IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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

ANSWER BRIEF OF RESPONDENT

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I. INTRODUCTION

Pursuant to this Court's Order of November 17, 2022, Respondent California Public Utilities Commission (Commission) respectfully submits its answer brief to the amended petition for writ of review (Petition) filed by Golden State Water Company (Golden State), in Case No. S269099, and the Petitions filed by California-American Water Company (Cal-Am), California Water Service Company
(Cal Water or CWS), California Water Association (CWA), and Liberty Utilities (Park Water) Corp. and Liberty Utilities (Apple Valley Ranchos Water) Corp. (together, Liberty), in Case No. S271493, (both cases jointly, Petitioners or WRAM Utilities) challenging Commission Decisions (D.) 20-08-047 https://docs.cpuc.ca.gov/PublishedDocs/Published/G000/M346/K225/346225800.PDF (Decision) and 21-09-047 (Rehearing Decision).[1]

Because these cases challenge decisions of the Commission, they are subject to Public Utilities Code section 1756[2] and Court Rule 8.724, *Review of Public Utilities Commission cases*. That rule sets the schedule for the filing of petitions, answers and

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[1] In addition to being available on LEXIS and Westlaw, citations to Commission decisions issued since July 1, 2000 are available on the Commission's website at: http://docs.cpuc.ca.gov/DecisionsSearchForm.aspx.

A copy of D.20-08-047 and D.21-09-047 can be found in Golden State's Exhibit K at pp. 275-387 and Exhibit EE at pp. 494-528, respectively.

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

replies; these filings brief the merits of the case.[3] Accordingly, this answer brief does not repeat everything the Commission addressed in its previous filings in these combined cases. Therefore, the Commission expressly incorporates by reference its previously filed *Answer of Respondent to Petitions for Writ of Review* (Answer) (filed January 28, 2022), *Respondent's Motion to Dismiss Petitions or, in the Alternative, to Reconsider the Issuance of the Writ* (Motion to Dismiss) (filed on October 21, 2022) and *Reply to Opposition to Motion to Dismiss* (Reply to Opposition) (filed November 15, 2022). Likewise, because the Answer addressed the issues presented and the standard of review for this case, those sections are not repeated here, rather the Court is referred to the Commission's Answer for the full discussions. See Answer, pp. 17-22.)

The Commission denies that any relief is warranted pursuant to the writ Petitions.

Moreover, Petitioners sought and achieved legislation that effectively reversed the challenged Commission order, rendering this case moot. Because the Court cannot provide effective relief in this mooted case, and no exceptions apply that would require judicial discretion, the Court should dismiss the writ Petitions. In the alternative, if the Court does not dismiss the writ Petitions, the Commission requests that it reconsider its issuance

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[3] In this way, section 1756 petitions for writ of review are unlike the more common California Supreme Court Rule 8.500 petitions for review. Petitions for writs of review are generally fully briefed on the merits during the initial round of briefing.

of the writ of review because the issues originally presented are no longer of import.

II. STATEMENT OF THE CASE

This case stems from a rulemaking proceeding categorized as quasi-legislative in nature. In its legislative capacity, the Commission made a policy decision to conclude its pilot program of promoting conservation by decoupling water sales from water revenues. In doing so, it established rules that would impact future ratemaking proceedings before the Commission, primarily the general rate cases (GRCs) of large water utilities under its jurisdiction. (*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 (Rulemaking or R.17-06-024) [Cal Water Appx. 50-74].)[4]

Section 1701.1 subdivision (d)(1) defines quasi-legislative cases as proceedings that establish policy, including, but not limited to, rulemakings and investigations that may establish rules affecting an entire industry. In contrast, section 1701.1 subdivision (d)(3) defines ratesetting cases as proceedings in which rates are established for a specific company, including, but not limited to, general rate cases, performance-based ratemaking,

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[4] For consistency, this Answer Brief retained the original exhibit numbering from the Answer, which references exhibits attached to the Petitions and Answer.

and other ratesetting mechanisms. The Decision is from an order instituting rulemaking proceeding that established rules for the water industry. Accordingly, it is not a ratesetting case because the Decision did not establish rates for any utility. However, the rules established in the Rulemaking will be implemented in future GRC proceedings of individual water utilities and may, at that time, require adjustments to the water utilities' rates and rate design. Evidentiary hearings are typically held in GRC proceedings.

As a result of the Rulemaking proceeding at issue, the Commission decided to conclude the pilot program because the Commission determined it was no longer necessary to incent the water utilities to promote conservation because many other factors were influencing customers to conserve water. (D.20-08-047, pp. 68-69 [Golden State Appx. 345-346].) As the Commission has previously explained, circumstances have changed since this pilot program was implemented:

> We have entered a new paradigm for water consumption as the drought continues and the weather brings us less rain and snow. Californians have heeded our calls and conserved in record numbers, and water [investor-owned utility] customers have done a particularly good job at conservation. As Governor Brown stated in his 2016 Executive Order B-37-16, water conservation must be a California way of life. Governor Brown's orders and the Commission's resolutions, the work of sister state and local agencies and the efforts of Californians have literally

> changed the landscape of California by incentivizing the removal of lawns, less outdoor watering, and taking steps to eliminate water waste and minimize leaks.

(*Order Instituting Rulemaking on the Commission's Own Motion into Addressing the Commission's Water Action Plan Objective of Setting Rates that Balance Investment, Conservation, and Affordability for Class A and Class B Water Utilities* (*Water Action Plan Rulemaking Decision*) [D.16-12-026], p. 24.)

A. The Mechanics of the WRAM/MCBA

The Commission implemented this pilot program by authorizing the water utilities to track the difference between forecast revenues and actual revenues, generated from quantity sales, in a decoupling Water Revenue Adjustment Mechanism (WRAM). The accompanying Modified-Cost Balancing Account (MCBA) tracks the difference between forecast and actual variable costs (i.e. purchased power, water, and pump taxes).

The goals of the WRAM/MBCA were to sever the relationship between sales and revenue to remove any disincentive for the utility to implement conservation rates and programs; ensure cost savings are passed on to ratepayers; and reduce overall water consumption. The authorization of the WRAM/MBCA was intended to ensure that the water utilities and their customers were proportionally affected when conservation rates were implemented, so that neither party would suffer or benefit from the implementation. (*Order Instituting Investigation to Consider Policies to Achieve the Commission's Conservation Objectives for Class A Water Utilities*

(WRAM Authorization Decision) [D.08-02-036], p. 26.) Theoretically, this is accomplished by authorizing the water utilities to true-up the balance in the WRAM/MBCA through rate surcharges (if under-collected) or surcredits (if over-collected) on ratepayers' utility bills. This true-up is designed to make the water utilities indifferent to their customers' increased water conservation, which could otherwise reduce the profits earned by the water utilities if the WRAM/MBCA did not exist. When sales are accurately forecasted, the balance in these mechanisms will be minimal. However, if a water utility's WRAM/MBCA is perpetually under-collected, customers may experience continually increasing surcharges on their water bills. (Decision, pp. 51-52, 55-56
[Golden State Appx. 328-329, 332-333].)

These surcharges can also result in undesirable consequences, such as reducing utility incentives to control costs, and shifting utility business risks away from investors and onto customers. (Decision, pp. 53 [Golden State Appx. 330].) This happens because the WRAM/MCBA protects the water utilities' revenue from *any* difference between forecast and actual sales, not just differences caused by conservation. (Decision, pp. 55-56 [Golden State Appx. 332-333].) For example, actual sales may be less than forecast sales during a rainy year in which customers require less water for landscaping or during an economic recession when customers are limiting water use as a means to reduce expenditures and companies are going out of business. (Decision, p. 55 [Golden State. Appx. 332].) Ratepayers are

required to make WRAM/MCBA utilities whole for revenue losses during these economic downturns. In contrast, under traditional regulation utilities bear the risk of these economic contractions, as do other types of businesses and industries. Utilities are compensated for this risk of economic contractions in their adopted rates of return. In fact, the Decision notes that the earlier settlements reached in GRCs that established the WRAMs for the WRAM Utilities alluded to the transfer of risk, but there is no evidence that this change in risk was ever quantified in determining the cost of equity for any water utility. (Decision, pp.73-74 [Golden State Appx. 350-351].)

