IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

CITY OF CHINO HILLS
Petitioner and Appellant,

V.

SOUTHERN CALIFORNIA EDISON,
Respondent.

PETITION FOR REVIEW

After a Decision by the Court of Appeal, Fourth Appellate District,
Division 2, Case No. E051033

Superior Court of the County of San Bernardino
Case No. CIVRS 901914 (Dept. R-6)
Honorable Keith B. Davis, Judge

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TO HONORABLE CHIEF JUSTICE TANI CANTIL-SAKAUYE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF CALIFORNIA:

Pursuant to California Rules of Court, Rule 8.500, the City of Chino Hills respectfully petitions for review following the unpublished decision of the Fourth Appellate District, Division Two, filed on September 12, 2011. A copy of the opinion authored by Acting Presiding Justice Betty Ann Richli, in which Justice Jeffrey King separately concurred, is attached as Exhibit 1 to this Petition.

I. ISSUE PRESENTED

The California Public Utilities Commission's powers do not include the power to authorize a regulated utility to do more than what is legally permitted under the scope of its existing easements. Did the Court of Appeal err in deciding that California Public Utilities Code §1759 foreclosed the trial court's review of a real property dispute between SCE and the City over whether Southern California Edison's current easements are sufficient to accommodate the construction Segment 8A of the Tehachapi Renewable Transmission Project ("TRTP")?

II. WHY REVIEW SHOULD BE GRANTED

In the trial court below, the City of Chino Hills sought a declaration that Defendant Southern California Edison ("SCE") does not possess the necessary property rights on which to construct Segment 8A of the Tehachapi Renewable Transmission Project ("TRTP"), a transmission project carrying wind-generated electricity from Tehachapi to Los Angeles. Agreeing with the trial court, the Court of Appeal found that Public Utilities Code §1759 divested the lower court of jurisdiction to adjudicate the property dispute. Slip Opinion at 17, 21. According the Court of Appeal, that power is vested in the California Public Utilities Commission ("PUC"). Slip Opinion at 2. The Court of Appeal, however, is incorrect, and review is warranted to settle this important question of law.

A. The Conflict Between Public Utilities Code §§1759 and 2106 and its Resolution: The *Covalt* Test

The California Constitution confers authority on the PUC to regulate utilities, including the power to fix rates, establish rules, hold various types of hearings, award reparations, and establish its own procedures. Cal.Const., art. XII, § 2, 4, 6; *San Diego Gas and Electric Co. v. Superior Court ("Covalt")*(1996) 13 Cal.4th 893, 914-915. In addition to those powers expressly conferred on the PUC, the California Constitution confers authority on the Legislature to regulate public utilities and to delegate regulatory functions to the PUC. Cal.Const., art. XII, §§ 3, 5. Consistent with these constitutional mandates, for example, the Legislature has granted the PUC the authority to determine whether a public utility may "sell, lease, assign, mortgage, or otherwise dispose of or encumber the whole or any part of [*the public utility's*] . . . property necessary or useful in the performance of its duties to the public." Public Utilities Code §851.

The Legislature also sets the limits of judicial review of PUC decisions. Public Utilities Code §1759 states that "[n]o court of this state, except the Supreme Court and the court of appeal . . . shall have jurisdiction to review, reverse, correct, or annul any order or decision of the Commission." The Legislature also declares in Public Utilities Code §2106 that:

> Any public utility which does, causes to be done, or permits any act, matter or thing prohibited or declared unlawful ... shall be liable to the persons or corporations affected thereby for all loss, damages, or injury causes thereby or resulting therefrom.... An action for such loss, damages, or injury may be brought in any court of competent jurisdiction by any corporation or person.

To resolve the apparent tension, the court in *Covalt,* 13 Cal.4th 893, found that Public Utilities Code §1759 bars a private action only when an award of damages would "*directly contravene* a specific order or decision of the commission" or undermine "a general supervisory or regulatory policy of the commission." *Id.* at p. 918, emphasis added. The *Covalt* court set forth a three-part inquiry to determine when an action is barred under Section 1759. The

Covalt test asks: (1) whether the PUC has the authority to adopt a regulatory policy, (2) whether the PUC has exercised that authority, and (3) whether the superior court action would interfere with the PUC's regulatory authority. Only if each of these questions is answered in the affirmative will an action be barred under Section 1759.

B. The PUC Has No Power to Adjudicate Property Rights Claims; Hence, this Court's Review is Required to Secure Uniformity with *Covalt* and *Koponen v. Pacific Gas and Electric*

The first inquiry under *Covalt* is whether the PUC has the authority to act on the issues underlying this lawsuit. *Covalt, supra,* 13 Cal.4th at p. 923. Hence, the relevant question under *Covalt* is whether the PUC has the authority to resolve the threshold dispute regarding the City's and SCE's respective rights under the subject easements. The Court of Appeal ruled that the PUC possesses such authority. Slip Opinion at 17. Its holding, however, directly conflicts the First Appellate District's holding in *Koponen v. Pacific Gas & Electric* (2008) 165 Cal.App.4th 345, where the court ruled that "the PUC does not have the requisite authority to decide property rights claims raised by a non-regulated entity ..."

In *Koponen,* the complaint alleged that PG & E owned easement rights over plaintiff's property to supply electricity. Sometime after acquiring the easement rights, PG & E began leasing fiber optic capacity and telecommunication services to third parties. In the operative complaint, Plaintiff alleged that by leasing its facilities to telecommunications companies, PG & E exceeded the scope of the easement and increased the burden on the servient estate. Ruling that Section[1] 1759 deprived it of jurisdiction, the trial court sustained the utility's demurrer.

In reversing, the *Koponen* court rejected PG & E's argument that Public Utilities Code §1759 divested the superior court of jurisdiction:

> Any suggestion in a commission order that PG & E acted properly in leasing or licensing the use of its right-of-way in a specific case is

[1] All references in this brief to "section" shall be to the California Public Utilities Code unless otherwise stated.

> not part of an identifiable broad and continuing supervisory or regulatory program. An award of damages for past invasions of plaintiffs' property rights would not interfere with the commission's authority to implement supervisory or regulatory policies to prevent future harm. And finally, a finding PG & E was violating plaintiffs' property rights would not interfere with the PUC's declared policy of encouraging joint use of PG & E's *facilities even if such finding would be contrary to or inconsistent with a PUC order, and would not constitute a review, reversal, correction, or annulment of the order itself.*

Id. at 358 (emphasis added). The *Koponen* court ruled that "section 1759 presents no bar to plaintiffs' claim for damages incurred as a result of unauthorized uses of the rights-of-way." *Id.* The court also recognized that the PUC does not have the authority to enforce or modify the terms of a utility's rights-of-way. Section 1759, the *Koponen* court ruled, also does not bar plaintiffs from seeking to enjoin PG & E from invading plaintiffs' property interests by licensing or leasing its facilities. Indeed, the PUC conceded:

> "Implicit in this authorization, however, is the assumption that PG & E in fact possesses the legal right to lay such cable alongside its electrical lines. The issue was not presented to the Commission for determination, and no such determination was made. *It is important to note that, in the Commission decisions cited by PG & E, the Commission did not (and could not) authorize PG & E to do more than what is legally permitted under the scope of PG & E's existing easements.*"

Id. at 356 (emphasis added).

Koponen is not an outlier. This Court, in *Hempy v. Public Utilities Commission* (1961) 56 Cal.2d 214, considered whether the PUC had the authority to authorize the transfer of certain highway operating rights "upon condition that specified creditors of the transferring utilities be given preferential treatment in the payment of their claims." *Id.* at 216. The Court held it did not, observing first that the PUC "is nowhere expressly given the power to adjudicate rights between a public utility subject to its regulatory powers and its general creditors or those asserting contract rights against it." The *Hempy* court concluded:

> In the absence of a legislative grant to the [PUC] to adjudicate the relative rights of the creditors of a public utility, we can find no

> theory under which it has acquired jurisdiction to do so. In cognate situations we have held that the [PUC] has no jurisdiction to adjudicate contract rights asserted by third parties against a public utility, but the proper forum for such adjudication is the superior court.

Id. at 217-218. The court rendered invalid the condition attached to the transfer. *Id.* at 219.

Time and time again the PUC itself has recognized that property-related disputes, including those challenging matters relating to title or ownership of right-of-way, involve legal questions that are determined by the courts. In *Petition of Golconda Utilities Co.* (1968) 68 Cal. Pub. Util. Corn. 296, the Commission noted that it "is not the forum in which questions of title to real property should be litigated. The Superior Court is one of general jurisdiction possessing legal and equitable powers and can adjudicate the question of ownership." *Id.* at p. 310.

This Honorable Court's review is required to resolve the conflicting conclusions of the appellate courts when applying the same law to nearly identical facts to secure uniformity of decisions.

C. The Court of Appeal's Opinion Turns the *Covalt* Test on its Head, Thereby Opening The Door To The Nulllification of Private Property Rights Whenever the PUC Desires

The Court of Appeal also applied the *Covalt* analysis in reverse, by starting its inquiry "by identifying what the plaintiff's action would 'hinder or interfere' with, and then determine whether that is a 'policy.'" Slip Opinion at 11. Applied in reverse by the Court of Appeal, the *Covalt* test became a tool to rationalize a desired result by allowing the Court of Appeal to point to a series of broad, amorphous environmental and aesthetic goals having no bearing on the crux of the City's underlying complaint. The Court's misapplication of the *Covalt* test begs for this Court's review because this decision allows the PUC to rationalize its action (and thereby avoid Superior Court jurisdiction under section 1759) by pointing to policies having no bearing on the issues underlying complaint's allegations, as both the PUC and the Court of Appeal did here.

The complaint alleges that SCE intends to violate its easement interests by doubling in size the current transmission towers on the City's property, and that this doubling materially and unreasonably increases the burden of its easements on the City's underlying fee estates and leasehold interest. There is no regulatory policy (and neither SCE nor the Court of Appeal cite to one) promulgated by the PUC governing the easement widths necessary to install and operate Segment 8A's 200-foot by 60-foot steel transmission facilities.

Perhaps recognizing this inherent deficiency, the Court of Appeal pointed to a random assortment of overarching polices that have no bearing on the underlying complaint, including "the state's renewable energy policies, [the PUC's] policy in favor of placing new transmission lines in existing rights of way, and its environmental policies." Slip Opinion at 13. Relying on these broad goals, the Court of Appeal stated matter-of-factly "that the injunctive and declaratory relief that the City is seeking would interfere with that policy determination." *Id.* Going in reverse, the Court of Appeal never undertook the analysis required by the first two prongs of the *Covalt* test.

Justice King's concurrence further illustrates the problem with reversing the *Covalt* test. Disagreeing with the majority, the concurrence rightly noted that the Superior Court is the proper tribunal to adjudicate whether the TRTP materially and unreasonably increases the burden of the easement on the City's underlying fee. Such jurisdiction, according to the concurrence, only extends so long as the adjudication of property rights does not hinder or frustrate the PUC's exercise of its regulatory powers. Slip Opinion at 5 (con. opn. of King, J.).

