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**BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF CALIFORNIA**

Order Instituting Rulemaking to Establish  
Policies, Processes, and Rules to Ensure  
Reliable Electric Service in California in  
the Event of an Extreme Weather Event in  
2021.

Rulemaking 20-11-003  
(Filed November 19, 2020)

**THE PROTECT OUR COMMUNITIES FOUNDATION  
APPLICATION FOR REHEARING OF D.21-02-028**

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**BEFORE THE PUBLIC UTILITIES COMMISSION  
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Rulemaking 20-11-003  
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**THE PROTECT OUR COMMUNITIES FOUNDATION  
APPLICATION FOR REHEARING OF D.21-02-028**

Pursuant to California Pub. Util. Code<sup>1</sup> section 1731, subdivision (b)(1) and Rule 16.1 of the California Public Utilities Commission (Commission) Rules of Practice and Procedure (Rules), The Protect Our Communities Foundation (PCF) submits this Application for Rehearing of Commission Decision D.21-02-028, *Decision Directing Pacific Gas and Electric Company, Southern California Edison Company, and San Diego Gas & Electric Company to Seek Contracts for Additional Power Capacity for Summer 2021 Reliability* (Decision). This application is timely filed within 30 days of February 17, 2021, the date the Commission issued the Decision.<sup>2</sup>

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<sup>1</sup> All statutory references are to the Public Utilities Code unless otherwise specified.

<sup>2</sup> Pub. Util. Code, § 1731, subd. (b); *see also* Cal. Code Regs., tit. 20, § 16.1, subd. (a).

## I. INTRODUCTION

The concept endorsed by the Decision – that an increased use of fossil fuels should become the solution to extreme weather events predominantly caused by the use of fossil fuels – defies science and reason. PCF requests rehearing of D.20-02-028 to request that the Commission correct its fundamental failure to determine the causes of last August’s events before ordering unnecessary and expensive procurement to the detriment of ratepayers.

The Commission failed to proceed in the manner required by law in arbitrarily requiring additional procurement without making the findings required by law. The findings the Decision does include are unsupported by any substantial evidence. The Commission had no evidence before it at the time it rendered the decision regarding the cause of the August 14<sup>th</sup> and 15<sup>th</sup> blackouts, much less evidence supporting a need for additional supply. Had the Commission earnestly investigated the causes of the blackouts, the obvious first step would be to recognize and address the fact that the California Independent System Operator (CAISO) ordered blackouts in California while sending electricity outside the state.

The Commission lacked jurisdiction to order fossil-fuel procurement outside its statutorily-required proceedings, and violated statutory mandates and principles of due process by ordering additional procurement without first providing notice and a hearing and ascertaining the facts about the cause for the blackouts and the appropriate corresponding solutions. Rather than allocating more and more ratepayer funds effectively to subsidize fossil-fueled energy providers, the Commission must stop and consider the actual evidence so that it can address the market distortions, the unexplained plant outages, and the fossil fuel use that led to the blackouts in the first place.

## II. STANDARD OF REVIEW

Rule 16.1 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,” and its purpose “is to alert the Commission to a legal error, so that the Commission may correct it expeditiously.”<sup>3</sup> Section 1757<sup>4</sup> provides the applicable standard of review because the Decision is “a ratemaking decision of specific application that is addressed to particular parties.”<sup>5</sup> Accordingly, PCF submits this application for rehearing on the following grounds:

- (1) The commission acted without, or in excess of, its powers or jurisdiction.
- (2) The commission has not proceeded in the manner required by law.
- (3) The decision of the commission is not supported by the findings.
- (4) The findings in the decision of the commission are not supported by substantial evidence in light of the whole record.
- (5) The order or decision of the commission was procured by fraud or was an abuse of discretion.
- (6) The order or decision of the commission violates any right of the petitioner under the Constitution of the United States or the California Constitution.<sup>6</sup>

The Commission acts in excess of its powers and fails to proceed in the manner required by law when it takes actions which contradict Legislative directives;<sup>7</sup> fails to proceed in the manner required by law by “failing to comply with required procedures, applying an incorrect legal standard, or committing some other error of law,”<sup>8</sup> including failing to comply with its own procedural rules.<sup>9</sup> Findings are required by Section 1705<sup>10</sup> and by decisional law.<sup>11</sup>

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<sup>3</sup> Rule 16.1, subd. (c); Cal. Code Regs., tit. 20, § 16.1, subd. (c).

<sup>4</sup> All references are to the Public Utilities Code unless otherwise stated.

<sup>5</sup> Pub. Util. Code, § 1757, subd. (a).

<sup>6</sup> Pub. Util. Code, § 1757.

<sup>7</sup> *Southern California Gas Co. v. Public Utilities Com.* (1979) 24 Cal.3d 653, 659 (Commission lacks authority to contradict or disregard specific legislative directives).

<sup>8</sup> *Pedro v. City of Los Angeles* (2014) 229 Cal.App.4th 87, 99.

<sup>9</sup> *Southern California Edison Co. v. Public Utilities Com.* (2006) 140 Cal.App.4th 1085, 1106.

<sup>10</sup> All statutory references are to the Public Utilities Code unless otherwise stated.

