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California Supreme Court Review of Decisions of the Public Utilities Commission—Is the Court's Denial of a Writ of Review a Decision on the Merits?

by
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Over seventy-five years ago, the Public Utilities Act of 1912 imposed upon the California Supreme Court the obligation to review decisions of the California Railroad Commission, now known as the California Public Utilities Commission (CPUC). The Act was amended in 1933, adding language to remove doubt about the sufficiency of the protection afforded constitutional rights by the California Supreme Court's review. Apart from this addition, the provisions for review have remained essentially unchanged since 1912.

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The authors are especially indebted to Arthur T. George, Esq., former Chief Counsel of the California Railroad Commission and former General Solicitor of The Pacific Telephone & Telegraph Co., for valuable historical information and advice.


2. The name of the Commission was changed from Railroad Commission to Public Utilities Commission by amendment, adopted on November 5, 1946, Cal. Const. art. XII, § 22 (current version as amended at Cal. Const. art. XII, §§ 1-9 (1974)). The Commission is referred to in this article from time to time as the CPUC.

In 1951, the review provisions were incorporated into the California Public Utilities Code sections 1756, 1757, and 1760.\(^{4}\) Section 1756 provides that after exhaustion of the administrative remedy

the applicant may apply to the Supreme Court of this state for a writ of certiorari or review for the purpose of having the lawfulness of the original order or decision or of the order or decision on rehearing inquired into and determined. The writ shall be made returnable at a time and place then or thereafter specified by court order and shall direct the commission to certify its record in the case to the court within the time therein specified.\(^{5}\)

Section 1757 provides:

No new or additional evidence may be introduced in the Supreme Court, but the cause shall be heard on the record of the commission as certified to by it. The review shall not be extended further than to determine whether the commission has regularly pursued its authority, including a determination of whether the order or decision under review violates any right of the petitioner under the Constitution of the United States or of this State.

The findings and conclusions of the commission on questions of fact shall be final and shall not be subject to review except as provided in this article. Such questions of fact shall include ultimate facts and the findings and conclusions of the commission on reasonableness and discrimination.\(^{6}\)

Section 1760 embodies the language added to the Act in 1933:

In any proceeding wherein the validity of any order or decision is challenged on the ground that it violates any right of petitioner under the Constitution of the United States, the Supreme Court shall exercise an independent judgment on the law and the facts, and the findings or conclusions of the commission material to the determination of the constitutional question shall not be final.\(^{7}\)

The prescribed method of direct access to the California Supreme Court is by petition for "writ of certiorari or review,"\(^{8}\) rather than by appeal. The California Supreme Court, however, holds the exclusive review authority. Section 1759 of the Public Utilities Code provides that "No court of this State, except the Supreme Court to the extent specified in this article, shall have jurisdiction to review, reverse, correct, or annul any order or decision of the Commission . . . ."\(^{9}\)

When the California Supreme Court grants a petition for writ of


\(^{5}\) CAL. PUB. UTIL. CODE § 1756 (Deering Supp. 1988).

\(^{6}\) Id. § 1757 (Deering 1970).

\(^{7}\) Id. § 1760.

\(^{8}\) See supra note 5 and accompanying text.

\(^{9}\) § 1759.
review of a CPUC decision, the judicial remedy satisfies the relevant constitutional and statutory requirements. The court receives the record, hears argument, and renders an opinion setting forth its reasoning. If legal issues are determined, the decision is given both res judicata and stare decisis effect.

In some ninety percent of the cases coming up from the CPUC, however, the court denies the petition for a writ of review. In such cases, the court does not have the record before it, does not hear oral argument, and issues its denial without opinion or explanation. Despite these limitations the United States Supreme Court held, in a decision rendered a few years after passage of the Public Utilities Act of 1912, that denial of the writ in that particular case was a determination on the merits. For nearly sixty years thereafter, the California Supreme Court interpreted that case as holding that denial of a writ is always a determination on the merits.

What prompted this sweeping interpretation? Did the California Supreme Court, as it became increasingly burdened with cases, strike an internal, unspoken compromise not long after enactment of the Public Utilities Act—characterizing a denial of a writ of review as a “decision on the merits” to satisfy the constitutional and statutory right of parties to a determination by a court of law, but in fact treating the issuance of these writs as discretionary, indistinguishable from the treatment accorded petitions for writs of review emanating from actions of lower courts?

This Article examines the historical development of cases involving the California Supreme Court’s review of CPUC decisions, which leads one to think that the answer is yes. Following an analysis of the relevant cases in section I, section II discusses the several unsatisfactory consequences of the court’s practice of denial-without-opinion. Finally, section III presents both short-term and long-term remedies for the California Supreme Court’s present, undesirable practice.

I. Case Law Until 1979

In the first few years after passage of the Public Utilities Act, the California Supreme Court rendered a written opinion in all utility cases coming before it, including those in which a petition for writ of review...
was denied. It was not long, however, before the court developed the practice, when it denied such a petition, of issuing a minute order without opinion—an order containing the single word "Denied," devoid of explanation or articulated reason.

A few years after the passage of the Public Utilities Act of 1912, the California Supreme Court decided *Napa Valley Electric Co. v. Railroad Commission.* In that case, the electric company had petitioned for writ of review on the ground that a Railroad Commission order fixing rates lower than those agreed to by contract violated the electric company's rights under article I, sections 10 and 14 of the United States Constitution. The California Supreme Court denied the petition without opinion. The electric company then went to the federal district court to enjoin the Commission from enforcing the rate order. The district court dismissed the action on the ground that the California Supreme Court's denial of the petition rendered the issue res judicata. On appeal, the United States Supreme Court affirmed.

The electric company contended that the California Supreme Court's denial of the petition could not be res judicata because no writ of review was issued, no hearing was held on a certified record, and no order was issued setting aside or affirming the Commission's decision. The United States Supreme Court rejected this contention, observing that "insistence upon the literalism of the statute meets in resistance the common, and at times, necessary practice of courts to determine upon the face of a pleading what action should be taken upon it."

