



DENNIS J. HERRERA
City Attorney

November 10, 2003

OPINION NO. 2003-05

SUBJECT: Validity Of Appointments Made By The Acting Mayor To The Public Utilities Commission

REQUESTED BY: Mayor Willie L. Brown, Jr.
Board of Supervisors
Public Utilities Commission

PREPARED BY: Jesse Capin Smith, Chief Assistant City Attorney
Buck Delventhal, Chief, Governmental Law Division

Question Presented

Are the October 22, 2003 appointments Supervisor Daly made to the Public Utilities Commission while serving as acting Mayor legally effective?

Short Answer

Only one of Supervisor Daly's two appointments is legally effective. Supervisor Daly's appointment of Adam Werbach is valid because that seat was vacant at the time of the appointment, the Supervisor possessed all of the powers of Mayor while serving as acting Mayor, and he completed the appointment before his tenure as acting Mayor ended. Supervisor Daly's appointment of Robin Chiang is not legally effective because the seat to which Supervisor Daly appointed Mr. Chiang was not vacant at the time of the appointment. Mayor Brown had completed his appointment of Andrew Lee to that seat on October 16, 2003, and the acting Mayor lacked any power to rescind that appointment.

Accordingly, because Supervisor Daly administered an oath of office to Mr. Werbach on October 22, 2003, Mr. Werbach may now serve as a member of the Public Utilities Commission, with a term expiring on January 15, 2007, unless eight or more members of the Board of Supervisors reject his appointment on or before November 21, 2003. Because Supervisor Daly's appointment of Mr. Chiang was not legally effective, Mr. Chiang does not hold office as a member of the Public Utilities Commission. But if Mr. Lee resigns from the Commission, as the Mayor has requested him to do and as the Mayor has informed the Board that Mr. Lee will, there will be one vacancy on the Public Utilities Commission. The term of that empty seat expires on January 15, 2004. If Mr. Lee does not resign, then the Board of Supervisors should have until December 4, 2003 to reject the appointment by a two-thirds vote. While ordinarily the period for the Board to reject a Mayoral appointment runs from the date that the Mayor transmits the Notice

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of Appointment, here we conclude that the period for considering Mr. Lee's appointment should be tolled because of the uncertainty surrounding who occupies the seat, which this opinion now clarifies, and because of the Board's reliance on the Mayor's assurance that Mr. Lee was resigning in not calendaring consideration of that appointment. Accordingly, the 30-day period for the Board to reject Mr. Lee's appointment should be extended by the period between Supervisor Daly's appointment of Mr. Chiang and the date of this opinion, and should expire on December 4, 2003.

Background

The San Francisco Charter establishes the Public Utilities Commission (the "Commission"), vesting it with authority over "the construction, management, supervision, maintenance, extension, operation, use and control of all water and energy supplies and utilities of the City as well as the real, personal and financial assets, which are under the Commission's jurisdiction..." (Charter, §4.112.) Under the Charter, the Commission consists of five members appointed by the Mayor, in accordance with section 3.100, for four-year terms. Under section 3.100 the Mayor is responsible for making appointments to the Commission "which shall be effective immediately and remain so, unless rejected by a two-thirds vote of the Board of Supervisors within 30 days following transmittal of the Notice of Appointment." The Charter further specifies that the "Notice of Appointment shall include the appointee's qualifications to serve and a statement how the appointment represents the communities of interest, neighborhoods and diverse populations of the City and County." (Charter, §3.100.) Members of the Commission may be removed by the Mayor only for cause, following notice and an opportunity to be heard, under section 15.105 of the Charter. (Charter, §4.112.)

In September 2003, two seats on the Commission became vacant when members of the Commission resigned. In a letter dated September 4, 2003, Ashok Bhatt, who occupied a seat with a term expiring on January 15, 2007, resigned. Mr. Bhatt's letter of resignation, which the Mayor's Office received, did not contain any conditions to the effectiveness of his resignation. In a letter dated September 29, 2003, Jeff Chen, a Commission member occupying a seat expiring on January 15, 2004, resigned because he had moved out of San Francisco. The Charter generally requires that commissioners be electors of San Francisco at all times during their terms in office. (Charter, §4.101.) Mr. Chen's resignation letter, which the Mayor's Office received, did not include any conditions to the effectiveness of his resignation.

