No. S269099 and S271493

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

GOLDEN STATE WATER COMPANY
(Petitioner in Case No. S269099),

CALIFORNIA-AMERICAN WATER COMPANY, CALIFORNIA WATER SERVICE COMPANY, CALIFORNIA WATER ASSOCIATION, AND LIBERTY UTILITIES CORP.
(Petitioners in Case No. S271493)

v.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA
(Respondent in Cases Nos. S269099 and S271493).

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

Of the Public Utilities Commission of the State of California

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JOINT REPLY TO ANSWER TO PETITIONS FOR WRIT OF REVIEW

[Appendix of Exhibits Vol III Filed Concurrently]

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JOINT REPLY TO ANSWER TO PETITION FOR WRIT OF REVIEW

This Reply is filed by California-American Water Company ("CAW"), California Water Service Company ("CWS"), Golden State Water Company ("GSWC"), and Liberty Utilities (Park Water) Corp. and Liberty Utilities (Apple Valley Ranchos Water) Corp. ("Liberty" and, collectively with CAW, CWS, and GWSC, "Petitioners" or the "WRAM Utilities") in support of their Petitions for a writ of review of California Public Utilities Commission ("Commission") Decisions ("D.") 20-08-047 and D.21-09-047 ("Decisions"). To avoid duplication of the records pending the requested case consolidation, Petitioners request that this Court take judicial notice of all appendices filed in docket S269099 for purposes of docket S271493 and vice versa.

I. SUMMARY OF REPLY

The Petitions should be granted because (1) the Commission failed to regularly pursue its authority on issues of statewide importance and violated Petitioners' rights under the California and U.S. Constitutions; (2) the Commission's failures jeopardize Petitioners' abilities to promote water conservation while maintaining affordable rates for low-income customers; (3) this Court's grant of a writ is the sole avenue of appellate review (California Public Utilities Code[1] Section 1756, subd. (f)); and (4) nothing in the underlying record or the Commission's Answer provides this Court with a basis for denying relief.

As discussed in the Petitions, the order revoking Petitioners' rights to continue using two ratemaking mechanisms referred to as the "WRAM/MCBA" ("Revocation Order") should be

[1] Unless otherwise stated, all statutory references herein ("Section") are to the California Public Utilities Code.

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reversed because changing or revoking the WRAM/MCBA were not identified as issues in the Scoping Memos[2] for the proceeding in which the Commission issued the Revocation Order ("LIRA I"). As a result, Petitioners were denied the notice and opportunity to be heard on these issues required under Sections 1708 and 1708.5(f) and their due process rights under the California and U.S. Constitutions.

Throughout its Answer, the Commission argues that the WRAM/MCBA were included within the original Scoping Memo for LIRA I. This claim is belied by (1) that Scoping Memo's plain language, which does not mention the words "WRAM/MCBA", (2) the Answer's tortured attempt to equate water sales forecasts with the WRAM/MCBA, (3) the Commission's errant position that parties' comments and the Administrative Law Judge's ("ALJ") Ruling issued 19 months after that Scoping Memo dictated LIRA I's scope, (4) the Commission's practice of explicitly addressing the "WRAM/MCBA" in the scoping memo for any proceeding in which they were under consideration, and (5) the almost total absence of information about the WRAM/MCBA in the instant record.

The Answer attempts to salvage the Decisions by imputing to Petitioners a collective waiver of their constitutional rights. (Ans. at 38.) But under California law, only the intentional relinquishment of a known right after knowledge of the facts may constitute a waiver, even in an administrative context. There is no discussion, much less a finding, of waiver in either of the Decisions. For Petitioners to have waived their constitutional rights, each would need to have done so knowingly, intentionally,

[2] "Scoping Memos" collectively refers to both the original and amended scoping memos for the proceeding.

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and believing that there was some advantage in doing so, as shown by clear and convincing evidence. The administrative record supports none of this.

Because the Commission failed to provide notice and opportunity to be heard before issuing the Revocation Order, that failure was prejudicial to Petitioners, and Petitioners did not waive their rights to notice and a hearing, the Revocation Order must be annulled. *Southern Cal. Edison Co. v. Public Utilities Com.* (2006) 140 Cal.App.4th 1085 ("*Edison*") (annulling Commission orders on an issue not identified in the scoping memo because the Commission had violated its own rules by considering the new issue without an adequate opportunity for petitioners to respond, which failure was prejudicial).

These central failures are themselves sufficient to require annulment of the Revocation Order. The Decisions are, however, invalidated by numerous other legal errors, detailed in the Petitions. Petitioners demonstrate below that the Answer employs obfuscation and *post hoc* rationalizations trying to conceal those errors. In sum, the Revocation Order should be annulled for any one of several reasons.

II. ARGUMENT

A. The Commission is not entitled to a deferential standard of review; this Court is to exercise its independent judgment in accordance with Section 1760.

A petition for writ of review is Petitioners' sole means to obtain relief from errors of the Commission. Section 1756(f). "[W]hen writ review is the exclusive means of appellate review of a final order or judgment, an appellate court may not deny an apparently meritorious writ petition, timely presented in a

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formally and procedurally sufficient manner[.]" *Powers v. City of Richmond* (1995) 10 Cal.4th 85, 113-114.

The Commission argues that its actions are entitled to great deference from this Court, emphasizing that it is a "constitutional body with broad legislative and judicial powers" (Ans. at 19). The Commission's power to establish its own procedures, however, is constitutionally constrained by statute and due process. Cal. Const., art. II, § 2. The "ultimate decision" as to whether the Commission complied with its established rules and the law is for the courts. *Pac. Gas & Elec. Co. v. Public Utilities Com.* (2015) 237 Cal.App.4th 812, 840). Courts "will annul a decision by the Commission if the Commission failed to comply with its own rules and the failure was prejudicial." *Calaveras Tel. Co. v. Public Utilities Com.* (2019) 39 Cal.App.5th 972, 980; *see also Edison*, *supra*, 140 Cal.App.4th at 1104-1106; *Southern Cal. Edison Co. v. Public Utilities Com.* (2000) 85 Cal.App.4th 1086 at 1090, 1105-1106.

