Court of Appeal No. B293420

IN THE

Court of Appeal

FOR THE

STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT
DIVISION SIX

Californians for Green Nuclear Power, *Petitioner*

v.

Public Utilities Commission of the State of California, *Respondent.*

APPEAL FROM THE CALIFORNIA PUBLIC UTILITIES COMMISSION'S
DECISION 18-01-022
APPROVING THE RETIREMENT OF DIABLO CANYON NUCLEAR POWER PLANT

REPLY TO PETITION FOR WRIT OF REVIEW AND MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT THEREOF

ACTIUM LLP
MIKE GATTO (S.B. NO. 232674)
5419 HOLLYWOOD BLVD., SUITE C-356
LOS ANGELES, CA 90027
TELEPHONE: (323) 819-0300
E-MAIL: MIKE@ACTIUMLLP.COM

Attorney for Petitioner Californians for Green Nuclear Power

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Regulations

INTRODUCTION

Two Answers were filed to Petitioner's writ petition, one by the PUC and one by the Real Parties in Interest led by PG&E. Neither Answer vitiates the Petitioner's arguments.

As a threshold matter, the Real Parties in Interest argue that a short special bill (SB 1090 - 2018) mooted this Petition. (3 PA 26 at 00846.) SB 1090 covered workforce and community mitigation issues that the petition does not challenge. Moreover, SB 1090 did not repeal the Coastal Act or California's clean-air laws. In any event, Petitioner can still obtain relief, as the Court can order the PUC to make Decision 18-01-022 conditional on the proper permit issuing and the replacement-power determination occurring, and the Court can also award Petitioner damages and costs. Finally, even if the above were not true, the issues at stake here are so important that mootness should not be permitted to evade review. So this petition remains ripe.

On the substance, both the PUC and the Real Parties in Interest concede that the PUC substantively shifted the scope of the proceeding midway through, and impliedly concede that the Commission violated its Rules of Practice and Procedure and due-process principles. They have not rebutted that this shift

prejudiced the Petitioner. The PUC attempts to justify such machinations because they are "common" – as if the recurrent nature of violations (which often go unchallenged based solely on parties' litigation budgets) absolves the violations in the instant case. The Real Parties in Interest repeat their mootness mantra, under the erroneous assumption legislation can retroactively override constitutional and procedural requirements. Both positions are meritless.

Respondents further concede that the PUC conclusively approved the Diablo Canyon retirement, which makes it a "development" under the Coastal Act because of the undeniable changes in intensity of land use, water use, and coastal access stemming therefrom. Respondents cite a regulation that lists the exemptions from the Coastal Act, yet this kind of project does not appear thereon. Then the PUC argues that because the retirement of Diablo would "return the coast to its natural state," (a finding not in the record), the Court should engraft a newly discovered, subjective exception to the plain language of the Coastal Act. No such exception exists. Many developments (for example, the massive mechanical alterations necessary to fill an unused harbor) would arguably return the coast to a more

"natural" state – but that does not exempt them from obtaining first a Coastal Development Permit. Furthermore, both Answers misapply relevant precedent, and the Real Parties' mootness talisman is particularly unreasonable here, as the Legislature certainly did not overturn the Coastal Act with a minor piece of legislation in 2018.

Finally, in response to the duties of the PUC to consider the climate-change consequences in its decisions, the Answers ignore legislative intent and the PUC's own regulatory materials, instead choosing to interpret the various clean-air laws to render them a nullity. Real Parties tellingly resort to words like, "intent" and "commitment" – words without legal effect. These words, hastily added to the decision, and relied upon in both Answers, suggest the PUC knew it was violating the law when it approved the retirement of Diablo without first securing equivalent GHG-free resources to replace it – or, in the least, making Decision18-01-022 expressly conditional upon the outcome of the future proceeding.

Neither Answer rebutted the Petitioner's claims.

ARGUMENT

I. Petitioner Can Obtain Relief; The Petition Is Not Moot.

Real Parties in Interest allege a short special statute (SB 1090, 2018) mooted this petition. Yet SB 1090 covered issues not challenged here, and did not repeal by implication the Coastal Act or California's clean-air laws. Moreover, in any event, the Petitioner can still obtain relief, because the Court can award it nominal damages and costs due to the Rules violations, and can make Decision 18-01-022 conditional on PG&E obtaining a Coastal Development Permit and proving it can satisfy statutory mandates regarding GHG emissions without Diablo. Finally, these issues (coastal development, climate change) are of such broad importance that even if mootness were applicable, an exception exists.

A. SB 1090 Covered Issues not Challenged Here, and Did not Repeal the Code Provisions on Which the Petition Is Based.

The Real Parties in Interest stretch the issues SB 1090 covered when they argue it mooted the Petitioner's claims regarding due-process violations, violations of the Coastal Act, and violations of California's clean-air laws. There is a strong presumption against repeal of a statute by implication. "[A]ll

presumptions are against a repeal by implication." *Medical Bd. of California v. Superior Court* (2001) 88 Cal.App.4th 1001, 1005 (citations omitted). "Repeals by implication are not favored. Unless express terms are used to disclose the intention to repeal, the presumption is against repeal" *Di Napoli v. Superior Court of Kern County* (1967) 252 Cal.App.2d 202, 207. The Real Parties ask the Court to hold that SB 1090 repealed provisions of the Coastal Act and other clean-air mandates by implication.

