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**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA**

Order Instituting Rulemaking to Oversee the Resource Adequacy Program, Consider Program Reforms and Refinements, and Establish Forward Resource Adequacy Procurement Obligations.	R.21-10-002

CALIFORNIA COMMUNITY CHOICE ASSOCIATION'S APPLICATION FOR REHEARING OF DECISION 23-06-029

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TABLE OF AUTHORITIES

Caselaw

Assemb. v. Pub. Utils. Comm'n (1995) 12 Cal.4th 87 7
County of Inyo v. Pub. Utils. Comm'n (1980) 26 Cal.3d 154 7
Educ. & Recreational Servs., Inc. v. Pasadena Unified Sch. Dist. (1977) 65 Cal.App.3d 775...... 8
First M.E. Church v. Los Angeles Co. (1928) 204 Cal. 201 8
Grassi v. Super. Court (2021) 73 Cal.App.5th 283 19
Los Angeles Metro. Transit Auth. v. Pub. Utils. Comm'n (1959) 52 Cal.2d 655 7
Monterey Peninsula Water Mgmt. Dist. v. California Pub. Utils. Comm'n (2016) 62 Cal.4th 693 .... 7, 8
Moyer v. Workmen's Comp. Appeals Bd. (1973) 10 Cal.3d 222 17
Pac. Tel. & Tel. Co. v. Pub. Util. Comm'n (1965) 62 Cal.2d 634 7
People v. Welch (1971) 20 Cal.App.3d 997 8
PG&E Corp. v. Pub. Utils. Comm'n (2004) 118 Cal.App.4th 1174 13
Pineda v. Williams–Sonoma Stores, Inc. (2011) 51 Cal.4th 524 18
San Diego Gas & Elec. Co. v. Super. Ct. (1996) 13 Cal.4th 893 .... 6, 7
San Diego Serv. Auth. for Freeway Emergencies v. Super. Ct. (1988) 198 Cal.App.3d 1466 8
Santa Clara Valley Transp. Auth. v. Pub. Utils. Comm'n (2004) 124 Cal.App.4th 346 .... 6, 13
Select Base Materials v. Bd. of Equalization (1959) 51 Cal.2d 640 17
Shiheiber v. JP Morgan Chase Bank, N.A. (2022) 81 Cal.App.5th 688 .... 19, 20
State Dept. of Pub. Health v. Super. Ct. (2015) 60 Cal.4th 940 .... 18, 19
Stone St. Capital, LLC v. California State Lottery Comm'n (2008) 165 Cal.App.4th 109 19
Wirth v. St. of California (2006) 142 Cal.App.4th 131 19

Statutes

Cal. Civ. Proc. Code § 128.5 .... 19, 20
Cal. Civ. Proc. Code § 575 19
Cal. Civ. Proc. Code § 575.2 .... 19, 20
Cal. Const., Art. XII, §§ 1-6 6
Cal. Const., Art. XII, § 3 6
Cal. Const., Art. XII, § 4 6
Cal. Const., Art. XII, § 5 6
Cal. Pub. Res. Code § 25793(a) 27
Cal. Pub. Util. Code § 218.3 2
Cal. Pub. Util. Code § 331.1 2
Cal. Pub. Util. Code § 365.1 .... passim
Cal. Pub. Util. Code § 366 2
Cal. Pub. Util. Code § 366.2 .... passim
Cal. Pub. Util. Code § 380 .... passim
Cal. Pub. Util. Code § 381.1 2
Cal. Pub. Util. Code § 394 2
Cal. Pub. Util. Code § 394.25 2
Cal. Pub. Util. Code § 451 7
Cal. Pub. Util. Code § 453.5 7

Cal. Pub. Util. Code § 454.5 22
Cal. Pub. Util. Code § 701 7
Cal. Pub. Util. Code § 702 7
Cal. Pub. Util. Code § 1731 1

Other

Assembly Bill 117.......... passim
Assembly Bill 380.......... 11
CAISO Tariff Section 43A 27
CAISO Tariff Section 43A.2.3 29
CAISO Tariff Section 43A.8 .... 28, 29

California Public Utilities Commission Proceedings

R.06-02-013 16
R.10-05-006 22
R.17-06-026 .... 15, 16
R.19-11-009 24
R.20-05-003 16
R.21-10-002 .... 1, 27, 28

General Orders

Section 8.1 of General Order 96-B 1

California Public Utilities Commission Decisions

D.04-01-050, *Interim Opinion*, Order Instituting Rulemaking to Establish Policies and Cost Recovery Mechanisms for Generation Procurement and Renewable Resource Development, R.01-10-024 (Jan. 22, 2004) 11
D.05-12-041, *Decision Resolving Phase 2 Issues on Implementation of Community Choice Aggregation Program and Related Matters,* R.03-10-003 (Dec. 15, 2005)).......... 10
D.11-06-022, *Decision Adopting Local Procurement Obligations for 2012 and Further Refining the Resource Adequacy Program*, R.09-10-032 (June 23, 2011) 5
D.12-01-033, *Decision Approving Modified Bundled Procurement Plans*, R.10-05-006 (Jan. 12, 2012) 22
D.12-09-021, *Order Denying Rehearing of Resolution E-4250*, Application 10-05-015 (Sept. 13, 2012) 10
D.20-06-031, *Decision Adopting Local Capacity Obligations for 2021-2023, Adopting Flexible Capacity Obligations for 2021, and Refining the Resource Adequacy Program*, R.19-11-009 (June 25, 2020).......... 24
D.23-06-029, *Decision Adopting Local Capacity Obligations For 2024 - 2026, Flexible Capacity Obligations for 2024, and Program Refinements*, R.21-10-002 (July 5, 2023) .... passim

California Public Utilities Commission Rules of Practice and Procedure

Rule 16.1 1

TABLE OF CONTENTS

I. INTRODUCTION 2

II. THE DECISION VIOLATES CUSTOMERS' STATUTORY RIGHT TO AGGREGATE THEIR ELECTRIC LOADS WITH A CCA 3

III. RELEVANT LEGAL AUTHORITY ON COMMISSION JURISDICTION 6

A. The Commission's Jurisdiction Derives from Authority Expressly Granted by the Legislature 6

1. The Commission Has No Jurisdiction Over the Actions of Local Government Bodies Such as CCAs Except as Expressly Authorized by the Legislature 7

2. The Commission Justifies Its Decision by "Harmonizing" Its Statutory Authority in Sections 366.2, 365.1, and 380 8

a. Section 366.2 Establishes a Detailed, Narrow Scope of Commission Jurisdiction Over CCA Implementation and Expansion 9

b. Section 380 Establishes the Scope of Commission Jurisdiction Over CCAs' Resource Adequacy Activities 11

c. Section 365.1 Among Other Things, Governs Direct Access and Cost Recovery for Centralized Resource Adequacy Procurement 12

B. The Commission's Construction of Statutes Delimiting Its Jurisdiction is Not Entitled to Deference by Courts 13

IV. THE DECISION EXCEEDS THE COMMISSION'S JURISDICTION BY PROHIBITING CUSTOMERS FROM AGGREGATING THEIR LOADS WITH AN EXISTING CCA BASED ON THE CCA'S PRIOR RA COMPLIANCE HISTORY 14

A. The Legislature Has Not Expressly Authorized the Commission's Action 14

B. The Decision Exceeds the Commission's Statutory Jurisdiction to Prevent Cost Shifts 15

C. The Commission May Not Rewrite Existing Law to Imply Jurisdiction to Establish the New Rule by "Harmonizing" the Statutory Scheme as a Whole 18

TABLE OF CONTENTS continued

D. The Commission's Excursion Outside the Scope of Its Jurisdiction Cannot Be Justified by Its Obligation to Provide a CCA the "Earliest Possible Date" for Implementation 21

V. THE DECISION NEEDLESSLY DISCRIMINATES AGAINST CCAS WHEN OTHER, EVEN-HANDED RA ENFORCEMENT ALTERNATIVES ARE AVAILABLE UNDER SECTION 380 23

VI. THE COMMISSION ABUSES ITS DISCRETION AND FAILS TO ACT IN THE MANNER REQUIRED BY LAW BY MAKING FINDINGS THAT ARE UNSUPPORTED BY THE RECORD 26

