

BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF CALIFORNIA



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William R. Sarale, Julie Ann Sarale, Julie  
Ann Sarale as Trustee of the James J.  
Cavalli Testamentary Trust, and July Ann  
Sarale, as Trustee of the Eva M. Cavalli  
2007 Trust,

Complainants

vs.

Pacific Gas & Electric Company (U39E),

Defendant

C1106024

Case (C.) \_\_\_\_\_

Attachment #1 – Amicus Curiae Brief

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
THIRD APPELLATE DISTRICT

WILLIAM R. SARALE, et al.,

Plaintiffs & Appellants,

v.

PACIFIC GAS & ELECTRIC COMPANY,

Defendant & Respondent

RICHARD G. WILBUR AS TRUSTEE OF  
THE RICHARD G. WILBUR REVOCABLE  
TRUST,

Plaintiff & Appellant,

v.

PACIFIC GAS & ELECTRIC COMPANY,

Defendant & Respondent.

Appeal No. C059873

San Joaquin County Superior Court  
Case No. CV033900

Appeal No. C060515

Yuba County Superior Court  
Case No. YCSCCV080000252

**AMICUS CURIAE BRIEF OF THE  
PUBLIC UTILITIES COMMISSION OF  
THE STATE OF CALIFORNIA  
UPON REQUEST OF THE COURT OF APPEAL**

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**AMICUS CURIAE BRIEF OF THE  
PUBLIC UTILITIES COMMISSION OF  
THE STATE OF CALIFORNIA  
UPON REQUEST OF THE COURT OF APPEAL**

**TO THE HONORABLE PRESIDING JUSTICE ARTHUR G. SCOTLAND &  
ASSOCIATE JUSTICES OF THE CALIFORNIA COURT OF APPEAL,  
THIRD APPELLATE DISTRICT:**

## I. INTRODUCTION

In response to this Court's Order dated March 10, 2010, the California Public Utilities Commission ("Commission") respectfully submits its amicus curiae brief at the invitation of this Court. The Court specifically requested that the Commission address the following three questions:

1. Does Public Utilities Code section 1759 deprive a superior court of jurisdiction to adjudicate a claim for damages or to grant declaratory, injunctive, or other relief in an action brought by a private landowner against a public utility based on the landowner's claim that the utility's trimming of trees (or other vegetation) around its power lines on the landowner's property exceeded the scope of the utility's easement over the property?
2. If so, how would superior court adjudication of such an action hinder or interfere with the Commission's exercise of its regulatory authority over vegetation management practices by utilities around power lines?
3. Does the Commission provide a forum for a landowner to seek a determination whether the utility's vegetation management practices exceeded the scope of the utility's easement over the landowner's property and caused the private landowner to suffer damages, such as a claim that trimming exceeded the scope of the utility's easement and rendered unproductive the fruit or nut producing trees planted within the easement? If so, what remedies can the Commission impose?

The Commission appreciates the opportunity to address these questions and provides below its analysis and discussion. The Commission's discussion is not intended to support any individual party *per se*. Nor does the Commission offer any opinion at this time on the merits of those issues in the complaints that are within the jurisdiction of the Commission. Those issues will be considered by the Commission only if the

Appellants file formal complaints before the Commission seeking review under the Commission's vegetation management program.

## II. DISCUSSION

### A. **If The Court Finds That Tree Trimming Is Within The Scope Of The Easements, Then Public Utilities Code Section 1759 Precludes Any Further Court Adjudication Until The Commission Has Determined Whether The Trimming Exceeded Or Violated General Order 95.**

The Commission's response is based on analysis of: (1) the nature of the dispute; and (2) case law interpreting the jurisdictional split under Public Utilities Code sections 1759 and 2106.<sup>1</sup>

#### 1. **The Nature Of The Dispute**

Pleadings before the Court reflect differing views regarding how to properly characterize the nature of the dispute. Appellants suggest the dispute is entirely a matter of property rights under the easement,<sup>2</sup> while Respondent contends it is no more than a vegetation management dispute.<sup>3</sup>

In the Commission's view, there is a threshold question requiring interpretation of the scope of the easements. Specifically, the question is whether the easements permit tree trimming by the utility, and if so, whether there is any explicit limit on the degree of trimming that is allowed. The Commission has traditionally left matters of easement

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<sup>1</sup> Unless otherwise noted, all section references are to the Public Utilities Code.

<sup>2</sup> See e.g., Appellant's Reply Brief in *Sarale v. Pacific Gas & Electric Company* ("PG&E") ("Sarale ARB") at p. 1; Appellant's Opening Brief in *Wilbur v. PG&E* ("Wilbur AOB") at pp. 23-24.