SB 1090 chaptered a short special law whose purpose was primarily financial. By its plain language, the bill ordered the PUC to approve full funding to mitigate impacts to the local community and workforce. *See* Cal. Pub. Util. § 712.7(a)(1)-(2). The legislative findings confirm this was the focus:

> The Public Utilities Commission has invited guidance from the Legislature on the question of whether it has the legal authority to approve the community impact mitigation settlement proposed by the parties in Application 16-08-006.
>
> (c) Operation of the powerplant through the planned retirement date of Diablo Canyon Units 1 and 2 in a safe and reliable manner requires retaining existing members of the trained workforce and for this reason the employee retention program as agreed upon in the joint proposal in Application 16-08-006 should be

> approved by the Public Utilities Commission without modification.[1]

The other section of the new statute, 712.7(b), commands the PUC to "ensure that integrated resource plans are designed to avoid any increase in emissions of greenhouse gases as a result of the retirement" of Diablo Canyon. This just re-states current law, and reflects legislative angst that mirrors and confirms the legal concerns this petition raises. In the Legislature's own words:

> The Legislature finds and declares that a special law is necessary . . . because . . the state is still responding, at significant cost, to the sudden, permanent, and unexpected loss of greenhouse-gas-free electricity [from the closure of the state's other nuclear-power plant].[2]

Petitioner's claims center around the PUC approving the closure itself of Diablo Canyon, and the PUC's failure to make the challenged decision conditional on PG&E obtaining a coastal-

---

[1] Senate Bill 1090 (Chapter 561, Statutes of 2018), Section 1, available at https://leginfo.legislature.ca.gov/faces/billTextClient.xhtml?bill_id=201720180SB1090. Petitioner has asked the Court to take Judicial Notice of the bill under Evidence Code section 452, which covers statutes, legislative enactments, and official governmental acts. A copy of the legislation is provided in Petitioner's Supplemental Appendix, starting at PA00846.

[2] SB 1090, Section 2.

development permit and proving (in a future proceeding now) that it can satisfy the various statutes regarding GHG emissions without Diablo. The petition does not seek to overturn the community impact mitigation or worker retention funding that SB 1090 approved. Nothing in SB 1090 mooted this petition.

B. The Petitioner Can Obtain Relief.

Even if the Court found that SB 1090 was partly relevant, it still does not moot this petition because Petitioner can obtain relief. A subsequent legislative act cannot moot constitutional violations. *See Bernhardt v. County of Los Angeles*, 279 F.3d 862, 872 (9th Cir. 2002) ("A live claim for nominal damages will prevent dismissal for mootness") Petitioner complains of due-process and procedural violations in a proceeding where the PUC acted as lower tribunal. Those violations affected the outcome of that matter. Petitioner, a small non-profit, incurred costs fighting these Rule and due-process violations during the pendency of SB 1090, which did not take effect until 1 January 2018. Petitioner has properly sought costs and fees and other damages as just and proper. (*See* Petition at 19). The Court can and should award Petitioner nominal damages for the Rules violations. Such claims are not moot.

Moreover, the Court can and should order the PUC to make its approval of D.18-01-022 conditional on PG&E obtaining a Coastal Development Permit, and on the PUC identifying the still non-existent GHG-free power to replace Diablo. These concepts are discussed in detail *infra*.

C. The Coastal Act and Climate-Change Issues the Petition Raised Are of Broad Public Interest, and Likely to Evade Review if Mootness Applies.

An exception to mootness occurs when a case presents an issue of broad public interest or is likely to recur but may evade review if mootness was applied. *See Environmental Charter High School v. Centinela Valley Union High School* (2004) 122 Cal.App.4th 139, 144; *In re David B.* (2017) 12 Cal.App.5th 633, 652-54. Here, the issues of the proper application of the Coastal Act, along with the bigger issue of whether California's much-ballyhooed climate-change statutes have any teeth, both qualify as issues of "broad public interest."

Moreover, courts must not render statutes meaningless. *See, e.g.*, *City of San Jose v. Superior Court* (1993) 5 Cal. 4th 47, 55; *In re Marriage of Duffy* (2001) 91 Cal. App. 4th 923, 939. The issue of whether the PUC must apply California's climate-change

statutes in each proceeding is one that could evade review if mootness were to apply. If the PUC is correct, that based on SB 1090 or its interpretation of other statutes, it can punt climate-change considerations to future proceedings ("we promise"), then any party seeking to enforce the climate-change analysis would always be mooted, rendering the statutes meaningless. The PUC could simply assert in any proceeding that it "intends" to visit an issue in the future, thus evading review. The Court should not render statutory mandates meaningless by allowing such potentially empty procrastinations.

II. Neither Answer Rebutted Petitioner's Claims.

A. Due Process and Rules Violations Occurred.

The PUC effectively re-scoped the proceeding midway through, and violated its own rules when it did not insist PG&E amend its application in accord with the PUC rules. An amendment is any "document that makes a substantive change to a previously filed document." Rule 1.12(a). at 00615. The PUC states in conclusory fashion, "P&E [sic.] did not amend its application" (PUC's Answer at 20). Precisely. The fact that PG&E did not formally amend its Application is the exact deficiency about which Petitioner complains. This violated the

Commission's Rules, and therefore Decision 18-01-022 violated Utilities Code Section 1757(a)(2), since it did not "proceed in the manner required by law."