A. The Commission Errs in Summarily Concluding that Compliant LSEs are Subsidizing Deficient LSEs' Energy Procurement 26

B. The Commission Errs in Summarily Concluding that Allowing LSEs Deficient in Meeting RA Requirements to Expand or Otherwise Take on New Customer Load is Detrimental to Grid Reliability 28

VII. CONCLUSION 29

SPECIFICATION OF ERROR

California Community Choice Association hereby requests rehearing of Decision (D.) 23-06-029 (Decision) and the California Public Utilities Commission's (Commission's) prohibition of the expansion of a community choice aggregator's (CCA's) service area if the CCA had a Resource Adequacy (RA) deficient in the prior two calendar years. Rehearing should be granted based on the following legal errors set forth in the Decision:

- The Commission exceeds its jurisdiction, and therefore fails to act in the manner required by law, by acting outside of its express, narrow, and predominantly administrative authority under Public Utilities Code Section 366.2 over CCA implementation plans, and by impairing the express statutory right of customers to aggregate their loads with a CCA.
- The Commission unlawfully justifies its jurisdictional reach and impliedly exerts its authority over CCA expansion by "harmonizing" its authority under Sections 366.2 (CCA implementation), 365.1 (electric service provider (ESP) implementation), and 380 (RA rules and enforcement mechanisms), despite California law requiring express authorization of jurisdiction over CCAs as governmental bodies and not allowing harmonization of statutes when the authority set forth in such statutes is unambiguous. As such, the Commission exceeds it jurisdiction and fails to act in the manner required by law.
- The Commission misapplies and exceeds its statutory authority to prevent cost shifts by failing to identify the costs and impose them on CCA customers as required by subsections 366.2(c)(5) and 366.2(c)(7), and failing to read the more general cost shift language of Section 366.2(a)(4) in light of the requirements of Section 366.2(d), (e), and (f) regarding prevention of cost shifts in connection with CCA implementation. As such, the Commission exceeds its jurisdiction and fails to act in the manner required by law.
- The Commission overreaches in its authority to provide an "earliest possible date" for CCA expansion under Section 366.2(c)(8) by applying a requirement outside of the express statutory requirement that the Commission only consider the impact of the expansion on the investor-owned utility's (IOU's) annual procurement plan. Instead, the Commission has inserted as a factor determining the "earliest possible date" the evaluation of a CCA's RA compliance history. The Commission has thus exceeded its jurisdiction and failed to act in the manner required by law.
- The Commission violates Section 380 requiring the Commission to enforce its RA program rules in a nondiscriminatory manner by applying the rule against expansion as an additional RA enforcement policy imposed on CCAs and ESPs, but not on IOUs. The Commission violates Section 380's requirement for nondiscriminatory enforcement despite the availability of less restrictive, and nondiscriminatory, measures in Section 380 including improving the existing RA penalty structure or allocating the costs of generating capacity and demand response in a manner that prevents cost shifts. As a result, the Commission exceeds its jurisdiction and fails to act in a manner required by law.

- The Commission abuses its discretion by basing its Decision to restrict CCA expansions on conclusory, superficial, unsupported, and largely incorrect findings. As a result, the Commission has failed to act in the manner required by law.

BEFORE THE PUBLIC UTILITIES COMMISSION
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CALIFORNIA COMMUNITY CHOICE ASSOCIATION'S
APPLICATION FOR REHEARING OF DECISION 23-06-029

Pursuant to Rule 16.1 of the California Public Utilities Commission (Commission) Rules of Practice and Procedure, Section 8.1 of General Order 96-B, and California Public Utilities Code Section 1731,[1] California Community Choice Association[2] (CalCCA) submits this Application for Rehearing of Decision (D.) 23-06-029[3] (Decision) issued in Rulemaking (R.) 21-10-002 on July 5, 2023. The Decision, among other things, prohibits the expansion of a community choice aggregator's (CCA's) service area if the CCA had a Resource Adequacy (RA) deficiency in the prior two calendar years. This application for rehearing is timely filed.

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[1] All subsequent code sections cited herein are references to the California Public Utilities Code unless otherwise specified.

[2] California Community Choice Association represents the interests of 24 community choice electricity providers in California: Apple Valley Choice Energy, Central Coast Community Energy, Clean Energy Alliance, Clean Power Alliance, CleanPowerSF, Desert Community Energy, East Bay Community Energy, Energy For Palmdale's Independent Choice, Lancaster Energy, Marin Clean Energy, Orange County Power Authority, Peninsula Clean Energy, Pico Rivera Innovative Municipal Energy, Pioneer Community Energy, Pomona Choice Energy, Rancho Mirage Energy Authority, Redwood Coast Energy Authority, San Diego Community Power, San Jacinto Power, San José Clean Energy, Santa Barbara Clean Energy, Silicon Valley Clean Energy, Sonoma Clean Power, and Valley Clean Energy.

[3] D.23-06-029, *Decision Adopting Local Capacity Obligations For 2024 - 2026, Flexible Capacity Obligations for 2024, and Program Refinements*, R.21-10-002 (July 5, 2023): https://docs.cpuc.ca.gov/PublishedDocs/Published/G000/M513/K132/513132432.PDF.

I. INTRODUCTION

California Public Utilities Code Section 366.2(a) expressly entitles customers "to aggregate their electric loads as members of their local community with community choice aggregators."[4] The Commission's jurisdiction in this process is narrowly limited and primarily administrative, derived solely from the Legislature's express grants of authority over CCAs. Unlike its regulation of public utilities, the Commission has no general jurisdiction to regulate CCAs or the customers or local governments that form the CCAs.

The Decision exceeds the Commission's jurisdiction, and results in the Commission not proceeding in the manner required by law, by impairing this express right of customers to aggregate their electric loads with a CCA. Specifically, the Decision unlawfully prohibits customers from aggregating load with an existing CCA if the CCA has a history of noncompliance with the Commission's regulations governing resource adequacy (RA), promulgated under Section 380, in the prior two years (New Rule).[5]

The Commission may not, as it has done in the Decision, lawfully expand its jurisdiction to promulgate the New Rule by simply "harmonizing" statutes addressing separate subjects, particularly when there is no conflict among the statutes. And while courts may defer to the Commission's judgment in some circumstances, the Commission is not entitled to deference in its interpretation of statutes delimiting its jurisdiction.

The Commission also fails to comply with the requirement in Section 380 that it apply its RA enforcement authority in a nondiscriminatory manner to CCAs. The Commission has a range

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4 Assembly Bill No. 117, Chapter 838 (2002) (An act to amend Sections 218.3, 366, 394, and 394.25 of, and to add Sections 331.1, 366.2, and 381.1 to, the Public Utilities Code, relating to public utilities) (AB 117).

5 Throughout this Application for Rehearing, CalCCA refers both to the customer right to aggregate load through forming a CCA <u>and</u> joining an existing CCA (i.e., a CCA expansion) as CCA implementation, as both require the same Implementation Plan to be filed pursuant to Section 366.2.

of even-handed measures that can be used to address RA noncompliance without exceeding its jurisdiction over CCAs or applying enforcement mechanisms to CCAs or Electric Service Providers (ESPs) without applying the same mechanisms to investor-owned utilities (IOUs). By failing to adopt such nondiscriminatory measures, the Commission acts outside of its jurisdiction and fails to proceed in a manner required by law.

Finally, the Commission abuses its discretion and therefore fails to act in the manner required by law by making findings without explanation or support in the record. The Commission has not explained and cannot support its findings that CCA RA noncompliance is "subsidized" by other customers and affects grid reliability. Other customers do not contribute to the cost of replacement RA to account for a CCA's noncompliance, and the Commission has not asserted that such replacement purchases are made. The regulatory framework requires replacement RA resources needed to bolster reliability to be procured, instead, by the California Independent System Operator (CAISO) under Federal Energy Regulatory Commission (FERC) authority, and the costs are billed directly to the noncompliant CCA or other load-serving entity (LSE).

CalCCA requests rehearing of D.23-06-029 to correct these legal errors.