Although in certain contexts there may be a "strong presumption of validity of the commission's decisions" (*Greyhound Lines, Inc. v. Public Utilities Com.* (1968) 68 Cal.2d 406, 410-411), that presumption does not apply when the issue is whether the Commission's procedures failed to comply with due process. *SFPP, L.P. v. Public Utilities Com.* (2013) 217 Cal.App.4th 784, 794 ("When constitutional issues are raised, [appellate courts] exercise independent judgment on the law and facts.") (Citation omitted). The "strong presumption of validity" upon which the Commission relies is implicated only "when no constitutional issue is presented." *Pac. Gas & Elec. Co. v. Public Utilities Com.* (2015) 237 Cal.App.4th 812, 838 (referencing *Toward Utility Rate Normalization v. Public Utilities Com.* (1978)

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22 Cal.3d 529, 538; *Pac. Tel. & Tel. Co. v. Public Utilities Com.* (1965) 62 Cal.2d 634, 647). Otherwise, Section 1760, which identifies "independent judgment" as the standard of review for constitutional issues, would be meaningless. *The Ponderosa Tel. Co. v. Public Utilities Com.* (2011) 197 Cal.App.4th 48, 56 ("[W]here a Commission decision is challenged on the ground that it violates a constitutional right, the reviewing court must exercise independent judgment on the law and the facts and the Commission's findings or conclusions material to the constitutional question shall not be final.") (citing § 1760).

The Commission points to the deference afforded it "where the agency interprets one of its own regulations, or where the agency engages in fact-finding based on conflicting evidence" (Ans. at 21 (citing *New Cingular Wireless PCS, LLC v. Public Utilities Com.* (2016) 246 Cal.App.4th 784, 807) (internal citations omitted)), but that authority is inapposite here. This case is not about the Commission's interpretation of its own regulations or fact-finding based on conflicting evidence. This case is about the Commission's failure to provide the notice and opportunity to be heard required under Sections 1708 and 1708.5(f) and the California and U.S. Constitutions.

> Whether judicial deference to an agency's interpretation is appropriate and, if so, its extent—the 'weight' it should be given—is thus fundamentally situational. A court assessing the value of an interpretation must consider a complex of factors material to the substantive legal issue before it, the particular agency offering the interpretation, and the comparative weight the factors ought in reason to command.

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Southern Cal. Edison Co. v. Public Utilities Com. (2000) 85 Cal.App.4th 1086, 1096 (quoting *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 12). The circumstances here—the Commission's *post hoc* rationalizations for an order that was issued without adequate notice and opportunity to be heard—warrant this Court's independent judgment concerning the legal issues in question, without deference. *Yamaha*, 19 Cal.4th at 8 ("applying its independent judgment de novo to the merits of the legal issue before it" is a "quintessential judicial duty").

B. The Commission failed to comply with Section 1701.1(c) and Commission Rule 7.3, which require that the scoping memo address the issues to be considered in the proceeding.

The Commission's Answer is premised on the proposition that revocation of the WRAM/MCBA was within the scope of LIRA I as set forth in the Scoping Memos. This foundational premise is untenable for several reasons.

1) The two Scoping Memo questions regarding water sales forecasting did not incorporate the WRAM/MCBA as issues in LIRA I.

The Commission argues that "The WRAM/MCBA was included in the original Scoping Memo as part of the water sales forecasting issue, so any interested party would have known the Commission planned to address these issues in the proceeding." (Ans. at 23.) But the plain language of the two questions in the original Scoping Memo about water sales forecasting demonstrates that the WRAM/MCBA were not in the LIRA I scope. Those questions were:

2. Forecasting Water Sales

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> 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[3] 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?

(GSWC Ex. AA at 2-3.)

Neither question mentions the WRAM/MCBA, in particular, or the general concept of "decoupling" revenues from sales, notwithstanding that the WRAM is a revenue-decoupling mechanism. Instead, they refer to sales forecasts and processes underlying sales forecasting. The WRAM/MCBA are not forecasting methodologies, guidelines, or mechanisms. Moreover, under the Commission's preferred water sales forecasting methodology, customer usage is forecasted based only on weather and time (*See* D.07-05-062 (GSWC Ex. FF) at A-23, n.4.); the

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[3] General rate cases ("GRCs") are proceedings used to address the costs of operating and maintaining the utility system and the allocation of those costs among customer classes.

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WRAM/MCBA, revenue-decoupling, or other rate-design mechanisms are not considered. Accordingly, nothing in these questions alerts the reader of any intention to consider the WRAM/MCBA.

Petitioners also had no notion that the Commission intended to consider the WRAM/MCBA based on these questions because forecasting mechanisms are used by, and forecasting issues concern, utilities that employ the WRAM/MCBA and those that do not. As the Commission emphasizes to claim that it was entitled to consider extra-record evidence, LIRA I "is a rulemaking proceeding in which the Commission is setting policy for the entire water industry. . . ." (Ans. at 32.) The Commission regulates over 100 water utilities;[4] all of them employ sales forecasts in their ratemaking, but there are only five WRAM Utilities. Interested parties had no reason to believe that the Commission intended to address changes to the WRAM/MCBA for five companies based on two questions of much wider, general application about sales forecasting mechanics.

The Commission even goes so far as to argue: "Water sales forecasting was an issue in this proceeding because of its effect on WRAM balances and the effect of those balances on customer rates." (Ans. at 24.) Were this so, the Scoping Memo's two questions about the water sales forecasting issue would have mentioned the WRAM and its effect on customer rates. They do not, and there is no other question in either Scoping Memo that does. The Commission's assertion that the reason forecasting was included in the original Scoping Memo is because of the WRAM is not credible.

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[4] Water Division facts (available at https://www.cpuc.ca.gov/about-cpuc/divisions/water-division).

2) *BullsEye* is Inapposite.

