

**BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF CALIFORNIA**



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In the Matter of the Updated and Corrected Application of GREAT OAKS WATER CO. (U-162-W) for an Order Authorizing an Increase in Rates Charged for Water Service, increasing the revenue requirement by \$1,846,100 or 14.94% in 2010, by \$254,425 or 1.79% in 2011 and by \$165,822 or 1.14% in 2012.

Application No.: A.09-09-001  
(Filed September 3, 2009)  
(Updated and Corrected Caption filed 11/12/2009)

**APPLICATION OF GREAT OAKS WATER COMPANY  
FOR REHEARING OF DECISION 10-11-034**

December 21, 2010

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Application No.: A.09-09-001  
(Filed September 3, 2009)  
(Updated and Corrected Caption filed 11/12/2009)

**APPLICATION OF GREAT OAKS WATER COMPANY  
FOR REHEARING OF DECISION 10-11-034**

Pursuant to Public Utilities Code § 1731(b) and Rules 16.1(a) and 16.1(c) of the Commission’s Rules of Practice and Procedure, Great Oaks Water Company (“Great Oaks”), Applicant in the above-captioned proceeding, hereby submits its application for rehearing of Decision (“D.”) 10-11-034, which was issued by the Commission and mailed to Great Oaks on November 22, 2010.

**I. Summary of Application for Rehearing**

D.10-11-034 (the “Decision”) contains many serious errors of law and Great Oaks is compelled to submit this application for rehearing to seek correction of those legal errors and to satisfy the requirement of Public Utilities Code § 1731(b)(1) that an application for rehearing must be filed before seeking judicial review of a Commission decision. The purpose of this application for rehearing is to alert the Commission to the legal errors in the Decision and provide the Commission with the opportunity to correct those errors expeditiously.<sup>1</sup>

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<sup>1</sup> Commission Rule 16.1(c).

The following presents a brief, point-by-point summary of the errors of law contained in the Decision:

- ◆ The Decision requires Great Oaks to implement a “pilot program” of conservation rates intended to reduce water consumption by Great Oaks’ largest group of customers – single-family residential customers. In so doing, the Decision deviates significantly from Commission policy and prior Commission decisions authorizing full-decoupling ratemaking adjustment mechanisms coincident with the adoption of conservation rate design and conservation rates. In this respect, the Decision is contrary to law and violative of Great Oaks’ legal rights.
- ◆ The Decision denies Great Oaks’ equal treatment under the law with respect to memorandum account treatment for lost revenues due to mandatory conservation requirements imposed by the Santa Clara Valley Water District.
- ◆ The Decision modifies an existing memorandum account authorized by Commission Resolution (“Res.”) W-4534 in violation of Great Oaks’ due process rights and Public Utilities Code § 1708.
- ◆ The Decision adjusts salaries retroactively and arbitrarily and not based upon Commission authority or the evidence presented, thereby violating Great Oaks’ due process rights.
- ◆ The Decision includes legal error resulting from an incorrect interpretation of the federal tax code and federal tax regulations, resulting in a lower revenue requirement in violation of Great Oaks’ legal rights.
- ◆ The Decision erroneously determined the California motor vehicle license fee to be an expense item, rather than a tax, and then failed to include such fees as either an expense item or a tax, all in violation of Great Oaks’ legal rights.
- ◆ The Decision erroneously adopts an amount for uncollectible expenses that is unsupported by any evidence and in violation of Great Oaks’ legal rights.
- ◆ The Decision makes many findings that are unsupported by either evidence or Commission authority, thereby violating Great Oaks’ rights of due process and equal protection under the law.
- ◆ The Decision is based, in part, on a Division of Water and Audits (“DWA”) Verification Report prepared pursuant to admittedly erroneous and flawed

instructions from the Administrative Law Judge. Basing any portion of the Decision on the Verification Report is contrary to Commission authority and clearly violates Great Oaks' due process rights.

## **II. Discussion of the Decision's Legal Errors**

### **A. The Decision Contains Errors of Law Pertaining to Conservation Rate Design and Water Sales.**

#### **1. The Decision Orders an Experimental "Pilot Program" for Conservation Rates.**

The Decision adopts and requires Great Oaks to implement an experimental "pilot program"<sup>2</sup> of conservation rates for single-family residential customers of Great Oaks.<sup>3</sup> The "pilot program" is an experiment to determine if the conservation rate design adopted is effective. At the evidentiary hearing on Great Oaks' Application 09-09-001, a witness for the Division of Ratepayer Advocates ("DRA") testified: "I can't quantify how much of a reduction will result from conservation rate design. We won't know that until it is in use and after the fact."<sup>4</sup> The witness further testified: "We can't quantify the amount that will be conserved. It could be less. It could be 15 percent exactly. It could be more. We don't know."<sup>5</sup> Clearly, the conservation rate design and rates adopted by the Decision are experimental, leaving both Great Oaks and its customers at risk. In this regard, the Decision is contrary to Commission policy and prior Commission decisions, and if not corrected, will result in a violation of Great Oaks' legal rights.

#### **2. The Conservation Rates Adopted in the Decision for Great Oaks are Based Upon Commission Policy and are Intended to Reduce Water Consumption by Great Oaks' Customers and Water Sales by Great Oaks.**

The Commission's Water Action Plan 2005 ("WAP") provides the basic policy of the Commission pertaining to conservation rate design and conservation rates. Increasing block rates or tiered rates, such as those adopted in the Decision are intended to reduce water consumption by providing water users (in this instance, Great Oaks' customers) with a financial incentive to reduce consumption. As stated in the WAP: "Various rate

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<sup>2</sup> D.10-11-034, at p. 2 (note that this page is not numbered, but is located between page i and page 3 of the Decision). Decision, p. 80 (Ordering Paragraph No. 9).

<sup>3</sup> The conservation rate design adopted in the Decision is discussed at pp. 52-57 and is the subject of Finding of Fact Nos. 24-26 (pp. 72-73), Conclusion of Law No. 19 (p. 76) and Ordering Paragraphs 4 and 9 (pp. 78, 80).

<sup>4</sup> Reporter's Transcript, Volume 4 ("TR4"), at p. 321.

<sup>5</sup> *Id.*

designs can help promote efficient use of water. Increasing block rates, in which rates increase with usage, provide a financial incentive for customers to reduce water consumption.”<sup>6</sup>

The Commission determined well prior to the introduction of evidence in this proceeding that it would make conservation rate design a priority.<sup>7</sup> The Decision cites D.08-08-030 as authority for the proposition that conservation rate design will advance the Commission’s WAP objectives.<sup>8</sup> In this regard, there was never a question as to whether conservation rate design would be adopted in this proceeding; the outcome on this issue was predetermined by Commission policy objectives. The only question about conservation rate design in A.09-09-001 was how the conservation rates would be designed.

The Decision confirms that the conservation rates adopted are based upon Commission policy and the WAP in particular. The Decision states: “A conservation rate design will advance our Water Action Plan conservation objectives.”<sup>9</sup> This leaves no doubt that Commission policy was the driving factor behind the focus on and adoption of conservation rates in this proceeding.

While DRA was unable to estimate the amount by which water consumption would be reduced by conservation rates, there can be no debate that the conservation rates adopted in the Decision are intended to result in lower water consumption by Great Oaks’ customers.<sup>10</sup> Lower water consumption by Great Oaks’ customers means that Great Oaks will sell less water and, therefore, generate less revenue through water sales.

3. Commission Policy and Prior Commission Decisions Require Revenue-Decoupling WRAM Ratemaking Mechanisms with the Adoption of Experimental Conservation Rates.

The Commission has recognized the financial disincentive that exists for water companies to conserve. Water utilities earn revenue from water sales, and when water sales decline, so do revenues. A reduction in revenues due to lower water sales means

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<sup>6</sup> Water Action Plan, issued December 27, 2005, p. 8.

<sup>7</sup> *Id.*, p. 55 (reference to Scoping Memo).

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*, at p. 73 (Finding of Fact No. 25).

<sup>10</sup> If the conservation rates adopted in the Decision are not intended to reduce water consumption by Great Oaks’ customers and water sales by Great Oaks, then the conservation rates would have no purpose at all.

that the utility's opportunity to earn its allowed rate of return is also reduced or eliminated, as the fixed costs of the utility consume a larger percentage of water sales revenues. The WAP acknowledges this reality and states:

Because water utilities recover their costs through sales, there is a disincentive associated with demand side management: a successful campaign to reduce water use leads to less revenue and less profit. The Commission will consider decoupling water utility sales from earnings in order to eliminate current disincentives associated with conservation.<sup>11</sup>

The Commission has considered the issue of decoupling water utility sales from earnings in the context of conservation rate design and has determined that full revenue-decoupling WRAMs are necessary to achieve the WAP's policy objectives when implementing conservation rate design.<sup>12</sup> The Commission's rationale is based upon fairness so that neither the utility nor its customers should be disproportionately affected when conservation rates are implemented. As stated by the Commission in D.08-02-036: "With WRAMs in place, the utility and the ratepayers are not at risk for under- and over-collection of revenues following the adoption of conservation rates."<sup>13</sup>

The authorization of a revenue-decoupling WRAM when conservation rates are adopted also serves other purposes deemed by the Commission to be important for both the utility and its customers. "A WRAM also removes weather and economic risk associated with sales volatility from both the utility and ratepayers. Removing sales risk also reduces the importance of sales forecasting in regulatory proceedings."<sup>14</sup>

The Commission has consistently employed this approach when adopting conservation rates on an experimental or initial basis. In D.08-02-036, the Commission approved revenue-decoupling WRAM accounts for California Water Service Company ("CalWater") and Park Water Company ("Park") coincident with the adoption of trial conservation rate programs, with the WRAMs staying in place at least until the companies' next general rate cases. The only exception to this approach is when the

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<sup>11</sup> Commission Water Action Plan, December 15, 2005, p. 9.

<sup>12</sup> In D.08-02-036, the Commission stated, with respect to its conservation objectives for Class A water companies: "Those objectives include adoption of conservation rate designs and revenue adjustment mechanisms that decouple sales from revenues." (emphasis added).

<sup>13</sup> D.08-02-036, p. 28.

<sup>14</sup> *Id.* (citations to evidence omitted).

adoption of such a revenue-decoupling WRAM would actually result in a removal of a conservation incentive,<sup>15</sup> a situation that does not exist in this proceeding.

For California-American Water Company (“Cal-Am”), the Commission approved “conservation oriented increasing block rates and related ratemaking mechanisms for ensuring full recovery by Cal-Am of all authorized fixed costs and actual variable costs.”<sup>16</sup> The “related ratemaking mechanisms” adopted in D.08-06-002 included a revenue-decoupling WRAM.<sup>17</sup>

Likewise, in D.08-08-030, the Commission approved a settlement agreement for Golden State Water Company (“GSWC”) that included a revenue-decoupling WRAM with the implementation of new conservation rates.<sup>18</sup>

While discussing the Commission’s conservation objectives and the financial disincentive to conserve that exists for water utilities in implementing conservation rates, in D.08-08-030, the Commission noted:

The Commission’s WAP concluded that water utilities had a financial disincentive to conserve water. Therefore, to advance the goals of conservation, the Commission would need to remove that disincentive. To begin the effort of changing the usage patterns and valuation of water, the first steps must address the linkage between utility profitability and the growth of water sales. At a minimum, the adoption of decoupling mechanisms for the water utilities was necessary.<sup>19</sup>

D.08-11-023 presents further proof that the Commission regularly employs revenue-decoupling WRAM mechanisms when adopting experimental or “pilot” programs with conservation rates. Again, while approving a settlement adopting conservation rates combined with a revenue-decoupling WRAM ratemaking mechanism for Cal-Am’s Coronado, Village and Larkfield districts, the Commission observed that

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<sup>15</sup> *Id.*, p. 25 (A revenue-decoupling WRAM was not even proposed for Suburban Water Systems (“Suburban”) due to its unique water supply situation which created an entirely different incentive than envisioned by the Commission in its WAP.) *See also* Section II.A.6, below.

<sup>16</sup> D.08-06-002, p. 6.

<sup>17</sup> *Id.*, p. 14. Notably, ALJ Walwyn, the assigned ALJ for A.09-09-001, was the assigned ALJ in the proceeding that resulted in D.08-06-002. ALJ Walwyn did not employ the same rationale for Great Oaks as she did for Cal-Am when addressing the same issue.

<sup>18</sup> D.08-08-030, p. 16.

<sup>19</sup> *Id.*, p. 28.

the pilot programs incorporated ratemaking mechanisms removing the disincentive for Cal-Am to implement conservation rates and programs.<sup>20</sup>

Clearly, in D.08-11-023, the Commission was employing the same rationale for Cal-Am as it had in the prior Commission decisions noted above. That consistent approach continued in D.09-05-005 wherein the Commission approved a settlement for GSWC that included a revenue-decoupling WRAM ratemaking mechanism. In D.09-05-005, the Commission repeated its rationale for this approach:

If revenues are coupled with sales, reduced sales resulting from reduced consumption can result in reduced revenues. Water revenue adjustment mechanisms are means of decoupling revenues and sales, enabling revenue requirements to be met in the face of changing patterns of consumption. Differences between authorized revenue (based on forecasts) and actual revenue are tracked in such accounts, allowing any over-collection or under-collection of revenues, plus interest, to be either recovered from ratepayers or refunded to them.<sup>21</sup>

In summary, the Commission has regularly authorized revenue-decoupling WRAM ratemaking mechanisms when implementing experimental or “pilot” programs of conservation rate design. In each instance, the Commission based its decision on policy considerations and fairness to both the utility and its ratepayers, noting that without the revenue-decoupling WRAM ratemaking mechanism the Commission’s conservation policy objectives would not be met.