B. History of the WRAM/MCBA

On December 15, 2005, the Commission issued a Water Action Plan to be used as a roadmap for water policies and priorities in response to increasing statewide concerns about water quality and supply. The Commission's primary goals were to place water conservation at the top of the loading order as the best, lowest-cost supply and to strengthen water conservation programs to a level comparable to those of energy utilities. (Decision, p. 3 [Golden State Appx. 280].)

The Commission concluded it would have to decouple sales from revenues in order to remove the water utilities' financial disincentive to conserve water. The Commission subsequently adopted the WRAM/MCBA as a pilot program for certain class A water utilities to address conservation. (Decision, p. 56 [Golden State Appx. 333].)

After the WRAM Utilities implemented the decoupling mechanism, there was significant growth in WRAM surcharges,

so the Commission modified various aspects of the decisions adopting the decoupling mechanisms. In particular, a cap was placed on the amount of WRAM surcharges that could be placed on a customer's bill. (D.12-04-048, *Decision Addressing Amortization of Water Revenue Adjustment Mechanism Related Accounts and Granting in Part Modification to Decision (D.) 08-02-036, D.08-08-030, D.08-09-026, and D.09-05-005* (*WRAM Amortization Decision*), pp. 41-44.) However, this measure only extended the time necessary to collect WRAM balances and ultimately increased WRAM balances as interest on the balances continued to accumulate.

In 2015, the Commission expanded the scope of its *Order Instituting Rulemaking Addressing the Commission's Water Action Plan Objective*s, R.11-11-008, to consider other means to address the continuing growth in WRAM balances. (D.16-12-026 (*Water Action Plan Rulemaking Decision*), pp. 5-7.) Although the final decision retained the mechanisms for that three-year rate cycle, it also provided guidance on the creation of new mechanisms that could potentially decrease WRAM balances. (*Id.* at pp. 27-28 and 84-85, Ordering Paragraphs 3-4.)

The Commission opened this proceeding, R.17-06-024, to address the 2010 Water Action Plan objective of achieving consistency among 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. To ensure proper notice to interested parties, the Commission served the Class A, B, C, and D water utilities,

in addition to other organizations. (Rulemaking, pp. 20-21, Ordering Paragraphs 17-19 [Cal Water Appx. 71-72].)

In the Rulemaking, the Assigned Commissioner issued the scoping memo that identifies the issues to be considered and set a timetable for resolution of those issues. (See *Scoping Memo and Ruling of Assigned Commissioner* (Scoping Memo), January 9, 2018 [CWA Appx. 44-46]; Pub. Util. Code, § 1701.1 subd. (c).) The Scoping Memo identified water sales forecasting as an issue the Commission would address in the proceeding, specifically asking "What guidelines or mechanisms can the Commission put in place to improve or standardize water sales forecasting for Class A water utilities?" (Scoping Memo, pp. 2-3 [CWA Appx. 45-46].)

Workshops were held to provide an opportunity for the parties to discuss the issues in the scoping memo. An Administrative Law Judge (ALJ) ruling and industry division staff workshop report were issued and the parties were invited to file comments responding to questions raised in the ruling and/or workshop report. (Cal. Code of Regs., tit. 20, § 7.5 [Quasi-Legislative Proceedings].) This process was repeated for each workshop held, with sales forecasting being addressed in the third workshop and in the fifth and final workshop.

At the end of Phase I of the Rulemaking, the Commission issued D.20-08-047. In that Decision, the Commission 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. To keep rates just

and reasonable, the Commission precluded the continued use of the WRAM/MCBA in future general rate cases, but continued to allow future use of the Monterey-style WRAM with an Incremental Cost Balancing Account (jointly, M-WRAM/ICBA).[5] The Decision also adopted other requirements relating to Class A water utilities' low-income rate assistance programs.

C. Procedural History

Liberty, Cal-Am, CWA, Cal Water, and Golden State filed timely applications for rehearing of D.20-08-047 on October 5, 2020. Before the Commission issued a decision resolving the pending applications for rehearing, Golden State filed a petition for writ of review with this Court on June 2, 2021.

After this Court granted the Commission's request to hold the court case in abeyance until the Commission could issue its rehearing order, the Commission issued D.21-09-047 on September 27, 2021. The Rehearing Decision modified D.20-08-047 for clarity and denied rehearing.

On October 27, 2021, in response to the Commission's Rehearing Decision, Golden State filed an amended petition for writ of review with this Court in Case No. S269069. Cal-Am, Cal Water, CWA, and Liberty each filed timely petitions for writ of review, which were filed in Case No. S271493.

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[5] The M-WRAM differs from the WRAM, in that the M-WRAM was adopted to protect the utility from reduced revenues collected under tiered rates as compared to a uniform rate design, while the WRAM was created to protect utilities from revenue shortfalls from lower than adopted sales due to conservation. (Decision, p.52 [Golden State Appx. 329].)

In November 2021, in response to the Commission's filed request to consolidate the two cases, the Court ruled that a single answer and a single reply may be filed in both cases and the Court granted the Commission's request for an extension of time to file its answer. The Commission filed its Answer on January 28, 2022 and Petitioners filed replies to the Answer on March 28, 2022.

On February 18, 2022, Senate Bill (SB) 1469 was introduced in the California legislature. Senate analyses indicates that four of the Petitioners in this case are the source of the Senate Bill: California American Water, California Water Service, Golden State Water Company, and Liberty Utilities. (Sen. Rules Com., Off. Of Sen. Floor Analyses, Sen. Floor Analysis – Unfinished Business, Sen. Bill No. 1469 (2021-2022 Reg. Sess.) as amended August 23, 2022, p. 1 (Exhibit B, attached to *Respondent's Motion to Dismiss Petitions or, in the Alternative, to Reconsider the Issuance of the Writ*, filed on October 21, 2022.) As discussed more fully below, SB 1469 requires the Commission to consider applications of Class A water companies to implement decoupling mechanisms, such as the WRAM, in their future general rate case applications.

Subsequent to the introduction of SB 1469, on May 18, 2022, this Court issued writs of review to hear the cases. Shortly thereafter it consolidated the cases and set an additional briefing schedule. Accordingly, Petitioners filed their *Petitioners' Opening Brief on the Merits* (Petitioners' Brief) on September 1, 2022.

Twenty-nine days later the Governor signed SB 1469 into law. On October 21, 2022, based on SB 1469, the Commission filed its Motion to Dismiss the Petitions as moot. Petitioners filed their *Petitioners' Opposition to Respondent's Motion to Dismiss Petitions or, in the Alternative Reconsider the Issuance of the Writ* (Petitioners' Opposition) to the Motion to Dismiss on November 9, 2022, and the Commission filed a reply to Petitioners' Opposition on November 15, 2022. On November 17, 2022, the Court denied the motion to dismiss without prejudice to raising arguments concerning mootness in its answer brief and reset the briefing schedule.

III. SUMMARY OF ARGUMENT

In this case, Petitioners, certain Class A water utilities,[6] challenge a Commission policy determination reached in a quasi-legislative proceeding. The Commission determined that a pilot program balancing account mechanism, WRAM/MCBA, applied to certain Class A water utilities, is not serving its purpose and should be discontinued.[7] Without basis, Petitioners contend that they were denied due process and that the underlying proceeding had procedural deficiencies.

Petitioners' arguments misconstrue the nature of the Commission proceeding, which is a rulemaking as opposed to a ratesetting proceeding. They also mischaracterize their own

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[6] Class A water utilities are those water utilities with more than 10,000 service connections.