On October 16, 2003, Mayor Brown transmitted to the Clerk of the Board of Supervisors a Notice of Appointment of Andrew Lee to the Commission. The Notice of Appointment included Mr. Lee's resume. In the Notice of Appointment, Mayor Brown designated Andrew Lee to fill the seat of Jeff Chen, with his term expiring January 15, 2004. Mr. Lee did not take an oath of office at this time.

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On or about October 17, 2003, Mayor Brown left the State with a delegation of San Franciscans for a trade mission to Tibet. Under section 3.100(12) of the Charter the Mayor has the responsibility to "designate a member of the Board of Supervisors to act as Mayor in the Mayor's absence from the state or during a period of temporary disability." Under section 3.102 of the Charter, if the Mayor is out of state without designating an acting Mayor, the President of the Board acts as Mayor until the Mayor returns. Before the Mayor left on his trip, he designated various members of the Board to act as Mayor on particular days. He did so verbally through his Chief of Staff, who prepared a list. The Mayor did not inform the Supervisors in writing of his designations, rather he made them orally. He verbally designated Supervisor Daly to act as Mayor on October 22, 2003, and his Chief of Staff's Office communicated that designation to Supervisor Daly orally and then subsequently by e-mail. There is no dispute that before leaving the State, Mayor Brown appointed Supervisor Daly to act as acting Mayor for that day.

The controversy involves the events that occurred on October 22, 2003. On that day, Supervisor Daly undertook as acting Mayor to make two appointments of his own to the Commission, Mayor Brown took steps to terminate Supervisor Daly's tenure as acting Mayor and to appoint Supervisor Dufty as acting Mayor, and Supervisor Dufty took actions to rescind Supervisor Daly's appointments and make the appointments that Mayor Brown wished to make to the Commission.

The long-standing practice and understanding of Board members and the Mayor is that an acting Mayor serves primarily a ceremonial function, and that the acting Mayor should do everything possible to consult with and obtain the consent of the Mayor before taking any significant action, particularly any policy or personnel decision that can not be readily reversed by the Mayor upon his return to the State. Nonetheless, on October 22, 2003, without consulting with Mayor Brown's office, Supervisor Daly took steps to appoint Adam Werbach and Robin Chiang to the Commission. He appointed Mr. Chiang to the same seat that Mayor Brown had appointed Mr. Lee to fill, with a term ending on January 15, 2004. He appointed Mr. Werbach to the seat that has a term expiring on January 15, 2007.

Based on our investigation, the sequence of events on October 22 is as follows. Between 2:15 and 2:25 p.m.¹, Supervisor Daly appointed and administered the oath of office to Mr. Werbach and Mr. Chiang. Then, between 2:19 and 2:27 p.m., Supervisor Daly transmitted to the Clerk of the Board of Supervisors separate Notices of Appointment for Mr. Werbach and Mr. Chiang.² The Notices of Appointment bear the signature of Supervisor Daly as acting Mayor. Supervisor Daly's submission to the Clerk included oaths of office signed by both of his appointees; he acknowledged both oaths as acting Mayor. The Notice of Appointment for

¹ Unless otherwise indicated, all times specified in this background section are Pacific Standard Time.

² Although the documents are time stamped 2:19 p.m., our investigation indicates that the time stamp in the Clerk's Office on that day may have been up to eight minutes slow.

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Mr. Chiang included a brief description of his qualifications and his resume. The Notice of Appointment for Mr. Werbach included a brief statement of his qualifications. In his transmittal for Mr. Chiang, Supervisor Daly did not mention the earlier appointment of Mr. Lee, nor did he expressly undertake to rescind that appointment made by Mayor Brown.

