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BEFORE THE PUBLIC UTILITIES COMMISSION

OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking to Review, Revise, and Consider Alternatives to the Power Charge Indifference Adjustment.	R.17-06-026 (Filed June 29, 2017)

APPLICATION OF THE PROTECT OUR COMMUNITIES FOUNDATION AND UTILITY CONSUMERS' ACTION NETWORK FOR REHEARING OF DECISION 18-10-019

April Rose Maurath Sommer
Executive Director and Lead Counsel
PROTECT OUR COMMUNITIES FOUNDATION
1547 Palos Verdes Mall #196
Walnut Creek, CA 94597
Telephone: (619) 363-6790
April.Sommer@ProtectOurCommunities.org

Ellison Folk
Stephanie L. Safdi
SHUTE, MIHALY & WEINBERGER LLP
396 Hayes Street
San Francisco, CA 94102
Telephone: (415) 552-7272
Facsimile: (415) 552-5816
Folk@smwlaw.com
Safdi@smwlaw.com

Attorneys for Protect Our Communities Foundation

Jane Krikorian, J.D.
Supervisor, Advocacy & Administration
UTILITY CONSUMERS' ACTION NETWORK
3405 Kenyon Street, Suite 401
San Diego, CA 92110
Telephone: (619) 696-6966
Jane@ucan.org

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APPLICATION OF THE PROTECT OUR COMMUNITIES FOUNDATION AND UTILITY CONSUMERS' ACTION NETWORK FOR REHEARING OF DECISION 18-10-019

Pursuant to Public Utilities Code section 1731(b)(1) and Rule 16.1 of the Commission's Rules of Practice and Procedure, Protect Our Communities Foundation ("POC") and Utility Consumers' Action Network ("UCAN") apply for rehearing of Decision 18-10-019 ("Decision") in proceeding R.17-06-026, the Rulemaking to Review, Revise, and Consider Alternatives to the Power Charge Indifference Adjustment.[1] Administrative Law Judge ("ALJ") Roscow issued e-mail rulings on October 5, 2017 and February 2, 2018 granting party status to UCAN and POC, respectively. POC and UCAN are therefore parties to this proceeding with standing to apply for rehearing pursuant to Rule 16.2(a). This application is timely because it is filed and served on the first business day following 30 days after the date the Commission issued the Decision, October 19, 2019.[2]

I. INTRODUCTION AND EXECUTIVE SUMMARY

The Commission's decision on the Power Charge Indifference Adjustment ("PCIA") framework violates the law and ignores the substantial body of evidence painstakingly developed by the parties. In so doing, the Commission ignores explicit statutory limits on its authority. It

[1] Unless otherwise indicated, all further references to rules in this application for rehearing are to the Commission's Rules of Practice and Procedure and all statutory references are to the Public Utilities Code.
[2] *See* Rule 16.1(a); Cal. Pub. Util. Code § 1731(b)(1).

turns the Legislature's goal of preventing cost shifts between customer classes on its head, blinding itself to the myriad ways that the Decision unfairly imposes resource costs on departing customers while refusing to credit them for the benefits that utility customers receive from those same resources. And it violates its duty to make findings of facts and conclusions of law on multiple issues material to the Decision. The Commission's errors together jeopardize the very viability of California's legislatively mandated Community Choice Aggregation ("CCA") program. These errors must be corrected.

Since the mid-1990s, the Legislature has sought to ensure a competitive electricity market in California with a diverse ecosystem of electric service providers competing to procure energy at low costs and in pursuit of the State's energy and climate goals. In furtherance of this objective, the Legislature passed Assembly Bill 117 in 2002, authorizing customers to aggregate their electricity demand as members of their local communities through CCAs. CCAs enable customers to match their electricity sources with local demands and preferences and have played a critical role in accelerating the transition toward a zero carbon economy. Recognizing the importance of CCAs, the Legislature has repeatedly acted to protect the CCA program against utility market power and to encourage its viability and expansion.

At the same time that the Legislature gave rise to the CCA program, it authorized a cost recovery mechanism—the PCIA—to help ensure that when customers depart utility service, neither they nor the utility's remaining customers would be unfairly penalized by being forced to absorb costs that were not incurred on their behalf. The idea behind the PCIA is that the utilities may enter into long-term electricity purchase contracts for customers who later depart utility service for CCAs. Even if those contracts were competitively priced at the time they were executed, they may end up locking the utility into paying more for electricity than it is worth if

costs decline over time. The PCIA helps to make the utilities' remaining customers indifferent to departures by allocating to CCA customers their fair share of the above-market costs of contracts that the utility entered into to serve the CCA customers before the utilities knew they would depart.

At the same time, the Legislature subjected the PCIA to several critical limits. First, the Legislature explicitly limited the PCIA to "electricity purchase contract costs," meaning the costs of contracts that the utilities enter into with third parties to procure generation. Notably absent from the statute is any provision authorizing the Commission to include in the PCIA the costs of generation resources that the utilities own themselves (referred to herein as utility-owned generation, or "UOG"). Second, the Legislature limited the PCIA to costs that are both "unavoidable" and "attributable" to CCA customers. Thus, if the utility could have avoided costs by entering into a less expensive contract or by selling excess generation at a competitive price, the statute bars it from including those avoidable costs in the PCIA. And if the utility procured electricity that was not meant to serve a CCA customer (because, for instance, the utility knew that the customer would leave utility service within the lifetime of the contract), then the statute also bars the utility from including those unattributable costs in the PCIA. Finally, the Legislature required any costs of an electricity resource allocated to CCA customers to be offset by the value of the benefits that resource provides. Thus if utility customers obtain some benefit for a resource (because, for instance, the utility holds that resource in its portfolio to buffer it against market fluctuations), CCA customers must be credited with that same benefit, and their PCIA obligation must be correspondingly reduced.

The Commission abused its discretion and violated the law by revising the PCIA in a way that entirely ignores these clear limits. Among the significant and highly impactful errors in its decision, the Commission:

- **Violates clear statutory limits by including UOG costs in the PCIA:** In AB 117, the Legislature set forth a comprehensive and finite list of costs that can be imposed on CCA customers. Outside of past under-collections and costs related to procurement by the Department of Water Resources, the statute limits any indifference charges to the CCA customer's "share of the electrical corporation's estimated net unavoidable *electricity purchase contract costs* attributable to the customer." The utilities concede that electricity purchase contract costs do not include costs associated with UOG resources, and the Commission does not suggest otherwise. Rather, it reads the Legislature's general intent to prevent cost-shifting to override the specific statutory limits. This is error. The Commission is constrained by the plain text of the statute, which excludes UOG costs from the PCIA. And even if there were a conflict between statutory provisions, which there is not, the Legislature's specific limits on PCIA-eligible costs take precedence over general pronouncements. For these and other reasons, the Commission should revise the Decision to exclude UOG costs from the PCIA entirely. If it does not, it must, at minimum, retain the well-justified ten-year limit on recovery of post-2002 UOG costs, which both CCAs and the utilities have relied on in their planning and procurement decisions for well over a decade. And it should revise the Decision to exclude UOG resources that have already termed out of the PCIA under the ten-year limit.

- **Abuses its discretion by creating a toothless PCIA cap that will not ensure CCA viability:** AB 117 and its progeny enacted clear legislative policy to ensure CCA economic viability and safeguard CCAs against utilities' inherent market power. Recognizing the potential that indifference charges like the PCIA could prevent customers from departing utility service, the Commission in the past capped those charges at an absolute level that would ensure a competitive market

for electric service providers. Ignoring its own precedent, the record evidence, and its obligation to ensure just and reasonable rates, the Commission now refuses to cap the PCIA at a known quantity that will allow CCAs to continue functioning and instead permits the PCIA to escalate annually. It also destroys any ameliorative effect its "cap" might have by delaying it until 2020, after the dramatic increase in PCIA charges caused by the Commission's decision has already occurred and at a point that the PCIA is expected to begin declining anyway. Substantial evidence in the record directly rebuts the Commission's finding that this escalating and unreasonably delayed cap will create certainty and predictability for CCA customers.

- **Violates statute by shifting costs to departing customers:** The Commission predicates the entire Decision on the Legislature's goal of preventing cost shifts between customer classes, and yet it ignores overwhelming evidence that the Decision will have just this effect. First, the Decision significantly undervalues PCIA-eligible resources by using short-term metrics to value these long-term resources. As a consequence, it illegally refuses to credit CCA customers for many of the benefits that these resources provide, including the utilities' ability to use them as a buffer against price fluctuations. Even worse, the Commission acts arbitrarily and capriciously by refusing to use long-term valuation metrics for the PCIA at the same time that it applies those same metrics in related contexts. Second, the Commission illegally refuses to credit CCA customers for the significant added value of the utilities' greenhouse gas-free resources, instead valuing them as if they were the cheap and dirty fossil fuel resources that California is rapidly phasing out of the energy system. Third, the Commission violates the law by refusing to credit CCA customers for the additional benefits that utility resources provide to maintain grid stability and security, such as voltage and frequency control (referred to as "ancillary services"), and by refusing to even make findings of fact or conclusions of law on the topic.

- **Illegally includes in the PCIA both avoidable costs and costs that are not attributable to departing customers.** The Commission violates that law by including costs in the PCIA that are avoidable or not attributable to CCA customers, and it compounds its errors by refusing to make findings or conclusions on these material issues. Substantial evidence in the record shows that the high PCIA costs are driven by the utilities' execution of contracts for long-term renewable resources at inflated prices, well above the market. Likewise, substantial evidence in the record shows that the utilities are imposing costs on CCA customers for resources that they knew would not serve those customers, since CCAs had already informed the utilities of their launch dates and, in some cases, since those customers had already departed utility service. Moreover, the Commission allows the utilities to charge CCA customers for UOG costs that were incurred well after those customers left utility service, including costs for capital additions that were not built to serve them. The Decision impermissibly sweeps all of these costs into the PCIA while improperly refusing to consider shareholders' responsibility for their fair share of these costs.

- **Violates the statutory requirement to make findings of fact on multiple issues material to the second phase of this proceeding.** The Commission rightly creates a second phase of this proceeding aimed at reducing above-market costs for the benefit of all customers and minimizing the further accumulation of above-market costs going forward. In doing so, it lays out the list of issues to be included in Phase 2 and creates workgroups dedicated to pursuing them. Glaringly absent from this list—and, indeed, absent from the Commission's entire decision—are two issues that the records shows will be key to achieving the Commission's goals: reforming the independent evaluator process to ensure that evaluators are sufficiently impartial to exercise effective oversight over utility procurement; and replacing the ineffective procurement review group process with broad public scrutiny of utility procurement decisions. In addition, the Commission improperly subordinates securitization to all Phase 2 proposals, ignoring substantial evidence

that refinancing above-market costs through securitization is both achievable and essential to relieve the burden of these contracts on all customers.

Unfortunately, the Commission does not have the luxury of time to slowly revisit and correct the many flaws in its Decision. The utilities have already forecasted PCIA rates for the coming calendar year. And the new PCIA rates will go into effect on January 1, 2019.[3] Moreover, the Decision may cause CCAs to suspend programs or cease taking in new customers and may cause others in the process of formation to abandon those efforts entirely. To prevent customers from suffering serious and irreparable harm, POC and UCAN respectfully request that the Commission grant a stay and allow the old PCIA framework to remain in effect while it considers this application. POC and UCAN also respectfully request that the Commission expeditiously grant this application for rehearing.

II. STANDARD OF REVIEW

Rule 16.1(c) requires an application for rehearing to "set forth specifically the grounds on which the applicant considers the order or decision of the Commission to be unlawful or erroneous."[4] The purpose of an application for rehearing is to "alert the Commission to a legal error, so that the Commission may correct it expeditiously."[5] Pursuant to section 1757, which applies in a ratesetting proceeding such as this one,[6] a decision is legally erroneous and subject to reversal on appeal if, *inter alia*, "the Commission has not proceeded in the manner required by

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[3] *See* D.18-10-019 at Ordering Paragraph 2.
[4] Rule 16.1; *see also* 20 Cal. Code. Regs., tit. 20, § 16.1(c).
[5] Cal. Code Regs., tit. 20, § 16.1(c).
[6] R.17-06-026, Scoping Memo and Ruling of Assigned Commission at 24 (Sept. 25, 2017) ("Scoping Memo").

law," its "decision is not supported by the findings," the "findings are not supported by substantial evidence in light of the whole record," or the decision "was an abuse of discretion."[7]

The Commission's decision is unlawful if its interpretation of the Public Utilities Code fails to "bear a reasonable relation to statutory purposes and language,"[8] or if it is not supported by the "plain meaning" of the statute.[9] The courts are the ultimate arbiter of statutory interpretation,[10] and less deference is owed to the Commission's interpretation of the Public Utilities Code than of its own regulations.[11]

Pursuant to section 1705, Commission decisions "shall contain, separately stated, findings of fact and conclusions of law on all issues material to the order or decision."[12] Such findings are essential to "help the commission avoid careless or arbitrary action" and to assist a reviewing court "to determine whether [the Commission] acted arbitrarily" and thus abused its discretion.[13] The Commission must make its findings based on substantial evidence in the "whole record," meaning that it must consider "all relevant evidence, including evidence detracting from the decision."[14] Substantial evidence is evidence of "ponderable legal

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[7] Cal. Pub. Util. Code § 1757(a).
[8] *Greyhound Lines, Inc. v. P.U.C.* (1968) 68 Cal. 2d 406, 410-11.
[9] *Bd. of Trustees of Cal. State Univ. v. Public Employee Relations Bd.* (2007) 155 Cal.App.4th 866, 876 (vacating agency's decision where its interpretation of a statute it administers was not supported by the plain meaning of the statutory language).
[10] *New Cingular Wireless PCS, LLC v. P.U.C.* (2016) 246 Cal.App.4th 784, 807 ("The final word on statutory interpretation always rests with the judiciary.").
[11] *Util. Consumers Action Network v. P.U.C.* (2010) 187 Cal.App.4th 688, 698.
[12] Cal. Pub. Util. Code. § 1705; *see also* Cal. Pub. Util. Code § 1701.2(e).
[13] *Cal. Manufacturers Assn. v. P.U.C.* (1979) 24 Cal.3d 251, 258-59 (citation omitted); *see also Cal. Hospital Assn. v. Maxwell-Jolly* (2010) 188 Cal. App. 559, 567-68 (arbitrary and capricious decision will be reversed for abuse of discretion); *Roddenberry v. Roddenberry* (1996) 44 Cal.App.4th 634, 651-52 (citation omitted) (purpose of substantial evidence review is to uncover "irrational findings and thus preclude the risk of affirming a finding that should be disaffirmed as a matter of law").
[14] *Id.* (citation omitted).

significance"[15] that is "reasonable in nature, credible, and of solid value such that a reasonable mind might accept it as adequate to support a conclusion."[16] Ultimately, if the Commission "fail[s] to comply with required procedures, appl[ies] an incorrect legal standard, or commit[s] some other error of law," its decision will be reversed on appeal.[17]

III. ARGUMENT

A. The Commission Committed Legal Error by Making Departing Customers Indefinitely Liable for Costs of Utility-Owned Generation.