II. THE DECISION VIOLATES CUSTOMERS' STATUTORY RIGHT TO AGGREGATE THEIR ELECTRIC LOADS WITH A CCA

The Decision treads directly on the rights granted to customers by the Legislature in AB 117, set forth in Section 366.2: "[c]ustomers shall be entitled to aggregate their electric loads as members of their local community with [CCAs].[6] A local community's election to implement or expand a CCA program is accomplished through local ordinance.[7] AB 117 requires the Commission to

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6 § 366.2(a)(1).
7 § 366.2(c)(12).

perform distinct, administrative, and narrowly designated tasks related to CCA implementation after a public agency's adoption of a CCA implementation plan at a duly noticed public hearing:

- Development of a cost-recovery mechanism to be imposed on a CCA pursuant to subsections [366.2] (d), (e), and (f) to be paid by the customers of the CCA to prevent shifting of costs from the CCA's implementation;[8]

- Notification to the IOU serving the customers proposed for aggregation that a CCA implementation plan has been filed (within ten days of filing);[9]

- Certification that the Commission has received the implementation plan (and any other information requested by the Commission to determine a cost-recovery mechanism) (within 90 days of filing);[10]

- Provision of findings to the CCA regarding cost recovery that must be paid by the CCA's customers to prevent cost shifting as provided for in [Section 366.2] (d), (e), and (f),[11] and authorization of implementation only if the cost recovery mechanism is imposed;[12] and

- Designation of the "earliest possible effective date" for CCA implementation, "taking into consideration the impact on" the IOU's Commission approved annual procurement plan.[13]

The Decision unlawfully expands the Commission's authority related to CCA implementation and expansion beyond that set forth in Section 366.2 by, among other things:

- Establishing the New Rule "harmoniz[ing] the statutory scheme as a whole, including Sections 380 [RA enforcement], 365.1 [direct access transactions] and 366.2";[14]

- Applying the New Rule to CCA implementation plans submitted after the effective date of the Decision,[15] beginning with the September 2023 month-ahead filing and the 2024 year-ahead RA filing due October 21, 2023;[16]

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[8] § 366.2(c)(5).
[9] § 366.2(c)(6).
[10] § 366.2(c)(7).
[11] *Ibid.*
[12] § 366.2(i).
[13] § 366.2(c)(8).
[14] Decision, Ordering Paragraph (OP) 9 at 137.
[15] *Ibid.*
[16] *Id.*, OP 9 at 137.

- Applying a similar rule to ESPs but exempting the IOUs based on their current role as the Provider of Last Resort (POLR).[17]

- Excluding from the events triggering the Commission's expansion prohibition the following circumstances: (i) a year-ahead deficiency cured in the month-ahead filing, but only for year-ahead deficiencies accrued two years before the year in which the LSE files its binding load forecast;[18] (ii) a month-ahead or year-ahead system RA deficiency that is less than one percent of the LSE's system RA requirements;[19] and (iii) non-substantive "specific violations," as adopted in Resolutions E-4107 and E-4195 and modified in Decision 11-06-022.[20]

- Authorizing Energy Division to review RA referrals and citations issued by the Consumer Protection and Enforcement Division for the prior two years to determine if a CCA is eligible to expand.[21]

Neither Section 366.2 nor any other statute expressly authorize the Commission to impose the New Rule. Implicitly aware of this shortcoming, the Decision engages in hand-waving, claiming: "our approach harmonizes the statutory scheme as a whole, including Sections 380, 365.1 and 366.2."[22]

Rehearing of the Decision and its adoption of the New Rule should be granted to address the significant legal errors set forth therein. In the sections below, CalCCA addresses the following.

- Section III discusses relevant legal authority on the scope of Commission jurisdiction and each of the purportedly "harmonized" statutes, noting, *inter alia*, that the authority permitting the Commission to regulate the acts of a public body

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[17] *Ibid.*

[18] *Id.* at 40, OP 10 at 138. Year-ahead deficiencies in the year that the LSE files its binding load forecast with additional load it intends to serve are not eligible for exclusion from the expansion prohibition. *Ibid*. The Commission states that there will be insufficient time for the LSE to cure the year-ahead deficiency in that year's month-ahead timeframe as the LSE will have already filed its binding load forecast commitments. *Ibid.*

[19] Note that OP 10 describes a "month-ahead or system-ahead system RA deficiency," however CalCCA believes the Commission means "year-ahead system RA deficiency." *See id.* Clarification on OP 10 is therefore necessary. *Ibid.*

[20] *Ibid.*; *see* D.11-06-022, *Decision Adopting Local Procurement Obligations for 2012 and Further Refining the Resource Adequacy Program*, R.09-10-032 (June 23, 2011): https://docs.cpuc.ca.gov/PublishedDocs/WORD_PDF/FINAL_DECISION/138375.PDF.

[21] *Id.*, OP 11 at 138-139.

[22] *Id.* at 115 (emphasis added).

must be "express," and not simply inferred.[23] Section III also discusses California law refuting the ability to "harmonize" distinct statutes to obtain a result other than what is expressly provided in a statute. Section III also emphasizes that the usual deference provided by courts to the Commission's interpretation of its governing statutes does not extend to the Commission's interpretation of its own jurisdiction.

- Section IV examines the law set forth in Section III in the context of the Decision, describing the legal errors committed by the Commission.
- Section V. describes the failure of the Commission to act within its jurisdiction granted through Section 380 to apply the RA enforcement mechanism in a nondiscriminatory manner.
- Section VI describes the Commission's abuse of discretion resulting from the lack of evidence or analysis supporting its conclusions in the Decision.

III. RELEVANT LEGAL AUTHORITY ON COMMISSION JURISDICTION

A. The Commission's Jurisdiction Derives from Authority Expressly Granted by the Legislature

Except as expressly authorized or directed by the Legislature, the Commission has no jurisdiction over the actions of local government bodies such as CCAs, which form either as a municipality or a joint powers authority. In this regard, its jurisdiction differs greatly from its general authority over IOUs. The following describes the parameters of Commission jurisdiction over IOUs versus other entities.

The Commission's overall authority stems from the California Constitution,[24] which grants the Commission broad authority to regulate transportation companies[25] and vests the Legislature with control over privately owned providers of energy, water and telecommunications.[26] The Constitution provides that "the Legislature has plenary power . . . to

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[23] *Santa Clara Valley Transp. Auth. v. Pub. Utils. Comm'n* (2004) 124 Cal.App.4th 346, 364.
[24] *San Diego Gas & Elec. Co. v. Super. Ct.* (1996) 13 Cal.4th 893, 914; Cal. Const., Art. XII, §§ 1-6.
[25] Cal. Const., Art. XII, § 4.
[26] *Id.*, Art. XII, § 3.

confer additional authority and jurisdiction upon the [C]ommission."[27] The Legislature exercised this plenary power by enacting the Public Utilities Code, vesting the Commission with broad authority to "supervise and regulate every public utility in the State"[28] and to "do all things, whether specifically designated in [the Public Utilities Code] or in addition thereto, which are necessary and convenient in the exercise of such power and jurisdiction."[29] While the Commission's authority over public utilities (i.e., IOUs) is broad, courts have even placed limits on this authority, including finding that the Commission is not authorized to disregard express legislative directives or restrictions upon its powers found in other statutes.[30]

1. The Commission Has No Jurisdiction Over the Actions of Local Government Bodies Such as CCAs Except as Expressly Authorized by the Legislature

Established law provides that except as authorized or directed by the Legislature, the Commission has no jurisdiction over the actions of government bodies such as CCAs.[31] Any authority granted by the Legislature, however, must be "express" and not simply inferred. In other words, the Commission should not presume the Legislature intended "to legislate by

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[27] *Id.,* Art. XII, § 5.

[28] *San Diego Gas & Electric,* 13 Cal.4th at 915; *see also* Section 701.

[29] Section 701; *see also* Section 451 (Commission authority to ensure public utilities operate safely); *see also* Section 702 (public utilities must obey and comply with all Commission orders as to any matter affecting its business as a public utility).

[30] *See Assemb. v. Pub. Utils. Comm'n* (1995) 12 Cal.4th 87, 103 (finding that an express legislative directive in Public Utilities Code Section 453.5 that a ratepayer refund be paid to the ratepayers of public utilities prevented the Commission from diverting that refund for other public purposes); *see also Pac. Tel. & Tel. Co. v. Pub. Util. Comm'n* (1965) 62 Cal.2d 634, 653 (Section 701 inapplicable because the actions of the Commission disregarded "express legislative directives").

