

STATE OF CALIFORNIA

Public Utilities Commission

M e m o r a n d u m

Date: April 16, 2003

To: The Commission
(Meeting of April 17)

From: Alan LoFaso
Office of Governmental Affairs (OGA) — Sacramento

**Subject: AB 840 (Calderon): Public Utilities Commission: evidence:
orders or decisions: review.**

As amended April 10, 2003

Legislative Subcommittee Recommendation: Oppose.

Summary: This bill would alter judicial review of commission decisions to automatic judicial review, likely at the trial court level, to an undetermined extent (see below, discussing ambiguities in the bill). This bill would also subject commission adjudicatory decisions to the Administrative Procedure Act (APA).

Analysis: Existing law, the California Constitution, Art. XII, sec. 5, gives the Legislature plenary power over the Public Utilities Commission, including the authority “to establish the manner and scope of review of commission action in a court of record...”

This bill would provide:

1. All evidence in any adjudication case shall be taken in accordance with Section 11513 of the Government Code, notwithstanding current law requiring the commission to develop its own rules governing hearings, which need not apply the technical rules of evidence.
2. Notwithstanding any other provision of Article 3, Chapter 9, Part 1, Division 1 of the P.U. Code (sec. 1756 et. seq. – “Judicial Review”), including, but not limited to, Section 1759, judicial review of a decision of the commission shall be had upon a verified petition of the “party beneficially interested”, under either of the following:
 - a. Petitioner has no plain, speedy, or adequate remedy in the ordinary course of law; or
 - b. The petition challenges the commission decision on either of the two

following grounds:

- i. The decision relies on reasoning that misconstrues, misinterprets, or misapplies a relevant statutory provision; or
 - ii. The decision relies on a statutory provision that is unconstitutional, or unenforceable on the basis that federal law or federal regulation prohibits its enforcement.
3. The commission shall amend its rules of practice and procedure in accordance with these requirements.

The bill would therefore have two main effects on commission practice. First, it would alter the evidentiary standards for adjudicatory proceedings at the commission.

Secondly, the bill would expand available judicial review of Commission actions. The extent of the increased level of judicial review is unclear due to the drafting of this bill. For example, the bill is unclear regarding:

- **Which forum could hear the petitions.** By granting a petition “notwithstanding” Article 3 (which includes P.U. Code sec. 1759), existing law limiting court challenges to the Supreme Court or courts of appeal might be set aside in favor of appeals to superior court.
- **Who could file a petition.** The bill’s grant of a right to file a petition “parties beneficially interested” appears to conflict with P.U. Code sec. 1731(b), which explicitly enumerates those parties who may petition for rehearing, prior to direct court challenge.
- **The standard of review for appeals.** The bill’s standards “notwithstanding” P.U. Code secs. 1757 and 1757.1 leave unclear the degree of deference that whatever court hearing the appeal would give to both the commission’s fact finding and legal determinations. Sec. 1757 clearly states, “no new or additional evidence shall be introduced upon review.” This bill would set that provision aside.

Other provisions of AB 840, as amended, appear to be clearer. It is apparent that the bill would provide for judicial review as a matter of right. Moreover, the bill appears to grant the right of review if a petitioner alleges that he or she has no other adequate remedy

At the current time, the judicial review available to challenge commission decisions ensures that any legal errors will be reviewed.

Since SB 1322 (see below) was passed, judicial review of commission decisions has increased dramatically. Many more commission decisions have had appellate hearings, and many times when appellate review is granted, commission decisions are upheld.

Adding complexity to the judicial review process is unnecessary and detracts from the goal of efficiently resolving legal disputes.

Currently, commission decisions are reviewed in the Courts of Appeal, and parties have an option to take their cases directly to the Supreme Court. If interpreted to provide review in superior court, this bill would add a new court to the list of available forums for review of commission decisions, making the review process more complex.

This apparent expansion of judicial review would detract from the efficient way the courts currently review commission decisions. The Courts of Appeal currently scrutinize commission decisions, and most of those decisions that are issued are upheld. This indicates that there is no quality control problem with Commission decisions that requires additional, inefficient, judicial review mechanisms.

Moreover, this bill would have a large negative impact on commission practice, which would be even further exacerbated if the bill, in fact, provides review in superior court. Three levels of review would draw commission resources away from other tasks. In addition, by requiring each challenged decision to be reviewed by the court under an unclear standard of review potentially different from the standards contained in sections 1757 and 1757.1, this bill would make it difficult to determine in advance if a Commission decision was legal and potentially more difficult for the Commission to craft a decision in conformance with the law. This discrepancy would contribute to regulatory uncertainty.

Moreover, many of the parties involved in commission proceedings are sophisticated and well-funded. If these parties had additional legal mechanisms available to them, they might feel obliged to use them to protect their stakeholders' interests. Under this bill, these petitioners would have an opportunity to focus a significant portion of the Commission's resources on the review of commission decisions. These parties could also overwhelm the resources of public interest groups and individual citizens who participate in commission proceedings.

The current Pacific Gas & Electric (PG&E) bankruptcy case offers an instructive example of one well-funded entity's ability to muster superior financial resources in an attempt to overpower the commission. According to court filings, PG&E has incurred more than \$56 million in outside counsel fees in connection with the bankruptcy litigation. This figure does not include the amounts spent by PG&E's parent corporation, PG&E Corp. In an April 2002, Disclosure Statement, PG&E Corp. estimated that it would seek reimbursement \$75 million in legal fees, above those spent by PG&E. These represent only partial figures because PG&E Corp. is not required to file for approval of its fees in bankruptcy court. The actual amount that PG&E Corp. has spent to date has not been disclosed in any court filing.

