BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

FILED
12/05/19
04:59 PM

Order Instituting Rulemaking to Develop an Electricity Integrated Resource Planning Framework and to Coordinate and Refine Long-Term Procurement Planning Requirements.	Rulemaking 16-02-007

APPLICATION OF THE CALIFORNIA ENVIRONMENTAL JUSTICE ALLIANCE, SIERRA CLUB, DEFENDERS OF WILDLIFE AND THE PUBLIC ADVOCATES OFFICE TO REHEAR AND CLARIFY DECISION 19-11-016

Deborah Behles
Of Counsel for CEJA
2912 Diamond Street, No. 162
San Francisco, CA 94131
Email: deborah.behles@gmail.com
(415) 841-3304

Shana Lazerow
Email: slazerow@cbecal.org
Communities for a Better Environment
340 Marina Way
Richmond, CA 94801
(510) 302-0430

Representing California Environmental Justice Alliance

Nina Robertson
Email: nrobertson@earthjustice.org
Earthjustice
50 California Street, Suite 500
San Francisco, CA 94111
(415) 217-2000

Katherine Ramsey
Email: katherine.ramsey@sierraclub.org
Sierra Club
2101 Webster Street, Suite 1300
Oakland, CA 94612
(415) 977-5636

Representing Sierra Club

Kim Delfino
California Program Director
Defenders of Wildlife
980 9th St, Suite 1730
Sacramento, CA 95814
E-mail: kdelfino@defenders.org
(916) 313-5800

Representing Defenders of Wildlife

Diana L. Lee
Attorney for the Public Advocates Office
California Public Utilities Commission
505 Van Ness Avenue
San Francisco, CA 94102
Email: Diana.Lee@cpuc.ca.gov
(415) 703-4342

Dated: December 5, 2019

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

Regulations

Other Authorities

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking to Develop an Electricity Integrated Resource Planning Framework and to Coordinate and Refine Long-Term Procurement Planning Requirements.	Rulemaking 16-02-007

APPLICATION OF THE CALIFORNIA ENVIRONMENTAL JUSTICE ALLIANCE, SIERRA CLUB, DEFENDERS OF WILDLIFE, AND PUBLIC ADVOCATES OFFICE TO REHEAR AND CLARIFY DECISION D.19-11-016

Pursuant to Rule 16.1 of the California Public Utilities Commission's ("Commission") Rules of Practice and Procedure and California Public Utilities Code Section 1731(b), the California Environmental Justice Alliance ("CEJA"), Sierra Club, Defenders of Wildlife, and the Pubic Advocates Office (hereinafter "Joint Parties") respectfully submit this application for rehearing of Decision ("D.") 19-11-016 (hereinafter "Decision" or "D.19-11-016"). The Commission mailed the Decision on November 13, 2019; thus, this application for rehearing is timely filed.[1]

The Decision recommends the extension of the compliance deadlines for once-through cooling ("OTC") facilities slated to retire by December 31, 2020, and it requires 3,300 MW of incremental procurement. The Joint Parties argued in comments that this procurement should not include new fossil fuel resources because such new fossil fuel procurement is inconsistent with statutory mandates, Commission precedent, and the Integrated Resource Plans ("IRPs") submitted by Load Serving Entities ("LSEs") and approved by the Commission. Unfortunately, the Decision requires that procurement be conducted on an all-source basis, including existing and new resources, except for certain new-gas only resources, and may include LSE-owned

[1] See Rule 16.1(a).

resources when justified. The Decision further specifies that the following types of fossil fuel resources can be procured:

- Storage facilities co-located with existing fossil fuel facilities;
- "[N]ew projects that *may* utilize storage combined with natural gas"; and
- *"[S]ome* augmentation of capacity, at existing sites and including efficiency improvements or repowering, may also help support system reliability."[2]

Therefore, as currently worded, the Decision creates ambiguity and potential loopholes that could allow new fossil fuel development anywhere. First, it appears to allow new fossil fuel development throughout California as long as it "may" include a small battery installed with the facility. Second, it also appears to allow broad "augmentation of capacity" at existing facilities through building entirely new fossil fuel units.[3]

This direction represents legal error because it is wholly inconsistent with Commission precedent, the record in this proceeding, and statutory requirements, and because it lacks support in the record. Although there is support for co-locating storage facilities with *existing* fossil fuel facilities, there is *no* stated party support or record evidence for allowing any *new* natural gas projects that "may" utilize some unspecified amount of storage. And although several parties asked for the ability to improve the efficiency and capability at existing units, the Commission's late redline revisions to the Decision go beyond this request and appear to allow new gas capacity to be developed as long as it is at an existing site.

