OFFICE OF TAX APPEALS

STATE OF CALIFORNIA

In the Matter of the Appeal of:

NEXTERA ENERGY CAPITAL HOLDINGS, INC. AND AFFILIATES

OTA Case No. 20096580

OPINION ON PETITION FOR REHEARING

Representing the Parties:

For Appellant: Benjamin Muilenburg, Representative
Ronald A. Cox, Representative

For Respondent: Rafael Zaychenko, Attorney
Delinda Tamagni, Assistant Chief Counsel

A. KLETTER, Administrative Law Judge: On May 30, 2023, the Office of Tax Appeals (OTA) issued an Opinion sustaining respondent Franchise Tax Board's (FTB's) deemed denials of the claims for refund of tax and applicable interest of NextEra Energy Capital Holdings, Inc. and affiliates (collectively, appellant) for the 2009 through 2015 tax years (collectively, Years at Issue) in the amounts of $966,950 for the 2009 tax year, $924,326 for the 2010 tax year, $1,520,896 for the 2011 tax year,[1] zero for the 2012 tax year, $890,969 for the 2013 tax year, $1,877,585 for the 2014 tax year, and $2,416,183 for the 2015 tax year. In the Opinion, OTA held that appellant was engaged in a unitary business for the Years at Issue (Unitary Issue) and that appellant failed to demonstrate that the standard allocation and apportionment provisions found in California's Uniform Division of Income for Tax Purposes Act (UDITPA)[2] do not fairly reflect the extent of appellant's California business activity (Distortion Issue).

OTA will grant a rehearing where one of the following grounds for a rehearing exists and materially affects the substantial rights of the party seeking a rehearing: (1) an irregularity in the appeal proceedings which occurred prior to issuance of the Opinion and prevented fair

[1] The parties dispute the amount of appellant's refund if it prevailed for the 2011 tax year; however, OTA found that it need not decide the amount of appellant's refund because the Opinion concluded that appellant was not due a refund for the 2011 tax year.

[2] UDITPA is codified at Revenue & Taxation Code sections 25120 et seq.

consideration of the appeal; (2) an accident or surprise, occurring during the appeal proceedings and prior to the issuance of the Opinion, which ordinary caution could not have prevented; (3) newly discovered evidence, material to the appeal, which the party could not have reasonably discovered and provided prior to issuance of the Opinion; (4) insufficient evidence to justify the Opinion; (5) the Opinion is contrary to law; or (6) an error in law in the OTA appeals hearing or proceeding. (Cal. Code Regs., tit. 18, § 30604(a)(1)-(6);[3] *Appeal of Shanahan*, 2024-OTA-040P.)

On June 14, 2023, appellant timely filed a petition for rehearing (Petition) with OTA under Revenue and Taxation Code (R&TC) section 19334, based on the above-mentioned grounds one, two, and four through six. On July 15, 2024, appellant requested additional briefing, and on August 1, 2024, OTA asked the parties to provide additional briefing, limited to whether the enactment of R&TC section 25128.9 on June 27, 2024, is grounds for a rehearing. The parties provided additional briefing. Upon consideration of appellant's Petition and the additional briefing, OTA concludes that the grounds set forth in this Petition do not constitute a basis for granting a new hearing.

<u>Irregularity in the Appeal Proceedings</u>

An irregularity in the proceedings warranting a rehearing would generally include any departure by OTA from the due and orderly method of conducting appeal proceedings by which the substantial rights of a party (here, appellant) have been materially affected. (*Appeal of Graham and Smith*, 2018-OTA-154P; see also *Jacoby v. Feldman* (1978) 81 Cal.App.3d 432, 446.) Indeed, courts have found that an irregularity in the proceeding is "any act that (1) violates the right of a party to a fair trial and (2) which a party 'cannot fully present by exceptions taken during the progress of the trial . . . .' [citation]." (*Montoya v. Barragan* (2013) 220 Cal.App.4th 1215, 1230.) Included in the classification of irregularities is an "overt act of the trial court . . . or adverse party, violative of the right to a fair and impartial trial . . . ." (*Russell v. Dopp* (1995) 36 Cal.App.4th 765, 780.) Examples of irregularities include the absence of a judge from the courtroom during a portion of the trial, and a judge threatening to prejudge testimony unless a witness is withdrawn. (See *O'Callaghan v. Bode* (1890) 84 Cal. 489, 495; see also *Pratt v. Pratt* (1903) 141 Cal. 247, 252.)