While the Commission has broad discretion to fix rates and establish rules, in doing so, it may not contravene statutory limits on its authority.[18] Yet this is precisely what the Commission does in disregarding the Legislature's clearly delineated limits on its authority to impose UOG costs on departing customers.[19] The Commission rests its decision on a flawed interpretation of the Public Utilities Code, which ignores its plain meaning, misapplies canons of statutory interpretation, and disregards legislative history underscoring the Legislature's intent to exclude UOG costs from PCIA charges. Even if the Commission's decision to include all UOG costs was not statutorily proscribed—which it is—it would be an abuse of discretion and legally erroneous. The Commission's finding that there is no justification to exclude UOG costs from the PCIA is contradicted by substantial evidence in the record showing, among other things, that including these costs undermines the Commission's goals to create certainty and stability in indifference charges. In addition, the record shows that the Commission's decision to eliminate the ten-year

[15] *People v. Johnson* (1980) 26 Cal.3d 557, 576 (citation omitted).
[16] *S. Coast Framing, Inc. v. Worker's Compensation Appeal Bd.* (2015) 61 Cal.4th 291, 303 (citation omitted).
[17] *Pedro v. City of Los Angeles* (2014) 229 Cal.App.4th 87, 99.
[18] *Southern California Edison v. Peevey* (2003) 31 Cal.4th 781, 792.
[19] This Application refers to customer groups who leave utility service as "departing customers" or, if they leave to join CCAs, as "CCA customers." And it refers to customer groups who continue to take service from the investor-owned utilities as "bundled customers" or "utility customers."

limit on post-2002 UOG costs will impermissibly shift costs to departing customers in violation of statute.

1. There is No Statutory Basis for Imposing Any Utility-Owned Generation Costs on Departing Customers.

In his proposed decision, ALJ Roscow recognized that the plain language of the Public Utilities Code barred the inclusion of legacy UOG costs in the PCIA.[20] The Commission's decision to make these legacy UOG costs PCIA-eligible ignores this critical point. Even more egregiously, the Decision *assumes* that costs of post-2002 UOG resources are PCIA-eligible without setting forth any findings or conclusions to support this assumption, in contravention of section 1705. An examination of the statutory language, history, and context shows that this assumption is wrong: the Legislature clearly intended to exclude *all* UOG costs from the PCIA.

a. The Legislature Has Not Authorized a Departing Load Charge for Costs Associated with UOG.

The fundamental task of statutory interpretation is "to ascertain the intent of the lawmakers so as to effectuate the purpose of the statute."[21] This task begins by considering the statute's text, giving the words "their usual and ordinary meaning."[22] Here, the plain text of Assembly Bill ("AB") 117,[23] which governs the PCIA, is dispositive: the Legislature declined to include costs associated with UOG in the list of costs that may be recovered from departing customers. While the Legislature has authorized limited additional charges for departing customers since it enacted AB 117 in 2002, those actions only underscore the Legislature's intent to limit charges that may be imposed on CCA customers to specific categories. Because the list

[20] R.17-06-026, Proposed Decision of ALJ Roscow at 56-57 (mailed Aug. 1, 2018).
[21] *Apple, Inc. v. Superior Court* (2013) 56 Cal.4th 128, 135 (citation omitted).
[22] *Id.* (citation omitted).
[23] Assem. Bill No. 117 (Reg. Sess. 2001-2002).

of authorized charges clearly and unambiguously excludes costs associated with UOG, the Commission must "assume the lawmakers meant what they said, and the plain meaning of the language governs."[24]

AB 117, which authorized customers to aggregate their loads as members of CCAs, also authorized a "mechanism to be imposed on the community choice aggregator to prevent a shifting of costs to an electrical corporation's bundled customers."[25] But rather than giving the Commission unfettered discretion to establish the contours of this cost recovery mechanism, the Legislature limited charges to specific categories of costs set forth in sections 366.2(d), (e), and (f) for which CCA customers must reimburse the utilities that previously served them:[26] (1) California Department of Water Resources ("CDWR") bond charges,[27] (2) the CCA customer's share of CDWR's "estimated net unavoidable electricity purchase contract costs,"[28] (3) "unrecovered past undercollections for electricity purchases,"[29] and (4) the CCA customer's "share of the electrical corporation's estimated net unavoidable electricity purchase contract costs attributable to the customer."[30] The Legislature has never modified these categories.

Costs associated with UOG are pointedly absent from this legislatively authorized list. It is beyond dispute that they are neither CDWR-related costs, nor past undercollections for electricity purchases. Furthermore, the term "electricity purchase contract" in section 366.2(f), which provides the specific legislative authorization for PCIA charges, refers, in its "plain,

[24] *Day v. City of Fontana* (2001) 25 Cal.4th 268, 272.
[25] Legis. Counsel's Dig., Assem. Bill No. 117 (2001-2002 Reg. Sess.) ¶ 1.
[26] Cal. Pub. Util. Code § 366.2(c)(5).
[27] Cal. Pub. Util. Code § 366.2(e)(1).
[28] Cal. Pub. Util. Code § 366.2(e)(2).
[29] Cal. Pub. Util. Code § 366.2(f)(1).
[30] Cal. Pub. Util. Code § 366.2(f)(2).

commonsense meaning,"[31] to resources procured under power purchase agreements ("PPAs") with third party energy producers, not resources that the utilities own outright. Lest any doubt remain as to the meaning of that term, the Legislature clarified elsewhere in the Code that "power purchase contracts" are "*between electric utilities and private energy producers*."[32] And, indeed, the utility owners of UOG themselves agree that UOG falls outside the "electricity purchase contract" category, explaining that legacy UOG does not qualify as a "'procurement' arrangement at all" because it was not "'obtained' but rather was 'built' by the utilities."[33]

The Commission deems this list merely illustrative,[34] but statutory language directly rebuts that interpretation. Section 366.2(c)(5), adopted by AB 117, clarifies the exclusive nature of this list, requiring CCAs to file implementation plans to help the Commission "determine the cost-recovery mechanism to be imposed on the community choice aggregator *pursuant to subdivisions (d), (e), and (f)*."[35] The Legislature reaffirmed the comprehensive nature of this list in Senate Bill ("SB") 790, adopted in 2011. That bill barred the Commission from requiring CCA customers to pay charges other than those "imposed by the commission pursuant to subdivisions (d), (e), (f), and (h), [of section 366.2(c)(5)] and programs authorized by the commission to provide broader statewide or regional benefits to all customers."[36] Had the

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[31] *Riverside County Sherriff's Dept. v. Stiglitz* (2014) 60 Cal.4th 625, 630.
[32] Cal. Pub. Util. Code § 2826(a) (emphasis added).
[33] Joint Utilities Reply Brief at 85 & n. 230.
[34] D.18-10-019 at 51-52.
[35] Cal. Pub. Util. Code § 366.2(c)(5) (emphasis added). As discussed below, section 366.2(d) does not add to the list of cost recovery mechanisms but instead clarifies the Legislature's general intent to prevent cost shifting and to ensure that departing customers bear their fair share of uneconomic costs of DWR electricity purchases. Cal. Pub. Util. Code § 366.2(d)(1).
[36] Sen. Bill No. 790 (2011-2012 Reg. Sess.) § 5; *see* Cal. Pub. Util. Code § 366.2(k)(1). Section 366.2(h) does not expand the list of recoverable costs but rather clarifies the ownership of costs recovered pursuant to subdivisions (e) and (f). Cal. Pub. Util. Code §§ 366.2(h)(1)-(2).

Legislature intended to make the list illustrative only, it would have said so, as it did elsewhere in section 366.2.[37]

The Legislature's authorization of narrow additional charges that could be imposed on CCA customers further manifests its intent to limit charges to the statutorily delineated categories. As discussed below, the Legislature enacted AB 1890 in 1996, authorizing a since-expired charge on all customers—the Competition Transition Charge ("CTC").[38] The CTC allowed the investor-owned utilities ("utilities" or "IOUs") to recover through the end of 2001 the above-market costs of utility "generation-related assets," including UOG, that would become uneconomic in the transition to a competitive market.[39] Through AB 380 in 2005, the Legislature enacted a resource adequacy mandate for all load serving entities and authorized limited cost-recovery through a charge for those resources.[40] In SB 790 in 2011, the Legislature authorized a nonbypassable charge for net capacity costs of certain resources authorized to meet system or local area reliability needs for all customers.[41] And through SB 350 in 2015, the Legislature authorized a nonbypassable charge for the "net costs of any incrementable renewable integration

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[37] *See, e.g.*, Cal. Pub. Util. Code §§ 366.2(c)(3)(E) & (G) (requiring CCA implementation plans to set forth "the rights and responsibilities of program participants, *including, but not limited to*, consumer protection procedures, credit issues, and shutoff procedures" and a "description of third parties that will be supplying electricity under the program, *including, but not limited to*, information about financial, technical, and operational capabilities) (emphasis added); *id.* at § 366.2(c)(9) (requiring utilities to provide CCA with "billing and electrical load data, *including, but not limited to*, electrical consumption data . . . and other data detailing electricity needs and patterns of usage") (emphasis added); *id.* at § 366.2(c)(20) (requiring utilities to recover from CCAs "any costs reasonably attributable to the [CCA] . . . of implementing this section, *including, but not limited to*, all business and information system changes, except for transaction based costs") (emphasis added).

[38] Assem. Bill No. 1890 (1995-1996 Reg. Sess.).

[39] Cal. Pub. Util. Code § 367; *see also* D.95-12-063 at 119 (requiring CTC collection to be completed by 2005).

[40] Assem. Bill. No. 380 (2005-2006 Reg. Sess.) § 1; Cal. Pub. Util. Code §§ 380(a), (g). The Legislature also required that to the extent any CCA or direct access customers are charged for those costs of those resources, any amounts collected under the PCIA be deducted from the charge. Cal. Pub. Util. Code § 380(g).

[41] Sen. Bill 790 (2011-2012 Reg. Sess.) § 4; Cal. Pub. Util. Code § 365.1(c)(2)(A).

resources procured by an electrical corporation" as part of its new integrated resource planning requirement.[42]

None of these charges permits the blanket inclusion of UOG costs that the Commission authorizes, and neither the Commission nor any party argues otherwise. To the contrary, the Legislature's careful delineation of charges that may be imposed on departing customers further manifests its intent to limit the PCIA to electricity purchase contract costs, as stated in the statute. The Commission's creation of a new charge for UOG resources out of whole cloth contravenes these limits and is subject to reversal if not corrected.

b. The Commission Misapplies Canons of Statutory Construction

The Commission does not dispute that none of these cost-recovery provisions includes the UOG costs the Commission now stacks on departing customers. Rather, the Commission relies on several canons of statutory interpretation to impliedly abrogate the statutory limitations to reach its desired policy result, including the canon that favors harmonizing potentially inconsistent statutes and the canon providing that later in time statutes trump earlier ones. But the Commission errs in deciding even to apply these canons. When, as here, "statutory language is unambiguous," the Commission "must follow its plain meaning whatever may be thought of the wisdom, expediency, or policy of the act, even if it appears probable that a different object was in the mind of the legislature."[43] The Commission may only resort to extrinsic sources, including interpretive canons and legislative history, if the operative statutory language is ambiguous, which it is not.[44] The Commission also compounds its errors by applying the canons incorrectly

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[42] Sen. Bill 350 (2015-2016 Reg. Sess.) §§ 26-27; *see* Cal. Pub. Util. Code §§ 454.51(c), 454.52(c).
[43] *Lopez v. Sony Electronics* (2018) 5 Cal.5th 627, 640.
[44] *See Kavanaugh v. West Sonoma County Union High School Dist.* (2003) 29 Cal.4th 911, 919; *Hoitt v. Department of Rehabilitation* (2012) 207 Cal.App.4th 513, 523.

and refusing to consider directly applicable ones, including the canon that the specific trumps the general and that things not expressly included in a statutory list are to be deemed excluded. When properly applied, the canons clearly underscore the Legislature's intent to exclude UOG costs from the PCIA.

First, relying on the canon directing courts to harmonize related statutory sections where possible,[45] the Commission contends that giving effect to section 366.2(f)'s exclusion of UOG costs would render the statute inconsistent with other provisions.[46] Yet the Commission fails to show that any such inconsistency exists. The Commission points to section 366.2(d)(1), added by AB 117,[47] and section 365.2, added by SB 350.[48] But section 366.2(d)(1) merely expresses, and section 365.2 reaffirms, the Legislature's general intent to prevent cost shifts between customer classes.[49] They neither modify nor add to the list of cost categories that may be included in the PCIA nor invest general authority in the Commission to create a fee that the Legislature did not authorize. The Commission also concludes that giving effect to section 366.2(f)'s limitations would "read part of" that very same subdivision "out of the law," but it points to no language that would be rendered surplusage and offers no reasoning to support this logically flawed conclusion.[50] Likewise, the Commission contends that excluding UOG costs "would render the statute inconsistent with" section 366.2(g),[51] added by SB 790 in 2011, but that section has no

[45] *See Dyna-Med, Inc. v. Fair Employment and Housing Com.* (1987) 43 Cal.3d 1379, 1387; *see also State Department of Public Health v. Superior Court* (2015) 60 Cal.4th 940, 956 (directive to harmonize potentially inconsistent statutes is a "canon of construction" that "like all such canons, does not authorize courts to rewrite statutes").
[46] D.18-10-019 at 52.
[47] Assem. Bill. No. 117 § 4.
[48] Sen. Bill. No. 350 § 14.
[49] *See* Cal. Pub. Util. Code § 366.2(d)(1) ("It is further the intent of the Legislature to prevent any shifting of recoverable costs between customer classes."); *see also* Cal. Pub. Util. Code § 365.2.
[50] D.18-10-019 at 52.
[51] *Id.*

bearing on the scope of PCIA-eligible costs.[52] Rather, it mandates that departing customers be credited for the value of benefits that remain with utility customers—a mandate that, as discussed in Section III.C. below, the Commission's decision contravenes.[53]

Furthermore, the Commission fatally misapplies the canon on statutory harmonization by reading the general indifference principle set forth in sections 365.2 and 366.2(d)(1) to supplant the specific cost recovery mechanisms provided in sections 366.2(e)-(f) and the other indifference fee provisions set forth above.[54] Applying the statutory harmonization canon in *Department of Public Health v. Superior Court*, the California Supreme Court explained that where, as here, "one of the statutes involved deals generally with a subject and another relates specifically to particular aspects of the subject," the provisions are to be "read together and so construed as to give effect, when possible, to all the provisions thereof" and to prevent "a repeal by implication" of any of the provisions.[55] The Commission's interpretation of the general customer indifference language to authorize a departing load charge for UOG generation effectively repeals the Legislature's specific list of allowable fees and improperly renders the Legislature's explicit statutory language meaningless.[56] As the Supreme Court has explained, the directive to harmonize potentially inconsistent statutes "is not a license to redraft the statutes to strike a compromise that the Legislature did not reach."[57]

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[52] Sen. Bill No. 790 § 5.
[53] *See* Cal. Pub. Util. Code § 366.2(g).
[54] *See* Cal. Pub. Util. Code §§ 366.2(e)-(f), 380(b)(2), 365.1(c)(2)(A), 454.51(c).
[55] *State Dept. of Public Health v. Superior Court* (2015) 60 Cal.4th 940, 955 (citation omitted); *see also* Cal. Code Civ. Proc. § 1859 ("[W]hen a general and particular provision are inconsistent, the latter is paramount to the former. So a particular intent will control a general one that is inconsistent with it.").
[56] *See Dyna-Med, Inc.*, 43 Cal.3d at 1386-87 ("In determining [the Legislature's] intent, a court must . . . accord[] significance, if possible, to every word, phrase, and sentence . . . . A construction making some words surplusage is to be avoided.").
[57] *State Dept. of Public Health*, 60 Cal.4th at 956.