In the Decision addressed herein, the Commission deviated completely from its regular approach as evidenced by the Commission decisions noted above. In so doing, the Commission committed serious errors of law resulting in violations of Great Oaks’ legal rights.

4. Rather than Apply the Commission’s Established Policy and Rationale for Authorizing Revenue-Decoupling WRAM Ratemaking Mechanisms When Adopting Pilot Programs with Conservation Rates, the Decision Applies an Entirely New and Different Standard to Great Oaks as Compared to Other Class A Water Utilities.

During the course of the proceedings on A.09-09-001, it became clear that Great Oaks was being treated very differently than all other Class A water utilities with respect to conservation issues. Rather than addressing the issues identified in the Commission’s

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<sup>20</sup> D.08-11-023, p. 2.

<sup>21</sup> D.09-05-005, p. 3, footnote 2.

WAP and in other ratemaking proceedings involving Class A water utilities and conservation rates, DRA and the assigned ALJ chose to address other issues, including past actions and statements by Great Oaks related to conservation. No other Class A water utility has been subjected to or held to such a standard at any time, nor have any other Class A water utilities been denied revenue-decoupling WRAM ratemaking mechanisms intended to remove the financial disincentive to conserve for such irrelevant and erroneous reasons.

The Decision recites DRA's opposition to "a 'full' WRAM that would decouple sales from revenues" as being: "Great Oaks is not under a production limitation, has not implemented a conservation program, does not actively encourage its customers to conserve, and its recorded consumption data do not show its customers have significantly conserved."<sup>22</sup> The WAP and the prior Commission decisions referenced above do not address or deem any of these factors to be important or relevant to achieving the Commission's conservation objectives through rate design and revenue-decoupling mechanisms. Yet, clearly DRA's opposition was embraced by the Commission.

In discussing the basis for the finding that Great Oaks would be denied a "full WRAM mechanism," the Decision states:

Great Oaks has not provided evidence of additional conservation measures its customers are making that would support consideration of a full WRAM mechanism. As we have previously discussed, SCVWD's call for a 15% reduction in consumption is not mandatory, is set to expire shortly, and does not qualify Great Oaks to deviate from its sales forecasting methodology specified in the Rate Case Plan. In addition, Great Oaks does not obtain any of its water supply from SCVWD and it has informed its customers in its 2009 Water Supply Report and at the PPH in this proceeding that it has ample water supply to serve them.<sup>23</sup>

The Decision then goes on to state: "We discuss here our basis for concluding that Great Oaks has not actively promoted conservation in its service territory to a degree that would warrant consideration of a full WRAM."<sup>24</sup>

At no time before the Decision had the Commission applied such a standard to any other Class A water utility to determine if a "full" WRAM or revenue-decoupling

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<sup>22</sup> D.10-11-034, p. 58.

<sup>23</sup> *Id.*, p. 59.

<sup>24</sup> *Id.* (emphasis added).

WRAM ratemaking mechanism would be adopted coincident with the adoption of experimental “pilot program” conservation rates. In fact, basing a decision to deny a mechanism to decouple revenues from sales in the context of adopting conservation rate design to promote the Commission’s conservation objectives is directly contrary to those objectives.

As the Commission recognized in the WAP, water utilities have a financial disincentive to promote conservation because doing so reduces the revenues necessary to cover the fixed costs of the utility and, necessarily, reduces the utility’s profits. Rather than punishing utilities for not promoting conservation, the Commission has regularly employed revenue-decoupling WRAM mechanisms on a prospective basis to encourage the implementation of conservation rates to overcome the financial disincentive such rates provide. The Commission has never looked back at whether a utility was promoting conservation sufficiently (or to a degree) to deserve a revenue-decoupling mechanism. In fact, the Commission has no test of any kind to determine to what degree a utility must have historically promoted conservation to obtain a revenue-decoupling WRAM ratemaking mechanism when adopting conservation rates. Yet, clearly, in some manner, the Commission applied such a test upon Great Oaks and found that Great Oaks had not promoted conservation to the degree necessary to deserve equal treatment with other Class A water utilities.

The Decision denies Great Oaks a “full WRAM” (revenue-decoupling WRAM ratemaking mechanism) because Great Oaks’ past promotion of conservation was not to the “degree” required by ALJ Walwyn or the assigned Commissioner.<sup>25</sup> By basing such denial of a revenue-decoupling WRAM ratemaking mechanism with conservation rate design on a completely novel and entirely undefined subjective standard, the Decision errs as a matter of law and violates Great Oaks’ rights of due process and equal protection of the law.

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<sup>25</sup> *Id.*

5. The Decision Results in Confiscatory Rates by Failing to Authorize a Revenue-Decoupling WRAM Ratemaking Mechanism Coincident with the Order to Implement a Pilot Program with Conservation Rates.

The Commission has considered whether the adoption of a revenue-decoupling WRAM ratemaking mechanism coincident with the adoption of conservation rate pilot programs requires an adjustment to participating utilities' return on equity.<sup>26</sup> The Commission noted:

The Commission's WAP concluded that water utilities had a financial disincentive to conserve water. Therefore, to advance the goals of conservation, the Commission would need to remove that disincentive. To begin the effort of changing the usage patterns and valuation of water, the first steps must address the linkage between utility profitability and the growth of water sales. At a minimum, the adoption of decoupling mechanisms for the water utilities was necessary. The question then becomes, has adoption of that one mechanism, in isolation, caused a change in risk that is sufficiently clear and precise so as to warrant an adjustment to the cost of capital.<sup>27</sup>

In D.08-08-030, the Commission determined that the revenue-decoupling WRAM ratemaking mechanism, as designed, decreased risk and stabilized revenues.<sup>28</sup> In that proceeding, DRA had argued that the WRAM mechanisms adopted with conservation rates reduced risk sufficiently so as to require a downward adjustment to the utilities' return on equity ("ROE"), and DRA proposed a loose methodology for making that ROE adjustment.<sup>29</sup> The Commission ultimately determined that insufficient data existed for such an adjustment and that the issue should be addressed in subsequent cost of capital proceedings.<sup>30</sup>

If a revenue-decoupling WRAM ratemaking mechanism in combination with conservation rates reduce a utility's risk and justify a downward adjustment to ROE, as DRA contended, then the denial of a revenue-decoupling WRAM ratemaking mechanism with conservation rates surely increases Great Oaks' risk and justifies an increase in its ROE. Great Oaks understands that this is not the proceeding for adjusting its ROE, but instead suggests that the denial of the revenue-decoupling WRAM ratemaking

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<sup>26</sup> See, e.g., D.08-08-030, p. 29.

<sup>27</sup> *Id.* (emphasis added).

<sup>28</sup> *Id.*, p. 31.

<sup>29</sup> *Id.*, pp. 31-35.

<sup>30</sup> *Id.*, pp. 36-37.

mechanism in this proceeding clearly impacts Great Oaks' opportunity to earn its authorized ROE.

The Commission is required to provide Great Oaks with an opportunity to realize "revenues and earnings sufficient to afford the utility an opportunity to earn a reasonable return on its used and useful investment, to attract capital for investment on reasonable terms and to ensure the financial integrity of the utility."<sup>31</sup> Rates set by the Commission that do not meet this standard are confiscatory and constitute the taking of the utility's property without just compensation, without due process and through a denial of equal protection of the laws.<sup>32</sup>

Based upon the Proposed Decision<sup>33</sup> on Great Oaks' Cost of Capital Application, A.09-05-007, it is expected that the Commission will decide that in order to meet the requirements of Public Utilities Code §701.10(a) and the *Bluefield* and *Hope* legal standards, Great Oaks is authorized a net rate of return of 9.26%. Since the denial of a revenue-decoupling WRAM ratemaking mechanism in this proceeding decreases Great Oaks' opportunity to earn this rate of return, the Decision effectively reduces Great Oaks' authorized rate of return below the 9.26% deemed necessary to avoid confiscatory rates. In short, reducing Great Oaks' rate of return produces confiscatory rates in violation of Great Oaks' legal rights. This Application for Rehearing requests this correction of this legal error so that judicial review is not necessary.

6. The Decision Violates Great Oaks' Rights of Due Process and Equal Protection of the Law and Must be Corrected on Rehearing.

At no time prior to Great Oaks' submission of its Application 09-09-001 had the Commission based the authorization or denial of a revenue-decoupling WRAM ratemaking mechanism when implementing pilot programs for conservation rates on a utility's past actions in promoting water conservation. Instead, Commission decisions on this topic issued before Great Oaks filed A.09-09-001 did not address the past promotion of conservation by a utility at all in deciding the propriety of a revenue-decoupling

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<sup>31</sup> Public Utilities Code §701.10(a).

<sup>32</sup> *Bluefield Waterworks & Improvement Co. v. Public Service of West Virginia* (1923) 262 U.S. 679, 695 ("*Bluefield*"); *Federal Power Commission v. Hope Natural Gas Company* (1944) 320 U.S. 591 ("*Hope*"). See also California Constitution, Article I, Section 7(a) and United States Constitution, 14<sup>th</sup> Amendment.

<sup>33</sup> The Proposed Decision was filed November 2, 2010.

WRAM mechanism. In fact, the Commission’s authorization of pilot programs for conservation rates combined with a revenue-decoupling WRAM mechanism were made based upon Commission policy objectives as stated in the WAP, and not upon whether a utility had or had not promoted conservation in the past.<sup>34</sup>

Likewise, at no point in time did the Commission notify Great Oaks that it would be treated differently than other Class A water utilities when ordered to implement conservation rate pilot programs.<sup>35</sup>

Based upon established Commission precedent, Great Oaks did not know, nor could it have known, that in this proceeding the Commission would adopt a new and never-before utilized standard for determining eligibility and applicability of a revenue-decoupling WRAM ratemaking mechanisms when the Commission requires a utility to implement a pilot program of conservation rates to accomplish the Commission’s WAP conservation objectives. No prior notice had been provided to Great Oaks directly or through prior Commission decisions that the Commission was adopting its new and entirely subjective (arbitrary and non-quantifiable) standard for revenue-decoupling WRAMs. Nor would reading prior decisions authored by ALJ Walwyn have revealed the new and subjective standard, as ALJ Walwyn had not previously applied that standard in Class A water utility ratemaking proceedings resulting in pilot programs with conservation rates. And, now even after the new standard has been applied to Great Oaks, Great Oaks still is without knowledge of the requirements of the new standard, as those requirements are not articulated in the Decision. All Great Oaks now knows is that prior active promotion of conservation to some unstated and unspecified degree was required to warrant consideration of a “full WRAM.”<sup>36</sup>

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<sup>34</sup> Ironically, the WAP recognizes current financial disincentives associated with conservation and makes no suggestions whatsoever that water utilities should be judged or punished based upon past conservation efforts. *See, e.g.*, WAP, p. 9.

<sup>35</sup> The Decision notes that in its last general rate case, the Commission recommended that Great Oaks develop a conservation incentive program attractive to its customers. *See* Decision, p. 60, footnote 86. However, the Commission never stated that without such a program Great Oaks would receive disparate treatment as compared to other Class A water utilities.

<sup>36</sup> Decision, p. 59.

Notice and opportunity to be heard are essential requirements of due process. To satisfy the requirements of due process, notice must be both real and reasonable, and reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.<sup>37</sup> Moreover, the Commission is specifically prohibited from establishing procedures that violate a party's due process rights.<sup>38</sup> Adopting a new and entirely subjective standard for revenue-decoupling WRAM eligibility when pilot program for conservation rates are established without prior notice to Great Oaks of the standard or that it would be applied to A.09-09-001 violates due process requirements.<sup>39</sup>

Due process in the substantive sense provides protection against arbitrary government action, even when procedural due process safeguards are provided.<sup>40</sup> Obviously, the Decision's denial of revenue-decoupling WRAM treatment for Great Oaks is based upon a standard that to this day is unknown and is certainly arbitrary.

The Decision violates Great Oaks' equal protection rights as well, as Great Oaks has been denied the same revenue-decoupling WRAM ratemaking mechanism authorized for other Class A water utilities when those utilities, like Great Oaks, were ordered to implement pilot programs with conservation rates.<sup>41</sup> "The equality guaranteed by the equal protection clause of the federal and state Constitutions is equality under the same conditions, and among persons similarly situated."<sup>42</sup> By denying Great Oaks the same treatment under the law for a revenue-decoupling WRAM coincident with the adoption of new pilot programs with conservation rates as the Commission provided to Cal Water, Park, Cal-Am and GSWC, Great Oaks has been denied equal protection under the law.

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<sup>37</sup> See, e.g., *In re Lambert* (1901) 134 Cal. 626; *In re Hampton's Estate* (1942) 55 Cal.App.2d 131; *Edward W. v. Lamkins* (2002) 99 Cal.App.4<sup>th</sup> 516 (review denied); *In re J.I.* (2003) 108 Cal.App.4<sup>th</sup> 903 (review denied); *In re Vitamin Cases* (2003) 132 Cal.Rptr.2d 425.

