# SUMMARY OF CALIFORNIA SUPREME COURT AND COURT OF APPEAL OPINIONS REVIEWING DECISIONS OF THE CALIFORNIA PUBLIC UTILITIES COMMISSION; OVERVIEW OF CASES CONSTRUING SECTION 1759; TABLE OF AUTHORITIES

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Since 1950, the California Supreme Court has issued 70 opinions in response to a Petition for Writ of Review[2] of a Commission Decision or a Petition for Writ of Mandate directed at the Commission. Most of the decisions of the Court reversed the Commission decision in whole or in part. The balance affirmed the order, dismissed the matter as moot or otherwise disposed of the dispute in a manner leaving the Commission's order undisturbed.

The Court of Appeal has issued 43 such opinions since the enactment of SB 1322 and SB 779 in the late 1990s. Just over half of the opinions of the Court of Appeal affirmed the Commission order at issue in its entirety; the rest reversed[3] the Commission's order in whole or

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[1] This memorandum was originally prepared in the early 1990s in support of efforts at the California Legislature to expand judicial review of decisions of the Commission. It reflects court action on petitions for writ of review or mandate through April 24, 2024. With one exception (Para. 6 of the cases in the Appendix construing Section 1759) , it only addresses decisions that have been certified for publication. *See e.g. S. Cal. Generation Coalition v. Cal. PUC,* 2008 Cal. App. Unpub. LEXIS 4023 (May 19, 2008). In addition to adding recent decisions, this update revises the text related to some of the older cases to reflect recent developments in the law addressed in those cases.

[2] The main portion of this memorandum only addresses decisions arising from petitions for writs of review or mandate. The reader is advised to review other recent decisions construing important provisions of the Public Utilities Code. A past limitation of this document stems from the fact that decisions arising out of writ review of Commission decisions will, by their nature, not address the issue of the extent to which the Commission's decisions bind the Superior Court pursuant to Section 1759. That subject is addressed in the Appendix, *Overview of Case Law Construing Section 1759 of the Public Utilities Code.*

[3] Prior to 1996, the Court could either affirm or "annul" the Commission's order. Today, Section 1758(a) provides that after review, the court "shall enter judgment either affirming or setting

in part.[4] None of the 43 opinions of the Court of Appeal have been accepted for review by the California Supreme Court.

The advent of review in the Court of Appeal has resulted in a far greater number of written opinions reviewing Commission decisions than was the case prior to the enactment of the Calderon-Peace-MacBride Judicial Review Act of 1998 (SB779). By way of illustration, six opinions were issued in 2004 alone, more than any year since 1979 when the Supreme Court issued eight opinions reviewing Commission decisions. Four opinions were again issued in 2013 and three were issued in 2014. In the last ten years, the Court of Appeal has issued fifteen opinions in Commission writ matters. The California Supreme Court has issued one. (See Para. 11 *infra*). By contrast, only eight opinions were issued by the California Supreme Court in the fourteen-year period from 1983 to 1996 (and only one after 1995).[5]

The California Supreme Court has largely declined to review Commission decisions, whether review is sought by a petition for writ of review of a Commission decision or by a petition for review of a decision of the Court of Appeal. Over the last thirty years, the Court has only issued two full opinions in response to a petition for writ of review of a Commission decision. (See Paras. 12 and 45, *infra*). In a recent matter, however, the Court played a key role in directing the course of a proceeding in the Court of Appeal toward a favorable outcome for the Petitioner. (See *Rittiman*, Para. 6).

Of course, California appellate courts may also decide writ petitions by summarily denying them without a full written decision; those summary denials have *res judicata*, but not *stare decisis,* effect. (See Para. 56, *infra*).

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aside the order or decision of the commission." This memorandum employs the more common terms, "affirm" or "reverse."

[4] The Commission has actually fared much better in writ proceedings in the Court of Appeal than the figures for published opinions would indicate. Many petitions for writ of review were simply denied. In other instances, the petition for writ of review was granted but the Commission order was ultimately affirmed in an unpublished order. In rare instances, a court has reversed a Commission decision in an unpublished decision. See, *TURN v. PUC*, 2012 Cal. App. Unpubl. LEXIS 2049 mentioned in Para 17.

[5] The constitutionality of the Legislature's limitation of appellate review of Commission decisions is explained by the First District Court of Appeal in *Communities For A Better Environment v. Energy Resources Conservation And Development Commission* 57 Cal.App.5th 786, 807-808 (2020). See also, *Gerawan v. ALRB*, 27 Cal. App. 4$^{th}$ 284 (2016).

In reverse chronological order, the published decisions rendered in those cases are summarized (briefly) below. A table of cases and other authorities is provided at the end of the Summary. Only the name of the petitioner is provided. All statutory references are to the California Public Utilities Code unless otherwise indicated.

1. *Center For Biological Diversity, Inc*, 98 Cal App. 5th 20 (December 20, 2023). Exercising the judicial deference it deemed required when the statute at issue lies within the Commission's "administrative jurisdiction", the Court of Appeal (First District, Division 3) affirmed a Commission decision adopting a successor tariff to govern utility billing of customers with renewable energy systems. On April 10, 2024, however, the California Supreme Court granted review of this decision. That court may well examine what level of deference remains required in light of the 1998 legislation reforming the procedures governing judicial review of Commission decisions. (See discussion of this issue at Paras. 13, 14 and 18 *infra*.) For the time being, however, the Supreme Court has permitted the Court of Appeal decision to be cited "not only for its persuasive value, but also for the limited purpose of establishing the existence of a conflict in authority…" The underlying Commission proceeding was widely covered in the media with public focusing on the effect of the Commission's' decision both the owners and installers of rooftop solar systems. The Court's resolution of the matter before it, however, simply followed a well-marked path. At least as described in the Court's opinion, the petition was limited to an assertion that the Commission had "not proceeded in the manner required by law" (Section 1757(a)(2)) by adopting a successor tariff that did not meet the requirements of Section 2827.1. Because the construction of that statute did not implicate the jurisdiction of the Commission (see Para 29), the court could "disturb the Commission's interpretation [of Section 2827.1]only if " 'it fails to bear a reasonable relation to statutory purposes and language.' " (*Southern California Edison Co. v. Peevey* (2003) 31 Cal.4th 781, 796.)". (The California Supreme Court is expected to address this characterization of the required deference to the Commission's construction of the statute.) The Court of Appeal had no real difficulty finding that the Commission's construction of Section 2827.1 met that standard, concluding that "the successor tariff adequately serves the various — albeit sometimes inconsistent — objectives of section 2827.1." The "Background" portion of the opinion provides a very good summary of the history of the NEM tariff and the policy arguments surrounding the proposed modification of it. From a legal perspective, however, the outcome is unsurprising given the presumptions in favor

of the Commission (at least until we hear from the California Supreme Court) and the deference accorded it when the matter does not turn on questions of jurisdiction or rights guaranteed by the California or US Constitutions. Section 1757(a)(1), (6). On January 29, 2024, the Petitioner sought review in the California Supreme Court. On February 5, 2024, the Court website stated that the Court had "Received [a] letter dated February 5, 2024, from Respondent, the California Public Utilities Commission to inform the Court that it will not be filing an answer to petition for review." As noted at the outset, the Supreme Court granted review on April 10, 2024.

2. *Kerman Telephone Co*. 94 Cal App 5th 920 (August 7, 2023)- The Fifth District Court of Appeal reversed an order of the Commission imposing a $2,752,000 fine on Kerman Telephone Company, Volcano Telephone Company, and Sierra Telephone Company, Inc ("Petitioners") for failing to disclose the proceeds of Petitioners' redemption of shares in the Rural Telecommunications Bank ("RTB"). The Commission concluded that by failing to do so the Petitioners had violated Rule 1.1 of the Commission's Rules of Practice and procedure which required that the Petitioners not mislead the commission or its staff "by an artifice or false statement of fact or law." The Court, however, concluded that the imposition of the fine contravened the Due Process Clause of the U.S. Constitution which requires, in an "administrative context… that agencies bringing an enforcement action "provide," through written guidance, regulations, or other activity, 'a person of ordinary intelligence fair notice of' what is prohibited or required…" The Court concluded that the Commission had not done so before imposing the fine, finding that the Commission had not clearly asked the Petitioners to disclose the proceeds. , stating that "(t)the Commission's lack of direction to Petitioners about the requirement to disclose the amount of the redemption proceeds "fail[ed] to provide a person of ordinary intelligence fair notice of what is [required]." [Citing (*F.C.C. v. Fox Television Stations, Inc.* (2012) 567 U.S. 239, 254.] The Court did not hold that the Commission was barred from requiring that Petitioners disclose the proceeds of the redemption of the shares (even thought they were not in rate base); it simply held that the Commission had not clearly ordered the Petitioners to do so. *Kerman* marks the latest phase of a proceeding, referred to by the Court as a "saga", commenced in 2007. See, *Ponderosa,* Para. 23. The Commission closed the docket when it denied rehearing of the order imposing the fine; it is not known whether the matter will be re-opened.

3. *Securus Technologies, LLC*, 88 Cal App. 5th 787 (February 1, 2023). In a decision which could affect the procedural path of future Commission proceedings, the Court of Appeal (Second District, Division 4) affirmed a Commission decision setting caps on the rates charged to incarcerated persons for telephone calls ("incarcerated persons calling service" ("IPCS")). *Securus* and the facts leading to it raise questions about whether procedural flexibility pursued by the Commission in the 21st Century, even if warranted from a policy perspective, is nonetheless legally restricted by century old statutes and the case law construing them.[6] The *Securus* Court generally did not think so. It rejected Securus's assertion that the Commission acted arbitrarily by not considering the cost to IPCS providers of providing IPCS service. Much of the decision addresses (1) whether and how that cost data could or should have been part of the record and (2) whether an evidentiary hearing was required before the Commission adopted the rate caps. The Court's determinations on those and other related points raise cautionary flags for practitioners, particularly those involved in phased proceedings. As is the case with unpublished portions of the *Calaveras* decision, (Para 4), *Securus* represents a further erosion of the notion that the word "hearing" in the Public Utilities Code means the formal activity that, for at least the last seventy years, has been described in Sections 1705-1706. One might now argue that those sections only apply to complaint proceedings, even though (1) the California Supreme Court has historically subjected Commission proceedings in general to the requirements of Section 1705 (see, Paras 54, 74, 79, 80, 87 and 88) and (2) at the time the Legislature employed the term "hearing" in SB 960 (which enacted Sections 1701.1-1701.5) a Commission "hearing" was understood to be an activity described in Sections 1705-1706 (sworn testimony before a court reporter). Moreover, since the Commission's jurisdiction to order a utility to lower rates turns on the construction of Section 728, one might fairly question the Court's "considerable deference" to the Commission's construction of that statute. While the Court relied on the 2015 *PG&E* decision (Para 14 *infra*) to accord "considerable deference" to the Commission, the proper standard is arguably the "independent review" described in the 2004 *PG&E Corporation* decision (Para. 33 *infra*). The decision also treats any statutory obligation on the Commission's part to conduct a "hearing" as one a party has waived if not expressly asserted. The case law on

[6] The current Public Utilities Code is comprised of (1) the 1951 recodification of old statutes enacted largely contemporaneously with the creation of the Commission over a century ago and (2) amendments to the Code since 1951.

which the Court relied supports that outcome in the case of "an *opportunity* to be heard as in the case of complaints" guaranteed by Section 1708. *California Trucking Association,* Para 67.) Query, however, whether the prospect of waiver tethered to "an *opportunity* to be heard" exists as well where a statute describes an action the Commission may, textually, only take "after a hearing." (See e.g. Sections 728, 761.) The Court answered that question in the affirmative but did so by recourse to jurisprudence governing Section 1708 rather than Section 728. Indeed, the Court's construction of Section 728, the jurisdictional basis for a Commission-ordered reduction of rates, appears to have abrogated the principal procedural requirement embraced in that statute. The Court construed *Southern California Edison* (Para 66) and *City of Los Angeles* (Para 69) in a manner permitting the Commission to order the interim rate reduction even though (1) the caps on IPCS rates were not premised on "mechanical cost adjustments" and (2) the caps can be viewed as largely expressions of the Commission's view that the rates were simply too high - "unreasonable" within the meaning of Section 728. Finally, *Securus* also cautions parties considering a challenge based on a scoping memo not to read *Huntington Beach* (Para 21) and *Edison* (Para 26) too broadly particularly with respect to the scope of each phase of a proceeding. (With regard to scoping memos generally, see *Bullseye Telecom*, Para 7).

4. *Calaveras Telephone Company*, 87 Cal App. 5th 793 (December 20, 2022, modified January 18, 2023) . The Court of Appeal (Third District) affirmed a Commission decision providing that when calculating the California High Cost Fund A (CHCF-A) subsidies for eligible rural telephone companies, the Commission would impute the "net positive retail broadband Internet access service revenues of the telephones companies and their affiliates (broadband imputation)"…" The Court rejected all of the Petitioners' statutory and constitutional claims but initially directed that its opinion remain unpublished. On January 18, 2023, however, the Court elected to publish Part II of the opinion addressing the proper construction of Section 275.6. It reviewed the legislative history of SB 379 which enacted the 2012 amendments to Section 275.6 and concluded that the resulting text, which neither expressly authorized nor proscribed broadband imputation, was "ambiguous on that particular issue" requiring the Court to apply various rules of statutory construction. The Court first noted that, since the jurisdiction of the Commission turned on the construction of Section 275.6, the Commission's construction of the statute was not entitled to deference. (See, *PG&E*

*Corporation*, Para 33.)[7] Nonetheless, the Court still agreed with the Commission's construction of Section 275.6, noting that the legislative history showed that the Legislature (1) "was aware of the Commission's concerns about subsidizing broadband facilities that could be used to generate revenues from unregulated services" and (2) amended SB 379 "to address this concern...". In part of the unpublished portion of the opinion, the Court also noted that Section 275.6 (as amended by SB 379), was "more specific" and "later enacted" than statutes which might arguably have limited the Commission's authority to impute revenues from unregulated broadband service; accordingly, the text of Section 275.6 would prevail in any conflict with more general and earlier enacted statutes. See *Santa Clara Valley Transportation* (Para. 29 *infra*). On February 27, 2023, the Petitioner sought review in the California Supreme Court but the Court denied the Petition for Writ of Review on April 26, 2023.

5. *Southern California Gas Company* 87 Cal App. 5th 324 (January 6, 2023). The Court of Appeal (Second District, Division One) vacated (reversed) Commission Resolution ALJ-391 which had ordered SoCalGas to comply with a subpoena served by the Public Advocate's Office ("PAO" or "CalAdvocates"). The subpoenas directed SoCalGas to produce "all '100% shareholder funded' accounts that 'house[] costs for activities related to influencing public opinion on decarbonization policies,' and 'for lobbying activities related to decarbonization policies." SoCalGas objected to the production. It argued that (1) the Commission's interest in obtaining information about SCG's political activities and activities that are "100% shareholder-funded" was not compelling because such activities are not subject to CalAdvocates' oversight and (2) disclosure of information about political activities and

[7] One could argue that what turned on the construction of Section 275.6 was not whether the Commission had exceeded its jurisdiction (Section 1757(a)(1)) but whether it had failed to proceed in the manner required by law (Section 1757(a)(2)). The Commission plainly had the jurisdiction to determine the level of the subsidy. Is the appropriate challenge to broadband imputation, therefore that it, resulted in an improper application of Section 275.6 or an act in excess of the Commission's jurisdiction? (In unpublished portions of the opinion , the Court rejects any notion that broadband imputation had the effect of "regulating" Petitioners' unregulated affiliates.) The distinction between statutory construction resolving jurisdictional questions and statutory construction simply resolving whether the Commission has proceeded in the manner required by law is not simply academic. Courts will (to varying degrees) defer to the Commission's construction in the latter instances (see *SPBP II* at Para 11) but not the former (See, *PG&E Corporation*, Para 32 and *Santa Clara Valley Transportation Authority,* Para 28.)

activities that were "100% shareholder funded" would infringe on SCG's First Amendment rights. Notably, the Court first stayed the Commission order at issue, determining that:

> "(T)he requirements of Public Utilities Code sections 1762, subdivision (c) and 1763, subdivision (b) are satisfied because it appears that imminent and irreparable injury will occur if the data requests and subpoena at issue in the Resolution are enforced prior to completion of the statutory judicial review process, because enforcement could force disclosure of material that may be protected by the United States and California Constitutions.

After briefing and argument, the Court held that, "SCG has shown that disclosure of the requested information will impact its First Amendment rights, and the Commission failed to show that its interest in determining whether SCG's political efforts are impermissibly funded outweighs that impact." In particular, the Court held that disclosure of shareholder expenses lies outside CalAdvocates' statutory charge to "obtain the lowest possible rate for service…" This is the first decision in over twenty years to overturn a Commission order on First Amendment grounds. (See, *Pacific Gas & Electric*, Para 42, *infra*). The decision is also notable in that while the Court described the procedural requirements and standards for a Petition for Writ of Review (§ 1756), the relief sought was mandate (§1759(b)) rather than review. The grant of the writ of mandate here is the first such published order issued by a California appellate court in a Commission matter in at least seventy years. (See, Para 6 of the Appendix, "*Aguirre*", *infra* for a brief discussion of an unpublished order.) In a part of the decision that may not seem important at first blush, the Court rejected SoCalGas's argument that it was denied due process because the Commission order requiring production (ALJ-391) was issued outside of an existing formal Commission proceeding. The Court held that while the Commission had established a process pursuant to which SoCalGas could adequately advance argument and present evidence in support of its position, "SCG neither requested evidentiary hearings nor contested relying on written pleadings to resolve the issues set forth herein." While SoCalGas did not prevail on the procedural due process issue, however, it successfully established that ALJ-391 contravened the First Amendment. On February 15, 2023, the Commission filed a Petition for Review of this decision at the California Supreme Court, also seeking an order from that court de-publishing the decision described above. On April 19, 2023, the California Supreme Court denied both requests.

6. *Rittiman*, 79 Cal App $5^{th}$ 1130 (June 17, 2022). The Court of Appeal (First District, Division 1) affirmed the Commission's refusal to provide Mr. Rittiman (a Sacramento television reporter), "all communications between" CPUC President Batjer and/or her "principal executive staff," and members of the Governor's staff, since the date of President Batjer's appointment in mid-August 2019. The records Mr. Rittiman requested under the Public Records Act ("PRA") included "all documents, emails, or texts whether made on state-issued or personal devices." After a lengthy process, which itself became a major issue, the Commission rejected Mr. Rittiman's request, asserting the documents were exempt from disclosure under Government Code section 6254, subdivision (l)—the "Governor's correspondence" exemption. The Court rejected Mr. Rittiman's argument that the exception only applied to correspondence "by letter sent from individuals, companies, and/or groups who are outside of the government." The Court held that "correspondence" also included emails, facsimiles and other forms of communications that did not exist in 1968 when the PRA was enacted. More significantly, it concluded that the exception applied to communications between the Governor's Office and other bodies of government, including the Commission. In perhaps the most significant portion of the Court's opinion, however, the Court rejected the Commission's position that Section 1731 barred Mr. Rittiman from seeking relief in the Court of Appeal because he had not first filed an application for rehearing of the Commission resolution formally denying his PRA request. The Court stated that:

> While the CPUC has also been granted the constitutional power to "establish its own procedures," this authority is "[s]ubject to statute and due process." (Article XII, § 2.) Given that the Legislature has expressly made the PRA applicable to the CPUC, we conclude the PRA represents an exercise of the Legislature's "plenary power" over the CPUC, and further conclude that the administrative remedies set forth in the Public Utilities Code, and specifically, the rehearing requirement set forth in Public Utilities Code section 1731, do not apply to the PRA and that the PRA fixes the bounds of the CPUC's authority to adopt procedures for PRA requests such as those set forth in General Order 66-D.

While the Court reached its conclusion regarding Section 1731 based on a statutory analysis, it was also obviously troubled by the amount of time taken by the Commission to respond to Mr. Rittiman's request characterizing it as "egregious by any measure" and observing that "it is well-established that the exhaustion of administrative remedies is excused where, as here, 'the administrative procedure is too slow to be effective' " Had the request for mandate arisen from

a matter solely grounded in the Public Utilities Act (§§ 201-2119 of the Public Utilities Code) rather than the Government Code, the Court might have reached a different conclusion although the arguments against a burdensome application of Section 1731 are the same. See discussion of *North Shuttle* (Para. 44, *infra*). While the Commission prevailed on the merits (the question of whether the material sought was exempt from the PRA), its loss on the procedural issue (whether Section 1731 barred Mr. Rittiman from seeking relief in the Court of Appeal) led it to petition the California Supreme Court to depublish the Court of Appeal's opinion. That Court denied the request which came as no surprise since the Supreme Court had played a preliminary, but significant, role in Mr. Rittiman's success with respect to the question of whether he was required file an application for rehearing before seeking review of the Commission's rejection of his request under the PRA.[8] (On April 5, 2024, the Court of Appeal (Second District, Division 1) held the PRA did require that the Governor's Office produce the appointment calendar of the Governor's senior advisor for energy showing scheduled meetings with certain entities during the year prior to the advisor's appointment as President of the Commission. *State of California v. Superior Court of Los Angeles County, Energy & Policy Institute RPI*. 2024 WL 1477132.)

7. *Bullseye Telecom, Inc*. (Qwest Communications, RPI), 66 Cal.App.5th 301 (July 6, 2021). In a significant development in a fourteen year old complaint proceeding still pending before the Commission, the Court of Appeal (First District, Division 5), affirmed a 2019 decision of the Commission which (1) granted rehearing of an earlier 2016 order finding in favor of the defendants (several CLECs) (2) modified the 2016 order to completely reverse its outcome (essentially finding in favor of the complainant interexchange carrier, Qwest) and then (3) announced that no further proceedings would be conducted on the merits of the claims. The 2008 complaint alleged that Petitioners (and many other defendants) had offered reduced rates for switched access services to AT&T and Sprint while charging the complainant higher, tariff rates. The Commission initially dismissed the complaint for failure to state a cause of action but

[8] See the entries for 10/22/21 and 11/22/21 on the Docket Card in the Court of Appeal at https://appellatecases.courtinfo.ca.gov/search/case/dockets.cfm?dist=1&doc_id=2351376&doc_no=A162842&request_token=NiIwLSEnXkw8W1BJSCNdXExJUFQ6UVxfJSI%2BJz5TUCAgCg%3D%3D

reversed that dismissal in 2012 stating that a hearing should be held. The hearing was held in 2013 and resulted in the 2016 order denying relief on the merits. Three years later, in response to an application for rehearing, the Commission, in the decision under review, reversed its 2016 decision and found for Qwest. Petitioners asserted that (1) Sections 1731 and 1736 precluded the Commission from completely reversing the 2016 order without first actually conducting a "rehearing", (2) the 2019 order was inconsistent with the Scoping Memo in a fashion that prejudiced Petitioners and (3) the award of reparations embraced in the 2019 order contravened the filed rate doctrine and certain portions of the Public Utilities Code. The Court disagreed. It held that notwithstanding text in Section 1736 requiring that any modification of the 2016 order was to take place "after such rehearing", a comparison of the Section 1736 with Section 1708 showed that while Section 1708 expressly required a hearing before modification of a final Commission decision, no such express language was present in Section 1736. The Court also rejected Petitioners claims that the Commission had contravened the Scoping Memo, distinguishing *Huntington Beach* (Para 21 *infra*) and *Edison* (Para 26 *infra*) and limiting the reach of those cases to instances in which the Commission decided issues not set forth in the Scoping Memo rather than extending *Edison* to instances in which the Commission did not decide issues set forth in the Scoping Memo. Finally, the Court rejected Petitioners' claims that an award of reparations in this proceeding would itself result in discrimination in the unique circumstances of this case. Because no further proceedings were conducted at the Commission following the 2019 order, Petitioner/defendants' claims that substantial portions of the sought reparations were barred by the statute of limitations were to be resolved a second phase of the Commission complaint proceeding; the statute of limitations was not addressed earlier because the 2016 order found for the defendants on the merits and, accordingly, the 2019 order did not reach that issue. The underlying proceeding continues with two non-settling defendants remaining.

8. *Calaveras Telephone Company,* 39 Cal App. 5$^{th}$ 972 (August 20, 2019). The Court of Appeal (Third District) reversed a Commission resolution denying Petitioner's request to augment its CHCF-A funding to offset losses in "revenues in 2016 because of regulatory changes identified in Federal Communications Commission (FCC) Orders 14-190 and 16-33." The resolution annulled by the Court had held that Petitioner should have pursued recovery of the lost revenues in a later rate case. Petitioner argued, and the court agreed, that

"the Commission failed to follow the CHCF-A implementing rules when it disallowed the advice letter adjustment requests…." Relying on *Edison* (Para 26), the Court held that by not adhering to its own rules, the Commission had failed to proceed in the manner required by law (Section 1757(a)(2)) and had abused its discretion. The Court did not agree with Petitioner that the Commission was required to augment Petitioner's revenues. It only held that the process followed to reach a decision on that question must adhere to rules already established by the Commission. (The Court reached a similar conclusion in *Huntington Beach* (Para 21), where the Court held that (1) the Commission was almost certainly empowered to declare a local building ordinance preempted by state law but (2) could not do so where the scoping memo in the matter had expressly excluded the issue from the proceeding.

9. *Ponderosa Telephone Company et. al.,* 36 Cal. App. 5th 999; (June 18, 2019). Petitioners were small independent local exchange carriers contesting the Commission's determination of their respective returns on equity ("ROE") for ratesetting purposes. The Court of Appeal (Fifth District), however, affirmed the Commission's decision. The Court viewed its role as limited to determining whether the Commission had erred in its resolution of certain factual issues. Even Petitioners' constitutional claim, which rested on *Hope-Bluefield*[9], turned, in the Court's view, on a factual analysis. Framing the issue before it in that fashion set the bar quite high for the Petitioners but the Court's analysis finds support in other decisions of the Court of Appeal. The Court stated several times that the methodology the Commission employed to set ROE was not as important as the resulting rate, citing decisions of the US Supreme Court holding that:

> "It is not theory but the impact of the rate order which counts. If the total effect of the rate order cannot be said to be unreasonable, judicial inquiry…is at an end. The fact that the method employed to reach that result may contain infirmities is not then important.'"