The PUC further misunderstands the concept of "prejudice," and tries to justify Rules violations by alleging they are common. Neither position has merit.

1. The Petitioner was prejudiced.

The procedural and rules violations prejudiced the Petitioner. The PUC misapplies *So. Cal. Edison v. PUC* (2006) 140 Cal. App. 4th 1085, attempting to distinguish it by stating that the court there overturned the PUC because it allowed a "new proposal" midway through that proceeding. (PUC's Answer at 20). That argument is semantical. Here, PG&E submitted a new proposal that a major component of its Application and this proceeding would be considered in a separate proceeding. That was a "new proposal" of <u>when</u> those <u>substantive</u> matters would be considered – and the discussion of replacement power is inextricably tied to whether the PUC followed the law in this proceeding.

Moreover, Petitioner and other parties devoted substantial legal resources toward addressing the original contents of the

Application and the Scoping Ruling. Under the circumstances, this prejudiced the Petitioner. It doesn't matter that the Petitioner was the only party who advocated for an extension. (PUC's Answer at 21, FN 10). The Petitioner was the only truly adverse party in the proceeding. *See* 2 PA 23 at 00586-00589.

The very purpose of the scoping ruling is to delineate the issues covered in a proceeding, to provide the parties and the public certainty on the same. *See* Rule 7.3, 2 PA 24 at 00650. This prejudice (and the lack of due process) is further demonstrated by the tortured logic in the PUC's Answer. After (1) arguing that changes and informality are "common" and should be accepted (PUC's Answer at 19); (2) acknowledging that PG&E conclusively altered the scope of its application, in rebuttal testimony; and (3) that the Commission countenanced that alteration – the PUC, on the next page of its brief, then states (4) that the topics PG&E moved "remained in the scope of the proceeding" and (5) that "the Commission continued to have the ability to consider" the same topics! (PUC's Answer at 20). If the excluded topics remained within the scope of the proceeding, why didn't the Commission address them in its Decision?

Furthermore, does PG&E or does the scoping ruling set the parameters of a proceeding?

Moreover, PG&E acted as if the topic had been moved, denying the Petitioner's data requests (akin to discovery) on the topic. The PUC's citation to PUC Resolution 164, (PUC's Answer at 22), which by its very language limits itself to "guide parties on discovery practice" is inapt. Nothing in the CPUC's Rules of Practice and Procedure required a Motion to Compel under these circumstances. And to the extent a formal grievance of PG&E's denial was required – the Petitioner filed such an objection several times. *See* 1 PA 12 at 00184-00189; 1 PA 10 at 00176*;* 1 PA 15 at 00252; 2 PA 18 at 00398; 2 PA 19 at 00469. The Commission denied it each time.

2. Rules exist for a reason, and repeated non-compliance does not excuse such violations when challenged.

The rules controlling government proceedings sound in due process, or arise from the transparency and accuracy society expects in public civic affairs. These principles are the same reason why courts have a formal system that governs complaints and briefing. If a plaintiff wishes to change the causes of action

or theories of recovery under which that plaintiff proceeds, the plaintiff must follow the proper rules and procedure.

CGNP sought to have the formalities of the proceeding observed, the rules followed, and for the record to reflect the proceeding accurately. The PUC argues that procedural violations are "common," as if that excuses violations when a party complains. It attempts to distract by stating that "[r]equiring a utility to continue to advocate for a request it no longer supports or finds necessary is nonsensical." (PUC's Answer at 19.) But no one tried to make PG&E take positions it no longer supported. PG&E still supported the exact same positions; it just wanted them punted to a future proceeding for convenience and delay.[3] Secondly, if PG&E wished the scope of the proceeding to change, the proper steps to take were to amend its application, and move for the PUC to change the scoping

[3] It also enabled PG&E to avoid addressing a range of issues about the high costs of proposed intermittent replacements, necessary storage systems, and the proposal's damaging effect of grid reliability and resilience – all issues the commission is required to consider under Utilities Code sections 451(just and reasonable electric charges mandate) and 701.1 (resource-reliability and air-quality mandates).

ruling[4]. It did neither. Thus, at issue here was not a "position" taken by PG&E, but the very scope of this proceeding – items that needed to be considered here to comply with statutory mandates.

B. Retiring Diablo Should Be Conditional on PG&E First Obtaining a Coastal Development Permit.

There is a strong presumption against *sub silentio* repeals of statutes. *See Medical Bd. of California v. Superior Court,* 88 Cal.App.4th at 1005. The Real Parties' argument, that the Legislature mooted everything, including the Coastal Development Permit issue, is absurd. The Legislature did not repeal the Coastal Act with a short, obscure bill.

A change in the future intensity of coastal use requires a Coastal Development Permit before such a project proceeds. *See Pacific Palisades Bowl Mobile Estates, LLC v. City of Los Angeles* (2012) 55 Cal.4th 783*; La Fe, Inc. v. County of Los Angeles* (1999)

---

[4] While the PUC may argue that the Scoping Ruling allowed some wiggle room on parties to state their preferences as to where they thought the replacement-procurement issue should be addressed, the operative clause of the Scoping Ruling reads, "The scope of this proceeding is based **upon the issues raised by PG&E's application**.... Specifically, the scope of the proceeding includes the following **issues**: . . . 2.2 Proposed Replacement Procurement" (emphasis added).

