasting is flawed and D.20-08-047 fails to support either assertions with law or evidence in the record, rendering the asserted justification baseless.[42] More importantly, that purported linkage was never readily apparent from the description of "Forecasting Water Sales" found in the original scoping memo so as to apprise parties that the elimination of the decoupling WRAM would be implicated in this proceeding.

In Southern California Edison Co. v. Pub. Utilities Com., the Court of Appeals explained that in examining whether an issue is within the scope of a Commission proceeding, the express language found in the scoping memo must be interpreted "in the context of the discussion and directives that followed in the order."[43] The Edison court was required to determine whether the issue of "prevailing wages" fell within the ambit of the scoping memo's inquiry into "whether to adopt rules to prohibit 'bid shopping' and 'reverse auctions' consistent with rules governing state

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[40] D.20-08-047, p. 103, Finding of Fact 19.

[41] D.20-08-047, p. 104, Conclusion of Law 4.

[42] *See* California Manufacturers Association v. Pub. Utilities Com., 24 Cal. 3d 251 (1979) (annulling a prior Commission decision due to the fact that "The findings on the material issues are insufficient to justify the rate spread adopted. While the commission's asserted justification for changing its method of spreading rate increase is conservation of natural gas resources, neither finding nor evidence exists showing the method adopted will result in conserving more natural gas than would other proposed methods.").

[43] Edison, at 1105.

and federal public works contracts."[44] In order to do so, the court considered what subjects were specifically discussed in the scoping memo and what information was sought from the utilities.[45] After considering those factors, the court concluded that "the prevailing wage" proposal was beyond the scope of issues identified in the scoping memo.[46] Thus, the court held that the Commission violated its own procedures regarding the issuance of a Scoping Memo and annulled the offending decision that had addressed that issue.[47]

Here, with respect to "Forecasting Water Sales" listed in the initial scoping memo, the Commission address two questions in particular:[48]

> 2. Forecasting Water Sales
>
> a. How should the Commission address forecasts of sales in a manner that avoids regressive rates that adversely impact particularly low-income or moderate income customers?
>
> b. 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?

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[44] *Id.*

[45] *Id.*

[46] *Id.*

[47] *Id.*, at 1106.

[48] Scoping Memo, pp. 2-3. These same questions are presented in a block quote in D.20-08-047 on pages 53-54 when discussing the scope of the proceeding.

These questions clearly reflect a more explicit focus on the processes governing methodologies and specific mechanisms directly affecting water sales forecasts. While issues tangentially concerning the decoupling WRAM might be arguably responsive to these questions, the complete elimination of the decoupling WRAM was never included by the particular language here. Relative to the strained linkage between sales forecasting and the decoupling WRAM in the initial scoping memo (which again never even mentions the terms "WRAM" or "decoupling" anywhere), D.20-08-047's outsized[49] and extensive discussion dedicated to the decoupling WRAM is wholly inconsistent with the amount of discussion (or lack thereof here) in the scoping memos. Therefore, D.20-08-047's rationale that the elimination of the decoupling WRAM was included under the issue of improving water sales forecasting fails.

This overly broad interpretation of the initial scope of issues to be considered in this proceeding by D.20-08-047 would effectively render the scoping memo requirements entirely meaningless as the Commission could include any issue in a final decision so long as it can come up with an explanation, no matter how tenuous and questionable it is after the fact. That should not be the case. The mandate for the formal issuance of a scoping memo in Public Utilities Code Section 1701.1(c)(1) and Rule 7.3 serve to prohibit that unlawful practice.

Therefore, the tenuous, post-hoc explanation asserted in D.20-08-047 simply does not meet the obligation of the Commission to follow the procedures it has set forth to issue a proper scoping memo in each rulemaking proceeding. Instead, it is readily apparent that current parties, including Cal Water, or others who may have elected to participate as parties were never apprised of the fact the Commission apparently intended to address the decoupling WRAM in

[49] For example, twenty-one of the twenty-four Findings of Fact address whether the decoupling WRAM should be continued. Setting aside the portions of D.20-08-047 that summarize the comments of the parties, address procedural issues and set forth Findings of Fact, Conclusions of Law and Ordering Paragraphs, over 70% of the substantive text of D.20-08-047 is devoted to the WRAM, a term that is never expressly mentioned in any the scoping memo.

this proceeding at the time each scoping memo was issued. At a minimum, on an issue as major and contentious as the decoupling WRAM has been, it is patently unsupported by the record as well as highly prejudicial for the Commission to assert that it had innocuously included that topic under the guise of "improving sales forecasting" all along.

4. The Failure to Identify the Decoupling WRAM as an Issue to Be Considered in the Scope of this Proceeding Resulted in Undue Prejudice to Parties That Supported Retaining the WRAM.

Had the OIR or any of the scoping memos at the outset clearly indicated that whether to permit water utilities to continuing implementing the decoupling WRAM as an issue to be considered in this rulemaking proceeding, Cal Water would have disputed its categorization and/or requested an evidentiary hearing . The decoupling WRAM has been one of the most contentious and closely analyzed topics in water utility ratemaking before the Commission. Issues relating to the decoupling WRAM have been litigated in virtually every GRC of the water utilities that has implemented one, including for Cal Water. As detailed in Section 4 B below, the decoupling WRAMs were adopted in ratesetting categorized proceedings with scheduled hearings.

At the outset, Cal Water would have invoked numerous procedural rights that were never afforded in this quasi-legislative rulemaking proceeding. These include evidentiary hearings to present admissible evidence that (1) eliminating the decoupling WRAM will likely lead to bill increases for many low-income and low-usage customers; and (2) water utilities with the decoupling WRAM have maintained greater cumulative reductions in water use, on a per capita basis, as compared to water utilities with the Monterey WRAM. Instead, it was not until July 10, 2019 (over a year after the first amended scoping memo was issued) that the elimination of the decoupling WRAM was raised as an issue in this proceeding. The Commission did not raise the issue by amending the OIR. Nor was it raised by the Assigned Commissioner through an

amended scoping memo. It was raised by a single party to the proceeding, Public Advocates Office, in a set of comments.[50] In reply comments, CWA objected to Public Advocates Office's proposal as outside the scope of this proceeding.[51] Notwithstanding these objections, the Administrative Law Judge issued a ruling soliciting for further comments on the issue in September 2019.

Between September of 2019 and July of 2020, neither the Commission nor the Assigned Commissioner took any action in response to the comments, including to confirm or deny whether the proposed elimination of the decoupling WRAM was actually an issue in this proceeding. For this reason, the parties were further denied notice or opportunity to file a motion or request other interim relief, including raising the matter to the full Commission. It was not until July 3, 2020 that the Assigned Commissioner issued her Proposed Decision, which not only indicated that the elimination of the decoupling WRAM was going to be considered and addressed in this rulemaking proceeding, but that it would be the central focus of the Proposed Decision despite the earlier protests that it was never properly identified as an issue to be considered in any of the earlier scoping memos.

As discussed above, the issue of whether to eliminate the decoupling WRAM was never included as an issue to be considered in any of the scoping memos issued in this proceeding. That omission denied the current parties and other stakeholders that supported the decoupling WRAM any adequate notice to dispute the quasi-legislative characterization, request a ratesetting categorization and/or invoke their corresponding procedural rights, including, without limitation,

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[50] *Comments of the Public Advocates Office On Administrative Law Judge Ruling Inviting Comments on Water Division Staff Report and Modifying Proceeding Schedule* (July 10, 2019), p. 13.

[51] *Reply Comments of California Water Association Responding to Administrative Law Judge's June 21, 2019 Ruling* (July 24, 2019), p. 2.

a hearing from the outset of this proceeding. Therefore, the Commission violated Public Utilities Code Section 1701.1(c)(1) by considering and addressing the proposed elimination of the decoupling WRAM in D.20-08-047, which was outside the established scope of the proceeding. The Commission should grant rehearing and order the decoupling WRAM to be addressed in a separate phase or proceeding with a ratesetting categorization.

B. D.20-08-047 Unlawfully Modified Several Prior Commission Decisions Addressing the Decoupling WRAM Without Providing the Parties an Opportunity to Be Heard.

In D.20-08-047, the Commission prohibited California-American Water Company, Cal Water, Golden State Water Company, Liberty Utilities (Park Water) Corp., and Liberty Utilities (Apple Valley Ranchos Water) Corp. from requesting to continue the decoupling WRAM in their next GRCs.[52] The Commission initially approved decoupling WRAMs for these companies in ratesetting categorized proceedings with an opportunity for hearings and repeatedly approved continuation of the decoupling WRAMs in multiple decisions in ratesetting proceedings over the last decade.

For Cal Water, the Commission approved the decoupling WRAM in five separate ratesetting proceedings that all provided the opportunity for evidentiary hearings. Cal Water first requested a decoupling WRAM in Application 06-10-026. That matter was consolidated with similar conservation-related applications by other water companies, as well as with an investigation to consider policies to advance the Commission's conservation objectives.[53] The scoping memo for that proceeding categorized Phase I, which would consider decoupling, among

[52] D.20-08-047, p. 106, Ordering Paragraph 3.

[53] A.06-09-006, A.06-10-026, A.06-11-009, A.06-11-010, I.07-01-022, *Administrative Law Judge's Ruling Affirming Consolidation of Proceedings* (January 16, 2007), *available at* https://docs.cpuc.ca.gov/PublishedDocs/EFILE/RULINGS/63704.PDF.

other issues, as ratesetting, and set a schedule for evidentiary hearings.[54] Cal Water was able to reach a settlement on the decoupling WRAM and other issues with the Division of Ratepayer Advocates ("DRA") and The Utility Reform Network. The settlement was contested, and evidentiary hearings were held.[55]

In D.08-02-036, the Commission approved the decoupling WRAM settlement and found that it was reasonable in light of the whole record, consistent with law, and in the public interest.[56] In particular, the Commission found that Cal Water's decoupling WRAM balances "utility and ratepayer interests and will ensure that neither is harmed nor benefits from the adoption of conservation rates."[57]

In its subsequent GRC, the Commission authorized Cal Water to continue the decoupling WRAM. The proceeding was categorized as ratesetting and provided an opportunity for hearings.[58] Cal Water entered into a settlement with multiple parties, including the Public Advocates Office (then known as DRA), agreeing, "the Commission should not change the fundamental mechanism of the WRAM/MCBA as it was adopted in D.08-02-036."[59] In its decision in that proceeding, D.10-12-017, the Commission identified the decoupling WRAM as key settlement issue, and approved the settlement, finding that it was reasonable in light of the whole record, consistent with law, and in the public interest.[60]

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[54] A.06-09-006, A.06-10-026, A.06-11-009, A.06-11-010, I.07-01-022, *Assigned Commissioner's Ruling and Scoping Memo* (March 8, 2007), pp. 7-8, *available at* https://docs.cpuc.ca.gov/PublishedDocs/EFILE/RULC/65375.PDF.

[55] D.08-02-036, p. 4.

[56] *Id.*, p. 29.

[57] *Id.*

[58] A.09-07-001, *Assigned Commissioner's Scoping Memo and Ruling* (October 2, 2009), pp. 4, 7, *available at* https://docs.cpuc.ca.gov/PublishedDocs/EFILE/RULC/107886.PDF.

[59] D.10-12-017, Attachment C, p. 489.

[60] D.10-12-017, pp. 6-8, 32.

In D.12-04-048, the Commission addressed an application filed by Cal Water and the other WRAM companies regarding amortization of the WRAM balancing accounts.[61] That proceeding had been categorized as ratesetting and provided an opportunity for evidentiary hearings.[62] In that decision, the Commission directed the applicants to provide testimony in their next GRCs addressing, among other issues, whether the Commission should adopt a Monterey-style WRAM instead of a decoupling WRAM and whether the decoupling WRAM should be eliminated.[63]

In its next GRC, Cal Water provided the testimony required by D.12-04-048. That proceeding was categorized as ratesetting and provided the opportunity for evidentiary hearings.[64] In its decision in that proceeding, the Commission noted that the parties had agreed to retain the decoupling WRAM without modification, and found that the settlement was reasonable in light of the whole record, consistent with law and in the public interest.[65]

In Cal Water's next GRC, it requested that the decoupling WRAM no longer be considered a "pilot" program and that it be considered a permanent part of Cal Water's rate structure.[66] That proceeding was categorized as ratesetting and included the opportunity for

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[61] D.12-04-048, p. 1 ("In this decision we address the schedule and process that Apple Valley Ranchos Water Company, California Water Service Company, Golden State Water Company and Park Water Company (applicants) use to recover from customers, or refund to customers, the annual net balance in their Water Revenue Adjustment Mechanisms and Modified Cost Balancing Accounts (WRAM/MCBA).").

[62] A.10-09-017, *Assigned Commissioner and Administrative Law Judge's Ruling and Scoping Memo* (June 8, 2011), pp. 14, 16, *available at* https://docs.cpuc.ca.gov/PublishedDocs/EFILE/RULC/136757.PDF.

[63] D.12-04-048, pp. 42-43, Ordering Paragraph 4.

[64] A.12-07-007, *Assigned Commissioner and Administrative Law Judge's Scoping Memo and Ruling* (December 3, 2012), p. 5, *available at* https://docs.cpuc.ca.gov/PublishedDocs/Efile/G000/M031/K735/31735785.PDF.

[65] D.14-08-011, pp. 73, 93.

[66] A.15-07-015, *Application of CALIFORNIA WATER SERVICE COMPANY (U60W), a California corporation, for an order (1) authorizing it to increase rates for water service by $94,838,100 or 16.5% in test year 2017, (2) authorizing it to increase rates by $22,959,600 or 3.4% on January 1, 2018, and $22,588,200 or 3.3% on January 1, 2019, in accordance with the Rate Case Plan, and (3) adopting other related rulings and relief necessary to*

evidentiary hearings.[67] In the settlement agreement submitted in that proceeding, Cal Water and the Office of Ratepayer Advocates (predecessor to the Public Advocates Office) agreed that the decoupling WRAM should no longer be considered a pilot.[68] The Commission approved the settlement, finding that it was reasonable in light of the whole record, consistent with the law and in the public interest, and conveyed the permanent status of the decoupling WRAM in an ordering paragraph.[69]

In sum, the Commission has approved Cal Water's decoupling WRAM in five separate decisions, all issued in ratesetting proceedings that provided the opportunity for evidentiary hearings.[70] In D.20-08-047, the Commission unlawfully modified these previous decisions by eliminating the decoupling WRAM without providing an opportunity to be heard, as follows.

1. Public Utilities Code Section 1708 Requires the Commission to Provide Parties with an Opportunity to Be Heard Before the Commission Can Rescind, Alter, or Amend any Order or Decision Made by It.

The Public Utilities Code requires the Commission to provide parties notice and the opportunity to be heard before rescinding, altering or amending any order or decision:[71]

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implement the Commission's ratemaking policies (July 9, 2015), p. 18, *available at* https://docs.cpuc.ca.gov/PublishedDocs/Efile/G000/M153/K177/153177625.PDF.

[67] A.15-07-015, *Scoping Memo and Ruling of Assigned Commissioner and Administrative Law Judge* (January 7, 2016), pp. 19-22, *available at* https://docs.cpuc.ca.gov/PublishedDocs/Efile/G000/M157/K541/157541800.PDF.

[68] D.16-12-042, Exhibit A, p. 35 ("The Parties agree that the "pilot" conservation rate design that has been in effect for Cal Water since 2008 should be considered permanent going forward, without limiting the possibility for future modifications and improvements.").As indicated on that page of the settlement agreement, "the attributes of the conservation rate design program include the following for each ratemaking area: tiered residential quantity rates, single quantity rates for non-residential customer (with greater revenue collection shifted to quantity rates), an enhanced water conservation program, full Water Revenue Adjustment Mechanisms ("WRAMs"), and Modified Cost Balancing Accounts ("MCBAs")." (Emphasis added).

[69] D.16-12-042, p. 78, Ordering Paragraph 7.

[70] Although not addressed here specifically, the Commission similarly issued multiple decisions approving the decoupling WRAMs for the other WRAM companies.

[71] Pub. Util. Code § 1708.