The United States Supreme Court then concluded that the California Supreme Court had itself interpreted the Public Utilities Act as not requiring the issuance of a writ of review in every case to render a court decision res judicata. This opinion recognized that in some cases a court could decide, simply upon the face of the pleadings, that the Commission regularly pursued its authority, and thus, simply denying the writ would be sufficient.

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13. These opinions were very brief indeed, often no more than a single paragraph. *See,* e.g., *City of Santa Monica v. Railroad Comm'n*, 179 Cal. 467, 177 P. 989 (1918); *E. Clemens Horst Co. v. Railroad Comm'n*, 175 Cal. 660, 166 P. 804 (1917); *C.A. Hooper & Co. v. Railroad Comm'n*, 175 Cal. 811, 165 P. 689 (1917) (mem.); *City of Pasadena v. Railroad Comm'n*, 175 Cal. 812, 166 P. 356 (1917) (mem.).


15. *Id.* at 411, 163 P. at 497.


18. *Id.* at 372.

19. *Id.*
In reaching this conclusion the United States Supreme Court relied on four California Supreme Court decisions denying petitions for writ of review, which were accompanied with an opinion. In one case, *Ghriest v. Railroad Commission*, the California court held that the Commission's assumed failure to require notice was cured when the Commission gave the complaining party an opportunity to be heard—the failure did not warrant holding that the Commission had failed to regularly pursue its authority.\(^{20}\) The second case, *Mt. Konocti Light & Power Co. v. Thelen*, held that there was no substantial departure by the Commission from the procedure provided by the Public Utilities Act, and therefore no basis for granting a writ of review.\(^ {21}\) The third case, *E. Clemens Horst Co. v. Railroad Commission*, denied a writ because the Commission's order merely directed a railroad to enforce its tariff and did not attempt to adjudicate liability to the railroad.\(^ {22}\) Finally, in *Hooper & Co. v. Railroad Commission*, the court denied a petition for writ of review because the Commission's order did not deprive consumers of any prior right.\(^ {23}\)

Based on its reference to these four cases, one may reasonably conclude that the United States Supreme Court meant simply that in some situations the merits can be determined from the face of the pleadings, making the issuance of a writ an idle gesture. The California Supreme Court had so interpreted the statute respecting its review authority, thus allowing the denial of a writ in those situations to have res judicata effect.

Notwithstanding the likelihood that the United States Supreme Court intended its decision to have this limited meaning, for nearly sixty years *Napa Valley Electric* was interpreted as holding that a denial of a writ of review of a CPUC decision is always a determination on the merits, having both res judicata and stare decisis effect. This interpretation prevailed although it was obviously difficult in some cases to fathom how the California Supreme Court could make an intelligent determination on the merits without having the record before it and without the benefit of oral argument. In its 1936 decision of *Southern California Edison Co. v. Railroad Commission*, the court might have cast doubt on the prevailing interpretation, but instead held that the 1933 addition to the review provisions of the Public Utilities Act "did not, in any substantial degree, change the rules in force prior thereto."\(^ {24}\)

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22. 175 Cal. 660, 661, 166 P. 804, 804 (1917).
23. 175 Cal. 811, 811, 165 P. 689, 689 (1917).
24. 6 Cal. 2d 737, 746, 59 P.2d 808, 812 (1936).
People v. Western Air Lines, 25 decided in 1954, also contributed to a broad reading of Napa Valley Electric. In that case, the state brought an action in the superior court to collect statutory penalties from the airline for failure to charge the fares prescribed by the CPUC. The superior court dismissed the action, holding that the CPUC lacked jurisdiction to fix the rates of an airline. 26 The California Supreme Court reversed on the ground that the CPUC had determined in a prior proceeding that it did have such jurisdiction and that jurisdiction had been sustained by the California Supreme Court's denial of a writ of review without opinion in Western Air Lines v. Public Utilities Commission. 27 The court in People v. Western Air Lines relied on Southern California Edison Company for the proposition that a denial of a writ “is a decision on the merits both as to the law and the facts presented in the review proceedings,” 28 and on Napa Valley Electric for the proposition that “[t]his is so even though the order of this court is without opinion.” 29 Because there was an identity of issues and parties, the matter was res judicata. 30

Despite the court's position that the prior denial of the writ without opinion in Western Air Lines v. Public Utilities Commission was a decision on the merits of the issues presented in the instant case, the court in People v. Western Air Lines proceeded to list those issues and to discuss the relevant legal principles, thereby supplying the explanation which the parties had failed to obtain in the earlier proceeding. 31 Logically there was no need in People v. Western Air Lines to do more than recite the issues and declare that they had been resolved by the denial—without—opinion in the cognate case. One wonders if the court was uncomfortable with the notion that issues of such serious magnitude could really be resolved properly without a full record and oral argument, followed by a written opinion. In any case, the unusual circumstance of the penalty proceeding in the superior court, followed by

26. Id. at 629, 268 P.2d at 730.
27. Id. at 630, 642-43, 268 P.2d at 728, 735-36 (noting Western Air Lines v. Public Util. Comm'n, S.F. No. 18,427 (Aug. 2, 1951) (order denying petition for writ of review)).
28. Id. at 630, 268 P.2d at 728 (citing Southern California Edison Co. v. Railroad Comm'n, 6 Cal. 2d 737, 747, 59 P.2d 808, 812 (1936)).
29. Id. at 630-31, 268 P.2d at 728 (citing Napa Valley Electric Co. v. Railroad Comm'n, 251 U.S. 366, 372-73 (1920)).
30. Id. at 630, 268 P.2d at 728.
31. As stated by the court, the issues in question were: (1) whether the CPUC had jurisdiction to fix intrastate fares of an air carrier operating in interstate and intrastate commerce, (2) whether the airline was a public utility within the meaning of the state constitution, and (3) whether state jurisdiction had been preempted by the federal Civil Aeronautics Act. Id. at 629-30, 268 P.2d at 728. The California Supreme Court in this instance did have the benefit of the record and oral argument in the superior court proceeding below.
appeal, did supply the elements of a hearing and a record, and the court did write a full opinion. As the court explained:

Since the conclusions on this appeal . . . are to be the same as those which to that extent formed the basis for the order denying the writ, . . . it is deemed desirable to state all of the reasons . . . to the end that none of the reasons for such denial be left to implication or conjecture. 32

The court seems to recognize, by this comment, the essential unfairness of the denial-without-opinion procedure when important issues are involved. Why should parties ever be compelled to resort to inference and conjecture respecting the basis for the supreme court’s action? Would not the court want parties to know the grounds on which it denied the writ? Most importantly, would not the court be more likely to give careful attention to the issues if it had to provide written reasoning for all to see?