Between 2:15 and 2:20 p.m., Mayor Brown's Office learned of the steps that Supervisor Daly appeared to be taking as acting Mayor to make appointments to the Commission. Between 2:30 and 2:34 p.m.³ the Mayor's Office placed a telephone call to Mayor Brown, who was then in Tibet.⁴ During this call, Mayor Brown verbally terminated his designation of Supervisor Daly as acting Mayor. He then orally designated Supervisor Dufty to serve as acting Mayor, requested that Supervisor Dufty proceed with his intended appointments to the Commission and that those appointees be sworn in that afternoon. At about 2:37 p.m., a representative of the Chief of Staff's Office informed Supervisor Daly that Mayor Brown had rescinded his designation as acting Mayor. Shortly thereafter, the Chief of Staff's Office informed Supervisor Dufty that Mayor Brown had designated him as acting Mayor and wished that he withdraw Daly's appointments and make the appointments that Mayor Brown intended.

Supervisor Dufty then withdrew the appointments of Mr. Werbach and Mr. Chiang to the Commission made by Supervisor Daly. A written rescission of those appointments, signed by Supervisor Dufty as acting Mayor, bore the hand-written time of 2:45 p.m. and was time stamped in the Mayor's Office at 2:46 p.m. Between 2:56 and 3:04 p.m., Supervisor Dufty transmitted the written rescission to the Clerk of the Board.⁵

Supervisor Dufty then took steps to appoint Mr. Lee and Clementine Clarke to serve as members of the Commission. That afternoon, Judge Dearman administered the oath of office to Mr. Lee and Ms. Clarke in the Mayor's Office. Between 4:35 and 4:43 p.m., a Notice of Appointment for Ms. Clarke bearing Mayor Brown's signature was transmitted to the Clerk of the Board. The notice included a statement of her qualifications, including her resume, and a statement of how the appointment represents the communities of interest, neighborhoods and diverse populations of the City.

³ Our investigation indicated discrepancies in the system that the Department of Telecommunications and Information Services uses to record City phone calls; therefore, we were unable to ascertain the precise time of the call with certainty.

⁴ Before we shifted from Daylight Savings Time, Tibet was 15 hours ahead of San Francisco time, so it was between 5:30 and 5:34 a.m., October 23, 2004, Tibet time.

⁵ Again, although the document is time stamped 2:56 p.m., our investigation indicates that the time stamp in the Clerk's Office on that day may have been up to eight minutes slow.

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Following these events, Mayor Brown cut short his trip to Tibet and returned to San Francisco on or about October 24. In his annual State of the City address four days later, Mayor Brown said that he was withdrawing the two appointments to the Commission that he and Supervisor Dufty made and that he expected that the Board and Mayor could work together to find two qualified candidates for the Commission. In a letter dated October 29, 2003 to the Clerk of the Board, Mr. Brown stated that to accomplish this objective, he had requested and would receive written resignations from Mr. Lee and Ms. Clarke, and he called on Supervisor Daly to do the same with his appointees. The Mayor's Office has not yet received written resignations from Mr. Lee or Ms. Clarke. To date Supervisor Daly's appointees have not submitted their resignations.

Analysis

I. Supervisor Daly's Appointment Of Mr. Chiang Was Legally Ineffective Because The Seat To Which Supervisor Daly Appointed Mr. Chiang Was Not Vacant.

The threshold question is whether two vacancies existed on the Commission for Supervisor Daly to fill. We conclude that only one seat was vacant for the reasons described below.

A. Before October 16, 2003, Two Seats On The Public Utilities Commission Were Vacant.

The City's Administrative Code governs the resignation of City officers. Section 16.80-15 provides that all resignations must be in writing and that an appointed officer, such as a member of the Commission, must transmit the resignation to the body or officer who made the appointment. A resignation becomes effective, unless otherwise stated in the written resignation, at the time the office of the appointing authority receives the resignation. *See* S.F. Admin. Code §16.80-15.

Ashok Bhatt and Jeff Chen earlier held the two seats at issue. As previously mentioned, they submitted their written resignations to the Mayor's Office in September 2003, and their written resignations were not conditioned on any subsequent events. Under the Charter, the Mayor has the authority to fill these vacancies, subject to possible rejection by the Board of Supervisors by a two-thirds vote within 30 days of the transmittal of the Notice of Appointment. Before October 16, 2003, the Mayor had not transmitted any Notices of Appointment to fill either of the two vacancies on the Commission.

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B. Mayor Brown Filled One Of The Vacant Seats When He Completed His Appointment Of Andrew Lee To The Public Utilities Commission On October 16, 2003, Before Supervisor Daly's Actions To Appoint Other Commissioners.