[7] The Commission regulates more than 100 investor-owned water utilities. Five of the nine Class A water utilities were authorized to implement this accounting mechanism.

failure to offer evidence, or otherwise participate in review of the accounting mechanism issue, as a due process failing on the part of the Commission. In fact, it was Petitioners' own decision not to provide substantive input after the September 2019 ALJ Ruling invited parties to do so, that brings us to this Court.

Petitioners fail to demonstrate any error in the Commission's conduct or holding, or any other basis, for this Court to grant relief.

The above notwithstanding, this case is moot because Petitioners have achieved through legislation, the very remedy it seeks from this court. The Court should dismiss the case as moot because it can provide no effective remedy.

IV. ARGUMENT

A. The Court should dismiss the case as moot.

The Petitions should be dismissed because the California Legislature has enacted legislation that renders moot the relevant issue in the petitions, such that it is impossible for the Court to grant Petitioners any effective relief. In the alternative, should any residual matters remain, the Court should change its grant of review to denial as the issuance of the writ of review was based on pre-Senate Bill 1469 facts. (Sen. Bill No. 1469, approved by Governor, Sept. 30, 2022 (2021-2022 Reg. Sess.) §2 (SB 1469) (Exhibit A, attached to Motion to Dismiss).) In light of this subsequent legislation, any residual or academic issues are of no import.

1. Senate Bill 1469 renders moot the relevant order in Decision 20-08-047.

On September 30, 2022, Governor Gavin Newsom signed SB 1469, legislation that supersedes the Commission's discontinuance of the WRAM/MCBA pilot program in D.20-08-047. Effective January 1, 2023,[8] SB 1469 modifies Public Utilities Code Section 727.5 to insert language that requires the Commission to consider applications of Class A water companies to implement decoupling mechanisms, such as the WRAM,[9] which are the subject of the instant case before the Court:

> (2) (A) Upon application by a water corporation with more than 10,000 service connections, the commission shall consider, and may authorize, the implementation of a mechanism that separates the water corporation's revenues and its water sales, commonly referred to as a "decoupling mechanism."

(Sen. Bill No. 1469, approved by Governor, Sept. 30, 2022 (2021-2022 Reg. Sess.) §2.)

In their Petitions, Petitioners raise multiple issues, all of which ultimately challenge the Commission's order that the WRAM/MCBA utilities "in their next general rate case

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[8] None of the WRAM Utilities are scheduled to file their general rate case applications in the time period between Governor Newsom's signing the bill and its effective date.

[9] See section A.2.b., for discussion regarding omission of MCBA from SB 1469.

applications, shall not propose continuing existing Water Revenue Adjustment Mechanisms/Modified Cost Balancing Accounts . . . .” (Decision, p. 106, Ordering Paragraph #3 [Golden State Appx. 383].) For example, Golden State seeks a single remedy in its amended Petition: “Enter judgment setting aside the Decision insofar as it prohibits the WRAM Utilities from proposing continuation of the WRAM/MCBA in future general rate cases.” (Golden State Amended Petition, p. 14.) Likewise, Cal Water’s prayer for relief requests that the Court “[e]nter judgment setting aside the Decision insofar as it prohibits CWS and the other WRAM Utilities from proposing the continuation of their existing WRAM/MCBA in future General Rate Cases.” (Cal Water Petition, p. 14.) The remaining three Petitions contain almost identical requests.
(Cal-Am Petition, pp. 14-15; Liberty Petition, p. 13; CWA Petition, pp. 12-13.)

Likewise, Petitioners are clear in their joint brief that they seek judicial review of just one order in D.20-08-047, Ordering Paragraph #3:

> **The Petitioners seek judicial review of** Commission Decisions 20-08-047 and 21-09-047 (Decisions) with regard to **one order in D.20-08-047**. That order unlawfully prohibits the WRAM Utilities from continuing to use two ratemaking mechanisms referred to as the [WRAM/MCBA] that are critical elements of the tiered rate designs that those utilities use to promote water conservation [**Ordering Paragraph #3 of D.20-08-047**].

(Petitioners' Brief, p. 9, fn. omitted, emphasis added.)

Because SB 1469 has superseded that ordering paragraph, this case is moot. There is no need to continue this case. Petitioners have already achieved through the legislature the singular remedy they sought through this Court.

2. The Petitions should be dismissed because the Court cannot grant effective relief.

Well-settled law holds that an appeal is moot if events occur while the appeal is pending, which render it impossible for the appellate court to grant appellant any effective relief. (*Newsom v. Superior Court* (2021) 63 Cal.App.5th 1099, 1109-1110, citing *La Mirada Avenue Neighborhood Assn. of Hollywood v. City of Los Angeles* (2016) 2 Cal.App.5th 586, 590 (*La Mirada*).) Subsequent legislation is one type of event that can render a pending appeal moot. (*Ibid.*; see also *Equi v. San Francisco* (1936) 13 Cal.App.2d 140,141–142 (*Equi*).) "It is well settled that an appellate court will decide only actual controversies. [A]n action which originally was based upon a justiciable controversy cannot be maintained on appeal if the questions raised therein have become moot by subsequent acts or events." (*La Mirada*, *supra*, 2 Cal.App.5th, p. 590.)

Here, it would make no difference if the Court were to conclude the Commission improperly discontinued its authority for water companies to apply for WRAM/MCBA because SB 1469, and its changes to section 727.5, supersede Ordering Paragraph #3. As a result of SB 1469, the water companies are now authorized to file for WRAM protection in their future general

rate case applications and the Commission must consider that request. In other words, the Court is unable to provide effective relief, therefore the appeal of that issue is moot. (*Id.*)

The effective relief limitation is applicable even where other issues remain in the case. In *Equi*, after declaring the case moot based on one issue, the court held that the remaining question of whether appellants "had the power to impose such a license tax for revenue have become abstract, academic and dead issues which no longer present any actual controversy between the parties. It therefore appears that the only issues presented by this appeal have become moot and that 'the appeal should not be entertained solely for the purpose of entering an academic discussion of the legal questions presented.' [Citations.]" (*Equi, supra,* 13 Cal.App.2d, p. 142.) As in *Equi*, even if some WRAM discussion remains in the Decision, any Court review of that discussion is now entirely academic because SB 1469 requires the Commission to "consider" utilities' WRAM proposals anew. Because their remedy has been granted, any arguments the Petitioners may have about residual holdings are entirely academic.

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

Petitioners claim that the new legislation does not restore them to their position before the Commission issued D.20-08-047 and that only action by the Court can do that. (Petitioners' Opposition, p. 12.) This claim is incorrect. First, Petitioners cite no authority that authorizes them to be in their original position or the Court to act retroactively. Further, if they wanted to

prevent the implementation of the orders in the Decision, they would have had to seek a stay of those orders from the Commission or the Court. (Pub. Util. Code, §§ 1761-1762.) They did not.

Pursuant to the Public Utilities Code, the Court cannot take any action that would refund the rates the Commission has set in Petitioners' rate case proceedings:

> If a commission order or decision authorizing any increase or decrease in rates, or changing any rate classification, is set aside by the Supreme Court or court of appeal, the matter shall be referred back to the commission for further action consistent with the order of the court. The commission, in taking this further action, shall not authorize refunds, and any relief ordered by the commission that shall have the effect of increasing or decreasing rates shall be prospective only.

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

the matter would be moot. The Court could not provide effective relief that the legislation had not already provided.

b) Petitioners' claim that SB 1469 does not grant them full relief is disingenuous.

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

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

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

(D.08-02-036, pp.25-26.) As Petitioners' Opposition explains, the WRAM tracks the revenues and the MCBA tracks the costs. Petitioners further explain that "[t]he WRAM and MCBA amounts are netted against each other so that the revenues lost as a result of lower sales may be offset by associated cost savings." (Petitioners' Opposition, p. 9.) D.08-02-036 explicitly states that the MCBA is designed to "ensure cost savings are passed on to ratepayers."
(D.08-02-036, pp.25-26.) Therefore, there is no reason the Commission would approve WRAMs in the future, but refuse to

allow Petitioners to request a MCBA. In fact, the Commission likely would *require* it.