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[3] As provided in *Appeal of Martinez Steel Corp.*, 2020-OTA-074P, California Code of Regulations, title 18, section 30604 is based upon the provisions of California Code of Civil Procedure (CCP) section 657; therefore, it is appropriate for OTA to look to CCP section 657 and applicable caselaw as relevant guidance in determining whether a ground has been met to grant a rehearing.

Appellant argues that OTA departed from the due and orderly method of conducting an appeal by disregarding relevant material evidence in reaching its conclusions, which substantially impacted appellant's right to a fair hearing. Regarding the Unitary Issue, Scott Bores, Vice President of Florida Power & Light Company (FPL), provided testimony which appellant asserts "was not considered by the Panel in rendering the Opinion on unity." Regarding the Distortion Issue, OTA's correspondence dated August 10, 2021, requested information and documentation to develop a complete record for OTA, including board minutes from NextEra Energy, Inc. (NEE) or its predecessor; from FPL; and from NextEra Energy Resources, LLC (NEER); and complete copies of appellant's Schedules R for the Years at Issue, each of which appellant asserts are "barely referenced in the Opinion." Appellant also submitted Exhibit 20, appellant's hearing presentation slides, in response to OTA's Prehearing Conference Minutes and Orders, which contained relevant evidence to the Distortion Issue and which appellant asserts are "completely overlooked by the Opinion."

As a preliminary matter, appellant does not explain how OTA's procedural actions in conducting the appeal proceedings violated its right to a fair hearing. Appellant does not dispute that, consistent with the applicable regulations, OTA validly requested additional information from the parties to develop a complete record; validly issued prehearing conference orders; and included Mr. Bores's testimony and appellant's hearing presentation slides in the record. (See Cal. Code Regs., tit. 18, §§ 30304(a); 30213; 30102(w).) OTA finds that its actions did not substantially and adversely impact appellant's right to a fair hearing.

Appellant asserts that relevant and material evidence was not considered at the hearing or as part of the Opinion. However, in its Petition, appellant acknowledges that these items of evidence were entered into the record and as applicable, presented at the hearing, and the record shows that each item of evidence was entered into the record, and as applicable, presented during the hearing. Moreover, in its Petition, appellant also acknowledges that the Opinion references the schedules R-7 and Mr. Bores's sworn testimony. While appellant asserts that the Opinion does not reference the board minutes or appellant's hearing presentation slides, the Opinion also considers these items of evidence.[4] Thus, OTA concludes that no irregularity in the proceeding prevented fair consideration of appellant's appeal.

[4] The Opinion considered appellant's hearing presentation slides, as addressed further below in the discussion of insufficient evidence. Briefing for the underlying appeal was voluminous at over 6,000 pages. The Opinion discussed the evidence which the Panel found to be most relevant and persuasive.

Accident or Surprise during the Appeal Proceedings

California Code of Regulations, title 18, (Regulation) section 30604(a)(2) permits a rehearing when an accident or surprise occurs during the appeal proceedings and prior to the issuance of the Opinion, which ordinary caution could not have prevented. The terms “accident” and “surprise” have substantially the same meaning, and each is used to denote some detrimental condition or situation in which a party is unexpectedly placed, without any negligence on the part of that party, which ordinary caution could not have guarded against. (*Appeal of Le Beau*, 2018-OTA-061P; *Kauffman v. De Mutiis* (1948) 31 Cal.2d 429, 432.) A rehearing is only appropriate if the accident or surprise materially affected the substantial rights of the party seeking the rehearing. (Code Civ. Proc., § 657; *Appeal of Le Beau*, *supra*.)