> The commission may at any time, upon notice to the parties, and with opportunity to be heard as provided in the case of complaints, rescind, alter, or amend any order or decision made by it. Any order rescinding, altering, or amending a prior order or decision shall, when served upon the parties, have the same effect as an original order or decision.

Because the Commission rescinded its prior approval of the decoupling WRAM, under the Public Utilities Code it had an obligation to provide the WRAM companies with notice and opportunity to be heard. The only exception to this requirement is set forth in Section 1708.5(f), which allows the Commission to "adopt, amend, or repeal a **regulation** using notice and comment rulemaking procedures, without an evidentiary hearing, except with respect to a regulation being amended or repealed that was adopted after an evidentiary hearing."[72] The Legislature has indicated that it did not intend for the term "regulation" to apply to all Commission decisions and orders:[73]

> It is the further intent of the Legislature that the term "regulation," as used in subdivision (a) of Section 1708.5 of the Public Utilities Code, not be construed to refer to all orders and decisions of the Public Utilities Commission, but, rather, be construed as a general reference to rules of general applicability and future effect. It is the intent of the Legislature that the Public Utilities Commission have the authority to define more precisely the term "regulation" for the purpose of Section 1708.5 of the Public Utilities Code.

The decoupling WRAM is not a "regulation." It is not a rule of general applicability, but is instead a specific revenue mechanism that the Commission has authorized for four Class A water utilities. Moreover, even if the Commission attempted to improperly characterize the decoupling WRAM as a "regulation," because Cal Water's WRAM was adopted after an

[72] Pub. Util. Code § 1708.5(f) (emphasis added).

[73] Assembly Bill 301 (1999), Stats. 1999, c. 568, Section 1(b), *available at* https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=199920000AB301.

evidentiary hearing, the "notice and comment" process provided in this proceeding would still be insufficient.

2. The Commission Failed to Afford Parties a Meaningful Opportunity to Be Heard Prior to Reversing its Earlier Decisions that had Authorized the Use of the Decoupling WRAM.

As discussed above, the Commission held several workshops in this proceeding, and offered the occasional opportunity to submit comments on the workshop reports. In California Trucking Association v. California Public Utilities Commission, however, the California Supreme Court held that Section 1708 "requires a hearing at which parties are entitled to be heard and to introduce evidence…"[74] In particular, the California Supreme Court held that "merely being allowed to submit written objections" was insufficient.[75]

The Commission initially approved the decoupling WRAM in a ratesetting proceeding following an evidentiary hearing, and has affirmed it in multiple ratesetting decisions since then. As such, the Public Utilities Code requires the Commission to provide Cal Water and the other decoupling WRAM companies a hearing and the opportunity to present evidence. The requirements of Section 1708 are not satisfied by merely offering the parties an opportunity to submit written comments on a new proposal (the course followed in this proceeding).

When the assigned Administrative Law Judge raised the issue of converting decoupling WRAMs to Monterey-style WRAMs late in the proceeding, it was framed as an issue for the Commission to consider in subsequent GRCs.[76] In comments on that ruling, CWA stated that

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[74] California Trucking Association v. Pub. Utilities Com., 19 Cal. 3d 240, 245 (1977).

[75] *Id.,* at 244.

[76] *Assigned Administrative Law Judge's Ruling Inviting Comments on Water Division Staff Report and Responses to Additional Questions* (September 4, 2019), p. 3.

such a change would have to be made in the GRCs for the WRAM companies.[77] GRCs are categorized as ratesetting and offer the opportunity for evidentiary hearings. When the Proposed Decision was issued eliminating the decoupling WRAM in this proceeding, Cal Water and others noted in comments that that no formal evidence had been received in this proceeding and requested the opportunity to present and respond to evidence.[78] Cal Water would have presented admissible evidence that (1) eliminating the decoupling WRAM will likely lead to bill increases for many low-income and low-usage customers and (2) water utilities with the decoupling WRAM have maintained greater cumulative reductions in water use, on a per capita basis, as compared to water utilities with the Monterey WRAM. Perhaps most critically, no fair opportunity was ever given to rebut or even respond to the material found in the earlier September 23, 2019 reply comments by Public Advocates Office (including the graph purportedly based on water utility annual reports) that is relied upon heavily in D.20-08-047.

The Commission did not respond to these requests. The Proposed Decision instead was revised to chide the parties for not providing evidence of the benefits of the decoupling WRAM,[79] ignoring the fact that the Commission never provided the opportunity to introduce evidence at a hearing as required by Section 1708. The Commission must remedy this legal error

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[77] *Comments of California Water Association Responding to Administrative Law Judge's September 4, 2019 Ruling* (September 16, 2019), p. 14.

[78] *Comments of California Water Service Company (U 60 W) On The Proposed Decision Of Commissioner Guzman Aceves* (July 27, 2020), pp. 14-15; *Comments of California-American Water Company on the Proposed Decision of Commissioner Guzman Aceves* (July 27, 2020), pp. 7-8; *Joint Comments of Liberty Utilities (Park Water) Corp. (U 314-W) and Liberty Utilities (Apple Valley Ranchos Water) Corp. (U 346-W) on the Proposed Decision* (July 27, 2020), pp. 4-5; *Comments of Golden State Water Company (U 133 W) on Proposed Decision and Order* (July 27, 2020), pp. 8-13; *Comments of California Water Association on the Proposed Decision of Commissioner Guzman Aceves* (July 27, 2020), pp. 4-7.

[79] D.20-08-047, pp. 68-69.

by granting this application for rehearing and providing the opportunity for an evidentiary hearing.

a. The Fact that the Earlier Decisions Addressing the Decoupling WRAM Approved Settlement Agreements Does Not Excuse the Commission's Statutory Duty to Provide an Opportunity to be Heard.

In D.20-08-047, the Commission observed that since the issuance of D.12-04-048, the issue of whether to continue the decoupling WRAMs had been resolved by settlements in the WRAM companies' GRCs. The Commission stated, "the policy to continue the use of WRAM/MCBA has not been adjudicated."[80] The Commission further stated, "The various options for modifying or eliminating WRAM/MCBA as ordered by D.12-04-048 were not adjudicated and resolved in subsequent GRC proceedings."[81]

Although, as noted previously, the Commission did not specifically address the parties' requests for an evidentiary hearing, the dismissal of settlement approval and the claim regarding "adjudication" does not remove it from the requirements of Section 1708. Any suggestion that a decision adopting a settlement is not subject to Section 1708 is flatly incorrect.

As an initial matter, it is important to recall that although the Commission first approved Cal Water's decoupling WRAM via settlement, the settlement was contested and evidentiary hearings were held on the settlement. Moreover, even in proceedings where the issue of continuation of the decoupling WRAM was settled without an evidentiary hearing, it was still "resolved" by the Commission. The Commission's approval of a settlement is governed by Rule 12.1, which states, "The Commission will not approve settlements, whether contested or uncontested, unless the settlement is reasonable in light of the whole record, consistent with law,

[80] *Id.*, pp. 58-59. Despite the Commission's reference to "policy" here, as noted above the decoupling WRAM is not a rule of general applicability and therefore does not fall under the "regulation" exemption of Section 1708.

[81] *Id.*, p. 101, Finding of Fact 8.

and in the public interest." Therefore, in each of the proceedings approving settlements for Cal Water and the other WRAM companies, the Commission determined that the record supported continuation of the WRAM, that continuing the decoupling WRAM was consistent with the law, and that the decoupling WRAM served the public interest.

D.20-08-047's suggestion that decisions approving settlements do not warrant the procedural protections embraced in Section 1708 not only has no basis in law but it is inconsistent with the longstanding policy of the Commission that settlements are a favored means of resolving contested proceedings. Numerous Commission decisions have endorsed settlements as an "appropriate method of alternative ratemaking" and express a strong public policy favoring settlement of disputes if they are fair and reasonable in light of the whole record.[82] This policy supports many worthwhile goals, including not only reducing the expense of litigation and conserving scarce Commission resources, but also allowing parties to reduce the risk that litigation will produce unacceptable result.[83]

If Section 1708 were interpreted to include an unwritten exception for decisions approving settlements, it would create disincentive for parties to enter into such agreements. Parties would be effectively waiving their rights to notice and hearing if the Commission subsequently rescinds, alters or amends the decision approving the settlement.

The language of Section 1708 applies to "any order or decision," not any "adjudicated" order and decision. It does not exempt decisions approving settlements. There is no authority for the creation of two classes of Commission decisions: those approving settlements and those

[82] *See, e.g.,* D.05-10-041, D.15-03-006, D.15-04-006.

[83] *See* D.14-12-040, p. 32.

resolving issues in dispute at submission. As such, the Commission committed legal error by elimination the decoupling WRAM with providing the opportunity for an evidentiary hearing.

b. Characterizing the Decoupling WRAM as a Pilot Program is Inaccurate and Does Not Excuse the Commission's Statutory Duty to Provide an Opportunity to be Heard.

Throughout D.20-08-047, the Commission refers to the decoupling WRAM as a "pilot program."[84] However, in D.16-12-042 the Commission ordered that the decoupling WRAM and other elements of Cal Water's conservation rate design are no longer a pilot and are now considered permanent.[85] In that proceeding, Cal Water requested that the Commission adopt the conservation rate design pilot as a permanent component of Cal Water's rate structure. Cal Water defined the conservation rate design as including "tiered residential rates, single-tariff rates for non-residential customer classes, an enhanced water conservation program, full Water Revenue Adjustment Mechanisms ("WRAMs"), and Modified Cost Balancing Accounts ("MCBAs")."[86] Cal Water and the Office of Ratepayer Advocates (the predecessor to Public Advocates Office, "ORA") entered into a settlement on this and other issues, which the Commission approved. In its decision, the Commission specifically ordered:[87]

> The pilot conservation rate design that has been in effect for California Water Service Company since 2008 shall be permanent, without limiting the possibility of future modifications and improvements.

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[84] *See, e.g.*, D.20-08-047, p. 55 ("The WRAM and MCBA were first implemented in 2008 and were developed as part of a **pilot program** to promote water conservation") (emphasis added)

[85] D.16-12-042, p. 78, Ordering Paragraph 7 ("The pilot conservation rate design that has been in effect for California Water Service Company since 2008 shall be permanent, without limiting the possibility of future modifications and improvements.").

[86] A.15-07-015, *Application of CALIFORNIA WATER SERVICE COMPANY (U60W), a California corporation, for an order (1) authorizing it to increase rates for water service by $94,838,100 or 16.5% in test year 2017, (2) authorizing it to increase rates by $22,959,600 or 3.4% on January 1, 2018, and $22,588,200 or 3.3% on January 1, 2019, in accordance with the Rate Case Plan, and (3) adopting other related rulings and relief necessary to implement the Commission's ratemaking policies* (July 9, 2015), p. 18, *available at* https://docs.cpuc.ca.gov/PublishedDocs/Efile/G000/M153/K177/153177625.PDF.

[87] D.16-12-042, p. 78, Ordering Paragraph 7.

Even for WRAM companies that may not have obtained such an order, the continued characterization of the decoupling WRAM as a "pilot" is inaccurate and misleading. Nothing in D.12-04-048, issued eight years ago, established a termination date or "sunset" for the employment of a WRAM. Instead, it directed that the future employment of each utility's WRAM be determined in that utility's GRC, where the Commission approved the continuation of each via settlement.

If this characterization of the decoupling WRAM as a pilot program is intended to suggest that the prior decisions are exempt from the reach of Section 1708, it fails. In each of the WRAM company GRCs after D.12-04-048, the companies presented evidence regarding the following issues:

> Option 1: Should the Commission adopt a Monterey-style WRAM rather than the existing full WRAM? The Monterey-style WRAM is not a revenue decoupling mechanism as such, it is rather a revenue adjustment mechanism that allows the utility to true-up the revenue it actually recovers under its conservation rate design with the revenue it would have collected if it had an equivalent uniform rate design at actual sales levels.
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> Option 2: Should the Commission adopt a mechanism that bands the level of recovery, or refund, of account balances based on the relative size of the account balance. For example, an annual WRAM/MCBA under-collection/over-collection less than 5% of the last authorized revenue requirement would be amortized to provide 100% recovery/refund, balances between 5-10% would be amortized to provide only 90% recovery/refund, and balances over 10% would be amortized to provide only 80% recovery/refund.
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> Option 3: Should the Commission place WRAM/MCBA surcharges only on higher tiered volumes of usage, thereby benefiting customers who have usage only in Tier 1 or have reduced their usage in the higher tier levels?
>
> Option 4: Should the Commission eliminate the WRAM mechanism?

> Option 5: Should the Commission move all customer classes to increasing block rate design and extend the WRAM/MCBA mechanisms to these classes?[88]

In each of these proceedings, the Commission determined that continuation of the decoupling WRAM was reasonable based on this evidence, consistent with the law, and in the public interest. By contrast, in this proceeding, the Commission did not provide any opportunity to present evidence on issues related to continuation of the decoupling WRAM, and prohibited the WRAM companies from providing evidence on this issue in next GRCs. This is entirely at odds with the Section 1708, which requires that before the Commission terminates a decoupling WRAM adopted in a prior decision, the parties to the proceeding that led to the decision be permitted to introduce evidence with respect to its continued use. That is the outcome that would result from determining the continued use of a decoupling WRAM in each WRAM utility's next GRC.[89] That is the course required by Section 1708.

c. The Commission Criticized the Lack of Evidence in the Support of the WRAM, But Did Not Allow Parties to Present Evidence

Although, as discussed below, the Commission did not provide adequate evidence to support its decision, it chided the parties for failing to present evidence in support of the decoupling WRAM, and used that lack of evidence to justify its decision to eliminate it. For example, the Commission claims, "there is no evidence that eliminating the WRAM will raise rates on low-income and low use customers."[90] With respect to the impact of elimination of the decoupling WRAM on rates for low-income and low use customers, Cal Water and others

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[88] D.12-04-048, p. 39.

[89] To be clear, Cal Water does not assert that a rate-setting proceeding considering the future use of a WRAM must be a GRC. The proceeding must, however, offer Cal Water an "opportunity to be heard as provided in the case of complaints..." Section 1708.

[90] D.20-08-047, p. 68.

provided extensive information on this issue in comments on the Proposed Decision as an offer of proof and in support of a hearing request.[91] While this information may not rise to the level of evidence admitted at a hearing, the Commission ignored these substantial showings, despite citing to the comments of the Public Advocates Office on the Proposed Decision to support its claim. [92]

Furthermore, the Commission explained that a fundamental reason for its elimination of the WRAM is that "no party presented evidence or arguments that persuade us that the pilot WRAM/MCBA mechanism provides discernable benefits that merit its continuation."[93] As discussed above, however, the issue of the WRAM was outside the scope of this proceeding. When the issue was raised by the by the assigned Administrative Law Judge very late in the proceeding, there was no opportunity for parties to provide evidence or any hearing held. Requests in comments on the Proposed Decision by Cal Water and others for the opportunity to provide evidence were ignored. The Commission cannot base its decision on a lack of evidence that it gave the parties no opportunity to provide.

C. The Commission Unlawfully Mischaracterized this Proceeding as Quasi-Legislative Rather Than as Ratesetting, Thereby Depriving Parties of Procedural Rights Available Only in Ratesetting Proceedings.

D.20-08-047 is unlawful because it improperly deprives water utilities of many of the procedural rights that should have been available in this proceeding given to the ratesetting

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[91] *Comments of California Water Service Company (U 60 W) On The Proposed Decision Of Commissioner Guzman Aceves* (July 27, 2020), pp. 3-6; *Comments of California-American Water Company on the Proposed Decision of Commissioner Guzman Aceves* (July 27, 2020), p. 3; *Comments of Golden State Water Company (U 133 W) on Proposed Decision and Order* (July 27, 2020), p. 3.

[92] *See* The Utility Reform Network v. Pub. Utilities Com., 166 Cal. App. 4th 522, 537 (2008). (It is error for the Commission to rely on a single source untested by hearing or cross-examination while rejecting others without explanation other than to characterize them as "unpersuasive.").

