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MAIL DATE
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Decision 97-04-049 April 9, 1997

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

In the Matter of UNITED PARCEL SERVICE, INC. filing tariff pages that reflect increases in parcel rates without authorization from this Commission and using an outdated Decision No. 89-09-014 dated September 7, 1989, as authority to increase rates effective February 24, 1991.	Case 92-02-026 (Filed February 13, 1992)
In the Matter of Application of UNITED PARCEL SERVICE, INC. to confirm the increase to certain of its rates for exempt small package delivery service and to clarify the procedure to be utilized in implementing changes in the rates and rules applicable thereto.	Application 92-04-026 (Filed April 24, 1992)

ORDER MODIFYING AND DENYING REHEARING OF DECISION 96-12-090

I. INTRODUCTION

Todd-AO Corporation (Todd-AO) has filed an application for rehearing of Decision (D.) 96-12-090.[1] United Parcel Service, Inc. (UPS) filed a response opposing the application for rehearing. In D.96-12-090 (the Decision to Reverse), we reversed D.93-02-001 (the Original Decision), which held that a rate

1. Todd-AO's application originally requested rehearing of both D.96-10-042 and D.96-12-090. However, the Docket Office excluded D.96-10-042 from the rehearing application because it had been more than 30 days since that decision was issued. (See Pub. Util. Code § 1731(b).)

increase filed in 1992 by UPS was unlawful. Todd-AO contends that we are without authority to reopen and reverse the Original Decision. In addition, Todd-AO argues that the Original Decision was correct. Finally, Todd-AO raises a number of issues which address the propriety of reopening the Original Decision. We have carefully reviewed each and every allegation of error raised by Todd-AO and have considered UPS' response. We conclude that good cause for rehearing has not been shown. However, Todd-AO has raised a number of issues which require clarification. Therefore, we will modify the Decision to Reverse accordingly.

II. BACKGROUND

On January 7, 1992, UPS filed a tariff increasing rates for intrastate small parcel delivery service. The rate increase averaged 8.4% and was to become effective on February 24, 1992. Although there were no customer protests to the rate increase, the staff of Transportation Division notified UPS on February 21, 1992 that prior authority for the rate increase was required pursuant to Public Utilities Code section 454. However, staff did not officially reject or suspend the rate increase.

On February 13, 1992, Cal Pak Delivery Service, Inc. (Cal Pak), a competitor of UPS, filed a complaint against UPS alleging that the rate increase was unlawful. UPS began charging the increased rate on February 24, 1992, pursuant to its filed tariff. On April 24, 1992, UPS filed a formal application requesting confirmation of its increased rates and to clarify the procedures to be used to file such rates. Cal Pak's complaint and UPS' application were consolidated in June 1992. Briefs were filed in the proceeding, but it was determined that evidentiary hearings were not needed.

On February 3, 1993, the Commission approved D.93-02-001 (the Original Decision). The Commission held that the tariffs filed by UPS, with a purported effective date of February 24, 1992, were unlawful and ineffective because they were not

filed by formal application and approved in advance as required by Public Utilities Code section 454. The Commission found, however, that the rates filed by UPS were reasonable and approved the rates prospectively. The Commission denied Cal Pak's request for refunds.

Both UPS and Cal Pak filed applications for rehearing of the Original Decision. A limited rehearing was granted to determine whether refunds were legally required for the period from February 24, 1992 to February 4, 1993, during which time the rate increase was charged, but had not yet been approved by the Commission. (See D.93-05-018.) In D.94-11-066, we determined that our authority to grant refunds is permissive rather than mandatory and that Cal Pak had failed to show any economic harm from the rate increase. Cal Pak's complaint was dismissed with prejudice.

Cal Pak filed for rehearing again on the issue of refunds. In D.95-03-044, we once again dismissed Cal Pak's refund claim, with prejudice. We clarified, however, that, because the rates in effect during the period February 24, 1992 to February 4, 1993 had not been approved, other parties might seek refunds provided they could demonstrate damages or other economic harm.[2]

In the meantime, on June 9, 1993, UPS filed a petition for writ of review of the Original Decision (D.93-02-001) and the decision denying rehearing of the Original Decision (D.93-05-018). On August 12, 1993, the California Supreme Court denied UPS' petition for writ of review.

On the same day that UPS filed the petition for writ of review, June 9, 1993, UPS filed suit against the Commission in federal court alleging that the Commission's decision that UPS

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2. A third application for rehearing filed by Cal Pak was denied in D.95-08-057.

was required to file a formal application for a rate increase violated UPS' equal protection rights. The United States District Court dismissed the action on the ground that the denial of review by the California Supreme Court constituted a final judgment and was entitled to res judicata in the district court. (United Parcel Service, Inc. v. California Public Utilities Commission (N.D.Cal 1993) 839 F.Supp. 702.) However, on February 28, 1996, the Ninth Circuit Court of Appeals reversed and remanded the district court decision, holding that UPS had reserved its federal constitutional claims for resolution in federal court and that they were not barred by res judicata. (United Parcel Service, Inc. v. California Public Utilities Commission (9th Cir. 1996) 77 F.2d 1178.)

In light of the Ninth Circuit ruling that UPS' constitutional claims could go forward, we decided to reexamine the bases for the Original Decision. Thus, on October 9, 1996, we issued D.96-10-042 (the Decision to Reopen), seeking comments from all interested parties. Comments were filed only by UPS and Todd-AO, a shipper which allegedly had been overcharged by UPS.[3] Neither party requested evidentiary hearings.

On December 26, 1996, we issued D.96-12-090 (the Decision to Reverse), which is at issue in this application for

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3. During this same period, Todd-AO filed a class action complaint for overcharges and damages against UPS in the California Superior Court. The trial court dismissed the complaint but, on appeal, the California Court of Appeal, First Appellate District, reversed the dismissal. UPS filed a petition for writ of review of First District Court of Appeal decision. On December 11, 1996, the California Supreme Court granted the petition and transferred the case back to the First District Court of Appeal, with directions to that court "to vacate its decision and to reconsider the cause in light of the Public Utilities Commission's rehearing of its decision determining that the United Parcel Service rate increase was unlawful." (The Todd-AO Corporation v. United Parcel Service, Inc. (December 11, 1996, S056244).)

rehearing. We held that the rate increase filed by UPS in January of 1992 was not unlawfully filed given the ambiguity of the decisions and regulations which were relevant to UPS at that time. We also stated that the rate increase was just and reasonable at the time that it was filed.[4]

III. DISCUSSION

A. Section 1708 and Related Doctrines

The essential legal issue raised by Todd-AO's application for rehearing is whether the Original Decision can be reversed pursuant to Public Utilities Code section 1708, after the California Supreme Court has denied a petition for writ of review, but while a challenge to the decision is pending in federal court. Section 1708 provides:

> The Commission may at any time, upon notice to the parties, and with opportunity to be heard as provided in the case of complaints, rescind, alter, or amend any order or decision made by it. Any order rescinding, altering, or amending a prior order or decision shall, when served upon the parties, have the same effect as an original order or decision.

