**A169524**

**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FIRST APPELLATE DISTRICT**
**DIVISION TWO**

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California Community Choice Association

*Petitioner,*

*v.*

Public Utilities Commission of the State of California

*Respondent.*

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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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# PETITIONER'S REPLY TO RESPONDENT'S ANSWER

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Document received by the CA 1st District Court of Appeal.

## TABLE OF CONTENTS

**Page**



Document received by the CA 1st District Court of Appeal.

## TABLE OF AUTHORITIES

**Page**

**CASES**



Document received by the CA 1st District Court of Appeal.

## TABLE OF AUTHORITIES
**(Continued)**

**Page**



**STATUTES**



**CALIFORNIA PUBLIC UTILITIES CODE**



Document received by the CA 1st District Court of Appeal.

## TABLE OF AUTHORITIES
**(Continued)**

**Page**






Document received by the CA 1st District Court of Appeal.

## TABLE OF AUTHORITIES
**(Continued)**

**Page**



**DECISIONS OF THE CALIFORNIA PUBLIC UTILITIES COMMISSION**



**CALIFORNIA CONSTITUTION**



Document received by the CA 1st District Court of Appeal.

In accordance with Rule 8.724 of the California Rules of Court, and consistent with the Stipulation for Extension of Time submitted by the parties on January 26, 2024, the California Community Choice Association (CalCCA) submits its Reply to Respondent California Public Utilities Commission's (Commission) Answer to the Petition for Writ of Review (Answer). The Commission's Answer provides no basis for preserving Decision 23-06-029 (the Decision) or Decision 23-12-038 (the Rehearing Decision). CalCCA maintains that this Court should grant review and set both decisions aside.

## I. STATUS OF RELATED LITIGATION

On May 6, 2024, the First District Court of Appeal, Division 4, issued a formal writ in Case No. A168807, *California Community Choice Association v. California Public Utilities Commission*.

## II. INTRODUCTION

The issue before the Court is simple: Does the Commission have unbridled authority to create and impose a new enforcement mechanism on Community Choice Aggregators (CCAs), notwithstanding the fact that the new mechanism conflicts with the express statutory rights of communities to join a CCA, conflicts with the express statutory limits on the



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Commission's jurisdiction over CCA expansion, and is not expressly grounded in any statute? Despite the Commission's efforts to argue that the existing statutory limitations on its chosen enforcement mechanism are inapplicable, the answer to the question is "no."

### A. The Commission's Resource Adequacy Enforcement Authority is Not Unlimited

The Commission's focus on Public Utilities Code[1] section 380 as the source of its ability to enforce the Resource Adequacy (RA) program by limiting CCA expansion (the New Rule) side-steps the existence and relevance of Sections 366.2, subdivision (a)(1) and 366.2, subdivision (c)(8), which expressly limit the Commission's authority to create the New Rule. Section 380, subdivision (e) (380(e)) authorizes the Commission to implement and enforce the RA requirements in a nondiscriminatory manner (Answer, p. 22), but the Commission's choice to enforce the RA requirements *by limiting CCA expansion* (1) exceeds the Commission's enforcement authority as it has itself described it; (2) is not grounded in any statutory provision authorizing it to deny service to new CCA customers as a means of "enforcement"; and (3) conflicts with Section 366.2, the only

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



Document received by the CA 1st District Court of Appeal.

statute that addresses CCA expansion, thus preventing residents from exercising their statutory right to join a CCA. The limited authority that Section 366.2 vests in the Commission does not include RA enforcement.

There is no dispute that the Commission can exercise its enforcement authority to promote RA compliance, but *how* the Commission can exercise that authority is still dictated by statute and cannot conflict with other statutory rights. The mechanisms by which the Commission can enforce statutes and its own orders are clearly delineated by the Legislature. As the Commission stated recently, it can (1) enforce its orders by suit (Section 2101), or by mandamus or injunction (Section 2102); (2) impose fines (Sections 2100, 2107, and 2108); (3) award reparations (Section 735); (4) sue to recover fines by an action in superior court (Section 2104); (5) punish a regulated entity with contempt (Sections 2112 and 2113); and (6) entertain complaints against a public utility (Section 1702). (Decision (D.) 23-10-032,[2] pp. 20–21.) The Commission's existing RA enforcement framework is pursued under color of its authority to seek fines. (Petition,

[2] This Decision is available in the Commission's electronic decision database at: https://docs.cpuc.ca.gov/PublishedDocs/Published/G000/M520/K712/520712478.PDF.



Document received by the CA 1st District Court of Appeal.

pp. 16–17; see also Answer, p. 22 [citing D.21-06-029, which revised the financial penalty framework for RA noncompliance (D.21-06-029, pp. 55–60)].) Section 380(e) authorizes the Commission to enforce the RA requirements, but the existing statutory mechanisms by which the Commission is permitted to pursue that enforcement still apply. The Commission cannot, as it proposes in this case, expand its statutory enforcement authority without enabling legislation.