On October 16, 2003, Mayor Brown transmitted to the Clerk of the Board of Supervisors a Notice of Appointment of Andrew Lee to the Commission to fill the vacancy created by Commissioner Chen's resignation. The question here is whether that appointment could be implicitly rescinded by Supervisor Daly as acting Mayor when he transmitted his appointment of Mr. Chiang. We conclude that Supervisor Daly did not undo the Mayor's earlier appointment of Mr. Lee.

The courts have well established the rule that once the appointing authority has completely exercised the power of appointment, that person then has no power to remove the appointee (where the appointee can only be removed for cause) or rescind the appointment. *See, e.g., Marbury v. Madison*, 5 U.S. 137, 157 (1803); *In re Commission on the Governorship v. Curb*, 26 Cal.3d 110, 121 (1979). "Until the last act has been performed the whole matter is *in fieri*, and within the control of the person or persons by whom the appointment is to be made, and there is nothing to prevent them from changing their minds and appointing some other person than the one first selected." *Conger v. Golmer*, 32 Cal. 75, 79 (1867). Accordingly, if Mayor Brown completed his appointment of Mr. Lee by filing a Notice of Appointment with the Board of Supervisors on October 16, 2003, there was no vacancy for Supervisor Daly to fill.

Courts have held that an appointment is completed when the last act required of the person vested with the power to appoint has been performed. *See, e.g., Marbury*, 5 U.S. at 157; *Curb*, 26 Cal.3d at 121. The Charter sets forth several steps that the Mayor must perform before an appointment to the Public Utilities Commission is complete. The Mayor must select a candidate that meets the qualifications for the vacancy. *See, generally*, S.F. Charter §4.101, Article VIII B. The Mayor must officially designate the candidate by signing a Notice of Appointment signifying the designation. S.F. Charter §3.100(17); *see also* Cal. Gov't Code § 1342; *Conger*, 32 Cal. at 78-79. Finally, the Mayor must transmit the Notice of Appointment to the Board of Supervisors with the appointee's qualifications to serve on the Commission and a statement describing how the appointment represents the communities of interest, neighborhoods and diverse populations of the City and County. Charter §3.100(17). In appointing Mr. Lee, the Mayor completed all of these steps on October 16, 2003.

The fact that Mr. Lee had not taken the oath at the time Supervisor Daly sought to make his own appointment to the same seat does not matter for purposes of determining when the last act in the appointment process was completed. Charter section 3.100(17) expressly provides that a mayoral appointment is effective immediately upon the transmittal of the Notice of Appointment. Although the Charter gives the Board of Supervisors the authority to reject the appointment by a two-thirds vote of its members within 30 days following the filing, that power

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to reject is not a step in the appointment process. *See id.* In enacting this Charter provision, the voters sought to implement a system of checks and balances authorizing the Mayor to make an immediate appointment to fill a vacancy, but subjecting the appointment to rejection by the Board.

The Mayor's transmittal of the Notice of Appointment is a crucial and final step in the process of appointing commissioners. *See, e.g., State v. Essling*, 128 N.W.2d 307, 313 (Minn. 1964); *Tucker v. Watkins*, 737 So.2d 443, 446 (Ala. 1999). The transmittal puts the Board on notice of the appointment, triggers the Board's power to reject the appointment within 30 days and starts the running of the 30-day period. If the appointee takes the oath of office, the appointee may begin serving as a commissioner during this 30-day period. If the transmittal of the Notice of Appointment were not required to complete the appointment process, a Mayor could prevent the Board from considering a newly appointed commissioner by making an appointment, having the oath administered and refraining from transmitting the Notice of Appointment.

The significance of the oath is that an appointed commissioner may not undertake any official duties before taking and filing an oath. Article 20, section 3 of the California Constitution requires that all public officers "shall, *before they enter upon the duties of their respective offices*, take and subscribe [the oath or affirmation]." (Emphasis added). This action is a condition precedent to holding office. *See Melony v. Whitman*, 10 Cal. 38, 43 (1858); *see also Smith v. County Engineer of San Diego County*, 266 Cal.App.2d 645, 653 (1968) (stating, "[g]iven the basic purpose of the oath it follows in reason that the requirement of execution of the oath 'before' entering upon the duties to be undertaken establishes the execution of the oath as a condition precedent to a lawful undertaking of those duties").