Whether the rates resulting from the ROE "cannot be said to be unreasonable.." was, according to the Court, a factual question. Employing the "substantial evidence" test embraced in Section 1757(a)(4), the Court could not conclude that "substantial evidence" did not exist to support the

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[9] *Federal Power Commission et al v. Hope Natural Gas Co*. ("*Hope"*), 320 U.S. 591, 603 (1944).; *Bluefield Water Works and Improvement Co. v. Public Service Commission of West Virginia ("Bluefield")*, 262 U.S. 679 (1923).

Commission's findings. (Notably, a finding supported by "substantial evidence" need not be supported by a *preponderance* of the evidence.) The Decision reflects the difficult challenge faced by petitioners advancing claims based on a factual dispute, as Petitioner's constitutional claim became styled. Asserting that the Commission made an erroneous factual finding is no longer impossible as it was prior to 1996 (see the legislatively overruled *Camp Meeker* decision at Para. 46) It remains, however, the most difficult claim to advance by one seeking reversal of a Commission decision. (See *Ames* at Para. 22.)

10. *New Cingular Wireless PCS, LLC* (The Utility Reform Network et al., Real Parties in Interest) 12 Cal App. 5th 1197; (March 13, 2018) ("*New Cingular Wireless II").* The Court of Appeal (First District, Division Four) again <u>reversed</u> the Commission's award of intervenor compensation to TURN and CforAT. In *New Cingular Wireless PCS, LLC*, Para. 11 *infra*, (hereinafter *New Cingular Wireless I*), the same Court rejected AT&T's argument that no intervenor compensation could be awarded in a case where no decision on the merits was issued. Nonetheless, the Court vacated the intervenor compensation awards that were the subject of *New Cingular Wireless I* because the Commission did not provide an adequate explanation of how it determined the level of the awards. On remand, the Commission again awarded intervenor compensation to TURN and CforAT. While it modified its rationale for doing so, the awards were in the same amounts awarded in the order vacated by *New Cingular Wireless I.* AT&T again sought appellate review and again the Commission's order was vacated. One can glean from the Court's tone a view by the Court that it had already said all it thought it needed to express in *New Cingular Wireless I,* observing that:

> On remand, as expected, the CPUC jettisoned its harmonization rationale, but seems to have focused on the fact we confirmed it has discretion to award intervenors' compensation under…[Sections 1801-1807] <u>while ignoring the limitations we identified</u>. We said that, on remand, the CPUC needed to "anchor its rationale in its own factual findings and show how those findings fit into the statutory language" while avoiding the justification of fees and costs for reasons that "produce[] a range of discretion going well beyond anything claimed in . . . [any] prior administrative decisions since 1992."
>
> <u>The Remand Decisions fail to bridge this gap in the record, choosing instead to patch it over with a new rationale that suffers from the same flaw we identified before</u>. The CPUC has now taken the view that, so long as positions advocated by TURN and CforAT "would have" materially influenced a decision on the merits in Docket. No. I11-06-009—had there been one—an award of 100

> percent of the claimed fees and costs is reasonable... In doing so, it makes no serious attempt to link with any specificity the fees and costs incurred to any of the many interim rulings, both procedural and substantive, that the record shows were adopted as part of the final resolution of Docket No. I.11-06-009.

(Emphasis supplied).

Again, the matter was remanded to the Commission "for further proceedings consistent with *New Cingular* [I] and with this opinion." Ironically, the day before the Court issued its opinion in *New Cingular II*, TURN filed a notice with the Commission seeking intervenor compensation for its activity in *New Cingular I.* On August 21, 2019, in response to the remand directed by *New Cingular II,* the Commission ordered TURN to repay approximately $100,000 in intervenor compensation (D. 19-08-031).

11. *New Cingular Wireless PCS*, (The Utility Reform Network et al., Real Parties in Interest) 246 Cal. App. 4th 784; (April 19, 2016) ("*New Cingular Wireless I*"). The Court of Appeal (First, District, Division 4) affirmed the Commission's determination that Section 1801-1807 of the Public Utilities Code ("Article 5") permitted to the Commission to award intervenor compensation with respect to a decision other than one on the merits of the case; the decision at issue dismissed as moot a Commission investigation regarding AT&T's proposed acquisition of T-Mobile. The Court went on, however, employing a granular exposition of the rules of deference, to reverse the specific intervenor compensation awards to The Utility Reform Network (TURN) and the Center for Accessible Technology (CforAT). The Court, citing, *Southern California Gas Company* (Para. 51, *infra*), observed that it was addressing "a set of 'explicit, limited fee rules'…enacted as part of detailed statutory scheme defining the CPUC's jurisdiction in this area." Accordingly, the Court concluded that it need not broadly defer to the Commission's construction of Article 5 in the manner described in *Greyhound* (Para. 78, *infra*).[10] The Court cautioned that "applying the *Greyhound* test here would effectively swallow the statutory scheme in whole, rendering its limitations subordinate to the CPUC's interpretation of the statute." The Court held that the level of deference to be afforded the Commission was instead governed by *Yamaha Corp. of America v. State Bd. of*

[10] The high-water mark of *Greyhound* deference is found in *Southern California Edison* (Para. 32). The *New Cingular Wireless* cases (Paras. 8 and 9) may represent an outflowing tide but see *Securus* (Para. 1).

*Equalization* (1998) 19 Cal.4th 1 ("*Yamaha*") and *Ramirez v. Yosemite Water Co.* (1999) 20 Cal.4th 785 ("*Ramirez*"). The Court acknowledged that the California Supreme Court had not settled on the proper measure of deference required where an agency decision at issue was "hybrid" in nature, both quasi-legislative and interpretive. Accordingly, the Court, like other intermediate appellate courts, tested the Commission's determination (in great detail) under both *Yamaha* and *Ramirez*. In the Court's view, application of *Yamaha* and *Ramirez* required that the awards be set aside because "the CPUC's explanation of the legal basis for the awards at issue falls short." The Court was unable to discern whether the Commission had placed undue emphasis on Section 1801.3(b) (which states that Article 5 is to be administered in a manner that encourages participation) when it applied Section 1802(i) (detailed definition of "substantial contribution"). It noted that the broad policy directive in Section 1801.3(b) should not, "be used as a roving warrant to nullify more specific statutory limitations that follow." Accordingly, it vacated the awards to TURN and CforAT "without prejudice to reinstatement…on grounds consistent with this opinion." The Commission issued new compensation orders in the remanded proceeding. As noted in Para. 10, *supra,* those orders fared no better in the First District.

12. *Monterey Peninsula Water Management District* (*"Monterey"*) 62 Cal. 4th 693 (January 25, 2016). In its first full opinion reviewing a Commission decision in twenty years, the California Supreme Court, unanimously, reversed the Commission decision under review. (Pursuant to Section 1756(f), review of a Commission decision in a non-adjudicatory case involving a water utility may only be sought in that court.) The Court "set aside" two Commission decisions which had effectively prevented the Petitioner, a local government entity ("District"), from collecting a user fee through the bills of California-American Water Company ("Cal-Am"), a Commission regulated water company. For over thirty years, the revenues collected by the District through Cal-Am funded environmental mitigation and water supply programs administered by the District. In 2009, the Commission began to question the level of the fee and ultimately refused to permit Cal-Am to continue to collect it on behalf of the District. The Commission initially asserted that it was vested with the authority to review the District's fee pursuant to Section 451 which requires that "all charges demanded or received by any public utility" for any product or commodity furnished, or any service rendered, be just and reasonable." After the Court granted review, the Commission abandoned that position and instead justified its scrutiny of the District's user fee on the fact that the user fee funded

mitigation programs undertaken by the District that the Commission stated were legally the responsibility of Cal-Am. The Court, however, pointed out that Cal-Am only became legally obligated to undertake the programs if the District elected not to undertake the programs. The decision is largely a straightforward application of *County of Inyo* (Para. 55). It does not break any new ground legally although it is worth noting the Court's holding that Section 451, standing alone, does not vest the Commission with any jurisdiction with which the Commission is not already vested; the Court held instead that (1) the Commission has the power to regulate privately owned utilities, (2) it may not regulate government owned utilities absent express statutory authority and (3) "Section 451 cannot fill that gap" (provide the "express statutory authority"). *Monterey* is a significant opinion, principally because (1) it is the first time in over twenty years the Court has spoken on the limits of the Commission's jurisdiction, and (2) the vast majority of large municipalities in California collect utility fees and taxes through the bills of Commission-regulated utilities. *Monterey* confirms that the broad reach of the Commission's jurisdiction does not extend to reviewing, let alone rejecting, these government fees. Finally, one cannot overlook the significance of the fact that the court granted review; such grants are rare but a strong case, particularly one grounded in jurisdiction, will draw the Court's attention.

13. *San Pablo Bay Pipeline* ("*SPBP II*") 243 Cal. App. 4th 295, (December 23, 2015). The Fifth Appellate District affirmed a Commission decision ordering a pipeline company to pay reparations to a number of shippers of crude oil. One of the shippers (Chevron) filed a complaint in 2005 and another in 2008 (after the Commission had closed the 2005 case without ordering reparations). Another shipper (Tesoro) intervened in the Chevron case in 2005 and filed its own complaint in 2009. A third shipper (Valero) filed a complaint in 2009. Not surprisingly, the Court concluded that nothing in law barred the Commission from phasing the proceeding before it. The case, however, turned on the Court's holding that the Commission was vested with the authority to toll the two-year statute of limitations set forth in Section 735, the applicable statute of limitations, during the initial (jurisdictional) phase of the proceeding. The net effect was that the award of reparations to all three complainants was calculated from mid-2005 forward, without regard to when any specific complaint was filed. The Court, citing *Greyhound* (Para.78) deferred to the Commission's construction of Section 735 and opened its analysis by (again citing *Greyhound*) paying homage to "the well-established principle that there is a strong presumption of validity of the Commission's decisions." *SPBP II* adds to the growing

body of 21st century case law displaying a broad judicial deference to the Commission (See Paras. 14 and 18, *infra*.) As noted in Para.18, *infra*, the jurisprudence underlying that deference is almost 50 years old and predates the major reform of appellate review enacted in 1998 (SB779). One might question whether that level of deference actually survived the 1998 legislation. The California Supreme Court has not addressed the question but may do so soon. (See, Para 1 *supra*.) The Court of Appeal, however, has generally adhered to the notion that Commission decisions are presumptively valid.

14. *Pacific Gas and Electric Company,* 237 Cal. App. 4th, 812 (June 16, 2015); . In a decision replete with holdings very favorable to the Commission, the Court of Appeal (First District, Division 2) affirmed the Commission's imposition of a $14.35 Million fine on PG&E. The fine was imposed on PG&E for filing an "Errata" modifying a prior submission to the Commission regarding the allowable operating pressure of a particular pipeline. PG&E made the filing in one of the dockets opened by the Commission after the tragic explosion of the PG&E pipeline in San Bruno. In terms of the Commission's enforcement program, the Court's decision is perhaps even as consequential as the Fourth District's 2006 decision in *Pacific Bell Wireless ("Cingular")* affirming the Commission's jurisdiction to directly impose fines. (See, Para. 27, *infra.*) The Court here held that (1) the Commission may lawfully conclude that an entity has violated Rule 1.1 without finding that the entity has done so intentionally (or even negligently), (2) the Commission properly concluded that PG&E's error in filing the "Errata" was a continuing violation within the meaning of Section 2108 and that "the statutory scheme clearly accepts that the PUC will be able to identify when a violation amounts to a continuing one", (3) the Order to Show Cause issued with respect to the "Errata" provided PG&E with constitutionally adequate notice of the potential $14.35 Million fine and (4) the $14.35 Million fine did not violate the excessive fines clause of either the state or federal constitutions. The decision is exceedingly deferential to the Commission on virtually every point, even in instances (as was the case with respect to the question of a *scienter* requirement for Rule 1.1) where the Commission's own case law varied greatly with respect the point at issue. Most of the case law cited in the decision is from the middle of the 20th Century and one could question whether many of the holdings with regard to deference survived the enactment of SB779 in 1998.[11] Any

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[11] See discussion at Para. 18, *infra*.

skepticism, however, would have to be tempered by the growing body of 21$^{st}$ Century case law displaying broad judicial deference to the Commission. (See Para. 13, *supra,* and Para. 18. *infra*.) If *Edison* is the high water mark of *Greyhound* deference (see Paras 34 and 78), *PG&E* is the high water mark of the presumption of correctness of a Commission order. *New Cingular Wireless I and II* (Paras. 10 and 11 *supra*) provide the only recent evidence of a contrary view. (As noted in Para 1 *supra*, the California Supreme Court may address this question soon.) However one evaluates the merits of the decision, it unquestionably reflects a growing (and welcome) judicial willingness to grant a Petition for Writ of Review and affirm the Commission decision in a reasoned opinion rather than simply denying the petition, leaving the parties guessing as to the rationale for doing so.

15. *Clean Energy Fuels Corp.* ("*Clean Energy*"), 227 Cal. App. 4th 641, (May 29, 2014). The Court of Appeal (Fourth District, Division Three) affirmed a Commission decision by which the Commission approved Southern California Gas Company's ("SoCalGas") proposed Compression Services Tariff ("CST"), allowing SoCalGas to expand its natural gas compression services to include provision of compressed natural gas and Natural Gas Vehicle fueling stations. Clean Energy Fuels Corporation ("Clean Energy"), Integrys Transportation Fuels, LLC and ORA protested the application on the grounds that the proposed expanded service would give SoCalGas, the monopoly gas supplier for customers in its service area, an unfair commercial advantage. The Protestants advanced an alternate proposal pursuant to which the parent of SoCalGas could enter the market through an unregulated affiliate (the "Affiliate Option"). The Commission approved the CST after amending SoCalGas's proposal to include several "mitigation measures" designed to ensure fair competition. In approving the amended CST the Commission rejected the Affiliate Option as unnecessary in light of the "mitigation measures" it required SoCalGas to adopt. The Commission did not, however, issue a finding comparing the merits of the amended CST with the merits of the Affiliate Option insofar as preventing unfair competition by SoCal gas was concerned. Clean Energy sought rehearing and then review in the Court of Appeal alleging, among other things, that the CST allowed SoCalGas to compete unfairly and that the Commission's decision was not supported by adequate findings on material issues as required by Public Utilities Code section 1705. With respect to the issue of findings, Clean Energy relied principally on *California Manufacturers Association* (Para. 60), *City of Los Angeles* (Para. 69), *City and County of San Francisco* (Para. 73) and *NCPA*

(Para. 74). The Court, however, affirmed the Commission decision, finding that (1) the Commission reasonably determined that the CST, as amended, would not allow SoCalGas to compete unfairly and (2) the Commission did not err in failing to make findings comparing the CST to the Affiliate Option. The court reasoned that the Commission has authority under Section 1705 to determine what issues are material to the decision, and found the Commission made adequate findings with respect to the Affiliate Option.

16. *Southern California Edison*, 227 Cal App. 4th 172; (May 28, 2014; modified and certified for publication on June 18, 2014.) The Court of Appeal (Second Appellate District Division 3) affirmed a Commission decision implementing the Electric Program Investment Charge ("EPIC"). Responding to an assertion by Southern California Edison ("SCE") that the Commission had exceeded its jurisdiction, the Court held that:

> "given the PUC's vast, inherent power to take any action that is cognate and germane to utility regulation, supervision, and rate setting, unless specifically barred by statute, there is no question that the PUC has the inherent authority to create EPIC and to impose fees necessary to carry out that program."

The Court, *inter alia*, rejected assertions by SCE that the EPIC decision resulted in improper delegation of authority to California Energy Commission ("CEC") and that the EPIC charge constituted the imposition of a tax in violation of Article XIIIA of the California Constitution (Proposition 13 and progeny). The decision underscores the extent to which the Commission has proven to be the true winner under the 1998 expansion of the scope of judicial review of its decisions. While the Commission has won some and lost some in the Court of Appeal, it has prevailed in all of the significant decisions construing its jurisdiction. In addition to this decision see *PacBell Wireless* (Para. 27, *infra*) and *PG&E Corporation* (Para. 33, *infra*). A 2004 decision concluding that the Commission was without jurisdiction, *Santa Clara Valley Transportation* (Para. 29, *infra*), was largely inconsequential. The same can be said for *Monterey* (Para. 12) because the Commission's decision to issue the order reversed in *Monterey* is simply inexplicable, essentially a management breakdown. Notably, the *EPIC* Court initially elected not to publish its opinion but at the request of many parties elected to do so. In many respects, it follows the lead of other decisions of the Court of Appeal upholding Commission action. Section 701 is (1) read very expansively and (2) regarded as providing a presumption of the validity of Commission actions with regard to utilities unless an express legislative directive

provides to the contrary. (The rule with respect to Commission jurisdiction over government entities is just the opposite. (See, *Monterey*, Para. 11, *supra* and *County of Inyo,* Para. 55 *infra*.)

17. *Independent Energy Producers Association/Utility Reform Network ("IEP/TURN")* 223 Cal. App. 4th 945 2014 Cal. App. LEXIS 119 (February 5, 2014). The Court of Appeal (First District, Division 5) reversed a Commission decision authorizing PG&E to acquire a new gas fired power plant in Oakley, California (the "Oakley Project"). The Court held that uncorroborated hearsay could not constitute "substantial evidence in light of the whole record" (Section 1757(a)(4)) to support a finding of a specific need for the project. Almost two years earlier, in an unpublished opinion, (*TURN v. PUC*, 2012 Cal. App. Unpubl. LEXIS 2049) the same court reversed an earlier Commission decision approving the project, citing myriad procedural errors and concluding that "(t)he Commission's procedural maneuvering runs afoul of *Edison*." (See Para. 26 *infra*.) PG&E filed another application in 2012 and the Scoping Memo (Section 1701.1(b)(1)) provided that one of the issues in that proceeding was whether there was a specific need for the Oakley Project. In support of its showing on that issue, PG&E introduced a declaration of an official of the California Independent System Operator ("CAISO") which included certain statements regarding the need for increased system-wide capacity in California by the end of 2017 but not identifying any specific need for Oakley. The CAISO official, however, was not proffered as a witness at the evidentiary hearings in the matter. Accordingly, the Administrative Law Judge ("ALJ") ruled that the declaration of the CAISO official could not be introduced for the truth of the matter asserted in the declaration because the statement was hearsay. She admitted the declaration for the purpose of establishing that CAISO had reached a final determination on the issue of significant negative reliability risk, but not for the purpose of showing that there was a specific need for the Oakley Project. Her proposed decision denied the application but the Commission adopted an alternate decision approving the application, relying on the declaration of the CAISO official. The Independent Energy Producers Association ("IEP") and The Utility Reform Network ("TURN") sought review of the decision, arguing that their substantial rights had been violated because of the Commission's reliance on the CAISO declaration and noted that the admission of hearsay denied them the opportunity to cross-examine the declarant on the substance of his opinion- a denial exacerbated by the fact that the admission of his opinion itself occurred well after briefs had been filed. While the Court reversed the Commission because of its reliance on hearsay evidence, it did not do so in response

to Petitioners' argument that their substantial rights had been violated. Instead, the Court held that the Commission's determination on a principal issue - the specific need for the project- was not supported by substantial evidence (Section 1757(a)(4)), a secondary argument raised by Petitioners. The Court did not dispute the Commission's authority to receive hearsay evidence; it concluded, however, that the Commission's "finding that the Oakley Project is needed cannot rest on those materials alone." The Court held that because there was no other evidence to support the finding of the need, the Court was required to reverse the decision pursuant to Section 1757(a)(4). [12] Tangentially, the reversal raises questions with regard to the Commission's discretion under Section 1701.1(b)(1) to determine whether an evidentiary hearing is required in a particular matter. Is the Commission lawfully required to conduct a hearing where a protest to an application contests a factual assertion in the application? Is a hearing required in a Rulemaking or Investigation where the issuance of an order reducing rates turns on resolution of a factual question; if so, what is the nature of the "hearing" required? *Securus* Paragraph 3, *supra*, suggests that some far less formal than the "hearing" described in Section 1705-1706 will suffice. The Commission asked the California Supreme Court to de-publish this opinion but the Court elected not to do so.

18. *San Pablo Bay Pipeline ("SPBP")* 221 Cal. App. 4th 1436; (December 11, 2013) (Fifth Appellate District) affirmed a Commission Decision finding that truck racks and storage tanks owned by the Petitioner had been dedicated to the public and were thus subject to Commission regulation. An earlier Commission decision found that the Petitioner's pipeline had been dedicated but did not expressly find that the truck racks and storage tanks had been so dedicated. In the decision under review, however, the Commission stated that its earlier finding of dedication (of the pipeline) included the truck racks and storage tanks. The Court (1) noted that the definition of "pipeline" in Section 227 included "all real estate, fixtures, and personal property, owned, controlled, operated, or managed in connection with or to facilitate the transmission, storage, distribution, or delivery of crude oil or other fluid substances except water

[12] See, Somogyi, Objection! Hearsay: The Prohibition Against Basing CPUC Findings on Uncorroborated, Contested Hearsay Evidence, https://www.goodinmacbride.com/objection-hearsay-the-prohibition-against-basing-cpuc-findings-on-uncorroborated-contested-hearsay-evidence/.

through pipe lines" and (2) held that the Commission could reasonably construe its earlier finding of dedication to include the truck racks and storage tanks. (The Court found that the Commission was possessed with the authority under Section 701 to construe its prior decisions.) One issue raised by Petitioner was whether the earlier finding met the requirement of Section 1705 that Commission Decisions contain findings of fact on all issues material to the order or decision; the Court concluded that the decision did meet the requirements of Section 1705 since (1) the parties did not expressly raise the issue of truck racks and storage tanks in the earlier proceeding and (2) "Petitioners have cited no authority construing the statutory requirement for findings 'on all issues material' to require specific findings on issues not addressed by the parties." Finally, the Court relies heavily on *Greyhound* (Para. 78, *infra*) principally for the notion that "there is a strong presumption that the Commission's decisions are valid" (rather than with regard to deference on questions of statutory construction.) The Court's application of *Greyhound* in such a sweeping fashion (extending beyond statutory construction) raises the question of whether that "strong presumption" (announced in an era when the law proscribed any challenge to a factual finding by the Commission) remains appropriate in light of the 1998 amendments to the Code intended to subject Commission decisions to judicial review "consistent with judicial review of the other state agencies." Stats 1998, c. 866, Sec. 1.5. (As noted in Para 1 *supra*, the California Supreme Court may address this question soon.)

19. *BNSF Railway*, 218 Cal. App.4$^{th}$ 778;(August 5, 2013). The Court of Appeal (Third District) reversed a Commission's decision holding that the Commission had the authority to direct a railway company to employ lights and other warning signs located at a pedestrian railroad track crossing rather than, as the railroad desired, employing a horn mounted on the locomotive itself. The court paid particular attention to recent legislation amending Section 7604 but treated it as "cosmetic", arguing that it effectively left the prior regulatory scheme intact. The Commission and the City of San Clemente, by contrast, argued that the legislation permitted the Commission to require trains to rely on train-mounted horns only in emergencies and to otherwise employ warning devices located at the crossings. The opinion analyzes the complex interplay between the federal regulations (49 C.F.R. § 222) and the state statutes, Sections 1202 and 7604. Arguably, the Court failed to defer to the Commission with regard to the Commission's construction of the statutes pursuant to *Greyhound* (Para. 78). Indeed, the opinion is devoid of any discussion of deference even though the issue was

extensively briefed by both the City and the Commission. The California Supreme Court denied the Commission's Petition for Review. The Commission has not fared well in the appellate courts in railroad matters (See Paragraphs 29, 32, 35, 47 and 68.)

20. *SFPP,* 217 Cal. App. 4th 784, (June 13, 2013). The Court of Appeal (Fourth District, Division Three) affirmed a Commission Decision with regard to expenses related to Federal income tax of a regulated pipeline corporation. The pipeline, a limited partnership, had sought to recover income tax expenses in rates notwithstanding the fact that the partnership itself paid no income tax; the tax was paid by the pipeline's upstream owners, the individual partners. The ratemaking treatment sought by the pipeline was consistent with that employed by the Federal Energy Regulatory Commission ("FERC") as well as many states. Indeed, the Commission itself had allowed income tax expenses for limited partnerships noting that the Commission's customary practice was to calculate income tax liability on a stand-alone basis. The Court, however, elected to treat the decision to disallow federal income tax expense as one of "policy choice" and stated that in the event SFPP disagreed, it should seek a remedy with the Legislature. The Court also rejected SFPP's challenge to the Commission's adoption of a return on equity lower than that sought by SFPP. Reviewing the customary standards for return on equity (set by the U.S. Supreme Court a century ago) the Court found that the Commission possessed broad discretion in the area and had not "abused its discretion" by concluding that a rate of return of 12.8% was appropriate. The California Supreme Court denied review.[13] As noted in Para 73 *infra*, a 2020 Commission decision with regard to a sewer utility addressed the propriety of imputing income taxes for utilities organized as sub-chapter S corporations or partnerships, proscribing such imputation. Decision 20-07-036 (July 16, 2020).

