

Study N-200

April 5, 1999

## First Supplement to Memorandum 99-21

### Judicial Review of Agency Action: Selected Issues

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Attached is a letter concerning the basic memorandum:

*Exhibit pp.*

1. Letter from Legal Division of Public Utilities Commission . . . . . 1-2

Also attached is a staff draft of revisions to provide that proposed Sections 1098 and 1099 of the Code of Civil Procedure do not apply to mandamus proceedings under the Public Utilities Code, as the PUC letter requests. (No revisions are proposed to sections on mandamus to enforce bondholders' rights — see Pub. Util. Code §§ 13106, 30981, 100492, 102602, 103602, 120702.)

#### Exhaustion of Administrative Remedies

The PUC is concerned about the effect on its proceedings of the staff proposal to replace the rule that the exhaustion of remedies requirement is jurisdictional with a more flexible rule that would allow courts to recognize new exceptions to the exhaustion requirement, to broaden existing exceptions, or to excuse a lack of exhaustion based on a balancing of factors. The PUC says this “would create undesirable uncertainty.” But the flexible rule proposed in the basic memo is consistent with case law since *Abelleira v. District Court of Appeal*, 17 Cal. 2d 280, 102 P.2d 329 (1941), the leading case announcing the rule that the exhaustion requirement is jurisdictional. As reported in Professor Asimow's study, “[s]ince *Abelleira*, both the Supreme Court and lower courts have often countenanced exceptions to the exhaustion requirement.” Asimow, *Judicial Review: Standing and Timing*, 27 Cal. L. Revision Comm'n Reports 1, 258 (1997). And,

A few California cases use a flexible, balancing analysis to decide whether to excuse a failure to exhaust remedies. See *Doster v. County of San Diego*, 203 Cal. App. 3d 257, 251 Cal. Rptr. 507 (1988); *Hull v. Cason*, 114 Cal. App. 3d 344, 359, 171 Cal. Rptr. 14 (1981) (public interest demands court take case which had already been litigated for several years despite failure to exhaust remedies); *Hollon v. Pierce*, 257 Cal. App. 2d 468, 64 Cal. Rptr. 808 (1964);

*Greenblatt v. Munro*, 161 Cal. App. 2d 596, 605-07, 326 P.2d 929 (1958). This approach is probably contrary to *Abelleira*.

*Id.* at 258 n.97. The staff believes its recommendation in the basic memo to adopt a flexible rule on exhaustion is consistent with post-*Abelleira* case law, and is therefore not a radical change in the law.

However, the PUC also argues time should be allowed to pass for an evaluation of 1998 legislative changes to PUC procedures before more changes are imposed. The staff is persuaded by this argument. The attached draft of amendments to nine sections of the Public Utilities Code provides that proposed Section 1098 of the Code of Civil Procedure would not apply to mandamus proceedings under these sections. The staff would also add the following to the Comment to proposed Section 1098 (basic memo, pp. 4-5) to make clear Section 1098 would not affect writs of review under the Public Utilities Code:

By its terms, Section 1098 applies only to a proceeding under this chapter, i.e., to writs of mandamus. It does not apply to other forms of judicial review, such as a writ of review under the Public Utilities Code. See Pub. Util. Code §§ 1756, 1758. See also Pub. Util. Code §§ 1759, 2102, 5251, 5259, 5259.5, 13575.6, 13575.7, 26816, 29046 (Section 1098 does not apply to specified mandamus proceedings under Public Utilities Code).

### **Venue for Judicial Review of State Agency Action**

The PUC argues that the staff-proposed expansion of venue in mandamus proceedings to review state agency action should not apply to its proceedings, which are either in the California Supreme Court or court of appeal. The staff thinks the PUC makes a good point. The rationale given in the basic memo for expanding venue is that it is “probable that superior court judges in small counties are inexperienced in administrative law matters.” Although the California Constitution confers concurrent jurisdiction on the Supreme Court, courts of appeal, and superior courts to hear original proceedings for extraordinary relief, application for writ relief should ordinarily be filed in the lowest court capable of granting relief. Cal. Const. Art. VI, § 10; California Civil Writ Practice § 5.1, at 181-82 (Cal. Cont. Ed. Bar., 3d ed. 1997). Statutes that provide for judicial review in the Supreme Court or court of appeal typically have their own venue provisions, and deal with forms of review other than mandamus and so would not be affected by venue rules for mandamus. See, e.g., Gov’t Code §§ 3520 (Public Employment Relations Board: venue of petition

