IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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

ANSWER OF RESPONDENT
TO PETITIONS FOR WRIT OF REVIEW

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ANSWER OF RESPONDENT
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TO THE HONORABLE PRESIDING JUSTICE TANI GORRE CANTIL-SAKAUYE & ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE STATE OF CALIFORNIA:

Pursuant to Rule 8.724 of the California Rules of Court, Respondent, the California Public Utilities Commission

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(Commission), respectfully submits its answer to the amended petition for writ of review (petition) filed by Golden State Water Company, in Case No. S269099, and the petitions filed by California-American Water Company, California Water Service Company, California Water Association, and Liberty Utilities (Park Water) Corp. and Liberty Utilities (Apple Valley Ranchos Water) Corp. (together, Liberty), in Case No. S271493, (both cases jointly, Petitioners) challenging Commission Decisions (D.) 20-08-047 (Decision) and 21-09-047 (Rehearing Decision).[1] The Commission denies that any writ should be issued.

I. STATEMENT OF THE CASE

In this case, Petitioners, certain Class A water utilities,[2] challenge a Commission policy determination reached after a quasi-legislative proceeding. The Commission determined that a pilot program balancing account mechanism, applied to certain Class A water utilities, is not serving its purpose and should be discontinued.[3] Without basis, Petitioners contend that they were denied due process and that the underlying proceeding had procedural deficiencies.

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[1] Unless otherwise noted, citations to Commission decisions issued since July 1, 2000 are to the official pdf versions, which 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] Class A water utilities are those water utilities with more than 10,000 service connections.

[3] 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.

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

II. INTRODUCTION AND BACKGROUND

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].)

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Public Utilities Code section 1701.1 subdivision (d)(1)[4] 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, 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 often 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. (Decision at pp. 68-69 [Golden State Appx. 345-346].) As the Commission has previously explained, circumstances have changed since this pilot program was implemented:

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

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> 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] at p. 24.)

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

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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] at 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. However, if a water utility's WRAM/MBCA is perpetually under-collected, customers may experience continually increasing surcharges on their water bills. (Decision at pp. 51-52, 55-56 [Golden State Appx. 328-329, 332-333].)

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. 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 at pp. 55-56 [Golden State Appx. 332-333].) For example, actual sales may be less than forecast sales during a rainy year in which

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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 at 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 many 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 at pp.73-74 [Golden State Appx. 350-351].)

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 at 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

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disincentive to conserve water. The Commission subsequently adopted the WRAM/MCBA as a pilot program for some class A water utilities to address conservation. (Decision at 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 (*WRAM Amortization Decision*) at 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*) at pp. 5-7.) Although the final decision retained the mechanisms, 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

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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 at 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 a timetable for resolution. (Pub. Util. Code § 1701.1 subd. (c).) Workshops were held to provide an opportunity for the parties to discuss the issues in the scoping memo. An 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]

[5] The M-WRAM differs from the WRAM, in that the M-WRAM was adopted to protect the utility from reduced revenues collected

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The Decision also adopted other requirements relating to Class A water utilities' low-income rate assistance programs.

Timely applications for rehearing of D.20-08-047 were filed jointly by Liberty Utilities (Park Water) Corp. and Liberty Utilities (Apple Valley Ranchos Water) Corp. (together, Liberty); and separately by California-American Water Company (Cal-Am); California Water Association (CWA); California Water Service Company (Cal Water); and Golden State Water Company (Golden State) 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. California-American Water Company, California Water Service Company, California Water Association, and Liberty Utilities Corp. each filed timely petitions for writ of review, which were filed in Case No. S271493.

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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 at p.52 [Golden State Appx. 329].)

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On November 8, 2021, in response to the Commission's filed request to consolidate the two cases, the Court ruled that the Commission may file a single answer to both cases and Petitioners may also file a single reply to both cases.

On November 11, 2021, the Court granted the Commission's request for an extension of time to file its answer. The answer is now due by January 31, 2022.

The National Association of Water Companies (NAWC) filed a Letter of Amicus Curiae (Amicus Curiae Letter) on December 9, 2021.

III. ISSUES PRESENTED

The Petitions raise the following issues:

1) Is the Commission's discontinuation of the WRAM/MCBA within the scope of the proceeding?
2) Did the Commission afford the parties due process?
3) Is the Decision supported by record evidence?
4) Did the Commission consider the impact of its decision on conservation and low-income customers?
5) Did the Commission properly characterize the proceeding as quasi-legislative?

The answers to all these questions are in the affirmative. The Commission acted lawfully and respectfully requests that the Court deny the Petitions as meritless.

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IV. STANDARD OF REVIEW

This Court has jurisdiction to review the Commission decisions at issue pursuant to section 1756. Section 1756, subdivision (a) provides: "any aggrieved party may petition for a writ of review in the court of appeal or the Supreme Court.…" Section 1756, subdivision (f) provides: "… review of decisions pertaining solely to water corporations shall only be by petition for writ of review in the Supreme Court," except in cases of complaints or enforcement matters. The scope of judicial review of a Commission decision is to be "narrow in both 'manner and scope.'" (*San Diego Gas & Electric Co. v. Superior Court* (1996) 13 Cal.4th 893, 915.)

The grant of a writ of review of Commission decisions under section 1756 is discretionary rather than mandatory. (*Pacific Bell Wireless, LLC v. Public Utilities Com.* (2006) 140 Cal.App.4th 718, 729; *Pacific Bell v. Public Utilities Com.* (2000) 79 Cal.App.4th 269, 272.) The plain language of the statute provides: "*If* the writ issues, it shall be made returnable at a time and place specified by court order . . . ." (Pub. Util. Code, § 1756, subd. (a) (emphasis added).) Thus, the Court is "not compelled to issue the writ if the [Commission] did not err . . . ." (*Pacific Bell v. Public Utilities Com.*, *supra*, 79 Cal.App.4th at p. 279; see also, *Southern California Edison Co. v. Public Utilities Com.* (2005) 128 Cal.App.4th 1, 9, rehg. den., 2005 Cal.App. LEXIS 745 ["the court need not grant a writ if the petitioning party fails to present a convincing argument that the decision should be annulled"].)

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The standard of review of the Commission decisions challenged by Petitioners is set forth in section 1757.1. Section 1757.1, subdivision (b) provides:

> In reviewing decisions pertaining solely to water corporations, the review shall not be extended further than to determine whether the commission has regularly pursued its authority, including a determination whether the order or decision under review violates any right of the petitioner under the Constitution of the United States or this state.