<sup>38</sup> Public Utilities Code ("PUC") §1708.

<sup>39</sup> It is one thing to require a utility to submit information on past conservation programs and actions, such as minimum data requirements in D.07-05-062. It is an entirely different matter to use that information in an entirely new and previously undisclosed manner to deny requested relief in a ratemaking proceeding.

<sup>40</sup> See, e.g., *Gray v. Whitmore* (1971) 17 Cal.App.3d 189.

<sup>41</sup> See Section II.A.3, above.

<sup>42</sup> *Adams v. Commission on Judicial Performance* (1994) 8 Cal.4<sup>th</sup> 630, 659.

Unless corrected for the reasons stated above, Great Oaks will be required to seek judicial review to correct the errors. This Application for Rehearing provides the Commission with the opportunity to correct the legal errors of the Decision.<sup>43</sup>

7. No Comments or Justifications Advanced by DRA Address or Correct the Legal Errors of the Decision.

During the course of the proceedings on A.09-09-001, DRA made a number of statements apparently intended to persuade the assigned ALJ and Commissioner to treat Great Oaks differently than other Class A water utilities. None of these statements address legal errors of the Decision or in any way justify the due process and equal protection violations inherent in the Decision.

For example, in an effort to convince ALJ Walwyn and Commissioner Bohn that Great Oaks should be treated differently than other Class A water utilities because of Great Oaks' past actions related to conservation, DRA commented upon Great Oaks statement that it told its customers the truth when saying Great Oaks has an ample water supply. DRA stated: "Great Oaks' assertion that it 'told its customers the truth' means that it misinformed its customers about the reality of a state-wide [sic] drought."<sup>44</sup>

This comment by DRA is typical of the unsupported arguments DRA advanced throughout this proceeding. There is no evidence whatsoever that Great Oaks' water supply was anything other than ample, and DRA cites none. Instead, DRA makes a general reference to a statewide drought for which there also was no evidence presented in this proceeding.<sup>45</sup> In fact, the emphasis on conservation in this proceeding is not based upon a "statewide drought," but is instead based upon Commission policy objectives.<sup>46</sup>

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<sup>43</sup> Commission Rule 16.1(c).

<sup>44</sup> Reply Comments of the Division of Ratepayer Advocates to Great Oaks Water Company's Comments to the Proposed Decision of Administrative Law Judge Walwyn and on the Alternative Proposed Decision of Commissioner Bohn ("DRA Reply Comments"), p. 1.

<sup>45</sup> The Commission's WAP does not focus on water shortages due to droughts, or even a particular drought. While recognizing that conservation is important during drought periods (WAP, pp. 8 25), the primary emphasis of the WAP is to conserve water at all times.

<sup>46</sup> See Section II.A.2, above.

And, finally, there is no factual or legal basis offered by DRA for suggesting that Great Oaks misinformed its customers by telling them the truth.<sup>47</sup>

From a legal perspective and in the context of this Application for Rehearing, there is no Commission standard or precedent for denying Great Oaks equal treatment under the law on the basis of Great Oaks' past actions on water conservation (and certainly not for punishing Great Oaks for telling its customers the truth). DRA's criticism (incorporated into the Decision as discussed above) is direct proof that the Decision is based not upon the evidence, not upon prior Commission decisions, not upon an identifiable, articulated standard and not upon Commission policy as stated in the WAP, but is instead based upon an entirely new, unstated, unsupported and subjective determination that Great Oaks should be treated differently when adopting pilot programs for conservation rates compared to other Class A water utilities.

DRA's only other comments related to the "full WRAM" issue highlight the erroneous nature of DRA's analysis of the issue. In the DRA Reply Comments, DRA argued that the treatment of Suburban under D.08-02-036 supports the Decision's denial of "full WRAM" treatment for Great Oaks.<sup>48</sup> Had DRA performed any analysis of D.08-02-036, it would have learned quickly that its comments were inapposite. Suburban obtains 70% percent of its purchased water supply from 25 different sources, creating an inherent conservation incentive for Suburban to avoid additional purchases of water at higher incremental rates.<sup>49</sup> It was for this reason that a full-decoupling WRAM was not even proposed for Suburban and certainly not ordered.

Clearly, Great Oaks, which obtains all of its water from one source – groundwater, is not similarly situated to Suburban. The Commission's treatment of Suburban in D.08-02-036 has no application in this proceeding whatsoever. On the other

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<sup>47</sup> DRA's point – that Great Oaks misinformed its customers by telling them the truth – raises a more serious issue: Is DRA advocating that Great Oaks should not tell its customers the truth about water supply issues within Great Oaks' service territory so as to advance the Commission's water conservation objectives? In other words, is DRA saying Great Oaks should have lied to its customers to get them to conserve?

<sup>48</sup> DRA Reply Comments, p. 5.

<sup>49</sup> D.08-02-036, p. 25. The Commission noted that this incentive was different than envisioned by the Commission in its WAP.

hand, as discussed above,<sup>50</sup> D.08-02-036 does fully support Great Oaks' position that when adopting experimental or pilot programs for conservation rates, the Commission has consistently authorized revenue-decoupling WRAM ratemaking mechanisms for Class A water utilities to overcome the financial disincentive to conserve acknowledged by the Commission in its WAP. Proper application of Commission policy and practice adopted in D.08-02-036 (DRA's cited authority) supports Great Oaks' position in this Application for Rehearing.

8. This Application for Rehearing Provides the Commission with an Opportunity to Correct the Decision's Legal Errors.

Consistent with Commission Rule 16.1(c), this Application for Rehearing alerts the Commission to legal errors in the Decision and provides the Commission with the opportunity to correct those legal errors expeditiously. In this instance, correcting the Decision is an entirely straightforward matter. The Decision should be modified to authorize Great Oaks to: (1) track in a WRAM account the under- and over-collection of revenues following the adoption of the Decision's conservation rate design; and (2) to recover or refund the under- or over-collection of revenues through a surcharge or surcredit, respectively. Such a revenue-decoupling WRAM ratemaking mechanism will correct all of the legal errors associated with the Decision's failure to address the lost sales and lost sales revenues sustained by Great Oaks resulting from the Commission's policy directive to require Great Oaks to implement the conservation rate design pilot program. This correction would be consistent with the Commission's Water Action Plan, Commission decisions and treatment of other Class A water utilities and the Commission's legal obligations in ratemaking. Absent such a correction, Great Oaks will seek judicial review and intervention to correct the Commission's legal errors.

This proposed solution is not amenable to attack on the grounds that Great Oaks did not provide evidence of additional conservation measures its customers are making, as the WRAM solution proposed is directly related to conservation rate design and not to any other conservation measures.<sup>51</sup> Nor would it be proper to deny the WRAM solution because Great Oaks does not obtain any of its water supply from the Santa Clara Valley Water District or because Great Oaks has informed its customers that it has ample water

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<sup>50</sup> See Section II.A.3.

<sup>51</sup> Decision, p. 59.

supply to serve them.<sup>52</sup> The proposed WRAM solution has no bearing upon Great Oaks' water supply or the fact that Great Oaks has truthfully informed its customers that Great Oaks has ample water supplies; the proposed WRAM solution only relates to the conservation rate design experimental pilot program ordered by the Decision.

Finally, the Commission may not deny the proposed WRAM solution on the basis that the WRAM would be compensating Great Oaks for sales losses due to the economy. First, there was no evidence presented in connection with A.09-09-001 that Great Oaks' water sales have declined due to the economy.<sup>53</sup> And, secondly, the proposed WRAM solution is directed at the Commission's experimental pilot program on conservation rate design, which seeks only reduced water consumption and does not take into account individual customer reasons for reducing (or not reducing) consumption.

Great Oaks requests that the Commission correct the Decision by authorizing Great Oaks to establish a WRAM account that tracks the under- and over-collection of revenues following the adoption of the Decision's conservation rate design and allows Great Oaks to recover or refund the under- or over-collection through an appropriate surcharge or surcredit.

**B. The Decision Violates the California and United States Constitutions in Denying Great Oaks a Mandatory Conservation Memorandum Cost Balancing Account for the Time Period from February 2, 2010 through June 30, 2010.**

1. Background Information Relevant to Legal Error.

In its Advice Letter 197-W, filed February 2, 2010, Great Oaks requested authority to establish two memorandum accounts, effective the same day, February 2, 2010 and lasting through June 30, 2010: (1) a Mandatory Conservation Memorandum Account to track operational and administrative costs associated with implementing water conservation programs and practices; and (2) a Mandatory Conservation Revenue Adjustment Memorandum Account ("MCRAMA") "designed to track the financial impacts on quantity revenues occurring during times when mandatory conservation

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<sup>52</sup> *Id.*

<sup>53</sup> The Decision makes reference to comments made at the public participation hearing related to the economy, but none of these comments are evidence and none of the comments established any connection between lower water sales and general economic conditions.

practices are required by outside governmental or municipal agencies.”<sup>54</sup> Advice Letter 197-W was filed in response to the Santa Clara Valley Water District’s (“SCVWD”) extension (on December 8, 2009) of its 15% mandatory conservation requirement throughout Santa Clara County.<sup>55</sup>

As indicated above, the MCRAMA requested by Great Oaks was for a period of time outside of the time period addressed in Great Oaks’ General Rate Case Application 09-09-001, as the first test year for A.09-09-001 began July 1, 2010. The MCRAMA request was based upon and patterned after a prior request by San Jose Water Company (“SJWC”) for such a memorandum account - a request granted by the Commission.<sup>56</sup>

In Resolution (“Res.”) W-4838, issued August 13, 2010, the Commission denied Great Oaks authority to establish the MCRAMA. In making this ruling, the Commission declared: “The rates to be set by A.09-09-001 are effective September 1, 2009 based on Great Oaks’ request for interim rates in AL 196-W-C.”<sup>57</sup> In AL 196-W-C, Great Oaks requested the establishment of rates for the time period from September 1, 2009 through June 30, 2010 because, pursuant to D.07-05-062, Great Oaks experienced a delay beyond three years between general rate cases.<sup>58</sup> D.07-05-062 provided that in such event, the affected utility is to establish such rates (for the transition period caused by the change in the schedule of Class A water utility general rate cases) via an advice letter, with such interim rates being subject to refund (“adjusted upward or downward back to the effective date of the interim rates”) with the adoption of final rates at the conclusion of the general rate case.<sup>59</sup>

In Res. W-4838, the Commission also declared:

We also find that rejection of AL 197-W does not prejudice Great Oaks because the issues underlying the need to establish the two memorandum accounts requested by Great Oaks are being reviewed as part of our consideration of A.09-09-001. Given that Great Oaks has interim rates in place effective September

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<sup>54</sup> Great Oaks Advice Letter 197-W.

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> Res. W-4838, p. 4.

<sup>58</sup> Great Oaks Advice Letter 196-W-C.

<sup>59</sup> D.07-05-062, pp. A-2 – A-3.

2009, the ultimate resolution of the issues raised in AL 197-W can be dealt with in A.09-09-001 without concern for retroactive ratemaking.<sup>60</sup>

By this declaration, the Commission advised Great Oaks, for the first time, that issues pertinent to the time period from September 1, 2009 through June 30, 2010 would be addressed in the context of A.09-09-001, an application to establish rates beginning July 1, 2010. Since the Commission had never before stated that A.09-09-001 covered the pre-July 1, 2010 time period, Great Oaks filed (in this proceeding) its Motion to Reopen Record for Limited Purpose of Updating and Revising Water Sales Data and Addressing Conservation Water Revenue Adjustment Mechanisms (“Motion to Reopen No. 1”) on August 20, 2010. Motion to Reopen No. 1 was specifically based upon Res. W-4838.<sup>61</sup>

The Decision denied Great Oaks’ Motion to Reopen No. 1.<sup>62</sup> The basis for this ruling is stated as follows:

We find that the language in Resolution W-4838 cited by Great Oaks does not say what Great Oaks asserts. The language does not change the test period of this GRC or state that a sales forecast for the transition period September 1, 2009 – June 30, 2010 will be established in this proceeding (A.09-09-001). The underlying issues referenced in the resolution are that the Commission in A.09-09-001 is setting both a new sales forecast for Great Oaks and considering a WRAM adjustment, and is doing both for the test period from July 1, 2010 to June 30, 2011. As stated in Resolution W-4838, once this is done in A.09-09-001, the interim rates authorized in AL 196C-W will then be trued-up to the final rates that are adopted in A.09-09-001.<sup>63</sup>

The combined effect of the Decision and Res. W-4838 is that the MCRAMA requested by Great Oaks in Advice Letter 197-W is not being addressed by the Commission at all, in any proceeding. On the one hand, Res. W-4838 specifically states: “The rates to be set by A.09-09-001 are effective September 1, 2009 based on Great Oaks’ request for interim rates in AL 196-W-C.”<sup>64</sup> On the other hand, the Decision specifically states: “[t]he Commission in A.09-09-001 is setting both a new sales forecast for Great Oaks and considering a WRAM adjustment, and is doing both for the test

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<sup>60</sup> Res. W-4838, p. 5.