<sup>11</sup> Pub. Util. Code, § 1705 (“the decision shall contain, separately stated, findings of fact and conclusions of law by the Commission on all issues material to the order or decision”); Pub. Util. Code, § 1757, subd.

Findings must be supported by substantial evidence in the record.<sup>12</sup> Although a reviewing court will not substitute its own findings for the Commission's, a reviewing court must engage in "some weighing to fairly estimate the worth of the evidence."<sup>13</sup> Irrelevant evidence will not support a finding.<sup>14</sup> Nor will materials that do not rise to the level of substantial evidence. Evidence will not be considered "substantial" unless it constitutes "evidence that a rational trier of fact could find to be reasonable, credible, and of solid value."<sup>15</sup> Expert witness testimony "does not constitute substantial evidence when it is based upon conclusions or assumptions not supported by evidence in the record."<sup>16</sup>

The Commission abuses its discretion when the Commission exceeds the bounds of reason.<sup>17</sup> The Commission violates due process when it denies a party the opportunity to present its own evidence, or to cross-examine and refute evidence the Commission did rely upon.<sup>18</sup>

The application of these legal requirements demonstrate that the Decision should be vacated. The Commission exceeded its authority and failed to proceed in the manner required by law by failing to acknowledge, much less conform, to numerous statutory directives and by

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(a)(3); *California Manufacturers Assn. v. Public Utilities Com.* (1979) 24 Cal.3d 251, 258-259 (citations omitted) (Findings are essential to "afford a rational basis for judicial review and assist a reviewing court to ascertain the principles relied upon by the commission and to determine whether it acted arbitrarily, as well as assist parties to know why the case was lost and to prepare for rehearing or review, assist others planning activities involving similar questions, and serve to help the commission avoid careless or arbitrary action.").

<sup>12</sup> Pub. Util. Code, § 1757, subd. (a)(4).

<sup>13</sup> *McAllister v. California Coastal Commission* (2009) 169 Cal.App.4th 912, 921.

<sup>14</sup> *Broadway, Laguna, Vallejo Association v. Bd. of Permit Appeals* (1967) 66 Cal.2d 767, 773.

<sup>15</sup> *Pedro v. City of Los Angeles* (2014) 229 Cal.App.4th 87, 99.

<sup>16</sup> *Hongsathavij v. Queen of Angels/Hollywood Presbyterian Medical Center* (1998) 62 Cal.App.4th 1123, 1137.

<sup>17</sup> *San Pablo Bay Pipeline Co. LLC v. Public Utilities Com.* (2013) 221 Cal.App.4th 1436, 1460 ("The abuse of discretion standard can be restated as whether the Commission exceeded the bounds of reason.").

<sup>18</sup> *Caesar's Restaurant v. Industrial Acc. Commission* (1959) 175 Cal.App.2d 850, 855 ("The right to [a fair and open hearing] is one of 'the rudiments of fair play' (citation) assured to every litigant by the Fourteenth Amendment as a minimal requirement.").



failing to make the findings required by those laws. The findings the Decision does make are unsupported by substantial evidence.

The Decision also constitutes an abuse of discretion because it fails to provide a reasoned analysis which would justify more fossil-fueled energy procurement to resolve the fossil-fueled climate change impacts that the Commission itself claims necessitated this proceeding. The Commission failed to hold a hearing and provided no opportunity to present evidence or refute the unsubstantiated and extra-record materials it relied upon unnecessarily to order procurement, nor did the Commission provide notice and an opportunity to be heard before changing its prior procurement decision.<sup>19</sup> As detailed below, the Decision should be vacated.

### **III. BACKGROUND**

On August 14-15, 2020 – days when energy demand did not exceed the peak levels forecasted by the CAISO and the Commission – the CAISO unjustifiably allowed thousands of megawatts of power to leave the state while electricity resources that Californians had already paid for sat idle. Had CAISO ensured that even a fraction of the power that it allowed to be exported was available to be used in California, Californians would not have experienced rolling blackouts statewide.

The August 14<sup>th</sup> and 15<sup>th</sup> blackouts understandably angered many Californians who already pay some of the highest utility rates in the nation. Governor Newsom called the blackouts unacceptable and demanded an investigation,<sup>20</sup> and the President and Chairs of the

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<sup>19</sup> *California Trucking Assn. v. Public Utilities Comm.* (1977) 19 Cal.3d 240, 244 (the “phrase ‘opportunity to be heard’ implies at the very least that a party must be permitted to prove the substance of its protest rather than merely being allowed to submit written objections to a proposal.”).

<sup>20</sup> Letter from Governor Newsom to Presidents and Chair of Commission, CAISO, and CEC (August 17, 2020), p. 1-3, available at <https://www.gov.ca.gov/wp-content/uploads/2020/08/8.17.20-Letter-to-CAISO-PUC-and-CEC.pdf>.