To justify the Revocation Order, the Commission tries to shoehorn the facts of LIRA I into the Court of Appeal's reasoning in *BullsEye Telecom, Inc. v. California Public Utilities Commission* (2021) 66 Cal.App.5th 301. But the *BullsEye* scenario was entirely different. The underlying proceeding addressed whether local carriers (the petitioners) impermissibly charged higher rates for certain services provided to long-distance carriers, and the scoping memo included whether "there was a rational basis for different treatment" as an issue to be considered. *Id.* at 306. The petitioners argued that the Commission erred in concluding that the "rational basis" analysis was limited to a single factor—the difference in cost-of-service. But the court concluded that because the scoping memo did not specify any particular factors that would be considered, the Commission's conclusion that certain factors were not relevant to the rational basis analysis did not violate the requirement that the scoping memo identify the issues to be considered. *Id.* at 317-18, 325. In short, the scoping memo in *BullsEye* expressly stated that whether a rational basis existed to treat services differently was within the scope of that proceeding.

In contrast, in LIRA I, there was nothing in either Scoping Memo that identified elimination of the WRAM/MCBA as an issue that would be considered in the proceeding. The WRAM Utilities therefore had no reason to suspect that it might be considered.

The Commission argues that Section 1701.1 and Commission Rule 7.3 do not require the Commission "to list all possible outcomes to a proceeding." (Ans. at 24.) That is true, but they do require the Commission to list the issues that will be

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considered. Unlike the *BullsEye* scoping memo that identified the issue (i.e., was there a rational basis for the higher rates), the Commission never identified elimination of the WRAM/MCBA as an issue in LIRA I. The Revocation Order is not responsive to the Scoping Memo questions about forecasting or any other question in either Scoping Memo.

Moreover, *BullsEye* concluded that the petitioners were not prejudiced by the Commission's narrowing of the scoped "rational basis for different treatment" issue to the cost-of-service factor because the petitioners "identif[ied] no evidence they could have or would have presented had they been aware the Commission would ultimately conclude the exemplary factors . . . . did not constitute a rational basis for different treatment . . . ." *Id.* at 325-326. The court emphasized that the petitioners knew prior to hearings that the real party in interest's position was that the differing rates could be justified only "where the provider . . . establishes that the relevant economic cost . . . varies between customers" and that "nothing . . . prevented them from countering [the real party in interest's] evidence that there was no cost difference with their own evidence of any such difference." *Id.* The *BullsEye* petitioners thus had ample opportunity to provide evidence to refute the Commission's determination that only cost-of-service was relevant to the scoping memo's "rational basis for different treatment" issue.

In contrast, here, the Commission's failure to include the WRAM/MCBA in the Scoping Memos directly resulted in the WRAM Utilities' inability to provide evidence supporting continued use of the WRAM/MCBA. In their comments on the Proposed Decision, Petitioners identified evidence they could have or would have presented in refutation of the Revocation

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Order, had they been aware that it was under consideration. (CAW Ex. O at 2-6; CWS Ex. X at 9-10; GSWC Ex. M at 10-13; Liberty Ex. K at 7-8.) But as the Commission admits, it afforded Petitioners' comments on the Proposed Decision "no weight" because they were not "record evidence" (Ans. at 45), notwithstanding that Petitioners were denied any opportunity to submit such evidence (and notwithstanding the Commission's statements that it may rely, and did rely, on information not part of the formal record in support of the Revocation Order (Ans. at 43-44)). This prejudiced Petitioners and renders *BullsEye* inapplicable.

3) The Commission's practice has always been to identify the WRAM/MCBA with specificity in the scoping memo for any proceeding in which their continuance was under consideration.

The Commission argues that "the parties had notice that, as a pilot program, the continuation of the WRAM and MCBA was regularly under consideration." (Ans. at 33.) This is misleading.

The Commission's past practice of "regularly" considering the WRAM/MCBA shows why including water sales forecasting in the original Scoping Memo was not sufficient to provide notice that the WRAM/MCBA would be considered in LIRA I. In the prior proceedings in which the WRAM/MCBA were considered, they were specifically listed in the scoping memo as under review:

- *Assigned Commissioner's Ruling and Scoping Memo* (Mar. 8, 2007) in docket I.07-01-022 *et al.* (CAW Ex. B) at 3 ("The first phase of this proceeding will address rate-related conservation measures, including the parties' increasing block rate and

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Water Revenue Adjustment Mechanism (WRAM) proposals.");

- *Assigned Commissioner and Administrative Law Judge's Ruling and Scoping Memo* (June 8, 2011) in docket A.10-09-017 (CWS Ex. E) at 13 (identifying examination of WRAM/MCBA balances and whether the mechanisms comport with the Commission's expectations and objectives as issues to be considered);
- *Scoping Memo and Ruling of Assigned Commissioner and Administrative Law Judge* (Nov. 2, 2011) in docket A.11-07-017 (GSWC Ex. GG) at 8 ("we will consider whether the WRAMs/MCBAs are achieving their stated purpose . . . and if not, what changes are needed to ensure the WRAMs/MCBAs achieve their stated purpose");
- *Assigned Commissioner's Third Amended Scoping Memo and Ruling Establishing Phase II* (Apr. 30, 2015) in docket R.11-11-008 (GSWC Ex. F) at 14-16 (listing 9 of 16 questions directly related to whether the WRAM/MCBA should be maintained, modified, or replaced).

Given the Commission's historic practice, Petitioners reasonably expected that if the Commission were again to consider the efficacy of the WRAM/MCBA, it would comply with Section 1701.1(c) and Commission Rule 7.3, as in the past, by identifying the issues expressly in the Scoping Memo.

Further, the Commission's efforts to cast the WRAM/MCBA as a "pilot program" and thereby to create the impression that the mechanisms were merely an experiment, subject to

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revocation at any time, must be rejected. It is inaccurate to characterize as a "pilot program" mechanisms that have been fundamental elements of the WRAM Utilities' rate design for more than a decade.