<sup>3</sup> See e.g. Respondent's Brief in *Wilbur v. PG&E* ("Wilbur RB") at p. 1.

construction and interpretation to the Courts, and it would continue to do so here.<sup>4</sup>

Consequently, if the Court finds that the easements preclude the action complained of, it is within the Court's jurisdiction to order injunctive or other relief.

However, if this Court finds that trimming was permissible under the easements, then the crux of the dispute shifts to whether the degree of trimming exceeded or violated any applicable Commission-approved rules. As discussed herein, this Commission has exclusive jurisdiction over public utilities, and has established an identifiable broad and continuing supervisory and regulatory program to oversee utility vegetation management. That program includes rules governing utility tree trimming practices.<sup>5</sup> Consequently, the Commission respectfully submits that this second question is an issue subject to the Commission's exclusive jurisdiction. (See e.g., *San Diego Gas and Electric Company v. The Superior Court of Orange County* ("Covalt") (1996) 13 Cal.4<sup>th</sup> 893, 919 ["The PUC has exclusive jurisdiction over the regulation and control of utilities, and once it has assumed jurisdiction, it cannot be hampered, interfered with, or second-guessed by a concurrent superior court action addressing the same issue."].)

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<sup>4</sup> While the Commission does not attempt to resolve property right disputes, the Commission will review easements as necessary to address issues within the Commission's jurisdiction. (See e.g., *Camp Meeker Water System, Inc. v. Public Utilities Commission* (1990) 51 Cal.3d 845, 850 [Ascertaining facts regarding deeds which conveyed easements and associated water rights, as necessary to address an application for increased rates].)

<sup>5</sup> See General Order 95, Rule 35 including Appendix E, and Rule 37 (Clerk's Transcript in *Wilbur v. PG&E* ("Wilbur CT"), at pp. 71, 77, 79-80.)

**2. Jurisdiction Pursuant To Public Utilities Code  
Sections 1759 And 2106**

Section 1759 provides:

No court of this state, except the Supreme Court and the court of appeal, to the extent specified in this article, shall have jurisdiction to review, reverse, correct, or annul any order or decision of the commission or to suspend or delay the execution or operation thereof, or to enjoin, restrain, or interfere with the commission in the performance of its official duties, as provided by law and the rules of court.

(Pub. Util. Code, § 1759.)

Section 2106 provides:

Any public utility which does, causes to be done, or permits any act, matter, or thing prohibited or declared unlawful, or which omits to do any act, matter, or thing to be done, either by the Constitution, any law of this State, or any order or decision of the commission, shall be liable to the persons or corporations affected thereby for all loss, damages, or injury caused thereby or resulting therefrom. If the court finds that the act or omission was willful, it may, in addition to the actual damages, award exemplary damages. An action to recover for such loss, damage, or injury may be brought in any court of competent jurisdiction by any corporation or person. No recovery as provided in this section shall in any manner affect recovery by the State of the penalties provided in this part or the exercise by the commission of its power to punish for contempt.

(Pub. Util. Code, § 2106.)

By its plain language, section 2106 vests the Court with authority to award damages. No statute vests the Commission with similar authority.

Although the Court may award damages, it must exercise care to not take any action that would interfere with, hinder, frustrate, obstruct, second-guess, or undermine

the Commission's authority in carrying out its own policies. (See e.g., *Waters v. Pacific Telephone Company* ("Waters") (1974) 12 Cal.3d 1, 11-12; and *Anchor Lighting v. Southern California Edison Company* ("Anchor Lighting") (2006) 142 Cal.App.4<sup>th</sup> 541, 549-550.)

Under the accepted test, section 1759 would bar Court adjudication of this dispute if: (1) it is within the Commission's authority to adopt a regulatory policy for utility vegetation management; (2) the Commission has exercised that authority; and (3) adjudication by the Court would interfere with the Commission's exercise of that authority. (See e.g., *Covalt, supra*, 13 Cal. 4<sup>th</sup> at pp. 924-936; *Hartwell Corporation v. The Superior Court of Ventura County* ("Hartwell") (2002) 27 Cal. 4<sup>th</sup> 256, 266.) This test is applied below.

**a) It Is Within The Commission's Broad Inherent Authority To Regulate Utility Vegetation Management Practices.**

The California Supreme Court has described the Commission's authority in the following manner:

The commission is a state agency of constitutional origin with far reaching duties, functions and powers. (Cal. Const., art. XII, §§ 1-6.) The Constitution confers broad authority on the commission to regulate utilities, including the power to fix rates, establish rules, hold various types of hearings, award reparation, and establish its own procedures. (*Id.*, §§ 2, 4, 6.) The commission's powers, however, are not restricted to those expressly mentioned in the Constitution: "The Legislature has plenary power, unlimited by the other provisions of this constitution but consistent with this article, to confer additional authority and jurisdiction upon the commission...." (Cal. Const., art XII, § 5.)