[31] *See Monterey Peninsula Water Mgmt. Dist. v. California Pub. Utils. Comm'n* (2016) 62 Cal.4th 693, 698 (2016) ("Public Utilities Commission … has no authority, however, to regulate public agencies like the District, absent a statute expressly authorizing such regulation…"); *see also County of Inyo v. Pub. Utils. Comm'n* (1980) 26 Cal.3d 154, 166-167 (citing *Los Angeles Metro. Transit Auth. v. Pub. Utils. Comm'n* (1959) 52 Cal.2d 655, 661 ("In the absence of legislation otherwise providing, the commission's jurisdiction to regulate public utilities extends only to the regulation of privately owned utilities").

implication"[32] – the modern rule of construction disfavors such practice.[33] In fact, even where the activity of a government body has some relationship to an activity of a Commission-regulated utility, the Commission lacks jurisdiction over the government body's activity in the absence of express legislative authority for the Commission action at issue.[34] For this reason, the California Supreme Court held in *Monterey* that the Commission lacked jurisdiction to review a user fee imposed by a government body even though the user fee itself was billed and collected, on behalf of the government body, by a Commission-regulated utility.[35] Therefore, without express Legislative authority, the Commission lacks jurisdiction to delay customers' exercise of their rights "to aggregate their electric loads as members of their local community with community choice aggregators" under Section 366.2(a)(1).

2. The Commission Justifies Its Decision by "Harmonizing" Its Statutory Authority in Sections 366.2, 365.1, and 380

While the Commission lacks express authority to justify its New Rule, it reasons that the Decision is justified because it "harmonizes the statutory scheme as a whole, including Sections 380, 365.1 and 366.2."[36] These sections, however, serve unique, separate, and nonconflicting purposes and do not separately or together provide the jurisdiction that the Commission claims: (i) Section 380 authorizes the Commission to oversee a CCA's RA activities; (ii) Section 365.1 governs direct access – not CCA – transactions and authorizes the Commission to recover costs from bundled and unbundled (including direct access and CCA) customers for Commission

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32 *People v. Welch* (1971) 20 Cal.App.3d 997, 1002 (citing *First M.E. Church v. Los Angeles Co.* (1928) 204 Cal. 201, 204.

33 *See Educ. & Recreational Servs., Inc. v. Pasadena Unified Sch. Dist.* (1977) 65 Cal.App.3d 775, 782 (rejecting an argument that the Legislature implied meaning in a statute); *see also San Diego Serv. Auth. for Freeway Emergencies v. Super. Ct.* (1988) 198 Cal.App.3d 1466, 1472 ("a Court should not presume the Legislature intended to legislate by implication") (citing *People v. Welch* (1971) 20 Cal.App.3d at 1002).

34 *See Monterey,* 62 Cal.4th at 699-700.

35 *Ibid*.

36 Decision at 115.

authorized or ordered central procurement of RA by an IOU; and (iii) Section 366.2 governs implementation of a new or expanded CCA. Each separate and distinct area of statutory authority is described below.

a. Section 366.2 Establishes a Detailed, Narrow Scope of Commission Jurisdiction Over CCA Implementation and Expansion

As discussed in Section II above, the Commission's authority in connection with CCA implementation is expressly set forth in Section 366.2. The statute prescribes the rights and obligations of customers aggregating their load through a CCA, the responsibilities of the CCA, and the Commission's, narrow, distinct, and largely administrative roles in the implementation process to:

- "[N]otify any electrical corporation serving the customers for aggregation that an implementation plan initiating [CCA] has been filed" (within 10 days of implementation plan filing);[37]
- Seek "information …. that the commission determines is necessary to develop the cost-recovery mechanism in subdivisions (d), (e), and (f)";[38]
- "Certify" that it "has received the implementation plan, including any additional information necessary to determine a cost-recovery mechanism" (within 90 days of implementation plan filing);[39]
- Provide the CCA with findings regarding any cost recovery to be paid by customers of the CCA to prevent cost shifting as provided for in Sections 366.2 (d), (e), and (f)[40] and authorize implementation only if the cost recovery mechanism is imposed;[41]
- "[D]esignate the earliest possible effective date for implementation" of the CCA program "taking into consideration the impact on any annual procurement plan of the electrical corporation that has been approved by the commission";[42] and

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37 § 366.2(c)(6).
38 § 366.2(c)(5).
39 § 366.2(c)(7).
40 *Ibid.*
41 § 366.2(i).
42 § 366.2(c)(8).

- Oversee electrical corporation cooperation in the implementation of the CCA program.[43]

The New Rule, effectively extending the Commission's jurisdiction over CCA implementation, is not expressly provided for in Section 366.2, or in any other statute.

The Decision's expansion of jurisdiction conflicts with the Commission's prior express and clear acknowledgement of the limits of its jurisdiction over CCAs. In its first major decision on implementation, the Commission concluded that AB 117 does not confer authority for "general regulatory oversight of CCAs"[44] and further clarified its belief that nothing in "AB 117 intended to give this Commission broad jurisdiction over CCAs."[45] In focusing specifically on the regulatory process for considering CCA implementation, it found that: "AB 117 does not provide us with authority to approve or reject a CCA's implementation plan or to decertify a CCA."[46] Importantly, it also concluded that its jurisdiction was limited by the express terms of the statute: "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."[47]

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43 § 366.2(c)(9).

44 D.05-12-041, *Decision Resolving Phase 2 Issues on Implementation of Community Choice Aggregation Program and Related Matters,* R.03-10-003 (Dec. 15, 2005), Conclusion of Law (COL) 2, at 60; *see also id.* COL 1, at 60 and Finding of Fact (FOF) 2, at 56: https://docs.cpuc.ca.gov/PublishedDocs/WORD_PDF/FINAL_DECISION/52127.PDF.

45 *Id.* at 16; *see also* D.12-09-021, *Order Denying Rehearing of Resolution E-4250*, Application 10-05-015 (Sept. 13, 2012) (the Commission acknowledges its "limited jurisdiction over CCAs" in contrast to its "general jurisdiction" over IOUs).

46 D.05-12-041, at 4; *see also id.,* at 14 ("we find nothing in the statute that directs the Commission to approve or disapprove an implementation plan or modifications to it. Nor does the statute provide explicit authority to 'decertify' a CCA or its implementation plan").

47 *Id.* at 15. The Commission seems to suggest that D.05-12-041 claimed authority to terminate a CCA's service. *See* Decision at 37. The quoted language omits key elements of the relevant finding of fact in D.05-12-041 and the underlying discussion. The Commission contemplated termination "in the event of a system emergency or where public health or safety is involved" and then only after an order by the Commission. *See* D.05-12-041 at 49. Moreover, the Commission has never terminated a CCA service for any reason and thus the scope of its authority has not been tested by a court.

As discussed further in Section IV.C, the New Rule, by interpreting the Commission's "overall" and "harmonized" authority in Sections 365.1, 366.2 and 380, ignores this previous acknowledgment of the Commission's narrowly established authority over CCA implementation.

b. Section 380 Establishes the Scope of Commission Jurisdiction Over CCAs' Resource Adequacy Activities

As discussed above, the Decision claims to have "harmonized" Section 366.2 with Section 380 to justify the New Rule for CCAs.[48] Section 380, granting authority to the Commission to establish RA requirements for all LSEs (including CCAs), neither addresses nor provides any authority to the Commission over CCA implementation plans. Instead, this statute represents an entirely separate authority addressing oversight of RA once a CCA is operational.

The Commission has developed its RA program over nearly two decades; its first key decision framed the program in 2004[49] with requirements very similar to those of the current program. Not until the adoption of AB 380 (Nunez, 2005), however, did the Legislature expressly grant the Commission authority to oversee the RA activities of CCAs. Section 380 provides the Commission authority to establish an RA program to ensure the reliability of electric service in California, which applies equally to all LSEs, including IOUs, CCAs, and ESPs.[50] Although Section 366.2 was enacted in 2002, AB 380 (enacted in 2005) did not alter or cross-reference Section 366.2.

Section 380 does not provide authority for the Commission to tie a CCA's RA compliance history to its implementation. However, Section 380 expressly contains four

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[48] Decision at 115.