But while the oath is the necessary precondition to the ability of the appointee to engage in official activity, the taking of an oath is not a step of the appointment process. *See Conger*, 32 Cal. at 79-80. In *Conger*, the California Supreme Court held that a Board of Supervisors could change an appointment up until the time when the appointment is complete. *See id.* The Court concluded that the appointment was complete when "the commission or certificate of appointment has been made out in due form under the seal of the Board, and signed by the officers of the Board," but did not include the oath as part of this process. *See id.*

The taking of an oath to serve is not an act for which the appointing authority is responsible. California law authorizes numerous people to give the oath to appointees, not just the official making the appointment. *See, e.g.,* Government Code § 1362. Moreover, the law imposes the duty to take and file the oath on the appointee. *See* Government Code § 1360 (" . . . before any officer enters on the duties of his office, *he shall take and subscribe* the oath or affirmation . . .") (Emphasis added.); Government Code § 1367 ("No compensation nor reimbursement for expenses incurred shall be paid to any officer by any public agency unless *he has taken and subscribed* the oath or affirmation . . .") (Emphasis added.); Government Code

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§1770(i) (office becomes vacant upon officer's "refusal or neglect to file his or her required oath or bond within the time prescribed.").

The United States Supreme Court reached the same conclusion – that the oath is not a step in the appointment process – in *U.S. v. LeBaron*, 60 U.S.73, 79, (1856):

. . . when the commission of a postmaster has been signed and sealed, and placed in the hands of the Postmaster General to be transmitted to the officer, so far as the execution is concerned, it is a completed act. The officer has then been commissioned by the President pursuant to the Constitution; and the subsequent death of the President, by whom nothing remained to be done, can have no effect on that completed act. It is of no importance that the person commissioned must give a bond and take an oath, before he possesses the office under the commission; nor that it is the duty of the Postmaster General to transmit the commission to the officer when he shall have done so. These are acts of third persons. The President has previously acted to the full extent which he is required or enabled by the Constitution and laws to act in appointing and commissioning the officer; and to the benefit of that complete action the officer is entitled, when he fulfils the conditions on his part imposed by law.

In light of these rules of law, on October 16, 2003, the Mayor completed his appointment of Andrew Lee to the Commission by transmitting Mr. Lee's Notice of Appointment to the Clerk of the Board. As a result, on October 22, 2003, the date that Supervisor Daly attempted to make two appointments to the Commission, there was only one vacant seat on the Commission. Because the seat to which Supervisor Daly as acting Mayor sought to appoint Mr. Chiang was not vacant, the appointment of Mr. Chiang is not legally effective. We turn now to the question of the validity of Supervisor Daly's appointment of Mr. Werbach to the other seat, which was vacant.

II. Mr. Werbach's Appointment Is Legally Effective Because Supervisor Daly Assumed All Of The Powers Of The Office Of The Mayor When He Served As Acting Mayor, And Mayor Brown Could Not Replace Supervisor Daly As Acting Mayor While He Was Outside Of The State.

An acting Mayor's appointment of a City commissioner, contrary to the wishes of the Mayor, is, to our knowledge, without precedent in San Francisco. But this situation is not without precedent in California. The State of California confronted a similar circumstance in 1979, culminating in the seminal case of *In re Commission on the Governorship v. Curb*, 26 Cal.3d 110 (1979). The California Supreme Court held in *Curb* that an acting officer exercises all of the powers of the office, including the appointment power. *See id.* at 120. That case controls here.

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A. The Physical Absence Doctrine, Which The California Supreme Court Adopted In The *Curb* Case, Controls Here.

