

Decision 12-07-023

July 12, 2012

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking to
Implement Portions of AB 117
Concerning Community Choice
Aggregation.

Rulemaking 03-10-003
(Filed December 21, 2007)

**ORDER MODIFYING DECISION (D.) 10-05-050,
AND DENYING REHEARING OF DECISION, AS MODIFIED**

I. INTRODUCTION

In Decision (D.) 10-05-050 (or “Decision”), we resolved the City and County of San Francisco’s (“CCSF’s”) petition to modify D.05-12-041,¹ which finalized procedures for implementing community choice aggregation (“CCA”)² programs. Among other things, the Decision modified D.05-12-041 to make clear that if Pacific Gas and Electric Company (“PG&E”), San Diego Gas & Electric Company (“SDG&E”), or Southern California Edison Company (“Edison”) engage in commercial speech concerning CCA service and the utility’s competing service that is untrue or misleading, they may be liable for penalties and subject to a temporary restraining order (“TRO”) or preliminary injunction in a complaint before the Commission.

PG&E and CCSF both timely filed applications for rehearing of the Decision. PG&E’s rehearing application alleges the following legal errors: (1) the

¹ *Decision Resolving Phase 2 Issues on Implementation of Community Choice Aggregation Program and Related Matters* [D.05-12-041] (2005) ____ Cal.P.U.C.3d ____.

² “CCA” also refers to a community choice aggregator, i.e., the entity providing the CCA procurement service.

Decision violates PG&E's rights under the First Amendment to the United States Constitution and the liberty of speech clause of the California Constitution by regulating PG&E's commercial speech but not regulating the commercial speech of CCAs; (2) the Decision exceeds the Commission's jurisdiction as Public Utilities Code section 701³ does not grant the Commission authority to regulate the utilities' commercial speech; and (3) the Decision violates section 310's restriction on delegation of the Commission's statutory duties.

CCSF's rehearing application alleges that: (1) the Decision errs in finding that section 366.2(c)(9) does not require the utilities to refrain from marketing against CCAs; (2) the Decision errs in finding that CCSF's request to ban any anti-CCA marketing by the utilities violates the First Amendment; and (3) the Decision violates Article III, section 3.5 of the California Constitution by effectively declaring section 366.2(c)(9) unenforceable.

CCSF, the Marin Energy Authority, and the San Joaquin Valley Power Authority ("SJVPA") jointly filed a response to PG&E's rehearing application. PG&E filed a response to CCSF's rehearing application.

We have reviewed each and every argument raised in the rehearing applications and are of the opinion that modifications, as described herein, are warranted to: (1) delete the statement that CCAs are subject to Business and Professions Code sections 17200 and 17500; and (2) include a fuller explanation of the bases for the Commission's authority to allow an individual Commissioner or administrative law judge ("ALJ") to issue a TRO or preliminary injunction subject to ratification or reversal by the full Commission. Rehearing of D.10-05-050, as modified, is denied.

³ All subsequent section references are to the Public Utilities Code, as amended by Senate Bill 790 (Stats. 2011, ch. 599) ("SB 790"), unless otherwise specified.

II. DISCUSSION

A. Allegations in PG&E's Rehearing Application

1. Alleged violations of free speech rights

a) Allegation that the Decision violates the First Amendment

The Decision concluded that untrue or misleading commercial speech is not protected speech. (D.10-05-050, 18 [Conclusion of Law 5].) Accordingly, the Decision prohibited PG&E, SDG&E, and Edison from engaging in untrue or misleading commercial speech concerning CCA service and the utility's competing service. (D.10-05-050, pp. 20-21 [Ordering Paragraph 1].)

PG&E alleges that by regulating the utilities' commercial speech but not regulating the commercial speech of CCAs, the Decision violates the First Amendment of the United States Constitution. (PG&E Rehr. App., p. 7.) The First Amendment provides, in part: "Congress shall make no law ... abridging the freedom of speech" (U.S. Const., 1st Amend.) The First Amendment's freedom of speech provision applies to state and local governments pursuant to the Fourteenth Amendment's due process clause. (*Kasky v. Nike, Inc.* (2002) 27 Cal.4th 939, 951.)

PG&E fails to demonstrate that the Decision violates the First Amendment. The speech at issue in the Decision is untrue or misleading commercial speech.⁴ Untrue or misleading commercial speech is not protected speech under the First Amendment. (*Central Hudson Gas & Electric Corp. v. Public Service Com. of New York* (1980) 447

⁴ The Decision found that although PG&E previously represented that it did not intend to engage in marketing relating to the CCA program, PG&E actively solicited customers to opt out of CCA programs starting in mid-2007. (D.10-05-050, p. 18 [Findings of Fact 1& 2].) Contrary to PG&E's allegations, there is record evidence relating to PG&E's commercial speech. (See PG&E Rehr. App., p. 2, fn. 3.) For instance, PG&E was involved in a mailer sent to San Francisco and Marin customers that stated "before you buy, get the facts on CCA." (Petition of CCSF to Modify D.05-12-041 ("CCSF Petition"), App. K.) The Decision did not make a finding that any of the speech PG&E had engaged in was necessarily untrue or misleading. But the Decision determined that this changed circumstance warranted consideration of CCSF's petition to modify D.05-12-041, which included rules for utilities' marketing relating to the CCA program. (D.10-05-050, p. 18 [Finding of Fact 3].)

U.S. 557, 566 (“*Central Hudson*”).) Because misleading commercial speech is not protected speech, it may be prohibited entirely. (*In re R.M.J.* (1982) 455 U.S. 191, 203.) Indeed PG&E states that it “does not argue against [*Central Hudson*’s] threshold standard that commercial speech is unprotected where it is false or misleading.” (PG&E Rehr. App., p. 5, fn. 10.)

PG&E fails to explain how the Decision could violate the First Amendment when the speech at issue is not protected by the First Amendment. As noted by the California Supreme Court:

[T]o decide whether a law regulating speech violates the First Amendment, the very first question is whether the speech that the law regulates is entitled to First Amendment protection at all. ... [C]ommercial speech that is false or misleading receives no protection under the First Amendment, and therefore a law that prohibits only such unprotected speech cannot violate constitutional free speech provisions.

