

# PUBLIC LAW RESEARCH INSTITUTE

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## **REPORT**

### ENFORCEMENT OF PUBLIC UTILITIES' TREE-TRIMMING REQUIREMENTS

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## **I. Introduction**

Investor-owned electric utilities in California are required by the Public Resources Code, and through the Public Utilities Code and specifically General Order (G.O.) 95 of the California Public Utilities Commission (Commission), to maintain a distance between electric power lines and all vegetation. However, although both requirements direct electric utilities to maintain tree-line clearance, they differ in the specific distance required.

In "any mountainous land, or in forest-covered land, brush-covered land, or grass-covered land" within "state responsibility areas," Public Resources Code section 4293 requires a clearance of four feet, six feet or ten feet between vegetation and all conductors depending on the voltage at which the power line operates.<sup>1</sup> It specifies:

- (a) For any line which is operating at 2,400 or more volts, but less than 72,000 volts, four feet.
- (b) For any line which is operating at 72,000 or more volts, but less than 110,000 volts, six feet.
- (c) For any line which is operating at 110,000 or more volts, 10 feet.

In every case, such distance shall be sufficiently great to furnish the required clearance at any position of the wire, or conductor when the adjacent air temperature is 120 degrees Fahrenheit, or less. Dead trees, old decadent or rotten trees, trees weakened by decay or disease and trees or portions thereof that are leaning toward the line which may contact the line from the side or may fall on the line shall be felled, cut, or trimmed so as to remove such hazard.<sup>2</sup>

Public Resources Code section 4292 also orders utilities to maintain "around and adjacent to any pole or tower which supports a switch, fuse, transformer, lightning arrester, line junction, or dead end or corner pole, a firebreak which consists of a clearing of not less than 10 feet in each direction from the outer circumference of such pole or tower" in "any mountainous land, or in forest-covered land, brush-covered land, or grass-covered land" within "state responsibility areas."<sup>3</sup>

In contrast to such specific requirements, the Commission's clearance rule formerly only required utilities to maintain "a reasonable amount of tree trimming . . . in order that the wires may clear branches and foliage."<sup>4</sup> The Commission approved changes to that standard in 1997. According to the amended Rule 35 of G.O. 95 and Table 1 referred therein, a minimum clearance of 18 inches must be maintained "between line conductors and vegetation under normal conditions."<sup>5</sup> The Commission's 18 inch standard is clearly more lenient than the clearance requirements of the Public Resources Code. Utilities would need to trim more trees to obey the Public Resources Code. Thus, the question arises whether more severe clearance requirements can be imposed upon utilities when the Commission requires clearance of only 18 inches.

## **II. There Is No Conflict Between the Public Resources Code's Clearance Requirements and the Commission's Tree-trimming Rule.**

The Public Resources Code's clearance requirements existed when the Commission declared its new 18 inches tree-trimming rule. Since the 18 inches rule is more lenient

than the requirements of the Public Resources Code, electric utilities may try to argue that they no longer need to comply with the more strict rules. However, the Commission has made it clear that its rule does not contradict or overrule the clearance requirements of the Public Resources Code, and its conclusion is supported by law. The very clear language and clearance requirements of the Public Resources Code restrict the Commission from adopting standards in conflict with the Public Utilities Code.

**A. General Order 95 Did Not Preempt Or Overrule The Public Resources Code's Clearance Requirements.** First, the Commission stated that the 18 inches clearance is the *minimum* clearance required.<sup>6</sup> The Commission explained, "Our action today does not limit or mandate the maximum limits of tree trimming, or specify the manner in which trimming activities must be accomplished. We are selecting a safe minimum standard to insure system safety and reliability . . . ." <sup>7</sup> It decided that there is no "need to determine what the appropriate maximum clearance should be," but only a need to "determine the minimum safe clearances and a reasonable level of expense for the utility to maintain such clearances."<sup>8</sup> By refusing to set a maximum clearance requirement, the Commission allowed for the possibility that a clearance of more than 18 inches may be appropriate in some situations.

Second, the Commission specifically declared that the clearance standards contained in the Public Resources Code remain effective.<sup>9</sup> In fact, the Commission was required to make its clearance rule consistent with the existing Public Resources Code's rules. When the California legislature ordered the Commission to adopt standards for safe and reliable electric service, it specified,

On or before December 2, 1996, the Commission shall prepare and adopt specific, measurable, and enforceable standards for electric distribution system maintenance and operations to ensure system reliability and to minimize or prevent service interruption due to storms, earthquakes, fire and other disasters. The standards *shall specify tree trimming and brush clearing requirements, consistent with existing laws, which ensure that the electric distribution system is protected from damage.* The standards shall require the Commission to investigate and take appropriate action against utilities which fail to meet the standards.<sup>10</sup>

Although Public Utilities Code section 701 allows the Commission to exercise a very broad regulatory power over public utilities, the Commission must comply with any restrictions placed upon its power by the legislature. The California Supreme Court has ruled, "Whatever may be the scope of regulatory power under . . . section [701], it does not authorize disregard by the commission of express legislative directions to it, or restrictions upon its power found in other provisions of the act or elsewhere in general law."<sup>11</sup> Since the legislature expressly directed the Commission to make its tree-trimming rule "consistent with existing laws," the Commission was required to follow the legislature's order.<sup>12</sup>

While deciding on the clearance standard, the Commission considered adopting the standards contained in the Public Resources Code but decided against it.<sup>13</sup> The Commission rejected those standards because "[t]hose standards, which in some instances would require drastic trimming, are not appropriate for application in more urbanized environments, and would be unreasonably expensive to implement and maintain."<sup>14</sup> The Commission sought to make a general rule which would apply in a wide range of environments and determined that the Public Resources Code's clearance

standards did not meet this aim. However, the Commission clarified that the standards rejected for adoption still "remain in force wherever required under the Public Resources Code."<sup>15</sup>