Indeed, these statutory provisions can be readily harmonized without abrogating the Legislature's limitations on indifference fees. The specific departing load charges authorized by AB 117 and its progeny are key mechanisms through which the Commission is to satisfy the Legislature's general intent to prevent cost-shifting. But departing load charges are not the only means at the Commission's disposal to reduce or eliminate above-market costs. Indeed, the Commission's decision initiates a second phase of the proceeding to "reduc[e] the levels of above-market costs going forward"[58] through mechanisms such as voluntary auction frameworks and consideration of shareholder responsibility for imprudent utility portfolio management.[59] Rather than invent a PCIA category that the Legislature did not authorize, the Commission should pursue strategies in Phase 2 that will eliminate the above-market costs associated with UOG. Such strategies include implementing financing mechanisms like securitization to minimize UOG costs and placing responsibility on utility shareholders where the IOUs failed to follow Commission directives to align their portfolios with forecasted load.[60]

Second, the Commission contends that a reading of section 366.2(f) that excludes UOG costs would "subordinate a later-in-time statute [SB 350] to an earlier in-time one [AB 117]." But this canon applies only "[i]f conflicting statutes cannot be reconciled."[61] As discussed above, these statutes are readily harmonized in a way that gives effect to all their provisions. And even if the statutes could not be reconciled, AB 117's specific limitations on PCIA-eligibility would override SB 350's general directive to prevent costs shifts, because "[t]he rule that specific

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[58] D.18-10-019 at 129.
[59] D.18-10-019 at 111-12.
[60] *See* Sections III.D. and III.E.2, *infra.*
[61] *Lopez*, 5 Cal.5th at 634 (citation omitted).

provisions take precedence over more general ones trumps the rule that later-enacted statutes have precedence."[62]

Third, the Commission's specific inclusion of UOG-related costs in other charges imposed on CCA customers shows that Legislature's decision to exclude UOG costs from the PCIA was intentional. As the Commission recognizes,[63] the Legislature explicitly authorized the Commission to impose certain UOG costs on departing customers through two non-PCIA charges: (1) AB 1890's now-expired charge for the uneconomic component of "generation facilities" and "generation-related regulatory assets,"[64] and (2) SB 790's charge for the "net capacity costs of . . . *utility-owned generation"* that the Commission ordered an electric corporation to obtain "to meet system or local area reliability needs for the benefit of all customers."[65] The only UOG costs that can be imposed on CCA customers are those that fit into those two categories, one of which has expired and both of which are unrelated to the PCIA. These provisions show that the Legislature "clearly knew how to draft language" authorizing a charge for above-market costs associated with UOG resources and "could have included such language [in the PCIA statute] had it [so] desired."[66] Yet it pointedly did not do so in AB 117 and, outside of the narrow and inapplicable circumstance provided for by SB 790, has not done so since. Pursuant to well-settled principles of statutory interpretation, the Legislature's

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[62] *Id.* at 635 (citation omitted) (examining statutes' "relative specificity" to determine which controls).
[63] D.18-10-019 at 49 (citing Pub. Util. Code § 365.1(c)(2)).
[64] Assem. Bill. No. 1890; Cal. Pub. Util. Code § 367(a).
[65] Sen. Bill 790 (2011-2012 Reg. Sess.) § 4; Cal. Pub. Util. Code § 365.1(c)(2) (emphasis added).
[66] *People v. Abillar* (2010) 51 Cal. 4th 47, 56.

deliberate inclusion of UOG charges in one section of the Code and exclusion from another should be presumed intentional, and its limits on the PCIA respected.[67]

Finally, the Commission erroneously refuses to apply the well-settled canon *expressio unius est exclusio alterius*: "the expression of some things in a statute necessarily means the exclusion of other things not expressed."[68] This canon applies "when there is reason to believe a legislative omission was intentional, as when the statute contains a specific list or presents a facially comprehensive treatment."[69] Both are true here: sections 366.2(e) and (f) provide the list of above-market costs eligible for recovery from departing customers through cost responsibility surcharges, and this list is facially comprehensive, encompassing DWR-related costs, past undercollections, and the above-market costs of long-term contracts between utilities and third party energy providers.

The Commission relies in a footnote on *Association of California Insurance Companies v. Jones* ("*Jones*")[70] to avoid the *expressio unius* canon, but *Jones* is readily distinguishable.[71] That case involved two distinct statutory subdivisions: one that broadly barred any knowingly "untrue, deceptive, or misleading statement"[72] with respect to the business of insurance, and another that barred a list of sixteen specific "unfair claims settlement practices."[73] Plaintiffs invoked the *expressio unius* canon to argue that the enumeration of specific unfair claims

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[67] *See Bates v. United States* (1997) 522 U.S. 23, 29; *see also Simmons v. Ghaderi* (2008) 44 Cal.4th 570, 582 (judicial creation of exceptions not present on face of a statute "would run contrary to legislative intent" and disrupt the Legislature's "sound policy judgment").
[68] *Gikas v. Zolin* (1993) 6 Cal.4th 841, 852 (applying canon); *Dyna-Med, Inc.* 43 Cal.3d at 1391 & n.13 (same).
[69] *Lopez*, 5 Cal.5th at 636 (citation omitted).
[70] *Association of California Ins. Companies v. Jones* (2017) 2 Cal.5th 376, 398.
[71] D.18-10-019 at 52 n.109.
[72] Cal. Ins. Code § 790.03(b).
[73] Cal. Ins. Code § 790.03(h).

settlement practices showed that the Legislature intended to preclude the California Insurance Commissioner from barring a specific misleading statement about wildfire insurance costs. The California Supreme Court unsurprisingly disagreed.[74] The two statutory subdivisions at issue pertained to entirely different activities. The Legislature's decision to enumerate specific instances of unfair claims settlement practices in one subdivision did not somehow override or narrow its unrelated ban on misleading statements.

The Court's decision in *Jones* only serves to illustrate an obviously improper application of the *expressio unius* canon. That canon could have been appropriately invoked if, for instance, the Commissioner was attempting to add a seventeenth unfair claims settlement practice to the statutory list. That is precisely what the Commission does here by attempting to add a new category of UOG costs to the comprehensive list the Legislature created. The Commission's use of general cost-shifting proscriptions to expand the list of recoverable costs is both legal error and an abdication of its responsibility to ensure customer indifference through other means, like allocating costs to shareholders when they result from imprudent utility investment decisions.[75]

c. Legislative History Shows that the Legislature Intended to Exclude UOG-Related Costs from the PCIA

Because the statutory language clearly and unambiguously shows that the Legislature did not intend to authorize a departing load charge for UOG-related costs, its plain meaning controls and it is unnecessary to consult the legislative history.[76] In any event, like the canons of statutory interpretation, the history of AB 117 and its progeny underscores the Legislature's intent to exclude UOG-related costs from the PCIA.

[74] *Id.*
[75] *See* Section III.D, *infra.*
[76] *See Kavanaugh*, 29 Cal.4th at 919.

The Legislature's intent to exclude UOG costs from the PCIA is evident in its prior and long-lapsed authorization of departing load charges for legacy UOG. As discussed above, the Legislature, through the passage of AB 1890 in 1996, authorized a charge on all customers to allow utilities to recover costs associated with UOG resources that "may become uneconomic as a result of a competitive generation market."[77] At the same time, the Legislature provided a clear sunset date for UOG cost recovery, mandating that collection of above-market UOG costs "shall not extend beyond December 31, 2001."[78] The Commission responded by establishing the Competition Transition Charge, with the proviso that "no further accumulation of CTC will be allowed after 2003 and collection will be completed by 2005."[79] The utilities' opportunity to recover above-market legacy UOG costs thus lapsed nearly two decades ago, and the Legislature has not lifted that cost recovery limit or authorized any further broad-based collection of UOG costs.

This history shows that the Legislature anticipated that all above-market costs associated with legacy UOG would be recovered by December 31, 2001—nine months before AB 117 was approved in September 2002. The Legislature clearly did not anticipate that legacy UOG would continue to generate above-market costs, and it thus stands to reason that it intended to exclude costs associated with those resources from the authorized cost recovery mechanisms. Indeed, the Commission first included legacy UOG in charges for DWR contracts only because those resources were relatively cheap, and the Commission believed that direct access customers should benefit from offsetting expensive above-market DWR contracts with the lower cost UOG

[77] Cal. Pub. Util. Code § 367.
[78] Cal. Pub. Util. Code § 367(a).
[79] D.95-12-063 at 119.

resources serving utility customers.[80] Now that UOG resources are markedly uneconomic, the Commission's decision ironically permits only pre-2009 DA customers to escape liability for UOG costs when it should instead respect legislative intent by removing these costs from the PCIA altogether.[81]

The Commission contends that SB 350 extended AB 117's limits on cost recovery mechanisms to include costs associated with UOG, but nothing in SB 350's legislative history suggests such an intent. SB 350, in fact, had little to do with cost recovery and was instead enacted to meet three clean-energy goals by 2030: a 50% reduction in petroleum used in motor vehicles, a doubling of energy efficiency of existing buildings, and generating 50% of total retail sales of electricity from renewable resources.[82] As discussed above, the Legislature permitted a limited additional indifference charge to prevent its integrated resource planning directive from causing any cost shift. Nothing in the committee reports or the senate or assembly analyses asserts or implies that sections 365.2 and 366.3 were intended to override the Legislature's carefully delineated indifference fee categories.[83]

2. The Commission's Elimination of the Ten-Year Cost Recovery Limit for Post-2002 Utility-Owned Generation is Not Supported by Substantial Evidence

The Commission's determination that there is no "justification to continue a 10-year limit on recovering costs for post-2002 UOG from departing load" is contradicted by substantial evidence in the record.[84] As the Commission previously found and as ALJ Roscow recognized in

[80] D.02-11-022 at 22, 24-25.
[81] D.18-10-019 at 125.
[82] Senate Comm. on Energy, Utils. & Communications, Committee Analysis, Sen. Bill. No. 350 (2015-2016 Reg. Sess.) p. 2 (Apr. 7, 2015).
[83] *See, e.g.*, Assembly Floor Analysis, Sen. Bill. No. 350 (2015-2016 Reg. Sess.) p. 1 (Sept. 4, 2015).
[84] D.18-10-019 at 59.

his carefully reasoned Proposed Decision, the ten-year limit is a critical incentive spurring the utilities to appropriately align their portfolios with forecasted load.[85] The Commission now arbitrarily sweeps aside its longstanding precedent based on the erroneous assumption that limiting UOG cost recovery forces utility customers to bear the entire financial consequences of poor IOU performance.[86] However, the Commission fails to address whether and to what extent such costs may be assigned to shareholders. Even more egregiously, the Commission entirely ignores evidence and argument that eliminating the ten-year limit will undermine several of the Commission's goals for this proceeding, including ensuring a transparent PCIA methodology that does not "create unreasonable obstacles for customers of non-IOU energy providers" and that produces "reasonably predictable outcomes that promote certainty and stability for all customers within a reasonable planning horizon."[87] It also undermines the reliance interests of CCAs that have incorporated the long-settled ten-year limit into their planning and formation decisions.[88]

The consequences of the Commission's decision are already being seen. Although the Decision is silent on the issue, the utilities construe it to make UOG plants, like SGD&E's Palomar Energy Center and Miramar Energy Facility 1, retroactively eligible for PCIA cost-

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[85] *See* D.08-09-012 at 54 ("With respect to non-RPS resources" subject to the 10-year limit, "the utilities can, over time, adjust their load forecasts and resource portfolios to mitigate the effects of DA, CCA, and any large municipalizations on bundled service customer indifference. By the end of a 10-year period, we assume the IOUs would be able to make substantial progress in eliminating such effects for customers who cease taking bundled service during that period."); *see also* R.17-06-026, Proposed Decision of ALJ Roscow at 59 (mailed Aug. 1, 2018) (removing ten-year limit would "remove any incentive for the IOUs to manage their portfolios more aggressively to eliminate their long positions in non-RPS-eligible UOG); POC reply brief at 6.
[86] D.18-10-019 at 59.
[87] D.18-10-019 at 15.
[88] *See* POC Reply Brief at 7.

recovery even though they termed out of the PCIA years ago under the ten-year limit.[89] The Commission should at minimum clarify whether it intends the Decision to have this retroactive effect.[90] If this is indeed the Commission's intent, then its inclusion in the PCIA of UOG resources that have already termed out without any explanation or findings would be arbitrary and capricious and a violation of section 1705.[91] It also ignores evidence of the severely disruptive effects for CCAs and their customers. Sweeping in facilities that have termed out of the PCIA appears to cause, in and of itself, a 0.619 cent/kWh increase in SDG&E's territory.[92] This dramatic escalation in PCIA charges has the potential to unsettle CCA formation and portfolio management plans.[93]

The Commission's assertion that there is no "principled justification" to maintain the ten-year cost recovery limitation also ignores the unique nature of UOG resources. Unlike the majority of the long-term resources in the IOUs' portfolios, which are procured under time-limited contracts with third parties, UOG resources may be held in utility portfolios indefinitely, imposing costs on customers so long as they remain used and useful.[94] And the rates themselves

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[89] *See* SDG&E-06-POC-1 at ¶¶ 2-4.
[90] *See McClung v. Employment Dev. Dept.* (2004) 34 Cal.4th 467, 475 (California law imposes a "strong presumption against retroactivity."); *see also Cal. Drive-in Restaurant Ass'n v. Clark* (1943) 22 Cal.2d 287, 292 (statutory rules of construction apply equally to administrative agencies).
[91] *See Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.* (1983) 463 U.S. 29, 43 (agency's decision is arbitrary and capricious if it fails to "examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made") (citation omitted); *see also Mateel Environmental Justice Foundation v. Office of Environmental Health Hazard Assessment* (2018) 24 Cal.App.5th 220, 229 (reviewing court "must ensure that an agency has adequately considered all relevant factors, and has demonstrated a rational connection between those factors, the choice made, and the purposes of the enabling statute").
[92] Compare SDG&E's 2019 PCIA rate projections of 3.342 cents/kWh under the Alternate Proposed Decision adopted by the Commission with 2.723 cents/kWh under the ALJ's Proposed Decision. *See* SDG&E Revised Rates Tables, PD and APD Analysis, R.17-06-026 (Sept. 4, 2018).
[93] Tr. 745:1-19 (POC, Powers).
[94] *See* Tr. 346:22-347:2, 347:13-17; 348:15-23 (IOUs, Cushnie) (testifying that "the [departing] customer should expect to pay for their pro rata share of these costs for as long as the resource is used and useful").

will be unpredictable, because O&M costs and fuel costs fluctuate from year to year and capital additions can add hundreds of millions of dollars per year to UOG costs.[95] The Commission fails to consider that without some prescribed time limit for UOG cost recovery, these resources will saddle departing load with indefinite and unknowable cost liability, undermining the Commission's goals to create certainty and predictability in CCA rates. Indeed, even the Joint Utilities recognized the need to place time limits on UOG costs and proposed a default rule that would tie UOG resource eligibility to the lifetime of the longest of the long-term electricity procurement contracts associated with a customer vintage.[96]

The Commission should create stability and certainty in PCIA rates by removing UOG costs entirely from the PCIA, as the Legislature intended. But if it does not, the Commission should maintain the well-vetted ten-year limit that departing customers and the entities that serve them have relied on for nearly a decade and a half. As the Commission has repeatedly recognized, ten years is sufficient to allow the IOUs to align their portfolios with forecasted load to mitigate any cost shifting.[97] And the Commission could continue to allow the IOUs to apply for extended cost recovery on a case-by-case basis if above-market costs persist despite prudent utility portfolio management efforts.[98]

Furthermore, the Commission commits legal error by neglecting to consider the rate impacts of its decision to eliminate the ten-year limit for post-2002 UOG. The California Constitution authorizes the Commission to enforce a "just and reasonable" standard for utility

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[95] *See* CalCCA-01 at 2B-17 to 18; CalCCA Comments on APD at 12.
[96] IOU-1 at 4-21:19-27 ("[T]he Joint Utilities propose that both legacy and post-2002 UOG resources be considered as Eligible Resources . . . until the last of the long-term contract associated with those customers' vintage portfolios expires….").
[97] D.08-09-012 at 54-55; *see also* D.04-12-048 at 65.
[98] *See* D.04-12-048 at 55.

rates,[99] and statues mandate that it do so.[100] In SDG&E's service territory alone, eliminating the ten-year limit will escalate PCIA-eligible costs by hundreds of millions of dollars. SDG&E's PCIA rate projections with the ten-year limit show above-market UOG costs at approximately $50 million in 2018 and disappearing almost entirely by 2021.[101] By contrast, without the ten-year limit, SDG&E projects over $100 million in above-market costs for UOG resources from 2019 until at least 2035.[102] SCE and PG&E project similar PCIA increases as a consequence of indefinite UOG eligibility.[103] For instance, with the exception of legacy hydro resources, PG&E's UOG portfolio would have produced no above market costs after 2025[104] but under the Decision, will now generate over $100 million in above-market costs through at least 2040.[105] The Commission's failure to give any consideration to whether eliminating the ten-year limit will render PCIA rates unjust and unreasonable is in itself grounds for reversal.