Despite apparent discomfort with the issuance of denials-without-opinion, the court continued the practice. It was not until 1979 that the court in Consumers Lobby Against Monopolies v. Public Utilities Commission partially destroyed the prior interpretation by holding that a denial-without-opinion is res judicata but does not have the impact of stare decisis. 33 In the CPUC proceedings, representatives of ratepayer interests challenged rates proposed by the Pacific Telephone and Telegraph Company. Each of those participants sought an award of attorney fees. The issues were: (1) whether the CPUC had power to award attorney fees in a quasi-judicial proceeding; (2) whether in such a proceeding a non-attorney representative would be eligible for attorney fees; and (3) whether the CPUC had power to award attorney fees in a quasi-legislative rate making proceeding. 34

The CPUC held that it lacked power to award attorney fees. 35 Petitions for a writ of review were granted by the California Supreme Court. The CPUC and Pacific Telephone both contended that the court had previously decided the issue in the negative by denying several prior petitions for writs of review and that the court should rely on these denials under the doctrine of stare decisis. 36

In holding that a denial of a writ to review a CPUC decision makes the matter res judicata only, and not stare decisis, 37 the court sought to extricate itself from a dilemma. On the one hand, it recognized that it is

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32. Id. at 633, 268 P.2d at 730 (emphasis added).
34. Id. at 897, 603 P.2d at 44, 160 Cal. Rptr. at 127.
35. Id. at 906, 603 P.2d at 57, 160 Cal. Rptr. at 140.
36. Id. at 899, 603 P.2d at 45, 160 Cal. Rptr. at 128.
37. Id. at 902, 603 P.2d at 47, 160 Cal. Rptr. at 130.
the only California court empowered to review CPUC decisions. It must, therefore, make a determination on the merits when a petition for writ of review is filed if the petitioner is to be accorded the right to a law court determination—a right to which the petitioner may be entitled under the state and federal constitutions. On the other hand, the court wanted to continue, and perhaps justify, the policy of limiting the instances in which it would engage in the time consuming process of examining the record, hearing oral argument, and rendering a formal opinion. Thus, the court resorted to a fiction: if it denies without opinion a petition for writ of review, and such denial is not, in fact, a decision on the merits, such denial will nevertheless be “deemed a decision on the merits.” As such, it will be entitled to less respect than a decision actually on the merits, in that the doctrine of res judicata will apply, but the doctrine of stare decisis will not. As the court explained:

The sole means provided by law for judicial review of a commission decision is a petition to this court for writ of review ... which thereby serves in effect the office of an appeal. If our ruling on such a petition were not a final “decision on the merits both as to the law and the facts presented,” the parties would be denied their right to such review. Because it must therefore be deemed a decision on the merits, our denial of such a petition raises the bar of res judicata against relitigation of the same cause of action between the same parties or their privies.

The court attempted to explain why stare decisis does not apply even though the denial is “deemed” on the merits:

As we have seen, the merits of the decision may well be procedural rather than substantive; yet because there is no opinion, its ratio decidendi does not appear on its face. It would therefore be sheer speculation for litigants to rely on such decisions as precedents. In addition, such reliance may well prove a trap for the unwary: members of the public who have potentially meritorious petitions for review to present to this court may be dissuaded from doing so by the mere fact that we declined to take an earlier case allegedly raising the same question.

In short, the court resorted to semantic rationalization, using the phrase “on the merits” to extend even to procedural matters. Accordingly, a denial “on the merits” may be based on procedural grounds, such as failure to raise the issue below, failure to file the petition on time, or failure to recognize that the issue has become moot.

Again, one must ask: Why does the court drive litigants to guess what “merits” formed the basis of the court’s decision? The excerpt

40. Id.
41. Id. at 905, 603 P.2d at 49, 160 Cal. Rptr. at 132.
quoted above suggests that, in a given case, there may be no principled basis for the decision and the denial may be purely an act of discretion.

II. Deficiencies in the Practice of Denial-Without-Opinion

The court's practice of denial-without-opinion of petitions for writ of review of CPUC decisions leads to several problems—problems exacerbated by the court's indulgence in the fiction that these denials are "deemed to be on the merits." This section considers several deficiencies in this practice: (A) failure to reveal the grounds for a denial; (B) failure to meet statutory requirements; (C) failure to observe requirements of the California Constitution; (D) failure to provide a "plain, speedy and efficient remedy" for rate cases within the meaning of the Johnson Act of 1934; (E) failure to provide assurance of judicial review on the merits to protect federal rights; and (F) failure to justify abstention from exercise of jurisdiction by the federal district court.

A. Failure to Reveal Grounds for Denial

The most obvious objection to the denial-without-opinion practice is that while it purportedly results in a decision by the supreme court on the merits, there is no way of discovering the court's reasoning. Did the court agree with the rationale for each issue raised, or only with the conclusion? Did the court possibly deny the petition on a procedural ground pleaded by a party or raised by the court on its own initiative? Finally, did the court deny the petition for an administrative reason, such as an overcrowded calendar, which would normally fail to qualify as being "on the merits"? One is left to speculate.

When a court has discretion to grant or deny a petition without reference to the merits, as in the case of a petition for a writ of certiorari to the United States Supreme Court, it is acceptable that the court deny such a petition simply by an order without opinion. This practice seems reasonable since the court's motivations in this instance are of little significance to the parties. When the court's action is based on the merits, however, the considerations are very different; in those situations, an understanding of the court's reasoning can help a party decide what subsequent steps to take. Such knowledge can also guide future parties faced with similar issues.