[49] D.04-01-050, *Interim Opinion*, Order Instituting Rulemaking to Establish Policies and Cost Recovery Mechanisms for Generation Procurement and Renewable Resource Development, R.01-10-024 (Jan. 22, 2004), at 10-17: https://docs.cpuc.ca.gov/PublishedDocs/WORD_PDF/FINAL_DECISION/33625.PDF.

[50] § 380 applies to "load serving entities" as defined in subdivision (k).

important directives relevant to the reliability issues that the Commission purports to address in the Decision. First, it expressly gives the Commission a tool to prevent cost shifting among customers, requiring the Commission to "[e]quitably allocate the cost of generating capacity and demand response in a manner that prevents the shifting of costs between customer classes."[51] Second, it authorizes the Commission to ensure compliance with its RA program through the exercise of its enforcement powers.[52] Third, it must exercise its powers in a way that "[m]inimize[s] enforcement requirements and costs" and in a "nondiscriminatory manner."[53] Fourth, it requires the Commission to determine "the most efficient and equitable means" for achieving the goals set forth in Section 380.[54] Importantly, nothing in Section 380 expressly establishes a new enforcement power related to CCA implementation plans or permits the Commission to tie its RA enforcement authority to any distinct authority the Commission holds in another statute such as Section 366.2.

c. Section 365.1 Among Other Things, Governs Direct Access and Cost Recovery for Centralized Resource Adequacy Procurement

The Decision relies not only on Sections 366.2 and 380 but contends that these provisions have also been harmonized with a third Section, 365.1, to justify the Commission's action.[55] While the Commission summarily states that it "disagrees that …Section 365.1 constrain[s] the Commission's ability to ensure CCAs seeking to expand service of meeting their RA requirements,"[56] the Decision does not explain where in the 1,300 words of Section 365.1 it finds support for its position. CalCCA agrees that this section does not expressly "constrain" the

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51 § 380(b)(3) (original Section 380(b)(2)).
52 § 380(e).
53 *Id*.
54 § 380(h).
55 Decision at 115.
56 *Ibid*.

Commission's action but neither does it expressly authorize or justify its New Rule. On its face, the section seems irrelevant to the question at hand given that it predominantly governs direct access.

In fact, only subdivisions (c) and (d) of Section 365.1 apply to CCAs; the other sections apply to "other providers" (such as ESPs) which expressly excludes CCAs.[57] The two applicable subdivisions prescribe the cost recovery mechanism to address circumstances in which the Commission orders an IOU pursuant to Section 380 to centrally procure RA generation resources for the benefit of all customers. Neither subdivision expressly authorizes the Commission to do so by rejecting an expansion plan of a CCA. It is unclear how the Commission "harmonized" this statute with other statutes to support its New Rule.

B. The Commission's Construction of Statutes Delimiting Its Jurisdiction is Not Entitled to Deference by Courts

Because the Commission may only take actions with respect to government bodies that are expressly authorized by the Legislature, whether the Commission has exceeded its jurisdiction will often turn on the construction of a statute purportedly providing that express authority. Unlike the deference granted by courts to the Commission's interpretation of statutes subject to the regulatory jurisdiction of the Commission, its construction of the scope of its authority under such statutes is entitled to no deference by a reviewing court.[58] Instead, construction of the statute at issue is subject to independent review.[59]

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[57] § 365.1(a).

[58] *See Santa Clara Valley,* 124 Cal.App.4th at 359 ("This case turns on statutory interpretation and issues of legislative intent underlying sections 1201 and 1202 as well as the VTA's enabling legislation and related statutes applicable to public light rail transit systems. … Therefore, our review is independent review"); *see also PG&E Corp. v. Pub. Utils. Comm'n* (2004) 118 Cal.App.4th 1174, 1194-95 ("the general rule of deference to interpretations of statutes subject to the regulatory jurisdiction of agencies does not apply when the issue is the scope of the agency's jurisdiction…(Citations omitted)…..We conclude that the PUC's interpretation of the scope of its own jurisdiction must bear more than just a "reasonable relation" to statutory purposes and language…").

[59] *See Santa Clara Valley,* 124 Cal.App.4th at 359; *see also PG&E Corp.,* 118 Cal.App.4th at 1194-95.

Here, the Commission contends that its jurisdiction to delay or prevent CCA expansion turns on the harmonization of three statutes: Sections 366.2, Section 380, and Section 365.1.[60] As discussed above, none of these statutes independently provides the requisite authority to reject or delay the rights of local communities to adopt community choice, whether through a new or expanded CCA. Section 366.2 establishes in great detail the narrow scope of the Commission's role in reviewing a CCA's implementation plan. Section 380 separately prescribes the scope of the Commission's jurisdiction over CCAs in regulating their RA activities. Section 365.1 primarily applies to direct access and ESPs; subdivisions (c) and (d), however, address cost recovery for all customers for any centralized resource adequacy procurement the Commission directs. None of these statutes expressly authorizes the Commission to delay or prevent expansion of CCA service. In the event of court review of the Decision, the Commission's novel "harmonization" of the three statutes to grab authority not otherwise expressly provided by statute will be subject to a Court's independent review.

IV. THE DECISION EXCEEDS THE COMMISSION'S JURISDICTION BY PROHIBITING CUSTOMERS FROM AGGREGATING THEIR LOADS WITH AN EXISTING CCA BASED ON THE CCA'S PRIOR RA COMPLIANCE HISTORY

A. The Legislature Has Not Expressly Authorized the Commission's Action

The Commission has exceeded its limited jurisdiction over CCAs by conditioning a local community's aggregation of customer loads with an existing CCA on the existing CCA's RA compliance history. As explained in Section III.A.1, the Commission has no general authority over local governments absent express statutory authority. Moreover, nothing in the three statutes cited by the Decision – Sections 366.2, 365.1, or 380 expressly authorizes the Commission to take this action; indeed, the Decision claims no express authority. In adopting the New Rule to prohibit

[60] Decision at 115.

customers from aggregating their loads with an existing CCA based on the CCA's prior RA compliance history, the Decision therefore exceeds the Commission's jurisdiction.

The Commission must look to the plain language of Section 366.2, which clearly and in great detail delineates the role of the Commission in CCA implementation. Nothing in that language permits the Commission to prevent or delay implementation of an expansion based on the existing CCA's RA compliance history.

B. The Decision Exceeds the Commission's Statutory Jurisdiction to Prevent Cost Shifts

The Decision appears to suggest that its New Rule has been adopted to prevent cost shifting among customer classes. Finding of Fact 6 states: "LSEs that are deficient in their RA obligations result in reliance on other LSEs' procurement activities and cost-shifting."[61] It further observes its duty to prevent cost shifting in Section 366.2(a)(4) and to allocate costs equitably under Section 380.[62] While the Legislature has delegated these responsibilities to the Commission, the Commission misapplies and exceeds its authority.

As an initial matter, the misapplication of its authority is unmistakable in its choice of remedies to address the purported cost shift. Preventing cost shifts for CCA implementation, as Section 366.2(c)(5) describes, is achieved by identifying the costs that "shall be paid by the customers of the community choice aggregator." The Commission has historically identified such costs in its Power Charge Indifference Adjustment (PCIA) proceeding, R.17-06-026,[63] and the proceeding's predecessors. The Commission calculates these costs annually in each IOU's

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[61] Decision at 130.

[62] *Id.* at 36.

[63] *See generally, e.g.,* D.18-10-019, *Decision Modifying the Power Charge Indifference Adjustment Methodology*, R.17-06-026 (Oct. 11, 2018): https://docs.cpuc.ca.gov/PublishedDocs/Published/G000/M232/K687/232687030.PDF.

Energy Resource Recovery Account (ERRA) proceeding,[64] and imposes the costs as a nonbypassable charge on each customer's bill. If the Commission believes, as it suggests in the Decision, that a cost shift was occurring, its statutory authority requires it to identify the cost and impose it on CCA customers, not to prevent or delay a CCA's expansion.

Likewise, the Commission has equitably allocated reliability costs under Section 380 for many years, using its Cost Allocation Mechanism, both on a collective[65] and individual LSE[66] basis. Nothing in the Decision, however, suggests that there is a need for reallocation of any reliability costs. In short, if the problem was purported cost shifting, the Commission failed to deploy the remedy the Legislature provided: allocation of centrally procured RA costs.