**B. The Public Resources Code's Clearance Requirements Do Not Conflict With The Commission's Rule.** Public Resources Code sections 4292 and 4293 govern the utilities' responsibility to maintain a clearance around power lines in "any mountainous land, or in forest-covered land, brush-covered land, or grass-covered land."<sup>16</sup> The rules operate to prevent fire in such highly flammable lands. Such lands must also be within "state responsibility areas."<sup>17</sup> "State responsibility areas" are "areas of the state in which the financial responsibility of preventing and suppressing fires has been determined . . . to be primarily the responsibility of the state."<sup>18</sup> Such areas are indicated on the "Official Map [sic] State Responsibility Area for Fire Protection" filed in the office of the Director of the Fire Protection Section in Sacramento.<sup>19</sup>

Since sections 4292 and 4293 apply only to specific lands, all other lands containing power lines are governed by the Commission's clearance rule. The Commission intended for its 18 inches clearance requirement to "fill the interstices where the Public Resources Code does not specify minimum clearances . . . ." <sup>20</sup> This means that the Commission's 18 inches rule applies only in situations when the Public Resources Code's clearance rules do not. Therefore, the only time that the Commission's 18 inches minimum clearance rule will apply in "any mountainous land, or in forest-covered land, brush-covered land, or grass-covered land" is when the power lines located in such lands carry less than 2,400 volts since Public Resources Code section 4293 specifies minimum clearance only for power lines carrying 2,400 volts or more.<sup>21</sup>

However, since Public Resources Code section 4292's 10 feet minimum clearance requirement around poles and towers does not depend on any minimum voltage, its 10 feet clearance must always be maintained without regard to the Commission's 18 inches rule. So in "any mountainous land, or in forest-covered land, brush-covered land, or grass-covered land" in state responsibility areas, electric utilities may maintain an 18 inches clearance around the power lines carrying less than 2,400 volts but they must still keep a 10 feet clearance around poles or towers "which support[] a switch, fuse, transformer, lightning arrester, line junction, or dead end or corner poles . . . ." <sup>22</sup> Section 4292's 10 feet clearance rule does not conflict with the Commission's 18 inches rules since the Commission intended for its rule to apply only when the Public Resources Code does not. Likewise, as Public Resources Code section 4293's clearance rule and the Commission's rule apply to different types of power lines, there is no conflict between the rules.

A utility that failed to meet the requirements of the Public Resources Code would also be in violations of Public Utilities Code Section 451, which requires electric utilities to maintain facilities so that they are safe. Not abiding by the safe clearance requirements in the Public Resources Code would violate Section 451.

### **III. A District Attorney Has the Authority to Bring an Action Against a Utility That Violates the Clearance Requirements.**

Since there is no conflict between the Public Resources Code and the Commission's own tree trimming rule, electric utilities must comply with both of the clearance rules in order to maintain safety. Their failure to obey these rules can lead to fires when tree limbs come in touch with nearby power lines. Particularly, violations of the Public Resources

Code clearance requirements can cause devastating wildfires in highly flammable lands. According to the California Department of Forestry and Fire Protection, an electric utility's failure to comply with the vegetation clearance requirements caused the "1990 Campbell fire in Tehama County which burned 125,000 acres . . . , the 1992 Fawn Hill fire in Placer County, which burned 250 acres, and [the] 1995 Saylor fire in Placer County, which burned 150 acres" along with hundreds of smaller wildfires.<sup>23</sup> After such fires, some district attorneys sued the responsible utilities to fine them for their violations and to enforce the clearance rules.<sup>24</sup> A district attorney has the power to bring criminal actions and civil actions against utilities that violate the clearance rules.

**A. A District Attorney Has The Authority To Bring A Criminal Action Against A Utility That Violates The Clearance Rules.** A willful or negligent violation of the Public Resources Code's clearance requirements is a misdemeanor.<sup>25</sup> Further,

[e]very public utility and every officer, agent, or employee of any public utility, who violates or fails to comply with, or who procures, aids, or abets any violation by any public utility of any provision of the Constitution of this state or of this part [the Public Utilities Code], or who fails to comply with any part of any order, decision, rule, direction, demand, or requirement of the commission, or who procures, aids, or abets any public utility in such violation or noncompliance in a case in which a penalty has not otherwise been provided, is guilty of a misdemeanor and is punishable by a fine not exceeding one thousand dollars (\$1,000), or by imprisonment in a county jail not exceeding one year, or by both such fine and imprisonment.<sup>26</sup>

Thus, a violation of the Commission's tree-trimming rule in its General Order 95 is also a misdemeanor. Since a district attorney is "the public prosecutor . . . [and has the power to] initiate and conduct on behalf of the people all prosecutions for public offenses," he may bring a criminal action charging a utility with a misdemeanor.<sup>27</sup>

A criminal action against a utility must be brought in court. The Commission is "not a court with criminal jurisdiction" and thus "it is for the appropriate state court, upon prosecution by the proper authorities, to convict . . . [a public utility] of criminal violations . . ."<sup>28</sup> There is no conflict of jurisdiction between the Commission and the courts even if the criminal action involves a violation of the Public Utilities Code, because it is established that "[t]he courts have exclusive jurisdiction of proceedings for the prosecution of criminal offenses defined by the Public Utilities Code even though the offenses charged are premised on violations of rules and regulations prescribed by that code, or the Public Utilities Commission . . . ."<sup>29</sup>

**B. A District Attorney Has the Authority To Bring a Civil Action Against a Utility That Violates the Clearance Rules.** Although the Public Resources Code and the Public Utilities Code each provide that a noncompliance with its clearance rules is a criminal offense, a district attorney is not just limited to bringing a criminal action.<sup>30</sup> A district attorney may choose to bring a civil action by alleging that the utility's violation of the clearance rules constitutes unfair competition under Sections 1700 et seq. of the Business and Professions Code, or a public nuisance.