for “writ of extraordinary relief” is in court of appeal in appellate district where unit determination or unfair practice dispute occurred), 3542 (same), 3564 (same); Lab. Code §§ 1160.8 (Agricultural Labor Relations Board: venue of petition requesting order of the board “be modified or set aside” is in court of appeal having jurisdiction over county in which unfair labor practice occurred or where petitioner resides or transacts business), 5950 (Workers’ Compensation Appeals Board: venue of petition for writ of review is in Supreme Court or court of appeal for appellate district in which petitioner resides); Pub. Res. Code § 25531 (decisions of California Energy Commission subject to review in same manner as decisions of PUC); Pub. Util. Code § 1756 (PUC: venue of petition for writ of review is in Supreme Court or court of appeal for judicial district in which petitioner resides or has principal place of business). So, although the staff-proposed expansion of venue would not affect any of these non-mandamus proceedings, the staff thinks it would be better to confine the expanded venue rule to proceedings in superior court. **Accordingly, the staff would revise the draft of proposed Section 1099 in the basic memo as follows:**

**Code Civ. Proc. § 1099 (added). Venue in Sacramento County**

1099. In addition to any other county authorized by law, Sacramento County is a proper county for proceedings in superior court under this chapter to review state agency action.

**Comment.** Section 1099 is new, and authorizes Sacramento County as an additional county for administrative or traditional mandamus proceedings in superior court under this chapter to review state agency action. The general rule is that venue is proper in the county where the cause of action arose. See Sections 1109 (general rules of civil practice apply to proceedings under this title), 393(1)(b) (venue); *Duval v. Contractors State License Bd.*, 125 Cal. App. 2d 532, 271 P.2d 194 (1954) (administrative mandamus).

**Notice of Last Day for Review of Adjudication**

Professor Michael Asimow asks what the effect would be if an agency fails to give the proposed notice of the last day for review. He believes the limitations period should not be open-ended. The staff agrees. The Commission’s 1997 recommendation on *Judicial Review of Agency Action* provided that “[i]n no case shall a petition for review . . . be filed later than one hundred eighty days after the decision is effective.” The staff recommends revising Government Code Section 11523 (formal adjudication under the Administrative Procedure Act) and

Code of Civil Procedure Section 1094.5 (administrative mandamus) as follows (these revisions replace those in the basic memo):

**Gov't Code § 11523 (amended). Judicial review**

11523. (a) Judicial review may be had by filing a petition for a writ of mandate in accordance with the provisions of the Code of Civil Procedure, subject, however, to the statutes relating to the particular agency. Except as otherwise provided in this section, the petition shall be filed within the later of the following:

(1) 30 days after the last day on which reconsideration can be ordered .

(2) 30 days after the notice required by Section 11518.3 is delivered, served, or mailed, but in no case later than 180 days after the last day on which reconsideration can be ordered.

(b) The right to petition shall not be affected by the failure to seek reconsideration before the agency.

(c) On request of the petitioner for a record [etc., same as in basic memo, p. 8]

**Comment.** Section 11523 is amended to make the limitations period for judicial review under the section dependent on the giving of the notice required by Section 11518.3.

[Note. Proposed Section 11518.3 is in the basic memo, p. 7.]

**Code Civ. Proc. § 1094.5 (amended). Administrative mandamus**

1094.5. (a) . . . .

(k) In a proceeding subject to review under this section, the agency shall, in the order or decision or otherwise, give notice to the parties in substantially the following form: "The last day to file a petition with a court under Section 1094.5 of the Code of Civil Procedure to review the order or decision is [date] unless the time is extended as provided by law." This subdivision does not apply to review of proceedings under the California Environmental Quality Act. The limitations period for commencing a proceeding under this section begins to run from the later of the following:

(1) The date or event otherwise provided by law.

(2) The date the notice is delivered, served, or mailed, but in no case later than 180 days after the date or event otherwise provided by law.

**Comment.** Subdivision (k) is added to Section 1094.5 to require notice to the parties of the last date for review by administrative mandamus, and to delay commencement of the running of the limitations period under the section until the date the notice is delivered, served, or mailed, but in no case later than 180 days after

the date or event otherwise provided by law. For the date or event otherwise provided by law and for limitations periods that may be extended by this section, see [same as in basic memo, p.9].