(*Kasky v. Nike, Inc.*, *supra*, 27 Cal.4th at p. 968; see also *Thompson v. W. States Med. Ctr.* (2002) 535 U.S. 357, 367 [to determine whether commercial speech regulation is constitutionally permissible, the threshold matter is whether commercial speech concerns unlawful activity or is misleading].)

Relying on *Central Hudson*, PG&E argues that under the First Amendment, the regulation of commercial speech must directly advance a substantial governmental interest and be no more extensive than necessary to serve the governmental interest. (PG&E Rehr. App., p. 5 citing *Central Hudson*, *supra*, 447 U.S. at p. 564.) PG&E’s reliance on *Central Hudson* is misplaced.

In *Central Hudson*, the U.S. Supreme Court explained the four-part analysis used to determine whether a commercial speech regulation is permissible under the First Amendment: (1) whether the commercial speech concerns lawful activity and is not misleading, and therefore protected under the First Amendment; (2) whether the asserted government interest is substantial; (3) whether the regulation directly advances the governmental interest asserted; and (4) whether the regulation is not more extensive than

is necessary to serve the interest. (*Central Hudson, supra*, 447 U.S. at p. 566.) The U.S. Supreme Court explained that parts 3 and 4 of the analysis are only reached where the inquiries to parts 1 and 2 yield positive answers. (*Ibid.*)

PG&E attempts to argue that the Decision does not meet parts 3 and 4 of *Central Hudson*'s four-part test. But since the Decision only regulates misleading commercial speech that is not protected under the First Amendment, the inquiries in parts 3 and 4 do not apply to the Decision. Pursuant to *Central Hudson*'s four-part analysis, the Decision does not violate the First Amendment.

PG&E also alleges that under the First Amendment, the government cannot use the regulatory process to advance some points of view by burdening the expression of others. (PG&E Rehr. App., p. 4 citing *Pacific Gas & Electric Co. v. Public Utilities Com.* (1986) 475 U.S. 1.) PG&E alleges that the Decision's prohibition of any untrue or misleading commercial speech by the utilities while not imposing a similar prohibition on the CCAs' commercial speech is an impermissible content-based regulation in violation of the First Amendment. (PG&E Rehr. App., p. 5 citing *Citizens United v. Federal Election Com.* (2010) 130 S.Ct. 876 ("*Citizens United*").)

PG&E's allegation lacks merit in that it fails to take into account the fact that there is a different standard under the First Amendment for commercial versus noncommercial speech. All of the cases PG&E cites regarding viewpoint or content regulation are cases involving noncommercial speech. In the main case PG&E relies on, *Citizens United*, the U.S. Supreme Court stated: "We find no basis for the proposition that, *in the context of political speech*, the Government may impose restrictions on certain disfavored speakers." (*Citizens United, supra*, 130 S.Ct at p. 899, emphasis added.)

PG&E alleges that although the issue of "preferential speech" comes up most often in the context of political speech, the principle of protecting against identity-

specific speech restrictions applies equally to commercial speech.⁵ (PG&E Rehr. App., p. 6, fn. 13) PG&E does not offer any legal support for this proposition.

It is well established that commercial speech is analyzed under a different standard. In *Central Hudson*, the U.S. Supreme Court explained:

In most other contexts, the First Amendment prohibits regulation based on the content of the message. ... Two features of commercial speech permit regulation of its content. First, commercial speakers have extensive knowledge of both the market and their products. Thus, they are well situated to evaluate the accuracy of their messages and the lawfulness of the underlying activity. ... In addition, commercial speech, the offspring of economic self-interest, is a hardy breed of expression that is not “particularly susceptible to being crushed by overbroad regulation.”

(*Central Hudson, supra*, 447 U.S. at p. 564, fn. 6, citations omitted.) Thus, the U.S. Supreme Court has found that the Constitution accords a lesser protection to commercial speech than to other forms of constitutionally guaranteed speech. (*Id.* at p. 563.) PG&E fails to explain why standards applicable to noncommercial speech would apply to the Decision insofar as the Decision regulates untrue or misleading commercial speech. The applicable standard for determining whether a commercial speech regulation is permissible under the First Amendment is set forth by the U.S. Supreme Court in *Central Hudson*. As explained above, pursuant to *Central Hudson*’s four-part analysis, the Decision’s regulation of the utilities’ untrue or misleading commercial speech does not violate the First Amendment.

In any event, PG&E fails to demonstrate that we are suppressing the utilities’ viewpoints. The Decision does not prohibit the utilities from expressing their viewpoints.

⁵ PG&E alleges that this principle applies to commercial speech in order for consumers to be able to freely and easily obtain as “broad, truthful and accurate information” as possible. (PG&E Rehr. App., p. 6, fn. 13.) PG&E fails to explain how untrue or misleading commercial speech, which is what the Decision regulates, advances this purpose. (See *Central Hudson, supra*, 447 U.S. at p. 563 [inaccurate commercial speech does not serve First Amendment’s concern for commercial speech, which is based on the informational function of advertising].)

The Decision only prohibits untrue and misleading commercial speech. (See, e.g., *Kasky v. Nike, Inc.*, *supra*, 27 Cal.4th at p. 967 [distinguishing between suppression of points of view as opposed to suppression of false and misleading statements of fact].) Also, as described in section II.A.1.b., *infra*, the recently enacted SB 790 similarly prohibits the CCAs from disseminating untrue or misleading information.

Since the Decision only regulates untrue or misleading commercial speech unprotected by the First Amendment, and since PG&E's allegations incorrectly apply standards applicable to noncommercial speech, there is no merit to PG&E's allegations that the Decision violates the First Amendment.

b) Allegation that the Commission must also regulate CCAs' speech

PG&E alleges that if we regulate the utilities' commercial speech, we must also regulate the CCAs' commercial speech in order to comply with the First Amendment. According to PG&E, we have the legal authority to regulate the CCAs' speech. (PG&E Rehr. App., p. 3.)

As explained above, the Decision only regulates untrue or misleading commercial speech, which is not protected by the First Amendment. As this speech is unprotected by the First Amendment, PG&E fails to demonstrate that the First Amendment imposes any requirements with regard to this speech, including the requirement that the Commission must regulate the CCAs' untrue or misleading commercial speech in order to regulate the utilities' speech.

