



Comments to California's Proposed Low-Income Assistance (LIRA) Program
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Navigating complex and competing realities.

Providing drinking water services implicates complex and at times competing realities. Water infrastructure – drinking water, wastewater and stormwater infrastructure – is costly to build, operate, maintain, and periodically rehabilitate. Insufficient funding resulting from smaller or lower income ratepayer bases and less government funding has caused many communities to fall behind in their maintenance and replacement of aging infrastructure components. Without financing, infrastructure ultimately fails to deliver its expected services. Water users should be responsible for paying for water services similarly to how they are responsible for paying for electricity, heating, internet, cable, and telephone services. At the same time, these infrastructures provide vital public health services. Therefore, when certain families are unable to afford water services and their access is cut off, it presents a public health concern. These are not services we want shut off.

In crafting a low-income assistance programs, the related challenges of guaranteeing safe, reliable, and predictable infrastructure services generally do not disappear. In fact they perhaps become even more pronounced. At the heart of providing water services are these realities:

- Water infrastructure costs a lot.
- Water is essential to human life.
- Someone has to pay. Not everyone can.
- Assistance to low-income families must make it possible for them to consistently pay their water and sewer bills.
- Consumers pay for treating contaminated source waters.
- Leaks waste money and energy.
- Sludge is a valuable waste product.
- Ratepayer bases matter. Infrastructure may not be a local issue.

This list is not exclusive but highlights the context in which we evaluated the proposed low-income assistance programs. Given these realities, our priority questions are: does the program increase the likelihood that low-income families will be able to pay their water (and sewer) bills on time and does it contribute to an improved delivery of water and wastewater services?

Navigating complex legal obligations.

The provision of drinking water services and payment for those services in California is informed by a complex legal landscape. There are several laws which instruct rate-setting and the provision of drinking water services, including but not limited to:

- California Water Code § 189.5 (2015) (also known as Assembly Bill No. 401) requiring the creation of a low-income rate assistance program,
- California Water Code § 106.3 (2013) providing for a human right to water
- California Public Utility Code § 451 requiring public utilities to adopt “just and reasonable” charges for water services
- California Constitution Article X § 2 (1976) which requires water conservation and the prevention of water waste
- California Health & Safety Code § 116682 (2016) authorizing the State Water Board to require water systems that consistently fail to meet drinking water quality standards to consolidate with another public water system
- California Constitution Article XIII D § 6 (also known as Proposition 218) limiting the revenue collected to cover only those expenses for providing the related service
- Municipal laws may allow the shutoff of water services for nonpayment of water, sewer or trash services under different circumstances

These laws create a complicated vision for how to ensure the provision of safe, reliable water and sewer services to low-income families.

Assembly Bill No. 401, adopted in 2015, requires the State Water Resources Control Board to “develop a plan for the funding and implementation of the Low-Income Water Rate Assistance program.” While AB No. 401 identifies what elements should be included in the plan, such as the method for collecting moneys to support and implement the program and the mechanism for providing funding assistance to low-income families, the bill does not identify a clear objective other than to provide “assistance” to low income families with incomes equal to or less than 200 percent of the federal poverty guideline level (“FPL”). Further complicating the development of this plan is that the Bill was adopted in the context of other laws which inform the scope of the government’s obligation to provide drinking water services, how those services and underlying infrastructure can be paid for, government obligations to conserve and prevent water waste, requirements to meet drinking water quality standards, and options to shutoff water services in the face of nonpayment. Below we discuss how the laws listed above may impact the development and implementation of the Low-Income Rate Assistance (“LIRA”) program.

California is the first state to legislatively recognize a human right to water; however, the strength of the mandate is untested. The California Water Code states:

- (a) It is hereby declared to be the established policy of the state that every human being has the right to safe, clean, affordable, and accessible water adequate for human consumption, cooking, and sanitary purposes.
- (b) All relevant state agencies, including the department, the state board, and the State Department of Public Health, shall consider this state policy when revising, adopting, or establishing policies, regulations, and grant criteria when those policies, regulations, and criteria are pertinent to the uses of water described in this section.