In arguing that section 1708 does not authorize the Commission to reopen and reverse the Original Decision, Todd-AO often ignores the distinction between section 1708 and section

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4. On January 7, 1997, prior to filing the instant rehearing application, Todd-AO filed a petition for writ of mandate and/or prohibition with the California Supreme Court, seeking substantially the same relief it is now seeking in this application for rehearing. The petition for writ of mandate was denied on March 12, 1997. (The Todd-AO Corporation v. California Public Utilities Commission (March 12, 1997, S058334).)

1709.[5] Section 1708 permits the Commission to modify or rescind its own decisions at any time, as long as there has been an opportunity to be heard. Section 1709, on the other hand, governs the conclusive effect of final Commission decisions in collateral actions. Thus, a decision which is final and conclusive for purposes of collateral actions may nevertheless be modified or rescinded by the Commission under the authority granted in section 1708.

The statutory language of section 1708 provides no limitations on the Commission's authority to reopen and reverse its decisions. As stated by the Supreme Court: "That section . . . permits the commission at any time to reopen proceedings even after a decision has become final." (City of Los Angeles v. Public Utilities Commission (1975) 15 Cal.3d 680, 706.) The courts and the Commission have established some parameters to the authority granted in section 1708. However, as the following discussion indicates, we do not believe that those parameters prohibit the Commission's determination to reopen and reverse the Original Decision under the circumstances presented in this case.

1. Section 1708 and Res Judicata

The doctrine of res judicata provides that conclusive effect is given to a former judgment in subsequent litigation involving the same controversy. (7 Witkin, Cal. Procedure (3rd ed. 1986) § 188, p. 621.) Todd-AO argues that res judicata precludes the Commission's reversal of the Original Decision, citing People v. Western Airlines, Inc. (1945) 42 Cal.2d 621. In related arguments on conclusiveness, Todd-AO contends that

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5. Todd-AO asserts, among other things, that this case is governed by section 1709 rather than section 1708. This argument is addressed below in section A.3.

Commission decisions interpreting section 1708 do not permit reversal in this case.

a. Court Decisions

In People v. Western Airlines, supra, 42 Cal.2d 621, the California Supreme Court addressed a prior Commission decision which had asserted jurisdiction over the defendant, Western Airlines. The Commission argued that that decision, review of which had been denied by the California Supreme Court, should be given res judicata effect in a subsequent proceeding imposing penalties. The court held that a denial of a petition for review by the court is a decision on the merits as to both the law and the facts presented in the review proceedings. In reaching this conclusion, the court also stated:

> [I]t seems clear that where [Commission] determinations have been appropriately and unsuccessfully challenged, as here, by direct attack and have run the gamut of approval by the highest courts, state and federal, they should have the conclusive effect of res judicata as to the issues involved where they are again brought into question in subsequent proceedings between the same parties.

(Id. at p. 630, emphasis added.)

The Original Decision in this case has not run the gamut of both state and federal review. Indeed, the Commission's reexamination of the Original Decision was triggered by the Ninth Circuit Court of Appeals holding that UPS was not barred by res judicata with respect to its attack on the Original Decision on federal constitutional grounds. Moreover, People v. Western Airlines is a section 1709 case, rather than section 1708 case. It addresses the res judicata effect of a Commission decision in a collateral court proceeding, not the authority of the Commission to reopen one of its own proceedings.

Todd-AO also relies on the language in Witkin which states that the Public Utilities Commission is not a mere administrative body, but a constitutional court. "Accordingly, their final decisions are given res judicata effect." (7 Witkin, Cal. Procedure (3rd ed. 1986) § 208, p. 644.)

The cases cited in Witkin, however, do not support Todd-AO's argument that the Commission may not reverse the Original Decision under section 1708. (See People v. Western Airlines, supra, 42 Cal.2d 621, 630 [Commission decision has conclusive effect in collateral court action if unsuccessfully challenged in state and federal courts]; Sale v. Railroad Commission (1940) 15 Cal.2d 612, 616 [exception to the doctrine of res judicata based on the continuing jurisdiction of the Commission to modify its orders]; Foothill Ditch Co. v. Wallace Ranch Water Co. (1938) 25 Cal.App. 555, 563 [distinguishing between the res judicata effect of a Commission decision in a collateral court action and the authority of the Commission to revisit its own decisions].)

In Sale v. Railroad Commission, supra, 15 Cal.2d 612, the California Supreme Court reviewed a Commission decision which had reopened, but refused to rescind, a prior order authorizing the transfer of certain highway common carrier certificates. In determining whether the Commission regularly pursued its authority, the court interpreted the predecessor to Public Utilities Code section 1708. The court stated:

> It is true that the commission's decisions and orders ordinarily become final and conclusive if not attacked in the manner and within the time provided by law. [Citations.] This is not to say, however, that such a decision is res judicata in the sense in which that doctrine is applied in the courts. [Citations.] The commission has continuing jurisdiction to rescind, alter or amend its prior orders at any time.

(Id. at p. 616.)

Additional support for the Commission's authority to modify or rescind its own decisions under section 1708 is found in Northern California Association v. Public Utilities Commission (1964) 61 Cal.2d 126, which was also a certificate case. In that case, the court held that a party has no statutory right to reopen a proceeding after the time for filing an application for rehearing has passed. The court pointed out that the Commission's authority to reopen under section 1708 is discretionary. In concluding that the Commission's refusal to reopen was not an abuse of discretion, the court stated that the Commission "did not refuse to exercise its discretion under section 1708 or indicate an erroneous belief that it had no jurisdiction to reconsider its prior decision." (Id. at pp. 135-136.) Clearly, the court recognized the Commission's authority to reopen under section 1708.

Todd-AO cites several other cases as support for its argument that even if the Original Decision is wrong, res judicata prevents the Commission from modifying or rescinding the decision. However, the cases Todd-AO cites are not applicable because they deal with the finality of court decisions and not decisions made by administrative agencies which have section 1708-type authority. (See Panos v. Great Western Packing Co. (1943) 21 Cal.2d 636, 640; Smith v. Smith (1981) 127 Cal.App.3d 203, 209; Beverly Hills Nat. Bank v. Glynn (1971) 16 Cal.App.3d 274, 284.)

b. Commission Decisions

Commission decisions which have interpreted section 1708 often recognize the broad authority granted by that provision, but frequently state that, as a matter of policy, this authority should only be exercised in extraordinary circumstances.

Several Commission decisions hold that 1708 cannot be used to modify or rescind decisions, "absent extrinsic fraud or

other extraordinary circumstances." (Golconda Utilities Company (1968) 68 Cal.P.U.C. 296, 305.) In Golconda, the Commission determined that section 1708 did not allow the Commission to void transfers of utility property under Public Utilities Code section 851, where such transfers were the basis for granting a certificate of public convenience and necessity (CPCN) to Golconda. The Commission stated:

> We construe Section 1708 as authorizing the Commission to rescind, alter or amend decisions with respect to its prospective regulatory jurisdiction. [Citations.] Where jurisdiction has been reserved a point may be reopened or considered at a later date. [Citations.] However, absent extrinsic fraud or other extraordinary circumstances, where jurisdiction has not been reserved and the Commission passes on a past transaction, and the adjudication has become final, Section 1708 does not permit the Commission to readjudicate the same transaction differently with respect to the same parties.