Curb arose when Governor Edmund Brown, Jr. left the State for a short trip to Washington, D.C. *See Curb*, 26 Cal.3d at 114. Under the California Constitution, the Lieutenant Governor "shall act during the Governor's absence from the State." *See id.* at 113 (quoting Cal. Const. Art. V, § 10). While the Governor was gone, Lieutenant Governor Mike Curb appointed Judge Armand Arabian to fill the vacant position of presiding judge for the Court of Appeal. *See id.* at 114. Governor Brown had intended to appoint Justice Bernard S. Jefferson to that position. *See id.* On the day after the Lieutenant Governor made the appointment, the Governor returned to the State and withdrew the appointment of Judge Arabian and appointed Justice Jefferson to fill the vacancy. *See id.*

The California Supreme Court held that when the Governor is physically absent from the State, all of his or her powers devolve upon the Lieutenant Governor. *See id.* at 120. The Court relied in part on the legislative history of the constitutional provision, which indicated that when the Governor is absent from the State he or she is legally disabled from performing any duties. *See id.* at 118. The Court reasoned that, "[s]ince a physically absent Governor cannot act, the overriding purpose of avoiding a hiatus in the availability of executive power requires that, during the absences, the sole and entire power to act as Governor be transferred to a Lieutenant Governor who is physically within the state." *Id.* at 119.

The Court rejected arguments that physical absence alone should not suffice to enable the Lieutenant Governor to act, but rather that an effective absence must be shown. *See id.* at 119. Under the "effective absence" theory, there must be a need for the acting official to perform a duty before the absent official is able to do so. *See id.* (quoting *Sawyer v. First Judicial District Court*, 410P.2d 748, 749 (Nev. 1966) (describing effective absence as an "absence [that] must be measured by the state's need at a given moment for a particular act by the official then physically not present.")). The Court concluded that there was no room in California's statutory scheme for "a watered down 'effective' absence [doctrine] or any other concept whereby an acting governor could discharge some but not all of the duties of the governor in his absence. *See id.* at 120.

Indeed, the majority in *Curb* dismissed the arguments embraced by a Justice in the concurring opinion that travel and technology had evolved to the point where the physical absence doctrine no longer made sense and that application of the effective absence doctrine in this modern world would safeguard against lapses in authority. Accordingly, the Court found that the Lieutenant Governor was free to act on any matter that the Lieutenant Governor determined needed attention without any need to consult with or obtain the consent of the Governor, even in the absence of an emergency compelling action. *See id.* at 120.

Although the Court held that the Lieutenant Governor's appointment during the Governor's absence was valid, the Court concluded that on his return the Governor had the

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authority to withdraw the appointment because the appointment had not yet been perfected. *See* 26 Cal.3d at 123. The appointment was subject to confirmation by the Commission on Judicial Appointments and that Commission had not yet acted. *See id.* As a result, in *Curb* – in contrast to the situation here – there was a condition precedent to the effectiveness of the appointment.

Under *Curb*, the law in California is clear: when pursuant to applicable law a public official temporarily assumes the office of another public official because that second official is absent from the state, the first official is vested with all of the powers of the office he or she has assumed. *See Curb*, 26 Cal.3d at 120. Because all of the powers devolve upon the acting official, the public official who has left the state has no authority to take any official actions. *See* 26 Cal.3d at 120. The Mayor cannot revoke or change a designation of acting Mayor until the Mayor returns to the State. This conclusion conforms to advice that this Office has consistently given to the Mayor's Office going back many years. *See, for example*, San Francisco City Attorney Opinion No. 662, February 16, 1953 (concluding that a member of the Board of Supervisors designated as acting Mayor has the same powers and duties as the Mayor during the Mayor's absence).

The San Francisco Charter provides that the Mayor has the responsibility to "designate a member of the Board of Supervisors to act as Mayor in the Mayor's absence from the state or during a period of temporary disability." (Charter §3.100(12).) Although in *Curb* the Court interpreted the meaning of the phrase "absence from the state" as that phrase is used in the California Constitution, the Court's holding likely controls the interpretation of that same language as it is used in our Charter because courts would presume that the voters understood the meaning of that phrase in California when they added it to the Charter in 1996, 17 years after the *Curb* decision. *See Robert S. v. Superior Court*, 9 Cal.App.4th 1417, 1420 (1992) (stating that "the electorate is deemed to have been aware of existing laws and judicial constructions at the time an initiative is enacted").