Appellant asserts that the Opinion “rests in large part on a finding of [s]trong [c]entralized [m]anagement”[5] which it claims FTB never argued,[6] and which appellant was never given an opportunity to address. Appellant further asserts that the Opinion relies on *Appeals of Monsanto Co.* (70-SBE-038) 1970 WL 2471 (*Monsanto*), *Dental Ins. Consultants, Inc. v. Franchise Tax Bd.* (1991) 1 Cal.App.4th 343 (*Dental Ins.*), *Mole-Richardson Co. v. Franchise Tax Bd.* (1990) 220 Cal.App.3d 889 (*Mole-Richardson*), cases which the parties’ briefing did not address.

However, the Opinion directly states that it does not rest on the presumption of strong centralized management. Footnote 27 of the Opinion explains that FTB does not assert, and the Panel does not rely on, the presumption of strong centralized management under Regulation section 25120(b)(3), and states that where no presumption applies, the taxpayer bears the burden of proof. Instead, the Opinion relies on the burden of proof applicable to unitary cases, which FTB repeatedly cited in its briefing, that the taxpayer bears the burden of proving a unitary business determination erroneous and must “prove . . . by a preponderance of the evidence that in the aggregate, the unitary connections relied upon by FTB are so lacking in substance as to compel the conclusion that a single integrated economic enterprise did not exist.” (See, e.g., *Appeal of Saga Corp*. (82-SBE-102) 1982 WL 11779.) Moreover, the

[5] Strong centralized management refers to the “strong presumption that the activities of a taxpayer constitute a single trade or business” where “there is a strong central management, coupled with the existence of centralized departments for such functions as financing, advertising, research, or purchasing.” (Cal. Code Regs., tit. 18, § 25120(b), (b)(3).)

[6] Appellant concedes that the audit determination, Audit Issue Presentation Sheet (AIPS) 01, references the strong centralized management presumption. AIPS 01 also discusses centralized management and the *Appeals of Monsanto Co.* (70-SBE-038) 1970 WL 2471 and *Appeal of Aimor Corp.* (93-SBE-221) 1984 WL 15592. The Opinion cites these cases in determining that each part of the unitary business does not need to be directly related to each other part.

Opinion's conclusion on the Unitary Issue is that "appellant has not met its burden [of proof] to show that the unitary connections between the rate-regulated electric utility business through FPL and the wholesale energy business through NEER are so insubstantial as to compel the conclusion that appellant did not conduct one unitary business."

Furthermore, the parties provided voluminous briefing on the Unitary Issue, which cited and discussed the unitary factors of strong central management and centralized departments. In briefing, FTB asserted that there were common officers and directors which constituted an integrated executive force, and cited *Appeal of Trails End, Inc*. (85-SBE-106) 1985 WL 47214 (*Trails End*) for the proposition that "shared officers and directors are dominant indicators of unity" because of "implicit control."[7] During the hearing, FTB argued for strong central management and centralized departments.[8] Appellant directly addressed FTB's contentions. In briefing, appellant addressed common management[9] and centralized departments,[10] and responded to FTB's arguments concerning management's asserted operational role.[11] At the hearing, appellant stated that it will discuss strong centralized management and acknowledged that FTB was arguing for strong central management.[12]

Appellant asserts that the Opinion raised a "new" theory and "new" cases, which denied appellant a meaningful opportunity to rebut the arguments by way of a hearing and briefing. As described above, the issue of strong central management and centralized departments was

[7] See, e.g., Respondent's Op. Br., p. 16.

[8] See, e.g., Transcript, p. 104, lines 8-14 ["major policy matters are what count" in FTB's estimation of integration], citing *Chase Brass and Copper Co. v. Franchise Tax Bd.* (1970) 10 Cal.App.3d 496); Transcript, p. 119, lines 16-18 ["both [NEER and FPL] essentially had the same nuclear department"].