Pursuant to section 1757.1, subdivision (c):

> No new or additional evidence shall be introduced upon review by the court. The findings and conclusions of the commission on findings of fact shall be final and shall not be subject to review except as provided in this article. The questions of fact shall include ultimate facts and findings and conclusions of the commission on reasonableness and discrimination.

The Court's function is not to hold a trial de novo, but to review the entire record to determine whether the Decision's conclusions are reasonable and are supported by the evidence. *(Camp Meeker Water System, Inc. v. Public Utilities Com.* (1990) 51 Cal.3d 845, 863-864.)

Courts have opined that the Commission "is not an ordinary administrative agency, but a constitutional body with broad legislative and judicial powers." (See e.g., *Wise v. Pacific Gas & Electric Co.* (1999) 77 Cal.App.4th 287, 300; *Southern California Edison Co. v. Public Utilities Com.* (2000) 85 Cal.App.4th 1086, 1096.)

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In *Greyhound Lines, Inc. v. Public Utilities Com.* (1968) 68 Cal.2d 406, the Court noted that there is a "strong presumption of validity of the commission's decisions." (*Id.* at pp. 410-411 [citations omitted]; see also, *Southern California Edison Co. v. Public Utilities Com.*, *supra*, 85 Cal.App.4th at pp. 1086, 1096.) The Court has cautioned that the scope of review of Commission decisions shall not extend further than to determine whether the Commission has regularly pursued its authority. (See, e.g., *Goldin v. Public Utilities Com.* (1979) 23 Cal.3d 638, 652-653; *Toward Utility Rate Normalization v. Public Utilities Com.* (1988) 44 Cal.3d 870, 880.)

In the Court's review, the Commission's interpretation of the Public Utilities Code, as the agency constitutionally authorized to administer its provisions, should be given great weight. (*Southern California Edison Co. v. Peevey* (2003) 31 Cal.4th 781, 796; *Greyhound Lines, supra,* 68 Cal.2d at p. 410 ["the commission's interpretation of the Public Utilities Code should not be disturbed unless it fails to bear a reasonable relation to statutory purpose and language…"]; *Southern California Edison Co. v. Public Utilities Com.* (2004) 117 Cal.App.4th 1039, 1044.)

Even under the more general agency deference guidelines of *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1 (*Yamaha*), the Commission is entitled to the greatest level of agency deference, as the Commission has been delegated the Legislature's lawmaking power in its regulation of public utilities. (Pub. Util. Code, § 701; *Yamaha, supra,* 19 Cal.4th at

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p. 11.) Because these rulemaking decisions are created "'pursuant to a delegation of legislative power'," they "'do not present a matter for the independent judgment of an appellate tribunal; rather [questions of their validity] come to this court freighted with [a] strong presumption of regularity….' [Citation]." (*Yamaha, supra,* 19 Cal.4th at p. 11.) "The rationale for deference is strongest when the challenged action by the agency results from a rulemaking decision within the authority delegated to the agency [citation], where the agency interprets one of its own regulations [citations], or where the agency engages in factfinding based on conflicting evidence [citation]." *New Cingular Wireless PCS, LLC v. Public Utilities Com.* (2016) 246 Cal.App.4th 784, 807.)

Finally, with respect to Petitioners' constitutional challenges, section 1760 provides:

> Notwithstanding Sections 1757 and 1757.1, in any proceeding wherein the validity of any order or decision is challenged on the ground that it violates any right of petitioner under the United States Constitution or the California Constitution, the Supreme Court shall exercise independent judgment on the law and the facts, and the findings or conclusions of the commission material to the determination of the constitutional question shall not be final.

It has long been recognized that section 1760 does not authorize the Court to substitute its own judgment as to the weight to be accorded evidence before the Commission or the purely factual findings made by it. "In other words, judicial reweighing of evidence and testimony is ordinarily not

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permitted." (*Pacific Gas & Electric Co. v. Public Utilities Com.* (2015) 237 Cal.App.4th 812, 838-839, *citing, inter alia, Toward Utility Rate Normalization v. Public Utilities Com.* (1978) 22 Cal.3d 529, 538 ["When conflicting evidence is presented from which conflicting inferences can be drawn, the commission's findings are final"]; *Pacific Tel. & Tel. Co. v. Public Utilities Com.* (1965) 62 Cal.2d 634, 647 [findings which are final include those involving "conflicting evidence [or] undisputed evidence from which conflicting inferences may reasonably be drawn"]; *Cal. Portland Cement Co. v. Public Utilities Com.* (1957) 49 Cal.2d 171, 175 ["The weighing of whatever factors may have tended [to support an implied finding by the Commission] was a matter within the exclusive jurisdiction of the [C]ommission"].) "The only exception is those findings or conclusions 'drawn from undisputed evidence from which conflicting inferences may not reasonably be drawn [and therefore] present questions of law.'" (*Pacific Gas & Electric Co. v. Public Utilities Com.*, *supra*, 237 Cal.App.4th at p. 839, quoting *Pacific Tel. & Tel. Co. v. Public Utilities Com., supra*, 62 Cal.2d at p. 647.)

In the present case, the Commission proceeded in the manner required by law. Petitioners have failed to present any valid argument for the Court to annul the Commission decisions. Therefore, the Commission respectfully submits that the Petitions should be denied.

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V. ARGUMENT

A. The discontinuation of the WRAM was 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 7.3[6] (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 discontinuation of the WRAM/MCBA decoupling mechanism was not included in the scoping memos issued in the proceeding. (Golden State at p. 28, CWA at p. 30, Cal-Am at p. 26, Cal Water at p. 25, Liberty at p. 25.) Additionally, Cal-Am claims there may be entities who would have participated in the proceeding, but were not noticed of the potential discontinuation of the WRAM/MCBA. (Cal-Am at pp. 29-30.) As explained below, Petitioners are not correct. 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, at pp. 2-3 (Scoping Memo) [CWA Appx. 45-46].) The Commission did not violate its own rules or fail to regularly pursue its authority.

Section 1701.1, subdivision (c) provides, in relevant part, that "[t]he assigned commissioner shall prepare and issue by

[6] Unless otherwise noted, all rule references are to the Commission's Rules of Practice and Procedure.

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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.