[93] D.20-08-047, p. 68-69.

nature of the elimination of the decoupling WRAM. Public Utilities Code Section 1701.1 defines the categorizations of Commission proceedings for the purposes of determining the applicable procedural mechanisms available in each type of proceeding, which are described in subsection (d):[94]

> (1) Quasi-legislative cases, for purposes of this article, are cases that establish policy, including, but not limited to, rulemakings and investigations that may establish rules affecting an entire industry.
>
> (2) Adjudication cases, for purposes of this article, are enforcement cases and complaints except those challenging the reasonableness of any rates or charges as specified in Section 1702.
>
> (3) Ratesetting cases, for purposes of this article, are cases in which rates are established for a specific company, including, but not limited to, general rate cases, performance-based ratemaking, and other ratesetting mechanisms.
>
> (4) Catastrophic wildfire proceedings, for purposes of this article, are proceedings in which an electrical corporation files an application to recover costs and expenses pursuant to Section 451 or 451.1, as applicable, related to a covered wildfire, as defined in Section 1701.8.

Rule 1.3 of the Commission's Rules further define the categories of proceedings and provide the following definitions relevant here:[95]

> (e) "Quasi-legislative" proceedings are proceedings that establish policy or rules (including generic ratemaking policy or rules) affecting a class of regulated entities, including those proceedings in which the Commission investigates rates or practices for an entire regulated industry or class of entities within the industry.
>
> (f) "Ratesetting" proceedings are proceedings in which the Commission sets or investigates rates for a specifically

[94] Pub. Util. Code § 1701.1(d)(1)-(4).

[95] Rule 1.3(e)-(f).

> named utility (or utilities), or establishes a mechanism that in turn sets the rates for a specifically named utility (or utilities). "Ratesetting" proceedings include complaints that challenge the reasonableness of rates or charges, past, present, or future. Other proceedings may be categorized as ratesetting, as described in Rule 7.1(e)(2).

The OIR establishing this proceeding preliminarily determined the categorization to be a quasi-legislative proceeding.[96] The category was later confirmed in the January 9, 2018 scoping memo and has not been changed since that time.[97] The elimination of the decoupling WRAM for the five water utilities expressly identified in Order Paragraph 3 is plainly inconsistent with the quasi-legislative categorization of this proceeding. In turn, this unlawful designation resulted in substantial prejudice to the parties supportive of the decoupling WRAM, including Cal Water.

1. The Elimination of the Decoupling WRAM in this Proceeding Renders it a Ratesetting Proceeding Because it Effectively Predetermines the Outcome on that Issue in Future GRC Proceedings, Contrary to the Commission's Designation of the Proceeding as Quasi-Legislative.

The elimination of the decoupling WRAM in D.20-08-047 is presented as a specific prohibition that five expressly-named water utilities (including Cal Water) "in their next general rate case applications, shall not propose continuing existing Water Revenue Adjustment Mechanisms/Modified Cost Balancing Accounts but may propose to use Monterey-Style Water Revenue Adjustment Mechanisms and Incremental Cost Balancing Accounts."[98] The nature of this Ordering Paragraph is such that it clearly belongs in a ratesetting proceeding.

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[96] OIR, p. 18, Ordering Paragraph 3 ("The category of this Order Instituting Rulemaking is preliminarily determined to be a quasi-legislative proceeding as the term is defined in Rule 1.3(d) of the Commission's Rules of Practice and Procedure.").

[97] *Scoping Memo and Ruling of Assigned Commissioner* (January 9, 2018), p. 8, Ordering Paragraph 1 ("The category of this proceeding is quasi-legislative."). The quasi-legislative categorization in the OIR and each of the Scoping Memos further bolsters the argument above that the Commission had never intended to include the elimination of the decoupling WRAM in this proceeding, which would be an action properly taken in a ratesetting proceeding addressing a rate mechanism for specifically-named utilities.

[98] D.20-08-047, p. 106, Ordering Paragraph 3.

The elimination of the decoupling WRAM in Ordering Paragraph 3 does not "establish policy or rules (including generic ratemaking policy or rules) affecting a class of regulated entities" as with a quasi-legislative proceeding,[99] but instead belongs in a ratesetting proceeding, which "establishes a mechanism that in turn sets the rates for a specifically named utility (or utilities)."[100] The decoupling WRAM is clearly a mechanism that sets the rates of a water utility through the annual true-up mechanism and Ordering Paragraph 3 is indisputably aimed at specifically named utilities, which included Cal Water. Therefore, the elimination of the decoupling WRAM is an unlawful ratesetting action taken in a Commission proceeding improperly categorized as quasi-legislative in violation of statute and the Commission's own rules.

The fact that the immediate elimination of the WRAM does not occur directly in D.20-08-047, but rather will be implemented in each water utility's subsequent GRC (each of which should be a ratesetting proceeding) is a distinction without a difference. Ordering Paragraph 3 essentially pre-decides the future resolution of the decoupling WRAM in those GRCs by entirely prohibiting any of the water utilities from even proposing to the continue the decoupling WRAM at all. This unlawfully binds the discretion of future Commissioners to address the decoupling WRAM by preventing the issue from ever reaching them. At minimum, the Commission must revise Ordering Paragraph 3 to avoid impermissibly precluding itself from considering issues in future, separate proceedings.

Nor was there any reasonable grounds for appealing the designation of the proceeding as quasi-legislative following the issuance of any of the scoping memos pursuant to Public Utilities

[99] Rule 1.3(e) (defining quasi-legislative proceedings).

[100] Rule 1.3(f) (defining ratesetting proceedings).

Code 1701.1(a) and Rule 7.6, since the proposed elimination of the decoupling WRAM was never properly identified as an issue to be considered in this proceeding. Due to that fault, this issue was belatedly made apparent only upon the issuance of the Proposed Decision. By then, it was too late.

If the Commission intended to issue a decision affecting the rates of the water utilities with a decoupling WRAM, it should have properly categorized the matter as "ratesetting." Instead, the Commission failed to do that to the detriment and prejudice of those parties.

2. The Incorrect Categorization of the Proceeding Prejudiced the Parties By Depriving Them of Critical Procedural Protections Available in Ratesetting Proceedings.

The improper categorization of the proceeding as quasi-legislative indisputably prejudiced the parties in this proceeding by depriving them of important procedural protections that would have been available were it properly designed as ratesetting, including, without limitation, a hearing. The failure of the Commission to follow the statutory requirements and its own established procedural rules governing the categorization of its proceedings and the resulting prejudice caused to the parties are grounds for vacating D.20-08-047.[101]

The Commission's continued treatment of the docket as a quasi-legislative proceeding without a hearing denied the affected parties the right to introduce evidence rebutting the inferences drawn by D.20-08-047. This categorization foreclosed a review of whether the findings are supported by substantial evidence in light of the whole record, which is the standard applied to each of the ratesetting proceedings in which the decoupling WRAM was adopted.

Although a decision in a rulemaking proceeding generally is not subject to a substantial evidence review, it is when it modifies a decision from a ratesetting proceeding without a

[101] Edison, at 1106.

hearing. Public Utilities Code Section 1708 precludes modification of an order subject to an evidentiary standard (*i.e.*, a decision reached in a prior ratesetting proceeding) by an order not subject to an evidentiary standard (*i.e.*, a decision reached in a quasi-legislative proceeding), unless the subsequent rulemaking proceeding offers the parties to the earlier ratesetting proceeding the opportunity to introduce evidence. Indeed, irrespective of whichever evidentiary standard ultimately governs either type of proceeding, Section 1708 provides the parties that opportunity before a decision in the second proceeding may lawfully modify that reached in the first. A contrary rule eviscerates Section 1708 and the distinction between rulemaking and ratesetting proceedings drawn in Public Utilities Code Section 1708.5(f).[102]

The Commission's continued treatment of the docket as a quasi-legislative proceeding without a hearing denied Cal Water and other parties the right to present oral argument before the Commission guaranteed by Section 1701.3(i) and Rule 13.13. Indeed, on August 20, 2020, Cal Water and other parties made a joint motion for oral argument on the issues in the Proposed Decision concerning the decoupling WRAM.[103] This motion was summarily denied in D.20-08-047.[104]

Moreover, even the governing rules for this proceeding would have been different under a ratesetting categorization. The statutory rules governing adjudications and ratesetting provide

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[102] Pub. Util. Code 1708.5(f) ("Notwithstanding Section 1708, the commission may conduct any proceeding to adopt, amend, or repeal a regulation using notice and comment rulemaking procedures, without an evidentiary hearing, except with respect to a regulation being amended or repealed that was adopted after an evidentiary hearing, in which case the parties to the original proceeding shall retain any right to an evidentiary hearing accorded by Section 1708.").

[103] *Joint Motion of California Water Association, California-American Water Company, California Water Service Company, Golden State Water Company, Liberty Utilities (Park Water) Corp. and Liberty Utilities (Apple Valley Ranchos Water) Corp. for Oral Argument and Request to Shorten Time for Response* (August 20, 2020).

[104] D.20-08-047, p. 108, Ordering Paragraph 8 ("8. All pending motions in this proceeding not specifically addressed in this decision, or not previously addressed, are denied.")

for proscriptions, restriction or reporting of ex parte communications;[105] the statutory rules governing quasi-legislative matters do not. [106] The statutory rules governing adjudications and ratesetting provide for peremptory challenges;[107] the statutory rules governing quasi-legislative matters do not.

D. D.20-08-047's Elimination of the Decoupling WRAM is Unlawful Because the Commission it Predetermined the Outcome on that Ratesetting Issue Without Holding a Hearing.

D.20-08-047's elimination of the decoupling WRAM is unlawful because it effectively fixed water utility rates and rate mechanisms without first holding a hearing as statutorily required. Public Utilities Code Section 728 dictates the manner in which the Commission is to "fix, by order, the just, reasonable, or sufficient rates, classifications, rules, practices, or contracts" and provides in the relevant part:[108]

> Whenever the commission, **after a hearing**, finds that the rates or classifications, demanded, observed, charged, or collected by any public utility for or in connection with any service, product, or commodity, or the rules, practices, or contracts affecting such rates or classifications are insufficient, unlawful, unjust, unreasonable, discriminatory, or preferential, the commission shall determine and fix, by order, the just, reasonable, or sufficient rates, classifications, rules, practices, or contracts to be thereafter observed and in force.

Public Utilities Code Section 729 requires:[109]

> The commission may, **upon a hearing**, investigate a single rate, classification, rule, contract, or practice, or any number thereof, or the entire schedule or schedules of rates, classifications, rules, contracts, and practices, or any thereof, of any public utility, and may establish new rates, classifications, rules, contracts, or practices or schedule or schedules in lieu thereof.

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[105] *See* Pub. Util. Code § 1701.2(g) & 1701.3(h).

[106] *See* Pub. Util. Code § 1701.4(c).

[107] *See* Pub. Util. Code § 1701.2(c) & 1701.3(g).

[108] Pub. Util. Code § 728.

[109] Pub. Util. Code § 729.

Both of these statutory provisions have been construed by the California Supreme Court as requirements for the Commission to hold hearings prior to the implementation of new rates. In City of Los Angeles v. Pub. Utilities Com., the Court explained that the "purpose behind the hearing requirement of section 728 … is to air the policy considerations behind various rate proposals and to establish controverted facts."[110] Previously, in Pacific Tel. & Tel. Co. v. Pub. Utilities Com., the Court also explained that "the same is true of the provision of section 729, also cited by the commission. From 1915 until the Public Utilities Act was codified in 1951, the provisions now found in sections 728 and 729 comprised paragraphs (a) and (b), respectively, of section 32, and at all times the section instructed the commission to first hold a hearing, and then fix rates to be thereafter observed and in force."[111]

The crux of both of these statutory provisions and these long-standing California Supreme Court cases is that the Commission must hold a hearing **before** fixing utility rates. In this case, as explained above, Ordering Paragraph 3 predetermines the disposition of the WRAM in subsequent GRCs, effectively fixing the outcome of that issue on utility rates. The consequence of this failure is apparent in this proceeding: the evidentiary record and D.20-08-047 itself fail to include much of the important policy considerations – including on water conservation and affordability of utility rates – that are squarely implicated with the elimination of the decoupling WRAM.

Having failed to properly hold a hearing on that ratesetting matter before essentially resolving it with finality, D.20-08-047 violates the mandates of Sections 728 and 729.

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[110] City of Los Angeles v. Pub. Utilities Com., 15 Cal. 3d 680, 697 (1975).

[111] Pacific Tel. & Tel. Co. v. Pub. Utilities Com., 62 Cal. 2d 634, 653-654 (1965) (citations and footnotes omitted).

E. D.20-08-047 is an Unlawful Abuse of Discretion Because Several of the Findings of Fact and Substantive Discussion That Serve as the Basis for Eliminating the Decoupling WRAM are Not Based on Evidence in the Record.

The Public Utilities Code requires the Commission to "render its decisions based on the law and on the evidence in the record."[112] As discussed above, the Commission held a series of workshops, and gave the parties the occasional opportunity to provide comments. There is no properly developed record in this proceeding, and certainly nothing that could be characterized as "substantial evidence" to support the Commission's findings. Moreover, parties had no opportunity to dispute and test the purported factual predicates on which the Commission relied. Contested assertions not subject to cross-examination may not provide substantial evidence to support a finding.[113]

1. The Evidence in the Record Does Not Support D.20-08-047's Finding Regarding Comparative Reductions in Water Consumption and Conservation.

The Commission based its decision to eliminate the decoupling WRAM in large part on its belief that it was not necessary to achieve water conservation.[114] The Commission included two findings of fact with respect to water conservation:[115]

> 13. Average consumption per metered connection for WRAM utilities is less than the consumption per metered connection for non-WRAM utilities as evidenced in water utility annual reports filed from 2008 through 2016.
>
> 14. Conservation for WRAM utilities measured as a percentage change during the last 5 years is less than conservation achieved by non-WRAM utilities including Class B utilities

[112] Pub. Util. Code §1701.1(e)(8).

[113] Independent Energy Producers Association/Utility Reform Network v. Pub. Utilities Com., 223 Cal. App. 4th 945 (2014).

[114] D.20-08-047, pp. 62-70.

[115] *Id.*, pp. 102-103.

> as evidenced in water utility annual reports filed from 2008 through 2016.

The reference to unidentified annual reports in each finding was added the day before the Commission voted on the Proposed Decision. First, these findings are flawed because they purport to show the difference in water consumption for companies with and without the WRAM, but provide no information as to the magnitude of the difference, which is necessary to determine whether the differences are meaningful and reasons therefore.

Second, Finding of Fact 13 appears to be based on the graph included in the Public Advocates Office's September 23, 2019 reply comments.[116] As noted above, Cal Water had no opportunity to provide evidence or even comments regarding this issue. The Commission improperly accepted without question a limited data set that had not been subject to public review, was untested at a hearing and failed to provide stakeholders the opportunity to provide different data or any explanation why that data does not lead to the conclusion reached.

Third, as Cal Water demonstrated in its reply comments on the Proposed Decision, decoupled water companies have consistently maintained greater cumulative reductions, on a per capita basis, as compared to companies with the Monterey-style WRAM. In these comments, Cal Water offered a graph, also based on information from the annual reports, illustrating the cumulative reduction in water use per customer by companies with and without the decoupling WRAM.[117] Cal Water's graph demonstrated that before the drought, customers of decoupled

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[116] *Id.*, p. 67-68 ("The Public Advocates Office of the Public Utilities Commission made its recommendations based on the Class A water utilities' annual reports to the Commission from 2008 to 2016."). Aside from the discussion of reporting requirements in annual reports discussed in Section 9 of D.20-08-047, this is the only express mention of annual reports in the text of the decision before arriving at Findings of Fact 13 and 14.

[117] *Reply Comments of California Water Service Company (U 60 W) on the Proposed Decision of Commissioner Guzman Aceves* (August 3, 2020), pp. 3-4.

companies achieved 29% more than those of non-WRAM companies. For the entire period of 2008-2018, the savings were more than 13%.[118]

In its discussion of the comments on the Proposed Decision, the Commission makes no reference to Cal Water's graph. It is not clear why the Public Advocates Office's graph is part of the "record" relied upon by the Commission when Cal Water's graph and the comments of others were not. With data like that presented by Cal Water absent from the record and not even mentioned expressly in D.20-08-047, the evidence does not support the Commission's findings.