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

Petitioners further argue that a Court ruling finding the Decision unlawful would "provide a tangible benefit should [Cal Water and Liberty] seek to restore the use of their WRAM and MCBA mechanisms before their next triennial GRC filings . . .." (Petitioners' Opposition, p. 15.) However, as discussed above, such Court-ordered relief is moot because Petitioners already have the right to file a petition for modification of their GRC decisions to include WRAM/MBCAs as a result of SB 1469 (Cal. Code of Regs., tit. 20, § 16.4) or file an Advice Letter requesting authorization for a WCMA. (Decision, p. 74.) Both Liberty utilities have filed such Advice Letters and the Commission has approved them. (Exhibits A and B, attached to *Respondent's Motion for Judicial Notice*, filed November 15, 2022.)

Finally, Petitioners claim that the legislation does not grant them full relief because the findings and conclusions in the Decision may prejudice them in the future. They speculate that other parties or the Commission may rely on those findings and conclusions in future proceedings to the detriment of Petitioners.

Based on this speculation they argue this case is not moot because the court can vacate the order to prevent this potential prejudice in future cases. (Petitioners' Opposition, p. 15-19.)

As discussed above, in *Equi*, after declaring the case moot based on one issue, the court held that the remaining questions had become "abstract, academic and dead issues which no longer present any actual controversy between the parties. It therefore appears that the only issues presented by this appeal have become moot and that 'the appeal should not be entertained solely for the purpose of entering an academic discussion of the legal questions presented.' [Citations.]" (*Equi, supra,* 13 Cal.App.2d, p. 142.) Here, the holdings are of even less import because Commission holdings do not have precedential effect and are not binding on future Commissions, as discussed below. The actual controversy in this case has been addressed by SB 1469 and the case is now moot.

c) The exceptions to the rules regarding mootness are inapplicable.

The rules regarding mootness, discussed above, are not absolute; a court may exercise its discretion to hear a matter even if moot. There are three circumstances in which the courts may continue a case or action that would otherwise be moot: 1) when a material question remains for the court's determination; 2) when the case presents an issue of broad public interest that is likely to recur; and 3) when there may be a recurrence of the controversy between the parties.

(*Harris v. Stampolis* (2016) 248 Cal.App.4th 484, 495.) Here, none of those exceptions apply.

As discussed above, no material question remains. The singular issue in this case is whether the Commission improperly discontinued its authorization for the water utilities to include WRAM/MCBA in their general rate case applications. With the new legislation reinstating that authorization, no controversy between the parties remains for the Court to decide. (*Equi, supra,* 13 Cal.App.2d, p. 142.) Moreover, this controversy is not likely to recur as Petitioners' rights have been codified and the Commission must comply with Public Utilities Code section 727.5.

Likewise, the case does not present a matter of broad public interest that is likely to recur and evade review. This case is a matter relevant only to the Class A water companies – whether the Commission improperly discontinued the WRAM Utilities' ability to seek authorization for their WRAM/MCBAs, which is too fact specific to be of broad public interest. (*Building a Better Redondo, Inc. v. City of Redondo Beach* (2012) 203 Cal.App.4th 852, 867 ["[T]his case presents fact-specific issues that are unlikely to recur and thus does not justify our exercise of discretion to resolve moot questions."].)

Petitioners claim the Court should find the remaining procedural issues are matters of broad public importance. (Petitioners' Opposition, pp. 21-22.) However, what remains are only particular procedural allegations regarding the process that led to the WRAM/MCBA discontinuation, which is now

superseded. Any remaining abstract or academic procedural issues are not matters of broad public importance.

Moreover, those remaining procedural issues are entirely moot because SB 1469 requires the Commission to "consider" the future WRAM proposals. Such consideration would occur in the context of individual GRC proceedings which would include evidentiary hearings. (Pub. Util. Code, § 728.) In their GRC proceedings, parties will present their cases and on the basis of the record evidence, the Commission will issue its decision. The Commission is not bound by the holdings and orders of past decisions. Courts have held that particular circumstances may warrant departure from prior decisions. (*Los Angeles v. Pub. Util. Com*. (1975), 15 Cal.3d 680, 698.) Here, new legislation has created changed circumstances that require the Commission to depart from D.20-08-047. As mentioned, the Commission can and will in this context, reconsider its holdings. Accordingly, none of the alleged procedural deficiencies with respect to the Commission's WRAM/MCBA determinations could reoccur.

Further, the Commission's process decisions are not likely to evade review. Petitioners and other parties can challenge the Commission's process in the future, as they have in this case, should they think the Commission has violated procedural rules. Moreover, Commission proceedings do not have the limited-time constraints that the courts have recognized when exercising discretion to hear an otherwise moot matter. (See, e.g., *Roe v. Wade* (1973) 410 U.S. 113 [pregnancy would reach full term before effective appellate review]; *Madera v. Gendron* (1963)

59 Cal.2d 798 [although defendant lost re-election during appeal, public interest question remains for future office holders].)

Although Petitioners opposed this motion to dismiss the case as moot and requested that the Court address the underlying issues in the abstract or academically, the Court should reject their request. Courts have held that "[a]ppellants cannot maintain an appeal that their own discretionary decisions have rendered nonappealable and nonjusticiable." (*Building a Better Redondo, Inc. v. City of Redondo Beach, supra,* 203 Cal.App.4th, 867.) Petitioners made the decision to seek legislation to overturn Ordering Paragraph #3 of the Decision before the Court had time to decide the issues in this case. If Petitioners wanted Court review, they could have waited for the Court to decide this case before seeking legislation, but they did not. (See *ibid*.)

d) Petitioners misinterpret the relevant caselaw.

Petitioners argue that if the Court concludes that SB 1469 renders the Petitions moot and that the case should be dismissed, the Court should still vacate the Decision and its findings and conclusions. (Petitioners Opposition, pp. 26-27.) They base this argument on *Paul v. Milk Depots, Inc.* (1964) 62 Cal.2d 129, 134 (*Milk Depots*). Petitioners' reliance on this case is misplaced. *Milk Depots* holds that once the subject ordinance was modified and the basis for the judgment in the trial court has disappeared, to avoid impliedly affirming that judgment, the Court should reverse the judgment to restore the matter to the superior court, with directions to the lower court to dismiss the proceeding.

However, *Milk Depots* is not applicable here because, unlike this case, in *Milk Depots* the petitioner was not the cause of the change in the ordinance that rendered the case moot:

> It is settled that "the duty of this court, as of every other judicial tribunal, is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it. It necessarily follows that when, pending an appeal from the judgment of a lower court, and **without any fault of the defendant**, an event occurs which renders it impossible for this court, if it should decide the case in favor of plaintiff, to grant him any effectual relief whatever, the court will not proceed to a formal judgment, but will dismiss the appeal. [Citations.]". [Citations.] In the present status of the case before us there is neither any "actual controversy" upon which a judgment could operate nor "effectual relief" which could be granted to any party.

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

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

> In the *Milk Depots*, *City of Yucaipa* and *City of Los Angeles* cases, however, **the events that mooted the underlying controversies were not initiated by**

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

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

Likewise, *Van't Rood v. County of Santa Clara* (2003) 113 Cal.App.4th 549, 560 (*Van't Rood*) can be distinguished. Petitioners argue that the instant case is not moot because the remedy provided by the legislation merely provides an alternate remedy. (Petitioners' Opposition, pp. 19-20.) In *Van't Rood* the petitioner had filed a petition to exclude the petitioners' properties from the 1970 parcel map so he could divide it three ways and not have to meet the minimum lot sizes under the parcel map. The County argued the case was moot because the zoning ordinance had changed and petitioner could legally divide his property into two parcels, without an exclusion. (*Van't Rood*,

supra, 113 Cal.App.4th 558-560.) These were two very different remedies. In the instant case, Petitioners procured the very remedy from legislation that they seek from this Court, to effectively reverse the Commission's order eliminating Petitioners' authority to request WRAM/MCBAs in future GRCs. Because it is not an "alternate remedy," this case is moot.