Commission, CAISO, and the California Energy Commission (CEC) promised to perform a root cause analysis “to understand the cause of the resource shortfalls.”<sup>21</sup>

Three months after the August blackouts occurred, on November 19, 2020, the Commission instituted this siloed “emergency” proceeding.<sup>22</sup>

On December 11, 2020, three weeks after instituting R.20-11-003, the assigned Administrative Law Judge (ALJ) issued an e-mail ruling that speculated about a need for additional capacity to be procured by summer 2021 and sought comments from the parties.<sup>23</sup> The December 11<sup>th</sup> ALJ ruling speculated about the need for additional capacity based on a misinterpretation of D.19-11-016, a misinterpretation of the PRCA, and comments by only three parties to the proceeding.<sup>24</sup> No opportunity to present testimony or evidence to refute the Commission’s conclusions with respect to D.19-11-016, the PRCA, or the comments by the three parties was provided to PCF or any other party.

The prehearing conference was held on December 15, 2020<sup>25</sup> and the Assigned Commissioner’s Scoping Memo and Ruling (Scoping Memo) was issued on December 18, 2020.<sup>26</sup> The Scoping Memo identified issues different from the issues identified preliminarily in the OIR, changed the categorization of R.20-11-003 from quasi-legislative to ratesetting, and

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<sup>21</sup> Letter from Presidents and Chair of Commission, CAISO, and CEC to Governor Newsom (August 19, 2020), p. 3, available at [https://www.cpuc.ca.gov/uploadedFiles/CPUCWebsite/Content/News\\_Room/NewsUpdates/2020/Joint%20Response%20to%20Governor%20Newsom%20Letter%20August192020.pdf](https://www.cpuc.ca.gov/uploadedFiles/CPUCWebsite/Content/News_Room/NewsUpdates/2020/Joint%20Response%20to%20Governor%20Newsom%20Letter%20August192020.pdf).

<sup>22</sup> R.20-11-003, Order Instituting Rulemaking Emergency Reliability (November 19, 2020).

<sup>23</sup> R.20-11-003, E-Mail Ruling Directing Parties to Serve and File Responses to Proposals and Questions Regarding Emergency Capacity Procurement by the Summer of 2021 (December 11, 2020).

<sup>24</sup> R.20-11-003, E-Mail Ruling Directing Parties to Serve and File Responses to Proposals and Questions Regarding Emergency Capacity Procurement by the Summer of 2021 (December 11, 2020), p. 3 (“This need for expedited action is additionally supported in some parties’ opening comments, including those of the California Independent System Operator, Southern California Edison, and the Independent Energy Producers.”).

<sup>25</sup> R.20-11-003, Reporter’s Transcript for 12/15/2020 Prehearing Conference (December 22, 2020).

<sup>26</sup> R.20-11-003, Assigned Commissioner’s Scoping Memo and Ruling (December 21, 2020).

changed the preliminary determination in the OIR to “find that evidentiary hearings may be needed.”<sup>27</sup>

Ten days after the Scoping Memo, on December 28, 2020, President Batjer issued a ruling that directed the utilities to seek contracts for additional capacity for summer 2021 and summer 2022 without taking any evidence, based largely on the same speculation referenced by the ALJ’s December 11<sup>th</sup> ruling, and comments by only certain parties in response to the ALJ’s speculation.<sup>28</sup> The December 28<sup>th</sup> ruling purported to be “consistent with, and [] essentially an extension of, the reliability procurement ordered in Integrated Resources Plans (IRP) Decision (D.) 19-11-016,” claiming that the “‘potential’ system reliability challenges” referred to in D.19-11-016 “are now actual system reliability challenges.”<sup>29</sup> Again at this point, PCF had no opportunity to present testimony or evidence to refute assumptions being made by others.

On January 8, 2020, the assigned ALJ issued a proposed decision (PD) that addressed the same issues as the December 28<sup>th</sup> ruling.<sup>30</sup> Still, no opportunity to present testimony or evidence to refute the assumptions being made were provided to PCF or any other party. The Commission issued its PD requiring additional procurement despite the fact that the CAISO had announced its intention to publish a final root cause analysis to address numerous questions that the CAISO admitted had not yet been addressed by the October 2020 PCRA.

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<sup>27</sup> *Id.* at p. 3-4; *id.* at p. 5 (“...I change the preliminary determination in the OIR and find that evidentiary hearing may be needed”); *id.* at p. 7 (“...the category is hereby changed to ratesetting”); *compare* R.20-11-003, Order Instituting Rulemaking Emergency Reliability (November 19, 2020), p. 8-11, 21.

<sup>28</sup> R.20-11-003, Assigned Commissioner’s Ruling Directing the State’s Three Large Electric Investor-Owned Utilities to Seek Contracts for Additional Power Capacity to Be Available by the Summer of 2021 or 2022 (December 28, 2020).

<sup>29</sup> *Id.* at 3.

<sup>30</sup> R.20-11-003, Proposed Decision Directing Pacific Gas and Electric Company, Southern California Edison Company, and San Diego Gas & Electric Company to Seek Contracts for Additional Power Capacity for Summer 2021 Reliability (January 8, 2020).