Like the majority, the concurrence ignores the first and second prong of the *Covalt* test. Specifically, Justice King notes that the discussion of the requirement in *Covalt* that there be a policy in place relative to the TRTP is irrelevant. Slip Opinion, p. 4. Justice King states that because the PUC has jurisdiction over the siting and design of transmission lines and issued a decision authorizing the construction of the TRTP, the superior court cannot enjoin the installation. But this conclusion ignores the *Covalt* progeny, including *Koponen,* in which the court

upheld an injunction against the lease of transmission towers even though the PUC had a policy promoting the joint use of facilities. *Koponen*, 165 Cal.App.4th at 358. The case law is clear that for the trial court to be divested of jurisdiction, the legal relief sought must impede, frustrate, contradict or otherwise interfere with PUC policies. Given the confusion in the application of the *Covalt* test, even within this one Court of Appeal panel, it is important for this Court to clarify whether the *Covalt* test must be applied in order.

D. Policy Goals with No Regulatory Impact Cannot Bar the City's Property Rights Action

As noted above, because there is no policy governing the width of the right of way that is required for installing two hundred foot towers in residential areas, the Court of Appeal relied on broad goals (renewable energy, environmental and aesthetic goals) to circumvent the trial court's jurisdiction. The fact that a PUC policy (or goal) may tangentially relate, as do the policies identified in the Court of Appeal, to the subject matter of the underlying lawsuit is not enough to divest the trial court of jurisdiction. Indeed, "the mere possibility of or potential for, conflict with the PUC is, in general, insufficient in itself to establish that a civil action against a public utility is precluded by section 1759." *People ex rel. Orloff v. Pacific Bell* (2003) 31 Cal.4th 2, 1138.

Neither *Covalt,* nor any of its progeny, consider policy goals of the type that SCE asserts – such as the timely meeting of renewable energy goals or the preference that existing rights of way be utilized whenever possible for transmission lines. Those goals, while commendable, are a far cry from the supervisory or regulatory policies targeted in lawsuits where the Court found the trial court's jurisdiction lacking, such as in *[Decision 97-01-044] Re San Diego Gas And Electric Company* (1997) 70 Cal.P.U.C.2d 693, 694 cited in *Sarale v. Pacific Gas & Elec. Co.* (2010) 189 Cal.App.4th 231, 238 (promulgating PUC's uniform policy on safe tree trimming distances) or *[Decision 93-11-013] Re Potential Health Effects of Electric and Magnetic Fields of Utility Facilities* (1993) 52 Cal.P.U.C.2d 1, 1993 WL 561942 (*Electric and Magnetic Fields*) cited

in *Covalt, supra.*, 13 Cal.4th 893, 930. To interpret *Covalt* to protect the types of policy goals relied on by the Court of Appeal would pose a sweeping extension of the *Covalt* holding that would swallow the rights of all property owners who get in the way of a PUC policy goal.

Indeed, this Court has thrice before rejected the contention that allegations of a complaint simply touching on a PUC policy, regardless of how remote its connection may be to a PUC order or policy, will not divest the trial court of jurisdiction. *See People ex rel. Orloffv. Pacfic Bell* (2003) 31 Cal.4th 2 (the "mere possibility of or potential for, conflict with the PUC is, in general, insufficient in itself to establish that a civil action against a public utility is precluded by section 1759."); *Hartwell Corp. v. Superior Court* (2002) 27 Cal.4th 256, 276 (High court allowed plaintiffs to pursue damages claims for the utility's past violations of water quality standards, even where the PUC had preliminarily found that the water utilities were in compliance); *Wallace Ranch Water Co. v. Foothillitch Co.* (1935) 5 Cal.2d 103, 121-122 (Supreme Court expressly affirmed portion of the judgment resolving an easement dispute between the parties). Those cases where a superior court action was deemed preempted turned on the fact that the plaintiff's claims effectively interfered with a properly-enacted PUC regulatory policy or order involving the same subject matter. Such is not the case here. Accordingly, this Honorable Court's review is necessary to address an issue of statewide public importance: whether, under *Covalt*, the PUC can rely on broad public policy goals to bar a party from the superior court.

III. SUMMARY OF RELEVANT PROCEDURAL AND FACTUAL HISTORY

Plaintiff City filed a complaint on February 25, 2009, seeking declaratory and injunctive relief against SCE. JA, vol. I, tab 1, p. 9. The complaint alleged that SCE intends to violate easements by doubling in size the current transmission towers on the City's property, and that this doubling materially and unreasonably increases the burden of its easements on the City's underlying fee estates and leasehold interest ("City Property"). JA, vol. I, tab 1, pp. 5-7. The City conceded

that SCE is the holder of eleven (11) one hundred and fifty-foot wide (150) easements (the "SCE's 150 Foot Easements"). Slip Opinion at 3; JA, vol. I, tab 1, p. 3, ¶ 8. The SCE 150-Foot Easements allow SCE to "construct, reconstruct, maintain, operate, enlarge, improve, remove, repair and review an electric transmission line" with towers, wires and other facilities for the conveyance of electricity over and under the City Property. Slip Opinion at 3; JA, vol. I, tab 1, p. 3. However, SCE's150-foot wide easements are too narrow to accommodate the replacement of the current approximately 100 foot tall steel towers with 198 foot lattice steel towers or poles. JA, vol. I, tab 1, p. 5, ¶¶ 16-17. SCE's actions materially and unreasonably increase the burden of the easement on the City's underlying fee estate. Slip Opinion at 4; JA, vol. I, tab 1, p. 7, ¶ 23.

A. Background

In 1941, SCE purchased easements from various farmers for an "electric transmission line[.]" Slip Opinion at 3; JA, vol. IV, tab 12, pp. 800-898. These easements allowed for enlargement and reconstruction, but each easement contained unique reservations, and most reserved the right for the grantor to cultivate the land underneath. JA, vol. IV, tab 12, p.796, ¶ 7. Some reservations were very specific. For example, one limited SCE to two towers on that particular easement. JA, vol. IV, tab 12, p. 815. Shortly thereafter, SCE built its Chino-Mesa 220 kV transmission line within the 150 foot wide right-of-way easements it had purchased. Slip Opinion at 4; JA, vol IV., tab 11, p. 786, ¶ 13. At the time the lawsuit was commenced, the towers were approximately 30-feet wide and 100-feet tall. Slip Opinion at 3; JA, vol. I, tab 1, p. 4, ¶ 13.

Now, approximately sixty years later, three miles of that line traverse residential neighborhoods in which there are approximately 1046 homes that are located less than 500 feet from the proposed line. JA, vol. I, tab 1, p. 5, ¶ 16. The City now owns in fee much of the property underlying the Chino-Mesa 220 kV transmission line. Slip Opinion at 3; JA, vol I, tab 1, pp. 2-3, ¶ 6-8. The City currently uses the City Property for parks and recreational uses including tot lots,

open space and multi-purpose trails for hiking, biking and equestrian use. Slip Opinion at 3; JA, vol. I, tab 1, p. 2, ¶ 6.

B. Summary of Overburdening Allegations

On June 29, 2007, SCE filed with the PUC an application for a Certificate of Public Convenience and Necessity ("CPCN") to construct segments 4 through 11 of the TRTP. Slip Opinion at 4; JA, vol. I, tab 1, pp. 4-5. The TRTP will deliver electricity from new wind farms in the Tehachapi area of eastern Kern County to the Los Angeles Basin. Slip Opinion at 4; JA, vol. I, tab 1, pp. 5-6, ¶ 14. Segment 8A of the TRTP consists primarily of rebuilding the existing Chino-Mesa 220 kV transmission line with 500 kV double circuit structures along a route that traverses the City. Slip Opinion at 4; JA, vol. I, tab 1, p. 5, ¶ 15. SCE towers can collapse and SCE poles can fall, and the increase in height to 198 feet means that such a fall, emanating from the center of the 150 foot right of way, could impact an area over 120 feet outside of the right of way in the SCE 150 Foot Easements. Slip Opinion at 4; JA, vol. I, tab 1, pp. 5-6, ¶ 18. The scale of this potential safety impact is multiplied given the close proximity to schools, City streets, churches, parks and residential homes. Slip Opinion at 4; JA, vol. I, tab 1, pp. 5-6, ¶ 18.

The City holds a leasehold interest in property which authorizes the City to construct, operate and maintain a Community Center on property owned by the County of San Bernardino (the "Leased Property"). Slip Opinion at 4; JA, vol. I, tab 1, p. 6, ¶ 19. Because SCE has now disallowed parking under the SCE Easements, the programming capabilities at the Community Center Property were reduced to such an extent that it was no longer practicable to operate a community center at the Leased Property. *Id.*

C. Procedural History

On February 25, 2009, Petitioner City filed its Verified Complaint for Declaratory and Injunctive Relief. Slip Opinion at 6; JA, vol. I, tab 1, p. 1. Respondent SCE filed a demurrer on grounds claiming that the PUC had "primary jurisdiction" over the matter while its application for a CPCN to construct the

TRTP was pending before the PUC and that the case was not yet ripe. Slip Opinion at 6; JA, vol. I, tab 2, p. 51, lns. 6-28. The court overruled SCE's demurrer - including SCE's "primary jurisdiction" argument - but imposed a stay on the case pending a decision by the PUC on the TRTP as to whether the alternative chosen would be objectionable to the City. JA, vol. IV, tab 8, p. 781. At that time, the court observed that "I am aware that the PUC does not resolve property disputes[.]" RT, p. 13, lns. 27-28.

On January 22, 2010, the court lifted the stay because in December of 2009 the PUC chose the SCE-proposed alternative for the TRTP which the City alleged overburdened the City's easements. Slip Opinion at 6; JA, vol. IV, tab 10, p. 783.) SCE filed an Answer and a Cross-Complaint. JA, vol. IV, tab 11, p. 784 and tab 12, p. 794. The City filed an Answer to the Cross-Complaint. JA, vol. IV, tab 13, p. 900.

SCE filed a Motion for Judgment on the Pleadings. Slip Opinion at 6; JA, vol. IV, tab 14, p. 908. SCE premised its motion on the grounds that the trial court had no jurisdiction over the City's complaint because Public Utilities Code Section 1759 divested it of jurisdiction; and that SCE's easement rights were sufficient as a matter of law for the construction, operation and maintenance of the TRTP. JA, vol. VIII, tab 4, p. 913, ln. 6 to p. 914, ln. 17.

The trial court granted SCE's Motion for Judgment on the Pleadings. Slip Opinion at 6; JA, tab 20, p. 1764. The trial court ruled that the PUC, subject to appellate review, had exclusive jurisdiction of this real property dispute because all three of the *Covalt* findings were met. RT, p. 26, ln. 13 - p. 27, ln. 7; p. 35, lns. 16-17. Judgment was filed on May 24, 2010 (Slip Opinion at 6; JA, vol. VIII, tab 24, p. 1785), and Notice of Entry of Judgment was filed and served by SCE on June 3, 2010. JA, vol. VIII, tab 25, p. 1788.

On June 4, 2010, the City filed the Notice of Appeal from the Judgment on the Pleadings. JA, vol. VIII, tab. 27, p. 1796. The Fourth Appellate District, Second Division denied the City's Appeal on September 12, 2011. No petition for rehearing was filed with the Court of Appeal.

IV. DISCUSSION

Are SCE's easement rights sufficient to install and operate the nearly 200-foot steel transmission facilities proposed for Segment 8A of the TRTP? The trial court has jurisdiction pursuant to Article VI, Section 1 of the California Constitution and Public Utilities Code Section 2106 to resolve this fundamental question. The trial court is afforded this jurisdiction as long as the City does not seek the direct review, reversal or nullification of a specific PUC order, and any relief granted would not hinder or frustrate any declared regulatory or supervisory policy. *Coval, supra.,* 13 Cal.4th at 914-915. The City does not seek to challenge, undo or invalidate any specific approval by the PUC. Nor does the City seek to frustrate a regulatory or supervisory policy of the PUC. Indeed, no such policy (and the Court of Appeal does not credibly cite to one) is applicable here. The City merely seeks Superior Court review of whether SCE possesses the necessary property rights on which to construct a segment of the TRTP, a ruling implicating the City's fundamental property rights. Cities possess the same rights to enforce property rights against utilities as private parties[2] and the PUC has no right to take property rights away from the City and give them to SCE.