3. Petitioners' assertion of harm is unfounded and groundless.

Petitioners' Opposition alleges certain of the Petitioners have been harmed as a result of filing their GRC applications without requesting WRAM/MBCAs. (Petitioners' Opposition, p. 10.) Petitioners' allegations do not identify any specific harm incurred by any Petitioner. This is likely because none of the water utilities are operating under rates that do not include a WRAM/MBCA or a similar mechanism that provides revenue protections for the utilities.

Petitioners' claims of harm are speculative because the WRAM/MCBA tracks both over- and under-collections. In a situation where the WRAM/MCBA would have been over-collected, not having a WRAM/MCBA could provide a windfall for the utility. Accordingly, there is no basis to conclude that the utilities are harmed simply by filing a GRC application without including a request for a WRAM/MCBA. The Commission regulates many water companies that do not have a WRAM/MCBA. Regardless of whether a water utility has a WRAM/MCBA or not, the Commission has a statutory obligation to set rates to afford utilities "an opportunity to earn a reasonable rate of return on its used and useful investment, to attract

capital for investment on reasonable terms and to ensure the financial integrity of the utility." (Pub. Util. Code, § 701.10 subd. (a).)

Moreover, Petitioners have the right to file a petition for modification of their GRC decisions to include WRAM/MBCAs as a result of SB 1469 (Cal. Code of Regs., tit. 20, § 16.4.) or file an Advice Letter requesting authorization for a WCMA. (Decision, p. 74.) Both Liberty utilities have filed such Advice Letters and the Commission has approved them. (Exhibits A and B, attached to *Respondent's Motion for Judicial Notice*, filed November 15, 2022.) Likewise, Cal-Am has filed a motion in its current GRC proceeding to include a request for a decoupling mechanism. (Petitioners' Opposition, p. 10.)

As discussed above, Petitioners' requested remedy in these Petitions is to set aside the Commission's order that the WRAM/MCBA utilities shall not propose continuing their existing WRAM/MCBA in their next GRC applications. SB 1469 provides that relief. Because the Court cannot provide effective relief in this mooted case, and no exceptions apply that would require judicial discretion, the Court should dismiss the writ Petitions. In the alternative, if the Court does not dismiss the writ Petitions, the Commission requests that it reconsider its issuance of the writ of review because the issues originally presented are no longer of import. However, assuming arguendo this Court decides to review this case on the merits, the Commission addresses the issues raised in Petitioners' Brief in

the following sections of this brief and submits that the decisions at issue should be upheld.

B. The issue of the WRAM/MCBA was included within the scope of the proceeding.

Petitioners allege that the Decision is unlawful because it eliminated the WRAM in violation of section 1701.1, subdivision (c) and Commission Rules of Practice and Procedure (rules) 7.3 (Cal. Code of Regs., tit. 20, § 7.3.) by addressing an issue that was not within the scope of the proceeding. Specifically, Petitioners allege that the two scoping memo questions regarding water sales forecasting provided no notice that any change to the WRAM/MCBA would be considered in the proceeding. (Petitioners' Brief, pp. 26-27.)

Section 1701.1, subdivision (c) provides, in relevant part, that "[t]he 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 . . .." Rule 7.3, in relevant part, provides:

> The assigned Commissioner shall issue the scoping memo for the proceeding, which shall determine the schedule (with projected submission date), issues to be addressed, and need for hearing. . . . In a proceeding initiated by application or order instituting rulemaking, the scoping memo shall also determine the category. . ..

(Cal. Code of Regs., tit. 20, § 7.3.) Section 1701.1, subdivision (b) and rule 7.3 require the Scoping Memo to include the issues to be addressed in the proceeding but does not require it to list all

possible outcomes to a proceeding. In this proceeding, the discontinuation of the WRAM/MCBA was the action the Commission took as a result of its review of the forecasting issue, as identified in the Scoping Memo.

1. Water sales forecasting and the WRAM are inextricably linked.

The Scoping Memo identified water sales forecasting as an issue the Commission would address in the proceeding, specifically asking "What guidelines or mechanisms can the Commission put in place to improve or standardize water sales forecasting for Class A water utilities?" (Scoping Memo, pp. 2-3 [CWA Appx. 45-46].) The WRAM is a regulatory accounting mechanism that tracks the difference between forecast revenues and actual revenues. Water sales forecasting was an issue in this proceeding because of its effect on WRAM balances and the negative effect of those balances on customer rates. Accordingly, the WRAM is inextricably tied to water sales forecasting because when forecast sales are higher than actual sales, the WRAM Utilities recover that difference in revenue through WRAM surcharges on customers' bills. Therefore, the risk of the utilities' inaccurate forecasting is borne by the ratepayers. For water utilities without a WRAM, there is no mechanism to true-up the lost revenue when their water sales forecast is higher than actual sales and therefore the risk is borne by the utility.

In its February 23, 2018 comments, CWA specifically tied changes to the WRAM with the Commissioners' intent and the Scoping Memo:

> Last, the Commission should also consider folding the Water Revenue Adjustment Mechanism/Modified Cost Balancing Account ("WRAM/MCBA") recovery into base rates instead of surcharges. This would be in keeping with the opinions expressed by the Commissioners at the meeting when this rulemaking was initiated. . ..¶ These changes will help address the issue articulated in the Scoping Memo, because more of the revenue differences between the earlier sales forecast and the actual sales will flow into base rates. This will send more accurate pricing conservation signals to customers, ameliorate intergenerational risk, help utilities avoid large WRAM/MCBA surcharges . . ..

(Comments of CWA on Phase I Issues, February 23, 2018, pp. 8-9 [*Exhibits to Answer of Respondent to Petitions for Writ of Review,* Exhibit 1, Bates No. 009-010, filed January 28, 2022].) CWA's clear understanding of the Commissioners' intent at the initiation of the rulemaking and that the issue articulated in the Scoping Memo contemplated changes to the WRAM disproves Petitioners' argument that changes to the WRAM were outside the scope of the proceeding. As the Commission explained in its Answer (pp. 25-27), it also disproves Petitioners' other argument that neither occasional mentions of the WRAM/MCBA by parties nor the ALJ's final ruling put the WRAM/MCBA within the scope of the proceeding. (Petitioners' Brief, pp. 33-34.)

Nonetheless, Petitioners argue that the Commission's central premise that the WRAM and water sales forecast are inextricably linked is without merit. For several pages,

Petitioners offer opinions and speculation on what the Commission would have, or should have, said in its scoping memos to be more explicit. (Petitioners' Brief, pp. 26-30.) However, the fact remains that the WRAM balancing account is simply an accounting of the dollar difference between a water utility's forecast water sales and its actual water sales. The WRAM exists to track the inaccuracy of forecast water sales; if water sales forecasts were accurate, there would be no need for a WRAM balancing account. Petitioners' Brief explains this concept as it tries to show how forecasting and WRAM are not linked:

> Neither the WRAM or MCBA is a component of any water sales forecasting methodology, mechanism or guideline. Instead, these water conservation ratemaking mechanisms provide protections to both the WRAM Utilities and their customers when the actual amount of water sold is less than, or greater than, the utility's applicable revenue forecast used by the Commission to determine customer water rates.

(Petitioners' Brief, p. 29.) As the Commission explained in its Answer (pp. 23-25), the issue of 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. (*Scoping Memo and Ruling of Assigned Commissioner*, January 9, 2018, pp. 2-3 (Scoping Memo) [CWA Appx. 45-46].) Accordingly, the Commission did not violate its own rules or fail to regularly pursue its authority.

2. Parties' comments show understanding that the WRAM and water sales forecasting were within the scope of the proceeding.