3. Eliminating the Ten-Year Limit for Post-2002 Utility-Owned Generation Impermissibly Shifts Costs to Departing Customers.

The Commission reasons that the ten-year cost recovery limit for post-2002 UOG resources shifts costs to bundled customers,[106] but substantial evidence in the record shows that just the opposite is true. Since the Commission issued Decision 04-12-048 on December 16, 2004, the Commission has put the IOUs on notice that they would be barred from allocating to

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[99] *Monterey Peninsula Water Mgmt. Dist. v. P.U.C.* (2016) 62 Cal.4th 693, 699-700 (The Commission's authority to enforce the just and reasonable standard "derives from the Commission's constitutional power to fix the rates of public utilities (Cal. Const., art. XII, § 6).").
[100] *See* Cal. Pub. Util. Code § 451 ("Every unjust or unreasonable charge demanded or received for such product or commodity or service is unlawful."); *id.* at § 454 (Commission must ensure that any "new rate is justified.").
[101] IOU-5 at App. D, p. 3 (PDF pp. 142).
[102] IOU-5-R at p. 2 (PDF p. 3).
[103] *Compare* IOU-5 at App. D *to* IOU-5-R.
[104] IOU-5 at App. D, p. 2 (PDF p. 140).
[105] IOU-5-R at p. 4 (PDF p. 5)
[106] D.18-10-019 at 59.

departing load above-market costs for any new UOG resource after a ten-year window, commencing on the date the resource began commercial operation.[107] The IOUs' planning and procurement decisions since 2004 have been predicated on that knowledge.[108] For instance, when SDG&E acquired its Desert Star, Miramar 2, and Cuyamaca natural gas facilities, it knew that any above-market costs ten years later could only be borne by remaining bundled customers, irrespective of the level of load departure.[109] The ten-year limit thus created a bright-line rule governing attribution of above-market UOG costs, which the IOUs embedded in their planning and procurement decisions. To lift that limit now would allow the IOUs to pass costs to departing customers for resources that were not intended to serve them. Such cost shifting is barred by sections 365.2 and 366.3, which require the Commission to ensure that departing customers do not experience any cost increases "as a result of an allocation of costs that were not incurred on [their] behalf."[110]

Lifting the ten-year limit also exacerbates cost-shifting caused by the improper attribution of post-acquisition UOG costs to departing customers. The record shows that UOG resources incur significant short-run operating costs on an annual basis (including fuel costs, fixed and variable O&M costs, and taxes), as well as hundreds of millions of dollars in capital addition costs.[111] Unlike initial capital costs and short-run costs incurred before CCA customers left bundled service, these costs are incurred after customers depart and thus are not legally or

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[107] D.04-12-048 at 61; *see also* D.03-12-059 at 32 (establishing ten-year cost recovery limitation for SCE's Mountainview plant). The Commission allowed the utilities to request a longer cost-recovery period in their applications, but no utility has done so. *See* D.04-12-048 at 61; Tr. 437:2-14 (IOUs, Shults).
[108] Tr. 429:21-25, 434:24-434:7 (IOUs, Shults) (testifying that IOUs have adjusted their load forecasts to mitigate the effect of the ten-year limit).
[109] SDG&E-06-POC-01 at 1; POC-1 at 6.
[110] Cal. Pub. Util. Code §§ 365.2, 366.3
[111] CalCCA-1 at 2B-17 to 2B-18.

logically attributable to those customers. The Decision acknowledges this problem but concludes that the Commission "lacks sufficient record support" to provide a solution, despite CalCCA's comprehensive testimony and briefing on precisely this point.[112] The Commission's failure to consider CalCCA's evidences is an abuse of discretion; it "cannot just isolate the evidence and call it a day, thereby disregarding other relevant evidence in the record."[113] The Commission's decision to include UOG costs in the PCIA that are not attributable to CCA customers also represents a wholesale abdication of its duties under section 365.2 and 366.3. Rather than defer the issue for piecemeal consideration in general rate case proceedings, the Commission should, at minimum, devote part of Phase 2 to further developing and implementing a mechanism to appropriately assign UOG facilities and related costs.

B. The Commission Abused its Discretion and Committed Legal Error by Creating a Cap That Fails to Protect the Economic Viability of CCAs.

Although it includes a cap on the PCIA, the Decision will, in fact, allow an immediate spike and continuous escalation in PCIA charges. As a result, the Decision contravenes legislative intent to promote and protect the viability of CCAs against utility market power and violates the Commission's responsibility to ensure that rates are just and reasonable. The Commission's finding that its cap will promote certainty and stability for CCA customers is also contradicted by substantial evidence in the record demonstrating that its rate escalation will compromise the viability of both new and well-established CCAs and will interfere with their efforts to meet sustainability and policy goals and to provide competitive rates for their customers. And the Commission's decision to delay the cap until 2020 lacks all record support

[112] D.18-10-019 at 135; *see* CalCCA Comments on APD at 12 (citing testimony).
[113] *Util. Reform Network v. P.U.C* (2014) 223 Cal.App.4th 945, 959.

and eliminates any ameliorative effect the cap might have had. The Commission should correct this flawed decision by instead capping PCIA charges at or below 2.2 cents/kWh—a level that the record shows will enable CCAs to function as the Legislature intended.

1. The Decision to Adopt an Annually Increasing Cap Ignores Substantial Evidence That Continued PCIA Growth will Undermine CCA Viability.

AB 117 and its progeny establish legislative policy to ensure a robust ecosystem of electricity service providers, to devolve control over procurement to the local level, and to safeguard CCAs' economic viability. AB 117 entitled "[c]ustomers . . . to aggregate their electricity loads as members of their local community with [CCAs],"[114] and SB 790 made it the "policy of the state to provide for the consideration, formation, and implementation of [CCA] programs."[115] Among CCAs' central purposes are "to reduce transaction costs to consumers, provide consumer protections, and leverage the negotiation of contracts."[116] Recognizing that IOUs' "inherent market power" has served as a "deterrent to the consideration, development, and implementation of [CCAs]," the Legislature has insisted on protections to facilitate CCA formation and to foster fair competition.[117] It has also charged the Commission with ensuring that rates—including exit fees—are "just and reasonable."[118]

The Commission's decision to set an escalating cap of 0.5 cents/kWh/year violates these statutory directives. Record evidence shows that continued PCIA growth will undermine CCA viability. POC expert witness Bill Powers testified that CCAs can compete and remain viable if

[114] Cal. Pub. Util. Code § 366.2(a)(1).
[115] S.B. 790, 2011-2012 Reg. Sess., ch. 599, sec. 2.
[116] Cal. Pub. Util. Code § 366.2(c)(1).
[117] *Id.*
[118] Cal. Pub. Util. Code §§ 451, 454.

the PCIA is stable at about 2 cents/kWh,[119] the approximate level of SDG&E's forecasted 2018 PCIA.[120] Beyond that level, CCAs will be unable to serve customers "at a rate that is at or below the utility's rate," undercutting their ability to compete with the IOUs as the Legislature intended.[121] There is no contrary evidence on rate impacts in the record.

Furthermore, as AReM/DACC pointed out in testimony, the Commission has previously determined that a cap on PCIA charges at around 2.2 cents/kWh would protect the economic viability of electricity service providers.[122] In 2002 and 2003 orders, the Commission considered the appropriate level to cap Cost Responsibility Surcharge ("CRS") fees for Direct Access customers. Recognizing that "bundled customer indifference" must be balanced against "economic viability,"[123] the Commission set the CRS cap at 2.7 cents/kWh "to preserve the economic viability of the DA program."[124] A PCIA cap of 2.2 cents/kWh, which AReM/DACC proposed in testimony and POC supported, equals the former CRS cap minus the DWR bond charge paid by DA and CCA customers.[125] ALJ Roscow also recognized 2.2 cents/kWh as a reasonable PCIA level by setting the initial cap at that amount in his Proposed Decision.[126] Not only did the Commission fail to make requisite findings on rate impacts, but its decision to permit PCIA rate increases above 2.2 cents/kWh contravenes even the Commission's own prior findings about the reasonable level of indifference fees.

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[119] Tr. 745:1-13 (POC, Powers).
[120] SD&E, PCIA Rulemaking Workshop # 1C at 34, R.17-06-026 (Dec. 6, 2017).
[121] Tr. 745:1-19.
[122] AD-1 at 28-30.
[123] D.03-07-030 at 6.
[124] D.02-11-022 at 118; *see also* D.03-07-030 at 106 (maintaining the 2.7 cents/kWh CRS cap).
[125] AD-1 at 30; *see also* POC Comments on PD and APD at 13-15.
[126] R.17-06-026, Proposed Decision of ALJ Roscow, Conclusion of Law No. 21 (mailed Aug. 1, 2018).

2. The Commission Abused its Discretion by Delaying Implementation of the Cap Until 2020.

The Commission's decision to delay implementation of the cap until 2020 violates its responsibility to ensure just and reasonable rates and contradicts substantial evidence in the record that earlier implementation is required to protect CCA viability. The Commission subscribes to the "principle of gradualism," which limits sudden rate increases to "mitigate[] the short-term impact of large changes" in policy.[127] In contravention of this principle, the Commission's decision to delay the cap until 2020 permits its PCIA policy change to cause an immediate and substantial spike in PCIA charges. For instance, whereas SDG&E forecasted a 2018 PCIA rate of only 2.257 cents/kWh under the prior methodology, it now projects a PCIA rate for its 2019 vintage of 3.387 cents/kWh—a 1.13 cent/kWh or 50% increase.[128] Likewise, the departing load burden on PG&E and SCE's systems will increase in 2019 by around .47 cents/kWh (17%) and .57 cents/kWh (38%), respectively.[129] By contrast, the IOUs project that above market costs for PCIA-eligible resources will stabilize and even begin to decline from 2020.[130] By delaying the cap until 2020, the Commission fails to mitigate rate spikes at precisely the point that such intervention is necessary. And it renders the cap effectively meaningless by installing it at a point when PCIA rates will likely begin declining.

The Commission's decision to delay the cap until 2020 also lacks any record support. Based on the evidence, ALJ Roscow proposed to implement an initial 2.2 cents/kWh cap

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[127] D.14-08-032 at 598.
[128] *Compare* SDG&E PCIA Common Workpaper Model 2019 ERRA Forecast, R.17-06-026 (Oct. 22, 2016) (projecting 3.387 cents/kWh PCIA for 2019 vintage and 3.225 cents/kWh for 2018 vintage) *with* SD&E, PCIA Rulemaking Workshop # 1C at 34, R.17-06-026 (Dec. 6, 2017) (2018 ERRA forecast projecting 2.257 cents/kWh PCIA under prior PCIA methodology).
[129] CalCCA Comments on APD at 3.
[130] IOU-5-R.

immediately.[131] AReM/DACC's expert witness testified in favor of an immediate cap set at 2.2 cents/kWh.[132] While expert witnesses for the Joint Utilities and ORA objected to a cap, and TURN's witness proposed a different cap methodology,[133] no party introduced evidence or argument that would support delaying the cap to 2020. Nor did the Commission make any findings on the appropriateness of delaying cap implementation, as it was required to do.[134] The Commission's claim that the "risk of substantial and immediate undercollections" justifies the delay fails to acknowledge that undercollection is tracked in interest-bearing accounts and will be fully paid over time.[135] Likewise, the Commission's decision to delay the cap contravenes its finding that the cap will "promote[] certainty and stability for all customers," because the immediate rate hikes that it permits will jeopardize the very existence of the entities that serve departing customers.[136]

C. The Decision Illegally Shifts Resource Costs to Departing Customers by Failing to Credit Them for All the Benefits Those Resources Provide.

The Commission's approach to valuing the IOUs' portfolios understates the benefits their resources provide to bundled customers in contravention of section 366.2(g)[137] and impermissibly shifts costs to departing load, in contravention of sections 365.2, 366.2(d)(1), and

[131] *See* R.17-06-026, Proposed Decision of ALJ Roscow, Conclusion of Law No. 21 (mailed Aug. 1, 2018).
[132] AD-1 at 30.
[133] *See* AD-2 at 13-14.
[134] Cal. Pub. Util. Code § 1705.
[135] D.18-10-019 at 86-87; *see also* AD-2 at 15.
[136] D.18-10-019 at Finding of Fact 18; *see also, e.g.*, CalCCA Comments on APD at 3-6; CalCCA Reply Comments at 2-3; Solana Energy Alliance Comments on APD at 4; East Bay Community Energy Reply Comments at 3-4.
[137] Cal. Pub. Util. Code § 366.2(g) (requiring that PCIA fees paid by CCA customers "be reduced by the value of any benefits that remain with bundled service customers, unless the customers of the [CCCA] are allocated a fair and equitable share of those benefits").

366.3.[138] To fully credit CCA customers for the "value of any benefits that remain with bundled service customers" and to prevent cost shifts, the market price benchmarks must capture the entire value of the long-term resources in the IOUs' portfolios. The Commission's adopted benchmarks fail to do so. Because they rely on revenues achieved through short-term sales into energy and capacity markets, these benchmarks leave significant components of the value of these long-term products on the table, including their ability to act as a hedge against future price spikes [139] Substantial evidence of these lost value streams contradicts the Commission's finding that its decision "preserve[s] all . . . long-term value of the resources procured by the utilities."[140] The Commission also neglects to credit departing customers for the premiums attributable to GHG-free energy and ancillary services. Moreover, the Commission failed to enter any findings on the value of benefits that remain with bundled service customers—a material issue at the heart of this proceeding—in violation of its duties under section 1705. These flaws must be corrected.

1. The Adopted Benchmarks Illegally Fail to Credit CCA Customers for the Full Value of the IOUs' Long-Term Products

The Commission violates section 366.2(g) by adopting benchmarks that significantly undervalue the IOUs' resources, permitting utility customers to extract benefits that the Commission refuses to credit to CCA customers. As CalCCA witness Hoekstra testified, the benchmarks employed by the Commission must match the nature of the product being valued to fully reflect the benefits the product provides.[141] The IOU portfolio products included in the

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[138] Cal. Pub. Util. Code § 366.2(d)(1) ("It is further the intent of the Legislature to prevent any shifting of recoverable costs between customers."); *see also id.* at § 365.2 ("The Commission shall also ensure that the departing load does not experience any cost increases as a result of an allocation of costs that were not incurred on behalf of the departing load."); *id.* § 366.3 (same).
[139] *See* UCAN-4 at 22 ("Short-run, monolithic spot price metrics, i.e., CAISO LMP markets, are inappropriate to value bilateral contracts.").
[140] D.18-10-019.
[141] CalCCA-1 at 2B-3.