The "right to acquire, own, enjoy and dispose of property is ... a basic fundamental right guaranteed by the Fourteenth Amendment to the United States Constitution." *People v. Beach* (1983) 147 Cal.App.3d 612, 622. As one court explained:

> "[I]t is particularly important that courts, in the exercise of the particular functions imposed upon them by the Constitution, shall scrutinize with care legislation which tends to encroach upon the constitutional guaranties, to the end that the right of the individual to liberty and possession of property shall become, not a mere theory, but shall be maintained as a practical reality. And while it is true that the increasing conflict between the rights of

[2] Gov. Code, § 50335 provides that cities may grant easements to public "upon such terms and conditions as the parties thereto may agree."

> the individual and the general welfare of society presents ofttimes difficult and perplexing problems, nevertheless courts should not and will not permit the violation of those most fundamental rights that underlie our very existence as a nation."

People v. Davenport (1937) 21 Cal.App.2d 292, 297-98.

Under California law, every piece of property is unique and thus damages are an insufficient remedy to the denial of property rights. *Cottonwood Christian Center v. Cypress Redevelopment Agency* (2002) 218 F.Supp.2d 1203, 1229; also see Civ. Code § 3387). A property owner's right to exclude others from his or her property is "'one of the most essential sticks in the bundle of rights that are commonly characterized as property.'" *Dolan v. City of Tigard* (1994) 512 U.S. 374, 384.

Easements allow a property owner to relinquish a limited portion of this right, but the easement holder is obliged to use the property only for the particular purpose allowed by the grant. See, e.g., *Kazi v. State Farm Fire & Casualty Co.* (2001) 24 Cal.4th 871, 881. When an easement is granted, the parties must generally allow changes to the easement for reasonable and consistent future uses to the easement. However, changes in uses that were not reasonably contemplated or which greatly increase the burden are not allowed. *Red Mountain, LLC v. Fallbrook Public Utility Dist.* (2006) 143 Cal.App.4th 333, 350. California, like other states, recognizes that property rights not conveyed in an easement are retained by the underlying landowner. *Pasadena v. California-Michigan Land & Water Co.* (1941) 17 Cal.2d 576, 579. Whether a particular use of an easement by either the servient or dominant owner unreasonably interferes with the rights of the other owner is a question of fact. *Red Mountain, supra.,* 143 Cal.App.4th at 350.

Further, where an easement does not specify the height or voltage of a transmission line – it must be classified as a "floating easement." See *City of Los Angeles v. Howard* (1966) 244 Cal.App.2d 538, 541, fn. 1. Once the parameters of a floating easement are set (as is the case here), they become fixed. *Id.* This prevents the grantors from being left in a "perpetual state of uncertainty" about the

future use of their land. *Woods Irr. Co. v. Klein* (1951) 105 Cal.App.2d 266, 270. Consequently, when SCE built its 100 foot tall transmission line, it "fixed" the placement, voltage and height of its towers along the vertical plane. Both SCE and the owners of the underlying property accepted this configuration by their acquiescence, relied on this configuration by their actions, and are now bound by the line's current parameters. While some enlargement could be anticipated because of the terms of the agreement permitting enlargement, doubling the size in a manner which burdens the City so excessively could not have been. For this reason, among others, construction of the TRTP materially and unreasonably increases the burden of the easement on the City's underlying fee estate. The Court of Appeal ran roughshod over these fundamental property rights when it prevented the adjudication of these issues.

A. The PUC has No Authority To Adopt a "Regulatory Policy" Regarding the Property Rights Of an Entity Not Regulated by The PUC That Bars a Superior Court Action

The Court of Appeal properly assumed that the PUC "lacked jurisdiction to "adjudicate" private property rights (Slip Opinion, p 2), but went on to hold that the PUC could do just that: the PUC did has "authority to make a finding regarding such rights, when doing so is cognate and germane to the exercise of its broad constitutional and statutory powers to regulate public utilities." Slip Opinion, p. 3. As its primary support, the Court of Appeal relied on *Camp Meeker Water System, Inc. v. Public Utilities Com.* (1990) 51 Cal.3d 845. (Slip Opinion, p. 19.) *Camp Meeker,* however, does not support the Court of Appeal's reliance. Indeed, the *Camp Meeker* court stated specifically:

> [I]t appears that, in the exercise of its rate-making authority, the commission has done no more than construe deeds conveying real property and easements to petitioner and its predecessor. It has done so in the same manner that a court or agency construes any written instrument for the purposes of ascertaining facts relevant to the merits of the application for increased rates, and not for the purpose of resolving disputes between parties claiming rights under the deeds, or to enforce rights conveyed by those deeds. The

> commission acknowledges that it does not have jurisdiction equivalent to that of a court, to adjudicate incidents of title, and that is would be bound by a judicial ruling a quiet title action brought by any person claiming in interest in the subject property who believes the commission's ruling clouds his title.

In *Camp Meeker,* the Supreme Court reviewed a PUC decision and held that the PUC, in the exercise of its ratemaking authority, had done no more than construe deeds conveying real property and easements in the same manner that a court or agency construes any written instrument for the purpose of ascertaining facts relevant to the merits of the application for increased rates but *not* for the purpose of resolving disputes between parties claiming rights under deeds or to enforce rights conveyed by those deeds. Indeed, the PUC "expressly recognizes that its functions do not include determining the validity of contracts, whether claims may be asserted under a contract, or interests in or title to property, those being questions for the courts. It claims only the power to construe, for purposes of exercising its regulatory and ratemaking authority, the existing rights of a regulated utility." *Id.* at 861.

It is also important to note that Camp Meeker, the regulated utility, sought a rate increase before the PUC on the ground that it would have to lease additional wells from the neighboring Chenowith parcel. But the Chenowiths were the sole owners of Camp Meeker. Hence, the *Camp Meeker* court was not construing a deed as between a regulated utility and private property owner, as is the case here. See *id.* at 862.

The PUC can construe easements for the purpose of ratemaking, and the *Camp Meeker* case is limited to these grounds. Thus, the finding the PUC makes has no bearing or effect on the actual contractual right outside of the PUC. The PUC decision finding that the easement rights allowed for the construction of the TRTP on City property cannot bar the City's trial court action.

The PUC does not have the requisite authority to decide property rights claims raised by a non-regulated entity such as the City. *Koponen, supra.,* 165 Cal.App.4th 34,5 further establishes this point. As discussed above, the complaint

in *Koponen* alleged that PG & E owned easement rights over plaintiff's property to supply electricity and that by leasing its facilities to telecommunications companies, PG & E exceeded the scope of the easement and increased the burden on the servient estate. Ruling that Public Utilities Code Section 1759 deprived it of jurisdiction, the trial court sustained the utility's demurrer.

In reversing, the *Koponen* court rejected PG & E's argument. The court held that "the PUC has no regulatory authority or interest in private disputes over property rights between PG & E and private landowners." *Id.* at 353; *see also, e.g., Oakland v. El Dorado Terminal Co.* (1940) 41 Cal.App.2d 320, 328 (statutes "prohibiting public utilities from conveying rights, property or accessories, presupposes legal title thereto").

The PUC itself recognizes that it lacks the authority to resolve property disputes between utilities and private landowners, including challenges related to the ownership of rights-of-way. As noted above, in *Koponen*, the PUC actually submitted an amicus curiae brief which stated so. *Id.* at 356.

The Court of Appeal attempted to distinguish *Koponen* in two ways, and both fail. The Court of Appeal relied on what it referred to as *dicta* in *Koponen* by noting that the PUC had not made any ruling on the issue of easement rights in that case. Slip Opinion, 16-17. Specifically, the *Koponen* court noted that if such rights had been addressed by the PUC, then the outcome might have been different. *Koponen, supra.*, 165 Cal.App.4th at 351. The majority of the Court of Appeal used this statement to distinguish *Koponen* from this case, citing that one of the easements was submitted into evidence at the PUC and there was testimony about the easements. J.A., vol. V, p. 1030. On that basis the PUC determined that SCE possessed the property rights to build the TRTP on City property. Slip Opinion, p. 16; J.A., vol. V, tab 16, p. 1030. But the PUC does not possess the right to resolve property rights for other than its own rate-making and regulatory purposes. Because it does not, then a ruling by the PUC purporting to pass upon the property rights of a non-regulated entity cannot be used to take jurisdiction of a real property case from the trial court and give it to the PUC.

The second basis on which the majority claims that this case is distinguishable from *Koponen,* is that in this case there is interference with a PUC policy, whereas in *Koponen* there was not. Slip Opinion, 16. However, as discussed more fully in Section IV.C. below, this claim fails as well because there is no such policy in this case.

B. The Court of Appeal's Holding That The Superior Court Lacked Jurisdiction To Resolve This Property Rights Question Results From a Flawed Application of the *Covalt* Test

In finding that the trial court lacked jurisdiction to hear the City's case, the Court of Appeal misapplied the *Covalt* test, *supra.*, 13 Cal.4th 893, 914-915. The *Covalt* test asks: (1) whether the PUC the authority to adopt a regulatory policy, (2) whether the PUC has exercised that authority, and (3) whether the superior court action would interfere with the PUC's regulatory authority. Only if each of these questions is answered in the affirmative will an action be barred under Section 1759. This test is a mechanical, objective test, but the Court of Appeal majority opinion started at the end and identified what the City's action would interfere with, and then traced that back to determine what the policy would be. Slip Opinion at p. 11. When a test has to be applied in reverse order to achieve the desired result, that is a good indication that the test cannot be met when applied properly.

The majority cites *Hartwell Corporation v. Ventura County* (2002) 27 Cal.App.4th 256 for support for this reversal of the test. But *Hartwell* does not at all stand for this proposition. The court in *Hartwell* did not look to the impact of a court decision on the policy to determine what the policy was. Rather, the court in *Hartwell* knew exactly what the policy was and stated it up front. The *Hartwell* court devoted 6 pages (from 266-272) to discussing the development of that regulatory policy. In *Hartwell*, the regulatory policy that the court identified set specific standards for water quality. *Id.* at 271. It was [PUC] General Order no. 103, first issued in 1956 and modified over years of study. *Id.* It applied to all regulated water utilities across the State. *Id.* Only after the court determined that

there was such a policy, that the PUC had the authority to adopt it and that the PUC had exercised that authority, did the court then ask the question – would the state court action hinder or interfere with that policy. *Id.* at 266-72. Only at that point did the court determine the injunction in that case would hinder the PUC's regulatory policy on water quality because the PUC had determined the water quality standard already.

The *Covalt* test does not work in reverse. When reversed as this court proposes, it becomes a tool for rationalizing the result that the PUC wants to achieve. That is because the Public Utilities Commission's purpose is to weigh beneficial policy goals in coming to a decision, so a trial court decision on any matter is bound to conflict with a PUC policy goal.