(Id. at p. 305, emphasis added.)

The Commission concluded: "We do not believe that Section 1708 authorizes the Commission to revoke the certificate granted in Decision 67347 based on the same facts [that] were before the Commission when the certificate was granted." (Id. at p. 306.) This decision is somewhat surprising given the fact that two California Supreme Court cases had previously indicated that section 1708 authorized the Commission to reopen CPCN cases. (See Sale v. Railroad Commission (1940) 15 Cal.2d 612 and Northern Cal. Assn. v. Public Utilities Commission (1964) 61 Cal.2d 126.) Nevertheless, later decisions interpreting section 1708 rely on Golconda. (See, e.g., Laguna Hills Water Company (1980) 3 Cal.P.U.C.2d 373; Application of PG&E Co. (1980) 4 Cal.P.U.C.2d 139; Application of Pacific Gas and Electric Co. (September 19, 1983) Dec. No. 87-03-034.)

In another line of cases, the Commission has stated that it may only modify or rescind a decision if (1) new facts

are brought to the attention of the Commission, (2) conditions have undergone a material change, or (3) the Commission proceeded on a basic misconception of law or fact. (See Application of So. Pac. Co. (1969) 70 Cal.P.U.C. 150, 152 [rejecting Southern Pacific's request to discontinue passenger service of certain trains through the San Joaquin Valley where the same request had been denied the previous year]; Cal. Manufacturers Assn. v. Cal. Trucking Assn. (1971) 72 Cal.P.U.C. 442, 445 [reopening decision which established minimum rates where new evidence was presented]; (Winton Manor Mutual Water Co., et al. v. Winton Water Co. (1978) 84 Cal.P.U.C. 645, 651 [reconfirming the authority under section 1708 to alter the certificated area of a public utility where there is evidence of changed circumstances, but concluding that the changed circumstances here reinforced the results of the prior order].)

In Application of PG&E Co. (1980) 4 Cal.P.U.C.2d 139, 150 (Diablo Canyon), the Commission denied a petition filed by the Center For Law in the Public Interest to reopen CPCN decisions relating to PG&E's Diablo Canyon nuclear plants. Calling section 1708 a departure from the standard of res judicata, the Commission stated that the authority to reopen must be justified by extraordinary circumstances, "particularly where, as here, one or more parties have relied on decisions granting authority to construct a major generating facility, with substantial investments of time, money, and other resources." (Id. at pp. 149-150.)

> In view of these factors, only a persuasive indication of new facts or a major change in material circumstances, which would create a strong expectation that we would make a different decision based on these facts or circumstances, would cause us to reopen the proceedings.

(Id. at p. 150; but see So. Pac. Transportation Co. (1973) 76 Cal.P.U.C. 2 [reopening a decision approving Southern Pacific's

application to relocate a passenger station in San Francisco, without applying any of the standards discussed above].)

c. Distinction between Quasi-Judicial and Quasi-Legislative Proceedings

Although section 1708 allows the Commission to reopen any case, the Commission decisions on section 1708 often distinguish quasi-judicial and quasi-legislative proceedings, and suggest that a there is a higher hurdle to get over before a quasi-judicial proceeding may be reopened. Todd-AO contends that the Commission acted in its quasi-judicial rather than legislative capacity when it issued the Original Decision, and that the decision has no prospective regulatory implications. Thus, Todd-AO suggests that Commission precedent does not allow us to reopen the Original Decision. UPS, on the other hand, counters that the Commission was acting in its quasi-legislative capacity when it issued the Original Decision.

The distinction between quasi-judicial and quasi-legislative is often blurred, and may be difficult to apply in a given case. A proceeding which applies then-existing law to past events to determine the rights of specific parties is generally considered to be quasi-judicial. Thus, the instant decision could be considered to be quasi-judicial.[6]

Even assuming that this is a quasi-judicial decision, we believe that our prior decisions do not prevent us from

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6. But see United Parcel Service v. California Public Utilities Commission (9th Cir. 1996) 77 F.2d 1178, which refers to this case as a ratemaking proceeding, which is legislative in nature. (Id. at p. 1184, fn. 5.) Indeed, the Decision to Reverse reopened the UPS application proceeding, in which UPS requested confirmation that its rate increase was reasonable, and that the procedure for filing the rate increase was proper and should be authorized for all future rate changes.

reopening and reversing the Original Decision. We have established discretionary factors which limit, but do not prohibit, reopening under section 1708 for quasi-judicial decisions. Thus, we have stated that a quasi-judicial decision should not be reopened, absent extraordinary circumstances. (See, e.g., Golconda Utilities Company (1968) 68 Cal.P.U.C. 296, 305.)

However, this case presents extraordinary circumstances. Here, several years after the Commission believed that all legal challenges to the Original Decision had been dismissed,[7] the Ninth Circuit Court of Appeals revived UPS' federal constitutional challenge to the Original Decision. (See United Parcel Service, Inc. v. California Public Utilities Commission (9th Cir. 1996) 77 F.2d 1178.) It was at that point, after the Ninth Circuit held that the Supreme Court's denial of review of the Original Decision was not res judicata for the purposes of UPS' federal claims, that we decided to review the Original Decision to ensure that we had not overlooked any factual or legal issues relevant to that decision. In addition, the fact that UPS' challenge of the Original Decision is pending in federal court means that the decision is clearly not "final" under the standards of People v. Western Airlines, supra, 42 Cal.2d 621.

Moreover, both the courts and the Commission have acknowledged the statutory authority to reopen any case under section 1708. Thus, in Cal. Manufacturers Assn. v. Cal. Trucking

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7. The California Supreme Court denied UPS' petition for writ of review of the Original Decision on August 12, 1993; the United States District Court held that that denial of writ was entitled to res judicata effect in federal court on December 2, 1993. (See United Parcel Service, Inc. v. California Public Utilities Commission (August 12, 1993, S033276) and United Parcel Service, Inc. v. California Public Utilities Commission (N.D.Cal. 1993) 839 F.Supp. 702.)

Assn. (1971) 72 Cal.P.U.C. 442, 445, the Commission stated that it "generally" adhered to the doctrine of res judicata in the execution of its quasi-judicial powers. In Application of So. Pac. Co. (1969) 70 Cal.P.U.C. 150, further blurring the lines between its legislative and judicial functions, the Commission stated that even where the ultimate conclusion of a Commission proceeding is "legislative," the resolution of disputed issues of facts are "strictly judicial." (Id. at p. 152.) The Commission explained that, although section 1708 "would seem to indicate that the Commission has the discretion to permit it to repeat this 'judicial process,'. . . sound procedural policy requires that such discretion be applied very restrictively." (Ibid.)

Those cases construe section 1708 as giving the Commission discretionary authority to modify or rescind any order, including a quasi-judicial order. This interpretation of section 1708 is supported by the court cases discussed above. (See Sale v. Railroad Commission (1940) 15 Cal.2d 612 and Northern Cal. Assn. v. Public Utilities Commission (1964) 61 Cal.2d 126.)