The Commission's assertions regarding conservation in the body of D.20-08-047 are similarly unsupported. For example, the Commission cites discussion at the August 2, 2019 workshop and comments on the workshop support as the basis for its conclusion that continuation of the decoupling WRAM for conservation purposes will not benefit customers.[119] Yet an examination of the workshop report provides no indication of a discussion of conservation and the decoupling WRAM, and the only information on the issue in the comments is the graph in the reply comments of the Public Advocates Office, which we have discussed above.

The Commission states, "We continue to believe that other actions by companies, the Legislature, the State Water Resources Control Board, and the Commission have, and continue to do more to achieve conservation requirements...,"[120] but provides no information regarding these actions or any studies or reports that would allow the parties to quantify the impacts of these "other actions" as compared to the decoupling WRAM.

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[118] *Id.*, p. 4.

[119] D.20-08-047, p. 67.

[120] *Id.*, p. 69.

Similarly, the Commission claims that the decoupling WRAM is not necessary because:[121]

> [I]t appears that over the years since WRAM/MCBA mechanisms were adopted, including drought years in 2014, 2015, and 2016, customers have heeded the continuing message and mandates that water is a precious resource that should not be wasted. These efforts heed the message from former Governor Brown's Executive Orders during our drought years from 2013-2017 that declared a drought state of emergency in 2014; called for a statewide 25 percent reduction in urban water usage in 2015; and set forth actions in 2016 to make conservation a California way of life.

To the extent that D.20-08-047 is asserting the Governor's Order, rather than inclining block rates, led to the consumption reductions, it offers no study or report or report reaching such a conclusion that the parties could test at hearing. The findings of fact regarding consumption, as well as the conclusions made in the body of the decision, are not supported by the evidence and therefore do not provide sufficient support for the Commission's decision.

2. The Evidence in the Record Does Not Support D.20-08-047's Claim that Eliminating the Decoupling WRAM Would Improve Water Sales Forecasting.

The Commission also based its decision to eliminate the decoupling WRAM on its claim that it will improve water sales forecasting. In Conclusion of Law 4, the Commission stated:[122]

> Elimination of the WRAM/MCBA will provide better incentives to more accurately forecast sales while still providing the utility the ability to earn a reasonable rate of return.

To support this conclusion, the Commission provided Finding of Fact 19, which stated:[123]

> Implementation of a Monterey-Style WRAM means that forecasts of sales become more significant in establishing test year revenues.

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[121] *Id.*, pp. 69-70 (footnotes omitted).

[122] *Id.*, p. 104.

[123] *Id.*, p. 103, Finding of Fact 19.

The Commission does not provide any support for the presumption that the "significance" of sales in establishing test year revenues leads to forecasts that are more accurate. Without the protection of the decoupling WRAM, companies may have an incentive to develop conservative forecasts to provide better protection against sales risk. Furthermore, based on the summary of comments made at the August 2, 2019 workshop, it appears that sales forecasting has actually improved since the implementation of the decoupling WRAM.[124]

Indeed, some of the Commission's statements with respect to forecasting give the impression that the Monterey-style WRAM is misunderstood:[125]

> In view of the foregoing, we believe that it is an appropriate time to move to eliminate the option for water utilities to use the full WRAM/MCBA mechanism. However, to account for the consequences of inaccurate forecasts, it is reasonable that these former WRAM utilities be provided an opportunity to establish Monterey-Style WRAMs offset by ICBAs.

The Monterey-style WRAM does not "account for the consequences of inaccurate forecasts." Indeed, it was the failure of the Monterey-style WRAM to account for the difference between forecasted and actual consumption that led to the development of the decoupling WRAM. The Commission's misstatements regarding the Monterey-style WRAM undercut its findings regarding the benefits to sales forecasting of transitioning to the Monterey-style WRAM.

Moreover, the Commission provides no support in D.20-08-047 for its belief that the (unproven) potential for more accurate forecasts with the Monterey-style WRAM provides more protection to customers than the decoupling WRAM. As the Commission explained in Findings

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[124] *Administrative Law Judge's Ruling Inviting Comments on Water Division Staff Report and Responses to Additional Questions* (September 4, 2019), Attachment A, p. 5, noting comments by CWA that "Current methods are producing more accurate three-year forecasting" and by the Public Advocates Office that "Recent forecasts have improved, but there is still room for further improvements."

[125] D.20-08-047, p. 71.

of Fact Nos. 1 and 2, the decoupling WRAM raises **or lowers** rates to adjust for variances in sales.[126] Nothing in the decision, however, explains how improved forecasts without the decoupling WRAM will ensure that a utility's actual revenue is no more and no less than that the Commission found reasonable in the utility's last GRC.

The Commission's findings with respect to sales forecasts are not supported by evidence and therefore do not justify the Commission's decision to eliminate the decoupling WRAM.

3. The Evidence in the Record Does Not Support D.20-08-047's Finding Regarding Intergenerational Transfer of Costs.

The Commission also cites intergenerational transfers as a justification for elimination of the decoupling WRAM,[127] supported by the following findings:[128]

> 15. Since WRAM/MCBA is implemented through a balancing account for recovery, there are intergenerational transfers of costs.
>
> 16. The WRAM/MCBA mechanism is not the best means to minimize intergenerational transfers of costs when compared to an alternative available to the utilities and the Commission.

Finding of Fact 15 could be made of any balancing account, including, for example, the incremental cost balancing account authorized for all water utilities for many years. The Commission does not quantify the extent of these transfers, although it concedes elsewhere in

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[126] Finding of Fact No. 2 erroneously states that (emphasis added):

> If actual sales exceed adopted sales, the WRAM/MCBA mechanism will return the over-collected revenues to customers through a balancing account with a surcharge on customer bills.

The text at page 48 of D.20-08-047 correctly states that (emphasis added):

> The WRAM tracks the difference between the authorized quantity rate revenues and actual billed quantity-rate revenues over a calendar year period and recovers any shortfall or returns any over-collected amount via a quantity-based surcharge or a meter-based sur-credit, respectively.

[127] D.20-08-047, p. 70.

[128] *Id.*, p. 103, Findings of Fact 15 & 16.

D.20-08-047 that "such intergenerational transfers may not be significant over long periods of time."[129] The simple fact that there are intergenerational transfers associated with the WRAM, particularly in light of the fact they may not be significant, does not support the Commission's decision to eliminate the decoupling WRAM.

Finding of Fact 16 is more unsupported opinion than fact. The finding (and the body of D.20-08-047) are absent of (1) any description or identification of the "alternative available to the utilities and the Commission", (2) whether employment of that "alternative" would result in "intergenerational transfers" and (3) why one is "not the best." Finding of Fact 16 is devoid of evidentiary support. Any reliance on it is unlawful.

F. The Commission Unlawfully Reached D.20-08-047 By Failing to Meet its Obligations Under Public Utilities Code Section 1705 to Hear All Evidence that Might Bear On the Exercise of its Discretion and to Demonstrably Weigh that Evidence.

Public Utilities Code Section 1705 provides a statutory requirement that Commission decisions "contain, separately stated, findings of fact and conclusions of law by the commission on all issues material to the order or decision."[130] Courts have interpreted this requirement for the Commission to render findings on all material issues under Section 1705 as a concomitant obligation to (1) hear all evidence that might bear on the exercise of its discretion and (2) demonstrably weigh that evidence.[131] In United States Steel Corporation v. Pub. Utilities Com., the California Supreme Court explained these responsibilities:[132]

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[129] *Id.*, p. 64.

[130] Pub. Util. Code § 1705.

[131] United States Steel Corporation v. Pub. Utilities Com., 29 Cal. 3d 603 (1981); Northern California Power Agency v. Pub. Utilities Com., 5 Cal. 3d 370 (1971); Industrial Communications Systems v. Pub. Utilities Com., 22 Cal. 3d 572 (1978).

[132] United States Steel Corporation v. Pub. Utilities Com., 29 Cal. 3d 603, 608-609 (1981) (citations omitted).

> Concomitant with the discretion conferred on the commission is the duty to consider all facts that might bear on exercise of that discretion. The commission must consider alternatives presented and factors warranting adoption of those alternatives. That duty is inherent in the requirement that the decision "contain, separately stated, findings of fact and conclusions of law ... on all issues material to the order or decision."

In this proceeding, it is plainly evident from the analysis and disposition of the issues relating to the decoupling WRAM that the Commission has failed to meet its duties under Section 1705.

1. D.20-08-047 Unlawfully Precludes Water Utilities From Proposing to Continue the Decoupling WRAM in their Subsequent GRCs.

First, as explained above, D.20-08-047 unlawfully precludes Cal Water and other water utilities from proposing to continue the decoupling WRAM in their subsequent GRCs and effectively binds the discretion of future Commission actions on the issue. Having been denied a fair opportunity to present testimony or exhibits on that issue, D.20-08-047's preemptive determination here effectively bars water utilities from presenting evidence in their next GRCs showing that decoupling is in the public interest entirely. That is inconsistent with the Commission's obligation under Section 1705 to hear all evidence that might bear on the exercise of its discretion and makes it impossible for the Commission to demonstrably weigh that evidence. The preemptive denial of the matter in subsequent GRCs also violates the Legislative directive under Public Utilities Code Section 727.5(c) that the "commission shall consider, and may authorize, a water corporation to establish a balancing account, rate stabilization fund, or other contingency fund, the purpose of which shall be the long-term stabilization of water rates."[133] Therefore, Ordering Paragraph 3 of D.20-08-047 is unlawful because it violates the Commission's statutory responsibilities relating to the exercise of its discretion under Section 1705 set forth in United States Steel Corporation v. Pub. Utilities Com..

[133] Pub. Util. Code § 727.5(c).

2. D.20-08-047 Unlawfully Omits Any Meaningful Analysis Regarding the Impact of the Elimination of the Decoupling WRAM.

Second, D.20-08-047 violates the Commission's duty under Section 1705 to hear all evidence that might bear on the exercise of its discretion and demonstrably weigh that evidence by unlawfully omitting any meaningful discussion regarding the potential impacts of eliminating the decoupling WRAM on Commission's Water Action Plan objective of "set[ting] rates that balance investment, conservation, and affordability."[134]

In comments to the Proposed Decision, each of the water utilities with a decoupling WRAM (including Cal Water) highlighted the negative consequences that the elimination of the decoupling WRAM would have on low-income and low-use customers due to the modifications that would need to be made to the existing conservation-focused rate design made possible only with the existence of the decoupling WRAM.[135] Commissioner Randolph's subsequent dissent to D.20-08-047 goes further to succinctly lay out the potential negative consequences that should have been explored in the evidentiary record of this proceeding:[136]

> No one likes a WRAM surcharge, especially when those surcharges become large. However, simply eliminating a WRAM surcharge does not make water more affordable. This Decision is not a magic bullet slaying high bills. Indeed, it removes a revenue adjustment mechanism. Without that mechanism, companies will still need to design rates to match their revenue requirement.
>
> While this Decision does not make changes to any company's rate design, there will be an increasing need for the water companies to limit sales risk due to the removal of the WRAM. They are very likely to propose higher service charges as well as having flatter tiers or else face a very real risk of not meeting their revenue requirement.

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134 2005 Water Action Plan, p. 5.

135 *Comments of California Water Service Company (U 60 W) On The Proposed Decision Of Commissioner Guzman Aceves* (July 27, 2020), pp. 3-6; *Comments of California-American Water Company on the Proposed Decision of Commissioner Guzman Aceves* (July 27, 2020), p. 3; *Comments of Golden State Water Company (U 133 W) on Proposed Decision and Order* (July 27, 2020), p. 3.

136 D.20-08-047, *Dissent of Commissioner Randolph*, p. 1 (emphasis added).

> Such an outcome would lead to increasing the bills of low-usage customers which correlates with low-income customers. This outcome is exactly opposite of this proceeding's intent by harming low-income customers. Such a rate design would also blunt the conservation signal.
>
> Now, one could argue that such a rate design has neither been proposed nor approved. Hypothetically, assume that in the future the Commission does not allow higher service charges or the flattening of tiers. If such a rate design were to be approved, then the water companies will likely argue that they should increase their rates of return on equity as their business risk is increased. This will lead to higher rates for everyone.

Consideration of these unanticipated consequences is absent from the evidentiary record because the parties were not afforded on opportunity to address them – whether in disagreement or in support. Rather than properly contemplating these issues, D.20-08-047 dismisses out of hand, without any real consideration or explanation, the possibility that eliminating decoupling could harm low-income and low-use customers, instead providing the single conclusory statement that "there is no evidence that eliminating the WRAM will raise rates on low-income and low-use customers."[137] Particularly in a rulemaking proceeding purportedly opened specifically with the goal of assisting low-income water customers, this is plainly insufficient.

This dismissive take fails to recognize that major water policy changes are interconnected, and as such merit a comprehensive analysis to understand their implications. Commissioner Randolph's dissent references the third leg of the "balanced rates" objective that is missing from D.20-08-047 – infrastructure investment. Namely, if the Commission now denies a request to modify rate designs in the absence of decoupling, a higher return on equity could be needed to ensure appropriate infrastructure investment. The result could be a rate increase for all

[137] D.20-08-047, p. 68.

customers that is caused neither by new capital investment nor an increase in expenses, but by the elimination of decoupling.

Reviewing Commissioner Randolph's dissent in light of this crucial Water Action Plan objective brings into sharp focus how D.20-08-047, with its superficial analysis of these issues, makes no attempt to consider the appropriate balance between conservation, affordability, and investment. The Commission need not ultimately accept arguments made by the water utilities or the Public Advocates Office, but it is obligated to at minimum hear and weigh them under Section 1705 – D.20-08-047 fails to demonstrate that this was ever done in a legal manner.

Therefore, D.20-08-047 clearly fails to support a conclusion that the Commission demonstrably weighed all of the evidence that might bear on the exercise of its discretion in violation of Section 1705. Additionally, as explained in the following section, the failure to properly consider all of the material impacts that eliminating the decoupling WRAM would have resulted in other unintended consequences that further render D.20-08-047 unlawful.

G. D.20-08-047's Elimination of the Decoupling WRAM and Preemptive Prohibition on Rate Design Changes Unlawfully Impairs the Ability of Cal Water to Earn an Adequate Rate of Return in Violation of the Constitution.

D.20-08-047 asserts that "there is no legal basis upon which WRAM/MCBA is required or necessary in water utility regulation."[138] This statement is an oversimplification of the matter and misses the point. By eliminating the decoupling WRAM and simultaneously preempting the ability of water utilities to make the necessary rate design changes, D.20-08-047 unlawfully impairs the ability of Cal Water to earn its authorized rate of return, in violation of the Constitutional mandate to afford regulated public utilities a fair opportunity to earn an adequate return on its investment.

[138] *Id.*, p. 60.

As explained above, the elimination of the decoupling WRAM will necessarily require substantial changes to the existing conservation-focused water utility rate designs to offset the resulting increased revenue risk in its absence. While D.20-08-047 acknowledge that "rate design is the ultimate determinant of impacts to low-income and low-use customers," it inexplicably then mandates that "water utilities can and will propose rate structures in their next GRC application where the Commission will ensure low-income and low-use customers are not adversely impacted."[139] Yet simple mathematics demonstrate that the only means by which a utility with a decoupling WRAM can retain an opportunity to earn its authorized rate of return is to increase its monthly charge and flatten its rate tiers, resulting in increases to the charges assessed to low-volume users (which often coincide with low-income users), precisely the **opposite** result from that sought in the OIR. It is troubling that D.20-08-047 entirely fails to even properly acknowledge this legal deficiency. Courts have held that the determination of whether the rates set by the Commission will produce a constitutionally adequate return on equity is a factual question.[140] Such a determination required here was never adequately considered in D.20-08-047, let alone properly addressed.

Therefore, D.20-08-047's immutable retention of the existing conservation-focused rate structure in periods of volatile consumption will impair the utility's ability to earn its authorized rate of return in the absence of a decoupling WRAM, resulting in an unlawful and confiscatory rate of return in violation of the long-standing utility ratemaking principles under the

[139] *Id.*, p. 68.