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 at pp. 2-3 [CWA Appx. 45-46].) The WRAM is a regulatory accounting mechanism. 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. 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 surcharges on customer's bills. Therefore, the risk of the utilities' inaccurate forecasting is borne

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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.

The Commission's concern about water sales forecasting and its effect on rates is, therefore, 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) at 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.)

Here, 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

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> substantial balances in the Water Revenue Mechanism Accounts."

(Decision at 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[7] 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.[8] 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 at p. 54, fns. in original [Golden State Appx. 331].)[9]

> 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 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

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

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

[9] 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.

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> 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 at p. 30 [Golden State Appx. 307].)

Further, in its February 23, 2018 comments cited above, CWA specifically tied WRAM recovery 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, dated February 23, 2018 at pp. 8-9 [Resp. Appx. 009-010].)

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.

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(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.

The above notwithstanding, Petitioners cite *Southern California Edison Co. v. Public Utilities Com.* (2006) 140 Cal.App.4th 1085 (*Edison*) to support their scoping memo arguments. (Golden State at pp. 31-33, CWA at pp. 35-38, Cal-Am at pp. 27-29, Cal Water at pp. 30-31, Liberty at pp. 29-32.) However, Petitioners' reliance on *Edison* is misplaced. In *Edison*, a party, joining the proceeding late, filed opening comments ten months after opening comments were due. The comments included four-hundred pages of supporting materials and offered new proposals, for the first time in the proceeding, which were entirely unrelated to the issues listed in the scoping memo. The ALJ ruling gave parties three business days (excluding the weekend and a legal holiday) to file supplemental reply comments. (*Edison*, *supra*, 140 Cal.App.4th at 1104-1106 [prevailing wage issue added to proceeding scope to consider bid shopping and reverse auction in utility contracting].) In contrast, here, as explained above, WRAM issues were included in the list of issues in the Scoping Memo as water sales forecasts and the WRAM are inextricably linked. CWA and Cal-Am argue that neither a party nor the ALJ may expand the proceeding, but that argument is not relevant here. (CWA at p. 37, Cal-Am at p. 28.) As discussed above, sales forecasting was identified in the Commissioner's scoping memo.

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Moreover, *Edison* found that the Commission's violation of its rules was prejudicial because three business days was not enough time for parties to respond to the new proposals. (*Edison*, *supra*, 140 Cal.App.4th at 1106.) Here, in addition to the issue being part of the scoping memo and discussed throughout the proceeding, on September 4, 2019, the ALJ issued a ruling inviting further comments on the issue and thus provided the parties an additional opportunity for input. The ALJ ruling specifically asked parties to comment on whether the Commission should consider converting WRAM/MCBA to M-WRAM/ICBA. (*Administrative Law Judge's Ruling Inviting Comments on Water Division Staff Report and Responses to Additional Questions*, September 4, 2019 (September 2019 ALJ Ruling Inviting Comments) at p. 3 [CWA Appx. 127].) The parties had twelve days to file opening comments and another seven days to file reply comments. (*Id*. at p. 5 [CWA Appx. 129].) Once the ALJ's ruling issued, the parties had ample time to submit comments, and parties did file both opening and reply comments. No party has alleged it did not have time to respond to the questions. Further, unlike *Edison*, there were no lengthy proposals with attachments and the issue was one with which Petitioners were completely familiar. Even assuming, arguendo, that the Commission had violated its rules, *Edison* is not relevant here, because the parties were not prejudiced. They had ample opportunity to file substantive comments, but chose not to do so.

Additionally, Cal Water and CWA cite *City of Huntington Beach v. Public Utilities Commission* (2013) 214 Cal.App.4th 566

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(*Huntington Beach*) to support their argument. (CWA at pp. 34-34, Cal Water at pp. 31-32.) Like *Edison*, this decision is not relevant to this case. In *Huntington Beach*, in its rehearing decision, the Commission concluded that a construction project preempted local ordinances where "[t]hroughout the [Commission] proceedings, the parties and the [C]ommission emphasized that a court, not the [C]ommission, would adjudicate the validity of the City's municipal ordinances." (*Huntington Beach*, *supra*, 214 Cal.App.4th at 570.) The Court held that the Commission lacked authority to expand the scope of the underlying proceeding, during the reconsideration process, to the detriment of a party. (*Id.* at 592-593.) In the present case, there was no stipulation or express language in the Scoping Memo that eliminated an issue from the proceeding, nor was there prejudice to a party, equivalent to that in *Huntington Beach*.

The Court of Appeal addressed the holdings in both of these cases in *BullsEye Telecom, Inc. v. Public Utilities Com.* (2021) 66 Cal.App.5th 301 (*BullsEye Telecom*). In *BullsEye Telecom*, the Court of Appeal discussed that the petitioners asserted that their "evidentiary showing would have been quite different if the Scoping Memo in 2012 reflected the Commission's current view that only differences in cost-of-service could provide a 'rational basis for different rates.'" (*BullsEye Telecom*, *supra*, 66 Cal.App.5th at 327.) The Court of Appeal held that, because rational basis for different rates was an issue in the Scoping Memo, petitioners failed to show that cost was excluded as an issue by the Scoping Memo, especially in light of the legal

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position taken by the Real Party in Interest that there is no difference in cost. (*Ibid*.)

Bullseye Telecom explains that *Edison* and *Huntington Beach* "do not hold the Commission may not "depart" from a scoping memo and they do not support a finding of prejudice in the present case." (*BullsEye Telecom*, *supra*, 66 Cal.App.5th at 326.) Both of the earlier cases were reversed because the scoping memo violations were prejudicial to a party. As in *BullsEye Telecom*, those earlier cases do not support a finding of prejudice in the instant case. Here, as in *BullsEye Telecom*, the Decision did not resolve issues not encompassed by the Scoping Memo and Petitioners were not prejudiced, as they had adequate opportunity to provide evidence on the issues addressed in the Decision. (*Id*. at p. 327.)

Nonetheless, in an effort to show prejudice, Golden State and Cal Water argue if they would have had any notice that the Commission would consider eliminating the use of the WRAM and MCBA mechanisms in future general rate cases, they would have advocated for hearings. (Golden State at p. 31, Cal Water at pp. 34-35.) Further, Cal Water alleges it "was denied a meaningful opportunity to present ***any*** evidence regarding the potential elimination of the WRAM/MCBA because the Commission provided inadequate notice. (Cal Water at pp. 34-35, emphasis in original.) These baseless claims are belied by 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

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> Account (MCBA), should the Commission consider converting to Monterey-Style WRAM with an incremental cost balancing account?