<sup>61</sup> The Decision also quotes the same language of Res. W-4838 quoted above in discussing Great Oaks’ Motion to Reopen No. 1. *See* Decision, p. 6, footnote 7.

<sup>62</sup> Decision, Ordering Paragraph No. 1, p. 78.

<sup>63</sup> *Id.*, p. 7.

<sup>64</sup> Res. W-4838, p. 4.

period July 1, 2010 to June 30, 2011.”<sup>65</sup> In other words, neither Res. W-4838 nor the Decision address the relief requested by Great Oaks in Advice Letter 197-W for the time period from February 2, 2010 through June 30, 2010.

Now that the Decision has been rendered, there is no doubt that the procedures employed by the Commission with respect to the “issues underlying the need to establish the two memorandum accounts requested by Great Oaks”<sup>66</sup> were not “reviewed as part of [the Commission’s] consideration of A.09-09-001.”<sup>67</sup> The procedures employed by the Commission on these issues violate Great Oaks’ due process rights.

2. By Failing to Address the Issues Underlying the Need to Establish the Two Memorandum Accounts Requested by Great Oaks, the Decision Violates Great Oaks’ Due Process Rights.

As discussed above, Res. W-4838 and the Decision are irreconcilable on the issue of the two memorandum accounts requested by Great Oaks in Advice Letter 197-W. The Commission failed to consider the issues underlying the need to establish the two memorandum accounts requested by Great Oaks in either proceeding. Whether by design or through inadvertence, the procedures adopted by the Commission on such issues resulted in the issues being left unaddressed,<sup>68</sup> resulting in a violation of Great Oaks’ due process rights.

Article XII, Section 2 of the Constitution provides: “Subject to statute and due process, the commission may establish its own procedures.” To satisfy the requirements of due process, the Commission is required to provide notice to the parties, with a real and reasonable opportunity to be heard.<sup>69</sup> Here, on this issue, the Commission

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<sup>65</sup> Decision, p. 7.

<sup>66</sup> Res. W-4838, p. 5.

<sup>67</sup> *Id.*

<sup>68</sup> The Decision does not address the time period relevant to the request for the two memorandum accounts – February 2, 2010 through June 30, 2010. And, the procedure the Decision instructs Great Oaks to employ to true-up interim rates specifically does not address the issues underlying the memorandum account requests. See Decision, Ordering Paragraph No. 5, pp. 78-79 (Great Oaks is to use “the methodology set forth in Decision 07-12-055” for the true-up.) See also Section II.C., below, discussing this aspect of the Decision.

<sup>69</sup> See, e.g., on due process requirements, generally, *In re Lambert* (1901) 134 Cal. 626; *In re Hampton’s Estate* (1942) 55 Cal.App.2d 131; *Edward W. v. Lamkins* (2002) 99 Cal.App.4<sup>th</sup> 516 (review denied); *In re J.I.* (2003) 108 Cal.App.4<sup>th</sup> 903 (review denied); *In re Vitamin Cases* (2003) 132 Cal.Rptr.2d 425.

completely avoided hearing the issue of the requested memorandum accounts in this proceeding, resulting in a violation of Great Oaks' due process rights.

One need only look at the Decision to see that, contrary to the findings of Res. W-4838, the issues underlying the need for the requested memorandum accounts were not addressed in the Decision. In denying Great Oaks' Motion to Reopen No. 1, the Decision made no mention whatsoever to the time period of February 2, 2010 through June 30, 2010, the time period relevant to the issues underlying the need for the requested memorandum accounts.

The Decision must be corrected so that the issues underlying the need for the memorandum accounts requested by Great Oaks in Advice Letter 197-W are addressed in the proceedings on A.09-09-001, as determined by Res. W-4838.

**C. The Decision Instructs Great Oaks to “True-Up” Interim Rates with a Procedure and Methodology that Violates Due Process Requirements and Commission Ratemaking Rules.**

1. Background Information Pertaining to this Issue.

In D.07-05-062, the Commission established the Rate Case Plan for Class A water utilities, including Great Oaks. D.07-05-062 established a schedule for the filing of general rate case applications under the new Rate Case Plan, and for Great Oaks, rather than filing on a three-year schedule between rate cases, D.07-05-062 scheduled Great Oaks for a period of four years between rate case filings.<sup>70</sup> D.07-05-062 provided a procedure to address the situation where a utility experiences a delay beyond three-years in filing a general rate case application:

A water utility that experiences a delay beyond three-years in filing a GRC application due to the transition to the RCP [Rate Case Plan] schedule may seek to implement an interim rate change via an advice letter.

Such filing will not excuse a utility from filing its future GRCs according to the RCP schedule. These interim rates, when approved, will be subject to refund and shall be adjusted upward or downward back to the effective date of the interim rates with the adoption of final rates by the Commission at the conclusion of a GRC scheduled under the RCP.

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<sup>70</sup> Great Oaks was originally scheduled to file its general rate case application on July 1, 2008, but under the new schedule of the Rate Case Plan, Great Oaks' application was delayed a full year, until July 1, 2009. See D.07-05-062, p. A-17. The Commission subsequently granted Great Oaks an extension until September 1, 2009 to file its general rate case application.

The procedures will herein will only apply during our transition to the RCP in instances when this RCP schedule delays a GRC for any water utility beyond the three-year cycle set forth in Section 455.2.<sup>71</sup>

Great Oaks filed its Advice Letter 196-W (and subsequently, Advice Letter 196A-W) to establish interim rates for the transition period (September 1, 2009 through June 30, 2010), together with Workpapers addressing all of the minimum data required for general rate case applications.<sup>72</sup> The Division of Water and Audits (“DWA”) rejected the filing and instead decided to establish interim rates for the transition period by a simple adjustment to Great Oaks’ revenue requirement due to inflation and a continuation of the existing rate of return (9.01%) from Great Oaks’ last general rate case.<sup>73</sup> The Commission subsequently authorized Great Oaks to continue charging the interim rates under Advice Letter 196C-W until the effective date of rates from the proceeding on A.09-09-001.<sup>74</sup>

As a result of these filings, the interim rates necessitated by the greater-than-three-year period between general rate case filings by Great Oaks are based, not upon revenue, cost or rate base data pertinent to the interim time period (September 1, 2009 through June 30, 2010), but instead upon an inflationary adjustment to revenue requirements and a continuation of the authorized rate of return from Great Oaks’ last rate case.<sup>75</sup>

Notably, the interim rates authorized by the Commission under Great Oaks’ Advice Letter 196C-W are not the kind of interim rates addressed by Public Utilities Code §455.2. Such interim rates are necessary when the proceedings on a general rate case application are delayed and prevent the implementation of rates on the first day of the rate case (Test Year No. 1). Public Utilities Code §455.2 interim rates are based upon existing rates, adjusted for inflation. When final rates are adopted in the general rate case, the utility is authorized to recover (through a surcharge, if the new rates are higher)

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<sup>71</sup> D.07-05-062, pp. A-2 – A-3.

<sup>72</sup> Advice Letter 196-W was filed July 14, 2009; Advice Letter 196A-W was filed July 22, 2009.

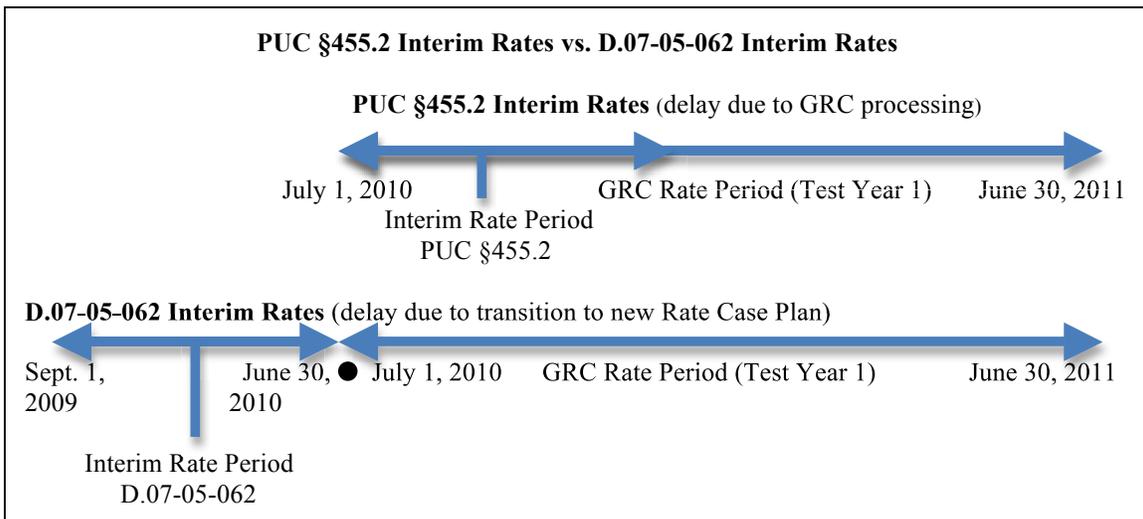
<sup>73</sup> Great Oaks filed Advice Letters 196B-W and 196C-W to comply with DWA’s instructions on August 21, 2009 and September 8, 2009, respectively.

<sup>74</sup> Advice Letter 198A-W, filed June 9, 2010.

<sup>75</sup> See Res. W-4594, dated May 11, 2006.

the difference between revenues under the interim rates and the revenues that would have been collected under the new rates. Through this process, the rates authorized in the general rate case for the time period covered by the general rate case are implemented and are based on the data submitted for that time period in the rate case.

This same procedure cannot be applied for Great Oaks’ interim rates because the time period of the interim rates, and all pertinent ratemaking data for that time period, were not addressed in A.09-09-001 or in the Decision. The following diagram depicts the difference between the two kinds of interim rates.



As shown above, the interim rates for the RCP transition period are for a period of time outside of the first test year of the rate case application and are not based upon ratemaking data for that transition period of time. In the case of Great Oaks, the D.07-05-062 interim rates are for the period of time from September 1, 2009 through June 30, 2010, while the first test year under A.09-09-001 is from July 1, 2010 through June 30, 2011. No data pertaining to the D.07-05-062 transition period was admitted into evidence in A.09-09-001, as the Decision denied Great Oaks’ Motion to Reopen No. 1.

2. The Decision Erroneously Instructs Great Oaks to “True-Up” the D.07-05-062 Interim Rates by Employing the Methodology of D.07-12-055.

Ordering Paragraph No. 5 of the Decision instructs Great Oaks to use the methodology set forth in D.07-12-055 to “true-up” the interim rates established through Advice Letter 196C-W.<sup>76</sup> D.07-12-055 does not address interim rates under D.07-05-

<sup>76</sup> Decision, pp. 78-79.

062, but instead addresses interim rates under Public Utilities Code §455.2. Simply stated, the Decision is requiring Great Oaks to employ a methodology that is incorrect.

In D.07-12-055, the Commission established rates for eight districts of Cal Water.<sup>77</sup> Due to the delay in the processing of its general rate case applications, Cal Water filed a motion to establish interim rates pursuant to Public Utilities Code §455.2.<sup>78</sup> The Commission determined it was in the public interest to grant the interim rates requested.<sup>79</sup> Ultimately, when the Commission issued its decision on Cal Water's consolidated general rate case applications, the Commission instructed Cal Water to file an advice letter to "true-up" the interim rates granted by D.07-06-028 using the following methodology: "Cal Water should calculate this surcharge amount based on the actual loss or gain in each district's revenue, determined by applying the rate differential to the actual quantities of water sales and the actual number of customers."<sup>80</sup> The net result was that Cal Water's customers in all of the eight districts affected were charged rates established in the consolidated general rate case proceeding that were based upon data submitted for the time period for which those rates were being charged.

The situation is very different for Great Oaks and the interim rates established pursuant to D.07-05-062. If Great Oaks employs the methodology of D.07-12-055, as instructed, Great Oaks will be calculating the revenue differential between what Great Oaks collected under the interim rates (established without the benefit of ratemaking data for the September 1, 2009 through June 30, 2010 time period) and what Great Oaks would have collected for actual water sales under rates established using ratemaking data for the July 1, 2010 through June 30, 2011 time period. In other words, the Decision is instructing Great Oaks to collect revenue from its customers for the September 1, 2009 through June 30, 2010 time period using ratemaking methodology having nothing whatsoever to do with that time period.

The procedure employed by the Commission for trueing-up the interim rates established under D.07-05-062 is violative of due process. No consideration has been

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<sup>77</sup> CalWater's eight applications were consecutively numbered from A.06-07-017 through A.06-07-024.

<sup>78</sup> See D.07-06-028.

<sup>79</sup> *Id.*

<sup>80</sup> D.07-12-055, p. 71.

given to ratemaking data necessary to set proper rates for the time period during which the interim rates have been charged. No consideration has been given to the proper rate of return Great Oaks should have the opportunity to earn during that time period. The Decision employs a procedure that, while simple, fails to take into account the ratemaking process determined by this Commission to be appropriate and legal.