### B. The Commission's Cited Authority Does Not Support the New Rule

A plain reading of the Answer shows that the Commission's arguments in support of its jurisdiction, its governing statutes, and its own precedent give only the illusion of support. The Commission's jurisdictional claims rest principally on its own decisions, including those under review here, rather than (fairly construed) applicable statutes and case law. (See Answer, pp. 23 [citing D.23-06-029], 27 [citing D.05-10-042].) In addition to the fact that a decision being challenged for its jurisdictional holdings makes a poor foundation on which to build jurisdictional arguments, the Commission's interpretations of its own powers and jurisdiction are not entitled to deference. (Petition, p. 21 [citing *PG&E Corp. v. Pub. Util. Com.* (2004) 118 CalApp.4th 1174, 1194



Document received by the CA 1st District Court of Appeal.

("*PG&E Corp.*")].) The Commission acknowledges that no deference is required but seeks refuge in *Yamaha Corporation of America v. State Board of Equalization* (1998) 19 Cal.4th 1, 8 ("*Yamaha*"), yet it offers none of the "contextual" justification for the New Rule that *Yamaha* requires. (See Answer, p. 21.) And the Commission's citations to D.05-10-042 for the largely noncontroversial proposition that regulatory programs must have consequences for noncompliance if they are to succeed can hardly form the basis for now concluding that, back in 2005, the Commission had somehow reserved to itself the jurisdiction to issue the New Rule. (See Answer, p. 27; see also Petition, pp. 14–15.)

The Commission fares no better with its analysis of case law or statutory authority. While it persistently argues that Section 380 authorizes it to enforce RA requirements—a position that CalCCA does not dispute—the Commission fails to provide statutory authority for its view that Section 380, enacted 20 years ago, (apparently unbeknownst to all then involved) *always* authorized the Commission to prevent government bodies from expanding CCA service to new communities. That expansive view of Section 380 is not consistent with the views expressed in the 2005 Decision issued contemporaneously with the enactment of Section 380. (Petition, p.



Document received by the CA 1st District Court of Appeal.

20; see also discussion at pp. 13–14, *infra*.) More importantly, it is (1) not consistent with any statutory text describing the Commission's "enforcement" powers, and (2) not consistent with, and in fact conflicts with, Section 366.2.

The Commission's attempts to distinguish *County of Inyo v. Public Utilities Commission* (1980) 26 Cal.3d 154 ("*County of Inyo*"), *Monterey Peninsula Water Management District v. Public Utilities Commission* (2016) 62 Cal. 4th 693 ("*Monterey Peninsula*"), and *Santa Clara Valley Transportation Authority v. Public Utilities Commission* (2004) 142 Cal.App.4th 346 ("*Santa Clara Valley*"), all of which hold that the Commission cannot regulate local government actions without express statutory authorization, fail for the same reason. (Answer, pp. 25–26, 29–32.) The Commission's jurisdiction to enforce RA requirements is not at issue. The issue is whether the Legislature has expressly expanded the Commission's enforcement powers to include restricting a government body's statutory right to serve new CCA customers. Nothing in Section 380 so provides, and Section 701 cannot be used to impute an open-ended "anything goes" approach to enforcement that, even if applicable to *public utilities* under Section 701, is not consistent with jurisprudence limiting the



Document received by the CA 1st District Court of Appeal.

Commission's authority to restrain the actions of *government bodies*. The Commission's arguments that Section 366.2 does not conflict with the New Rule are similarly based on the Commission's misinterpretation of the foundational principles that govern its authority over government bodies. (Answer, pp. 28–32.)

### C. The Local Government CCA Right is Not Limited By the Commission's Resource Adequacy Enforcement Authority

Not only does the Answer proclaim an unsupported view of sweeping Commission jurisdiction over CCAs, but it reveals the Commission's apparent belief that CCAs have no absolute right to exist—notwithstanding clear statutory authority to the contrary, and in stark contrast to the Commission's own proclamations, made contemporaneously with the enactment of Section 380(e), that its authority over CCAs is quite limited. (Answer, pp. 33–34; Petition, pp. 18–21 and fn. 7.) Section 366.2(a)(1), which establishes the right of local communities to form a CCA (the "Local Government CCA Right"), is explicit: "Customers shall be entitled to aggregate their electric loads as members of their local community with community choice aggregators." Neither Section 366.2 nor any other statutory provision gives the Commission express authority to



Document received by the CA 1st District Court of Appeal.

interfere with customers' rights to choose CCA service. (Petition, pp. 11–16.) The Commission itself even acknowledged, at the same time Section 380 was enacted, that its jurisdiction is limited to the provisions of Section 366.2 that dictate its role in reviewing CCA implementation and expansion plans: "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." (Petition, p. 15; Petitioner's Appendix (PA), Exh. 1, p. 21.)