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

Next, Cal Water argues that evidentiary hearings were held in prior proceedings that addressed WRAM issues. (Cal Water at pp. 34-35.) Most of those proceedings were individual water utility GRC proceedings in which customer water rates were set for that specific utility. As discussed more fully in section V. C., below, this is a rulemaking proceeding in which the Commission is setting policy for the entire water industry on a prospective basis. Here, the Commission did not set any rates for any water utility.

Cal Water argues that it would have provided "pertinent evidence" if the Commission had held evidentiary hearings.[10] (Cal Water at pp. 34-35.) However, hearings were not necessary for Cal Water to present such evidence. Cal Water and any other party had every opportunity to present such evidence in its comments to the September 2019 ALJ Ruling Inviting Comments, but declined to do so. As the Court found in *BullsEye Telecom*, "[i]f petitioners had relevant evidence to present on that issue but failed to do so, that was their own strategic decision and they cannot now be heard to complain." (*BullsEye Telecom, supra,* 66 Cal.App.5th at 327.)

[10] The evidence Cal Water alleges it would have provided is irrelevant to the Rulemaking proceeding. That evidence is more appropriately presented in its next GRC proceeding in which the Commission will set rates for Cal Water's customers.

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Moreover, nothing in the Scoping Memo precluded the WRAM utilities from requesting hearings. In fact, the Scoping Memo stated that hearings are not required at this time. It further stated that if hearings are required at a later date, an amended scoping memo would be issued. (Scoping Memo at p. 4 [CWA Appx. 47].) The parties at any time could have filed a motion to request hearings. No party did. Even after the September 2019 ALJ Ruling Inviting Comments specifically asked for comments on whether the Commission should consider replacing the WRAM with the Monterey-Style WRAM, no party requested hearings. More than ten months elapsed, after the parties filed their reply comments to the September 2019 ALJ Ruling Inviting Comments, before the Proposed Decision was issued. The parties had adequate time to file a motion requesting hearings after the ALJ ruling requested comments on that issue.

Further, the parties had notice that, as a pilot program, the continuation of the WRAM and MCBA was regularly under consideration. 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. In D.12-04-048 (*WRAM Amortization Decision*) the Commission ordered "a more vigorous review of the [WRAM/MCBA] mechanisms and options to the mechanisms, as well as sales forecasting, be conducted [in] each applicant's pending or next [GRC] proceeding." It further ordered the utilities to address five options in those proceedings, including whether the Commission should adopt a Monterey-Style WRAM

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rather than the existing full WRAM and whether the Commission should eliminate the WRAM mechanism. (*Id*. at pp. 42-43.) In D.16-12-026 the Commission stated: "We conclude that, at this time, the WRAM mechanism should be maintained." (D.16-12-026 (*Water Action Plan Rulemaking Decision*) at p. 41.) Finally, the Petitioners' filings themselves show the Commission's ongoing evaluations of the viability of the WRAM in their individual GRC, and other, proceedings. (See, e.g., Golden State at pp. 17-19, Cal Water at pp. 18-19, Liberty at pp. 17-18.) 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.

In the Amicus Curiae Letter of National Association of Water Companies (NAWC), NAWC argues that it was precluded from participating in R.17-06-024 because the Scoping Memo did not indicate the Commission would consider eliminating the WRAM during the proceeding. It alleges it was therefore deprived of the opportunity to participate in the proceeding to provide the Commission a "full and robust record on which to base its decision." (Amicus Curiae Letter at p. 6.).

Even assuming, arguendo, that NAWC was under the mistaken belief that the issue of forecasting did not include the WRAM, its allegations are disingenuous at best. As discussed more fully below, NAWC's members were participants in the proceeding, so it should have been well aware that the September 2019 ALJ Ruling Inviting Comments had requested comments on the Commission's discontinuation of the WRAM. NAWC could

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have requested party status at that time. Instead, it filed its request for party status almost a year later. By the time NAWC requested party status on July 22, 2020, Phase I of the proceeding had been submitted and the Proposed Decision had been issued.

Moreover, NAWC's motion for party status never mentioned Phase I, filing comments on the Proposed Decision, or the issue of the WRAM. In fact, its references to Covid-19 indicated it was interested in participating in Phase II of the proceeding because the scoping memo for Phase II identified Covid-19 as an issue to be addressed:

> NAWC's member companies share a deep understanding of the importance of uninterrupted delivery of quality water and wastewater services. Water plays an essential role in any thriving community and our nation's economy. Our water infrastructure systems are the backbone upon which communities survive and prosper. NAWC shares the Commission's interest in issues concerning affordability of clean, safe drinking water for low-income customers and disadvantaged communities.
>
> Now more than ever, access to quality water and wastewater services is critical for the containment of COVID-19 and the preservation of public health and sanitation. Our member companies are working to combat the spread of COVID-19 by ensuring the communities they serve have unimpeded access to clean water in order to promote personal hygiene and overall public health. As the COVID-19 pandemic continues to evolve, NAWC is committed to the health of our nation's water systems by offering the information and resources we have at our disposal to communities in need. NAWC can draw upon the

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> experience of member companies nationwide and provide insight as to industry best practices.
>
> NAWC expects to file comments when given the opportunity and participate in workshops to the extent possible. NAWC's participation will not raise new issues in this proceeding, will not prolong or delay this proceeding, and will not adversely affect the interests of existing parties.

(National Association of Water Companies Motion for Party Status, filed July 22, 2020 [Resp. Appx. 021-023].) NAWC's reference to participating in workshops further supports its intent to participate in Phase II of the proceeding, rather than Phase I.

Accordingly, the ALJ Ruling granted NAWC party status for Phase II. (August 27, 2020 E-Mail Ruling Granting Party Status to National Association of Water Companies at pp. 3-4 [Resp. Appx. 026-027].) A review of the docket card in the Rulemaking reveals that NAWC has made no filings in Phase II of the proceeding.

Nonetheless, NAWC's interests were well represented in that proceeding. All four of the petitioning water companies in Case Numbers S269099 and S271493 are active members of NAWC. The remaining petitioner, CWA, serves as a chapter of NAWC:[11]

[11] NAWC website at https://nawc.org/about-2/our-members/active-members/ and https://nawc.org/chapters/california/. The Commission respectfully requests that the Court take judicial notice of NAWC's website pages identified above, as permitted under Evidence Code section 452 subdivision (h) as the Petitioners in this case are capable of confirming or denying, with accuracy, their membership in NAWC. (Resp. Appx. 028-031].)