The Commission voted to adopt D.21-02-028 on February 11, 2021, erroneously finding that CAISO initiated the blackouts “[a]s a result of the prolonged heat event,” and concluding that “PG&E, SCE, and SDG&E should contract for capacity that is available to serve peak and net peak load in the summer of 2021 and seek approval for cost recovery in rates.”<sup>31</sup>

**IV. THE COMMISSION’S FINDINGS ABOUT A HEAT EVENT DO NOT SUPPORT THE DECISION TO ORDER ADDITIONAL PROCUREMENT; AND THE FINDINGS ABOUT HEAT AS THE CAUSE OF THE BLACKOUTS AND ABOUT THE NEED FOR ADDITIONAL PROCUREMENT LACK EVIDENTIARY SUPPORT.**

The Commission’s speculation about a “prolonged heat event” fails to address the relevant question, and its presumed cause for the August 2020 blackouts lacks evidentiary support. The Commission’s assumptions regarding the cause for the blackouts led it to dangerous and unsupported conclusions about the need for ratepayer-funded “solutions” in the form of additional procurement. Before ordering more fossil-fueled procurement purportedly to address a problem caused by fossil fuel use, the Commission should have allowed the submission of evidence and made findings about the actual cause of the blackouts and then tailored any solution to address that cause after considering the availability of alternatives.

**A. The Commission Made No Finding that Demand Exceeded Supply or Even That Demand Exceeded Expected Peak Levels.**

The first and second findings in the Decision purport to establish “a prolonged heat event” as the cause for CAISO initiating rolling blackouts.<sup>32</sup> Critically, however, the Commission makes no finding that demand exceeded supply, or even that demand exceeded expected peak levels for a hot summer day. The Commission makes no link whatsoever between

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<sup>31</sup> D.21-02-028, p. 15 (Finding of Fact 2), p. 17 (Conclusion of Law 1), p. 18 (Ordering Paragraph 1).

<sup>32</sup> D.20-02-028, p. 14-15 (1. In August 2020, a majority of the western United States encountered a prolonged extreme heat event. 2. As a result of the prolonged heat event, the CAISO initiated rotating outages in its balancing authority area to prevent wide-spread service interruptions.”).

the temperature outside in mid-August and California's energy supply falling short of demand. Without this link, the Commission's finding about a "prolonged heat event" becomes nothing more than a red herring – distracting the public from the glaring absence of a meaningful factual inquiry regarding the cause for the blackouts. The Decision is unsupported by any findings providing the requisite reasoned analysis to support additional fossil fueled procurement.

**B. The Commission Failed to Take Any Evidence Regarding the Cause for the Blackouts or the Need for Additional Procurement, and Its Speculation Is Unsupported by Substantial Evidence.**

The record of this proceeding contains no evidence regarding the cause for the blackouts. The record does not even contain the deficient and unreliable PRCA that the Commission refers to in its findings.<sup>33</sup> The Commission did not and could not take official notice of the PRCA pursuant to Rule 13.9.<sup>34</sup> The Commission could not have taken official notice of the PRCA because revisions to the PRCA were anticipated, and because the document was signed by the Presidents of the Commission and the California Energy Commission (CEC) but contains no indication it was officially adopted by either government agency – as opposed to by individual members of those organizations – so as to constitute an official act.<sup>35</sup> No substantial evidence exists to support the third finding that, as organizations, "the CPUC, CEC, and CAISO" each officially adopted the PRCA for publication.

Additionally, before taking official notice of any matter that is "of substantial consequence to the determination" of the proceeding, the Commission would have been required to provide PCF and others with a reasonable opportunity to present evidence relevant to the

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<sup>33</sup> D.20-02-028, p. 15 (Finding of Fact 3).

<sup>34</sup> Cal. Code Regs., tit. 20, § 13.9.

<sup>35</sup> Evid. Code, § 452, subd. (c); *Childs v. California* (1983) 144 Cal.App.3d 155, 162; *see also LaChance v. Valverde* (2012) 207 Cal.App.4th 779, 783 (email from attorney general is not judicially noticeable).

propriety of taking official notice before judicial notice may be resorted to by decision-makers.<sup>36</sup> Here, PCF had no such opportunity.

In any event, the Commission did not and could not have taken official notice of the truth of the contents of the PRCA.<sup>37</sup>

Moreover, even if the PRCA had been made part of the record, it could not constitute substantial evidence to support the finding that temperature caused the blackouts because an analysis of temperature alone does not address the relevant question.<sup>38</sup> The issue in determining the cause of the blackouts is not whether it was hot outside and people ran their air conditioners throughout the evening, but whether energy demand exceeded the anticipated, planned for, and available supply. In fact, the blackouts were initiated at demand levels that were below the CAISO's forecast 1-in-2 peak demand for the summer of 2020.<sup>39</sup>

Notwithstanding the above, the PRCA at best would have constituted uncorroborated hearsay evidence, which does not constitute substantial evidence to sustain the Decision.<sup>40</sup> The PRCA was not and could not have been corroborated because no such evidence whatsoever was

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<sup>36</sup> Evid. Code, § 455 (“ . . . (a) If the trial court has been requested to take or has taken or proposes to take judicial notice of such matter, the court shall afford each party reasonable opportunity, before the jury is instructed or before the cause is submitted for decision by the court, to present to the court information relevant to (1) the propriety of taking judicial notice of the matter and (2) the tenor of the matter to be noticed. (b) If the trial court resorts to any source of information not received in open court, including the advice of persons learned in the subject matter, such information and its source shall be made a part of the record in the action and the court shall afford each party reasonable opportunity to meet such information before judicial notice of the matter may be taken.”).