Pursuant to this grant of power the Legislature enacted Public Utilities Code section 701, conferring on the commission expansive authority to “do all things, whether specifically designated in [the Public Utilities Act] or addition thereto, which are necessary and convenient” in the supervision and regulation of every public utility in California. The commission’s authority has been liberally construed. (citation omitted) Additional powers and jurisdiction that the commission exercises, however, “must be cognate and germane to the regulation of public utilities....”

(*Consumers Lobby Against Monopolies v. Public Utilities Commission* (“CLAM”) (1979) 25 Cal.3d 891, 905-906.)<sup>6</sup>

In addition, the Court has explicitly affirmed the Commission’s authority to undertake measures related to public health and safety. For example, in *Hartwell*, the Court stated:<sup>7</sup>

Consistent with these constitutional mandates, the Legislature has granted PUC comprehensive jurisdiction to regulate the operation and safety of public utilities....

(*Hartwell, supra*, 27 Cal.4<sup>th</sup> at p. 256, citing to Cal. Const., art. XII, §§ 1-6 & Pub. Util. Code, §§ 701, 761, 768, & 770, subd. (a).)<sup>8</sup>

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<sup>6</sup> See also *Southern California Edison Company v. Peevey* (“*Edison v. Peevey*”) (2003) 31 Cal.4<sup>th</sup> 781, 792; *Covalt, supra*, 13 Cal.4<sup>th</sup> at p. 915.

<sup>7</sup> *Hartwell* involved Commission authority to develop and apply standards for water quality, for water provided by regulated water companies. While the California Department of Health Services was found to have primary responsibility for the administration of safe drinking water laws, the Court recognized the Commission’s concurrent jurisdiction in connection with its constitutional and statutory authority and responsibilities to ensure that regulated utilities provide service that protects the public health and safety. (See *Hartwell, supra*, 27 Cal.4<sup>th</sup> at pp. 270-272.)

<sup>8</sup> Section 701 provides:

The commission may supervise and regulate every public utility in the State and may do all things, whether specifically designated in this part or in addition thereto, which are necessary and convenient in the exercise of such power and jurisdiction.

(footnote continued on next page)

Further, permissible regulatory functions include taking steps to determine whether a danger is posed by any utility equipment, operations, or services, and if so, to

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*(footnote continued from previous page)*

Section 761 provides:

Whenever the commission, after a hearing, finds that the rules, practices, equipment, appliances, facilities, or service of any public utility, or the methods of manufacture, distribution, transmission, storage, or supply employed by it, are unjust, unreasonable, unsafe, improper, inadequate, or insufficient, the commission shall determine and, by order or rule, fix the rules, practices, equipment, appliances, facilities, service, or methods to be observed, furnished, constructed, enforced, or employed. The commission shall prescribe rules for the performance of any service or the furnishing of any commodity of the character furnished or supplied by any public utility, and, on proper demand and tender of rates, such public utility shall furnish such commodity or render such service within the time and upon the conditions provided in such rules.

Section 768 provides in pertinent part:

The commission may, after a hearing, require every public utility to construct, maintain, and operate its line, plant, system, equipment...in a manner so as to promote and safeguard the health and safety of employees, passengers, customers, and the public. The commission may prescribe...[and]...establish uniform standards of construction and equipment, and require the performance of any other act which the health or safety of its employees, passengers, customers, or the public may demand.

Section 770 provides the Commission may after a hearing:

(a) Ascertain and fix just and reasonable standards, classifications, regulations, practices, measurements, or service to be furnished, imposed, observed, and followed by all electrical, gas, water, and heat corporations.

prescribe corrective measures.<sup>9</sup> (See *Covalt, supra*, 13 Cal.4<sup>th</sup> at pp. 924-925, citing to Pub. Util. Code, §§ 451, 701, 761, 762, 768.)<sup>10</sup>

In carrying out these functions, the Commission recognized that unchecked vegetation growth near utility power lines may pose a risk to public health and safety, and could threaten reliable operation of the electric system. (See e.g., *Re San Diego Gas and Electric Company* [D.96-09-097] (1996) 68 Cal.P.U.C.2d 333, 334, 336.)<sup>11</sup> Thus, consistent with the scope of its authority, the Commission has prescribed measures to

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<sup>9</sup> In *Covalt* the Court found it within the Commission's authority to adopt a policy on whether electric magnetic fields ("EMFs") arising from utility power lines pose a public health risk, and determine what action, if any, utilities should take to minimize that risk. (*Covalt, supra*, 13 Cal.4<sup>th</sup> at pp. 924-925.)