Knowledge of the court's reasoning is just as valuable when a writ is denied on the merits as it is when the court grants a writ, hears oral argument, and writes an opinion. In the former case, it may be that the circumstances may justify only an abbreviated decision, but at a bare minimum the parties should be entitled to know whether the court...
agreed with the commission's reasoning on each issue or only with the conclusion. Moreover, the parties should be informed whether the denial was based solely on a procedural ground such as lack of standing or the expiration of the applicable statute of limitations. Finally, if the denial was based on administrative considerations such as an overcrowded calendar, the parties should be entitled to know that fact.

A California court of appeal in *People v. Rojas* expressed the value of an articulated decision by a reviewing court: """"In our opinion, the requirement [of a written opinion] is designed to insure that the reviewing court gives careful thought and consideration to the case and that the statement of reasons indicates that appellant's contentions have been reviewed and consciously, as distinguished from inadvertently, rejected."""

The California Supreme Court has recognized the value of requiring an administrative body, notably the CPUC, to articulate the basis for its conclusions. In *California Motor Transport Co. v. Public Utilities Commission*, Justice Traynor, speaking for the court, quoted Professor Davis with approval: """"[A] disappointed party, whether he plans further proceedings or not, deserves to have the satisfaction of knowing why he lost his case."""

Justice Traynor also emphasized that findings on material issues would be helpful to anyone planning activities involving similar questions and could also help prevent careless or arbitrary action by the deciding body.

One must conclude that the California Supreme Court, while recognizing the importance of articulated reasoning by the CPUC, has, by the denial-without-opinion process, adopted a lesser requirement for its own actions.

B. Failure to Meet Statutory Requirements

As early as 1920, counsel argued before the United States Supreme Court in *Napa Valley Electric* that considering a summary denial of a petition for review of a Railroad Commission order to be a judgment on the merits and thus given res judicata effect is not consistent with the judicial review provisions of the Public Utilities Act. These provisions, now incorporated in the Public Utilities Code, provide that judicial re-

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43. 59 Cal. 2d 270, 274, 379 P.2d 324, 327, 28 Cal. Rptr. 868, 871 (1963) (quoting 2 K. DAVIS, ADMINISTRATIVE LAW TREATISE § 16.05, at 448 (1958)).
44. *Id.*
view may be had only from the California Supreme Court\textsuperscript{46} by means of an application for a writ of certiorari or review.\textsuperscript{47} The writ shall direct the CPUC to certify its record to the supreme court\textsuperscript{48} and the cause shall be heard on the record of the CPUC as certified by it.\textsuperscript{49} Further, the CPUC and each party to the action or proceeding before the CPUC may appear in the review proceeding and, upon the hearing, the supreme court shall enter a judgment either affirming or setting aside the CPUC decision.\textsuperscript{50} The provisions of the Code of Civil Procedure relating to prerogative writs of review apply to the extent they are compatible with the provisions of the Public Utilities Act.\textsuperscript{51}

The court does not observe these essential elements of the review procedure when a petition for writ of review is summarily denied without opinion. First, the record of the CPUC proceeding is not certified to the supreme court. Second, there is no hearing, in the sense of oral argument before the court, although oral argument is required by the state constitution in all cases in which the court issues a judgment on the merits\textsuperscript{52} unless oral argument is waived.\textsuperscript{53} Third, the court does not enter a judgment either affirming or setting aside the CPUC decision but enters a minute order that the petition for writ of review is denied. Finally, the Code of Civil Procedure relating to writs of review\textsuperscript{54} is not followed, particularly since the court does not enter a judgment on the merits of a petition for a prerogative writ unless it grants at least an alternative writ.\textsuperscript{55}

Counsel for the Napa Valley Electric Company argued that since the Public Utilities Act prohibits judicial review of Commission orders other than in the manner specified in the Act, a summary denial of a petition for review could not be treated as a judgment on the merits but rather must be understood as a decision by the court to exercise its discretion not to grant judicial review.\textsuperscript{56} While the United States Supreme

\begin{thebibliography}{56}
\bibitem{46} CAL. PUB. UTIL. CODE § 1759 (Deering 1970); see supra text accompanying note 9.
\bibitem{47} § 1756 (Deering Supp. 1988); see supra text accompanying note 5.
\bibitem{48} Id.
\bibitem{49} § 1757 (Deering 1970); see supra text accompanying note 6.
\bibitem{50} § 1758.
\bibitem{51} Id.
\bibitem{52} CAL. CONST. art. VI, § 2; see Metropolitan Water Dist. v. Adams, 19 Cal. 2d 463, 468, 122 P.2d 257, 259 (1942).
\bibitem{53} CAL. R. CT. 28(g); OP. LEGISLATIVE COUNSEL, 1966 JOURNAL OF THE SENATE 1047-48.
\bibitem{54} CAL. CIV. PROC. CODE §§ 1067-1077 (Deering 1973).
\bibitem{55} Funeral Directors Ass'n v. Board of Funeral Directors, 22 Cal. 2d 104, 106, 136 P.2d 785, 786 (1943); Board of Equalization v. Superior Court, 20 Cal. 2d 467, 470-71, 127 P.2d 4, 7 (1942).
\end{thebibliography}
Court rejected this argument, it may have intended to hold only (1) that there are situations in which the grant of a writ would be an idle gesture, and (2) that the California Supreme Court had itself recognized that in such situations there is no need to observe the literalism of the statute by going through the motions of granting a writ and receiving oral argument.\(^{57}\) Despite this probably limited holding, *Napa Valley Electric* was construed, until *Consumers Lobby* in 1979, as holding that every denial of a writ without opinion is a denial on the merits.

It is reasonable to concede that literalism should give way to common sense when adherence to statutory formalities would be an idle gesture. But what of all the cases in which a petition for writ of review raises not only questions of law, which the California Supreme Court might be able to determine on the pleadings, but questions of fact as well? Although the findings and conclusions of the CPUC on questions of fact are said to be final and not subject to judicial review,\(^{58}\) finality attaches only to those findings and conclusions that are supported by evidence in the record of the CPUC proceedings.\(^{59}\) The California Supreme Court cannot determine whether findings of fact are supported by evidence in the record if the court does not have the record of the CPUC proceedings certified to it. Yet, unless the court grants the writ of review, no such certification occurs.