The Decision's allowance of new fossil fuel procurement prejudices the Joint Parties because they lack the ability to protest such procurement at a later date through an evidentiary

[2] D.19-11-016, pp. 64-65 (emphasis added).
[3] D.19-11-016, pp. 64-65 (emphasis added).

process. The Decision allows investor-owned utilities ("IOUs") to submit only advice letters and allows Electric Service Providers ("ESPs") and Community Choice Aggregators ("CCAs") to submit mere "summaries" of intended procurement, and the Joint Parties cannot formally protest either of these types of submissions through evidentiary hearings.

As discussed in more detail below, the Commission committed legal error because the Decision is not supported by the findings or by substantial evidence in light of the whole record. The Commission also failed to proceed in a manner required by law and therefore abused its discretion when it approved the Decision. Therefore, the Joint Parties request that the Commission revise the Decision to ensure that these broad loopholes for gas procurement are eliminated before procurement begins. Finally, in Appendix A to this Application for Rehearing, we include proposed revisions to the Decision that are necessary to bring it into compliance with the law.

I. DISCUSSION

CEJA, Sierra Club, and Defenders of Wildlife collectively represent thousands of Californians who live in some of the country's most polluted air and who seek to protect wildlife, ecosystems, and landscapes while supporting the timely development of renewable energy resources in California. Our members will be directly impacted if the Decision allows for procurement of fossil fuel resources because the emissions from fossil fuel generation directly impact the communities, residents, and members we represent. The Public Advocates Office is the independent consumer advocate within the California Public Utilities Commission, with a mandate to obtain the lowest possible rates for utility services consistent with reliable and safe service levels, and the state's environmental goals.

Problematically, the Joint Parties will be prejudiced if this Application for Rehearing is not granted because the Decision eliminates the ability to the Joint Parties to protest fossil fuel procurement in an evidentiary hearing at a later date. Under the Decision, IOUs will only need to present their proposal in a Tier 3 advice letter, while other LSEs will only provide summaries of their procurement.[4] Both of these scenarios either limit or eliminate the ability of Joint Parties to protest the reasonableness of any proposed fossil fuel procurement at a later stage. In both cases, the Joint Parties and the members we represent will be prejudiced if the Decision is not changed.

Pursuant to Section 1757 of the Public Utilities Code,[5] the Commission must act within its powers or jurisdiction and proceed in a manner required by law.[6] When subjected to judicial scrutiny, a court will review whether the Commission's decision is supported by the findings and whether the findings are supported by substantial evidence in light of the whole record.[7] To determine if the findings are supported by substantial evidence, the court must consider all relevant evidence, including evidence detracting from the decision, a task which involves some weighing to fairly estimate the worth of the evidence."[8]

As described below, the Decision creates at least two loopholes that could allow virtually any new fossil fuel facility to be built. First, the Commission's decision permits new fossil fuel facilities at any site as long as there "may" be some storage. Second, it allows any amount of new fossil fuel capacity at existing sites. This direction is not supported by the findings or by substantial evidence in the record. It is also inconsistent with Commission precedent and

[4] See Decision, p. 3.
[5] Unless otherwise stated, all further section references are to the Public Utilities Code.
[6] Cal. Public Util. Code § 1757.
[7] Cal. Public Util. Code § 1757.
[8] *Lucas Valley Homeowners Assn. v. County of Marin* (1991) 233 Cal.App.3d 130, 141–142.

statutory requirements. As such, we request that the Commission revise the Decision to clarify that the only new projects associated with fossil fuel generation that can be procured to meet the need include the following narrow set of options: energy storage projects that decrease greenhouse gas ("GHG") emissions and projects that increase the efficiency or capability of existing units.

1. The Decision Erroneously Allows for Procurement of New Fossil Fuel Generating Units and Facilities.

Although the Decision states an intent to prohibit new fossil-fuel facilities, the actual language of the Decision allows for the development of fossil fuel facilities anywhere.

The Decision initially notes that it will adopt the prohibition on new fossil-fueled resources, stating that the Commission:

> will adopt the prohibition on new fossil-fueled resources suggested by CEJA, Sierra Club, and [Defenders of Wildlife] in their comments. Specifically, any new development of fossil-fuel-only resources, at sites without previous electricity generation facilities, will not be considered to count toward any of the procurement obligations outlined in this decision. Another way of saying this is that all new resources should all be from preferred sources, or hybrid technologies, and not fossil-fuel-only sources. If there are existing fossil-fueled resources that may have the ability to make modifications or produce incrementally more to serve reliability needs, those may still be considered, even if the units were part of the baseline, but only for the incremental capacity added.[9]

However, the Decision's specific language is not as limited as intended. The Decision goes onto state that:

> [the Commission's] intention is to prohibit new fossil-fuel-only facilities at new sites which have not previously hosted electricity generation. However, storage facilities co-located with existing fossil-fueled facilities may represent GHG emissions improvements over the status quo and are desirable. Likewise, new projects that may utilize storage combined with some natural gas may be desirable. And finally, some augmentation of capacity, at existing sites and including efficiency improvements or repowering, may also help support system reliability. At existing sites

[9] Decision, pp. 43-44.