[140] Ponderosa Telephone Co. v. Pub. Utilities Com., 36 Cal. App. 5th 999 (2019).

Constitution set forth by U.S. Supreme Court in Bluefield Co. v. Pub. Serv. Com.,[141] Power Comm'n v. Hope Gas Co.,[142] and Duquesne Light Co. v. Barasch.[143]

IV. REQUEST FOR ORAL ARGUMENT ON APPLICATION FOR REHEARING

Pursuant to Rule 16.3, Cal Water hereby requests oral argument on the issues presented in this Application for Rehearing. Holding oral argument here would materially assist the Commission in resolving this Application for Rehearing by creating an open venue for the Commissioners and the parties to fully evaluate each of the legal errors outlined herein. In particular, the extremely complex procedural history and substantive policymaking consideration associated with the decoupling WRAM are best explored through a dynamic two-way dialogue that can only be held equitably and transparently in public oral argument before the entire Commission.

D.20-08-047 raises issues of major significance for the Commission because it "departs from existing Commission precedent without adequate explanation."[144] D.20-08-047 radically shifts away from the decoupling WRAM tool that water utilities like Cal Water have used from more than a decade. Yet, as outlined above, many of the substantive explanations for doing so remain unanswered (in particular, the issue of how the Commission intends to resolve the inevitable impacts to low-income and low-use customers caused by the elimination of the decoupling WRAM, as alluded to in Commissioner Randolph's dissent). Moreover, the extensive comments on the Proposed Decision and considerable involvement of the parties in this proceeding leading up to the adoption of D.20-08-047 easily demonstrate that it "presents legal

[141] Bluefield Co. v. Pub. Serv. Com., 262 U.S. 679 (1923).

[142] Power Com. v. Hope Gas Co., 320 U.S. 591 (1944).

[143] Duquesne Light Co. v. Barasch, 488 U.S. 299 (1989).

[144] Rule 16.3(a)(1).

issues of exceptional controversy, complexity, or public importance."[145] For these reasons, oral argument on this Application for Rehearing is well-justified and should be granted.

V. REQUEST FOR RELIEF

Cal Water requests that the Commission vacate the portions of D.20-08-047 that address the decoupling WRAM due to the legal errors outlined in this Application for Rehearing and direct that it be considered in a separate phase or proceeding characterized as ratesetting that clearly identifies in a scoping memo the decoupling WRAM as an issued to be considered. Such an evaluation would necessarily involve a hearing, fair opportunities for parties to present and cross-examine evidence in the record, and other requisite procedural protections afforded in a ratesetting proceeding. At minimum, the Commission must revise D.20-08-047 to avoid precluding or pre-deciding issues from fairly being considered in its other future proceedings.

VI. CONCLUSION

In summary, the elimination of the decoupling WRAM in D.20-08-047 is a product of numerous procedural and substantive legal errors that have prejudiced the parties in this proceeding, including Cal Water. These legal infirmities have led not only to unsound decision-making by eliminating an important progressive water conservation and ratemaking mechanism, but also result in an unlawful decision. Therefore, Cal Water respectfully urges the Commission to grant this Application for Rehearing and vacate the portions of D.20-08-047 addressing the decoupling WRAM for the reasons outlined above. Cal Water also respectfully requests that the Commission hold oral argument on this Application for Rehearing.

[145] Rule 16.3(a)(3).

Date: October 5, 2020

Respectfully submitted,

By: */s/ Natalie D. Wales*
Natalie D. Wales

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S_____

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

CALIFORNIA WATER SERVICE COMPANY
Petitioner,

v.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA
Respondent.

Decisions No. 20-08-047 and 21-09-047

Of the Public Utilities Commission of the State of California

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EXHIBIT CC

R.17-06-024, *Application of California Water Service Company for Rehearing of Decision 21-07-029* (August 19, 2021)

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BEFORE THE PUBLIC UTILITIES COMMISSION

OF THE STATE OF CALIFORNIA

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.	Rulemaking 17-06-024 (Filed June 29, 2017)

APPLICATION OF CALIFORNIA WATER SERVICE COMPANY FOR REHEARING OF DECISION 21-07-029

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August 19, 2021

TABLE OF CONTENTS

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

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.	Rulemaking 17-06-024 (Filed June 29, 2017)

APPLICATION OF CALIFORNIA WATER SERVICE COMPANY
FOR REHEARING OF DECISION 21-07-029

I. INTRODUCTION

Pursuant to Rule 16.1 of the Rules of Practice and Procedure ("Rules") of the California Public Utilities Commission ("Commission"), California Water Service Company ("Cal Water") hereby submits this Application for Rehearing of Decision ("D.") 21-07-029, which the Commission adopted during the July 15, 2021 Commission business meeting and issued on July 20, 2021. For the reasons set forth below, the Commission must vacate portions of D.21-07-029 that unlawfully and erroneously imposed disallowances and other limitations on Cal Water's recovery of customer arrearages for water service rendered that have accrued from the moratorium on disconnections and other COVID-19 pandemic-related protections. These customer arrearages borne by Cal Water over the course of the pandemic are for safe and reliable water service rendered to customers pursuant to rates that the Commission previously established as just and reasonable.

At the outset of the COVID-19 pandemic, both the State and the Commission ordered Cal Water and other water utilities to take significant actions to mitigate the impact of the crisis on

customers.[1] While these directives mandated that water utilities continue to provide safe and reliable service in response to the emergency, they never intended to modify the underlying obligations of customers to pay just and reasonable rates for the water service rendered.[2] Notwithstanding these efforts by Cal Water and other Class A water utilities to protect customers throughout the COVID-19 pandemic, the Commission adopted D.21-07-029 in July 2021 without giving lawful consideration to some of the critical ratesetting elements included as part of that decision. In particular, Ordering Paragraph 9 of D.21-07-029 imposed an unjustified and arbitrary "uncollectibles buffer" to be offset against the recovery of COVID-19 customer arrearage balances by Cal Water and other Class A water utilities. As established herein, the uncollectibles buffer is unlawful and erroneous because it is an unconstitutional taking of water utility funds without just compensation. It does this by requiring water utility shareholders to bear the debt for water service already rendered to customers at just and reasonable rates. Not only is this a clear violation of the regulatory compact that undergirds the Commission's ratemaking framework, it also violates the long-standing prohibition against retroactive ratemaking.

Moreover, D.21-07-029 is unlawful because it established a significant ratesetting mechanism for the recovery of COVID-19 customer arrearage balances (through the Catastrophic Event Memorandum Account or CEMA), even dictating the specific percentage (0.0867 percent) to be utilized in that calculation. This was imposed without affording parties

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[1] *See, e.g.,* Executive Order N-42-20 (April 2, 2020) (establishing a statewide moratorium on disconnection of water service for nonpayment); Resolution M-4842 (April 16, 2020) (requiring Commission emergency customer protections for utilities in response to the COVID-19 pandemic); Resolution M-4849 (February 11, 2021) (extending the emergency customer protections enacted in Resolution M-4842).

[2] Executive Order N-42-20 (April 2, 2020) ("Nothing in this Order eliminates the obligation of water customers to pay for water service, prevents a water system from charging a customer for such service, or reduces the amount a customer already may owe to a water system.").

notice or a meaningful opportunity to present evidence and be heard regarding the uncollectibles buffer because it appeared for the first time in the June 16, 2021 proposed decision of Commissioner Guzman Aceves addressing issues in Phase II of the proceeding ("Phase II Proposed Decision"). Had it been given the opportunity, Cal Water would have presented evidence demonstrating that the uncollectibles buffer is methodologically flawed, unsupported by the record, and conceptually inconsistent with the Commission's long-standing cost of service ratemaking principles. Cal Water also would have shown that the underlying assumptions relating to the impact of the COVID-19 pandemic on utility risk in D.21-07-029 were erroneous.

This legal error was exacerbated by the fact that the Commission had previously conducted this phase of the proceeding as quasi-legislative, which meant that the ratesetting uncollectibles buffer in D.21-07-029 was adopted without affording Cal Water and other parties critical due process protections required before ratesetting actions, including without limitation the right to an evidentiary hearing to address material disputed facts. Without undertaking the requisite procedural steps before adopting the uncollectibles buffer, the Commission lacked an evidentiary basis for a 0.0867 percent uncollectibles buffer in D.21-07-029, rendering its adoption arbitrary and capricious. Lastly, Cal Water objects to certain dicta in D.21-07-029 that may be erroneously interpreted as requiring an earnings test for recovery of COVID-19-related CEMA balances. Cal Water requests that these dicta be expeditiously corrected or eliminated from the decision. To the extent that D.21-07-029 imposed the earnings test on recovery of CEMA balances prospectively, it would be legal error.

In summary, the Commission should grant rehearing and vacate portions of D.21-07-029 because they are unlawful or erroneous as a result of numerous procedural and substantive errors. Alternatively, notwithstanding Cal Water's substantive objections outlined above, the

Commission must grant rehearing and re-categorize this phase as ratesetting to consider the uncollectibles buffer and afford Cal Water and other parties an opportunity to present testimony and cross-examine witnesses along with the other requisite procedural protections afforded in a ratesetting proceeding.

II. PROCEDURAL HISTORY

On June 2, 2020, the Commission issued the Second Amended Scoping Memo to initiate Phase II of this rulemaking proceeding to consider potential Commission response to the COVID-19 pandemic.[3] Notably, the Second Amended Scoping Memo confirmed that the categorization of Phase II of the proceeding was quasi-legislative.[4] Parties filed comments on the questions presented in the Second Amended Scoping Memo on June 30, 2020 and reply comments on July 14, 2020. In response to October 12, 2020 *Administrative Law Judge's Ruling Seeking Comment on Strategies to Manage the Impact of the COVID-19 Pandemic on Water Customers and Utilities*,[5] parties submitted further comments on November 9, 2020 and reply comments December 7, 2020. The Commission also held a workshop for this phase of the proceeding on October 30, 2020. On December 3, 2020, the Commission issued the *Administrative Law Judge's Ruling directing the parties to file and serve comments on Water Division Staff Report* and the Water Division Workshop Report.[6] Parties filed comments on the Water Division Workshop Report on December 23, 2020. California Water Association also

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3 *Second Amended Scoping Memo and Ruling of Assigned Commissioner and Administrative Law Judge Directing Comments to Consider Potential Commission Response to COVID-19* (June 2, 2020) ("Second Amended Scoping Memo").

4 *Id.*, p. 5.

5 *Administrative Law Judge's Ruling Seeking Comment on Strategies to Manage the Impact of the COVID-10 Pandemic on Water Customers and Utilities* (October 12, 2020).

6 *Administrative Law Judge's Ruling Directing the Parties to File and Serve Comments On Water Division Staff Report* (December 3, 2020).

filed a motion on December 23, 2020 expressly requesting that the Commission amend the Second Amended Scoping Memo in order to allow for presentation of testimony and a hearing to resolve disputed issues of material fact in this proceeding.[7] Great Oaks Water Company similarly made a request for evidentiary hearings in this phase of the proceeding in its comments dated December 23, 2020.[8]

On June 15, 2021, the Commission issued the Phase II Proposed Decision, in which the Commission introduced the uncollectibles buffer for the first time in this proceeding, requiring a proposed offset of 0.0998 percent before allowing recovery of COVID-19 customer arrearage balances through the CEMA.[9] This 0.0998 percent was purportedly calculated using a methodology presented for the first time in Table 7 of the Phase II Proposed Decision.[10] However, the underlying data and specific calculations for particular water utilities were never put into the record of this proceeding or otherwise made available to the parties. Additionally, with respect to California Water Association's motion requesting an opportunity to present testimony and a hearing on disputed issues of material fact, the Phase II Proposed Decision summarily denied that request without any explanation.

In response, parties filed opening comments on the Phase II Proposed Decision on July 6, 2021 and reply comments on July 12, 2021. On July 14, 2021, the Commission issued Revision 1

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[7] *Motion of California Water Association to Modify the Second Amended Scoping Memo to Provide for Testimony and Evidentiary Hearings on Disputed Phase II Issues* (December 23, 2020).

[8] *Great Oaks Water Company's Comments on Water Division Staff Report and Recommendations* (December 23, 2020).

[9] Phase II Proposed Decision, p. 80, Ordering Paragraph 9 ("California Water Service Company, Golden State Water Company, San Jose Water Company, California-American Water Company, San Gabriel Valley Water Company, Suburban Water Systems, Liberty Utilities, and Great Oaks Water Company, shall offset the unpaid bill amounts tracked in their Catastrophic Event Memorandum Accounts by their uncollectible allowance rate in 2020 and 2021 increased by 0.0998 percent.").

[10] *Id.*, pp. 52-53.

to the Phase II Proposed Decision, slightly modifying the buffer methodology to reach a 0.0867 percent figure (ultimately adopted), but otherwise retaining the ratesetting mechanism intact. Additionally, Revision 1 included new language not previously contained in the original Proposed Decision, mistakenly stating that CEMA balances are subject to an earnings test and reasonableness review.[11] Notwithstanding informal requests by California Water Association and other parties for a hold of the Phase II Proposed Decision to a future voting meeting to allow for further evaluation and consideration, the Commission nonetheless proceeded to adopt Revision 1 on July 15, 2021. The Commission formally issued the final decision resolving Phase II of this proceeding as D.21-07-029 on July 20, 2021.

III. DISCUSSION

A. The imposition of the uncollectibles buffer on recovery of customer arrearages in D.21-07-029 an unlawful and erroneous because it is an unconstitutional taking of revenues due to water utilities for water service rendered, without just compensation, resulting in illegal confiscatory rates. .

1. The imposition of the uncollectibles buffer on recovery of COVID-19 customer arrearages is an unconstitutional regulatory taking without just compensation of utility funds for water service already rendered and performed.

D.21-07-029 is unlawful and erroneous because the denial of recovery of COVID-19 customer arrearages resulting from the uncollectibles buffer is an unconstitutional regulatory taking, without just compensation, of utility funds for water service already rendered and performed. Ordering Paragraph 9 of D.21-07-029 ordered that Cal Water and other Class A water utilities "shall offset the unpaid bill amounts tracked in their Catastrophic Event Memorandum Accounts by their uncollectible allowance rate in 2020 and 2021 increased by 0.0867 percent."[12]

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[11] D.21-07-029, p. 59.

[12] D.21-07-029, p. 84, Ordering Paragraph 9.

For each individual water utility, the Commission establishes in a general rate case an uncollectibles allowance expense that represents the portion of revenues that will not be collected from customers. The uncollectibles allowance is then factored into the overall authorized revenue requirement for the utility. Typically determined separately for each Class A water utility as part of each General Rate Case, the allowance is based on historic data and other evidence evaluated by the Commission in those ratesetting proceedings. Therefore, the uncollectibles allowance for each water utility is already factored into **existing** water utility rates established by the Commission. For example, the 2020 and 2021 uncollectibles allowance authorized for Cal Water was previously established in D.20-12-007 as part of a settlement agreement approved in its most recently completed General Rate Case proceeding (A.18-07-001).[13] Here, by requiring Class A water utilities to offset unpaid bill amounts by an additional uncollectibles buffer beyond that already built into rates established as just and reasonable, the Commission commits an unconstitutional regulatory taking without just compensation.

The Fifth Amendment to the United States Constitution provides that "private property [shall not] be taken for public use without just compensation."[14] Likewise, Article I, Section 19 of the California Constitution provides in part: "Private property may be taken or damaged for public use only when just compensation, ascertained by a jury unless waived, has first been paid to, or into court for, the owner."[15] While takings law had its genesis in real property disputes, over time the United States Supreme Court expanded the constitutional protection of property

13 D.20-12-007, Attachment 1, pp. 64-65 (addressing uncollectible expense in the General Rate Case settlement agreement).

14 Palazzolo v. Rhode Island (2001) 533 U.S. 606, 617 ("The Takings Clause of the Fifth Amendment, applicable to the States through the Fourteenth Amendment, *Chicago, B. & Q. R. Co. v. Chicago*, 166 U.S. 226, 41 L. Ed. 979, 17 S. Ct. 581 (1897), prohibits the government from taking private property for public use without just compensation.")