21. *City of Huntington Beach; Crown Castle NG West,* 214 Cal. App.4th 566; (March 14, 2013). The Court of Appeals (4th District, Division 3) affirmed the Commission's holding that NextG Networks (a distributed antenna system, or "DAS" provider) was a "telephone corporation" within the meaning of Section 7901 but reversed those portions of the Commission decision "purporting to preempt local ordinances." The Court held that whether it deferred to the Commission's construction of Section 7901 under *Greyhound* (Para. 78 *infra*) or subjected it to independent review (*Hillsboro Properties*) (Para. 36, *infra*) the Commission's

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[13] Three of the seven Justices recused themselves. Four affirmative votes are required to grant review.

construction of Section 7901 was correct. With respect to the Commission's preemption of local ordinances, however, the Court reached a contrary conclusion. The court noted that the parties to the proceeding had agreed that any conflict between (1) NextG's rights under Section 7901 and (2) the city's rights to regulate its streets and highways under its general police power would be resolved in state court rather than in the proceeding before the Commission. The Scoping Memo and the initial Commission decision concurred on that point. In its decision denying the city's application for rehearing,[14] however, the Commission changed course and expressly preempted the local ordinances stating that "a statewide interest in public utility service preempts this ordinance in the event of a conflict, as is the case here." The Court held that while the Commission may have had the power to preempt local ordinances, NextG did not initiate (and the Commission did not hold) proceedings designed to entertain the question. The Court stated that, "we see no authority in the Commission's rules or elsewhere for the notion that the scope of the underlying proceeding can be expanded during the reconsideration process to the detriment of a party." That text suggests that the Court concluded that the Commission had not proceeded in the manner required by law (Section 1757(a)(2), and in that sense its decision is akin to *Edison* (Para. 26, *infra*) holding that the parties to Commission proceedings are entitled to be fully apprised of the issues that the Commission will consider. (As noted in *Bullseye* (Para 7, *supra*), however, the proscription on expansion of issues beyond those set forth in the scoping memo should not be read to require the Commission to address each issue in the scoping memo.) The precise ground for reversal, however, is unclear since the decision alludes textually to Section 1757(a)(5) by concluding that "the Commission violated the procedural rights of the city and thereby abused its discretion by purporting to 'preempt' city ordinances through its 'approval' of the project." In the context of CCP 1094.5 (administrative mandamus) "abuse of discretion" embraces error described in Section 1757(a)(2) (failure to proceed as required by law) Section 1757(a)(3) (inadequate findings) as well as Section 1757(a)(4) (absence of substantial evidence to support the findings). Whether the definition in CCP 1094.5 is fully embraced in Section 1757(a)(5) is open to question. The Commission sought review in the California

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[14] Regrettably, the appellate courts continue to make reference to "petitions for rehearing" of Commission decisions. No such pleading exists under the Public Utilities Code or the Commission's Rules of Practice and Procedure.

Supreme Court and also asked the Court to de-publish the lower court opinion. The Court denied both requests.

22. *Douglas Ames,* 197 Cal. App. 4th 1411; (July 6, 2011). The Court of Appeal (Fourth District Division 3) affirmed a Commission decision excluding petitioner's proposed "thermal energy storage" project from eligibility for customer incentives provided by energy utilities. The Court, citing *Greyhound* (Para. 78, *infra*) , concluded that the Commission had correctly construed Section 454.5 of the Public Utilities Code. The Court held that while Section 454.5 governs the utility's development of overall procurement plans, it did not constrain the Commission in any fashion with respect to its approval of specific demand response proposals. The Court also concluded that while there was an "abundance of evidence submitted by Ames demonstrating the merits of thermal energy storage, the Commission was entitled to conclude that questions remained about the desirability of implementing Ames' proposal-questions which required further analysis before imposing a change in policy." The Court's opinion reminds practitioners that there is no fixed outcome under the "substantial evidence" standard of Section 1757(a)(4). (Nor, indeed, has a court or statute ever fixed a general burden of proof in non-adjudicatory matters before the Commission.) (But see, Section 854(e) and *Vernon*, Para. 40). Complex proceedings such as that under review in this decision posit myriad outcomes and there is likely more than one that can be deemed to be "supported by substantial evidence in light of the whole record", an observation explicitly advanced in *Center For Biological Diversity* (Para 1).The Court initially decided not to publish this decision but subsequently granted the Commission's request for publication. The Court denied the Commission's request that a companion decision (related to rate design) be published.
Mr. Ames sought review in the California Supreme Court but review was denied.

23. *Ponderosa Telephone Company,* 197 Cal. App. 4th 48; (July 5, 2011). Petitioners were small independent local exchange carriers. Proving that reports of the demise of the rule against retroactive ratemaking are premature, the Court of Appeal (Fifth Appellate District) reversed a Commission decision which had allocated the proceeds of Petitioners' redemptions of stock from the Rural Telephone Bank ("RTB") to the ratepayers of Petitioners. The stock at issue was comprised of (1) shares of RTB that its borrowers (Petitioners) were

required to purchase as a condition of receiving loans from RTB ("5% shares[15]") and (2) "patronage shares", a partial rebate by RTB to the borrowers reflecting the difference between interest RTB had received from its borrowers and RTB's actual costs of providing the loans. The Commission concluded that pursuant to its Gain on Sale decision (D.06-12-043) and other Commission precedent, both the "5% stock" as well as the "patronage shares" were not shareholder funded purchases but were in fact indirectly funded by ratepayers. With regard to the "5% stock," the Commission concluded that the stock purchase was a cost of obtaining a loan, debt ultimately included in the capital structure on which the ratepayers paid a return. Similarly, as described by the court, the Commission's position with respect to the "patronage shares" was that "because the interest payments were supplied by the ratepayers through the regulated revenue requirement, the ratepayers furnished the funds that led to the patronage refund stock." (The Court's full opinion provides a far more comprehensive description of the Commission's position with regard to the redeemed shares.) Both the Commission's decision as well as the Court's decision were informed by the extent to which the stock was included in rate base or was deemed a "public utility asset." Ultimately, however, the Court concluded that the Commission's reasoning was "circular" and "not persuasive." The Court held that the "5% stock" was flatly owned by the shareholders and that allocating it to the ratepayers "constituted an illegal appropriation of Ponderosa's property." Since legislation reforming appellate review of Commission decisions was enacted in 1998, *Ponderosa* represents one of only three instances in which a decision of the Court of Appeal annulled a Commission decision on constitutional grounds. The first was *Pacific Gas & Electric* (Para. 42) finding that the Commission's order violated the First Amendment; the second is this decision finding the order to constitute an "illegal appropriation" violative of the State and Federal Constitution (although the Court was less than precise with regard to the specific constitutional provision transgressed); the third, and most recent, is *Southern California Gas Company* (Para 5, *supra*.) Notably, the Court acted quickly; the Commission denied rehearing on October 28, 2010, oral argument took place on June 14, 2011 and the decision was issued three weeks later. The other notable aspect of the decision is the resuscitation of the rule against retroactive ratemaking. While the bulk of the Court's decision addresses the "5% stock", the far greater dollar amount at issue was that with

[15] The telephone companies were required to purchases stock from RTB equal to 5% of the sum RTB loaned to the telephone company.

respect to the "patronage shares" and the Court concluded that the Commission's allocation of those shares to ratepayers violated the rule against retroactive ratemaking. The Court made no reference to Section 728, instead relying squarely on *Pacific Telephone* (Para. 82) and distinguishing *Southern California Edison* (Para.66). The latter decision had been regarded by many to have created an exception that largely swallowed up the rule against retroactive ratemaking but the Court's order in *Ponderosa Telephone* affirms that the principle retains vitality today. (The scope of Section 728, however, seems to have been narrowed by *Securus,* Para. 1)). The Commission sought review of the decision in the California Supreme Court but review was denied on October 19, 2011. (In late 2011, the Commission granted rehearing of a companion decision by which it imposed fines on eight of the eleven LECs for alleged violations of Rule 1.1, an allegation premised on the failure of some of the LECs to disclose the receipt of the redemption proceeds. In mid-2012, the Commission issued an order returning the sums at issue to Petitioners. In-mid 2013, the assigned Commissioner issued a Scoping Memo but little transpired until late 2015 when the new Assigned Commissioner issued a new Scoping Memo and conducted further proceeding ultimately resulting in an order fining the small independent local exchange carriers for violating Rule 1.1. That order was reversed by the Court of Appeal (Fifth District) in *Kerman* (Para 2, *supra*) bringing a fifteen-year docket to a close.

24. *Utility Consumers' Action Network*, 187 Cal. App. 4th 688; (August 17, 2010). The Court of Appeal (Fourth District Division 1) followed the curious practice of other Appellate Courts (see Para. 27, *infra*) by denying a petition for a writ of review (on August 17, 2010) after first granting it (on March 16, 2010.) That course is not permitted by Section 1758(a). In any event, the Court essentially affirmed a Commission decision granting a CPCN to SDG&E for construction of the Sunrise Powerlink Transmission Project. (A separate proceeding, addressing only issues raised under the Public Resources Code (CEQA) remained pending before the California Supreme Court but that court denied UCAN's Petition for Writ of Review on February 24, 2011.) The decision is noteworthy in a number of respects. At the outset, the Court was critical of the parties' scant citation of record evidence in support of points raised in their briefs. The Court then considered, and rejected, UCAN's claim that the Commission was bound to apply a "clear and convincing" evidentiary standard to factual issues rather than the "preponderance of evidence" customarily applied by the Commission. (The decision did not address the "substantial evidence" standard of Section 1757(a)(4), the only

evidentiary standard found in the portions of the code devoted to hearings and judicial review.) The court also noted, in a portion of the opinion which should guide the practitioner, that none of UCAN's eighteen specifications of error in its application for rehearing cited a specific statute the Commission allegedly violated. Turning to more substantive issues, the Court rejected UCAN's claims that Commission Rule 14.3 (governing comments on proposed decisions) could be construed to limit the Commission's ability to consider representations at oral argument; the court cited the Commission's Rule specifically providing for oral argument. The Court held that by considering matters raised at oral argument the Commission does not contravene the requirement that the Commission act "in the manner required by law." Section 1757(a)(2). Finally, the Court concluded that while it was debatable whether UCAN's application for rehearing to the Commission properly raised UCAN's claim regarding Section 1002.3, the court would nonetheless consider that claim but reject it.

25. *The Utility Reform Network*, 166 Cal. App. 4th 522, (August 29, 2008). The Court of Appeal (Second District, Division 8) affirmed in part and reversed in part a Commission order denying a 2004 request by TURN for intervenor compensation. In an earlier decision, the Court it agreed with TURN that it was entitled to intervenor compensation for its efforts in Federal Court defending the Commission's post-transition rate making decisions (See Para. 34, *infra*). At issue here was TURN's request for intervenor compensation for its later efforts challenging the lawfulness of a subsequent settlement between the Commission and Southern California Edison. TURN's challenges to the settlement failed in the Federal District Court, the Ninth Circuit Court of Appeals and in the California Supreme Court. Nonetheless, TURN's 2004 request for intervenor compensation included a request for compensation related to (1) its work in the earlier Federal Court litigation, (2) its work related to the Court of Appeal decision in *Edison* (Para. 34, *infra*) and (3) its unsuccessful challenges (in Federal Courts and in the California Supreme Court) to the Edison/Commission settlement. In April of 2005, the Commission denied much, but not all, of the request. TURN sought rehearing and, almost two years later, rehearing was denied. The portions of the denial order at issue in this matter were (1) the Commission's denial of compensation for TURN's unsuccessful challenges to the Edison/Commission settlement and (2) the Commission's refusal to compensate TURN's outside counsel at the comparable rate for other outside counsel, choosing instead to compensate that counsel at the rate paid to TURN's in-house attorneys. The Court deferred to the Commission's

construction of Section 1801.3 ("substantial contribution"), concluding that it did not "fail to bear a reasonable relation to the statutory purposes and language" a portion of the decision which today has to be read in light of *New Cingular Wireless I and II* (Paras. 10 and 11). (But see, *Edison*, Para. 34, *infra*). The Court noted that TURN was not "entitled, as a matter of law, to an award of compensation for pursuing a position that the PUC, two Federal Courts and the California Supreme court rejected." (TURN sought review of this aspect of the decision in the California Supreme Court but that Court (by a 5-2 vote) denied review.) The Court of Appeal, however, reversed the Commission's refusal to award TURN compensation for the efforts of its outside counsel at hourly rates paid "to persons of comparable training and experience who are offering similar services." (Section 1806). The Court held that the Commission abused its discretion by simply capping the compensable rates for the outside counsel at the rates paid to TURN's in-house attorneys "who are expert at administrative litigation before the PUC." The court appears to have been displeased by the Commission's summary rejection (as "unpersuasive") of TURN's evidence regarding (a) rates TURN had requested for outside counsel, (b) rates paid to PG&E's lead counsel, (c) rates appearing in a survey of outside counsel rates and (d) the rates charged by TURN's outside counsel to that counsel's fee-paying clients. This decision is notable in that it is one of the few decisions where the court has expressly applied the "abuse of discretion" standard set forth in Section 1757(a)(5). *Huntington Beach* (Para. 21) does so but the actual ground for reversal there was more properly described by Section 1757(a)(2) since the Commission transgressed the Scoping Memo.

26. *Southern California Edison,* 140 Cal. App. 4th 1085, (June 26, 2006). The Court of Appeal (Second District, Division 3) reversed that portion of a Commission decision in a rulemaking proceeding that directed utilities to pay "prevailing wage" on construction projects. As a threshold matter, the Court held that the Commission's order was not preempted by the NLRA. In a textually brief (but legally more significant) portion of the opinion, however, the Court concluded that (1) the Commission decision under review departed so sharply from the original Scoping Memo (*see* Section 1701.1(b)) that the Commission had not "proceeded as required by law" (Section 1757(a)(2)) and (2) the departure from the Commission's own rules was prejudicial. Indeed, one aspect of this decision that should not be overlooked is that the annulment was based on the Commission's violation of its own Rules of Practice and Procedure rather than violation of a specific statute. The Third District took the

same approach in *Calaveras* (Para. 8 *supra*). (In an unpublished opinion issued March 16, 2012, *TURN v. PUC*, 2012 Cal. App. Unpubl. LEXIS 2049, the First District (Division Five) re-affirmed this aspect of the decision while annulling a Commission Order related to the Oakley Generation Project; the same Court revisited Oakley in 2014 in a published opinion. (See, Para. 17 *supra*)). While parties to Commission legislative (rulemaking) proceedings may not enjoy formal rights to "due process" in the constitutional sense, (see *Wood*, Para 76 *infra*) the Commission is required to follow its own rules as well as those set by statute. Note that for the error to result in reversal, the Petitioner must show that the error prejudiced the Petitioner. (Moreover, as noted in *Bullseye* (Para 7), the proscription on expansion of issues beyond those set forth in the scoping memo should not be read to require the Commission to address each issue in the scoping memo.) The other notable aspect of the opinion is that it suggests that a court's discretion to grant or deny a petition for writ of review is more narrow than that suggested by *Pacific Bell* (Para. 43); the Court stated that "a court ordinarily has no discretion to deny a timely-filed petition for writ review if it appears the petition may be meritorious." (Emphasis supplied.) *Calaveras* (Para 4) concurs with that view and notes that *Pacific Bell Wireless* (Para 27, below) does as well.

27. *Pacific Bell Wireless ("Cingular"),* 140 Cal. App. 4th 718, (June 20, 2006). In a sweeping victory for the Commission's enforcement program, the Court of Appeal (Fourth District, Division 3) affirmed the Commission's imposition of a $12,000,000 fine (with an accompanying reparations order) on Cingular Wireless. The Court's decision resolved the then long-standing question of whether the Commission was vested with the jurisdiction to directly impose a fine, answering that question the affirmative. The Court's analysis on the issue of fines relied on (1) Section 701, (2) deference[16] to the Commission's construction of statutes fixing its authority and (3) the legislative history of 1993 amendments to Section 2107 and 2104, specifically Committee reports indicating that the Commission was vested with the jurisdiction to impose fines.[17] Moreover, the court found that imposition of a fine related to early

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[16] Remarkably, the Court cited *PG&E Corporation* (Para. 33, *infra*) both for (1) the proposition that it should defer to the Commission's construction of a statute and (2) the proposition that it should not.

[17] One reference in the decision to an amendment of Section 2104 is simply incorrect; the legislation referenced by the Court did not amend that section, but instead enacted Section 2889.6. This fairly significant error in the text of the Court's opinion is not the only such mis-

termination fees ("ETFs") was not preempted by federal law, nor did imposition of a fine for violations of Sections 451 and 2896 contravene Cingular's due process rights. The Court finessed the question of whether a fine could be imposed on the basis of Section 2896 alone (an issue arising from the fact that the statute does not fall into the portion of the Public Utilities Code for which fines may be imposed pursuant to Section 2107) by finding that Cingular could be fined for violating Section 451. Cingular argued that the broadly stated requirements of Section 451 ("just and reasonable service" etc.) rendered the statute too vague to form the basis for the imposition of a fine. The Court disagreed, concluding that "Cingular could reasonably discern from the Commission's interpretations of Section 451 that its conduct in this instance would also violate that statute." The Court denied the Petition for Writ of Review, even though (1) it had already granted it and (2) denial of the writ was not an option available to the Court once it had heard the case.[18] Cingular ultimately sought review in the U.S. Supreme Court but reached a settlement with the Commission during the pendency of the Petition for Writ of Certiorari. Whether the Court's logic would extend to portions of the Code imposing fines on non-public utilities (entities not subject to Sections 451 or 701), is open to question. Moreover, some questions remain with respect to whether the Commission may impose a fine in a non-adjudicatory proceeding. It is impossible to overstate the significance of this decision. A contrary outcome would have produced a dramatically different approach to regulation over the last eighteen years.

28. *Southern California Edison,* 128 Cal. App. 4th 1, (April 4, 2005). The Court of Appeal (Second District, Division 7) affirmed a Commission decision extending Edison's obligation to enter into QF contracts (specifically, Standard Offer 1) even though the Commission did not concurrently revisit and determine short-run avoided costs ("SRAC"). The Court concluded that the Commission was not required to determine SRAC at the time it extended Edison's obligation to enter into SO1 contracts since the Commission was already

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citation. At the conclusion of the Court's discussion on the question of the Commission's jurisdiction to impose fines, it states that, "An action to recover penalties under Section 2107, pre-supposes a penalty has been levied …" the Court probably intended to make reference to Section 2104.

[18] Section 1758 provides, *inter alia*, that "after hearing, the Supreme Court or Court of Appeal shall enter judgment either affirming or setting aside the order or decision of the Commission." Prior to 1996, the statute employed the term "annul," rather than "set aside."

conducting a separate proceeding (R. 04-04-025) in which SRAC levels were being addressed. While the Commission decision was affirmed, however, the court stated its expectation that if the Commission modified the SRAC formula, any resulting lower levels would be applied retroactively. Indeed, the court stated that in order to meet the intent of Congress, it would be "the Commission's duty to apply it retroactively." (See Para. 386, *infra,* for the genesis of this requirement.)

29. *Santa Clara Valley Transportation Authority,* 124 Cal. App. 4th 346, (November 22, 2004). The Court of Appeal (Sixth District) reversed the Commission, holding that Sections 1201 and 1202 of the Public Utilities Code, granting the Commission jurisdiction over railroad crossings, did not apply to Petitioner, a public agency providing passenger rail service. Even though the statutes at issue could be characterized as of the type the Legislature intended the Commission to enforce, the court accorded *no* deference to the Commission's interpretation of the statutes, choosing instead to subject the Commission's interpretation to "independent review." Since the question before the court was one of *jurisdiction,* the Court's choice is not particularly surprising (see Para. 33, *infra,* but see also *City of Arlington* (footnote 27, *infra*) ). But the opinion did not rest its election to conduct an expressly independent review (instead of applying *Greyhound*[19] deference) on the jurisdictional nature of the question. Instead, the court suggested that great deference was due to agency construction of a statute *only* where that construction was embraced in a quasi-legislative act by the agency, one authorized by the Legislature (such as promulgating a regulation). (*New Cingular Wireless I* (Para. 11) adopts a similar approach.)[20] The Commission unsuccessfully sought review of the *SCVTA* Order in the California Supreme Court.

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[19] See Paras 33 and 78, *infra*.

[20] Whatever departure *SCVTA* may represent from *state* law regarding deference to agency interpretation of a statute, it seems consistent with present *federal* law as articulated by the Ninth Circuit. *See Natural Resources Defense Council v. National Marine Fisheries Service,* 421 F. 3d 872 (August 24, 2005). (Part II of the Court's opinion discusses *Chevron* deference (*see* fn. 24, *infra*) as construed by the United States Supreme Court's later decision in *U.S. v. Mead,* 513 U.S. 218 (2001).) A full reading of *SCVTA* suggests that the deference accorded the Commission was tantamount to that afforded federal agencies under the *Skidmore* standard (employed in *New Cingular Wireless I* (Para. 11)), *i.e.,* not deference, but a level of "respect" based on the persuasiveness of the agency decision. Indeed, even the original *Chevron* decision seemed to differentiate between (1) explicit grants of rulemaking authority, and (2) only implicit authority

30. *Southern California Edison* (CEERT), 121 Cal. App. 4th 1303, (August 31, 2004). The Court of Appeal (Second District, Division 1) reversed a Commission Order that construed Section 399.25 to require public utility transmission providers to pay the up-front cost of network upgrades needed to ensure reliable delivery of independent generator output. The Court did not, nor was it apparently asked to, examine the merit of the Commission's construction of Section 399.25. Rather, the Court agreed with Edison that the Federal Energy Regulatory Commission ("FERC") had occupied the field of regulation related to cost recovery for such interconnections. While the Court agreed that general law embraces a presumption against implied federal preemption, the Court observed that the presumption does not apply when the state "regulates in an area where there has been a history of significant federal presence." Indeed, in other portions of the opinion, the Court appears to place great weight on the fact that, by contrast to transmission line *siting* or local service issues, the financial aspects of interconnection agreements did not seem to fall within traditional state regulation. Notably, the Court concluded that because Edison alleged "field" preemption rather than "conflict" preemption, the Court was not required to determine whether Section 399.25 (as construed by the Commission) actually conflicted with the FERC order. (The Commission sought review of the Order in the California Supreme Court, but review was denied.)

31. *Utility Consumers' Action Network,* 120 Cal. App. 4th 644 (July 12, 2004). The Court of Appeal (Fourth District, Division 1) affirmed a Commission decision entering into a settlement of a suit in federal court related to statutory provisions governing the restructuring of the electricity markets in California. Citing *Edison v. Peevey,* 31 Cal. 4th 781 (2003), the Court held that, barring some express statute to the contrary, the Commission possessed the inherent power to enter into a settlement. The Court also held that Article III, Section 3.5 of the State Constitution did not bar the settlement because the settlement itself did not abrogate[21] the state statute lying at the heart of the suit (Section 332.1) but merely construed it. Even though the Court did not agree completely with the Commission's construction, it found

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to "fill-in gaps." The U.S. Supreme Court affirmed the distinction in *Gonzales v. Oregon,* 546 U.S. 243 (2006), 2006 U.S. LEXIS 767, the Oregon case involving physician-assisted suicide.

[21] As noted in *Burlington Northern* (Para. 35), a Commission order refusing to adhere to a state statute does, not in and of itself, contravene Article III, Section 3.5. The constitutional provision only bars such a refusal where (1) it is based on preemption or constitutional grounds and (2) no California appellate court decision supports the Commission's basis for refusal.

that the terms of the settlement did not violate the statute *as construed by the Court*. In this matter, the Court appears to have followed a course akin to the traditional *Chevron* analysis employed by federal courts reviewing federal agency decisions.[22] The Court looked first to whether the plain language of the statute resolved the issue of its construction *before* deciding whether to defer to the agency (Commission) construction. Since the Court affirmed the Commission's order without deferring to the Commission, the question of whether the Court formally eschewed *Greyhound* deference (see Paras. 34 and 78, *infra*) is largely academic.

32. *City of St. Helena,* 119 Cal. App. 4th 793 (June 21, 2004), 14 Cal. Rptr. 3d 713. The Court of Appeal (First District, Division 4) reversed the Commission's holding that The Napa Valley Wine Train was a common carrier (and thus generally exempt from City regulation of its facilities). The Court concluded that the service was not a common carrier service because it did not provide "transportation" between one point and the other. The Court finessed the fact that the "one point and another" criteria statutorily only applies to vessels (Section 1007).[23] (In unpublished portions of the opinion, the Court reached some novel conclusions on procedural issues.) The word "Greyhound" does not appear in the decision (see Paras. 34 and 78, *infra*).

33. *PG&E Corporation,* 118 Cal. App. 4th 1174 (May 21, 2004), 13 Cal. Rptr. 3d 630. The Court of Appeal (First District, Division 5) affirmed a Commission decision denying the motions of three holding companies (Petitioners) for dismissal from a Commission investigation of the Petitioners' actions during the electricity crisis of 2000-1. The Court held that the Commission's construction of statutes delimiting the Commission's *jurisdiction* was *not*

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[22] *See* fn. 27, *infra,* and discussions of *Chevron* and *Greyhound* at Para. 32, *infra* (*Edison*).

[23] *See Golden Gate Scenic Steamship Lines* (Para. 89). *See also Gomez v. Superior Court (Disney)*, 35 Cal. 4th 1125, which calls into question the holding in *City of St. Helena* that the round trip train travel was not "transportation." While not overruling the *St. Helena* court's determination that the Wine Train was not subject to Commission jurisdiction, the Supreme Court "disapproved" of the *St. Helena* decision to the extent it suggested that a provider of round trip transportation was not a "carrier of persons for reward." The Commission concluded that *Gomez* did not require the Commission to revisit its Wine Train Decision. *See also Squaw Valley Ski Corp. v. Superior Court*, 2 Cal. App. 4th 1499 (1992) and *Huang v. The Bicycle Casino, Inc.*, No. B266350, 2016 Cal. App. LEXIS 876 (Cal. Ct. App. Oct. 19, 2016). An entity which would not be deemed a "common carrier" under Section 211 may still be a "common carrier" under Civil Code Section 2168.

entitled to the level of deference required (described in *Edison* Para. 33, *infra)* with regard to the Commission's construction of other statutes. (In 2013, the U.S. Supreme Court adopted a contrary view with regard to *Chevron* deference. See *City of Arlington* cited at footnote 27, *infra*). The Court nonetheless agreed with the Commission that the statutes pursuant to which regulated energy utilities sought authority to create the holding companies in the first instance, coupled with Section 701,[24] provided the Commission with limited authority over the resulting holding companies such that the Commission could (1) enforce the holding companies' compliance with conditions in the orders authorizing their creation and (2) do so in its own forum. The opinion does not, however, hold that affiliates of public utilities, without more, are subject to commission jurisdiction. (As the Commission held in D.17-04-042, the decision also does not hold that the Commission has jurisdiction over a non-public utility that does business with a public utility.) The Court also held that challenges to the fashion in which the Commission was construing one of those conditions were premature. The Court expressly affirmed the Commission's construction on an interim basis, however, because denial of the petitions on the issue would "foreclose further review of the interim decision." The discussion reminds practitioners of the burden borne by those seeking review of Commission decisions in the state appellate courts; if a petition is summarily denied because the court deems the issue raised unripe, the denial is treated as *res judicata* on *all* grounds which were raised in the Petition or could have been raised unless the court, as it did in this decision, disclaims finality. There are also instances in which a party may seek review of a technically ripe issue (one with respect to which the Commission has denied rehearing) even though other issues arising out of the same Commission decision (with respect to which rehearing was granted) remain pending. In 2009, the California Supreme Court denied the petition for writ of review in such a case but expressly did so without prejudice to the petitioner's right to again seek review of the issue after the Commission decided the remaining issues before it.[25]

34. *Southern California Edison,* 117 Cal. App. 4th 1039 (2004), 12 Cal. Rptr.