[9] See, e.g., App. Op. Br., p. 8 ["To the extent common management may exist, the limited impact of that common management . . . preclude[s] the combination of the [businesses]" and "[u]nder [the] backdrop [of Florida Public Service Commission (FPSC) oversight of FPL] there was no centralized management of any unitary import"].

[10] See, e.g., App. Reply Br., pp. 13-14 [NEER and FPL's parallel corporate structures with autonomous departments provide "the same type of oversight that would exist in any parent-subsidiary relationship"]; App. Supp. Brief, p. 4 [intercompany groups, employees, and management were "indicative of oversight and reporting lines, not of a management structure focused on operating the two businesses as a single integrated enterprise"].

[11] See, e.g., App. Reply Br., pp. 13-15 [rebutting FTB's arguments concerning a centralized executive force]; App. Supp. Br., pp. 3-4 [discussing in detail the officer and director overlap between FPL and NEER].

[12] See, e.g., Transcript, p. 43, lines 18-21 [focus of case is lack of operational integration; appellant will discuss strong, centralized management and notes that the FTB is "pushing", i.e., arguing, for it].

thoroughly briefed and heard, and FTB cited *Monsanto*, *supra*, and *Trails End*, *supra*, in its audit determination and appeal briefing, respectively.[13] The Opinion considers whether NEE had actual or implicit control of FPL and NEER based on *Trails End*, *supra*.[14] Appellant was aware that the appeal focused on an integrated executive force because whether appellant had an integrated executive force was addressed in briefing and at the hearing. OTA raised no new legal theory and concluded that appellant "has not rebutted the evidence of actual executive control."

The Opinion directly states that the parties did not address two cases where the California Court of Appeal held that close control by management was sufficient to uphold a unitary finding. Appellant was aware of *Monsanto*, *supra*, a case authority concerning close control by management, but chose not to address it. (See *Appeal of NASSCO Holdings, Inc.* (2010-SBE-001) 2010 WL 5626976.) Exercising ordinary diligence, appellant could have addressed *Dental Ins.*, *supra*, and *Mole-Richardson*, *supra*,[15] also case authorities concerning unity and close control by management. Accordingly, OTA finds that appellant has not established grounds for rehearing based on accident or surprise during appeal proceedings.

<u>Insufficient Evidence</u>

To find that there is an insufficiency of evidence to justify the Opinion, OTA must find that, after weighing the evidence in the record, including reasonable inferences based on that evidence, the Panel clearly should have reached a different opinion. (Code Civ. Proc., § 657; *Appeal of Shanahan*, *supra*; *Bray v. Rosen* (1959) 167 Cal.App.2d 680, 684.) OTA considers the evidence in the light most favorable to the prevailing party (here, FTB). (*Appeal of Shanahan*, *supra*.)

Appellant argues that its hearing presentation slides which included multiple metrics for distortion are never referenced in the Opinion, and therefore, there is insufficient evidence to justify the Opinion. Appellant acknowledges that the hearing slides may not be evidence but that "the data underlying the various qualitative and quantitative measures is generally contained elsewhere in the record." Appellant further argues that the Opinion "ignores almost the entire factual record supporting the [Distortion Issue]." Finally, appellant repeatedly argues

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[13] See footnotes 6 and 7, above.

[14] Appellant acknowledges that respondent cited to *Trails End*, *supra*, in briefing. Appellant's other assertions regarding *Trails End*, *supra,* are addressed below under the contrary to law ground.

[15] Appellant cited *Mole-Richardson*, *supra*, in its hearing slide deck and at the hearing; thus, appellant was aware of the case. See Exhibit 20, p. 6; Transcript, p. 14, lines 21-2, and p. 15, lines 1-2.

that the Opinion "incorrectly asserts that [a]ppellant failed to provide evidence contained in the slides and that [a]ppellant had therefore not met its burden of proof."