4) The paucity of the record regarding the WRAM/MCBA further demonstrates that they were outside the scope of LIRA I.

The fact that no Petitioner established any record on the need for the WRAM/MCBA is powerful evidence that the two questions on water sales forecasting in the original Scoping Memo failed to provide notice that continuation of the WRAM/MCBA would be considered. Had they known the Commission intended to address these issues, it is not plausible that the five WRAM Utilities, who spent years in multiple proceedings establishing the need for the WRAM/MCBA, would not have offered any evidence demonstrating that the WRAM/MCBA should be maintained. Every WRAM Utility filed comments on the Proposed Decision, applications for rehearing, and petitions for writ of review regarding the Revocation Order—demonstrating that this issue is important to them. Yet the Commission argues that all these utilities knew that revocation of the WRAM/MCBA was under consideration but chose to remain silent about it. No evidence exists to support this inference because Petitioners would never have put something as important as the WRAM/MCBA at risk so cavalierly or recklessly.

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5) Neither occasional mentions of the WRAM/MCBA by parties nor the ALJ's final ruling put the WRAM/MCBA within LIRA I's scope.

To create the impression that revocation of the WRAM/MCBA was within LIRA I's scope, the Answer identifies a handful of occasions in which a party mentioned the WRAM/MCBA during the 27 months between the Order Instituting Rulemaking and the comments on the ALJ's September 19, 2019 ruling ("ALJ's Final Ruling"). This is legally erroneous and factually misleading.

Legally, the scope of a proceeding is not determined by comments made by parties, or even by a ruling by the assigned ALJ. Rather, a proceeding's scope must be set forth by the assigned Commissioner in a scoping memo. Section 1701.1(c) ("The assigned commissioner shall prepare and issue by order or ruling a scoping memo that describes the issues to be considered"); Commission Rule 7.3. Indeed, when the Commission determined that the scope of LIRA I required expansion to incorporate two additional issues, on July 9, 2018, the Commission issued the amended Scoping Memo. The Commission never issued any such amendment to bring the WRAM/MCBA within LIRA I's scope, and the ALJ's Final Ruling that listed a single two-part question about future consideration of the WRAM/MCBA (*see infra*, Part II.D) does not constitute a scoping memo issued by the assigned commissioner.

Factually, the Answer's use of four cherry-picked excerpts from proceeding materials mentioning the WRAM (two of which are actually extracts from D.20-08-047 setting forth the Commission's *post hoc* rationalization for the Revocation Order) is highly misleading. There were approximately 1,900 pages of

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documents filed during LIRA I. Given that the WRAM/MCBA are fundamental to the rate design used by the WRAM utilities to promote water conservation and maintain affordable rates for low-usage customers, it is not surprising that the WRAM was mentioned among topics tangential to issues that actually were in LIRA I's scope. But a party's comments over the course of a proceeding, even in response to an ALJ's question regarding an out-of-scope topic, does not bring any new issue into the scope of the proceeding.

The central premise of the Answer—that "WRAM issues were included in the list of issues in the Scoping Memo as water sales forecasts and the WRAM are inextricably linked" (Ans. at 28)—is meritless. Improving water sales forecasting is no more tethered to revoking the WRAM than reducing global mosquito populations would be to banning an anti-malarial drug. Although fewer mosquitos might make the medicine less necessary, a proceeding about mosquito abatement would not be expected to result in banning a medicine for a mosquito-borne illness. So too for a proceeding considering mechanisms for making water sales forecasts more accurate and eliminating the WRAM. (*See* GSWC Amended Petition at 29-30.) The Revocation Order must therefore be annulled, just as the Court of Appeal annulled portions of the Commission's decision in *Edison*, *supra*, 140 Cal.App.4th 1085, on the grounds that the decision exceeded the scope of issues identified in the scoping memo. *Id.* at 1106. In *Edison*, the court concluded that the Commission failed to proceed in the manner required by law and that failure was prejudicial. *Id.* (citing Section 1757.1). The same is true here.

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C. Petitioners had statutory and constitutional rights to notice and an opportunity to be heard before the WRAM/MCBA were revoked.

Under *California Trucking Association v. Public Utilities Commission* (1977) 19 Cal.3d 240, the Revocation Order must be annulled because it was issued in violation of Petitioners' statutory and constitutional rights to notice and opportunity to be heard. In *California Trucking*, this Court did not need to consider the petitioner's assertion that it was entitled to hearing under constitutional due process guarantees because the statutory right to hearing under Section 1708 was inarguable. *Id.* at 245. This Court should reach the same conclusion here. The Revocation Order took away the rights of the WRAM Utilities to continue using the WRAM/MCBA in the future. But under Section 1708 (applicable to all the WRAM Utilities) and under Section 1708.5(f) (applicable to GWSC), Petitioners were entitled to notice and a hearing before the Commission could issue such an order.

1) The Commission violated Petitioners' due process rights under Section 1708.

Before the Commission may "rescind, alter, or amend any order or decision made by it," it must give notice to interested parties and, if an interested party requests a hearing, the Commission must also provide that party with an adequate opportunity to be heard "as provided in the case of complaints." Section 1708. The Commission's failure to afford the WRAM Utilities notice and an opportunity to be heard before revoking their rights to use the WRAM/MCBA is thus fatal.

The Commission argues that the Decision does not rescind, alter, or amend a prior decision because "[t]he Decision

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specifically stated that the policy decision to discontinue the . . . WRAM would be implemented in the utilities' next GRCs." (Ans. at 38.) Ordering Paragraph #3 of the Decision shows that this is false. This order precludes the five WRAM Utilities from proposing the WRAM/MCBA in their future GRCs. (D.20-08-047 at Ordering Paragraph #3.) Earlier decisions allowed the WRAM Utilities to propose to employ WRAM/MCBAs in their future GRCs. Ordering Paragraph #3 changes these earlier decisions. This is indisputable and dispositive.

2) The Commission violated GSWC's rights under Section 1708.5.