C. Further, the *Covalt* Test Cannot Be Met by Identifying Policy Goals With No Regulatory Impact

The California Supreme Court, recognizing a potential conflict between Public Utilities Code sections 2106 and 1759, has held that: "[T]he two sections must be construed in a manner which harmonizes their language and avoids unnecessary conflict. Section 2106 reasonably may be interpreted as authorizing only those actions which would not interfere with or obstruct the commission in carrying out its own policies." *Covalt, supra,* 13 Cal.4th at 918. Thus, there are two competing statutes, and in order to bar a superior court action, the Court of Appeal would have to name a policy with which the trial court decision would interfere. *Covalt* very specifically holds that such a policy must be a "regulatory or supervisory policy." *Covalt, supra,* 13 Cal.4th at 918-919; see also *Hartwell Corp. v. Superior Court* (2002) 27 Cal.4th 256, 275.

However, the PUC has never set forth a policy guidance on the width of the right of way that is required for installing two hundred foot towers in a dense residential area. And why would there be? No one has ever installed a 200-foot high double-circuit 500,000 volt transmission line on a 150 foot wide easement in a dense residential community anywhere in the country. JA, vol. I, tab 1, p. 6, ¶ 21. In fact, in the past, in at least one eminent domain case, an engineer testified

that an easement 200 feet wide would be necessary for a single 500 kV transmission line. *Pacific Gas & Electric Co. v. Parachini* (1972) 29 Cal.App.3d 159, 164.

Because the PUC has not studied and adopted such a policy, the Court of Appeal is forced to argue that policy goals of timely completion of renewable energy goals and the Garamendi principles that prefer the use of existing right-of-way would be hindered by a trial court decision in this case. Slip Opinion, pp. 12-13. However, these are not the kind of policies protected by *Covalt,* and a trial court decision would not hinder them in any event as noted in Section V.D. below. It is unfortunate that the English language allows the term "policy" to mean two very different but related concepts which leads to this confusion.[3] The Court of Appeal erroneously uses these terms interchangeably.

In *Covalt*, the court described the type of policy that would bar a private damages action as follows:

> "When the bar raised against a private damages action has been a ruling of the commission on a single matter such as its approval of a tariff or a merger, the courts have tended to hold that the action would not 'hinder' a 'policy' of the commission within the meaning of *Waters* and hence may proceed. But when the relief sought would have interfered with ***a broad and continuing supervisory or regulatory program of the commission***, the courts have found such a hindrance and barred the action under section 1759."

Covalt, supra, 13 Cal.4th at 918-919 [emphasis added]; see also *Hartwell Corp. v. Superior Court* (2002) 27 Cal.4th 256, 275.

Sarale, *Waters* and *Covalt* and the other cases that follow *Covalt* all provide examples of what is meant by a "broad and continuing supervisory or regulatory program." These are clearly distinguishable from the policy goals and objectives at issue in this case. Regulatory policies are adopted after years of

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[3] Definitions, *inter alia*, of "policy" in online Merriam-Webster Unabridged Dictionary (Feb. 25, 2011): "**a :** a definite course or method of action selected from among alternatives and in light of given conditions to guide and determine present and future decisions;][**b :** a high-level overall plan embracing the general goals and acceptable procedures especially of a governmental body."

study of the practices of all utilities, and they apply across the board to all utilities in places all over the state.

The regulatory policy at issue in *Sarale v. Pacific Gas & Elec. Co., supra.*, 189 Cal.App.4th 225, provides the most recent and prime example of the type of policy *Covalt* was concerned with. In *Sarale*, the court barred claims that a power utility had engaged in excessive tree trimming because the utility had acted under guidelines or rules on tree trimming set forth by the PUC. The court explains in great detail how the PUC had studied and modified the applicable regulatory rule, Rule 35 of General Order No. 95, which specifically governs tree trimming. "Prompted by the "unfortunate fatality" of a farm worker" in 1994 the PUC studied and investigated tree trimming practices of all other investor-owned California electric utilities to ensure that [its] investigation would have statewide scope and effect. *Id.* at 238-39. Only after a three-year review did it adopt a table of specific clearances and minimum standards. *Id.* It is also noteworthy that the modification also provided that the rule did "not apply where the utility has made a 'good faith' effort to obtain permission to trim or remove vegetation but permission was refused or unobtainable." *Id.* at 239.[4]

In *Covalt*, the plaintiffs alleged that the use and enjoyment of their property had been impaired by the fear that the EMF's would cause them physical harm. *Id.* at p. 939. The Supreme Court found, "the commission has exercised-and is still exercising-its constitutional and statutory *authority to adopt a general policy on whether electric and magnetic fields arising from the power lines of regulated utilities are a public health risk and what steps, if any, the utilities should take to minimize that risk.*" *Id.* at p. 935 (emphasis added). Specifically, the court detailed the years of studies and investigations (*id.* at 926-934) and noted that the EMF policy was:

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[4] *Covalt* applied to bar the property rights action in *Sarale*, because this case was facially about property rights, but the sole underlying issue in that case was about a well-established and studied PUC regulatory policy – the safe height of tree-trimming under transmission lines - that the PUC had the authority to issue.

> "[R]eached after consulting with [the Department of Health Services], studying the reports of advisory groups and experts, and holding evidentiary hearings, that the available evidence does *not* support a reasonable belief that [the EMF's to which the plaintiffs had been exposed] present a substantial risk of physical harm, and that unless or until the evidence supports such a belief regulated utilities need take no action to reduce field levels from existing powerlines."

Id. at 939.

Another example is *Waters v. Pacific Telephone Co.* (1974) 12 Cal.3d 1. In *Waters*, the plaintiffs sued a telephone company in superior court for failing to furnish adequate telephone service. *Waters* affirmed the judgment of nonsuit despite the fact that the plaintiff's action for damages for telephone service interruptions did not directly contravene any order or decision of the commission because "the commission has approved a *general policy of limiting the liability of telephone utilities for ordinary negligence to a specified credit allowance*, and had relied upon the validity and effect of that policy in exercising its rate-making functions. [Citation.]" *Id.* at 10, [emphasis added].

All of the policies cited in these cases have a specific, regulatory purpose that was studied carefully and apply across the board to every regulated utility wherever they are in California. Regulating EMF uniformly, limiting the liability of telephone utilities for ordinary negligence to a specified credit allowance, and the tree-trimming away from power lines are all generally applicable supervisory and regulatory policies that tell the utilities: "You must do "x." "

This is in contrast to the policy goals cited by the Court of Appeal. "Timely" completion of renewable projects and the Garamendi principles which state a preference for the use of existing right-of-way to build transmission lines are admirable goals that guide PUC decisions. But they do not require every utility to do one specific thing one way. These policy goals do not have a regulatory purpose. If this Court were to so broadly construe *Covalt*, then policy goals would swallow up any right that could possibly impinge on them. If this were the law, nobody could ever object when the PUC needed a transmission line built quickly, or in existing ROW, whether on real property grounds or for any

number of reasons. As long as there was a well-intended policy goal to cite, this sweeping argument would obliterate all private rights in its path.

D. Resolution of the City's Claims Would Not Frustrate Any Policy of the PUC Nor Would It Interfere with Any PUC Order

Contrary to the holding in the Court of Appeal decision that the City's lawsuit could hinder a policy of the PUC (Slip Opinion, p. 11), the mere existence of a PUC decision or policy touching in some way upon the subject of the challenged lawsuit is not enough to divest the trial court of jurisdiction. As stated in the *Koponen* case: "Any suggestion in a [PUC] order that PG&E acted properly in leasing or licensing the use of its right-of-way in a specific case is not part of an identifiable broad and continuing supervisory or regulatory program. *Koponen*, *supra*, 165 Cal.App.4th at 358. Indeed, the trial court retains jurisdiction over certain claims even in the face of a PUC decision arising from the very same events underlying the lawsuit. *Hartwell Corp., supra,* 27 Cal.4th 256.

The *Hartwell* court applied the *Covalt* three-part analysis to an action for injunctive relief and damages for injuries sustained by alleged harmful chemicals in drinking water. The *Hartwell* court answered the first two questions affirmatively, ruling that the PUC had authority to enforce water quality standards and found that the PUC exercised ongoing regulatory authority over water service, including opining on what constitutes adequate compliance with applicable standards.

As to the third factor, however, the court ruled that plaintiff's challenge "would not interfere with any ongoing PUC regulatory program" because Section 2106 authorized the PUC to act in aid of, rather than in derogation of, the PUC's jurisdiction. And the Court made clear:

> When the bar raised against a private damages action has been a ruling of the commission on a single matter ..., the courts have tended to hold that the action would not 'hinder' a 'policy' of the commission within the meaning of *Waters* and hence may proceed.

Hence, the court concluded, even if a jury award of damages would seemingly contradict the PUC's finding regarding defendants' compliance with water quality standards, it would only "be contrary to a single PUC decision, it would not hinder or frustrate the PUC's supervisory and regulatory policies. *Id.* at 277-278.

As noted, the City does not challenge the PUC's decision on the TRTP project. Nor does the City challenge the policies underlying the TRTP project. The City does not directly, or even indirectly, seek from the trial court review or reversal of the PUC's decision that the TRTP project falls within the public's convenience and necessity. The City challenges only whether SCE possesses the underlying legal authority to construct and install its facilities within its existing easements.

For example, if this Petition is successful, this case is remanded back to a trial court, and that trial court rules that SCE does not have the requisite property rights to construct Segment 8A of the TRTP, then the PUC will merely have to factor the impact into its decision. The TRTP will likely become more expensive, but if the PUC still wants the TRTP, SCE can bring condemnation actions for identified property (Pub. Util. Code, § 612), and it can raise the rates paid by the ratepayers to obtain and pay for additional property rights (Cal.Const., art. XII, § 2, 4, 6). In sum, resolution of the City's claims will not frustrate or impede any function or declared policy within the regulatory or supervisory function of the PUC.

V. CONCLUSION

For all the reasons set forth above, the City respectfully requests that this Honorable Court grant review.

Dated: October 24, 2011

Respectfully submitted,

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CERTIFICATE OF WORD COUNT
(California Rules of Court, Rule 8.504(d)(1)

The text of this Petition for Review, excluding face page, table of contents and table of authorities consists of 8,375 words as counted by the Microsoft Word word-processing program used to generate the brief.

Elizabeth M. Calciano

See Concurring Opinion

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

CITY OF CHINO HILLS,

Plaintiff and Appellant,

v.

SOUTHERN CALIFORNIA EDISON COMPANY,

Defendant and Respondent.

E051033

(Super.Ct.No. CIVRS901914)

OPINION

APPEAL from the Superior Court of San Bernardino County. Keith D. Davis, Judge. Affirmed.

Jenkins & Hogin, Mark D. Hensley, John C. Cotti, and Elizabeth M. Calciano for Plaintiff and Appellant.

Leon Bass, Jr.; Latham & Watkins, James L. Arnone, Laura A. Godfrey, Adrianna B. Kripke; Willenken, Wilson, Loh & Lieb, Jason S. Wilson and Nhan T. Vu for Defendant and Respondent.

The Public Utilities Commission (the Commission or PUC) issued a certificate of public convenience and necessity and adopted a final environmental impact report for a proposed electrical transmission line running from Kern County to Los Angeles County. In the course of doing so, it approved a route that involved running the line through the City of Chino Hills (the City), using easements that the proponent of the project, Southern California Edison Co. (SCE), already owned.

Meanwhile, the City had filed this action against SCE. The City alleges that the construction of the transmission line would exceed the scope of the easements, would interfere with the use of the City's property, and would threaten the safety of people and buildings nearby. The trial court ruled that the action was barred by Public Utilities Code section 1759 (section 1759), which forbids a trial court "to review, reverse, correct, or annul any order or decision of the commission . . . ."