The Commission's newfound position that Section 366.2(a)(1) does not provide an absolute right for local governments to form CCAs (regardless of the Commission's other regulations and RA requirements) is based on a flat misinterpretation of Section 366.2 and the statutes delineating the manner in which the Commission can exercise its enforcement authority. (See Answer, p. 34.) And the Commission's view in its Answer that Section 366.2 simply "created the infrastructure for CCAs within the Commission" is concerning, as it suggests that CCA formation and operations are housed within the Commission's jurisdiction—which they are not. (*Ibid.*) The well-established rule bears repeating: the Commission only has the jurisdiction over government

Document received by the CA 1st District Court of Appeal.

bodies that the Legislature expressly grants it. (*County of Inyo*, *supra*, 26 Cal.3d at 166–167; *Monterey Peninsula*, *supra*, 62 Cal. 4th at 698; and *Santa Clara Valley*, *supra*, 142 Cal.App.4th at 359.) The express provisions of Section 366.2(c)(8) that enumerate the actions the Commission may take regarding CCA formation and expansion prevent the Commission from enforcing the RA program *by restricting CCA expansion*. The Commission has many enforcement options available to it, but not that one.

## III. ARGUMENT

The Commission's Answer provides no argument or authority that cures the regulatory overreach of the Decision and Rehearing Decision. The Court should therefore grant review and set both Decisions aside.

### A. CCAs Have The Right To Exist

The Commission, for the first time, takes a concerning new position that CCAs have no absolute right to exist. (Answer, pp. 33–34.) The Commission ignores the express statutory right of customers to "aggregate their electric loads as members of their local community with community choice aggregators." (Pub. Util. Code, § 366.2(a).) Section 366.2(a) unambiguously grants customers, through their local government bodies,



Document received by the CA 1st District Court of Appeal.

the right to form or join community choice aggregators.

The Commission may not interfere with a local government's right to form or join a CCA. The Commission has, by its own admission, only narrow authority over the implementation of community choice aggregation programs under Section 366.2. CCAs are entities of local governments, governed by local elected and appointed officials. (Cal. Pub. Util. Code, §§ 331.1(a)–(b); see also Gov. Code, § 6500 et seq.) In D.05-12-041, in which the Commission issued regulations to implement AB 117 (Section 366.2), the Commission considered the issue of "whether and the extent to which AB 117 grants [the] Commission jurisdiction over CCAs and, by implication, the cities and counties that create and oversee them." (PA, Exh. 1, p. 13.) The Commission found it has limited regulatory authority over CCA program implementation and, in turn, limited jurisdiction over the local government bodies that implement CCAs. (PA, Exh. 1, p. 17.)

The Commission's Answer selectively quotes from D.05-12-041 to piece together an argument that the Commission may interfere with the customers' election to implement a CCA. (See Answer, pp. 33–34.) The Commission's Answer ignores the central holding of that decision: the Commission's "authority over CCAs is circumscribed" and limited by the



Document received by the CA 1st District Court of Appeal.

express terms of AB 117. (PA, Exh. 1, pp. 15, 21–22.) As outlined in the Petition, Section 366.2 establishes express parameters for the Commission's authority over CCA implementation. (Petition, pp. 12–14.) Nothing in Section 366.2 supports the Commission's decision to extend its separate grant of authority over RA under Section 380 to CCA implementation. The Commission has overstepped its authority under Section 366.2 and unlawfully interfered with the rights of local governments.

The Commission's apparent interpretation that AB 117 established CCAs "within the Commission" is further troubling. (Answer, p. 34.) CCAs do not exist "within the Commission"; they are entities of local governments. The Commission has narrow jurisdiction over CCA implementation, which the Commission can only exercise after a community has chosen to form or join a CCA. AB 117 may have established the limited steps the Commission must take to implement its role in the launch of a CCA's operations, but the bill did not ensconce CCAs under the Commission's general jurisdiction.

CalCCA also notes the Commission's unsupported remarks that suggest that CCAs have brought these new regulations on themselves. The



Document received by the CA 1st District Court of Appeal.

Commission notes that the presence of CCAs and Electric Service Providers ("ESPs") has "made California's power grid and energy markets multi-faceted and highly complicated." (Answer, p. 7.) The Commission also observes that RA violations by non-utility market participants (such as CCAs and ESPs) "puts an extraordinary stress on electric service reliability for all . . . customers." (*Id.* at p. 8.) "In the face of these increasing challenges," the Commission concludes, it has enacted more stringent and specific RA obligations and a stricter enforcement scheme. (*Ibid.*) The Commission's narrative perpetuates the unsupported conclusory statements that riddled the Decision and Rehearing Decision. (PA, Exh. 1, pp. 323–325 [CalCCA Application for Rehearing of D.23-06-029].) On rehearing, CalCCA noted that the RA market is complex and that the record lacked evidence supporting the Commission's conclusions that RA procurement shortfalls actually caused cost-shifting or procurement subsidization. (*Ibid.*) The Commission's narrative is convenient to justify the perceived need for the New Rule, but the Commission's allegations have never been supported by record evidence.

On the whole, the Answer gives the impression that the Commission yearns for the days of yore when the utilities provided all electric service



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and the entire retail electric market was under the Commission's control. But times have changed—by order of the Legislature.