**D. The Decision Erroneous Modifies Res. W-4534 and By Doing So Violates the Public Utilities Code and Great Oaks' Due Process Rights.**

1. Background Information Pertinent to this Issue.

The Commission issued Res. W-4534 on May 5, 2005 pursuant to Great Oaks' Advice Letter 169-W. Res. W-4534 states, in pertinent part:

On April 8, 2005, Great Oaks filed AL No. 169-W to add a new section to the preliminary statement in its tariffs to establish a memorandum account. The purpose of the account was to track the expenses of a lawsuit against the Santa Clara Valley Water District (District) to stop its practice of levying a "northern zone" pump tax upon the utility that is then passed through to utility customers through a balancing-type memorandum account. The suit would also request corrections of misallocations between the water utility and flood control functions managed by the District which causes pump tax to be increased more than otherwise necessary, and a refund of monies already overpaid to the extent permitted by the statutes of limitations.<sup>81</sup>

The lawsuit referenced in Res. W-4534 was filed by Great Oaks in 2005 and is currently pending on appeal.<sup>82</sup>

No aspect of Great Oaks' general rate case application, A.09-09-001, addressed the Res. W-4534 memorandum account in any way. Great Oaks did not seek recovery from the memorandum account. Great Oaks did not seek modification of the memorandum account. No expenses appropriate for inclusion in or to be recovered from the memorandum account were included in requested rates.<sup>83</sup> Outside services expenses requested by Great Oaks related to SCVWD litigation were unrelated to the one case addressed in Res. W-4534.

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<sup>81</sup> Res. W-4534, p. 3 (emphasis added).

<sup>82</sup> *Great Oaks Water Company v. Santa Clara Valley Water District*, Sixth Appellate District Court of Appeal, Case No. H035885.

<sup>83</sup> The Decision correctly points out that Great Oaks had not requested memorandum account treatment for litigation expenses for cases subsequent to the one case addressed in Res. W-4534, and did not make such a request in A.09-09-001. *See* Decision, p. 42.

Pursuant to Res. W-4534, Great Oaks filed and the Commission approved a new addition to Great Oaks' tariffs. Tariff Sheet Nos. 465-W and 466-W contain the terms under which Great Oaks is to seek recovery under the Res. W-4534 memorandum account. In particular, Tariff Sheet No. 465-W includes terms recognizing that the outcome of the litigation authorized by the Commission could be successful or unsuccessful, and if successful, that a judgment could take many forms:

If successful, the judgment could take several forms. If the Company is shifted into the south zone prospectively only or/and other misallocations are corrected with no cash money everything will be booked to the Memorandum Account and the Company will file an Advice Letter to recover the expense of the successful litigation – subject to a reasonableness review – and reduce rates, subject to full notice and review. If the judgment also includes a refund of cash money then the Company expects to offset the expense of the litigation first against the cash money – subject to a reasonableness review – with 100% of the balance going to the ratepayers. The Company will book what it receives to the Memorandum Account and file an Advice Letter to initiate this review and rate reduction subject to full notice and review. If the litigation is *not* successful then the Company intends that customers repay the litigation expenses – subject to reasonableness review – in future rates capped at a maximum of \$100,000 which is equivalent to one week of current pump tax or about \$5 per customer total.<sup>84</sup>

The Commission established a procedure by which Great Oaks may recover from the Res. W-4534 memorandum account, and that procedure is not in a general rate case proceeding:

If recovery of the expenses from the Memorandum Account is requested, it will be in an appropriate proceeding for which a new public notice to ratepayers will be provided. Establishing this Memorandum Account and tracking the expenditures does *not* authorize any monetary recovery by the Company from ratepayers without further specific public notice to ratepayers, a reasonableness review, and CPUC authorization.<sup>85</sup>

Clearly, the Res. W-4534 memorandum account was not an issue in A.09-09-001. However, ALJ Walwyn decided, at the close of the evidentiary hearings, to make the Res. W-4534 memorandum account an issue. The rationale employed by ALJ Walwyn on this issue, and adopted by the Commission, is unsupportable under the law. The resulting modification of the Res. W-4534 memorandum account and rulings related thereto in the Decision violate the Public Utilities Code and the Constitution.

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<sup>84</sup> Tariff Sheet 465-W (emphasis in original).

<sup>85</sup> Great Oaks' Tariff Sheet 465-W (emphasis in original).

2. The Res. W-4534 Memorandum Account Was Not an Issue in the Proceeding on A.09-09-001 Until Raised by ALJ Walwyn at the Conclusion of the Evidentiary Hearings.

There is no question that recovery under the Res. W-4534 memorandum account was not an issue in the proceedings on A.09-09-001 until the close of the evidentiary hearings. A simple review of A.09-09-001 will reveal no request by Great Oaks in any way related to the Res. W-4534 memorandum account.

Great Oaks knew, as discussed above, the Commission had already determined that any recovery under the Res. W-4534 memorandum account was to be in a separate proceeding for which “a new public notice to ratepayers will be provided.”<sup>86</sup> No notice was provided to ratepayers in connection with A.09-09-001 regarding the Res W-4534 memorandum account for the simple reason that no recovery under that memorandum account was being requested.

Perhaps the obvious needs to be stated: It would have been entirely premature to seek recovery under the Res. W-4534 memorandum account because the litigation is still ongoing and none of the various scenarios described in the memorandum account regarding success or failure of the litigation have had a chance to play out.

There is also no question that it was not until after the close of the evidentiary hearings<sup>87</sup> that ALJ Walwyn requested briefing on the following issues relevant to this discussion: (1) “[T]he position of each party on the status and the eligible balances of litigation memorandum accounts that have been previously authorized;”<sup>88</sup> and (2) “[A] position on should the Commission authorize use of any further or new memorandum accounts for litigation and if so under what terms and conditions.”<sup>89</sup>

Until that point in time, the scope of the proceedings under A.09-09-001 did not include whether Great Oaks was or was not entitled to recovery under the Res. W-4534 memorandum account. In fact, the Scoping Memo for the proceeding on A.09-09-001 referenced only the “establishment, discontinuance, or continuation of balancing and

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<sup>86</sup> *Id.*

<sup>87</sup> The Decision states that the issues to be briefed by the parties were not disclosed until the “conclusion of the evidentiary hearings.” *See* Decision, p. 38.

<sup>88</sup> Reporter’s Transcript (“TR”), Volume 4, p. 399.

<sup>89</sup> *Id.*, p. 400. *See also*, Decision, p. 38.

memorandum accounts to track specific expenses.”<sup>90</sup> Other than the “full WRAM” discussed in Section II.A., above, the proceedings on A.09-09-001 did not seek the establishment of any new memorandum accounts, and no requests were made by Great Oaks (or DRA) to discontinue any existing balancing or memorandum accounts. The issue of continuing or modifying the Res. W-4534 memorandum was also not an issue raised or contested in A.09-09-001 by any party. ALJ Walwyn raised the issue of the Res. W-4534 memorandum account on her own after the close of the evidentiary hearings.<sup>91</sup> By doing so, ALJ Walwyn injected the error into the proceeding that was later adopted by the Commission in the Decision.

3. The Commission’s Decision Modifying the Res. W-4534 Memorandum Account Violated Public Utilities Code §1708 and is Unsupported by the Law of Estoppel.

California law requires that the Commission provide notice to the parties, with an opportunity to be heard on the issues to be decided, before the Commission may rescind, alter or amend a prior decision or order.<sup>92</sup> A Commission Resolution, such as Res. W-4534, is a Commission decision or order. The record of the proceeding on A.09-09-001 does not contain notice to Great Oaks that Res. W-4534 was subject to rescission, alteration or amendment as part of the proceeding. The Scoping Memo for the proceedings on A.09-09-001 does not reference Res. W-4534 in any way.

There may be no debate as to whether the Decision modifies Res. W-4534. Res. W-4534 related to “a lawsuit against the Santa Clara Valley Water District (District) to stop its practice of levying a “northern zone” pump tax upon the utility that is then passed through to utility customers through a balancing-type memorandum account.”<sup>93</sup> The Decision applies the Res. W-4534 memorandum account to other, subsequent lawsuits that were not the subject of Res. W-4534. In fact, none of the other lawsuits existed when Res. W-4534 was issued.<sup>94</sup>

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<sup>90</sup> Assigned Commissioner and Administrative Law Judge’s Ruling and Scoping Memo (“Scoping Memo”), in A.09-09-001, filed December 2, 2009, p. 4.

<sup>91</sup> Decision, p. 38.

<sup>92</sup> Public Utilities Code §1708.

<sup>93</sup> Res. W-4534, p. 3.

<sup>94</sup> Decision, p. 40. There is no language in Res. W-4534 indicating or even suggesting application to more than one lawsuit.

The Decision's modification to Res. W-4534 is based upon a completely erroneous factual and legal analysis. First, none of the pleadings setting forth the claims made in any of the cases are part of the record of the proceedings on A.09-09-001, including the one case addressed in Res. W-4534. So, without even reading the pleadings or researching the law underlying Great Oaks' litigation with SCVWD, ALJ Walwyn determined all of the cases are sufficiently related as to justify inclusion under the terms of Res. W-4534. Instead, ALJ Walwyn relied upon a series of stipulations indicating that there are overlapping issues in the cases,<sup>95</sup> although the Decision does not state what those "overlapping issues" may be. An analysis any more superficial than this would amount to no analysis at all.

This aspect of the Decision is also legally erroneous. After first concluding that all lawsuits filed by Great Oaks against SCVWD are covered under Res. W-4534, the Decision then referenced the law of estoppel to say that Great Oaks cannot say the cases are different or unrelated.<sup>96</sup> Notably absent from this aspect of the Decision is any legal analysis of the law of estoppel or even the single citation to legal authority supporting this legal conclusion.

The law of estoppel, generally, is an equitable doctrine used to prevent a party from taking a position in a legal proceeding contrary to its position taken in the same or earlier proceeding when doing so would work an injustice or weaken the integrity of the judicial process.<sup>97</sup> Great Oaks has not taken inconsistent or different positions with respect to the case subject to Res. W-4534 and subsequent cases brought against SCVWD. Great Oaks has always said that its SCVWD litigation includes claims not addressed in Res. W-4534, and that issues related to Res. W-4534 are not included in A.09-09-001.<sup>98</sup> The law of estoppel has no application under these facts, rendering the Decision's legal conclusion on this issue incorrect.

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<sup>95</sup> *Id.*, pp. 41-42.

<sup>96</sup> *Id.*

<sup>97</sup> *See, e.g., Jackson v. Los Angeles* (1997) 60 Cal.App.4<sup>th</sup> 171; *see also Darlington v. Basalt Rock Co.* (1961) 188 Cal.App.2d 706.

<sup>98</sup> *See, e.g., Exhibit 8*, pp. 3-4.

4. The Decision's Modification of Res. W-4534 Violates Great Oaks' Due Process Rights.

As indicated above,<sup>99</sup> ALJ Walwyn first raised the Res. W-4534 memorandum account issue at the close of the evidence, and even then, the issue was raised only generally, without specific reference to Res. W-4534. The Decision even acknowledges that the issue was raised “[a]t the conclusion of the evidentiary hearings.”<sup>100</sup> By first raising the issue after all evidence had been presented, no opportunity was offered to Great Oaks to introduce evidence on this issue. This constitutes a complete denial of Great Oaks' due process rights.

All Commission proceeding must comply with due process requirements.<sup>101</sup> There are no exceptions to this Constitutional mandate. To satisfy due process requirements, notice is required, and that notice must be both real and reasonable, and reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the issue and afford them the opportunity to present evidence and objections.<sup>102</sup> Since the issue of modification and application of Res. W-4534 was not raised or noticed timely, the portion of the Decision modifying and applying Res. W-4534 is violative of Great Oaks due process rights and must be corrected.

5. DRA's Position on this Issue Is Unsupported.

DRA has stated that the Decision on this issue is correct and that the authority supporting the Decision is “well established.”<sup>103</sup> DRA cites Commission Decision 02-10-058 in support of its position.<sup>104</sup>

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<sup>99</sup> See Section II.D.2.

<sup>100</sup> Decision, p. 38.

<sup>101</sup> Constitution, Article XII, Section 2.

<sup>102</sup> See, e.g., *on due process requirements, generally, In re Lambert* (1901) 134 Cal. 626; *In re Hampton's Estate* (1942) 55 Cal.App.2d 131; *Edward W. v. Lamkins* (2002) 99 Cal.App.4<sup>th</sup> 516 (review denied); *In re J.I.* (2003) 108 Cal.App.4<sup>th</sup> 903 (review denied); *In re Vitamin Cases* (2003) 132 Cal.Rptr.2d 425.

<sup>103</sup> DRA Reply Comments, p. 4.

<sup>104</sup> *Id.* Note: DRA specifically cites pp. 22-23 of D.02-10-058 as supporting its position. Those pages include Ordering Paragraphs 7-13 of D.02-10-058, none of which address any of the issues pertaining to Res. W-4534 and the rationale of the portion of the Decision relating to Res. W-4534. Nevertheless, assuming DRA is in any way relying upon D.02-10-058 as authority for its position, Great Oaks addresses that Commission decision herein.

