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Decision 06-01-047 January 26, 2006

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Rulemaking to implement the provisions of Public Utilities Code § 761.3 enacted by Chapter 19 of the 2001-02 Second Extraordinary Legislative Session	R.02-11-039 (Filed on November 21, 2002)

ORDER MODIFYING AND DENYING REHEARING OF DECISIONS 04-05-017 and 04-05-018

I. INTRODUCTION

In this decision, we dispose of applications for rehearing of both Decision ("D.") 04-05-017 and D.04-05-018 filed by Mirant Delta, LLC and Mirant Poterero, LLC ("Mirant"), the Western Power Trading Forum, et al. ("WPTF"), and Elk Hills Power, LLC ("Elk Hills").[1] We have reviewed each and every allegation of error raised in the applications for rehearing and are of the opinion that applicants have not demonstrated good cause of rehearing. However, we will modify the decisions and General Order ("GO") 167 as explained further below. In addition, we will order supplemental proceedings to further refine the procedures by which staff may issue citations under GO 167. Therefore, we deny rehearing of D.04-05-017 and D.04-05-018, as modified.

[1] Elk Hills filed an application for rehearing of only D.04-05-018. Mirant filed two applications for rehearing of D.04-05-017 and D.04-05-018, respectively. WPTF filed one application for rehearing of both D.04-05-017 and D.04-05-018, with joint applicants. The joint applicants include the WPTF; Cabrillo Power I LLC; Cabrillo Power II LLC; El Segundo Power, LLC; Long Beach Generation LLC; FPL Energy, LLC; AES Alamitos LLC; AES Huntington Beach LLC; AES Redondo Beach LLC; Reliant Energy Coolwater, Inc.; Reliant Energy Ellwood, Inc.; Reliant Energy Etiwanda, Inc.; Reliant Energy Mandalay, Inc.; and Reliant Energy Ormond Beach, Inc.

II. FACTUAL BACKGROUND

In 2002, the Legislature passed Senate Bill No. 39XX ("SB 39XX") in response to the 2000-2001 energy crisis. (Stats. 2002, 2nd Ex. Sess., Ch 19.) In enacting SB 39XX, the Legislature declared that electric generating facilities and powerplants in California "are essential facilities for maintaining and protecting the public health and safety of California residents and businesses." (SB 39XX, § 1(a).) The Legislature further declared that it is in the public interest "to ensure that electric generating facilities and powerplants are effectively and appropriately maintained and efficiently operated." (SB 39XX, § 1(b).) SB 39XX added section 761.3 to the Public Utilities Code.

Public Utilities section 761.3 (a) requires the Commission to implement and enforce standards for the maintenance and operation of electric generating facilities to ensure reliability, notwithstanding Public Utilities Code section 216(g), which declares that exempt wholesale generators ("EWGs") are not public utilities. Section 761.3 further provides that the Commission shall enforce protocols of the California Independent System Operator ("CAISO" or "ISO") for the scheduling of powerplant outages.

Section 761.3(b)(1) provides that the Commission and the ISO shall jointly establish the California Electricity Generation Facilities Standards Committee ("Committee"), and that the Committee shall consist of three members: one member of the Commission, one member of the ISO, and one individual with expertise regarding electric generation facilities. Section 761.3(b)(1) requires that the Committee, within 90 days of the effective date of the legislation, adopt and thereafter revise standards for the maintenance and operation of generation facilities. Section 761.3(b)(2) provides for staff support for the Committee. Section 761.3(b)(3) states that "[t]his subdivision shall be operative only until January 1, 2005."

Section 761.3(c) provides that nothing in section 761.3 authorizes the Commission to establish rates for wholesale sales in interstate commerce or to approve the sale or transfer of control of facilities that have been certified as EWGs by the Federal Energy Regulatory Commission. ("FERC").

In D.04-05-017 and D.04-05-018, the Commission adopted standards for electric generating facilities and powerplants located in California pursuant to Public Utilities Code section 761.3. In D.04-05-017, the Commission adopted Logbook Standards for thermal powerplants. In D.04-05-018, the Commission adopted GO 167, which contains rules for the implementation and enforcement of General Duty Standards and Maintenance Standards, and which provides for the enforcement of the Outage Coordination Protocol adopted by the CAISO.

Mirant, WPTF, and Elk Hills filed timely applications for rehearing of both decisions. In their rehearing applications, Mirant and WPTF allege, among other things, that various aspects of the decisions exceed the authority of the Commission under state law, violate state and federal constitutional provisions, and are preempted by federal law. Elk Hills alleges that the General Duty Standards are impermissibly vague and that the Commission erred in failing to adopt certain modifications to GO 167. No responses to the rehearing applications were filed.

III. DISCUSSION

A. State Law and Constitutional Claims

1. The Commission has the authority under state law to regulate exempt wholesale generators.

Mirant and WPTF argue that the Commission has no authority to regulate EWGs because they are not "public utilities" under state law.[2] According

[2] To the extent that the applicants raise related issues of federal preemption, those arguments will be addressed below in the section on federal preemption.

to WPTF, the authority conferred on the Commission in Public Utilities Code section 761.3 is a limited grant of authority, not a grant of general jurisdiction. WPTF further contends that the Legislature prescribed a way for the Commission to fulfill its obligations without asserting jurisdiction over EWGs, which is to seek enforcement authority from the FERC. Mirant similarly argues that the scope of the Commission's regulatory authority under section 761.3 is restricted and that the Legislature intended the standards to be incorporated into the ISO's tariff and to be enforceable by FERC.

As applicants acknowledge, section 761.3 requires the Commission to "implement and enforce standards" for the maintenance and operation of electric generation facilities, "[n]othwithstanding" Public Utilities Code section 216(g), which exempts EWGs from the definition of "public utility." However, nothing in section 761.3, nor in the decisions, purports to assert general jurisdiction over the EWGs as public utilities.

In *PG&E Corporation v. Public Utilities Commission* (2004) 118 Cal. App. 4th 1174 (the "Holding Company Decision"), the California Court of Appeal rejected claims that the Commission could not assert jurisdiction over holding companies because they were not "public utilities." In that case, the holding companies claimed that the Commission's jurisdiction is limited to the regulation of "public utilities." The Commission pointed out that it had never sought to exercise general or plenary jurisdiction over holding companies as public utilities, but that it could assert limited jurisdiction over holding companies to enforce holding company conditions.

The court agreed. The court acknowledged that it is undisputed that the holding companies are not "public utilities." However, the court explained, the California Constitution provides that the Legislative has plenary power, unlimited by other provisions of the constitution, to confer additional authority and

jurisdiction upon the commission. "Thus, for example, there is no dispute that, when authorized by the Legislature, the [Commission] may exercise limited jurisdiction over entities other than public utilities." (*Id*. at p. 1197.) Furthermore, the court found that Public Utilities Code section 701, which allows the Commission to "do all things . . . necessary and convenient" in the exercise of its authority to regulate public utilities, is not limited to actions against public utilities. (*Id*. at p. 1198.)

WPTF argues that *PG&E Corporation v. Public Utilities Commission* is distinguishable from the instant case, because the holding companies were created by the Commission. "By contrast, no such jurisdictional nexus exists for EWGs, who are and have always been subject to FERC jurisdiction, not that of the Commission." (WPTF's App. for Rehg. at p. 7.) We do not agree with WPTF's analysis of the Holding Company decision. Although WPTF is correct that holding companies were created by the Commission, while EWGs were not, the fundamental issue in the Holding Company Decision was whether the Commission's jurisdiction was limited to regulation of "public utilities." The court concluded that it was not. (*PG&E Corporation v. Public Utilities Commission, supra*, at p. 1200.) Moreover, here, in contrast to the Holding Company Decision, the Commission has "express statutory authority" to implement and enforce generation standards pursuant to Public Utilities Code section 761.3. (See *id*. at p. 1207.)[3]

[3] We also note that a standard provision of procurement contracts between public utilities and generators obligates the "seller" to operate the applicable generating unit in conformance with all applicable laws and regulations, including GO 167. The maintenance standards implemented by GO 167 constitute such "applicable" regulations.

B. The statute does not require the Commission to seek enforcement capability from FERC.

WPTF and Mirant contend that the Commission failed to proceed in the manner required by law because the Commission declined to follow the Legislature's instruction in SB 39XX to seek approval for the standards and/or enforcement capability from FERC. This argument is based on language in section 1(c) of SB 39XX which states, in part:

> It is in the public interest that the Public Utilities Commission seek enforcement capability from the Federal Energy Regulatory Commission regarding the private generator agreement to provide for broader state control of operational activities of generation facilities in the state.

This language is contained in the un-codified findings and declarations portion of the statute.[4]

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[4] Section 1 of SB 39XX states in full:

"The Legislature finds and declares all of the following:

(a) Electric generating facilities and powerplants in California are essential facilities for maintaining and protecting the public health and safety of California residents and businesses.

(b) It is in the public interest to ensure that electric generating facilities and powerplants located in California are effectively and appropriately maintained and efficiently operated.

(c) Owners and operators of electric generating facilities and powerplants provide a critical and essential good to California residents. It is in the public interest that the Public Utilities Commission seek enforcement capability from the Federal Energy Regulatory Commission regarding the private generator agreement to provide for broader state control of operational activities of generation facilities in the state.

(d) To protect the public health and safety and to ensure electrical service reliability and adequacy, the Public Utilities Commission and the Independent System Operator shall work collaboratively to develop clearly articulated, uniform operating practices and procedures. The commission shall enforce compliance with those practice and procedures."

(Stats. 2002, ch.19, § 1.)

In construing a statute, our role, like the court's role, is to ascertain the Legislature's intent so as to effectuate the purpose of the law. In determining intent, we look first to the words of the statute, giving the language its usual, ordinary meaning. If there is no ambiguity in the language, we will presume that the Legislature meant what it said and the plain meaning of the statute governs. (*People v. Canty* (2004) 32 Cal.4th 1266, 1276.) Where the language of a statute is ambiguous, it is appropriate for us to consider other evidence to ascertain legislative intent, such as the history and background of the provision. (*People v. Birkett* (1999) 21 Cal.4th 226, 231-232.)

The "plain meaning" rule does not prohibit us from determining whether the literal meaning of a statute comports with its purpose or whether such a construction of one provision is consistent with other provisions of the statute. The meaning of a statute may not be determined from a single word or sentence; the words must be construed in context. Provisions relating to the same subject matter must be harmonized to the extent possible. The intent of the law prevails over the letter of the law; and the letter of the law is read, if possible, to conform to the spirit of the act. (See *People v. Canty*, *supra*, at pp. 1276-1277.)

Uncodified findings or declarations are part of the statutory law of the state (*Carter v. Calif. Dept. of Veterans Affairs* (2004) 121 Cal.App.4th 840, 850) and are properly used as an aid in construing a statute. However, they do not confer power, determine rights, or enlarge the scope of a statute. (*People v. Canty*, *supra*, at pp. 1276-1280.) Furthermore, where a declaration is in irremediable conflict with a statute's substantive provision, the substantive provisions of the statute will prevail.

Applying these statutory construction rules to the instant case, the overall purpose of SB 39XX is to ensure the effectiveness and reliability of electric generating facilities. The codified portion of Public Utilities Code section 761.3 states that the Commission "shall" implement and enforce the standards

adopted by the Committee. (See Pub. Util. Code, § 761.3(a).) There is nothing in the statute that requires the Commission to seek approval of the standards or enforcement capability from FERC. If the Legislature had intended the Commission to do so, the Legislature could have plainly stated this. It did not.

The applicants quote the declaration in section 1(c) out of context and, we believe, misinterpret its meaning. First, although section 1(c) declares that it is in the public interest to seek enforcement capability from FERC, it does not directly require the Commission to do so. In contrast, the express language of section 761.3 requires the Commission to implement and enforce generator standards. As applicants interpret section 1(c), it would be in direct conflict with the codified portion of the statute.