15 Cal. Const. art. 1, § 19.

beyond the concepts of title and possession and sought to protect the value of investments against governmental use or regulation.[16] In particular, the United States Supreme Court recognized two categories of regulatory takings for Fifth Amendment purposes: first, where the government requires an owner to suffer a permanent physical invasion of the property; and second, where government regulation completely deprives an owner of all economically beneficial use of the property.[17]

In Penn Central Transportation Co v. New York City, the United States Supreme Court acknowledged that it has been unable to develop any set formula for determining when government action has gone beyond regulation and constitutes a taking.[18] Nevertheless, Penn Central set forth several factors that have particular significance for determining when government action amounts to a regulatory taking:[19]

- The economic impact of the regulation on the claimant;
- The extent to which the regulation has interfered with distinct investment-backed expectations; and
- The character of the governmental action.

Here, the nature of the disallowance in Ordering Paragraph 9 of D.21-07-029 meets the definition of a regulatory taking based on the factors set forth in Penn Central.

First, the economic impact of the regulation on the claimant is straightforward. Ordering Paragraph 9 of D.21-07-029 directly requires water utilities to offset recovery of customer arrearages that have validly accrued for water service rendered pursuant to rates established as just and reasonable. Pursuant to those Commission-approved rates, water utilities are entitled to

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16 Pennsylvania Coal Co. v. Mahon (1922) 260 U.S. 393, 415 ("while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking.").

17 Lingle v. Chevron U.S.A., Inc. (2005) 544 U.S. 528, 538.

18 Penn Central Transportation Co v. New York City (1978) 438 U.S. 104, 124.

19 *Id.; see also* Bottini v. City of San Diego (2018) 27 Cal.App.5th 281, 312 ("the Penn Central test…applies to regulatory takings causes of action arising under the California Constitution.").

the revenues generated from the provision of water service and thus the associated debts are treated as utility assets. Despite the receipt of such water service by customers, the offset established in D.21-07-029 shifts a portion of the burden for paying for such service from customers to the water utility's shareholders, rendering them unrecoverable. The economic impact of the regulation is effectively to require water utility shareholders to take on customer debts that would otherwise be due and owed to the water utility by customers. Therefore, the decision to apply an unjustified offset to the recovery of such arrearages is an illegal appropriation of water utility property without just compensation.[20]

Second, the Commission's decision to arbitrarily shift the burden for the just and reasonable costs of providing water service to water utility shareholders plainly interferes with their reasonable, investment-backed expectations under the Commission's cost of service ratemaking framework.[21] Under that long-established cost of service ratemaking framework, water utility shareholders invest capital funds to allow water utilities to deliver safe and reliable service. These investments fund capital improvement projects and other critical utility plant assets necessary to provide such service. More pertinently, these investments were never intended to fund operating expenses, let alone to pay for customer arrearages. There was never any reasonable expectation that the capital funds contributed could be used directly to offset customer arrearages. While Cal Water and other water utilities have voluntarily contributed significant funds towards assisting customers throughout the course of the COVID-19 pandemic,

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[20] The Ponderosa Tel. Co. v. Pub. Utilities Com. (2011) 197 Cal. App. 4th 48, 59 (annulling a Commission decision on the basis that certain "public utility assets that were owned by Ponderosa" and that the Commission's decision to credit the proceeds from certain utility assets to ratepayers "constituted an illegal appropriation of Ponderosa's property.").

[21] Lucas v. S.C. Coastal Council (1992) 505 U.S. 1003, 1035 (Kennedy, J., concurring in the judgment) (noting that investment-backed "expectations protected by the Constitution are based on objective rules and customs that can be understood as reasonable by all parties involved").

requiring shareholders to bear the burden of customer arrearages on a mandatory basis plainly interferes with the reasonable expectations of investors in a cost of service regulatory framework.

Lastly, the character of the governmental action at issue in D.21-07-029 is that of a ratesetting disallowance that directly affects the financial bottom line of water utility shareholders. The disallowances in D.21-07-029 are not just an instance of a Commission regulation that may or may not indirectly impact the broader operations of water utilities. Instead, they are an unlawful, direct post-hoc disallowance of specific costs that were determined to be just and reasonable in a formal proceeding, were incurred for water service rendered, and will not be recovered due to a catastrophic event, the COVID-19 pandemic.

Therefore, the disallowance of customer arrearages in D.21-07-029 for water service already rendered amounts to an unconstitutional regulatory taking of utility funds without just compensation.

2. The imposition of the uncollectibles buffer on recovery of COVID-19 customer arrearages violates the Commission's regulatory compact with water utilities, impairing the ability of Cal Water to earn an adequate rate of return in violation of the Constitution.

D.21-07-029 is unlawful and erroneous because the imposition of the uncollectibles buffer on the recovery of COVID-19 customer arrearages therein violates the Commission's regulatory compact with water utilities, impairing the ability of Cal Water to earn an adequate rate of return and thus violating the Constitution. Under the regulatory compact, utilities are entitled to a reasonable opportunity to earn a reasonable return on investment and the recovery of prudently incurred expenses in exchange for meeting their obligation to serve their customers.[22]

[22] D.05-10-042, p. 9 ("We have already noted that under traditional regulation of integrated utilities, providing an opportunity for a reasonable return on investment was at the core of the regulatory compact.").

The Commission recently summarized the regulatory compact in D.20-01-002, explaining that it establishes rights, obligations, and benefits between the utility's investors and its customers:[23]

> - Utilities accept the obligation to serve and charge regulated cost-based rates, and customers accept limited entry (i.e., loss of choice) in exchange for protection from monopoly pricing.
>
> - Under this agreement, the utility is provided the opportunity to recover its actual legitimate or prudent costs—determined by a public examination of the utility's outlays—plus a fair return on capital investment as measured by the cost of obtaining capital in a competitive capital market.
>
>   - Investors will only provide capital for provision of utility services if they anticipate obtaining a return that is consistent with returns they might expect from employing their capital in an alternative use with similar risk;
>
>   - Customers will only accept utility rates if they perceive that the rates fairly compensate the utility for its costs, but are not excessive as a result of the utility taking advantage of its privileged position.

"It is the role of regulatory bodies such as this Commission to ensure that both sides fulfill their respective obligations under this bargain."[24] The United States Supreme Court has held an unlawful taking or confiscation occurs in the utility context when a regulation or rate is unjust and unreasonable so as to be confiscatory and invalid.[25] Similarly, the California Supreme Court has explained that a utility is entitled "to the opportunity to earn a reasonable return on its investment."[26]

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23 D.20-01-002, pp. 10-11 (footnotes omitted).

24 *Id.*, p. 11.

25 Federal Power Commission v. Hope Natural Gas. Co. (1944) 320 U.S. 591, 603 ("From the investor or company point of view it is important that there be enough revenue not only for operating expenses but also for the capital costs of the business."); Duquesne Light. Co. v. Barasch (1989) 488 U.S. 299, 307 ("The guiding principle has been that the Constitution protects utilities from being limited to a charge for their property serving the public which is so "unjust" as to be confiscatory.").

26 Southern Cal. Edison Co. v. Public Utilities Com. (1978) 20 Cal.3d 813, 821, fn. 8.

Here, the cost-based rates providing Cal Water with the opportunity to recover its actual legitimate or prudent costs, plus an opportunity for a fair return, were previously established through public examination in Commission proceedings, including, but not limited to, Cal Water's general rate case and cost of capital proceedings.[27] For example, Cal Water's authorized rates for 2020 were established in its General Rate Case decision, D.20-12-007, and its most recent cost of capital decision, D.18-03-035. As explained above, the imposition of the uncollectibles buffer in D.21-07-029 amounts to a post-hoc requirement for shareholders to fund customer arrearages based on those already-established just and reasonable rates. By definition, these unjustified offsets deprive Cal Water of a reasonable opportunity to recover its actual legitimate or prudent costs and a reasonable return on its investment, as mandated by the regulatory compact. Accordingly, the requirement of the uncollectibles offset in D.21-07-029 is so unjust and unreasonable so as to be confiscatory and invalid as a matter of law.

3. The imposition of the uncollectibles buffer on recovery of COVID-19 customer arrearages violates the Commission's long-standing rule against retroactive ratemaking.

D.21-07-029 is unlawful and erroneous because the imposition of the uncollectibles buffer on recovery of COVID-19 customer arrearages violates the Commission's long-standing rule against retroactive ratemaking by having the effect of modifying water rates that have already been established and been applied to water service rendered. As explained above, the water rates charged by Cal Water and other water utilities for service provided over the course of the COVID-19 pandemic were previously established by the Commission in General Rate Cases and other proceedings or regulatory processes.

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[27] Pub. Util. Code § 451 ("All charges demanded or received by any public utility, or by any two or more public utilities, for any product or commodity furnished or to be furnished or any service rendered or to be rendered shall be just and reasonable.").

It is a "well-established tenet of the Commission that ratemaking is done on a prospective basis."[28] The Commission has stated, "Retroactive ratemaking basically consists of an adjustment of future rates upward or downward to recover shortfalls or refund windfalls occasioned by prior rates which were incorrect."[29] In D.92-03-027, the Commission summarized the legal underpinnings for the doctrine against retroactive ratemaking:[30]

> The general concept of retroactive ratemaking is spelled out in the case law of numerous other states. Retroactive ratemaking occurs when a rate is set so as to permit collection in the future for expenses attributable to past services. (*State ex rel. Utilities Commission v. Nantahala Power and Light Co.*, 309 S.E. 2d 473, 485, 65 N.C. App. 198.) It is the setting of rates which permit a utility to recover past losses or which require it to refund past excess profits collected under a rate that did not perfectly match expenses plus rate of return with the rate actually established. (*State ex rel. Utility Consumers Council of Missouri, Inc. v. Public Service Commission*, 585 S.W. 2d 4159 (Mo.).) Adjustments to future rates to rectify undue past profits are retroactive ratemaking. (*Madison Gas and Electric Co. v. Public Service Commission of Wisconsin, App.*, 441 N.W. 2d 311, 321, 150 Wis. 2d 186.) Retroactive ratemaking occurs when additional charge is made for past use of utility service, or the utility is required to refund revenues collected, pursuant to then lawfully established rates, for such past use. (*State ex rel. Utilities Commission v. Edmisten*, 232 S.E. 2d 184,194, 291 N.C. 451.) Retroactive ratemaking only occurs when new rates are applied to prior consumption. (*Citizens of State v. Public Service Commission of Florida*, 448 So. 2d 1024, 1027.) In short, under these cases retroactive ratemaking seeks to adjust for past rate errors. It is a future rate set artificially high or low to compensate for a prior rate error.

More recently in The Ponderosa Tel. Co. v. Pub. Utilities Com, the court annulled a Commission decision on the basis that it constituted retroactive ratemaking, explaining:[31]

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[28] D.92-03-094, p. 6.

[29] D.92-02-037, p. 7.

[30] *Id.*, p. 6.

[31] The Ponderosa Tel. Co. v. Pub. Utilities Com. (2011) 197 Cal. App. 4th 48, 63–64.

> Rather, the rates were set by the Commission in general rate proceedings held in 1997 and in subsequent years. Those Commission decisions constituted "general ratemaking." The Commission's allocation of the patronage share redemption proceeds to the ratepayers rests on the premise that the amounts collected pursuant to the approved general rates were excessive because they overstated the cost of debt. Thus, the Decision retroactively revises costs that formed the basis for prior general rates. This is precisely the type of action prohibited by the retroactive ratemaking doctrine. Such a roll back of general rates already approved by the Commission and refund of amounts collected pursuant to such approved rates constitutes retroactive ratemaking and therefore is invalid.

Ponderosa Tel. Co. and these numerous court cases describe what D.21-07-029 attempts to do here in contravention of the doctrine against retroactive ratemaking: retroactively adjusting the adopted uncollectible allowance that forms the basis for water utility rates previously established in General Rate Case proceedings. The decision itself explained that the uncollectibles buffer therein "artificially, but systematically, injects an amount of risk back into the calculation for 2020 and 2021, essentially preserving the ratepayer's balance of risk."[32] Therefore, this after-the-fact adjustment of the adopted uncollectible allowance for water service already rendered to account for the impacts of the COVID-19 pandemic illegally "reset those rates when the actual costs turn out to be different than the forecast."[33] The rule against retroactive ratemaking "prevents the agency from forcing a utility to disgorge the proceeds of rates that have been finally approved and collected, as well as the fruits of those proceeds."[34]

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[32] D.21-07-029, p. 62.

[33] The Ponderosa Tel. Co. v. Pub. Utilities Com. (2011) 197 Cal. App. 4th 48, 62.

[34] *Id.*

B. The adoption of the uncollectibles buffer in D.21-07-029 is unlawful because it deprived parties a meaningful opportunity to be heard on this ratesetting mechanism in violation of the Commission's statutory obligations and the parties' due process rights.

1. The Commission unlawfully and erroneously took a ratesetting action in a quasi-legislative proceeding.

D.21-07-029 is unlawful and erroneous because the uncollectibles buffer was a ratesetting action taken in a quasi-legislative proceeding, improperly depriving water utilities of procedural due process rights that must be afforded prior to establishing any ratesetting mechanisms. Public Utilities Code Section 1701.1 defines the categorizations of Commission proceedings for the purposes of determining the applicable procedural mechanisms available in each type of proceeding, which are described in subsection (d):[35]

> (1) Quasi-legislative cases, for purposes of this article, are cases that establish policy, including, but not limited to, rulemakings and investigations that may establish rules affecting an entire industry.
>
> (2) Adjudication cases, for purposes of this article, are enforcement cases and complaints except those challenging the reasonableness of any rates or charges as specified in Section 1702.
>
> (3) Ratesetting cases, for purposes of this article, are cases in which rates are established for a specific company, including, but not limited to, general rate cases, performance-based ratemaking, and other ratesetting mechanisms.
>
> (4) Catastrophic wildfire proceedings, for purposes of this article, are proceedings in which an electrical corporation files an application to recover costs and expenses pursuant to Section 451 or 451.1, as applicable, related to a covered wildfire, as defined in Section 1701.8.

[35] Pub. Util. Code § 1701.1(d)(1)-(4).

Rule 1.3 of the Commission's Rules further define the categories of proceedings and provide the following definitions relevant here:[36]

> (f) "Quasi-legislative proceedings" are proceedings that establish policy or rules (including generic ratemaking policy or rules) affecting a class of regulated entities, including those proceedings in which the Commission investigates rates or practices for an entire regulated industry or class of entities within the industry, even if those proceedings have an incidental effect on ratepayer costs.
>
> (g) "Ratesetting proceedings" are proceedings in which the Commission sets or investigates rates for a specifically named utility (or utilities), or establishes a mechanism that in turn sets the rates for a specifically named utility (or utilities). Ratesetting proceedings include complaints that challenge the reasonableness of rates or charges, past, present, or future. Other proceedings may be categorized as ratesetting, as described in Rule 7.1(e)(2).

In the Second Amended Scoping Memo for this proceeding, the Commission stated that "The January 19, 2018, Scoping Memo confirmed the categorization of the proceeding as quasi-legislative, and the proceeding remains categorized as such."[37] As a result, the Commission may not validly take any direct ratesetting actions in Phase II of this rulemaking proceeding unless it were to re-categorize this phase of the proceeding (which it never has).

The imposition of the uncollectibles buffer in D.21-07-029 is clearly a ratesetting mechanism. Ordering Paragraph 9's directive for Cal Water and other water utilities to "offset the unpaid bill amounts tracked in their Catastrophic Event Memorandum Accounts by their uncollectible allowance rate in 2020 and 2021 increased by 0.0867 percent"[38] plainly establishes

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[36] Rule 1.3(f)-(g).

[37] Second Amended Scoping Memo, p. 5.