PG&E also fails to demonstrate that Assembly Bill 117 (Stats. 2002, ch. 838) ("AB 117"), the statute authorizing the CCA program, has given the Commission the legal authority to regulate CCAs' speech or to hear consumer complaints against CCAs. The Legislature has given the Commission general jurisdiction over public utilities but only limited jurisdiction over CCAs. (See D.10-05-050, pp. 16-17.) We previously found that nothing in AB 117 directs the Commission to regulate a CCA's program except to

the extent its program elements may affect utility operations and the rates and services to other customers.⁶ (D.05-12-041, *supra*, at p. 9 (slip op.)) We also previously found that nothing in AB 117 suggests that the Commission act as a forum for consumer complaints against CCAs. (*Id.* at pp. 19-20 (slip op.))

The Legislature’s treatment of electric service providers (“ESPs”) is instructive. Unlike with CCAs, the Legislature explicitly authorized the Commission to resolve consumer complaints against ESPs and initiate investigations into the activities of ESPs. (Pub. Util. Code, § 394.2.) The Legislature also found that within the service territory of a local publicly owned utility, consumer complaints shall be resolved through the local publicly owned utility’s consumer complaint procedures. (Pub. Util. Code, § 394.2.)

In contrast, as described further in section II.A.2, *infra*, we have broad and expansive authority over the public utilities of this state. Furthermore, section 1702 gives the Commission the jurisdiction to hear any complaint “setting forth any act or thing done or omitted to be done by any public utility.” (Pub. Util. Code, § 1702.)

PG&E alleges that sections 366.2(c)(15)(A) and 366.2(c)(17)⁷ authorize the Commission to regulate the information that CCAs provide to their customers and to ensure compliance with basic consumer protection rules. (PG&E Rehr. App., p. 3.) Neither statutory provision cited by PG&E supports the conclusion that we have the jurisdiction to hear consumer complaints against CCAs or otherwise regulate the CCAs’ speech.

Section 366.2(c)(15)(A) sets forth procedures whereby the CCAs shall “fully inform” participating customers regarding their automatic enrollment in the CCA program, their right to opt out of the CCA program, and the terms and conditions of the

⁶ Other statutes and Commission decisions address other areas of the Commission’s jurisdiction (e.g., resource adequacy requirements) over CCAs. (D.05-12-041, *supra*, at pp. 8-9, fn. 3 (slip op.))

⁷ Prior to the enactment of SB 790, these sections were sections 366.2(c)(13)(A) and 366.2(c)(14), respectively. PG&E’s rehearing application, which PG&E filed prior to the enactment of SB 790, cites to the former code sections.

services offered. This section sets forth requirements for CCAs, but does not direct the Commission to oversee or enforce these requirements. The extent of the Commission's involvement is set forth in section 366.2(c)(15)(b), which provides that a CCA may request that the Commission approve and order the electrical corporation to provide the customer notices, at cost, in regular monthly bills. With regard to the content of these customer notices, we previously noted that "we have no reason to assume an agency of local government is incapable of complying with the statute and providing reasonable notice to potential customers." (D.05-12-041, *supra*, at p. 22 (slip op.).)

Section 366.2(c)(17) provides that CCAs must register with the Commission, which "may require additional information to ensure compliance with basic consumer protection rules and other procedural matters." This section allows the Commission to require additional information but does not provide the Commission with the jurisdiction to enforce any and all consumer protection rules pertaining to CCAs. Although section 366.2(c)(17) requires a CCA to register with the Commission, the Commission does not have the authority to subsequently "decertify" a CCA. (D.05-12-041, *supra*, at p. 61 [Conclusion of Law 4] (slip op.).) We previously found that although we have the jurisdiction to prescribe various consumer protection rules relating to CCAs (e.g., to prevent cost-shifting among customers, or to oversee the electric system generally), AB 117 gives the Commission a limited role in other types of consumer protections. (*Id.* at p. 19 (slip op.); see also *id.* at p. 61 [Conclusion of Law 9](slip op.).) We also previously noted that CCAs are local governmental entities that are already subject to numerous laws that protect CCA customers and promote accountability by CCAs. (*Id.* at pp. 10-11 (slip op.).)

PG&E points out that in *Decision Approving Settlement* [D.08-06-016] (2008) ___ Cal.P.U.C.3d ___, the Commission approved a settlement that regulated the marketing and commercial speech practices of both PG&E and a CCA program sponsored by SJVPA. (PG&E Rehr. App., p. 3.) According to PG&E, the Commission's approval of this settlement demonstrates the Commission's underlying legal authority and jurisdiction to regulate the marketing practices and commercial

speech of CCAs. (PG&E Rehrig. App., p. 4, fn. 7.) In light of D.08-06-016, PG&E alleges that declining to regulate the CCAs' commercial speech in this instance is arbitrary and capricious, and an abuse of the Commission's discretion. (PG&E Rehrig. App., p. 7, p. fn. 14.)

As acknowledged by PG&E, unless the Commission expressly provides otherwise, the Commission's approval of a settlement does not constitute approval of, or precedent regarding, any principle or issue in the proceeding or in any future proceeding. (Cal. Code Regs., tit. 20, § 12.5.) This rule reflects the fact that a settlement agreement represents parties' compromises on the issues in a proceeding. (See, e.g., D.08-06-016, *supra*, Attachment A, Article 11.1.) We did not provide that the settlement agreement between PG&E and SJVPA was precedential. Thus, the Commission's holdings in D.08-06-016 do not apply to the Decision.⁸

The fact that we do not regulate the CCAs' speech does not mean that the CCAs are permitted to engage in untrue or misleading speech. The recently enacted SB 790 provides:

The governing body of a [CCA] shall adopt a policy that expressly prohibits the dissemination by the [CCA] of any statement relating to the [CCA's] rates or terms and conditions of service that is untrue or misleading....

