IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

CALIFORNIA COMMUNITY CHOICE ASSOCIATION

Petitioner,

v.

CALIFORNIA PUBLIC UTILITIES COMMISSION

Respondent.

From Decision No. 23-06-029 (June 29, 2023) and Decision No. 23-12-038 (December 14, 2023) of the California Public Utilities Commission

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PETITION FOR WRIT OF REVIEW; MEMORANDUM OF POINTS AND AUTHORITIES

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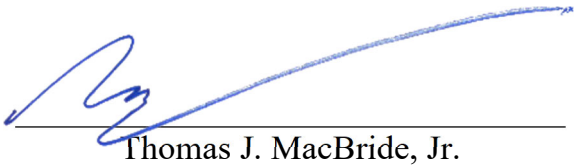
CERTIFICATE OF INTERESTED ENTITIES AND PERSONS

Pursuant to California Rules of Court, Rules 8.208 and 8.496, Petitioner hereby states that no entities or persons have either (1) an ownership interest of 10% or more in the party or parties filing this Certificate (Cal. Rules of Court, rule 8.208(e)(1)), or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves (Cal. Rules of Court, rule 8.208(e)(2)).

DATED: January 17, 2024

By: 

Thomas J. MacBride, Jr.
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DECISIONS OF THE PUBLIC UTILITIES COMMISSION

PETITION FOR WRIT OF REVIEW

To the Honorable Justices of the Court of Appeal of the State of California, First Appellate District:

I.
STATEMENT OF THE CASE

Pursuant to Rule 8.724 of the California Rules of Court and California Public Utilities Code[1] section 1756 et seq., California Community Choice Association ("Petitioner" or "CalCCA") brings this Petition for Writ of Review of Decisions ("D.") 23-06-029 (the "Decision") and 23-12-038 (the "Rehearing Decision") of the California Public Utilities Commission ("Respondent" or "Commission"). In the Decision and the Rehearing Decision, the Commission greatly exceeds the boundaries of its jurisdiction over local governments' implementation of community choice aggregation programs to provide electricity to their residents. The Commission has, by its own admission, only narrow authority over the implementation of community choice aggregation programs under Section 366.2. Critically, the Legislature has not expressly granted the Commission authority to prohibit a local government from taking the steps to implement

[1] All further statutory references are to the California Public Utilities Code unless otherwise specified.

such a program as the Commission has done in the decisions. And without express authority, as the California Supreme Court has consistently held, the Commission has no jurisdiction over the actions of local government bodies. This includes local government decisions whether and how to form a community choice aggregator ("CCA") to serve its residents.

The Commission's general authority over all load-serving entities, including CCAs, under Section 380(e), which allows the Commission to enforce requirements governing the procurement of electric generation resources ("Resource Adequacy" or "RA") neither provides the necessary express authority required nor expands the narrow grant of authority in Section 366.2 to support the decisions. The Commission simply has no authority to restrict the longstanding statutory right of customers through their local government bodies to form or join CCAs under Section 366.2(a) (referred to herein as the "Local Government CCA Right"). The Commission unlawfully exceeded the scope of its jurisdiction by restricting the Local Government CCA Rights without express legislative authority. Accordingly, this Court should grant review and set aside the Decision and the Rehearing Decision.

A. Public Utilities Code Section 366.2: the Local Government CCA Right

The Legislature enacted Assembly Bill 117 ("AB 117") in 2002, establishing the Local Government CCA Right, which gives residents of a community, together with their local government, the opportunity to form or join a CCA. CCAs procure electricity to meet their community's needs, rather than those same customers purchasing their electricity through the investor-owned utility serving their area, such as Pacific Gas and Electric Company ("PG&E"), Southern California Edison Company ("SCE"), or San Diego Gas & Electric Company.[2] (Stats. 2002, c. 838, codified at Cal. Pub. Util. Code, § 366.2(a)(1).) CCAs are formed by cities, counties, cities and counties, or groups of local government bodies joined through a joint powers agency. (Cal. Pub. Util. Code, §§ 331.1(a)–(b); see also Gov. Code, § 6500 et seq.)

CCA implementation involves several steps, as specified in Section 366.2. Prior to the Commission's involvement, an ordinance is passed by a city, county, city and county, or joint powers agency to implement a CCA

[2] While the CCA purchases and sells the electricity, the electricity continues to be delivered to the customer over the utilities' transmission and distribution lines.

or join an existing CCA. (Cal. Pub. Util. Code, § 366.2(c)(3).) As part of that public process, the CCA must develop an implementation plan, detailing organizational structure, operations and funding, participant rights and responsibilities, descriptions of third-party contracting procedures, and other information regarding the planned CCA. (Cal. Pub. Util. Code, §§ 366.2(c)(3)(a)–(g).) The implementation plan is then considered for adoption at a community public hearing (Cal. Pub. Util. Code, § 366.2(c)(3)) and a CCA is formed or the community elects to act through an existing CCA.

After community adoption of an implementation plan, the CCA files the plan with the Commission. (Cal. Pub. Util. Code, § 366.2(c)(5).) After receiving the implementation plan, the Commission must complete express and statutorily required tasks. Section 366.2, subdivisions (c)(5) though (7) outline these tasks, which include ministerial tasks such as notifying utility customers proposed for CCA service and certification of receipt of the implementation plan.[3]

[3] Within 10 days of the filing, the Commission must notify the utility serving the customers proposed for CCA service that an implementation plan has been filed. (Cal. Pub. Util. Code, § 366.2(c)(6).) The Commission must also certify that it has received the implementation plan within 90 days of receipt. (Cal. Pub. Util. Code, § 366.2(c)(7).)

After certification of receipt, the Commission must also provide its findings regarding the costs to be paid by the CCA to compensate the utility for electricity purchases it makes on behalf of the customer departing utility service for the CCA. (Cal. Pub. Util. Code, §§ 366.2(c)(7), (d)–(f).)

The Commission must then designate the "earliest possible date" for the CCA's implementation, taking into consideration the impact on the utility's Commission-approved annual procurement plan.[4] (Cal. Pub. Util. Code, §§ 366.2(c)(8).)

The Commission acknowledged its limited authority over CCA implementation in D.05-12-041, in which it issued regulations to implement AB 117 (Section 366.2).[5] The Commission concluded that AB

[4] In doing so, the Commission is ensuring that the utility's previously approved plans for procurement on behalf of its customers (including those leaving for CCA service) during that year are considered.