The City appeals. It contends that section 1759 does not apply because the Commission has no authority to adjudicate private property rights, and therefore allowing this action to proceed would not interfere with any order or regulatory policy of the Commission. It further contends that the trial court's ruling is unconstitutional because it violates the judicial powers clause of the California Constitution, it results in a taking of property without just compensation, and it violates the right to trial by jury.

We will hold that this action did threaten to interfere with multiple policies of the Commission, as embodied in its decision, and hence that the action was barred under section 1759. Assuming the Commission lacks jurisdiction to "adjudicate" private

property rights, it does have the authority to make a finding regarding such rights, when doing so is cognate and germane to the exercise of its broad constitutional and statutory powers to regulate public utilities. And even if, under section 1759, a decision of the Commission bars an action regarding private property rights, that does not mean that the Commission has improperly "adjudicated" those rights, has violated the judicial powers clause, has taken property without just compensation, or has violated the right to trial by jury.

Hence, we will affirm.

I

FACTUAL BACKGROUND

Because this is an appeal from a judgment on the pleadings, we take the facts from the City's complaint, as supplemented by matters of which the trial court took judicial notice. (See *Shimmon v. Franchise Tax Bd.* (2010) 189 Cal.App.4th 688, 692-693.)

SCE owns a series of contiguous easements that collectively cut a swath 150 feet wide and five miles long across the City. SCE is entitled to use them to "'construct, reconstruct, maintain, operate, enlarge, improve, remove, repair and review an electric transmission line . . . .'" Within the easements, SCE has built a 220-kilovolt transmission line (not currently used), including towers that are 100 feet tall and 30 feet wide. The City owns much of the property underlying the easements; it uses this property for parks-and-recreation purposes, such as "tot lots," trails, and open spaces.

SCE plans to build what it calls the Tehachapi Renewable Transmission Project (the Project) to deliver electricity from wind farms in Kern County to the Los Angeles area. As part of the Project, SCE proposes to replace the existing 220-kilovolt line with a 500-kilovolt line, which would require towers 198 feet tall and 60 feet wide.

The City alleges that 198-foot tall towers cannot be safely built in the 150-foot wide easements. A tower could fall; if it did, it could land over 120 feet outside the easements. This would pose a threat to nearby homes, schools, churches, parks, and streets. The 198-foot towers will also have "a significant negative aesthetic impact on the City and its residents." The Project will limit the use of the parks, trails, and open spaces that are located in the easements. It will also limit the City's ability to use certain property that it leases for use as a community center.

According to the City, there are less burdensome alternatives to the construction of the Project as planned, including (a) rerouting the line through Chino Hills State Park, (b) running the line at least partially underground, or (c) converting the line as it passes through the City from AC to DC, as DC towers would be roughly similar to the existing towers.

In 2007, SCE applied to the Commission for a certificate of public convenience and necessity for the Project. (See Pub. Util. Code, § 1001.) This required the Commission to prepare an environmental impact report, pursuant to the California Environmental Quality Act (CEQA). The City participated in the proceedings before the Commission. The Commission considered contentions, raised by the City and others, that

the construction of the Project within the easements would be unsafe, would have a negative aesthetic impact, and would interfere with the use of local parks. The Commission also considered alternatives to the proposed Project, including alternatives proposed by the City.

In December 2009, the Commission certified a final environmental impact report and issued a certificate of public convenience and necessity. It concluded that a route running through the easements was the "Environmentally Superior Alternative." It also specifically determined that the easements were wide enough to permit the Project to be built and operated safely. Hence, it authorized SCE to construct the Project using a route that ran through the easements.

The City had argued that the Commission should consider the fact that this then-pending action was likely to delay construction of the Project. It specifically argued that this action was not barred by section 1759. Citing *Koponen v. Pacific Gas & Electric Co.* (2008) 165 Cal.App.4th 345, it asserted that section 1759 would not apply unless the Commission specifically investigated and rejected its claims.

The Commission responded, "We disagree with [the City]'s interpretation of § 1759. Nevertheless, we have considered [the City]'s arguments regarding the [easements]." Based on the sole written easement that the City had offered in evidence, the Commission concluded that the Project was "consistent with the language of the easement . . . ."

II

PROCEDURAL BACKGROUND

In February 2009, the City filed this action against SCE, seeking only injunctive and declaratory relief. The trial court stayed the case "pending a determination by the PUC of the route for the [Project]." In January 2010, after the Commission had approved the route, the trial court lifted the stay. SCE filed an answer alleging, among other things, that the action was barred by section 1759.

SCE then filed a motion for judgment on the pleadings based, in part, on section 1759. The trial court granted the motion without leave to amend. Accordingly, in May 2010, it entered judgment in favor of SCE and against the City.

III

THE TRIAL COURT CORRECTLY RULED

THAT THIS ACTION IS BARRED BY SECTION 1759

The City contends that the trial court erred by ruling that it lacked jurisdiction over the City's claims.

A. *This Action Would Hinder or Interfere with Multiple Commission Policies.*

We begin by placing section 1759 in context. "[T]he Constitution and statutes of this state grant the commission wide administrative, legislative and judicial powers. [Citations.]" (*Southern Pac. Transportation Co. v. Public Utilities Com.* (1976) 18 Cal.3d 308, 311, fn. 2.)

"The Constitution confers broad authority on the commission to regulate utilities, including the power to fix rates, establish rules, hold various types of hearings, award reparation, and establish its own procedures. [Citations.] The commission's powers, however, are not restricted to those expressly mentioned in the Constitution: 'The Legislature has plenary power, unlimited by the other provisions of this constitution but consistent with this article, to confer additional authority and jurisdiction upon the commission . . . .' [Citation.]

"Pursuant to this grant of power the Legislature enacted Public Utilities Code section 701, conferring on the commission expansive authority to '*do all things*, whether specifically designated in [the Public Utilities Act] *or addition thereto*, which are necessary and convenient' in the supervision and regulation of every public utility in California. . . . The commission's authority has been liberally construed. [Citations.] Additional powers and jurisdiction that the commission exercises, however, 'must be cognate and germane to the regulation of public utilities . . . .' [Citations.]" (*Consumers Lobby Against Monopolies v. Public Utilities Com.* (1979) 25 Cal.3d 891, 905.)

Section 1759, subdivision (a) provides: "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 . . . ." A decision

of the Commission is subject only to writ review by a Court of Appeal or the Supreme Court. (Pub. Util. Code, §§ 1756, subd. (a), 1757, 1757.1, 1759.)

"[A]n action for damages against a public utility . . . is barred by section 1759 not only when an award of damages would directly contravene a specific order or decision of the commission, i.e., when it would 'reverse, correct, or annul' that order or decision, but also when an award of damages would simply have the effect of undermining a general supervisory or regulatory policy of the commission, i.e., when it would 'hinder' or 'frustrate' or 'interfere with' or 'obstruct' that policy." (*San Diego Gas & Electric Co. v. Superior Court* (1996) 13 Cal.4th 893, 918, fn. omitted (*Covalt*).)

In *Covalt*, the Supreme Court established a three-part test for determining whether an action is barred under section 1759: (1) "whether the commission has the *authority* to adopt a policy" (*id.* at p. 923; see also *id.* at pp. 923-925); (2) "whether the commission has *exercised* th[at] authority" (*id.* at p. 926; see also *id.* pp. 926-934); and (3) "whether the present superior court action would hinder or interfere with that policy" (*id.* at p. 935; see also pp. 935-943).

Covalt's three-part test, to some extent, begs the question: What is the relevant policy? The City argues that a "policy" is something more than a mere ruling or decision. We agree. "When the bar raised against a private damages action has been a ruling of the commission on a single matter such as its approval of a tariff or a merger, the courts have tended to hold that the action would not 'hinder' a 'policy' of the commission . . . and hence may proceed. But when the relief sought would have interfered with a broad and

continuing supervisory or regulatory program of the commission, the courts have found such a hindrance and barred the action under section 1759." (*Covalt, supra*, 13 Cal.4th at pp. 918-919.)

Hartwell Corp. v. Superior Court (2002) 27 Cal.4th 256 illustrates the distinction nicely. There, the Commission had issued an opinion, following an investigation, that (1) existing drinking water quality standards were adequate to protect the public health and safety, (2) water utilities had complied with these standards, and (3) the water these utilities had provided was "'"in no way harmful or dangerous to health."' . . . " (*Id.* at p. 265.) Meanwhile, the plaintiffs sued some of the utilities, alleging that they had supplied contaminated water and seeking damages and injunctive relief. (*Id.* at p. 261.)

Significantly, the Supreme Court held that section 1759 barred some of the plaintiffs' claims, but not others. For example, it held that their claim for injunctive relief was barred. (*Hartwell Corp. v. Superior Court, supra*, 27 Cal.4th at p. 278.) "As part of its water quality investigation, the PUC determined, not only whether the regulated utilities had complied with drinking water standards for the past 25 years, but also whether they were currently complying with existing water quality regulation. [Citation.] . . . Based on that factual finding, the PUC impliedly determined it need not take any remedial action against those regulated utilities. A court injunction, predicated on a contrary finding of utility noncompliance, would clearly conflict with the PUC's decision and interfere with its regulatory functions in determining the need to establish prospective remedial programs." (*Ibid.*)

Section 1759 also barred any claim for damages sought on the theory that water provided in the past, even though it complied with the existing standards, was unhealthy. (*Hartwell Corp. v. Superior Court*, *supra*, 27 Cal.4th at pp. 275-276.) Such a claim "would interfere with a 'broad and continuing supervisory or regulatory program' of the PUC. [Citation.] . . . [T]he [existing] standards have been used by the PUC in its regulatory proceedings for many years as an integral part of its broad and continuing program or policy of regulating water utilities. As part of that regulatory program, the PUC has provided a safe harbor for public utilities if they comply with the . . . standards. An award of damages on the theory that the public utilities provided unhealthy water, even if the water met [the] standards, 'would plainly undermine the commission's policy by holding the utility liable for not doing what the commission has repeatedly determined that it and all similarly situated utilities were not required to do.' [Citation.]" (*Id.* at p. 276.)

On the other hand, however, section 1759 did *not* bar any claim for damages sought on the theory that water provided in the past failed to comply with the existing standards. (*Hartwell Corp. v. Superior Court*, *supra*, 27 Cal.4th at pp. 276-278.) The Commission's "retrospective finding" that the utilities had complied with these standards in the past "was not part of an identifiable 'broad and continuing supervisory or regulatory program of the commission' [citation], related to such routine PUC proceedings as ratemaking [citation] or approval of water quality treatment facilities." (*Id.* at pp. 276-277.) The Commission itself had characterized its investigation as "'an

information gathering process,'" rather than "'a rulemaking proceeding'" or "'an enforcement proceeding.'" (*Id.* at p. 277.) The court concluded that the Commission's finding of past compliance was not "part of a broad and continuing program to regulate public utility water quality . . . ." (*Ibid.*) Thus, "[a]lthough a jury award supported by a finding that a public water utility violated . . . PUC standards would be contrary to a single PUC decision, it would not hinder or frustrate the PUC's declared supervisory and regulatory policies . . . . [I]t would also not constitute a direct review, reversal, correction, or annulment of the decision itself." (*Id.* at pp. 277-278.)