1. A District Attorney May Bring An Unfair Competition Action.

Some district attorneys have charged that a utility company engaged in unfair competition when it violated the tree-trimming rules. Unfair competition is "any unlawful, unfair or fraudulent business act or practice . . . ."<sup>31</sup> The California Supreme Court has explained,

[I]n essence, an action based on Business and Professions Code section 17200 to redress an unlawful business practice §borrows' violations of other laws and treats these violations, when committed pursuant to business activity, as unlawful practices independently actionable under section 17200 et seq. and subject to the distinct remedies provided thereunder.<sup>32</sup>

○Virtually any law--federal, state or local--can serve as a predicate for a section 17200 action."<sup>33</sup> Thus, a Business and Professions Code section 17200 action can be based on the utility's violation of the tree-trimming laws. A district attorney can show that the utility's failure to maintain a required clearance distance between vegetation and power lines was "unlawful."<sup>34</sup> It is not necessary to prove that the utility company intended to injure anyone through its violation because unfair competition is a strict liability offense.<sup>35</sup>

A district attorney may also allege that the utility's noncompliance with the tree-trimming requirements was an "unfair" business act, which is another basis for an unfair competition action.<sup>36</sup> The test for determining whether a business practice is unfair "involves an examination of [that practice's] impact on its alleged victim, balanced against the reasons, justifications and motives of the alleged wrongdoer. In brief, the court must weigh the utility of the defendant's conduct against the gravity of the harm to the alleged victim . . . ." <sup>37</sup> The alleged victim would be the county in which the utility violated the clearance rules. The county suffers a grave harm when a utility company's business practice of violating the clearance requirements causes or threatens to cause a fire which damages county properties. The utility companies who obey the clearance rules may also be seen as "victims" because while they expended money and resources into their tree-trimming programs, an offending utility company unjustly increased its profits by not spending money to trim trees as all utilities are required to do. Considering there is no public benefit derived from a utility's failure to maintain the required clearances, the harm suffered by the victims weighs heavily in comparison, suggesting that the utility's conduct was "unfair."

The California Court of Appeal has said that a business practice is "unfair" when it "offends an established public policy or when the practice is immoral, unethical, oppressive, unscrupulous or substantially injurious to consumers."<sup>38</sup> A district attorney may show that a utility's act of violating tree-trimming requirements of the Public Resources Code and/or the Commission's rule goes against the public policy behind these rules of ensuring safety around power lines. A violation of the clearance requirements may also substantially injure consumers as it creates a hazardous environment and may cause fires.

After a district attorney brings an unfair competition action, it is up to the superior court to decide whether the utility committed an unfair competition by violating the clearance laws. In the past, courts have held that those who violated the following state laws engaged in unfair competition: antidiscrimination laws; antitrust laws, criminal laws, environmental protection laws; fish and game laws; housing laws; labor laws and vehicle laws.<sup>39</sup> It is highly probable that the court will find that a violation of the clearance rules also constitutes unfair competition.

A district attorney has an express grant of authority to bring a civil action in the name of the People to seek relief for unfair competition.<sup>40</sup> A district attorney may ask the court to enjoin violations of Business and Professions Code 17200 and seek a \$2,500 civil penalty for each violation of section 17200.<sup>41</sup> The fact that a violation of the Public Resources

Code or the Public Utilities Code is a misdemeanor does not prohibit the court from separately imposing a civil penalty or an injunction in an unfair competition action. "Unless otherwise expressly provided, the remedies or penalties provided by [the Business and Professions Code section 17200 et seq.] are cumulative to each other and to the remedies or penalties available under all other laws of this state."<sup>42</sup>

## 2. A District Attorney May Bring A Public Nuisance Action.

Certain district attorneys have also brought civil actions alleging that a utility company's violation of the tree-trimming laws creates a public nuisance. The Butte County district attorney relied on Civil Procedure Code section 731's grant of authority to district attorneys to bring a civil action in the name of the People to abate a public nuisance as defined in Civil Code section 3480.<sup>43</sup> The superior court "has jurisdiction to abate a nuisance created or maintained by a public utility and neither the public utilities law nor the Constitution excludes such jurisdiction."<sup>44</sup>

Civil Code section 3479 defines a nuisance as "[a]nything which is injurious to health, including, but not limited to, the illegal sale of controlled substances, or is indecent or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property . . . ." According to Civil Code section 3480, a nuisance is public when it "is one which affects at the same time an entire community or neighborhood, or any considerable number of persons, although the extent of the annoyance or damage inflicted upon individuals may be unequal." A district attorney needs to first show that a utility creates a nuisance according to Civil Code section 3479's definition when it fails to trim trees near the power lines as required. He then needs to show that the nuisance is public. He may argue that a violation of the clearance rules is a nuisance when it creates a fire hazard which is injurious to health. Since such a fire hazard can cause a fire which may affect the entire community, a court may find that it is a public nuisance.

Government Code section 26528 also gives a district attorney the power to bring a civil action to abate a public nuisance but it does not limit the definition of a public nuisance to how it is defined in the Civil Code. Therefore, a district attorney may use the definition used in the Public Resources Code to establish a public nuisance. The Public Resources Code section 4171 provides, "Any condition endangering public safety by creating a fire hazard and which exists upon any property which is included within any state responsibility areas is a public nuisance." Since a public utility is required to keep a clearance distance between vegetation and power lines in state responsibility areas to prevent fires in highly flammable areas, a district attorney would be able to establish that a violation of the Public Resources Code's clearance laws creates a fire hazard and thus a public nuisance.