[5] Pursuant to Section 366.2's requirement that the Commission establish rules regarding CCA implementation, the Commission issued orders in 2004 and 2005 implementing CCA service in California. (See D.04-12-046 (Dec. 16, 2004); see also Exhibit 1.) In addition, the Commission issued Resolution E-4907 in 2018, adopting an informal review process for CCA implementation plans pursuant to the requirements of Section 366.2 and D.05-12-041 that coordinates the timing of the implementation plans with the timeline of the mandatory forecast filings for the Commission's RA electric procurement program. (Exhibit 3.)

117 does not confer authority for "general regulatory oversight of CCAs," further clarifying that "we do not believe [that] AB 117 intended to give this Commission broad jurisdiction over CCAs . . . ." (Exhibit 1, pp. 22, 66.) The Commission also concluded: "AB 117 does not provide us with authority to approve or reject a CCA's implementation plan or to decertify a CCA . . . ." (Exhibit 1, p. 10.) Critically, it concluded that its jurisdiction was limited by the express terms of AB 117: "We assume that if the Legislature intended for us to regulate the CCA's implementation plan in other ways, the Legislature would have included *explicit language in the statute* with regard to its intent." (Exhibit 1, p. 21, emphasis added.)

Since the enactment of AB 117, many communities have formed CCAs. Petitioner's membership comprises 24 CCAs formed by over 200 local government entities participating as individual government bodies and as joint powers agencies. Governed by local elected and appointed officials, CCAs in California provide electric service to approximately 14 million users of electricity in the State—equivalent to 37 percent of customers in the utility territories.

In issuing the Decision and Rehearing Decision, the Commission has overstepped its limited authority over CCA implementation, attempting to

unlawfully extend its separate grant of authority over RA under Section 380 to CCA implementation under Section 366.2 without the requisite express authority. In doing so, the Commission has unlawfully interfered with the rights of local governments and their residents granted by the Legislature in AB 117.

B. Public Utilities Code Section 380: Commission Authority to Enforce Resource Adequacy Requirements

In 2005, the Legislature enacted Section 380, which authorized the Commission to establish Resource Adequacy requirements for all California entities serving retail electric customers (commonly referred to as "load-serving entities" or "LSEs"). CCAs, as well as utilities, are LSEs and must abide by the Commission's RA requirements which are intended to, among other goals, "ensure the reliability of electrical service in California." (Cal. Pub. Util. Code, § 380(b).) Section 380 authorizes the Commission to require LSEs to procure sufficient electricity to serve their customers, as well as additional electricity resources to account for contingencies or emergencies. Section 380 also authorizes the Commission to "exercise its enforcement powers to ensure LSEs abide by the RA requirements." (Cal. Pub. Util. Code, §380(e).) Shortly after Section 380 was enacted, the Commission, under color of Section 2111 imposing

monetary penalties on privately owned utilities, established a financial penalty system for LSEs that fail to procure the required RA. (See Exhibit 2, p. 105.) The Commission concluded that "[c]ommunity choice aggregators are subject to enforcement action pursuant to Public Utilities Code section 2111" and that its "proposed procedures for the citation program fulfill the objectives of Public Utilities Code section 380." (Exhibit 2, p.112.)

C. The "New Rule" Unlawfully Extends Section 380 to Section 366.2

Despite the Legislature's clear delineation of the Commission's express authority over CCAs in the context of CCA implementation and, separately, RA requirements, the Commission recently issued a rule combining its CCA implementation and RA authority to unlawfully expand its jurisdiction over CCAs. On June 29, 2023, the Commission issued the Decision announcing its new RA deficiency rule (the "New Rule"). The New Rule prohibits customers, through their local governments, from joining an existing CCA by preconditioning a CCA's submission of an implementation plan to expand based on its Resource Adequacy compliance record, a condition that does not exist in Section 366.2. The New Rule prohibits such a submission if a CCA has any record of RA non-

compliance exceeding one percent over the past two years. The New Rule, issued in the absence of any express statutory basis, thus impairs the Local Government CCA Right.

The Rehearing Decision states that Section 380 and other statutes permit the Commission to control government bodies by "preventing further expansion" of their CCAs, even though none of the statutes the Commission relies on expressly permit the Commission to restrict government bodies in such a fashion. (Exhibit 6, p. 333.)

D. The Commission May Not Enforce the New Rule to Limit the Local Government CCA Right

The Court should grant this Petition and set aside the Decision and Rehearing Decision because subjecting government bodies to the New Rule exceeds the Commission's jurisdiction. First, the Commission has no authority over local government bodies in the absence of express statutory authority, which it does not have. The last two decisions of the California Supreme Court addressing decisions of the Commission annulled the decisions under review because the Commission had exceeded its jurisdictional bounds. (See *Monterey Peninsula Water Management District v. Pub. Util. Comm'n* (2016) 62 Cal.4th 693 ("*Monterey Peninsula*"); *Assembly of State v. Pub. Util. Comm'n* (1995) 12 Cal.4th 87.)

The Court's most recent decision on this issue, *Monterey Peninsula*, reaffirmed the long-standing precedent holding that the Commission has no authority over government bodies except as expressly provided by the Legislature. (*Monterey Peninsula*, *supra*, 62 Cal.4th 693; see also *County of Inyo v. Pub. Util. Comm'n* (1980) 26 Cal.3d 154 ("*County of Inyo*"); see also *Los Angeles Metropolitan Transit Authority v. Pub. Util. Comm'n* (1959) 52 Cal.2d 655 ("*LA Metro*").)

In the present case, the Legislature has enacted a statute establishing a limited role for the Commission in the expansion of service by CCAs (Section 366.2 (c)(8)). The Legislature has also authorized the Commission to "enforce . . . resource adequacy requirements…" (Cal. Pub. Util. Code, §380(e).) In the nearly 19 years both statutes have been in effect, the Legislature, despite myriad opportunities, has never expressly authorized the Commission to enforce RA requirements by denying or qualifying the Local Government CCA Right.[6] As the Commission itself noted when

[6] Section 366.2 was enacted in 2002 (Stats. 2002, c. 838); since then, it has been amended four times, in 2008 (Stats. 2008, c. 558), 2011 (Stats. 2011, c. 599), 2012 (Stats. 2012, c. 162) and 2019 (Stats. 2019, c. 407). Section 380 was enacted in 2005 (Stats. 2005, c. 367); since then, it has been amended six times, in 2008 (Stats. 2008, c. 558), 2011 (Stats. 2011, c. 599), 2014 (Stats. 2014, c. 627), 2018 (Stats. 2018, c. 851), 2022 (Stats. 2022, c. 367) and 2023 (Stats. 2023, c. 367). Each legislative proposal was

disclaiming authority to approve or reject a CCA's implementation plan, "[w]e assume that if the Legislature intended for us to regulate the CCA's implementation plan in other ways, the Legislature would have included explicit language in the statute with regard to its intent." (Exhibit 1, p. 21.) This statement was included in D.05-12-041 even though the Commission was aware that ten weeks earlier, the Legislature, with the Commission's support, had already enacted Section 380, which was due to take effect two weeks after D.05-12-041 was issued.[7] After Section 380 became effective, the Commission formally responded to its directives by (1) adopting a program for the imposition of monetary penalties; and (2) providing the statutory basis it believed to provide support for that program. (Exhibit 2.)