> where the facilities were already included in the baseline, only the incremental capacity additions would count toward the incremental requirements in this decision. All of the situations described here are intended to be able to count toward the incremental procurement required by this decision, and the text has been clarified accordingly. However, for clarity, returning mothballed units to service that were already in the baseline are not eligible to be counted toward the incremental procurement requirement in this decision.[10]

This language creates two broad loopholes that could allow for the procurement of new fossil fuel facilities. First, the Decision allows "new projects that may utilize storage combined with some natural gas." The Decision fails to describe what it means by "some" gas or and by the direction that new project "may" use storage combined with gas. As a result, any new facility could subvert the Decision's apparent prohibition on new fossil fuel generation by installing a battery of any size, no matter how small. Such broad, undefined language is inconsistent with the underlying rationale of the Decision, and appears to be a drafting error.

Second, the Decision allows "some augmentation of capacity" at existing facilities. This augmentation does not appear to be limited to improvements at existing units, as parties as requested, but instead goes far beyond that to allow for *any* potential augmentation of capacity, including repowering entire facilities. Such unqualified augmentation is inconsistent with the underlying rationale of the Decision, and the Commission should accordingly modify it to conform to other parts of the Decision and to governing law.

Furthermore, the Decision's Conclusions of Law do not eliminate this problem. The Commission concludes in paragraphs 21 and 22 as follows:

> 21. The Commission should not distinguish, in its incremental procurement requirement identified herein, between existing and new resources, except with respect to contract length required and prohibiting new fossil-fuel-only resources (without storage) at sites not previously used for electricity generation, for purposes of the procurement required in this decision.

[10] Decision, pp. 65-66.

> 22. The Commission should prefer all-source procurement of resources, including demand-side resources and preferred resources, to the extent possible, as long as resources can be shown to be incremental to the 2022 baseline set of resources. New fossil-fuel-only resources (without storage) at sites not previously used for electricity generation and OTC units are not eligible to meet the 3,300 MW incremental need identified in this decision. Capacity upgrades to and repowers to add capacity to existing resources, including baseline resources, are eligible based on the incremental capacity addition.[11]

By only requiring some type of storage at entirely new fossil-fueled generating sites, and placing no restraints on additional generation at existing sites, the Decision inappropriately opens procurement to any new fossil fuel project.

Nor does the Ordering Paragraph resolve these errors, providing in paragraph 7:

> 7. Pacific Gas and Electric Company, San Diego Gas & Electric Company, and Southern California Edison Company shall conduct all-source solicitations to procure their obligations given in Ordering Paragraph 3 above and shall consider existing as well as new resources, demand-side resources, combined heat and power, and storage, as long as all resources are shown to be incremental to the baseline identified in Ordering Paragraph 6 above. New fossil-fuel-only resources, without storage, at sites not previously used for electricity generation, are not eligible to satisfy the requirements of Ordering Paragraph 3 above, but modifications and augmentations to existing facilities are eligible for the incremental capacity addition, even if the facility is in the baseline identified in Ordering Paragraph 6. The utilities shall utilize the Demand Response Auction Mechanism contract as a starting point for negotiations with any demand response resources that bid into the solicitations.[12]

This Ordering Paragraph could be read to broadly allow any new fossil fuel development as long as the developer adds a small battery, and any additional construction of new units and resources at existing site without restriction.

[11] Decision, pp. 76-77, Conclusions of Law, paras 21-22 (emphasis added).
[12] Decision, p. 83, Order, para 7.

2. The Decision Commits Legal Error by Allowing Procurement of New Fossil Fuel Capacity.

The Decision commits legal error by allowing for the procurement of new fossil fuel resources. Allowing procurement of fossil fuel facilities is inconsistent with numerous important mandates and rulings including Senate Bill ("SB") 100,[13] California's commitment to decarbonization, SB 32,[14] SB 350,[15] the Loading Order,[16] statutes that require analysis of other resources before procurement of fossil fuel resources, and this Commission's prior decision and planning, as discussed below.