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[24] For an opinion setting forth constraints on the reach of Section 701, *See State Assembly* (Para. 45, *infra*).

[25] *Center For Biological Diversity, Petitioner, v. California Public Utilities Commission, Respondent; San Diego Gas And Electric Company, et al., Real Parties in Interest*, S169876, Supreme Court of California, 2009 Cal. LEXIS 1317.

3d 441. The Court of Appeal (Second District, Division 8), affirmed a Commission award of intervenor compensation to TURN. At issue was the portion of the award compensating TURN for its efforts as an intervenor in a proceeding in federal court. Edison had initiated the federal action to challenge the Commission's jurisdiction to enter certain rate orders in a Commission proceeding to which both TURN and Edison were parties. The Court of Appeal held that TURN's activities as an intervenor in the federal court proceeding on behalf of the *defendant* therein (the Commission) fell within the scope of the phrase "obtaining judicial review" in Section 1802. The Court deferred to the Commission's construction of Section 1802, citing language from *Southern Californian Edison v. Peevey,* 31 Cal. 4th 781 (2003) ("*Peevey*") stating that "the PUC's interpretation of the Public Utility (sic)[26] Code 'should not be disturbed unless it fails to bear a reasonable relation to statutory purposes and language.'" The *Peevey* court, in turn, had cited *Greyhound* (Para. 78, *infra)* for that proposition. The Court seems to have applied the second step of *Chevron* deference[27] without applying the first, an approach *Chevron*'s critics

[26] One hopes that, with the passage of time, the Court of Appeal will discontinue references to "the Public Utility Code" and "Petitions for Rehearing." As late as 2011, however, the California Supreme Court referred to the Commission as the "Public Utility Commission." *Voices of the Wetlands v. State Water Resources Control Board*, 52 Cal.4th 499, footnote 9.

[27] *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842, 81 L. Ed 2d 694, 104 S. Ct. 2778. *Chevron* asks, first, [Step One] whether "Congress has directly spoken to the precise question at issue," in which case courts, as well as [regulatory agencies] must give effect to the unambiguously expressed intent of Congress," *id.,* at 842-843, 81 L. Ed. 2d 694, 104 S. Ct. 2778. However, whenever Congress has "explicitly left a gap for the [implementing] agency to fill," the agency's regulation is "given controlling weight unless [it is] arbitrary, capricious, or manifestly contrary to the statute." [Step Two] *Id.,* at 843-844, 81 L. Ed. 2d 694, 104 S. Ct. 2778. Pp. 4-5.

(On January 17, 2024, the Court heard argument in *Loper Bright Enterprises v. Raimondo* and *Relentless v. Department of Commerce* . Many expect the Court will, at long last, overrule *Chevron* in its decision in those matters. Nonetheless, it remains in affect for now and so this overly long footnote survives another year.)

In 2013, the U.S. Supreme Court held that Step 2 of Chevron applied to an agency determination of its own jurisdiction. *City of Arlington v. FCC, 133 S. Ct. 1863* (May 20, 2013). (See, Somogyi, Deference Means Never Having to Say "You're Wrong:" the Potential Effect of City of Arlington v. FCC on California Law and the CPUC, https://www.goodinmacbride.com/deference-means-never-having-to-say-youre-wrong-the-potential-effect-of-city-of-arlington-v-fcc-on-california-law-and-the-cpuc/. *Chevron* and *Arlington* were implicated in the 2015 U.S. Supreme Court decision regarding the Affordable Care Act ("ACA") but the Court elected to squarely decide the case according to its view of the intent of Congress reached outside the dictates of *Chevron. King v. Burwell*, 135 S. Ct. 2480,

find particularly unsettling.[28] That approach, however, does find support in *Greyhound* (to a much greater extent than from *Edison v. Peevey* where the Legislature had expressly authorized[29] the Commission to determine "uneconomic costs"). In any event, the affirmation of the vitality of *Greyhound* (and thereby *Greyhound* deference) was significant because *Greyhound* arguably requires a greater level of deference to the Commission's construction of statutes than that enjoyed by any federal agency under *Chevron* and its progeny. One must question, however, whether *Greyhound* deference remains appropriate for the intervenor compensation statutes in

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2488-2489.

An interesting twist on *Chevron* was announced in *NCTA v. Brand X*, 125 S. Ct. 2688; 2005 U.S. LEXIS 5018 (June 7, 2005), in which the Supreme Court held that "(a) court's prior judicial construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion." (125 S. Ct. at 2700) *NCTA* was followed in *Metrophones Telecommunications v. Global Crossing* (9th Circuit, September 8, 2005); 2005 U.S. App. LEXIS 19370.

*Chevron* has its detractors; see, Beerman, End the Failed *Chevron* Experiment Now: How *Chevron* has Failed and Why it Can and Should be Overruled., Administrative and Regulatory Law News (Vol 35 No. 2 (Winter 2010)). Other commenters argue that all doctrines of deference can or should be reduced to a single rule: a court should uphold reasonable agency action; the three factors that would inform that inquiry are (1) is the agency action consistent with relevant statutes; (2) is it consistent with available evidence and (3) is it adequately explained. See Pierce, What Do the Studies of Judicial Review of Agency Actions Mean? 63 Administrative Law Review 77 (Winter, 2011). Most recently, see Lawson and Kam, Making Law Out of Nothing at All: The Origins of the *Chevron* Doctrine, 65 Administrative Law Review. 1 (Winter, 2013). However stated, court deference to agency construction of statutes (under the *Chevron* test) remains a vital rule of jurisprudence even where (1) the construction is in an amicus brief and (2) the Court makes no reference to *Chevron*. See *Talk America, Inc. v. Michigan Bell*, U.S. Supreme Court (June 9, 2011) 180 L.Ed. 96; 2011 U.S. LEXIS 4375.

More importantly, while recent US Supreme Court opinions have arguably ignored *Chevron*, the Court, as noted earlier, has yet to overrule it. Instead, the Court seems to have expanded the scope of Step One to apply traditional rules of statutory construction before determining that the statute is ambiguous. See, https://www.theregreview.org/2022/07/14/pierce-chevron-deference/

[28] Note that while the Court appears to have applied a form of Step One *Chevron* deference in *Greenlining* (Para. 37), no issue of deference was before the Court since the Commission was not charged with administering the statute at issue. Bus. & Prof. Code §17204.

[29] In *Santa Clara Valley Transportation* (Para. 26), the Court stated that its obligation to defer to the Commission was limited to instances where the Court could discern a statutory authorization for the Commission to engage in quasi-legislative activities. See Section 1701.1(e)(2), for example, where the Commission is charged with defining "decisionmaker."

light of *New Cingular Wireless I and II* (Paras. 10 and 11). At the same time, the reader should also note that Section 1759 requires a *Superior Court* to adhere an even stricter level of deference, requiring it to defer to the Commission's construction of a statute if "even palpably erroneous." *Anchor Lighting v. Edison,* (Para. 21 of the Appendix). For the Commission's most recent view on awards of intervenor compensation for defending a Commission decision in court (in this case, the U.S. Supreme Court), see Decision 21-12-064 (December 16, 2021).

35. *Burlington Northern & Santa Fe Railway* (*United Transportation Union*), 112 Cal. App. 4th 881 (2003), 5 Cal. Rptr. 3d 503. The Court of Appeal (Third District) reversed a Commission order in which the Commission found that it was required to enforce Section 6906 of the Labor Code notwithstanding a credible (indeed, compelling) argument that the statute was invalid. The Commission stated that Article III, Section 3.5 of the State Constitution[30] barred it from refusing to enforce the statute. The Court pointed out, however, that Article III, Section 3.5, only barred the Commission from refusing to enforce a statute where the prospective refusal rested on perceived constitutional infirmities or federal preemption. It held that where the statute had been repealed by implication (in this case, by a state ballot measure), the Commission (1) could recognize the implied repeal and refuse to enforce the statute and (2) was required to do so.

36. *Hillsboro Properties,* 108 Cal. App. 4th 246 (2003), 133 Cal. Rptr. 2d 343, . The Court of Appeal (First District, Division 2) determined that the proper construction of Section 739.5 was a question of law subject to independent review. It affirmed a Commission order that directed a mobile home park owner to refund to tenants the portion of rent that improperly included sums related to the provision of submetered gas and electric service provided by the park owner. In general, the Commission lacks jurisdiction over landlords providing quasi-utility services such as water or energy service in multi-family buildings or mobile home parks (whether submetered or not.) The absence of *dedication* precludes a finding of public utility status with regard to the landlord provider. *Story v. Richardson,* 186 C 2d 162 (1921). The decision here highlights the fact that, notwithstanding that limitation, the Legislature may direct the Commission to take actions outside the scope of the original Public

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[30] See Para. 68 *infra* for the genesis of Article III, Section 3.5. A much more detailed exposition of the events leading to the adoption of Section 3.5 is found in *Lockyer v. City and County of San Francisco,* 33 Cal. 4th 1055 (2004), 2004 Cal. LEXIS 7238.

Utilities Act.[31] Section 739.5 requires the Commission to ensure that the "master-meter customer" (typically <u>not</u> a public utility but rather a residential landlord) limits the level of rates charged to sub-metered tenants. Absent such express authority from the Legislature, the Commission may only compel actions by non-utilities only <u>indirectly</u>, by approving or requiring utility tariffs with which the non-utility must comply under threat of disconnection. (In days of yore, some of these tariff provisions were fairly absurd. See Para. 75, *infra*). It is not always easy to determine whether the Legislature intends to extend the Commission's reach to non-public utility entities; does Section 780.5, for example, vest the Commission with jurisdiction over metering in buildings constructed in the LADWP service area? Another notable aspect of the case is the Court's affirmation that the directives of the Commission, with respect to a matter lying within its jurisdiction, take precedence over a local ordinance. Indeed, the *Huntington Beach* court would likely have so concluded had the matter been properly joined at the Commission (See, Para. 21, *supra*).

37. *Greenlining Institute,* 103 Cal. App. 4th 1324 (2002), 127 Cal. Rptr. 2d 736, 2002 Cal. App. LEXIS 5066. The Court of Appeal (First District, Division 3) <u>affirmed</u> the Commission order at issue but held that the Commission did not possess the jurisdiction to enforce Section 17200, *et seq.,* of the Business and Professions Code ("Unfair Competition Law" or "UCL"). The Commission had held that it had "discretion" to leave enforcement of the UCL to the courts. Greenlining argued that the Commission was required to decide UCL issues. While the Court <u>affirmed</u> the Commission's decision, it rejected both views. It held that, while the Commission might consider the UCL in deciding other questions, enforcement of the UCL was a task left to the courts. (The extent to which the Commission's resolution of those "other questions" binds the Superior Court in UCL cases depends on your reading of *Orloff* and of cases cited therein (see the Appendix to this document regarding Section 1759.) Notably, the Court did not affirm or "set aside" (reverse) the Commission's order (as required by Section 1758) but

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[31] Pursuant to Article XII Section 5 of the California Constitution, the Legislature may provide the Commission with jurisdiction over <u>non-public utilities</u> so long as the newly conferred authority is "cognate and germane" to the regulation of public utilities. The constitutional provision confers "plenary power" on the legislature to enlarge the Commission's jurisdiction. In *Independent Energy Producers v. McPherson,* 38 Cal.4th 1020 (June 19, 2006) the California Supreme Court decided that the <u>voters</u> may also confer additional jurisdiction on the Commission.

simply denied the Petition for Writ of Review, thereby upholding the outcome, if not the rationale, of the Commission's decision. A reading of *Greenlining* and *Pacific Bell* (Para. 43) may leave the reader with some uncertainty regarding the power of the Court of Appeal to summarily deny a writ petition. One question was whether a procedurally sound petition that raises an important question of law <u>must</u> be heard <u>regardless of its merit</u>. While question is likely answered in the negative, it now seems clear that a procedurally sound petition that "might have merit" should be granted. (*Calaveras*, Para 4). What should not be open to question is whether the Court, having accepted review by <u>granting</u> a petition for writ of review, may then affirm the Commission's order by <u>denying</u> the petition in a written opinion. This procedural device is simply not an option available under Section 1758. (At footnote 11 of the opinion, the Court warns the parties that because it denied the petition for writ of review, the order was "final" on the date of filing, an admonition at odds with *Bay Development v. Superior Court,* 50 Cal. 3d 1012, 1024-25 (1990*)*.

38. *Southern California Edison,* 101 Cal. App. 4th 982 (2002). The Court of Appeal (Second District, Division 7) <u>affirmed</u> most of a Commission order that determined the level of short run avoided costs ("SRAC") for electric utilities. (SRAC returned to the court in 2005; see Para. 28.) The Court <u>reversed</u> that portion of the order in which the Commission refused to consider adjusting SRAC retroactively, holding that PURPA required that the Commission at least consider whether such an adjustment was required by the evidence. (The court did *not*, as some have suggested, find that there was no "substantial evidence"[32] to support the outcome already rendered.) The opinion addresses Section 1708.5(f) of the Public Utilities Code and holds that it applies not only to proceedings initiated by parties but to proceedings initiated by the Commission itself as well. The court also held that, pursuant to Section 1708.5(f), the Commission was not required to hold a hearing to modify a prior rule unless the rule was adopted after a hearing. In a footnote (fn. 17) the Court recognized that "at

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[32] The Court of Appeal's lone <u>express</u> forays into the requirements of the "substantial evidence" test (Section 1757(a)(4)) were in *Ponderosa* (Para. 9), *IEP/TURN* (Para. 17) *Ames* (Para. 22) and *Vernon* (Para. 40). *TURN* (Para. 25) indirectly raises the "substantial evidence" standard by resting on "abuse of discretion." Future challenges may not turn on the quantum of evidence but whether "evidence" received other than through an evidentiary hearing can satisfy the standard. In *UCAN* (Para. 24), the Court rejected a claim that the Commission could not consider representations at oral argument. In *IEP/TURN* (Para. 17), however, the court held that hearsay, while admissible, could not, alone, satisfy the "substantial evidence" test of Section 1757(a)(4).

some point a failure to hold hearings could be a violation of due process." While the parties to non-adjudicatory matters are theoretically not entitled to "due process" in the constitutional sense (*Henry Wood*, Para. 74), prejudicial failure to follow procedures can lead to annulment of a Commission decision (see *Huntington Beach*, Para. 21and *Edison,* Para. 26.) This decision and the following one (Para. 39) are relevant to any analysis of *Younger* abstention (*Younger v. Harris,* 401 U.S. 37 (1971)) in federal court actions. Both should dispel any suggestion that federal claims may not be adequately pursued in state court, a question raised in the past in connection with *Younger*. See *Communications Telesystems International v. Public Utilities Commission,* 196 F.3d 1011 (9th Cir. 1999). Parties, with some justification, had argued that the paucity of written decisions (under writ review prior to the enactment of SB 779) precluded a finding that state court review of federal questions existed to any meaningful degree.

39. *Southern California Edison (Caithness Energy),* 101 Cal. App. 4th 384, 124 Cal. Rptr. 2d 281 (2002), 2002 Cal. App. LEXIS 4520. The Court of Appeal (Second District, Division 7) affirmed the portion of a Commission order fixing the line loss factor to be applied to the determination of utility avoided costs. The Court, however, reversed that portion of the order that fixed a floor for line losses. The Court concluded that the determination of a floor was preempted by FERC regulations. The former holding seems predicated on an application of the "abuse of discretion" standard (Section 1757.1(a)(1)) while the Caithness petition seemed more grounded in a claim that the Commission had exceeded its jurisdiction and had not proceeded in the manner required by law (Section 1757.1(a)(2)-(3)).

40. *City of Vernon,* 88 Cal. App. 4th 672 (2001), 106 Cal. Rptr. 2d 145. The Court of Appeal (Second District, Division 1) affirmed the Commission's denial of Vernon's complaint against the Santa Fe Railroad, finding that substantial evidence supported the Commission's finding that no EIR was required for expansion of the railroad's terminal in Vernon. The court held that "unlike review under CEQA where the burden of demonstrating the reasonableness of a project lies with its proponent, the burden here was on the City of Vernon as the opponent . . . to show that it was unreasonable." The Court cites no statutory authority for assignment of the "burden of proof" to the City and its resolution of the matter rests on a conclusion that there was "substantial evidence" to support the railroads projections with regard to traffic. The assignment of the "burden of proof" to the City may well stem from its status as a complainant in an adjudicatory matter before the Commission. With rare exceptions, however,

(Section 854(e)) no statutory burden of proof exists. See discussion of *Ames,* Para. 22.

41. *Southern California Edison,* 85 Cal. App. 4th 1086 (2000), 102 Cal. Rptr. 2d 684. The Court of Appeal (Second District, Division 3) issued a writ requiring the Commission to recognize the effective date of an advice letter to be 40 days following the filing of the advice letter pursuant to Section 455. The Commission had instead issued a resolution (effectively reversed by the Court's decision) approving the advice letter but delaying its effectiveness by over seven months after the passage of the 40 days set forth in the statute. The Court held that Section 455 clearly[33] required that the advice letter become effective in 40 days unless suspended prior to that time by the Commission. The Court also held that the utility had not waived the statutory effective date by asking the Commission to issue a resolution approving the advice letter. (The Court noted, but did not address, the fact that the statute actually provides that an advice letter becomes effective on 30 days' notice; General Order 96-A, which governed filings under Section 455, stated that Section 455 filings become effective in 40 days unless first suspended.) Undaunted, the Commission simply issued a resolution delegating to its staff the Commission's power to suspend filings. Edison sought review of that resolution (raising the issue of whether discretionary powers may be delegated) but the court (Second District, Division 1) denied its Petition for Writ of Review. In January of 2005, the Commission issued D.05-01-032 setting forth the procedures for staff suspension of advice letters. Earlier, it set forth its view on the staff exercise of delegated authority in D. 02-02-049 denying rehearing of Res. M-4801.

42. *Pacific Gas & Electric,* 85 Cal. App. 4th 86 (2000). The Court of Appeal (First District, Division 3) reversed a Commission order directing PG&E to issue refunds to customers equal to 40 percent of PG&E's cost of postage for customer bills that included PG&E advocacy material. The Court held that a statute (Section 453(d)) proscribing such advocacy in bill inserts was unconstitutional on its face as violative of the First Amendment. The Court rejected the Commission's argument that the refunds were intended to prevent ratepayer subsidization of utility speech. The Court noted that the Commission never reached the "subsidization" issue in the Commission decision under review. Accordingly, it refused to permit the Commission to employ a newly discovered rationale during appellate review. Federal courts will also refuse to consider an agency rationale advanced for the first time on appeal. *SCE*

[33] Even *Greyhound* deference (Paras. 34 and 78) could not save the order under review.

*v. Chenery Corp.* (1943) 318 U.S. 80, 94-95. (But see, *Morgan Stanley v. PUD of Snohomish County* (June 26, 2008) 128 S.Ct. at 2733, 2008 U.S. Lexis 5266.)

43. *Pacific Bell,* 79 Cal. App. 4th 269 (2000). The Court of Appeal (First District, Division 5) first concluded that the enactment of SB 1322 and SB 779) (the judicial review legislation passed in the late 1990s) left it with the same discretion possessed by the California Supreme Court under prior law to grant or deny a petition for writ of review of a Commission decision. The Court stated that it was permitted to summarily deny petitions that were either (1) procedurally defective[34] or (2) both non-meritorious[35] *and* which did not raise an issue significant to the development of the law. On the merits of the case, the Court affirmed the Commission decision at issue, concluding that the Commission had acted within its authority when it required Pacific to file an application to effect changes in its yellow pages tariff rather than proceeding through an advice letter.

44. *North Shuttle,* 67 Cal. App. 4th 386 (1998), 79 Cal. Rptr. 2d 46. The Court of Appeal (First District, Division 4) construed for the first time since their enactment 50 years earlier) the provisions of the Code (§§ 1761, *et seq*.) governing stays of Commission decisions by a Court. (Since *North Shuttle,* only one other decision has addressed stays.)[36] The Court affirmed the Commission's order, concluding that the Petitioner had not shown the prospect of irreparable injury, (the predicate for both a long-term stay under § 1762 and a temporary stay under § 1763). (Notably "great or irreparable damage" is the lone statutory criteria; the statute does not expressly require the applicant for the stay to a "likelihood of prevailing on the merits".) North Shuttle had first filed an application for rehearing of the Commission's order. The application for rehearing stayed that order pursuant to Section

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[34] "Procedurally defective" embraces more than filing fees, due dates and page limits. *See Consumers Lobby Against Monopolies,* 25 Cal. 3d 891, 902-904 (1979) regarding issue preclusion, ripeness, mootness and standing. (Para. 56.) A petition denied solely because it is "procedurally defective" will not be identified as such. The denial remains deemed "on the merits." (But, see Para. 33.) In 2006, the U.S. Supreme Court addressed problems created when summary denials of writ petitions by California courts are deemed "on the merits." *See Evans v. Chavis* (January 10, 2006), 546 U.S; 189, 126 S. Ct.846; 2006 U.S. LEXIS 757.

[35] *Greenlining* (Para. 37, *supra*) suggests that the Court may deny a petition on absence of merit alone, *i.e.,* may refuse to issue a written opinion even where an important question of law is raised. *Greenlining*, more than *Pacific Bell*, probably describes current practice.

[36]See, *Southern California Gas Company* (Para 5).

1733(a).[37] Accordingly, a question left open by this decision is whether a party is required to file an application for rehearing in order to seek a stay in the first instance. In other words, does Section 1731 bar an application to a court for a stay under Sections 1761-3 where the party has not first sought rehearing from the Commission under Section 1731? An appellate court order so finds but I harbor reservations.[38] The recent court decision may have rested on the fact that, in the absence of an application for rehearing, no petition for writ of review could have been filed (Sections 1731 and 1756). The Court would be correct in that view but it begs the question of whether a pending petition for writ of review is a predicate to an application to an appellate court for a stay. Is a request for a stay a "cause of action" within the meaning of Section 1731? Requiring a party that seeks a stay to first file an application for rehearing seems inconsistent with the immediacy typically associated with a request for a stay since the party presumably suffering irreparable harm would have to wait as long as 60 days to even acquire standing to file the petition for writ of review (Sections 1733(b) and 1756.) In *Rittiman* (Para 6), the delay associated with an application for rehearing was plainly a factor in the Court's conclusion that 1731 did not bar a party from seeking mandate to enforce the Public Records Act without first seeking rehearing of the Commission order refusing to provide the requested records.

45. *Assembly of the State of California,* ("*State Assembly*") 12 Cal. 4th 87 (1995), 48 Cal. Rptr. 2d 54. The California Supreme[39] Court reversed a Commission order by which the Commission directed that a large portion of the interest component of a refund by Pacific Bell fund consumer education and school telecommunications development. The remaining portion was to be refunded to ratepayers. The Court ruled that the Commission's disposition of the refund violated § 453.5 which requires that rate refunds be paid "to all current utility customers and, when practicable, to prior customers on an equitable basis . . ." In so doing, the Court reaffirmed the restrictions on the scope of § 701, finding that, in light of the express directive of § 453.5, § 701 does not infer an "open-ended grant of authority to the Commission" with respect to the use of the funds. *Pacific Bell Wireless* (Para. 27) and *PG&E*

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[37] Today, the Commission usually makes its orders effective on the date of signature, precluding application of the automatic stay provisions of Section 1733(a).

[38] Rely on the legal opinions of the author of this memorandum at your own risk.

[39] All the Decisions at Para. 45 and following are those of the California Supreme Court, which, until 1998, was the only state court with jurisdiction to review Commission decisions.

*Corporation* (Para. 33), however remind us that Section 701 retains considerable vitality as the Commission's "necessary and proper" clause. *State Assembly* should not be read too broadly. (But neither should *PG&E Corporation* which, again, does not hold that affiliates of public utilities, without more, are subject to commission jurisdiction.)

46. *Camp Meeker Water System,* 51 Cal. 3d 845 (1990). The Court affirmed the Commission order at issue, concluding that the Commission had properly exercised its jurisdiction under Sections 451, 454, 701, 728 and 851 when it resolved certain issues of property law related to the transfer of utility assets. The case may have turned on a representation by counsel for the Commission (at oral argument) that the determination of property ownership was *only* for ratemaking purposes and would not bind the parties at issue in any future civil actions involving title to the property. In a footnote (fn. 3) the court held that § 1709 is only implicated when the Commission has acted in a judicial (rather than ratemaking) capacity. *Camp Meeker* held that the scope of review of Commission decisions was limited to whether the Commission "has regularly pursued its authority". The *Camp Meeker* holding was expressly overruled by the Legislature when it enacted the Calderon-Peace-MacBride Judicial Review Act of 1998 (Stats. 1998, c. 886, Sections 1-1.5), although the old standard remains in effect for non-adjudicatory water matters. As the cases below suggest, however, the construction of the phrase "regularly pursued its authority" in Section 1757 (as it existed prior to SB 779) was much more expansive in practice than the Court always cared to admit. I do not believe that the increase in the number of Commission cases being reviewed post-SB 779 can be legitimately ascribed, as some have, to the legislative rejection of the standard of review articulated in *Camp Meeker.*[40] The standards now set forth in Sections 1757 and 1757.1, were all tacitly enforced in one or more of the decisions summarized below even as the Court applied the old ("regularly pursued its authority") standard. The change in reviewing court, not the change in standard, was the principal cause of the sharp increase in the number of cases being heard. The Commission did not "regularly pursue its authority" in *Huntington Beach* (Para. 21) and *Edison* (Para. 26) but it is hard to envision the California Supreme Court agreeing to hear those cases.

47. *Napa Valley Wine Train,* 50 Cal. 3d 370 (1990). The Court concluded that

[40] The text overruling *Camp Meeker* can be found under Stats. 1998, c. 886, Section 1.5(b) found in "Historical and Statutory Notes," West's Annotated Public Utilities Code following Section 311.

because the Wine Train's passenger service would be operated on "rights-of-way" already in existence, the new service qualified for an exemption from the California Environmental Quality Act ("CEQA"). The Commission decision to the contrary was reversed. Fourteen years later, the Wine Train litigation was still pending before the Commission and the Courts (see *City of St. Helena*, Para. 32, *supra*.) Note that under Section 21168.6 of the Public Resources Code, review of Commission actions related to CEQA is reserved to the Supreme Court, a factor leading to delay of the review in *UCAN.* (Para. 24).