Eighteen years later, the Commission has forgotten that there is still no "explicit language" in law that permits the Commission to apply the New Rule to government bodies. Yet, contrary to at least three decisions of

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amended several times during the legislative process.

[7] The Commission supported AB 380, which enacted Section 380, as it made its way through the Legislature in the Summer of 2005. (See, e.g., Analysis of the AB 380 in the Senate Energy, Utilities and Communications Committee (June 30, 2015).) The Governor signed AB 380 on September 29, 2005. Ten weeks later, on December 15, 2005, the Commission issued D.05-12-041. (See Stats 2005, c.367.)

the California Supreme Court, the Decision and Rehearing Decision unlawfully seek to limit the Local Government CCA right through the New Rule.

In addition, the Commission's attempts to justify its jurisdictional overreach by asserting that its decisions deserve deference given its special expertise are misplaced. It is well-established that administrative agencies, including the Commission, are not entitled to such deference on questions of the agency's own jurisdiction. (*PG&E Corp. v. Pub. Util. Comm'n* (2004) 118 Cal.App.4th 1174, 1194, citing *Kaiser Foundation Health Plan, Inc. v. Zingale* (2002) 99 Cal.App.4th 1018, 1028.)

The Commission also attempts to rely on its authority under Section 701 in the absence of a legislative directive to the contrary, to do all that is necessary and convenient in connection with its regulation of utilities. The Commission mischaracterizes this authority, however, as being applicable to government bodies such as CCAs. Rather than rely on Section 701 (applicable by its own terms only to public utilities), the Commission must identify a statute expressly authorizing its action before it may take any action with respect to a government body such as a CCA. It cannot do so in this case.

Finally, the Commission asserts that the New Rule is necessary because its existing RA penalty system has not been effective. If the Commission finds that its RA enforcement has not been effective, however, it still must continue to act only within its express statutory authority over CCAs. It cannot attempt to address its concerns with the existing enforcement process by expanding its jurisdiction in a way that conflicts with another statute. Instead, the Commission must act only within the limitations of its existing authority, such as revising the existing RA penalty system to be more effective. To restore the distinction between the Commission's broad authority over privately owned public utilities and its narrow authority over government bodies such as CCAs, the Decision and Rehearing Decision must be reversed. Accordingly, this Court should grant review of D.23-06-029 and D.23-12-038 and set them aside. (Cal. Pub. Util. Code, §§ 1758(a)–(b).)

E. <u>This Matter is Properly Before the Court</u>

On July 26, 2023, Petitioner filed an Application for Rehearing of D.23-06-029. (Exhibit 5.) The Application for Rehearing alleged that the Commission's restrictions on CCAs under the New Rule (1) exceeded the Commission's jurisdiction over government bodies, (2) violated Section

380 by discriminating against CCAs, and (3) was not supported by substantial evidence in light of the whole record. (Exhibit 5, p. 299.)

On December 18, 2023, the Commission issued the Rehearing Decision. (Exhibit 6.) Relying principally on Section 380 and a wholly unsupported application of Section 701 and *PG&E Corp.* to government bodies, the Commission denied rehearing without modifying the Decision in any respect.

Following the issuance of the Rehearing Decision, Petitioner has timely filed this Petition for a Writ of Review of the Decision and Rehearing Decision.

II.
RELATED LITIGATION

This Petition for Writ of Review is related to another case filed on October 5, 2023, by the same Petitioner and pending before this Court, *California Community Choice Association v. California Public Utilities Commission* (Case No. A168807). The related petition seeks review of the Commission's Resolution E-5258, issued on April 28, 2023, and Decision 23-08-053, denying Petitioner's application for rehearing. It similarly argues that the Commission has acted outside of its express statutory jurisdiction and unlawfully broadened its authority over the government

bodies that serve as CCAs.

III.
JURISDICTION

Pursuant to Section 1756, subdivision (a), this Court has original jurisdiction to review the decisions of the Commission. Section 1756, subdivision (a), authorizes any aggrieved party to petition the Court of Appeal for a writ of review within 30 days after the Commission issues an order denying an application for rehearing, for the purpose of having the lawfulness of the decision "inquired into and determined."

The Commission adopted the Decision on July 5, 2023. Petitioner filed a timely application for rehearing of the Decision on July 26, 2023. (Cal. Pub. Util. Code, § 1731(b)(1).) On December 14, 2023, the Commission issued its Rehearing Decision, denying Petitioner's application for rehearing. (Cal. Pub. Util. Code, § 1756(c).) This Petition for Writ of Review is timely filed pursuant to Section 1756, subdivision (a).

IV.
ISSUES PRESENTED

In adopting a new rule prohibiting an existing CCA from submitting an implementation plan pursuant to Section 366.2 for future service expansion based on the CCA's past RA compliance, has the Commission:

1. Exceeded the limited jurisdiction provided by the Legislature over government bodies whose constituents have elected to implement CCA programs?
2. Failed to proceed in the manner required by Public Utilities Code Sections 366.2 and 380?

V.
PARTIES

Petitioner, CalCCA, is a California nonprofit mutual benefit corporation organized pursuant to Part 3 of Division 2 of the Corporations Code. CalCCA represents the interests of (1) local government bodies that operate their own CCA, (2) joint powers agencies formed by local governments that operate CCAs, and (3) local government bodies or joint powers agencies that have submitted an implementation plan with the Commission pursuant to Section 366.2, whether individually or through an expansion of an existing CCA's scope of service, and are preparing to launch service.

Petitioner's organizational mission is to foster a legislative and regulatory environment that supports the development and long-term sustainability of the provision of electric service by local governments through CCAs. Petitioner represents the interests of its members in

numerous proceedings before the Commission. The Petition presents questions of law that affect all CalCCA members seeking now or in the future to expand their scope of service to incorporate new communities electing to receive electric service from a CCA.[8]

Petitioner was an active party to Rulemaking 21-10-002 and served written comments on D.23-06-029, pursuant to Rule 14.3 (Cal. Code Regs. tit. 20, § 14.3); Petitioner sought rehearing of the Decision on July 26, 2023, pursuant to Section 1731, subdivision (b) and Rule 16.2 (Cal. Code Regs. tit. 20, § 16.2).

Respondent, Commission, is an administrative agency of the State of California established by Article XII of the California Constitution.