## **IV. The Commission's Jurisdiction Does Not Bar a District Attorney from Bringing an Action Against a Utility.**

The authority of district attorneys to bring court actions against the utilities that violate the clearance rules has been questioned. Certain utility companies have argued that such enforcement authority over the utilities rests in the Commission alone. They have asserted that the Commission has exclusive jurisdiction over the enforcement of the clearance rules, which precludes the superior court from deciding an action brought by a district attorney. However, the Commission does not have exclusive jurisdiction over the tree-trimming practices of utilities, and the Commission acknowledged this fact when it amended its tree-trimming rule.

Utilities have alternatively argued that the court should apply the primary jurisdiction doctrine to stay the action until the Commission itself takes an enforcement action against the utility being sued by the district attorney. However, it is unlikely that the court will apply the primary jurisdiction doctrine if it finds that the Commission's expertise is not required to decide the enforcement actions. Nonetheless, the court possesses a broad discretion and power to apply the doctrine to stay the actions.

**A. The Commission's Jurisdiction Over Utility's Tree-Trimming Practices Is Not Exclusive.** The Commission is vested with a broad authority to "supervise and regulate every public utility in the State."<sup>45</sup> Instead of being limited to the specific powers conferred upon it by statutes, the Commission is authorized to "do all things, whether specifically designated in [the Public Utilities Act] or in addition thereto, which are necessary and convenient in the exercise of such power and jurisdiction [over public utilities]."<sup>46</sup> According to the California Supreme Court, "'The commission's authority has been liberally construed' and includes not only administrative but also legislative and judicial powers."<sup>47</sup> Consequently, the Commission has the power to make rules regarding utilities' tree-trimming practices and the power to enforce them.<sup>48</sup> The Commission's authority over utilities' tree-trimming is also specifically shown in the Supplemental Report of the 1996 Budget Act where the California legislature directs the Commission to adopt tree-trimming standards.<sup>49</sup>

The Commission's broad powers largely deprive others of the authority over most aspects of utilities' operation. California Constitution Article XII, section 8 provides, "A city, county, or other public body may not regulate matters over which the Legislature grants regulatory power to the Commission." Since the legislature granted a very broad regulatory power over public utilities to the Commission, "[a] city, county, or other public body" is generally prohibited from directly regulating public utilities. Thus, since a district attorney acts on behalf of a county, his power to regulate public utilities is limited.

However, the legislature also gave local governments the authority to regulate local matters. Article XI, section 7 of the California Constitution provides, "A county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws." Thus, a local government may regulate public utilities as long as its regulation does not conflict with general laws. The Utilities Safety Branch, a section within the Commission, advised the Commission that "[a] case brought by [a] District Attorney [against an electric utility for its violations of the Public Resources Code's clearance rules] is an exercise of local police power" and thus, permitted by the California Constitution.<sup>50</sup>

While the Commission was considering what tree-trimming rule to enact, utilities had opportunities to make recommendations and requests. PG&E asked the Commission to declare that it has exclusive jurisdiction over utilities' tree-trimming practices and that local governments are prohibited from regulating these activities.<sup>51</sup> However, the Utilities Safety Branch advised the Commission against such declaration.<sup>52</sup> Referring to the California Constitution Article XI, section 7, the Utilities Safety Branch explained that although the Commission "has authority over tree trimming for utility safety and reliability," its "jurisdiction over tree trimming is not exclusive. Local government may also regulate utility operations, to the extent of its power, so long as there is no conflict. Local regulation may meet legitimate purposes which the Commission would support."<sup>53</sup> The Utilities Safety Branch advised the Commission against asserting its "jurisdiction [over utilities' tree trimming] abstractly or hypothetically" and suggested instead determining on

"a case-by-case" basis whether the regulation by a local government is "consistent with or impinges upon the Commission's jurisdiction."<sup>54</sup>

The Commission followed the Utilities Safety Branch's advice and declined to declare its jurisdiction over utilities' tree-trimming because "such a course would be fraught with the danger of acting outside of [its] authority. . . ." <sup>55</sup> California courts also agree that "[i]t has never been the rule in California that the [public utilities] commission has exclusive jurisdiction over any and all matters having any reference to the regulation and supervision of public utilities." <sup>56</sup> A district attorney does not act "in conflict with general laws" when he, on behalf of a local government, brings an unfair competition action or a public nuisance action to enforce the clearance requirements already established by general laws.<sup>57</sup> Therefore, a district attorney is not barred from bringing such actions.

**B. The Superior Court Has The Authority To Decide The Action Brought By A District Attorney Unless The Commission Itself Takes An Enforcement Action Against The Defendant Utility For The Same Alleged Violations.** Although a district attorney may be able to bring actions against utilities in the superior court, the superior court's authority over public utilities is limited. In section 1759 of the Public Utilities Code, the legislature gave only the California Supreme Court and the court of appeal the

jurisdiction to review, reverse, correct, or annul any order or decision of the commission or to suspend or delay the execution or operation thereof, or to enjoin, restrain, or interfere with the commission in the performance of its official duties, as provided by law and the rules of court.<sup>58</sup>

The superior court, thus, "may not act in such a manner as to circumvent, or to impede, the commission in the exercise of its constitutional jurisdiction over public utilities."<sup>59</sup> Nevertheless, the superior court has "concurrent jurisdiction to award damages in those cases which do not impede the [Commission's] supervisory and regulatory functions."<sup>60</sup> Thus, one must examine whether the superior court deciding the tree-trimming case brought by a district attorney interferes with the Commission in carrying out its own tree-line clearance policies. On examination, there does not seem to be such interference.