In addition, the "enforcement capability" referenced in section 1(c) relates to "private generator agreements" and is for the purpose of providing "broader state control of operational activities of generation facilities in the state." It appears that this section was intended to apply to what is commonly known as "participating generator agreements." A participating generator agreement is an agreement entered into by a generator with the CAISO. The terms of such agreements are approved by FERC, and are generally enforced by FERC. Contrary to applicants' argument, it appears that the Legislature's intent was to declare that it is in the public interest for the Commission to seek the capability to enforce participating generator agreements between generators and the ISO, *in addition to* implementing and enforcing generator standards adopted by the Committee. The language in the statute as a whole does not support applicants' view that "implementation of standards should be through application to FERC." (WPTF's App. for Rehg. at p. 10.)

For all of the above reasons, applicants' argument that the Commission failed to follow the requirements of the statute and seek enforcement capability from FERC is without merit.

1. The citation program set forth in D.04-05-018 and GO 167 is a proper delegation of authority and does not violate due process.

a) Delegation of authority to staff

Mirant and WPTF allege that D.04-05-018 and GO 167 impermissibly delegate authority to Commission staff to make discretionary decisions and to exercise functions that are judicial in nature. Applicants challenge section 13.3 of GO 167, which allows the Commission's Consumer Protection and Safety Division ("CPSD") to assess scheduled fines for specified violations of GO 167. Appendix F (formerly Appendix E) of GO 167 sets forth the specified violations and schedule of fines that CPSD may impose:

(1) Failure to file an Initial Certification, Recertification or Notice of Material Change -- $1,000 per incident plus $500 per day for each day the filing is late.

(2) Failure to maintain logbooks -- $5,000 per incident.

(3) Failure to respond to an Information Requirement -- $1,000 per incident plus $500 per day for the first ten days the requirement is not satisfied and $1,000 for each day thereafter.

(4) Negligent submission of inaccurate information in response to an Information Requirement -- $2,000 per incident plus $500 per day for the first ten days the accuracy is not corrected and $1,000 for each day thereafter.

(5) Repeated violations of any of the above -- 200% of the fine that would have been imposed for a first-time violation.

Such fines "may be assessed only on the concurrence of the Generating Asset Owner ("GAO") against whom the fine is imposed." (GO 167, § 13.3.4.) If the GAO contests the fine, the GAO must file its objection within 30 days. If a fine is contested, the Commission and CPSD are not limited to the scheduled fines set forth in Appendix F. (GO 167, § 13.3.4.)

As a general rule, powers conferred upon public agencies and officers which involve the exercise of judgment or discretion are in the nature of a public trust and cannot be surrendered or delegated to subordinates in the absence of statutory authorization. (*Bagley v. City of Manhattan Beach* (1976) 18 Cal.3d 22, 24; *California School Employees Association v. Personnel Commission* (1970) 3 Cal.3d 139, 144; *Schecter v. County of Los Angeles* (1968) 258 Cal.App.2d 391, 396.) On the other hand, public agencies may delegate the performance of ministerial tasks, including the investigation and determination of facts preliminary to agency action (*California School Employees*, *supra*, at p. 144), functions relating to the application of standards (*Bagley*, *supra*, at p. 25), and the making of preliminary recommendations and draft orders (*Schecter*, *supra*, at p. 397). 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*, *supra*, at p. 145.)

As the Commission pointed out in *California Association of Competitive Telecommunication Companies* [D.02-02-049] (2002) 2002 Cal.P.U.C. LEXIS 162, cases such as *California School Employees* and *Schecter* follow the general rule that agencies cannot delegate discretionary duties in the absence of statutory authority. However,

> they really stand for the narrower principle that while agencies cannot delegate the power to make fundamental policy decisions or "final" discretionary decisions, they may act in a practical manner and delegate authority to investigate, determine facts, make recommendations, and draft proposed decisions to be adopted or ratified by the agency's highest decision makers, even though such activities in fact require staff to exercise judgment and discretion.

(*California Association of Competitive Telecommunication Companies* [D.02-02-049], *supra*, 2002 Cal.P.U.C. LEXIS 162 at pp. *9-*10, petn. for writ den. Dec. 4, 2002, *Southern California Edison Company v. Public Utilities Commission*,

B157507.) Thus, in determining whether a delegation of authority is unlawful, the question is whether the Commission has delegated its power to make fundamental policy decisions or final discretionary decisions.

> We have said that the purpose of the doctrine that legislative power cannot be delegated is to assure that "truly fundamental issues [will] be resolved by the Legislature" and that a "grant of authority [is] . . . accompanied by safeguards adequate to prevent its abuse." [Citations.]

(*Kuglar v. Yocum* (1968) 69 Cal.2d 371, 376, original alterations.)

In the instant case, the delegation of authority to assess fines is proper. The Commission has not delegated its power to make fundamental policy decisions or final discretionary decisions. Rather, the Commission has made the policy decision to impose specific fines for certain types of violations.

Moreover, the Legislature has expressly provided for delegation of powers and duties conferred upon the Commission. Section 7 of the Public Utilities Code states:

> Whenever a power is granted to, or a duty is imposed upon, a public officer, the power may be exercised or the duty may be performed by a deputy of the officer or by a person authorized, pursuant to law, by the officer, unless this code expressly provides otherwise.

Similarly, Public Utilities Code sections 308 and 309, relating to the Executive Director, contemplate delegation of duties by the Commission. These provisions clearly authorize the delegation of responsibilities that involve some exercise of judgment and discretion. (See *California Association of Competitive Telecommunication Companies* [D.02-02-049], *supra*, 2002 Cal.P.U.C. LEXIS 162 at pp. *14-*16.)

Finally, if a GAO does not agree with the fine, the GAO can contest it. If a fine is contested, "staff must either drop the matter or proceed with other traditional methods of enforcement." (D.04-05-018 at p. 14.) Thus, a fine would be imposed by staff only when a generator agrees with the fine.

Mirant points out that GO 167 itself, referring to section 13.3.4, fails to specify that staff must drop the fine or proceed to a formal proceeding if the generator contests the fine. (Mirant's App. for Rehg. of D.04-05-018 at p. 23.) Section 13.3.1 of Go 167 states that fines may only be assessed on concurrence of the GAO. However, section 13.3.4 does not make that entirely clear. Therefore, we will modify section 13.3.4 to more accurately reflect the intent of the decision.

We will also modify section 13.3.4 to clarify that, if a formal proceeding is instituted, neither CPSD staff in its investigation nor the Commission will be limited to the specified violations or to the scheduled fines set forth in Appendix F of GO 167. In other words, the Commission may expand the scope of such proceeding, if appropriate, to consider other alleged violations of GO 167 beyond those specified in Appendix F. In addition, if, after a formal proceeding, the Commission concludes there were violations of GO 167, the Commission is not limited to the scheduled fines set forth in Appendix F; the Commission may adjust the fines upwards or downwards, consistent with the Commission's authority under section 14.0 of GO 167 and with Public Utilities Code section 2100. et seq.

In summary, the Commission has not delegated its authority to make fundamental policy decisions, and has final approval of any contested fines. Therefore, applicants have failed to demonstrate unlawful delegation.

b) Due process

WPTF and Mirant also argue that the decision violates due process because staff is allowed to declare violations without granting the generators prior notice or opportunity to be heard.

The essence of due process, a right guaranteed by both the United States and California Constitution, is that the government may not deprive an individual of life, liberty, or property without notice and opportunity to respond, in a manner appropriate to the nature of the case. (*Coleman v. Department of*

Personnel Administration (1991) 52 Cal.3d 1102, 1108, 1112.) "Notice is required before property interests are disturbed, before assessments are made, before penalties are assessed." *Lambert v. California* (1957) 355 U.S. 225, 228.) However, due process is a flexible concept. The resolution of what constitutional protections are appropriate in a particular context depends on the interests affected. (*Coleman v. Department of Personnel Administration, supra*, at pp. 1118-1119.)

In the instant case, no property right is affected until the GAO accepts the fine in writing, which must be done within 30 days of the initial assessment. (GO 167, § 13.3.3.) If the GAO contests the fine within the 30 days, no penalty is due until further formal proceedings take place. The assessment of the scheduled fine by staff serves as notice to the GAO. To ensure that GAOs are notified of the right to contest a citation, we will modify GO 167 to require staff to include notice of the GAO's right to contest the fine and/or right to a hearing with any assessment of a fine.

c) The need for further review of the GO 167 citation program

Although we conclude that, as modified, the GO 167 citation program constitutes a proper delegation and satisfies due process, we have determined that there should be supplemental proceedings to refine the program. We believe that it would benefit both CPSD staff and GAOs to further detail the procedural steps to be followed in implementing the program. For example, although notice is required, GO 167 does not specify the form and content of such notice. We will direct CPSD staff to draft a proposal which further details the program's procedures. This may be based, in part, on other citation programs that the Commission has implemented (e.g., transportation, mobile home parks). Staff's proposal shall be served on all of the parties to this proceeding for comment. After reviewing the comments, CPSD staff shall draft a proposed resolution for the Commission's consideration and approval. If, during this process, CPSD staff

determines that any changes should be made to GO 167 itself (as opposed to merely supplementing the general order), such proposed changes shall be presented in a petition to modify D.04-05-018 and GO 167, rather than in a resolution.

2. The Maintenance Assessment Guidelines and the General Duty Standards are not vague, ambiguous, or overbroad.

a) General Duty Standards

WPTF, Mirant, and Elk Hills contend that the General Duty Standards ("GDS") adopted in D.04-05-018 violate due process because they are vague and ambiguous. The General Duty Standards were adopted by the Committee and submitted to the Commission for implementation. They are as follows:

1. Each Facility shall be operated and maintained in a safe, reliable and efficient manner that reasonably protects the public health and safety of California residents, businesses, employees, and the community.
2. Each Facility shall be operated and maintained so as to be reasonably available to meet the demand for electricity, and promote electric supply system reliability, in a manner consistent with prudent industry practice.
3. Each Facility shall comply with the protocols of the California Independent System Operator for the scheduling of powerplant outages.
4. [Reserved.][5]
5. Each Facility shall maintain reasonable logs of operations and maintenance in a manner consistent with prudent industry practice.

[5] The Commission concluded that it was unable to implement and enforce GDS 4 because it "makes specific reference to potential behaviors – economic and physical withholding – that might violate requirements imposed by FERC." (D.04-05-018 at p. 24.) Although the Commission had referred GDS 4 back to the Committee for revisions, no revisions were ever adopted.

> 6. Each Facility shall be operated and maintained in a reasonable and prudent manner consistent with industry standards while satisfying the legislative finding that each facility is an essential facility providing a critical and essential good to the California public.

Applicants argue that the GDS are so vague and nebulous that it is impossible for a GAO to know if it is in compliance with a given standard. Applicants focus particularly on GDS 1 (facility shall be operated in a manner that "reasonably protects" public health and safety); GDS 2 (facility shall be operated so as to be "reasonably available"); and GDS 6 (facility shall be operated in a "reasonable and prudent" manner "while satisfying the legislative finding" that each facility is an essential facility).

The General Duty Standards were adopted as a temporary measure until more specific operations standards were implemented. On December 16, 2004, the Commission issued D.04-12-049, which adopted operations standards. In the same decision, the Commission modified GO 167 to state that the GDS would cease to be applicable on December 20, 2004. (D.04-12-049 at p. 29 and Attachment 4 at pp. 1, 4.) However, this issue is not entirely moot. Although the GDS have been superseded by the operations standards, it is possible that an enforcement action based on the GDS could arise for the period prior to December 20, 2004. (See D.05-08-038 at pp. 28-29)

It is an established principle of constitutional law that an enactment that either forbids or requires the doing of an act "in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application" violates due process. (*Bowland v. Municipal Court* (1976) 18 Cal.3d 479, 491.) Laws must "give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he can act accordingly." (*Grayned v. City of Rockford* (1972) 408 U.S. 104, 108.) Furthermore, laws must provide

explicit standards for those who apply them in order to prevent arbitrary and discriminatory enforcement. (*Id.* at p. 108-109.)

Although the principles regarding vagueness apply to administrative regulations, the standard is less strict than when applied to criminal statutes (*Ford Dealers Association v. Department of Motor Vehicles* (1982) 32 Cal.3d 347, 366), or when First Amendment concerns are implicated (*Smith v. Goguen* (1974) 415 U.S. 566, 573). Greater leeway is allowed in the field of regulatory statutes governing business activities. (*Ford Dealers Association v. Department of Motor Vehicles*, *supra*, at p. 366.)