In D.02-10-058, the Commission declined to approve the portion of a jointly proposed settlement agreement related to water quality litigation costs forecast by San Gabriel Valley Water Company (“San Gabriel”). The joint settlement proposal would have resulted in San Gabriel recovering such forecast litigation costs through rates.<sup>105</sup> The Commission concluded that while those forecast litigation costs should not be recovered through rates, “[t]his conclusion does not affect San Gabriel’s authorization to record amounts in the water quality memorandum account for later review and consideration by the Commission.”<sup>106</sup>

DRA has, then, cited Commission authority supporting Great Oaks’ position on this issue (and completely refuting DRA’s own position). As in D.02-10-058, the Commission here should not preclude Great Oaks from recording litigation expenses incurred in the SCVWD litigation authorized by Res. W-4534 into the authorized memorandum account, which will be subject to later review and consideration by the Commission when the issue is ripe for determination (*i.e.*, when the litigation is successfully or unsuccessfully concluded). D.02-10-058 supports Great Oaks’ position that the Decision is in error.

6. Correcting the Decision on This Issue is Uncomplicated and Will Preserve All Issues Until Ripe for Decision.

As this Application for Rehearing is intended to provide the Commission to correct legal errors, Great Oaks proposes that the legal errors pertaining to Res. W-4534 be corrected by modifying the Decision and eliminating any findings, conclusions and ordering paragraphs related to Res. W-4534. The prejudicial harm caused by the legal errors pertaining to Res. W-4534 will be alleviated. Neither Great Oaks nor its customers will be disadvantaged in any way by this proposed correction. Absent this correction, Great Oaks will seek judicial review on this issue to protect its legal rights.

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<sup>105</sup> D.02-10-058, pp. 14-15.

<sup>106</sup> *Id.*, p. 16.

**E. The Decision Violates Great Oaks' Due Process Rights by Adjusting Salaries Arbitrarily.**

1. Background Information Relevant to this Issue.

The Decision employs two methodologies to adjust downward (reduce) salaries for Great Oaks' employees that are arbitrary and contrary to the evidence. In particular, at the urging of DRA, the Commission adjusted base salaries downward using the Commission's October 2009 labor escalation memorandum to find that salary increases made six months earlier were too high.<sup>107</sup> The evidence in the record showed that Great Oaks' non-management salaries were increased in early 2009.<sup>108</sup> DRA urged the Commission to use the October 2009 labor escalation memorandum to judge whether those salary increases were appropriate. The Decision employed this methodology.

The evidence showed that when the non-management salary increases were made, the percentage increases were well within the labor escalation rates published at the time of the increases.<sup>109</sup> The labor escalation memorandum published by DRA in April 2009 showed that salary increases of up to 4.3% were appropriate.<sup>110</sup> The salary increases made at that time were only 2.3% over 2008 salary levels.<sup>111</sup> Even DRA's evidence was that the salary increases made by Great Oaks were only 3%.<sup>112</sup> In short, there was no evidence presented in the proceeding on A.09-09-001 supporting the finding that when the salary increases were made they exceeded the Commission's labor escalation rates applicable to those salary increases.

Instead of applying the Commission labor escalation rates for the time when the salary increases were made, the Decision applied the Commission's labor escalation rates for October 2009.<sup>113</sup> This was not just erroneous; it was arbitrary.

The effect of this arbitrary application of labor escalation rates was to adjust downward non-management salaries for ratemaking purposes. The Decision then adopted the lower non-management salaries to calculate the revenue requirement. By

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<sup>107</sup> Decision, pp. 24, 31.

<sup>108</sup> See discussion in Decision, p. 30.

<sup>109</sup> Exhibit 25 (April 2009 DRA Labor Escalation Memorandum).

<sup>110</sup> *Id.*

<sup>111</sup> Exhibit 13.

<sup>112</sup> Exhibit 16, p. 3-4.

<sup>113</sup> Decision, p. 31.

doing so, the Commission has committed legal error and violated Great Oaks' due process rights.

With respect to management salaries, the Decision adjusted certain management salaries downward purportedly to reflect that time spent by those management employees on non-utility business.<sup>114</sup> Upon examination, however, it is clear that the downward adjustments are not based upon evidence, but are instead completely arbitrary.

The salary of the Chairman, CEO was adjusted downward by 10%.<sup>115</sup> There is no evidence in the record that the Chairman, CEO spent 10% of his time on non-regulated business activities.<sup>116</sup> The 10% adjustment, therefore, is not based upon the evidence presented, but is instead based upon some other, unstated rationale. Such a procedure defies due process and necessarily produces arbitrary results.

The same is true with respect to the downward adjustment of the salary for the Treasurer/CFO. The Decision adjusts that salary downward by 5% and, again, cites no evidence in the record to support the adjustment. During the evidentiary hearings, the CFO was asked how much time she spent on non-regulated activities, and she responded by saying she spent "negligible" time on non-utility matters.<sup>117</sup> A five percent (5%) adjustment is not a negligible adjustment and is, therefore, contrary to the evidence presented. Since the salary adjustment for the CFO is not based on evidence, it is an arbitrary adjustment and in violation of law.

The same is again true with respect to Great Oaks' regulatory attorney. There is no evidence supporting the Decision's 10% downward salary adjustment and the Decision cites none. Without evidence, any adjustment is arbitrary and contrary to law.

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<sup>114</sup> Decision, pp. 28-29.

<sup>115</sup> *Id.*, p. 29.

<sup>116</sup> The Decision states: "At hearing, the CEO testified that he spent 30% of his time on SCVWD litigation and property management, and that he spent more time on property management than other employees. Decision, p. 28. However, the time spent on litigation is not the basis for the downward adjustment, as the Decision provides that "Great Oaks should be allowed to use its existing employees to pursue the SCVWD litigation over the coming GRC period." *Id.*, p. 27.

<sup>117</sup> TR, Volume 3, p. 261.

In DRA's Reply Comments, DRA claimed that the record contained testimony upon which the salary adjustments were based.<sup>118</sup> The testimony cited by DRA,<sup>119</sup> however, does not support DRA's contention. Review of the testimony cited by and relied upon by DRA reveals no testimony supporting the downward salary adjustments. Instead, as pointed out above, that testimony shows that Great Oaks' regulatory attorney spent less time on property management matters than the CEO,<sup>120</sup> and that the CFO spent "negligible" time on non-utility matters as compared to time spent on utility matters.<sup>121</sup> DRA's citation to the evidence only further proves Great Oaks' point – the Decision's downward salary adjustments are not based upon the evidence presented, but are instead based upon some other, unknown and arbitrary standard.

2. The Commission Must Employ Procedures Consistent with Due Process and the Decision's Adjustment of Great Oaks' Salaries Violates this Requirement.

Article XII, Section 2 of the Constitution requires that Commission proceedings be conducted consistent with due process requirements. Notice is an essential element of due process, including notice of Commission methodology in ratesetting proceedings. When Commission decisions are arbitrary and not based upon evidence, the proceedings do not satisfy due process requirements as no notice has been provided on the standards being applied.

The Decision's handling of salary adjustments is not based upon a procedure employed in prior Commission proceedings, nor is it based upon the evidence presented for A.09-09-001. The only Commission decision cited in the Decision to support its conclusions on salaries is D.07-05-062 for the proposition that "the most recent labor inflation factors as published by the DRA" should be used for escalation year advice letter filings.<sup>122</sup>

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<sup>118</sup> DRA's Reply Comments, p. 3.

<sup>119</sup> DRA cited TR, Volume 2, pp. 177-178 and TR, Volume 3, pp. 252-263. See DRA's Reply Comments, p. 3.

<sup>120</sup> TR, Volume 2, p. 178. Since the Decision adjusts both the CEO's and the regulatory attorney's salaries downward by the same 10%, clearly the Decision is not based on the evidence that the CEO handled more property management activities than the regulatory attorney.

<sup>121</sup> TR, Volume 3, p. 261.

<sup>122</sup> Decision, pp. 24-25.

Clearly, A.09-09-001 was not an escalation year advice letter filing; A.09-09-001 was a general rate case application. Escalation year advice letter filings, by their very nature, are requests made based upon the then current data. In the context of salary increases, for example, an escalation year advice letter filing would request salary increases based upon the data for that time, i.e., the DRA-published labor factors. Labor factors for some other period of time are not used to challenge such escalation year filings.

In the Decision, however, the DRA labor factors published at the time of the salary increases<sup>123</sup> by Great Oaks were not used to judge the propriety of the increases. Instead, DRA and the Commission used the labor factors published by DRA six months after the salary increases were made in order to find that the salary increases were too extravagant. No Commission precedent exists that permits the Commission to judge the propriety of past salary increases using data for an entirely different period of time in the future.

DRA has taken issue with the fact that the Commission has retroactively adjusted salaries downward.<sup>124</sup> DRA states: “The application of labor escalation factors to historical data is used to develop forward-looking forecasts.”<sup>125</sup> Here, however, labor escalation factors are used, not to develop forward-looking forecasts, but to make adjustments to the historical salary data itself. Simply put, the data DRA and the Commission used to conclude that the April 2009 salary increases were too extravagant did not exist in April 2009. The DRA data was published in October 2009.

Moreover, the use of October 2009 DRA labor factors to judge April 2009 salary increases was completely random. If this is permitted, what prevents the use labor factors from whatever DRA monthly publication has the lowest rates (from any year) to find all salary increases by every utility to be too extravagant? If the DRA-published labor factors are to be used to judge the propriety of salary increases, then the labor factors for

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<sup>123</sup> Exhibit 25 (If the DRA-published labor escalation factors of April 2009 were used to judge the April 2009 salary increases, the salary increases would have been found to be well within the DRA-published rates of 4.3%. See discussion in Section II.E.1, above.)

<sup>124</sup> DRA’s Reply Comments, p. 3.

<sup>125</sup> *Id.*

the time of the salary increases must be used. Otherwise, as is the case here, the procedure employed is void of due process protections.

Similarly, if the Commission makes salary adjustments based upon undisclosed factors, rather than upon the evidence presented, all due process requirements are ignored. The Decision's adjustments to management salaries are not based upon evidence in the record, but are instead based upon entirely undisclosed, completely subjective factors. The Commission should not condone or adopt arbitrary procedures like this in any proceeding, and certainly not in ratemaking proceedings.

3. Correction of this Error is Required and Uncomplicated.

Pursuant to this Application for Rehearing, the proper method of correcting the legal errors discussed in this section is relatively simple. The downward adjustments made to Great Oaks' salaries on the basis of the October 2009 DRA labor rates must be eliminated, and the downward adjustments to management salaries based upon those rates and factors outside of the evidence must be eliminated. Revenue requirements then may be recalculated for ratemaking purposes. Absent this correction, judicial review will be sought.

**F. The Decision's Application of Federal Tax Law is Erroneous.**

1. Background Information Relevant to this Issue.

The Decision makes a finding that Great Oaks' rates should be based, in part, on Great Oaks taking a Domestic Production Activities Deduction ("DPAD") when filing its federal income taxes.<sup>126</sup> The Decision concludes that for the 2010-2011 rate year, Great Oaks should take a federal tax deduction amounting to \$83,328.30.<sup>127</sup> Over the course of the three-year rate case cycle, the DPAD amounts to over \$218,000.<sup>128</sup> The Decision relies upon DRA's interpretation of federal tax law.<sup>129</sup> No Commission decisions are cited in support of this finding.

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<sup>126</sup> Decision, p. 52. See also p. 76 (Conclusion of Law No. 18).

<sup>127</sup> Decision, Appendix A, p. 6.

<sup>128</sup> The DPAD amounts for 2011-2012 and 2012-2013 are \$72,555.80 and \$62,191.50, respectively. *Id.*

<sup>129</sup> Decision, p. 52.

The DRA witness supplying DRA’s position on the issue (Lindsay Laserson) had no qualifications whatsoever pertaining to federal taxation.<sup>130</sup> In fact, when asked about her qualifications to offer testimony on federal taxation, the DRA witness replied: “I can’t speak to that.”<sup>131</sup> By adopting DRA’s position on this issue, the Commission has based an important federal taxation decision on the testimony of a witness who knew nothing about federal taxation.<sup>132</sup>

Then, for the first time, in DRA’s Reply Comments, DRA claimed that D.10-06-038 stands for the proposition: “DPAD applies to water utilities and the Commission requires them to include DPAD in their income tax calculations for ratemaking purposes.”<sup>133</sup> As with virtually every attempt by DRA to cite authority supporting its position, this citation, too, proves to be inapposite.

In D.10-06-038, the Commission actually rejected DRA’s interpretation and methodology pertaining to DPAD and accepted, instead, the tax treatment proposed by Cal Am.<sup>134</sup> Just as here, DRA had claimed that its DPAD methodology complied with Internal Revenue Service guidelines,<sup>135</sup> but the Commission wisely rejected DRA’s approach.

DPAD is a federal tax deduction governed under Section 199 of the Internal Revenue Code.<sup>136</sup> If a taxpayer derives “domestic production gross receipts” from the production, rather than the distribution of potable water, then that taxpayer may qualify for DPAD.<sup>137</sup> As noted in D.10-06-038: “Internal Revenue Code § 1.199-4(iii) states that “Gross receipts from storage of potable water after completion of treatment of

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<sup>130</sup> Exhibit 16, Appendix C.

<sup>131</sup> TR, Volume 4, p. 387.

<sup>132</sup> DRA may attempt to argue in opposition to this issue that Ms. Laserson’s testimony was based upon the work of other, unidentified persons employed with DRA who actually have tax experience, or at least claim to have that experience. Of course, such an argument by DRA would be wholly improper and not based on evidence in the record of the proceeding on A.09-09-001.