<sup>10</sup> See *ante*, fn. 8 regarding sections 701, 761, and 768.

Section 451 provides in pertinent part:

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

Section 762 provides in pertinent part:

Whenever the commission, after a hearing, finds that...changes...ought reasonably be made...to promote the security or convenience of its employees or the public, or in any other way to secure adequate service or facilities, the commission shall make and serve an order directing that such...changes be made....

<sup>11</sup> For example, the Commission has stated:

Where overhead wires pass through trees, safety and reliability of service demand that a reasonable amount of tree trimming be done in order that the wires may clear branches and foliage.

(*Re San Diego Gas and Electric Company* [D.96-09-097], *supra*, 68 Cal.P.U.C.2d at p. 336.)

address utility vegetation management practices. These measures are embodied in General Order (“GO”) 95 and related decisions.

**b) The Commission Has Exercised An Identifiable Broad And Continuing Supervisory And Regulatory Program For Utility Vegetation Management.**

The exercise of authority is marked by the existence of an “identifiable broad and continuing supervisory and regulatory program.” (See e.g., *Covalt, supra*, 13 Cal.4<sup>th</sup> at pp. 919-920; *Hartwell, supra*, 27 Cal.4<sup>th</sup> at p. 276.) As discussed below, GO 95, in combination with the Commission's actions and related decisions demonstrate that the Commission’s vegetation management program meets this standard.

While GO 95 and its predecessor GO 64-A have been in existence since 1928, events during the 1990s brought forth the need for increased regulatory oversight of utility practices. During that time, certain power outages were determined to have been caused primarily by overgrown foliage and lax utility trimming cycles. (See *Re San Diego Gas and Electric Company* [D.96-09-097], *supra*.)

In response, the Commission determined that a more concerted effort was needed to establish uniform rules and policies for vegetation management. Standardized interim requirements were immediately adopted. (*Id.* at p. 334.) The Commission then went on to consider and develop more permanent rules. That process produced two more guiding decisions during the 1990s. (*Re San Diego Gas and Electric Company* [D.97-10-056] (1997) 76 Cal.P.U.C.2d 118.)

The Commission has continued to oversee and review the utility's practices, and has continued to refine the applicable rules. In 2001, the Commission opened a new proceeding to again revisit whether revisions to GO 95 and GO 128 were warranted.<sup>12</sup> The Commission held public workshops over a sixteen month period, which were attended by utilities, labor organizations, the public, and the technical staff. That process resulted in a number of revisions to the rules. (*Order Instituting Rulemaking to Revise Commission General Order Numbers 95 and 128 (Opinion Adopting Consensus Changes to General Orders 95 and 128 and Deciding Contested Rule Changes)* [D.05-01-030] (2005) \_\_ Cal.P.U.C.3d \_\_ ).<sup>13</sup>

More recently, Commission experienced renewed concerns regarding the need to reduce potential fire hazards attendant to utility power lines. Accordingly, it again reviewed the existing requirements and adopted additional measures. (*Order Instituting Rulemaking to Revise and Clarify Commission Regulations Relating to the Safety of Electric Utility and Communications Infrastructure Provider Facilities (Decision in Phase 1 – Measures to Reduce Fire Hazards in California Before the 2009 Fall Fire*

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<sup>12</sup> GO 128 covers Rules for Construction of Underground Electric Supply and Communication Systems.

<sup>13</sup> For the convenience of the Court, the Commission is providing a separate appendix of all Commission decisions referenced by the brief that are not available in the published "Opinions and Orders of the Public Utilities Commission of California." Thus, a copy of D.05-01-030 can be found as Exh. 1 in the Commission's Appendix ("Amicus Append.").

*Season*) [D.09-08-029] (2009) \_\_ Cal.P.U.C.3d \_\_ at pp. 26-31 (slip op.).<sup>14</sup> This most recent proceeding (Rulemaking (R.) 08-11-005) continues to remain open and active.

Apart from these activities to set and monitor the applicable rules, the Commission exercises its authority when called upon from time to time to consider individual complaints regarding utility vegetation management practices. (See e.g., *Bereczky v. Southern California Edison Company* (“*Bereczky*”) [D.96-03-009] (1996) 65 Cal.P.U.C.2d 145; and *Morgan v. Pacific Gas and Electric Company* (“*Morgan*”) [87-09-066] 25 Cal.P.U.C.2d 393.)

Despite having established this clearly identifiable and ongoing regulatory program, certain pleadings before the Court suggest that the Commission ceded its jurisdiction over utility vegetation management. To support this claim, pleadings argue that by not adopting any maximum limit on tree trimming clearances, the Commission intentionally decided not to exercise its authority.<sup>15</sup> The following language is cited:

The degree of tree trimming appropriate around utility lines can become a highly technical determination.... We do not need to determine what the appropriate maximum clearances should be, but we do have to determine the minimum safe clearances and a reasonable level of expense....