This statutory provision has not been interpreted by the courts. Based on the language of the statute it seems unclear what kind of obligation the government has to actualize California residents’ right to a safe, affordable, accessible, adequate amount of water. The statute is clear that in developing new policies, the State Board is required to “consider” the human right to water policy. Therefore, in developing a low-income rate assistance program, the State Board

must consider how the rate assistance program increases the affordability of water, improves accessibility to water, and delivers safe and clean drinking water. Arguably the objective of the LIRA program is to provide assistance to low-income families, but when analyzed in the context of §106.3 the question becomes how is that assistance making water rates affordable and why are sewer rates being excluded given that their nonpayment can lead to the same issues as nonpayment of water bills. Lastly, the acknowledgement of a human right to water raises a serious question about whether municipalities can continue to legally shut off water and/or sewer services in response to nonpayment of water or sewer bills.

Under §451 of the California Public Utilities Code , public utility companies providing water and sewer services are required to charge just and reasonable rates for services provided. The Public Utilities Code states that:

All charges demanded or received by any public utility, or by any two or more public utilities, for any product or commodity furnished or to be furnished or any service rendered or to be rendered shall be just and reasonable.

Every public utility shall furnish and maintain such adequate, efficient, just, and reasonable service, instrumentalities, equipment, and facilities, including telephone facilities, as defined in Section 54.1 of the Civil Code, as are necessary to promote the safety, health, comfort, and convenience of its patrons, employees, and the public.

All rules made by public utility affecting or pertaining to its charges or service to the public shall be just and reasonable.

This provision set a standard for utility operation. First, the statute requires public utilities to charge “just and reasonable” rates for services. Second, the utility must provide an “adequate, efficient, just and reasonable service”. With no definition of “just and reasonable” provided in the code, these terms were left to the interpretation of the utilities and the California Public Utilities Commission (CPUC). Arguably the scope of “just and reasonable” has been defined by Proposition 218.

Proposition 218 institutes a strict cost-of-service requirement for property-related services, including all charges for water delivery.¹

(b) Requirements for Existing, New or Increased Fees and Charges. A fee or charge shall not be extended, imposed, or increased by any agency unless it meets all of the following requirements:

(1) Revenues derived from the fee or charge shall not exceed the funds required to provide the property related service.

(2) Revenues derived from the fee or charge shall not be used for any purpose other than that for which the fee or charge was imposed.

(3) The amount of a fee or charge imposed upon any parcel or person as an incident of property ownership shall not exceed the proportional cost of the service attributable to the parcel.

(4) No fee or charge may be imposed for a service unless that service is actually used by, or immediately available to, the owner of the property in question. Fees or charges based on potential or future use of a service are not permitted.

¹ *Bighorn-Desert View Water Agency v. Verjil*, 39 Cal. 4th 205 (2006).

Proposition 218 requires public utilities to clearly demonstrate how the water rate structure reflects the cost of providing water services to their customers. Furthermore, utilities can only justify differential treatment between classes of customers based on the differences in the cost of providing services to those different classes. In *City of Palmdale v. Palmdale Water District*, the Palmdale Water District had adopted a tiered rate structure that encouraged conservation and efficient use in order to reduce demand on water supplies.² The California Court of Appeal struck down the tiered rate structure which established specific rates for each tier based on whether the customer's water use was for residential, commercial or irrigation purposes. The court concluded that the differentiated classes violated Proposition 218 because they disproportionately distributed costs. For example, it took less water use for irrigators to reach tier 5 pricing as compared with residential or commercial water users.³ While the California Water Code § 372 explicitly allows allocation-based conservation water pricing and Article X § 2 of the California Constitution requires the prevention of water waste, water rates cannot be disproportionate to the "cost of the service attributable to the parcel" according to Proposition 218.⁴ This approach was confirmed in *Capistrano Taxpayers Assn., Inc. v. City of San Juan Capistrano* where the Court of Appeal concluded that the distribution of the cost for making the capital improvements to the wastewater treatment plant to recycle water across all volume users was not justified.⁵ "Proposition 218 protects lower-than-average users from having to pay rates that are higher than the cost of service for them because those rates cover capital investments their levels of consumption do not make necessary."⁶ While being a well-intentioned effort to require governmental agencies to justify utility pricing, Proposition 218 may limit how a tiered structure could be developed that takes into consideration income in determining what a low-income family should pay for its water and sewer bills. It may be that relating water rates to level of income would be prohibited under Proposition 218, though no court has been asked to review that question.