We have discovered only one case which states without qualification that section 1708 may not be used to reopen a quasi-judicial proceeding. In Application of Pacific Gas and Electric Co. (September 19, 1983) Dec. No. 87-03-034, the Commission stated that res judicata applies to quasi-judicial proceedings, and that a reopening under Section 1708 is appropriate only for quasi-legislative proceedings. However, in that case, PG&E was requesting additional revenue. Thus, the proceeding was quasi-legislative. Accordingly, the language relating to quasi-judicial proceedings is only dicta. We do not believe that that case accurately describes our statutory authority under section 1708.

We have considered it a proper exercise of our discretion to establish some prudential constraints on the exercise of the authority granted in section 1708. We continue to consider reopening under section 1708 to be a discretionary

remedy, to be applied restrictively if we act in a quasi-judicial proceeding. Nevertheless, as stated above, the instant case presents extraordinary circumstances.

This case also meets the alternative standard which requires (1) significant new facts; (2) a material change in conditions, or (3) a basic misconception of law or fact by the Commission. Upon review, we determined that, in issuing the Original Decision, we had acted under a misconception of law regarding the rate increase requirements applicable to UPS.

2. **Retention of Jurisdiction**

Todd-AO also argues that the Commission did not reserve jurisdiction over the issue of the lawfulness of UPS' 1992 rate increase, and thus the Commission may not reopen that decision. According to Todd-AO, support for this argument is found in D.94-11-066 (the November 1994 Rehearing Decision). Todd-AO contends that in that decision, the Commission declared that "the claim of unlawfulness [has] been merged into a final judgment which constitutes an estoppel." (Todd-AO's Application for Rehearing at p. 36.)

Todd-AO misrepresents what we said in the November 1994 Rehearing Decision. In comments on the proposed rehearing decision, Cal Pak requested that the decision reflect the difference between Cal Pak's claims for refunds, which were not resolved and therefore should be dismissed, and Cal Pak's claims regarding the unlawful rate increase, which had been resolved. According to Cal Pak, only claims which have not been resolved by a final valid judgment are subject to dismissal; claims which have been resolved by a valid final judgment are merged into that judgment. As stated in the November 1994 Rehearing Decision:

> Cal Pak is arguing here that the only remaining substantive issues in these proceedings which are unresolved by a valid final judgment are the refund claims. The claims of unlawful increase, the

> effectiveness thereof, and overcharges have already been resolved by a final valid judgment (D.93-02-011). Those claims no longer exist but have been merged into the judgment and constitute an estoppel, Cal Pak asserts, citing Witkin [citation]. [Cal Pak] recommends that Conclusion of Law 1 and the proposed order be modified to reflect this argument.

(D.94-11-066, slip op. at p. 12.) We concluded that "Cal Pak's position appears to be correct. Our decision will adopt its suggestion." (Ibid.) As modified, Conclusion of Law No. 1 only states that "[t]he refund claims should be dismissed with prejudice." The Ordering Paragraph states that "the refunds claims made in this consolidated proceeding are dismissed, and this proceeding is closed." (See D.94-11-066, slip op. at pp. 14-15.)[8]

The November 1994 Rehearing Decision only expressly adopted Cal Pak's suggestion that just the refund claims be dismissed. The language that Todd-AO attributes to the Commission, i.e., that claims of unlawfulness have been "merged into the judgment and constitute an estoppel," are Cal Pak's assertions.

Even assuming the Commission had approved Cal Pak's "merger" language, that would not preclude us from reopening the Original Decision under section 1708. The "merger" language used by Cal Pak and relied upon by Todd-AO is found in Witkin and refers to the res judicata effect of a valid final judgment in favor of the plaintiff. (The res judicata effect of a judgment for the defendant constitutes a "bar" to further suits of the plaintiff on the same cause of action.) (See 7 Witkin, Cal.

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8. The decision to close the proceeding was reversed in D.95-03-044 (the March 1995 Rehearing Decision) in order to accommodate any complaints seeking refunds for overcharges from other parties.

Procedure (3rd ed. 1985) § 243, p. 681 and § 249, p. 687.) This doctrine is applicable to court judgments.

Todd-AO once again confuses the conclusive effect of a final Commission decision in a collateral action and the Commission's power to modify its own decisions. Section 1708 gives the Commission continuing jurisdiction over its orders and decisions and allows the Commission to modify or rescind a decision even after it has become final. (See Sale v. Railroad Commission (1940) 15 Cal.2d 612, 616; City of Los Angeles v. Public Utilities Commission (1975) 15 Cal.3d 680, 706; Winton Manor Mutual Water Co., et al. v. Winton Water Co. (1978) 84 Cal.P.U.C. 645, 651.)[9]

3. Section 1709

As we noted above, Todd-AO contends that section 1709, rather than section 1708, governs the Commission's actions in the case. Section 1709 provides:

> In all collateral actions or proceedings, the orders and decisions of the commission which have become final shall be conclusive.

Todd-AO relies on People v. Western Airlines (1954) 42 Cal.2d 621, as well as Commission decisions addressing the

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9. In Golconda Utilities Company (1968) 68 Cal.P.U.C. 296, which we discussed earlier in this order, the Commission stated that section 1708 only applies to the Commission's prospective regulatory jurisdiction, absent extrinsic fraud or other extraordinary circumstances. In addition, the Commission stated that "[w]here jurisdiction has been reserved a point may be reopened or considered at a later time." (Id. at p. 305.) To the extent that this language suggests that an express reservation of jurisdiction is required to reopen a decision under section 1708, we believe that it is wrong. As stated above, the Commission has continuing jurisdiction under section 1708.

parameters of section 1708 (Golconda Utilities Company (1968) 68 Cal.P.U.C. 296 and Laguna Hills Water Company (1980) 3 Cal.P.U.C.2d 373). Todd-AO's argument has no merit. This case is not a "collateral" action. Rather, this case deals with the Commission's ability to reopen the same action and reverse its own decision. Section 1709 is not applicable here.

4. Detrimental Reliance

Todd-AO alleges that the parties detrimentally relied on the Original Decision in filing various lawsuits in state and federal courts for three and a half years. The only allegation of legal error that Todd-AO raises is that the Original Decisions and subsequent rehearing orders established the "right" to refunds, and thus, the Decision to Reverse deprives Todd-AO and Cal Pak of vested property rights without due process of law. There is no merit to this argument.

Any "right" to refunds established by the Original Decision would not vest prior to Todd-AO obtaining a judgment in its favor for damages. (See Coombes v. Getz (1932) 285 U.S. 434.) The only case Todd-AO cites is the First District Court of Appeal decision, issued August 14, 1996, which held that the superior court has jurisdiction concurrent with the Commission's to award damages resulting from unlawful overcharges. (Todd-AO Corp. v. United Parcel Service, Inc. (1996) 48 Cal.App.4th 549.) However, Todd-AO neglects to point out that this case was vacated by the California Supreme Court, and remanded to the Court of Appeal to reconsider in light of the Commission's reopening of the Original Decision.