VI.
VENUE

The Petitioner's principal place of business in California is in Contra Costa County. Accordingly, venue is proper in the First Appellate District

[8] Petitioner as an association has standing to bring this petition for writ of review on behalf of its members because (1) its members have standing to sue in their own right; (2) the interests it seeks to protect are germane to the organization's purpose; and (3) neither the claim asserted nor the relief requested requires the participation in the lawsuit of each of the individual members. (See *Hunt v. Wash. State Apple Adver. Comm'n* (1977) 432 U.S. 333.)

pursuant to Section 1756, subdivision (d).

VII.
EXHIBITS

Pursuant to Section 1756, subdivision (a), the Commission certifies the record in the proceeding below to the Court only after the writ issues. The documents referred to in this Petition are provided as exhibits in a separate volume. All exhibits accompanying this Petition are true and correct copies of original documents on file with the Commission. The exhibits are incorporated by references fully set forth in this Petition. The exhibits are paginated consecutively from pages 1 through 361, and page references in this Petition are to the consecutive pagination.

VIII.
BASIS FOR RELIEF

Through the issuance of Decision 23-06-029 and Decision 23-12-038, the Commission has exceeded its limited authority over government bodies, failed to proceed as required by law, and committed other legal error. Accordingly, Petitioner asks this Court to grant review of Decision 23-06-029 and Decision 23-12-038 and set them aside. (Cal. Pub. Util. Code, §§ 1758(a)–(b).)

IX.
PRAYER FOR RELIEF

WHEREFORE, Petitioners respectfully ask this Court to grant relief, as follows:

1. Issue a writ of review, setting a date when Respondent Public Utilities Commission of the State of California shall file its return and a certified copy of the record in this matter, and a date when Petitioners may respond to that return.

2. Inquire into and determine the lawfulness of Commission Decision 23-06-029 and Decision 23-12-038.

3. After review, set aside Decision 23-06-029 and Decision 23-12-038.

4. Grant such other and further relief as the Court may deem just and proper.

DATED: January 17, 2024

Respectfully Submitted,

Downey Brand LLP

By: _____

Thomas J. MacBride, Jr.
Attorneys for California
Community Choice Association

VERIFICATION ON BEHALF OF CALIFORNIA COMMUNITY CHOICE ASSOCIATION

I, Elizabeth Vaughan, declare under penalty of perjury:

I am Chief Executive Officer of Petitioner California Community Choice Association. I am authorized to make this verification and do so on behalf of Petitioner. I have read the foregoing Petition for Writ of Review and know the contents thereof, and the facts therein stated, to be true to my own knowledge, except for those matters that are stated on information and belief, and as to those matters, I believe them to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on January 17, 2024, at San Francisco, California.

Elizabeth Vaughan
Chief Executive Officer

MEMORANDUM OF POINTS AND AUTHORITIES

I.
INTRODUCTION

The Commission has exceeded its authority by subjecting CCAs, as government bodies, to the New Rule. While the Commission has broad, general jurisdiction over privately owned utilities, its jurisdiction over government bodies, including CCAs, is strictly limited to authority expressly provided by the Legislature. Through the Decision and Rehearing Decision, the Commission acted outside of its jurisdiction: the New Rule prohibits customers, through their local governments, from joining an existing CCA by precluding a CCA, based on its RA compliance record, from submitting a implementation plan to expand. By stepping outside of its jurisdiction, the Commission has also failed to proceed in the manner required by law. Given the Commission's egregious overstep of its authority, the Court should grant this Petition and set aside the Commission's actions.

II.
STANDARD OF REVIEW

Any party aggrieved by a Commission decision may petition for a writ of review in the Court of Appeal or Supreme Court. (Cal. Pub. Util.

Code, § 1756(a).) A court ordinarily has no discretion to deny a timely-filed petition if it appears that the petition may be meritorious, because review by extraordinary writ is the exclusive means of judicial review. (*PG&E Corp. v. Pub. Util. Comm'n* (2004) 118 Cal.App.4th 1174, 1193 ("*PG&E Corp.*"); Cal. Pub. Util. Code, § 1759.)

Section 1757 prescribes the standard of review in this matter, which the Commission categorized as "ratesetting." (Rulemaking 21-10-002, Order Instituting Rulemaking to Oversee the Resource Adequacy Program, Consider Program Reforms and Refinements, and Establish Forward Resource Adequacy Procurement Obligations, p. 10 (Oct. 11, 2021).) Section 1757 applies to "a complaint or enforcement proceeding, or . . . a ratemaking or licensing decision of specific application that is addressed to particular parties . . . ." (Cal. Pub. Util. Code, § 1757(a).) As relevant here,[9] Section 1757, subdivision (a), provides that a decision in a ratemaking proceeding is legally erroneous and subject to being set aside on appeal if the commission has acted without, or in excess of, its powers

[9] The Commission also arguably uses the Decision and Rehearing Decision as a means of exercising licensing and enforcement authority over the CCAs. The Commission lacks such licensing authority, and attempting to enforce RA compliance by creating the New Rule, as described more fully herein, is improper.

or jurisdiction.

Section 1757 review must therefore address whether the Commission exceeded its jurisdiction and proceeded in the manner required by law. (Cal. Pub. Util. Code, §§ 1757(a)(1)–(2).) The interpretation of statutes that define or circumscribe the Commission's jurisdiction is a question of law subject to independent judicial review. (*PG&E Corp.*, *supra*, 118 Cal.App.4th at 1194–1195, citing *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 7 ("*Yamaha*").) While an agency's interpretation of certain statutes is afforded presumptive value given the agency's "special familiarity and presumed expertise with satellite legal and regulatory issues," such deference does not apply when the issue is the scope of the agency's jurisdiction. (*PG&E Corp.*, *supra*, 118 Cal.App.4th at 1194, citing *Kaiser Foundation Health Plan, Inc. v. Zingale* (2002) 99 Cal.App.4th 1018, 1028; *Santa Clara Valley Transportation Authority v. Pub. Util. Comm'n* (2004) 124 Cal.App.4th 346, 359 ("*Santa Clara Valley*").)

Were the Court to conclude that this matter should be reviewed instead under Section 1757.1, the applicable tests are the same. (See Cal. Pub. Util. Code, §§ 1757.1(a)(2)–(3).)

III.
THE COMMISSION ACTED IN EXCESS OF ITS JURISDICTION WHEN ISSUING DECISION 23-06-029 AND DECISION 23-12-038

The Commission's limitation of the Local Government CCA Right in D.23-06-029 and D.23-12-038 is premised on an unlawful expansion of its limited jurisdiction over government bodies. The Commission has provided no credible authority to support its position that it is empowered to act as it has. The Commission's Decision and Rehearing Decision must therefore be set aside.