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> The California Water Association (CWA) is an independent organization that also serves as a chapter of the NAWC. CWA represents the interests of approximately 125 investor-owned water utilities that are regulated by the California Public Utilities Commission . . . .

Regardless of the reason NAWC was not a party to Phase I of the proceeding, it has failed to show that it was prejudiced by that decision. Many members of NAWC were active participants in that phase of the proceeding.

B. Petitioners were afforded due process.

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. Golden State and Liberty contend the Decision violated section 1708 by failing to have an evidentiary hearing before discontinuing the WRAM. 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. (Golden State at pp. 34-37, Liberty at pp. 32-34.)

Section 1708 provides the Commission discretion to rescind, alter, or amend any order or decision made by it:

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

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> decision shall, when served upon the parties, have the same effect as an original order or decision.

The Petitioners are incorrect in their argument that Section 1708 provides the right to evidentiary hearings in the Rulemaking proceeding. The Decision does not rescind, alter, or amend any prior decision. Rather, based upon the record in the Rulemaking proceeding, the Commission determined that it was no longer necessary to incent the water utilities to promote water conservation. The Decision specifically stated that the policy decision to discontinue the use of the WRAM would be implemented in the utilities' next GRCs. (Decision at p. 76 [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.

Even assuming, arguendo, that Petitioners did have a statutory right to hearings, Petitioners waived that right by not requesting that the Commission schedule hearings. In *California Trucking Association v. Public Utilities Commission* (1977) 19 Cal.3d 240 (*California Trucking*), a ratesetting proceeding, the Commission cancelled minimum rates on the transportation of flattened automobile bodies. The petitioner had requested a hearing on two separate occasions, but the Commission refused those requests. (*California Trucking Assn. v. Pub. Util. Com.*, *supra*,19 Cal.3d at 242-243.) Although the Court, based on the circumstances in that case, found that the petitioner was entitled to a hearing, it also 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." (*Id.*

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at p. 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.) 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.

Golden State alleges that because its authorization to use the WRAM/MCBA was granted following an evidentiary hearing, section 1708.5 subdivision (f) is applicable in the Rulemaking. (Golden State at p. 37.) The Commission does not dispute that section 1708.5 subdivision (f) grants the right to an evidentiary hearing under certain circumstances. However, as discussed above, even if Golden State were entitled to an evidentiary hearing in the Rulemaking, it waived that right by failing to assert it.

Golden State and Liberty next argue that because "no evidence on the efficacy of the WRAM/MCBA or the effects of its elimination had been collected in the Rulemaking …, the WRAM utilities had no reason to imagine that the Commission would eliminate the WRAM/MCBA in the Rulemaking." (Golden State at p. 36, Liberty at pp. 33-34.) As Commission-regulated water utilities, Petitioners are well aware that a rulemaking proceeding develops record evidence through the parties' submission of comments on questions posed by the Commissioner or ALJ. (See discussion, *infra*, § V. C. at p. 43.) The September 2019 ALJ

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Ruling Inviting Comments notified the parties that "the proposed decision in this proceeding may include amendments to the Commission's program rules . . . ." and "[i]n order to ensure a complete record for consideration in this proceeding the parties, in addition to commenting on the attached Staff Report, are to respond to the questions set out below." (September 2019 ALJ Ruling Inviting Comments at p. 2 [CWA Appx. 126].) One of those questions alerted the parties that the Commission was considering whether it should convert WRAMs to Monterey-style WRAMs. This was the time for the parties to provide evidence, and establish a record, on whether the Commission should do so. It is not clear how the water utilities could have "had no reason to imagine" that the Commission would eliminate the WRAM when the September 2019 ALJ Ruling Inviting Comments specifically asked that question. The Commission cannot be faulted for the Petitioners' decision to decline to provide evidence for the record.

BullsEye Telecom addressed this due process issue. In that decision, the Court of Appeal found the petitioners had the opportunity to present evidence but had not done so. (*BullsEye Telecom*, *supra*, 66 Cal.App.5th at 327.) The Court held: "[i]f petitioners had relevant evidence to present on that issue but failed to do so, that was their own strategic decision and they cannot now be heard to complain." (*Ibid.*) Likewise, in the present case, Petitioners had the opportunity to provide substantive comments in response to the questions in the September 2019 ALJ Ruling Inviting Comments, but declined to

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do so. They cannot now complain that they lacked the opportunity to be heard.

Further, Petitioners' reliance on *California Association of Nursing Homes, etc. v. Williams* (1970) 4 Cal.App.3d 800 is misplaced. (Golden State at p. 36, Liberty at p. 34.) In that case, the defendant agency, required by statute to create Medi-Cal reimbursement rates for nursing homes, failed to produce an evidentiary record for the court to review and the defendant agency based its decision on off-the-record, private negotiations with select affected businesses, rather than public hearings as required by statute. (*Cal. Assn. of Nursing Homes, etc. v. Williams, supra*, 4 Cal.App.3d at 810-812.) Golden State and Liberty argue that this case requires that evidence must be made available for rebuttal by affected parties. (Golden State at p. 36, Liberty at 34.) Here, the Commission's Rulemaking was a public proceeding. The entire record is available to the parties on the Commission's website, all parties were entitled to attend the workshops and file opening and reply comments, and there are no allegations of private negotiations.

Nonetheless, Golden State and Liberty argue that the only evidence in the record to support the Decision's elimination of the WRAM is Public Advocates Office's graph and because it had no opportunity to rebut this data, the Commission violated section 1708 and the WRAM utilities' due process rights. (Golden State at pp. 36-37, Liberty at p. 34.)[12]

[12] See page 47 for a discussion that the Public Advocates Office's graph is not "the only evidence in the record to support the Decision's elimination of the WRAM."

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It is well established that due process requires "adequate notice" and an opportunity to be heard. "Due 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 Airlines, Inc.* (1954) 42 Cal.2d 621, 632.)