### B. The Commission Overstates the Deference to Which its Decisions are Entitled Before this Court

The Commission states that because it is not "an ordinary administrative agency" the standards of appellate review governing this proceeding place an unusually high burden on the Petitioner. (Answer, pp. 18–19.) The Commission, using text found in virtually every Commission Answer to a Petition for Writ of Review, states that:

> The presumption in favor of the validity of Commission decisions is a "strong" one. (*Pacific Gas & Electric Co. v. Public Utilities Com.* (2015) 237 Cal.App.4th 812, 838, quoting *Greyhound Lines, Inc. v. Public Utilities Com*. (1968) 68 Cal.2d 406, 410 ["There is a strong presumption of validity of the commission's decisions."]; *Pacific Tel. & Tel. Co. v. Public Utilities Com.* (1965) 62 Cal.2d 634, 647 ["strong presumption of the correctness of the findings and conclusions of the commission, which may choose its own criteria or method of arriving at its decision…."].) This is because the Commission "is not an ordinary administrative agency, but a constitutional body with broad legislative and judicial powers." (See, e.g., *Wise v. Pac. Gas & Elec. Co.* (1999) 77 Cal.App.4th 287, 300; *Utility Consumers Action Network v. Public Utilities Com*. (2004) 120 Cal.App.4th 644; Cal. Const., art. XII.) A party seeking to overturn a Commission decision has the burden of overcoming this strong presumption of validity. (*Market S.R. Co. v. Railroad Com*. (1944) 24 Cal.2d 378, 399.) (*Ibid*.)

Document received by the CA 1st District Court of Appeal.

But with regard to most Commission proceedings, including those involving electric service, the standards of appellate review the Commission espouses in the Answer are not those actually established by the Legislature. For 25 years, most Commission decisions have been subject to the same standards of appellate review as "an ordinary administrative agency," standards that do not embrace a "strong presumption of the correctness of the findings and conclusions of the commission . . . ." (See Answer, pp. 18–19.)

### 1. The Legislature has Enacted Standards of Review Governing this Proceeding that are Sharply at Odds with those Described in the Answer

In 1998, the Legislature enacted the Calderon-Peace-MacBride Judicial Review Act of 1998. (Sen. Bill No. 779 (1997–1998 Reg. Sess.) Sept. 26, 1998 [Stats. 1998, ch. 886] (hereinafter "Judicial Review Act").) The Judicial Review Act exercised the Legislature's authority "to establish the manner and scope of review of commission decisions in a court of record" (Cal. Const., art. XII, § 5.) The Legislature did so by enacting omnibus changes to the "manner and scope of review" of Commission decisions that had existed, largely unchanged, for 80 years.

The Judicial Review Act amended Section 1756 to authorize Courts



Document received by the CA 1st District Court of Appeal.

of Appeal, for the first time, to review most decisions of the Commission. (Stats. 1998, ch. 886, §§ 10–10.5.) That jurisdiction was previously vested only in the California Supreme Court. (Cal. Pub. Util. Code, § 1756, subd. (a).)

The reach of the Judicial Review Act, however, was broader than just extending appellate review to courts other than the Supreme Court. It also enacted sweeping changes to the standard of review of Commission decisions. Prior to the Judicial Review Act, appellate review of Commission decisions was largely governed by Section 1757, which provided that:

> No new or additional evidence may be introduced in the Supreme Court, but the cause shall be heard on the record of the commission as certified to it. The review shall not be extended further than to determine whether the commission has regularly pursued its authority, including a determination of whether the order or decision under review violates any right of the petitioner under the Constitution of the United States or of this State.
>
> The findings and conclusions of the commission on questions of fact shall be final and shall not be subject to review except as provided in this article.[3] Such questions

[3] As noted in *Camp Meeker*, "Section 1760 gives the court the power to exercise its independent judgment on the law and the facts if an order or decision of the commission is challenged on grounds that it violates the federal constitutional rights of the petitioner, no claim to which section 1760 applies is properly before us." (*Camp Meeker*, *supra*, 51 Cal.3d at



Document received by the CA 1st District Court of Appeal.

> of fact shall include ultimate facts and the findings and conclusions of the commission on reasonableness and discrimination. (*Camp Meeker Water System, Inc. v. Pub. Util. Com.* (1990) 51 Cal.3d 845, 863 [quoting then current Section 1757] ("*Camp Meeker*").)

Section 1757 was central to the California Supreme Court's decision in *Camp Meeker*. Relying on Section 1757, the Court held that it was "limited to determining if the commission has regularly pursued its authority" and that, with limited exceptions, the Commission's factual findings could not be disturbed by an appellate court. (*Camp Meeker, supra,* 51 Cal3d. at 863–864.) *Camp Meeker* marked the Court's last word on the correct standards of review of a Commission decision prior to the enactment of the Judicial Review Act eight years later.[4]

The Judicial Review Act overruled *Camp Meeker* as it pertained to decisions affecting the energy, telecommunications, and transportation industries. (Stats. 1998, ch. 886, § 1.5(b).) It also repealed Section 1757 and replaced it with the detailed standards now found in Sections 1757 and 1757.1. (Stats. 1998, ch. 886, §§ 11–14.5.) These new standards are

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864.)

[4] After *Camp Meeker* was issued, the California Supreme Court issued its decision in *Assembly of the State of California v. Public Utilities Commission* (1995) 12 Cal.4th 87. That decision, however, did not address the standards of appellate review of Commission decisions.



Document received by the CA 1st District Court of Appeal.

largely consistent with those set forth in Code of Civil Procedure section 1094.5 governing writs of administrative mandate.