48. *Southern California Gas Company,* 50 Cal. 3d 31 (1990), 784 P.2d 1373. The Court reversed a Commission decision ordering Southern California Gas Company to disclose the contents of an opinion of counsel regarding the enforceability of gas supply contracts. The Court concluded that the attorney/client privilege applies to Commission proceedings. (The Court's analysis suggests that other provisions of the Evidence Code do not.) The Court also held that the Commission exceeded its authority by ruling that the company had, by implication, waived its attorney/client privilege. Notably, the Court concluded that when Legislature enacted Section 582 and other statutes vesting the Commission with broad investigatory powers, the Legislature assumed those powers would still be limited by the attorney-client privilege. In May of 2017, the California Supreme Court remanded to the Commission a matter in which the attorney-client privilege and the Public Records Act were alleged to be in conflict. The Court had held the matter in abeyance pending its consideration of the issue in another proceeding. Following the decision in that matter, *Los Angeles County Bd. of Supervisors v. Superior Court*, 2 Cal. 5th 282, the Commission issued an order concluding that certain invoices for legal services were subject to the attorney-client privilege.

49. *Toward Utility Rate Normalization,* 44 Cal. 3d 870 (1988). The Court affirmed a Commission decision which authorized interim rate increases for PG&E pursuant to its major additions adjustment clause ("MAAC"). The Commission authorized the rate increase *prior* to reaching a final determination on the prudency of PG&E's investment in the plant. TURN asserted that the Commission could award interim rate relief only where (1) such relief was required to forestall a financial emergency or (2) the cost basis for the relief was beyond dispute. The Court, without really fixing the parameters of the Commission's authority to provide interim relief, found that the Commission had the discretion to order it here as a means of insuring that present and future ratepayers fairly shared in recovering PG&E's costs. Future

disputes related to interim relief may turn on what is "required by law" (see Paras. 21 and 26 *supra*) before any order is issued. Does any provision of Section 454, restrict the broad authority vested in the Commission by Section 701? The decision does not address an issue in *Securus* (Para. 3), what requirements the Commission must meet to reduce rates on an interim basis.

50. *City and County of San Francisco,* 39 Cal. 3d 523 (1985), 703 P.2d 381. The Court affirmed a Commission decision approving an offset rate increase for Pacific Bell over the objection of the City that certain terms of a prior settlement between the City and Pacific in an earlier (general rate) proceeding required a reduction of the offset rate increase. The offset rate increase resulted from a decision of the FCC requiring Pacific to change its accounting procedures to treat installation costs as a current expense rather than a capital expenditure.

51. *Southern California Gas Company, Pacific Telephone & Telegraph Co. and PG&E*, 38 Cal. 3d 64 (1985), 695 P.2d 186. The Court dismissed Petitions by three utilities which asserted that an award of "public participation costs" contravened judicial precedent, the *CLAM* decision (Para. 56, *infra*). The Court held that the issues raised in the petitions had been rendered moot by the enactment of legislation (SB4-Montoya), effective January 1, 1985, setting forth conditions under which the Commission could award such costs, today known as "intervenor compensation."[41] The Court held that, notwithstanding the fact that the proceedings in question had commenced prior to the effective date of the legislation, the legislature had the power to furnish the requisite authority *nunc pro tunc* where "it clearly evinces an intent to do so and no vested or constitutional rights are infringed." Of greater significance today, the Court held that by enacting specific rules in SB 4 (now Section 1801, *et seq.*) the Legislature "foreclosed the notion that additional implied authority exists." *New Cingular Wireless I* (Para. 11, *supra*) relied on this decision to conclude that *Greyhound* deference was not appropriate when reviewing Commission interpretations of Sections 1801 - 1807.

52. *General Telephone Company of California,* 34 Cal. 3d 817 (1983), 670 P.2d 349. The Court affirmed a Commission order requiring GTE to adopt a competitive bidding procedure for the purchase of central office switching equipment instead of relying on its prior practice of purchasing such equipment from its affiliate. This decision comes very close to

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[41] SB 4 enacted Section 1802, the statute at issue in *Southern California Edison*, Para. 34, *supra*.

flatly overruling *Pacific Telephone* (Para. 113) without expressly doing so.

53. *Kenneth Cory, State Controller,* 33 Cal. 3d 522 (1983), 658 P.2d 749. The Court reversed a Commission decision determining that unclaimed refunds payable to Pacific Telephone & Telegraph Company should be distributed pro rata to Pacific's current customers. The Court concluded instead that the unpaid refunds should be paid to the State under the unclaimed property law (Civil Code Section 1500, *et seq*.). This case became of some significance in a number of Commission enforcement actions in which an effort was made to provide reparations to past telephone subscribers.

54. *United States Steel Corporation,* 29 Cal. 3d 603 (1981). In a Commission proceeding considering exemption of private vessel commodities from minimum rate regulations ("MRT"), the Commission concluded that it need not consider the extent to which its decision would affect the ability of domestic steel producers to compete with foreign producers. The Court reversed the decision and held that the Commission should have assessed the economic impact of its action, pursuant to the Commission's duty to consider all facts that might bear on the exercise of its discretion. The Court held that such a duty was inherent in the requirement of Section 1705 that the Commission decision contain separately stated Findings of Fact and Conclusions of Law on all material issues. (See Para. 64 for a similar holding, but see also Para.18 for limitations on the scope of Section 1705.) At some point the Courts will have to address whether any evidentiary requirements govern what would today probably be deemed a rulemaking proceeding subject to Section 1757.1, standards of review that do not include a "substantial evidence" test. (See Para. 38 and the reference to footnote No. 17 of the case discussed therein.)

55. *County of Inyo,* 26 Cal. 3d 154 (1980), 604 P.2d 566. In a lengthy opinion examining the constitutional and statutory underpinnings of the Commission's jurisdiction, the Court affirmed a Commission order[42] dismissing petitioner's complaint seeking Commission review of rates assessed by the Los Angeles Department of Water & Power to customers lying outside Los Angeles County. The Court held that that while Article XII, Section 5, of the

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[42] The Commission order affirmed by the Court, *County of Inyo v. LADWP*, 84 CPUC 515, 1978 Cal.PUC LEXIS, is worth the reader's attention. It addresses (1) the scope of Section 851-854, (2) the fact that eminent domain proceedings lie beyond their reach and (3) facts familiar to fans of the movie *Chinatown*.

California Constitution authorized the Legislature to vest the Commission with jurisdiction over municipalities providing water service outside their boundaries, the Legislature had never done so.[43] See *PG&E Corporation* (Para. 33) and *Hillsboro Propertie*s (Para. 36) for examples of legislative exercise of authority under Article XII Section 5 (the former by implication (the enactment of Section 854) while the latter by express direction.) Questions remain regarding (1) the meaning of the term "express" and (2) whether the requirement of "express authority" applies to any legislative act deemed under color of Article XII, Section 5 or only those vesting the Commission with some form of authority over a government body. See also *Independent Energy Producers v. McPherson*, 38 Cal. 4th 1020 (2006) in which the California Supreme Court held that references in the California Constitution to the authority of the Legislature to enact specified legislation include the people's reserved right to legislate through the initiative power; the Court held that a reference to the Legislature's plenary power in Cal. Const., Art. XII, § 5, does not preclude the people, through their exercise of the initiative process, from conferring additional powers or authority upon the Commission. (*County of Inyo* is the case on which *Monterey* (Para. 12) principally relies.)

56. *Consumers Lobby Against Monopolies ("CLAM"), Towards Utility Rate Normalization,* 25 Cal. 3d 891 (1979). In a decision reversing in part and affirming in part an underlying Commission decision, the Court held that the Commission had the authority to award attorney's fees under the common fund theory announced in *Serrano v. Priest,* 20 Cal. 3d 25 (1977), in quasi-judicial (adjudication) proceedings but that it held no authority to award such fees in rate proceedings. In 1985, the Legislature responded by abrogating the distinction and permitting an award of fees ("intervenor compensation") in many Commission matters. (See, Para. 51, *supra*.) The Court also addressed the then widely-accepted misconception that denial by the Court of a petition for writ of review of a Commission decision resulted in a "decision on the merits" for purposes of *stare decisis*. In *CLAM,* the Court confirmed that "although a summary denial by this court of a petition for writ of review is a 'decision on the merits' for *res judicata* purposes,[44] it is not *stare decisis*." This decision (known as "*CLAM*") seems to have

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[43] *Compare: Los Angeles Metropolitan Transit Authority*, Para. 84. Article XII Section 5, provides the Legislature "plenary power, unlimited by other provisions of this constitution but consistent with this article to confer additional authority . . ." on the Commission.

[44]In *Pacific Telephone v. Public Utilities Commission*, 600 F.2d 1309; U.S. App. LEXIS 13091, which was decided while *CLAM* was pending before the California Supreme Court, the Ninth

replaced *People v. Western Airlines*[45] as the Rosetta Stone of Commission jurisdiction although a strong case can be made for *County of Inyo* (Para. 55). Notably, in *dicta,* the Court observed that "(i)n Public Utilities Commission proceedings…the participants are not required to be licensed attorneys, and it is common for such persons to make appearances on behalf of others." This passage in *CLAM* formed the basis for a subsequent opinion by the Attorney General that non-attorneys could practice before the Commission notwithstanding the provision in Section in Section 1706 that "(a) complete record of all proceedings and testimony before the commission or any commissioner on any formal hearing shall be taken down by a reporter appointed by the commission, <u>and the parties shall be entitled to be heard in person or by attorney</u>." A recent ruling by an ALJ at the Commission has called into question the long standing acceptance of representation by non-attorneys in Commission proceedings. The ruling required a party to "ensure that it is represented by counsel that satisfy the requirements of Business and Professions Code section 6125." The question of whether the ruling represents a change in Commission policy remains unresolved.

57. *California Tahoe Regional Planning Agency,* 25 Cal. 3d 540 (1979), 601 P.2d 206. Prior to ruling on the Petition for Writ of Review of a Commission decision authorizing intra-state air carriers PSA and Air California to provide service to the Tahoe Valley Airport, the Court remanded the matter to the Commission upon learning that PSA had ceased passenger service to Tahoe Valley Airport and that Air California would soon do so. The original Petitions for Writ of Review addressed (1) the asserted concurrent jurisdiction of Petitioner over passenger air service into the Tahoe Basin, and (2) the inadequacy of the environmental impact report.

58. *California Manufacturers Association*, 24 Cal. 3d 836 (1979), 598 P.2d 836. The Court <u>reversed</u> a Commission decision that ordered local distribution companies (SoCal Gas, PG&E) that had received refunds from gas suppliers not to distribute the refunds to <u>prior or existing customers</u> based on <u>prior usage</u>. The Commission instead ordered that the refunds be employed to reduce the level in a gas cost "balancing account," which would have the effect of reducing <u>future rates</u> to <u>current customers</u>. The Court's decision concluded that the

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Circuit reaffirmed that denials of Petitions for writ of review had *res judicata* effort in federal courts.

[45] *People v. Western Airlines,* 42 Cal.2d 621 (1954), is not included in this summary because it did not arise out of a petition for writ of review of a Commission decision but, rather, out of an appeal of a judgment in a Superior Court proceeding filed under Section 2104.

Commission's method of distributing the proceeds of the supplier refunds violated Section 453.5, the statute at issue in *State Assembly* (Para. 45).

59. *Southern California Gas Company,* 24 Cal. 3d 653 (1979), 596 P.2d 1149. The Court reversed portions of a Commission decision requiring gas utilities to implement a home insulation financing program. The Court concluded that statutory language directing the Commission to permit utilities to enact a financing program could not be construed to allow the Commission, even under the mandates of Sections 701 and 702, to require a financing program. In fact, under the rules of statutory construction, the Legislature's express authorization of a permissive plan, "impliedly precludes any authority to impose a mandatory requirement." Even an implied legislative directive may restrict the Scope of Section 701.

60. *California Manufacturers Association,* 24 Cal. 3d 251 (1979), 595 P.2d 98. The Court reversed the Commission's decision, concluding that "neither finding nor evidence exists" supporting the Commission's conclusion that an adopted rate design would conserve more natural gas than any other proposed rate design. Justice Clark's addition of the phrase "or evidence" seems at odds with the text of § 1757 (as it existed in 1979). Today, however, § 1757(a)(4) would subject the Commission finding to a "substantial evidence" test. Some expected the Court to clarify this decision in *Edison v. Peevey*, 31 Cal. 4th 781 (2003). The Court did not do so, however, concluding that a settlement adopted by the Commission had not resulted in an increase in rates, precluding any need to clarify the "showing" required by Section 454. *Clean Energy* (Para. 15) calls the vitality of this decision into question.

61. *California Manufacturers Association, Owens Corning Fiberglass Corp*., 24 Cal. 3d 263 (1979), 595 P.2d 104. These were companion matters to the above-referenced CMA decision, but were not consolidated for decision. The Court remanded the underlying proceedings for the same reasons. (See Para. 60, above.)

62. *Marvin Goldin,* 23 Cal. 3d 638 (1979), 592 P.2d 289. Over Petitioner's claims that his rights under various constitutional and statutory provisions were violated by GTE's application of its Rule 31 (termination of service for unlawful use), the Court affirmed the Commission order terminating service to the subscriber. The Court, *inter alia*, held that the Commission's finding regarding the unlawful use of the telephone by Petitioner was not subject to review. (But, see *Phonetele*, Para. 70.) Today, that finding would be subject to a "substantial evidence" test pursuant to Section 1757(a)(4).

63. *Southern California Gas Co.,* 23 Cal. 3d 470 (1979), 591 P.2d 34. The Court affirmed a Commission decision reducing Petitioner's rate of return by .25 percent based on Petitioner's improved financial position resulting from investment tax credit benefits provided by the Federal Tax Reduction Act of 1975. The decision reflects the energy sector's lone participation in the "tax wars" of the 1970's, one principally fought in the telecommunications sector. (See Paras. 69, 72 and 73, *infra*.)

64. *Industrial Communications Systems,* 22 Cal. 3d 572 (1978), 585 P.2d 863. The Court reversed the Commission's termination of an investigation which had the effect of permitting a General Telephone to expand its paging service area by filing an advice letter. The Court concluded that since the expansion in question was more than minimal. General should have been required to file an application under Section 1001. The court also held that the Commission had failed to consider the anticompetitive effects of the expansion (See Para. 74.) The Court held that simply admitting evidence did not discharge the Commission obligations; it was required as well to demonstrably weigh it. (This case is frequently cited in tandem with *United States Steel*, Para. 54; subsequent appellate decisions offer nothing to suggest appellate courts have much, if any, interest in this argument.)

65. *Toward Utility Rate Normalization,* 22 Cal. 3d 529 (1978), 585 P.2d 491. Over various constitutional and statutory objections raised by TURN, the Court affirmed a Commission decision adopting single message-rate timing ("SMRT") for Pacific Bell. TURN's principal argument was that the findings failed to satisfy Section 1705. By a 4-3 vote, the Court disagreed. The Court also took the opportunity to dispel any notion that a party must "seek rehearing of a decision following rehearing" before seeking a writ of review. The Court observed that, instead, the second application may be implicitly foreclosed by Section 1756. In a 2011 decision, D. 11-10-020, the Commission took the view that the second application for rehearing was absolutely foreclosed but left room for the Commission to grant an "exception" in "extraordinary circumstances", a view the Commission again took in 2015 (D. 15-05-056). The two decisions treat the matter of "second round applications for rehearing" as almost one of policy rather than law although D. 15-05-056 does state the rule to be as follows: "a second round rehearing application must be based on new issues [new findings or new conclusions of law] presented in the decision being challenged …and not on issues [factual assertions] that are entirely new to the proceeding…" Somewhat surprisingly, D. 15-05-056 makes no reference to

the decision addressed here nor really addresses the matter from any statutory perspective. This memorandum dwells on this issue because the filing deadlines are statutory; a party that guesses wrong on the point could be left with no remedy. If a second application for rehearing is filed and dismissed, it will be too late to file a petition for writ of review of the first rehearing decision. If a petition for writ of review is instead filed, the petition may be dismissed if a second application for rehearing was required; but, at that point, it will be too late to file one. In *Bullseye* (Para. 7, *supra*), the Petitioners raised a related issue, questioning the lawfulness of the Commission's common practice of responding to an application for rehearing by modifying the decision at issue and then simply denying rehearing of the decision as modified without any further proceedings. They pointed out that Section 1736 provides that the modification of a decision of which rehearing is sought can take place only after "such rehearing.." *Bullseye*, however, resolved that question in the Commission's favor.

66. *Southern California Edison,* 20 Cal. 3d 813 (1978). The Court affirmed a Commission decision directing Edison to refund, over a 36-month period, certain over collections generated by operation of Edison's fuel cost adjustment clause. The Court concluded that because the application of fuel cost adjustment clauses was not "true ratemaking" but, rather, a mechanical application of an adjustment clause, the rule against retroactive ratemaking (Section 728) did not proscribe the prospective refund of past over collections. Many regarded this decision as a judicial signal that the rule against retroactive ratemaking had lost its vitality. It seemed to have enjoyed a rebirth under *Ponderosa Telephone* (Para. 23) but, at least insofar as the rule is grounded in Section 728, could be limited by *Securus* Para. 3). Notwithstanding *Ponderosa,* however, *Edison* remains ripe for further elucidation. What is the "bright line" between (1) "true ratemaking" and (2) everything else?

67. *California Trucking Association,* 19 Cal. 3d 240 (1977), 561 P.2d 280. In an oft-cited opinion, the Court reversed a Commission decision adding exemptions from minimum rate tariffs ("MRTs") for flattened auto bodies and empty sea vans. The Court concluded that the Commission had failed to grant Petitioner an "opportunity to be heard as provided in the case of complaints" required by Section 1708. The Court construed the phrase "an opportunity to be heard" as embracing more than the opportunity to file written comments on a proposal. Section 1708, the Court held, required a proceeding "at which parties are entitled to be heard and to introduce evidence . . ." Notably, the Court held only that the required "notice

and opportunity to be heard" be provided to survive review under Section 1708. The hearing requirement is not self-executing; in the absence of a request for a hearing, no hearing is required. (*Securus* (Para.3) applies the same rule to the "hearing" requirement in Section 728.) This is another decision which should be explored by the intermediate appellate courts, particularly in light of the enactment of Section 1708.5. Is a workshop an "opportunity to be heard"? (Probably not.) Moreover, *Securus* (Para. 3) and unpublished portions of *Calaveras* (Para.4) suggest that the phrase "after a hearing" (see e.g. Section 728, Section 761) need not be construed to require an evidentiary hearing. *California Trucking Association*, however, concludes that the "opportunity to be heard" embraces the opportunity "to introduce evidence."

68. *Southern Pacific Transportation Co.,* 18 Cal. 3d 308 (1976), 556 P.2d 289. The Court reversed the Commission's determination that Section 1202.3 was unconstitutional. The Court concluded that while the Commission had the power to declare statutes unconstitutional, it had incorrectly ruled that Section 1202.3 was unconstitutional. Eighteen months following the issuance of this decision, and in response to it, the voters enacted Section 3.5 of Article III of the California Constitution, which prohibited the Commission and other administrative agencies from declaring statutes to be unconstitutional or preempted by federal law unless an appellate court had first so held. See *Burlington Northern* at Para. 35. See also footnote 21, *supra*.

69. *City of Los Angeles,* 15 Cal. 3d 680 (1975), 542 P.2d 1371. Reversing in part and affirming in part the Commission order, the Court concluded that, notwithstanding Section 728, even as construed prior to *Edison* (Para. 66), the Commission possessed the power to implement an annual adjustment scheme for Pacific and GTE by which certain tax savings enjoyed by these utilities would be flowed through to ratepayers. This decision contains a discussion by the Court of (1) the legal difference between reopening a decision and rehearing it, and (2) when a Commission decision is truly "final." The decision was cited with respect to the latter issue, by the Ninth Circuit in *CTI*, 196 F.3d 1011, 1016.[46] The reader is invited to consider whether the cite in *CTI* is actually supported by the text of this case.

[46] *CTI* offers a primer on how the doctrines of *Younger* Abstention and Issue Preclusion have closed the doors of federal courts to those seeking relief from Commission enforcement orders. The Supreme Court, however, narrowed the scope of *Younger* in *Sprint v. Jacobs*, 134 S. Ct 584; 2013 U.S. LEXIS 9019 (82 U.S.L.W. 4027 (December 10, 2013).

70. *Phonetele, Inc.,* 11 Cal. 3d 125 (1974), 520 P.2d 400. The Court reversed a Commission order requiring customers that used nonutility provided customer premises equipment ("CPE") to also employ a protective connection device ("PCA") provided by the utilities. The Court held that (1) the Commission had applied an incorrect standard for determining whether the protective connector was required, and (2) there was an inadequate record to support the PCA requirement under the correct standard. Notably, the Court does not articulate what standard of review it employed. The decision seems wholly at odds with both (1) *Marvin Goldin* (Para. 62), in which the Commission's factual determination was deemed inviolate and (2) the deference due under *Greyhound*. (Para. 78)

71. *Desert Environment Conservation Association*, 8 Cal. 3d 739 (1973), 505 P.2d 223. The Court denied the petition for a writ of mandate as premature (and apparently moot). Two issues raised by Petitioner, related to the application of CEQA (referred to by the Court as "EQA") to the Commission, were resolved legislatively during the pendency of the matter. (The Commission initially took the view that CEQA did not apply to the issuance of certificates of public convenience and necessity under Section 1001.) With regard to the remaining issue -- Petitioner's assertion that an EIR must be prepared prior to any hearing on a plant certification application -- the court determined that CEQA permits the Commission to adopt its own rules regarding the timing of such reports. (The Commission subsequently adopted Rule 17.1 of its Rules of Practice and Procedure, replaced by today's Rule 2.4; see discussion of appellate review of CEQA determinations at Paras. 24 and 47.)

72. *City of Los Angeles, William Bennett, California Public Interest Law Center,* 7 Cal. 3d 331 (1972), 497 P.2d 785. The Court reversed a Commission order authorizing a rate increase for Pacific Telephone & Telegraph Co. The court held that the rate increases were based in part on accounting practices embracing depreciation methodologies of which the Court had previously disapproved. The Court, relying on Section 728, also concluded that sums collected pursuant to the order must be refunded.

73. *City and County of San Francisco, Consumers Arise Now*,6 Cal. 3d 119 (1971), 490 P.2d 798. The Court reversed a Commission decision in which the Commission had refused to consider the merits of flowing through to ratepayers tax benefits a utility derived from accelerated appreciation. The issue of ratemaking treatment of income taxes was before the court many times in the 1970s. (See Paras. 63, 69 and 72, *supra*.) A 2020 Commission decision

with regard to a sewer utility addressed the propriety of imputing income taxes for utilities organized as sub-chapter S corporations or partnerships; the order proscribed such imputation. Decision 20-07-036 (July 16, 2020).

74. *Northern California Power Agency,* 5 Cal. 3d 370 (1971), 486 P.2d 1218. In a frequently cited decision ("*NCPA*"), the Court reversed a Commission decision granting a Certificate of Public Convenience and Necessity to PG&E for the construction of a geothermal electric generating plant because the Commission failed to give adequate consideration to, and make appropriate findings with regard to, antitrust issues raised by Petitioner. The Court also stated that the Commission was obligated to consider such issues *sua sponte* even though the Commission itself lacked the jurisdiction to enforce anti-trust laws. Notably, the Court also held that even if the Commission had considered antitrust issues, as PG&E argued it simply must have, the findings in the decision failed to evidence any such consideration as required by Section 1705. *NCPA* is, at its core, grounded in Section 1705.

75. *Orange County Air Pollution Control District*, 4 Cal. 3d 945 (1971), 44 P.2d 1361. The Court was presented with an apparent conflict of jurisdiction between (1) that of the Commission which had granted SCE the authority to construct a steam electric generating plant and (2) that possessed by Petitioner which had denied SCE's application for a permit to operate the plant. The Court held that the utility was required to obtain approval from both the Commission and the District, stating that "the commission must share its jurisdiction over utilities regulation where that jurisdiction is made concurrent by another (especially a later) legislative enactment." Accordingly, the Court reversed a Commission order asserting exclusive jurisdiction over the certification process but stated that its order was "without prejudice to Edison's right to seek judicial review of [Petitioner's] order pursuant to the judicial review provisions of the Health & Safety Code."

76. *Henry Wood,* 4 Cal. 3d 288 (1971), 481 P.2d 823. The Court affirmed the Commission order dismissing complaints against PG&E and Pacific Telephone. The complaints challenged the validity of credit rules already approved by the Commission. The Court concluded that in adopting such rules, the Commission was acting in a quasi-legislative capacity and that customers of the utilities did not enjoy any particular procedural due process rights with regard to the adoption of the rules by the Commission. This case is frequently cited for the proposition that the Commission need not offer the traditional trappings of due process (such as a

notice and hearing) when acting in a legislative capacity (ratemaking and rulemaking).[47] At least with respect to ratemaking, however, some question remains. See Paras. 38 and 60, *supra.* Moreover, today, ratemaking proceedings are subject to a "substantial evidence" test (Section 1757(a)(4) that did not exist when *Wood* was decided.) Finally, even in purely legislative matters such a rulemaking, the Commission's failure to follow its own rules may lead to annulment. (See Paras. 21 and 26.) But the core holding in *Henry Wood* remains significant because it affirms that no constitutionally based "due process" right attaches to quasi-legislative matters which (either before or after SB 960) include ratemaking matters. Whatever "process" is "due" in those matters is fixed by statute or the Commission's rules.

77. *Fred E. Huntley,* 69 Cal. 2d 67 (1968). The Court reversed a Commission decision authorizing Pacific Bell to require customers employing answering machines to "include in their recorded announcements their names and the address at which the service is provided." (I'm not making this up.) The Court found that "the tariff schedules unquestionably impair the First Amendment's guarantees of freedom of speech." See discussion of *Huntley* in *Los Angeles Police Protective League v. City of Los Angeles* 78 Cal.App.5th 1081 (2022).