In addition, the types of costs the Commission has identified as a potential "cost shift" fall outside the bounds of its authority under Section 366.2(c)(7). This section defines the scope of cost shifts the Commission is authorized to address in CCA implementation, pointing to subdivisions (d), (e), and (f). These costs currently are addressed in the Commission's PCIA proceeding, R.17-06-026. The Decision goes beyond these categories and institutes new and statutorily undelineated cost shift policy based upon RA deficiencies.

Specifically, Section 366.2 permits recovery of several categories of costs as defined in subdivisions (d), (e), and (f). Subdivisions (d) and (e) require recovery from CCA customers of

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[64] *See, e.g.,* D.22-12-044, *Decision Adopting the Electric Revenue Requirements and Rates Associated with the 2023 Energy Resource Recovery Account and Generation Non-bypassable Charges Forecast and Greenhouse Gas Forecast Revenue Return and Reconciliation and the 2023 Electric Sales Forecast for Pacific Gas and Electric Company*, A.22-05-029 (Dec. 15, 2022): https://docs.cpuc.ca.gov/PublishedDocs/Published/G000/M500/K043/500043722.PDF.

[65] D.06-07-029, *Opinion on New Generation and Long-Term Contract Proposals and Cost Allocation*, R.06-02-013 (July 20, 2006): https://docs.cpuc.ca.gov/PublishedDocs/WORD_PDF/FINAL_DECISION/58268.PDF.

[66] D.22-05-015, *Decision on Modified Cost Allocation Mechanism for Opt-Out and Backstop Procurement Obligations*, R.20-05-003 (May 23, 2022): https://docs.cpuc.ca.gov/PublishedDocs/Published/G000/M479/K339/479339449.PDF.

Department of Water Resources (DWR) costs stemming from the 2000-2001 energy crisis. Subdivision (f) requires recovery of the IOU's "past undercollections" for IOU purchases prior to the load departing. The statute provides no other express categories of cost recovery in the CCA implementation process.

The types of cost shift addressed by the Decision go beyond the scope of this express authority. The Decision finds "that LSEs that are deficient in their RA obligations result in leaning on other LSEs' procurement activities."[67] The Decision asserts that "if one LSE fails to contract for resources to serve its own load, the customers of other LSEs that did accomplish such forward contracting are effectively subsidizing the deficient LSE's energy procurement, and such deficiencies may impact grid reliability."[68] These costs do not fall within the scope of subdivisions (d), (e), or (f) and, critically, the Decision does not claim otherwise.

Finally, the more general language of Section 366.2(a)(4) must be read within the context of the overall implementation statute. Subdivision (a)(4) provides that "[t]he implementation of a community choice aggregation program shall not result in a shifting of costs between the customers of the community choice aggregator and the bundled service customers of an electrical corporation." While subsection (a)(4) provides the principle, it is informed by later subdivisions (d), (e), and (f) to provide the explicit mechanisms to prevent such cost shifting.

Fundamental rules of statutory construction require reading together the sections within a statutory provision.[69] Harmonizing the subsections of Section 366.2, the legislative intent is clear: subsections (d), (e), and (f) are the methodologies provided by the Legislature to prevent the cost

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67 Decision at 37-38.

68 *Id.* at 37.

69 *See Select Base Materials v. Bd. of Equalization* (1959) 51 Cal.2d 640, 645; *see also Moyer v. Workmen's Comp. Appeals Bd.* (1973) 10 Cal.3d 222, 230-31 (citing *Select Base Materials,* 51 Cal.2d at 645).

shifting identified in subsection (a)(4) that may result from the implementation of the CCA program. In other words, subsection (a)(4) was not enacted in a vacuum and does not alone provide the Commission authority to prevent cost shifting outside of Section 366.2's parameters.

C. The Commission May Not Rewrite Existing Law to Imply Jurisdiction to Establish the New Rule by "Harmonizing" the Statutory Scheme as a Whole

The Commission cannot cure its lack of jurisdiction through the Decision's misapplication of a canon of statutory interpretation. Lacking express statutory authority for its action, the Decision touts its "new requirement" as falling "under the umbrella of reliability and [RA] for CCAs planning to implement an expansion."[70] The Commission rests its action on its "statutory obligations to ensure energy reliability at just and reasonable rates and specific authority to ensure RA compliance" and its theory that "harmonizes the statutory scheme as a whole, including Sections 380, 365.1 and 366.2."[71] As an initial matter, the Decision lacks any explanation of the ambiguity or conflict the harmonization was intended to address or the rationale supporting its conclusion. Even if there were a cogent explanation, however, the Commission cannot simply rewrite existing law by tying together two limited grants of authority on separate subject matters – certification of CCA implementation and RA enforcement authority over all LSEs – to create an overarching "new" requirement for CCAs.

Harmonization, as a canon of statutory construction, is the process of reconciling conflicting statutes and interpreting them in a way that gives effect to the intent of the legislature. Statutory construction begins with the plain language of the statutes and "their respective texts."[72] In general, "[i]f two seemingly inconsistent statutes conflict, the court's role is to

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70 Decision at 37.

71 *Id.* at 115.

72 *State Dept. of Pub. Health v. Super. Ct.* (2015) 60 Cal.4th 940, 956 (citing *Pineda v. Williams–Sonoma Stores, Inc*. (2011) 51 Cal.4th 524, 529 ("we look first to the words of a statute, 'because they generally provide the most reliable indicator of legislative intent'")).

harmonize the law."[73] As the California Supreme Court observed: "The cases in which we have harmonized potentially conflicting statutes involve choosing one plausible construction of a statute over another in order to avoid a conflict with a second statute."[74] Moreover those statutes must relate to the same subject.[75] Courts have made clear, however, that "the requirement that courts harmonize potentially inconsistent statutes when possible is not a license to redraft the statutes to strike a compromise that the Legislature did not reach."[76]

The California First District Court of Appeals addresses strikingly similar circumstances in 2022 in *Shiheiber v. JPMorgan Chase Bank, N.A.*[77] In *Shiheiber*, the cross-complainant Henderson attempted to interpret Civil Procedure Code Section 575.2, providing enforcement mechanisms for superior courts for their local rules, by reading it in the "context of its surrounding statutes" including Sections 575 and 128.5.[78] The court first finds that "[g]iven its entirely different language, subject and provenance, section 575 [governing rules adopted by the Judicial Council] simply has no bearing on the interpretation of section 575.2."[79] The Court concludes:

> [C]ontrary to Henderson's suggestion that there is something in section 575 with which section 575.2 must be "harmonized," she points to no conflict between the two sections, and we can conceive of none.[80]

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[73] *Stone St. Capital, LLC v. California State Lottery Comm'n* (2008) 165 Cal.App.4th 109, 118-119 (citations omitted).

[74] *State Dept. of Pub. Health,* 60 Cal.4th at 956 (citations omitted); *see also Grassi v. Super. Court* (2021) 73 Cal.App.5th 283, 307(citations omitted).

[75] *See Wirth v. St. of California* (2006) 142 Cal.App.4th 131, 140 (citations omitted) (finding statutes addressing "salary and benefits" and "supervisory compensation differential" on the same matter); *see also Med. Bd. of California v. Super. Ct.* (2001) 88 Cal.App.4th 1001, 1015 (finding statutes addressing discipline action for a licensee on the same matter).

[76] *St. Dept. of Pub. Health,* 60 Cal.4th at 956 (citations omitted); *see also Grassi*, 73 Cal.App.5th at 307 (citations omitted).

[77] *Shiheiber v. JP Morgan Chase Bank, N.A.* (2022) 81 Cal.App.5th 688.

[78] *Id.* at 699.

[79] *Ibid.*

[80] *Ibid*.

Henderson also argued that Section 575.2 must only be applied under the broader rules set forth in Section 128.5, requiring a showing of bad faith for sanctions. The Court observes that "Henderson makes *no* attempt at any valid exercise in statutory interpretation" of the unambiguous meaning of Section 575.2 (which does not require the bad faith showing).[81] The Court finds that:

> . . . Henderson does not engage at all with the statutory text. She has identified no ambiguity in the statutory language that calls for judicial construction, much less has she articulated any cogent reason for us to read into the statutory language a limitation the Legislature did not state expressly.[82]

Shiheiber is highly instructive in this case given that the court refuses in two instances to "harmonize" statutes when the unambiguous meaning of such statutes is clear. In the Decision, the Commission attempts harmonization similar to Henderson, when the meaning of Sections 365.1, 366.2, and 380 are unambiguous. As in *Shiheiber,* however, no legal reason exists to "harmonize" the statutes except for the Commission attempting to justify its expansion of jurisdiction.