In concluding that appellant failed to meet its burden of proof on the Distortion Issue, the Opinion considered facts related to the Unitary Issue; appellant's apportionment formulae; appellant's California business activities; and FPL's lack of assets, plants, power generation, transfer, or distribution facilities, employees, customers, or sales in California. In evaluating the qualitative difference, the Opinion cites information from appellant's Exhibits 1, 3, 19, and 20, and hearing presentation slide 28 [qualitative differences] and slide 32 [comparative profit margins], among other asserted evidence.[16] In evaluating the quantitative distortion, the Opinion cites information from the hearing presentation slide 23 [FPL's net income, NEER's loss, total income] and 33 [reduction of combined group's apportionment factor].

In the Opinion, OTA explained that the party invoking R&TC section 25137 – here, appellant – has the burden of proving by clear and convincing evidence that: (1) the approximation provided by the standard apportionment formula is not a fair representation of the taxpayer's business activity in California, and (2) its proposed alternative is reasonable. (*Microsoft Corp. v. Franchise Tax Bd.* (2006) 39 Cal.4th 750, 765 (*Microsoft*).) Under California's unitary authorities, appellant has not shown that it did not constitute a unitary business. OTA considered the evidence that appellant provided but found that appellant failed to identify or provide specific evidence of distortion, i.e., that the standard apportionment formula arbitrarily taxed income earned outside of California. OTA finds that there was sufficient evidence to justify the Opinion and that OTA cannot grant a rehearing based on this ground.

<u>Opinion is Contrary to Law</u>

The contrary to law standard of review shall involve a review of the Opinion for consistency with the law. (Cal. Code Regs., tit. 18, § 30604(b).) For a decision to be contrary to law, there must be a finding that the decision is "unsupported by any substantial evidence." (*Appeal of Shanahan*, *supra*, citing *Sanchez-Corea v. Bank of America* (1985) 38 Cal.3d 892, 907 (*Sanchez-Corea*).) This requires a review of the Opinion to indulge "in all legitimate and reasonable inferences" to uphold the Opinion. (*Appeal of Shanahan*, *supra*, citing *Sanchez-Corea*, *supra*, 38 Cal.3d at p. 907.) The relevant question is not over the quality or nature of the reasoning behind the Opinion, but whether the Opinion can or cannot be valid according to the law. (*Appeal of NASSCO Holdings, Inc.*, *supra*.) OTA considers the evidence

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[16] Appellant's opening brief asserted that FPL had a regulated and authorized 10 to 10.5 percent profit margin, while NEER's wholesale energy business reported zero taxable profit. Appellant's hearing slide 32 reported FPL's average profit margin to be an average of 9.8 percent.

in the light most favorable to the prevailing party (here, FTB). (*Appeal of Shanahan*, *supra*, citing *Sanchez-Corea*, *supra*.) A rehearing may be granted when the petitioning party (here, appellant) establishes that the Opinion incorrectly stated or applied the law and, therefore, is contrary to law. (*Appeal of NASSCO Holdings, Inc.*, *supra*.)

Unitary Issue

Appellant asserts that, although *Trails End*, *supra*, is a precedential opinion of the Board of Equalization (BOE), *Trails End*, *supra*, has “never been adopted by a[nother] precedential administrative decision . . . on unity.” OTA may rely on *Trails End*, *supra*, because it is a precedential opinion of the BOE and OTA has not removed the precedential status of that opinion. (See Cal. Code Regs., tit. 18, § 30504.) Appellant further asserts that *Trails End*, *supra*, “received no further judicial or administrative approval, and its persuasive value should be treated accordingly.” *Trails End*, *supra*, was cited by the BOE in its precedential opinion, *Automatic Data Processing West, Inc*. (89-SBE-009) 1989 WL 37899. Moreover, the BOE cited or considered *Trails End*, *supra*, in two nonprecedential board opinions, indicating that the BOE continued to approve of the opinion and parties considered it to be relevant authority.[17]

Appellant argues that *Trails End*, *supra*, cites no meaningful authority for its “implicit control analysis.” However, appellant acknowledges that *Trails End* cites the Supreme Court’s decision in *Container Corp. v. Franchise Tax Bd.* (1983) 463 U.S. 159, 177 (*Container*), which references implicit authority in footnote 16. In *F.W. Woolworth Co. v. Franchise Tax Bd.* (1984) 160 Cal.App.3d. 1154, 1162, the California court of appeal considered the Supreme Court’s analysis in *F.W. Woolworth Co. v. Tax and Rev. Dept. of N.M.* (1982) 458 U.S. 354 (*Woolworth I*), and while it distinguished the facts of *Woolworth I*, incorporated the implicit control analysis into California law. Therefore, the Opinion properly cited *Trails End* for the unitary criterion of strong central management through implicit control.