78. *Greyhound Lines, Inc.,* 68 Cal. 2d 406 (1968), 438 P.2d 801. The Court affirmed a Commission decision requiring petitioner to extend commuter bus service over routes in the San Francisco Bay Area.[48] Petitioner argued that the Commission had exceeded the authority provided to it pursuant to Section 762. The Court, however, agreed with the Commission's construction of the statute, holding that the Commission's construction was entitled to a substantial deference. Indeed, the deference announced in *Greyhound* is quite substantial. The Court held that "there is a strong presumption of validity of the Commission's decisions and the Commission's interpretation of the Public Utilities Code should not be disturbed unless it fails to bear a reasonable relation to statutory purposes and language." The deference announced in *Greyhound* originated in that case alone; the prior decision cited in

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[47] "Ratemaking is an essentially legislative act . . ." *New Orleans Public Service Inc. v. Council of New Orleans*, 491 U.S. 350, 109 S.Ct. 2506; (1989 U.S. LEXIS 3043). This 1989 decision of the U.S. Supreme Court (known as "*NOPSI*") is a must-read for anyone seeking to understand the first prong of *Younger* Abstention.

[48] The court had annulled a similar order a year earlier because the Commission failed to make the requisite findings under Section 1705; See Para. 80.

support of the proposition, *Southern Pacific* (41 Cal. 2d, 354, 367) simply does not.[49] (See Para. 108, *supra.*) Moreover, one has to question whether the "strong presumption of validity" survived the 1998 legislation. (See discussion at Paras. 13 and 18.) *Greyhound* also questioned the vitality of the dedication requirement announced in *Richfield* (Paras. 93 and 96) but, in a lengthy dissertation on the nature of dedication, found that the facts satisfied that requirement.

79. *Southern Pacific Company,* 68 Cal. 2d 243 (1968), 436 P.2d 889. The Court reversed a Commission decision rejecting the request by Petitioner (supported by the Commission staff) that Petitioner be authorized to install a sophisticated automatic crossing gate at certain rail crossing in Tehama County. The Court concluded that the decision must be annulled because the Commission had failed to make Findings of Fact on all material issues as required by Section 1705.

80. *Greyhound Lines, Inc.,* 65 Cal. 2d 811 (1967), 423 P.2d 556. The Court reversed an order requiring petitioner to institute peak hour commute service in certain portions of the San Francisco Bay Area. The Court concluded that the Commission failed to render separately stated Findings of Fact on all material issues as required by Section 1705. The Commission corrected that omission and prevailed in the Court a year later. (See Para. 78).

81. *Edward J. Sokol,* 65 Cal. 2d 247 (1966), 418 P.2d 265. In an order which led to the adoption of Local Exchange Carrier ("LEC") Rule 31 (see *Goldin* at Para. 62, *supra*), the Court reversed a Commission order requiring telephone corporations to summarily discontinue service to subscribers when advised by any law enforcement agency that the service was being used for unlawful purposes. The Court concluded that the procedure by which telephone service was terminated on such a basis must include submission of the claim of unlawfulness to a magistrate for a determination of probable cause.

82. *Pacific Telephone & Telegraph Co., California Independent Telephone Association; Edward J. Blincoe,* 62 Cal. 2d 634 (1965). The Court reversed that portion of the Commission's order ordering rate refunds. The Court concluded that the refund portion of the order violated the proscription on retroactive ratemaking set forth in Section 728. (See *Ponderosa* at Para. 23 but also see *Edison* at Para. 66, *supra*.) The balance of petitioner's contentions, regarding prospective rates, were rejected.

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[49] The same observation can be made with regard to the cases cited in *Greyhound* in support of the "strong presumption of validity."

83. *River Lines, Inc.,* 62 Cal. 2d 244 (1965). The Court affirmed a Commission decision rejecting a claim by a barge company engaged in hauling petroleum by water that rates charged by a competing pipeline corporation were unreasonably low.

84. V*entura County Waterworks District No. 5*, 61 Cal. 2d 462 (1964). The Court reversed a Commission decision granting a Certificate of Public Convenience and Necessity to a private water corporation. The Court held that the Commission had erroneously "excluded all evidence that the [public] district [Petitioner] could provide better and more economical service than [the water corporation]." The Court noted that a certified entity was entitled to a hearing before a competitor could be granted a CPCN. (Section 1005.) Why Section 1005 has not been amended to exclude competitive industries is a mystery.

85. *Northern California Association to Preserve Bodega Head and Harbor, Inc.,* 61 Cal. 2d 126 (1964). Affirming a Commission order granting a Certificate of Public Convenience and Necessity to PG&E to operate a nuclear facility at Bodega Bay, the Court concluded that (1) the Commission was not preempted from inquiring into safety questions apart from radiation hazards, (2) a party that has failed to seek timely judicial review of a Commission decision may not cure such failure by a series of late-filed petitions to modify or reopen a proceeding, and (3) the record of the underlying Commission proceeding supported the Commission's conclusion with regard to non-radiation related safety issues. While, unpublished portions of *St. Helena* (Para. 32) call point (2) into question, the Commission relied on this decision to deny PG&E's application for rehearing of a 2017 Commission decision denying of PG&E's 2016 petition for modification of a 2014 Commission decision; the Commission concluded that "(t)he issues raised in PG&E's application for rehearing are time-barred."

86. *Los Angeles Metropolitan Transit Authority,* 59 Cal. 2d 863 (1963). The Court concluded that the Legislature could constitutionally subject publicly owned common carriers such as petitioner to the jurisdiction of the Commission[50] and that, accordingly, a statute subjecting petitioner to the jurisdiction of the Commission "with respect to safety rules . . ." was constitutional. The Court then affirmed an order of the Commission compelling petitioner to comply with the same safety rules and regulations that the Commission adopted for privately

[50] The Court reached a similar conclusion regarding the scope of Article XII, Section 5 in *County of Inyo* (Para. 55), but in that case, as the Court noted, the Legislature had *not* acted to provide the Commission with the requisite statutory authority.

owned passenger stage corporations and street railroad corporations.

87. *Associated Freight Lines,* 59 Cal. 2d 583 (1963). The Court reversed a Commission order granting a Certificate of Public Convenience and Necessity to a highway common carrier because the order failed to contain Findings of Fact on all material issues as required by Section 1705.

88. *California Motor Transport Co*., 59 Cal. 2d 270 (1963). The Court reversed a Commission order granting a new Certificate of Public Convenience and Necessity to a highway common carrier because the Commission failed to make Findings of Fact on all material issues as required by Section 1705. *California Motor Transport*, relied on in *California Manufacturers Association* (Para. 60), contains the description by Justice Roger Traynor of the legislative purpose underlying Section 1705 that is most frequently cited in pleadings and court opinions.

89. *Golden Gate Scenic Steamship Lines, Inc.,* 57 Cal. 2d 373 (1962), 369P.2d 257. The Court reversed a Commission order asserting jurisdiction over a sightseeing vessel. The Court concluded that Section 1007 only subjected vessels operating "between points" in California to Commission jurisdiction; the statute did not apply to transportation of passengers who embark and disembark at the same point. This holding was apparently extended to non-vessel carriage in *St. Helena* (Para. 32) even though no statutory text would seem to support such an extension. With respect to vessel transportation, the Commission has adopted certain rules permitting recourse to the "loop exception" of *Golden Gate* even where the vessel lands and passengers are allowed to temporarily disembark before returning to the point of origin on the vessel.

90. *Walter J. Hempy,* 56 Cal. 2d 214 (1961). The Court reversed that portion of a Commission order conditioning a transfer of operating rights on preferential payment to specified creditors of the transferring entity. The Court concluded that, pursuant to Section 851, the sole inquiry for the Commission should be with respect to the impact of the transfer on the public rather than on any particular creditor. (See also *Stepak* at footnote 57 *infra* regarding minority shareholders.) Notably, while the Legislature has amended Section 854 to enlarge the range of interests the Commission must consider in an application for a transfer of control, Section 851 (governing transfers of assets) remains in the code largely unchanged from its original text. (The Legislature has amended the statute to permit certain transactions to be

approved by advice letter and the Commission may exempt certain transactions pursuant to Section 853.)

91. *Babe Talsky,* 56 Cal. 2d 151 (1961), 363 P.2d 341. The Court affirmed a Commission order directing a trucking operator to cease and desist from operating as a highway common carrier in the absence of Commission authority. The Court concluded that evidence before the Commission was sufficient to support the order. Remarkably, the Court undertook a detailed review of the evidence and never referred to the then existing text of Section 1757.[51]

92. *Dyke Water Co.,* 56 Cal. 2d 105 (1961), 363 P.2d 326. The Court affirmed a Commission order requiring the water utility to take various steps to improve its service and to require shareholders of the utility, rather than the ratepayers, to bear the expense of such improvements. Language in this decision ("tariffs filed with the PUC have the force and effect of law") has on occasion invited utilities to attempt to impose legal obligations on customers through tariff language. The scope of *Dyke* is not that broad. A tariff may impose requirements on customers as a condition of receiving service. A tariff, however, may do no more with respect to a customer. *Dyke* relied on *California Water and Telephone* (Para. 99), which, in turn, relied on § 532 which only governs the conduct of the serving utility.

93. *Richfield Oil Corporation,* 55 Cal. 2d 187 (1961), 358 P.2d 686. The Court reversed an order of the Commission asserting jurisdiction over petitioner, a gas producer. The Court concluded that Richfield had not dedicated its facilities to the public. (See, Para. 96).

94. *Yucaipa Water Company No. 1,* 54 Cal. 2d 823 (1960), 357 P.2d 295. The Court affirmed a Commission order concluding that Petitioner had dedicated its facilities to the public convenience and necessity and was thereby subject to the Commission's jurisdiction. Petitioner had asserted that it was operating as a mutual water corporation pursuant to Section 2701 *et seq*. The company had, however, effectively offered service to anyone who would "lease" a share of the company.

95. *Corona City Water Company,* 54 Cal. 2d 834 (1960), 357 P.2d 301. The Court affirmed a Commission decision determining that (1) a purported mutual water company (not Petitioner) was in fact a public utility subject to regulation by the Commission and (2) Petitioner could not sell assets to that company without seeking Commission approval

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[51] *See* Para. 46 for a discussion of the 1998 amendment to Section 1757. See also, Paragraphs 60 and 70.

pursuant to Section 851. A close reading of the opinion leaves the reader (at least this reader) at loss to understand why the Commission's jurisdiction under Section 851 turned at all on whether or not the buyer, a private company, was itself a public utility.

96. *Richfield Oil Corporation,* 54 Cal. 2d 419 (1960), 354 P.2d 4. In a landmark decision, the Court reversed a Commission order asserting jurisdiction over Petitioner, concluding that while petitioner might be characterized as a "gas corporation" pursuant to the literal text of Section 221, it had not dedicated its property to the public in a fashion which would cause it to be deemed to be a public utility pursuant to Section 216. A corollary holding is found in *Television Transmission Inc.,* Para. 103, *infra*). The Court disclaimed sole reliance on older decisions (reaching the same view) that rested on the "takings" clauses of the U.S. and California Constitutions. The Court chose instead to observe that the prerequisite of dedication had been accepted for decades without corrective action by the Legislature, a rationale that leaves the door open for the Legislature to subject entities that have not dedicated property to the public to Commission authority. Article XII, Section 5 would seem to permit the Legislature to do to so as long as the "additional powers …[are] … cognate and germane to the regulation of public utilities….". *People v Western Airlines,* footnote 45 *supra*. The reader is left with the question of whether this standard invites circular reasoning.

97. *Pajaro Valley Cold Storage Company,* 54 Cal. 2d 256 (1960), 352 P.2d 721. The Court reversed a Commission decision asserting jurisdiction over petitioner as a warehouseman (Section 239). The Court found that petitioner was essentially organized as a cooperative. (In 1980, the Legislature repealed Section 239 per Stats. 1980, c. 1063.) [52]

98. *Los Angeles Metropolitan Transit Authority*, 52 Cal. 2d 655 (1959), 343 P.2d 913. The Court affirmed a Commission order granting Certificates of Public Convenience and Necessity to passenger stage corporations in the Los Angeles area, concluding that the grant of such certificates did not unreasonably conflict with the intent of the Legislature in creating the Los Angeles Metropolitan Transit Authority. This case is also cited frequently for affirming that "in the absence of legislation otherwise providing, the Commission's jurisdiction

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[52] Similarly, the Legislature repealed Section 242 (defining "wharfinger") per Stats. 1987, c. 369. Notwithstanding the repeal "(p)rivate corporations and persons that own, operate, control, or manage…. wharfage" remain "public utilities subject to control by the Legislature." Cal Const. Art XII, Sec. 3.

to public utilities extends only to the regulation of privately owned utilities." See Para. 55.

99. *California Water & Telephone Company,* 51 Cal. 2d 478 (1959), 334 P.2d 887. The Court reversed a Commission order directing petitioner to extend water service to a tract of land adjacent to its then present service area. The Court concluded that while the Commission could direct a public utility to render service within its dedicated service area under terms and conditions at variance with any existing contract, the Commission could not compel the utility to execute a contract to provide service outside of that service area. (Note that in *Greyhound*, Para. 78, *supra* the Court concluded that Greyhound had dedicated its service to the area and could be ordered to provide a different form of service than that contemplated by the carrier.)

100. *Hayden W. Church,* 51 Cal. 2d 399 (1958), 333 P.2d 321. The Court reversed a Commission order directing an overlying carrier of property to pay reparations to subhaulers. The Court held that the Commission had applied the incorrect statute of limitations to the cause before them. (Where a statute creates the amount of a liability, but not the liability itself, a two-year, rather than three-year statute of limitation applies). The Court also held that the Commission had erroneously found that the Petitioner had waived the statute of limitations defense by failing to assert it at hearing. The decision refers to the predecessor of present Commission Rules 5.1 - 5.2, and notes that unless a Respondent is required to respond to an OII nothing is waived by a failure to do so. The portion of the present Rule 5.2, however, does support the notion that the Respondent can be deemed to have waived objections to certain aspects of the preliminary Scoping Memo. See also Rule 7.6(a)(3) regarding appeals of categorizations of OIIs.

101. *Commercial Communications, Inc., Watson Communications Systems, Inc., City of Los Angeles,* 50 Cal. 2d 512 (1958), 327 P.2d 513. The Court affirmed an order of the Commission authorizing Pacific Telephone & Telegraph Co. to provide tariffed mobile telephone communications systems. Petitioners argued that the Commission did not have jurisdiction over such systems and that the filed tariff created a conflict with federal law and with the provisions of the 1956 federal court consent decree in *United States v. Western Electric*.

102. *California Portland Cement Co.,* 49 Cal. 2d 171 (1957), 315 P.2d 709. The Court reversed a Commission order dismissing petitioner's complaint alleging discrimination in rail rates. The Court rejected the Commission's conclusion that,

notwithstanding an unreasonable difference in rates charged between certain pairs of points, no undue discrimination could exist absent a competitive market. The Court found that, notwithstanding the general rule that Commission Findings of Fact are deemed conclusive on review (Section 1757),[53] an order based on inconsistent findings should be annulled. In *dicta*, the Court stated that one filing a complaint has a right to a hearing, a position seemingly at odds with today's Section 1701.1(b)(1) .

103. *Television Transmission, Inc.,* 47 Cal. 2d 82 (1956), 301 P.2d 862. The Court reversed a Commission decision that asserted jurisdiction over a cable television system. The Court concluded that offering service to the public was not enough to subject an entity to regulation as a public utility; the service offered must also be one identified by the Legislature as a public utility service. This is the other side of the *Richfield* coin. In *Richfield*, (Para. 96, *supra*) the activity at issue fell within a statutory description but the non-statutory element of dedication was absent.

104. *California Mutual Water Companies Association,* 45 Cal. 2d 152 (1955), 287 P.2d 748. The Court affirmed a Commission order authorizing Southern California Edison to phase out a schedule permitting customers to receive energy at several metering points but receive billing as though a single meter were involved. Interestingly, one of the issues addressed by the Court arose under the old language of Section 1731, which provided that "no cause of action arising out of any order . . . shall accrue in any court . . . unless the corporation or person has made, before the effective date of the order . . . , application to the Commission for a rehearing." Petitioner argued that it had prepared and mailed the document to the Commission prior to the effective date ("made" the Application) and that, even though the document had not been "filed" before the effective date, no such "filing" was required by the statute. The Court found for petitioner on this point, noting the uncertainties surrounding the term "made" and concluding that "construction in doubtful cases should be in favor of preserving the right whenever substantial interests are not adversely affected by the claimed delay." The Legislature seems to have had difficulty redressing this ambiguity. In 1965, it amended Section 1731 by substituting "filed" for "made." Subsequent amendments changed the filing deadlines. The Legislature, however, has never enacted a corresponding amendment to Section 1733 (the

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[53] In adjudication and ratemaking proceedings, findings of fact are now subject to a "substantial evidence" test. *See* Section 1757(a)(4).

Code's automatic stay and "deemed denied" provisions.) During the 2006 legislative session, the Legislature enacted AB 2390 providing for electronic notification of the issuance of Commission decisions and providing that the "date of issuance" for purposes of Section 1731 and 1756 is the notification date; the bill, however, did not correct Section 1733. In 2010, legislation which would have enacted fairly innocuous (and unnecessarily complex) changes to the "deemed denied" provisions also would have, at long last, substituted "filed" for "made." While the bill passed in 2010, it was vetoed by the Governor.

105. *California Manufacturers Association,* 42 Cal. 2d 530 (1954), 268 P.2d 1. The Court affirmed a Commission order fixing rates for carriage of general commodities. Petitioner argued that Section 726 required the Commission to consider the costs of providing transportation services incurred by each of several different types of carriers and then set rates based on the lowest of those. The Court concluded that the Commission could "consider all the available data from all types of carriers to determine what the cost of the most efficient service is."

106. *Glen D. Nolan,* 41 Cal. 2d 392 (1953), 260 P.2d 790. The Court affirmed a Commission order directing petitioner to cease and desist from operating as a highway common carrier. The Court concluded that the evidence was sufficient to conclude that petitioner was operating as a highway common carrier, notwithstanding petitioner's attempts to provide service solely pursuant to a variety of written and oral contracts.

107. *Walter Alves,* 41 Cal. 2d 344 (1953), 260 P.2d 785. The Court reversed a Commission order proscribing highway carriers from operating separate common and contract operations. The Court concluded that the California statutory scheme permitted a carrier to engage in both common and contract carriage so long as the same commodities are not carried between the same points in both capacities.

108. *Southern Pacific Company,* 41 Cal. 2d 354 (1953), 260 P.2d 70. The Court affirmed an order directing Petitioner to substitute modern railway passenger cars for steam locomotives in connection with its service between San Francisco and Sacramento. The Court also found that the provisions of the Commission order that simply required petitioner to make a study did not need to be supported by the type of findings and underlying evidence required to support an order actually compelling some operational modification by petitioner.

109. *Daniel H. Souza,* 37 Cal. 2d 539 (1951), 233 P.2d 537. The Court

reversed a Commission order asserting jurisdiction over Petitioner as a radial highway common carrier. The Court found that the Commission had not attempted to determine whether petitioner had actually "dedicated its facilities to the public" but had simply determined that the scope of petitioner's operations was not sufficiently "restrictive" to characterize it as a contract carrier.

110. *Gordon A. Samuelson,* 36 Cal. 2d 722 (1951), 277 P.2d 256. In a case similar to *Souza*, the Court reversed a Commission order directing Petitioner to cease and desist from highway common carriage. The Court rejected the Commission's application of a "substantial restrictiveness" test to determine whether Petitioner was in fact a contract, rather than a common, carrier.

111. *Southern California Freightlines*, 35 Cal. 2d 586 (1950), 220 P.2d 393. The Court reversed that portion of the Commission's order prohibiting a single carrier from consolidating certificates held by it and affirmed the order in all other respects.

112. *Riverside Cement Company,* 35 Cal. 2d 328 (1950), 217 P.2d 403. The Court reversed a Commission order dismissing Petitioner's complaint for reparations against an electric utility. Petitioner and the electric utility had entered into a Commission approved contract. The Commission concluded that the utility had correctly assessed charges to petitioners pursuant to the terms of that contract. The Court disagreed.

113. *Pacific Telephone & Telegraph Co.,* 34 Cal. 2d 822 (1950), 215 P.2d 441. The Court reversed a Commission order attempting to prescribe the terms and conditions by which Pacific Telephone & Telegraph Co. could contract with AT&T for various services (license contracts). The vitality of this decision is subject to serious question in light of the Supreme Court's 1983 holding in *General Telephone* (Para. 52).

# APPENDIX

## OVERVIEW OF CASE LAW CONSTRUING SECTION 1759 OF THE PUBLIC UTILITIES CODE

As the main document suggests, the California Supreme Court and the Courts of Appeal do not frequently issue written opinions reviewing decisions of the Commission. Review is limited pursuant to the discretionary writ procedures established by Section 1756.

Appellate courts also address the Commission's regulatory authority, however, in cases construing the extent to which Section 1759(a)[54] constrains the Superior Court from acting in matters arguably affecting the Commission's exercise of its jurisdiction. In most cases involving Section 1759(a), the Commission is not a party. A case typically reaches the Court of Appeal through direct appeal (appeal as a matter of right) of a trial court proceeding rather than through a discretionary writ such as the writ of review provided for in Section 1756 or, far less frequently, the writ of mandamus (mandate) provided for in Section 1759(b).

Before listing recent cases decided under Section 1759, it is worth noting a few of the predicate bodies of case law that set the stage for the latest decisions describing the limitation on the jurisdiction of the Superior Court (and, in many recent instances, federal courts[55]) embraced in Section 1759.

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[54] 1759 provides as follows:

> *(a) No court of this state, except the Supreme Court and the court of appeal, to the extent specified in this article, shall have jurisdiction to review, reverse, correct, or annul any order or decision of the commission or to suspend or delay the execution or operation thereof, or to enjoin, restrain, or interfere with the commission in the performance of its official duties, as provided by law and the rules of court.*
>
> *(b) The writ of mandamus shall lie from the Supreme Court and from the court of appeal to the commission in all proper cases as prescribed in Section 1085 of the Code of Civil Procedure.*

[55] See *Kairy v. SuperShuttle International,*660 F.3d 1146 (2012). The Ninth Circuit reversed a trial court's ruling that Section 1759 barred a class action where the outcome sought would undermine a 1996 Commission Order construing General Order 158-A. The District Court's order had affirmed the primacy of the Commission's authority over the status of drivers of charter party carriers. The Commission, somewhat inexplicably, filed an *amicus* brief which played a major role in the Ninth Circuit's reversal of that order. See also, *Cooney v. Public Utilities Commission* (July 15, 2014) holding that Section 1759 cannot require a federal court to

## *PEOPLE v. SUPERIOR COURT (DYKE WATER)* *&* *WATERS v. PACIFIC BELL*

Prior to 1995, the two cases most frequently cited as delineating the scope of Section 1759 were *Waters v. Pacific Bell*, 12 Cal. 3d 1, 114 Cal. Rptr. 753 (1974) and its predicate, *People v. Superior Court (Dyke Water Company, Real Party In Interest),* 62 Cal. 2d 515, 42 Cal. Rpt. 849 (1965) (*Dyke Water*).

*Waters* in particular addresses the apparent conflict between (a) Section 1759 which prohibits the Superior Court from reviewing, reversing, correcting or annulling any order or decision of the Commission or interfering in any respect with the Commission in the performance of its official duties and (b) Section 2106[56] which provides a personal cause of

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dismiss federal claims. (The court did dismiss claims against Commission President Michael Peevey and then Attorney General Kamala Harris on other grounds). See also *United Energy Trading v. PG&E*, 2015 U.S. Dist. LEXIS 158060 rejecting *PG&E's* arguments that Section 1759 barred tort claims in federal court. . See also (1) *Rosen v. Uber Technologies* 2016 U.S. Dist. LEXIS 21960 (February 22, 2016) holding that Section 1759 required dismissal of unfair competition claims brought in federal court and (2) *In re SDG&E Consol. Cases*, 2021 U.S. Dist. LEXIS 33873 holding that a suit against SDG&E that sought damages bared by the limitation of liability found in SDG&E Rule 26 contravened Section 1759. See also *Doe v. Uber Techs., Inc*. 2020 U.S. Dist. LEXIS 77382

Most recently, see *Gantner v. PG&E* 2021 U.S. Dist. LEXIS 58461 (March 26, 2021) holding that Section 1759 barred claims for damages arising out of public safety power shutoffs approved by the Commission. That decision upheld the decision of the Bankruptcy Court in the Northern District of California in the PG&E Chapter 11 Bankruptcy Proceeding, *Gantner v. PG&E Corp. (In re PG&E Corp.)*, 2020 Bankr. LEXIS 894. The plaintiff class's assertion of damages arising out of a public safety power shutoff (PSPS) event was deemed precluded by Section1759. Ganter's appeal to the Ninth Circuit resulted in a referral to the California Supreme Court to resolve a question of state law. The California Supreme Courts response is addressed in Paragraph 1 *infra*.

[56] Section 2106 provides that:

> *Any public utility which does, causes to be done, or permits any act, matter, or thing prohibited or declared unlawful, or which omits to do any act, matter, or thing required to be done, either by the Constitution, any law of this State, or any order or decision of the commission, shall be liable to the persons or corporations affected thereby for all loss, damages, or injury caused thereby or resulting therefrom. If the court finds that the act or omission was willful, it may, in addition to the actual damages, award exemplary damages. An action to recover*

action to anyone damaged by a public utility failing to do anything required by law. *Waters* harmonized the two statutes by holding that Section 2106 "must be construed as limited to those situations in which an award of damages would not hinder or frustrate the Commission's declared supervisory and regulatory policies." Applying that test, the *Waters* court held that the Commission's approval of a limitation of liability provision in Pacific Bell's tariffs barred the Superior Court from entertaining a complaint by a Pacific Bell customer seeking damages in amounts which would exceed the limitation set forth in the Commission-approved tariff.