(D.97-01-044, *supra*, 70 Cal.P.U.C.2d at p. 697.)

This argument would have merit if the Commission had determined not to adopt any requirements. However, this language is merely a statement of what requirements

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<sup>14</sup> A copy of D.09-08-029 can be found as Amicus Append. Exh. 2.

<sup>15</sup> See e.g., Appellants Opening Brief in *Sarale v. PG&E* (“*Sarale AOB*”) at pp. 9.

must, at a minimum, be adopted to ensure safe and reliable operation of utility power lines. It concerns only the degree of regulation deemed necessary.

Moreover, no Court has found that an exercise of authority will be recognized only when an agency adopts exhaustive, comprehensive, or maximum requirements. For example, in *Covalt*, it was deemed sufficient that the Commission adopted a "general policy" regarding permissible electric magnetic field ("EMF") levels for utility power lines. (*Covalt, supra*, 13 Cal.4<sup>th</sup> at pp. 935-936.) Notably, there too the Commission had declined to set maximum limits. Instead, the utilities were required only to take reasonable low-cost/no-cost steps to prevent unnecessary public exposure to EMFs.<sup>16</sup> (*Id.* at pp. 928-929.)

The following language is similarly cited to suggest the Commission has declined to exercise authority:<sup>17</sup>

In recognition of this circumstance we will decline to adopt a declaration of our jurisdiction as part of our order.

(D.97-01-044, *supra*, 70 Cal.P.U.C.2d at p. 699.)

When this statement is read in context, it reveals that the statement was made in response to a specific request that the Commission declare its rules would effectively

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<sup>16</sup> See also *Waters, supra*, 12 Cal.3d at pp. 10-11 [The Commission was deemed to have exercised its authority by adopting a "general policy" of limiting utility liability for negligence. That exercise barred the Court from awarding damages for alleged utility negligence and breach of warranty.]; *Hartwell, supra*, 27 Cal.4<sup>th</sup> at p. 276 [The Commission was deemed to have exercised its authority by adopting water quality "benchmarks." That exercise barred the Court from adjudicating the adequacy of water quality standards and awarding damages.].

<sup>17</sup> Sarale AOB, at p. 10.

trump any local tree trimming requirements. (D.97-01-044, *supra*, 70 Cal.P.U.C.2d at p. 696.) [“PG&E’s concurring comments...request a declaration of this Commission’s jurisdiction over utility tree trimming practices in California to defeat local restrictions on tree trimming.”].)

In declining that request, the Commission reasoned it would not be appropriate to make such a declaration because the Commission's rules were not intended to represent an exhaustive scheme of rules and procedures. Further, the Commission reasoned that such a declaration could exceed the scope of the proceeding.<sup>18</sup> (D.97-01-004, *supra*, 70 Cal.P.U.C.2d at p. 699 [“We are selecting a safe minimum standard to insure system safety and reliability, but we are not adopting comprehensive rules and procedures.... In recognition of this circumstance, we will decline to adopt a declaration of our jurisdiction.... In our view such a course would be fraught with the danger of acting outside of our authority in this proceeding.”].)

Pleadings also suggest that the Commission has clearly directed complainants to the Courts for any relief, leaving “little doubt” it is not interested in regulating utility vegetation management and admits it lacks jurisdiction to do so.<sup>19</sup> The following language is cited:

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<sup>18</sup> The Commission’s rules require proceeding “scoping memos,” which describe, among other things, the issues to be considered in a proceeding. (See Commission Rule of Practice and Procedure 7.3; Cal. Code of Regs., tit. 20, § 7.3) The Commission is cautious not to decide issues outside the defined scope, as doing may be grounds for reversal. (See e.g., *Southern California Edison Company v. Public Utilities Commission* (2006) 140 Cal.App.4<sup>th</sup> 1085, 1104-1107.)

<sup>19</sup> See e.g., Sarale AOB at pp. 12-14.

Even if SCE's actions could be construed as a violation of Rule 35, we have no power to award monetary damages for injury to Berezky's property, or for emotional distress. For incidents such as this, the only monetary relief at our disposal if we find that the utility violated a Commission rule or order is a fine, which would not be payable to the complainant. This is not to say that Berezky is without recourse for the property damage and other harm he allegedly suffered. *If there is an express easement that defines the extent of permissible use, that document may afford him a basis for relief. If not, he may nevertheless be able to seek relief under civil law. In either instance, his recourse is to the courts rather than this commission.* (emphasis added)

(*Berezky* [D.96-03-009], *supra*, 65 Cal.P.U.C.2d at p. 147.)