(Pub. Util. Code, § 396.5.) Significantly, in SB 790, the Legislature tasked the governing body of the CCA, and not the Commission, with regulating the CCAs' speech. This is consistent with provisions in AB 117 that task the CCA with consumer protections. (See, e.g., Pub. Util. Code, § 366.2, subd. (c)(1) [authorizing a CCA to provide consumer

⁸ SB 790 subsequently ratified D.08-06-016 to a certain extent. SB 790 required the Commission to consider and adopt a code of conduct, rules, and enforcement procedures governing the conduct of electrical corporations relative to the consideration, formation, and implementation of CCA programs. (Pub. Util. Code, § 707.) We have instituted Rulemaking (R.) 12-02-009 for this purpose. In adopting a code of conduct, rules and enforcement procedures for the electrical corporations, SB 790 stated that it was the intent of the Legislature that these rules include, in whole, or in part, the rules approved by the Commission in D.08-06-016. (Pub. Util. Code, § 707, subd. (a)(4)(B).) This provision of SB 790 only applies to rules governing the conduct of electrical corporations and is silent regarding CCAs.

protections], see also Pub. Util. Code, § 366.2, subd. (c)(3)(E) [requiring a CCA’s implementation plan to include consumer protection procedures for its program participants].) Again, CCAs are themselves governmental entities. (See D.05-12-041, *supra*, at pp. 10-11 (slip op.).)

The Decision stated that the commercial speech of CCAs is already regulated by Business and Professions Code sections 17200 and 17500.⁹ (D.10-05-050, p. 16, fn. 9.) PG&E alleges that CCAs are governmental entities and thus, their commercial speech is exempt from regulation under sections 17200 and 17500. (PG&E Rehr. App., p. 2.) This allegation has merit. CCAs are comprised of cities and/or counties. (Pub. Util. Code, § 331.1.) Governmental entities are not included within the definition of specific “persons” subject to sections 17200 or 17500. (Bus. & Prof. Code, §§ 17200, 17201, 17500 & 17506; see also *Janis v. Cal. State Lottery Com.* (1998) 68 Cal.App.4th 824, 831.) Accordingly, we modify the Decision, as set forth in the ordering paragraph below, to delete the statement that the CCAs are regulated by sections 17200 or 17500. Although these provisions of the Business and Professions Code do not apply to CCAs, CCAs are still prohibited from disseminating untrue or misleading statements pursuant to SB 790. (Pub. Util. Code, § 396.5.)

**c) Allegation that the Decision violates the
Liberty of Speech Clause**

PG&E alleges that the Decision violates the liberty of speech clause of the California Constitution. (PG&E Rehr. App., p. 7.) The liberty of speech clause provides: “Every person may freely speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right. A law may not restrain or abridge liberty of speech or press.” (Cal. Const., art. I, § 2, subd. (a).)

⁹ Business and Professions Code section 17200 et seq. prohibits unfair competition. Section 17200 defines unfair competition as including any unlawful, unfair or fraudulent business act or practice and unfair, deceptive, untrue or misleading advertising and any act prohibited by Chapter 1 (commencing with section 17500) of the Business and Professions Code. (Bus. & Prof. Code, § 17200.) Section 17500 prohibits a broad range of untrue or misleading advertising. (Bus. & Prof. Code, § 17500.)

Other than a conclusory allegation regarding a violation of the liberty of speech clause, PG&E's rehearing application does not further discuss the clause. This allegation fails to meet the requirements of Public Utilities Code section 1732 and Rule 16.1 of the Commission's Rules of Practice and Procedure, which require that a rehearing application set forth specifically the grounds on which the rehearing applicant considers an order or decision of the Commission to be unlawful. (Pub. Util. Code, § 1732; Cal. Code Regs., tit. 20, § 16.1, subd. (c); see also *Order Modifying Decision (D.) 10-12-052, and Denying Rehearing as Modified* [D.11-04-034] (2011) __ Cal.P.U.C.3d __ at pp. 25-26 (slip op.)) Thus, we deny rehearing on this issue.

In any event, this allegation lacks merit because, as with the First Amendment, the liberty of speech clause under the California Constitution only protects commercial speech concerning lawful products and services that is truthful and not misleading. (*Kasky v. Nike, Inc.*, *supra*, 27 Cal.4th at p. 959.) As the Decision only regulates untrue or misleading commercial speech, it does not violate the liberty of speech clause.

2. Allegation that the Commission exceeded its jurisdiction

PG&E alleges that we exceeded our jurisdiction in regulating the commercial speech of the utilities. PG&E alleges that we do not have the authority pursuant to section 701 to regulate the commercial speech of utilities. (PG&E Rehr. App., p. 7.) PG&E also alleges that Business and Professions Code section 17500.1 bars state agencies and commissions from restricting or prohibiting commercial advertising that has not been determined to be false or misleading under Business and Professions Code section 17500 or prohibited by other law. (PG&E Rehr. App., p. 9.)

According to PG&E, the Legislature has provided express directives to the Commission in the area of commercial speech regulation. (PG&E Rehr. App., pp. 7-8 citing Pub. Util. Code, §§ 796, 453, subd. (b), & 2896.) Relying on the maxim *expressio unius est exclusion alterius*, which means that the expression of one thing is the exclusion of another, PG&E alleges that the Legislature's intent in enacting these other more

specific provisions in the Public Utilities Code was not to confer general authority on the Commission to regulate the commercial speech of electric utilities under section 701. (PG&E Rehr. App., p. 7.) PG&E also relies on the California Supreme Court's decision in *Assembly v. Public Utilities Com.* (1995) 12 Cal. 4th 87, for the proposition that an open-ended grant of authority may not be inferred from section 701, where more express directives have been provided by the Legislature. (PG&E Rehr. App., p. 7.)

Section 701 provides that 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." (Pub. Util. Code, § 701, emphasis added.) The authority of the Commission has been liberally construed. (*Consumer Lobby Against Monopolies v. Public Utilities Com.* (1979) 25 Cal.3d 891, 905.) Pursuant to section 701, we have the authority to act even in cases where there is no express statutory authorization, so long as the additional power and jurisdiction we exercise is cognate and germane to the regulation of public utilities. (*Id.* at pp. 905-906.)