Neither has there been the type of reliance on the Original Decision that existed, for example, in Diablo Canyon, supra, 4 Cal.P.U.C.2d 139. Because no refunds have been granted in this case, Todd-AO and other potential class members have, at most, an expectation or hope that they will obtain refunds.

Finally, Todd-AO fails to acknowledge the fact that any claims it may have to refunds would be subject to the resolution of UPS' federal claims regarding the constitutionality of the Original Decision. Those claims are still pending in the United States District Court.

5. Denial of Review by the Supreme Court, Law of the Case, and Judicial Estoppel

Todd-AO claims that denial of review of the Original Decision by the California Supreme Court precludes the Commission from reopening and reversing that decision. First, Todd-AO relies on court decisions which have held that a denial of review by the court is a decision on the merits both as to the law and the facts presented in the review proceedings. (See People v. Western Airlines, Inc. (1945) 2 Cal.2d 621, 630-631; Consumers Lobby Against Monopolies (1979) 25 Cal.3d 891, 900-901.)

As discussed previously, Todd-AO ignores the language in People v. Western Airlines which states that Commission decisions should have res judicata effect when they have been unsuccessfully challenged in both state and federal courts. Here, a federal challenge to the Original Decision is still pending. In addition, People v. Western Airlines deals only with a separate (collateral) court action for penalties, in which the Commission argued that the issue of its jurisdiction over Western Airlines had been previously decided by the Commission and upheld by the court. People v. Western Airlines does not discuss the Commission's power to reopen its own proceedings under section 1708.

The other case cited by Todd-AO, Consumers Lobby Against Monopolies, is not really a res judicata case. Instead, that decision deals with the stare decisis effect of a denial of review. The court held that although a summary denial of a petition for review, without opinion, may have res judicata effect, as explained in People v. Western Airlines, supra, it

cannot be given stare decisis effect because the grounds for the decision are not known. (Consumers Lobby Against Monopolies, supra, 2 Cal.2d at pp. 902-905.) Thus, this decision does not support Todd-AO's argument.

Todd-AO also contends that the doctrine of "law of the case" precludes reversal of the Commission's Original Decision. This contention is without merit. Under "law of the case," the decision of an appellate court which states a rule of law necessary to the decision in the case, conclusively establishes that rule and makes it determinative of the rights of the same parties in any subsequent retrial or appeal in the same case. (See George Arakelian Farms, Inc. v. Agricultural Labor Relations Bd. (1989) 49 Cal.3d 1279, 1291; Nally v. Grace Community Church (1988) 47 Cal.3d 278, 301-902; 9 Witkin, Cal. Procedure (3rd ed. 1986) § 737, p. 705-707.) In this case, the court denied review of the Original Decision without opinion and without stating any rule of law. Therefore, law of the case is not applicable here.

Finally, Todd-AO alleges that the Commission may not reverse its Original Decision because of the doctrine of judicial estoppel, which precludes a party from taking contradictory positions in judicial proceedings. As Todd-AO points out, in the Commission's answer to UPS' petition for writ of review of the Original Decision, the Commission argued that UPS' rate increase was unlawful. We may now find ourselves in the position of arguing to the California Supreme Court that UPS' rate increase was lawful. However, we do not conclude that we are estopped from doing so.

The type of estoppel to which Todd-AO is referring occurs where a party attempts to take inconsistent positions with regard to a claim arising in concurrent or successive actions. The basis of the estoppel is the unfair advantage a party may gain because of the possibility that claims may be decided differently in separate adjudications. (9 Witkin, Cal. Procedure (3rd ed. 1986) § 191, p. 624.)

Here, the Commission is not taking different positions in separate actions and is not obtaining any unfair advantage as a party. Instead, the Commission as decisionmaker is reversing a prior decision in the same proceeding. The only case cited by Todd-AO is a civil case between private parties and is not applicable to the instant case. (See Kirk v. Rutherford (1955) 137 Cal.App.2d 681, 683.)

B. Correctness of the Original Decision

Todd-AO asserts that the Commission's analysis in the Decision to Reverse is wrong and that the Original Decision was correct.

1. The Original Decision

The Original Decision held that the February 24, 1992 rate increases filed by UPS were unlawful and ineffective because they were not filed by formal application and approved by the Commission in advance, as required by Public Utilities Code section 454. That determination was based on the history of the Commission's regulation of UPS.

In 1938, when the Commission established minimum rates for highway carriers, UPS was exempted from minimum rate regulation because its small parcel delivery services were in competition with the United States Postal Service. However, other rules and regulations applicable to common carriers continued to be applied to UPS. (See D.31606 (1938) 41 C.R.C. 671.) Among other things, UPS was required to file formal applications for rate increases under Public Utilities Code section 454. (See D.93-02-001, slip op. at pp. 9-11.) UPS followed that practice until the 1992 rate increase filing.

UPS argued in the Original Decision that it was exempt from minimum and other rate regulation, citing Application (A.)

90-12-017. However, the Original Decision concluded that D.91-01-034, the decision issued in A.90-12-017, merely continued the exemption granted in D.89-09-014, which in turn continued the exemption granted in D.31606. Thus, the Original Decision found no support for UPS' argument that it was somehow exempt from the requirements of section 454. (See D.93-02-001, slip op. at pp. 6-12.)

The Original Decision concluded that the UPS rate increases filed in 1992 were just and reasonable, for the future, and approved the rates prospectively. The decision also directed UPS to file formal applications for future rate increases, but stated that UPS could file an amended application to propose alternative procedures for obtaining such rate increases. (See D.93-02-001, slip op. at pp. 12-13 and 14, Conclusion of Law No. 5.)

2. The Decision to Reverse

In determining to reverse the Original Decision, the Commission relied primarily on its conclusion that, at the time UPS filed the 1992 rate increase, the law regarding the procedures that UPS should follow was ambiguous. (D.96-12-090, slip op. at pp. 21-22.) Consistent with the Original Decision, the Decision to Reverse reviews the exemption granted in the 1938 minimum rate decision and notes that UPS nevertheless continued to be subject to section 454. However, the Decision to Reverse discusses the regulation of UPS in the context of the deregulation of rates for common carriers that began in 1981.

The Commission began to gradually reduce the regulation of rates for common carriers, including the elimination of minimum rate regulations, with the adoption of General Order (GO) 147. In 1987, the Commission enacted GO 147-A, which established "rate windows" for common carriers. The "rate windows" allowed common carriers to increase or decrease rates up to 5% without

formal approval pursuant to section 454. However, in D.88-01-027, a decision granting UPS' application for a 7.1% increase in rates, the Commission expressly stated that the rate windows were not available to UPS.

> UPS was previously granted a departure from the Commission's rate regulation and is therefore not subject to General Order 147-A. . . . Additionally, UPS may not adjust its rates under the rate window authorized by Rule 7.3 of General Order 147-A.

(United Parcel Service (1988) Cal.P.U.C. Dec. No. 88-01-027 [1988 Cal. PUC LEXIS 8, at pp. *1-*2].)