Moreover, when the validity of a CPUC decision is challenged on the ground that it violates any of the petitioner's rights under the Federal Constitution, the California Supreme Court may make an independent review of the evidence relevant to the constitutional issue,\(^{60}\) although it is not authorized to substitute its own judgment for that of the commission as to the weight afforded conflicting evidence.\(^{61}\) Again, the court cannot make an independent review of the evidence when constitutional issues are raised unless it has the CPUC's record certified to it by granting the writ of review.

A remarkable instance of the court's use of the denial-without-opinion process occurred recently in *Kern River Gas Transmission Company*

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57. See supra text accompanying notes 20-24.
58. CAL. PUB. UTIL. CODE § 1757 (Deering 1970).
60. § 1760. This provision was not part of the Public Utilities Act when the *Napa Valley* case was decided. See supra notes 3 & 7 and accompanying text; see also American Toll Bridge Co. v. Railroad Comm'n, 12 Cal. 2d 184, 190, 83 P.2d 1, 3-4 (1938), aff'd, 307 U.S. 486 (1939).
v. Public Utilities Commission.\textsuperscript{62} The case raised serious mixed questions of law and fact as to the applicability of the California Environmental Quality Act (CEQA) to a series of CPUC decisions mandating a dramatic restructuring of California’s natural gas industry.\textsuperscript{63} In addition to other requirements, the California public utility gas corporations, as traditional providers of gas sales service, were ordered to provide transportation service through their pipelines for gas owned by end users or third parties. While these mandates would inevitably produce significant environmental impacts, the CPUC conducted no environmental evaluation.\textsuperscript{64} When challenged, the CPUC claimed immunity from CEQA on the ground that the decisions involved rates.\textsuperscript{65} The petitioner, Kern River, argued that the presence of a rate element did not create immunity from CEQA.\textsuperscript{66} The court granted a writ of review in 1986, when Chief Justice Bird and Justices Reynoso and Grodin were still on the court. Before the matter had been set for oral argument, however, the composition of the court changed. Approximately one year after the grant of the writ, the new court issued the following order without explanation: “The writ of review is discharged and the petition for writ of review is dismissed as improvidently granted.”\textsuperscript{67}

One must inevitably ask, what was in fact the reason for the court’s reversal of position. Was it due to the new court’s huge backlog and an eagerness to clear its calendar?\textsuperscript{68} The court could not have acted on the merits, since significant mixed questions of law and fact were involved and the court did not examine the record. Under the rule of Consumers Lobby, however, the court’s action must be “deemed” to have been on the merits even though this may not be the case.

C. Failure to Observe the Requirements of the California Constitution

It is extremely difficult to reconcile the doctrine that a summary

\textsuperscript{62} S.F. No. 25,003 (Cal. filed Aug. 6, 1987).
\textsuperscript{63} Investigation into Operations of Gas Corporations, CPUC Decision 85-12-102 (Dec. 20, 1985).
\textsuperscript{64} Investigation into Operations of Gas Corporations, CPUC Decision 86-03-045 (Mar. 5, 1986).
\textsuperscript{65} Id.
\textsuperscript{66} Kern River, S.F. No. 25,003 (Cal. filed Aug. 6, 1987) (petition for writ of review).
\textsuperscript{67} S.F. No. 25,003 (Cal. filed Aug. 6, 1987) (order denying writ of review and dismissing petition for writ as improvidently granted).
\textsuperscript{68} See San Francisco Chron., Sept. 2, 1987, at 9, col. 1. Justice Marcus Kaufman was reported as saying at a luncheon meeting that he and his fellow justices are so busy that they handle nearly 200 cases each day, and there is still a huge backlog. He was quoted as saying: “A court can’t function forever with this kind of backlog and this kind of pressure.” Id. For further commentary on the court’s caseload, see infra note 110.
denial of a petition for review without opinion is a judgment on the merits with the state constitution's requirement that the supreme court must explain in writing the reasons for its decisions that determine causes. The requirement of written opinions was incorporated into the state constitution by the constitutional convention of 1879. Although the provision was not the subject of much debate, one speaker, Samuel Wilson, suggested that the court's increasing workload had forced it to adopt the undesirable practice of deciding cases without explaining its reasoning:

I think every lawyer will agree with me, that in every case there should be an opinion in writing. It tends to purity and honesty in the administration of justice. But . . . [the supreme court] is unable to dispose of the cases annually coming before it and render written decisions, for no five men on the face of the earth can deliberately determine five hundred and sixty cases a year, and render written opinions on them commensurate with the importance and character of the cases brought in this Court.

In 1942, the California Supreme Court described the summary denial of petitions for writs of review of CPUC decisions as an exception to the general rule that decisions of the California Supreme Court which determine causes should be in writing with reasons stated. The supreme court, however, never attempted to justify the exception in light of the apparently categorical language of the state constitution. Years later in Consumers Lobby, the court suggested that a written opinion may not be required when the decision is "deemed" to be on the merits, or "'when the sole possible ground for the denial is on the merits . . . ." This reasoning is unconvincing, however, since the state constitution requires the supreme court to explain the reasons for its decisions, not merely to state whether or not its decisions are on the merits.

69. CAL. CONST. art. VI, § 14, provides in part: "Decisions of the Supreme Court and courts of appeal that determine causes shall be in writing with reasons stated."

70. Id.

71. 2 DEBATES AND PROCEEDINGS OF CONSTITUTIONAL CONVENTION OF THE STATE OF CALIFORNIA 951 (1879). Mr. Wilson went on to explain that while the constitutional amendment would end the undesirable practice of rendering decisions without explanation, such an amendment had to be accompanied by other reforms that would permit the supreme court to render "pure and honest" opinions in all cases before it. Mr. Wilson's committee therefore recommended increasing the number of justices from five to seven and authorizing the court to sit in two chambers. See also Radin, The Requirement of Written Opinion, 18 CALIF. L. REV. 486 (1930) (reviewing the history of the requirement and arguing for a narrower interpretation than the California Supreme Court had given it).


