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BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

Implementing Senate Bill 846 Concerning Potential Extension of Diablo Canyon Power Plant Operations.	Rulemaking 23-01-007 (Filed January 12, 2023)

PACIFIC GAS AND ELECTRIC COMPANY'S (U 39 E) APPLICATION FOR REHEARING OF DECISION 23-12-036

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Dated: January 16, 2024

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Implementing Senate Bill 846 Concerning Potential Extension of Diablo Canyon Power Plant Operations.	Rulemaking 23-01-007 (Filed January 12, 2023)

PACIFIC GAS AND ELECTRIC COMPANY'S (U 39 E) APPLICATION FOR REHEARING OF DECISION 23-12-036

I. INTRODUCTION

Pursuant to Public Utilities Code section 1731 and California Public Utilities Commission ("Commission") Rule of Practice and Procedure 16.1, PG&E respectfully files this Application for Rehearing of Decision 23-12-036. The Commission adopted the Decision Conditionally Approving Extended Operations at Diablo Canyon Nuclear Power Plant Pursuant to Senate Bill 846 ("Decision") on December 14, 2023, and mailed it on December 15, 2023. Rule 16.1 requires that an application for rehearing be filed within 30 days of the date the Commission mails the decision. Pub. Util. Code, § 1731(b); Rule 16.1(a). This application is timely filed by the deadline of January 16, 2024.[1/]

In general, the Decision implements the extension of operations at the Diablo Canyon Nuclear Power Plant ("DCPP") consistent with Senate Bill ("SB") 846. With respect to the use of operating-risk compensation provided under Public Utilities Code Section 712.8(f)(5),[2/] the Commission appropriately recognized that Section 712.8(s) provides PG&E "some amount of

[1/] Thirty days after December 15, 2023 is January 14, 2024. Because January 14, 2024 is a Sunday, and the following Monday, January 15, 2024 is the Martin Luther King Jr.'s Birthday holiday during which Commission offices are closed, the deadline for filing this application falls on Tuesday, January 16, 2024. *See* Cal. Code Regs., tit. 20, § 1.15 ("If the last day falls on a Saturday, Sunday, holiday or other day when the Commission offices are closed, the time limit is extended to include the first day thereafter.").

[2/] Unless otherwise stated, statutory references in this application pertain to the California Public Utilities Code.

discretion on the use of surplus performance-based fees." Decision, at p. 110. The Commission also correctly determined that PG&E has discretion to allocate operating-risk compensation among the six critical public purpose priorities, and that such compensation cannot be used to fully offset operating costs. *Id.* at p. 114.

But in a few respects, the Decision is not compliant with the requirements of SB 846, which provides for full recovery of reasonable operating costs and discretion in how to spend operating-risk compensation as it is earned. Specifically, the Decision legally errs by adopting Conclusions of Law and Orders that:

1. Require PG&E to receive prior approval by the Commission through a Decision in advance of PG&E's expenditures of its earned operating-risk compensation;
2. Require PG&E to apply operating-risk compensation to offset the operating costs of Diablo Canyon that exceed 115% of its forecast costs.[3/]

The Commission must correct these errors to ensure that the Decision's treatment of compensation complies with the statute.[4/]

II. STANDARD OF REVIEW

Under Public Utilities Code section 1757.1(a)(2), the Commission commits legal error where "[t]he commission has not proceeded in the manner required by law." A Commission decision that is contrary to the governing statute will not survive, because it necessarily means the Commission has not proceeded in the manner required by law. *See Monterey Peninsula Water Mgmt. Dist. v. Pub. Utils. Com.* (2016) 62 Cal.4th 693, 699 (reversing Commission decision based in part on rejecting Commission's reading of governing statute). The interpretation of a statute and what it requires is a question of law subject to independent judicial

[3/] The Decision characterizes the amount at which operating risk compensation is required to offset operating costs of Diablo Canyon as costs in excess of 15 percent above PG&E's approved annual DCPP Cost Forecast Application. In this application, PG&E uses the mathematically equivalent terminology of costs that exceed 115 % of its forecast.

[4/] *See* PG&E Opening Comments on Proposed Decision, dated November 15, 2023 (identifying proposed changes to Proposed Decision consistent with PG&E's recommendations in this application at Appendix A, Conclusions of Law 55-61 and Ordering Paragraph 15).

review. Pub. Util. Code § 1757.1(a)(2); *see also Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 7.