Expressio unius est exclusion alterius does not apply in this instance. There is no negative implication to ascertain because the Legislature has affirmatively stated that the Commission's authority is not limited to those areas enumerated in the Public Utilities Code. (Pub. Util. Code, § 701; see also *Consumer Lobby Against Monopolies v. Public Utilities Com.*, *supra*, 25 Cal.3d at p. 906.) Application of the maxim would directly contradict the language in section 701 that the Commission has authority to act even where there is no express statutory authorization. The maxim cannot be used to contradict or vary a clear expression of legislative intent. (See, e.g., *Williams v. Los Angeles Metro. Transit Auth.* (1968) 68 Cal.2d 599, 603.)

Furthermore, it is not clear how the maxim *expressio unius est exclusion alterius* applies to the Public Utilities Code sections cited in PG&E's rehearing application. The maxim does not apply to every statutory listing or grouping but only when the items expressed are members of an associated group or series. (*Barnhart v. Peabody Coal Co.* (2003) 537 U.S. 149, 168.) The maxim generally applies to a specific

statute and its application to an entire code is questionable. (*In re Sabrina H.* (2007) 149 Cal.App.4th 1403, 1411.)

The Public Utilities Code sections PG&E cites involve unrelated statutes passed at different times regarding different topics, none of which involve regulation relating to CCAs. (See PG&E Rehrig. App., pp. 7-8.) Section 796 provides that the Commission shall disallow rate recovery for advertising by electrical, gas, or heat corporations, which encourage increased consumption. (Pub. Util. Code, § 796.) The now-repealed section 453(d) prohibited public utilities from including political advertising and literature in customers' bills. (Pub. Util. Code, § 453, subd. (d), declared unconstitutional by *Pacific Gas & Electric Co. v. Public Utilities Com.* (2000) 85 Cal.App.4th 86.) Section 2896 requires telephone corporations to provide certain customer service and information to telecommunications customers. (Pub. Util. Code, § 2896.) PG&E fails to demonstrate that these unrelated sections constitute exceptions to a general rule or evince a legislative intent to prohibit the Commission from regulating utilities' deceptive or misleading commercial speech relating to CCAs.

PG&E's reliance on *Assembly v. Public Utilities Com.* is also misplaced. In that case, the California Supreme Court held that section 701 does not confer upon the Commission the authority to contravene or disregard an express legislative directive. (*Assembly v. Public Utilities Com.*, *supra*, 12 Cal. 4th at p. 103.) *Assembly v. Public Utilities Com.* does not address a situation such as the instant case, where there is no indication that the Commission is circumventing an express legislative directive. As noted above, none of the Public Utilities Code sections cited by PG&E prohibit the Commission from regulating the utilities' misleading or deceptive commercial speech relating to CCAs. (See Pub. Util. Code, §§ 796, 453, subd. (b), & 2896.)

Further, in addition to the Commission's broad and expansive authority over public utilities as a general matter under section 701, the Legislature expressly gave the Commission particular authority to regulate the conduct of electrical corporations relating to CCA programs. In SB 790, the Legislature specifically tasked the Commission with developing a code of conduct, associated rules, and enforcement procedures for electrical

corporations relative to the consideration, formation, and implementation of CCA programs. (Pub. Util. Code, § 707.) The Legislature authorized the Commission to incorporate rules that the Commission finds to be necessary or convenient in order to facilitate the development of CCA programs and to foster fair competition. (Pub. Util. Code, § 707, subd. (a)(4)(A).)

The Legislature was aware of the Commission's decisions regulating the utilities' conduct relating to CCA programs prior to the enactment of SB 790. In SB 790, the Legislature acknowledged that the Commission had made considerable progress in identifying and addressing the conduct that has hindered the creation of CCA programs, and concluded that it was now appropriate to further address these issues by statute. (Sen. Bill No. 790 (2011-2012 Reg. Sess.) § 2, subd. (e).) Further, in developing the code of conduct, rules, and enforcement procedures for electrical corporations, the Legislature declared its intent that the Commission include, in whole, or in part, the rules approved by the Commission in D.08-06-016. (Pub. Util. Code, § 707, subd. (a)(4)(B).) D.08-06-016 included provisions that parties' marketing relating to CCAs shall be truthful and non-misleading.¹⁰ (D.08-06-016, *supra*, at p. 5 (slip op.).) If the Legislature intended to limit the Commission's jurisdiction, it could have done so. Instead, the Legislature affirmed D.08-06-016, as well as the Commission's jurisdiction to incorporate other rules that it finds is "necessary or convenient" to facilitate the

¹⁰ Although D.08-06-016 was a settlement agreement that applied to both PG&E and SJVPA, section 707 only applies to a code of conduct for the utilities' conduct; it does not mention the CCAs' conduct. (Pub. Util. Code, § 707, subd. (a)(4)(B).) The fact that the Legislature authorized the Commission to consider the rules in D.08-06-016 in developing a code of conduct for the utilities does not authorize the Commission to apply the rules in D.08-06-016 generally to the CCAs. (See Cal. Code Regs., tit. 20, § 12.5.) Moreover, in implementing SB 790, the Commission is not required to incorporate the rules adopted in D.08-06-016. The Legislature did not limit the authority of the Commission to adopt rules that it determines are necessary or convenient in addition to those adopted in D.08-06-016 or to modify any rule adopted in that decision. (Pub. Util. Code, § 707, subd. (a)(4)(C).) Whether and to extent the Commission will adopt the rules in D.08-06-016 in developing electrical corporations' code of conduct relating to CCAs is being considered in R.12-02-009.

development of CCA programs and foster competition.¹¹ (Pub. Util. Code, § 707, subd. (a)(4)(A).)

There is also no merit to PG&E’s allegation that Business and Professions Code section 17500.1 bars the Commission from prohibiting the utilities’ deceptive or misleading commercial advertising. (PG&E Rehr. App., p. 9.) Section 17500.1 provides:

[N]o trade or professional association, or state agency, state board, or state commission within the Department of Consumer Affairs shall enact any rule, regulation, or code of professional ethics which shall restrict or prohibit advertising by any commercial or professional person, firm, partnership or corporation which does not violate the provisions of Section 17500 of the Business and Professions Code, or which is not prohibited by other provisions of law.

This statutory provision only applies to a “state agency, state board, or state commission within the Department of Consumer Affairs.” Thus, it does not apply to this Commission.