<sup>133</sup> DRA’s Reply Comments, p. 4.

<sup>134</sup> D.10-06-038, pp. 42-44.

<sup>135</sup> *Id.*, p. 43.

<sup>136</sup> 26 U.S.C.A. Chapter 1, Subchapter B, Part VI, Section 199 (hereinafter “Section 199”).

<sup>137</sup> Section 199(c)(4)(A)(i)(III) and Section 199(c)(4)(B)(ii).

potable water, as well as gross receipts attributable to the transmission and distribution of potable water are non-domestic production gross receipts.”<sup>138</sup>

During the evidentiary hearings, DRA’s witness on DPAD was asked if she knew if Great Oaks had any receipts from qualified production activities, and the DRA witness answered: “No.”<sup>139</sup> While unqualified, at least the witness was truthful in responding that she did not know if Great Oaks meet the requirement for DPAD application under Section 199.

The Decision’s conclusion on DPAD is in conflict with the Decision’s own summary of federal tax law pertaining to DPAD:

Section 199 of the Internal Revenue Code, enacted as part of the American Jobs Creation Act of 2004, allows a taxpayer a federal tax deduction for certain domestic production activities. This deduction is allowed when the taxpayer fulfills conditions specified in Section 199. A water utility is allowed this deduction if its domestic production activities include the acquisition, collection, and storage of raw water (untreated water), transportation of raw water to a water treatment facility, and treatment of raw water at such a facility.<sup>140</sup>

Great Oaks produces water from its groundwater wells and sells the water produced directly to its customers without the need for water treatment. Great Oaks is in no way involved in the transportation of raw water to water treatment facilities or the treatment of raw water at such a facility. There is no evidence in the record that would in any way support such a finding or conclusion. By the Decision’s own summary of DPAD eligibility, Great Oaks is not eligible. The Decision is clearly in error.

Great Oaks also does not generate revenues on the water it pumps (produces) from its groundwater wells. Great Oaks derives revenue from the transmission and distribution of potable water, so its “gross receipts attributable to the transmission and distribution of potable water are non-domestic production gross receipts”<sup>141</sup> under the Internal Revenue Code. DPAD does not apply to these facts. The Decision’s use of DPAD to calculate the federal tax liability portion of ratemaking expenses is clearly erroneous.

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<sup>138</sup> D.10-06-038, p. 43 (emphasis added).

<sup>139</sup> TR, Volume 4, p. 387.

<sup>140</sup> Decision, p. 51 (emphasis added to highlight that these activities are listed in the conjunctive, meaning that all of the listed activities are deemed to be requirements for DPAD).

<sup>141</sup> D.10-06-038, p. 43 (emphasis added).

2. The Decision Contains a Clear Error of Law and Must be Corrected.

The rates authorized by the Decision are based, in part, on an incorrect application of federal tax law advocated by a DRA witness with no federal tax experience, expertise or qualifications. In any other setting, it would be pure recklessness to base a federal tax decision on advice from a person who knows nothing on the subject, yet the Commission has adopted that advice as its own and has used it to establish rates for Great Oaks. Great Oaks requests that the Commission correct this legal error and adopt Great Oaks' federal tax expenses, which do not include DPAD. Otherwise, it will be necessary to seek judicial review.<sup>142</sup>

**G. The Decision's Finding that Department of Motor Vehicle Registration Fees is Not Taxes is Clearly Erroneous and Must be Corrected.**

1. Background Information Pertaining to this Issue.

Great Oaks submitted data pursuant to D.07-05-062 projecting its motor vehicle registration fees ("DMV Fees") for the three-year rate case period among the "Taxes Other than Income" category.<sup>143</sup> DRA argued that the Commission treats DMV fees as expenses, rather than as taxes, that Great Oaks first introduced its request for DMV fees in its opening brief and that the Proposed Decision and Alternate Decision for A.09-09-001 found that Great Oaks first made such request in its opening brief.<sup>144</sup> Even though DRA was wrong on each point, the Decision adopted DRA's position, resulting in clear error.

2. DMV Fees Are Taxes, as a Matter of Law.

In California, the motor vehicle license fee is a tax levied pursuant to Revenue & Tax Code §10751. "The motor vehicle license or registration fee is a privilege tax levied in exercise of the police power to control and regulate travel on the public highways."<sup>145</sup>

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<sup>142</sup> Another option for the Commission would be to enter into an agreement with Great Oaks under which the Commission would indemnify and hold Great Oaks harmless in all respects if Great Oaks takes the DPAD deduction specified in the Decision and the Internal Revenue Service finds it to be improper. Great Oaks does encourage the Commission to use caution, however, as the tax advice it is asserting still comes from a person with no tax experience at all.

<sup>143</sup> See, e.g., Exhibit 10, p. A-12c.

<sup>144</sup> DRA's Reply Comments, p. 4.

<sup>145</sup> *Ingels v. Botelar*, 100 F.2d 915, 919 (9<sup>th</sup> Cir. 1938).

As a matter of law, therefore, the DMV fees projected by Great Oaks in A.09-09-001 are taxes.

Great Oaks projected DMV fees as taxes for purposes of A.09-09-001 in its Workpapers that were admitted into evidence during the evidentiary hearings.<sup>146</sup> Great Oaks did not first raise the issue in its opening brief as claimed by DRA. In addition, neither the Proposed Decision nor the Alternate Decision for A.09-09-001, nor the Decision itself, found that Great Oaks did not raise the issue until its opening brief as claimed by DRA.<sup>147</sup> The DMV fees projected by Great Oaks were submitted timely and correctly and no Commission rule or precedent supports the Decision's denial of that legitimate tax expense in A.09-09-001.

The Decision must be corrected to include the projected DMV fees in the rate calculation for Great Oaks. That Great Oaks will incur the DMV fees has never been challenged. DRA's evidence did not even address the DMV fees.<sup>148</sup> There is simply no legal basis for denial of this legitimate tax expense.

#### **H. The Decision's Handling of the Country View Tank Capital Addition is Erroneous and Requires Correction.**

##### **1. Background Information Pertaining to this Issue.**

Great Oaks requested authority to add a new water supply tank to its utility plant during the rate case period:

Country View Tank (Account 324): Great Oaks acquired the water system of Calero Lake Estates in about 1999. The system had been built by the developer in 1992 to supply domestic water and limited fire flow through a very long 8" transmission main from a 220,000-gallon tank. The fire flow requirement for most of the properties in this area of the county is 1,500 gpm at 20 psi. The existing tank is capable of delivering approximately 1,500 gpm at 20 psi far down the hill in the valley. However, this high flow rate creates a very low pressure (even a vacuum) at areas along the summit and ridge of the hill. No houses have been built within this critical area in the past 17 years since the lots were developed. The pressure at the highest lot will maintain a pressure of over 20 psi if the flow

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<sup>146</sup> Exhibit 10, p. A-12-c.

<sup>147</sup> The Decision, at p. 48, states: "Great Oaks also includes an unexplained 'Payroll Expense' item of \$533 in its opening brief." This is the same language as in both the Proposed Decision and the Alternate Decision. Notably, Great Oaks submitted the "Payroll Expense" item in its Workpapers admitted into evidence before the filing of its opening brief, so to the extent DRA's Reply Comments and the Decision relate to the "Payroll Expense" item, both are in error. *See* Exhibit 10, p. A-12c.

<sup>148</sup> *See* DRA's Report on Results of Operations, Exhibit 16.

rate stays below 900 gpm. A good solution is to construct another tank (approximately 100,000 gallons) along the main on the summit over a mile down from the larger tank. The flow into this tank would be limited to 800 gpm with over 1,500 gpm flowing out down to the valley. All water would flow into and then out of the small tank (none would bypass). The tank would also eliminate the need for a pressure reducer that is currently a maintenance and operation problem. Great Oaks has made a rough estimate of \$385,000 to purchase land, engineer, design, excavate, grade, install and construct the tank, fence, and related equipment. We request approval of the concept of the project and inclusion into rate base subject to an advice letter application after it is in service. Great Oaks also requests CPUC's help and advice to determine the most equitable method of charging the cost of this improvement.<sup>149</sup>

DRA concurred with the need to construct the Country View Tank and recommended that Great Oaks include the cost of the project in rate base when completed and “recover the cost from future customers by charging a fee upon connection for water service.”<sup>150</sup> As to the methodology for recovering costs from customers, DRA proposed the methodology adopted by the Commission in Res. W-4787.<sup>151</sup>

As to the Country View Tank, the Decision states:

Both parties agree that Great Oaks may submit this project [the Country View Tank], when complete, by advice letter and there should be a cost cap of \$385,000. DRA further states that Great Oaks should recover the cost of construction of this tank from future customers through a service fee assessed on future customers when they connect to Great Oaks water service.<sup>152</sup>

The Decision's finding that Great Oaks and DRA agreed on capping the costs of the Country View Tank at \$385,000 is erroneous. There is no evidence of such an agreement anywhere in the proceedings on A.09-09-001. Instead, the evidence showed that Great Oaks made a “rough estimate of \$385,000” and requested approval of “the concept of the project and inclusion into rate base subject to an advice letter application after it is in service.”<sup>153</sup> Obviously, such an advice letter finding would be subject to the Commission's normal reasonableness review, including the final costs of the project.

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<sup>149</sup> A.09-09-001, Exhibit E, Chapter 10 and Exhibit G, pp. 4-5. Such portions of Great Oaks' A.09-09-001 were admitted into evidence as Exhibit 1, Section E, Chapter 10 and Exhibit 1, Section G.

<sup>150</sup> Exhibit 16, p. 7-10.

<sup>151</sup> *Id.*, pp. 7-9 – 7-11.

<sup>152</sup> Decision, pp. 46-47 (citing Exhibit 16 at pp. 7-9 – 7-11).

<sup>153</sup> *See* citations to evidence in footnote 148, above.

The Decision's handling of the cost recovery for the Country View Tank is also erroneous, as it does not follow the methodology the Commission approved in Res. W-4787 (the methodology recommended by DRA). In Res. W-4787, the Commission authorized a service fee on future customers as part of the funding mechanism to repay a federal loan sought by the utility to enable construction of water system improvements. That service fee was only part of the funding mechanism, and the Commission noted that it was uncertain whether any revenue would be received by the utility in the future from the service fee.<sup>154</sup> The primary funding of the water system improvements authorized by the Commission in Res. W-4787 was a surcharge on existing customers.<sup>155</sup> As the Decision stands, authorizing only the ability only to recover the costs through a service fee on future customers, the Decision renders the project untenable, even though Great Oaks and DRA did agree on the necessity and propriety of the Country View Tank.

The Decision's Conclusion of Law No. 15 provides:

15. Great Oaks should be allowed to submit a Tier 2 advice letter to recover the costs of the Country View Tank when the project is completed and it is used and useful. Construction costs should be capped at \$385,000 and Great Oaks should be allowed to recover the costs from future customers through a service fee.<sup>156</sup>

When Great Oaks commented on the handling of this issue in the Proposed Decision and the Alternate Decision for A.09-09-001, Great Oaks presented the same analysis of the error.<sup>157</sup> DRA's Reply Comments on this issue were brief and amounted to no more than calling Great Oaks' comments foolish.<sup>158</sup>

The facts remain uncontroverted. The Decision states that Great Oaks and DRA reached agreement on this issue when that was not the case, and the cost recovery methodology adopted is either contrary to Res. W-4787 (which it is apparently designed to emulate) or in need of clarification. Finally, the total cost of the Country View Tank should be reviewed in the advice letter authorized in the Decision, using the

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<sup>154</sup> Res. W-4787, p. 5.

<sup>155</sup> *Id.*

<sup>156</sup> Decision, p. 76.

<sup>157</sup> *See* Comments of Great Oaks Water Company to Proposed Decision of ALJ Walwyn, p. 22; Comments of Great Oaks Water Company to Alternate Decision of Commissioner Bohn, p. 22.

<sup>158</sup> DRA's Reply Comments, p. 4.

Commission's well-established reasonableness standard, without imposing upon Great Oaks a cap that was indisputably a "rough estimate."

2. Conclusion of Law No. 15 Must be Corrected.

By supporting its conclusion on this issue upon a non-existent agreement between Great Oaks and DRA, the Decision is obviously erroneous. Moreover, by deviating significantly from the Res. W-4787 cost-recovery methodology previously employed by the Commission for capital additions, the Decision violates Great Oaks' equal protection rights, as Great Oaks is entitled to receive treatment equal to that of other water utilities under the same or similar circumstances. And, finally, by capping construction costs at \$385,000, rather than allowing Great Oaks to proceed and submit the actual construction costs in an advice letter filing subject to reasonableness review, the Decision prevents Great Oaks from the recovery of any additional costs, no matter how reasonable.

Correcting these errors is, again, relatively simple. The Decision should be modified to reflect that Great Oaks and DRA did not reach agreement on the issue. Great Oaks should be permitted to file an advice letter upon completion of the project, putting into rate base the reasonable costs of the Country View Tank. Recovery of the costs should be through the full methodology of Res. W-4787, rather than just by collecting costs from future customers through a service fee. Unless corrected, the aforementioned errors in the Decision will cause this necessary project to financially nonviable.