A. The Commission is Not Entitled to Deference on Determinations of Its Own Jurisdiction

The Commission acknowledges the well-established legal principle that it is not entitled to deference by the courts on determinations of the scope of its own jurisdiction. (Exhibit 6, p. 331, citing *BullsEye Telecom, Inc. v. Pub. Util. Comm'n* (2021) 66 Cal.App.5th 301, 309.) Notwithstanding that rule, the Commission asks the Court to give credence to a sweeping assertion of ancillary jurisdiction over CCA implementation, based on inapposite authority and the Commission's previous constructions of its own jurisdiction. The Court is not required to endorse the Commission's viewpoint—nor should it.

The Commission attempts to side-step the rule against deference by

arguing that courts may "take into account" agency interpretations in a "contextual" manner, weighing factors like the thoroughness evident in the agency's consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and "all those factors which give it power to persuade, if lacking power to control." (Exhibit 6, pp. 331–332, citing *Yamaha*, *supra*, 19 Cal.4th at 8, 14–15 [internal citations and quotation marks omitted].) However, the Commission misapplies *Yamaha*, which dealt with an administrative agency's interpretation of specific provisions of the Revenue & Taxation Code for purposes of determining tax liability, not with the agency's view of its own jurisdiction. (*Yamaha*, *supra*, 19 Cal.4th at 5–6.) Even within the inapposite context of *Yamaha*, the court explained that "the standard for judicial review of agency interpretation of law is the *independent judgment* of the court, giving *deference* to the determination of the agency *appropriate* to the circumstances of the agency action." (*Id.* at 8, emphasis in original.) *Yamaha* ultimately concluded that the lower court erred in giving the administrative agency's interpretation "a weight amounting to unquestioning acceptance" and reversed the lower court's judgment. (*Ibid.*) *Yamaha* does not negate the principle that administrative agency determinations of their own jurisdiction are not

entitled to deference, nor does it provide a basis for this Court to nevertheless weigh the context in which the Commission issued the New Rule. Even if it did provide such a basis, the Court would find that the Commission exceeded its jurisdiction.

B. The Commission has No Jurisdiction over the Actions of Government Bodies Except as Expressly Authorized by the Legislature

The Commission acted outside of its narrow authority over CCAs through its issuance of the Decision and Rehearing Decision. The Commission's jurisdiction over government bodies is limited to the express authorization or direction of the Legislature. (*Monterey Peninsula*, *supra*, 62 Cal.4th at 698 ["[T]he Public Utilities Commission . . . has no authority, however, to regulate public agencies like the District, absent a statute expressly authorizing such regulation."]; *County of Inyo*, *supra*, 26 Cal.3d at 66–167, citing *LA Metro*, *supra*, 52 Cal.2d at 661 ["In the absence of legislation otherwise providing, the Commission's jurisdiction to regulate public utilities extends only to the regulation of privately owned utilities."].) In other words, the Commission may only take actions with respect to a government body pursuant to statutory authority that is "express," not simply inferred. (*Santa Clara Valley*, *supra*, 124

Cal.App.4th at 364 ["[I]n the absence of an express provision, we will not infer a legislative intent to confer PUC jurisdiction . . . ."].) Even where the activity of a government body has some relationship to an activity of a Commission-regulated utility, the Commission lacks jurisdiction over the activity of the government body in the absence of express legislative authority. In *Monterey Peninsula*, for example, the California Supreme Court held that the Commission lacked the jurisdiction to review a user fee imposed by a government body even though the user fee itself was billed and collected, on behalf of the government body, by a Commission-regulated utility. (*Monterey Peninsula*, *supra*, 62 Cal.4th at 699–700.)

Nor can the Commission presume the Legislature intended "to legislate by implication"—the modern rule of statutory construction disfavors doing so. (See *Educ. & Recreational Serv., Inc. v. Pasadena Unified Sch. Dist.* (1977) 65 Cal.App.3d 775, 782 [rejecting an argument that the Legislature implied meaning in a statute]; *San Diego Serv. Auth. for Freeway Emergencies v. Superior Ct.* (1988) 198 Cal.App.3d 1466, 1472, citing *People v. Welch* (1971) 20 Cal.App.3d 997, 1002 ["a Court should not presume the Legislature intended to legislate by implication"]; *Santa Clara Valley*, *supra*, 124 Cal.App.4th at 364) Therefore, even where the

activity of a government body has some relationship to an activity of a Commission-regulated utility, the Commission still lacks jurisdiction over the government body's activity in the absence of express legislative authority for the Commission action at issue. (See *Monterey Peninsula*, *supra*, 62 Cal.4th at 699–700.)

The Commission's stance that the Legislature deferred to the agency's expertise in RA and granted it considerable discretion to determine the actions necessary to accomplish the goals stated in Section 380 is incorrect. The Commission's view that it has "the authority to employ all necessary means to accomplish [its ends]," is a significant misstatement of the bounds of Commission authority. (Exhibit 6, p. 334, internal quotation marks omitted.) Instead, the Legislature authorized the Commission to use "its enforcement powers" under Section 380 and when the Commission implemented its enforcement program in response to Section 380 following its enactment it followed a statutory path to adopt the system of monetary penalties in place today. (Exhibit 2.) Those enforcement powers, within the meaning of Section 380, make no reference to the provisions of Section 366.2 or to extending the Commission's RA enforcement authority to include CCA implementation or expansion. To

the contrary, the Commission's RA enforcement authority and its limited authority over CCA implementation have no express statutory connection, as would be required for the New Rule to be lawful. (*Santa Clara Valley*, *supra*, 124 Cal.App.4th at 364; *Monterey Peninsula*, *supra*, 62 Cal.4th at 698.)

The Commission's attempt to validate its expanded jurisdiction by citing *Wendz v. California Department of Education* (2023) 93 Cal.App.5th 607, 622 ("*Wendz*") is inapposite. (Exhibit 6, p. 334.) *Wendz* dealt with a regulatory agency's ability to promulgate regulations to "fill up the details" of a statutory scheme over which the agency had express statutory authority to act. (*Wendz*, *supra*, 93 Cal.App.5th at 622–623.) The Commission may have statutory authority to implement the RA program under Section 380, but that authority does not expressly extend to rewriting the CCA implementation framework expressly provided in a different statute, Section 366.2.