Under *Hartwell*, then, a given Commission ruling or decision may or may not constitute a "policy," depending on the nature and effect of the plaintiff's particular claims. In other words, in applying the three-part *Covalt* test, rather than starting by identifying a "policy" and then asking whether the plaintiff's action would "hinder or interfere" with that policy, we may start by identifying what the plaintiff's action would "hinder or interfere" with, and then determine whether that is a "policy."

Here, the injunctive and declaratory relief that the City is seeking would interfere with the Commission's decision approving the route for the Project. In *Hartwell*, the Supreme Court held that the utilities could not be held liable for not doing what the Commission had determined that they were not required to do. Here, similarly, SCE should not be held liable for doing what the Commission has determined that it is entitled to do. Indeed, although the Commission has not *required* SCE to construct the Project, it

has determined that public convenience and necessity require the construction of the Project.

Unlike the "retrospective finding" in *Hartwell*, this decision was part of a broad and continuing program of regulation. Under Public Utilities Code section 1001, SCE could not construct a transmission line unless and until the Commission issued a certificate of public interest and necessity. Under former Public Utilities Code section 399.25, subdivision (a), a new transmission line was deemed necessary "if the commission finds that the new facility is necessary to facilitate achievement of [specified statewide] renewable power goals . . . ." (See now Pub. Util. Code, § 399.2.5, subd. (a).)

The Commission had previously established that "to rely on [Public Utilities Code section] 399.25 to establish the need for a project, . . . a proponent must demonstrate: (1) that a project would bring to the grid renewable generation that would otherwise remain unavailable; (2) that the area within the line's reach would play a critical role in meeting the [renewable power] goals; and (3) that the cost of the line is appropriately balanced against the certainty of the line's contribution to economically rational [renewable power] compliance." (*Southern California Edison Co.* (2007) Cal.P.U.C. Dec. No. 07-03-012 [2007 Cal. PUC LEXIS 282, *165].) It concluded that the Project satisfied all three of these requirements.

Moreover, the Commission had to approve the route for the entire Project. In doing so, it had to consider various policy goals, in conformity with CEQA, including not only a myriad of environmental policy goals, but also the feasibility and necessity of the

Project. In the process, it specifically considered the "adverse visual impact" of the Project, the effect of the Project on recreational and park areas, and the risk that a tower might fall.[1] Indeed, the City concedes that the Commission was *required* to consider these objections to the Project.

It also had to consider the so-called "Garamendi principles." These are an uncodified declaration of legislative intent; they state that it is in the public interest "[w]hen construction of new transmission lines is required, [to] encourage expansion of existing rights-of-way, when technically and economically feasible." (Stats. 1988, ch. 1457, § 1, p. 4995; see also Cal. Code of Regs., tit. 20, § 2320.) The Commission specifically determined that "[a]ny individual community's preference to avoid development of transmission infrastructure in its boundaries cannot outweigh these important statewide policy goals . . . ."

In sum, the Commission had to consider, balance, and make tradeoffs among numerous competing policies, including the state's renewable energy policies, its policy in favor of placing new transmission lines in existing rights of way, and its environmental policies. The route that the Commission approved embodies its resolution of a host of policy considerations. The injunctive and declaratory relief that the City is seeking would interfere with that policy determination.

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[1] We do not consider administrative collateral estoppel, which was not raised below. We mention these specific findings here because they illustrate how comprehensive the Commission's consideration of the various competing policies was.

B. *The Commission Had the Authority to Make Findings Concerning the City's Claimed Private Property Rights.*

The City responds that the Commission did not have "the authority to resolve property disputes between utilities and private land owners . . . ." We recognize that "section 1759 deprives the courts of jurisdiction only as to acts undertaken by the commission 'in the performance of its official duties' and not acts in excess of its jurisdiction. [Citations.]" (*Thrifty-Tel, Inc. v. Bezenek* (1996) 46 Cal.App.4th 1559, 1571.) The City, however, does not take the position that the Commission exceeded its jurisdiction. To the contrary, it affirmatively asserts that the Commission did not purport to resolve a private property dispute. Instead, the City's argument seems to be that this action would not interfere with a policy determination because the Commission could not — and, a fortiori, it did not — determine the parties' property rights.

The City relies — as it did before the Commission — on *Koponen v. Pacific Gas & Electric Co.*, *supra*, 165 Cal.App.4th 345. In *Koponen*, the Commission had approved agreements between an electric utility and various telecommunications companies allowing the latter to install fiber optic lines in the utility's easements. (*Id.* at p. 351.) The plaintiffs, who owned the land burdened by the easements, alleged that the installation of fiber optic lines would exceed the scope of the easements. (*Id.* at p. 349.)

The court held that section 1759 did not bar the action.[2] First, it held that the plaintiffs could seek damages, because "the commission has no authority to determine the property dispute between plaintiffs and [the utility], and it does not matter that the commission has approved [the utility]'s applications. The commission certainly can determine that the applications are in the public interest, . . . but neither that finding nor the commission's approval of the applications in any way determined the extent of [the utility]'s rights in the easements. Moreover, even if the commission's decisions might be interpreted as finding [the utility]'s interest in the easements permitted [the utility] to enter into the leases or licenses, [the utility] has not established that the commission's regulatory authority actually allows it to adjudicate private property rights." (*Koponen v. Pacific Gas & Electric Co.*, *supra*, 165 Cal.App.4th at pp. 355-356.)

It also held that the plaintiffs could seek injunctive relief. It distinguished *Hartwell* on the ground that "[i]n that case . . . , the commission had investigated the plaintiffs' claims, had concluded they were unfounded, and effectively found no need to take any remedial action against the utilities. It followed that '[a] court injunction, predicated on a contrary finding of utility noncompliance, would clearly conflict with the PUC's decision and interfere with its regulatory functions in determining the need to establish prospective remedial programs.' [Citation.] In the present case, the commission

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[2] With one exception: Because the Commission had determined how the utility had to allocate its revenues from the agreements, the plaintiffs' claim for "disgorgement" of those revenues was barred. (*Koponen v. Pacific Gas & Elec. Co.*, *supra*, 165 Cal.App.4th at p. 358.)

has made no investigation into the validity of plaintiffs' claims, has made no finding [the utility] has complied with the terms of the grants of its rights-of-way, and has made no determination further action has been rendered unnecessary." (*Koponen v. Pacific Gas & Electric Co.*, *supra*, 165 Cal.App.4th at p. 358.)

Koponen is not controlling here, for two reasons. First, in *Koponen*, the Commission had not made any determination regarding the plaintiffs' claims. Indeed, in an amicus brief, the Commission had conceded that its authorization had been based on "'the assumption that [the utility] possesses the legal right to lay [fiber optic] cable alongside its electrical lines. That issue was not presented to the Commission for determination, and no such determination was made. . . . [T]he Commission did not (and could not) authorize [the utility] to do more than what is legally permitted under the scope of [the utility]'s existing easements.'" (*Koponen v. Pacific Gas & Electric Co.*, *supra*, 165 Cal.App.4th at p. 356.) By contrast, here — much as in *Hartwell* — the Commission did investigate the City's claims; moreover, it rejected them, and it ruled that they should not affect the routing of the Project.

Second, in *Koponen*, there was no interference with any policy of the Commission. The utility argued that there was a regulatory policy in favor "of promoting the joint use of utility property for general telecommunications purposes." (*Koponen v. Pacific Gas & Electric Co.*, *supra*, 165 Cal.App.4th at p. 351.) In its amicus brief, however, the Commission essentially conceded that this policy did not apply unless the utility had the legal right to permit the joint use. Here, we have the exact opposite situation — the

Commission has taken the position that allowing this action to proceed *would* undermine its policies and specifically that section 1759 *does* apply.

According to the City, *Koponen* "establishes" the principle that "the PUC does not have the requisite authority to decide property rights claims raised by a non-regulated entity . . . ." Not so. Admittedly, *Koponen* did state: "Plaintiffs contend the commission has no regulatory authority or interest in private disputes over property rights between [a utility] and private landowners. *We agree.*" (*Koponen v. Pacific Gas & Electric Co., supra,* 165 Cal.App.4th at p. 353, italics added.) Later, however, the court expressed the same concept in more cautious and limited terms. It concluded that, by determining that the utility's applications were in the public interest, the Commission had not actually determined the extent of the utility's interest in the easement; but alternatively, even if it had, "[the utility] *has not established* that the commission's regulatory authority actually allows it to adjudicate private property rights." (*Id.* at pp. 355-356, italics added.) This left open the possibility that this proposition *could* be established in another case.

If the *Koponen* court really did intend to declare that there was no *possible* decision within the Commission's jurisdiction that could *ever* require it to make a finding concerning private property rights, that declaration was dictum. "[T]he language of an opinion must be construed with reference to the facts presented by the case; the positive authority of a decision is coextensive only with such facts. [Citation.]" (*PLCM Group, Inc. v. Drexler* (2000) 22 Cal.4th 1084, 1097, fn. omitted.)

Actually, "[t]he PUC may, and indeed sometimes must, consider areas of law outside of its jurisdiction in fulfilling its duties." (*Greenlining Institute v. Public Utilities Com.* (2002) 103 Cal.App.4th 1324, 1333, fn. 10.) Subject to the "cognate and germane" test (see *Consumers Lobby Against Monopolies v. Public Utilities Com.*, *supra*, 25 Cal.3d at p. 905), it can even make determinations regarding private property rights.

For example, in *Limoneira Co. v. Railroad Commission* (1917) 174 Cal. 232, the Commission[3] set the rate that a water utility could charge a particular customer (Limoneira). (*Limoneira*, at p. 233.) Limoneira claimed that it was entitled to receive the water for free, because a deed from its predecessor in interest to the utility's predecessor in interest had reserved a right to the water. (*Id.* at pp. 239-241.) The Commission ruled that the reservation in the deed was void. (*Id.* at p. 242.)

The Supreme Court agreed that the reservation was void. (*Limoneira Co. v. Railroad Commission of Cal.*, *supra*, 174 Cal. at pp. 241-242.) However, it also stated, "A large part of the briefs of learned counsel for petitioner is devoted to discussion of a claim that the . . . commission was without jurisdiction to determine any question as to the validity of petitioner's asserted rights of property in regard to the waters claimed by them

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[3] At the time, the PUC was known as the Railroad Commission: "In 1911, the PUC was established by Constitutional Amendment as the Railroad Commission. In 1912, the Legislature passed the Public Utilities Act, expanding the Commission's regulatory authority to include natural gas, electric, telephone, and water companies as well as railroads and marine transportation companies. In 1946, the Commission was renamed the California Public Utilities Commission." (<http://www.cpuc.ca.gov/PUC/aboutus/puhistory.htm>, as of July 6, 2011.)

in good faith. In view of the provisions of our constitution and the Public Utilities Act, and our decisions thereunder, we do not see how it can be doubted that the . . . commission had the power to determine for the purposes of the exercise of its jurisdiction to regulate a public utility by the fixing of rates, subject to such power of review as is possessed by this court, all questions of fact essential to the proper exercise of that jurisdiction." (*Id.* at p. 242, italics omitted.)

More recently, in *Camp Meeker Water System, Inc. v. Public Utilities Com.* (1990) 51 Cal.3d 845, a water utility sought a rate increase, arguing that it needed to lease wells on certain property. (Significantly, the owners of the utility were also the owners of the property.) The Commission denied the rate increase, finding that, under two 1951 deeds, the utility already owned an easement entitling it to water from the same property. (*Id.* at pp. 850-851; see also *id.* at pp. 852-861.)