The enforcement of the tree-trimming requirements by district attorneys and the superior court supports and furthers, rather than impede, the Commission's mandate to ensure safety around power lines. The Commission has declared its tree-trimming policy of requiring specific clearance distances. Typically, a district attorney simply alleges that these clearance distances were not kept when he brings an unfair competition action or a public nuisance action. Instead of making subjective policy determinations which may conflict with the Commission's policies, the superior court would need to simply determine the relatively straightforward factual question of whether the required distances were maintained between vegetation and power lines. Since these are clear, objective distance requirements which can be measured, there does not seem to be a danger of the superior court's determination impeding the Commission's policy. In fact, the superior court's enforcement of the clearance rules prevents potential fires, adds to the incentive for utility companies to obey the rules, and carries out the Commission's tree-trimming policy.

However, the superior court's jurisdiction is ultimately dependent on the Commission's inaction with respect to specific counts of alleged violations. The superior court's concurrent jurisdiction "to enforce an obligation imposed by law upon any public utility"

lasts only "until the . . . Commission has acted in reference to [such] utility."<sup>61</sup> Once the Commission assumes "jurisdiction over a public utility for the purpose of administering the law applicable to the activities of the utility, the commission has exclusive jurisdiction over the regulation and control of said utility and may take any action necessary to the proper and complete exercise of this jurisdiction."<sup>62</sup> This means that if the Commission itself takes steps to enforce the clearance requirement against a specific utility which has been found to be in violation, a district attorney may not maintain an action in the superior court against the same utility for the same violations. Once the Commission acts in reference to the utility for specific violations, the superior court may not decide the matter pertaining to those same violations on its own. Also, after the Commission makes its decision, the superior court cannot reverse it.<sup>63</sup>

Therefore, if the Commission decides that certain instances have not in fact been clearance violations, a district attorney cannot sue in the superior court alleging that these same instances indeed were violations. The superior court does not have the power to contradict the Commission's finding on the alleged violations. However, until the Commission acts to adjudicate the allegations of clearance violations against a specific utility, the superior court maintains concurrent jurisdiction to enforce the tree-trimming rules.

**C. The Court May Apply The Primary Jurisdiction Doctrine To Stay The Action Brought By A District Attorney.** Even though the superior court has jurisdiction to decide a civil action regarding a public utility's violation of the clearance laws, the court may apply the primary jurisdiction doctrine to stay the action. The primary jurisdiction doctrine

applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views.<sup>64</sup>

The policy reasons for the doctrine are to "enhance[] court decision making and efficiency by allowing courts to take advantage of administrative expertise, and [to] . . . help[] assure uniform application of regulatory laws."<sup>65</sup>

There is no rigid formula used to decide when the primary jurisdiction doctrine applies. Courts have broad discretion and great flexibility, and their determination generally depends on the extent to which the doctrine's policy reasons are implicated.<sup>66</sup> Courts generally ask two questions regarding the action in making their determination. First, is there "a pervasive and self-contained system of administrative procedure" available to handle the issues involved in the action?<sup>67</sup> Second, are "the factual issues in . . . [the] case . . . of a complex or technical nature beyond the usual competence of the judicial system" that there is "a paramount need for specialized agency fact-finding expertise as to require [prior resort to] . . . administrative remedies"?<sup>68</sup>

To apply the primary jurisdiction doctrine to a case involving a public utility's alleged violation of the clearance laws, a court would first need to decide whether the Commission has a "pervasive and self-contained system of administrative procedure" for regulating and monitoring the clearance rules.<sup>69</sup> The Commission has not announced a specific procedure for enforcing the clearance requirements. However, the Public Utilities

Code provides various actions that the Commission can or must take to enforce the state laws and the rules and orders of the Commission against utilities. "Whenever the [C]ommission is of the opinion that any public utility is failing or omitting or about to fail or omit, to do anything required of it by law, or by any order, decision, rule, direction, or requirement of the [C]ommission," the Commission must direct its attorney to commence an action or proceeding in the superior court to request a mandamus or injunction in order to stop or prevent the violation.<sup>70</sup> If the Commission finds that "any order, decision, decree, rule, direction, demand, or requirement" of the Commission has been violated, the Commission can also order the utility to pay a penalty.<sup>71</sup> Furthermore, the Commission has the option to sue a utility in the name of the people of the State of California to enforce a state statute and to recover any penalties due.<sup>72</sup> A court may decide that these actions available to the Commission to enforce the clearance rules constitute a "pervasive and self-contained system of administrative procedure."<sup>73</sup>

But even if a court decides that there is such procedure, it is unlikely that a court will see a need for the Commission's expertise in adjudicating whether the utility violated the clearance laws. The fact question of whether a utility company failed to keep a clear, measurable clearance distance required between vegetation and power lines can be determined by a court without assistance from the Commission. A court will most likely decide not to stay the action if there is no "paramount need for specialized agency fact-finding expertise."<sup>74</sup>

But if a court determines that complex public utility regulations are involved, it may wish to exercise its discretion to stay the action until the Commission completes an administrative procedure that may be underway. A court may wish to wait until the Commission completes its own investigation into the specific alleged violations to determine whether the utility has violated the clearance rules. However, although a court is free to apply the primary jurisdiction doctrine in public nuisance actions, it is possible that a court is prohibited from applying the doctrine in unfair competition actions.