Discontinuation of the WRAM/MBCA was raised throughout the proceeding and the opportunity to file opening and reply comments on this specific issue was explicitly provided in the September 2019 ALJ Ruling Inviting Comments. The graph at issue was provided in Public Advocates Office's reply comments in response to CWA's opening comments. (*Reply Comments of the Public Advocates Office on the Water Division's Staff Report and Response to Additional Questions*, September 23, 2019 at pp. 6-7 [Golden State Appx. 461-462].) In the ten months between Public Advocates Office's introduction of the graph and the issuance of the Proposed Decision, Petitioners never sought the opportunity to respond to the graph. Petitioners and the other parties could have filed a motion to strike the graph or a motion requesting the opportunity to respond to the graph. No party did so.

As discussed above, the parties did not avail themselves of the opportunity to address the graph; they "cannot now be heard to complain." Petitioners have not shown that the Commission failed to proceed in the manner required by law.

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C. The Decision is supported by record evidence.

Petitioners argue that the Decision is not supported by the record. More specifically, they contend that elimination of the WRAM is not supported by record evidence. Despite these allegations, there is ample record evidence to support the Commission's Decision.

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).)

When the Commission is acting in its legislative capacity it can rely on facts beyond just those established in an evidentiary

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hearing, with freedom to consider a broader set of record evidence, including "legislative facts." Indeed, the California Supreme Court explained that the facts found when an agency is performing a quasi-legislative function "must themselves be viewed as quasi-legislative in nature. All are informed with legal, policy, and technical considerations… . Consequently, none is similar to the sort of 'historical or physical facts' ... typically found in the course of administrative adjudication." (*20th Century Ins.*, *supra*, 8 Cal.4th at 278, fn. 12.) The Court went on to note that agencies can consider "legislative facts" that may fall outside the record (*id*. at p. 306), which are general facts that do not directly concern the parties, but can assist the Commission in deciding "questions of law and policy and discretion." (*Western Oil & Gas Assn. v. State Lands Com.* (1980) 105 Cal.App.3d 554, 565; *Order Instituting Investigation on the Commission's Own Motion into Competition for Local Exchange Service* [D.99-07-047] 1999 Cal. PUC Lexis 451 at pp. 23-24.)

In the Rulemaking proceeding, 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.

The above notwithstanding, Petitioners erroneously

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contend that certain findings of fact and conclusions of law are not supported by record evidence in violation of section 1757.1 subdivision (a)(1). (Golden State at pp. 38-45, Cal-Am at pp. 38-44, Liberty at pp. 34-40.) Petitioners support their claims with evidence they provided in their comments on the Proposed Decision. (*Ibid*.)

However, 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).)

Findings of Fact #13 and #14

Petitioners specifically argue that a critical determination in the Decision's discontinuation of the WRAM/MCBA is its finding that the mechanisms are no more effective in promoting conservation than the Monterey-Style WRAM/ICBA mechanisms, as stated in Findings of Fact #13 and #14. (Golden State at pp. 38-41, Cal-Am at pp. 42-43, Liberty at pp. 35-38.)

Findings of Fact #13 and #14 state:

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

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Golden State and Liberty allege Finding of Fact #13 is solely based on the graph submitted in Public Advocates Office's September 2019 reply comments. (Golden State at pp. 39-40, Liberty at p. 36.). However, this argument is in error because the Rehearing Decision modified the Decision to remove Finding of Fact #13 from the Decision because it was not necessary. (Rehrg. Dec. at p. 34 [Golden State Appx. 528].)

Regarding Finding of Fact 14, Golden State and Liberty further argue that because the WRAM utilities were not provided an opportunity to counter Public Advocates Office's graph, no valid record was established on the issue of whether the WRAM/MBCA should be discontinued. (Golden State at pp. 38-39, Liberty at p. 37.) To support this claim, they cite *The Utility Reform Network v. Public Utilities Commission* (2014) 223 Cal.App.4th 945, 959 (*TURN*) and claim the "[C]ourt's point was that the question was not whether hearsay evidence was admissible in Commission proceedings, but whether the Commission may rely only on disputed evidence that has not been subject to cross-examination." (Golden State at p. 39, Liberty at pp. 35-36.) Golden State and Liberty misconstrue this decision. In fact, the Court stated: "Consequently, the issue before us is a narrow one. May the Commission base a finding of fact *solely* upon hearsay evidence where the truth of the extrarecord statements is disputed? The answer is no." (*TURN*, *supra*, 223 Cal.App.4th at 959, italics added.)

In *TURN*, the Commission held adjudicatory hearings to determine whether to grant permission to Pacific Gas & Electric

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Company (PG&E) to enter into an energy contract. PG&E submitted the evidence in dispute, and because of its hearsay nature, the presiding ALJ ruled the materials could not be used as evidence of the need for the project in question. Then the Commission based the approval of the project solely upon that hearsay evidence. (*TURN*, *supra*, 223 Cal.App.4th at 949.)

Here, in this quasi-legislative proceeding, 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. The Decision cites many factors that support the discontinuation of the WRAM/MCBA. For example, it lists actions by the Legislature, the State Water Resources Control Board, and the Commission to achieve conservation; water use reduction mandates by Executive Orders of the Governor; negative customer experiences with WRAM surcharges; and that the WRAM/MCBA adjusts for variances in water sales for factors beyond just reductions caused by conservation. (Decision at p. 69 [Golden State Appx. 346].) The policy determination, in the Rulemaking proceeding, to discontinue the WRAM/MCBA is based on multiple factors and is well supported by the Decision. Therefore, *TURN* is not relevant to this proceeding.

Next, Cal-Am and Golden State claim that there are flaws in the graph provided by Public Advocates Office, so the graph does not support a finding that the M-WRAM is as effective as the WRAM/MCBA in promoting conservation. Therefore, Cal-Am

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and Golden State conclude, the Commission failed to establish any valid evidentiary record on this point. (Cal-Am at p. 43, Golden State at pp. 39-40.) This conclusion is inaccurate. Again, Cal-Am and Golden State cite to their comments on the Proposed Decision as evidence to support their argument that there are flaws in Public Advocates Office's graph. As discussed above, new evidence offered in comments on a proposed decision are not part of the record and 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.

Findings of Fact #15 and #16

Golden State argues there is no evidence to support findings regarding substantial under-collections and intergenerational transfers of costs. However, Golden State erroneously dismisses other parties' comments filed in the Rulemaking's record as cited by the Rehearing Decision at pages 14-15. Instead, Golden State asserts its arguments, provided in comments on the Proposed Decision that are not in the record, disproves the findings in the Decision. (Golden State at p. 43.)