The limitations on the Commission's narrow authority over government bodies stands in sharp contrast to its broad authority over public utilities. The Commission's failure to honor the contrasting levels of its jurisdiction over privately owned utilities and government operated

CCAs pervades the Decision and the Rehearing Decision. In the Rehearing Decision, for example, the Commission states that "[S]ection 366.2 empowers us to regulate CCAs to the extent that their procurement deficiencies affect other customers and [utilities]" and asserts that the New Rule "is not an expansion of our jurisdiction over CCAs but an enforcement of existing scope of authority." (Exhibit 6, p. 336.) However, the Commission points to no statute underlying its "existing scope of authority" (in Section 366.2 or anywhere else) that expressly permits it to restrict the exercise of the Local Government CCA Right based on RA violations. (See *Ibid*.)

Again, the Commission's authority to act adversely to a government body turns on whether the statutes governing the matter provide the Commission with the "express" authority to do so. (*Santa Clara Valley*, *supra*, 124 Cal.App.4th at 364.) In this case, no such authority exists.

C. The Commission Improperly Seeks to Subject Government Bodies to Section 701

1. Section 701 is Applicable to Privately Owned Public Utilities, Not Government Bodies

The Commission, possibly recognizing its lack of express authority under Sections 366.2 and 380 to establish the New Rule, attempts to glue

its jurisdiction together by invoking its general authority over public utilities under Section 701. The Commission's repeated citations to Section 701 as a primary basis for its jurisdiction to issue the New Rule are, however, in error. (Exhibit 6, pp. 331, 333, 334, 335.) While Section 701 does empower the Commission to do all things necessary and convenient in the exercise of its jurisdiction over privately owned public utilities, the statute is limited on its face to public utilities. Nothing in the statute or in case law authorizes the Commission to extend that broad authority to government bodies such as CCAs.

The contrast between the Commission's broad authority over privately owned utilities and its limited authority over government-operated CCAs is illustrated in a comparison of *Southern California Edison v. Public Utilities Commission* (2014) 227 Cal.App.4th 172 ("*SCE* "), with *Monterey Peninsula*. *SCE* described the broad scope of the Commission's jurisdiction over utility rates stating that "[S]ection 701 **. . .** vests the PUC with 'expansive' authority to 'supervise,' to 'regulate every public utility,' and '*do all things* . . . which are *necessary and convenient* in the exercise of such power and jurisdiction,' regardless of whether it is specifically designated in the Public Utilities Code 'or *in addition thereto*.'" (*SCE*,

supra, 227 Cal.App.4th at 186–187, emphasis in original, citations omitted.) *Monterey Peninsula*, on the other hand, reached a different result with regard to government bodies, stating that the "Public Utilities Commission . . . has no authority, however, to regulate public agencies like the District, absent a statute expressly authorizing such regulation." (*Monterey Peninsula*, *supra*, 62 Cal.4th at 698; see also, *County of Inyo, supra*, 26 Cal.3d at 166–167.) With respect to government entities, the limited jurisdictional tenet described in *Monterey Peninsula* and *County of Inyo* is the opposite of the Commission's broad authority to govern privately owned utilities, as set forth in *SCE* (broad jurisdiction, tantamount to a presumption of jurisdiction, unless "a specific statutory directive . . . *prohibits* the PUC's action"). (*SCE*, *supra*, 227 Cal.App.4th at 187, emphasis in original.)

The Commission's claim that, absent an express legislative directive to the contrary, Section 701 supports its authority to do all things necessary and convenient in its exercise of its authority under Section 380 is unsupported. (Exhibit 6, pp. 334–335.) The Commission is correct that (1) Section 701 describes actions the Commission may take with regard to public utilities, and (2) the scope of the actions the Commission may take

with respect to public utilities is generally limited only by express legislative restrictions. (Exhibit 6, p. 331.) With respect to government bodies such as CCAs, however, *the test is exactly the opposite*. The Court must find a statute that *expressly authorizes* the Commission's action, not a statute that expressly limits it. (*Monterey Peninsula*, *supra*, 62 Cal.4th at 698; *County of Inyo*, *supra*, 26 Cal.3d at 166–167.) Petitioner does not bear the burden of identifying an "express legislative restriction" limiting the Commission's authority under Section 701 to direct the actions of CCAs; Section 701 only applies to public utilities. It is the Commission's burden to identify a statute "expressly authorizing" its action because in the absence of such a statute, the Commission is without authority over government bodies such as CCAs.

The Commission has failed to identify such a statute and it fares no better with its inaccurate citations to case law, including *PG&E Corp*.

2. *PG&E Corp.* Did Not Vest the Commission with Authority over Government Bodies

Citing this Court's decision in *PG&E Corp.*, the Commission also claims that its jurisdiction over *entities adjacent to public utilities* mirrors its broad authority over public utilities under Section 701. (Exhibit 6, p. 333 [citing *PG&E Corp*.].) *PG&E Corp.* made no such holding and

repeatedly stressed that it found only that the Commission was vested with limited jurisdiction over PG&E's parent holding company under Section 701 because the Commission was required "to enforce the holding company conditions that were the preconditions to formation of the holding companies." (*PG&E Corp*, *supra*, 118 Cal App. 4th at 1201.) Moreover, in *PG&E Corp.*, the Petitioner contesting the Commission's jurisdiction was a *private company* (i.e., PG&E's holding company). The Commission's reliance on *PG&E Corp.* suggests to the Court that it resolves the question of jurisdiction in this matter as though government bodies such as CCAs are privately owned public utilities or some other private entity "adjacent to" a privately owned public utility. *PG&E Corp.* cannot be read to allow an extension of Commission authority over government bodies proscribed by *Monterey Peninsula* and *County of Inyo*.

Nor can Section 701 and *PG&E Corp.* be stretched to legitimize the New Rule on the basis that its exercise of jurisdiction over CCA implementation is "cognate and germane to utility regulation." (Exhibit 6, p. 333–334.) At the outset, the Commission misapplies the "cognate and germane" standard, which does not, as the Commission states, apply to actions or regulations that the Commission itself undertakes or issues.