73 Cal.App.4th 231. The Answers misapply relevant regulations, which govern zoning and coastal access. The PUC improperly tries to establish a novel, "returning the coast to a more natural state" exception to the Coastal Act. And both Answers ignore the maxim of *ubi jus, ibi remedium*.

1. The PUC misunderstands relevant regulations.

The PUC's citation of 14 CCR § 13052 proves Petitioner's point. That section, which applies to zoning and planning, lists the only instances when other permits are required before a Coastal Development Permit, and they are only the ones appearing on the list within the regulation (which the PUC conveniently omits). The doctrine of *expressio unius est exclusio alterius* applies.

> "Under the familiar rule of construction . . . where exceptions to a general rule are specified by statute, other exceptions are not to be implied or presumed."

Mutual Life Ins. Co. v. City of Los Angeles (1990) 50 Cal.3d 402, 410.

14 CCR § 13052 lists the approvals an applicant should receive before bothering the Coastal Commission, and unsurprisingly, they are preliminary zoning approvals like "Tentative map approval" and "All required variances." *See id.* (a)

and (e). This regulation cannot be read to allow another governmental agency to set in motion a dispositive, outcome-determinative chain of events that wholly usurps Coastal Commission review.

Moreover, even if 14 CCR § 13052 applied, it would be damning on whether the PUC had to make its Decision conditional on or subject to the Coastal Commission also approving the retirement of Diablo Canyon. Section 13052 requires other governmental agencies to give "preliminary" approval. Granting a preliminary approval by making its decision effective upon final Coastal Commission approval would have been proper. Instead, the Commission made its Decision effective immediately (2 PA 21 at 00574).

Another regulation places Diablo in a restricted zone because it is a nuclear plant. *See* 33 CFR 165.1155. Other than military bases and nuclear plants, the coast belongs to all Californians (*see* Cal. Const. art. X § 4), and battles to augment public coastal access are so common as to become axiomatic. Therefore, false is the PUC's assertion that there will not be a change in intensity of land use because "[t]here is no evidence that the public will have any access to Diablo Canyon after

retirement." (PUC's Answer at 25). That statement is illogical and willfully ignorant of the law.

2. Returning to a "more natural condition" is not the proper test under the Coastal Act.

The PUC also asks this Court to engraft on the Coastal Act a new rule that a party can exempt a development from the Act if it can claim it "restores a coastal resource to its natural condition." There is no such subjective exception. If this was the rule, the question would be "natural when and to whom?" The "natural" *i.e.,* pre-Columbian state of our coast is probably not knowable; it has been altered so many ways for the last five-hundred years.

Moreover, the PUC's newly discovered exception could easily swallow the rule, and doesn't reflect pattern and practice or reality. Many significant coastal developments (for example demolishing a section of a man-made harbor, or re-locating a rock jetty, or even depositing mass quantities of sand on a beach) could arguably be described as "returning the coast to a more natural state." Yet there can be no doubt such actions require a Coastal Development permit. The better reading of the statute is that no such exception exists.

The Act concerns itself with changes in the Coastal status quo. *See Stanson v. San Diego Coast Regional Com.* (1980) 101 Cal.App.3d 38, 47-49. It doesn't limit itself to an exacerbation or worsening of coastal use intensity. Diablo Canyon's presence has limited development and coastal access, and taking it offline would result in increased intensity of use. Additionally, warmed outflows from Diablo's cooling system have created a microhabitat for creatures that usually inhabit warmer climes. *See* 1 PA 5 at 00125-00142. Taking Diablo offline would therefore result in a diminishment of intensity of water use – but also important habitat changes that must be considered. Thus, even the "utility" aspects of Diablo (*i.e.,* shutting it off without any redevelopment occurring) require a Coastal Development Permit.

3. The PUC may not predetermine coastal outcomes.

The PUC claims "PG&E's application was not a development but was an exercise in resource planning." (PUC's Answer at 23). This is conclusory and circular, analogous to a city stating that a decision subject to the Coastal Act was "not a development but an exercise in zoning." Such phrasing has never been the lodestar of Coastal Act developments, and it isn't now.

And the PUC is too modest. Its position that it acted merely as "resources planning" and not land use violates the maxim of *ubi jus, ibi remedium*. *See* Cal. Civ. Code § 3523. If the PUC approves the retirement of Diablo (setting off an unalterable chain of events of shutting it down, relocating all personnel necessary to run it, letting federal licenses expire, etc.), then there can be no other outcome than to shutter Diablo. The PUC will have pre-destined a coastal outcome. In other words, even if the Coastal Commission does not grant the requisite permits, still – the only thing possible will be for Diablo to shut down anyway. Thus, a change of intensity of land at the coast is a certainty. The PUC violates Utilities Code Section 1757(a)(1), acting in excess of its jurisdiction, when it determines an outcome that the Coastal Commission must first approve.

Finally, even assuming *arguendo* the Commission can act preliminarily or concurrently with the Coastal Commission, Decision 18-01-022 is still invalid unless it is stayed or made expressly conditional upon Coastal Commission approval. Without that condition – parties seeking to enforce the law would be left without a remedy because the Coastal Commission cannot order a power plant to re-start.