The Commission has done just what California courts forbid: it either has rewritten Section 366.2 to include a new criterion for certification of a CCA implementation plan or rewritten Section 380 to override the very specific CCA implementation directives in Section 366.2. In the case of the Commission's New Rule, there is no conflict or inconsistency among the statutes the Decision relies on and thus no reason to "harmonize" those statutes; the Commission cites no such conflict. Instead, the statutes simply address different subjects of regulation. Section 366.2 governs implementation or "start-up" of a CCA, while Sections 380 and 365.1 govern RA activities of an operational CCA or direct access provider.

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[81] *Id.* at 701 (emphasis in original).

[82] *Id.* at 702.

There is no conflict among these provisions. Even if there *were* a conflict between Sections 366.2 and 380, it would be one of the Commission's own creation. Nothing in the language of Section 366.2 prevents the Commission from administering and enforcing the RA program governing CCAs. Indeed, the Commission has overseen and enforced the RA program under Section 380 without the New Rule, as discussed in greater detail in Section V. Similarly, nothing in the language of Section 380 prevents the Commission from administering Section 366.2 as the Legislature directed. Only when deploying the New Rule as an RA enforcement mechanism does it become a conflict. Had the Commission remained in the lanes the Legislature created, continuing to revise and improve its RA penalty structure, there would be no problem.

D. The Commission's Excursion Outside the Scope of Its Jurisdiction Cannot Be Justified by Its Obligation to Provide a CCA the "Earliest Possible Date" for Implementation

The Decision, in its effort to find a solid legal basis for its action, cites the Commission's statutory authority to set the effective date for a CCA planned implementation as an invitation for the Commission to review and base the effective date on a CCA's history of RA deficiencies.[83] The Commission reasons that the RA compliance history demonstrates a CCA's inability to serve its existing customers and therefore is relevant to the planned expansion date.[84] The Commission purportedly justifies this overreach of its authority under 366.2(c)(8)'s requirement that the Commission "designate the earliest possible date for implementation of a community choice aggregation program taking into consideration the impact on any annual procurement plan of the electrical corporation that has been approved by the commission." Again, this reasoning is misplaced, and the requirement cannot justify the Commission's New Rule.

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[83] Decision at 38.

[84] *Id.*

First, the context of the statute makes clear that the "earliest possible date" is something specified *after* an implementation plan is filed. Indeed, this subdivision follows the subdivisions delineating rules for submission of implementation plans ((c)(4)), identification of cost recovery to prevent cost shifts ((c)(5)), notice of implementation plans to the IOU ((c)(6)), and certification of a plan ((c)(7)). In setting the "earliest possible date," the statute expressly provides the only factor the Commission is permitted to consider – "the impact on any annual procurement plan of the electrical corporation that has been approved by the commission."[85] The Commission's New Rule, inserting the evaluation of a CCA's RA compliance history as an additional factor, does not comport with this limitation. The reference to the IOU's approved procurement plan is informed by Section 454.5, which describes in great detail the requirement that an IOU file and submit a procurement plan for Commission approval. The procurement plan is intended to detail the IOUs' "procurement of electricity for its retail customers."[86] Indeed, this requirement is fulfilled by the IOUs' BPPs which are updated periodically.[87] Section 366.2(c)(8) therefore contains a specific requirement intended to ensure that the CCA's implementation will be accounted for vis a vis the relevant IOU's procurement plan.

The New Rule, however, instead will result in the setting of the "earliest possible date" without reference to any approved IOU BPP, but rather to a CCA's RA compliance history. The Decision attempts to rebut the argument that the Commission is limited to considering the bundled procurement plan as set forth in Section 366.2(c)(8) with backbends:

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[85] § 366.2(c)(8).

[86] § 454.5(a). For example, the 2021 Bundled Procurement Plan (BPP) for PG&E approved by the Commission states: " PG&E's BPP describes in detail its planning, procurement, and scheduling and bidding processes, all of which are designed to enable PG&E to provide reliable, cost-effective bundled electric service." PG&E's Bundled Procurement Plan - Public Version (pge.com)

[87] *See, e.g.,* D.12-01-033, *Decision Approving Modified Bundled Procurement Plans*, R.10-05-006 (Jan. 12, 2012): https://docs.cpuc.ca.gov/PublishedDocs/WORD_PDF/FINAL_DECISION/157640.PDF.

> These arguments ignore that if one LSE fails to contract for resources to serve its own load, the customers of other LSEs that did accomplish such forward contracting are effectively subsidizing the deficient LSE's energy procurement, and such deficiencies may impact grid reliability.[88]

However, this very generalized handwaving does not rise to the level of specificity contemplated in Section 366.2(c)(8). There is no specific plan approved by the Commission in question, nor is there any particular explanation of how the CCA's historical RA compliance will affect any such plan. The Commission's defense has no basis.

V. THE DECISION NEEDLESSLY DISCRIMINATES AGAINST CCAS WHEN OTHER, EVEN-HANDED RA ENFORCEMENT ALTERNATIVES ARE AVAILABLE UNDER SECTION 380

The Decision also violates Section 380, needlessly discriminating against CCAs when other less restrictive solutions are available. Section 380(e) requires the Commission to apply its RA program rules even-handedly, by "implement[ing] and enforc[ing] the resource adequacy requirements established in accordance with this section in a nondiscriminatory manner." Section 380(e) requires that "[e]ach LSE shall be subject to the same requirements for [RA]…." In addition, Section 380(b)(4) requires the Commission to "minimize enforcement requirements." Despite these clear directives, the Decision fails to exercise its enforcement powers even-handedly and fails to minimize enforcement requirements despite the availability of less restrictive measures.

The Commission has not applied its new "cure" for RA noncompliance even-handedly to all LSEs. While the Decision applies the New Rule to CCAs and ESPs, it excludes their retail competitors, the IOUs. The Decision attempts to justify this exclusion by pointing to the IOUs' role as POLR.[89] While exempting the IOU in its role as POLR makes sense – the whole point of

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88 Decision at 36-37.
89 *Id.* at 38-39.

the POLR is to serve customers other LSEs are no longer serving – the Decision misses a critical point: POLR is only one role among others served by the IOUs.

Beyond the narrow role of POLR, the IOUs, like CCAs and ESPs, serve their own load and are responsible for their RA requirements. SCE and PG&E also serve as Central Procurement Entities (CPEs), bearing responsibility to procure all local RA capacity for all LSEs. The Decision does not explain why the New Rule cannot be applied to the IOUs in these roles.

Moreover, even if there were good reasons to exempt the IOUs entirely from the rule, the inability to apply the rule even-handedly points to a need for a more broadly applicable tool to enforce RA requirements. At least two options fit comfortably within the scope of Section 380: penalties and cost allocation, and no doubt other solutions could be designed within the Commission's authority.

The Commission has to date enforced RA requirements using penalties, and there is no reason that this approach could not be further adapted to serve the Commission's objectives of driving RA compliance. Concerned that "penalty prices below the RA capacity prices may not incentive LSEs to meet system requirements in summer months," the Commission increased penalties in 2020 from $6.66/kilowatt (kW) -month to $8.88/kW-month. [90] In 2021, finding that the "current RA penalty structure does not adequately discourage LSEs from incurring repeated deficiencies,"[91] the Commission added a multiplier point system with increasing penalty levels for repeated deficiencies.[92] Indeed, D.23-06-029 clarifies the operation of the point system.[93]

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[90] D.20-06-031, *Decision Adopting Local Capacity Obligations for 2021-2023, Adopting Flexible Capacity Obligations for 2021, and Refining the Resource Adequacy Program*, R.19-11-009 (June 25, 2020), at 60-61: https://docs.cpuc.ca.gov/PublishedDocs/Published/G000/M342/K083/342083913.PDF .