To further complicate the financing of infrastructure and the consideration of the unique needs of low-income families, municipalities may adopt laws which allow for water services to be discontinued for nonpayment and can establish different circumstances under which the disconnection and reconnection will occur. For example, the City of Mendota allows for water services to be discontinued for bill nonpayment. To reconnect water services the City requires the payment of all back bills, a reconnection charge of ten dollars, all costs incurred by the city for disconnecting and reconnecting the service and, at the request of the City Clerk, a deposit. Municipal laws controlling water shutoff and service reconnection can differ in a number of ways including the number of fees that are required to be paid before reconnecting water services, the number of days a bill must be delinquent before water service is discontinued, and what types of nonpayment trigger the discontinuance of service. These laws frustrate the ability to provide each California resident an adequate amount of water. While in some circumstances

² *City of Palmdale v. Palmdale Water Dist.*, 198 Cal. App. 4th 926 (2011).

³ *Id* at 937.

⁴ *Id* at 936-937. Article X § 2 of the California Constitution states: "It is hereby declared that because of the conditions prevailing in this State the general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented, and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare." Cal Const, Art. X § 2.

⁵ *Capistrano Taxpayers Assn., Inc. v. City of San Juan Capistrano*, 235 Cal. App. 4th 1493 (2015).

⁶ *Id* at 1503.

the law is not forgiving of low-income circumstances, it does authorize the State Water Resources Control Board to consolidate water systems where a small water system serving a disadvantaged community consistently fails to provide safe drinking water.⁷

These laws create an intricate web of obligations and limitations related to the provision of drinking water services and water service rate setting.

Creating a meaningful discount and fair basis of eligibility.

Providing meaningful assistance to low-income families is essential to a successful low-income assistance program. The degree of assistance provided will determine the ability of low-income California residents to consistently pay their water (and sewer) bills, their stability, and the overall fairness, affordability, and legality of the LIRA program.

In developing the LIRA program, the State Board must consider how the program is improving the affordability of adequate, safe, clean drinking water for all Californians.⁸ To satisfy this obligation, the State Board should be able to demonstrate that the assistance provided through the LIRA program will improve the affordability of water for vulnerable, low-income families. What this actually means is that the assistance being provided should significantly increase the chances that low-income families receiving the assistance can consistently pay their water (and sewer) bills. In other words, the LIRA program must have a *real* impact on low-income families' ability to maintain access to water (and sewer) services. Providing a limited discount on the provision of water services does not resolve or address many of the issues that make water unaffordable or inaccessible for low-income families

Based on the information provided, it is unclear how the four proposed scenarios will make water (and sewer) services affordable and therefore provide *real* assistance. How will a 20% discount significantly increase the odds that low-income families will be able to pay their bills? How are previous debts (including missed monthly payments, interests and fees associated with nonpayments or disconnections) being dealt with? In the event that the discount is insufficient to make a monthly payment affordable, are payment plans available? How is the discount balancing the need to guarantee access to an adequate amount of water while encouraging water conservation and reliable water infrastructure operations? Should water shutoffs still be an available tool for securing payment? Does assistance change in times of increased water scarcity? Given the silence of the information provided regarding the four proposed scenarios, it is impossible to comment on the strengths and weaknesses of the intended program design, to review the reasoning behind those decisions, or to understand what the real impact of the LIRA program will be.

In light of the shortage of information, the CWSC proposes a variety of broad options for determining the discount amount and the eligibility for the discount.

⁷ The California Health and Safety Code states: "Where a public water system or a state small water system, serving a disadvantaged community, consistently fails to provide an adequate supply of safe drinking water, the state board may order consolidation with a receiving water system as provided in this section and Section 116684. The consolidation may be physical or operational." California Health & Safety Code § 116682 (2016).