Based on the foregoing, there is no merit to PG&E’s allegations that we lack the jurisdiction to regulate the utilities’ misleading or deceptive commercial speech relating to CCAs.

3. Allegation that the Commission unlawfully delegated its duties

The Decision found that ALJs or presiding officers have the authority to hear and grant a TRO or preliminary injunction pending confirmation or rejection of the order by the full Commission. (D.10-05-050, p. 19 [Conclusion of Law 7].) The Decision

¹¹ PG&E also alleges that the Commission does not have the authority to regulate the utilities’ commercial speech regarding CCAs because it is funded by shareholders. (PG&E Rehr. App., p. 9, fn. 21.) SB 790 contemplates that the utilities’ marketing activities related to CCAs would not be paid by ratepayers, but still gives the Commission broad authority to regulate the conduct of electrical corporations relative to CCAs. (Pub. Util. Code, § 707, subds. (a)(1) & (a)(4).) The Constitution gives the legislature “plenary power ... to confer additional authority and jurisdiction upon the commission...” (Cal. Const., art. XII, § 5.)

modified D.05-12-041 to alert stakeholders of the availability of a TRO or preliminary injunction in a CCA complaint case. (D.10-05-050, p. 19 [Conclusion of Law 8].)

PG&E claims that the Decision unlawfully delegates authority to the Commissioners and ALJs, alleging that under section 310, an individual Commissioner or ALJ does not have the authority to grant a TRO or preliminary injunction. (PG&E Rehr. App., p. 10.) This allegation lacks merit.

In stating that a TRO or preliminary injunction is available, the Decision did not create new procedure but merely affirmed existing Commission procedure. It is a well-established practice in Commission proceedings that an assigned Commissioner or ALJ may issue a TRO or preliminary injunction in order to preserve the status quo, subject to its ratification or reversal by the full Commission. (See, e.g., *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.3d ___, at p. 7 (slip op.); *Order Denying Request for Stay and Temporary Restraining Order* [D.05-04-040] (2005) ___ Cal.P.U.C.3d ___, at p. 2 (slip op.).) The Commission generally holds meetings twice a month. Thus, in order to prevent irreparable harm, we have authorized an assigned Commissioner or ALJ to grant interim emergency relief until the full Commission can determine whether to impose a more permanent restraint. (D.05-04-040, *supra*, at p. 2 (slip op.).) The Commission is authorized to “do all things, whether specifically designated in [the Public Utilities Act] or in addition thereto, which are necessary and convenient” in the supervision and regulation of every public utility in California. (Pub. Util. Code, § 701.) Subject to statute and due process, the Constitution authorizes the Commission to establish its own procedures. (Cal. Const., art. XII, § 2.)

PG&E asserts that, pursuant to section 310, any finding, opinion, or order of a single Commissioner is not effective until and unless the full Commission approves and confirms it. (PG&E Rehr. App., p. 10.) This is incorrect. Section 310 provides, in part:

Every finding, opinion, and order made by the commissioner or commissioners so designated, pursuant to the investigation, inquiry, or hearing, when approved or confirmed by the

commission and ordered filed in its office, is the finding, opinion, and order of the commission.

Thus, section 310 provides that an order of an Assigned Commissioner becomes an order of the Commission when it is approved or confirmed by the Commission. Nowhere does section 310 state that an order of an Assigned Commissioner is not effective until approved or confirmed by the Commission. (Cf. Pub. Util. Code, § 311, subd. (d) (discussing the filing of proposed decisions).) The Constitution also provides that “Any commissioner as designated by the commission may ... issue an order subject to commission approval.” (Cal. Const., art. XII, § 2.) Pursuant to this constitutional and statutory authority, an individual Commissioner may issue a TRO or preliminary injunction, subject to Commission approval.

ALJs also have the authority to issue a TRO or preliminary injunction in appropriate circumstances. Section 309 authorizes the Executive Director to employ ALJs “to carry out the provisions of [the Public Utilities Act] or to perform the duties and exercise the power conferred upon the commission by law.” (Pub. Util. Code, § 309.) Rule 9.1 of the Commission’s Rules of Practice and Procedure authorizes an ALJ to “rule upon all objections or motions which do not involve final determination of proceedings.” (Cal. Code Regs., tit. 20, § 9.1; see also Cal. Code Regs., tit. 20, § 11.1 (authorizing an ALJ to rule on motions).) The issuance of a TRO or preliminary injunction is not a final determination.

PG&E fails to explain how there can be an unlawful delegation where an Assigned Commissioner or ALJ is only authorized to provide interim relief, which is subject to ratification or reversal by the full Commission. We previously explained that: “Generally, an improper delegation of authority will be found where a government entity has ‘surrendered’ control and/or delegated its power to make fundamental policy or final discretionary decisions.” (*Order Modifying Decision (D.) 10-12-016, and Denying Rehearing, as Modified* [D.11-04-035](2011) ___ Cal.P.U.C.3d ___, at p. 6 (slip op.).) We did not delegate such authority in the Decision.

Moreover, “an agency’s subsequent approval or ratification of an act delegated to a subordinate validates the act, which becomes the act of the agency itself.” (*California School Employees Assn. v. Personnel Com.* (1970) 3 Cal.3d 139, 145.) Consistent with established Commission practice, the Decision provided that any TRO or preliminary injunction is subject to ratification or reversal by vote of the full Commission. (D.10-05-050, pp. 7-8.)

PG&E fails to demonstrate that section 310 or any other authority prohibits an individual Commissioner or ALJ from issuing a TRO or preliminary injunction. As explained above, we have the constitutional and statutory authority to authorize an individual Commissioner or ALJ to issue a TRO or preliminary injunction subject to ratification or reversal by the full Commission. The Decision mentions the Commission’s authority pursuant to section 310, but does not discuss all the bases for this authority. Thus, we modify the Decision, as set forth in the ordering paragraphs below, to include a fuller explanation of the bases for this authority. As modified, rehearing on this issue is denied.