Nothing in this language supports a conclusion that the Commission has not exercised its jurisdiction, or cannot exercise jurisdiction, for the purpose of interpreting and applying its own rules and decisions. The focus of this language is clearly limited to the remedies at the Commission's disposal "if we [the Commission] find that the utility violated a Commission rule or order." The statement that damages must be sought in Court is entirely consistent with section 2106. Similarly, the statement correctly notes that a determination of property rights under any easement is properly an issue for the Courts.

Finally, pleadings suggest *Koponen v. Pacific Gas and Electric Company* ("*Koponen*") (2008) 165 Cal.App.4<sup>th</sup> 345 is analogous, such that the instant dispute may also be fully resolved by this Court.<sup>20</sup> This argument misses an important distinction. In *Koponen*, interpretation of the scope of the easement was the only issue before the Court.

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<sup>20</sup> See e.g., Wilbur AOB at pp. 24-27.

At issue was whether the utility had a right under its right-of-way easement to lease space to a third party. While, the Court acknowledged that section 1759 would bar it from acting if that would interfere with any Commission regulatory function, both the Court and this Commission agreed that no Commission function would be hindered in that instance since the Commission had no regulatory program related to utility property rights under right-of-way easements.<sup>21</sup> (*Id.* at pp. 354-358.)

The instant matter differs. Here, there are two issues in dispute. One involves the scope of the easement. However, if the easement does not prevent the utility's action, then resolution requires determination of whether the trimming was excessive or unlawful under existing requirements. Those requirements are indeed the subject of a Commission regulatory program. Thus, any determination by the Court would interfere with the Commission's authority to interpret and apply its own rules, orders and decisions governing utility vegetation management.

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<sup>21</sup> At most, the Commission had a policy generally favoring the shared use of utility property. However, the Commission explicitly recognized that any application of its policy depended first on whether the utility had the property right under its easement that would allow it to do so. And the Commission agreed that the Court was the proper entity to make that preliminary determination. (*Koponen, supra*, 165 Cal.App.4<sup>th</sup> at pp. 356-357.) It is also relevant to note that the Court and the Commission also agreed that section 1759 would bar certain relief that the Court might fashion. That included any relief that would redirect utility revenues, as that would interfere with the Commission's ratemaking authority. (*Koponen, supra*, 165 Cal.App.4<sup>th</sup> at pp. 357, 359.)

**c) Any Court Action Beyond Determining The Scope Of The Easement Would Interfere With The Commission's Policies For, And Regulation Of, Utility Vegetation Management.**

This issue is embodied in the Court's second question to the Commission.

Accordingly, it is addressed in full below.

**B. Court Adjudication Prior To A Commission Finding Of Utility Wrongdoing Would Interfere With The Commission's Identifiable Broad And Continuing Supervisory And Regulatory Program For Utility Vegetation Management.**

As previously stated, presuming there is no violation of the easements, the complaints may succeed only if it is determined that the degree of trimming exceeded or violated any established rules. Although parties imply the Commission's rules may not go far enough, no party disputes that the Commission has indeed adopted a regulatory program to oversee utility vegetation management. Given this program, and the Commission's exclusive jurisdiction over public utilities, it is difficult to conceive how the Court could arrive at any conclusion here that would not somehow undermine, second-guess, or interfere with the Commission regulatory functions.

For example, if the Court were to determine the trimming was reasonable based on the fact the Commission's rules impose no maximum limit on clearance distances, it would presume the Commission would have come to the same conclusion in interpreting the rules. That cannot be predicted with absolute certainty. Arguably, the complaints raise a unique issue involving the trimming of commercial crops. To the Commission's knowledge, it has never directly addressed a complaint of this nature. While the rules

may not distinguish between types of vegetation, only the Commission can determine whether the trimming in question was reasonable within the spirit and intent of its own rules.<sup>22</sup> A Court determination would interfere by depriving the Commission of any opportunity to address this issue, and would second-guess what conclusion the Commission may reach if presented with these facts.

A similar result would occur if the Court were to award damages for any alleged injury to the walnut trees. Doing so would unavoidably set (if only by implication) a new rule regarding maximum permissible trimming clearances. That result would undermine the Commission's existing Commission rules.

Further, such an award would do precisely what the Court found impermissible in *Koponen*.<sup>23</sup> It would undermine the Commission's policies by holding a utility liable for not doing something (not curtailing its trimming at some maximum point), which the Commission has not yet determined. (*Id.* at p. 358.)

For the above stated reasons, the Commission respectfully requests that the Court find section 1759 acts here to bar any Court adjudication beyond determining the property rights of the parties.