Earlier, in *Dyke Water,* the Supreme Court held that Section 1759 barred the Superior Court from adjudicating rights in a sum of money being held for a refund to water company customers. Specifically, the court held that so long as the fate of the sum at issue was before the Commission, the Superior Court had no jurisdiction to adjudicate rights in it. *Dyke Water* held in part that had the Commission already adjudicated those rights, the relevant parties could have sought to enforce them in the Superior Court. The oft-cited text from *Dyke*, frequently found in 1759 jurisprudence, provides that the Superior Court may exercise its jurisdiction when it "is in aid and not in derogation of the jurisdiction of the Commission."

## *COVALT AND PROGENY*

### *Covalt*

Twenty-two years after the *Waters* case was decided, the California Supreme Court issued its decision in *San Diego Gas & Electric Company v. Superior Court (Martin Covalt, Real Party In Interest*), 13 Cal. 4th 893, 55 Cal. Rptr. 2d 724 (1996) ("*Covalt*"). *Covalt* barred a suit against an electric utility in which the plaintiffs claimed to have suffered personal injuries and property damage from electromagnetic radiation from the utility's power lines.

The Court looked first to find some Commission activity with which the suit might "interfere." It found that notwithstanding the Commission's finding that a significant uncertainty existed as to whether electromagnetic fields (EMFs) caused harm, the Commission had adopted a

*for such loss, damage, or injury may be brought in any court of competent jurisdiction by any corporation or person.*

*No recovery as provided in this section shall in any manner affect a recovery by the State of the penalties provided in this part or the exercise by the commission of its power to punish for contempt.*

policy on electromagnetic fields arising from the operations of electric utilities; the Court noted that the Commission had stated a continuing interest in the subject and directed utilities to implement "low cost EMF mitigation measures" in new projects. The Court determined that the suit in Superior Court, if pursued, would interfere with the Commission in its exercise of an ongoing and continuing supervisory and regulatory policy regarding EMFs. While Justice Mosk's opinion is lengthy, subsequent decisions have described the *Covalt* analysis as embracing a three part test stated as follows:

> "(1) Whether the PUC had authority to adopt a regulatory policy on whether EMFs are a public health risk and what steps the utility should take, if any, to minimize the risks;
>
> (2) Whether the PUC had exercised that authority; and
>
> (3) Whether the Superior Court action would hinder or interfere with the PUC's exercise of regulatory authority with respect to EMFs." (Emphasis supplied.)

Due to the broad sweep of the Commission's authority, part (1) of the test is typically not an issue in 1759 cases[57] and most turn on part (3) (as set forth later in this Appendix). Part (2) however, cannot be ignored; the actual "exercise of ongoing PUC authority" is a clear predicate.

### *Hartwell*

In the late 1990s, water utility advocates pursued a well-conceived and soundly executed plan to "*Covalt*" the water industry. Its intent was to insulate water utilities from suits for damages related to water quality just as *Covalt* protected electric utilities from suits by those seeking damages related to EMFs. The campaign to do so was pursued in both the Legislature and at the Commission. Industry representatives were successful in both (1) persuading the

[57] There are, of course, exceptions. In *Stepak v. AT&T,* 186 Cal. App. 3d 633 (1986), the Court of Appeal reversed the dismissal of a shareholder complaint in Superior Court. The complaint asserted that the parties to a merger approved by the Commission under Section 854 had violated their fiduciary duty to the plaintiff. The Court of Appeal held that because the Commission was not charged with protecting the rights of minority shareholders, "we cannot conceive of how the …award of damages…would 'hinder or frustrate' declared Commission policy." (See Para. 88 in the appellate review summary for a similar holding related to creditors.) (*Stepak* may explain why *Greyhound* deference (Paras. 34 and Para. 78) is inappropriate with respect to Commission determinations (explicit or implicit) related to its own jurisdiction. (See Para. 33.)

Commission to initiate the requisite Commission proceeding and (2) ensuring that Commission proceedings related to water utilities remained exempt from the enlarged scope of judicial review enacted by SB 779).[58]

"In response to … lawsuits filed against the regulated utilities…" [59] the Commission opened a proceeding to consider the adequacy of current water quality standards. After a lengthy investigation, the Commission essentially found that (1) the existing standards were adequate to protect the public and (2) water utilities subject to Commission regulation had, for the preceding 25 years, provided safe water.

Following the completion of the Commission proceeding, the California Supreme Court addressed the pending suits against various public and privately owned water utilities in *Hartwell Corporation v. Superior Court*, 27 Cal. 4th 256, 115 Cal. Rptr. 2d 874 (2002).

*Hartwell* applied the three part *Covalt* test to bar damage claims against regulated public utilities that had met the water quality standards approved by the Commission.[60] The court held that the first two parts of the *Covalt* test had been met and that application of the third part required the court to return to the "in aid of rather than in derogation of" distinction employed in *Waters, Dyke* and *Vila v. Tahoe Southside Water Utility,* 233 Cal. App. 2d, 469, 43 Cal. Rptr. 654 (1965). Actions seeking damages for violations of PUC/DHS[61] standards were permitted; those deemed to implicitly contest the adequacy of those standards were not.

The aspect of *Hartwell* which has engendered significant discussion is its conclusion that certain damage actions in Superior Court, even where arguably inconsistent with Commission decisions on the same subject matter, do not "interfere with the PUC in implementing its supervisory and regulatory policies" if they simply seek redress for past violations.[62] The court stated that:

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[58] See Sections 1756(f), 1757(c), and 1757.1(b).

[59] *Hartwell*, *supra*, 27 Cal. 4th at 262.

[60] Claims that the water utilities had not complied with those standards as wells as claims against publicly owned water companies (districts) were permitted to proceed.

[61] The Commission adopted standards set by the Department of Health Services, now known as the Department of Public Health.

[62] Dicta in *Orange County* (Para. 75) is consistent with this view. See 4 Cal. 3d at 951.

> "although a jury award supported by a finding that a public water utility violated DHS and PUC standards would be contrary to a single PUC decision, it would not hinder or frustrate the PUC's declared supervisory and regulatory policies, by the reasons discussed earlier. Under the provisions of Section 1759, it would also not constitute a direct review, reversal, correction or annulment of the decision itself. Accordingly, such a jury verdict would not be barred by the statute." (*Hartwell*, 27 Cal. 4th at 277-278.)

Whether this limitation on the scope of Section 1759 would have been endorsed by the *Water*s court may be open to question. But it is well to recall that the *Waters* court found that the Commission, in approving limitation of liability provisions, had taken those limitations into account in setting ongoing rates. However one harmonizes *Waters* and *Hartwell*, it seems clear that one cannot confidently defend a civil suit by showing that the defendant's activity finds support in some past Commission order. The defendant has to show that the conduct claimed to be unsafe or unreasonable meets a standard of safety or reasonableness set by the Commission *on an ongoing basis* such that an award of damages based on a theory that conduct meeting the Commission standard was not safe or reasonable would interfere with the Commission's ongoing "supervisory and regulatory policies." (An analysis of the distinction can be found in *Nwabueze v. AT&T*, 2011 U.S. Dist. LEXIS 8506 The requirements of the third prong of *Covalt* (as construed in *Hartwell* ) were addressed in *Goncharov* (Para. 5 *infra.*)

## *ORLOFF AND THE APPLICATION OF SECTION 1759 TO CIVIL ENFORCEMENT ACTIONS*

In late 2003, almost two years after *Hartwell*, the California Supreme Court issued its opinion in *People ex rel Orloff v. Pacific Bell,* 31 Cal. 4th 1132; 7 Cal. Rptr. 3d 315; 2003 Cal. LEXIS 9459 (2003 ("*Orloff*"). In a long-awaited decision, the Court held that the Legislature by enacting an array of consumer protection statutes to which public utilities were subject, did not intend to foreclose civil enforcement actions in the courts simply because a similar action was pending at the Commission.

In the decision under review in *Orloff*, the Court of Appeal had held that (1) the mere pendency of the enforcement action at the Commission stripped the Superior Court of jurisdiction to hear a similar action and (2) the Commission's stated view that no "interference" was caused by the Superior Court action was of no moment.

The Supreme Court reversed on both points.

The Court held that the mere possibility of an inconsistent outcome did not preclude actions before both the Commission and the Superior Court. The Court stated its expectation that (1) prosecutors could coordinate their actions with the Commission to ensure that a conflict implicating Section 1759 did not arise and (2) the Superior Court itself could "tailor its proceedings and rulings…to avoid any actual conflict." Unlike the Court of Appeal, the Supreme Court clearly relied on the Commission's *amicus* brief in which the Commission (1) eschewed any suggestion that the action in the Superior Court interfered with the Commission in its actions and (2) stated that civil actions such as those at issue "are an important complement to the PUC's consumer protection efforts."

The Court seems to accept the possibility of "inconsistent" outcomes i.e. a finding of liability under the Public Utilities Code in the Commission proceedings but exoneration under the Business and Professions Code in the Superior Court. Indeed, the Court identifies as the "only instance" in which the facts before it would create an outcome barred by Section 1759 would be the issuance of injunctive relief by the Superior Court which proscribed activity embraced within a "safe harbor" established by the Commission. Again, <u>the analytical framework is forward looking</u> rather than focused on sanctions (or the lack thereof) for past actions.[63]

[63] As a practical matter, it could prove difficult to convince the Superior Court to find in favor of the utility after an adverse decision by the Commission. At some point, a prosecutor will advance Section 1709 ("In all collateral actions or proceedings, the orders and decisions of the commission which have become final shall be conclusive") to argue that the Superior Court may not conclude than an advertisement was not misleading after the Commission has concluded that it was. The decisional law regarding Section 1709, however, has been very sparse over the last ten years and, particularly in light of *Covalt*, *Hartwell* and *Orloff*, a court, if asked, could conclude that the reach of Section 1709 extends only to the ultimate Commission order and not to the underlying factual findings. *Camp Meeker* (Para. 46 in the appellate review summary) holds that the conclusive effect of Section 1709 only applies to adjudicatory Commission proceedings. Fairly read, the Legislature did not overrule that aspect of *Camp Meeker* when it enacted SB 779 in 1988. (See footnote 40, *supra*.)

**RECENT CASES FROM THE COURT OF APPEAL CONSTRUING SECTION 1759**

(In Reverse Chronological Order)

1. *Gantner v. PG&E,* 15 Cal 5th 396 (November 20, 2023)- Addressing a question of state law certified to it by the Ninth Circuit Court of Appeals, the California Supreme Court, in a unanimous opinion, held that Section 1759 "bars a lawsuit that seeks damages resulting from [Public Safety Power Shutoffs] PSPS events where the suit alleges that a utility's negligence in maintaining its grid necessitated the shutoffs but does not allege that the shutoffs were unnecessary or violated PUC regulations." Applying the third prong of *Covalt* (p. 69, *supra*), the Court determined that "allowing suit here would interfere with the PUC's comprehensive regulatory and supervisory authority over PSPS.". The Court relied heavily on the Commission's promulgation of criteria governing the implementation of a PSPS. It noted that even though the "Legislature transferred the responsibility to "oversee and enforce electrical corporations' compliance with wildfire safety" to the Office of Energy Infrastructure Safety (OEIS), the legislation doing so "clarified that '[n]othing in this chapter [describing the power of OEIS] affects the commission's authority or jurisdiction over an electrical corporation…' ". The Court provided examples of actions by which the "the PUC has continued to exercise control over various aspects of PSPS regulation and supervision." Citing *Sarale* (Para 17, *infra*), the Court) affirmed that "(a)ssessment of a utility's compliance with these standards in deciding to implement a PSPS event "is a factual issue that is within the exclusive jurisdiction of the [PUC] to decide". It then expressed concern over the possibility that "Gantner's suit would require a court to hold a parallel review process, adding the judgment of a jury to that of the PUC in assessing the causes and propriety of PG&E's PSPS implementation." It also raised the prospect that a plaintiff would seek damages resulting directly from PSPS events and thereby "heighten… the risk that potential tort liability will factor into a utility's shutoff decision-making" putting the "suit at cross-purposes with the PUC's carefully designed scheme." As is common in virtually all decisions finding Section 1759 to bar a civil action, the Court's analysis is on the <u>prospective</u> effect of the suit on events in the future. (The Court arguably finessed Gantner's argument that even if PG&E properly applied the Commission's PSPS standards, it was PG&E negligence in

managing its grid that required the application of the standards in the first instance.) The Court was not persuaded by arguments that a suit for damages could not interfere with the Commission's authority because the Commission was without authority to award damages; it noted that such an outcome was not a surprising consequence of the application of Section 1759 and that ("(t)o the extent that customers are left without recourse to seek compensation for the alleged negligence of utilities or the loss of power during PSPS events, such concerns are properly directed to the Legislature." The Ninth Circuit had also sought the Court's view on the question of whether PG&E's Electric Rule Number 14 protected PG&E "from liability for an interruption in its services that PG&E determines is necessary for the safety of the public at large, even if the need for that interruption arises from PG&E's own negligence?" Having concluded that the suit was barred by Section 1759, however, the Court declined to address Rule 14. *Gantner* marks the first decision of the Court addressing Section 1759 since *Orloff* (pp. 72-73, *supra*) in 2003.

2. *TruConnect v. Maximus, Inc et. al*, 91 Cal.App.5th 497 ; 2023 WL 3364956 (May 11, 2023). The Court of Appeal (First District, Division Three) reversed a trial court's dismissal of TruConnect's action against two software providers that had been selected by the Commission to develop new software intended to facilitate enrollment of telephone subscribers in the Lifeline program (GO 153). The rollout of the software encountered substantial difficulties. TruConnect asserted that the failure of the software caused it to lose millions of dollars in potential revenue when it was unable to add subscribers and generate payments under the Lifeline program While the complaint included allegations regarding the Commission's conduct, it only named the providers of the failed software as defendants. The defendants moved for dismissal pursuant to Section 1759 and the Commission filed an *amicus* brief supporting the defendants' position.[64] The trial court granted the motion. Applying the third prong of *Covalt* (p. 70, *supra*) the Court dismissed the action because "the court found that allowing the case to proceed against respondents would undermine the CPUC's decision to launch the new software when it did, infringe on the Commission's judgment about applicants' eligibility for enrollment in the program, and encroach on the Commission's determination that TruConnect was ineligible for reimbursement." On appeal, TruConnect successfully argued that

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[64] The Commission's success with amicus briefs has been mixed. See discussion of *Kairy* at p. 65, *Orloff* at pp. 70-71 and Para 10 of this Appendix.

the action against the software providers would not interfere with the Commission's exercise of its authority. TruConnect noted that (1) any recovery would come from the defendants as tort damages and not from the Lifeline program and (2) a judgment in TruConnect' s favor would do no violence to any determination made by the Commission. The Court cited the admonition in *Orloff* (p. 73, *supra*) that "the mere possibility of, or potential for, conflict with the PUC is, in general, insufficient in itself to establish that a civil action…is precluded by section 1759". The Court also distinguished *Goncharov* (Para. 5) and *Lefebvre* (Para. 7) stating that "(a)lthough TruConnect's complaint contains allegations about the CPUC, the action is not trying to constrain any CPUC findings, as was the case in *Goncharov*, or to interfere with the CPUC's oversight of a program, as was the case in *Lefebvre*." Unfortunately for TruConnect, the Court's decision did not completely resolve the ultimate question of whether the case could go forward. The Court remanded the matter to the trial court for a determination of whether the Commission was an indispensable party under Code of Civil Procedure Section 389. The Court noted that if it were ultimately determined that the Commission was an indispensable party, Section 1759 would then preclude the matter from proceeding.[65]

3. *Uber Technologies Pricing Cases*, 46 Cal. App. 5th 963 (March 23, 2020). The Court of Appeal (First District, Division One)- affirmed the trial courts dismissal of a

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[65] *CCP 389* (a)-(b) provides that:

*(a) A person who is subject to service of process and whose joinder will not deprive the court of jurisdiction over the subject matter of the action shall be joined as a party in the action if (1) in his absence complete relief cannot be accorded among those already parties or (2) he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of his claimed interest. If he has not been so joined, the court shall order that he be made a party.*

*(b) If a person as described in paragraph (1) or (2) of subdivision (a) cannot be made a party, the court shall determine whether in equity and good conscience the action should proceed among the parties before it, or should be dismissed without prejudice, the absent person being thus regarded as indispensable. The factors to be considered by the court include: (1) to what extent a judgment rendered in the person's absence might be prejudicial to him or those already parties; (2) the extent to which, by protective provisions in the judgment, by the shaping of relief, or other measures, the prejudice can be lessened or avoided; (3) whether a judgment rendered in the person's absence will be adequate; (4) whether the plaintiff or cross-complainant will have an adequate remedy if the action is dismissed for nonjoinder.*

complaint by several cab companies against Uber alleging that Uber had violated California's Unfair Practices Act or "UPA" (Business & Professions Code Section 17000 *et seq* ). The UPA, however, by its terms (B&P 17024(1)) does not apply "[t]o any service, article or product for which rates are established under the jurisdiction of the Public Utilities Commission … and sold or furnished by any public utility corporation…" While Uber is not a "public utility", the cab companies inexplicably agreed that it was for purposes of Section 17024 (1). The parties disagreed, however, over whether the exception only applied where the Commission had actually set rates (the cab companies 'position) or also applied when the Commission had not set rates but had the authority to do so (Uber's position.) The trial court agreed with Uber and sustained its demurrer. The Court of Appeal affirmed the dismissal. In so doing, the Court also rejected Uber's claim that the action was barred by Section 1759. Distinguishing *Goncharov* (Para 5 *infra*), the Court found that Uber could not satisfy the third prong of *Covalt*-"whether the superior court action would hinder or interfere with the CPUC's exercise of that regulatory authority"- because "there is no evidence that in the seven years the rulemaking proceeding involving Uber has been ongoing the commission has set its sights on setting Uber's fares…" While the Court may have reached the correct conclusion with respect to Section 1759, the Court (as well as the trial court) likely erred with respect to the application of B&P 17024 (1). Uber is not a "public utility corporation" and no provision of the Public Utilities Code expressly permits the Commission to set its rates. Three Northern California federal district court decisions concur with the Court but, like the Court, they proceed from the flawed premise that an entity subject to the jurisdiction of the Public Utilities Commission is, *ipso facto*, a "public utility" (wrong) and that even if the Commission has not set Uber's rates, it could (highly debatable.)

4. *City and County of San Francisco v. Uber Technologies, Inc*, 36 Cal. App. 5th 66; 2019 Cal. App. LEXIS 534 (May 17, 2019). The City and County of San Francisco ("SF") opened an investigation into the operations of Transportation Network Companies ("TNCs") operating in SF. The SF City Attorney issued subpoenas to Uber Technologies, Inc., Raiser-CA, LLC, and Rasier, LLC (collectively, "Uber") seeking all annual reports Uber filed with the Commission and all of the underlying data supporting the annual reports. Uber challenged SF's right to issue the subpoenas in the first instance and claimed as well that (1) the issuance of the subpoenas, (2) the investigation and (3) anything SF might do pursuant to that investigation were preempted by Section 1759. The Court of Appeal (First District, Division

Three) affirmed a trial court's ruling rejecting those claims. The Court of Appeal held that SF was entitled to issue the subpoenas, that the information sought was relevant to the investigation and that the wording in the subpoenas was "not too indefinite." The Court then held that Uber's claims regarding Section 1759 were premature, resting on "crystal ball predictions" of what SF might do. The Court noted that cases cited by Uber (such as *Goncharov*, Para. 5) addressed proceedings "far beyond the investigative stage." The Court also held that Section 1759 did not strip the trial court of jurisdiction to enforce the subpoenas since Uber had not demonstrated that enforcement of the subpoenas would "hinder or interfere with the CPUC's exercise of its regulatory authority…" (the Third Prong of *Covalt,* see p. 70, *supra.*)

5. *Goncharov v. Uber Technologies, Inc.* 19 Cal. App. 5th 1157, 2018 Cal. App. LEXIS 72 (January 29, 2018). The Court of Appeal (First District, Division One) affirmed the dismissal of a class action by several taxicab companies against Uber Technologies, Inc.("Uber"). The plaintiffs claimed that Uber had unfairly competed with the them by operating unlawfully as a transportation provider without the requisite authority from the Commission. The Court held that the class action was barred by Section 1759 because it could interfere with R.12-12-011, the Commission's ongoing Rulemaking regarding Transportation Network Companies ("TNC"s). *Goncharov* is significant because it examines the third prong of *Covalt* as described in (p. 70, *supra*) and *Orloff* (pp. 72-73, *supra*.). All agreed that the first two prongs of *Covalt* (*Commission jurisdiction* and the *exercise of it*) were met. The question in dispute was whether the third prong was satisfied, i.e. would the action in Superior Court "interfere with the CPUC's prospective regulatory program…" , R.12-12-011, the TNC Rulemaking? In *Hartwell*, the California Supreme Court held that the prospect of a court verdict inconsistent with a finding in a past Commission decision was not enough to satisfy the third prong of Covalt; a party asserting a defense under Section 1759 had to show that the court proceeding would actually interfere with a prospective, ongoing regulatory program. *Hartwell* held that (1) an action asserting that water meeting Commission/DHS standards was, nonetheless, unsafe, would interfere with a "prospective, ongoing regulatory program" but (2) an action that asserted that a particular company had not met Commission/DHS standards in the past would not interfere with an ongoing program even though the Commission decision at issue in *Hartwell* had rendered finding that large water utilities had complied for the last 25 years. The *Goncharov* Court, distinguished the water quality proceeding at issue in *Hartwell* from the TNC Rulemaking in part

by relying on *Orloff*'s description of the Commission proceeding at issue in *Hartwell* as "a process designed to gather information, rather than as a rulemaking proceeding". The Court noted that:

> The CPUC's evaluation of whether Uber is a charter party carrier and what regulations should apply is not merely informational. Rather, it is an express focus of the CPUC's formal Rulemaking regarding Uber and TNC's. Any determination regarding Uber's status would strike at the heart of this process. And any finding by the CPUC on this issue would be directly related to its ongoing efforts to regulate Uber and TNC's. A judicial ruling to the contrary could potentially undermine this process.

6. *California Public Utilities Commission v. Superior Court, Michael Aguirre, Real; Party In Interest ("Aguirre"),* 2 Cal. App. 5th 1260; 2016 Cal. App. LEXIS 730 (August 31, 2016). The Court of Appeal (First District, Division Two) directed the Superior Court in San Francisco to sustain the Commission's demurrer to a petition for writ of mandate filed by Michael Aguirre. Mr. Aguirre sought a writ directing the Commission to disclose documents related "to the CPUC's investigation of the San Onofre Nuclear Generating Station shutdown…" and communications between utility and Commission officials prior to the Commission's resolution of that matter. Mr. Aguirre successfully argued in the Superior Court that (1) the Commission was required to disclose the documents pursuant the California Public Records Act ("PRA") and (2) his action in Superior Court was not barred by Section 1759. The Court of Appeal took no position with respect to the first point but held that Section 1759 did bar an action in the Superior Court to enforce the PRA with respect to the Commission. The Court directed the Superior Court to sustain the Commission's demurrer and "prohibited [the Superior Court] from conducting any further proceedings in this matter." The Court relied in large part on "a closely analogous case regarding another sunshine-type ordinance in the Government Code that also imposes duties on the CPUC…" *Disenhouse v. Peevey* (Para 13, *infra*,) which held that Section 1759 barred the Superior Court from enjoining alleged violations of the Bagley-Keene Open Meeting Act. Senate Bill 19 (Hill), enacted in 2018, would have exempted PRA actions from the reach of Section 1759. Just prior to enactment, however, that provision was removed from the bill. Mr. Aguirre ultimately sought the same relief in the Court of Appeal and largely prevailed when the First District issued an unpublished order stating as follows:

> (By the Court - Unpublished) Having reviewed the documents and given careful consideration to the parties' written and oral arguments and the governing law, we now direct the CPUC, within ten days from the date of this order, as follows: First, the CPUC shall produce every document, with any attachment(s), over which it asserted the deliberative-process privilege, including those appearing at tabs 40, 41, and 42, with the redacted portions restored. As to all of these documents and redactions, the CPUC did not meet its burden of " 'demonstrat[ing] a clear overbalance on the side of confidentiality'" between the public interest in nondisclosure and the public interest in disclosure. (*American Civil Liberties Union of Northern California v. Superior Court* (2011) 202 Cal.App.4th 55, 68-69; *County of Santa Clara v. Superior Court* (2009) 170 Cal.App.4th 1301, 1321 [" 'Where the public interest in disclosure of the records is not outweighed by the public interest in nondisclosure, courts will direct the government to disclose the requested information.' "].) Second, of the documents withheld on the basis of the exemption for correspondence to and from the Governor's Office (Gov. Code, § 6254, subd. (l, the CPUC shall produce all of the following: the documents and any attachments appearing at tabs 4-5, 7-9, 14-15, 18, 22, 25, 28-29, 33, 59, 65-68, and 74. Third, the CPUC shall provide petitioner with a copy of the privilege log it prepared in response to our October 27, 2017 order. In addition, we uphold the limited redactions made within the documents appearing at tabs 14 and 18 to protect personal privacy, as follows: Michael Picker's personal contact information at the top of page 435 and in the middle of page 442 may be redacted; Ryan McCarthy's personal cell phone number at the bottom of page 444 may be redacted. The other redactions are denied. Finally, we conclude, as we did in our October 27, 2017 order, that respondent may continue to withhold the 16 records over which it asserted the attorney-client privilege, as petitioner has not timely or convincingly disputed respondent's claim that he waived his request for these 16 documents. (Resolution No. L-522, p. 12.)

While this memo does not normally include unpublished material, an exception is warranted here to point out that the limitations of section 1759 are mitigated by the fact that <u>a properly presented case in the Court of Appeal can achieve the sought result.</u>

7. *Lefebvre v. Southern California Edison*, 244 Cal. App. 4th 143; 2016 Cal. App. LEXIS (January 25, 2016) 46. The Court of Appeal (Second District, Division 4) affirmed the trial court's dismissal of a class action suit against SCE alleging that SCE fraudulently enrolled ineligible customers in the California Alternate Rates for Energy (CARE) program. The plaintiff claimed that SCE employed funds received from non-CARE customers to subsidize plainly ineligible CARE customers to inflate the CARE program participation rolls and thereby "curry favor with the PUC and increasing the likelihood that the PUC would approve Edison's requests for future rate increases." The trial court's dismissal of the class action had not rested on

Section 1759 but instead relied on Section 532 which prohibits a public utility from "refund[ing] or remit[ting], directly or indirectly, in any manner or by any device, any portion of the rates, tolls, rentals, and charges" specified in a filed tariff. The Court of Appeal affirmed the dismissal but elected to rely on Section 1759. The parties had already agreed that the first two prongs of *Covalt* were satisfied; the only question was "whether Lefebvre's action in superior court would hinder or interfere with the commission's exercise of its regulatory authority." The Court concluded that SCE satisfied the third prong by tying the outcome to ongoing CARE rates. It found the matter susceptible to analysis similar to that adopted in *Guerrero* (Para. 12, *infra*). Both cases affirm that the fastest path toward satisfaction of the third prong of *Covalt*, begins by finding some connection (however thin) between the civil court action and ongoing utility rates.