Leaving no doubt that it intended to implement broad changes to appellate review of Commission decisions, the Legislature further stated that "the conversion of the *energy*, transportation and telecommunications industries from traditional regulated markets to competitive markets necessitates a change in the judicial review of Public Utilities Commission decisions that pertain to these industries." (Stats. 1998, ch. 886, § 1.5(a) [emphasis added].)

Contrary to the Commission's claim that judicial review in this proceeding should recognize that the Commission "is not an ordinary administrative agency," the Legislature provided for just the opposite to be the case. (See Answer, pp. 18–19.) It stated that it intended to "*conform judicial review* of the Public Utilities Commission decisions that pertain to utility service providers with competitive markets *to be consistent with judicial review of the other state agencies*." (Stats. 1998, ch. 886, § 1.5(b) [emphasis added].)

Document received by the CA 1st District Court of Appeal.

### 2. The Answer's Support for its Claimed Strong Presumption of Validity Consists of Outdated and Inapposite Authority

Most of the authority the Commission offers in support of its assertion that "[t]he presumption in favor of the validity of Commission decisions is a 'strong' one" long pre-dates the Judicial Review Act. (See Answer, p. 18.) The lone 21st century cases cited by the Commission, *Pacific Gas & Electric Co. v. Public Utilities Com*mission (2015) 237 Cal.App.4th 812, and *Utility Consumers Action Network v. Public Utilities Commission* (2004) 120 Cal.App.4th 644, rely, respectively, on *Greyhound Lines, Inc. v. Public Utilities Commission* (1968) 68 Cal.2d 406, and *Consumers Lobby Against Monopolies v. Public Utilities Commission* (1979) 25 Cal.3d 891, which both predate the Judicial Review Act by at least 20 years. (Answer, pp. 18–19.) The scope of judicial review of Commission decisions is governed by the Judicial Review Act, not decisions of the California Supreme Court that pre-date it.[5] Therefore,

[5] CalCCA notes that in S283614, the California Supreme Court recently granted review of *Center for Biological Diversity, Inc. v. Public Utilities Commission* (2023) 98 Cal.App.5th 20. In the Petition for Review, the petitioners advanced similar arguments to those made here regarding the effect of the Judicial Review Act on previously existing standards of review for Commission decisions. The Court's official website showing issues pending before it describes the issues under review as follows: "(1) What



Document received by the CA 1st District Court of Appeal.

the Commission's claim of heightened deference and the "strong presumption of the correctness" of its findings and conclusions should be ignored. Instead, this Court's should review the matter under the current version of Section 1757. (Petition, pp. 31–32.)

### C. The Commission Lacks Authority to Enforce RA Compliance by Limiting CCA Expansion

The Commission only has jurisdiction over government bodies to the extent expressly provided in statute. (*Monterey Peninsula*, *supra*, 62 Cal.4th at 698; *County of Inyo*, *supra*, 26 Cal.3d at 166–167.) The Commission cannot take actions with respect to a government body under authority that is inferred from statutory language. (*Santa Clara Valley*, *supra*, 124 Cal.App.4th at 365 ["[I]n the absence of an express provision, we will not infer a legislative intent to confer PUC jurisdiction . . . ."].) The Commission's argument is apparently that, because the plain language

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standard of review applies to judicial review of a Public Utilities Commission decision interpreting provisions of the Public Utilities Code? (2) Did the Public Utilities Commission proceed in the manner required by law, specifically Public Utilities Code section 2827.1, subdivision (b)(1) and (3), when it adopted the successor tariff in Decision Revising Net Energy Metering Tariff and Subtariffs (2022) Cal.P.U.C. Dec. No. D.22-12-056?" CalCCA acknowledges that the case descriptions on the Court's website are informational and do not reflect the Court's views or define the issues to be addressed.



Document received by the CA 1st District Court of Appeal.

of Section 380 gives it express authority to enforce the RA program, it may do so not only by exercising its existing statutorily based enforcement powers but also by any other means possible, including preventing CCAs from providing service to new customers. The Commission's view is based on the incorrect premise that Section 366.2, either by inoperation or by inference, has no bearing on the Commission's authority over CCAs. (Answer, pp. 28–34.) The Commission is mistaken.

Section 366.2, the only statute that permits the Commission to take any action relating to CCA expansion, expressly prescribes the Commission's limited authority over CCA formation and expansion. (Petition, pp. 12–15.) CCA formation begins with a local ordinance to form a new CCA or join an existing one, followed by a public process that informs the CCA's implementation plan, which is then adopted at a community public hearing. (Cal. Pub. Util. Code, § 366.2(c)(3).) The implementation plan is then filed with the Commission, which must complete a series of statutory tasks. (*Id.* at §366.2(c)(5).) Section 366.2 empowers the Commission to notify utility customers in the proposed CCA service area, certify receipt of the implementation plan, provide findings on the costs to be paid by the CCA to compensate the utility for electricity

Document received by the CA 1st District Court of Appeal.

purchases made on behalf of the new CCA customers, and determine the earliest possible date for CCA implementation. (*Id.* at §§ 366.2(c)(5)–(8).) That is it. Section 366.2 contains no provisions that allow the Commission to limit CCA expansion as a means of enforcing the RA program.