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<sup>22</sup> See e.g., Pub. Util. Code, § 451.

<sup>23</sup> See also *Ford v. Pacific Gas and Electric Company* (1997) 60 Cal.App.4<sup>th</sup> 696 [Section 1759 barred the Court from determining EMFs were dangerous, or awarding damages, because to do so would contradict the Commission's contrary findings and would hold utilities liable for not doing what the Commission determined they were not required to do.].

**C. The Appellants May File A Complaint With The Commission Raising Their Claims Of Alleged Improper Utility Vegetation Management Activities.**

The question posed by the Court inquired whether the Commission provides a forum for a landowner to seek a determination that the utility's actions exceeded the scope of its easement over a landowner's property. As already noted, the Commission generally defers to the Court in matters of easement interpretation and construction.

However, the Commission does have a forum for a landowner to seek a determination whether a utility's vegetation management activities were unreasonable or unlawful in connection with the Public Utilities Code and/or Commission orders, rules and decisions. To seek such a determination a landowner would file a formal complaint with the Commission.<sup>24</sup> If a complaint included an argument that the utility violated the scope of an easement, and a Court had not rendered any determination on that issue, the Commission would generally ensure to its satisfaction that the utility did in fact possess an easement to access the landowner's property to conduct the Commission regulated activity in question. It is relevant to note that in the Commission's experience, utility

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<sup>24</sup> It is noted that the policy issues of the utility vegetation management can be raised before the Commission through other procedural vehicles. For example, although not an ideal forum to address issues requiring immediate action, a landowner could also request that the Commission open a proceeding to consider changes or modifications to the existing rules. Section 1708.5 permits any entity to file a petition asking the Commission to adopt, amend, or repeal a regulation.

Also, as shown in Section II.A.2.(b) above, the Commission will from time to time and on its own motion open investigations and/or rulemaking proceedings to consider changes to its rules, orders, and decisions. (See Pub. Util. Code, §§ 1708, 1701.1(c).) Any interested member of the public may intervene for the purpose of participating in, or simply following such Commission proceedings.

right-of-way easements are generally worded very broadly, so as to permit most any activity the utility may deem necessary to provide adequate service and operate its facilities in a safe and reliable manner. Complaints and associated filing procedures are governed by section 1702 and Commission Rules of Practice and Procedure 4.1 – 4.5.<sup>25</sup> Information regarding complaints, as well as electronic filing forms, can also be found on the Commission’s website.<sup>26</sup>

**D. Remedies The Commission May Provide Include Injunctive Relief, The Imposition of Fines, And Denial Of Utility Cost Recovery. However, Pursuant To Public Utilities Code Section 2106 Only The Court May Award Damages.**

The Commission derives its authority to provide remedies from the California Constitution, and the Public Utilities Code. In connection with the Commission’s broad inherent powers under Article XII of the California Constitution, and section 701, the Courts have recognized that the Commission has authority to provide a number of remedies, should the Commission determine that the utility has violated the law. (See

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<sup>25</sup> Section 1702 states in pertinent part:

Complaint may be made by the commission of its own motion or by any corporation or person...setting forth any act or thing done or omitted to be done by any public utility, including any rule or charge heretofore established or fixed by or for any public utility, in violation or claimed to be in violation, of any provision of law or of any order or rule of the commission.

See also Cal. Code of Regs., tit. 20, Article 4, §§ 4.1, 4.2, 4.3, 4.4, 4.5.

<sup>26</sup> Information and electronic complaint forms may be located at: [www.cpuc.ca.gov/puc/](http://www.cpuc.ca.gov/puc/). See main page under Consumer Information Center.

e.g., *CLAM, supra*, 25 Cal. 3d at p. 907.)<sup>27</sup> One of these remedies is injunctive relief.

Consistent with this authority, it is not unusual for the Commission to issue a temporary restraining order (“TRO”) to enjoin a utility from engaging in a particular action.<sup>28</sup>

The Commission is also authorized to directly impose fines and penalties upon a utility, as set forth in section 2100 et seq. (See e.g., *Pacific Bell Wireless LLC v. Public Utilities Commission* (2006) 140 Cal.App.4<sup>th</sup> 718, 736-738.) For example, upon a finding that a utility violated the Public Utilities Code or any Commission rule, decision or requirement, section 2107 would enable the Commission to impose a penalty of not less than five hundred dollars (\$500), and not more than twenty thousand dollars (\$20,000) for each offense.<sup>29</sup> Additionally, the Commission could prevent a utility from recovering

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<sup>27</sup> In *CLAM*, the Court noted that in connection with the Commission’s equitable jurisdiction it may require the creation of trust funds to hold potential refunds, reform utility contracts, and issue cease and desist orders. The Commission may also order utilities that charge unlawful rates to make reparation to aggrieved ratepayers pursuant to section 734. (*CLAM, supra*, 25 Cal.3d at p. 907.)