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Moreover, the proffered data, which is not record evidence, only addresses two of Golden State's many service areas. However, the Decision considers the WRAM/MCBA mechanism generically for all the service areas of all the WRAM utilities to make its policy determination. The Rehearing Decision sufficiently identifies the basis for the Decision's findings regarding the existence of substantial under-collections and intergenerational transfers of costs, therefore, Golden State's allegation of obfuscation is unfounded. (Rehrg. Dec. at pp. 14-15 [Golden State Appx. 508-509].)

Finding of Fact #19

Cal-Am relies on *California Manufacturers Assn. v. Public Utilities Com.* (1979) 24 Cal.3d 251 and *Camp Meeker Water System, Inc. v. Public Utilities Com., supra*, 51 Cal.3d 845 to support its claim that the Commission commits legal error when it issues a decision which is unsupported by evidence before it. (Cal-Am at p. 38-39.) However, that is not the situation in this proceeding. Cal-Am's petition provides 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. (Cal-Am at pp. 39-43.) Cal-Am merely disagrees with the Commission's policy determination. It has not shown legal error.

Cal-Am alleges Finding of Fact #19 is unsupported by the record. Finding of Fact #19 states:

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

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This Finding of Fact is supported by Public Advocates Office's comments, which addressed incentives to develop accurate forecasts:

> [T]he Public Advocates Office strongly supports the development of forecasts that are as accurate as possible for both revenues and expenses. When revenue variances are tracked in decoupling mechanisms (i.e., Water Revenue Adjustment Mechanisms (WRAMs)), and/or expenses are tracked in balancing and memorandum accounts, it reduces the financial repercussions to the utility of inaccurate forecasts. This, in turn, reduces the utility's incentive to develop accurate forecasts. This can result in misguided attempts by Water IOUs to lower rate increases in General Rate Cases (GRCs) with artificial forecasts that are deliberately inaccurate (e.g. higher adopted sales quantities or lower proposed expenses), with the resulting variances recovered through different mechanisms between GRC cycles that provide for rate increases via a less transparent process.

(*Reply Comments of the Public Advocates Office on Administrative Law Judge's Ruling Inviting Comments on Water Division Staff Report and Modifying Proceeding Schedule*, July 24, 2019, at p. 2 [Resp. Appx. 015].) Public Advocates Office further addressed the incentive to manipulate forecasts to produce smaller increases in rates:

> Utilities should not propose and the Commission should not adopt sales forecasts with any particular rate outcome in mind. Instead of lowering noticed rate impacts with [higher] than reasonable sales forecasts and allowing new mechanisms to "stagger the impact on customers into smaller increments" as suggested by CWA, the water utilities should propose accurate forecasts openly and transparently in GRCs. Customers should not be required to face the

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> continued uncertainty of stealth rate increases that accompany the operation of existing—much less new—alternative rate mechanisms.

(*Id*. at pp. 2-3 [Resp. Appx. 015-016].)

Cal-Am argues, more specifically, that there is no record to support the claim that eliminating the WRAM/MCBA will provide better incentives to more accurately forecast sales. To support this argument, it alleges that there is no factual or evidentiary support for Public Advocates Office's statements regarding risks associated with forecasting, on which the Decision relied. (Cal-Am at p. 41.) As discussed above, party comments are the record evidence in rulemaking proceedings. Moreover, Cal-Am cites to no record evidence that contradicts Public Advocates Office's comments.

Similarly, Cal-Am erroneously argues that there is nothing in the record that addresses whether sales forecasts are more significant with the Monterey-Style WRAM, as stated in Finding of Fact #19. (Cal-Am at p. 41.) Public Advocates Office's quoted language above stating that when revenue variances are tracked in decoupling mechanisms like the WRAM, it reduces the financial repercussions to the utility of inaccurate forecasts, contradicts Cal-Am's arguments. Logic dictates when revenue protection for inaccurate forecasts is discontinued, forecasting becomes more significant, both to the utility and the ratepayer.

Conclusion of Law #4

Cal-Am next alleges Conclusion of Law #4 is unsupported by the record. Conclusion of Law #4 states:

> Elimination of the WRAM/MCBA will provide better incentives to more accurately forecast sales while still

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> providing the utility the ability to earn a reasonable rate of return.

Conclusion of Law #4 is based on the language in the Decision on page 18 [Golden State Appx. 296], which reads:

> In addition, parties highlighted the reality that drought is the new normal in California and that forecasts need to be more accurate so that WRAMs can be smaller, and that the Monterey-Style WRAM would provide better incentives for parties to more accurately forecast sales while still providing the utility the ability to earn a reasonable rate of return.

This statement is supported by Public Advocates Office's Comments on Phase I Issues, in which it discusses the reduced risk associated with WRAMs:

> . . . [W]ith revenue decoupling for water utilities,[fn.] the impact on water utilities of forecast variance is muted since nearly all revenue forecast risk has been transferred from utility investors to ratepayers. As a result of the WRAM decoupling mechanism in California, variance in forecasted revenues manifests not as the normal business risk underpinning rate-of-return regulation but as the perceived cause of large WRAM balances and increased customer surcharges.
>
> By mitigating the consequences of inaccurate sales forecasts, WRAM and other decoupling mechanisms can be reasonably assumed to not only reflect variances in sales forecasts but to exacerbate the actual size of the variance.

(Public Advocates Office Comments on Phase I Issues February 23, 2018, at p. 8 [Cal-Am Appx. 70].) The discussion on increased risk associated with converting WRAMs to M-WRAMs in Southern California Edison's

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Comments also support that statement:

> In certain situations, implementing a Monterey-Style WRAM with a MCBA may balance the benefits and risks of implementing a conservation rate design more equitably among stakeholders. However, implementing a Monterey-Style WRAM as opposed to a full decoupling WRAM requires shareholders may be required to make up the difference for any shortfalls in authorized revenue not related to the use of a conservation rate design that far exceeds normal business risk. [fn.]

(Southern California Edison Comments on Staff Report, September 16, 2019, at p. 4 [Cal-Am Appx. 97].)

Finally, Cal-Am argues that the Commission's conclusion that utilities will still have the opportunity to earn a reasonable rate of return is contradicted by Cal-Am's experience in Monterey. First, Cal-Am's experience in Monterey is not in the record of this proceeding. More importantly, the Commission did not set rates in the Rulemaking so the Decision does not affect rate of return. In future GRCs of the water utilities, the Commission will make the appropriate changes necessary to provide water utilities the opportunity to earn a reasonable rate of return.