On March 20, 1989, UPS filed an application requesting an amended CPCN authorizing operations as a highway common carrier, which was granted in D.89-09-014. In response to UPS' request, the Commission also preserved the departure from economic regulation for UPS' small parcel delivery services, which were competitive with services provided by the U.S. Postal Service. In Appendix A of that decision, the Commission stated that UPS shall, among other things, "Comply with General order Series 80, 100, 123, 147, and all other applicable Commission General Orders." (United Parcel Service (1989) Cal.P.U.C. Dec. No. 89-09-014, Appendix A, Condition (5)c, [1989 Cal. PUC LEXIS 400, at p. *21], emphasis added; see D.96-12-090, slip op. at pp. 17-18.)

As stated in the Decision to Reverse, it is at this point that the requirements for UPS' rate increases for small parcel delivery services became unclear. D.89-09-014 does not specify whether the continued departure from minimum rates for small parcel delivery precluded UPS' use of the GO 147 rate windows.

On March 15, 1990, GO 147-B went into effect, which allowed increases in rates of up to 10% without prior approval and permitted rate decreases to floor prices established by the Commission. In December 1990, UPS filed an application for a

rate increase of 10.6%, which was granted in D.91-01-034. This application and decision do nothing to clarify whether the GO 147-B rate windows were available for rate increases of 10% or less. Indeed, D.91-01-034 further clouds the issue because, in continuing the departure from economic regulation for small parcels, the decision authorizes a waiver from section 454 "[t]o the extent necessary." (United Parcel Service (1991) Dec. No. 91-01-034, Conclusion of Law No. 2 [1991 Cal. PUC LEXIS 758, at p. *8]; see D.96-12-090, slip op. at pp. 18-19.)

On June 7, 1991, GO 147-C became effective, which further deregulated minimum rates. In January of 1992, UPS submitted the tariff changes at issue here, which involved rate increases of less than 10% for small parcel services. Those rate increases were to become effective on February 24, 1992. (See D.96-12-090, slip op. at pp. 20-21.)

The Decision to Reverse holds that the rate filing rules applicable to UPS were so ambiguous when UPS filed its 1992 rate increase, it could not be concluded that UPS contravened those rules. In addition, the Decision to Reverse states that the 1992 rate increase was found to be just and reasonable at the time it was filed. Therefore, the Commission determined that it should not have held that the rate increase was unlawful. (See D.96-12-090, slip op. at p. 22.)

3. Todd-AO's Contentions

Todd-AO argues that the Decision to Reverse merely attempts to rationalize a predetermined conclusion. Todd-AO supports this contention with the assertion that neither the Commission nor UPS ever took the position that UPS was subject to General Order (GO) 147, prior to the issuance of the Decision to Reverse.

Todd-AO is correct that the Commission did not rely on GO 147 in its Original Decision. That is precisely the point made in the Decision to Reverse. The ambiguity in Appendix A of

D.89-09-014, which applied GO 147 to UPS, was discovered when the Commission reviewed the Original Decision after the 1996 Ninth Circuit Court of Appeals decision was issued.

It also appears that UPS may not have relied on this particular argument when it filed its rate increase in February of 1992. However, in UPS' comments on the Decision to Reopen, UPS did rely on the GO 147 rate window provisions in arguing that the Original Decision should be reversed. In any event, the subjective belief of UPS at the time of the 1992 rate increase is not the issue. Rather, the Decision to Reverse properly focuses on the directions that the Commission gave to UPS.

Todd-AO cites two UPS applications for rate increases, which are not discussed in the Decision to Reverse, in support of its argument that UPS was aware that it was required to file an application for approval of the 1992 rate increases. First, in A.88-12-039, UPS filed an application for a 7.3% increase for small parcel delivery services. D.89-02-033 approves the increase and states that UPS' rates are not subject to the provisions of GO 147-A. (D.89-02-033, slip op. at p. 2.) However, this decision was issued before D.89-09-014, which is the source of the ambiguity relied on in the Original Decision.

Second, in A.89-12-017, UPS requested a 6.3% increase in rates for small parcel services. This application was filed before the March 15, 1990 effective date of GO 147-B, which raised the level of a rate increase that may be automatically approved to 10%. Thus, an application would have been required even if UPS was subject to GO 147. However, as Todd-AO points out, UPS specifically states in A.89-12-017 that its rates are not subject to GO 147-A, "nor can the rates of UPS be raised by the use of the rate window currently available to other common carriers." (A.89-12-017 at pp. 4-5.) D.90-01-061, approving this rate increase, is silent on the applicability of GO 147 and Public Utilities Code section 454.

A.89-12-017 does demonstrate that UPS believed that it was required to file an an application for a rate increase after

D.89-09-014 was issued. However, UPS' belief is not relevant to the issues decided in the Decision to Reverse. As stated above, the focus of the Decision to Reverse is not what UPS believed, but rather what requirements the Commission had established for obtaining a rate increase in February of 1992. The Decision to Reverse properly found that our directions to UPS were so ambiguous that it cannot be concluded that UPS contravened those rules by filing a rate increase without filing a formal application.

C. Justification for Reopening and Reversing Original Decision

Todd-AO asserts that the Decision to Reopen and the Decision to Reverse were issued without justification, give the appearance of impropriety, misrepresent the Commission's prior holdings, and engage in impermissible speculation. We do not believe that any of Todd-AO's arguments demonstrate legal error. However, Todd-AO raises several issues which require clarification.

First, Todd-AO argues that the Decision to Reverse and the reasons stated for that decision are not legitimate. Todd-AO contends that the Decision to Reverse failed to address any of the arguments made by Todd-AO in its comments on the Decision to Reopen. This is incorrect. The Decision to Reverse summarizes Todd-AO's comments and responds specifically to Todd-AO's argument that the Commission exceeded its authority in reopening this case. The Decision to Reverse also explains the reasons for reopening and the reasons for its departure from the Original Decision.

Second, Todd-AO contends that the Decision to Reverse gives the appearance of impropriety because the decision states that reconsideration of the Original Decision was "prompted by UPS' continuing legal efforts to have that earlier decision scrutinized." (D.96-12-090, slip op. at p. 2.) Todd-AO

interprets this to refer to some type of ex parte efforts on the part of UPS. The "legal efforts" language refers to UPS' challenge of the Original Decision in federal court. More specifically, as we stated in the Decision to Reopen, the Commission's reconsideration of the Original Decision was in reaction to the 1996 Ninth Circuit Court of Appeals decision which held that the Original Decision was not res judicata for purposes of UPS' federal constitutional claims. (See United Parcel Service, Inc. v. California Public Utilities Commission (9th Cir. 1996) 77 F.2d 1178.) We will modify the Decision to Reverse to clarify our meaning.

Third, Todd-AO refers to language in the Decision to Reverse which states: "(A)s we instituted critical and significant changes to our regulation of common carriers, we relied perhaps too much on custom and what might be called a gentleman's agreement with UPS" regarding UPS' rate filing responsibilities. (D.96-12-090, slip op. at p. 14.) The Decision to Reverse also refers to custom and the "tacit understanding" that had developed between UPS and the Commission. (D.96-12-090, slip op. at pp. 2, 20.) Todd-AO claims that this language indicates that there was a secret agreement between UPS and the Commission which relieved UPS of the obligation to comply with section 454 for any rate increases. (See Todd-AO's Application for Rehearing at pp. 14, 30.)