For the reasons stated above, the Commission's concern about water sales forecasting and its effect on customer rates is heightened because of the WRAM. The Commission has recognized in prior rulemaking proceedings that "[i]mproving forecasting methodologies is key to reducing WRAM and surcharge balances. Inaccurate forecasts provide the air that balloons the WRAM and surcharges." (D.16-12-026 (*Water Action Plan Rulemaking Decision*), p. 6.) Additionally, it found that "[t]he record of substantial WRAM balances or surcharges imposed over months or years on Class A and B water [investor-owned utility] customers due to mismatches between authorized revenue and sales demands action now to better align forecasted rates to recorded sales." (*Id*. at p. 37.)

In this Rulemaking, the Decision explains that the WRAM issue, as it relates to water sales forecasting, was part of the Rulemaking from the beginning. As the Decision emphasizes, comments made by parties throughout the proceeding show the parties understood that the WRAM and sales forecasting were to be addressed by the Rulemaking:

> California-American Water Company also identified sales forecasting as an important issue for this rulemaking to explore as the "long-standing problem of forecasting future sales … has been heightened by periods of drought and issues related to very substantial

> balances in the Water Revenue Mechanism Accounts."

(Decision, pp. 18-19, quoting Cal-Am's August 21,2017 comments to R.17-06-024, p. 3 [Golden State Appx. 295-296].)

> 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[10] while the Public Advocates Office of the Public Utilities Commission argued that the large variances in forecasted sales are exacerbated by the WRAM/MCBA process.[11] 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.

(Decision, p. 54, fns. in original [Golden State Appx. 331].)[12]

> The Public Advocates Office of the Public Utilities Commission recognizes that forecast variance is inevitable in rate-of-return regulation, but that the impact on

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[10] CWA Comments dated February 23, 2018 at p. 9.

[11] Public Advocates Office Comments dated February 23, 2018 at p. 8.

[12] The Public Advocates Office is the independent consumer advocate at the California Public Utilities Commission. The office's mission is to advocate for the lowest possible monthly bills for customers of California's regulated utilities consistent with safety, reliability, and the state's environmental goals.

> water utilities has been muted as the result of the WRAM decoupling mechanism in California. While the Public Advocates Office of the Public Utilities Commission recognized that large WRAM balances are not solely caused by a large variance in forecasted sales, it argued that by mitigating the consequences of inaccurate sales forecasts, WRAM and other decoupling mechanisms exacerbate the actual size of the variance.

(Decision, p. 30 [Golden State Appx. 307].)

Finally, the Water Division staff report on the workshop held on January 14, 2019, reports that the issue of WRAMs was discussed:

> Also discussed were the effects of mid-year corrections, water revenue adjustment mechanisms (WRAMS) and sales reconciliation methods (SRMs), which [Public Advocates Office] claimed reduce scrutiny of company expenses and are burdensome to ratepayers.

(March 2019 ALJ Ruling, Att. A, p. 2 [CWA Appx. 79].) These comments, many of which were filed early in the proceeding, illustrate that WRAM issues were an integral part of the discussions on sales forecasting throughout the proceeding.

Petitioners attempt to downplay the importance of these quotes claiming the Commission relies on a small number of examples. (Petitioners' Brief, p. 34.) Notably, they do not discuss the substance of the quotes. As shown above and in its Answer, the Commission provided enough examples to show that many parties, including the Petitioners, throughout this long

proceeding, demonstrated an understanding that the WRAM was included within the scope of the proceeding.

3. As a pilot program, continuation of the WRAM/MCBA was regularly under review.

Further, the parties had notice that changes to the WRAM/MCBA would be considered in the proceeding because, as a pilot program, the continuation of the WRAM and MCBA was regularly under consideration. As explained in the Answer, from the time the WRAMs were initially authorized, the Commission regularly evaluated whether the WRAM and MCBA should be continued and highlighted the need for further consideration. (See Answer, pp. 33-34, citing D.12-04-048, *WRAM Amortization Decision at pp. 42-43 and D.16-12-026, Water Action Plan Rulemaking Decision at p. 41.*)

Nonetheless, Petitioners claim the Commission's efforts to cast the WRAM/MCBA as a 'pilot program' must be rejected because the Commission made the WRAM/MCBA pilot program permanent for all WRAM Utilities when it adopted a settlement agreement in a Cal Water general rate case. (Petitioners' Brief, p. 32.) In this Cal Water GRC decision, the Commission ordered:

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

(D.16-12-042, p. 78, Ordering Paragraph #7; 2016 Cal. PUC LEXIS 746, *103.) Petitioners claim that per the settlement adopted by that decision, two of the five elements comprising the pilot conservation rate design are the WRAM and MCBA.

However, Petitioners ignore that this same decision contains a finding of fact that states "Cal Water's current Water Revenue Adjustment Mechanism (WRAM) will remain in place through this GRC cycle." (D.16-12-042, p. 75, Finding of Fact #13; 2016 Cal. PUC LEXIS 746, *100.) Moreover, Chapter 3 (Rate Design Issues) of the settlement agreement explains what rate design is:

> In general, once the revenue requirement for a rate case has been finalized, a determination is made in regards to apportioning the revenue requirement among different customer classes: residential, non-residential, flat-rate, fire service, etc. Once that apportionment is made, a determination is made within a customer class as to what portion of the revenue requirement is obtained from fixed monthly charges and what portion of the revenue requirement is obtained from variable usage charges.

(D.16-12-042, Settlement, p. 14; 2016 Cal. PUC LEXIS 746, *129.) Nowhere in the rate design chapter is WRAM/MCBA even mentioned. Although revenue generated by the WRAM/MCBA is apportioned by the "pilot conservation rate design," it is not part of rate design and was not made permanent by D.16-12-042.

Moreover, in that decision, Conclusion of Law #10 makes clear that "pursuant to Rule 12.5, the Settlement does not bind or otherwise impose a precedent in this or any future proceeding" and in future applications, Cal Water must "fully justify every request and ratemaking proposal without reference to, or reliance

on, the adoption of the Settlement." (D.16-12-042, p. 76, Conclusion of Law #10; 2016 Cal. PUC LEXIS 746, *101.)

4. Parties had notice that the Commission was considering replacing the WRAM/MCBA.

Petitioners further allege the fact that none of the five WRAM Utilities proffered any record evidence on the need to continue the WRAM/MCBA demonstrates that the Scoping Memo failed to provide notice that the Commission would consider eliminating the WRAM/MCBA. (Petitioners' Brief, pp. 32.) Petitioners ignore the September 2019 ALJ Ruling Inviting Comments that specifically invited the parties to comment on that exact question:

> 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?

(September 2019 ALJ Ruling Inviting Comments, p. 3 [CWA Appx. 127].)

Petitioners had every opportunity to present such evidence in its comments to the September 2019 ALJ Ruling Inviting Comments, but declined to do so. Their rationale that they misunderstood the intent of the ALJ's question does nothing to support their argument. (Petitioners' Brief, pp. 33-34.) For further discussion that parties had notice and an opportunity to present evidence, see pages 31-33 of the Answer.

The above notwithstanding, Petitioners cite *Southern California Edison Co. v. Public Utilities Com.* (2006) 140 Cal.App.4th 1085 (*Edison*) and distinguish *BullsEye Telecom, Inc. v. Public Utilities Com.* (2021) 66 Cal.App.5th 301 (*BullsEye Telecom*) to support their scoping memo arguments. (Petitioners' Brief, pp. 35-38.) As discussed in Respondent's Answer, Petitioners' reliance on *Edison* is misplaced. The Commission stands by its analysis of both cases in its Answer (pp. 28-31) and will not repeat that analysis here.

There was no scoping memo violation, and even if there had been, Petitioners were not prejudiced because they had ample opportunity to address the issue.

C. Petitioners had an ample opportunity to be heard.

Petitioners contend they were denied due process because they were not given a meaningful opportunity to be heard and to respond to the discontinuation of the WRAM in violation of statutory requirements and constitutional due process. Petitioners argue the Decision violated section 1708 by failing to have an evidentiary hearing before discontinuing the WRAM. (Petitioners' Brief, p. 38.) More specifically, they argue that the Decision's order to refrain from seeking WRAM/MCBAs in their next general rate case proceedings rescinds previous Commission decisions without affording parties a meaningful opportunity to address the relevant issues as required by section 1708. (Petitioners' Brief, pp. 39-40.) As discussed above, this issue is now moot, as a result of SB 1469.