III. ARGUMENT

A. Senate Bill 846

As relevant to this application, Senate Bill 846 includes two mechanisms for PG&E to receive payments for the continued operation of DCPP. *First*, the Commission "shall" authorize recovery of "all reasonable costs and expenses necessary to operate DCPP" as an "operating expense" from rates on an annual forecast basis and a subsequent true-up for the prior year via an expedited advice letter process. Pub. Util. Code § 712.8(h)(1). With respect to that true-up, the statute provides that "there shall be no further review of the reasonableness of costs incurred if actual costs are below 115 percent of the forecasted costs." *Id.*

Second, "[i]n lieu of a rate-based return on investment and in acknowledgement of the greater risk of outages in an older plant that [PG&E] could be held liable for," *id.* § 712.8(f)(5), PG&E is entitled to a separate fixed volumetric charge that PG&E may spend on six "critical public purpose priorities," "to the extent [the compensation] is not needed for DCPP," *id.* § 712.8(s)(1). Those public purpose priorities are: "[a]ccelerating customer and generator interconnections," "[a]ccelerating actions needed to bring renewable and zero-carbon energy online and modernize the electrical grid," "[a]ccelerating building decarbonization," "[w]orkforce and customer safety," "[c]ommunications and education," and "[i]ncreasing resiliency and reducing operational and system risk." *Id.*

Under the statute, PG&E "shall submit to the commission for its review, on an annual basis the amount of compensation earned" through volumetric payments, "how it was spent, and a plan for prioritizing the uses of such compensation the next year." *Id.* PG&E may not pay that compensation out to shareholders, may not "earn a rate of return" on any of its spending on critical public purpose activities so that "no profit shall be realized" by shareholders, and may not "increase existing public earning per share guidance" because of such compensation. *Id.* § 712.8(s)(1), (2). "The commission shall ensure no double recovery in rates." *Id.* § 712.8(s)(2).

B. The Decision Commits Legal Error by Requiring PG&E to Obtain Commission Approval Before Spending Operating-Risk Compensation.

The Decision concludes that PG&E may not use operating-risk compensation on critical public purpose priorities until after PG&E has submitted a formal application to the Commission and the Commission has reviewed and approved PG&E's proposed use of funds. *See* Decision, at pp. 111–112 & n.294. The Decision provides that "[p]arties will litigate, and the Commission will ultimately determine, whether PG&E's proposal actually conforms with the activities defined in statute," and that the "Commission may render a decision that replaces or modifies the PG&E proposal utilizing proposals made by other parties to the proceeding, if those party proposals comply with [the] statute as interpreted by this decision." *Id.* at 115. "Parties are encouraged to offer a variety of proposals." *Id.*

The Decision's pre-approval requirement reflects legal error. The statute does not allow the Commission to impose a prospective application requirement for spending operating-risk compensation.

1. The Text of the Statute Contemplates that the Commission Will Retrospectively Review Operating-Risk Compensation Already Spent, Not Impose a Prospective Application Requirement.

The plain text of SB 846 makes clear that PG&E may spend compensation without prior Commission approval and that review of its spending is undertaken retrospectively. First, the past-tense phrasing of the terms "earned" and "spent" in Section 712.8(s) demonstrates that PG&E may spend compensation during the same year it is received, without prior Commission approval. As previously noted, Section 712.8(s) requires that PG&E "submit to the [C]ommission for its review, on an annual basis the *amount of compensation earned* under paragraph (5) of subdivision (f), how *it was spent*, and a plan for prioritizing the uses of such compensation *the next year*." Pub. Util. Code § 712.8(s)(1) (emphasis added). It is well established that "[i]n construing statutes, the use of verb tense by the Legislature is considered significant." *Hughes v. Board of Architectural Examiners* (1998) 17 Cal.4th 763, 776. Here, the Legislature chose to use the past tense when it described compensation that PG&E not only has "earned," but also has "spent," Pub. Util. Code § 712.8(s)(1)—that is, the statute provides that the Commission will be reviewing spending that has already occurred. That choice contrasts with the final clause of the sentence, which requires PG&E to report its "plan for prioritizing the uses of such compensation *the next year*." *Ibid*. (emphasis added). The juxtaposition of the past tense in the first two clauses and the phrase "the next year" in the final clause indicates that two time periods are involved in the Commission's review. *See In re Valerie A*. (2007) 152 Cal.App.4th 987, 1008 (concluding that "two time periods are involved" because of the use of different verb tenses). Because the statute makes clear that operating-risk compensation will have already been "spent" at the time of the Commission's review, PG&E's expenditures of that compensation—whether on costs "needed" at DCPP or the critical public purpose priorities—cannot require prior approval.