We recognize that it is not clear from the Decision to Reverse what these references mean. We intended to refer to a custom and practice whereby the Commission expected UPS to file formal applications for rate increases, and UPS did file such applications to increase its rates, even though General Order 147 might have provided an exception for rate increases within the rate window. Until the period of deregulation of minimum rates and the establishment of the rate windows, UPS was required to file applications for rate increases. However, as deregulation progressed, it became increasingly unclear from our decisions what was required of UPS. Thus, the Decision to Reverse states

that we may have relied on the practices that had developed, rather than looking at what we had actually told UPS.

Upon review, the Commission looked more closely at the actual directions given to UPS, particularly the application of GO 147 to UPS under D.89-09-014, and determined that it was not clear at that time what was legally required of UPS. The Decision to Reverse will be modified to clarify what the Commission meant and to delete the references to a "gentleman's agreement" and "tacit understanding."

Fourth, Todd-AO claims that Conclusion of Law No. 4, which deals with the reasonableness of UPS rate increases, is misleading. Conclusion of Law No. 4 states:

> The rate increases which UPS charged its customers from February 24, 1992 to February 4, 1993 were properly determined by the Commission to be just and reasonable in D.93-02-001, as affirmed in D.94-11-066.

(D.96-12-090, slip op. at p. 27, Conclusion of Law No. 4.)

Todd-AO refers to other similar language in the Decision to Reverse, which characterizes the Original Decision as finding the rate increases just and reasonable, at the time they were filed. (See D.96-12-090, slip op. at pp. 5, 7, 22, 27, and 28.) Upon review, we agree that these references are somewhat incomplete.

The Original Decision, which was approved on February 3, 1993, states:

> For the future, that is, for the period after the effective date of this order, UPS' rates filed on January 7, 1992 are just and reasonable.

(D.93-02-001, slip op. at p. 14, Conclusion of Law No. 5; see also Id. at pp. 13 and 15, Ordering Paragraph No. 2.) The Original Decision bases this finding on the rationale that UPS is in a competitive market. (D.93-02-001, slip op. at p. 13.)

According to the Decision to Reverse, D.94-11-066 (the November 1994 Rehearing Decision) confirms that the Original Decision found the rates to be reasonable at the time of filing. While it is true that both the Original Decision and the November 1994 Rehearing Decision rejected Cal Pak's claims for refunds on the basis that the rates UPS charged were reasonable, the November 1994 Rehearing Decision was later modified by D.95-03-044 (the March 1995 Rehearing Decision).

The March 1995 Rehearing Decision contains a lengthy discussion about the reasonableness of UPS' rates. (D.95-03-044, slip op. at pp. 3-7.) That decision concludes that the Original Decision found "the rates filed by UPS on January 7, 1992, and challenged by Cal Pak, were only reasonable after they were approved by the Commission in D.93-02-001 (the Original Decision)." (D.95-03-044, slip op. at p. 6, emphasis added.) The March 1995 Rehearing Decision also states that the negative implication of statements in the Original Decision is that "UPS' rates filed on January 7, 1992 were not just and reasonable prior to the effective date of D.93-02-001 (the Original Decision)." (D.95-03-044, slip op. at p. 6.)

It is clear, however, as suggested in the Decision to Reverse, that the reason the Commission determined that the rates were not reasonable prior to February 4, 1993 was that they were not approved prior to that date. There is nothing in the decisions in this proceeding to indicate that the Commission ever determined that the level of rates charged prior to February 4, 1993 were excessive from the standpoint of any kind of financial or economic analysis. On the contrary, the rationale in the Original Decision for finding the rates reasonable prospectively, would appear to apply to the period prior to February 4, 1993, if not for the "unlawful" procedure used to increase the rates. (See D.96-12-090, slip op. at p. 5, fn. 4.)

We will modify the Decision to Reverse to further explain the basis for finding that the rates were reasonable from the date they were filed.

Finally, Todd-AO alleges that Finding of Fact No. 15 of the Decision to Reverse inaccurately states that the Commission only received one complaint, filed by Cal Pak, seeking refunds based on the 1992 rate increase. Todd-AO contends that the Commission received a letter dated February 24, 1993 from the Natural Distribution Agency demanding a refund. We will modify Finding of Fact No. 15 to state that the Commission received only one "formal" complaint.

III. CONCLUSION

For all of the foregoing reasons, good cause for rehearing has not been shown. However, we will modify the decision as discussed above. In addition, we will modify the decision to correct clerical and other nonsubstantive errors.

THEREFORE, IT IS ORDERED that D.96-10-042 is modified as follows:

1. On page 2, in the seventh line of the first full paragraph, "February 22, 1992" is deleted and replaced with "February 24, 1992."

2. On page 2, the last sentence of the first full paragraph is modified to read:

> The reexamination of our earlier decision, prompted by the Ninth Circuit Court of Appeals decision that UPS' federal constitutional claims were not barred on res judicata grounds, has revealed that the findings of fact and conclusions of law in D.93-02-001 failed to include matters material to the issues before the Commission

3. On page 3, the last sentence in the first partial paragraph is modified to read:

> Therefore, we now realize that, in undertaking the complex task of deregulating the trucking industry in the 1980's and early 1990's, we did not sufficiently clarify certain rules and definitions affecting UPS. Rather, we relied on the requirements that had applied to UPS prior to deregulation, and UPS' established practice, whereby UPS filed formal applications for all rate increases.

The footnote at the end of this paragraph is not modified.

4. On page 4, in the second line of the final paragraph, "January 21, 1992" is deleted and replaced with "February 21, 1992."

5. On page 5, in the sixth line of the first full paragraph, "May, 1992" is deleted and replaced with "June, 1992."

6. On page 5, footnote 4, the final two sentences are deleted and replaced with the following:

> As discussed below, this rationale clearly applied to UPS' rate increase at the time of filing in January, 1992.

7. On page 7, the three full paragraphs (beginning with "In D.94-11-066, we further explained" and ending with "We did not determine that the rates were only just and reasonable prospectively") are deleted.

8. On page 7, the first sentence of the final partial paragraph is modified to read:

> In the meantime, UPS sought judicial review of the Original Decision.

9. On page 8, the first three lines of the final partial paragraph are modified to read:

> In the meantime, Cal Pak filed a complaint against UPS in the California Superior Court seeking to establish a class action to recover refunds based on the UPS rate increase. Cal Pak also filed an application for rehearing of the Commission's decision,

10. On page 9, in the second sentence of footnote 5, insert the word "formal" before "complaint."

11. On page 9, in the third sentence of footnote 5, delete the word "demands" and replace with "other formal complaints."

12. On page 10, the last sentence in the first partial paragraph is modified to read:

> On December 11, 1996, the California Supreme Court granted UPS' petition for review of the Court of Appeal decision, and transferred the cause back to the Court of Appeal, with directions to the court to vacate its decision and reconsider the cause "in light of the Public Utilities Commission's rehearing of its decision" determining that UPS' rate increase was unlawful. (The Todd-AO Corporation v. United Parcel Service, Inc. (December 11, 1996, S056244).) At the present time, the UPS action against the Commission is pending in the United States District Court, and Todd-AO's suit against UPS is pending in the California Court of Appeal.