B. Allegations in CCSF’s Rehearing Application

1. Allegation that section 366.2(c)(9) bars utility marketing against CCAs

CCSF alleges that section 366.2(c)(9) prohibits utilities from marketing against CCAs and the Decision erred in finding to the contrary. (CCSF Rehr. App., p. 5.) Section 366.2(c)(9) provides, in part: “All electrical corporations shall cooperate fully with any community choice aggregators that investigate, pursue, or implement community choice aggregation programs.” CCSF alleges that by stating that electrical corporations shall “cooperate fully” with the CCAs, the Legislature intended to bar utility marketing against CCAs. (CCSF Rehr. App., pp. 5-7.) This allegation lacks merit.

The Decision found that there is nothing in the language of section 366.2(c)(9) that explicitly prohibits utilities from marketing their own generation service or otherwise marketing against CCAs. (D.10-05-050, p. 13.) Thus, the Commission construed section 366.2(c)(9) as not requiring an outright ban on marketing by the

utilities against CCA service. (D.10-05-050, pp. 13-14.) As the agency authorized by the Constitution to administer the provisions of the Public Utilities Code, the Commission is entitled to great deference in its interpretation of the Public Utilities Code. (*Greyhound Lines, Inc. v. Public Utilities Com.* (1968) 68 Cal.2d 406, 410-411.)

Section 366.2(c)(9) does not specifically mention utility marketing. Section 366.2(c)(9)'s requirement that the utilities shall "cooperate fully" with CCAs must be understood in context. (See *California Assn. of Psychology Providers v. Rank* (1990) 51 Cal. 3d 1, 18.) As an example of cooperation, section 366.2(c)(9) states that an electrical corporation shall provide CCAs with appropriate billing and electrical load data. (Pub. Util. Code, § 366.2, subd. (c)(9).) It further states that an electrical corporation shall continue to provide all metering, billing, collection, and customer service to retail customers that participate in CCA. (Pub. Util. Code, § 366.2, subd. (c)(9).) The section also provides that the Commission shall determine the terms and conditions under which an electrical corporation provides services to CCAs and retail customers. (Pub. Util. Code, § 366.2, subd. (c)(9).) Although section 366.2(c)(9) does not provide an exhaustive list of what it means to "cooperate fully," the examples provided are instructive in determining the Legislature's intent. The examples of cooperation all relate to the fact that a CCA cannot provide its services without an electrical corporation's provision of certain services. Nothing in section 366.2(c)(9) itself indicates that the Legislature intended to prohibit all utility marketing against the CCA program.

The recently enacted SB 790 supports the Commission's interpretation that the Legislature did not intend to prohibit all utility marketing against the CCA program. SB 790 provides that the Commission shall adopt rules to govern the conduct of electrical corporations relative to CCA programs. (Pub. Util. Code, § 707, subd. (a).) SB 790 does not prohibit an electrical corporation from marketing against CCA programs, but rather provides that such marketing activity can be carried out only through an independent marketing division that is funded exclusively by the electrical corporation's shareholders, and is functionally and physically separate from the electrical corporation's ratepayer-funded divisions. (Pub. Util. Code, § 707, subd. (a)(1).) The fact that the Legislature

provided rules governing an electrical corporation's marketing against CCA programs confirms that the Legislature did not intend to prohibit such marketing.¹²

Section 366.2(c)(9) cannot be construed as prohibiting utility marketing against CCAs where SB 790 allows such marketing subject to certain restrictions. A specific provision relating to a particular subject will govern a general provision, even though the general provision standing alone would be broad enough to include the subject to which the specific provision relates. (*San Francisco Taxpayers Assn. v. Board of Supervisors* (1992) 2 Cal. 4th 571, 577.) AB 117, which includes section 366.2(c)(9), does not specifically discuss utility marketing relating to the CCA program. SB 790 does discuss utility marketing relating to the CCA program and does not prohibit such marketing. (See Pub. Util. Code, § 707.)

Based on the foregoing, CCSF's allegation that section 366.2(c)(9) should be construed to prohibit all utility marketing against CCAs lacks merit.

2. Allegation that CCSF's proposed ban on CCA marketing does not violate the First Amendment

CCSF's petition to modify D.05-12-041 sought to prohibit utilities from marketing to retail customers regarding a CCA program. (CCSF Petition, p. 11.) CCSF's definition of marketing included materials that discuss the rates or services of a CCA program, have the purpose or effect of discouraging customers from taking service from a CCA program, or have the purpose or effect of encouraging or facilitating the utility's retention of customers. (CCSF Petition, p. 11.)¹³ CCSF alleges that its request is permissible under the First Amendment and that the Decision's rejection of CCSF's request on this basis is arbitrary and unsupported. (CCSF Rehr. App., pp. 9-10.)

¹² The Legislature did give the Commission broad and expansive authority to incorporate rules governing the conduct of electrical corporations that the Commission finds to be necessary or convenient in order to facilitate the development of CCA programs and to foster fair competition. (Pub. Util. Code, § 707, subd. (a)(4)(A).) The Commission is currently considering these rules in R.12-02-009.

¹³ CCSF's rehearing application implies that its petition did not request a total ban on utility commercial speech relating to CCAs. (CCSF Rehr. App., p. 11, fn. 25.) The language in its petition demonstrates otherwise. (See CCSF Petition, p. 11.)

As explained in section II.A.1.a., *supra*, the U.S. Supreme Court in *Central Hudson* articulated a four-part test to determine whether a commercial speech regulation is permissible under the First Amendment. Any restriction on commercial speech protected by the First Amendment must directly advance a substantial governmental interest and be no more extensive than necessary to serve that interest. (*Central Hudson*, *supra*, 447 U.S. at p. 566.) So long as the restriction is narrowly tailored to achieve a substantial governmental interest, courts give governmental decisionmakers discretion to determine what is a reasonable fit between the restriction and the governmental interest. (*Board of Trustees v. Fox* (1989) 492 U.S. 469, 480 (“*Fox*”).)

CCSF fails to demonstrate any legal error. CCSF alleges that its proposed restrictions on CCA marketing are permissible under the standards set forth in *Central Hudson* and *Fox*.¹⁴ But CCSF fails to demonstrate that its proposed restrictions are legally required. As explained in section II.B.1., *supra*, there is no indication the Legislature intended to prohibit utilities from marketing against CCAs. Thus, assuming *arguendo* that CCSF’s proposed restrictions were legally permissible under the standards set forth in *Central Hudson* and *Fox*, CCSF still fails to demonstrate that it was legally erroneous for the Commission to decline to adopt CCSF’s proposed restrictions.