Here, Supervisor Daly, while serving as acting Mayor, assumed all of the duties and powers of the Office of Mayor. He had the power to fill vacancies on City boards and commissions such as the Public Utilities Commission. Because he was absent from the State, Mayor Brown had no authority to rescind his designation of Supervisor Daly as acting Mayor. *See id.* As a result, Supervisor Daly's appointment of Mr. Werbach is legally effective.

B. Even If The Mayor Could Terminate Supervisor Daly's Tenure As Acting Mayor While The Mayor Was Out Of State, He Was Too Late In Doing So.

Even if Mayor Brown were able to exercise the authority to rescind his designation of Supervisor Daly while the Mayor was out of State, which he was not able to do under the *Curb* decision, our investigation of the facts indicates that he did not do so in time here. It appears that the Mayor was between three and 15 minutes late in orally rescinding his designation.

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Conclusion

Supervisor Daly's Appointment of Mr. Werbach is legally effective. Supervisor Daly had all of the powers of the Mayor when he was acting Mayor, including the power to make appointments, and Supervisor Daly completed the appointment before his tenure as acting Mayor ended. Because Mr. Werbach took his oath of office on October 22, 2003, he holds office as a member of the Public Utilities Commission and will continue to do so unless eight or more members of the Board of Supervisors reject his appointment on or before November 21, 2003. The fact that Mr. Werbach has already taken the oath of office does not affect the ability of the Board of Supervisors to reject the appointment. Unless the Board rejects his appointment, Mr. Werbach's term ends on January 15, 2007.

Supervisor Daly's appointment of Mr. Chiang is not legally effective because the seat to which Supervisor Daly appointed Mr. Chiang was not vacant at the time of the appointment. Mayor Brown had completed his appointment of Andrew Lee to that seat on October 16, 2003, nearly one week before Supervisor Daly, as acting Mayor, appointed Mr. Chiang. But this seat on the Public Utilities Commission would become vacant if Mr. Lee resigns from the Commission as the Mayor has assured the Board he will. If so, Mayor Brown may make an appointment of his choice to that seat. Any such appointment would be subject to the process for possible rejection by eight members of the Board of Supervisors within 30 days of such appointment set forth in section 3.100 of the Charter.

If for any reason Mr. Lee does not timely submit his written resign to the Mayor's Office, then the Board of Supervisors has until December 4, 2003 to reject the appointment by a two-thirds vote. Under the Charter the period for the Board to reject a Mayoral appointment runs from the date that the Mayor transmits the Notice of Appointment. But here we conclude that the period for considering Mr. Lee's appointment should be tolled, and should run for 24 days from the date of this opinion. That is, the period for rejection of Mr. Lee's appointment should be tolled from the date Supervisor Daly made his appointment until the date of this opinion. The uncertainty surrounding who occupies the seat, which this opinion now clarifies, and the Board's failure to calendar Mr. Lee's appointment in reliance on the Mayor's assurance that Mr. Lee was resigning⁶, both compel this conclusion.⁷

⁶ After the Mayor transmitted the Notice of Appointment of Mr. Lee, the Board President assigned to the Rules Committee on October 21, 2003 alternative motions rejecting, confirming and taking no position on the appointment. Only the appointments of Mr. Werbach and Mr. Chiang have been calendared for consideration by the Rules Committee on November 12, 2003.

⁷ There is precedent for this conclusion. For example, in 1989 proponents of an initiative Charter amendment that would impose term limits on members of the Board of Supervisors relied on a Registrar of Voters' information bulletin that specified an incorrect number of signatures required to qualify the measure for the ballot. After the petition had been submitted, the Department of Elections discovered that the State Legislature had changed the signature requirement, nearly doubling it. In response to this situation, the Registrar returned the petition to the

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If the Board or the Mayor believes that the physical absence doctrine – as embraced by the California Supreme Court in *Curb* – no longer makes sense for San Francisco government in the modern world of travel and communications, then the Board could consider proposing an amendment of the Charter to the voters. We are prepared to assist in any such endeavor.

Very truly yours,

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proponents and informed them that she would toll the time period to file the petition by the number of days the petition had been pending in the Registrar of Voters Office. In *San Franciscans for Reasonable Reform vs. Germain Q. Wong*, the Superior Court upheld the Registrar's decision requiring the proponents to gather additional signatures and granting them more time to do so.