Moreover, there is a presumption of constitutionality that applies to statutes and regulations. (*Williams v. Garcetti* (1993) 5 Cal.4th 561, 568.) A statute should be sufficiently certain so that a person may know what is prohibited and what may be done without violating its provisions, but "it cannot be held void for uncertainty if any reasonable and practice construction can be given to its language." (*Ibid.*, quoting *Walker v. Superior Court* (1988) 47 Cal.3d 112, 143, internal quotation marks omitted.) The law does not require "mathematical certainty" in regulatory language; no more than a "reasonable certainty" can be demanded. (*People ex rel. Gallo v. Acuna* (1997) 14 Cal.4th 1090, 1117.)

In addition, when a statute is challenged for vagueness, "'[t]he particular context of the law or regulation is all important.'" (*People ex rel. Gallo v. Acuna*, *supra*, at p. 1118, quoting *Communications Assn. v. Douds* (1950) 339 U.S. 382, 412.) As courts do, we look at such things as the purpose or intent of the statute, its legislative history, whether the language in the statute has been defined by courts, and whether the language has an established meaning in the profession or industry involved. (See *McMurtry v. State Board of Medical Examiners* (1960) 180 Cal.App.2d 760, 766-767.) Certainty may be provided by the common knowledge of members of a particular vocation or profession to which statute applies. (*Cranston v. City of Richmond* (1985) 40 Cal.3d 755, 765.)

Furthermore, it is neither unusual, nor unconstitutional, to refine and develop standards for a statute on a case-by-case basis. (*Ford Dealers Association v. Department of Motor Vehicles*, *supra*, 32 Cal.3d at p. 367.)

Here, because the General Duty Standards have not been enforced against the applicants in any particular context, they are making a facial challenge to the standards. (See *Personal Watercraft Coalition v. Marin County Board of Supervisors* (2002) 100 Cal.App.4th 129, 137.) A "facial" challenge means that a law or regulation is completely invalid, and therefore incapable of any valid application. (*Village of Hoffman Estates et al. v. The Flipside, Hoffman Estates, Inc.* (1982) 455 U.S. 489, 495, fn. 5.) A party claiming that a statute is invalid on its face "confronts daunting obstacles to success." (*Personal Watercraft Coalition v. Marin County Board of Supervisors*, *supra*, at p. 137.)

To support a determination of facial unconstitutionality, thereby voiding a law, the challenger must demonstrate "that *no set of circumstances exists under which the [law]* would be valid." (*Id*. at p. 138, original italics, internal quotation marks omitted.) A facial challenge would succeed only if the enactment "is impermissibly vague in all of its applications." (*Village of Hoffman Estates et al. v. The Flipside, Hoffman Estates, Inc.*, *supra*, at p. 495.) If we can conceive of "a single situation in which the legislative enactment can be constitutionally applied," a facial challenge must fail. (See *Personal Watercraft Coalition v. Marin County Board of Supervisors*, *supra*, at p. 138.)

Applicants have failed to demonstrate legal error on the ground of vagueness. Applicants have not even attempted to demonstrate that "no set of circumstances exist" under which the provisions would be valid. (See *Personal Watercraft Coalition v. Marin County Board of Supervisors, supra*, 100 Cal.App.4th at p. 138.) Indeed, in arguing vagueness, both WPTF and Elk Hills question whether GDS 1 adds anything to existing public health and safety requirements imposed by the state and federal government. The body of safety

requirements noted by applicants provides a reference point for interpreting and refining GDS 1 on a case-by-case basis. (See, e.g., *McMurtry v. State Board of Medical Examiners, supra,* 180 Cal.App.2d at pp. 766-767; *Ford Dealers Association v. Department of Motor Vehicles, supra*, 32 Cal 3d at p. 367.) It is reasonably certain that a violation of an existing safety regulation would violate GDS 1. Under such circumstances, the standard is capable of a valid application and is not unconstitutionally vague. (See *Personal Watercraft Coalition v. Marin County Board of Supervisors, supra*, at pp. 137-138.)[6]

Similarly, GDS 2 refers to "industry practice" in requiring facilities to be maintained and operated in a manner that ensures reasonable availability to meet demand and promotes system reliability. As with safety requirements, "industry practice" provides a guide for determining what conduct may violate GDS 2.

GDS 6 may also be interpreted by reference to what is reasonable and prudent, "consistent with industry standards." WPTF and Elk Hills question the meaning of the phrase "while satisfying the legislative finding that each facility is an essential facility providing a critical and essential good to the California public." The Committee explained that GDS 6 "involves the essential facility status" of generating facilities. The apparent intent of the standard is to require

[6] In comments to the proposed GDS, some generators urged the Commission to implement the GDS in a way that simply affirms obligations and duties already imposed on generating facilities by federal, state and local law. (See, e.g., Comments of West Coast Power on the Commission's Implementation and Enforcement of the GDS, filed May 12, 2003, at p. 5; Comments of West Coast Power on the Commission's Implementation and Enforcement of the Revised GDS, filed June 20, 2003, at p. 2.) In developing the GDS, the Committee declined to limit the standards as suggested. Rather, the Committee intended the standards to be consistent with the stated legislative findings of SB 39XX. (See Notice of Filing of Resolution No. 3 of the California Electricity Generation Facilities Standards Committee, filed June 6, 2003, Attachment B, at p. 4.) Thus, GDS 1, for example, is intended to prohibit actions or behavior beyond what is prohibited by public health and safety codes. Nevertheless, the issue of whether the GDS are impermissibly vague in some applications is properly addressed if and when the Commission seeks to enforce the GDS in such circumstances. Here, the issue is whether the GDS are "impermissibly vague in all of its applications." (See *Village of Hoffman Estates et al. v. The Flipside, Hoffman Estates, Inc., supra*, 455 U.S. at p. 495.)

GAOs to operate and maintain generation facilities consistent with the notion that such facilities are "essential facilities."

Similar language to that contained in the GDS has been upheld by courts. Courts have regularly upheld statutes barring "unfair" competition, and have found that "so far as practicable" and "good faith" requirements are not vague. (See *Ford Dealers Association v. Department of Motor Vehicles*, *supra*, 32 Cal.3d at p. 368, and cases cited therein.) In *Williams v. Garcetti* (1993) 5 Cal.4th 561, 568, the court found that a criminal statute, which prohibits contributing to the delinquency of a minor, was not unconstitutionally vague because it imposed on parents a duty to exercise a "reasonable care, supervision, protection, and control." Moreover, Public Utilities Code section 451, which requires public utility rates and services to be "just and reasonable," has been used as basis for assessing penalties.[7]

Based on all of the above, applicants have failed to demonstrate that the GDS are impermissibly vague.

b) Maintenance Assessment Guidelines

WPTF contends that the "maintenance assessment guidelines" (D.04-05-018, Attachment A, Appendix C) are vague and ambiguous. First, WPTF asserts that the decision is contradictory regarding the enforceability of the "guidelines." WPTF points to language in the GO 167, which suggests that the assessment guidelines are not required or enforceable in themselves; rather, they are guidelines that may be used by generating asset owners as a means of satisfying the Maintenance Standards. (D.04-05-018, Attachment A, Appendix C, at p. 1-3.) On the other hand, WPTF quotes language in D.04-05-018, Attachment

[7] In D.01-09-058, as modified by D.02-02-027, the Commission rejected Pacific Bell's argument that penalties could not be based on section 451. (*Utility Consumers' Action Network v. Pacific Bell* [D.02-02-027] (2002) 2002 Cal.P.U.C. LEXIS 189, at pp. *32, *36-*37; petn. for writ den. *Pacific Bell Telephone Co. v. Public Utilities Commission*, Nov. 27, 2002, A098039; rev. den. *Pacific Bell Telephone Co. v. Public Utilities Commission*, Feb. 19, 2003, S111976.)

B ("Response to Comments on Draft General Order Dated October 2, 2003") indicating the assessment guidelines are part of the required Maintenance Guidelines. (D.04-05-018, Attachment B, at p. 2.) Second, WPTF argues that the language in a number of the guidelines is vague and ambiguous and cites numerous examples.

The language in GO 167 governs the enforceability of the guidelines. The guidelines are not requirements, mandating compliance. The "Response to Comments" section was related to a draft order, and does not take precedence over the language in the General Order itself. This was clarified in D.04-12-049, in which the Commission eliminated reference to the assessment guidelines in GO 167.[8] (See D.04-12-049 at p. 14.) Because the guidelines are just that – guidelines, which are not required or mandated – we find no legal error.

3. The Commission did not exceed its authority by adopting the Logbook Standards and the General Duty Standards.

Mirant contends that the Commission exceeded its authority under Public Utilities Code section 761.3 by adopting the Logbook Standards (D.04-05-017) and General Duty Standards (D.04-05-018) because such standards do not qualify as "maintenance" or "operation" standards. Rather, according to Mirant, the Logbook Standards and GDS 5 are "recordkeeping" requirements; and GDS 1, 2, and 6 impose a "duty to operate" that can only be applied to public utilities. (Mirant's App. for Rehg. of D.04-05-017 at pp. 21-22, Mirant's App. for Rehg. of D.04-05-018 at pp. 14-16.). Mirant further contends that GDS 3 and 4 require facilities to comply with categories of requirements, such as ISO outage protocols and must-offer conditions imposed by FERC, that are not mentioned in section 761.3. (Mirant's App. for Rehg. of D.04-05-018 at p. 15.)

[8] We note that there is a pending application for rehearing of D.04-12-049. Our reference to that decision is not intended to resolve or prejudge that rehearing application.

Mirant's argument is without merit. The purpose of the Logbook Standards, which apply to thermal powerplants, is to document the operations and maintenance of a generation facility. As stated in D.04-05-017, comments of parties support the finding that keeping logs and other records is a basic and prudent component of operation and maintenance practice. (D.04-05-017 at pp. 22-23, 48 [FOF Nos. 7 and 8].) Regarding the General Duty Standards, D.04-05-018 points out that these standards were implemented "for the limited and temporary purpose of standing in for more detailed operation standards," which had not yet been adopted by the Committee or implemented by the Commission. (D.04-05-018 at p. 23.)

An administrative agency is not limited to the exact provisions of a statute in adopting regulations to enforce its mandate. The absence of specific statutory provisions regarding a regulation does not mean that the regulation exceeds statutory authority. An agency has the authority to "fill up the details" of a statutory scheme. (*Ford Dealers Association v. Department of Motor Vehicles*, *supra*, 32 Cal.3d at p. 362.) As long as the regulations (1) are within the scope of the authority conferred and (2) are reasonably necessary to effectuate the purpose of the statute, they will be upheld. (*Id*. at p. 355.)

Here, both the Logbook Standards and the General Duty Standards are clearly within the scope of the authority conferred and are reasonably necessary to effectuate the purpose of Public Utilities Code section 761.3 -- to ensure appropriately maintained and efficiently operated electric generating plants and to protect public health and safety.

4. The Commission did not exceed its authority in requiring generators to propose a common logbook format.

Mirant contends that D.04-05-017 exceeds the Commission's authority by requiring entities that are not public utilities to file an application with the Commission proposing a common logbook format. Mirant argues that "[o]nly

entities that are state-jurisdictional public utilities can be required to file an application proposing a common logbook format." (Mirant's App. for Rehg. of D.04-05-017 at p. 23.)

Mirant cites no authority for this contention, other than to point out that EWGs are not public utilities. As set forth above (see section A.1), Public Utilities Code section 761.3 gives the Commission the authority to implement and enforce operations and maintenance standards for EWGs.

In any event, this issue is now essentially moot. On May 25, 2005, WPTF filed a report recommending that the Commission not adopt a common logbook format. Comments of the parties generally supported the report's conclusion. In addition, CPSD recommended that, instead of requiring a common logbook format, GAOs should be required to phase in electronic database systems for logbooks. The Commission determined that it would not require existing powerplants to update logbook systems, but that certain minimum requirements would apply when logbook systems are updated to include electronic database systems. Finally, the Commission concluded that respondents were not required to file applications proposing common logbook formats. (D.05-08-038 at pp. 16-19.)