The Commission's argument that *other* express provisions in section 366.2 support its inferred authority to limit CCA expansion is unsuccessful. (Answer, p. 30.) It is irrelevant that Section 366.2, subdivisions (b)(4) and (5) respectively prohibit cost-shifting to utility customers and vest CCAs with sole responsibility for procuring their own energy. It is also irrelevant that subdivision (*l*)(1), a provision that addresses theoretical circumstances that have never arisen, provides that a utility may not terminate a CCA's service without a vote of the full Commission, following notice and an opportunity for a CCA to address the utility's contentions in support of termination.[6] (Answer, p. 30 [note that the Commission characterizes this provision as empowering it to "authorize an IOU to terminate CCA services."].) The prohibition against cost-shifting is well-established but does not speak to the Legislature's delineation of what actions the

[6] The level of due process required by subdivision (*l*)(1) is also a far cry from the truncated, staff-administered process by which CCA expansion can be limited under the New Rule.



Document received by the CA 1st District Court of Appeal.

Commission can take regarding CCA expansion. The CCAs' procurement autonomy is similarly uncontroversial and inapposite. And the provision addressing the process by which a utility can request to terminate CCA service is also unrelated to CCA expansion.

The Commission nevertheless cites to this grab-bag of express provisions to claim its authority to restrict CCA expansion as a means of RA enforcement: "Section 366.2, therefore, empowers the Commission to regulate CCAs to the extent that their procurement deficiencies affect other customers and IOUs." (Answer, p. 30.) The Commission therefore declares and apprises the Court that, by inference and despite the express statutory right of communities to form CCAs, the Commission is (and presumably always has been) vested with the authority to prevent a government body (a CCA) from providing electric service to members of its local community as a means of RA enforcement. (Answer, pp. 31–32; see Cal. Pub. Util. Code, § 366.2(a)(1).) The cited provisions do not, however, add up to the proposition for which the Commission cites them. Nor can they be used to create new means of express enforcement authority that have no basis in statute.

The Commission's interpretation of how Sections 366.2 and 380



Document received by the CA 1st District Court of Appeal.

should be read to form a unified statutory scheme is equally unfounded. (Answer, pp. 30–32.) After reversing its original position that Sections 366.2 and 380 must be harmonized to support the New Rule, the Commission's Answer focuses on its perceived obligation to intervene where CCA programs may affect utility operations and customer rates and services. (See PA, Exh. 4, p. 257 [explaining the Commission's view that the New Rule harmonizes sections 380, 365.1, and 366.2]; Petition, pp. 51–54; Answer, pp. 30–31 ["The Commission agrees that there is no conflict between sections 380 and 366.2."].) The Commission cites to the Decision under review here to support its view that the authority to enforce the RA program provided in Section 380 *supersedes* the express limitation on the Commission's authority over CCA expansion under Section 366.2, because "[o]therwise, if the Commission could not enact the RA enforcement rules it believed were necessary to ensure compliance, its enforcement ability would be significantly stymied." (Answer, p. 32.) The Commission has never had such broad authority to create any enforcement mechanisms that it finds convenient, regardless of other statutory mandates.[7] There is no

[7] The New Rule is not, as the Commission argues in a footnote, a more stringent or additional requirement that falls under the Commission's existing statutory authority and avoids the prohibition against conflicting



Document received by the CA 1st District Court of Appeal.

dispute that the Commission has the statutory authority to enforce compliance with the RA program—Section 366.2 simply prevents the Commission from doing so by restricting CCA expansion.

### D. The Commission's Enforcement Authority Is Not Unlimited

Section 380(e) only permits the Commission to enforce RA requirements by using enforcement methods already within its authority. (Cal. Pub. Util. Code, § 380(e) ["The commission shall exercise *its enforcement powers* to ensure compliance by all load-serving entities."] [emphasis added].) The Commission's argument to the contrary that there are "no limitations in the plain language of section 380 on the Commission's authority to enforce the RA requirements" is incorrect. (Answer, p. 28.) The Public Utilities Code is replete with statute-based enforcement actions the Commission may take to enforce its own orders and statutes under its jurisdiction; none authorize the Commission to restrict CCAs from serving new communities.

The Commission recently reaffirmed the principle that,

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regulations. (Answer, pp. 30–31, fn. 8 [distinguishing *County of San Diego v. Bowen* (2008) 166 Cal.App.4th 501].) CalCCA rejects the Commission's premise that the *means* by which it seeks to enforce RA requirements—restricting CCA expansion—is embraced in its existing statutory authority.



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notwithstanding its status as "a state agency of constitutional origin with far-reaching duties, functions, and powers that the courts have liberally construed, it is settled law that the 'Commission's jurisdiction is limited to the powers conferred upon it by the Constitution and laws of California.'" (D.23-10-032, p. 20 [citing *Mak v. P.T.&T. Co.* (1971) 72 CPUC 735, 738].) Those legislative powers fall into categories of specific actions, including: enforcing its orders by suit, or mandamus or injunction (Sections 2101, 2102); imposing fines (Sections 2100, 2107, and 2108); awarding reparations (Section 735); suing to recover fines in superior court (Section 2104); punishing a regulated entity with contempt (Sections 2112, 2113); and entertaining complaints against a public utility (Section 1702). (*Ibid.*) The Legislature also gave the Commission express authority to impose financial penalties on entities that are not regulated utilities. (Section 2111.) The Commission promulgated the longstanding RA financial penalty framework under color of Sections 2102–2105, 2107, 2108, and 2114, and it deemed CCAs subject to penalties for RA enforcement under Section 2111. (PA, Exh. 2, p. 105.)