PCIA consist entirely of long-term resources.[142] The value of these products could be appropriately "assessed by offering the products into the market under the same terms and conditions held by the portfolio (*i.e.*, offering a 20-year contract for 20 years)" or by "looking to the value of products sold, again with similar terms and conditions."[143] The abandoned Renewable Portfolio Standard ("RPS") adder employed such an approach, valuing "long-term RPS contracts in the portfolios at the current replacement price as measured by actual transactions."[144] By contrast, "[t]he value of a product cannot reasonably be determined . . . using a market price for a product with fundamentally different attributes. An egregious conflict arises when using short-term prices to value attributes attached to resources acquired to meet long-term needs."[145] Yet this conflict is precisely what the Decision achieves.

a. The Brown Power Benchmark Undervalues Energy Contracts

The Commission retains its existing "brown power benchmark" to estimate the value of fossil fuel and greenhouse gas-free resources despite substantial evidence that it undervalues the IOUs' energy contracts. The brown power benchmark values energy by using market indices of the coming calendar year's on-peak and off-peak power prices.[146] It thus relies on the flawed assumption that short-term sales capture the full value of long-term contracts for energy.[147] This mismatch fails to credit departing customers for the "inherent hedge and option value" in long-

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[142] Tr. 812:3-5 (IOUs, Cushnie).
[143] CalCCA-1 at 2B-3; *see also* UCAN-4 at 12 (explaining that "[b]ilateral contracts can be used for multiple markets, not just a single CAISO spot market").
[144] *Id.*
[145] CalCCA-1 at 2B-4.
[146] D.07-01-030 at 13; *see also* AD-1 at 9.
[147] Tr. 1066:13-21 (TURN, Woodruff) (testifying that it "might be" possible that "there is value in a long-term brown power contract . . . that couldn't be realized through short-term sale into the Cal ISO market"); *id.* at 1068:4-25 (TURN, Woodruff) (acknowledging appropriateness of "match[ing] the curve that you're using to gauge value of an attribute closer to the term of the contract under which it's procured").

term contracts,[148] such as the ability of the contract owner to use the asset flexibly in response to price fluctuations[149] and to hedge against risk exposure.[150] The Decision acknowledges concerns that the benchmark fails to "completely capture the long-term value of portfolio resources." Yet, in the same breadth, the Commission dismisses these concerns for failure of proof,[151] even though extensive testimony in the record demonstrates the need to employ long-term valuation metrics to better capture the value of long-term assets.[152] If the Commission believed that proposals to correct the brown power benchmark were underdeveloped, the appropriate response would be to move them to Phase 2 for further elaboration as it did with other such proposals.[153] But to dismiss these concerns outright despite extensive documentation of cost shifts amounts to legal error.

b. The Flawed Capacity Adder Shortchanges CCA Customers by Relying on Incomplete Market Data

The disconnect between the Commission's short-run valuation metrics and the long-term nature of the IOUs' assets is even more pronounced with respect to the modified Capacity Adder. The Commission first adopted a Capacity Adder in Decision 06-07-030 after recognizing that using only the brown power benchmark understated value of the IOU's portfolios, including the value of compliance with Resource Adequacy ("RA") requirements.[154] The Commission's Capacity Adder is calculated using year-before purchase and sale prices recorded in the Energy

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[148] UCAN-1 at 9; Tr. 899:20-900:2; *see also* UCAN-2 at 4 ("There is always a price premium paid to reduce long-term uncertainty, which is a major part of the hedge value inherent in bilateral contracts; spot (physical) prices have little if any hedge value, so would systematically understate bilateral contract value.").
[149] Tr. 1094:5-16.
[150] Tr. 900:8-16.
[151] D.18-10-019 at 35-36.
[152] *See, e.g.*, UCAN-4 at 3-5.
[153] *See* D.18-10-019 at 111-17
[154] D.06-07-030 at 10; *see* CalCCA-1 at 1-11.

Division's annual RA Report.[155] Yet the RA Report severely understates the value of capacity by relying on a limited number of short-term transactions that do not match the long-term nature of the utilities' capacity resources.[156] The Commission fails to even attempt to address these well-documented shortcomings, summarily concluding only that it is "not persuaded that any of the alternatives proposed represent a better capacity benchmark than the RA Report."[157] The Commission's poorly reasoned finding that its revised Capacity Adder "will produce reasonably accurate estimates"[158] is contradicted by substantial evidence in the record.

As the Commission acknowledges, based on 2016 data, use of the RA Report would cut recognized capacity value by as much as half, reducing it from $4.86/kW-month to $2.44/kW-month for system RA contracts and $3.20/kW-month for local RA contracts.[159] The RA Report's $29.28/kW-year value for system RA is also radically misaligned with other indicators of value. For instance, as expert witness Mark Fulmer testified for AReM/DACC, the prior capacity adder itself short-changed departing load by failing to reflect the full going-forward replacement cost of a combustion turbine: the proper approach, according to Fulmer, would be to value capacity at the cost of new entry (CONE), which would take into account fixed O&M, insurance, ad valorem, capital, and financing costs, as well as taxes.[160] Based on the California Energy Commission's 2015 estimates, AReM/DACC's CONE approach would value capacity at around

[155] D.18-10-019 at 73-74.
[156] CalCCA Comments on PD at 9 ("Extracting the values from the RA Report . . . , scrapes the 'bottom of the barrel' for capacity prices proxies, accounts for no more than 20 percent of the RA capacity used for compliance[,] and does not reasonably represent the value of all of the capacity in the Utilities' PCIA-Eligible portfolios.") (citing CalCCA-3 at 2B-4).
[157] D.18-10-109 at 152.
[158] D.18-10-019 at Finding of Fact 4.
[159] Decision 18-10-019 at 37 (citing TURN-1 at 6 & Ex. C).
[160] AD-1 at 18.

$233/kW-year.[161] The RA Report's value is also significantly lower than CalCCA's proposed capacity benchmark for long-term resources of $110.93/kW-year based on the Commission's own calculations for long-term capacity value,[162] as well as the $124/kW-year benchmark derived from taking the weighted average value of CAM and RA resources.[163]

The Commission also ignores the market distortions reflected in the RA Report.[164] As the Joint Utilities themselves testified, a capacity market "does not exist that would provide additional revenues to compensate for the full value of post-2002 resources."[165] The RA Report reflects these limitations: "less than 20% of the RA capacity used to meet compliance obligations is actually priced through the very limited set of bilateral contracts underlying the RA Report."[166] The RA Report "ignores the majority of capacity that is procured via long-term PPAs rather than via short-term transactions, overlooks capacity obtained from PCIA-eligible resources, and makes no attempt to assign any value to the capacity of UOG resources held in the portfolio."[167] Moreover, the RA Report "discloses prices for only one-year products," excluding the very long-term transactions that align with the capacity products being valued.[168]

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[161] *See* California Energy Commission, Cost of New Generation Report at Table E-4 (2015), *available at* https://www.energy.ca.gov/2014publications/CEC-200-2014-003/CEC-200-2014-003-SF.pdf; *see also* IOU-3 at 2-14, n. 44.
[162] *See* CalCCA-1 at 2B-7.
[163] CalCCA-3 at 2B-4 ("Relying on the 2016 RA Report, the contracted volumes represented only 19.7% of the RA Requirement for 2016, 14.9% for 2017 and 10.6% for 2018-2020.").
[164] *See id.* at 2B-3.
[165] IOU-1 at 5-9:21-23.
[166] CalCCA-3 at 2B-3; *see also id.* at 2B-5.
[167] *Id.* Testimony by CalCCA expert witness Robert Kinosian places the capacity value for PG&E's Diablo Canyon facility at $85/kW-year, nearly three times the average system RA value represented in the RA Report. CalCCA-3 at 2B-7:3-5; *see* CalCCA Opening Brief at 58.
[168] CalCCA-3 at 2B-3 to 2B-4; *see also id.* at 2B-4 ("Bilaterally contracted RA capacity provides a very limited view of the overall capacity 'market' and represents primarily the short-term residual transactions that LSEs engage in to balance their positions.").

The RA Report prices thus fail to capture much of the value of the IOUs' long-term capacity resources, including the hedge and option value they provide.[169] Even the Joint Utilities' expert witnesses concede the existence of these long-term value streams, attesting that optionality has value and that the IOUs maintain hedge policies to stabilize price volatility.[170] Given the nearly universal acknowledgment that a developed capacity market does not exist in California to more completely value these assets,[171] the appropriate solution to correcting the market price benchmark would be to locate a proxy for the actual value of the products at issue, such as the metrics proposed by CalCCA or AReM/DACC, rather than use a metric based on a limited and unrepresentative range of transactions.

c. Assigning No Value to Unsold Capacity Ignores the Benefits the Utilities and Their Customers Receive from Holding Long-Term Resources.

The Commission's decision to assign a zero or de minimis value to capacity expected to remain unsold magnifies illegal cost-shifts even further. This decision rests on the flawed premise that products that are not sold during the benchmark time period provide no benefit to the IOUs and bundled customers. Not so. The Commission overlooks value attributable to products that are purposefully withheld from the market to serve as a hedge against failure to meet RA compliance obligations or against price volatility.[172] It ignores evidence that the failure of a product to sell on the short-run capacity market may reflect the limited nature of that market

[169] *See* CalCCA Opening Brief at 54-55; Tr. 899:20-900:1, 900:8-16, 1093:25-1094:22.
[170] *See* Tr. 48:25-27 (IOUs, Wan), 60:6-21, 135:26-28 (IOUs, Sekhon).
[171] *See* IOU-1 at 5:9:21-23 (IOUs) (testifying that a capacity market does not exist that would generate "revenues to compensate for the full capacity value" of the IOUs' resources).
[172] *See* CalCCA Comments on PD at 7, 11; *see also, e.g.*, UCAN-1 at 9; UCAN-4 at 4; Tr. 899:20-900:1, 900:8-16, 1903:25-1094:22.

rather than the actual value of the asset.[173] And it refuses to acknowledge that the IOUs control when, where, and how to sell capacity and at what price, which creates troubling potential for manipulation and assumes that the IOUs are maximizing their efforts to sell excess capacity, despite evidence to the contrary.[174] As a consequence, the Decision impermissibly shifts costs by allowing bundled customers to benefit from the hedge and option value of unsold capacity while refusing to credit departing customers for these same benefits.

d. The Commission's Refusal to Use Long-Term Valuation Metrics is Inconsistent with Commission Practice

As CalCCA points out,[175] the Commission itself has rejected the same use of short-term prices to value the IOUs' portfolio products, which it acquiesces to here. In its 2017 report to the Legislature on cost and savings for renewable energy expenditures and contracts, the Commission refused to adopt the IOUs' proposed valuation methodology, which would "utilize[] short-term prices for energy and capacity."[176] The Commission explained,

> The CPUC's concern with the IOUs' approach is two-fold. First, few, if any resources in any of the large IOUs' portfolios would be considered cost-effective, including low-cost hydroelectric and nuclear resources. Second, the large IOUs' calculations are based on short-run avoided costs, and it seems unlikely that the large IOUs would be able to procure 20% or more of their portfolios accounted for by the RPS program under short-term contracts."[177]

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[173] *See* IOU-1 at 5:9:21-23; CalCC-3 at 2B-1316-18 ("Where utilities build capacity resources that outstrip need, they should be offering these resources in the long-term market to the LSEs that are serving load.").
[174] *See* Tr. 806:8-27 (IOUs, Lawlor) (testifying that PG&E did not seek authority for forward RPS sales until 2017 RPS plan); Tr. 808:1-19 (IOUs, Cushnie); *see also* CalCCA Comments on PD at 12.
[175] CalCCA Comments on PD at 12.
[176] CalCCA-106 (Padilla Report: Costs and Savings for the Renewable Portfolio Standard in 2016 (May 1, 2017)).
[177] *Id*.

Instead, the Commission decided to employ a well-vetted market price referent model as "the proxy for the long-term market price of electricity,"[178] and it reaffirmed that metric in its May 1, 2018 report to the Legislature, just months before contradicting its reasoning in the instant proceeding.[179] The Commission's use of short-run prices in this proceeding and long-run prices in these reports to value the same long-term attributes is arbitrary and capricious and subject to reversal if not corrected.

In a similar vein, when assigning value to long-term capacity for planning purposes, the Commission uses its E3 Avoided Cost Calculator, yielding a capacity value of $102.31/kW-year for Southern California and $110.93/kW-year for Northern California.[180] As CalCCA expert witnesses point out, the Commission's use of long-term values for planning and short-term values for the PCIA suggests that capacity assets are devalued from $110/kW-year to as low as $29/kW-year as soon as they become operational and their costs are included in the PCIA.[181] The Commission's decision provides no explanation for this anomalous result.

2. The Commission's Refusal to Adopt Adders for Greenhouse Gas Free Resources and Ancillary Services Ignores Substantial Evidence of Unaccounted for Value.

The Commission further violates section 366.2(g) and illegally shifts costs to departing customers by refusing to adopt an adder that would credit them for the premium attributable to

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[178] *Id.* at 10.
[179] CalCCA-107 at 12 (Padilla Report: Costs and Cost Savings for the RPS Program (Public Utilities Code 913.3) (May 1, 2018)) ("The Commission still finds the [market price referent] is the best method for comparing and determining cost savings for the RPS program, because it is a publicly vetted proxy for the cost of a new power plant it provides consistency with prior Padilla reports."), available at http://www.cpuc.ca.gov/General.aspx?id=6442457306.
[180] CalCCA-1 at 2B-7.
[181] *Id.* at 2B-7 to 2B-8.

GHG-free resources, despite substantial evidence that the value of these resources significantly exceeds that of fossil energy.[182]

The record provides extensive evidence of the premiums attributable to GHG-free resources including: the Joint Utilities promotion of the importance of their GHG-free assets in marketing and public relations materials;[183] load-serving entities' statutorily required Power Content Labels reflect the marketing value of GHG-free resources;[184] and PG&E's assertion in the Diablo Canyon Power Plant proceeding that GHG-free energy has value as high as that attributable to RPS-eligible resources.[185] The Joint Utilities also acknowledge the unique benefits and premiums attributable to GHG-free resources, conceding in testimony that CCAs have estimated carbon-free premiums of $2/MWh and $3.50/MWh, respectively, and deriving their own estimate of $6.14/MWh.[186]

The Commission does not refute evidence of a GHG-free market premium but instead wrongly concludes that it would be captured in the true-up for brown power.[187] The Commission relies on the Joint Utilities' assertion that the California Independent System Operator's ("CAISO") market prices reflect the costs of GHG compliance, so that GHG-free assets benefit from clearing at heightened market prices without having to pay compliance costs.[188] But even assuming that the Joint Utilities are correct that CAISO revenues perfectly incorporate compliance costs, their argument relies on the entirely unsupported premise that compliance

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[182] *See* D.18-10-019 at 151-53.
[183] *See* CalCCA Opening Brief at 63; CalCCA-116; CalCCA-117.
[184] *See* CalCCA Opening Brief at 64; CalCCA-1 at 2B-10.
[185] *See* CalCCA Opening Brief at 65-65; IOU-118, Ch. 3 at 3-11; IOU-118, Ch. 4 at 4-5; CalCCA-1 at 2B-11:3-5.
[186] IOU-3 at 2-25:7-15 & n.73; *see also* IOU-3 at 2-32:10-11 (Diablo Canyon Power Plant's "GHG-free energy undoubtedly provides statewide benefits.").
[187] D.18-10-019 at 150.
[188] *Id.* (citing Joint Utilities Reply Comments on PD and APD at 5).

costs precisely equate to GHG-free resource value.[189] No evidence in the record bears this out. And the IOUs' own extensive promotion of their GHG-free portfolios suggest that these assets have value that exceeds compliance-related savings.