SB 100 requires an orderly transition away from fossil fuel-powered electricity, and Executive Order B-55-18 requires California to achieve carbon neutrality by 2045. Allowing new fossil fuel procurement is inconsistent with these clear mandates and is likely to lead to stranded assets as California transitions to renewable and GHG-free fuels. Allowing the procurement of new fossil fuel capacity is not "just and reasonable" when, at the same time, California is prioritizing the retirement of fossil fuel facilities to meet these mandates and policies. The Commission has a duty to ensure its decisions are just and reasonable,[17] and the procurement of new fossil fuel capacity is not in light of SB 100 and the state's focus on retiring fossil fuel facilities.

Allowing the procurement of new fossil capacity is also inconsistent with SB 32 and prior Commission precedent. The Commission has conducted a detailed analysis of what resources

[13] California Renewables Portfolio Standard Program: emissions of greenhouse gases (De León, 2017-2018).
[14] California Global Warming Solutions Act of 2006: emissions limit, (Pavley, 2015-2016).
[15] Clean Energy and Pollution Reduction Act of 2015 (De León, 2015-2016).
[16] D.14-03-004 explains that the Loading Order, developed as part of the state's Energy Action Plan, prioritizes procurement of energy efficiency and demand response resources to meet energy demand, followed by renewable resources and distributed energy resources, and finally, fossil fuel generation, D.14-03-004, n.3, pp. 6-7.
[17] Cal. Public Util. Code § 451.

are necessary to meet GHG goals and requirements including SB 32. This analysis, implemented over the course of several years, is reflected in the Reference System Plan ("RSP") and the Preferred System Plan ("PSP"). Neither of these plans finds any need for new gas facilities. As the Commission noted in relation to the RSP, "[i]n no scenario does the model pick new natural gas plants to be built in the future."[18]

Procurement of new fossil fuel capacity is also inconsistent with the SB 350 requirement to minimize air emissions, with a priority for disadvantaged communities. Given the burden that fossil fuel facilities impose on disadvantaged communities, the Commission required in D.19-04-040 that any LSE proposing new natural plants make additional showings that lower-emitting or zero-emitting resources could not meet the identified resource need.[19] The Commission imposed these requirements based on the following reasoning:

> both because of the clear nexus between natural gas generation and emissions in disadvantaged communities within the electric sector and because a portfolio that includes new gas plant procurement would be inconsistent with the portfolio we are adopting in this decision…, we will require that any LSE proposing to develop new natural gas resources or re-contract with existing natural gas resources in their IRP for a term of five years or more, regardless of whether it is located in a disadvantaged community, make a showing as to why another lower-emitting or preferably zero-emitting resource could not reasonably meet the need identified.[20]

As the Commission has further stated, it is "focused on minimizing the operation of fossil-fueled resources to the extent possible, especially in disadvantaged communities."[21]

Allowing procurement of new fossil fuel facilities is also inconsistent with the approved and certified LSE IRPs. Not one LSE made the showing for a new natural gas plant or new

[18] D.18-02-018, p. 39.
[19] D.18-02-018, p. 70.
[20] D.18-02-018, p. 70.
[21] D.19-04-040, p. 136.

natural gas capacity in their proposed IRPs.[22] These plans were formally adopted and/or certified by the Commission pursuant to its duty under SB 350 to adopt a plan that meets CARB's GHG emissions reduction targets. The Commission should not now contradict its own decisions and order procurement that is inconsistent with these approved IRPs, the PSP, and the RSP.

Procurement of new fossil fuel resources is also inconsistent with the Loading Order, which requires procurement of preferred resources ahead of fossil fuel resources. As the Commission has found, "all utility procurement must be consistent with the Commission's established Loading Order, or prioritization."[23]

New fossil fuel procurement is also inconsistent with SB 350 requirements to optimize procurement of resources other than fossil fuel for integration of renewables. Under Section 454.51(a), the Commission is required to "identify a diverse and balanced portfolio of resources needed to ensure a reliable electricity supply that provides optimal integration of renewable energy in a cost-effective manner."[24] The Code further specifies that "[t]he portfolio shall rely upon zero carbon-emitting resources to the maximum extent reasonable and be designed to achieve" the GHG limit established by CARB.[25] Section 400 further requires the Commission to "authorize procurement of resources to provide grid reliability services that minimize reliance on system power and fossil-fuel resources."[26]

[22] *See* CEJA and Sierra Club Sept. 12, 2018 Comments (describing each LSE submission).
[23] D.14-03-004, p. 14.
[24] Cal. Public Util. Code § 454.51(a).
[25] Cal. Public Util. Code § 380.
[26] Cal. Public Util. Code § 400(c).