The Legislature has also granted the Commission express authority to take enforcement actions beyond those listed in Section 2100 et seq.

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(Violations) with respect to specific utilities or programs under its jurisdiction. In those instances, the Legislature has described the authorized action in detail. For example, Section 5387 allows the Commission to revoke a charter party carrier's operating authority for: violating any Commission order or regulation; the carrier's misdemeanor conviction or its officers' felony convictions; violating the terms of its operating permit; failure to pay required fees; failure to maintain vehicles in safe condition; rendition of a judgment against it for failure to pay a Commission-imposed fine; failure to provide reasonable service; knowingly filing false reports; or at the request of the carrier itself. (Cal. Pub. Util. Code, § 5387(c).) Section 1033.5 allows the Commission to suspend a passenger stage corporation's right to operate, or to impose a monetary fine, for failure to maintain its vehicles in safe operating condition or for knowingly filing false reports. (Cal. Pub. Util. Code, §§ 1033.4(a)–(c).) Section 1826 authorizes the Commission to petition the superior court to appoint a receiver for a water or sewer system that is failing to provide adequate service or has abandoned service altogether. (Cal. Pub. Util. Code, § 1826.) And Section 29047 directs the Commission to enforce the provisions of that section providing that the Bay Area Rapid



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Transit District is subject to Commission regulations for safety and that the District must reimburse the Commission for certain regulation-related costs. (Cal. Pub. Util. Code, § 29047.)

Regardless of whether the Commission is acting under the authority granted in Section 2100 et seq. or a specific statute allowing additional enforcement mechanisms, in all cases the Commission may only exercise the enforcement mechanisms the Legislature has provided in statute. For example, while Section 5387 allows the Commission to revoke a charter party carrier's operating authority under certain circumstances, it does not permit the Commission to seize and sell the carrier's vehicles. Similarly, Section 29047 directs the Commission to enforce the provisions of that section, but the Commission has looked to its specifically stated means of enforcement to support its implementation of that directive. (See e.g., D.19-04-049, p. 6 [imposing financial penalties on the Bay Area Rapid Transit District for a fatal accident occurring in 2013: "The Commission's penalty authority is conferred by Section 2100 et seq."].)

Section 380(e) only states that the Commission shall exercise its enforcement authority to ensure compliance with the RA program. Without additional directives or authorization in that statute, the Commission is



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limited to its existing statutory enforcement mechanisms under Section 2100 et seq.: fines and actions in superior court. The Commission developed its RA enforcement framework under its authority to impose fines. (PA, Exh. 2, p. 106.) The Commission is free to change the monetary penalty structure or to take other actions that fall under color of its existing statutory authority, such as pursuing writs of mandate or filing injunctions against entities that fail to comply. (Petition, p. 46; Cal. Pub. Util. Code, § 2102.) Of course, the Commission may also propose new enforcement mechanisms to the Legislature. But the Commission does not have statutory authority to enforce RA compliance by using a mechanism that the Legislature has never enacted—limiting CCA expansion. Not only does Section 380 not provide that additional remedy, but Sections 366.2(c)(5)–(8) occupy the field of what actions the Commission *can* take regarding CCA expansion.

The Commission's expansive reading of Section 380(e) also overlooks Section 380(b)(4), which expressly directs the Commission to minimize RA enforcement requirements and costs. That legislative directive is antithetical to the Commission's view that "there are no limitations in the plain language of section 380 on the Commission's



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authority to enforce the RA requirements . . . ." (Answer, p. 28.) Limiting CCA expansion is not consistent with that mandate. Not only does it impose a significant regulatory burden on the CCA, but it extends the effect of the sanction beyond the CCA itself to the communities denied a service, often at a lower cost than the alternative electric service provided by the utilities, that is statutorily available to many Californians.

Nor is the New Rule permissible under the theory that the enforcement provision in Section 380(e) provides a "continual delegation of authority to the Commission to ensure that [load-serving entities] comply with the RA program." (Answer, p. 27.) The Legislature gave the Commission authority to enforce the RA program using its existing authority, and the Commission has modified the enforcement framework multiple times, also using its existing authority to levy penalties under Section 2100 et seq. (See *Ibid*.) The Commission's argument that it would be absurd to require the Legislature to issue new legislation authorizing new enforcement mechanisms before each new RA rulemaking twists the governing legal principles for rhetorical effect. (*Ibid.*) The only enforcement authority the Commission has is what the Legislature has given it, and any new RA rulemaking must be conducted within the limits

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of the Commission's existing authority. The only way the Commission could properly adopt the New Rule is if the Legislature did, in fact, issue new legislation expressly authorizing it; the fact that the Commission wants badly to issue the New Rule does not obviate the requirement for obtaining express statutory authority first.