Respectfully submitted,

Robert J. Murphy  
Staff Counsel

## PUBLIC UTILITIES COMMISSION

505 VAN NESS AVENUE

SAN FRANCISCO, CA 94102-3298



March 29, 1999

Law Revision Commission  
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File: \_\_\_\_\_

Nathaniel Sterling, Executive Secretary  
California Law Revision Commission  
4000 Middlefield Road, Room D-1  
Palo Alto, CA 94303-4739

Re: Memorandum 99-21 Judicial Review of Agency Action

Dear Mr. Sterling:

We are writing to express the views of the Legal Division of the California Public Utilities Commission (CPUC) on the Law Revision Commission's (LRC's) recent memo on selected issues in judicial review.

As you are aware, the statutory scheme for judicial review of the CPUC was extensively revised by the Calderon-Peace-MacBride Judicial Review Act of 1998 (Chapter 886, Stats. 1998, SB 779). This Act addressed such matters as venue (Pub. Util. Code sec. 1756(d)) and standard of review (Pub. Util. Code secs. 1757, 1757.1). While extensively revising the provisions for judicial review of CPUC decisions, the Legislature did not disturb the long-standing requirement that before challenging a CPUC order or decision in court, a person must first file an application for rehearing with the CPUC in which it specifically alleges any grounds of unlawfulness that it later wishes to raise in court. (Pub. Util. Code secs. 1731(b), 1732.)

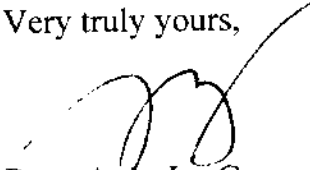
We are therefore concerned about Memo 99-2's discussion of relief from the exhaustion of administrative remedies. On pages 2-5, the Memo suggests a new Code of Civil Procedure (CCP) section 1098, which would allow the courts to excuse the requirement for exhaustion of administrative remedies under certain circumstances. We believe that this approach to revising the law about exhaustion would create undesirable uncertainty concerning review of the CPUC. The Exhibit to the Memo contains an alternative approach to this topic (EX 5 to EX 6) which would only apply to proceedings under CCP section 1094.5. Because the CPUC is not subject to CCP section 1094.5, this approach would not impact the CPUC. Accordingly, if the LRC is inclined to make changes to the law of exhaustion, we would recommend the latter approach.

In light of the recent legislation, which preserves the long-standing statutory requirement of an application for rehearing, we strongly suggest that the LRC not recommend any changes that would affect judicial review of the CPUC, until we have gained experience under the reforms which took effect in January.

Memo 99-21 also discusses the venue for judicial review of state agency action. The basis of this discussion seems to be that mandamus against a state agency may be sought "in the superior court of the county where the cause of action arose" (Memo at 5). However, judicial review of the CPUC is limited to the Supreme Court and courts of appeal (Pub. Util. Code sec. 1759(a)). Furthermore, the basis for the Memo's recommendation to add Sacramento County as an additional venue for judicial review, is based on the fact that "most state agencies have their headquarters offices in Sacramento, and that the Sacramento County Superior Court is like to have or to develop expertise in judicial review proceedings." This rationale has no applicability to the CPUC, which is headquartered in San Francisco, and is not subject to superior court review. Accordingly, we suggest that this venue provision ought to be drafted in a way that does not apply to the CPUC.

At this time, we will not specifically address the other issues raised in the Memo, either because the specific proposals would not impact the CPUC (Notice of Last Day for Review under formal hearing procedures of the APA that do not apply to the CPUC), or because LRC staff recommends against any statutory changes (e.g., standing, limitations periods). If any more specific proposals that would impact the CPUC are brought forward, we will comment on them later. At this time, we simply note that our general view is that now is not the time to revise statutory provisions governing judicial review of the CPUC, which were just revised in 1998.

Very truly yours,



Peter Arth, Jr., General Counsel  
Joel T. Perlstein, P.U. Counsel IV

JTP:dd

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Exhibit

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**PUBLIC UTILITIES CODE SECTIONS ON MANDAMUS**

**Pub. Util. Code § 1759 (amended). Jurisdiction**

1759. (a) No court of this state, except the Supreme Court and the court of appeal, to the extent specified in this article, shall have jurisdiction to review, reverse, correct, or annul any order or decision of the commission or to suspend or delay the execution or operation thereof, or to enjoin, restrain, or interfere with the commission in the performance of its official duties, as provided by law and the rules of court.

(b) The writ of mandamus shall lie from the Supreme Court and from the court of appeal to the commission in all proper cases as prescribed in Section 1085 of the Code of Civil Procedure. Section 1098 of the Code of Civil Procedure does not apply to proceedings under this section.