⁸ California Water Code § 106.3 (2013).

Eligibility

To ensure that the neediest Californians are part of the LIRA program, eligibility should be based on the FPL, as proposed. In order to best provide assistance proportionate to need, the State Board should consider whether different discounts should be applied to different levels of income. For instance, should a family below 100% of the FPL receive the same discount as a family below 200% of the FPL? If not, then there would be different tiers of eligibility based on % of FPL.

Related is the question of how eligibility will be established. Based on the information provided, it does not seem like there are any reasons to have a separate process for determining eligibility for the LIRA program. To decrease the costs of administering the LIRA program, low-income families eligible for other state assistance programs should be automatically enrolled in the LIRA program. Having to prove your poverty for different programs is not only administratively burdensome, but also demeaning. Furthermore, automatic enrollment ensures that those families that need help receive help. Rather than needing to know that such an assistance program exists, a family who has registered for one type of assistance will be enrolled in each assistance program for which they are eligible. Linking eligibility across assistance programs would reduce administrative costs generally. Families who do not apply for other forms of assistance would still be eligible to apply for the LIRA program.

Income levels can fluctuate; therefore it is important to periodically confirm that families remain eligible for the program and that families newly in need are aware that such a program exists. Typically assistance programs require recipients to inform the responsible governmental agency of any changes to their income or eligibility. It is important to consider whether income updates should be required every one or two years and whether those updates should be tied to continued receipt of the assistance. These income updates could be used across assistance programs to maintain up-to-date records on eligibility. However, collecting and reviewing proof of income submissions may also increase administration costs and may result in only a minimal reduction of any potential abuses of the system.

Discount

As with eligibility, there are various ways to calculate the discount received by LIRA program participants. The four program scenario alternatives primarily offer a 20% discount to householders below 200% of the FPL under a slight variation of circumstances. Without additional information being made available describing the reasoning for establishing the discount level at 20%, it is impossible to determine whether this discount will improve the likelihood that a majority of low-income families will be able to pay their monthly water bills on time.

Without being able to directly respond to supporting documentation detailing the rationale and explaining other options studied, there are a few approaches that we would recommend exploring. One approach would provide eligible customers a monthly discount of up to a certain cubic feet (or gallons) of free water and sewer charges. For example, DC Water provides eligible customers 400 cubic feet (almost 3000 gallons) of water and sewer charges at no cost. Currently, this discount amounts to a savings of \$37.00 per month.⁹ DC Water found that 44% of residential

⁹ DC Water, *Customer Assistance Programs* available at <https://www.dewater.com/customer-assistance>.

customers use that amount of water or less per month. Such a discount program both encourages conservation (because if you reduce your water use to 400 cubic feet or less, your water and services will be free) as well as guarantees an “adequate” amount of water to each home by providing a minimum amount of water that can provide basic domestic and sanitary services.¹⁰ Variations of this could be adopted, including charging a nominal fee of \$10 per month for families at 200% of FPL instead of \$0. A second approach would be to mandate that a water bill, or a water and sewer bill combined, cannot exceed a certain percentage of a resident’s income. Philadelphia recently adopted an income-based tiered assistance program (“TAP”). Monthly bills are based on a percentage of the income and “a schedule of different percentage rates for (i) households with income up to fifty percent (50%) of FPL, (ii) households with income from fifty percent (50%) to (100%) of FPL, and (iii) households with income from one hundred percent (100%) to one hundred fifty percent (150%) of FPL.”¹¹ A third approach would charge a low-income discounted rate per “X” number of gallons instead of the typical rate charged.

With the goal of the LIRA program to provide an adequate volume of water at an affordable rate while encouraging conservation, there are a variety of nuanced ways to meet those standards while not incurring burdensome administrative costs. However the program is established, it is essential that the program (1) provide assistance that significantly improves the likelihood that low-income householders will be able to pay their bills each month, (2) guarantee access to an adequate volume of water, and (3) discourage water waste.

Remaining questions.