<sup>28</sup> In determining whether to grant a TRO the Commission applies the same test as California courts, which requires a moving party to demonstrate: (1) irreparable injury to the moving party absent the TRO; (2) no harm to the public interest; (3) no substantial harm to other interested parties; and (4) a likelihood of prevailing on the merits. (See e.g., *Application of San Diego Gas & Electric Company for Review of its Proactive De-Energization Measures and Approval of Proposed Tariff Revisions (U902E) (Decision Granting the Motion for a Temporary Restraining Order Regarding San Diego Gas & Electric Company’s Power Shut-Off Plan)* [D.09-08-030] (2009) \_\_\_ Cal.P.U.C. \_\_; 2009 Cal. PUC LEXIS 423, \*8-9. A copy of this decision can be found as Amicus Append. Exh. 3.)

<sup>29</sup> Section 2107 states:

Any public Utility which violates or fails to comply with any provision of the Constitution of this state or of this part, or which fails or neglects to comply with any part or provision of any order, decision, decree, rule, direction, demand, or requirement of the commission, in any case in which a penalty has not otherwise been provided, is subject to a

(footnote continued on next page)

in rates the costs associated with any activity deemed to be unreasonable or impermissible.<sup>30</sup>

However, as already noted, the Legislature has not vested the Commission with authority to award damages to an aggrieved party. Pursuant to section 2106,<sup>31</sup> the authority to award damages rests solely with the Court. Accordingly, following a Commission finding that a utility violated the Public Utilities Code, or Commission rule, regulation, order or decision, any aggrieved party seeking damages would need to proceed to the Court to request such an award.

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*(footnote continued from previous page)*

penalty of not less than five hundred dollars (\$500), nor more than twenty thousand dollars (\$20,000) for each offense.

<sup>30</sup> See section 451, which states in pertinent part:

All charges demanded or received by any public utility, or by any two or more public utilities, for any product or commodity furnished or to be furnished or any service rendered or to be rendered shall be just and reasonable. Every unjust or unreasonable charge demanded or received for such product or commodity or service is unlawful.

<sup>31</sup> Section 2106 states:

Any public utility which does, causes to be done, or permits any act, matter, or thing prohibited or declared unlawful, or which omits to any act, matter, or thing required to be done, either by the Constitution, any law of this State, or any order or decision of the commission, shall be liable to the persons or corporations affected thereby for all loss, damages, or injury caused thereby or resulting therefrom. If the court finds that the act or omission was willful, it may, in addition to actual damages, award exemplary damages. An action to recover for such loss, damage, or injury may be brought in any court of competent jurisdiction by any corporation or person. No recovery as provided in this section shall in any manner affect a recovery by the State of the penalties provided in this part or in the exercise by the commission of its power to punish for contempt.

### III. CONCLUSION

In this amicus brief, the Commission respectfully submits its responses to the Court's three questions. The Commission would be glad to address any additional questions the Court may have.

Dated: May 17, 2010

Respectfully submitted,

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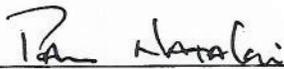
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**CERTIFICATE OF WORD COUNT**

I hereby certify that the foregoing Respondent's Answer is 5,874 words in length. In completing this word count, I relied on the "word count" function of the Microsoft Word program.

Dated: May 17, 2010

  
\_\_\_\_\_  
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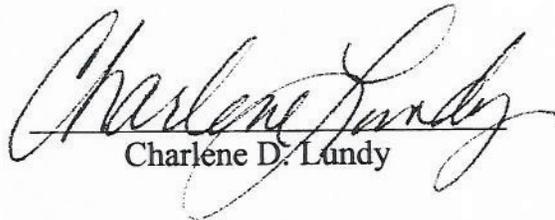
**CERTIFICATE OF SERVICE BY MAIL**

I hereby certify that I am a citizen of the United States, over the age of 18 years, with business address at 505 Van Ness Avenue, San Francisco, California and am neither a party to nor interested in *Sarale v. Pacific Gas and Electric Company* (Case No. **C059873**) and *Wilbur v. Pacific Gas and Electric Company* (**C060515**), before the Court of Appeal of the State of California, Third Appellate District.

On May 17, 2010, in San Francisco, California, I caused to be deposited by overnight mail copies of **AMICUS CURIAE BRIEF OF THE PPUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA UPON REQUEST OF THE COURT OF APPEAL** on all parties listed on the attached service list.

Each copy was enclosed in a sealed envelope and all postage thereon fully prepaid.

I certify under penalty of perjury that the foregoing is true and correct.

  
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