**Comment.** Subdivision (b) of Section 1759 is amended to provide that Section 1098 of the Code of Civil Procedure does not apply to proceedings under this section.

**Pub. Util. Code § 2102 (amended). Mandamus and injunction; petition of commission**

2102. Whenever the commission is of the opinion that any public utility is failing or omitting or about to fail or omit, to do anything required of it by law, or by any order, decision, rule, direction, or requirement of the commission, or is doing anything or about to do anything, or permitting anything or about to permit anything to be done, in violation of law or of any order, decision, rule, direction, or requirement of the commission, it shall direct the attorney of the commission to commence an action or proceeding in the superior court in and for the county, or city and county, in which the cause or some part thereof arose, or in which the corporation complained of has its principal place of business, or in which the person complained of resides, for the purpose of having such violations or threatened violations stopped and prevented, either by mandamus or injunction. The attorney of the commission shall thereupon begin such action or proceeding in the name of the people of the State of California, by petition to such superior court, alleging the violation or threatened violation complained of, and praying for appropriate relief by way of mandamus or injunction. Section 1098 of the Code of Civil Procedure does not apply to proceedings under this chapter.

**Comment.** Section 2102 is amended to provide that Section 1098 of the Code of Civil Procedure does not apply to proceedings under this chapter.



**Pub. Util. Code § 5251 (amended). Manner and application of proceedings**

5251. Except as otherwise expressly provided, in all respects in which the commission has power and authority under the Constitution of this State or this chapter, applications and complaints may be made and filed with the commission, process issued, hearings held, opinions, orders, and decisions made and filed, petitions for rehearing filed and acted upon, and petitions for writs of review or mandate filed with the Supreme Court of this State, considered and disposed of by the Supreme Court, in regard to the matters provided for in this chapter, in the same manner, under the same conditions and subject to the same limitations, and with the same effect specified in the Public Utilities Act, so far as applicable. Section 1098 of the Code of Civil Procedure does not apply to proceedings under this section.

**Comment.** Section 5251 is amended to provide that Section 1098 of the Code of Civil Procedure does not apply to proceedings under this section.

**Pub. Util. Code § 5259 (amended). Petition for mandamus or injunction**

5259. Whenever the executive director of the commission determines that any household goods carrier or any officer, director, or agent of any household goods carrier is failing or omitting or about to fail or omit, to do anything required of it by law, or by any order, decision, rule, direction, or requirement of the commission, or is doing anything or about to do anything, or permitting anything or about to permit anything to be done, in violation of law or of any order, decision, rule, direction, or requirement of the commission, the executive director may make application to the superior court in and for the county, or city and county, in which the cause or some part thereof arose, or in which the corporation complained of has its principal place of business, or in which the person complained of resides, for the purpose of having such violations or threatened violations stopped and prevented, either by mandamus or injunction, including, but not limited to, an order allowing vehicles used for subsequent operations subject to the order to be impounded at the carrier's expense and subject to release only by subsequent court order following a petition to the court by the defendant or owner of the vehicle. The executive director shall thereupon begin such action or proceeding in the name of the people of the State of California, by petition to such superior court, alleging the violation or threatened violation complained of and praying for appropriate relief by way of mandamus or injunction. Section 1098 of the Code of Civil Procedure does not apply to proceedings under this section.

**Comment.** Section 5259 is amended to provide that Section 1098 of the Code of Civil Procedure does not apply to proceedings under this section.

**Pub. Util. Code § 5259.5 (amended). Proceedings to protect stored goods or property**

5259.5. (a) Whenever the commission determines that any household goods carrier or any officer, director, or agent of any household goods carrier has abandoned, or is abandoning stored household goods or property of any shippers under contract with the carrier or carriers, it may commence a proceeding in

superior court for the purpose of having the court appoint either a receiver or commission staff to identify the stored items of property, to take possession of the property, and to arrange the return of the property to its owners in accordance with the orders of the court and with regard for the protection of all property rights involved.

(b) The proceeding shall be brought in the superior court in and for the county, or city and county, in which the cause or some part thereof arose, or in which the person or corporation complained of has its principal place of business, or in which the person complained of resides. The commission shall commence the proceeding in the name of the people of the State of California, by petition to the superior court, alleging the facts and circumstances involved and praying for appropriate relief by way of mandamus, or injunction, or the appointment of a receiver, and authorizing the commission to arrange for the hiring of a receiver who shall be required to comply with the requirements of Sections 566, 567, and 568 of the Code of Civil Procedure. Section 1098 of the Code of Civil Procedure does not apply to proceedings under this chapter.