GSWC also has a specific right to an evidentiary hearing before its WRAM/MCBA may be revoked; the Commission's failure to afford GSWC such a hearing is an independent basis for annulling the Revocation Order. Section 1708.5(f) provides a right to an evidentiary hearing, where evidence is taken and parties may cross-examine other parties' witnesses, in "any proceeding to adopt, amend, or repeal a regulation . . . with respect to a regulation being amended or repealed that was adopted after an evidentiary hearing." Section 1708.5, subd. (f).

GSWC's authorization to use the WRAM was adjudicated in its 2012 GRC. After an evidentiary hearing analyzing whether the WRAM/MCBA was achieving its stated purposes, the Commission approved their continued use by GSWC. (D.13-05-011 at Conclusions of Law #72 and #88.) This made Section 1708.5(f) applicable, giving GSWC the right to an evidentiary hearing before its ability to use the WRAM/MCBA may be revoked.

Up until its Answer, the Commission contended that GSWC's continued use of the WRAM resulted from a settlement.

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The original Decision states this (D.20-08-047 at 60, n.40), notwithstanding that GSWC had alerted the Commission to the error in comments on the Proposed Decision (GSWC Ex. M at 5-6). The Commission failed to correct the error in D.21-09-047, notwithstanding that GSWC again raised the error in its application for rehearing. (GSWC Ex. CC at 9-10.) Presumably recognizing that the error would be apparent to this Court, the Answer does not assert that GSWC's WRAM was the result of a settlement, implicitly conceding that, absent a waiver by GSWC (which, as set forth below, the Commission cannot establish), GSWC's WRAM cannot be revoked without an evidentiary hearing. There was no such hearing, so the Revocation Order must be annulled.

3) The Commission's failure to provide notice and an opportunity to be heard violated Petitioners' constitutional due process rights.

Although empowering the Commission to "establish its own procedures," the California Constitution expressly provides that those procedures must comport with due process. Cal. Const., art. XII, § 2. "An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Mullane v. Central Hanover Bank & Trust Co.* (1950) 339 U.S. 306, 314. Applying these principles in the context of Commission proceedings, this Court has held that "[d]ue process as to the commission's initial action is provided by the requirement of adequate notice to a party affected and an opportunity to be heard before a valid order can be made." *People v. Western Air*

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Lines, Inc. (1954) 42 Cal.2d 621, 632 ("*Western*"). The Commission's failure to identify the WRAM/MCBA in the Scoping Memos deprived the WRAM Utilities of the notice and opportunity to be heard that *Mullane* and *Western* require, violating their constitutional due process rights.

D. Petitioners did not waive their rights to a hearing because waiver must be knowing and intentional.

The Commission now argues that Petitioners collectively waived their rights to a hearing by failing to ask for one. (Ans. at 39.) To begin with, the Commission made no finding of waiver in either Decision; the word "waiver" (or any synonym) never appears. Moreover, Petitioners could only have known of their rights to hearings and waived these rights if they knew the Commission was considering revoking the WRAM/MCBA. Because the WRAM/MCBA were not issues in LIRA I's scope, Petitioners did not know that changing or revoking them were under consideration such that hearings would be needed—much less that Petitioners had statutory rights to hearings that would be waived unless asserted.

The Commission argues that the parties had notice that revocation of the WRAM/MCBA was under consideration because the ALJ's Final Ruling "specifically invited the parties to comment on that exact question." (Ans. at 31.) This contention is erroneous for several reasons.

First, the ALJ's Final Ruling is not the legally controlling document as to LIRA I's scope (*see supra*, Part II.B.5).

Second, when quoting the ALJ's question, the Commission conspicuously omits its second part, which is critical to understanding the question. In its entirety, the question was:

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> 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?

(GSWC Ex. B at 3.) Because of the way this two-part question was framed, Petitioners understood the ALJ to be asking whether this was a change the Commission should consider implementing at some future time—i.e., in a future rulemaking or in each utility's future GRC. This was both because (1) the first part of the question asked: "should the Commission *consider converting* to Monterey-style WRAM" (emphasis added), as opposed to "should the Commission convert to Monterey-style WRAM" and (2) because the second part of the question asked about the proper type of proceeding for such consideration—whether it should be done in each utility's GRC (as opposed to a subsequent phase of the instant proceeding or a future rulemaking).

Third, none of the Petitioners understood that this was an action that the Commission was considering during LIRA I, because the assigned Commissioner had never issued a scoping memo that included the WRAM/MCBA as an issue under consideration (*see supra*, Part II.B). When the California Water Association responded to the ALJ's question, it emphasized that considering such a change in LIRA I would be "a procedurally improper method for seeking to modify several final Commission Decisions and falls well outside the scope of this proceeding." (GSWC Ex. X at 13.)

Under California law, "[w]aiver is the intentional relinquishment of a known right after knowledge of the facts," and "always rests upon intent." *Southern Cal. Edison Co. v.*

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Public Utilities Com. (2000) 85 Cal.App.4th 1086, 1107. "The burden, moreover, is on the party claiming a waiver of a right to prove it by clear and convincing evidence that does not leave the matter to speculation, and 'doubtful cases will be decided against a waiver.'" *Id.* (citations omitted). "The waiver doctrine applies in the administrative context 'if the administrative record shows that the applicant has made a knowing, intelligent, and voluntary waiver in circumstances where the applicant might reasonably anticipate some benefit or advantage from the waiver.'" *Id.* at 1107-1108 (citations omitted).

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

To accept the Commission's waiver argument, the Court would need to find in the record clear and convincing evidence showing that Petitioners (1) had somehow intuited from the two questions about sales forecasts in the original Scoping Memo and the ALJ's two-part question in the Final Ruling that the Commission was considering whether to revoke the WRAM/MCBA during LIRA I, and (2) with this knowledge,

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decided not to request evidentiary hearings in order to achieve some strategic advantage. There is no evidence of any of this because it never happened.