5. The Commission did not exceed its authority by imposing an enforcement scheme that is not authorized by statute

Mirant contends that, in adopting D.04-05-018 and GO 167, the Commission exceeded its authority by imposing an enforcement scheme that is not authorized by statute. (Mirant's App. for Rehg. of D.04-05-018 at pp. 16-18) First, Mirant argues that the Commission cannot carry out its enforcement responsibilities through GO 167 because a general order can apply only to public utilities. Mirant relies on *Henderson v. United States* (9th Cir. 1985) 827 F.2d 1233, which concluded that General Order 95 (Rules for Overhead Electric Line Construction) is not applicable to non-public utilities.

In *Henderson*, the plaintiff, who had been injured as a result of contact with high voltage lines while trespassing on federal land, argued that GO 95 applies to the United States government. The court stated that the principal regulatory power of the Commission extends only to "public utilities." However, the plaintiff pointed out that GO 95 was enacted pursuant to Public Utilities Code section 8037, which by the terms of sections 8001-8036, was not limited to public utilities. The court disagreed, reasoning that, when section 8037 was enacted, the constitutional provisions in force (Cal. Const., art. XII, §§ 23 and 24) did not give the legislature the power to regulate non-utilities, unless the legislation, on its face, was "cognate and germane to the regulation of public utilities." (*Henderson*, *supra*, at pp. 1237-1238.)[9] In that case, the court found that section 8037 did not give the Commission general police power to enforce its general orders against an entity that was not a public utility, i.e., the United States government.

Henderson does not hold that general orders are only applicable to public utilities. Rather, the court in *Henderson* found that section 8037 and GO 95 did not apply to non-public utilities. Here, in contrast, the Commission is clearly authorized by Public Utilities Code section 761.3 to enforce the standards applicable to generating facilities, regardless of whether or not such facilities are public utilities under Public Utilities Code section 216(g). Moreover, section 761.3 is "cognate and germane" to the regulation of public utilities.

Mirant also contends that D.04-05-018 and GO 167 exceed the Commission's authority by requiring entities that are not public utilities to comply with numerous requirements that were not included in the standards or otherwise adopted by the committee. As discussed above in relation to the common logbook format, this argument is without merit. The GO 167 requirements to which Mirant

[9] The court also noted that, in 1974, California adopted Article XII, §§ 3 and 5, of the California Constitution, which empowers the legislature to confer any necessary authority upon the Commission to define broadly the persons affected by its regulation. (*Id*. at p. 1238.)

refers -- information requirements (§ 10); audits and inspections (§ 11); and violations and penalties (§§ 12, 13, 14) -- are clearly requirements pertaining to the implementation and enforcement of the maintenance standards.

In addition, Mirant contends that the Commission also generally lacks the authority to impose penalties directly on GAOs based on Public Utilities Code section 2104, which provides that actions to recover penalties should be brought in superior court. This argument has been rejected in numerous Commission decisions and we reject it here. (See, e.g., *Strawberry Property Owners Assoc. v. Conlin-Strawberry Water Co.* [D.00-03-023] (2000) 2000 Cal. PUC LEXIS 127, *6-*7.) Moreover, several of our decisions directly imposing penalties have been challenged in court. In each of these cases, the petition has been summarily denied by the Court of Appeal. (See, e.g., *Conlin Strawberry Water Co., Inc. v. Public Utilities Commission*, petn. for writ den. July 26, 2001, F035333)

Finally, Mirant contends that the Commission does not have the authority to declare that it is a violation of GO 167 if a GAO "retaliates" against an officer, employee, agent, contractor, or customer for reporting a violation or providing information during an audit, inspection, or investigation. GO 167 defines "retaliate" as that term has been used and applied in Title VII of the Civil Rights Act (42 U.S.C. § 2000e et seq.) or the California Fair Employment and Housing Act (Gov. Code, § 12940 et seq.). (See GO 167, § 12.2.) These statutes provide protection for what are commonly known as "whistleblowers." Mirant argues that any action for retaliation lies with the individual against whom the retaliation was allegedly directed, and that the courts are the proper forum for resolving individual claims of alleged retaliation.

Mirant cites no authority for its contentions. The courts' jurisdiction over state and federal whistleblower statutes does not prevent the Commission from considering similar conduct to be against the Commission's own rules. (See *Greenlining Institute, et al. v. Public Utilities Commission* (2002) 103 Cal.App.4th

1324, 1332-1333 [Commission may, and sometimes must, consider areas of law outside of its jurisdiction in fulfilling its duties, such as Unfair Competition Law or antitrust issues].)

6. The Commission has not unlawfully asserted its authority to implement, enforce, and amend the standards in perpetuity.

Mirant alleges that the decisions unlawfully conclude that the Commission has the authority to implement, enforce, and amend the standards after the January 5, 2005 sunset date specified in Public Utilities Code section 761.3. This argument was raised previously and was properly rejected by the Commission. (See D.04-05-017 at pp. 36-39; D.04-05-018 at pp. 21-22.)

Section 761.3(b)(1) requires the Committee, within 90 days of the effective date of the legislation, to adopt and thereafter revise standards for the maintenance and operation of generation facilities. Section 761.3(b)(3) states that "[t]his subdivision shall be operative only until January 1, 2005."

Mirant contends that only the Committee may adopt and amend operation and maintenance standards and that the Committee's authority ceases as of January 1, 2005. According to Mirant, because there will be no entity to revise or supplement the standards, they will become obsolete and unworkable over time. Mirant concludes that the "only reasonable interpretation" of the sunset requirement is that all of the adopted standards must cease to be effective as of January 1, 2005. (Mirant's App. for Rehg. of D.04-05-017 at pp. 24-25; Mirant's App. for Rehg. of D.04-05-018 at pp. 28-29.)

Mirant's arguments are flawed. The sunset provision only applies to "this subdivision," or 761.3(b), the portion of the statute that establishes the Committee. It does not apply to the standards adopted pursuant to section 761(a). The legislative intent is clear – the Committee was to be in existence for the purposes of adopting and revising initial standards, and was to cease operating as

of January 1, 2005. There is nothing in the legislative history of the statute to suggest any other result.

Regarding modification to the standards, Mirant is correct that the standards could become unworkable or obsolete over time. However, as stated in the decisions, the only interpretation of the statute that is consistent with the legislature's intent is that the Commission has the continuing authority to make changes to the standards. Nothing in the statute provides that the Commission may not revise or supplement those standards after the Committee ceases to exist.

7. The decision and general order are supported by the Commission's findings and do not constitute an abuse of discretion.

Mirant contends that the requirements imposed by D.04-05-018 and GO 167 are not supported by the findings in this case and constitute an abuse of discretion. Mirant argues that, even if the Commission has the authority to oversee operations and maintenance of EWG facilities, the Commission has failed to demonstrate that the "broad and burdensome requirements" adopted in GO 167 are reasonably necessary to carry out the Commission's responsibilities. (Mirant's App. for Rehg. of D.04-05-018 at p. 18.)

First, Mirant challenges the information and reporting requirements (GO 167, §10), particularly the requirement that GAOs report "safety-related incidents" to the Commission (§ 10.4). Mirant further challenges the audit, inspection, investigation, and testing requirements (§11), including the requirement that GAOs submit to and conduct tests when requested by staff (§§ 11.1, 11.3) and the requirement that EWGs and their employees and contractors must provide testimony under oath and submit to interviews (§ 11.2). Finally, Mirant challenges the imposition of enforcement proceedings and potential fines and sanctions (§§ 12, 13, 14).

Whether we acted lawfully in the instant rulemaking depends whether we have met certain criteria set forth by the courts. A reviewing court will ask

three questions: (1) did the agency act within its scope of its delegated authority; (2) did the agency employ fair procedures; and (3) was the agency action reasonable. Under the third inquiry, a reviewing court will not substitute its independent judgment for that of the agency on the basis of an independent trial de novo. A court will uphold the agency action unless the action is arbitrary, capricious, or lacking in evidentiary support. A court must ensure that an agency has adequately considered all relevant factors, and has demonstrated a rational connection between those factors, the choice made, and the purposes of the enabling statute. (*Western Oil and Gas Association v. State Lands Commission* (1980) 105 Cal.App.3d 554, 562; relying on *California Hotel and Motel Association v. Industrial Welfare Commission* (1979) 25 Cal.3d 200, 212; see also *Ford Dealers Association v. Department of Motor Vehicles*, *supra*, 32 Cal.3d at pp. 355-356.[10]

In *Greyhound Lines, Inc. v. Public Utilities Commission* (1968) 68 Cal.2d 406, the California Supreme Court reviewed the finding of the Commission that Greyhound had dedicated its property to public use. The court stated: "There is a strong presumption of validity of commission orders [citations], and a finding of dedication will not be disturbed if there is any substantial evidence to support it." (*Id*. at p. 414.)[11] The record necessary to support findings of an agency decision may include "legislative facts," which in turn, may be based on the agency's own expert opinion. (*Franz v. Board of Medical Quality Assurance*

[10] The above cases deal with agencies which are required to follow the Administrative Procedures Act ("APA"). Pursuant to California Government Code section 11351(a), the rulemaking provisions of the APA (Gov. Code, § 11346 et seq.) do not apply to the Commission.

[11] Public Utilities Code section 1757.1, which applies to rulemakings, does not expressly contain the "substantial evidence" standard. However, in practice, the courts have essentially applied the same standard to cases decided under former section 1757 ("substantial evidence" not included as a statutory requirement), cases decided pursuant to section 1757 ("substantial evidence" standard set by statute), and cases decided under section 1757.1.

(1982) 31 Cal.3d 124, 139-140; *Whispering Pines Mobile Home Park, Ltd. v. City of Scotts Valley* (1986) 180 Cal.App.3d 152, 159.)[12]

In *Western Oil and Gas Association v. State Lands Commission* (1980) 105 Cal.App.3d 554, the Court of Appeal reviewed regulations adopted by the State Lands Commission authorizing rent in oil and gas leases to be based on the annual volume of oil or gas passing through a pipeline ("throughput regulations"). Plaintiffs challenged the throughput regulations, asserting that the record was lacking in evidentiary support for the regulations, thus making them unreasonable, arbitrary, and capricious. The court upheld the regulations, stating:

> The "evidence" necessary to support these regulations is, of course, more judgmental than factual. . . . The distinction is between adjudicative and legislative facts. "Adjudicative acts are the facts about the parties and their activities, businesses and properties. Adjudicative facts usually answer the questions of who did what, where, when, how, why, with what motive or intent; adjudication facts are roughly the kind of facts that go to a jury in a jury case. Legislative facts do not usually concern the immediate parties but are general facts which help the tribunal decide questions of law and policy and discretion."

(*Id*., *supra,* at pp. 564-565, quoting 1 Davis, Administrative Law Treatise (1958) § 7.02, p. 413.)

Where there is opportunity to comment on proposed rules, and the comments are considered by the rulemaking agency, all that is required is that administrative actions be supported by a fair or substantial reason. "An action is arbitrary when it is based on no more than the will or desire of the decision-maker and not supported by a fair or substantial reason." (*Western Oil and Gas*

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[12] There is a long-recognized distinction between "legislative" and "adjudicative" facts. "Adjudicative facts" are facts concerning the immediate parties and what happened to them. "Legislative facts" are used for informing an agency's legislative judgment on question of law and policy. (*Franz v. Board of Medical Quality Assurance, supra*, 31 Cal.3d at p. 139, fn. 6, quoting 3 Davis, Administrative Law Treatise (2d ed. 1980) § 15.1, p. 135.)

Association v. State Lands Commission, supra, 105 Cal.App.3d at p. 565, quoting *California Nursing Homes, etc., Inc. v. Williams* (1970) 4 Cal.App.3d 800, 810, fn. 10.)

Applying the criteria set forth in *Western Oil and Gas Association v. State Lands Commission, supra,* the Commission did not abuse its discretion in adopting sections 10 through 14 of GO 167. First, the Commission clearly acted within the scope of its authority under Public Utilities section 761.3 (see above sections addressing issue of whether the Commission exceeded its authority under the statute). Second, Mirant and other parties had extensive opportunity to submit comments on the standards, implementation and enforcement issues, and on the proposed general order.