<sup>37</sup> Evid. Code, § 452, subds. (c), (h); *Jolley v. Chase Home Finance, LLC* (2013) 213 Cal.App.4th 872, 889; *Childs v. California* (1983) 144 Cal.App.3d 155, 162-163 (“the court cannot take judicial notice of self-serving hearsay allegations”).

<sup>38</sup> *The Utility Reform Network v. Public Utilities Com.* (2014) 223 Cal.App.4th 945, 961-962; *Broadway, Laguna, Vallejo Association v. Bd. of Permit Appeals* (1967) 66 Cal.2d 767, 773.

<sup>39</sup> CAISO, *2020 Summer Loads and Resources Assessment*, May 15, 2020, p. 3 (Forecast summer 1-in-2 peak = 45,907 MW); CAISO Today's Outlook website (click on Demand) (August 14, 2020 blackout initiated (18:36) = 45,716 MW; August 15, 2020 blackout initiated (18:20) = 44,662 MW), available at <http://www.caiso.com/TodaysOutlook/Pages/default.aspx>.

<sup>40</sup> *The Utility Reform Network v. Public Utilities Com.* (2014) 223 Cal.App.4th 945, 965.

before the Commission at the time it decided D.20-02-028. Although the Decision refers to party comments,<sup>41</sup> under the Commission's own rules<sup>42</sup> only the California Large Energy Consumers Association (CLECA) presented evidence<sup>43</sup> because only CLECA verified its comments on the OIR pursuant to Rule 6.2.

CLECA, however, did not submit evidence that would support the Commission's findings. CLECA's comments, which were submitted on November 11, 2020 in response to the OIR, commented that "the Commission is rightly focused on demand-side measures and Demand Response (DR)" and did not present evidence to suggest the Commission should consider expedited procurement.<sup>44</sup>

Notwithstanding that the PRCA was not made part of the record and does not and could not constitute substantial evidence, the third and fourth findings misdescribe the PRCA.<sup>45</sup> As mentioned above, the PRCA was signed by individual members of the Commission, CAISO, and the CEC, and provides no indication the document was approved by the agencies themselves. Nor did the PRCA "examine[] the cause of the August 2020 rotating outages" in any standard sense of the term "cause." The PRCA fails to disclose that CAISO failed to manage the grid and related markets as statutorily required<sup>46</sup> nor did it analyze or admit the fact that CAISO was exporting thousands of megawatts of energy as it ordered Californians' power shut off.

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<sup>41</sup> D.20-02-028, p. 9.

<sup>42</sup> Cal. Code Regs., tit. 20, § 6.2 ("...Unverified factual assertions will be given only the weight of argument.").

<sup>43</sup> R.20-11-003, Comments of the California Large Energy Consumers Association on Order Instituting Rulemaking Emergency Reliability (November 3, 2020), p. 1 ("The verification required by Rule 6.2 is attached hereto."), p. 17 (verification).

<sup>44</sup> *Id.* at p. 2, 8.

<sup>45</sup> D.20-02-028, p. 15 ("3. On October 6, 2020, the CPUC, CEC, and CAISO published a Preliminary Root Cause Analysis report that examined the cause of the August 2020 rotating outages.").

<sup>46</sup> Pub. Util Code, § 345.5, subd. (b).

Additionally, the fourth finding in D.21-02-028<sup>47</sup> fails to accurately describe the PRCA. The PRCA recommends enhanced oversight to ensure completion of existing construction and describes demand response and flexibility as the focus of its recommendation to quickly develop additional resources.<sup>48</sup>

The first four findings lead to the fifth and sixth findings, which purport to find that “[t]here is a need for incremental physical resources that can address grid needs during the system peak and net peak demand periods for summer 2021 and to prevent similar service interruptions to the August 2020 rotating outages,” and that “[t]ime is of the essence, and the Commission needs to expeditiously signal support of contracts for expansion of existing resources that can help maintain reliability in summer 2021 by delivering during peak and net peak demand periods.”<sup>49</sup> These findings, like those they build upon, lack any evidentiary basis. In summary, neither the PRCA nor party comments constitute substantial evidence, and no evidentiary basis exists in the record to support the Commission’s findings.

**V. THE DECISION CONTRADICTS D.19-11-016 AND THE NUMEROUS LAWS AND POLICIES TO WHICH THE COMMISSION MUST ADHERE, AND EXCEEDS THE COMMISSION’S AUTHORITY.**

D.19-11-016 was issued in the Integrated Resource Planning (IRP) rulemaking proceeding R.16-02-007, which had been initiated by the Commission to continue its “efforts to ensure a safe, reliable, and cost-effective electricity supply in California” on February 11,

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<sup>47</sup> D.20-02-028, p. 15 (“4. The preliminary report identified several actions that will address the contributing factors that caused the August 2020 rotating outages. The actions identified in the preliminary report include expediting the regulatory and procurement processes to develop additional resources that can be online by summer 2021.”).

<sup>48</sup> PRCA, p. 2 (“...Ensure that the generation and storage projects that are currently under construction in California are completed by their targeted online dates,” and “Expedite the regulatory and procurement processes to develop additional resources that can be online by 2021. This will most likely focus on resources such as demand response and flexibility. This can complement the resources that are already under construction...”.)