**D. Business and Professions Code Section 17204 May Prohibit A Court From Applying The Primary Jurisdiction Doctrine In An Unfair Competition Action.** By amending section 17204 of the Business and Professions Code, the Legislature seems have required unfair business practice actions to be decided by courts exclusively and not by any administrative agencies. If that indeed was the Legislature's purpose for amending section 17204, a court may not use the primary jurisdiction doctrine to stay an unfair competition action. "If the Legislature establishes a scheme under which a court is prohibited from exercising discretion under the doctrine of primary jurisdiction, a court must honor the legislative scheme, and may not decline to adjudicate a suit on the basis that available administrative processes should be first invoked and completed."<sup>75</sup>

Section 17204 was amended in 1993 to read, "Actions for any relief pursuant to this chapter [Business and Professions Code section 17200 et seq.] shall be prosecuted exclusively in a court of competent jurisdiction by the Attorney General or any district attorney . . . ." The amendment changed "may" to "shall" and added "exclusively in a court of competent jurisdiction." This amendment seems to have been a reaction to the decision in *Farmers Insurance Exchange v. Superior Court of Los Angeles County*.<sup>76</sup>

In *Farmers*, the Attorney General brought an unfair competition action alleging that various insurers engaged in an unlawful business practice by violating the sections of the Insurance Code which required them to offer a "Good Driver Discount policy" to all eligible applicants.<sup>77</sup> Using the primary jurisdiction doctrine, the court stayed the action

pending an administrative action by the Commissioner of the Department of Insurance.<sup>78</sup> The court felt that "prior resort to the administrative process is required" and held that "in the absence of legislation clearly addressing whether a court may exercise discretion under the primary jurisdiction doctrine, a court may exercise such discretion and may decline to hear an [unfair competition] suit until the administrative process has been invoked and completed."<sup>79</sup>

A year after the *Farmers* decision, the legislature amended Business and Professions Code section 17204. Since "it is assumed that the Legislature has existing laws in mind at the time that it enacts a new statute," it should be assumed that the legislature was aware of the *Farmers* case law when it amended section 17204.<sup>80</sup> At the time that section 17204 was amended, sections 17203 and 17206 already made it clear that a district attorney "may" seek an injunction or a civil penalty in an unfair competition action in any court of competent jurisdiction. In the amended section 17204, the legislature changed the word "may" to "shall" and added the word, "exclusively." Since "[w]here possible, all parts of a statute should be read together and construed to achieve harmony," the amended section 17204 should be harmonized with sections 17203 and 17206.<sup>81</sup> And in analyzing the meaning of a statute, "[l]egislative intent should be determined from the language of the statute. Significance should be given, if possible, to every word, phrase, sentence and part of an act."<sup>82</sup> Therefore, a careful attention should be paid to the change from a permissive word, "may" to a mandatory word, "shall."

Section 17204 was amended after the court in *Farmers* decided that although a district attorney "may" bring an unfair competition action in court, it is not mandatory for the court to hear the action and the court can choose to send the matter first to an administrative agency, unless the legislature instructs otherwise.<sup>83</sup> Considering that background, it appears that the legislature intended to clarify through the amended language of section 17204 that the court has exclusive jurisdiction over the unfair competition actions and cannot stay the actions pending administrative process. Section 17204 provides that a relief for unfair competition must be sought in court "exclusively."

However, in 1996, a California Court of Appeal held that the primary jurisdiction doctrine may be applied in an unfair competition action. However, the court did not discuss the amended section 17204 but based its decision on its opinion that "the cumulative remedy clause in Business and Professions Code section 17205 does not preclude application of the primary jurisdiction doctrine . . . ."<sup>84</sup> It is possible that the court was not aware of the amended language of section 17204 and would have decided differently if it had considered the amendment. Since there is no case law that analyzes or explains the meaning of the amended language of 17204, a court needs to resolve the first impression question of whether Business and Professions Code section 17204 deprives the courts of the primary jurisdiction doctrine in an unfair competition action. If the court concludes that it does, then the court hearing an unfair competition action based on a public utility's violation of the clearance rules would need to decide the action without involving the Commission.

## **V. Assembly Bill 1890 Seems to Divide the Authority over Utilities' Tree-trimming Practices Between the Commission and the Independent System Operator.**

**A. AB 1890 Seems To Change The Commission's Authority Over The Tree-Trimming Practices Of Utilities.** In 1996, the legislature enacted Assembly Bill (AB) 1890 to "provide the legislative foundation for transforming the regulatory framework of

California's electric industry."<sup>85</sup> AB 1890 directed the Commission to establish a nonprofit institution, called the Independent System Operator (ISO), which will be "charged with ensuring the efficient use and reliable operation of the transmission system."<sup>86</sup> The legislature explained that "[t]he proposed restructuring of the electricity industry would transfer responsibility for ensuring short- and long-term reliability away from electric utilities and regulatory bodies to the Independent System Operator and various market-based mechanisms."<sup>87</sup> However, the Commission still has duties under AB 1890 to ensure reliable electric service.

Recognizing that "[r]eliable electric service depends on conscientious inspection and maintenance of transmission and distribution systems," the legislature ordered inspection, maintenance, repair, and replacement standards to be adopted for transmission and distribution systems.<sup>88</sup> The legislature divided that responsibility between the Commission and the ISO by charging the Commission to adopt the inspection, maintenance, repair, and replacement standards for the distribution equipment or facilities and the ISO to establish such standards for the transmission equipment or facilities.<sup>89</sup>

Tree-trimming requirements are also part of the maintenance standards needed for ensuring reliable electric service. If the transmission equipment includes power lines, the ISO, not the Commission, is now responsible for establishing a clearance distance standards for those power lines. However, it is unclear whether the ISO has the power to overrule the pre-existing standards set by the Commission. In fact, AB 1890 did not address the possibility of a conflict between the maintenance standards that the ISO may adopt and the pre-existing standards of the Commission. If the legislature meant to authorize the ISO to overrule the Commission's pre-existing rules, the ISO is free to adopt any new tree-trimming standards for the transmission systems. However, if the ISO is required to comply with the existing rules of the Commission, it can only adopt the Commission's 18 inches standard or a more stringent standard requiring more than 18 inches clearance, since the Commission's 18 inches rule is a minimum requirement.<sup>90</sup> Either way, the Commission continues to have the authority over the tree-trimming standards for utilities' distribution systems.