8. *Pegastaff v. Pacific Gas & Electric Company*, 239 Cal. App. 4th, 1303, 215 Cal. App. LEXIS 755 ("*Pegastaff II*"). The Court of Appeal (First District, Division 2) reversed the trial court's dismissal of actions against PG&E predicated on the same claims described in *Pegastaff I* (Para. 10, *infra*). With respect to PG&E, the Court permitted Pegastaff's suit to continue. The Court applied the three part test in *Covalt* and concluded that while the Commission had jurisdiction to regulate utility minority enterprise diversity programs (Prong 1) and had in fact done so (Prong 2), nothing in the action in Superior Court would have interfered with the Commission's ability to administer that program (Prong 3). The Court, after reviewing all of the recent 1759 decisions, concluded that an action against the PG&E for exercising preferences in favor of certain enterprises did not interfere with the Commission's administration of its General Order 156. The Court indicated that "the PUC could not have stated more explicitly that utilities are not permitted to achieve their GO 156 goals by the use of preferences. There can be no doubt that the tier system as described in Pegastaff's [Complaint] is a preferential system."

9. *Davis v. Southern California Edison*, 236 Cal. App. 2d 619 (2015). The Court of Appeal (Second District, Division 7) affirmed the trial court's dismissal of Davis's claim that Edison violated its Tariff Rule 21 and a Commission mandated program when processing his application to interconnect solar systems and sell electricity to Edison, The court noted that before filing the action with Superior Court, Davis had filed two formal complaints with the Commission that related to his attempts to interconnect his solar generating systems to the grid (both denied in April of 2016.) The trial court sustained Edison's demurrer to all nine

causes of action without leave to amend, holding that it was without jurisdiction to hear Davis' claims. Applying the *Covalt* standard, the Court of Appeals determined that the facts before it clearly satisfied prongs one and two, finding that the Commission (1) has undisputed authority to adopt tariffs governing applications to interconnect solar energy generating systems to a utility's grid and (2) had adequately exercised its authority by its approval of Rule 21, Rule 16, and the CREST and NEM Programs. The sole remaining determination was whether the superior court's actions "would hinder or interfere with the Commission's exercise of regulatory authority." The Court had no difficulty concluding that all of Davis's claims turned on how Edison had applied its tariffs (particularly Rule 21) and concluded that permitting a trial court to, for example, construe the sizing requirements of the NEM program (a question already before the Commission in the Davis complaint dockets) could clearly hinder the Commission's ability to exercise its authority. While the Court rested its view to some degree on the pendency of the Davis complaints at the Commission, it is more than likely that the Court would have reached the same conclusion even in the absence of any proceeding before the Commission. The court noted that Rule 21 itself gives the Commission initial jurisdiction over Rule 21 claims. While the Court overstates the legal scope of a tariff,[66] the Commission did approve Rule 21 and implemented the statutorily based CREST and NEM programs. It is not surprising that, whether grounded in notions of exclusive jurisdiction or the jurisprudence surrounding Section 1759, an appellate court would not permit a trial court to construe tariffs differently than the Commission.

10. *Pegastaff v. CPUC,* 236 Cal. App.4th 374 (2015), 2015 Cal. App. LEXIS 359 ("*Pegastaff I*"). The Court of Appeal (First District, Division 2) affirmed the Superior Court's dismissal of Pegastaff's claims against the Commission. Pegastaff alleged that it was injured due to a preferential contracting program established by PG&E which sought to comply with the requirements of General Order (GO) 156. GO 156 implemented PU Code Sections 8281-8286 designed to encourage and develop the use of women, minority, and disabled veteran owned business enterprises (WMDVBE's). The Superior Court determined that (1) Section 1759, denied it jurisdiction to review constitutional challenges to Sections 8281-8286 because in doing so it could interfere with the Commission's performance of its "official duties"

[66] The Court repeated the oft-made (but inaccurate) statement that a utility tariff has the force of law. That statement is true with respect to the utility but not with respect to anyone else. See Para. 92 *supra.*

and (2) it was without jurisdiction to hear a challenge to GO 156 because to declare it unconstitutional would annul an order of the Commission. Pegastaff argued to the Court of Appeals, that the Superior Court erred in both jurisdictional determinations because (1) the Commission's "official duties" were not implicated in its cause of action and (2) Section 1759 does not address original claims for relief from the effects of GO 156. The Court of Appeals disagreed. The court reasoned that (1) so long as a law is validly enacted by the Legislature, any duties that a statute imposes on the Commission are "official duties" within the meaning of 1759, and (2) the Superior Court is without jurisdiction to interfere with the duties which the statute imposes on the Commission. The court also determined that Pegastaff could have sought relief from the Commission and must first exhaust its administrative remedies before seeking a judicial remedy. Though the Commission itself could not have declared Article 5 unconstitutional,[67] the court stated that Pegastaff could have sought a ruling from the Commission declaring that PG&E had exceeded the mandate of GO 156, thus committing a constitutional violation. It would have then been within the scope of the Commission's power to revise GO 156 to address its constitutional concerns.[68] Lastly, the Court of Appeals disposed of Pegastaff's contention that Section 1759 does not preclude original claims against the Commission for relief, but only bars Superior Court review of CPUC orders and decisions. It stated that:

> But even if we were to read "order" to mean only orders issued in judicial or quasi-judicial proceedings, section 1759 limits more than review of decisions and orders. It also prevents superior court from "enjoin[ing], restain[ing], or interfere[ing] with the commission in the performance of its official duties, as provided by law and rules of the court."

The Court reached a different conclusion with respect to the action against PG&E. See *Pegastaff II* (Para. 8, *supra*).

11. *Wilson v. Southern California Edison*, 234 Cal. App. 4th 123 (2015), 2015 Cal. App. LEXIS 119. The Court of Appeal (Second District, Division 4) rejected a contention

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[67] Article III, § 3.5 of the California Constitution prevents the Commission from declaring a statute unconstitutional or refusing to enforce it because it is unconstitutional absent an appellate court decision so holding. See discussion at Para. 35 and 68.

[68] Citing *Regents of Univ. of Cal. v. Public Employment Relations Bd,* 139 Cal. App. 3d 1037, 1042 (1983), and *Cumero v. Public Employment Relations Bd*., 49 Cal. 3d 575, 583 (19890, the court reasoned that the Commission, "still remained free to interpret the existing law in the course of discharging its statutory duties" in light of constitutional standards.

by Southern California Edison that Section 1759 barred a claim by a homeowner that stray voltage from an Edison sub-station had caused her physical and emotional harm. The Court noted at the outset that Edison could raise the 1759 defense in a motion for a new trial even though Edison had not raised it earlier in the proceeding. The court observed that since Section 1759 implicates the subject matter jurisdiction of the Court, a defense based on Section 1759 may not be waived. The Court's holding is consistent with other rulings that a tribunal may not acquire subject matter jurisdiction by consent, waiver or estoppel. Edison argued that the jury's award of damages to Ms. Wilson obstructed and interfered with regulations and policies with regard to safety of electrical distribution systems by "imposing liability on Edison for stray voltage that results from Edison's compliance with those regulations" and "effectively finds that Edison was required to do something - completely eliminating stray voltage - that the PUC does not require." Indeed, the Commission itself had apparently offered a similar analysis in *amicus* brief filed in two consolidated cases filed by Ms. Wilson's neighbors against Edison based on allegations of stray voltages in the area surrounding the same sub-station affecting Ms. Wilson. The Court, however, rejected this argument (stating that it was not bound by the Commission's legal opinion with respect to the applicability of Section 1759) and noted that the Commission had not investigated or regulated the specific issue of stray voltage. Moreover, the Court observed that:

> "Without any evidence that stray voltage cannot be mitigated without violating the PUC's regulation requiring grounding, we cannot say that Wilson's lawsuit would interfere with or hinder any regulatory policy of the PUC. Therefore we hold that Wilson's claims are not within the exclusive authority of the PUC under Section 1759."

Note that *Seachrist v. SCE*, 244 Cal. App. $4^{th}$ 308, 2016 Cal. App. LEXIS (January 27, 2016) which relied on *Wilson*, was depublished in May of 2016.

12. *Guerrero v. PG&E*, 230 Cal. App. $4^{th}$ 567; (October 10, 2014) 2014 Cal. App. LEXIS 909. The Court of Appeal (First District Division 3) affirmed a trial court decision dismissing a complaint against PG&E. The complaint sought restitution and disgorgement of some $100M in rates collected by PG&E over a 13-year period that, according to the plaintiffs, should have been expended on natural gas pipeline safety projects. The Court of Appeal held that Section 1759 precluded plaintiff's claims since the suit would interfere with the Commission in

ongoing matters related to PG&E. The plaintiff, having obviously reviewed *Hartwell*, pp. 70-72, *supra*, stressed that it only sought compensation for past acts and did not seek to affect in any fashion the Commission's ongoing and forward and future actions with regard to PG&E. The Court disagreed concluding that

> "upon a fair reading of the record of the administrative proceedings before the PUC, plaintiff's actions seeking disgorgement, restitution and damages for misappropriation of PUC approved funds interferes with the PG&E's ongoing authority over natural gas rates."

This is a close call. Part of the Court's analysis points to the fact that the Commission proceedings were also focusing on past actions but any conflict with regard to redress over past actions would not be barred by Section 1759 (at least as construed in *Hartwell*, *supra*). The Court also noted, however, that

> "an order of the Superior Court directing restitution to PG&E consumers in this case will direct refunds of rates approved by the PUC, rates that are continuing to receive scrutiny in the wake of the San Bruno explosion. Such an order would, in effect, hold PG&E liable for charging rates expressly authorized by the PUC, and that remain under the PUC's consideration."

In this sense, *Guerrero* can be regarded as precluding the Superior Court from effectively reversing the <u>effect</u> of a Commission decision rather than interfering with the Commission in the ongoing exercise of its responsibilities. While portions of *Hartwell* arguably permit jury verdicts inconsistent with Commission decisions, the *Guerrero* Court obviously saw the disgorgement action as too intertwined with ongoing <u>rate</u> proceedings. As a very general rule, any action in Superior Court that can be characterized as affecting Commission ratesetting implicates Section 1759.

13. *Disenhouse v. Peevey,* 226 Cal. App. 4th 1096, (June 4, 2014); 2014 Cal. App. LEXIS 487 - The Court of Appeal (4th Appellate District, Division 1) affirmed a Superior Court decision dismissing a complaint seeking to enjoin a Commission meeting. The plaintiff alleged that the Commission was violating the provisions of the Bagley-Keene Open Meeting Act (Gov.Code § 11120 *et seq.*) by denying her the ability to attend the meeting. (Whether such denial ever occurred is open to question). The Court of Appeal affirmed the Superior Court, which held that §1759 denied it the jurisdiction to provide injunctive relief against the Commission and dismissed the complaint. Two aspects of this unsurprising decision are of

interest. First, the case highlights the fact that §1759(b) provides for injunctive relief against the Commission so long as that relief is sought in the Court of Appeal or the California Supreme Court. Second, the Court notes that §1759 does not expressly apply to Federal courts. Several Federal courts, however, have decided that they are required to apply §1759 in matters in which they are applying state law. See footnote 55, *supra*.

14. *Rivera Mata v. PG&E*, 224 Cal. App.4th 309; 2014 Cal. App. LEXIS 199 (February 28, 2014). The Court of Appeal (First District, Division 3) reversed the trial court's decision which, relying on Section 1759 as construed in *Sarale* (Para. 17, *infra*) , dismissed negligence and premises liability complaints by plaintiffs, the heirs of a decedent electrocuted while trimming a tree that had grown above PG&E's 12,000-volt line. While the plaintiffs in *Sarale* claimed PG&E had trimmed too much, the plaintiffs here claimed it had trimmed too sparingly. The Court distinguished *Sarale* in two ways. First, in *Sarale*, the Court held that because the Commission had authorized PG&E to determine, based on safety and reliability considerations, whether to exceed the minimum clearances established in General Order (GO) 95, a claim that PG&E had trimmed to excess lay exclusively with the Commission; *Rivera Mata* held that while Section 1759 barred the Superior Court from entertaining a claim that PG&E had trimmed in excess of the minimum, Section 1759 did not bar a claim that PG&E had failed to trim as required by public safety or service reliability. (The court cited the "in aid and not in derogation of" text, which has its genesis in *Dyke Water*, p. 69, *supra,* observing that claims that PG&E failed to use due care in making such a determination complement and reinforce GO95.) Second, the Court reasoned that, in *Sarale*, the plaintiffs had an available remedy at the Commission which could have proscribed excessive trimming; here, however, dismissing the action would leave plaintiff without any remedy since the Commission may not award damages arising out of PG&E's past failure to exercise due care in making a determination whether to trim more than the minimum required in GO 95. (One can legitimately question whether this second point has any basis in prior Section 1759 jurisprudence which has resulted in more than one plaintiff being left without a remedy.) The Court concluded that Section 1759 did not prevent the Superior Court from considering claims involving alleged inadequate tree trimming around Commission regulated power lines and held that that the issue of whether PG&E breached its duty of due care was not within the exclusive jurisdiction of the Commission.

15. *Southern California Edison v. City of Victorville* 217 Cal. App. 4th 218, 2013 Cal. App. LEXIS 478 (June 17, 2013). The Court of Appeal (Fourth District, Division Two) reversed the trial court's dismissal of a complaint against Southern California Edison ("SCE"). The plaintiff was injured when a car in which she was riding struck a street pole placed and maintained by SCE. The plaintiff sued both the City of Victorville ("City") as well as SCE. SCE successfully moved for dismissal relying on Section 1759. SCE argued that placement of light poles fell within the exclusive jurisdiction of the Commission and that SCE's placement of the pole at issue was pursuant to a lawfully filed tariff which (1) required SCE to place street lights as directed by the City of Victorville ("City") and (2) included a provision limiting SCE's liability. Reversing the trail court, the Court of Appeal noted at the outset that nothing could support a claim that the pole at issue was placed as directed by the Commission or pursuant to any tariff approved in a Commission decision. The court next observed that the City possessed the authority to subject SCE to the police powers of the City so long as not in conflict with Commission requirements. The Court also recognized that not only was Commission jurisdiction over the placement of street lights not exclusive but SCE could not cite an instance of the Commission actually exercising whatever authority it had over street light placement. Indeed, as the Court noted, the Commission left the placement of the street lights to the "applicant"; under SCE's tariff, the "applicant" is the City. The City's exercise of its authority to place the streetlights could not be deemed to interfere with the Commission in a manner that implemented Section 1759. The Court also concluded that the limitation of liability provision in the SCE tariff was inapplicable. To make matters worse for SCE, the Court held that SCE could not seek indemnification from the City because SCE had not first timely filed a government claim.

16. *Elder v. Pacific Bell, 205* Cal App 4th 841; 2012 Cal App LEXIS 514 (April 30, 2012). The Court of Appeal (First District, Division Three) reversed the trial court's dismissal of a complaint against Pacific Bell and OAN, a telecommunications service provider, for damages arising out of alleged violations of Section 2890, the "anti-cramming" statute. The opinion does not clearly set forth the basis for trial court's dismissal stating that it rested on a determination the Commission had "exclusive jurisdiction" over the claim. The Court of Appeal then analyzed the matter through the lens of Section 1759 jurisprudence. The Court found that the defendants had not satisfied the third prong of *Covalt*. An action for damages arising out of

Section 2890, the Court held, it did not interfere with the Commission's exercise of regulatory authority over telephone billing through its G.O. No. 168.

17. *Sarale/Wilbur v. PG&E,* 189 Cal App 4th 225; 2010 Cal App. 1776 (October 15, 2010). By a two to one vote (and a separate opinion by each of the three justices) the Court of Appeal (Third District) affirmed a lower court decision dismissing complaints by landowners against PG&E. The landowners had argued that PG&E excessively trimmed trees lying within a PG&E easement below transmission lines. PG&E argued that the lawsuits would interfere with its ability to meet its obligation to trim trees as required by General Order No. 95 (GO 95. Accordingly, PG&E argued, the lawsuits interfered with the Commission in the exercise its jurisdiction and thereby violated Section 1759. A critical point in the case is that while the landowners did not contest PG&E's right to maintain the clearances required by GO 95, PG&E clearly trimmed the trees beyond the minimum clearance requirements set by GO 95 (Rule 35). Accordingly, the key question before the court was whether the lawsuits would actually "hinder or interfere" with the Commission's exercise of its regulatory authority. The court concluded that the lawsuits would (or, at least, could) have such an adverse impact on the Commission's regulatory activity, concluding that the minimum standards "recognized . . . that, in certain situations, safety considerations would demand that the trimming exceed the minimum." It stated that "the question of whether trimming must exceed the minimum standards on any particular section of an overhead power line is a factual issue that is within the exclusive jurisdiction of the Commission to decide." Accordingly, the court concluded that it had no jurisdiction to adjudicate the claims. The court also held that if landowners believed that PG&E had trimmed trees excessively it could seek relief at the Commission. The Court also, in a fairly unconvincing fashion, distinguished *Koponen* (Para. 19, *infra*). Justice Robie[69] filed a lengthy dissent. It is worth reading if for no other reason that it contains a lengthy exposition on the scope of Section 1759 and the cases construing it. The Commission filed an *amicus* brief in the case acknowledging that it "has traditionally left matters of easement construction and interpretation to the courts . . . ." while asserting that only the Commission may determine whether "the degree of trimming exceeded or violated any established rules" of the Commission.

[69] During the first administration of Governor Brown in the 70s, Ronald Robie was the Director of the Department of Water Resources and essentially the water guru/czar during that administration.

The dissent argued that the distinction is of no consequence since both the landowners acknowledged that they did not seek to restrict PG&E from trimming to the levels fixed by the Commission, their action extended only to trimming to levels beyond that. The Sarales sought review in the California Supreme Court but review was denied (One justice dissented from the denial and two justices recused themselves.) Both the Sarales and the Wilburs then filed complaints at the Commission. The Commission denied relief in the Wilbur case in October of 2012 and dismissed the Sarale complaint in May of 2014. The Sarales sought rehearing but rehearing was denied in early October of 2014. The Sarale's subsequent complaint against PG&E in federal court was dismissed in late 2015. *Sarale v. PG&E*, 2015 U.S. Dist. LEXIS 167126. The import of the Court of Appeal decision is addressed in *Rivera Mata* (Para. 14).

18. *City of Los Angeles v. Tesoro Refining,* 188 Cal. App. 4th 840; 2010 Cal App. LEXIS 1650 (September 22, 2010). The Court of Appeal (Second District, Division 2) reversed the trial court's grant of summary judgment in favor of the City. The trial court held that, as a charter city, Los Angeles, had the exclusive power to provide electric service within its boundaries and that no other utility could provide electric service for consumption with in those boundaries. (The Tesoro refinery straddled the service border between Southern California Edison ("SCE") and LADWP.) Most of the opinion reversing the trial court is devoted to an analysis of Article XI, Section 9 and Article XII, Section 8 of the State Constitution. The court concluded that the power vested in the Commission by the Constitution and the Legislature prevailed over any contrary provisions of the City Charter. While the decision does not cite Section 1759 until the end of the opinion, it forms the statutory basis for requiring the trial court to rule in favor of Tesoro. The appellate court's conclusion that the trial court's ruling was contrary to the Commission's grant of authority to SCE to provide electric service to the refinery, a matter of statewide concern, set the stage for it to hold that Section 1759 required the trial court to defer to the Commission. The Commission filed an *amicus* brief on behalf of Tesoro.

19. *Koponen v. PG&E*, 165 Cal. App. 4th 345 2008 Cal. App. LEXIS 1167 (July 28, 2008). The Court of Appeal (First District, Division 1) held that Section 1759 did not bar claims by landowners that PG&E improperly leased portions of its utility easements to telecommunications providers. The Court held that while the Commission, had issued myriad decisions endorsing the joint use of utility easements, it did so on the presumption that the utilities in question already possessed the legal right to do so. Accordingly, the landowners'

claims that the energy utility's lease of its easement to a telecommunications provider resulted in a burden on the servient estate did not interfere with any ongoing supervisory activity of the Commission, particularly since the Commission did not have jurisdiction to adjudicate interests in property.[70] The Court held that the plaintiffs' claims for injunctive relief and for damages predicated on the burden to the property could proceed. The Court held, however, that the claim for "disgorgement of unjustly obtained profits" was barred by Section 1759 because the Commission's ongoing ratemaking authority over PG&E embraces a determination of how PG&E revenues are to be allocated. (In an unpublished opinion, the Court of Appeal affirmed a denial of class certification to the plaintiffs and a similarly situated group of land owners.)

20. *In re Groundwater Cases,* 154 Cal. App. 4th 659, 2007 Cal. App. LEXIS 1405 (2007). The Court of Appeal (First District, Division 5) affirmed the dismissal of actions against both Commission regulated water utilities and public water districts. The complaints against the Commission-regulated entities were dismissed because (1) the only water quality standards to which those utilities could be held were those established by the Commission and the Department of Health Services (DHS), (2) Section 1759 precluded the Superior Court from entertaining a challenge to the adequacy of those standards and (3) per *Hartwell*, a "violation" of water quality standards can only occur if the water utility has violated the Commission/DHS standards. The actions against the public entities were dismissed because the plaintiffs could not meet the requirement of the California Tort Claims Act (Gov. Code Section 810 *et seq.*) that they show a violation of a mandatory duty.

21. *Anchor Lighting v. Southern California Edison,* 142 Cal. App. 4th 541, 2006 Cal. App. LEXIS 1316 (2006). The Court of Appeal (Second District, Division 1) affirmed the dismissal of Anchor Lighting's complaint alleging various causes of action all related to Edison's 10% rate reduction tariff for residential and small commercial customers. (PU Code Section 330(w). Anchor believed Section 330(w) required that it be eligible for the 10% rate reduction but Edison's tariff did not so provide. The Commission (1) approved Edison's tariff and (2) rejected Anchor's claim that it should nonetheless be eligible. Anchor's application for

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[70]The Commission does have jurisdiction to adjudicate interests in property in the context of ratemaking. See *Camp Meeker* at Para. 46 of the main document. While *Camp Meeker* was technically overruled by the Legislature when it enacted SB799 (see fn. 40, supra), a fair reading is that the legislative act extended only to the standard of review articulated in that 1990 decision.

rehearing was denied and it did not seek review of the Commission decision in the state appellate courts. The Court of Appeal affirmed the trial court's dismissal of Anchor's civil action against SCE. The Court deferred to the Commission's construction of Section 330(w) seemingly as both (1) a matter of traditional *Greyhound* deference as well as (2) adherence to Section 1759. The Court held that was required to do so even if the Commission's construction was "palpably erroneous in point of law" because Commission decisions bind all courts in the state unless annulled pursuant to the writ of review authorized by Section 1756. Next, applying the tests in *Covalt*, the Court had no difficulty finding that (1) the Commission was charged with implementing electric restructuring, (2) it had acted to do so and (3) a court order reaching a contrary conclusion to that of the Commission on the question of eligibility for the 10% rate reduction would "unquestionably interfere with the CPUC's orders and , indeed, the entire financing scheme [related to the funding of the rate reduction.]"

22. *Wise*[71] *v. PG&E,* 132 Cal. App. 4th 725, 2005 Cal. App. LEXIS 1418 (2005). While only tangentially addressing Section 1759 (concluding that it did not bar an action against PG&E related to PG&E's failure to maintain a gas meter inspection program) *Wise* is worth reviewing because the Court of Appeal (First District, Division 5) addresses the effect to be given to the Commission's election NOT to open an enforcement proceeding after indicating that it was considering doing so. The Court sets forth the required elements that must attend a Commission decision before it will be given any preclusive effect by the Court. It held that a letter from the Commission's General Counsel indicating that the Commission would not proceed was not entitled to any preclusive effect in the Superior Court case. The decision also provides an exposition on the interplay between the doctrines of primary jurisdiction[72] and issue preclusion.

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[71] This matter is known as *Wise II.* In an earlier opinion, *Wise I*, the Court found that 1759 did not bar the matter from proceeding in Superior Court but that that court should stay its proceeding pending action by the Commission. *Wise v. PG&E (Wise I)*, 77 Cal. App. 4th 287 (1999).

[72] This memorandum does not address primary jurisdiction to any significant degree. The reader may wish to note a decision of the Court of Appeal (Second District, Division Five) in which a divided Court upheld an order of the trial court abstaining from hearing a complaint over the level of AT&T's charges for non-published telephone listings. The Court held that the trial court did not abuse its discretion by sustaining a demurrer to the complaint, concluding that the case

23. *City of Anaheim v. Pacific Bell*, 119 Cal. App. 4th 838, 2004 Cal. App. LEXIS 967 (2004). In a matter abeyed by the Supreme Court during the pendency of *Orloff* (pp. 72-73, *supra*), the Court of Appeal (Fourth District, Division 3), affirmed the trial court's dismissal of the City's claim for reimbursement of costs incurred to underground Pacific Bell's lines. The City had created a special undergrounding district and had advised Pacific of the City's belief that the District met the requirements of Pacific's tariff rule for utility-funded undergrounding. When Pacific refused to underground at its own expense, the City did so and sued Pacific for the costs incurred by the city. The Court concluded that undergrounding of utility wires was a matter of statewide concern over which the Commission not only (1) possessed exclusive jurisdiction but (2) had exercised that jurisdiction. Because the City sought to circumvent what the court viewed as a statewide undergrounding plan, the action in Superior Court was deemed to interfere with the Commission in violation of Section 1759.

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"delves into complex economic policy and regulation that is better left to the Legislature." *Willard v. AT&T*, 204 Cal. App. 4th 53, 2012 Cal. App. LEXIS 266 (March 6, 2012).

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