[91] D.21-06-029, *Decision Adopting Local Capacity Obligations for 2022-2024, Flexible Capacity Obligations for 2022, and Refinements to the Resource Adequacy Program*, R.19-11-009 (June 24, 2021), at 59: https://docs.cpuc.ca.gov/PublishedDocs/Published/G000/M389/K603/389603561.PDF.

[92] *Id.*, OP 16 at 79.

[93] Decision at 62.

Improving the existing penalty structure – by raising RA penalties further or accelerating the multiplier effect until the penalty system actually serves its function – seems the most logical course rather than "double penalizing" CCAs by applying penalties and the New Rule. As it stands, the Commission now enforces RA through a penalty structure that is, by their own admission, ineffective.

Beyond penalties, Section 380 also authorizes the Commission to address cost shifting between customer classes in another way. Section 380(b)(3) permits the Commission to "equitably allocate the cost of generating capacity and demand response" in a manner that prevents cost shifts. As set forth above, the Decision justifies its restriction on CCA expansions based on a finding that LSE RA deficiencies result in cost shifts.[94] If the Commission's "cost shift" finding is valid, the Commission should not be restricting CCA expansion as an enforcement tool but should rather utilize its existing and express authority to allocate the cost of "shifted" generation capacity.

The Commission has two central obligations in exercising its enforcement powers pursuant to Section 380(e). It must exercise them "in a nondiscriminatory manner" and "minimize enforcement requirements." D.23-06-029 fails to meet either obligation in adopting the expansion restriction for CCAs and ESPs. Moreover, the Commission ignores the clear "cure" for cost shifting provided by Section 380: cost allocation. The Decision's exercise of its enforcement powers to prevent CCA expansion exceeds the Commission's jurisdiction under Section 380, and results in the Commission not acting in accordance with law.

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[94] *Id.*, FOF 6, at 130.

VI. THE COMMISSION ABUSES ITS DISCRETION AND FAILS TO ACT IN THE MANNER REQUIRED BY LAW BY MAKING FINDINGS THAT ARE UNSUPPORTED BY THE RECORD

The Decision's findings on grid reliability in support of its New Rule are conclusory and unsupported by the record. The Commission summarily rendered its findings not only without support and reasoning but in the face of contrary evidence. RA is transacted in a complex, bilateral market under FERC jurisdiction warranting significantly greater analysis than the Decision affords. The Decision's superficial, unstudied conclusions cannot form the basis of a reasonable decision and, instead, constitute an abuse of its discretion, and a failure to act in the manner required by law.

A. The Commission Errs in Summarily Concluding that Compliant LSEs are Subsidizing Deficient LSEs' Energy Procurement

The Decision justifies its New Rule based on the purported impacts LSE deficiencies have on other LSEs. Finding of Fact 6 provides: "LSEs that are deficient in their RA obligations result in reliance on other LSEs' procurement activities and cost-shifting." [95] The Decision attempts to support this Finding of Fact with two conclusory statements unsupported by any explanation or evidence.

First, the Decision concludes:

> [I]f one LSE fails to contract for resources to serve its own load, the customers of other LSEs that did accomplish such forward contracting are effectively subsidizing the deficient LSE's energy procurement, and such deficiencies may impact grid reliability.[96]

Nothing in the decision explains how or the extent to which such a subsidy occurs. The Decision fails to identify any direct evidence of a subsidy.[97] The deficient LSE by definition did not

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95 *Id.*, FOF 6 at 130.

96 *Id.* at 37.

97 "Subsidize" means "to purchase the assistance of by payment of a subsidy: *Merriam-Webster Dictionary.*

purchase the RA, so other LSEs are not "subsidizing" the deficient LSE's procurement. Neither do other LSEs subsidize the deficiency by procuring backstop resources to account for the deficiency; indeed, backstop responsibility lies with the California Independent System Operator (CAISO) under its FERC-regulated tariff.[98] Under the tariff, the CAISO has the authority to procure RA capacity to cure the deficiency and charge the cost of the backstop to the deficient LSE.

Second, the Decision concludes that:

> LSEs that are deficient in their RA obligations result in leaning on other LSEs' procurement activities and impairing grid reliability by failing to secure resources to support their existing customer base.[99]

The decision does not define "leaning" nor explain how it occurs. Other LSEs procure only for their own customers, and all LSEs, including deficient LSEs, contribute to procurement of additional resources as "excess Planning Reserve Margin" by paying for it through the Cost Allocation Mechanism.[100] Similarly, all taxpayers pay for the costs of the DWR Strategic Reliability Reserves to provide emergency reserves.[101] Other LSEs do not procure capacity to fill a deficiency by the deficient LSE. As CalCCA pointed out in its Comments on the Proposed Decision resulting in D.23-06-029 and the New Rule, if there is "leaning," the Commission caused it by failing to rely on existing regulatory mechanisms intended to solve this problem.[102] Had the Commission simply relied on the established backstop process, the CAISO under a

[98] CAISO Tariff Section 43A - Capacity Procurement Mechanism as of August 15, 2022: http://www.caiso.com/Documents/Section43A-CapacityProcurementMechanism-asof-Aug15-2022.pdf.

[99] Decision at 37-38.

[100] *Id.* at 25.

[101] Cal. Pub. Res. Code § 25793(a).

[102] *See California Community Choice Association's Comments on the Proposed Decision*, R.21-10-002 (June 14, 2023), at 6: https://docs.cpuc.ca.gov/PublishedDocs/Efile/G000/M511/K502/511502590.PDF.

FERC jurisdictional tariff would have procured any necessary resources and allocated the costs directly to LSEs deficient in their RA obligations.[103]

The Commission's findings and conclusions pointing to leaning or subsidies are not only unsupported, but also incorrect. The Commission's repeated conclusory assertions regarding such leaning or subsidies do not make them true – the Commission is required to justify such assertions and findings with reasoned evidence and support. The Decision's complete lack of such evidence and support of Finding of Fact 6 and other findings and conclusions concerning the existence of leaning or subsidies constitutes an abuse of discretion, and a failure of the Commission to act in accordance with law.

B. The Commission Errs in Summarily Concluding that Allowing LSEs Deficient in Meeting RA Requirements to Expand or Otherwise Take on New Customer Load is Detrimental to Grid Reliability

The abuse of discretion highlighted in Section VI.A above is exacerbated by the Commission's conclusion that "[a]llowing LSEs that cannot meet their existing RA obligations to expand their territory or to otherwise take on new customer load is detrimental to grid reliability."[104] Once again, the Commission has failed to connect the dots; it does not explain the connection between an LSE's deficiency and grid reliability, and ignores contrary evidence.

The Commission provides no response to important points raised by CalCCA in the RA Rulemaking on this issue. First, an expansion only moves customers from one LSE to another and does not alter the demand or supply for RA capacity. [105] The LSE losing customers has a lower need for RA capacity, while the LSE gaining customers has an increased need, with a net

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[103] CAISO Tariff Section 43A.8: https://www.caiso.com/Documents/Conformed-Tariff-as-of-May1-2023.pdf.

[104] Decision, FOF 6 at 130.

[105] *See California Community Choice Association's Comments on Assigned Commissioner's Amended Scoping Memo and Ruling*, R.21-10-002 (Feb. 24, 2023), at 25: https://docs.cpuc.ca.gov/PublishedDocs/Efile/G000/M502/K756/502756803.PDF.

zero effect on demand. Likewise, it has no effect on the supply available to meet California's energy needs. Second, even if an LSE's individual deficiency were to impact grid reliability, the CAISO has the authority to mitigate that impact by backstopping the deficiency under its tariff and imposing the associated costs on the deficient LSE.[106]

The Decision fails to address these points and to connect the dots between a single LSE's RA compliance deficiency and grid reliability. The Decision's lack of evidence and reasoning to support its finding regarding grid reliability constitutes an abuse of discretion by the Commission, as well as a failure to act in accordance with law.

VII. CONCLUSION

For the foregoing reasons, the Commission should grant rehearing to correct each of the legal errors specified in this Application for Rehearing of Decision 23-06-029.

Respectfully submitted,

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[106] CAISO Tariff Section 43A.2.3 and 43A.8: http://www.caiso.com/Documents/Section43A-CapacityProcurementMechanism-asof-Aug15-2022.pdf.