<sup>49</sup> D.20-02-028, p. 15.



2016.<sup>50</sup> The OIR in R.16-02-007 explained that resource and procurement planning “will be done in the context of SB 350, and will also be informed by previous policy documents such as the Energy Action Plan (EAP) I and II, the Commission’s Loading Order policies which prioritize certain preferred resources, the California Air Resources Board’s (CARB’s) 2030 Climate Change Scoping Plan...other state energy policies, such as the Global Warming Solutions Act of 2006 [] greenhouse gas limitations, and once-through-cooling policies.”<sup>51</sup>

These laws and policies aim to reduce the energy industry’s greenhouse gas emissions and corresponding contributions to climate change impacts, including on disadvantaged communities; and, as the Commission correctly noted in the OIR for R.16-02-007, must guide the Commission’s decision-making process.

**A. The Commission Remains Required to Reduce Climate Change Impacts, but the Decision Increases Use of Fossil Fuels That Increase Climate Change Impacts.**

In stark contrast, rather than taking action to reduce the use of fossil fuels that cause climate change and worsen climate change impacts, the subject Decision purports to react to climate change effects by *increasing* the use of fossil-fueled resources. In doing so, the Decision turns a blind eye to the numerous statutory directives governing the Commission’s actions,

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<sup>50</sup> R.16-02-007, *Order Instituting Rulemaking to Develop and Electricity Integrated Resource Planning Framework and to Coordinate and Refine Long-Term Procurement Planning Requirements* (February 11, 2016), p. 2.

<sup>51</sup> *Id.* at p. 4-5.

including Sections 380(b),<sup>52</sup> 454.51,<sup>53</sup> and 454.52,<sup>54</sup> the loading order policies,<sup>55</sup> and CAISO's statutory directives.<sup>56</sup> These statutory mandates require the Commission to reduce greenhouse gas emissions,<sup>57</sup> to rely upon zero carbon-emitting resources when possible,<sup>58</sup> and to minimize impacts to disadvantaged communities,<sup>59</sup> all of which the Commission failed to scope, much less consider in this proceeding.

**B. The Decision Violates the Commission's Duty to Protect Ratepayers Because It Orders Ratepayer-Funded Procurement Without Even Considering The Possibility That Increased Rates Might Not Be Necessary.**

The Decision orders additional procurement at ratepayer expense without first ascertaining the need for additional procurement, whether alternatives to ordering additional procurement exist,<sup>60</sup> or whether ordering additional procurement will actually address the cause(s) of the blackouts. For example, Section 761.3 requires CAISO to identify the causes of forced outages and to communicate that information to the Commission,<sup>61</sup> but the Decision wholly fails to investigate the reasons why multiple plants were not operating as expected. The Decision to

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<sup>52</sup> Pub. Util. Code, § 380, subd. (b) (“In establishing resource adequacy requirements, the commission shall ensure the reliability of electrical service in California while advancing, to the extent possible, the state’s goals for clean energy, reducing air pollution, and reducing emissions of greenhouse gases.”)

<sup>53</sup> Pub. Util. Code, § 451.51, subd. (a) (requiring the Commission to identify a portfolio of resources that “shall rely upon zero carbon-emitting resources to the maximum extent reasonable and be designed to achieve any statewide greenhouse gas emissions limit...”).

<sup>54</sup> Pub. Util. Code, § 451.52, subd. (a)(1)(I) (requiring the Commission to ensure that load serving entities “Minimize localized air pollutants and other greenhouse gas emissions, with early priority on disadvantaged communities...”).

<sup>55</sup> R.16-02-007, *Order Instituting Rulemaking to Develop and Electricity Integrated Resources Planning Framework and to Coordinate and Refine Long-Term Procurement Planning Requirements* (February 11, 2016), p. 5 & fn. 3.

<sup>56</sup> Pub. Util. Code § 345.5, subds. (b)(3), (c)(1).

<sup>57</sup> Pub. Util. Code, § 380.

<sup>58</sup> Pub. Util. Code, §§ 345.5, subd. (c)(1), 451.51, subd. (a); *see also* Pub. Util. Code, § 454.53.

<sup>59</sup> Pub. Util. Code, §§ 345.5, subd. (b)(3), 451.52, subd. (a)(1)(I).

<sup>60</sup> *Northern California Power Agency v. P.U.C.* (1971) 5 Cal.3d 370, 380 (“The Commission may and should consider Sua sponte every element of public interest affected by facilities which it is called upon to approve. It should not be necessary for any private party to rouse the Commission to perform its duty...”).

<sup>61</sup> Pub. Util. Code, § 761.3, subd. (e); *see also* General Order 167.

order additional procurement at ratepayer expense – unreasonably and without justification based on the requisite analysis and substantial evidence – disregards Legislative intent “that the commission reduce rates for electricity and natural gas to the lowest amount possible” and violates the express provisions of Sections 451, 454, 454.5(d)(1), (5), 454.52(a)(1)(C)-(D).<sup>62</sup> These statutory mandates require that increased rates be just and reasonable and justified with a proper evidentiary showing and findings,<sup>63</sup> and that that impacts on ratepayers’ bills be minimized.<sup>64</sup> The Decision lacks substantial evidence and makes no findings that would justify the increased costs to ratepayers resulting from the Decision.