Third, the rules adopted by the Commission are reasonable. The sections of GO 167 that Mirant challenges are essentially mechanisms to ensure compliance with the maintenance standards, as *required* by the section 761.3. The reporting, audit, inspection, and testing requirements (§§ 10 and 11), as well as the enforcement and penalty provisions (§§ 12, 13, 14), are typical of the mechanisms historically used by the Commission to ensure compliance with statues and rules. Indeed, Mirant itself generally agreed with such compliance mechanisms in comments filed early in this proceeding in response to a scoping memo issued by the assigned commissioner. (See Comments of Mirant on Implementation and Enforcement of Maintenance Standards, filed March 3, 2003.) In addition, CPSD staff filed comments that recommended reporting requirements, audits, inspections, and enforcement action, when necessary, as means of ensuring compliance. (See Comments of CPSD re the Implementation and Enforcement Issues of Phase I, filed March 3, 2003, as amended March 4, 2003, and Reply Comments of CPSD re the Implementation and Enforcement Issues of Phase I, filed March 10, 2003.)

The more specific concerns raised by Mirant in its application for rehearing were also set forth in Mirant's comments on the proposed general order. (See Comments of Mirant on Proposed General Order, filed October 27, 2003, pp. 15-27.) In the administrative law judge's ("ALJ's") draft decision adopting the general order, mailed on February 27, 2004, the Commission responded to such comments, either making changes to the proposed general order or explaining why no changes were necessary.[13] (See Commission Responses to Comments on Draft General Order Dated October 2, 2003, D.04-05-018, Attachment B.)

Regarding section 10.4 of GO 167, the Commission explained the purpose of reporting safety-related accidents: "Safety-related accidents may indicate defects in operations and maintenance that may affect electrical system reliability and adequacy." (D.04-05-018, Attachment B, at p. 9.) Regarding the testing requirements (§§ 11.1 and 11.3), the general order itself explains that any testing requested by CPSD would be for the purpose of providing "information reasonably necessary for determining compliance with the Standards enforced by this General Order." (GO 167, § 11.3.)

Regarding interviews and testimony (GO 167, §11.2), the Commission explained that these requirements are within the Commission's authority pursuant to Public Utilities Code section 311(a), which authorizes the Commission to administer oaths and issue subpoenas. Furthermore, these requirements mirror the Commission's authority (see Pub. Util § 314) to inspect records of any public utility and to examine, under oath, officers, agents or employees of a public utility. (D.04-05-018 at p. 36 and D.03-05-018, Attachment B, at p. 10.) Similarly, as stated above, the sections of the general order relating to enforcement proceedings and fines (§§ 12, 13, and 14) simply incorporate enforcement mechanisms that have long been applied to public utilities and other

[13] For example, in response to concerns raised by parties, section 11.3 of the general order was modified to specify that the any required tests would be conducted by the GAO or by a third party mutually agreed upon by the GAO and Commission staff.

entities. (See, e.g., Pub. Util. Code, § 2100 et seq.; see also D.04-05-018 at pp. 11-16 [responding to comments on enforcement and fines sections of GO].)

Based on the above, the compliance mechanisms that Mirant challenges are rationally related to the Commission's responsibility to implement and enforce the maintenance standards. Therefore, we find that Mirant's arguments are without merit.

8. The decision and general order do not violate the alter ego doctrine.

Mirant argues that D.04-015-018 and GO 167 unlawfully subject individuals to potential liability in violation of the alter ego doctrine. Mirant bases this argument on language in the decision responding to comments. The decision notes that several comments were offered about the vagueness or breadth of the definition of "Generating Asset Owner." (See GO 167, § 2.9.) The decision finds that no changes are warranted. The decision continues:

> Normally, we would not consider individual employees or contractors to be Generating Asset Owners, but these persons may have regulatory obligations under the GO (such as the obligation to testify, when requested by the Commission) and, in certain circumstances, they could be considered to exercise managerial or operational control over a Generating Asset.

(D.04-05-018 at pp. 33-34.)

The alter ego doctrine generally arises when a plaintiff claims that an opposing party is using the corporate form unjustly and in derogation of the plaintiff's interest. (*Mesler v. Bragg Management Co.* (1985) 39 Cal.3d 290, 300.) In certain circumstances, a court will disregard the corporate entity and will hold individuals or another corporation responsible. This is also known as "piercing the corporate veil." (See *Mid-Century Insurance Co. v. Gardner* (1992) 9 Cal.App.4th 1205, 1212-1213.) "There is no litmus test to determine when the corporate veil will be pierced; rather, the result will depend on the circumstances

of each particular case." (*Mesler v. Bragg Management Co.*, *supra*, at p. 300.) However, there are two general requirements. First, there must be such a "unity of interest" that the separate personalities of the corporation and the individual no longer exist. Second, if the acts in question are treated as the corporation's alone, an "inequitable result" will follow. (*Ibid*.; *Tomaselli v. Transamerica Insurance Co.* (1994) 25 CalApp.4th 1269, 1285; *Mid-Century Insurance Co. v. Gardner*, *supra*, at p. 1212.)

Thus, whether or not the alter ego test is applicable and/or satisfied depends on the particular facts of each case. In the instant case, it is premature to address this issue until the Commission attempts to hold an individual or a separate entity responsible for the actions of a GAO. If and when that occurs, Mirant or any other party may assert the alter ego doctrine.

9. The decision and general order do not violate statutes, case law, or the Commission's own procedures regarding privileges and confidentiality protections.

Mirant contends that D.04-05-018 and GO 167 impose broad document production requirements, and establish stringent requirements for GAOs seeking confidential treatment of documents, that are contrary to statutes, case law, and the Commission's own procedures.

GO 167 sets forth requirements for providing information to CPSD (§ 10); for cooperating with CPSD and providing testimony during audits, inspections, and investigations (§ 11); and for obtaining confidential treatment for documents and information (§ 15.4). Mirant asserts that GO 167 appears to contemplate that GAOs will be required to produce all documents and information, and to comply with all investigative requests, without exception. Mirant argues that these requirements violate GAOs' right to object to unreasonable requests and right to withhold privileged documents. Mirant alleges

four specific instances of legal error in the information requirements under GO 167.

a) Statutory privileges

First, Mirant contends that GO 167 fails to recognize that GAOs cannot be compelled to produce documents when they are protected by certain statutory privileges. Mirant relies primarily on *Southern California Gas Co. v. Public Utilities Commission* (1990) 50 Cal.3d 31, in which the California Supreme Court held that the attorney-client privilege applies to Commission proceedings. In that case, the court found that the statutory privileges encompassed in Evidence Code section 910, et seq., apply in "all proceedings," including administrative proceedings, unless there is a specific exemption to the privilege. (*Southern California Gas Co. v. Public Utilities Commission*, *supra*, at p. 38, citing Evid. Code, § 910, and at p. 39, fn.10.)

The statutory privileges under the Evidence Code are intended to apply to the information requirements under GO 167. Indeed, sections 15.4.1 and 15.4.2 of GO 167 acknowledge GAO's right to assert statutory privileges. However, section 15.4 of the general order does not clearly distinguish between information provided to the Commission, for which a GAO may be claiming confidential treatment, and information not provided, for which the GAO may be claiming an absolute privilege. Therefore, we will modify GO 167 to clarify the requirements for claims of privilege. As modified, we find no legal error.

b) Violation of federal law

Second, Mirant contends that GO 167 violates the Commission obligations to maintain confidentiality of information obtained from EWGs pursuant to Title 16 United States Code section 824(g) ("16 U.S.C. § 824"). Paragraph (1) of section 824(g) provides, in part:

> Upon written order of a State commission, a State commission may examine the books, accounts, memoranda, contracts, and records of . . . [¶] any

> exempt wholesale generator selling energy as wholesale to [an] electric utility, . . . [¶] wherever located, if such examination is required for the effective discharge of the State commission's regulatory responsibilities affecting the provision of electric service.

Paragraph (2) of section 824(g) provides:

> Where a State commission issues an order pursuant to paragraph (1), the State commission shall not publicly disclose trade secrets or sensitive commercial information.

Mirant fails to specify how GO 167 violates 16 U.S.C. § 824(g), except to argue that section 824(g) does not authorize the broad requirements in GO 167. (Mirant's App. for Rehg. of D.04-05-018 at p. 26.) Public Utilities Code section 1732 requires that an application for rehearing "set forth specifically the ground or grounds on which the applicant considers the decision or order to be unlawful." In addition, Rule 86.1 of the Commission's Rules of Practice and Procedure state that "vague assertions as to the record or the law, without citation, may be accorded little attention." Nevertheless, we will reach the merits of Mirant's argument to the extent possible.

We believe that the standards for confidentiality under GO 167 are consistent with the federal law on the treatment of trade secrets. GO 167 only requires that the party submitting information demonstrate to the Commission that the information comes under the trade secret privilege.

We also note that GO 167 relies on both on the authority vested in the Commission by state law and 16 U.S.C. § 824(g). (See GO 167, § 1.) The Commission previously relied on section 824(g) when it launched an investigation of generators pursuant to Resolution L-293, which was adopted on February 8, 2001, at the height of the California energy crisis. However, our position then, and now, is that the Commission has authority under state law, as well as federal law, to obtain information from non-public utility generators. (See *In the Matter*

of Application for Rehearing of Resolution No. L-293 [D.01-06-088] (2001) 2001 Cal. PUC LEXIS 595.) The Commission's state law authority has been enhanced by the enactment of Public Utilities Code section 761.3, and the court's decision in *PG&E Corporation v. Public Utilities Commission, supra,* 118 Cal.App.4th 1174 (the Holding Company Decision). Nevertheless, to the extent the Commission relies on section 824(g) to obtain information, we intend to comply with the provisions of paragraph (2).

c) Bridgestone/Firestone guidelines

Third, Mirant alleges that GO 167 requires GAOs to produce privileged trade secrets without following the three-step process established in *Bridgestone/Firestone, Inc v. Superior Court* (1992) 7 Cal. App.4th 1384. In *Bridgestone/Firestone,* the California Court of Appeal set forth procedures which a superior court should follow when dealing with the discovery of documents that may be privileged trade secrets under Evidence Code section 1060.[14] In that case, Petitioner Bridgestone/Firestone challenged a superior court order requiring petitioner to provide certain trade secret information under a protective order. The Court of Appeal found that the superior court erred in ordering disclosure where there was no showing that the information sought was directly relevant to a material element of the cause of action, and no showing that failure to disclose would work an injustice.

The court specified the following guidelines for trial courts to evaluate trade secret discovery requests which would, even if produced, be subject to a protective order. First, a party claiming a trade secret privilege has the burden of establishing its existence. Thereafter, the party seeking discovery must make a prima facie showing that the information sought is relevant and necessary to the

[14] Evidence Code section 1060 provides: "If he or his agent or employee claims the privilege, the owner of a trade secret has a privilege to refuse to disclose the secret, and to prevent another from disclosing it, if the allowance of the privilege will not tend to conceal fraud or otherwise work injustice."

proof of a material element of one or more causes of action presented in a case, and that the information sought is essential to a fair resolution of the case. If such a showing is made, it is then up to the holder of the privilege to demonstrate any claimed disadvantages of a protective order. (*Bridgestone/Firestone, supra*, 7 Cal. App.4th at p. 1393.) Mirant argues that GO 167 ignores the second step in the process, which, according to Mirant, obligates CPSD to demonstrate the relevance and need for the information.

There is no support for Mirant's argument that the Commission is required to follow the procedures outlined in *Bridgestone/Firestone*, which apply to trial court actions between private litigants. In contrast, the Commission is a public agency that has the authority to establish its own rules and procedures and is not bound by formal rules of evidence. (Cal. Const., art. XII, § 2; Pub. Util. Code, § 1701; *Sale v. Railroad Comm'n*, *supra*, 15 Cal.2d at p. 618.) The Commission has the authority to establish the specific procedures for determining whether the trade secret privilege is applicable in any given case. Therefore, the three-step process set forth in *Bridgestone/Firestone* is not applicable to Commission proceedings. (See D.04-05-018, Attachment B, at pp 17-18; see also Answer of Respondent to Petition for Writ of Review, at pp. 28-30, filed Sept. 12, 2001, *Mirant Delta, LLC, et al. v. Public Utilities Commission*, A095743, petn. for writ den. Dec. 04, 2001.)

d) Requirements of General Order 66-C and Public Utilities Code section 583

Fourth, Mirant states the requirements imposed in GO 167, section 15.4, for obtaining confidentiality are contrary to the Commission's own practices under GO 66-C and Public Utilities Code section 583. Mirant quotes GO 66-C, which provides that "records not open to public inspection" include "[r]ecords or information of a confidential nature furnished to or obtained by the Commission," including "[r]ecords of investigation and audits made by the Commission." (GO 66-C, § 2.)