New fossil fuel procurement is further inconsistent with Section 380, which requires that the Commission advance, to the extent possible, "the state's goals for clean energy, reducing air pollution, and reducing greenhouse gas emissions."[27]

For all the reasons described above, the Commission committed legal error by allowing for the procurement of new natural gas capacity and facilities.

3. The Decision's Allowance of New Fossil Fuel Procurement Is Not Supported by the Findings.

Importantly, there does not appear to be a finding that supports allowing *any* new fossil fuel capacity to be procured. To the contrary, the Findings support no procurement of new fossil fuel resources, especially not new fossil fuel resources that "may" include storage and any new units and capacity at existing sites. In particular, the following Findings of Fact from paragraphs 17 and 19 are contrary to the allowance of procurement of new fossil fuel facilities:

> 17. The need for system resource adequacy and renewable integration resources begins in 2021 and will extend through at least 2023, and beyond, as more renewable resources are added to meet California's climate goals and as more fossil-fueled and nuclear power plants retire. The need for additional resources is being examined in the 2019-2020 IRP cycle currently underway.
>
> 19. Neither the Commission's PSP adopted in D.19-04-040 nor the RSP adopted in D.18-02-018 identified a need for new fossil-fuel-only resources. Additionally, no LSE proposed procurement of fossil-fuel-only resources in their 2018 individual IRPs.[28]

Given these findings, the Commission should close these potential loopholes and ensure that no new fossil fuel resources are procured, consistent with its PSP and RSP, and prior Commission decisions.

[27] Cal. Public Util. Code § 380.
[28] Decision pp. 70-71, Findings of Fact paras 17, 19.

4. Substantial Evidence Does Not Support Allowing New Fossil Fuel Procurement.

It is difficult to find any evidence, let alone substantial evidence, that supports the Commission broadly allowing new fossil fuel resources and capacity as long as it includes some storage or is built at an existing site. In fact, as described above, the record evidence related to particular types of resources all support no procurement of new fossil fuel plants. The PSP and RSP did not identify a need for new fossil fuel resources or capacity, and neither did a single filed IRP.

Within the context of this Decision, only two parties—Southern California Edison Company ("SCE") and the California Independent System Operator ("CAISO")—completed an analysis of the procurement need, and neither of those parties support procurement of new fossil fuel resources. In fact, SCE argues that new emitting resources should not be eligible, reasoning that "10-year contracts for new emitting resources would set the state back on achieving its vital environmental goals to reduce GHG emissions and deliver clean energy to customers in a reliable and affordable manner."[29] Even CAISO is not recommending new gas plants.[30] Notably, other parties including The Utility Reform Network ("TURN") also support not allowing any new fossil fuel procurement.[31]

The Decision attempts to base its broad allowance of fossil fuel facilities on what it characterizes as the requests of certain parties. There are several fundamental errors in the Commission's reasoning. First, generalized party requests for procurement, unsupported by any actual evidence that the specific type of procurement is needed, do not constitute substantial

[29] SCE Comments, p. 10.
[30] See CAISO October 1, 2019 Notice of Ex Parte Contact, p. 4 ("Ms. Hou noted that CAISO did not recommend building new natural gas plants, but that other storage and wind could meet California's capacity needs.").
[31] See TURN Reply Comments on the Proposed Decision ("PD"), Public Advocates Office Reply Comments on PD, p. 4.

evidence, and California courts have rejected Commission decisions that lack such evidence. For example, in *The Utility Reform Network vs. Public Utilities Commission*, the California Court of Appeals for the First District annulled the Commission's finding of need for a new gas-fired power plant (known as the "Oakley Project") because the finding was improperly based on only hearsay material, the truth of which parties disputed.[32] In finding the Commission's action unlawful, the *Oakley* Court explained that "[u]nder established California law, such uncorroborated hearsay evidence does not constitute substantial evidence to support an administrative agency's finding of fact."[33] Accordingly, the *Oakley* Court rejected the Commission's sole reliance on hearsay evidence in the form of utility declarations and a CAISO petition filed with a federal agency, and annulled the finding of need.[34] In other proceedings, the Commission itself has recognized the need to base its finding of fact on non-hearsay evidence. For example, in *Clear World Communications,* the Commission noted that "[w]hile hearsay is admissible in our administrative hearings, it cannot be the basis for an evidentiary finding without corroboration where the truth of the out-of-court statements is at issue."[35] In this Decision, the Commission's exclusive reliance on positional statements by certain parties lacks substantial evidence and is therefore unlawful. In fact, those party statements are even *less* probative than the hearsay evidence that the *Oakley* Court rejected because they do not provide