Next, appellant asserts that the Opinion ignores business activities in favor of entity labels, particularly in interactions between NEE and the rate-regulated electric utility business of FPL. NEE was appellant’s parent company. Authorities discussing strong central management explain that the relationship between a parent entity and subsidiary corporations is relevant to a unitary determination. (Compare *Woolworth I*, *supra*, 458 U.S at p. 369 with *Container*, *supra*, 463 U.S. at 180 fn. 19; *Chase Brass and Copper Co. v. Franchise Tax Bd.* (1970) 10 Cal.App.3d 496, 504; *Dental Ins.*, *supra*, 1 Cal.App.4th at 349.) The Opinion expressly

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[17] See the nonprecedential appeal of *Appeal of Cycles Peugeot (U.S.A.), Inc*. (May 4, 1995) 1995 WL 520658, see also *Appeal of Comcast Cablevision Corp. of Ca. & Comcon Production Services I, Inc., Assumer* (Feb. 6, 2012) 2012 WL 1614038, *ibid.*, Hearing Summary (Jan. 1, 2012) 2012 WL 512689.

stated that labels are not helpful in justifying either combination or decombination, regardless of who uses them, citing *Appeal of Sierra Production Service* (90-SBE-010) 1990 WL 176060. The Opinion evaluated elements of strong central management, such as integrated executive force, implicit control, actual control, etc., by considering that appellant's parent implemented management policies, established executive committees, commenced an enterprise-wide cost savings initiative, transferred key executives, and the rate-regulated electric utility business was not shown to operate autonomously. The Opinion focused on activities showing that business segments were integrated with, dependent upon, or contributed to each other and appellant's operations as a whole, and did not ignore business activities in favor of entity labels.

Appellant also claims that the Opinion relied on the wrong legal standard to evaluate whether the Florida Public Service Commission (FPSC)'s regulation of FPL precluded unity. Appellant clarifies in its Petition that "the regulatory oversight exercised by FPSC . . . mitigate[s] against a unitary determination." However, the Opinion found that the FPSC's administrative rules did not require FPL to operate its business separately and independently from the wholesale energy business. The Opinion, after explaining that FPSC oversight did not prevent unitary flows of value, concluded that "[a]ppellant has not shown that complete separation of operations from all other affiliates was required such that unitary flows of value could not be achieved." In the quoted sentence, the Opinion addresses appellant's unsupported assertion that complete separation of operations was required by FPSC regulation; it does not rely on the wrong legal standard.

Finally, appellant asserts that the Opinion does not properly apply the dependency or contribution test because it includes elements from other tests, such as the test articulated under *Butler Bros. v. McColgan* (1941) 17 Cal.2d 664, 678, affd. (1942) 315 U.S. 501, where the court held that the existence of a unitary business was "definitely established" by the presence of: (1) unity of ownership; (2) unity of operation, as evidenced by central accounting, purchasing, advertising, and management divisions; and (3) unity of use, as evidenced by a centralized executive force and general system of operation (a.k.a., the "three unities" test). In *A.M. Castle & Co. v. Franchise Tax Bd.* (1995) 36 Cal.App.4th 1794, 1807 (*A.M. Castle*), the court stated that the dependency or contribution test "overlaps with the three unities test 'in many areas and many of the *same facts* and factors are used in reaching a determination under either test (italics added).'" However, appellant omits the italicized language and argues that "the facts necessary to determine unity under one test, say dependency or contribution, will be different from the facts needed to determine unity under a different test, say the three unities test." Appellant essentially re-argues its case, stating that the Opinion erred because appellant did not meet the “additional factor” of being in the same line of business, as in *A.M. Castle*, *supra*. However, *Monsanto*, *supra*, *Mole-Richardson*, *supra*, and *Dental Ins.*, *supra*, all apply the dependency or contribution test to businesses that were not in the same line of business and considered additional unitary factors. While appellant clearly disagrees with these authorities, appellant’s dissatisfaction with the outcome of its appeal, and the attempt to reargue the same issues a second time, is not grounds for a rehearing. (*Appeal of Graham and Smith*, *supra*.)