GO 66-C contains the Commission procedures for obtaining information under the Public Records Act (Gov. Code, § 6250 et seq.). Pursuant to Government Code section 6252, governmental records are presumed to be public unless an exception applies. If an exception applies, disclosure is allowed (unless otherwise prohibited by law), but not required. (Gov. Code, § 6254.) In addition to the many express exemptions listed in the Public Records Act (Gov. Code, § 6254), there is a "catchall" exemption, which allows a government agency to withhold records if it can demonstrate that, on the facts of a particular case, the public interest served by withholding the records clearly outweighs the public interest served by disclosure. (Gov. Code, § 6255; *City of San Jose v. Superior Court* (1999) 74 Cal.App.4th 1008, 1017.)

Thus, although the Commission has treated certain types of records as generally not open to inspection (e.g., records of on-going investigations or audits), the Commission has also disclosed such records by applying the balancing test under Government Code section 6255 on a case-by-case basis and/or to categories of records. Thus, GO 66-C does not provide an absolute bar to disclosure and does not provide any specific privilege to parties seeking confidentially.

Similarly, public utilities have long relied on Public Utilities Code section 583 to maintain confidentiality of records provided to the Commission. Section 583 states:

> No information furnished to the commission by a public utility . . . , except those matters specifically required to be open to public inspection by this part, shall be open to public inspection or made public except on order of the commission, or by the commission or a commissioner in the course of a hearing or proceeding.[15]

[15] In GO 66-C, the Commission has also delegated the authority to disclose information to Administrative Law Judges ("ALJs") in the course of a proceeding. (GO 66-C, § 3.5.)

However, as stated in GO 167 (§ 15.4.2), section 583 does not create a privilege that a utility can assert against the Commission's disclosure of documents.

> Section 583 does not create for a utility any privileges of nondisclosure. Nor does it designate any specific types of documents as confidential. To justify an assertion that certain documents cannot be disclosed, the utility must derive its support from other parts of the law.

(*Re Southern California Edison Company* [D.91-12-019] (1991) 42 Cal.P.U.C.2d 298, 301 [order authorizing staff to make public final report on a fatal accident occurring at utility's Mohave coal plant].)

We do not believe that the requirements set forth in GO 167 are contrary to the Commission's practices under GO 66-C and Public Utilities Code section 583. We note that the Commission's treatment of records disclosure has been evolving towards a policy that favors even more public disclosure. Moreover, in 2004, the voters of California passed Proposition 59, which amended the California Constitution to expressly state that the people have access to information concerning the conduct of the people's business and, therefore, "the writing of public officials and agencies shall be open to public scrutiny." (Cal. Const., art. 1, § 3(b)(1).) The amendment also provides that, although it is not intended to change existing exceptions to right of access to public records (Cal. Const., art. 1, §§ 3(b)(3)-(5)):

> A statute, court rule, or other authority, including those in effect on the effective date of this subdivision, shall be broadly construed if it furthers the people's right to access, and narrowly construed if it limits the right of access.

(Cal. Const., art. 1, § 3(b)(2).)

Also in 2004, the Legislature enacted Senate Bill No. 1488 ("SB 1488"), which directs the Commission to initiate a proceeding to examine its practices under Public Utilities Code sections 454.4 and 583, and the California

Public Records Act "to ensure that the commission's practices under these laws provide for meaningful public participation and open decisionmaking." (Stats. 2004, Ch. 690). The Commission has initiated a rulemaking proceeding (R.05-06-040) pursuant to SB 1488.[16] That proceeding is still in its early stages. However, as policies and practices are adopted in that proceeding, the confidentiality provisions of GO 167 may be revisited by the Commission on its own motion or in response to a petition for modification.

Section 15.4.3.4 of GO 167 requires a GAO, when requesting trade secret confidentiality, for example, to explain (a) "how the information fits the definition of a protectible trade secret," including "what steps the GAO has taken to maintain the secrecy of the information" and (b) "why allowance of the privilege will not tend to conceal fraud or otherwise work [an] injustice." Such requirements have been imposed by the Commission in other contexts.

For example, in Resolution G-3378, issued March 17, 2005, the Commission ruled that a proposed gas storage contract should be made public. In doing so, the Commission analyzed the confidentiality claims of San Diego Gas and Electric Company ("SDG&E"). The Commission reiterated that Public Utilities code section 583 neither creates a privilege, nor designates any specific types of documents as confidential. The Commission further stated that, if a confidentiality request is based on a privilege or exemption requiring a balancing of interests, the moving party must demonstrate why the public interest in disclosure is outweighed by the need to keep the material confidential. For specific privileges, such as the trade secret privilege, the moving party must explain (1) how the information fits into the definition of a trade secret, including what steps the moving party has taken to maintain secrecy of the information, and

[16] The rulemaking will be conducted in two phases. Initially, the Commission will examine confidentiality practices in the context of electricity procurement. In the second phase, the Commission intends to examine other contexts, including practices under GO 66-C. (R.05-06-040 at pp. 1-2.)

(2) why allowance of the privilege will not tend to conceal fraud or otherwise work an injustice. (Resolution G-3378, at p. 10.)

Although similar showings have been required in the context of protested advice letters and formal proceedings, we do not believe that requiring an entity to demonstrate that a privilege would not work an injustice should apply in the context of initial routine submissions of information to the Commission. Evidence Code section 1060 allows the owner or a trade secret to refuse to disclose the secret, "if the allowance of the privilege will not tend to conceal fraud or otherwise work an injustice." Thus, the privilege is not absolute. However, this presupposes a party seeking discovery of the information. Moreover, if such a showing is not made by the holder of the privilege, the information may still be subject to a protective order. (See *Bridgestone/Firestone, Inc v. Superior Court, supra*, 7 Cal. App.4th at p. 1393.)

Here, where the information is being provided to the Commission staff on a routine basis under the GO 167 requirements, and where no request has been made to make the information public in the context of a contested proceeding or pursuant to a records request, we do not believe that it is necessary for a GAO to demonstrate that "allowance of the privilege will not tend to conceal fraud or otherwise work an injustice." It should be sufficient for a GAO to indicate how the information fits into the definition of a trade secret, including what steps the moving party has taken to maintain secrecy of the information. On that basis, staff may provisionally treat trade secret information as confidential. Therefore, we will modify GO 167 to remove this requirement.[17]

[17] We note that, in practice, it does not appear that the requirements are being applied in an unduly burdensome manner. For example, in a June 14, 2005 letter, CPSD requested that GAOs provide access to Generating Availability Data System ("GADS") information. Mirant requested confidentiality for such information on the basis that the trade secret privilege applied. CPSD agreed, on a provisional basis, not to disclose GADS data received from any GAO. Although Mirant did not specify the length of time that the information should be kept confidential, the staff agreed to treat the information as confidential for a two-year period, and stated that this agreement was not binding on the Commission. (August 9, 2005 letter from Charlyn Hook, Counsel for CPSD, to Generating Asset Owners.)

If, at any time, there is a need to disclose such information, the Commission may impose additional requirements for maintaining confidentiality and/or may make the information public after notifying the holder of the privilege.

e) Due Process

Finally, Mirant alleges that fundamental principles of due process dictate that GAOs must be given the opportunity to contest and object to information, audit, and investigative requests made by CPSD. Where a GAO believes that a request of CPSD staff is unreasonable, the GAO always has the right to ask the Commission to review staff's determinations.

10. The decision and general order do not violate the contracts clause or the takings clause of the United States and California Constitutions.

Mirant contends that D.04-05-018 and Go 167 violate the contracts and takings clauses of the United States and California Constitutions.

a) Contracts Clause

Mirant refers to section 11.1 of GO 167, which requires GAOs to cooperate with CPSD staff "during any audit, inspection, or investigations (including . . . tests, technical evaluations and physical access to facilities)." In addition, section 11.1 states that such audits, inspections, and investigations "will occur on a regular, systematic, and recurring basis supplemented as needed by additional audits, inspections, or investigation to ensure compliance with this General Order." Section 11.3 requires GAOs to conduct tests or technical evaluations when requested by CPSD and to notify CAISO if a test or technical evaluation "may reasonably result in the reduced or suspended generation from a Generating Asset." Mirant argues that these requirements could impair a GAO's

ability to meet its performance and availability obligations under power supply agreements and other contracts, thus violating the contracts clause.

The contracts clauses of the United States and the California Constitutions provide that no state shall pass a law impairing the obligations of contracts. (U.S. Const, art. I, § 10, cl. 1; Calif. Const., art. 1, § 9.)

> Although the language of both contracts clauses is facially absolute, it has been determined that their "prohibition[s] must be accommodated to the inherent police power of the State 'to safeguard the vital interests of its people.'"

(*20th Century Insurance Co. v. Superior Court* (2001) 90 Cal.App.4th 1246, 1268, quoting *Energy Reserves Group v. Kansas Power & Light* (1983) 459 U.S. 400, 410.)

In determining whether a rule or regulation violates the contracts clause, courts consider three factors: (1) whether the regulation has, in fact, operated as a substantial impairment of a contractual relationship; (2) if there is substantial impairment, whether the law nevertheless have a significant and legitimate public purpose, and (3) if such a legitimate purpose is established, whether the adjustment of the rights and responsibilities of contracting parties based on reasonable conditions appropriate to the public purpose underlying the regulation. (See *Energy Reserves Group v. Kansas Power & Light*, supra, 459 U.S. at pp. 411-412.)

It is apparent that, until such time as the Commission actually takes an action that impairs a contractual obligation, Mirant's argument is premature. Therefore, Mirant has not demonstrated legal error.

In addition, the Commission has responded to such concerns a number of times. In D.04-05-018, the Commission stated: "We are confident that CPSD staff has the expertise and professionalism to schedule such tests and evaluations, when reasonably possible . . . , to minimize the cost and disruption to generators." (D.04-05-018 at p. 36.) Similarly, in the Commission's response to comments on

the October 2, 2003 draft general order, the Commission stated: "Commission staff will carefully schedule tests or evaluations to minimize generation disruptions and will, as appropriate, coordinate is activities with CAISO." (D.04-05-018, Attachment B, at p. 11.) Moreover, as discussed below in response to Elk Hills' proposed modifications to GO 167, we intend to modify GO 167 to state that Commission staff will endeavor, to the extent feasible in view of the requirements of GO 167, to minimize disruptions.

Finally, although GO 167 states that audits will occur on a "regular, systematic, and recurring" basis, this does not mean that any particular generator will continuously be exposed to such audits or tests. CPSD intends to conduct targeted or triggered audits when there is an anomaly in a generating asset's performance. CPSD also intends to conduct random audits of about 40 generators at a rate of about four audits per year. That would mean that each generator would be subject to a random audit once every ten years.

b) Takings Clause

Mirant further alleges that these same provisions violate the takings clauses of the United States and California Constitutions. Mirant contends that a regulatory taking occurs when regulations result in the loss of an intangible right, such as contractual rights. Mirant also refers to GO 167, section 11.3, which states that the GAO will pay "all costs and liabilities" resulting from such tests or technical evaluations, except for CPSD staff's own expenses. Mirant argues that the requirements imposed by sections 11.1 through 11.3 could result in potentially exorbitant costs and liabilities on GAOs. Finally, Mirant contends that non-utility generators are at a particular risk because they are not entitled to recover such costs from retail ratepayers.