First, the LIRA program will have to address how the system will account for pre-existing debt, penalties and interest. Typically, when a customer fails to pay their water and/or sewer bills, water services can be discontinued. In order to restore services, utilities frequently require customers to fully pay what they owe, interest that has accrued, and penalties, including a reconnection fee. Sometimes they will even need to submit a deposit or pay for services three months in advance as well to restore water services. In one way these requirements recognize the importance of all users contributing to the maintenance and operation of critical infrastructure and deter free riders who abuse the system. However, for low-income families who struggled enough that they could not pay in the first place, resulting in a discontinuance of service, having to pay past debts off before reconnection may be prohibitively expensive permanently. The LIRA program cannot overlook this problem.

One way to address these debts is to build loan forgiveness into the LIRA program. For those households that are in arrears, LIRA should incentivize payment—subsidized through the discounts discussed earlier—by connecting it to debt forgiveness. In particular, LIRA would benefit if debts were fully forgiven after a fixed number of payments or if there was a credit system that allowed the debt to be forgiven dollar-for-dollar as households pay their current bills. Under the second circumstance, current payments would go against current bills as well as be subtracted from existing debt until that debt is eliminated.

The LIRA program also does not account for unique situations, sometimes referenced as “special hardships” that result in an inability to pay water and/or sewer bills. For example, job loss,

¹⁰ Katherine Shaver, *D.C. residents, businesses to face higher water and sewer bills*, Washington Post (7 July 2015).

¹¹ City of Philadelphia Bill No. 140607-AA (2015).

serious illness, or death of the household's primary earner may impact a household's ability to afford their water bill.¹² Expanding the coverage of this program to include a limited number of commonly experienced special circumstances, helps achieve the purpose of this program.

The LIRA program should also include low-income assistance for sewer bills and other related fees, such as stormwater or impermeable pavement fees. If lower-income households are unable to pay water bills, they are likely unable to afford to pay sewer bills or other fees. As sewer bill nonpayment can also lead to water shutoffs, assistance must also be provided to low-income families to pay for sewer bills in order to prevent water shutoffs resulting from nonpayment of sewer bills. If sewer bills remain unaffordable and water can be shutoff for nonpayment of sewer bills, than a LIRA program for drinking water services will not change the ability of these families to pay their water and sewer bills and therefore prevent water shutoffs.

Finally, it is unclear if water shutoffs for non-payment of water and sewer bills remain legal after the passage of the human right to water in California. If every person is entitled to affordable, adequate, clean and safe water under the law, it would seem that families cannot be denied access to water because they cannot pay their monthly water and/or sewer bills (i.e. the water and/or sewer bills are not affordable). The interaction between the human right to water and the legality of water shutoffs has not been examined by the courts, leaving this question open and ripe for discussion.

Evaluating the success or failure of the program.

Essential to the meaningfulness of the LIRA program is that the assistance actually changes the number of families who cannot pay for water and sewer services and/or have been disconnected from these services. Therefore, two metrics in particular would illustrate the effectiveness of the program. First, the number of homes receiving assistance who have paid 12 out of 12 months of water bills at the end of the year. If a household can pay its water and/or sewer bills under the LIRA program, it means that the assistance provided sufficiently supplements their input. Second, the overall revenue collected from low-income families versus the overall revenue collected from those same families before the LIRA program was in place. This metric shows how much money low-income families are actually able to contribute to infrastructure maintenance when assistance is provided versus when the bill was unaffordable and they could not pay the bill or felt that a partial payment would not prevent a water shutoff.

Conclusion.

Establishing a LIRA program is essential to advancing access to adequate, safe and affordable drinking water as well as creating a water rate structure that maximizes the amount of capital that can be collected from ratepayers while encouraging water conservation and recognizing the needs of low-income families. Developing this program sheds light on the importance of a well thought out water and sewer rate structure in both providing access to services that are essential to public health as well as being able to pay for essential maintenance, operation and upgrades to the infrastructure in order to ensure safe, reliable services.

A well-structured LIRA program has the opportunity to change lives.

¹² City of Philadelphia, *Water bill customer assistance* available at <https://beta.phila.gov/services/water-gas-utilities/water-bill-customer-assistance/>.