The Commission's reliance on *California Trucking*, *supra*, 19 Cal.3d 240, actually underscores the problem. The text quoted in the Answer provides: "If no party seeks to challenge *a proposed order* except by merely submitting written comments on its merits, the commission is not required to hold a hearing." *Id.* at 245 (emphasis added). This Court's statement in *California Trucking* was made after the Commission circulated a "white paper" containing the specific proposal about which the petitioner was complaining. Because after receiving that white paper the petitioner had asked for hearings, there could be no question of waiver. *Id.* at 242-243, 245. Here, there can also be no question of waiver because there was no proposed order at the time that the Commission claims Petitioners waived their rights to hearings. When the Proposed Decision disclosed, for the first time, that the WRAM/MCBA could be abandoned, the record for LIRA I was closed; it was too late to request hearings. Nevertheless, all the WRAM Utilities objected to the Proposed Decision, identifying the inadequate record and/or need for hearings. (CAW Ex. O at 10-11; CWS Ex. X at 2; GSWC Ex. M at 3-4, 9; Liberty Ex. K at 1.) Thus, as in *California Trucking*, when the Commission first circulated its proposed order, Petitioners asserted their rights to be heard; there was no waiver of this right.

Based on the fundamental legal errors set forth above, this Court should annul the Revocation Order. But there are other compounding legal errors. Following are some of them.

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E. Issuance of the Revocation Order in a quasi-legislative proceeding was legally erroneous and prejudicial.

Because the WRAM is a mechanism that is intrinsic to setting the rates for specific utilities, its elimination in a quasi-legislative proceeding constitutes legal error. The Answer argues that "[the R.17-06-024 proceeding] is not a ratesetting proceeding because the Commission was not setting rates for any specific utility. (Pub. Util. Code § 1701.1 subd. (d)(3).)" (Ans. at 57.) The cited code section and the Commission's own rules belie this argument.

The code section provides: "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*." Section 1701.1(d)(3) (emphasis added). Commission rules define "Ratesetting proceedings" as "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)*." Cal. Code Regs., tit. 20, § 1.3(g) (GSWC Ex. HH) (emphasis added). The WRAM is a mechanism that in turn sets the rates for specific utilities; therefore, its elimination is a ratesetting action that could not properly be ordered in a rulemaking proceeding.

The Commission improperly faults the parties for failing to challenge the categorization of the proceeding, specifically citing the ALJ's Final Ruling, and arguing: "If Petitioners believed the ALJ had expanded the scope of the proceeding, they had ten days in which to seek rehearing on the original categorization." (Ans. at 58.) Irrespective of the original categorization of the proceeding, the ALJ is not authorized to expand the scope of the

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proceeding—only the assigned commissioner may modify the scope by issuing an amended scoping memo. Sections 1701.1(b)(1), (c) (both expressly providing that the "assigned commissioner" "shall prepare and issue by order or ruling a scoping memo that describes the issues to be considered").

Moreover, the Commission puts the onus on Petitioners to challenge the categorization of LIRA I before they were aware of the need to do so (*see supra*, Part II.D). Once a proceeding is characterized as quasi-legislative, the Commission is prohibited from taking specific ratesetting actions unless it first complies with the necessary procedural protections for such type of actions. Because the Commission categorized LIRA I as quasi-legislative, the parties reasonably understood that it would not be resolving specific ratesetting actions in LIRA I—thus, there was no reason to challenge the original categorization, either at the proceeding's outset or after the ALJ's Final Ruling. Were it otherwise, the Commission could always[5] circumvent due process protections by categorizing a proceeding as quasi-legislative and later (1) introducing ratesetting actions without prior notice after the time for challenging the categorization has passed, (2) failing to establish the evidentiary record required to support ratesetting actions, and (3) incorporating "legislative facts" as post hoc rationalizations for its orders—as it has done here. Such a rule would violate the Commission's due process obligation to provide "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Pac. Gas &*

[5] On March 22, 2022, the California Water Association filed with this Court another petition for writ of review arising from the Commission's issuance of a ratesetting order in the second phase of the LIRA rulemaking proceeding (*see* Case No. S273725).

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Elec. Co. v. Public Utilities Com. (2015) 237 Cal. App. 4th 812, 859.

The Commission's failure to follow the statutory requirements and its own rules are grounds for vacating a decision where there is resulting prejudice. *See Edison*, *supra*, 140 Cal.App.4th 1085, 1106. By issuing the Revocation Order in a quasi-legislative proceeding, the Commission failed to follow statutory requirements and its own rules to Petitioners' prejudice. The Revocation Order must be annulled.

F. The Commission abused its discretion by revoking the WRAM without establishing a record that supports revocation.

The Commission argues that the scant evidentiary record on which it relied suffices to support the Revocation Order because the Commission also had broad discretion under its legislative powers to consider extra-record "legislative facts." (Ans. at 44.) The Commission misses the point. Because it failed to provide the notice and opportunity for hearing that Sections 1708 and 1708.5(f) and due process require, the record on which the order is based is one-sided and grossly inadequate. Petitioners had no opportunity to present substantive evidence to counter the flawed and misleading graph submitted by one of the parties to the proceeding, the Public Advocates Office ("PAO") (*see* GSWC Amended Petition at 40)—much less the "legislative facts" that were never raised in the proceeding but only incorporated into the Decision as post hoc rationalizations for the Revocation Order. The Commission cannot revoke important rights of the WRAM Utilities based solely on disputed evidence that was not subject to cross-examination. *The Utility Reform*

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Network v. Public Utilities Com. (2014) 223 Cal.App.4th 945, 959 ("*TURN*").

The Commission argues that *TURN* is inapposite because "the Commission based its decision to discontinue the WRAM/MCBA on the voluminous comments submitted by the parties throughout the proceeding and other legislative facts derived from its decade of experience dealing with the WRAM/MCBA." (Ans. at 47.) There were voluminous comments submitted in LIRA I—roughly 1,900 pages—but not about discontinuing the WRAM/MCBA. The comments in the record recommending changing the WRAM to a Monterey WRAM are limited to (1) two paragraphs in PAO's July 19, 2019 comments, which were the impetus for the single two-part question in the ALJ's Final Ruling (*see supra*, Part II.D), (2) PAO's 6-sentence response to that question, which included no data, and (3) PAO's graph, included in its reply comments. Because Petitioners were never afforded the opportunity to rebut this "evidence," under *TURN*, it cannot be used to support the Revocation Order.