**C. The Decision Cannot Be Interpreted as Encompassing the Once-Through-Cooling Plants Referenced in D.19-11-016.**

The additional system capacity procurement required by D.19-11-016, and extended by the Decision here,<sup>65</sup> expressly excluded the Once-Through-Cooling (OTC) plants identified in D.19-11-016.<sup>66</sup> The Commission may only make changes to its prior decisions “upon notice to the parties, and with an opportunity to be heard as provided in the case of complaints.”<sup>67</sup> Far from providing such notice, the Scoping Memo appropriately eliminated from the scope of this

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<sup>62</sup> Pub. Util. Code, § 747, § 451, § 454, § 454.5, subd. (d)(1), (5) (requiring the Commission to approve only those procurement plans that allow for “just and reasonable rates”); Pub. Util. Code, § 454.52, subd. (a)(1)(C)-(D) (requiring the Commission to ensure that load serving entities “Enable each electrical corporation to fulfill its obligation to serve its customers at just and reasonable rates” and to “Minimize impacts on ratepayers’ bills”); *see also* Pub. Util. Code, § 345.5(b)(1), (5) (CAISO must manage the grid in a manner that reduces economic cost to California consumers and minimizes the cost to ratepayers).

<sup>63</sup> Pub. Util. Code, § 451, § 454, § 454.5, subd. (d)(1), (5), § 454.52, subd. (a)(1)(C).

<sup>64</sup> Pub. Util. Code, § 454.52, subd. (a)(1)(D).

<sup>65</sup> R.20-11-003, Assigned Commissioner’s Ruling Directing the State’s Three Large Electric Investor-Owned Utilities to Seek Contracts for Additional Power Capacity to Be Available by the Summer of 2021 or 2022 (December 28, 2020), p. 3.

<sup>66</sup> D.19-11-016, p. 80 (OP 2: “...Any contracts executed by any load-serving entity with plants listed in Ordering Paragraph 1 are in addition to and do not count toward the obligations required by Order Paragraph 3 of this decision.”); *id.* at p. 23.

<sup>67</sup> Pub. Util. Code, § 1708; *California Trucking Assn. v. Public Utilities Com.* (1977) 19 Cal.3d 240, 244 [“The phrase ‘opportunity to be heard’ implies at the very least that a party must be permitted to prove the substance of its protest rather than merely being allowed to submit written objections to a proposal.”].)

proceeding the preliminary reference in the OIR to retrofitting OTC plants.<sup>68</sup> To the extent that the Commission intended to refer to generation by OTC plants identified in D.19-11-016 for reliability capacity for the Summer of 2021,<sup>69</sup> the Decision is void for lack of jurisdiction.

**VI. THE DECISION EXCEEDS THE COMMISSION'S AUTHORITY BECAUSE IT RESULTED FROM A PROCESS THAT VIOLATES STATUTORY DIRECTIVES ISSUED TO THE COMMISSION AND BASIC PRINCIPLES OF DUE PROCESS.**

As discussed below, the substantive deficiencies in the Decision were the result of an unfair process that failed to conform to statutory and constitutional requirements. This proceeding duplicates other proceedings and the Commission failed to hold the required hearing or to comply with due process.

**A. The Scope of This Proceeding Duplicates Other Proceedings in Violation of Statutory Directives.**

The Decision claims to address the “actual system reliability challenges” that were identified in D.19-11-016 “as ‘potential’ system reliability challenges.”<sup>70</sup> In D.19-11-016, the Commission found that “incremental system resource adequacy and renewable integration resources will be needed by Summer 2021,” and recognized that “the need for additional resources is being examined in the 2019-2020 IRP cycle currently underway.”<sup>71</sup> Instead of reopening R.16-02-007 or addressing procurement in R.20-05-003,<sup>72</sup> the Commission

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<sup>68</sup> R.20-11-003, Order Instituting Rulemaking Emergency Reliability (November 19, 2020), p. 10 (“...retrofitting existing generators that are set to retire, such as Once-Through-Cooling (OTC) generators.”); R.20-11-003, Assigned Commissioner’s Scoping Memo and Ruling (December 21, 2020).

<sup>69</sup> D.20-11-003, p. 16 (“The following resource types may meet the emergency reliability capacity need for the summer of 2021: incremental capacity from existing power plants through efficiency upgrades including revised power purchase agreements, contracting for generation that is at-risk of retirement, incremental energy storage capacity, resource adequacy only contracts or contracts that include tolling agreements, and contracts for firm forward imported energy.”).

<sup>70</sup> D.20-02-028, p. 15 (Finding of Fact 7).

<sup>71</sup> D.19-11-016, p. 70 (Findings of Fact 16-17).

<sup>72</sup> R.20-05-003, Order Instituting Rulemaking to Continue Electric Integrated Resources Planning and Related Procurement Processes (May 7, 2020), p. 2.

contravened Section 452.52(d)<sup>73</sup> by opening an entirely new proceeding. Even before initiating this proceeding, splintered procurement-related proceedings<sup>74</sup> resulted in advocacy challenges and incomplete decision-making.<sup>75</sup> A decision disassociated from the controlling statutory mandates the Commission has now repeatedly acknowledged<sup>76</sup> would be avoided by following the Legislature’s specific procedural directive to avoid duplicative proceedings. Additionally, the Commission lacks authority to evade statutory environmental and ratepayer protections by opening this proceeding as a siloed proceeding.