Instead, the standard applies to the powers conferred on the Commission by the Legislature. (*Hartwell Corp. v. Superior Ct.* (2002) 27 Cal.4th 256, 280 ("*Hartwell*"); *Morel v. Railroad Comm'n of California* (1938) 11 Cal.2d 488, 492 ("*Morel*") ["One of the limitations placed upon the [Legislature's] grant of authority to confer additional powers upon the commission, it has been held, is that such additional powers must be cognate and germane to the regulation of public utilities . . . ."].) *Hartwell* and *Morel* reaffirm the standard adopted 110 years ago in *Pacific Telephone & Telegraph Company v. Eshleman* (1913) 166 Cal. 640, 689, that "[t]he legality of such powers as the Legislature has or may thus confer upon the Commission, if cognate and germane to the subject of public utilities, may not be questioned under the state Constitution." (See also *County of Sonoma v. State Energy Res. Conservation etc. Comm'n* (1985) 40 Cal.3d 361, 369 ["The Public Utilities Commission has been established under a constitutional enabling act with full power conferred on the Legislature to enact legislation even contrary to any other provisions of the Constitution provided it be cognate and germane to the regulation and control of public utilities."]; *S. California Gas Co. v. Pub. Util. Comm'n* (1979) 24 Cal.3d 653, 656 ["This plenary power, however, is subject to the limitation that the

additional powers bestowed upon the commission must be 'cognate and germane to the regulation of public utilities.'"]; *People v. W. Air Lines* (1954) 42 Cal.2d 621, 634 ["Such powers 'must be cognate and germane to the regulation of public utilities. . . .'"]; *Frost v. R.R. Comm'n of California* (1926) 197 Cal.230, 241, rev'd sub nom. *Frost v. R.R. Comm'n of California* (1926) 271 U.S. 583 ["It must be taken as settled that this grant of authority to confer additional powers is limited (so far as applicable to the question here under consideration) to such additional powers as are cognate and germane to the regulation of railroads and other transportation companies."].)

It is therefore irrelevant whether the Commission opines that the New Rule is cognate and germane to the Commission's regulation of public utilities. The Commission's actions in promulgating the New Rule must instead only be evaluated based on the express authority the Legislature gave to the Commission under Sections 366.2 or 380.

Section 366.2 establishes clear parameters for the Commission's authority over CCAs. In addition, D.05-12-041, which adopted the Commission's framework for implementing Section 366.2, expressly disclaimed the jurisdictional extension of *PG&E Corp.* by stating that,

while the Commission's authority over holding companies derives from its authority over their regulated utility subsidiaries, "[n]o such circumstance or law exists with regard to the implementation of CCA programs." (Exhibit 1, p. 16.) The Commission's ability to establish and enforce RA requirements under Section 380 cannot, therefore, be extended to prevent CCA implementation on the basis that the New Rule is "cognate and germane" to the Commission's authority over regulated utilities. (Exhibit 6, pp. 333–334.)

The Commission has established the RA program requirements and has already developed an enforcement framework, pursuant to its express authority under Section 380, to address compliance issues. (Exhibit 5, pp. 318, 321–322.) If the Commission believes the enforcement framework is not working as intended, the solution is to change that framework or seek additional authority from the Legislature, not to impose limits on CCA implementation that lie outside the Commission's present authority. (*Ibid.*)

The Commission also attempts to stretch *PG&E Corp.* to distinguish cases that describe the limits of the Commission's authority under Section 701 to ignore express statutory directives. (Exhibit 6, pp. 334–335.) The Commission first cites *Assembly of State v. Public Utilities Commission*

(1995) 12 Cal.4th 87 ("*Assembly*"), which found that Section 701 did not allow the Commission to disregard an express legislative directive regarding ratepayer refunds to divert a portion of those funds for a purpose other than refunding the utility's customers. (*Assembly*, *supra*, 12 Cal.4th at 102–104.) The Commission also cites *Pacific Telephone & Telegraph Company v. Public Utilities Commission* (1965) 62. Cal.2d 634 ("*Pacific Tel.*"), which held that Section 701 did not authorize the Commission to disregard the express legislative directive against setting utility rates retroactively provided in Section 729. (*Pacific Tel.*, *supra*, 62 Cal.2d at 653–654.) The fact that *PG&E Corp.* distinguished *Assembly* and *Pacific Tel.* from the holding company matter, however, does not validate the Commission's view of its own jurisdiction here to issue the New Rule. To the contrary, because *PG&E Corp.* dealt with the Commission's jurisdiction over the privately owned holding company of a regulated privately owned utility, based on a number of conditions to which PG&E and its holding company agreed, it is appropriate that the court found *Assembly* and *Pacific Tel.* to be inapposite. (See *PG&E Corp.*, *supra*, 118 Cal.App.4th at 1188, 1198–1199.) The inescapable reality is that *PG&E Corp.* does not bolster the Commission's decision here to limit CCA

implementation by a government body based on past RA compliance, and none of the holdings, citations, or dicta in *PG&E Corp.* aid the Commission in any way.

D. The Statutes on which the Commission Relies Do Not Expressly Authorize the Commission to Delay the CCAs' Plans to Expand Service based on Application of the New Rule

None of the statutes relied on by the Commission to justify its actions, including Sections 366.2, 365.1, or 380, provide the express authority necessary to render the New Rule lawful. The Commission's attempt to validate the New Rule based on its argument that it "harmonizes" the statutory provisions is similarly without merit. Instead, the Commission must establish express authority for the New Rule, which it cannot.

1. Section 380 Does Not Vest the Commission with Jurisdiction to Create the New Rule

Neither the plain language of Section 380 nor the Commission's reliance on inapposite authority to expand its authority justify imposition of the New Rule on government bodies. It is not in dispute that Section 380 gives the Commission authority to establish RA requirements with respect to CCAs and to enforce compliance with those requirements. (See Exhibit 6, p. 332; Exhibit 5, p. 309.)

The plain language of Section 380, however, fails to provide the requisite express authorization for the New Rule, and the Commission's response to the enactment of Section 380 adopted an enforcement program premised on specific statutory support.[10] (Exhibit 2.) Indeed, the Legislature has had multiple opportunities to provide the Commission with the express authority it now claims to hold but has not done so.

Section 380 gives the Commission authority to implement and enforce RA requirements in a nondiscriminatory manner, directs the Commission to ensure the reliability of electric service in California, and directs the Commission to equitably allocate the cost of generating capacity among customers to avoid cost-shifts. (Exhibit 5, pp. 308–309; Cal. Pub. Util. Code, § 380(b)(3), (e), and (h).) However, the Commission complains that its "already employed" its express authority under Section 380, which has been "to no avail" in achieving its goals. (Exhibit 6, p. 339.) Despite its ability to try different approaches under its existing authority, such as improving its penalty system or establishing different methods of cost allocation, the Commission instead took a different avenue wholly outside

[10] Petitioner takes no position here with regard to whether the statutory support cited in Res. E-4017 actually provides that support.

of its express authority in establishing the New Rule. This overreach, however, is not what the Legislature allowed.

In addition, the Commission argues that it may create a brand new enforcement mechanism under its penumbral authority to do all things "necessary and convenient to compel compliance" conferred by Section 701. (Exhibit 6, p. 333.) As explained above, neither Section 701 nor *PG&E Corp.* provide justification for such an expansion of the Commission's authority.