[32] See *The Utility Reform Network v. Public Utilities Commission*, 223 Cal. App. 4th 945, 966 (2014) ("Because the Commission's finding is based upon uncorroborated hearsay evidence, and the truth of the CAISO's extra-record statements is disputed, the finding cannot be sustained.").
[33] *The Utility Reform Network*, 223 Cal. App. 4th at 959-560 (citing cases); Cf. *Walker v. City of San Gabriel* (1942) 20 Cal.2d 879, 881 ("There must be substantial evidence to support ... a board's ruling, and hearsay, unless specially permitted by statute, is not competent evidence to that end.")
[34] *The Utility Reform Network*, 223 Cal. App. 4th at 966.
[35] *Investigation on the Commission's Own Motion Into the Fitness of the Officers, Directors, Owners and Affiliates of Clear World Communications Corporation* (Cal.P.U.C., June 16, 2005) Dec. No. 05–06–033 [2005 WL 1537220, at pp. *27–28] (*Clear World Communications*) (citing (Gov. Code § 11513(d).); see also *Cleancraft, Incorporated v. San Diego Gas and Electric Company* (1983) 11 C.P.U.C.2d 975, 984 (finding party's claim could not rest on "the hearsay opinions of unavailable experts.")

any specific evidence, hearsay or otherwise, to support a factual finding that additional fossil procurement is needed. Accordingly, the Commission's Decision is unsupported by substantial evidence and must be revised.

Second, even if mere positional statements constituted evidence that can establish substantial evidence, which they do not, the Decision still lacks support for the broad loopholes that it establishes because the parties have not actually requested these pathways to procurement of fossil generation. As the Decision states:

> A number of parties were also concerned about the prohibition, included in the revised proposed decision, on greenfield development of natural gas facilities. Some parties, including CEJA/Sierra Club/DOW and Vote Solar/SEIA, would like the prohibition to be tighter, not allowing any additional incremental fossil-fueled generation, even at existing sites. On the other hand, several parties including WPTF, CESA, Diamond/Sentinel, Range, and Calpine, would like clarifications to make it clear that modifications at existing sites are eligible. In this instance, we agree with the latter set of parties.[36]

However, a closer look at the party comments upon which the Decision relies reveals that the Decision goes far beyond what these parties requested. Several of the parties appear to request only upgrades to existing units, not broad augmentation of capacity, as the Commission suggests. In particular, Calpine requested that the Commission allow "upgrades to existing baseline fossil-fueled resources to be eligible for the Proposed Decision's incremental capacity procurement mandate."[37] Western Power Trading Forum ("WPTF") similarly requested that the Decision allow "upgrades to baseline units, which are newer and more efficient" because they "are likely to lead to lower emissions than comparable upgrades to older, less efficient non-baseline units."[38] Consistent with these requests, Diamond Generating Corporation and Sentinel asked

[36] Decision, p. 65
[37] Comments of Calpine Corporation on Revised Proposed Decision, p. 4.
[38] WPTF Comments on Revised Proposed Decision, p. 2.

for "clear permission to contract for a listed unit's unrecognized or unrealized capacity."[39] Given that these requests are framed in terms of upgrading a unit, not building entirely new units, the Decision's broad loophole to allow any augmentation of capacity goes beyond even these parts of the record and lacks the evidentiary support required by California law.

As related to energy storage, Range requested that the Commission "revise its definition of 'fossil-fueled' resources to exclude energy storage resources."[40] California Energy Storage Alliance ("CESA") requested the same type of exclusion, stating:

> CESA recommends that this "fossil-fueled resource" definition be refined to specify that this prohibition on fossil-fueled resources do [sic] not apply to energy storage or hybrid resources that utilize some natural gas in the energy storage process but would, in net, support the state's GHG emission reduction goals. The [Proposed Decision] already appears to recognize this nuance for hybridization of existing, brownfield fossil-fueled resources with energy storage that can contribute incrementally to reliability needs while supporting decarbonization goals through the reduced and more efficient utilization of the paired natural gas generator. A similar recognition and exclusion from the prohibition should apply to new, greenfield energy storage and/or hybrid resources that utilize some fossil fuels in operations but can be demonstrated to advance the state's decarbonization goals. For these reasons, a clear linkage to GHG emissions for this procurement directive and/or refinement of best-fit criteria could better support this nuanced consideration of resources.[41]

As shown by these statements, neither Range nor CESA have requested that all fossil fuel resources be allowed as long as there may be some storage. Rather, their concern is for storage or hybrid resources that rely on a small amount of fossil gas in the storage process and not a request for additional generation paired with storage. The Decision's broad exception is contrary to their focus, which is on assuring that all types of energy storage can be procured to meet the procurement targets.