4. The PUC misapplies relevant precedent.

Finally, the PUC misidentifies the significance of *Pacific Palisades, supra*. The Coastal Act allows some local agencies to stand in the shoes of the Coastal Commission (*i.e.*, assume its plenary jurisdiction, with the Commission retaining appellate jurisdiction) if the Coastal Commission has certified the local government's Local Coastal Program. *Id.*; Pub. Res. Code § 30519(a). Therefore, it doesn't matter if the applicant in *Pacific Palisades* was required to get its Coastal Development Permit from the City of Los Angeles (acting for the Coastal Commission) or the Commission itself. (PUC's Answer at 29). What matters is that the applicant was required to obtain a Coastal Development Permit first.[5]

---

[5] The PUC is incorrect when it states that Diablo is not within a "local government coastal program [sic.]" Diablo is within the Commission's delegated San Luis Obispo Local Coastal Program. *See* https://documents.coastal.ca.gov/reports/2017/1/w6a-1-2017.pdf (judicial notice requested for state government document) (3 PA 27 at 00848.)

Petitioner would not be in court if PG&E had secured from San Luis Obispo County a Coastal Development Permit before the PUC gave its outcome-determinative approval.

C. The Answers' Interpretation of Climate-Change Statutes Would Render Them a Nullity.

The Answers misread the statutes that establish the PUC's duties to consider GHG emissions and climate change in all that it does. A court should not render any language in a statute as surplusage, much less an entire statutory provision. *Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379, 1387. The Answers' interpretations would do just that.

1. The PUC ignores legislative intent.

In its opening brief, Petitioner discussed the several statutes (Utilities Code Sections 400, 454.51(a), and 701.1(c)[6]) that establish a duty for the PUC to consider climate change in all of its proceedings, based on the plain meaning of those statutes. In its Answer, the PUC argues those statutory mandates are unclear. Consequently, the canons of statutory construction permit the Court to turn to extrinsic materials on legislative intent.[7]

---

[6] In its opening brief, Petitioner mistakenly cites Section "701.1" as Section "701." The Petitioner regrets this error.

[7] In response to the PUC's claims that the statutes are unclear, Petitioner offers such materials to inform the Court, in its Supplemental Appendix.

Utilities Code Sections 400, 454.51(a), and 701.1(c) were each either chaptered or amended by SB 350 in 2015, a landmark law on climate change, which the author of this brief helped shape. The Assembly Floor analysis of the bill – the only comprehensive analysis of the bill's final form – stated that the legislation,

> Requires the CPUC . . . to do all of the following in furtherance of meeting the state's clean energy and pollution reduction objectives: . . .
>
> b) Take into account the opportunities to decrease costs and increase benefits, including pollution reduction. . . .
>
> (c) Where feasible, authorize procurement of resources to provide grid reliability services that minimize reliance on system power and fossil fuel resources.[8]

Courts interpreting statutes must take steps so as not to render them a nullity. The PUC's decision acknowledged that it had not taken into account pollution reduction, and that it had no idea if taking Diablo's GHG-free base-load resource offline could be replaced by similarly green power. Therefore, it could not

---

[8] Available at https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=201520160SB350#. Petitioner has asked the Court to take judicial notice of this, under Evidence Code section 452(c), which covers legislative records. (3 PA 28 at 00849.)

have fulfilled its statutory duties, and any holding otherwise would render those statutes, and the legislative intent behind them, as a nullity – entire statutory clauses as mere surplusage.

2. The PUC's own materials confirm Petitioner's interpretation.

In response to legislative mandates and additional executive actions, the PUC adopted a series of "Strategic Directives" in 2016, which bind the Commission. Strategic Directive 08 states:

> The CPUC promotes greenhouse gas (GHG) reductions through its decisions. . . .
>
> Within its jurisdictional authority, the CPUC will: . . . Consider adaptation to the impacts of climate change in CPUC decisions.[9]

There is no way to read this other than re-confirming the mandates to consider the impacts of climate change in all decisions. Any other reading (*i.e.*, "we will allow an action and consider the effects later") renders the directive meaningless. Unless Decision 18-01-022 is stayed or made conditional on the

---

[9] Available at http://docs.cpuc.ca.gov/publisheddocs/published/g000/m164/k197/164197263.pdf Petitioner has asked the Court to take judicial notice of this, under Evidence Code section 452(c), which covers actions of executive agencies. (3 PA 29 at 00856.)

future proceeding, there is no guarantee the required climate-change analysis will ever occur.

The PUC's statement that it mustn't consider climate change in each proceeding is especially peculiar, given that the PUC scolded FERC on this precise topic.[10] In an official filing PUC lawyers submitted, the PUC told FERC that GHG emissions and climate-change concerns must be considered in all infrastructure projects on which FERC approvals are needed, under the "is it in the public interest?" analysis – a test that both FERC and the PUC apply. This too, supports the Petitioner's contention that this is part of the statutory scheme and policies of the PUC, all which were ignored here.

3. The Answers show D.18-01-022 was unsupported by the record.

It is undisputed that Diablo alone is 10% of the state's power, non-intermittent and GHG-free; and that the Commission as fact-finder confirmed it has no current conception on how to replace Diablo's power with GHG-free sources. 2 PA 21 at 00570.