The takings clauses of the United States and the California Constitutions prohibit the taking of private property for public use unless just compensation is paid. (U.S. Const., 5th Amendment; Cal. Const., art. I, § 19.) In

a recent case, *Lingle v. Chevron* (2005) 161 L.Ed.2nd 876, the United States Supreme Court reviewed the development of takings jurisprudence: "The paradigmatic taking requiring just compensation is a direct appropriation or physical invasion of private property." (*Id*. at p. 887.) However, beginning with *Pennsylvania Coal Co. v. Mahon* (1922) 260 U.S. 393, the Court recognized that government regulation of private property may, in some instances, be so onerous that its effect is tantamount to a direct appropriation or ouster, and that such "regulatory takings" may be compensable under the Fifth Amendment. (*Lingle v. Chevron*, *supra*, at p. 887.)

There are two categories of regulatory action that generally will be deemed per se takings for Fifth Amendment purposes. First, where government requires an owner to suffer a permanent physical invasion of his property, however minor, it must provide just compensation. (See *Loretto v. Teleprompter Manhatten CATV Corp.* (1982) 458 U.S. 419.) Second, compensation is required where an owner is deprived of "*all* economically beneficial use" of his property. (*Lucas v. South Carolina Coastal Council* (1992) 505 U.S. 1003, 1019, original emphasis.) Outside of these two relatively narrow categories (and the special context of land-use exactions), regulatory challenges are governed by the standards set forth in *Penn Central Transportation Co. v. New York City* (1978) 438 U.S. 104. (*Lingle v. Chevron*, *supra*, at p. 888.)

In *Penn Central*, the Court acknowledged that it had been unable to develop any set formula for evaluating regulatory takings claims, but identified several factors that are significant. (*Lingle v. Chevron*, *supra*, at p. 888.) Primary among those factors are the economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations. In addition, the character of the governmental action may be relevant. (*Ibid*.)

Each of these three inquiries (reflected in *Loratto, Lucas, and Penn Central*) focuses directly on the "severity of the burden that government imposes upon private property rights." (*Lingle v. Chevron*, *supra*, at p. 888.) The *Penn Central* inquiry turns in large part on the magnitude of the regulation's economic impact and the degree to which it interferes with legitimate property interests. (*Lingle v. Chevron*, *supra*, at p. 889.)

First, Mirant contends that potential interference with contract rights violates the takings clause. As stated in the above discussion of Mirant's contracts clause argument, this argument is premature. In addition, the cases cited by Mirant are not persuasive. Mirant cites *Lynch v. United States* (1934) 292 U.S. 571, 579, which held that valid contracts are property, protected by the Fifth Amendment. However, as stated in *Pro-Eco, Inc. v. Board of Commissioners* (7th Cir. 1995) 57 F.3d 505, 510, the *Lynch* analysis does not resemble current takings jurisprudence. In *Connolly v. Pension Benefit Guarantee Corp.* (1986) 475 U.S. 211, 224, the Supreme Court stated that contractual rights may or may not be compensable property rights, depending on the particular facts of each case.

Mirant also cites *City of Glendale v. Superior Court* (1993) 18 Cal.App.4th 1768, 1780, in which the court stated that "every contract . . . is subject to the law of eminent domain." In that case, the City of Glendale had leased property to a corporate lessee. Before the lease was up, the city exercised eminent domain rights over the property. The lessee alleged that the eminent domain action was a breach of the lease agreement. The court held that the city's exercise of its sovereign power of eminent domain could not be considered a breach of the lease agreement. That case simply stands for the principle that governmental powers, such as eminent domain and police powers, cannot be contracted away. It does not support Mirant's argument.

Second, Mirant contends that requiring GAOs to pay for the costs of audits or tests, other than CPSD staff's expenses, constitutes a taking. Mirant does

not cite any authority to support this argument and does not even begin to demonstrate that the costs of audits and tests will be so severe that they might amount to a taking requiring compensation.

It should also be noted that in D.05-08-038, a later decision in this same proceeding, the Commission again addressed the issue of costs of tests. As pointed out there, section 11.3 of GO 167 specifies that the GAO incurs test costs, except those of CPSD staff. Thus, the Commission's costs are limited to the costs of staff resources. However, nothing in the Commission's order prevents the GAO from "recover[ing] costs and transfer[ing] liabilities as otherwise appropriate and consistent with law and insurance policies." (D.05-08-038 at p. 30.) For example, a GAO may attempt to obtain relief from FERC, which is responsible for setting wholesale rates. (See D.05-08-038 at pp. 21-22.)

For the foregoing reasons, Mirant's argument that GO 167 violates the takings clause is premature and is without merit.

11. The Commission's failure to include the modifications to GO 167 proposed by Elk Hills is not legal error.

Elk Hills contends that the Commission erred in failing to address and/or adopt the modifications to GO 167 urged by Elk Hills in comments submitted on March 18, 2004 and April 29, 2004. We address Elk Hills' proposed modifications below.

a) Definition of "exigent circumstances"

Section 2.6 of GO 167 defines "exigent circumstances" as follows:

> [A]ny condition related to the operation and maintenance of a Generating Asset that may result in imminent danger to public health or safety, including electrical service or adequacy, or to persons in the proximity of a Generating Asset.

Elk Hills contends that the Commission needs to clarify what triggers a finding of "electrical service reliability or adequacy." Elk Hills asserts, for

example, that it is unclear whether a temporary 10% decrease in a generator's ability to produce power would be deemed to impact "electrical service reliability or adequacy" and, thus, meet the exigent circumstances definition. Elk Hills argues that certainty is required because, if an exigent circumstances is deemed to exist, the rights of GAOs could be impacted substantially. Elk Hills refers to section 10.1 of GO 167, which states that staff may establish a shorter period than five days for provision of information if "exigent circumstances" exist, and section 12.0, which states that failure to comply with a requirement of GO 167 is a violation.

The purpose of GO 167 is to "maintain and protect public health and safety . . . and to ensure electrical service reliability and adequacy." (GO 167, § 1.) "Exigent circumstances" are those circumstances in which public health and safety and/or electrical service reliability and adequacy are at risk, or are in "imminent danger." The definition of "exigent circumstances" necessarily must include a variety of scenarios. It is neither possible, nor desirable, for example, to quantify at what point a decrease in a generator's ability to produce power would trigger an exigent circumstance. Where exigent circumstances exist, waiting five days for information from a generator could further jeopardize public health and safety, or service reliability. If staff were to apply these sections unreasonably, a GAO has the opportunity to seek redress from this Commission. Therefore, we reject Elk Hills' argument.

b) Providing information

Section 10.1 of GO 167 states that a GAO shall provide information as requested by CPSD, and shall otherwise "cooperate with CPSD in the provision of information." Elk Hills contends that, given the confidentiality concerns that will likely arise when CPSD requests information, GAOs must be assured that a lawful and reasonable assertion of their rights under state or federal law will not be

used to find a "failure to cooperate" and, thus, a violation pursuant to section 12.0 of GO 167.

Section 14.3.5 of GO 167 provides that a GAO's efforts to impede or frustrate CPSD in enforcement could enhance sanctions. Section 14.3.5 adds: "A Generating Asset Owner's lawful and reasonable assertion of its rights under this General Order or state or federal law will not be used to enhance a sanction." Elk Hills requests that similar language added to section 10.1 to indicate that a GAO's assertion of rights will not be used to find a violation for failure to cooperate.

The language in section 14.3.5 is intended to apply to the entire general order, including section 10.1. It should be understood that a lawful and reasonable assertion of rights would not be used as a basis for finding a violation. Nevertheless, to clarify our intent, we will modify GO 167, section 12.1, which relates to violations in general, to state that a lawful and reasonable assertion of rights shall not be used to find a failure to cooperate.

c) Tests and technical evaluations

Section 11.3 of GO 167 requires GAOs to conduct tests or technical evaluations, as requested by CPSD. The purpose of such tests is to provide staff with information that is reasonably necessary to determine compliance with the standards. Elk Hills contends that GO 167 contains no limits for CPSD's consideration when it requires a test or evaluation that may have a serious reliability impact on the grid or that may affect a GAO's ability to honor prior contractual commitments.

In D.04-05-018, the Commission responded to such concerns. "We are confident that CPSD staff has the expertise and professionalism to schedule such tests and evaluations, when reasonably possible . . . , to minimize the cost and disruption to generators." (D.04-05-018 at p. 10.) Similarly, in the Commission's response to comments on the October 2, 2003 draft general order, the Commission stated: "Commission staff will carefully schedule tests or evaluations to minimize

generation disruptions and will, as appropriate, coordinate its activities with CAISO." (D.04-05-018, Attachment B, p. 11.)

Elk Hills contends that such language should be included in GO 167. Although we believe that this language in D.04-05-018 is sufficient, we will modify section 11.3 of GO 167 to include a similar statement.

C. Federal Preemption

1. The decisions do not apply an unreasonably narrow interpretation of federal authority.

WPTF and Mirant claim that D.04-05-017 and D.04-05-018 are preempted by federal law in several respects.[18] Applicants allege, among other things, that the decisions apply an incorrect and unreasonably narrow interpretation of the FERC's authority under the Federal Power Act.

In D.04-05-017, the Commission pointed out the distinction between FERC's authority to regulate rate-setting in wholesale power markets, and the Commission's authority to regulate generation facilities for purposes of public health, safety, service adequacy, and reliability. (D.04-05-017 at pp. 14-15.) Applicants contend that the decisions err by focusing too narrowly on FERC's jurisdiction over transmission and wholesale rate regulation. Applicants argue that FERC's exclusive jurisdiction over the transmission and sale of electric energy extends to "all facilities for such transmission or sale of electric energy." (16 U.S.C. § 824(b), (d); *Duke Energy Trading & Mktg., L.L.C. v. Davis* (9th Cir. 2001) 267 F.3d 1042, 1056.) Applicants further contend that FERC's exclusive jurisdiction applies to "any rule, regulation, practice, or contract affecting" wholesale rates. (16 U.S.C. § 824e(a).) According to applicants, the Commission

[18] WPTF and Mirant reserve their rights to seek resolution of such issues in the appropriate forum, including federal court. Mirant reserves its right to obtain relief in federal court for violations of federal law or the U.S. Constitution, and specifically reserves its right to challenge the underlying statute. WPTF states that it is not asking the Commission to resolve these issues now, but is including them only to give notice of such claims to the Commission and to preserve their right to raise them in contemporaneous or subsequent judicial reviews.

does not have independent authority to regulate the operations and maintenance of powerplants owned by EWGs.

a) The "bright line" test

Part II of the Federal Power Act (16 U.S.C. §§ 824-824m) delegates to FERC "*exclusive* authority to regulate the transmission and sale at wholesale of electric energy in interstate commerce." (*Transmission Agency of Northern California v. Sierra Pacific Power Co.* (9th Cir. 2002) 295 F.3d 918, 928, original italics, quoting *New England Power Co. v. New Hampshire* (1982) 455 U.S. 331, 340.) The United States Supreme Court has drawn a "bright line" between state and federal jurisdiction.

> [Our] decisions have squarely rejected the view . . . that the scope of FPC [Federal Power Commission[19]] jurisdiction over interstate sales of gas and electricity at wholesale is to be determined by a case-by-case analysis of the impact of state regulation upon the national interest. Rather, Congress meant to draw a bright line, easily ascertained, between state and federal jurisdiction, making unnecessary such case-by-case analysis. This was done in the Power Act by making FPC jurisdiction plenary and extending it to all wholesale sales in interstate commerce except those which Congress has made explicitly subject to regulation by the States.

(*Nantahala Power & Light Co. v. Thornburg* (1986) 476 U.S. 953, 966, quoting *FPC v. Southern California Edison Co.* (1964) 376 U.S. 205, 215-216.) If FERC has jurisdiction over a subject, the States cannot have jurisdiction over the same subject. (*Duke Energy v. Davis*, *supra*, 267 F.3d at p. 1057.)