Distortion Issue

Appellant argues that the Opinion describes the wrong legal standard for distortion because of various statements in the Opinion. After concluding on the Unitary Issue, the Opinion correctly describes R&TC section 25137, which provides that if the standard allocation and apportionment provisions do not fairly represent the extent of the taxpayer’s business activity in California, the taxpayer may petition for, or FTB may require, with respect to all or any part of the taxpayer’s business activity, if reasonable, a proposed alternative method. The Opinion also correctly describes the burden of proof of the party seeking alternative apportionment, which is by clear and convincing evidence.

The Opinion correctly describes *Microsoft*, *supra*, as examining qualitative and quantitative distortion in determining whether to apply an alternative method in place of the standard apportionment formula. Appellant further argues that the Opinion makes statements that meld unity and distortion into one inquiry. However, the statements quoted by appellant are determinations by the Opinion that appellant has not met its burden of proof. Appellant argued on appeal that “the combination of the rate-regulated electric utility business wholly in Florida and the wholesale energy business solely outside of Florida is inherently distortive.” In responding to that assertion, the Opinion states that “the assignment of wholesale energy business activities to Florida, and rate-regulated electric utility business activities to California, is not a failure of the standard apportionment formula; rather, it is a result of conducting a unitary business.” The Opinion concludes that appellant has not shown distortion because, unlike *Microsoft*, *supra*, both the rate-regulated electric utility business and the wholesale energy business were appellant’s main business, and therefore, “appellant has not shown that its activities conducted through NEER or FPL were incidental to appellant’s main business, like *Microsoft’s* treasury department.”

Appellant further asserts that the Opinion improperly limited *Microsoft, supra,* and *General Mills, Inc. v. Franchise Tax Bd.* (2012) 208 Cal.App.4th 1290, 1299, 1301 (*General*

Mills) to facts fitting within the treasury and hedging paradigm, and argues that in *General Mills*, the "ultimate goal of [R&TC] section 25137 is to assess whether the standard formula fairly represents the company's business activities in California," a point also made in the *Appeals of Amarr Company, et al.*, 2022-OTA-041P (*Amarr*). The Opinion makes the same point: both qualitative and quantitative distortion are examined together in "assessing whether the standard [apportionment] formula fairly represents the [taxpayer's] business activity in California" but are not independent and separate requirements, citing *General Mills*, *supra*, and *Amarr*, *supra*. Moreover, footnote 58 states that the qualitative and quantitative effects are simply two factors to apply to factual findings, and that OTA applies the two factors to the facts before OTA because, "*even though this case does not involve treasury functions*, the factors may be examined in determining whether the standard formula fairly reflects appellant's California business activity." As illustrated above, the Opinion used the correct legal standard and considered appellant's evidence but found that appellant did not meet the burden of proof.

Appellant next argues that the Opinion dismissed relevant evidence of legislative approval for application of California's distortion provisions to utilities. Appellant disputes the Opinion's citation of an Illinois court decision regarding whether that state's adoption of UDITPA included utilities but appellant clarifies that it does not dispute that California's adoption of UDITPA generally includes utilities. As such, the citation of the Illinois court decision is not material. Moreover, the Opinion does not limit relief under R&TC section 25137 for taxpayers who are, or are combined with, utilities. Appellant asserts that "[i]f [] OTA had relied on the evidence of California legislative intent as submitted by appellant…[a]ppellant would have prevailed in this case." OTA disagrees. Even considering the legislative intent, appellant failed to prove distortion. Therefore, appellant has not shown error in the Opinion.