---

[10] Available at http://www.cpuc.ca.gov/cpucblog.aspx?id=6442458366&blogid=1551 Petitioner has asked the Court to take judicial notice of this, under Evidence Code section 452(c), which covers actions of executive agencies. (3 PA 30 at 00904.)

Thus, when the PUC in its reply brief states, "it was not clear . . . what impact the retirement of Diablo Canyon might have on greenhouse gas emissions", (PUC's Answer at 31) it cannot be taken seriously. The record and logic compel the opposite conclusion.

This is another example of where *ubi jus, ibi remedium* applies. Assuming *arguendo* that the PUC, in its promised future proceeding concludes that there is in fact no GHG-free base-load substitute for Diablo – an outcome the PUC acknowledged might be the case. There can be no remedy once Diablo is shut down – which is why Decision 18-01-022 should have been stayed or made expressly contingent on the outcome of the future proceeding.

The words the Real Parties in Interest use on this issue are telling, and evince an acknowledgement that the PUC is bound to applying the climate-change statutes in each proceeding. To wit:

- The Commission adopted a "guiding principle" that there would be no GHG increases. (Real Parties' Answer at 11).
- The decision included a "commitment" (read: promise) that the GHG issue would have a positive outcome at a later date. (Real Parties' Answer at 14).
- The Decision included a "goal" that GHG emissions would not increase. (Real Parties' Answer at 15).

- "The Commission expressed a general intent that no increase in GHG emissions be allowed to occur." (Real Parties' Answer at 17).

But those words fall short of complying with the statutory mandates in any practical or legally cognizable fashion, and they cannot be given legal effect.

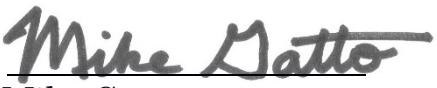
Section 454.51(a) requires the PUC to "rely upon zero carbon-emitting resources to the maximum extent reasonable" and Section 400 requires the PUC to aim for pollution reduction "using . . . technologies with zero or lowest feasible emissions of greenhouse gases." Absent clear findings in this record that the PUC followed its mandates to reduce GHG emissions to the maximum possible extent, the PUC could not have approved the retirement of Diablo. Thus, the Decision is not supported by the findings, in violation of Utilities Code section 1757(a)(3). The Court should order the PUC to make Decision 18-01-022 expressly conditional upon such a finding, if and when it occurs.

CONCLUSION

The respondents have not rebutted the bases for the Petitioner's writ. Petitioner respectfully asks the Court to grant it.

Dated: December 18, 2018

MIKE GATTO
ACTIUM LLP

By 
Mike Gatto
Attorney for Petitioner
CGNP

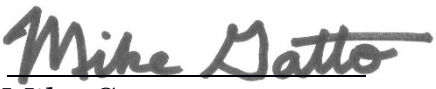
CERTIFICATE OF COMPLIANCE

WITH RULE 8.204

I certify that, pursuant to Rule 8.204(c)(1) of the California Rules of Court, the attached Reply to Petition for Writ of Review and Memorandum of Points and Authorities in Support Thereof has a typeface of 13 points or more, and contains 7,043 words, as determined by a computer word count.

Dated: December 18, 2018

MIKE GATTO
ACTIUM LLP

By 
Mike Gatto
Attorney for Petitioner
CGNP

CERTIFICATE OF SERVICE

I hereby certify that I am a citizen of the United States, over the age of eighteen years. My business address is 5419 Hollywood Blvd., Suite C-356, Los Angeles, CA 90027, and am not a party to within the action.

On December 18, 2018, I electronically filed the *Reply to Petition for Writ of Review and Memorandum of Points and Authorities in Support Thereof; and Petitioner's Appendix of Exhibits Volume 3 (filed concurrently/separately)* using the TrueFiling system which served all of the parties to this action:

Arocles Aguilar, General Counsel
Calif. Public Utilities Commission
505 Van Ness Avenue
San Francisco, CA 94102-3214
Arocles.Aguilar@cpuc.ca.gov

Alice Stebbins, Executive Director
Calif. Public Utilities Commission
505 Van Ness Avenue
San Francisco, CA 94102-3214
Alice.Stebbins@cpuc.ca.gov

Austin M. Yang
Deputy City Attorney
City and County Of San Francisco
1 Dr. Carlton B. Goodlett Pl, Rm 234
San Francisco, CA 94102-4682
Austin.Yang@sfgov.org
For: City and County of San Francisco

Brad Heavner
Policy Dir.
California Solar & Storage Association
1107 9th Street, No.820
Sacramento, CA 95814
Brad@Calssa.org
For: California Solar Energy Industries Association

Kara A. Woodruff, J.D.
Founder
Friends of Wild Cherry Canyon
1163 Pismo St.
San Luis Obispo, CA 93401
KaraSlo@Charter.net
For: Friends of Wild Cherry Canyon

Sara Steck Myers, Attorney at Law
Law Offices of Sara Steck Myers
122 - 28th Avenue
San Francisco, CA 94121
SSMyers@att.net
For: Center for Energy Efficiency and Renewable Technologies (CEERT)

Megan M. Myers, Attorney at Law
Law Offices of Sara Steck Myers
122 - 28th Avenue
San Francisco, CA 94121
MeganMMyers@yahoo.com
For: Geothermal Energy Association (GEA)