**B. Local Governments and District Attorneys Are Unaffected By AB 1890.** AB 1890 did not revoke the authority of local governments to make and enforce regulations that do not conflict with general laws.<sup>91</sup> Therefore, as long as the local regulations of public utilities do not conflict with general laws, including the new sections of the Public Utilities Code added by AB 1890, local governments may continue to regulate utilities. Likewise, district attorneys' authority to bring criminal actions or unfair competition actions or public nuisance actions against the utilities that violate the clearance rules is also unaffected by AB 1890.

## **CONCLUSION**

As there is no conflict between the Public Resources Code's clearance requirements and the Commission's tree-trimming rule, utilities must comply with both rules. If a utility violates these rules, a district attorney can prosecute the utility for a misdemeanor. Alternatively, a district attorney can choose bring an unfair competition action or a public nuisance action against the utility. The Commission's jurisdiction over utilities' tree-trimming practices does not prohibit a district attorney from bringing such actions in court.

The court has the authority to decide those actions brought by a district attorney unless the Commission itself takes an enforcement action on the alleged violations of the utility

being sued. Once the Commission takes steps to enforce the clearance rules against the utility, the Commission assumes exclusive jurisdiction over the alleged violations. Even if the court has jurisdiction over the matter, the court may choose to stay the action by applying the primary jurisdiction doctrine, although it is questionable whether the doctrine can be used to stay an unfair competition action. Since the Commission's expertise is not necessary for determining whether a utility company failed to maintain a required clearance distance, it is unlikely that the court will stay the action. Therefore, an action brought by a district attorney against a utility that violated the clearance rules will likely get resolved in court without involving the Commission, unless the Commission institutes an action or investigation to assess the same alleged instances of violation.



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## footnotes

1. Cal. Code Regs. Tit. 14, [◆ 1252](#). ([return to text](#))
2. Cal. Pub. Res. Code [◆ 4293](#). ([return to text](#))
3. Cal. Code Regs. Tit. 14, [◆ 1252](#). ([return to text](#))
4. *In re San Diego Gas & Elec. Co.*, Decision (D.) 97-01-044, slip op. at 2 (January 23, 1997). ([return to text](#))
5. Cal. Public Utilities Commission, General Order 95/128 Manual, III-16-19, Rule 35 (1997). ([return to text](#))
6. *In re San Diego Gas & Elec.*, D. 97-01-044 at 9. ([return to text](#))
7. *Id.* at 13. ([return to text](#))
8. *Id.* at 9. ([return to text](#))
9. *Id.* at 11. ([return to text](#))
10. *In re San Diego Gas & Elec. Co.*, D. 96-09-097, slip op. at 2 (quoting Supplemental Report of the 1996 Budget Act). ([return to text](#))
11. *Assembly of California v. Pub. Util. Comm'n*, 12 Cal. 4th 87, 103 (1995) (quoting *Pacific Tel. & Tel. Co. v. Pub. Util. Comm'n*, 62 Cal. 2d 634, 653 (1965)). ([return to text](#))
12. *In re San Diego Gas & Elec.*, D. 94-09-097 at 2. ([return to text](#))
13. *In re San Diego Gas & Elec.*, D. 97-01-044 at 11. ([return to text](#))
14. *Id.* ([return to text](#))
15. *Id.* ([return to text](#))
16. Cal. Pub. Res. Code [◆◆ 4292, 4293](#). ([return to text](#))

17. Cal. Code Regs. Tit. 14, § 1252. ([return to text](#))
18. Cal. Pub. Res. Code § 4102. ([return to text](#))
19. Cal. Code Regs. Tit. 14, § 1252.1. ([return to text](#))
20. *In re San Diego Gas & Elec.*, D. 97-01-044 at 11. ([return to text](#))
21. Cal. Pub. Res. Code § 4293. ([return to text](#))
22. Cal. Pub. Res. Code § 4292. ([return to text](#))
23. "PG&E Is Found Guilty Of Tree-Trimming Negligence That Caused 1994 Wildfires," *Electric Util. Wkly*, June 23, 1997, at 3. ([return to text](#))
24. *Id.* ([return to text](#))
25. Cal. Pub. Res. Code § 4021. ([return to text](#))
26. Cal. Pub. Util. Code § 2110. ([return to text](#))
27. Cal. Govt. Code § 26500. ([return to text](#))
28. *In re Pacifico Creative Services, Inc.*, 4 CPUC2d 645, 669, 688 (1980). ([return to text](#))
29. *People v. Miles & Sons Trucking Serv.*, 257 Cal. App. 2d 697, 707 (1968). ([return to text](#))
30. Cal. Pub. Res. Code § 4021; Cal. Pub. Util. Code § 2110. ([return to text](#))
31. Cal. Bus. & Prof. Code § 17200. ([return to text](#))
32. *Farmers Ins. Exch. v. Superior Court of Los Angeles County*, 2 Cal. 4th 377, 383 (1992). ([return to text](#))
33. *State Farm Fire and Casualty Co. v. Superior Court of Los Angeles County*, 45 Cal. App. 4th 1093, 1102-03 (1996). ([return to text](#))
34. Cal. Bus. & Prof. Code § 7200. ([return to text](#))
35. *Podolsky v. First Healthcare Corp.*, 50 Cal. App. 4th 632, 647 (1996). ([return to text](#))
36. Cal. Bus. & Prof. Code § 17200. ([return to text](#))
37. *State Farm Fire and Casualty Co.*, *supra*, 45 Cal. App. 4th at 1103-04. ([return to text](#))
38. *Id.* at 1104 (quoting *People v. Casa Blanca Convalescent Homes, Inc.*, 159 Cal. App. 3d 509, 530 (1984)). ([return to text](#))
39. *Id.* at 1103. ([return to text](#))
40. Cal. Bus. & Prof. Code § 17206(a). ([return to text](#))
41. Cal. Bus. & Prof. Code §§ 17203, 17206(a). ([return to text](#))