The commission's counsel, in contrast, has budgeted approximately \$8.7 million for legal representation for the bankruptcy litigation during FY 2003-04.

In addition to requiring another level of review, the superior court administrative mandamus proceedings can be more resource-intensive than the petition for writ of review route. The requirement that petitioners provide the record may be a large barrier for non-profits and other parties with limited resources, essentially meaning that only

those entities with substantial resources could avail themselves of mandamus in superior court.

Adding burdensome evidentiary requirements will not improve the quality of commission proceedings.

AB 840 would impose hearing and evidentiary requirements of the Administrative Procedure Act (APA), on commission adjudicatory proceedings. Although many state agencies, especially those with primarily adjudicatory functions are subject to the APA requirements, the commission has never been, and has consistently resisted efforts to apply the APA to the commission.

Specifically, the California Law Revision Commission recommended that the commission's hearings be exempt from the APA, along with hearings of several other state bodies including the Agricultural Labor Relations Board, the Alcohol Beverage Control Appeals Board, and the Board of Prison Terms, because these "hearings are so uncharacteristic and require such special treatment." (See, Cal. Law Revision Commission, Recommendation: Administrative Adjudication by State Agencies (January 1995) at 91-93.)

One negative effect of requiring the commission to utilize the APA's evidentiary procedures might be to discourage public complainants *in pro per* (appearing without an attorney) from seeking relief from the commission because of more technical evidentiary requirements.

Fiscal Impact: SB 840 will increase state costs in a several ways. First, the commission will need to expend additional resources to hold lengthier and more involved proceedings to meet SB 840's evidentiary requirements. Second, the commission will need to defend its decisions in superior court proceedings around the State, and will need to participate in an additional level of review. Also, the courts will need to expend additional resources in providing an additional level of review for these complex regulatory decisions.

Legislative History: Chapter 855, Statutes of 1996 (SB 1322 (Calderon)) permitted Courts of Appeal, in addition to the Supreme Court, to review most commission decisions and established the following additional grounds for review of commission decisions: a) whether the commission failed to proceed in the manner required by law; b) whether the decision is support by the findings; c) whether the findings are supported by substantial evidence in light of the whole record; and d) whether the decision was procured by fraud or was an abuse of discretion.

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BILL LANGUAGE:

BILL NUMBER: AB 840 AMENDED
BILL TEXT

AMENDED IN ASSEMBLY APRIL 10, 2003

INTRODUCED BY Assembly Member Calderon

FEBRUARY 20, 2003

An act to add Section 1769 to the Public Utilities Code, relating to public utilities.

LEGISLATIVE COUNSEL'S DIGEST

AB 840, as amended, Calderon. Public Utilities Commission: evidence: orders or decisions: review.

Under existing law, the ~~commission~~ *Public Utilities Commission* is not required to apply the technical rules of evidence to hearings, investigations, and proceedings, which are governed by certain existing law and by rules of practice and procedure adopted by the commission.

Existing law provides for judicial review of an order or decision of the Public Utilities Commission in the courts of appeal or Supreme Court, and requires the writ of mandamus to lie from the Supreme Court and from the court of appeal to the commission in all proper cases as prescribed in a specified section of the Code of Civil Procedure.

This bill would require all evidence in any ~~ratemaking, adjudication, or quasi-legislative case~~ to be taken in accordance with certain existing law governing evidence in administrative proceedings. The bill would ~~authorize~~ require judicial review of ~~any~~ a decision of the commission ~~pursuant to other additional provisions of the Code of Civil Procedure pertaining to the writ of mandamus~~ upon the *verified petition of the party beneficially interested, that there is no other plain, speedy, and adequate remedy. The bill would also require judicial review upon the verified petition of the party beneficially interested, that the decision relies on reasoning that misconstrues, misinterprets, or misapplies a relevant statutory provision or that it relies on unconstitutional or unenforceable statutory provisions*. The bill would require the commission to amend its rules of practice and procedure in accordance with the requirements of this bill.

Vote: majority. Appropriation: no. Fiscal committee: yes. State-mandated local program: no.

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. Section 1769 is added to the Public Utilities Code, to read:

~~(a)~~

1769. (a) Notwithstanding Section 1701, all evidence in any

~~ratemaking, adjudication, or quasi-legislative case~~ shall be taken in accordance with Section 11513 of the Government Code.

~~1769.~~

(b) Notwithstanding any other provision of this article, ~~including, but not limited to, Section 1759,~~ judicial review of ~~any~~ a decision of the commission ~~may~~ shall be had pursuant to Chapter 2 (commencing with Section 1084) of Title 1 of Part 3 of the Code of Civil Procedure. ~~upon the verified petition of the party beneficially interested, under either of the following circumstances:~~

(1) *Petitioner has no plain, speedy, or adequate remedy in the ordinary course of law.*

(2) *The petition challenges the decision on either of the following grounds:*

(A) *The decision relies on reasoning that misconstrues, misinterprets, or misapplies a relevant statutory provision.*

(B) *The decision relies on a statutory provision that is unconstitutional, or unenforceable on the basis that federal law or federal regulation prohibits its enforcement.*

(c) The commission shall amend its rules of practice and procedure in accordance with this section.