**I. The Decision's Order to Investigate Great Oaks' Handling of Groundwater Charges is Based upon the ALJ's Admittedly Flawed Instructions to DWA.**

1. Background Information Pertaining to this Issue.

ALJ Walwyn issued instructions to the Division of Water and Audits ("DWA") to verify certain information regarding Great Oaks' handling of disputed groundwater charges levied against Great Oaks by the Santa Clara Valley Water District ("SCVWD").<sup>159</sup> Great Oaks requested that ALJ Walwyn correct her instructions to DWA, because the instructions she provided ordered DWA to verify statements Great Oaks had never made.<sup>160</sup> The instructions essentially predetermined the outcome of

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<sup>159</sup> Decision, pp. 62-63.

<sup>160</sup> See Comments of Great Oaks Water Company to DWA Verification, filed September 3, 2010 in the proceedings on A.09-09-001. See also Comments of Great Oaks Water Company in Reply to the Comments of the Division of Ratepayer Advocates on the

DWA's work, since DWA would be unable to confirm statements never made. In short, ALJ Walwyn's instructions to DWA guaranteed a non-compliance finding by DWA.

In the Decision, ALJ Walwyn acknowledged that her instructions to DWA were flawed and required clarification.<sup>161</sup> However, rather than provide correct instructions to DWA, ALJ Walwyn buried her acknowledgement in a footnote of the Decision and allowed the DWA Verification to stand despite its flawed origins.

The Decision, therefore, includes findings, conclusions and ordering paragraphs based upon a DWA Verification issued pursuant to flawed instructions from ALJ Walwyn. The Decision then goes on to base other findings, conclusions and orders based upon the same DWA Verification. All aspects of the Decision based upon the DWA Verification are erroneous and constitute a denial of due process to Great Oaks.

The Commission is barred from conducting proceedings that violate due process.<sup>162</sup> The Decision recognizes that further investigation is necessary to determine if Great Oaks violated any Commission Rules, accounting requirements or sections of the Public Utilities Code.<sup>163</sup> The Decision contains no findings of non-compliance on the part of Great Oaks, and determines that further action in the context of A.09-09-001 would not be appropriate.<sup>164</sup>

Yet, despite the reality that the Commission requires further investigation in a separate proceeding, the Commission applies the flawed DWA Verification in the proceeding on A.09-09-001 to impose new restrictions and requirements on Great Oaks. Using the flawed DWA Verification to impose restrictions and requirements upon Great Oaks is a specific denial of due process, as Great Oaks has no opportunity to challenge those restrictions and requirements in the context of A.09-09-001. The flawed DWA Verification must instead be addressed separately.

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Division of Water and Audit's Financial and Compliance Verification of Great Oaks Water Company, filed September 7, 2010.

<sup>161</sup> Decision, p. 63, footnote 90.

<sup>162</sup> Constitution, Article XII, Section 2.

<sup>163</sup> Decision, p. 68.

<sup>164</sup> *Id.* The Decision calls for a investigation separate from the proceedings on A.09-09-001.

2. The Portions of the Decision Based upon the DWA Verification Must be Corrected or Stricken.

Since the DWA Verification was premised upon flawed instructions from ALJ Walwyn, the Verification itself is flawed.<sup>165</sup> The use of the flawed DWA Verification is unlawful and violates due process. The only way to correct this error is to strike the DWA Verification and provide correct instructions to DWA to look into the groundwater charge issue. Striking the DWA Verification will require that all portions of the Decision in any way based upon the DWA Verification also be stricken and the Decision modified accordingly.

It was not until the Proposed Decision that ALJ Walwyn finally acknowledged the flaws in her instructions to DWA. Then, no action was taken by ALJ Walwyn to correct the resulting error. No explanation has ever been offered by ALJ Walwyn for this action or inaction.

The Decision does note that the issues raised in the DWA Verification are not to be addressed in the proceeding on A.09-09-001, but are more proper for an adjudicatory proceeding.<sup>166</sup> Correcting the Decision as requested herein will have no effect on the rates established under A.09-09-001,<sup>167</sup> nor upon any separately initiated proceedings.

3. Other Issues Affected by the DWA Verification Error.

As discussed below, the DWA Verification error affects other aspects of the Decision, including the denial of rights under D.07-05-062, rate case expenses, the reporting of accounting processes or changes and a legal determination on liability for various speculative costs and expenses related to groundwater charges.

**J. The Decision's Denial of Rights Under D.07-05-062 is Unprecedented, Violates Public Utilities Code §455.2(c) and Denies Great Oaks Equal Protection Under the Law.**

1. Background Information Pertaining to this Issue.

In establishing the new Rate Case Plan for Class A water utilities, the Commission recognized that Public Utilities Code §455.2(c) directed the Commission to

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<sup>165</sup> Flawed input necessarily results in a flawed outcome.

<sup>166</sup> Decision, p. 68.

<sup>167</sup> In this regard, the issues raised by DRA regarding the disputed groundwater charges were never relevant to the ratemaking proceeding, as rates were unaffected by the dispute over the groundwater charges. The Decision makes no reference to any ratemaking effects of the dispute.

adopt a procedure for granting waivers to the requirement that water utilities file a GRC application every three years.<sup>168</sup> To comply with this statutory requirement, D.07-05-062 adopted a procedure pursuant to which a utility may seek waiver of a GRC application by letter to the Executive Director.<sup>169</sup> In addition, D.07-05-062 provides a procedure pursuant to which a utility may file an advice letter in lieu of an application under certain circumstances.<sup>170</sup> Pursuant to D.07-05-062 these rights to seek a GRC waiver and to file by advice letter are available to all Class A water utilities meeting the requirements stated therein.

The Decision orders: “Great Oaks Water Company shall file its next general rate case by application pursuant to the schedule established in Decision 07-05-062.”<sup>171</sup> By this order, the Decision eliminates Great Oaks’ rights to request a GRC waiver and to file by advice letter. Denying Great Oaks the same rights as granted to other Class A water utilities violates Great Oaks’ Constitutional right to equal protection under the law.

2. Eliminating Great Oaks’ Rights Under D.07-05-062 Affects Rate Case Expenses.

Rate case expenses authorized in the Decision were based upon expenses incurred by Great Oaks in its prior rate case submitted via advice letter.<sup>172</sup> By eliminating Great Oaks’ right under D.07-05-062 to file its next rate case by advice letter if Great Oaks meets the requirements, the Commission is requiring Great Oaks to incur rate case expenses far in excess of the allowed amounts, as Great Oaks will be required to be involved in the full rate case proceedings, even if Great Oaks meets the requirements permitting it to file its GRC by advice letter. No other Class A water utility has been denied its rights under D.07-05-062, clearly showing a violation of Great Oaks’ Constitutional right to equal protection under the law.

3. The Decision Must Be Correct to Provide Great Oaks with Equal Rights Under D.07-05-062.

Correcting the Decision by removing restrictions and new requirements based upon the flawed DWA Verification is appropriate. Consideration of any non-compliance

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<sup>168</sup> D.07-05-062, p. 20.

<sup>169</sup> *Id.*, p. A-14.

<sup>170</sup> *Id.*, pp. A-14 – A-15.

<sup>171</sup> Decision, Ordering Paragraph No. 11, p. 81.

<sup>172</sup> Historical expenses included in Exhibit 10, p. A-9, resulted from Great Oaks’ last rate case filed by advice letter. *See* Res. W-4594, p. 2.

by Great Oaks is to be addressed in a separate proceeding and correcting the Decision in this regard will have no effect on such separate proceeding. Absent this correction, the Decision will contain errors of law.

**K. The Decision’s Order Requiring Great Oaks to Provide Additional Reports Not Required of Other Class A Water Utilities Violates Great Oaks’ Due Process and Equal Protection Rights.**

1. Background Information Pertaining to this Issue.

Based upon the DWA Verification, the Decision orders Great Oaks to provide reports to a wide range of recipients if Great Oaks:

adopts any new accounting approaches, unusual accounting treatment or items, and changes to relevant procedures and records, especially any event involving a change that represents a difference of 10% or more between the new accounting approach or treatment and the prior accounting approach or treatment.<sup>173</sup>

This requirement is unlike any other imposed upon Class A water utilities, and is another of the results from the flawed DWA Verification. The vagueness of the terminology employed for this requirement and the lack of definitions for the terms “accounting approaches,” “accounting treatment,” “items,” and “relevant procedures and records” provides a high level of ambiguity and allows for many different interpretations of what is or what is not to be reported by Great Oaks.

The system of accounts for Class A water companies is set forth in Commission Standard Practice U-27-W (“SP U-27-W”). SP U-27-W does not define any of the terms listed above, showing that the language of the Decision is not based upon established Commission practice, but upon a general and ambiguous concept of regulatory accounting. For example, what “relevant procedures and records” are covered by the Decision’s order? Are they “procedures and records” relevant to SP U-27-W or are they “procedures and records” claimed to be relevant on some other basis?

As another example, if Great Oaks has expenses accounted for under U-27-W that fluctuate up or down by more than ten percent (10%) in a month or in a year or over a period of years, is that a reportable occurrence under the Decision and, if so, what is the requirement for frequency of reports? Accounting is a fairly precise activity, subject to established rules and Commission standard practices. The vague and ambiguous language of the Decision is completely imprecise and will lead to varying interpretations.

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<sup>173</sup> Decision, Ordering Paragraph No. 13, pp. 81-82.

Great Oaks objected to the imprecise and flawed instructions given by ALJ Walwyn to DWA regarding the DWA Verification. Now, ALJ Walwyn has created a new set of vague and ambiguous instructions for Great Oaks to follow. Rather than acknowledge the flaws after-the-fact as ALJ Walwyn did in the Decision, the flaws must be addressed now. Otherwise, the Commission will be subjecting Great Oaks to reporting requirements both wholly different than those applicable to any other Class A water company and entirely ambiguous and subject to various interpretations.

SP U-27-W is the established system of accounts for Class A water utilities. SP U-27-W was adopted decades ago and provides all of the reporting requirements deemed necessary by the Commission. The new requirements ordered in the Decision are completely flawed and do not add to the precision of accounting requirements for Great Oaks; instead, the Decision's new reporting requirements inject ambiguity into the accounting practice that the Commission should reject.

2. The Legal and Factual Errors of the Decision Must be Corrected.

The new reporting requirement for Great Oaks is a product of the flawed instructions to DWA and the equally flawed DWA Verification those instructions produced. Since the Commission will be investigating Great Oaks' accounting in a separate proceeding, any reporting requirements for Great Oaks should come from that proceeding and not be based upon the inherently flawed DWA Verification in A.09-09-001.

The portions of the Decision creating the new and highly ambiguous reporting requirements should be stricken. Absent correction, Great Oaks will be subject to vague, ambiguous and discriminatory reporting requirements in violation of its due process and equal protection rights.

**L. Great Oaks' Customers Did Not Receive Notice of Conservation Rates Ordered in the Decision.**

1. Background Information Relevant to this Issue.

The conservation rates ordered in the Decision was not based upon evidence in the record, but upon the Commission's independent judgment of how the conservation rates should be designed.<sup>174</sup> No evidence was presented, for example, regarding "rate

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<sup>174</sup> Decision, p. 57 (discussion of how rate differentials were determined).

shock for large water users” or any “price signal” to water users or the relative strength of a particular “price signal.” Yet, the Decision concluded: “A rate differential of 8% between Tiers 1 and 2 and a rate differential between Tiers 2 and 3 of 15% would lessen the rate shock for large water users while still providing a strong price signal in the trial period.”<sup>175</sup> No evidence exists in the record to support any of these findings.

The Decision modified DRA’s conservation rate design proposal.<sup>176</sup> There is no evidence in the record of A.09-09-001 that Great Oaks’ customers were notified of the conservation rates proposed by DRA. In fact, there is no evidence that any position or proposal of DRA in A.09-09-001 was in any way based upon or representative of Great Oaks’ customer concerns or interests.

In addition, there is no evidence that notice was provided to Great Oaks’ customers of the conservation rates adopted in the Decision. No such notice could have been provided, as the conservation rates adopted in the Decision were not known or otherwise disclosed until nearly a full year after the Public Participation Hearings conducted for A.09-09-001.<sup>177</sup>

In addition, because the conservation rates adopted in the Decision were not the subject of any evidence or a hearing, the procedures employed in A.09-09-001 violate the due process requirements of the Constitution.<sup>178</sup>

Without such notice, the proceedings on A.09-09-001 resulting in conservation rates was conducted without proper notice or the opportunity to be heard in violation of Article XII, Section 2 of the Constitution.

2. The Conservation Rates in the Decision Should Not Be Adopted and Ordered Unless or Until Proper Notice and an Opportunity to be Heard Has Been Provided.

Both Great Oaks and its customers should be provided with an opportunity to be heard on the conservation rates adopted in the Decision before those rates are charged to Great Oaks’ customers. Opposition to providing Great Oaks and its customers with this

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<sup>175</sup> *Id.*

<sup>176</sup> *Id.*

<sup>177</sup> The Public Participation Hearings for A.09-09-001 were conducted on January 12, 2010. The Decision was issued November 22, 2010.

<sup>178</sup> Article XII, Section 2 of the Constitution.







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