73. Consumers Lobby Against Monopolies v. Public Util. Comm'n, 25 Cal. 3d 891, 901 n.3, 603 P.2d 41, 46 n.3, 160 Cal. Rptr. 124, 129 n.3 (1979) (quoting People v. Medina, 6 Cal. 3d 484, 491 n.6, 492 P.2d 686, 690 n.6, 99 Cal. Rptr. 630, 634 n.6 (1972)).
The California Supreme Court has held that the state constitution does not require that petitions for prerogative writs, such as writs of prohibition and mandate, must be accompanied with an opinion. Summary denial of a prerogative writ, however, unlike the denial of a petition for writ of review of a CPUC decision, is normally considered to be a discretionary act by the court made for policy reasons rather than a decision on the merits determining a cause. Thus, analogy to prerogative writ practice fails to support the summary denial procedure in CPUC cases.

Another possible justification of the position that the constitutional requirement of written opinions does not apply to judicial review of CPUC decisions is found in article XII, section 5 of the California Constitution. The section provides that "The Legislature has plenary power, unlimited by the other provisions of this Constitution . . . , to establish the manner and scope of review of commission action in a court of record . . . ." Any exercise by the legislature of its plenary power to disregard other provisions of the state constitution, however, must be "cognate and germane" to the constitutional powers conferred on the Commission by article XII to regulate public utilities. Exempting the California Supreme Court from the requirement that it render written opinions would not seem to meet the "cognate and germane" test. In any case, legislation has never been enacted to exempt the supreme court from that requirement.

Therefore, it appears that at the very least the California Constitution requires an opinion in writing, however brief, setting forth the reasons for the court's denial of a writ of review respecting a CPUC decision.

D. Failure to Provide a "Plain, Speedy and Efficient Remedy" in Rate Cases Within the Meaning of the Johnson Act of 1934

The CPUC joined other state utility commissions in the early 1930s to press for federal legislation that would remove rate cases from the reach of the federal district courts. The result was passage of the Johnson Act of 1934. The Act removes from federal district courts the jurisdiction to review rate cases decided by a state commission if the state

75. Consumers Lobby, 25 Cal. 3d at 901 n.3, 603 P.2d at 46 n.3, 160 Cal. Rptr. at 129 n.3.
76. CAL. CONST. art. XII, § 5.
77. Pacific Tel. & Tel. Co. v. Eshleman, 166 Cal. 640, 655-56, 137 P. 1119, 1124 (1913).
law provides, among other things, "a plain, speedy and efficient remedy" in a state court.\textsuperscript{79}

As background to the Johnson Act, it is important to note that utility companies previously had viewed federal court proceedings to enjoin decisions of the CPUC as an attractive alternative to review by the California Supreme Court.\textsuperscript{80} There were several advantages to federal, rather than state, court review. First, in the California Supreme Court, if review was granted, it was conducted solely on the record before the Commission and no additional evidence could be introduced.\textsuperscript{81} The federal court, on the other hand, permitted the utility to present whatever evidence it wished and, in some cases, the federal court was not required to review the record of the Commission proceeding.\textsuperscript{82} Second, when the utility raised federal constitutional objections to a Commission decision, the federal court was required to exercise its independent judgment as to the weight of the evidence relating to the constitutional issue.\textsuperscript{83} Thus, review in federal court constituted a trial de novo on issues that had already been determined by the Commission.

Sometimes, a utility company pursued both its state and federal remedies concurrently until it could assess its chances of success in each forum. It would then dismiss the proceeding less likely to succeed and rely exclusively on the other.\textsuperscript{84}

Prompted by resentment from state commissions and the public toward federal interference in state utility regulation; by the expense and delay that federal interference caused;\textsuperscript{85} and perhaps also by concern over the flood of state utility rate cases clogging the federal courts, Congress finally took steps to restrict the right of federal court review of state public utilities commission rate decisions by enacting the Johnson Act in 1934.\textsuperscript{86} The proponents of the Act argued that state public utility regula-

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\textsuperscript{79} Id.

\textsuperscript{80} It was normally not difficult to find a federal question. A utility company wishing to challenge a commission rate order could allege that the rates were confiscatory and that the Commission had violated the company’s rights under the due process clause of the fourteenth amendment of the federal constitution. Alternatively, questions arising under the commerce or impairment of contracts clauses could often be found.

\textsuperscript{81} CAL. PUB. UTIL. CODE § 1757 (Deering 1970).


\textsuperscript{84} S. REP. No. 701, 72d Cong., 1st Sess. 2-3 (1932).

\textsuperscript{85} See Comment, Limitation of Lower Federal Court Jurisdiction over Public Utility Rate Cases, 44 YALE L.J. 119, 124-27 (1934).

tion was a matter of particular concern to the states. So long as the states created sufficient safeguards to prevent state public utilities commissions from violating federal constitutional rights, considerations of federalism dictated leaving the primary responsibility for judicial review of rate-making decisions to the state courts. As John E. Benton, General Solicitor for the National Association of Railroad and Utilities Commissioners, stated:

> When the people of a State have exercised that degree of care to guard the legal rights of public-service corporations . . . by placing the regulation of rates in the hands of a qualified commission, properly equipped with experts to enable it to exercise its powers intelligently, and when they have guarded against any inadvertent misuse of the power thus delegated, by providing for a review in court of orders of such commission, it is offensive to their proper sense of State pride, and tends to diminish their respect for and confidence in the Federal courts, if such courts nevertheless summarily issue injunctions whereby the orders of their commission are suspended and held in litigation for years.\(^{87}\)

Supporters of the Johnson Act also argued that it should be assumed that state courts are as scrupulous as federal courts in upholding federal constitutional rights. If the utility company remained dissatisfied with the determination of the federal constitutional question after exhausting its state judicial remedies, it could still seek appeal to the United States Supreme Court.\(^{88}\)

As finally adopted, the Johnson Act of 1934 provides:

> The district courts shall not enjoin, suspend or restrain the operation of, or compliance with, any order affecting rates chargeable by a public utility and made by a state administrative agency or a rate-making body of a state political subdivision, where: (1) Jurisdiction is based solely on diversity of citizenship or repugnance of the order to the Federal Constitution; and (2) The order does not interfere with interstate commerce; and (3) The order has been made after reasonable notice and hearing; and (4) A plain, speedy and efficient remedy may be had in the courts of such state.\(^{89}\)