---

[39] Comments of Diamond Generating Corporation and Sentinel Energy Center, LLC on the Revised Proposed Decision, p. 3.
[40] Range Energy Storage Systems, LLC Comments on Revised Proposed Decision, p. 6.
[41] CESA Comments on Revised Proposed Decision, p. 4 (citing Revised PD at p. 43).

Given the lack of any evidentiary support, the Commission's decision to allow procurement of new fossil fuel resources with some storage or at existing sites is not supported by substantial evidence on the record.

5. The Joint Parties Will be Prejudiced if This Application for Rehearing is not Granted Because They Lack the Ability to Protest Fossil Fuel Procurement in an Evidentiary Hearing.

The Decision provides that, "[p]rocurement shall be conducted on an all-source basis, including both existing and new resources (except new gas-only resources), and may include LSE-owned resources when justified."[42] Rather than requiring an application process as is often required for new procurement, the Decision states that "[t]he IOUs shall present their proposed contracts in a Tier 3 advice letter, with other LSEs [(i.e. Electric Service Providers and Community Choice Aggregators)] providing summaries of their resource procurements, accompanied by an attestation from a senior officer that they will meet the requirements for the electric capacity."[43] The effect of this language is to allow IOUs to proceed with procurement of fossil resources on an expedited basis, without any requirement that they respond to contrary evidence presented by other parties or, in the case of ESPs and CCAs, without even so much as a protest lodged by a party seeking to challenge the need for new fossil generation.[44]

CEJA, Sierra Club, and Defenders of Wildlife have consistently objected to the use of anything less than an application if fossil fuel is proposed to be procured,[45] while the Public

[42] Decision, p. 3.
[43] Decision, p. 3.
[44] While the language qualifies that "new gas-only resources" are excepted from this process, the existence of the loopholes described above (i.e. for new gas in existing facilities and new gas if paired with storage) means that the procurement of certain new gas resources can proceed under the Decision on an expedited basis, without the need for an application.
[45] See, e.g., Joint Parties Reply Comments on PD.

Advocates Office has opposed the use of advice letters for the procurement of new resources.[46] Members of the CEJA, Sierra Club, and Defenders of Wildlife live throughout the State and breathe some of the nation's most polluted air. If the Decision is not revised to eliminate the loopholes that allow for procurement of new fossil fuel capacity, those members will be directly impacted by new fossil fuel emissions, and the Joint Parties will be prejudiced because they lack the right to object to new procurement and to present and assess evidence through the exchange of testimony in an evidentiary hearing, and to engage in formal Commission-level decision making.

With respect to any IOU fossil fuel procurement, under the Commission's General Order 96-B, objecting parties have only 20 days after advice letter submittal to protest it, a very condensed period in which to gather evidence through discovery, and community input on a new or expanded gas project.[47] Moreover, the Commission resolves Tier 3 advice letters by resolution, without the opportunity for an evidentiary hearing, and based solely on the advice letter, parties' protests, and Energy Division analysis and recommendation.[48] As a result, parties protesting an advice letter are denied the opportunity to test LSE evidence, conduct discovery, or otherwise develop an evidentiary record.

Under the Decision CCAs and ESPs need only present mere "summaries of their resource procurements, accompanied by an attestation from a senior officer that they will meet the

[46] Opening Comments of the Public Advocates Office on Proposed Decision, pp.1-3; Reply Comments of the Public Advocates Office Responding to the Assigned Commissioner and Administrative Law Judge's Ruling Initiating Procurement Track and Seeking Comment on Potential Reliability Issues, August 12, 2019, pp. 4-6; Comments of the Public Advocates Office Responding to the Assigned Commissioner and Administrative Law Judge's Ruling Initiating Procurement Track and Seeking Comment on Potential Reliability Issues, July 22, 2019, p. 14 (citing the Commission's General Order 96-B, Rule 5.1 and Rule 7.4.3.).
[47] General Order 96-B, General Rule 7.4.1.
[48] General Order 96-B, General Rule 7.6.2.

requirements for the electric capacity."[49] The Decision does not specify what information must be included in those summaries, and it denies parties the right to protest the content of those "summaries" and present evidence that challenges any LSE-stated need for more fossil resources. As a result, with the scantest of information from CCA and ESP "summaries" and without any information or evidence from other parties, the Commission can approve procurement of fossil resources.

In sum, the Joint Parties will be prejudiced if the Decision is not modified to close the loopholes for new fossil capacity procurement described above.