R&TC Section 25128.9

Finally, appellant argues that the Opinion failed to consider or apply R&TC section 25128.9, which was enacted effective June 27, 2024, long after the Opinion was published. R&TC section 25128.9 generally provides that a transaction or activity, to extent that it that generates income or loss not included in "net income," as defined under R&TC section 24341, subject to apportionment, shall be excluded from the apportionment formula provided under Part 11 of Division 2 of the R&TC. Appellant asserts that R&TC section 25128.9 would change the outcome of the Opinion because "the wholesale energy business did not generate any income subject to apportionment."

However, R&TC section 25128.9 does not apply in the underlying appeal because appellant's wholesale energy business generated a loss which was included in "net income" subject to apportionment. Appellant's wholesale energy business loss was included in determining appellant's combined reporting group's net income or loss after state adjustments, which is the amount subject to apportionment. Accordingly, OTA finds that the Opinion is valid according to the law, and therefore, appellant has not established an error in law based on the enactment of R&TC section 25128.9. (*Appeal of NASSCO Holdings, Inc.*, *supra*.)[18]

Error In Law

Courts have found that a new trial may be granted based on an error in law if its original ruling as a matter of law was erroneous. (*Collins v. Sutter Memorial Hospital* (2011) 196 Cal.App.4th 1, 17-18, citing *Ramirez v. USAA Casualty Ins. Co.* (1991) 234 Cal.App.3d 391,397.) A claim on a petition for rehearing that there was an error in law is a claim of procedural wrong. For example, courts have found an error in law occurred when there was an erroneous denial of a jury trial (*Johnson v. Superior Court* (1932) 121 Cal.App. 288), an erroneous ruling on the admission or rejection of evidence (*Nakamura v. Los Angeles Gas & Elec. Corp.* (1934) 137 Cal.App. 487), an erroneous application of the law by a jury (*Shapiro v. Prudential Property & Casualty Co.* (1997) 52 Cal.App.4th 722), and an erroneous instruction to a jury (*Maher v. Saad* (2000) 82 Cal.App.4th 1317).

Error in law pursuant to Regulation section 30604(a)(6) generally refers to errors that occurred during the appeals hearing or proceedings. As stated in Code of Civil Procedure section 657 (7), in the judicial context, an error in law "occurring at the trial and excepted to by the party making the application," is grounds for a new trial. This includes situations where, for example, the trial court made an erroneous evidentiary or procedural ruling. (See, e.g., *Donlen v. Ford Motor Co*. (2013) 217 Cal.App.4th 138; *Ramirez v. USAA Casualty Ins. Co.*, *supra*.)

Appellant contends that OTA made an error in law in its proceedings because of its purported actions including (1) disregard of evidence, (2) application of a "new" theory and "new" cases and, (3) application of an incorrect legal standard, which appellant asserts could not have been anticipated by conduct at the hearing itself. However, as described above, OTA did not disregard evidence, apply a "new" theory or "new" cases, or apply an incorrect legal standard. Moreover, appellant has not shown that these purported errors, or any others,

[18] Both appellant and FTB raised other issues and arguments related to R&TC section 25128.9, including the ability to raise a new legal theory, the statute of limitations for raising a claim for refund, and whether R&TC section 25128.9 is retroactive. Since OTA finds that R&TC section 25128.9 does not apply, consideration of these further arguments is unnecessary.

occurred during the proceedings, such as an erroneous evidentiary ruling or procedural ruling, that materially affected the outcome. Accordingly, appellant has not established an error in OTA's proceedings that warrant a rehearing.

For the aforementioned reasons, OTA finds that appellant has not established that a ground exists for a rehearing pursuant to Regulation section 30604(a). Accordingly, appellant's Petition is denied.

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Asaf Kletter
Administrative Law Judge

We concur:

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Veronica I. Long
Administrative Law Judge

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Cheryl L. Akin
Administrative Law Judge

Date Issued: 5/13/2026