Second, when the Legislature intends to authorize or require advance approval, it has not simply used the term "review." Instead, the Legislature uses language such as "review and approve or deny," "review and approval," or "review and accept, modify, or reject." *See, e.g.*, Pub. Util. Code § 399.13(c) ("review and accept, modify, or reject each electrical corporation's renewable energy resource procurement plan prior to the commencement of renewable energy procurement pursuant to this article"); *id*. § 740.18 ("review, modify, if appropriate, and decide whether to approve, two pending . . . transportation electrification infrastructure applications"); *id*. § 961(b)(2), (4) ("review and accept, modify, or reject" plans for safe operation of gas pipeline facilities); *id*. § 8386 (b) ("[e]ach electrical corporation shall annually prepare and submit a wildfire mitigation plan to the Wildfire Safety Division for review and approval"); *id*. § 8388.5 (e)(5) ("review and approve or deny the application" for utility participation in expedited undergrounding programs). "Ordinarily, where the Legislature uses a different word or phrase in one part of a statute than it does in other sections or in a similar statute concerning a related subject, it must be presumed that the Legislature intended a different meaning." *Campbell v. Zolin* (1995) 33 Cal.App.4th 489, 497. The use of the lone word "review" in Section 712.8(s) indicates that the Legislature did not intend to authorize the Commission to require PG&E to obtain prior approval before spending operating-risk compensation.

At the same time, Section 712.8(s) lacks any language regarding an "application," indicating that the Legislature likewise did not intend to require PG&E to file the "formal application" that the Decision requires. Decision, at p. 111. Here, too, when the Legislature seeks to impose such a requirement, it says so expressly—including as it did elsewhere in SB 846. *See* Pub. Util. Code § 712.8(f)(2) ("[a]ny additional funding for the employee retention program . . . shall be submitted by [PG&E] in an *application for review* by the [C]ommission" (emphasis added)); *see also id*. § 8388.5 (requiring the Commission "review and approve or deny the application" for undergrounding programs). Indeed, where the Code makes no mention of an "application," those plans may be submitted as compliance filings. *See id*. § 399.13(c) (renewable energy resource plans); *id*. § 961(b)(2), (4) (safety plans for natural gas pipeline facilities); *id*. § 8386 (wildfire mitigation plans). In sum, the limited language of "review" and the absence of a requirement to file an "application"—particularly in the context of funds already "spent"—indicates that the Legislature contemplated a retrospective compliance process, not a prospective application requirement.

Third, the fact that the statute classifies operating-risk payments as "compensation" for the greater risk of outages at the plant is inconsistent with a prior approval requirement. Section 712.8(f)(5) and Section 712.8(t) provide that such payments, together with compensation earned pursuant to Section 712.8(f)(6), constitute PG&E's "sole compensation" provided "[i]n lieu of a rate-based return on investment and in acknowledgment of the greater risk of outages in an older plant that the operator could be held liable for." Pub. Util. Code §§ 712.8(f)(5), (f)(6), (t). In normal parlance, the recipient of "compensation"—whether an employee, a service provider, or a utility—is free to use that compensation for whatever purposes the recipient desires. Here, the statute limits those purposes, but, as the Commission appears to recognize, the statute gives PG&E discretion to use its "sole compensation" as it sees fit within and among those permitted priorities. *See* Decision, at pp. 110, 114. Given this latitude afforded to PG&E, there is no role for prior Commission approval over how compensation is spent that cannot be better accomplished by retrospective review. Such a prior approval requirement for how to spend such "compensation"—funds *already* recovered from ratepayers—must be found in the terms of the statute itself. The Decision does not identify any such language. Instead, for the reasons previously described, SB 846 contemplates that PG&E retains its discretion to spend compensation as it is earned without securing Commission preapproval.

2. The Structure, Context, And Purpose of the Statute Contemplates That the Commission Will Not Impose a Prospective Application Requirement.