Contradicting its own finding that the true-up perfectly captures any premium, the Commission also reasons that the data in the record do not converge on "a reliable market value on which to base an additional GHG-free benchmark that would apply to the hydroelectric and nuclear resources in the IOU portfolios."[190] In doing so, the Commission again uses market limitations as an excuse to short-change departing customers for the benefits that bundled customers receive. As Commission Rechtschaffen asserts in his concurring opinion, the appropriate response to the Commission's ambivalence would be to develop a precise and reliable GHG-free adder in Phase 2 of this proceeding,[191] not to altogether abdicate the Commission's responsibility to ensure that departing customers are comprehensively credited for the value of these resources.[192]

Furthermore, the Commission entirely fails to make findings or conclusions on the need for an ancillary services benchmark, despite acknowledging the proposals and testimony by CalCCA and others.[193] In addition to violating its responsibility to credit departing customers for these benefits, the Commission violates section 1705 by declining to enter findings on this material issue.

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[189] *See* CalCCA Reply Brief at 32.
[190] D.18-10-019 at 151.
[191] D.18-10-019 (Rechtschaffen, Commissioner, concurring) ("It is my hope and expectation that Phase 2 will seriously consider developing [a GHG-free premium] metric.").
[192] The Commission does not include a GHG-free adder among issues to be considered in Phase 2 but instead leaves open the possibility of developing a GHG-free adder at some unspecified future time, "[i]f market changes demonstrate a consistent heightened value for GHG-free resources in the coming years." D.18-10-019 at 152.
[193] *See* D.18-10-019 at 13.

D. The Decision Impermissibly Assigns Avoidable Electricity Procurement Costs to Departing Customers.

Commission decisions must include “findings of fact and conclusions of law by the commission on all issues material to the order or decision.”[194] Section 366.2(f)(2) limits PCIA-eligible costs to “*unavoidable* electricity purchase contract costs” that are “*attributable* to the customer.”[195] As a consequence, two issues material to Decision are whether IOU portfolio costs are unavoidable and attributable to departing customers within the meaning of the statute. The Commission abused its discretion and failed to proceed in the manner required by law when it refused to make any findings on the avoidability or attribution of the IOUs’ electricity purchase contract costs. Because the decision nonetheless renders the IOUs’ entire portfolio costs PCIA-eligible, its conclusions are not supported by the findings. Moreover, substantial evidence in the record shows that significant costs associated with the IOUs’ RPS portfolios were avoidable when the IOUs contracted for those resources and/or are not properly attributable to departing customers. The Commission’s allocation of the above-market component of those costs to departing customers is contrary to statute and must be corrected.

1. The Decision Ignores Substantial Evidence that the IOUs Were Executing Contracts for Renewable Resources at Artificially Inflated Prices.

As noted above, AB 117 limits the portfolio costs eligible for inclusion in the PCIA to “unavoidable electricity purchase contracts costs.”[196] Under settled principles of statutory construction, this term is to be given its “plain, commonsense meaning.”[197] Where, as here, the

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[194] Pub. Util. Code § 1705; *see also California Manufacturers Assn. v. P.U.C.* (1979) 24 Cal.3d 251, 258-59 (annulling Commission decision because its “findings on the material issues are insufficient to justify the rate spread adopted”).
[195] Cal. Pub. Util. Code § 366.2(f)(2) (emphasis added).
[196] Cal. Pub. Util. Code § 366.2(f)(2).
[197] *Riverside County Sheriff’s Dept. v. Stiglitz* (2014) 60 Cal.4th 625, 630.

Legislature did not specifically define a term, it is appropriate to look to dictionary definitions to discern its plain meaning.[198] Merriam-Webster's Dictionary defines "unavoidable" as "inevitable," which it in turn defines as "incapable of being avoided or evaded."[199] The term "unavoidable electricity purchase contract costs" thus plainly excludes those costs that the utility could have avoided at the time of contracting, such as by negotiating a more favorable price term or by limiting long-term contracting to account for forecasted departures.[200] Avoidable purchase contract costs also include those that the utility could have reduced or eliminated through prudent post-procurement portfolio management practices, such as by selling its long positions on favorable terms.[201]

Extensive evidence in the record shows that a significant portion of the contract costs associated with the IOUs' green power procurement could and should have been avoided at the time of contracting. In particular, testimony by expert witness Bill Powers on behalf of POC shows that the majority of utility-scale solar and wind contracts executed between 2008 and 2012 contained prices terms as much as $50/MWh above market rates at the time.[202]

SDG&E's Pacific Wind contract and PG&E's El Dorado Solar contract are illustrative of these inflated price trends. SGD&E initially executed a 20-year bilateral contract for the Pacific Wind project in 2005 at $57/MWh, a rate consistent with similar contracts at the time, but

[198] *See, e.g.*, Order Instituting Rulemaking on Regulations Relating to Passenger Carriers Ridesharing, and Online-Enabled Transportation Services, D.16-12-036, 2016 Cal. PUC LEXIS 686, *10-12, 19 & n. 8-11, 17 (Dec. 15, 2016) (consulting Webster's Dictionary to interpret statute); *Newark Unified School Dist. v. Sup. Ct.* (2015) 245 Cal.App.4th 887, 899 (same).
[199] Merriam-Webster Online Dictionary, "Unavoidable," https://www.merriam-webster.com/dictionary/unavoidable (last visited Nov. 11, 2018); Merriam-Webster Online Dictionary, "Inevitable," https://www.merriam-webster.com/dictionary/inevitable (last visited Nov. 11, 2018).
[200] POC Opening Brief at 4.
[201] *Id.*; *see* CalCCA-01 at 2A-4.
[202] POC-1 at 13-27; POC-2 at 5-13.

renegotiated and executed an amended contract five years later, which doubled the contract price to $115.47/MWh while reducing the nominal power output during a period when renewable pricing was on the whole declining.[203] Increased O&M costs and costs attributable to the delay documented in the Independent Evaluator's reports could account for at most a price increase of approximately $5.50/MWh; the remaining $52.97 delta is unexplained.[204] Further wind power contracting by SDG&E during this period betrays similar above-market premiums. For instance, SDG&E executed two utility-scale wind contracts in February and April 2011 for around $105/MWh,[205] a price nearly $40/MWh higher than that of the average Western wind project.[206]

Solar procurement during this period exhibits similar above-market pricing. In December 2008, PG&E executed a contract for the 10 MW El Dorado solar project at a levelized price of $139/MWh, almost exactly one year after SCE had executed a contract for the 21.6 MW FSE Blythe 1 project using identical technology at a price of only $89.625/MWh.[207] This $50/MWh price increase again occurred during a period when renewable energy pricing was declining and the thin-film solar photovoltaic technology used by both projects was becoming increasingly cost competitive.[208] Moreover, the El Dorado project ranked at the bottom of PG&E shortlisted bids for the solicitation, and the only reason given for its selection—its asserted viability advantage—failed to explain the anomalously high costs the project would impose on ratepayers.[209] A protest

[203] POC-1 at 24-25; POC-2 at 6.
[204] POC-2 at 7-8.
[205] *See* SDG&E-1 at Lines 24 (ESJ Wind Project) and 48 (Ocotillo Express Wind Project).
[206] POC-1 at Att. 21, PDF. p. 52 (Lawrence Berkeley National Laboratory, 2014 Wind Technologies Market Report: Summary at 52 (Aug. 2015)) (reporting that an average contract price of $60/MWh for western wind project contracts executed between 2012 and 2014).
[207] POC-2 at 10-11; POC-105 at PDF p. 4; POC-104 at 31 & App. IV; POC-1 at Ex. G, PDF p. 4; POC-2 at Tr. 824:11-14 (IOUs, Cushnie); *see* POC Opening Brief at 14.
[208] *See* POC Opening Brief at 14; POC-109 at 1.
[209] POC-102 at 3; IOU-3 at AppD-67.

filed by the Commission's Office of Ratepayer Advocates ("ORA") (now the Public Advocates Office) linked the price inflation to a "tainted solicitation process" and PG&E's favoritism toward Sempra Generation, the project's owner.[210] As the project's Independent Evaluator explained, "Sempra Generation successfully convinced PG&E management to bring a non-shortlisted project into negotiations in part by offering a much lower price than that provided by the original Offer, and then later raised the price back above the original Offer."[211] No other participant in PG&E's solicitation was accorded similar treatment.[212]

As with wind energy, the approval of the anomalously high-priced El Dorado contract opened the door to price inflation for similar solar projects.[213] PG&E, for instance, executed solar contracts with prices of $129.25 and $147.50, respectively, a year after executing the El Dorado contract.[214]

The Decision gives no mention at all to the extensive evidence of avoidable procurement costs. Nor does it address POC's proposals to exclude avoidable procurement costs from the PCIA without reopening individual project approvals.[215] The Commission could, for instance, create benchmarks reflecting the actual market value of solar and wind projects during this period of price inflation and assign costs in excess of that benchmark to shareholders to protect

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[210] *See* POC-102 at 2; *see also* POC-103; POC Opening Brief at 15-17.
[211] IOU-3 at AppD-62; POC Opening Brief at 63.
[212] IOU-3 at AppD-64; *see also id.* at AppD-65 (discussing factors that "created an appearance that PG&E's management provided preferential, advantageous treatment to Sempra Generation compared to other Participants").
[213] *See* POC Opening Brief at 17-18 (Table 1); POC-1 at 18-19 (Table 5); *see also* Tr. 480:4-13 (IOUs) (testifying that the IOUs take into account "every piece of information" in evaluating offers"); Tr. 490:13-25 (IOUs) ("Of course, any time you have information about the marketplace, that's not something you're going to ignore, but it's the bids that you receive in a solicitation that are actionable.").
[214] POC Opening Brief at 17-18 (Table 1); POC-01 at 18-19 (Table 5).
[215] *See* POC Opening Brief at 18-22.

utility customers from bearing sole responsibility for imprudent procurement decisions.[216] As demonstrated in Bill Powers' testimony, Renewable Auction Mechanism contracts provide a readily accessible benchmark to ascertain the avoidable component of solar contracts,[217] and reliable market indicators like the Pacific Wind contract and Lawrence Berkeley National Laboratory statistics could set the benchmark for wind projects.[218] The Commission should have implemented such mechanisms for removing avoidable procurement costs from the PCIA, or at least reserved the issue for further consideration in Phase 2. It did not. The Commission's tacit approval of PCIA charges that incorporate avoidable costs is legal error and its failure to even address the issue a clear abuse of discretion.

2. The Decision Ignores Substantial Evidence that the Utilities Were Over-Procuring Resources Due to Their Failure to Forecast Adequately Load Departures.

In addition to limiting the PCIA to net unavoidable costs, section 366.2(f)(2) requires that any costs included in the indifference charge be "attributable" to departing customers. The Legislature clarified the meaning of "attributable" in section 366.3, when it required the Commission to ensure that "departing load does not experience any cost increases as a result of an allocation of costs that were not incurred on behalf of the departing load."[219] In other words, for costs to be attributable to departing customers, they must have been specifically incurred on their behalf. Costs are not attributable to departing customers if they result from the procurement of power or capacity that was not intended to or did not in practice benefit those customers.[220]

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[216] *Id.*
[217] POC-2 at 20-22; POC Opening Brief at 18-20.
[218] POC Opening Brief at 20-21; POC-1 at 23; POC-1, Att. 21, PDF. p. 52 (Lawrence Berkeley National Laboratories 2014 Report).
[219] Cal. Pub. Util. Code § 366.3.
[220] *See* POC Opening Brief at 5; CalCCA-1 at 2A-7 to 2A-8.

The Commission fails entirely to address the substantial evidence in the record showing that the IOUs are including costs in the PCIA that are not attributable to departing customers within the meaning of the statute. These costs include those allocated to departing customers whom the IOUs either knew, or should have known through appropriate forecasting, would be imminently departing for newly forming CCAs. They also include costs incurred because the IOUs failed to adjust their procurement practices even upon receiving clear notice of imminent departures, and even after the customers departed. And they include costs of UOG resources dedicated to serving bundled customers.

First, the record shows that, despite longstanding and explicit Commission directives to the IOUs to "adjust their load forecasts and resource portfolios" to account for departures,[221] the IOUs have refused to adequately forecast load departures and to adjust their portfolios even when they had notice of CCA formations. For instance, SCE's witness testified that absent a binding notice of intent indicating that a CCA has "actually started operations"—which only one CCA has provided—SCE will not "plan to balance the portfolio around [a CCA's] formation intentions" or forecast customer departures.[222] PG&E forecasts departing load in a "similar fashion"—meaning, short of a binding notice of intent, not at all.[223] As a result, SCE failed to forecast departing load until its 2016 ERRA filing, even though the CCA Lancaster Choice Energy began operating in its service territory in May 2015.[224] Likewise, PG&E did not forecast

[221] D.08-09-12 at 54-55; *see also* D.04-12-046 at 30 (The IOUs should "us[e] available information to forecast customer demand and should incorporate CCA load losses into their planning efforts, just as they would include any other forecast variable related to expected changes in supply or demand."); D.04-12-048, Ordering Paragraph 9 at 239 (directing IOUs to "acknowledge potential CCA departing load . . . in future procurement plans").

[222] Tr. 809:20-810:3, 811:5-24 (IOUs, Cushnie).

[223] Tr. 813:9-10 (IOUs, Lawlor).

[224] Tr. 825:4-8 (IOUs, Cushnie); CalCCA Opening Br. at 98; *see also* About Lancaster Clean Energy, http://www.lancasterchoiceenergy.com/about-lce/.

the departure of customers for Marin Clean Energy ("MCE") (then Marin Energy Authority) even though MCE submitted its implementation plan to the Commission on December 4, 2009, providing notice of its intent to launch in 2010 and its negotiations for electricity contracts.[225]

Likewise, the record shows that the IOUs have failed to adjust their portfolios in accordance with Commission directives even when they had clear notice of CCA formation. PG&E's expert witness testified that "a reasonable portfolio manager" would not adjust a utility's procurement decisions in response to small CCA load departures, such as that represented by MCE's 2010 vintage.[226] Thus, even after MCE submitted its implementation plan providing PG&E and the Commission notice of its imminent formation and ongoing procurement activities, PG&E executed contracts for 1.7 GW of new capacity, approximately 600 MW of which was brought under contract after MCE had launched and customers had departed.[227] PG&E nevertheless assigns costs from all of these contracts to MCE's 2010 vintage, even though the costs are neither "avoidable" nor "attributable" to those customers within the meaning of the statute.[228]

Other evidence in the record shows that the IOUs have refused to change their long-term procurement practices even under much higher levels of load departure. Mr. Wan testified on behalf of the Joint Utilities that he would consider departures as high as 20% of a utility's total load to constitute "a small departure" that would not cause excess supply and thus trigger the need to adjust acquisition practices.[229] SCE's expert witness also testified that when SCE

[225] Tr. 818:4-9, 16-19; 819:18-820:10; Tr.857:18-20 (IOUs, Lawlor).
[226] Tr. 855:5-9 (IOUs, Lawlor); *see also* Tr. 853:25-854:6 (testifying that when MCE launched in 2010, its customers represented between 0.1 and 0.2% of PG&E's total load).
[227] CalCCA Opening Brief at 99; CalCCA-123.
[228] *See* CalCCA-123 (PG&E 2010 Contract Execution Dates from Attachment 10 ALJ Requested Data Matrix); Tr. 820:10-822:28; *see also* MCE Comments at 8; CalCCA Opening Brief at 99.
[229] Tr. 37:20-21 (IOUs, Wan).

receives notice of CCA formation short of a binding notice of intent, it customarily "curtail[s] [its] short-term procurement activity as a hedge that [a CCA] may or may not form" but not its acquisition of PCIA-eligible long-term resources, the costs of which can be shifted to the CCA's customers once they depart.[230]

The illegal allocation of costs to CCA customers, which were not incurred on their behalf and are thus not attributable to them, is also evident with respect to the UOG portfolios. As discussed in Section III.A.3 above, the IOUs concede, and the Commission's decision acknowledges, that the adopted PCIA formula will allocate UOG costs to CCA customers, which were incurred after those customers left bundled service, including capital addition costs, O&M and fuel costs, and taxes.