As to the Commission's "decade of experience dealing with the WRAM/MCBA," although the Commission claimed that it revoked the WRAM/MCBA because it "evaluated the sales forecasting processes used by water utilities and concluded that the WRAM/MCBA had proven to be ineffective in achieving its primary goal of conservation" (Ans. at 15), the Commission failed to include a single finding of fact from this "decade of experience" that supports that premise. The only finding supporting that assertion is Finding of Fact #14, which relies on PAO's graph and states: "Conservation for WRAM utilities measured as a percentage change during the last 5 years (2012-2016) is less than conservation achieved by non-WRAM utilities, including

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Class B utilities as evidenced in water utility annual reports filed from 2008 through 2016." (D.20-08-047 at Finding of Fact #14.) The fallacy of the Commission's claim is evidenced by its reliance on pre-2016 data, given that the Commission issued D.16-12-026 in December 2016 and concluded in that decision that the WRAM/MCBA should be upheld.

Many of the Commission's statements crafted to create the illusion that the Revocation Order rests on a sound foundation are drawn from D.16-12-026, including: describing the "new paradigm for water consumption as the drought continues and the weather brings us less snow" (Ans. at 11 (citing Decision 16-12-026 at 24)) and stating "[i]mproving forecasting methodologies is key to reducing WRAM and surcharge balances. Inaccurate forecasts provide the air that balloons the WRAM and surcharges." (Ans. at 25 (citing D.16-12-026 at 6).) The Commission never explained how the same facts that supported *upholding* the WRAM/MCBA in 2016 suddenly supported *revoking* the WRAM/MCBA four years later. That is because the Commission revoked the WRAM/MCBA without developing any valid record on their efficacy, pulled text from a prior proceeding to justify its action, and now says its decision was based on "legislative facts." If the Commission has discretion to do this, there are no limits on what it may do.

The Commission afforded no weight to Petitioners' comments on the Proposed Decision demonstrating the flaws in PAO's graph, stating "new evidence offered in comments on a proposed decision are not part of the record and accorded no weight." (Ans. at 48.) Thus, the Commission's position is that it has discretion to consider anything outside the record that supports the Commission's preferred outcome and to ignore

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information provided by impacted parties in comments on the Proposed Decision that does not support the Commission's preferred outcome. Such arbitrary line-drawing to rationalize Commission orders cannot be deemed a regular pursuit of the Commission's authority.

But the Commission does not stop there. It argues:

> Petitioners never disputed the accuracy of the utilities' annual report data submitted to the Commission on which Public Advocates Office relied, nor did they question the accuracy of the calculations Public Advocates Office made to arrive at the data reflected in the graph. Petitioners simply object to the inferences Public Advocates Office made about the data reflected in the graph.

(Ans. at 48.) As set forth in the Petitions (*e.g.*, CAW Petition at 42-43; GSWC Amended Petition at 40, n.10) and as was explained to the Commission in both comments on the Proposed Decision (e.g., CAW Ex. O at 7-9; GSWC Ex. M at 10-13) and in the Applications for Rehearing (e.g., CAW Ex. X at 26; GSWC Ex. CC at 22), the flaws in PAO's graph run much deeper than "inferences." The graph (1) fails to include any data or underlying methodology—just a citation to "Class A Annual Reports to the CPUC" (CWS Ex. U at 7)—and (2) fails to reflect facts critical to the Commission's Finding of Fact #14. Because this graph was submitted in PAO's final reply comments, Petitioners had no opportunity to respond or provide substantive evidence regarding the efficacy of the WRAM/MCBA for achieving conservation goals.

The Commission argues that Petitioners "could have filed a motion to strike the graph or a motion requesting the opportunity to respond to the graph." (Ans. at 42.) Because changes to the

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WRAM/MCBA were not within LIRA I's scope, Petitioners had no reason to know that any such action was warranted and cannot be faulted for not having done so. As the Court of Appeal stated in *Edison*, "We cannot fault the parties for failing to respond to the merits of proposals that were not encompassed in the scoping memo absent an order amending the scope of issues to include the new proposals." *Edison*, *supra*, 140 Cal.App.4th 1085, 1106.

In sum, the Commission's failure to include the WRAM/MCBA in LIRA I's Scoping Memos led the Commission to issue the Revocation Order without establishing a record that supports the revocation. In so doing, the Commission abused its discretion, and the order cannot stand. *Cal. Hotel and Motel Ass'n v. Indus. Welfare Com.* (1979) 25 Cal.3d 200, 212 (the Court "must ensure that an agency has adequately considered all relevant factors, and has demonstrated a rational connection between those factors, the choice made, and the purposes of the enabling statute."); Section 1757.1(a)(4) (decision of the Commission must be supported by the findings); Code Civ. Proc., § 1094.5(b) ("Abuse of discretion is established if the respondent has not proceeded in the manner required by law, the order or decision is not supported by the findings, or the findings are not supported by the evidence").

G. The Commission violated Section 321.1(a) by failing to consider the impact of revoking the WRAM/MCBA on low-income customers.

Section 321.1(a) provides: "It is the intent of the Legislature that the commission assess the consequences of its decisions, including economic effects . . . as part of each ratemaking, rulemaking, or other proceeding." The legislature's intent is evident from the statute's plain language; no special expertise is needed to understand its requirements.