Furthermore, the Decision adequately explained its reasoning for rejecting CCSF’s request for a complete ban on CCA marketing. The Decision recognized section 355.2(c)(9) evidences a substantial governmental interest in encouraging the development of CCA programs and allowing customer choice to participate in them. (D.10-05-050, p. 13.) But the Decision found that an outright ban on marketing by the utilities would be more excessive than reasonably necessary. (D.10-05-050, p. 14.) The Decision determined that prohibiting untrue or misleading commercial speech regarding CCA service and the utility’s competing service, prohibiting the acceptance of opt-outs before the CCA has informed customers of the terms and conditions of its services, and

¹⁴ *Fox* relies on the four-part test set forth in *Central Hudson*. (*Fox*, *supra*, 492 U.S. at p. 475.)

clarifying which entity has the sole responsibility for determining the opt-out mechanism, would advance these interests. (D.10-05-050, pp. 13-14.) As the Decision noted: “[f]lat-out bans on speech are disfavored.” (D.10-05-050, p. 14; see also *Central Hudson*, *supra*, 447 U.S. at p.566, fn.9 [the U.S. Supreme Court has not approved a blanket ban on commercial speech unless the expression itself was flawed in some way, either because it was deceptive or related to unlawful activity].)

CCSF alleges that in *Opinion Adopting Standards of Conduct Between Utilities and Their Affiliates* (“*Affiliate Transactions Opinion*”) [D.97-12-088](1997) 77 CPUC.2d 422, the Commission imposed more extensive marketing restrictions than those proposed in CCSF’s Petition. (CCSF Rehr. App., p. 11.) In that instance, the Commission adopted a rule prohibiting a utility from participating in joint advertising or joint marketing with its affiliates. (CCSF Rehr. App., p. 11 citing *Affiliate Transactions Opinion*, *supra*, App. A, Rule V.F.4.) The rule cited by CCSF only prohibited the utilities’ joint advertising and marketing with their affiliates. It did not place a complete ban on the utilities’ speech. In the *Affiliates Transaction Opinion*, the Commission chose rules that were no more extensive than necessary. (See, e.g., *Order Denying Rehearing of Decision (D.) 97-12-088* [D.98-12-089] (1998) 84 CPUC.2d 588, 598.) In any event, as noted above, so long as the restriction is not more extensive than necessary, the Commission has the discretion to determine what restriction is a reasonable fit with the governmental interest. (*Fox*, *supra*, 492 U.S. at p. 480.)

Based on the foregoing, CCSF fails to demonstrate that there is any legal error in the Commission’s rejection of CCSF’s proposal to prohibit all utility marketing regarding a CCA program. We left open the possibility that, if justified, we would consider further restrictions that fall short of a ban on all utility marketing. (D.10-05-050, pp. 14-15 & p. 20 [Conclusion of Law 17].) Pursuant to SB 790, we are currently considering new rules for utility conduct relative to the CCA program in R.12-02-009.

3. Allegation that the Decision violates Article III, section 3.5 of the California Constitution

CCSF alleges that the Decision violates Article III, section 3.5 of the California Constitution, by effectively declaring section 366.2(c)(9) unenforceable. Article III, section 3.5 states, in part: “An administrative agency, including an administrative agency created by the Constitution or an initiative statute, has no power: (a) To declare a statute unenforceable, or refuse to enforce a statute, on the basis of it being unconstitutional unless an appellate court has made a determination that such statute is unconstitutional.” (Cal. Const., art. III, § 3.5.)

CCSF’s allegation lacks merit. In declining to prohibit utility marketing against CCAs, we did not declare section 366.2(c)(9) unenforceable or state that we will not enforce the statute. Rather, as explained in section II.B.1, *supra*, we found that the statute does not prohibit utility marketing against CCAs.

III. CONCLUSION

For the reasons stated above, D.10-05-050 is modified to: (1) delete the statement that CCAs are subject to Business and Professions Code sections 17200 and 17500; and (2) include a fuller explanation of the bases for the Commission’s authority to allow an individual Commissioner or ALJ to issue a TRO or preliminary injunction subject to ratification or reversal by the full Commission. Rehearing of D.10-05-050, as modified, is denied.

THEREFORE, IT IS ORDERED that:

1. D.10-05-050 shall be modified as follows:
 - a. The first full sentence on page 8 beginning with “This procedure is fully within our authority ...” is modified to read:

“This procedure is fully within our authority and consistent with Article XII, sections 1-6 of the California Constitution; sections 309, 310, and 701 of the Public Utilities Code; and Rules 9.1, 11.1, and 14.6(c)(1) of the Commission’s Rules of Practice and Procedure.”

- b. Footnote 9 on page 16 is deleted in its entirety.
 - c. Conclusion of Law 7 on page 19 is modified to read:

“Administrative law judges and presiding officers have the authority to hear and grant a temporary restraining order or preliminary injunction pending confirmation or rejection of such order by the full Commission, consistent with Article XII, sections 1-6 of the California Constitution; sections 309, 310, and 701 of the Public Utilities Code; and Rules 9.1, 11.1, and 14.6(c)(1) of the Commission’s Rules of Practice and Procedure.”
 - d. The last sentence of Ordering Paragraph 1.a. on page 20 is modified to read:

“The Commission will entertain complaints against utilities for engaging in such improper communications where, in addition to penalties, the utility may be subject to interim relief, including a temporary restraining order or preliminary injunction, consistent with Article XII, sections 1-6 of the California Constitution; sections 309, 310, and 701 of the Public Utilities Code; and Rules 9.1, 11.1, and 14.6(c)(1) of the Commission’s Rules of Practice and Procedure.”
2. Rehearing of D.10-05-050, as modified, is denied.

This order is effective today.

Dated July 12, 2012, at San Francisco, California.

MICHAEL R. PEEVEY

President

TIMOTHY ALAN SIMON

CATHERINE J.K. SANDOVAL

MARK J. FERRON

Commissioners

I abstain.

/s/ MICHEL PETER FLORIO

Commissioner