In addition, the Decision allows the IOUs to allocate costs for UOG facilities to departing customers, even though the facility was not intended to and never did serve those customers. For instance, SCE's Pebbly Beach generating station is located on and dedicated to serve the ratepayers of Catalina Island, whose electric system is entirely isolated from the mainland 26 miles away.[231] Catalina Island has not experienced any load departures, and its electric system is not plagued by the excess supply problems evident elsewhere.[232] The costs associated with this facility cannot, in any sense, be attributed to customers who have departed from SCE's mainland electric system and thus were not and could not have been served by Pebbly Beach. Nevertheless, SCE included the $26.4 million annual costs of Pebbly Beach in its 2018 PCIA calculation.[233] Making matters worse, SCE failed to include any offsetting value attributable to

[230] Tr. 811:25-812:5 (IOUs, Cushnie).
[231] IOU-3 at 2-29:4-6.
[232] CalCCA-1 at 2B-17:10-13.
[233] CalCCA-1 at 2B-17:16-17.

Pebbly Beach in its PCIA calculations as required by section 366.2(g) until CalCCA pointed out this statutory violation.[234] While SCE has proposed to correct this deficiency going forward,[235] the Commission should also require it to refund departing customers whose allocated costs in the past were not offset by the value of the benefits Pebbly Beach provides.

As with avoidable contract costs, the Decision should be revised to exclude from the PCIA this set of costs that are not legally attributable to CCA customers. If the Commission has concerns about requiring utility customers to bear full responsibility for these investment decisions, it can allay them by exercising its discretion to require shareholders to shoulder their fair share of above-market costs.

3. The Commission Has Ample Authority to Allocate Appropriate Responsibility for Above-Market Costs to Shareholders

The Joint Utilities opposed POC's proposals for eliminating statutorily barred costs from the PCIA by arguing that the Commission lacks authority to reconsider prior investment decisions and to allocate appropriate cost responsibility to shareholders. The Joint Utilities' arguments are misguided and should be soundly rejected when the Commission takes up the issue on rehearing.

First, the Joint Utilities contend that consideration of shareholder responsibility for avoidable costs is outside the scope of the proceeding.[236] Not so. This argument ignores the ALJ's rulings permitting testimony on the topic,[237] and it ignores the Scoping Memo's explicit

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[234] IOU-3 at 2-30:9-11 ("CalCCA . . . raises the valid point that, to date, SCE has not included nay revenue from sale of Pebbly Beach output in the calculation of the PCIA."); *see also* CalCCA-1 at 2B-17:16-18.
[235] IOU-3 at 2-30:11-16.
[236] *Id.* at 7-1 to 7-12.
[237] R.17-06-026, Administrative Law Judge Ruling Denying Motion of San Diego Gas & Electric Company and Pacific Gas and Electric Company at 4 (Apr. 14, 2018) ("[W]hile the Scoping Memo does

directive that the PCIA may "only include legitimately unavoidable costs,"[238] an objective that the Decision reaffirms.[239] And even if the Joint Utilities were correct—which they are not—that the scope of Phase 1 precludes consideration of shareholder responsibility, the Commission has already incorporated this topic into Phase 2.[240] As the Commission's decision states with respect to Phase 2, "[u]tilities are of course required to manage their portfolios prudently," and "[i]mprudent management would justify disallowing recovery of portfolio costs."[241] If the Commission does not provide for shareholder responsibility for avoidable and unattributable procurement and investment-related costs in Phase 1, it should explicitly require Phase 2 to consider shareholder responsibility for past imprudent decision-making as well as "future portfolio mismanagement."[242]

The Joint Utilities next contend that analysis of shareholder responsibility contravenes section 454.5.[243] But that provision simply provides for utility procurement planning to enable more rational procurement of energy following the 2000-2001 energy crisis; it does not proscribe scrutiny of past procurement decisions or otherwise touch on allocation of above-market costs under the PCIA.[244]

Finally, the Joint Utilities contend that recognition of shareholder responsibility would constitute a collateral attack on Commission decisions approving utility contracts.[245] But as

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not invite testimony on shareholder responsibility for procurement costs, neither does it bar that testimony.") (quoting E-Mail Ruling on Motion to Expand Common Testimony Outline (Mar. 26, 2018)).
[238] Scoping Memo at 13.
[239] D.18-10-019 at 16, 120.
[240] D.18-10-019 at 112.
[241] *Id*.
[242] *Id*.
[243] IOU-3 at 7-2:22-25.
[244] *See* Cal. Pub. Util. Code § 454.5; POC Opening Brief at 10-11.
[245] IOU-3 at 7-2:10-21.

noted above, the Commission need not invalidate prior contracts or revisit individual prudency findings to determine appropriate shareholder responsibility for avoidable above-market costs. Indeed, there is ample precedent for such an approach. A similar argument played out in the CTC proceeding, with the IOUs asserting that their "investments were found prudent at the time they were made and therefore should be entitled to full recovery" and parties responding that "[s]hareholders should bear a fair share of the burden of stranded costs," particularly given that "utility shareholders have been compensated for business and competitive risks for many years."[246] The Commission, recognizing that it is "not obligated to guarantee full recovery of the costs the utilities have incurred to construct uneconomic assets," agreed that shareholders should be held to account and thus provided for "transition cost sharing between ratepayers and shareholders" by reducing the rate of return to shareholders on investment-related transition costs.[247] The Commission could take a similar approach here.[248]

Furthermore, even if allocating a fair share of above-market costs to shareholders required modification of the initial resolutions allowing for rate recovery, the Commission retains continuing jurisdiction to do so.[249] The Commission could use Phase 2 to develop and implement mechanisms to identify the avoidable component of resource costs and to begin the process of reopening prior approvals to make the modifications needed to comply with statute.

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[246] D.95-12-063 (Dec. 20, 1995), as modified by D.96-01-009 (Jan. 10, 1996) at 82-83 (quoting Association of California Water Agencies, et al., Customer statement on principles on electric restructuring response to the Memorandum of Understanding (Oct. 2, 1995)).
[247] *Id.* at 83, 85; *see also id.* at 84-85 (recognizing that two essential "principles—benefits for ratepayers and proper incentives for utilities—can be accommodate in a recovery mechanism that reduces the return on investment-related transition costs").
[248] *See* CalCCA Comments on PD at 13 (advocating for a reduced rate of return for certain UOG assets based on CTC precedent).
[249] *See Sale v. R.R. Com. of Cal.* (1940) 15 Cal.2d 612, 616 ("The commission has continuing jurisdiction to rescind, alter or amend its prior orders at any time," such as "upon a showing of mistake or newly discovered evidence.").

E. The Commission Committed Legal Error by Refusing to Consider Independent Evaluator and Procurement Review Group Reform and by Subordinating Securitization Proposals.

POC and UCAN agree with the Commission that a second phase of this proceeding should be opened "to develop structures, processes, and rules governing portfolio optimization" and prudent portfolio management.[250] As discussed above, however, the Commission's decision to limit Phase 2 to "going forward" portfolio optimization and management proposals constitutes an abuse of discretion, unless the Commission modifies its decision to remove from the PCIA avoidable costs and costs that are not attributable to CCA customers. In addition, the Commission erred in refusing to make findings and conclusions on two issues material to ensuring that the utilities effectively align their procurement decisions with load and mitigate the further accumulation of above-market costs: reform of the independent evaluator and procurement review group processes.[251] The Commission also erred in subordinating securitization—a frequently used financing mechanism to reduce costs—to other cost-reduction proposals, when substantial evidence shows that securitization can dramatically reduce above-market costs and can occur alongside additional securitization programs.[252]

1. The Commission Erroneously Refused to Make Findings of Fact and Conclusions of Law on Independent Evaluator and Procurement Review Group Reform.

As the Decision recognizes, improving alignment between the IOUs' portfolios and load will require the creation of new mechanisms and refinement of old ones to ensure effective

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[250] D.18-10-019 at 111-12.
[251] *See* Cal. Pub. Util. Code § 1705 (Commission decisions must include "findings of fact and conclusions of law . . . on all issues material to the . . . decision.").
[252] In addition to creating a working group dedicated to securitization, as discussed below, the Commission should expand the Phase Two working group list to encompass load forecasting, which the Commission's decision makes a priority Phase Two issue. *See* D.18-10-019 at 113.

oversight over utility procurement and portfolio management practices. The Joint Utilities in testimony cited Independent Evaluator ("IE") review and their Procurement Review Groups ("PRG") as two key oversight mechanisms "to ensure fairness among potential counterparties and transparency of individual transactions."[253] Yet substantial evidence in the record shows that IEs and PRGs are failing to accomplish these objectives and instead have permitted, and even facilitated, the accumulation of the significant stranded costs at issue in this proceeding. Despite the extensive testimony and POC's repeated arguments on these issues, the Decision ignores them entirely, failing to make any findings or conclusions on IE and PRG processes and reforms. The Commission abused its discretion and failed to proceed in the manner required by law by declining to address these material issues.

Independent evaluators are intended to "ensure a transparent and fair bid selections process,"[254] but substantial evidence shows that IEs are insufficiently impartial to do so effectively.[255] The Commission requires IE review of all competitive solicitations for products of two or more years, as well as affiliate transactions like those between SDG&E and its parent company, Sempra Energy.[256] But rather than oversee the review itself, the Commission has charged the IOUs with both IE selection and compensation.[257] As a result, IEs are hired, managed, and compensated by the utilities, essentially taking on the role of a paid contract employee.[258] For instance, SDG&E used a single IE, Jonathan Jacobs of PA Consulting, to

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[253] IOU-1 at 3-1 & 3-11.
[254] D.08-11-008 at 26.
[255] *See, e.g.* POC-1 at 27-28; POC Opening Brief at 28-30.
[256] *Id.* at 27, 30, 40; POC-1 at 27.
[257] *See* D.07-12-053 at 136-37 (declining to transfer IE contracting authority to the Commission and directing each IOU to develop and maintain a pool of at least three IEs).
[258] Tr. 730:25-731:19 (POC, Powers) (testifying that utility compensation is "a major source of income" for IEs, who are retained by the utility to review large volumes of procurement decisions, and that the IEs therefore do not occupy an "independent role").

review all or nearly all of its in-state solar and wind solicitations during the period of substantial price inflation, circa 2008 to 2010.[259] This entanglement compromises the necessary independence of IEs.[260] Recognizing this problem, ORA has appropriately recommended transferring hiring and supervision of the IEs to the Commission "to ensure the true impartiality of the IE."[261] Though it has promised to explore this possibility,[262] the Commission has deferred action on the proposal for over a decade.

In addition to the biases inherent in their hiring and compensation, IEs have a propensity toward conflicts of interests, which can further compromise the impartiality of their review. Because IEs often come "from firms that have multiple clients" and a "consultant's client base is fluid," conflicts of interest may occur during the duration of an IE's contract.[263] The Commission has taken only minimal steps to address these concerns by requiring the IOUs "to develop comprehensive conflict of interest disclosure requirements for the IE" and by generally endorsing the Federal Energy Regulatory Commission's minimum guidelines for review of affiliate transactions.[264] But beyond "ensuring that the personnel working as an IE do not have market participant relationships," the Commission has not developed specific, enforceable conflict of interest rules to assure that evaluations are fair and unbiased.[265] For instance, SCE's

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[259] POC-1 at 27; *see also* Tr. 731:13-19 (POC, Powers).
[260] *See* Tr. 730:25-28 (POC, Powers).
[261] D.07-12-052 at 135.
[262] *Id.*at 136 (concluding that it was "not practical" at the time "to transfer the IE contracting authority to the Commission" but promising to "continue to explore ways in which to do so in the future").
[263] *Id.* at 141.
[264] D.04-12-048 at 219.
[265] Tr. 787:22-788:9 (IOUs, Cushnie).

expert witness testified that he was unaware of any rules that would prevent an IOU from hiring a former employee, executive, or contract worker to serve as an IE for that same utility.[266]

POC set forth various proposals to ensure that IEs function with the requisite independence to robustly and impartially review IOU procurement, including: (1) enacting conflict-of-interest rules that preclude IEs from reviewing procurement proposals for an IOU if they are a current or former employee, executive, or contractor of that IOU, and (2) transferring authority to hire, supervise, and compensate IEs from the IOUs to ORA.[267] The Commission's refusal to enter findings or conclusions on these issues is not only reversible error, it also undermines the Commission's efforts to ensure progress in Phase 2 toward minimizing accumulation of stranded costs going forward.

Likewise, the record shows that structural features of the Procurement Review Group process make it incapable of serving as the "effective vehicle for IOU dialogue" and procurement oversight that the Commission envisioned.[268] The PRG possesses only "consultative and informal advisory functions:"[269] it "has no standing . . . to approv[e] or disapprov[e] a contract."[270] If PRG members disagree with a utility proposal, the utility retains discretion to disregard their inputs. In addition, there is no reporting requirement for the PRG to communicate its concerns to the Commission, either orally or in writing.[271] Rather, PRG

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[266] Tr. 787:22-788:9 (IOUs, Cushnie); *see also* Tr. 787:24-787:3 (IOUs, Cushnie) (testifying that witness was "unaware of a prohibition on" an IOU retaining an IE who had "been a paid consultant for the utility or even paid directly by the utility as an employee").
[267] POC Opening Brief at 30; *see also* Tr. 733:16-23 (POC, Powers).
[268] D.03-12-062 at 46; *see* POC Opening Brief at 30-32.
[269] D.03-12-062 at 46.
[270] Tr. at 781:20-24 (IOUs, Cushnie); *see also* Tr. 1071:14-21 (TURN, Woodruff) ("[T]he procurement review groups don't really have any decisional authority.").
[271] Tr. 783:17-20 (IOUs, Helm) ("But the PRG itself, where there are differences of opinion, doesn't formally pass those on through some written work product or oral comment to the Commission.").

members would need to incur the time and expense of filing a formal protest of an advice letter to bring concerns to Commission attention.[272] Independent Evaluators may summarize PRG meetings on procurement activities but offer scant detail.[273] Commission resolutions communicate to the public only that procurement proposals were presented to the PRG and whether, according to the utility, PRG members objected to the proposal.[274] And because of the enormous volume of proposals that may be presented—"hundreds of contracts over the course of several years"—PRG members' ability to review any given procurement proposal in meaningful detail is highly limited.[275] The IOU also has considerable discretion to determine what information to present to the PRG. There is no requirement, for instance, that members be presented with relevant market information against which to evaluate a proposal, such as the terms of previously executed contracts for similar projects.[276]

PRG members must execute non-disclosure agreements with broad remedy provisions and devote significant personnel, time, and resources to PRG participation.[277] These costs prevent community advocacy groups from taking part in the PRG process, hindering their ability to engage in successful dialogue about IOU contracts that will impact their constituents and making PRGs unrepresentative of the broader stakeholder community. Furthermore, because

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[272] Tr. 783:17-20 (IOUs, Helm).
[273] *See, e.g.*, IOU-3 at AppD-37 (providing cursory overview of PRG discussions).
[274] *See* Tr. 729:14-22 (POC, Powers) (Commission Resolutions or advice letters note that the utility "did present the project to the PRG, period."); POC-103 at 6 (noting that PG&E's PRG "participated in review of the PPA" and "PG&E stated that none of the PRG members objected to PG&E's execution of the PPA").
[275] Tr. 1071:6-7, 1072:1-3 (TURN, Woodruff).
[276] Tr. 785:21-24 (IOUs, Cushnie).
[277] Tr. 728:21-28 (POC, Powers).