The Supreme Court defined the issue as "whether . . . the [Commission] has jurisdiction to adjudicate interests in real property, and, if so, the effect of such adjudication on the interests of persons who are not regulated utilities in that property." (*Camp Meeker Water System, Inc. v. Public Utilities Com.*, *supra*, 51 Cal.3d at p. 849.) As the court noted, "The commission acknowledges that it does not have jurisdiction equivalent to that of a court, to adjudicate incidents of title . . . ." (*Id.* at p. 850.) "Rather, it purports only to have construed the existing legal rights of [the water utility], and disclaims any power to create new rights. The commission expressly recognizes that its functions do not include determining the validity of contracts, whether claims may be

asserted under a contract, or interests in or title to property, those being questions for the courts. [Citations.] It claims only the power to construe, for purposes of exercising its regulatory and ratemaking authority, the existing rights of a regulated utility." (*Id.* at p. 861.) The court concluded: "In construing the 1951 deeds for that purpose, the commission acted within its constitutional and statutory jurisdiction." (*Ibid.*)[4]

Camp Meeker did not involve any issue regarding section 1759. It is conceivable that, through the operation of section 1759, a determination by the Commission may have the practical effect of "adjudicating" a private property right. For example, in *Hartwell*, the Commission's findings precluded the plaintiff's from bringing certain tort claims (see *Hartwell Corp. v. Superior Court*, *supra*, 27 Cal.4th at p. 261) on certain theories, and thus, in a sense, "adjudicated" those claims.

Similarly, in *Ford v. Pacific Gas & Electric Co.* (1997) 60 Cal.App.4th 696, the Commission had adopted a policy regarding electromagnetic fields, which included a finding that current scientific evidence did not establish that electromagnetic fields were dangerous. (*Id.* at pp. 701-703.) The plaintiff filed a tort action, alleging that her husband had died of brain cancer because his employer — an electrical utility — had failed to warn him about the dangers of working around electromagnetic fields. (*Id.* at

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[4] The water utility also argued that the Commission's finding violated the property owners' due process rights. The Supreme Court refused to decide this issue, because it was an "attempt to assert the rights of other parties . . . ." (*Camp Meeker Water System, Inc. v. Public Utilities Com.*, *supra*, 51 Cal.3d at p. 852, fn. 3.) We address the City's due process argument in part III.C.2, *post*.

pp. 699-700.) The appellate court held that section 1759 barred the action. (*Ford*, at pp. 703-704.) The plaintiff argued, among other things, that the Commission "does not have authority to award tort damages . . . ." (*Id.* at p. 707.) The court rejected this argument, noting that the Commission had been acting within the scope of its constitutional and statutory authority. (*Ibid.*)

Although *Hartwell* and *Ford* both involved tort actions, we see no reason why a property action should be treated any differently. The bottom line is that *every time* section 1759 applies, it bars a court action. This does not mean that the Commission has improperly "adjudicated" the plaintiff's claims.

C. *Our Holding That the Commission's Decision Bars This Action Does Not Violate the Constitution.*

1. *The judicial powers clause.*

The City argues that the trial court's application of section 1759 violates the judicial powers clause of the state Constitution. (Cal. Const., art. VI, § 1.)

"Article VI, section 1 of our Constitution provides: 'The judicial power of this State is vested in the Supreme Court, courts of appeal, superior courts, municipal courts, and justice courts. . . .' Article III, section 3 provides: 'The powers of state government are legislative, executive, and judicial. Persons charged with the exercise of one power may not exercise either of the others except as permitted by this Constitution.' These two provisions preclude exercise of judicial power by 'nonconstitutional' administrative agencies — i.e., those agencies whose authority is derived solely from a grant of power

by the state or local governmental entity — but they do not limit the power of those agencies whose authority is derived from the Constitution itself. [Citations.]" (*Lentz v. McMahon* (1989) 49 Cal.3d 393, 404.)

The Commission is a constitutional agency. (Cal. Const., art. XII; *McHugh v. Santa Monica Rent Control Bd.* (1989) 49 Cal.3d 348, 355.) Its authority "includes not only administrative but also legislative and judicial powers [citation]." (*Covalt, supra,* 13 Cal.4th at p. 915.) "[W]hile it is true that the commission is not a judicial tribunal in a strict sense, it does not follow that it does not possess well established and well understood judicial power." (*People v. Western Air Lines, Inc.* (1954) 42 Cal.2d 621, 632.) The City does not contend that the Commission exceeded its constitutionally delegated powers. Thus, article VI adds nothing to the analysis.

Separately and alternatively, even a nonconstitutional agency "may constitutionally hold hearings, determine facts, apply the law to those facts, and order relief — including certain types of monetary relief — so long as (i) such activities are authorized by statute or legislation and are reasonably necessary to effectuate the administrative agency's primary, legitimate regulatory purposes, and (ii) the 'essential' judicial power (i.e., the power to make enforceable, binding judgments) remains ultimately in the courts, through review of agency determinations." (*McHugh v. Santa Monica Rent Control Bd., supra,* 49 Cal.3d at p. 372, italics omitted.) Here, the Commission's decision was subject to judicial review. And, once again, the City does not contend that the Commission's decision was unauthorized or that it was not reasonably necessary to effectuate the

Commission's primary purposes. Accordingly, it has not shown any violation of article VI.[5]

2. *The right to due process.*

Next, the City argues that a holding that this action is barred by section 1759, if taken to its ultimate extent, could (or would) result in a taking of property without just compensation, in violation of due process.

This argument appears[6] to rest on three premises: First, that the Commission has effected a taking of the City's property; second, that the Commission lacks jurisdiction to award just compensation; and third, that section 1759 would bar the City from seeking just compensation in court. The City offers some authority to support the second premise (*S.H. Chase Lumber Co. v. Railroad Com.* (1931) 212 Cal. 691, 701-706), but not the first or the third.

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[5] In making this argument, the City asserts that this case "illustrate[s]" the "danger in ceding judicial powers to an administrative body" because supposedly (1) the PUC itself was an interested party, and (2) the PUC official who directed the CEQA review had a conflict of interest.

The City does not appear to be raising these as independent claims of error; for example, it has not raised them under a separate point heading. (See Cal. Rules of Court, rule 8.204(a)(1)(B).) Moreover, it has not shown that it raised them in the trial court. Hence, we do not discuss them further.

[6] The City's argument is not totally clear. If we fail to respond to some point the City intended to make, it is because that point simply was not apparent to us and thus has been forfeited. (See *Friends of Juana Briones House v. City of Palo Alto* (2010) 190 Cal.App.4th 286, 313 ["[r]espondent's failure 'to make a coherent argument' in support of its suggestion 'constitutes a waiver of the issue on appeal'"].)

The first premise — that the City's property has somehow been taken — assumes that the City actually has the easement rights that it claims. The Commission, however, has determined otherwise. The City does not explain how this is a taking, any more than if a court determined the same issue against the City.

The third premise — that section 1759 would bar an inverse condemnation action — also appears to be incorrect. (See *Breidert v. Southern Pac. Co.* (1964) 61 Cal.2d 659, 662; *Union City v. Southern Pac. Co.* (1968) 261 Cal.App.2d 277, 280.) The Commission has previously acknowledged that any inverse condemnation issues arising out of its actions would have to be resolved subsequently in court. (*In re Livermore Car Wash* (1976) 80 Cal. P.U.C. 342.) We need not decide the question, however, because, once again (see part III.C.2, *ante*), the City has not asserted an inverse condemnation claim in this action.

Finally, the City lacks standing to assert that the Commission has taken its property without due process. The City is, after all, a public agency, not a private party. "[S]ubordinate political entities, as 'creatures' of the state, may not challenge state action as violating the entities' rights under the due process or equal protection clauses of the Fourteenth Amendment . . . . 'A municipal corporation, created by a state for the better ordering of government, has no privileges or immunities under the federal constitution which it may invoke in opposition to the will of its creator. [Citations.]' [Citations.]" (*Star-Kist Foods, Inc. v. County of Los Angeles* (1986) 42 Cal.3d 1, 6; accord, *Reclamation District v. Superior Court* (1916) 171 Cal. 672, 679.) "'The same reasoning

applies to the due process protections afforded under the California Constitution.' [Citation.]" (*City of Burbank v. Burbank-Glendale-Pasadena Airport Authority* (1999) 72 Cal.App.4th 366, 380.)

The City cites the venerable case of *Grogan v. San Francisco* (1861) 18 Cal. 590, which held that a state statute requiring a city to sell land previously granted to it by the state violated the federal contract clause. (*Id.* at pp. 612-614.) Even with respect to the federal contract clause, however, *Grogan* is no longer good law. (*Trenton v. New Jersey* (1923) 262 U.S. 182, 185-192 [43 S.Ct. 534, 67 L.Ed. 937] [city cannot invoke federal contract clause against state].)

We therefore reject the assertion that we are somehow countenancing an unconstitutional taking.

3. *The Right to Trial by Jury.*

Finally, the City also contends that "if the PUC decided property disputes with non-regulated entities, the City would be precluded from receiving its right to a jury trial . . . ." In this particular case, however, because the City was seeking injunctive and declaratory relief regarding the scope of an easement, it does not appear that it had any right to a jury trial. (See *Baugh v. Garl* (2006) 137 Cal.App.4th 737, 741; *Wolford v. Thomas* (1987) 190 Cal.App.3d 347, 354.)

The City also appears to be arguing that it has been deprived of a jury trial on a claim for the taking of its property without just compensation. Again, however, it raised no inverse condemnation claim in this action. In any event, "administrative adjudication

of a matter otherwise properly within the agency's regulatory power [does not] violate the constitutional guarantee of a jury trial. [Citation.]" (*Ford v. Pacific Gas & Electric Co.*, *supra*, 60 Cal.App.4th at p. 707; see generally *McHugh v. Santa Monica Rent Control Bd.*, *supra*, 49 Cal.3d at p. 380-386.) As we held in part III.B., *ante*, the City has not shown that the commission exceeded its authority.

IV

DISPOSITION

The judgment is affirmed. SCE is awarded costs on appeal against the City.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RICHLI
Acting P.J.

I concur:

CODRINGTON
J.

KING, J., Concurring.

I concur in the result.

The City of Chino Hills's (the City) verified complaint sets forth two causes of action. The first cause of action is for declaratory relief seeking a declaration that "Segment 8A of the [Tehachapi Renewable Transmission Project (the TRTP)] unlawfully interferes with and overburdens the City's use . . . and enjoyment of the Property." The second cause of action is for injunctive relief seeking a judgment enjoining "[Southern California Edison (SCE)] . . . from constructing and maintaining Segment 8A of the TRTP on the City's Property."