On the other hand, as pointed out in D.04-05-017, the Federal Power Act provides that FERC "shall not have jurisdiction over facilities for the *generation* of electric energy." (16 U.S.C. § 824(b), italics added.) In the instant case, the regulations adopted pursuant to Public Utilities Code section 761.3 relate

[19] The Federal Power Commission was FERC's predecessor agency.

to the operations and maintenance of electric generation facilities, and do not deal with wholesale sales or rates. The goal of both section 761.3 and the resulting regulations is to ensure that generating facilities located in California are properly maintained and effectively operated for the public health and safety of Californians. (See, SB 39XX, § 1.) Such regulation is on the state side of the "bright line" drawn by the Congress.

b) Indirect or incidental impact on wholesale rates

We recognize that wholesale sales or rates could be indirectly impacted by the generator standards. However, "every state statute that has some indirect effect on rates and facilities of [electric generation companies] is not preempted." (*Schneidewind v. ANR Pipeline Co.* (1988) 485 U.S. 293, 308.)[20]

In numerous cases that were brought during and after the California energy crisis, some of which are cited by applicants, the court concluded that state law claims were preempted by federal law because they potentially impacted wholesale rates. (See, e.g., *Duke Energy v. Davis*, *supra*, 267 F.3d at p. 1042, 1056 [governor's attempt to "commandeer" Southern California Edison's block forward contracts preempted because of conflict with FERC requirements]; *Calif. ex rel. Lockyer v. Dynegy, Inc.* (9th Cir. 2004) 375 F.3d 831, 852, amend. and rehg. den (9th Cir. 2004) 387 F.3d 966, cert. den. 2005 U.S. LEXIS 3340 (Apr. 18, 2005) (*California v. Dynegy*) [California's unfair competition claims preempted because they encroach on substantive provisions of the ISO tariff, an area reserved exclusively to FERC]; *Public Utility District No. 1 of Grays Harbor County Washington v. IDACORP Inc.* (9th Cir. 2004) 379 F.3d 641, 649 (*Grays Harbor*) [contract-related claims against energy wholesaler preempted because court would

[20] *Schneidewind* dealt with preemption under the Natural Gas Act (16 U.S.C. § 717 et seq.). However, "because the FPA and the Natural Gas Act are 'substantially identical,' there is an 'established practice of citing interchangeably decisions interpreting the pertinent sections of the two statutes.' " (*Public Utility District No. 1 of Grays Harbor County Washington v. IDACORP Inc.* (9th Cir. 2004) 379 F.3d 641, 649, fn. 8, quoting *Arkansas Louisiana Gas Co. v. Hall* (1981) 453 U.S. 571, 577, fn. 7.)

be required to determine fair price of electricity, a determination clearly within FERC's jurisdiction]; *Public Utility District No. 1 of Snohomish County v. Dynegy Power Marketing, Inc.* (9th Cir. 2004) 384 F.3d 756, 761 [state anti-trust and unfair competition claims preempted because court would be required to determine rates that would have been achieved in a competitive market].)

However, those cases are distinguishable from the instant case. The focus of the GO 167 standards is on operations and maintenance of generators. In contrast, the cases cited above address claims that more directly impacted FERC-approved rates and terms of service.

2. ISO outage protocols and FERC's market behavior rules do not preempt the Commission's authority.

Mirant and WPTF contend that FERC's enforcement of the ISO outage protocols and FERC's market behavior rules preempt the Commission's authority under state law to implement and enforce the maintenance standards.

First, applicants contend that FERC's oversight extends to enforcement of ISO outage protocols through the ISO tariff, and thus preempts the Commission from enforcing the protocols. Section 761.3 clearly provides that the Commission "shall enforce the protocols for the scheduling of powerplant outages of the Independent System Operator." (Pub. Util. Code, § 761.3(a).) As we stated above, the purpose of the Commission's regulation pursuant to section 761.3 is to ensure reliability and public health and safety in electric generation, and is not intended to regulate or affect wholesale rates.

Second, applicants point to the FERC's market behavior rules that apply to generators selling wholesale power at market rates. Market Behavior Rule 1 requires market-based rate sellers to:

> Operate and schedule generating facilities, undertake maintenance, declare outages, and commit or otherwise bid supply in a manner that complies with

> the Commission-approved rules and regulation of the applicable power market.

(*Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations* (2003) 105 F.E.R.C. 61,218, at ¶ 18.)

FERC's market behavior rules, which are very general, are aimed at ensuring that "*rates* are the product of competitive forces and thus will remain within the zone of reasonableness." (*Investigation of Terms and Conditions of Public Utility Market-Based Rate Authorizations* (2003) 105 F.E.R.C. 61,218, at ¶ 3.) In contrast, the Commission's regulations are detailed practices and procedures that are designed to ensure reliable operation of generation facilities for purposes of public health and safety. (See SB 39XX, § 1, and Pub. Util. Code, § 761.3(a).)

The primary focus of GO 167 is implementation and enforcement of operation and maintenance standards for generating facilities, rather than on wholesale rates. The Commission's rules are designed for different purposes and do not infringe upon FERC's jurisdiction over wholesale rates. We also reiterate that a standard provision of procurement contracts between public utilities and generators obligates the "seller" to operate the applicable generating unit in conformance with all applicable laws and regulations, including GO 167.

3. Other issues raised by applicants have no merit.

In D.04-05-017, the Commission addressed the generators' reliance on D.95-12-007, in which the Commission concluded that "regulation of EWGs would directly conflict with Federal jurisdiction over wholesale power rates." (*Re Compliance with the Energy Policy Act of 1992* (1995) 62 Cal.2d 517, 536 [COL No. 17]) WPTF contends that D.04-05-017 distinguishes D.95-12-007[21] by characterizing that case as a "rate regulation" case. (See D.04-05-017 at p. 18.)

[21] Both D.04-05-017 and WPTF mistakenly refer to D.95-12-007 as "D.95-12-006."

WPTF objects to this characterization, arguing that D.95-12-007 deals more broadly with federal preemption under the Energy Policy Act of 1992.

The discussion in D.95-12-007 dealt with regulation of EWGs as *public utilities*. Regulation of EWGs as public utilities would trigger all of the rights and obligations applicable to public utilities under the Public Utilities Code, including the Commission's authority to set just and reasonable rates. Here, in contrast, the Commission's is asserting limited jurisdiction over EWGs for a specific purpose. Moreover, as D.04-05-017 points out, any pronouncement of the Commission with respect to federal preemption does not impact the authority of the Legislature to enact a law, as in this case, which clearly intends to require the Commission's to implement and enforce maintenance and operation rules for generation facilities.

Mirant challenges the Commission's reliance on D.99-09-028.[22] In its discussion of jurisdiction, D.04-05-017 cites D.99-09-028 (*Order Instituting Investigation Into the Power Outage Which Occurred on December 8, 1998 on Pacific Gas & Electric System* [D.99-09-028] (1999) 1999 Cal. PUC LEXIS 635). (See D.04-05-017 at pp. 13-14.) In D.99-09-028, we addressed our authority to investigate power outages after the passage of AB 1890 and the creation of the CAISO. We found that AB1890 left intact the Commission authority to ensure that utility facilities and services do not endanger the health, safety, or welfare of the public. We concluded that we had concurrent jurisdiction with the CAISO over elements of the transmission system and transmission reliability. (1999 Cal. PUC LEXIS 635, at pp. *20-*21.)

Mirant contends that the cases cited in D.99-09-028 deal with jurisdictional issues between two state agencies, or between state and local entities, and do not apply to federal preemption under the Federal Power Act. Although our discussion of these cases was intended to support our state law

[22] D.04-05-017 mistakenly refers to D.99-09-028 as "D.99-07-028."

authority, upon review we recognize that the discussion may have further confused the issues. Therefore, we will modify the discussion of federal preemption in D.04-05-017.

IV. CONCLUSION

For all of the foregoing reasons, good cause has not been shown for granting rehearing of D.04-05-017 and D.04-05-018. However, as discussed in this order, we find that some modifications to D.04-05-018 and GO 167 are necessary for the purpose of clarification.

Therefore **IT IS ORDERED** that D.04-05-017 is modified as follows:

1. On pages 13 to 14 (beginning with the next to the last line on page 13), delete the text, including footnote 16, that states:

> "See Decision D.99-07-028.[16] We direct the attention of the parties to our reasoning on the jurisdictional question addressed in that Decision, which is directly analogous to the jurisdictional question we are faced with in this Decision."

2. On pages 13 to 14, replace the text deleted in Ordering Paragraph 1 with the following:

> "See D.99-09-028. Similarly, the Commission retains authority over the safety and reliability of generation plants for purposes of public health and safety."

3. On page 18, in the citation at the end of the first partial paragraph, replace "D.95-12-006" with "D.95-12-007."

IT IS FURTHER ORDERED that GO 167 is modified as follows:

4. The following sentence is added after the last sentence in section 11.3 Tests and Technical Evaluations:

> To the extent feasible, Commission staff shall schedule such tests or evaluations to minimize generation disruptions and shall, as appropriate, coordinate its activities with CAISO.

5. Section 12.1 is deleted and replaced with the following:

   Violation. A violation is the failure of a Generating Asset Owner to comply with a requirement of this General Order. A Generating Asset's Owner's lawful and reasonable assertion of its rights under this General Order or state or federal law will not be considered a failure to cooperate under any provision of this General Order.

6. Section 13.3.1 is deleted and replaced with the following:

   Section 13.3.1. Specified Violations. For specified Violations of the General Order, CPSD may assess a scheduled fine or, in the alternative, proceed with any remedy otherwise available to CPSD or the Commission. Scheduled fines may be assessed by CPSD only for the Violations referenced in subsection 13.3.2 of this General Order. CPSD shall notify the Generating Asset Owner, in writing, of any specified Violations and assessed fines, and shall include notice of the right to contest the fine as set forth in subsections 13.3.3 and 13.3.4 of this General Order. No fine assessed pursuant to this subsection shall become payable if contested by the Generating Asset Owner pursuant to subsection 13.3.4.

7. Section 13.3.4 is deleted and replaced with the following:

   Section 13.3.4. Contest of Assessed Fine. If a Generating Asset Owner contests the assessment of the scheduled fine, the Generating Asset Owner must file its contest within 300 days of the assessment. In the event of such a contest, staff shall withdraw the offer of the scheduled fine and proceed to any remedy otherwise available to the Commission, or shall withdraw the assessed fine and proceed no further, depending on the circumstances of each case. If the matter proceeds to a more formal proceeding before the Commission, neither CPSD in its investigation nor the Commission will be limited to the specified Violations or the schedule of fines set forth in Appendix F to this General Order.

8. Section 15.4.1 is deleted and replaced with the following:

> Section 15.4.1. Burden of Establishing Privilege. A Generating Asset Owner has the burden of establishing any privilege that it claims regarding requested documents or information. A Generating Asset Owner has the right to claim an absolute statutory privilege, such as the attorney-client privilege, for information requested. If such a privilege applies, the Generating Asset is not required to provide such information to the Commission. However, the Generating Asset Owner must specify the statutory privilege applicable to particular information. A Generating Asset Owner may also assert a claim of privilege for documents or information provided to the Commission on a confidential basis, such as the trade secret privilege. In such cases, the Generating Asset Owner must assert the specific privilege(s) it believes the Generating Asset Owner and/or the Commission holds and why the document, or portion of document, should be withheld from public disclosure.

9. Section 15.4.3.4 is deleted and replaced with the following:

> Section 15.4.3.4. Identify any specific privilege the Generating Asset Owner believes it holds and may assert to prevent disclosure of information, and explain in detail the applicability of that law to the information for which confidential treatment is requested. For example, if a Generating Asset Owner asserts that information is subject to a trade secret privilege (Evidence Code § 1060 *et seq.*, the Generating Asset Owner must explain how the information fits the definition of a trade secret (*e.g.*, how the information provides the holder with economic value by virtue of its not being generally known to the public and what steps the Generating Asset Owner has taken to maintain the secrecy of the information.

IT IS FURTHER ORDERED that

10. As modified by this order, the applications for rehearing of D.04-05-017 and D.04-05-018 are denied.

11. CPSD staff is directed to draft a proposal which further details the procedures of the staff citation program implemented by GO 167. Staff shall serve its proposal on all of the parties to this proceeding for comment. After reviewing the comments, CPSD staff shall draft a proposed resolution for the Commission's consideration and approval. If, during this process, CPSD staff determines that any changes should be made to GO 167 itself (as opposed to merely supplementing the general order), such proposed changes shall be presented in a petition to modify D.04-05-018 and GO 167, rather than in a resolution.

This order is effective today.

Dated January 26, 2006, at San Francisco, California.

MICHAEL R. PEEVEY
President
GEOFFREY F. BROWN
DIAN M. GRUENEICH
JOHN A. BOHN
RACHELLE B. CHONG
Commissioners