Sam Blakeslee, Ph.D
Dir
Central Coast Wave Energy Hub
1530 Broad Street
San Luis Obispo, CA 93401
Samuel@Blakeslee-Blakeslee.com
For: Central Coast Wave Energy Hub

Larissa Koehler
Senior Attorney
Environmental Defense Fund
123 Mission Street, 28th Floor
San Francisco, CA 94105
LKoehler@edf.org
For: Environmental Defense Fund

Patrick Ferguson
Attorney
Davis Wright Tremaine, Llp
Email Only
Email Only, CA 0
PatrickFerguson@dwt.com
For: Peninsula Clean Energy

Mark Shahinian
President
Future Grid Coalition
15 Lapidge Street, Apt. 2
San Francisco, CA 94110
Mark.Shahinian@FutureGridCoalition.org
For: Future Grid Coalition

Barbara Hale
President
California Community Choice Association
1125 Tamalpais Ave.
San Rafael, CA 94901
info@cal-cca.org
For: California Community Choice Association (CalCCA)

Ralph Cavanagh
Counsel
Natural Resources Defense Council
111 Sutter Street, 21/F
San Francisco, CA 94104
RCavanagh@nrdc.org
For: Natural Resources Defense Council

Kellie Smith
Policy Dir.
Cal. Energy Efficiency Industry Council
1535 Farmers Lane, Suite 312
Santa Rosa, CA 95405
Policy@EfficiencyCouncil.org
For: California Energy Efficiency Industry Council

Gregory Morris
Director
Green Power Institute
2039 Shattuck Avenue, Ste 402
Berkeley, CA 94704
GMorris@emf.net
For: Green Power Institute

Danielle O. Mills
Dir
American Wind Energy Assn Calif Caucus
1970 Meadow Oak Lane
Meadow Vista, CA 95722
Danielle@RenewableEnergyStrat.com
For: American Wind Energy Association California Caucus (AWEA)

Andrew B. Brown
Attorney at Law
Ellison Schneider & Harris LLP
2600 Capitol Avenue, Suite 400
Sacramento, CA 95816-5905
abb@eslawfirm.com
For: Alliance for Retail Energy Market (AreM)

Alex Morris
Sr. Dir., Policy & Regulatory Affairs
California Energy Storage Alliance
2150 Allston Way, Suite 210
Berkeley, CA 94704
cesa_regulatory@storagealliance.org
For: California Energy Storage Alliance (CESA)

Alvin S. Pak
Attorney at Law
Law Offices of Alvin S. Pak
827 Jensen Court
Encinitas, CA 92024
Apak@AlPakLaw.com
For: Alliance for Nuclear Responsibility (A4NR)

Shawn Marshall
Director
Lean Energy US
PO Box 961
Mill Valley, CA 94941
SMarshall@LeanEnergyUS.org
For: Lean Energy US

Jean Merrigan
Women's Energy Matters
PO Box 2615
Martinez, CA 94553
jnmWEM@gmail.com
For: Women's Energy Matters

Mona Tierney-Lloyd
Sr. Dir., Western Regulatory Affairs
Enernoc, Inc.
PO Box 378
Cayucos, CA 93430
MTierney-Lloyd@enernoc.com
For: EnerNOC, Inc. (Joint DR Parties)

Steven S. Shupe
General Counsel
Sonoma Clean Power Authority
50 Santa Rosa Ave., 5th Fl.
Santa Rosa, CA 95404
SShupe@SonomaCleanPower.org
For: Sonoma Clean Power Authority

Scott Blaising
Counsel
Braun Blaising Smith Wynne P.C.
915 L Street, Suite 1480
Sacramento, CA 95814
Blaising@Braunlegal.com
For: Silicon Valley Clean Energy

Erika Diamond
Energyhub
232 3rd Street, Suite 201
Brooklyn, NY 11215
Diamond@EnergyHub.net
For: EnergyHub (Joint DR Parties)

Matthew Vespa
Attorney
Earthjustice
50 California Street, Ste. 500
San Francisco, CA 94111
MVespa@Earthjustice.org
For: Sierra Club

Carolyn M. Kehrein
Consultant
Energy Management Services
2602 Celebration Way
Woodland, CA 95776
cmkehrein@ems-ca.com
For: Energy Users Forum

John W. Leslie
Attorney
Dentons US LLP
4655 Executive Drive, Suite 700
San Diego, CA 92121
John.Leslie@Dentons.com
For: Shell Energy North America (US), L.P.

Frank R. Lindh
Attorney at Law
340 Santa Margarita
San Rafael, CA 94901
FrankRichLindh@gmail.com
For: Friends of the Earth (FOE)

Jennifer A. Chamberlin
Exe Dir - Mrkt Development / Caiso
CPower
2633 Wellington Court
Clyde, CA 94520
JAC@CPowerEnergyManagement.com
For: CPower (Joint DR Parties)

Matthew Duesterberg
CEO
OHMConnect, Inc.
350 Townsend St., Ste. 210
San Francisco, CA 94107
Matt@ohmConnect.com
For: OhmConnect, Inc.