As to the cause of action for injunctive relief, I agree with the majority that the trial court does not have jurisdiction to enjoin the construction of the transmission towers and lines. I do not concur however with the analysis. As to the cause of action for declaratory relief, I disagree with the majority's suggestion that the Public Utilities Commission (the PUC) may adjudicate whether the TRTP "materially and unreasonably increase[d] the burden of the easement on the City's underlying fee . . . ." I believe the superior court is the proper tribunal for this issue.[1]

"'The [PUC] is a state agency of constitutional origin with far-reaching duties, functions and powers. (Cal. Const., art. XII, §§ 1-6.) The Constitution confers broad

[1] While the superior court does have jurisdiction of this issue to the exclusion of the PUC, the City did not seek a remedy which the superior court has jurisdiction to render.

authority on the [PUC] to regulate utilities, including the power to fix rates, establish rules, hold various types of hearings, award reparation, and establish its own procedures. (*Id.*, §§ 2, 4, 6.) The [PUC's] powers, however, are not restricted to those expressly mentioned in the Constitution: "The Legislature has *plenary power, unlimited by the other provisions of this constitution* but consistent with this article, to confer additional authority and jurisdiction upon the commission . . . ." (Cal. Const., art. XII, § 5.)' (*Consumers Lobby Against Monopolies v. Public Utilities Com.* (1979) 25 Cal.3d 891, 905 . . . , italics added.) [¶] Pursuant to this constitutional provision the Legislature enacted, inter alia, the Public Utilities Act. ([Pub. Util. Code,] § 201 et seq.) That law vests the commission with broad authority to 'supervise and regulate every public utility in the State' ([Pub. Util. Code,] § 701) and grants the [PUC] numerous specific powers for the purpose. . . . [T]he Legislature further authorized the commission to '*do all things*, whether specifically designated in [the Public Utilities Act] *or in addition thereto*, which are necessary and convenient' in the exercise of its jurisdiction over public utilities. (*Ibid.*, italics added.) Accordingly, 'The [PUC's] authority has been liberally construed' [citation] . . . ." (*San Diego Gas & Electric Co. v. Superior Court* (1996) 13 Cal.4th 893, 914-915.)

As provided in Public Utilities Code section 1759:[2] "(a) No court of this state, *except the Supreme Court and the court of appeal*, . . . shall have jurisdiction to review,

[2] All further statutory references are to the Public Utilities Code unless otherwise indicated.

reverse, correct, or annul any order or decision of the [PUC] or to suspend or delay the execution or operation thereof, or to enjoin, restrain, or interfere with the [PUC] *in the performance of its official duties, as provided by law and the rules of the court.*" (Italics added.)

Here, it is beyond dispute that the PUC has as part of its official duties the authority to regulate the routing, siting, and design of electrical facilities used for the transmission of electrical power. (*San Diego Gas & Electric Co. v. Superior Court, supra,* 13 Cal.4th at pp. 924-925.) Further, it has exercised that power as evidenced by its "Decision Granting a Certificate of Public Convenience and Necessity for the [TRTP] (Segments 4-11)." In approving the present project, the PUC was engaged in its official duties and was acting as provided by law; as such, the superior court has no jurisdiction to enjoin the construction of the project.

Furthermore, notwithstanding the holding in *Koponen v. Pacific Gas & Electric Co.* (2008) 165 Cal.App.4th 345, 358, the superior court is also barred from enjoining the alleged invasion of the City's property rights. The alleged invasion of the City's property rights is based on the allegation that the construction would increase the burden of the easement on the City's underlying fee. To enjoin the construction—even if it would take the City's interest in the property—would necessarily interfere with the PUC's decision approving the TRTP. Because the approval of the TRTP was pursuant to the PUC's

official duties, the superior court has no jurisdiction to issue such an injunction under section 1759. (See *Hartwell Corp. v. Superior Court* (2002) 27 Cal.4th 256, 278.)[3]

The parties, as well as the majority, have spent much time discussing whether the PUC has in place a policy relative to the construction of the TRTP. (See *Waters v. Pacific Telephone Co.* (1974) 12 Cal.3d 1; *San Diego Gas & Electric Co. v. Superior Court, supra,* 13 Cal.4th 893.)[4] In my opinion, this discussion is unnecessary and not applicable to the present facts. In both *Waters* and *San Diego Gas & Electric Co.*, the issue was the interplay between sections 1759 and 2106. In both cases, it was necessary for the court to discuss whether the PUC had performed studies or enacted policies in a general area for purposes of assessing whether the PUC had preempted a given area of regulation such that the superior court could not entertain suits for damages under

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[3] In *Koponen*, one of the court's holdings was that section 1759 did not bar plaintiffs from seeking to enjoin Pacific Gas & Electric Company's (PG&E) invasion of plaintiffs' property interest. The basis for the holding was that the commission made no investigation as to whether PG&E's grant of a license to various telecommunications companies overburdened its existing easement. I disagree with the holding for two reasons. As more fully explained above, section 1759 is quite explicit in stating that the superior court does not have jurisdiction to enjoin or interfere with a decision of the commission. And, regardless of whether the commission investigated the plaintiffs' claims that PG&E was overburdening the underlying fee by its grant of the license, the commission simply does not have jurisdiction to adjudicate property claims between utilities and third parties. As to the specific issue of whether an injunction could be granted by the superior court, I believe the court was inappropriately applying the three-part test delineated in *Waters* and *San Diego Gas & Electric*.

[4] In both *Waters* and *San Diego Gas & Electric Co.*, the court discussed at length whether the PUC had the authority to enact a policy relative to powerline electric and magnetic fields and whether the PUC had exercised that authority in enacting such a policy.

California law. Here, the issue is far more straightforward. As discussed above, the PUC has jurisdiction over the siting and design of transmission facilities. And, under section 1759, the superior court simply cannot enjoin the installation.

With that said, and contrary to the majority's suggestion, it is the superior court that has the jurisdiction to adjudicate the underlying property rights of the parties so long as it does not hinder or frustrate the PUC's exercise of its regulatory power. The City has alleged that by way of the construction of the TRTP, SCE has "materially and unreasonably increase[d] the burden of the easement of the City's underlying fee . . . ; in other words, the City has alleged that SCE has taken its property within the meaning of article 1, section 19 of the California Constitution"[5]

Here, it is alleged that the City owns the fee interest in the real property. By way of the TRTP, the City has been unable to construct and operate a community center and, because of the expansion of the transmission facilities, the City is unable to beneficially use the underlying fee. The City's allegations easily give rise to the issue that there has been "'an invasion or an appropriation of [a] valuable property right which the [City] possesses and the invasion or appropriation [has] directly and specially affect[ed] the [City] to [its] injury. [Citation.]'" (*Barthelemy v. Orange County Flood Control Dist.* (1998) 65 Cal.App.4th 558, 564 [Fourth Dist., Div. Two].)

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[5] While the City does not mention "inverse condemnation" or "taking" in its complaint, the allegation that the construction of the transmission facility "materially and unreasonably increase[d] the burden of the easement" on the underlying fee, is sufficient to give rise to the issue.

As between a private party and a utility, the superior court has jurisdiction to determine "[t]he extent of rights granted by conveyance of an easement . . . ." (*City of Los Angeles v. Ingersoll-Rand Co.* (1976) 57 Cal.App.3d 889, 894.) Such jurisdiction is to the exclusion of the PUC. (*S.H. Chase Lumber Co. v. Railroad Com.* (1931) 212 Cal. 691, 702-706; see *Camp Meeker Water System, Inc. v. Public Utilities Com.* (1990) 51 Cal.3d 845, 861 ["the [PUC] makes no claim to have . . . jurisdiction" to adjudicate incidents of title between a third party and a public utility]; *Southern Pacific Transportation Company* (1976) Cal.P.U.C. Dec. No. 86233 [1976 Cal.PUC Lexis 532] [The PUC does not have jurisdiction to resolve issues of inverse condemnation arising from one of its decisions].)

Thus, to the extent the City's first cause of action seeks relief which does not hinder or interfere with the PUC's performance of its duties, it is properly before the superior court. (See *San Diego Gas and Electric Co. v. Superior Court, supra,* 13 Cal.4th at p. 935.) Here, however, the City does not seek such relief. Had the City sought money damages as compensation for the alleged taking, I would conclude, contrary to the majority's suggestion, that the court would have erred in granting the motion for judgment on the pleadings on the basis of lack of jurisdiction. Clearly, if the City were to prevail on a theory that SEC, by way of constructing the TRTP, materially and unreasonably increased the burden of the easement, it would be entitled to compensation under the principle of inverse condemnation. (Cal. Const., art. I, § 19.) Furthermore, an award of damages under section 2106 would not hinder or impede the PUC's jurisdiction.

As stated in *Pacific Gas & Electric Co. v. Parachini* (1972) 29 Cal.App.3d 159, 163: "The acquisition of property through the power of eminent domain and the construction of facilities thereon are distinct functions. The acquisition of property by a public utility does not necessarily interfere with the exercise of the [PUC's] authority to determine what shall be built and where." I therefore disagree with the majority's discussion and suggestion that the PUC may adjudicate property rights between a third party and a utility.

Here, however, the City, in its cause of action for declaratory relief, alleged: "The City has no plain, speedy, and adequate remedy at law, in that in the absence of this court's injunction, the City cannot force SCE to relocate Segment 8A of the TRTP. The City has a duty to protect its citizens, *and no amount of monetary damages* or other legal remedy *can adequately compensate the City* for SCE's actions . . . ." (Italics added.) And, at the hearing on the motion for judgment on the pleadings, when offered the opportunity to amend the complaint, counsel for the City indicated: "At this point we are not intending to amend the complaint." Thus, while the City would be entitled to monetary compensation before the superior court for an overburdening of its underlying fee, it did not seek such relief and apparently does wish such a remedy. Because of this, there exists no remedy the superior court can provide that would not interfere with or hinder the PUC's performance of its duties. Therefore, the trial court properly granted the motion for judgment on the pleadings. (*Munoz v. City of San Diego* (1974) 37 Cal.App.3d 1, 4 [there is no justiciable issue where the court cannot provide a remedy];

Connerly v. Schwarzenegger (2007) 146 Cal.App.4th 739, 752 [where there is no justiciable issue dismissal is the proper remedy].)

/s/ King
J.

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF LOS ANGELES

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is: 1230 Rosecrans Avenue, Suite 110, Manhattan Beach, CA 90266.

On October 24, 2011, I served the foregoing document described as:

PETITION FOR REVIEW

City of Chino Hills v. Southern California Edison
Court of Appeal Case No. E051033

on the interested party or parties in this action by placing the original thereof enclosed in sealed envelopes with fully prepaid postage thereon and addressed as follows:

PLEASE SEE SERVICE LIST ATTACHED

_____ **VIA EMAIL.** I caused such document as described above, to be transmitted via **E-Mail** to the offices of the addressee(s).

_____ **VIA OVERNIGHT MAIL COURIER.** I caused such document as described above, to be transmitted via ***Overnite Express Mail Courier*** to the offices of the addressee(s).

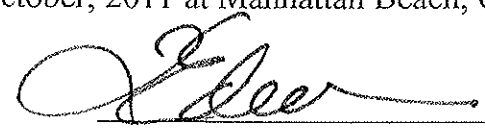
__X__ **VIA OVERNIGHT MAIL DELIVERY.** I enclosed the documents in an envelope or package provided by an overnight delivery carrier and addressed to the person(s) at the address(es) stated above. I placed the envelope or package for collection and overnight delivery at a regular utilized drop box of the overnight delivery carrier.

__X__ **VIA U.S. MAIL.** I enclosed the above described document(s) in a sealed envelope or package with prepaid postage thereon to be placed in the United States mail at Los Angeles, California.

I am readily familiar with the practice of collection and processing correspondence for outgoing mail at my place of business at Manhattan Beach, CA.. Under that practice it would be deposited with U.S. Postal Service on that same day with postage thereon prepaid at Manhattan Beach, California in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

__X__ **STATE** I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed this 24th day of October, 2011 at Manhattan Beach, CA.



TERRE A. EDWARDS

City of Chino Hills v. Southern California Edison
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Fourth Appellate District - Division Two Case No.: E51033

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