Furthermore, the Commission is precluded from issuing a rule or regulation under its existing authority if that rule or regulation conflicts with another statute. (See *County of San Diego v. Bowen* (2008) 166 Cal.App.4th 501, citing Govt. Code §§ 11342.1, 11342.2 [agency action must be within the scope of authority conferred by the Legislature, and cannot be inconsistent with other authorizing statutes]; see also *Agricultural Labor Relations Bd. v. Superior Ct.* (1976) 16 Cal.3d 392, 419 [even if an agency action is consistent with its authorizing statutes, the action may still be deemed void if it conflicts with another statute].) Therefore, even if the Commission's actions can be categorized as proper under Section 380 (which they are not); the Commission is not entitled to

promulgate a rule under Section 380 and restrict the Local Government CCA Right granted under Section 366.2. This is especially the case given the Commission has the ability under Section 380 to simply enforce the express authority it already has.

2. Sections 366.2, 365.1, and 380 Cannot be Harmonized to Give the Commission Jurisdiction to Create the New Rule

The Commission, again potentially recognizing its lack of express authority to enact the New Rule, also attempts to justify its actions by "harmonizing" Sections 380, 365.1, and 366.2. (Exhibit 4, p. 257.) As a preliminary matter, however, statutes need only be harmonized when there is an apparent conflict between them. The California Supreme Court noted that "[t]he cases in which we have harmonized potentially conflicting statutes involve choosing one plausible construction of a statute over another in order to avoid a conflict with a second statute." (*State Dept. of Pub. Health v. Superior Ct.* (2015) 60 Cal.4th 940, 956; see also *Grassi v. Superior Ct.* (2021) 73 Cal.App.5th 283, 307.) Moreover, statutes to be harmonized must relate to the same subject. (See *Wirth v. State of California* (2006) 142 Cal.App.4th 131, 140 [finding statutes addressing "salary and benefits" and "supervisory compensation differential" to be on the same subject matter]; see also *Med. Bd. of California v. Superior Ct.*

(2001) 88 Cal.App.4th 1001, 1005 [finding statutes addressing discipline action for a licensee to be on the same subject matter].) But the California Supreme Court has warned that the requirement to harmonize potentially inconsistent statutes when possible "is not a license to redraft the statutes to strike a compromise that the Legislature did not reach." (*State Dept. of Pub. Health*, *supra*, 60 Cal.4th at 956; see also *Grassi*, *supra*, 73 Cal.App.5th at 307; *Jarman v. HCR ManorCare, Inc.* (2020) 10 Cal.5th 375, 392, citing *Cornette v. Department of Transportation* (2001) 26 Cal. 4th 63, 73–74 [a statutes may not be rewritten, either by inserting or omitting language, to make it "confound to a presumed intent that is not expressed."].)

Despite the Commission's attempt to justify the New Rule based on an argument of "harmonization," the plain meaning of Sections 380, 365.1, and 366.2 is unambiguous and the statutes are not in conflict. Section 380 provides the terms under which the Commission is to establish and oversee the RA program; Section 365.1 governs RA activities for Electric Service Providers; and Section 366.2 governs CCA implementation.[11] The

[11] Notably, while Section 394.25 provides that the Commission "may enforce the provisions of Sections 2102, 2103, 2104, 2105, 2107, 2108, and 2114 against electric service providers as if those electric service providers

programs and entities addressed in each statute are clear and distinct from one another. Even assuming a conflict did exist between the statutory provisions, it would be one of the Commission's own making. Nothing in Section 366.2 prevents the Commission from administering and enforcing the RA program governing CCAs; to the contrary, the Commission has overseen and enforced the RA program under Section 380 without aid of the New Rule for years. Similarly, nothing in Section 380 prevents the Commission from performing its limited duties under Section 366.2 in accordance with the Legislature's directives. The provisions only come into conflict when the New Rule limiting CCA implementation (governed by Section 366.2) is used as an RA enforcement mechanism. (Exhibit 5, p. 317.)

This Court has rejected parties' attempts to harmonize statutes that are not in conflict with each other. In *Shiheiber v. JPMorgan Chase Bank, N.A.*, the party advocating harmonization attempted to interpret Code of Civil Procedure ("CCP") Section 575.2, providing enforcement mechanisms for superior courts for their local rules, by reading it in the "context of its surrounding statutes" including CCP section 575 and CCP

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were public utilities", no comparable provision exists with regard to CCAs.

section 128.5. (*Shiheiber v. JPMorgan Chase Bank, N.A.* (2022) 81 Cal.App.5th 688, 699.) The Court found that the language, subject, and provenance of Section 575 was entirely different to those of the other statutes and had no bearing on the interpretation of 575.2; the Court further observed that the proponent had identified no actual conflict between the provisions. (*Ibid.*) And in addressing another argument that one statute must be applied under the broader rules set forth in another statute, the Court again concluded that the proponent failed to identify any conflict between the provisions and declined to "read into the statutory language a limitation that the Legislature did not state expressly." (*Id.* at 701.)

The Commission has similarly failed to identify a conflict between Sections 380, 365.1, and 366.2. Instead, by promulgating the New Rule, the Commission has redrafted Section 380 to override the Local Government CCA Right provided in Section 366.2, or it has redrafted Section 366.2 to include a new criterion for certification of CCA implementation plans not found in that statute. Neither outcome is allowed nor acceptable.

IV.
THE COMMISSION FAILED TO PROCEED IN THE MANNER REQUIRED BY LAW WHEN IT DEPARTED FROM THE REQUIREMENTS OF SECTIONS 366.2 AND 380

As a separate ground, the Commission's incorrect construction of the statutes governing CCA implementation and RA compliance, and its own jurisdiction, constitutes a failure to proceed in a manner required by law. (Cal. Pub. Util. Code, § 1757(a)(2).) In *City of Marina v. Board of Trustees of California State University*, the California Supreme Court held "an agency's 'use of an erroneous legal standard constitutes a failure to proceed in a manner required by law.'" (*City of Marina v. Bd. of Trustees of California State Univ*. (2006) 39 Cal.4th 341, 355, quoting *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 88.)

In Section III, Petitioner explains why a correct construction of the statutes at issue herein shows that the Commission has not been expressly vested with the jurisdiction to restrict the Local Government CCA Right in the manner provided in D.23-06-029 and D.23-12-038. (Cal. Pub. Util. Code, § 1757(a)(1).)

V.
CONCLUSION

For the foregoing reasons, Decisions 23-06-029 and 23-12-038 exceed the Commission's jurisdiction and must therefore be set aside.

DATED: January 17, 2023 DOWNEY BRAND LLP

By: _____

Thomas J. MacBride, Jr.
Attorneys for California Community Choice Association

CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court, rule 8.204(c), I certify that according to Microsoft Word the attached petition is proportionally spaced, has a typeface of 13 points, and contains 9,605 words.

DATED: January 17, 2024 DOWNEY BRAND LLP

By: _____

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Attorneys for California Community Choice Association