II. CONCLUSION

For all the reasons above, we request that the Commission revise the Decision to clarify that the only projects that utilize fossil fuel that can be procured to meet the need include the following narrow set of options: energy storage projects that decrease GHG emissions and projects that increase the efficiency or capability of existing units. Because the Decision is inconsistent with legal mandates and Commission precedent and unsupported by evidence, these revisions are required in order for the Decision to comply with California law.

Dated: December 5, 2019

Respectfully submitted,

/s/ Nina Robertson

Nina Robertson
Email: nrobertson@earthjustice.org
Earthjustice
50 California Street, Suite 500
San Francisco, CA 94111
(415) 217-2000

[49] Decision, p. 3.

Katherine Ramsey
Email: katherine.ramsey@sierraclub.org
Sierra Club
2101 Webster Street, Suite 1300
Oakland, CA 94612
(415) 977-5627

Representing Sierra Club

/s/ Deborah Behles

Deborah Behles
Of Counsel for CEJA
Email: deborah.behles@gmail.com
(415) 841-3304

Shana Lazerow
Email: slazerow@cbecal.org

Representing California Environmental Justice Alliance

/s/ Kim Delfino

Kim Delfino
California Program Director
Defenders of Wildlife
980 9th St, Suite 1730
Sacramento, CA 95814
Tel: 916-313-5800
E-mail: kdelfino@defenders.org

Representing Defenders of Wildlife

/s/ Diana Lee

Diana L. Lee
Attorney for the Public Advocates Office
California Public Utilities Commission
505 Van Ness Avenue
San Francisco, CA 94102
Email: Diana.Lee@cpuc.ca.gov
(415) 703-4342

APPENDIX A: SUGGESTED REVISIONS TO THE DECISION AND ORDER

Decision pp. 3

Procurement shall be conducted for preferred resources, ~~on an all-source basis~~, including both existing and new resources ~~(except new gas-only resources),~~ and may include LSE-owned resources when justified.

Decision pp. 43-44

However, we will adopt the prohibition on new fossil-fueled resources suggested by CEJA, Sierra Club, and DOW in their comments. Specifically, any new development of fossil-fuel ~~only~~ resources~~, at sites without previous electricity generation facilities,~~ will not be considered to count toward any of the procurement obligations outlined in this decision. Another way of saying this is that all new resources should all be from preferred sources, or hybrid technologies, and not fossil-fuel ~~only~~ sources.

Decision pp. 65-66.

Our intention is to prohibit new fossil-fuel ~~only~~ facilities ~~at new sites which have not previously hosted electricity generation~~. However, storage facilities co-located with existing fossil-fueled facilities may represent GHG emissions improvements over the status quo and, only to the extent they actually reduce emissions, are desirable. ~~Likewise, new projects that may utilize storage combined with some natural gas may be desirable~~. And finally~~, some augmentation of capacity, at existing sites and including~~ efficiency improvements ~~or repowering,~~ may also help support system reliability. At existing sites where the facilities were already included in the baseline,

only the incremental capacity additions to existing units would count toward the incremental requirements in this decision.

Conclusions of Law:

21. The Commission should not distinguish, in its incremental procurement requirement identified herein, between existing and new resources, except with respect to contract length required and prohibiting new fossil-fuel ~~only~~ resources ~~(without storage) at sites not previously used for electricity generation~~, for purposes of the procurement required in this decision.

22. The Commission should prefer all-source procurement of resources, including demand-side resources and preferred resources, to the extent possible, as long as resources can be shown to be incremental to the 2022 baseline set of resources. New fossil-fuel ~~only~~ resources ~~(without storage) at sites not previously used for electricity generation~~ and OTC units are not eligible to meet the 3,300 MW incremental need identified in this decision. Capacity upgrades to and repowers to add capacity to existing ~~resources~~ units including baseline resources, are eligible based on the incremental capacity addition.

ORDER

7. Pacific Gas and Electric Company, San Diego Gas & Electric Company, and Southern California Edison Company shall conduct all-source solicitations to procure their obligations given in Ordering Paragraph 3 above and shall consider existing as well as new resources, demand-side resources, combined heat and power, and storage, as long as all resources are shown to be incremental to the baseline identified in Ordering Paragraph 6 above. New, fossil-

fuel ~~only~~ resources~~, without storage, at sites not previously used for electricity generation,~~ are not eligible to satisfy the requirements of Ordering Paragraph 3 above, but modifications and augmentations to existing ~~facilities~~ units are eligible for the incremental capacity addition, even if the facility is in the baseline identified in Ordering Paragraph 6.