1. Neither section 1708 nor section 1708.5 required hearings prior to the Commission's WRAM determination.

As set forth in section 1708, the Commission may rescind, alter, or amend any order or decision made by it, after notice to all the parties and with an opportunity to be heard.

However, the Decision does not rescind, alter, or amend any prior decision. Rather, based upon the record in the Rulemaking proceeding, the Commission determined that the water conservation mechanism that had been specifically approved *for past rate cycles* would not be necessary to incent the water utilities to promote water conservation in future rate cases. The Decision specifically stated that the policy decision to discontinue the use of the WRAM would be phased out, permitting the utilities to continue under their current GRC decisions, and as they expire, the policy would be implemented in the utilities' next GRC proceedings. (Decision, p. 72 [Golden State Appx. 353].) Because no changes or modifications were made to any prior decisions, section 1708 is not implicated, and no hearing is required.

In fact, the Commission has long interpreted Section 1708 in light of its discretion to reopen proceedings. (*Decision Denying Petition for Modification of Decision* 14-08-057 (2017) [D.17-12-006] p.10.) As a general matter, the Commission has exercised its discretion under section 1708 in order to ensure that settled expectations remain undisturbed, and to ensure that parties are insulated from relitigation of decided matters. The

burden of demonstrating that reopening a proceeding is justified is substantial. (*Order Denying Petition to Set Aside Submissions and Reopen Proceedings* (1980) [D.92058] 4 Cal.P.U.C.2nd 139, 150; 1980 Cal. PUC LEXIS 785, at *23-24.)

The Commission's Rules of Practice and Procedure support the premise that 1708 applies only when the Commission makes changes to prior Commission decisions. The Rules have three references to section 1708, each of which pertains to a request to modify the wording of a previous decision: Rule 16.4, Petition for Modification; Rule 16.5, Correction of Obvious Errors; and Rule 16.6, Extension of Time to Comply. (Cal. Code of Regs., tit. 20, §§ 16.4, 16.5, 16.6.) Only one rule references section 1708.5: Rule 6.3 subdivision (a), Petition for Rulemaking, which requires that the proposed regulation apply to an entire class of entities or activities and must apply to future conduct. (Cal. Code of Regs., tit. 20, § 6.3 subd. (a).) None of these rules apply to the instant case, a rulemaking proceeding initiated by the Commission, in which the Commission adopts a policy that will apply in future proceedings.

This is further reinforced by section 1708, which provides "[a]ny 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**." (Pub. Util. Code § 1708, emphasis added.) This section contemplates a corrective decision, not a forward-looking policy decision.

Next, Petitioners claim that section 1708.5 subdivision (f) entitles Golden State to evidentiary hearings before its

authorization to use its WRAM/MCBA can be revoked because it had evidentiary hearings in its GRC proceeding that affirmed its use of its WRAM/MCBA.[13] (Petitioners' Brief, pp. 40-41.) Petitioners are wrong. Section 1708.5 subdivision (f) is not applicable to the instant case because the Decision did not amend or repeal any regulations and Golden State's WRAM/MCBA is not a regulation under section 1708.5 subdivision (f). Section 1708.5 subdivision (f), authorizes the Commission to:

> 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.

However, the Legislature did not intend for the term "regulation" to apply to all Commission decisions and orders:

> 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,

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[13] Notably, this is a change in position for Cal Water. In its rehearing application it argued that under section 1708.5 subdivision (f), the WRAM is not a regulation as it is not a rule of general applicability. Its comments expressed concern about the improper characterization of the WRAM as a regulation. (*Application of California Water Service Company for Rehearing of D. 20-08-047*, October 5, 2020, p. 24 [Joint App. GG, p. 651 (prior CWS Ex. BB)].)

> be construed as a general reference to rules of general applicability and future effect.

(Assembly Bill 301 (1999), Stats. 1999, c. 568, Section 1(b), available at: https://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=199920000AB301.) Even if Golden State's WRAM was approved in its GRC proceeding after an evidentiary hearing, it is not a regulation because it is not a rule of general applicability, but is instead a revenue mechanism that the Commission authorized specifically for Golden State. As a result, section 1708.5 subdivision (f) is inapplicable in this case, as is section 1708.

2. Even if Petitioners had a right to a hearing, they waived the right by failing to assert it.

Even assuming, arguendo, that Petitioners did have a statutory right to hearings, as discussed in the Answer, Petitioners waived that right by not requesting that the Commission schedule hearings. (Answer, pp. 38-39.) In *California Trucking Association v. Public Utilities Commission* (1977) 19 Cal.3d 240 (*California Trucking*), a ratesetting proceeding, the Court noted that "[i]f 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." (*California Trucking, supra*,19 Cal.3d at 245.) Further, the Court found that "there is nothing remarkable in the concept that one who is entitled to a hearing may waive his right thereto by failing to assert it." (*Id*. at p. 245, fn. 7.)

Petitioners argue that "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." (*Joint Reply to Answer to Petitions for Writ of Review,* p. 28.) The law is not limited to this interpretation. This Court has explained: "Generally, "waiver" denotes the voluntary relinquishment of a known right. But it can also mean the loss of an opportunity or a right as a result of a party's failure to perform an act it is required to perform, regardless of the party's intent to abandon or relinquish the right. [Citations.]" (*Platt Pacific, Inc. v. Andelson* (1993) 6 Cal.4th 307, 315 (*Platt*).)

The Court further noted:

> The confusion engendered by the multiple meanings of "waiver" is not new. More than 30 years ago, Professor Williston observed: "In view of these different meanings of the word 'waiver' it is obviously futile to attempt to define the requirements of a valid waiver unless its use is first confined to some one or more of its ordinary applications wherein the requirements of the law are identical. Until that is done there will be constant confusion of expression." (5 Williston, Contracts, *supra*, § 679, at p. 257.)

(*Platt*, *supra*, 6 Cal.4th, 315.) Here, Petitioners had knowledge that the Commission was considering changes to the WRAM/MCBA and as experienced practitioners they knew the Commission's rules, yet they chose a strategy that did not include requesting hearings.

As discussed above, section 1708 does not provide the right to evidentiary hearings in this proceeding. But even if Petitioners had such a right, the Commission did not violate Petitioners' due process rights as no party requested evidentiary hearings. The Commission refers to its Answer on that topic which explains how Petitioners had ample and repeated notice and opportunities to be heard. (See Answer, pp. 39-42.)

D. The Decision is supported by record evidence.

Petitioners argue that that elimination of the WRAM is not supported by record evidence. Despite these allegations, as shown in the Commission's Answer, there is ample record evidence to support the Decision. (See Answer, pp. 43-53.)

The Decision is an exercise of the Commission's legislative powers. The proceeding from which the Decision arose is a rulemaking, categorized as quasi-legislative, which places the matter within the public utility legislative function. (See *Wood v. Public Utilities Com*. (1971) 4 Cal.3d 288, 291 (finding that "[i]n adopting rules governing service and in fixing rates, a regulatory commission exercises legislative functions delegated to it …").) A legislative or quasi-legislative proceeding stands in contrast to a quasi-adjudicative proceeding, which involves an agency "applying an existing rule to existing facts," whereas the legislative function involves "creating a new rule for future application." (*20th Century Ins. Co. v. Garamendi* (1994) 8 Cal.4th 216, 275 (internal citation marks omitted).) Here, the Commission's actions were entirely prospective and clearly legislative in nature — i.e., updating program rules and

establishing new programs. When acting in its legislative capacity the Commission has broad discretion. (See e.g., *id.* at p. 306 (applying the narrow arbitrary and capricious standard of review to an agency acting in a quasi-legislative capacity).)