13. On page 13, the first full paragraph is modified to read:

> We decided to reexamine D.93-02-001 because of UPS' challenge of that decision in federal court, in particular the Ninth Circuit Court of Appeals ruling on February 28, 1996 that UPS was not barred from litigating its federal constitutional claims. We exercised our discretion to reopen this proceeding so

that we could consider all relevant information available and assure informed decisionmaking.

14. On page 13, re-letter section "B. Administrative Notice" to read section "C. Administrative Notice" and insert the following as section "B.":

B. Reasonableness of UPS' Rates

As discussed above, in D.93-02-001 (the Original Decision) we determined that UPS' rates that were charged from February 24, 1992 to February 4, 1993 were unlawful because they had not been approved by formal application as required by Public Utilities Code section 454. However, the rate increases were approved as reasonable "for the future." In addition, we denied Cal-Pak's claims for refunds, concluding that "UPS' rates are competitive." (D.93-02-001, slip op. at p. 13.)

In D.94-11-066 (the November 1994 Rehearing Decision), we again denied refunds to Cal-Pak, finding that the rates were fair and nondiscriminatory, as well as reasonable, based on the financial and other evidence before the Commission. (D.94-11-066, slip op. at p. 9.) The financial information referenced here included data for the base year 1991 and projected 1992 data. Thus we confirmed that the rates we approved in D.93-02-001 for prospective application were just, reasonable and nondiscriminatory at the time the rates were filed in January of 1992.

However, in D.95-03-044 (the March 1995 Rehearing Decision) we discussed at length the "reasonableness" of the rates. The March 1995 Rehearing Decision noted the inconsistencies in the Original Decision between language concluding the rates were reasonable "for the future" and language denying refunds on the basis that the rates were reasonable when filed. (See, e.g., D.93-02-001, slip op. at p. 13.) The March 1995 Rehearing Decision states that these inconsistencies were carried over into the November 1994 Rehearing Decision, which also denied refunds.

> Nevertheless, it is clear even in the March 1995 Rehearing Decision that, to the extent that we considered the rates to be unreasonable, excessive, unlawful, or ineffective prior to February 4, 1993, this was solely because of the lack of approval of the rates pursuant to Public Utilities Code section 454 before that date. (See D.95-03-044, slip op. at pp. 3-7; see also D.93-02-001 and D.94-11-066.) We never determined that the level of the rates were unreasonable based on any financial data or other evidence in the record. To the contrary, whenever we specifically looked at the level of the rates, we found them to be reasonable.
>
> Now that we have determined, as discussed below, that the procedure UPS used for filing its rate increase was not unlawful, we reiterate our previous findings that the level of UPS' rates for the period February 24, 1992 to February 4, 1993 was reasonable. This is based on the record in this case, as discussed in our prior decisions, which shows that UPS was in a competitive market and that the financial data in evidence supported the rate increase, once approved. The same rationale for finding the level of the rate increases reasonable when approved on February 4, 1993, necessarily applies to the rates between the date UPS began charging the rates, on February 24, 1992, and the date of approval.

15. On page 14, the second full paragraph is modified to read:

> The scrutiny we have now applied to our prior order from the point of view of the notice that the Commission gave UPS of its rate filing responsibilities, rather than from the the obligations we presumed UPS would undertake, has revealed that as we instituted critical and significant changes to our regulation of common carriers, we relied too much on the prior practice and earlier requirements applicable to UPS whereby UPS filed formal applications for rate increases.

16. On page 15, on the seventh line of the first full paragraph, delete "Rule 3.2" and replace it with "Rule 3.20."

17. On page 20, the second full paragraph is modified to read:

> At that time, if we had more closely analyzed the practice whereby UPS filed formal applications for rate increases, which UPS had followed in the past, we would have found that the Commission's decisions did not provide clear directions as to what extent UPS was still required to conform to the filing requirements of section 454. Neither did the Commission's decisions clarify the extent to which UPS was required to comply with General Order 147-B and, if it was required to comply with the General Order, whether it was excluded from the provision pre-approving rate increases of up to 10%.

The footnote at the end of this paragraph is not modified.

18. On page 21, the first two sentences of the first paragraph are modified to read:

> It is at this point that UPS submitted, in January, 1992, tariff changes for rate increases below the 10% limit. This submittal was only proper if, like other common carriers, UPS was subject to the automatic rate increase authority of General Order 147-C, and therefore, not required to file a formal application under section 454 for approval of rate increases of less than 10%. In the decision which we are now reconsidering, D.93-02-001, we faulted UPS by focusing on the fact that the Commission had only expressly exempted UPS from minimum rate regulations.

19. On page 22, in the final sentence of the final paragraph, replace "the UPS rate increase" with "that the level of the UPS rate increase."

20. On page 23, in the second line of the third paragraph, replace "the UPS rate increase" with "the level of the UPS rate increase."

21. On page 24, in Finding of Fact No. 2, "it" is deleted and replaced with "its."

22. On page 24, in Finding of Fact No. 4, "January 21, 1992" is deleted and replaced with "February 21, 1992."

23. On page 24, in Finding of Fact No. 6, "May, 1992" is deleted and replaced with "June, 1992."

24. On page 26, in Finding of Fact No. 15, insert the word "formal" before "complaint."

25. On page 26, Finding of Fact No. 16 is deleted.

26. On page 27, the following language is added to the end of Conclusion of Law No. 1:

> This authority to reopen extends to proceedings that may be classified as quasi-judicial. The decision whether or not to reopen a particular proceeding requires a proper exercise of discretion.

27. On page 27, Conclusion of Law No. 4 is modified to read:

> The level of the rates which UPS charged its customers from February 24, 1992 to February 4, 1993 were determined to be just and reasonable in the Original Decision (D.93-02-001) and in the November 1994 Rehearing Decision (D.94-11-066).

28. On page 27, add Conclusion of Law No. 4(a) to read:

> In the March 1995 Rehearing Decision (D.95-03-044), we determined that the rates were not reasonable prior to February 4, 1993 because they had not been approved prior to that date. However, nothing in that decision indicates that the level of the rates charged was unreasonable.

29. On page 27, add Conclusion of Law No. 4(b) to read:

> Consistent with the Original Decision (D.93-02-001) and the November 1994 Rehearing Decision (D.94-11-066), we continue to find that the level of the rates charged by UPS between February 24, 1992 and February 4, 1993 was reasonable.

30. At the top of page 28, in Conclusion of Law No. 7, delete "the UPS rate increase" and replace with "the level of the UPS rate increase."

IT IS FURTHER ORDERED that rehearing of D.96-12-090, as modified by this order, is denied.

This order is effective today.

Dated April 9, 1997, at San Francisco, California.

P. GREGORY CONLON
President
JESSIE J. KNIGHT, JR.
HENRY M. DUQUE
JOSIAH L. NEEPER
RICHARD A. BILAS
Commissioners