Before the Johnson Act deprives the federal district courts of jurisdiction over decisions of a state’s public utilities commission, the state must provide a “plain, speedy and efficient” judicial remedy for violations of federal rights. The chief counsel of the CPUC, knowing that such a condition was to be written into the Johnson Act, feared that the

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88. *Id.* at 120-21.
89. § 1342.
existing California review procedure would not meet the standard declared by the United States Supreme Court to protect rights under the federal constitution.\(^9\) Thus, he urged the CPUC to take action which led to the adoption of the 1933 amendment to the Public Utilities Act.\(^{91}\) The 1933 amendment provides that whenever a violation of a federal constitutional right is alleged in a petition for writ of review of a CPUC decision, the California Supreme Court "shall exercise an independent judgment on the law and the facts, and the findings or conclusions of the commission material to the determination of the constitutional question shall not be final."\(^{92}\)

The California procedure for reviewing CPUC rate decisions meets the Johnson Act condition of providing a "plain, speedy and efficient" judicial remedy when the California Supreme Court grants a petition for writ of review. In that situation, the parties are given the opportunity to present oral argument, and the court writes an opinion. In the vast majority of cases, however, the California Supreme Court denies a petition without opinion. When this occurs, the petitioner has not been afforded a full hearing\(^{93}\) and has no means of knowing whether the supreme court made a judicial determination of the federal question raised in the petition.\(^{94}\) In such cases it is doubtful that there is a "plain, speedy and efficient" judicial remedy.

The meaning of a "plain, speedy and efficient" judicial remedy was examined in a 1981 case, Rosewell v. La Salle National Bank.\(^{95}\) The United States Supreme Court was called upon to interpret this phrase in the Tax Injunction Act of 1937.\(^{96}\) The words were identical to and actually modeled after those in the Johnson Act. The Court held the state's judicial procedure met the "plain, speedy and efficient" requirements because they provided a "full hearing and judicial determination" at which the taxpayers could raise any and all constitutional objections to the tax

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91. Act of May 18, 1933, ch. 442, 1933 Cal. Stat. 1157 (current version at CAL. PUB. UTIL. CODE § 1760 (Deering 1970)).

92. Id.

93. The supreme court does not have the record certified to it and does not receive oral argument.


being challenged.97

Rosewell implies that anything less than a “full hearing and judicial determination” would fail to meet the “plain, speedy and efficient” test in the Johnson Act. The denial-without-opinion practice of the California Supreme Court appears to fail that test: the practice plainly does not provide a “full hearing,” nor does it provide a “judicial determination” if the denial is only “deemed” to be on the merits.

E. Failure to Provide Assurance of Judicial Review on the Merits to Protect Federal Rights

Under the federal judicial system, a party may seek redress in federal court to protect a federal right if a proceeding has been brought before a state tribunal and the state fails to provide an adequate remedy.98 A state remedy is inadequate if the proceeding denies an applicant an absolute right to a state court determination of the federal claim on the merits.99

In Hillsborough v. Cromwell, the United States Supreme Court considered whether New Jersey's scheme of judicial review of decisions by the state board of tax appeals adequately protected the federal due process and equal protection rights under the fourteenth amendment.100 While the New Jersey Supreme Court had jurisdiction to review such decisions by writ of certiorari, the granting of the writ was not a matter of right but was within the discretion of the court. The United States Supreme Court concluded that “there was such uncertainty surrounding the adequacy of the state remedy as to justify the federal district court in retaining jurisdiction of the cause.”101

It follows from Hillsborough that if denials--without--opinion by the California Supreme Court are only “deemed” to be, and are not in fact, determinations on the merits, the state remedy is inadequate to protect federal rights and, thus, parties claiming violation of federal rights may seek redress in a federal court.

F. Failure to Justify Abstention from Exercise of Jurisdiction by the Federal District Court

The Johnson Act's restrictions on federal district court jurisdiction

97. Rosewell, 450 U.S. at 514.
100. Id. at 622.
101. Id. at 626.
in public utilities cases are supplemented by considerations of federalism. Although the federal courts may have jurisdiction over a particular matter, they should exercise their jurisdiction "with proper regard for the rightful independence of state governments in carrying out their domestic policy." When a state provides a unified method of formulating policy in an area involving substantial state interests, federal courts should apply the *Burford v. Sun Oil Co.* abstention doctrine and abstain from exercising their jurisdiction if intervention by the lower federal courts would interfere with state policies.

The principle of federal abstention has been applied to federal district court injunctive proceedings against state public utilities commission decisions, even when the Johnson Act has been inapplicable because the challenged decision was not one setting rates. As in cases under the Johnson Act, however, federal abstention will apply only if the state judicial review procedures are "adequate." What remains unclear is whether the standard of adequacy under the *Burford* abstention doctrine is necessarily the same as the "plain, speedy and efficient" standard discussed in *Rosewell*, or the certainty standard applied in *Hillsborough*.

Regardless of the exact standard used, however, "adequacy" for the purposes of federal abstention is measured in broader terms. In *Burford* and *Alabama Public Service Commission v. Southern Railway*, the United States Supreme Court emphasized that the state scheme of judicial review is an integral part of the regulatory process established by the state and that in determining the adequacy of the state review procedure, the federal courts should look at the state system as a whole. The

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105. Alabama, 341 U.S. at 349 n.11.
106. Rosewell v. La Salle Nat'l Bank, 450 U.S. 507, 512 (1981); see supra text accompanying note 102.
109. "Statutory appeal from an order of the Commission is an integral part of the regulatory process under the Alabama Code. Appeals, concentrated in one circuit court, are 'supervisory in character.'" Alabama Pub. Serv. Comm'n, 341 U.S. at 348 (quoting Avery Freight Lines v. White, 245 Ala. 618, 622-23, 18 So. 2d 394, 398 (1944)). "In describing the relation of the Texas court to the Commission no useful purpose will be served by attempting to label the court's position as legislative . . . or judicial . . . —suffice it to say that the Texas courts are
courts, therefore, must be particularly careful before condemning a state system of judicial review as inadequate.