As the Commission explained in its Answer, the Decision's policy determinations are well supported by the record evidence, which includes party comments in response to the July 10, 2017 Rulemaking 17-06-024; party comments in response to the multiple ALJ rulings inviting comments; and the multiple Staff Workshop Reports. The Commission considered this record evidence, along with legal, policy, and technical considerations, to reach its decision to discontinue any future authorization to use the WRAM/MCBA. (Answer, p.44.)

In their Brief, as in their Petitions, Petitioners support their allegations with evidence they provided in their comments on the Proposed Decision. (Petitioners' Brief, pp. 46-48, 50.) However, Petitioners cannot relitigate the proceeding before this Court. Where the Commission's findings are based upon adequate record evidence, the Court's inquiry must stop there. (*Clean Energy Fuels Corp. v. Public Utilities Com.* (2014) 227 Cal.App.4th 641, 659.)

Furthermore, comments on a proposed decision are not record evidence. Comments on a proposed decision must "focus on factual, legal or technical errors in the proposed … decision and … shall make specific references to the record or applicable law … [or are] accorded no weight. (Cal. Code of Regs., tit. 20, § 14.3 subd. (c).) Additionally, new evidence may not be

introduced in the Court's review of this case. (Pub. Util. Code, § 1757.1 subd. (c).)

Moreover, 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.

To further support their arguments, Petitioners cite *The Utility Reform Network v. Public Utilities Commission* (2014) 223 Cal.App.4th 945, 959 (*TURN*). The Commission's Answer explains that *TURN* is not relevant to this proceeding. (See Answer, pp. 46-47.) The Answer also lists the ample evidence that formed the basis for the Commission's conclusions in this quasi-legislative proceeding. (See Answer, pp. 44-53.)

Petitioners rely on *California Manufacturers Assn. v. Public Utilities Com.* (1979) 24 Cal.3d 251 to support its claim of legal error. (Petitioners' Brief, p. 49.) Petitioners provide several reasons for its belief that the evidence relied on by the Decision is faulty, however, it fails to provide references to any evidence in the record that contradicts that evidence. (Petitioners' Brief, pp.47-48.) Petitioners merely disagree with the Commission's policy determination and cannot relitigate its factual arguments before this Court. Accordingly, they have not shown legal error.

E. The Commission considered the impact of its decision on conservation and low-income customers.

Petitioners contend that the Decision violates section 321.1 subdivision (a) by failing to consider the consequences of the Decision on all ratepayers and on low-income customers. (Petitioners' Brief, pp. 51-52.) Petitioners' claims are unfounded, the Decision addressed the elimination of the WRAM and its effect on ratepayers. The Commission's Answer fully addressed this issue on the merits and the Commission stands on its Answer. (See Answer, pp. 54-57.)

The relevant part of section 321.1 subdivision (a) requires the Commission to "assess the consequences of its decisions, including economic effects . . . as part of each ratemaking, rulemaking, or other proceeding . . .."

Petitioners argue that nothing in the record addresses how elimination of the WRAM will impact low-income customers. (Petitioners' Brief, p. 52.) However, "[t]he plain language of the statute only requires the Commission to 'assess' the economic effects of a decision. It 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." (*Order Instituting Rulemaking on the Commission's Own Motion to Establish Consumer Rights and Protection Rules Applicable to All Telecommunications Utilities Rehearing Decision* [D.06-12-042], pp. 17-18.)

In its Answer, the Commission distinguished the caselaw cited in Petitioners' Brief. (See Answer, p. 55.) Additionally, the

Answer addressed Petitioners' claim that the Commission did not consider Petitioners' extra-record evidence. (Petitioners' Brief, pp. 52-54; Answer, p. 55.) It is well established that an agency's duty is to weigh the relevant evidence provided in a proceeding. However, Petitioners offer nothing to show that the Commission failed to consider all the relevant evidence in this proceeding.

The Commission has considered the material facts and weighed the relevant evidence provided in the record of this proceeding. (Decision, pp. 68-69 [Golden State Appx. 345-346].) In its consideration of the economic impacts of the Decision, the Commission explains that the appropriate place to address how each utility will provide for conservation and low-income customers, is in the water utilities' individual general rate cases, where rate design can be tailored to the specific circumstances of each district, in the setting of rates. (Decision, p. 68 [Golden State Appx. 345].) Notably, CWA's comments, on behalf of the water utilities, reflect a similar opinion. (Comments of CWA Responding to the Administrative Law Judge's September 4, 2019 Ruling, p. 18 (CWA Appx. 165).)

F. The Commission properly characterized the proceeding as quasi-legislative.

Petitioners argue that the Commission erroneously mischaracterized the proceeding as quasi-legislative rather than ratesetting, which deprived them of procedural rights available only in ratesetting proceedings. (Petitioners' Brief, p. 43.) As discussed below, as well as in the Commission's Answer, the proceeding was not miscategorized, therefore no procedural protections were denied.

The Commission fully addressed this issue in its Answer. (See Answer, pp. 57-59.) As stated there, Petitioner is statutorily barred from litigating the proceeding's quasi-legislative categorization because Petitioner did not file an appeal of the quasi-legislative categorization at any point in the proceeding. (Pub. Util. Code, § 1701.1, subd. (a).)

The proceeding was properly categorized as quasi-legislative. Section 1701.1 subsection (d)(1) defines quasi-legislative cases as proceedings that establish policy, including, but not limited to, rulemakings and investigations that may establish rules affecting an entire industry. R.17-06-024 is an order instituting rulemaking proceeding that established rules for the entire water industry. It is not a ratesetting proceeding because the Commission was not setting rates for any specific utility. (Pub. Util. Code, § 1701.1 subd. (d)(3).) The discontinuation of the WRAM was a policy decision affecting all water utilities, which will be applied in future rate proceedings. While the ordering paragraph identified the utilities that currently employ the WRAM, the adopted policy is applicable to all water utilities. (R.17-06-024, p. 19, Ordering Paragraph #7 [Cal Water Appx. 70].)

Petitioners claim that eliminating the WRAM is an unlawful ratesetting action, so it was improper for the Commission to categorize the proceeding as quasi-legislative, yet they fail to identify any rate that was set for any utility. Petitioners incorrectly argue that the "WRAM/MCBA is a mechanism that, when implemented, sets the rates for specific

utilities." (Petitioners' Brief, p. 44.) These accounting mechanisms simply track the difference between forecast water sales and actual water sales. They do not set rates. The difference reported by these mechanisms are used to set rates in a utility's GRC proceeding, but that did not happen in this quasi-legislative proceeding.

If Petitioners thought changes to the WRAM/MCBA were ratesetting in nature, they were required to challenge the categorization of the proceeding. As discussed, Petitioners were aware that changes to the WRAM/MCBA were within the scope of the proceeding yet they did not challenge the categorization of the proceeding. (See section III. B. above; Answer, p. 58.)

Moreover, if Petitioners *believed* the September 2019 ALJ Ruling Inviting Comments had expanded the scope of the proceeding, they had ten days in which to seek rehearing on the original categorization. Because they did not, the parties are statutorily barred from challenging the categorization of the proceeding. (Pub. Util. Code,
§ 1701.1, subd. (a).)

V. CONCLUSION

Because the Court cannot provide effective relief in this mooted case, and no exceptions apply that would require judicial discretion, the Court should dismiss the writ Petitions. In the alternative, if the Court does not dismiss the writ Petitions, the Commission requests that it reconsider its issuance of the writs of review because the issues originally presented are no longer of import.

In the event the Court rules on the merits of the Petitions, each of the Petitioners has failed to demonstrate any basis for the Court to grant Petitioners relief. As a result, the Commission respectfully requests that the Court uphold the Commission decisions at issue.

December 9, 2022 Respectfully submitted,

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CERTIFICATE OF WORD COUNT

I hereby certify that the foregoing Answer of Respondent is 13,003 words in length. In completing this word count, I relied on the "word count" function of the Microsoft Word program.

Dated: December 9, 2022 By: /s/ *DARLENE M. CLARK*
DARLENE M. CLARK

STATE OF CALIFORNIA
Supreme Court of California

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