Moreover, Cal-Am provides no citations to the record to support any of these allegations, but refers to language in its comments to the Proposed Decision, which is not part of the evidentiary record.

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

Golden State and Liberty 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' claims are unfounded. As discussed below, the Decision addressed the elimination of the WRAM and its effect on ratepayers.

The relevant part of section 321.1 subdivision (a) requires the Commission to assess the consequences of its decisions:

> 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, and that this be accomplished using existing resources and within existing commission structures.

More specifically, Golden State and Liberty argue that nothing in the record addresses how elimination of the WRAM will impact low-income customers. (Golden State at pp. 43-45, Liberty at pp. 38-39.) 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] at pp. 17-18.)

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Similarly, Cal Am contends that the Commission erred by failing to consider the consequences of the Decision on rate design, conservation, and low-income customers. Golden State, Liberty, and Cal-Am cite *United States Steel Corporation v. Public Utilities Commission* (1981) 29 Cal.3d 603, 608-609 (*U.S. Steel*) to support this contention. (Golden State at p. 43, Liberty at p. 38, Cal Am at pp. 32, 38.) However, *U.S. Steel* is not on point. In that case, this Court annulled the Commission's decision because the Commission refused to consider the economic effect of authorizing different rates for similar services over similar routes. That decision was the result of a ratesetting proceeding. As discussed above, the challenged Decision in this case came out of a rulemaking proceeding. Here, the Commission requested comments on whether it should consider discontinuing the WRAM/MCBA and the water utilities chose not to put forth any substantive evidence. Now, Cal Am is arguing that the Commission failed to consider evidence it provided in its comments on the Proposed Decision, well after the proceeding was submitted. (Cal Am at pp. 32, 38.) Likewise, Golden State and Liberty allege the Commission failed to consider extra-record evidence. (Golden State at p. 44, Liberty at pp. 38-39.)

It is well established that an agency's duty is to weigh the relevant evidence provided in a proceeding. However, Cal-Am offers nothing to show that the Commission failed to consider all the relevant evidence in this proceeding. For example, it asserts that the Commission failed to consider the potential rate design impacts of eliminating the WRAM and in doing so, the

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Commission failed to consider the effect of changed rate design on conservation and low-income customers again citing to its comments on the Proposed Decision, which is not record evidence. (Cal-Am at pp. 33-37.)

Cal-Am's claims are unfounded. The Commission did not set rates in the instant proceeding, therefore, there is no impact on rate design for the Commission to consider. The Commission has considered the material facts and weighed the relevant evidence provided in the record of this proceeding. (Decision at 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 at p. 68 [Golden State Appx. 345].) CWA's comments, on behalf of the water utilities, reflect a similar opinion:

> While the Commission should rightfully strive to set forth general principles and goals for the utilities to achieve in this proceeding, many of the details of implementation are going to depend on the specific circumstances for each utility district and so should be addressed on a district-by-district basis. This will require a careful and nuanced approach.

(Comments of CWA Responding to the Administrative Law Judge's September 4, 2019 Ruling at p. 18 (CWA Appx. 165).)

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As stated above, the appropriate place for the Commission to address rate design, on a district-by-district basis, is in a general rate case proceeding in which the Commission sets rates for that specific water utility. Petitioners have failed to show the Commission erred.

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

Cal Water argues that the Commission erroneously mischaracterized the proceeding as quasi-legislative rather than ratesetting, which deprived it of procedural rights available only in ratesetting proceedings.

First, Cal Water claims that eliminating the WRAM is an unlawful ratesetting action, so it was improper for the Commission to categorize the proceeding as quasi-legislative. (Cal Water at p. 40.) 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 at p. 19, Ordering Paragraph #7 [Cal Water Appx. 70].)

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Further, once the Commission has categorized a proceeding, section 1701.1 subsection (a) states, in relevant part, "the decision as to the nature of the proceeding shall be subject to a request for rehearing within 10 days of the date of that decision or of any subsequent ruling that expands the scope of the proceeding. Only those parties who have requested a rehearing within that time period shall subsequently have standing for judicial review . . . ."

As discussed above, the issue was explicitly presented in the September 2019 ALJ Ruling Inviting Comments. At that time CWA, on behalf of the water utilities, filed comments regarding that issue. 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. The parties may not now challenge the categorization of the proceeding.

Next, Cal Water argues that it was denied procedural protections as a result of the improper categorization. (Cal Water at pp. 41-43.) As discussed above, the proceeding was not miscategorized, therefore no procedural protections were denied.

Cal Water next contends that the Commission violated sections 728 and 729 by eliminating the WRAM because it effectively fixed water rates without holding a hearing. (Cal Water at pp. 43-45.) Cal Water's contention is not correct as the Commission did not fix any water rates. Both section 728 and 729 address the Commission's authority to fix rates. Cal Water fails to identify any rate that was set during the proceeding.[13]

[13] Cal Water cites caselaw to show that "these statutory provisions have been construed by the California Supreme Court

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Accordingly, Cal Water's related argument that mischaracterization of proceedings is a recurring issue that the Court must address to stem an onslaught of petitions for writ of review challenging future Commission decisions is entirely devoid of merit. It improperly references applications for rehearing that are pending before the Commission that were filed subsequent to the issuance of D.20-08-047, the challenged decision in this case. (Cal Water at pp. 45-46.) The Court should strike this argument and the associated exhibit as Cal Water may not introduce new or additional evidence in its Petition. (Pub. Util. Code § 1757.1 subd. (c).) The issues in those applications for rehearing are not properly before this Court.

VI. CONCLUSION

For the reasons discussed above, each of the petitioners has failed to demonstrate any basis for the Court to grant its writ petition. As a result, the Commission respectfully requests that the Court deny every petition.

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as requirements for the Commission to hold hearings prior to the implementation of new rates." (Cal Water at p. 44.) Because rates were not set in this proceeding, these cases are not on point.

January 28, 2022 Respectfully submitted,

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CERTIFICATE OF WORD COUNT

I hereby certify that the foregoing Answer of Respondent is 13,557 words in length. In completing this word count, I relied on the "word count" function of the Microsoft Word program.

Dated: January 28, 2022 By: /s/ *DARLENE M. CLARK*
DARLENE M. CLARK

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