[38] D.21-07-029, p. 84, Ordering Paragraph 9.

a "mechanism that in turn sets the rates for a specifically named utility (or utilities)."[39] The decision does not just establish a general "policy or rules" that would have been permissible in a quasi-legislative proceeding,[40] but instead proceeded to actually set the exact percentage (0.0867 percent) that Cal Water and other Class A water utilities "shall" use to offset customer COVID arrearages.[41] It is beyond reasonable dispute that this is a ratesetting mechanism unlawfully and erroneously adopted in a quasi-legislative proceeding.[42]

Moreover, the uncollectibles buffer was only introduced for the first time in the Phase II Proposed Decision. Cal Water never reasonably expected that the Commission would implement the uncollectibles buffer or any other ratesetting mechanism in this phase of the proceeding, as the proceeding had been conducted pursuant to the quasi-legislative categorization to that point. Earlier in this phase of the proceeding, California Water Association expressly moved for the Commission to amend the Second Amended Scoping Memo to allow for the presentation of testimony and a hearing to resolve disputed issues of material fact.[43] However, the Commission never acted on that request until the issuance of the Phase II Proposed Decision (which proposed to simply deny it). Therefore, Cal Water reasonably expected that the Commission would only take quasi-legislative actions in this phase of the proceeding and had no reason to challenge the quasi-legislative categorization until the Phase II Proposed Decision was issued. By then, it was

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39 Rule 1.3(g) (defining "Ratesetting proceedings").

40 Rule 1.3(f) (defining "Quasi-legislative proceedings").

41 D.21-07-029, p. 84, Ordering Paragraph 9.

42 Notably, the corresponding proceeding addressing customer arrearages for energy utility customers in rulemaking proceeding R.21-02-014 has proceeded under a ratesetting designation. While the Commission recently issued ruling noting that both proceedings were related and touch upon the same issues relating to the response to the COVID pandemic, it is unclear why one is categorized ratesetting (R.21-02-014) and the other quasi-legislative (R.17-06-024).

43 *Motion of California Water Association to Modify the Second Amended Scoping Memo to Provide for Testimony and Evidentiary Hearings on Disputed Phase II Issues* (December 23, 2020).

too late to appeal the categorization under Rule 7.6. For those reasons, it was unlawful and erroneous for the Commission to implement the ratesetting uncollectibles buffer mechanism in D.21-07-029.

2. By illegally taking a ratesetting action in a quasi-legislative proceeding, the Commission failed to regularly pursue its authority and proceed in the manner required by law, thereby depriving parties of procedural rights available only in ratesetting proceedings.

By taking this ratesetting action in a quasi-legislative proceeding, the Commission did not afford Cal Water and other parties the opportunity to avail themselves of critical procedural protections that would normally be required in a ratesetting proceeding. These protections include, without limitation, the opportunity to present evidence and participate in an evidentiary hearing. For example, Cal Water was not afforded the opportunity to dispute the purported factual basis for the uncollectibles buffer and to conduct cross-examination. As explained above, California Water Association and Great Oaks Water Company actually formally requested that the Commission allow for testimony and evidentiary hearings in this phase. These requests were summarily denied in D.21-07-029 without any substantive explanation beyond stating that the "motion is denied."[44] If it were provided adequate notice and a meaningful opportunity to be heard, Cal Water would have presented substantial evidence against the imposition of the 0.0867 percent uncollectibles buffer. This showing would have included, but is not limited to, evidence on the following disputed issues of material fact central to the uncollectibles buffer mechanism:

- The data from California-American Water Company had an outsized contribution to the 0.0867 percent uncollectibles buffer calculation: its relatively large difference of 0.3479 percent between the recorded expense and its allowance significantly skewed the

[44] D.21-07-029, p. 71 ("On December 23, 2020, CWA filed a motion to modify the Phase II Scoping Memo to allow testimony and evidentiary hearings. This request was echoed by Great Oaks in their comments also. This motion is denied.") (footnote omitted); p. 86, Ordering Paragraph 14 ("The motions to allow for testimony and for evidentiary hearing of the California Water Association Great Oaks Water Company are denied.").

aggregate 0.0867 percent calculated.[45] The next highest percentage difference was 0.1175 percent for Golden State Water Company. As California Water Association's comments on the Phase II Proposed Decision stated, this was due to a one-time non-recurring uncollectibles method change for 2019.[46] Therefore, it is unreasonable to utilize this data point for the calculation of 2020 and 2021 data, which result in a material change to the calculation.

- Cal Water's recorded uncollectibles expense varies from year-to-year. It is arbitrary to use the difference between the recorded and authorized uncollectibles expense for a single year as it may not be representative of the long-term trend or what is likely to be observed in 2020 and 2021.

- The demographics of certain districts for multi-district water utilities (including Cal Water) disproportionally impacted the uncollectibles buffer calculation. Because of these outsized impacts, it is unreasonable to uniformly apply the 0.0867 uncollectibles buffer not only to all districts across a water utility, but to all Class A water utilities.

- The imposition of the uncollectibles buffer is not a consideration reasonably factored or considered into the determination of authorized return on equity in Cal Water's last cost of capital proceeding.[47] This necessarily results in a material increase in business risk that will necessitate an increase in return on equity.[48]

- Over the course of the COVID-19 pandemic, water utilities needed to make sure they had sufficient cash on hand to fund operations, notwithstanding the moratorium on disconnections for nonpayment and other limitations on the collection of revenue. While municipal water agencies were able to take advantage of governmental grants and other funding sources early on in the pandemic, Cal Water and other investor-owned water utilities needed to rely on shareholder investments, bonds, or lines of credit. This aspect of utility financial risk is not adequately considered in D.21-07-029.

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45 D.21-07-029, p. 54.

46 *Comments of California Water Association on the Phase II Proposed Decision* (July 6, 2021), p. 6, fn. 18 ("For example, in 2019 California-American Water Company made a change to the uncollectible reserve methodology resulting in a one-time decrease in the reserve and uncollectible account expense that disproportionately skewed uncollectible expense downward by 50% from approximately $700K under previous methodology to approximately $350K under new methodology.").

47 D.18-03-035 (determining the cost of capital for Cal Water).

48 D.20-08-047, *Dissent of Commissioner Randolph*, p. 1 ("Now, one could argue that such a rate design has neither been proposed nor approved. Hypothetically, assume that in the future the Commission does not allow higher service charges or the flattening of tiers. If such a rate design were to be approved, then the water companies will likely argue that they should increase their rates of return on equity as their business risk is increased. This will lead to higher rates for everyone.")

Irrespective of the potential weight the Commission would have given that evidence, the fact of the matter is that the Cal Water was deprived of the opportunity to do so **at all** because this ratesetting action was inappropriately taken in a proceeding categorized and conducted as quasi-legislative. This denial of its due process rights prejudiced Cal Water in this proceeding as the uncollectibles buffer was ultimately adopted in D.21-07-029 over objections by Cal Water and other parties that they did not have notice and an opportunity to present evidence against it in a hearing in this proceeding.[49]

Thus, the Commission violated its duty to regularly pursue its authority and proceed in the manner required by law by taking a prohibited ratesetting action in a proceeding categorized and conducted as quasi-legislative, thereby substantially prejudicing and harming Cal Water and other parties.

3. The Commission unlawfully reached D.21-07-029 by modifying prior Commission General Rate Case decisions setting water utility uncollectibles allowances without providing parties with a meaningful opportunity to be heard.

Public Utilities Code Section 1708 requires the Commission to provide parties notice and the opportunity to be heard before rescinding, altering or amending any order or decision:[50]

> The commission may at any time, upon notice to the parties, and with opportunity to be heard as provided in the case of complaints, rescind, alter, or amend any order or decision made by it. Any order rescinding, altering, or amending a prior order or decision shall, when served upon the parties, have the same effect as an original order or decision.

The uncollectibles buffer imposed here in D.21-07-029 alters the prior General Rate Case decisions setting rates for water service based on specific uncollectibles allowances determined

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[49] *Comments of California Water Association on the Phase II Proposed Decision* (July 6, 2021), pp. 1-9 (indicating "CWA provides this response on behalf of the Class A water utility respondents in this proceeding" and opposing the uncollectibles buffer in the Phase II Proposed Decision).

[50] Pub. Util. Code § 1708.

in those proceedings, without providing parties notice and a meaningful opportunity to be heard. Effectively, the uncollectibles buffer disallows revenue for water service already rendered and billed based on those rates established in such General Rate Case proceedings.

As detailed above, the uncollectibles buffer was proposed for the first time when the Phase II Proposed Decision was issued on June 15, 2021. The only opportunity that Cal Water and other parties have had to respond to both the concept and the calculation of the uncollectibles buffer prior to its adoption was in comments and reply comments on the Phase II Proposed Decision. In California Trucking Association v. California Public Utilities Commission, however, the California Supreme Court held that Section 1708 "requires a hearing at which parties are entitled to be heard and to introduce evidence…"[51] In particular, the California Supreme Court held that "merely being allowed to submit written objections" was insufficient.[52] Thus, the mere opportunity to file written objections in comments to the Phase II Proposed Decision before the adoption of D.21-07-029 fails to satisfy the Commission's duties under Public Utilities Code Section 1708.

While Public Utilities Code Section 1708.5(f) provides an exception for "regulations" to be modified through notice and comment rulemaking procedures as opposed to an evidentiary hearing,[53] the uncollectibles buffer at issue here is not a "regulation" for the purpose of that

51 California Trucking Association v. Pub. Utilities Com. (1977) 19 Cal. 3d 240, 245.

52 *Id.*, p. 244.

53 Pub. Util. Code § 1708.5(f) ("Notwithstanding Section 1708, the commission may conduct any proceeding to adopt, amend, or repeal a regulation using notice and comment rulemaking procedures, without an evidentiary hearing, except with respect to a regulation being amended or repealed that was adopted after an evidentiary hearing, in which case the parties to the original proceeding shall retain any right to an evidentiary hearing accorded by Section 1708.").

statute. The Legislature has indicated that it did not intend for the term "regulation" to apply to all Commission decisions and orders:[54]

> It is the further intent of the Legislature that the term "regulation," as used in subdivision (a) of Section 1708.5 of the Public Utilities Code, not be construed to refer to all orders and decisions of the Public Utilities Commission, but, rather, be construed as a general reference to rules of general applicability and future effect.

As relevant here, the uncollectibles buffer in D.21-07-029 is not a "rule of general applicability and future effect" but instead dictates specific ratemaking procedures and even the specific percentage to apply for particular water utilities including Cal Water. Therefore, the exception in Public Utilities Code Section 1708.5(f) is not applicable here.

The Public Utilities Code requires the Commission to provide Cal Water and other parties with a hearing and the opportunity to present evidence before imposing the uncollectibles buffer. The Commission must remedy this legal error by granting this application for rehearing and providing the opportunity to present evidence at an evidentiary hearing.

4. The Commission unlawfully reached D.21-07-029 by failing to hold a hearing before it investigated and adopted a ratesetting mechanism.

The Commission unlawfully reached D.21-07-029 by failing to hold a hearing before it adopted the uncollectibles buffer as a ratesetting mechanism. Public Utilities Code Section 728 dictates the manner in which the Commission is to "fix, by order, the just, reasonable, or sufficient rates, classifications, rules, practices, or contracts" and provides in the relevant part:[55]

> Whenever the commission, **after a hearing**, finds that the rates or classifications, demanded, observed, charged, or collected by any public utility for or in connection with any service, product, or commodity, or the rules, practices, or contracts affecting such rates or classifications are insufficient, unlawful, unjust, unreasonable,

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54 Assembly Bill 301 (1999), Stats. 1999, c. 568, Section 1(b), *available at* https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=199920000AB301.

55 Pub. Util. Code § 728 (emphasis added).

> discriminatory, or preferential, the commission shall determine and fix, by order, the just, reasonable, or sufficient rates, classifications, rules, practices, or contracts to be thereafter observed and in force.

Likewise, Public Utilities Code Section 729 requires:[56]

> The commission may, **upon a hearing**, investigate a single rate, classification, rule, contract, or practice, or any number thereof, or the entire schedule or schedules of rates, classifications, rules, contracts, and practices, or any thereof, of any public utility, and may establish new rates, classifications, rules, contracts, or practices or schedule or schedules in lieu thereof.

Both statutory provisions require the Commission to hold hearings prior to the implementation of new rates or issues that directly address rates. In City of Los Angeles v. Pub. Utilities Com., the California Supreme Court explained that the "purpose behind the hearing requirement of section 728 … is to air the policy considerations behind various rate proposals and to establish controverted facts."[57] In Pacific Tel. & Tel. Co. v. Pub. Utilities Com., the Court also explained that "the same is true of the provision of section 729, also cited by the commission. From 1915 until the Public Utilities Act was codified in 1951, the provisions now found in sections 728 and 729 comprised paragraphs (a) and (b), respectively, of section 32, and at all times the section instructed the commission to first hold a hearing, and then fix rates to be thereafter observed and in force."[58]

Therefore, these cases expressly provide that the Commission must hold a hearing before fixing utility rates. Here, D.21-07-029 not only imposes the uncollectibles buffer as a ratemaking mechanism, but actually goes as far as setting the specific 0.0867 percent to be applied when water utilities seek recovery of COVID-19-related CEMA balances, thereby fixing the utility

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56 Pub. Util. Code § 729 (emphasis added).

57 City of Los Angeles v. Pub. Utilities Com. (1975) 15 Cal. 3d 680, 697.

58 Pacific Tel. & Tel. Co. v. Pub. Utilities Com. (1965) 62 Cal. 2d 634, 653-654 (citations and footnotes omitted).

rates to be applied when those balances are recovered. The failure to hold hearings as mandated by statute deprives the parties of a meaningful opportunity to be heard on those "rates to be thereafter observed and in force."[59] Having failed to properly hold a hearing on that ratesetting matter before essentially resolving it with finality, the Commission's adoption of D.21-07-029 violates the mandates of Public Utilities Code Sections 728 and 729.

5. The Commission unlawfully reached D.21-07-029 by failing to meet its obligations under Public Utilities Code Section 1705 to hear all evidence that might bear on the exercise of its discretion and to demonstrably weigh that evidence.

Public Utilities Code Section 1705 provides a statutory requirement that Commission decisions "contain, separately stated, findings of fact and conclusions of law by the commission on all issues material to the order or decision."[60] Courts have interpreted this requirement for the Commission to render findings on all material issues under Section 1705 as a concomitant obligation to (1) hear all evidence that might bear on the exercise of its discretion and (2) demonstrably weigh that evidence.[61] In United States Steel Corporation v. Pub. Utilities Com., the California Supreme Court explained these responsibilities:

> Concomitant with the discretion conferred on the commission is the duty to consider all facts that might bear on exercise of that discretion. The commission must consider alternatives presented and factors warranting adoption of those alternatives. That duty is inherent in the requirement that the decision "contain, separately stated, findings of fact and conclusions of law ... on all issues material to the order or decision."

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59 *Id.*

60 Pub. Util. Code § 1705.

61 United States Steel Corporation v. Pub. Utilities Com. (1981) 29 Cal. 3d 603; Northern California Power Agency v. Pub. Utilities Com. (1971) 5 Cal. 3d 370; Industrial Communications Systems v. Pub. Utilities Com. (1978) 22 Cal. 3d 572.

Here, the Commission violated Public Utilities Code Section 1705 because it failed to hear all evidence that might bear on the exercise of its discretion and to demonstrably weigh that evidence before adopting the uncollectibles buffer in D.21-07-029. As explained above, Cal Water and other parties have not had a meaningful opportunity to present evidence regarding the validity or need for the uncollectibles buffer. Moreover, D.21-07-029 establishes the specific 0.0867 percent uncollectibles buffer to be applied when water utilities seek recovery of COVID related CEMA balances, thereby precluding Cal Water and other water utilities from challenging that determination and prematurely binding the discretion of future Commission actions on that issue.