Nevertheless, the adequacy requirement for state judicial remedies must have some meaning. So long as the California Supreme Court continues to deny without opinion most petitions for a writ of review of CPUC decisions, there is little basis on which a federal court can assess the adequacy of the California procedure. Thus, if the federal courts accept the California Supreme Court’s assertion that it reviews all petitions on the merits they seem to be abdicating their duty to ensure the vindication of federal rights. It is time for the federal courts to recognize that continued deference is not appropriate.

III. Possible Remedies

Given the long history of the California Supreme Court’s treatment of petitions for writs of review respecting CPUC decisions and the court’s enormous case load, it would be unreasonable to expect the court to indulge in the time consuming procedures set forth in the Public Utilities Code each time a petition for writ of review is filed. Requiring the court to direct the CPUC to certify the record to the court, conduct oral argument, and render a detailed opinion seems quite unnecessary even if an effective argument can be made that the process is technically required by the California Constitution and the California Public Utilities Code. The workload of the court has dramatically increased over the years, and efforts should be made to reduce its burdens rather than increase them.110

One significant change, which would not exacerbate the court’s burdens appreciably, and yet would be welcome by the bar, is a statement in every CPUC case setting forth the rationale for the action taken. When the court decides that a writ of review should be denied, it need only state the reasons for the denial. If the denial is because no error of law has been committed, the court should at least state that conclusion. If the denial is based upon a procedural deficiency the court should state that deficiency. If the denial is due to discretionary considerations that require the court to invoke the concept of a decision “deemed to be on the


110. For earlier comments on the burdensome caseload in the California Supreme Court, see Comment, The California Supreme Court and Selective Review, 72 CALIF. L. REV. 720 (1984); Comment, Case Disposition by the California Supreme Court: Proposed Alternatives, 67 CALIF. L. REV. 788 (1979); Kleps, Can Our Supreme Court Survive?, L.A. Daily J., Aug. 18, 1982, at 4, col. 4.
merits," in order to comply with statutory and constitutional considerations, that fact should be made known to the parties.

Second, until the procedure for reviewing CPUC decisions is reformed, or at least until such time as the court adopts the practice of stating the reasons for its denial of a petition for writ of review, the bar should attempt to persuade federal courts that the present procedure often fails to meet the "plain, speedy and efficient" standard required by the Johnson Act for rate cases111 and the related standard of "adequacy" for judicial remedies required by the due process clause of the federal constitution.112 In such cases, the federal courts could then exercise jurisdiction to review CPUC decisions.

Third, remedial legislation should be enacted by the California Legislature to ensure that decisions of the CPUC are in fact subject to judicial scrutiny on the merits whenever a colorable basis for challenging a CPUC decision has been made in the petition for a writ of review and when no procedural infirmities exist. In view of the desirability, if not necessity, of relieving the California Supreme Court of some of its workload, the Select Committee appointed by Chief Justice Lucas has recommended that the California Supreme Court seek constitutional and legislative changes to place original review of CPUC decisions in the courts of appeal.113 Review authority could be lodged in one appellate court designated to hear all petitions for writ of review or in the appellate court sitting in the district where the utility has its principal office. While the issue of which court or courts should be granted review authority was not addressed by the Select Committee Report, lodging review authority in one court seems preferable to promote consistency and enable the chosen court to gain expertise in this area. Regardless of the approach taken, however, if such legislation is adopted, its most important aspect must be to ensure that judicial review is accorded as a matter of right.

As an interim measure (pending adoption of remedial legislation), it has been suggested that the California Supreme Court invoke power under the state constitution to transfer to a court of appeal any CPUC decisions coming before it that do not present issues of great importance.114 This proposal assumes a power which the supreme court ap-

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111. See supra notes 78-97 and accompanying text.
112. See supra notes 98-101 and accompanying text.
pears not to possess. Section 1759 of the Public Utilities Code declares that "No court of this State, except the Supreme Court . . . shall have jurisdiction to review . . . any order or decision of the commission . . . ." Nonetheless, the Legislature could amend section 1759 to grant the court this power. Serious consideration should also be given to legislation requiring the transfer of all cases to a court of appeal when it is not feasible for the supreme court to make a determination on the merits. Such legislation should mandate that the court of appeal review the decision on the merits and provide a written opinion.

Conclusion

This article advocates short-term and long-term action to address the current inadequacies of the California Supreme Court's review of decisions of the California Public Utilities Commission. For the present, efforts should be made to persuade the supreme court to set forth its reasons whenever it denies a petition for writ of review. The document denying the writ should reveal whether the denial is in fact on the merits, is to be taken as "deemed" on the merits, or is based on procedural grounds. If the court adopts this practice, parties will be in a position to know what further steps, if any, to take. The dissatisfaction with the court's current practice will be reduced while the court's workload will not be appreciably increased.

In addition, this Article advocates that until remedial legislation is enacted and so long as the California Supreme Court continues to deny petitions for writ of review without opinion, attorneys should not hesitate to file actions in the federal district court to challenge CPUC decisions that involve a federal question. Attorneys should urge the federal district court to entertain jurisdiction because the state remedy is not "plain, speedy and efficient" under the Johnson Act, or is not "adequate" under the doctrine of Hillsborough v. Cromwell.

For the long-term, remedial legislation should be enacted to ensure court review on the merits of challenged CPUC decisions. Legislation could take either of two forms. The Public Utilities Code could be amended to provide that whenever the California Supreme Court decides...
not to issue a writ of review, the court shall, except in cases where denial is for procedural reasons, certify the matter to a court of appeal, and the latter court shall be required to issue a writ, conduct a hearing, and write an opinion on the merits. Alternatively, the Public Utilities Code could be amended to provide that all petitions for writ of review of CPUC decisions be addressed to a court of appeal instead of the supreme court. The court of appeal should be required to issue a writ, hear argument, and write an opinion except when it appears on the face of the pleading that denial of a writ can be made without reference to the record, as in the case of an obvious procedural defect. Under either alternative, review authority should be lodged in only one court of appeal and the court of appeal should be required to state its reasoning. This will avoid conflicting decisions, promote consistency, and enable the chosen court to gain particular expertise in matters pertaining to the CPUC.