Dan Jacobson
Legislative Dir
Environment California
3435 Wilshire Blvd., Ste. 385
Los Angeles, CA 90010
DJacobson@EnvironmentCalifornia.org
For: Environment California

Daniel W. Douglass
Attorney
Douglass & Liddell
4766 Park Granada, Ste. 209
Woodland Hills, CA 91302
douglass@energyattorney.com
For: Direct Access Customer Coalition (DACC)

Frank Jablonski
Attorney
Progressive Law Group, LLC
354 W. Main Street
Madison, WI 53703
FrankJ@ProgressiveLaw.com
For: Environmental Progress

Laurence G. Chaset
Counsel
Keyes & Fox LLP
436 14th Street, Ste. 1305
Oakland, CA 94612
LChaset@kfwLaw.com
For: World Business Academy

Marcie Milner
VP - Regulatory Affairs
Shell Energy North America (Us), L.P.
4445 Eastgate Mall, Suite 100
San Diego, CA 92121
marcie.milner@shell.com
For: Shell Energy North America (US), L.P.

Gregory Klatt
Attorney
Douglass & Liddell
411 E. Huntington Drive, Ste. 107-356
Arcadia, CA 91006
Klatt@EnergyAttorney.com
For: San Luis Coastal Unified School District

Ann L. Trowbridge
Attorney at Law
Day Carter & Murphy LLP
3620 American River Drive, Ste. 205
Sacramento, CA 95864
ATrowbridge@DayCarterMurphy.com
For: California Clean DG Coalition

Charles R. Middlekauff
William V. Manheim
Pacific Gas and Electric Company
77 Beale Street, B30a / Box 7442
San Francisco, CA 94105
CRMd@pge.com
wvm3@pge.com
For: Pacific Gas and Electric Company

Vidhya Prabhakaran
Attorney
Davis Wright Tremaine LLP
505 Montgomery Street, Suite 800
San Francisco, CA 94111
VidhyaPrabhakaran@dwt.com
For: South San Joaquin Irrigation District, Tesla, Inc. (formerly SolarCity Corporation)

Sabrina D. Venskus
Attorney
Venskus & Associates P.C.
603 West Ojai Ave., Ste. F
Ojai, CA 93023
venskus@lawsv.com
For: San Luis Obispo Mothers for Peace, Inc.

Marc D. Joseph
Attorney at Law
Adams, Broadwell, Joseph & Cardozo
601 Gateway Blvd., Ste. 1000
South San Francisco, CA 94080
MDJoseph@AdamsBroadwell.com
For: IBEW Local Union 1245 and The Coalition of California Utility Employees

Steven R. Meyers
Attorney
Meyers Nave
555 12th Street, Ste. 1500
Oakland, CA 94607
SMeyers@MeyersNave.com
For: City of San Luis Obispo, Pismo Beach, Paso Robles, Arroyo Grande, Morro Bay and Atascadero

Evelyn Kahl
Attorney
Buchalter, A Professional Corporation
55 Second Street, Suite 1700
San Francisco, CA 94105-3493
EKahl@Buchalter.com
For: Energy Producers & Users Coalition (EPUC)

Nora E. Sheriff
Attorney
Buchalter, A Professional Corporation
55 Second Street, Suite 1700
San Francisco, CA 94105
NSheriff@buchalter.com
For: California Large Energy Consumers Association

Laura J. Tudisco
Calif Public Utilities Commission
505 Van Ness Avenue
Legal Division, Rm. 5032
San Francisco, CA 94102-3214
ljt@cpuc.ca.gov
For: ORA

David P. Lowrey
Director, Regulatory Strategy
Comverge, Inc.
999 18th Street, Suite 2300
Denver, CO 80202
DLowrey@Comverge.com
For: Comverge, Inc. (Joint DR Parties)

Brian T. Cragg
Attorney
Goodin, Macbride, Squeri & Day , LLP
505 Sansome Street, Suite 900
San Francisco, CA 94111
BCragg@GoodinMacBride.com
For: Independent Energy Producers Association

Tim Mason, Policy Director
Large-Scale Solar Association
Email Only
Email Only, CA 0
Tim@LargeScaleSolar.org
For: Large-Scale Solar Association

Megan Somogyi, Attorney
Goodin, Macbride, Squeri, & Day, LLP
505 Sansome St., Ste. 900
San Francisco, CA 94111
MSomogyi@GoodinMacBride.com
For: County of San Luis Obispo

Ty Tosdal, of Counsel
Braun Balising Mclaughlin & Smith, P.C.
915 L. Street, Suite 1270
Sacramento, CA 95814
Ty@TosdalLaw.com
For: City of Lancaster

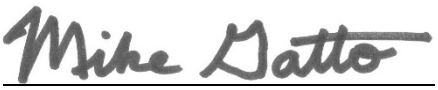
Michael Callahan, Reg. Counsel
Marin Clean Energy
Email Only
Email Only, CA 0
MCallahan@MCECleanEnergy.org
For: Marin Clean Energy (MCE)

Arocles Aguilar, General Counsel
Calif. Public Utilities Commission
505 Van Ness Avenue
San Francisco, CA 94102-3214
Arocles.Aguilar@cpuc.ca.gov

Alice Stebbins, Executive Director
Calif. Public Utilities Commission
505 Van Ness Avenue
San Francisco, CA 94102-3214
Alice.Stebbins@cpuc.ca.gov

I declare under penalty of perjury that the foregoing is true and correct.

Executed on December 18, 2018, at Los Angeles, California.



MIKE GATTO (S.B. NO. 232674)