(c) The court may also appoint a receiver to manage the business of the household goods carrier or carriers and return property to its owner or owners upon a showing by the commission satisfactory to the court that the abandonment or threatened abandonment by the carrier jeopardizes property or funds of others in the custody or under the control of the carrier. The court may make any other order that it finds appropriate to protect and preserve those funds or property.

(d) In the event a receiver is appointed by the court and the commission is responsible for contracting for a receiver to carry out the duties authorized by this section, the commission may contract on an emergency basis with a qualified person or corporation to serve as receiver under the conditions and guidelines set by the court. The contract for the receiver services may be executed by the commission on an expedited basis and without compliance with the requirements of Sections 11042 and 14615 of the Government Code and Sections 10295 and 10318 of the Public Contract Code. The receiver shall be paid from the fees collected pursuant to Section 5003.2.

**Comment.** Subdivision (b) of Section 5259.5 is amended to provide that Section 1098 of the Code of Civil Procedure does not apply to proceedings under this chapter.

**Pub. Util. Code § 13575.6 (amended). Review of orders; limitations**

13575.6. Any party aggrieved by a final order issued by the board under Section 13575.5, after granting review of a hearing officer order, may obtain review of the order of the board in the superior court by filing in the court a petition for writ of mandate within 30 days following the issuance of the order by the board. Any party aggrieved by a final order of a hearing officer issued under Section 13575.5 for which the board denies review may obtain review of the order of the hearing officer in the superior court by filing in the court a petition of writ of mandate

within 30 days following the denial of review by the board. Section 1098 of the Code of Civil Procedure does not apply to proceedings under this section.

If no aggrieved party petitions for writ of mandate within the time provided by this section, an order of the board or a hearing officer shall not be subject to review by any court or agency, except that the board may grant review on its own motion of an order issued under Section 13575.5 after the expiration of the time limits set by that section.

**Comment.** Section 13575.6 is amended to provide that Section 1098 of the Code of Civil Procedure does not apply to proceedings under this section.

**Pub. Util. Code § 13575.7 (amended). Review of orders; evidence; procedure**

13575.7. (a) Within 30 days after service of a copy of a decision and order issued by the board pursuant to Section 13575.5, any aggrieved party may file with the superior court a petition for writ of mandate for review thereof. Failure to file a petition shall not preclude a party from challenging the reasonableness and validity of a decision or order of a hearing officer or the board in any judicial proceedings brought to enforce that decision or order or for other civil remedies.

(b) The evidence before the court shall consist of the record before the board, including the hearing officer's record, and any other relevant evidence which, in the judgment of the court, should be considered to effectuate and implement the policies of this division. In every such case, the court shall exercise its independent judgment on the evidence.

(c) Except as otherwise provided in this section, subdivisions (e) and (f) of Section 1094.5 of the Code of Civil Procedure shall govern proceedings pursuant to this section. Section 1098 of the Code of Civil Procedure does not apply to proceedings under this section.

**Comment.** Subdivision (c) of Section 13575.7 is amended to provide that Section 1098 of the Code of Civil Procedure does not apply to proceedings under this section.

**Pub. Util. Code § 25816 (amended). Application for writ of mandate**

25816. Within 40 days after the mailing of the decision to the petitioner, the petitioner may apply for a writ of mandate in the manner provided in the Code of Civil Procedure. Section 1098 of the Code of Civil Procedure does not apply to proceedings under this section. The complete record of the proceedings, or such parts thereof as are designated by the petitioner, shall be prepared by the district and shall be delivered to the petitioner within 30 days after a request therefor, upon payment of the expense of preparation and certification thereof.

**Comment.** Section 25816 is amended to provide that Section 1098 of the Code of Civil Procedure does not apply to proceedings under this section.

**Pub. Util. Code § 29046 (amended). Application for writ of mandate**

29046. Within forty (40) days after the mailing of the decision to the petitioner, the petitioner may apply for a writ of mandate in the manner provided in the Code of Civil Procedure. Section 1098 of the Code of Civil Procedure does not apply to

proceedings under this section. The complete record of the proceedings, or such parts thereof as are designated by the petitioner, shall be prepared by the district and shall be delivered to the petitioner within thirty (30) days after a request therefor, upon payment of the expense of preparation and certification thereof.

**Comment.** Section 29406 is amended to provide that Section 1098 of the Code of Civil Procedure does not apply to proceedings under this section.