This deficiency in evidence and in the weighing of potential evidence is exacerbated by the fact that D.21-07-029 also summarily denied the requests of California Water Association and Great Oaks Water Company to allow for parties to submit testimony and participate in hearings on the relevant issues in this phase of the proceeding.[62] Leading up to the July 15, 2021 business meeting at which D.21-07-029 was adopted, California Water Association also submitted a letter via email to each of the Commissioner's offices requesting that the Phase II Proposed Decision be held to a future Commission business meeting in order to allow for further evaluation of the issues therein, including on the uncollectibles buffer. However, the Commission instead proceeded to rush through the adoption of D.21-07-029 at the July 15, 2021 business meeting. The Commission's haste was unjustified, since the disconnection moratorium extended by that decision would not expire until at least September 30, 2021, and the ultimate recovery of CEMA balances would not likely be resolved for some time after that date. Thus,

62 D.21-07-029, p. 86, Ordering Paragraph 14 ("The motions to allow for testimony and for evidentiary hearing of the California Water Association [and] Great Oaks Water Company are denied.").

while there was reasonable time for the Commission to carefully consider all evidence that might bear on the exercise of its discretion, and demonstrably weigh that evidence for the uncollectibles buffer, the unduly rushed process instead reflects an unwillingness to hear and weigh all evidence that may have been relevant, in violation of Public Utilities Code Section 1705.

C. The methodology for the uncollectibles buffer in D.21-07-029 is an unlawful abuse of the Commission's discretion because it contains critical errors and is otherwise not based on evidence in the record.

Public Utilities Code Section 1701.1(e)(8) requires the Commission to "render its decisions based on the law and on the evidence in the record."[63] Here, the parties had no opportunity to fully dispute and test the purported factual predicates on which the Commission relied to establish the uncollectibles buffer in D.21-07-029. Contested assertions not subject to cross-examination may not provide substantial evidence to support a finding.[64] In particular, the uncollectibles buffer in D.21-07-029 is purported "necessary since the disconnection moratorium reduced the utility risk inherent in the uncollectibles allowance in 2020 and 2021."[65] Finding of Fact 42 of D.21-07-029 finds that "Requiring the pandemic buffer of 0.0867 be added to each Class A water utility's authorized uncollectible allowance in 2020 and 2021 restores the risk balance inherent in the operation of the uncollectible allowance that was shifted by the authorizations in Resolutions M-4842, M-4843 and M-4849."[66] These assertions and findings are not based on law or evidence in the record.

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63 Pub. Util. Code § 1701.1(e)(8).

64 Independent Energy Producers Association/Utility Reform Network v. Pub. Utilities Com., 223 Cal. App. 4th 945 (2014).

65 D.21-07-029, p. 62.

66 *Id.*, p. 78, Finding of Fact 42.

As a preliminary matter, there is simply no substantial evidence in the record to support the threshold finding that the "disconnection moratorium reduced the utility risk inherent in the uncollectibles allowance in 2020 and 2021" as D.21-07-029 asserts.[67] To the contrary, parties in this proceeding have explained that in fact the impacts of the COVID and the disconnection moratorium in particular have caused substantial uncertainty as to the ability of water utilities to ultimately collect amounts billed to customers for water service rendered.[68] Indeed, D.21-07-029 expressly states, "We determine that the COVID-19 pandemic, as well as the Commission and Governor's directives regarding disconnections, disrupted the function of uncollectible allowances authorized through GRCs."[69] It is unclear how this statement can be harmonized with the finding that the disconnection moratorium reduced the utility risk inherent in the uncollectibles allowance. More importantly, Cal Water and other parties never had an opportunity to challenge these contested assertions that were never subject to cross-examination; therefore, they cannot constitute substantial evidence to support the necessary findings in D.21-07-029 as a matter of law. As mentioned above in Section III.B.2, Cal Water would have presented numerous pieces of compelling evidence demonstrating that the risk associated with uncollectibles did not in fact shift to ratepayers over the course of the COVID-19 pandemic as D.21-07-029 claimed.

With respect to the methodology utilized to derive the 0.0867 percentage in Finding of Fact 42 of D.21-07-029, there similarly is no substantial evidence in the evidentiary record

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67 D.21-07-029, p. 62.

68 *See, e.g., Reply Comments of California Water Association on Strategies to Manage the Impact of the COVID-19 Pandemic on Water Customers and Utilities* (December 7, 2020), p. 8 (explaining that "disconnections are a critical tool available to water utilities for limiting uncollectibles and reducing the forecasted uncollectible rate adopted for ratemaking purposes, which ultimately results in lower rates for the customer base as a whole.").

69 D.21-07-029, p. 61.

supporting that finding. The methodology was presented for the first time in the Phase II Proposed Decision and ultimately was based on the "aggregate among all Class As in 2019, between authorized and actual uncollectibles," applying it uniformly to each of the Class A water utilities.[70] There is no reasonable explanation for why applying a uniform figure for all Class A water utilities is at all justified. While D.21-07-029 asserts that the uncollectibles buffer is intended to reallocate risk, the applicable of a uniform factor on Cal Water based in part of the circumstances of other water utilities is completely at odds with the Commission's previously stated intention to evaluate company-specific risk factors independently.[71] Moreover, for companies like Suburban Water Systems and Liberty Apple Valley Ranchos Water Company, these water utilities had an actual 2019 uncollectibles that was greater than their authorized amounts, resulting in a **negative** value for the difference. While it is conceptually flawed to apply the uncollectibles buffer in this manner to these utilities that experienced greater uncollectibles than authorized, they were inexplicably incorporated into the aggregate calculation of the 0.0867 percentage adopt and made subject to the buffer. There is no substantial evidence in the record supporting the methodology adopted for the 0.0867 percent uncollectibles buffer in D.21-07-029, which instead appears to simply be arbitrarily calculated and indiscriminately applied. Each of these flaws are significant arguments that Cal Water would have presented against the 0.0867 percent uncollectibles buffer if it were properly afforded a meaningful opportunity to make them, as required by law.

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70 *Id.*, p. 62.

71 D.07-05-062, p. 15 (explaining that while the Revised Rate Case Plan for Class A water utilities would be consolidating certain cost of capital proceedings for streamlining purposes, "In these consolidated proceedings, we intend to consider company-specific factors.").

Therefore, there is no properly developed record in this proceeding to support the need for the uncollectibles buffer nor the methodology underlying it, and nothing that could be characterized as "substantial evidence" in the record to support the Commission's findings on that issue as mandated by Public Utilities Code Section 1701.1(e)(8).

D. The dicta in the D.21-07-029 stating that an earnings test is required for recovery of balances tracked in the CEMA is erroneous or otherwise unlawful.

1. The Commission does not currently require an earnings test for recovery of CEMA balances.

In the text of D.21-07-029, the decision states, "The additional CEMA guidance contained in today's decision does not change the rules of CEMA recovery in Standard Practice U-27-W, which requires an earnings test and proof of reasonableness, under the legal authority of Pub. Util. Code Section 454.9 and Resolution E-3238, dated July 24, 1991."[72] There is no corresponding finding of fact, conclusion of law, nor any ordering paragraph in D.21-07-029 expressly stating that such an earning test is required of CEMA recovery. This statement is legally erroneous, as the recovery of CEMA balances is not subject to the earnings test.

While D.21-07-029 cites generally to Standard Practice U-27-W as requiring an earnings test for recovery of CEMA balances, it does not specify what part of the Standard Practice is the basis for that conclusion. The CEMA itself is listed in the list of examples of existing memorandum accounts in the table set forth in Paragraph 28 Standard Practice.[73] Notably, there is no mention of an earnings test in connection with the CEMA in that table, in contrast to the example of the "Water Treatment Memorandum Account (California Water Service Company's

[72] D.21-07-029, p. 59.

[73] Standard Practice U-27-W, p. 7, Paragraph 28.

Salinas District)" in the table for Paragraph 29, which expressly states "(earnings test required)" for that account.[74]

The statement in D.21-07-029 is also inconsistent with how the Commission has addressed memorandum account amortization for Class A water utilities. For example, in Resolution W-5122 (December 15, 2016), the Commission expressly rejected an argument by the City of Bakersfield that Standard Practice U-27-W required an earnings test for California Water Service Company's request to amortize the balance in its Drought Memorandum Account.[75] In that resolution, the Commission again similarly found that the prior requirement for an earnings test for memorandum account amortization had been eliminated and that "Pursuant to D.06-04-037, Cal Water's requested recovery is not subject to an earnings test."[76]

Instead, the language regarding "an earnings test and proof of reasonableness" from D.21-07-029 appears to potentially be based on language from Paragraph 30 of Standard Practice U-27-W taken out of context, which states:[77]

> Memo account balances earn at the 90-day commercial paper rate. For Class B, C and D utilities the memo account must be kept on a cash basis not an accrual basis; that is, when an invoice is actually paid, then that expense may be booked to the memo account. Advice letter memo account recovery requests require an earnings test and proof of reasonableness.

Applying it to the CEMA balances here is inconsistent with Commission decisions that have eliminated the earnings test requirement more broadly for Class A water utilities. In D.06-04-037, the Commission expressly eliminated the earnings test requirement for Class A water

74 *Id.*, p. 8, Paragraph 29.

75 Resolution W-5122 (December 15, 2016), pp. 3-4; see also D.16-12-003, p. 27.

76 Resolution W-5122 (December 15, 2016), pp. 3-4

77 *Id.*, p. 8, Paragraph 30.(footnotes omitted).

utilities.[78] In that 2006 decision, the Commission found that regular review through General Rate Cases mandated with the adoption of the original Rate Case Plan in D.04-06-018 alleviated the concerns regarding over-earning that the Commission was attempting to address with the original earnings test mandated in D.03-06-072.[79] Thus, the language is Standard Practice U-27-W is taken out of context and does not itself constitute a binding order of the Commission. Instead, the purpose of the Standard Practice U-27-W and other Standard Practices are only "to provide guidance to Water Division…, to the public and to water and sewer utilities…."[80] A Standard Practice is defined as "[a] Water Division document that provides procedural guidelines… to the public and [u]tilities… and to Staff…."[81] However, unless expressly adopted in a Commission order, the provisions set forth in Standard Practice guidance documents themselves do not constitute binding Commission orders directly.

Nor do the other legal authorities cited in D.21-07-029 provide a basis for the assertion that recovery of CEMA balances is subject to an earnings test. While Public Utilities Code Section 454.9 provides that "The costs, including capital costs, recorded in the accounts set forth in subdivision (a) shall be recoverable in rates following a request by the affected utility, a commission finding of their reasonableness, and approval by the commission," that statutory code section does not mention any earnings test requirement nor anything of that nature. Similarly, for Resolution E-3238 – in which the Commission first authorized utilities to establish CEMAs in 1994 – there likewise is no mention of any earnings test for recovery of CEMA

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78 D.06-04-037, p. 1 ("This decision eliminates, the earnings test adopted in D.03-06-072 which currently applies to balancing account recovery for Class A water companies' balancing accounts existing on or after November 29, 2001.").

79 *Id.*, pp. 5-8.

80 D.11-09-040, p. 19, *citing* "Standard Practice U-1-W, "Creating and Modifying Standard Practices Under General Order 96-B", Section A."

81 *Id.*

balances. Cal Water is not of aware of any other legal basis for requiring an earnings test on CEMA balance recovery. In other recent proceedings addressing CEMA recovery in other contexts, the Commission has never mentioned any requirements for an earnings test.[82]

2. It is also unlawful and erroneous to prospectively apply an earnings test to recovery of CEMA recovery in D.21-07-029.

It would also be inappropriate for the Commission to now subject recovery of CEMA balances to an earnings test prospectively, as the language regarding the earnings test was only introduced in the Revision 1 to the Phase II Proposed Decision released on the eve of the adoption of D.21-07-029 – depriving the parties of any opportunity to address this issue. As explained above, the Commission does not currently require an earnings test for recovery of CEMA balances so to do so in D.21-07-029 would be a marked departure from Commission precedent on a key ratesetting issue. Similar to the uncollectibles buffer above, the imposition of an earnings test on CEMA recovery would be a ratesetting mechanism taking without requisite procedural protections necessary. Not only would this be a violation of the Commission own rules and procedures, but it would also violate Public Utilities Code Section 1708 in that it would "rescind, alter, or amend" prior Commission decisions and resolutions addressing the CEMA with the statutorily required notice and hearing.[83] These critical statutory requirements were never satisfied in this proceeding. Therefore, the Commission is prohibited from prospectively imposing an earnings test on recovery of CEMA balances in D.21-07-029.

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[82] *See, e.g.,* D.19-07-015 (setting forth the emergency disaster relief program for electric, natural gas, water and sewer utility customers, including CEMA requirements, but not mentioning earnings tests anywhere).

[83] Pub. Util. Code § 1708 ("The commission may at any time, upon notice to the parties, and with opportunity to be heard as provided in the case of complaints, rescind, alter, or amend any order or decision made by it. Any order rescinding, altering, or amending a prior order or decision shall, when served upon the parties, have the same effect as an original order or decision.").

In summary, Cal Water and other parties did not have a fair opportunity to address or respond to this errant language before it was adopted in D.21-07-029. For these reasons, the Commission should revise D.21-07-029 to eliminate these legally incorrect dicta stating that recovery of CEMA balances requires an earnings test.

IV. REQUEST FOR ORAL ARGUMENT ON APPLICATION FOR REHEARING

Pursuant to Rule 16.3, Cal Water hereby requests oral argument on the issues presented in this Application for Rehearing. Holding oral argument here would materially assist the Commission in resolving this Application for Rehearing by creating an open venue for the Commissioners and the parties to fully evaluate each of the legal errors outlined herein. In particular, Cal Water believes that oral argument would materially assist the Commission in resolving this Application for Rehearing because D.21-07-029 "presents legal issues of exceptional controversy, complexity, or public importance."[84] It is indisputable that the COVID pandemic and the resolution of customer arrearages that have accrued is a matter of immense public importance. The legal issues of how that issue is to be resolved is not to be underestimated and should be given due consideration before the Commission in oral argument. Additionally, D.21-07-029 also "raises questions of first impression that are likely to have significant precedential impact" in that it establishes principles for recovery of customer arrearages coming out of the COVID pandemic.[85] As explained in D.21-07-029, prior Commission orders such as Resolutions M-4842 and M-4849 did not previously resolve those such issues nor would it be

[84] Rule 16.3(a)(3).

[85] Rule 16.3(a)(4).

appropriate to do so through the informal advice letter process.[86] The determinations here are of great importance and deserve to be fully considered in oral argument before the Commission.

V. REQUEST FOR RELIEF

Cal Water requests that the Commission grant rehearing to vacate the portions of D.21-07-029 adopting the requirement to offset recovery of COVID customer arrearage balances against an uncollectibles buffer amount. In the alternative, if the Commission wishes to consider whether an uncollectibles buffer should be imposed, it must change the categorization of this proceeding to ratesetting and afford Cal Water and other parties an opportunity to present testimony and participate in an evidentiary hearing, along with other requisite due process protections afforded in a ratesetting proceeding. If the Commission so chooses, Cal Water stands ready to present its case on the uncollectibles buffer, including the evidence and arguments outlined above. Additionally, Cal Water requests that the Commission eliminate the incorrect dicta in D.21-07-029 requiring an earnings test for recovery of CEMA balances.

VI. CONCLUSION

In conclusion, D.21-07-029 includes a multitude of substantive and procedural errors that render it unlawful. Therefore, Cal Water respectfully urges the Commission to grant this Application for Rehearing and vacate the portions of D.21-07-029 addressed above. Notwithstanding Cal Water's substantive objections outlined above, if the Commission wishes to consider the uncollectibles buffer, it must grant rehearing to re-categorize this phase of the proceeding as ratesetting and hold evidentiary hearings, or otherwise direct that it be addressed

[86] D.21-07-029, p. 61 ("While Resolutions M-4842 and M-4849 gave blanket authorization for the establishment of COVID-19 CEMAs, these resolutions do not address the intersection of unpaid bills tracked in CEMA with uncollectible allowances. Nor would it be appropriate to expect this issue to be resolved in various CEMA Tier 2 Advice Letters.").

in a separate ratesetting proceeding. Finally, Cal Water respectfully requests that the Commission hold oral argument on this Application for Rehearing.

Date: August 19, 2021

Respectfully submitted,

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STATE OF CALIFORNIA
Supreme Court of California

PROOF OF SERVICE

STATE OF CALIFORNIA
Supreme Court of California

Case Name: **CALIFORNIA WATER SERVICE COMPANY v. PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**
Case Number: **TEMP-M25P429B**
Lower Court Case Number:

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