42. Cal.Bus. & Prof. Code [◆17205](#). ([return to text](#))
43. Cal. Civ. Proc. Code [◆731](#). ([return to text](#))
44. *California Oregon Power Co. v. Superior Court of Siskiyou County*, 45 Cal. 2d 858, 870 (1955). ([return to text](#))
45. Cal. Pub. Util. Code [◆701](#). ([return to text](#))
46. *Id.* ([return to text](#))
47. *San Diego Gas & Elec. Co. v. Superior Court of Orange County*, 13 Cal. 4th 893, 915 (1996) (citations omitted). ([return to text](#))
48. Pub. Res. Code [◆451](#) allows the Commission to set standards to ensure that electric companies have safe facilities. ([return to text](#))
49. *In re San Diego Gas & Elec.*, D. 96-09-097 at 2. ([return to text](#))
50. Reply Comments of the Utilities Safety Branch in Response to Decision 96-09-097 at 5 (June 8, 1994). ([return to text](#))
51. *Id.* at 3-4. ([return to text](#))
52. *Id.* at 4-5. ([return to text](#))
53. *Id.* ([return to text](#))
54. *Id.* at 5. ([return to text](#))
55. *In re San Diego Gas & Elec.*, D. 97-01-044 at 13. ([return to text](#))
56. *Ventura County Waterworks Dist., No. 12 v. Susana Knolls Mut. Water Co.*, 7 Cal. App. 3d 672, 678 (1970) (quoting *Vila v. Tahoe Southside Water Util.*, 233 Cal. App. 2d 469, 477 (1965)). ([return to text](#))
57. Cal. Const. Art. XI, [◆7](#). ([return to text](#))
58. Cal. Pub. Util. Code [◆1759](#). ([return to text](#))
59. *Ventura County Waterworks Dist., supra*, 7 Cal. App. 3d at 678. ([return to text](#))
60. *Todd-Ao Corp. v. United Parcel Serv.*, 48 Cal. App. 4th 549, 557 (1996). ([return to text](#))
61. *Miller v. Railroad Comm'n*, 9 Cal. 2d 190, 195 (1937). ([return to text](#))
62. *Ventura County Waterworks Dist.*, 7 Cal. App. 3d at 679 (quoting *Miller v. Railroad Comm'n*, 9 Cal. 2d at 195). ([return to text](#))
63. Cal. Pub. Util. Code [◆1759](#). ([return to text](#))
64. *State Farm Fire and Casualty Co. v. Superior Court of Los Angeles County*, 45 Cal. App. 4th 1093, 1111 (1996) (quoting *United States v. Western Pac. R.R. Co.*, 352 U.S. 59, 63-4 (1956)). ([return to text](#))
65. *Farmers Ins. Exch. v. Superior Court of Los Angeles County*, 2 Cal. 4th 377, 391 (1992). ([return to text](#))

66. *Id.* ([return to text](#))
67. *Id.* at 396. ([return to text](#))
68. *Id.* ([return to text](#))
69. *Id.* ([return to text](#))
70. Cal. Pub. Util. Code [§](#)2102. ([return to text](#))
71. Cal. Pub. Util. Code [§](#)2107. ([return to text](#))
72. Cal. Pub. Util. Code [§](#)2101. ([return to text](#))
73. *Farmers Ins. Exch.*, *supra*, 2 Cal. 4th at 396. ([return to text](#))
74. *Id.* at 401 (quoting *Rojo v. Kliger*, 52 Cal. 3d 65, 88 (1990)). ([return to text](#))
75. *Id.* at 394. ([return to text](#))
76. *Farmers Ins. Exch.*, *supra*, 2 Cal. 4th 377. ([return to text](#))
77. *Id.* at 381. ([return to text](#))
78. *Id.* ([return to text](#))
79. *Id.* ([return to text](#))
80. *Schmidt v. Southern California Rapid Transit Dist.*, 14 Cal. App. 4th 23, 27 (1993). ([return to text](#))
81. *McDill v. Martin*, 14 Cal. 3d 831, 837 (1975). ([return to text](#))
82. *People v. Western Air Lines*, 42 Cal. 2d 621, 638 (1954). ([return to text](#))
83. *Farmers Ins. Exch.*, *supra*, 2 Cal. 4th at 381. ([return to text](#))
84. *State Farm Fire and Casualty Co.*, *supra*, 45 Cal. App. 4th at 1112. ([return to text](#))
85. 1996 Cal. Adv. Legis. Serv. 854, [§](#)1(b) (Deering). ([return to text](#))
86. *Id.* at [§](#)1(c). ([return to text](#))
87. Cal. Pub. Util. Code [§](#)334. ([return to text](#))
88. Cal. Pub. Util. Code [§](#)330. ([return to text](#))
89. Cal. Pub. Util. Code [§](#)[§](#)348, 364. ([return to text](#))
90. *In re San Diego Gas & Elec.*, D. 97-01-044 at 13. ([return to text](#))
91. Cal. Const. Art. XI, [§](#) 7. ([return to text](#))