### E. Section 701 Does Not Give the Commission Authority to Limit CCA Expansion

Section 701 gives the Commission broad authority over regulated utilities, but it gives the Commission no authority over government bodies. While the Commission claims that CalCCA has misunderstood its citations to Section 701 and related case law, and that the New Rule does not depend on the Commission's general authority under Section 701, the Answer then proclaims that "section 701 supports the Commission's ability to take whatever enforcement actions it deems necessary and proper under Section 380"—which affirms that CalCCA has understood the Commission's position perfectly. (Answer, pp. 34–35.) As the Petition explains at length, no plausible reading of Section 701 or *PG&E Corp*, supports the Commission's interpretation. (Petition, pp. 39–48.)

Section 701, by its terms or by interpretation, does not allow the Commission to exercise new authority over CCA expansion under the



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pretext of its ability to regulate utilities. (Answer, pp. 35–36.) Section 701 gives the Commission express authority to supervise and regulate public utilities and to take actions that are necessary and convenient to its exercise of "such power and jurisdiction." By the plain language of the statute, that ability to take necessary and convenient actions is still limited to the Commission's authority to supervise and regulate *utilities*. (See *Southern California Edison v. Pub. Util. Com.* (2014) 227 Cal.App.4th 172, 186–187 [describing the Commission's broad authority over utilities under Section 701 as including all necessary and convenient actions, regardless of whether specifically designated in the Public Utilities Code or in addition thereto].) It is well-established, on the other hand, that the Commission's authority over government bodies must be expressly provided in statute. (*Monterey Peninsula*, *supra*, 62 Cal.4th at 698 [stating that the Commission "has no authority, however, to regulate public agencies . . . absent a statute expressly authorizing such regulation."].) These settled principles are not altered by the Commission's argument that the alleged and unsubstantiated impact of CCA RA compliance on grid reliability or utility procurement implicate Section 701 such that the Commission can issue the New Rule as a "necessary and convenient" measure under Section 380. (Answer, pp.

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35–36.) Section 701 does not give the Commission penumbral authority to limit CCA expansion.

Nor does *PG&E Corp.* stretch Section 701 to allow regulation of CCAs. The Commission's argument that the New Rule is proper because the Commission has authority to exercise limited jurisdiction over non-utilities in furtherance of its regulation of public utilities has always rested on inapposite authority. (Answer, p. 35.) *PG&E Corp.* held that because the holding companies were only permitted to own regulated utilities by leave of the Commission, the Commission could enforce the conditions under which it granted that leave. *PG&E Corp.* repeatedly emphasized that it found the Commission had limited jurisdiction over PG&E's parent company under Section 701 because the Commission was obligated to enforce specific holding company conditions that were a prerequisite to the holding companies' formation. (Petition, pp. 42–43 [citing *PG&E Corp.*, *supra*, 118 Cal.App.4th at 1201].) *PG&E Corp.* is not controlling, let alone analogous, of the circumstances here. CCAs are government bodies whose existence and operations are enshrined in statute, not by any action of the Commission. CCAs are not part of the regulated utilities' corporate structure. The Commission has no authority over CCAs except what the



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Legislature expressly grants.

Finally, the Commission's argument that it is empowered to "fill up the details" of express statutory authority is inapplicable to the New Rule. (Answer, p. 36.) As the Petition has already noted, the Commission may have statutory authority to implement and enforce the RA program under Section 380, but that authority does not expressly extend to rewriting the CCA implementation requirements in Section 366.2 and expanding the scope of its statutory enforcement authority. (Petition, p. 38.) The Commission may do any number of things to enforce the RA program under its existing statutory authority, but it cannot limit CCA expansion in contravention of the express provisions of Section 366.2.

## IV. CONCLUSION

The Commission only has the authority over government bodies that the Legislature expressly gives it. The Commission's Answer provides no statutory basis or cogent argument to justify its attempt to enforce RA requirements by restricting CCA expansion in contravention of the mandates of Section 366.2. The Commission has multiple statutory enforcement mechanisms already available to it, and it is free to adjust the RA enforcement framework using those existing mechanisms. But it



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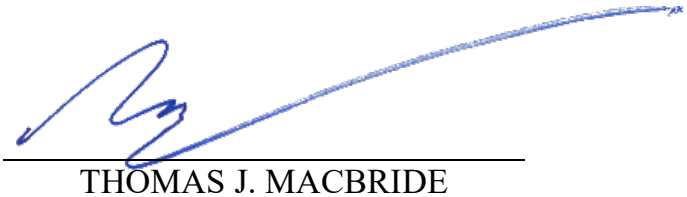
cannot rewrite the provisions of both Section 366.2 and Section 380(e) to legitimize the New Rule. The Court should therefore grant review and set aside the Decision and the Rehearing Decision.

DATED: May 16, 2024

DOWNEY BRAND LLP

By: 

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## CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court Rule 8.520, subdivision (c)(1), I certify that according to Microsoft Word the attached reply is proportionally spaced, has a typeface of 13 points, and contains 6,735 words.

DATED: May 16, 2024 DOWNEY BRAND LLP

By: _____

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