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The Commission argues that it considered the impact of the Decision on low-income customers; but its other statements disprove this assertion. The Commission states that it "requested comments on whether it should consider discontinuing the WRAM/MCBA and the water utilities chose not to put forth any substantive evidence" (Ans. at 55), thereby admitting that it failed to establish a record regarding the impact of WRAM/MCBA revocation on low-income customers. The Commission had a statutory duty under Section 321.1(a) to consider the economic consequences of revoking the WRAM/MCBA. Even though LIRA I was supposed to be about affordability and assisting low-income customers, the Commission never posed a single question about the economic effect of revoking the WRAM/MCBA generally, or the impact that revoking the WRAM/MCBA would have on low-income customers in particular. Now it blames Petitioners for not providing an answer to a question that the Commission never asked.

The Commission argues that Section 321.1(a) "does not require the Commission to perform a cost benefit analysis or consider the economic effect of its decision on specific customer groups or competitors." (Ans. at 54.) But in the context of a proceeding that was supposed to be about affordability and assisting low-income customers, the failure to establish any record whatsoever on the impact of revoking the WRAM/MCBA on low-income customers can only be deemed legal error.

The Commission argues that *United States Steel Corporation v. Public Utilities Commission* (1981) 29 Cal.3d 603 is inapplicable because that decision, finding the Commission's refusal to consider the economic effect of authorizing different rates for similar services to be legally erroneous, was issued in a

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ratesetting proceeding, whereas LIRA I is a rulemaking. (Ans. at 55.) This argument fails for multiple reasons. First, the plain language of Section 321.1(a) requires the Commission to assess the economic effects of its decisions "as part of each ratemaking, rulemaking, or other proceeding"; the obligation is explicitly not limited to ratemaking proceedings. Second, in *U.S. Steel*, the Court made clear that the Commission's obligation to "consider the economic effects of alternative rules" applies in numerous contexts—from whether a utility should be permitted to construct a power plant to whether a telephone company may restrict the use of certain customer-owned equipment. *Id.* at 609 (citing *Northern Cal. Power Agency v. Public Utilities Com*. (1971) 5 Cal.3d 370, 380 and *Phonetele, Inc. v. Public Utilities Com*. (1974) 11 Cal.3d 125, 132). The argument that this duty would not be applicable in a rulemaking proceeding that was supposed to be about affordability and assisting low-income customers lacks merit. Third, the Revocation Order is a ratesetting action that was improperly issued in a quasi-legislative proceeding (*see supra*, Part II.E), which prejudiced the WRAM Utilities' future ratesetting proceedings by removing a key tool for designing rates that are more affordable for low-use (who tend to be low-income) customers.

In sum, the Court's reasoning in *U.S. Steel* regarding the Commission's duty to consider the economic effects of its decision is equally applicable here. LIRA I's record demonstrates that the Commission failed to comply with this duty and thereby violated Section 321.1(a).

III. CONCLUSION

The Commission misused its own process in dealing with issues of statewide importance for utility regulation. It issued the

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Revocation Order notwithstanding that the WRAM/MCBA were outside the scope of LIRA I; Petitioners were denied the opportunity to establish any record supporting their continued use; and the Commission failed to develop a record that supported their revocation. If this Court allows the Commission to contravene its own procedural rules, in violation of the Public Utilities Code and due process, persons subject to the Commission's authority will be stripped of all protections.

Notice of the issues to be considered by the Commission and the opportunity to be heard on those issues are fundamental rights that this Court must protect, both to safeguard the due process rights of parties to Commission proceedings and because these procedures help ensure that the Commission has the information necessary to formulate sound policy. Here, the Commission did not employ its expertise to issue a new rule after considering an informed record. It adopted one party's version of certain facts without providing any opportunity for other parties to submit contrary information or to develop a record on critical issues. As a result, the Commission issued an order that will impair the ability of the WRAM Utilities to design water rates in a manner that keeps water affordable for low-income customers and is consistent with California's water conservation objectives.

This Court should grant relief and annul the Revocation Order.

Respectfully submitted,

March 28, 2022

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CERTIFICATE OF WORD COUNT
(Cal. Rule of Court 8.504(d)(1))

The text of this brief consists of 8,398 words (excluding tables and this certificate) as counted by the Microsoft Word word processing program used to generate this brief.

March 28, 2022

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DECLARATION OF SERVICE

Golden State Water Company

v.

Public Utilities Commission of the State of California

I, Lisa Schuh, hereby declare that I am a citizen of the United States, am over 18 years of age, and am not a party in the above-entitled action. I am employed in the City and County of San Francisco, State of California. I am over the age of eighteen and my business address is 101 California Street, 35th Floor, San Francisco, California 94111-5894.

On March 28, 2022, I served the following document(s) entitled:

JOINT REPLY TO ANSWER TO PETITIONS FOR WRIT OF REVIEW

VIA FEDERAL EXPRESS: by placing copies of the documents listed above in envelopes designated as FedEx Delivery for delivery on Wednesday March 30, 2022 and addressed to the persons as set forth below.

Christine J. Hammond, General Counsel
California Public Utilities Commission
505 Van Ness Avenue
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Rachel Peterson, Executive Director
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I am readily familiar with the firm's business practice for collection and processing of correspondence for delivery by FedEx Express–Overnight Delivery. On the same day, as referenced above, correspondence is placed for collection by FedEx Express–Overnight Delivery, with whom we have a direct billing account for payment of said delivery, to be delivered to the office of the addressees as set forth below on the next business day.

VIA ELECTRONIC MAIL: by transmitting an electronic mail message to each of the parties identified on the below Service List, through their attorneys of record as identified by the service list and corresponding email list provided in proceeding R.17-06-024 before the California Public Utilities Commission and/or as directed by the party(ies) and/or as directed by the California Rules of Court and Public Utilities Code. That email provided a link to an FTP site where the documents have been made available. Additionally, I stated in my email that if the recipient requested a physical copy of the documents my office would provide one.

I declare under the penalty of perjury under the laws of the state of California that the foregoing is true and correct and that this Declaration of Service was executed on March 28, 2022 in San Francisco, California.

/s/ *Lisa Schuh*
Lisa Schuh

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SERVICE LIST

See Attached Service List from California Public Utilities Commission and list of email addresses

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