### **B. The Commission Was Required to Hold a Hearing.**

To increase minimum procurement requirements or make other changes to D.19-11-016, the Commission must provide the parties with notice “and with an opportunity to be heard as provided in the case of complaints.”<sup>77</sup> Moreover, whenever the Commission investigates a “rate, classification, rule, contract, or practice” of any public utility, and when the Commission “finds that the rates or classifications, demanded, observed, charged, or collected by any public utility for or in connection with any service, product, or commodity, or the rules, practices, or contracts affecting such rates or classifications are insufficient, unlawful, unjust, unreasonable,

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<sup>73</sup> *Id.* at p. 11; Pub. Util. Code, § 452.52, subd. (d) (“To eliminate redundancy and increase efficiency, the process adopted pursuant to subdivision (a) shall incorporate, and not duplicate, any other planning processes of the commission.”); *Southern California Gas Co. v. Public Utilities Com.* (1979) 24 Cal.3d 653, 659 (Commission lacks authority to contradict or disregard specific legislative directives).

<sup>74</sup> R.19-11-009, Order Instituting Rulemaking (November 7, 2019), p. 5.

<sup>75</sup> *See e.g.* D.19-11-016, p. 4 (declining to take up a motion to value hybrid resources in the IRP proceeding before deciding D.19-11-016); D.20-01-004, p. 14 (deciding the motion to value hybrid resources in the RA proceeding but declining to include behind the meter resources).

<sup>76</sup> R.20-05-003, Order Instituting Rulemaking to Continue Electric Integrated Resources Planning and Related Procurement Processes (May 7, 2020), p. 2 (“...this proceeding will address ongoing oversight of the IRP planning process and the procurement necessary to achieve the goals set by the Legislature in SB 350 and SB 100, as well as by the Commission in R.16-02-007.”); *id.* at p. 5.

<sup>77</sup> Pub. Util. Code, § 1708; *California Trucking Assn. v. Public Utilities Com.* (1977) 19 Cal.3d 240, 244 [“The phrase ‘opportunity to be heard’ implies at the very least that a party must be permitted to prove the substance of its protest rather than merely being allowed to submit written objections to a proposal.”].)

discriminatory, or preferential,” it must first hold a hearing.<sup>78</sup> The Commission’s failure to hold a hearing before concluding that current procurement rules and practices were inadequate invalidates the Decision.<sup>79</sup>

**C. The Decision Violates Due Process Because the Parties Were Not Provided Any Opportunity to Present Their Own Evidence or to Refute the Material Upon Which the Commission Relied in the PD.**

The Commission violates due process when it denies a party the opportunity to present its own evidence, or to cross-examine and refute evidence the Commission did rely upon.<sup>80</sup> Here, the Commission issued the PD before providing any opportunity to submit testimony.

After the PD had already been issued, the parties were eventually permitted to submit testimony relating to a then-future (and now pending) additional proposed decision in this proceeding, but the Commission prevented the parties from testing or even objecting to other parties’ testimony.<sup>81</sup> No opportunity was given to submit evidence that the Commission would consider before deciding whether to adopt the PD. The Commission thus prevented any meaningful opportunity to disprove the erroneous assumptions in the Decision in violation of fundamental principles of due process.

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<sup>78</sup> Pub. Util. Code, § 728 (requiring a hearing when the Commission finds that “the rules, practices, or contracts affecting such rates...are insufficient...”); Pub. Util. Code, § 729 (requiring a hearing when the Commission investigates “rules, contracts, and practices” or establishes new “rules, contracts, or practices...”); Pub. Util. Code, § 761 (requiring a hearing when the Commission finds that rules or practices are inadequate or insufficient); *see also Southern California Edison Co. v. Public Utilities Com.* (1978) 20 Cal.3d 813, 829.

<sup>79</sup> *California Trucking Assn. v. Public Utilities Com.* (1977) 19 Cal.3d 240, 248.

<sup>80</sup> *Caesar's Restaurant v. Industrial Acc. Commission* (1959) 175 Cal.App.2d 850, 855 (“The right to [a fair and open hearing] is one of ‘the rudiments of fair play’ (citation) assured to every litigant by the Fourteenth Amendment as a minimal requirement.”).

<sup>81</sup> Contravening its own rules, the Commission admitted testimony without giving parties an opportunity to object. Rule 11.1, subd. (e); R.20-11-003, E-Mail Ruling Denying January 21, 2021 Motions of Protect Our Communities Foundation and Utility Consumers’ Action Network Seeking Evidentiary Hearings (January 22, 2021), p. 5 (“Parties that timely served opening and reply testimony shall move to introduce the evidence into the record no later than February 5, 2021”); R.20-11-003, E-Mail Ruling Identifying and Receiving Exhibits Into Evidence (February 10, 2021), p. 4; *Southern California Edison Co. v. Public Utilities Com.* (2000) 85 Cal.App.4th 1086, 1105-1106.

## VII. CONCLUSION

PCF respectfully requests this application for rehearing be granted and that the Decision be vacated.

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