even non-confidential information exchanged within PRG meetings is subject to participants' non-disclosure agreements, the PRG is a black box into which the public has no visibility.[278]

Ultimately, PRGs enable the IOUs to create a false impression of public scrutiny, making it easier for the Commission to rubber-stamp over-priced and unnecessary procurement. The Commission should use Phase 2 to replace the closed-door PRG process with broad public scrutiny of IOU procurement proposals, and it should create a working group or workshops on this topic.[279]

If the Commission retains PRGs at all, it must apply the Bagley-Keene Open Meeting Act[280] to the PRGs and should develop rules in Phase 2 to ensure the Act's effective implementation. The Bagley-Keene Act requires that "[a]ll meetings of a state body" be "open and public and all persons . . . be permitted to attend any meeting," unless a closed session is specifically authorized.[281] PRGs meet the Act's definition of "state body."[282] PRGs were authorized by and are governed by the Commission, exercising delegated authority to review utility procurement practices and to advise the IOUs and Commission staff on these activities.[283] Energy Division and ORA staff participate in the PRGs, and their activity is supported by public funds.[284] Other PRG members may also receive intervenor compensation for participating. PRGs thus qualify as a "multimember body" created by the Commission exercising delegated

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[278] Tr. 728:1-2, 21-22 (POC, Powers).
[279] *See* POC Opening Brief at 32-34; Tr. 733:6-11 (POC, Powers) ("If you get rid of the confidentiality, you don't need the independent evaluator or the PRG because you now have the public at large assessing whether this is a reasonable price or not.").
[280] Cal. Gov. Code §§ 11120-11132.
[281] Cal. Gov. Code §§ 11123, 11126, 11132.
[282] *See* Cal. Gov. Code § 11121.
[283] *See* D.03-12-062 at 24-25; D.03-12-062 at 44-48; D.07-12-052 at 1119; D.12-04-046 at 65-66.
[284] *See, e.g.*, D.07-12-052 at 120 (listing PRG membership).

authority;[285] as a "multimember advisory body of a state body" "created by formal action of the state body" and comprised of more than three members;[286] and a "multimember body on which a member of . . . a state body . . . serves in his or her official capacity" and that is supported in part by state funds.[287] Since the Commission is not authorized to conduct closed sessions to review IOU procurement activities, meetings of PRGs exercising this delegated authority and advising the Commission on these practices must be open to the public.[288]

The Commission should also revise in Phase 2 its overly broad interpretation of the term "market sensitive information" in section 454.5(g), which defines the scope of the Commission's confidentiality restrictions,[289] to align with the Public Record Act's guarantees of broad public "access to information concerning the conduct of the people's business."[290] And it should narrow the existing confidentiality windows (adopted at the IOUs' request, over strong objections), which shield procurement and related data from public scrutiny for "one year backward and three to five years forward."[291] As a long-term solution, the Commission should propose through Phase 2 that the Legislature revisit section 454.5's confidentiality provisions, which arose out of the state energy crisis, when aggressive, long-term procurement was deemed necessary as a policy matter.[292] The situation on the ground today is fundamentally different, with long-term

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[285] Cal. Gov. Code § 11121(b).
[286] Cal. Gov. Code § 11121(c); *see also* 85 Ops.Cal.Atty.Gen 145 at *3 (2002) ("Even advisory committees created by state bodies, rather than by statute, are subject to open meeting requirements.").
[287] Cal. Gov. Code § 11121(d).
[288] *See* Cal. Gov. Code §§ 11126(d)(2) and (e).
[289] *See* D.06-06-066 at 42 (defining the term "market sensitive information" in Cal. Pub. Util. Code § 454.5(g) as any information that is "material" in that it "affects the market price an energy buyer pays for electricity").
[290] Cal. Gov. Code § 6250; *see also* POC Opening Brief at 32-33.
[291] D.06-06-066 at 4; *see also* POC Opening Brief at 33.
[292] R.05-06-040, Order Instituting Rulemaking at 4 (July 5, 2005); *see also* POC Opening Brief at 34 (discussing AB 57 (2002), which enacted Cal. Pub. Util. Code § 454.5).

procurement imposing severe stranded costs on ratepayers and with escalating departures undercutting the rationale for going-forward long-term procurement by the IOUs.[293] The Commission should now be striving to ensure maximum public scrutiny of the IOUs' long-term commitments, not insulating their decisions from public view.

2. The Commission Erred in Subordinating Securitization Proposals.

The parties agree that securitization is a powerful and proven financing tool to reduce the above-market costs associated with the IOUs' UOG resources and PPAs.[294] Securitizing the rate base for UOG alone would reduce costs by at least $1.3 billion for PG&E and $589 million for SCE.[295] Achieving these savings becomes particularly necessary if the Commission refuses to remove UOG costs from the PCIA in violation of statute, as discussed in Section III.A. above. In addition, securitization can be used to finance the buydown of PCIA-eligible PPAs, yielding savings for both bundled and departing customers by lowering the total contract cost and by "allowing the up-front payment to be financed at a rate much lower than the utilities' weighted cost of capital."[296] The benefits securitization yields for both ratepayers and utilities are also well established. California has used the tool on multiple occasions, including to reduce rates during electric industry restructuring in the late 1990s, to provide PG&E the necessary cash flow to emerge from bankruptcy in 2005, and most recently to reduce wildfire liabilities through SB 901.[297] Twenty-one other states have authorized the issuance of securitized bonds for investor-

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[293] POC Opening Brief at 34.
[294] *See, e.g.*, IOU-3 at 3-37:3-10 (testifying that the Joint Utilities "believe that securitization is worth exploring," with the caveat that a workshop should be dedicated to the purpose); CalCCA-1 at 3-1; POC Opening Brief at 28; POC Reply Brief at 19.
[295] CalCCA-1 at 3-7:5-7; *see also* Tr. 670:17-671:25.
[296] *Id.* at 3-9:17-23.
[297] CalCCA Opening Brief at 129-31; *see also* Tr. 688:20-22; CalCCA-1, Ex. 3-C at 8-10; D. 18-10-019 at 114 & n.231.

owned utilities, including to recover stranded costs and costs of new renewable distributed generation.[298]

Although recognizing the value of securitization, the Commission subordinates it to other Phase 2 proposals based on the assumption that securitization is infeasible in light of the recently adopted legislation regarding securitization of wildfire liability costs.[299] The Commission abused its discretion in doing so, as substantial evidence in the record directly rebuts its assumption that securitization of wildfire costs and the stranded costs at issue in this proceeding cannot coexist. As CalCCA's expert witnesses explained, the utility sector attracts risk-averse investors who value the lower risk that securitization yields.[300] And credit rating agencies appreciate the stability and predictability that securitization brings, insulating the securitized portion of the utilities' portfolios from Commission-required rate reductions and other such political and regulatory risks.[301]

Even assuming some sort of "psychological ceiling" to issuance of securitized debt, credit rating agencies themselves "point[] out there's plenty of financing capacity available" before that hypothetical ceiling could be reached.[302] Thus, the IOUs could securitize their entire UOG portfolios "and still have tremendous capacity left in securitization for other things," such as wildfire costs, before any concerns about reaching a ceiling would be triggered.[303] Securitization of utility costs has reached as high as 14% in other states without raising any concerns, and conservative assessments would place a hypothetical ceiling closer to 25% of

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[298] CalCCA-1, Ex. 3-C at 10-11; *see also* CalCCA Opening Brief at 129.
[299] D.18-10-019 at 114 (citing SB 901(2018)) (directing the parties to "focus on the abovementioned issues first").
[300] Tr. 683:22-684:6.
[301] Tr. 687:18-688:2.
[302] Tr. 684:11-17.
[303] Tr. 686:25-687:17.

costs.[304] By contrast, securitizing PG&E's entire UOG portfolio would only reach 5% of costs,[305] leaving ample headroom for other securitization initiatives.[306] The Commission fails to identify the percentage of costs that wildfire cost securitization would represent, and there is nothing in the record to this effect. As such, the assumption that wildfire cost securitization would reach even the most conservative limits of market tolerance are entirely unsupported.

The Commission should thus revise its decision to include securitization among the priority Phase 2 topics, and, as suggested by the Joint Utilities, it should create a dedicated working group or workshops to explore the issue.[307] Any lingering concerns about the interaction of securitization of PCIA-eligible costs and wildfire liability costs can be appropriately explored in that setting, with the opportunity to solicit expert opinion and develop a record on the topic.

IV. MOTION FOR COMPLIANCE WITH CALIFORNIA PUBLIC UTILITIES CODE SECTION 311.5

Pursuant to section 311.5(b), the Commission "must publish and maintain on the Internet" a docket card listing by date and title of filing all documents filed in this proceeding, "including the public version of all prepared oral and written testimony."[308] As of the date of this filing, the Commission has failed to comply with this statutory requirement. The docket card for proceeding R.17-06-026 fails to list any of the extensive written testimony filed by the parties in April 2018. POC and UCAN thus respectfully move the Commission to expeditiously correct this omission by making public versions of the parties' written testimony available on the docket

[304] Tr. 686:25-687:8; 688:3-13.
[305] Tr. 686:27-687:2.
[306] *See* Tr. 688:10-13 (The assumption that securitization is a limited resource "is not applicable here.").
[307] IOU-3 at 3-37:6-10.
[308] Cal. Pub. Util. Code § 311.5(b)(5).

and by maintaining the complete docket card "until final disposition, including disposition of any judicial appeals," as required by section 311.5(b)(5).

V. MOTION FOR STAY

POC and UCAN respectfully request that the Commission enter an immediate stay of Decision 18-10-016 while this Application is pending. A stay would preserve the status quo, basing PCIA rates on the Commission's prior PCIA methodology until this Application is resolved.

The Commission has authority pursuant to section 1735 to stay the enforcement of Commission decisions.[309] The Commission considers the following factors in deciding whether to grant a stay: (1) whether the moving party will suffer serious or irreparable harm if the stay is not granted; (2) whether the moving party is likely to prevail on the merits of the application for rehearing; (3) a balance of the harm to the moving party (or the public interest) if the stay is not granted and the decision is later reversed, against the harm to the other parties (or the public interest) if the stay is granted and the decision is later affirmed, and (4) other factors relevant to the particular case.[310]

Each of these factors strongly favors the entry of a stay in this instance. As shown in this Application, the Decision contravenes the plain language of the Public Utilities Code by including UOG costs in the PCIA. Indeed, ALJ Roscow, who presided over the months' long evidentiary stages of this proceeding, reached the opposite conclusion from the Commission on UOG issues in his Proposed Decision, underscoring POC and UCAN's likelihood of success. Substantial evidence in the record also shows that the Decision will shift costs to CCA customers

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[309] *See* D.08-04-044 at 3 (quoting Cal. Pub. Util. Code § 1735).
[310] *Id.*

in violation of statute, including by using benchmarks that undervalue the IOUs' resources and by failing to create a mechanism to reflect the uncontested premiums for GHG-free resources. The Decision allows the IOUs to allocate costs to CCA customers that were avoidable and that are not attributable to them, in violation of statute. And the Commission fails in multiple respects to satisfy the requirement to make findings of fact on all issues material to the Decision and to ensure that PCIA rates are just and reasonable.

The consequences of the Commission's errors, individually and collectively, are enormous. As shown in the Application, the new PCIA framework that the Decision adopts will immediately spike PCIA rates by as much as 50% in SDG&E's service territory alone. And as CalCCA explained in comments on the APD, the Decision "will produce utility bundled customer rates *below* the rates a CCA could offer its customers if the CCA procured 100 percent of its portfolio at the benchmarks set by the APD and mirrored the utility's mix of brown, RPS and GHG-free energy."[311] Thus even if the CCAs abandoned their decarbonization goals and pursued only minimal RPS compliance, they would still be unable to compete with the IOUs' generation rates. The consequences of this distortion could "have a crippling effect on a CCA program," rendering it "economically infeasible or completely unappealing to customers."[312] It would "make a launching CCA uneconomic from the outset and strand costs in the portfolios of existing CCAs."[313] As CalCCA explained and multiple CCAs and jurisdictions spoke to at public hearing, CCAs that survive the Decision may do so only by cutting the programs that have been

[311] CalCCA Comments on APD at 3.
[312] Solana Energy Alliance Comments on APD at 4.
[313] CalCCA Comments on APD at 3.

essential to accelerating the state's transition to a zero carbon future and furthering the state's economic justice policy goals.[314]

POC, UCAN, and the Southern California energy consumers on whose behalf they advocate will be irreparably harmed by these developments. Southern California consumers, like those throughout the state, will face severe impediments in their attempts to aggregate their loads as AB 117 intended and a relative paucity of the types of innovative services that CCAs promote, such as electric vehicle programs and programs for low-income residents and disadvantaged communities.[315] Customers that have already departed for CCAs will be forced to absorb costs well beyond their fair share. UCAN will thus be injured in its mission to ensure fair utility rates. And POC will be irreparably harmed in its mission to promote sustainable energy systems and to help ensure that Southern California communities have a viable pathway to launch a CCA.

For similar reasons, the balance of hardships strongly favors granting a stay. The Decision if not stayed will create cost shifts that will be tremendously difficult, if not impossible, to retroactively correct if this Application is granted and the PCIA benchmarks corrected. And the loss of political impetus and consumer confidence necessary to CCA formations and expansions may be impossible to ameliorate. On the other side of the equation, a stay would simply maintain the status quo, leaving in place the PCIA framework that has been relied on for years.

VI. REQUEST FOR ORAL ARGUMENT

Pursuant to Rule 16.3, POC and UCAN respectfully request oral argument for this Application for Rehearing. The Decision raises issues of major significance that will impact the

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[314] *Id.* at 3, 5-6; *see also* Public comments at October 11, 2018 CPUC Meeting on Agenda Item 37a.
[315] *See* CalCCA Comments on APD at 5.

continued viability of CCAs in California. Among other things, the Decision departs from long-established precedent that limited PCIA-eligibility for post-2002 UOG costs to a ten-year window, and it includes costs of UOG resources in the PCIA going forward even though those resources had already termed out of the PCIA under the Commission's prior PCIA framework. It also departs from substantial Commission precedent that values long-term utility resources through long-term metrics and rejects the very short-term metrics that it now adopts. It presents issues of exceptional complexity, controversy, and public importance as manifested by the extensive evidentiary record and briefing, the extensive public interest and involvement in the proceeding and its outcome, and the multiple statutory expressions by the Legislature of the importance of CCAs to California's economy and energy future, which the Decision impacts. The Decision also raises multiple questions of first impression, including those concerning the interpretation of statutory provisions as they pertain to PCIA eligibility for UOG costs. Ultimately, oral argument will be critical to untangling the myriad and highly complicated issues presented.

VII. CONCLUSION

For the foregoing reasons, POC and UCAN respectfully request that their application for rehearing be granted.

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Respectfully submitted,

SHUTE, MIHALY & WEINBERGER LLP

By: /s/ Ellison Folk
ELLISON FOLK
STEPHANIE L. SAFDI
396 Hayes Street
San Francisco, CA 94102
Telephone: (415) 552-7272
Facsimile: (415) 552-5816
Folk@smwlaw.com
Safdi@smwlaw.com

Attorneys for Protect Our Communities Foundation

DATED: November 19, 2018

UTILITY CONSUMERS' ACTION NETWORK

By: /s/ Jane Krikorian
JANE KRIKORIAN, J.D.
Supervisor, Advocacy & Administration
Utility Consumers' Action Network
3405 Kenyon St, Suite 401
San Diego, CA 92110
Telephone: (619) 696-6966
Jane@ucan.org

1060596.8