Imposition of a prospective application requirement for the use of operating-risk compensation also conflicts with the structure, context, and purpose of SB 846. As an initial matter, the Decision's prior approval requirement is incongruous with the review of PG&E's use of operating-risk compensation that the Legislature directed. The Decision concludes that a "formal application process is best suited to ensure any surplus performance-based fees are spent in accordance with the directives in Section 712.8," Decision, at p. 112, and states that prospective review will be focused on ensuring, among other things, "that the spending would not result in double recovery in rates, cause compensation to be paid out to PG&E shareholders, or cause PG&E to earn a rate of return on any of the expenditures," *id.* at p. 114. Those limitations on the uses of compensation call for a retrospective review rather than a prospective application. For example, in a retrospective review, the Commission can verify that spending has, in fact, taken place in an incremental manner to cost recovery in the general rate case, thereby ensuring "no double recovery in rates," Pub. Util. Code § 712.8(s)(2). The Commission's task is not to set compensation, as it normally does in a prospective review proceeding, because the Legislature has fixed the operating-risk compensation. The Commission's task is instead to ensure that compensation was not spent on already funded activities. This entails a retrospective review. In a prospective review regime, PG&E could at most forecast that its spending will be incremental, but the Commission could not verify that it was so. Likewise, prospective evaluation of whether PG&E "increase[d] existing public earning per share guidance," *ibid.*, or "paid out [compensation] to shareholders," *id.* § 712.8(s)(1), would amount to no more than a direction to PG&E to act in a manner consistent with the statute. To confirm that PG&E did not in fact earn a rate of return or increase its earnings guidance, the Commission would track actual funds that have been spent and review earning announcements that have been issued—*i.e.*, through retrospective review.

In addition, Section 712.8(s) contemplates an annual review process, which is incompatible with the onerous and lengthy application process. Section 712.8(s) provides that PG&E will make submissions to the Commission on an "annual basis." Cal. Pub. Util. Code § 712.8(s)(1). Under the Decision, those submissions must take the form of an application, which will allow for more elaborate procedures for litigation, discovery, and decision-making. The Public Utilities Code contemplates an up to 18-month timeline for that process.[5/] *See* Pub. Util. Code § 1701.5 ("[I]n a ratesetting or quasi-legislative case, the commission shall resolve the issues raised in the scoping memo within 18 months of the date the proceeding is initiated."); Cal. Code Regs. tit. 20, § 2.1(c) (stating that the proposed schedule must be consistent with "18 months or less" for a ratesetting or quasi-legislative proceeding). And, in practice, such proceedings more often than not take longer than a year. *See generally* California Public Utilities Commission, Report to the Legislature: Resolution of Proceedings, Disposition of Applications for Rehearing, and Commissioner Presence at Hearings 2022 (Jan. 31, 2023). The Commission's resolution of spending plans that the Decision requires PG&E to submit through an application is not guaranteed to occur on an annual basis, which conflicts with the statute's direction to make annual submissions. A Tier 2 advice letter, by contrast, has a more expedited timeframe, requiring resolution in at most 330 days, or else the advice letter is deemed effective.

[5/] Because the application process would "modify or reject PG&E's proposed spending," and seek to ensure that "appropriate guidelines have been put in place" governing the spending of compensation, Decision, at pp. 111–112, it would be a rate-setting proceeding. *See* Cal. Code Regs. tit. 20, § 1.3(g) (a rate-setting proceeding "sets or investigates rates for a specifically named utility (or utilities), or establishes a mechanism that in turn sets the rates for a specifically named utility (or utilities)"); *id*. § 7.1(e)(2) ("When a proceeding does not clearly fit into any of the categories as defined in Rules 1.3(a), (b), (f) and (g), the proceeding will be conducted under the rules applicable to the ratesetting category unless and until the Commission determines that the rules applicable to one of the other categories, or some hybrid of the rules, are best suited to the proceeding.").

See General Order 96-B, § 7.5.2. Unlike the over-year-long timeline for a typical application, that advice letter duration is consistent with the annual review process envisioned under Section 712.8(s).

A Tier 2 advice letter can also effectively demonstrate compliance with the directives of Section 712.8(s) and provide transparency to all stakeholders. For example, an advice letter could include the items that the Decision indicates should be in an application, including: a detailed report on whether and how fees were used for DCPP or critical public purpose priorities, and a declaration under the penalty of perjury that none of the funds were paid out to shareholders, that none earned a rate of return for PG&E, that no profit was realized, and that no public earnings per-share guidance increased as a result of the compensation. *See* Decision, at p. 113. A Tier 2 advice letter may also include a plan for how to use remaining funds to accelerate, or increase spending on, critical public purpose priorities, and how such spending complies with Commission decisions, resolutions, and orders. *See id*. at pp. 112–113. There is also nothing that would prevent the Commission from imposing sanctions should it find that PG&E, in its Tier 2 advice letter, did not comply with the requirements of Section 712.8(s). *See id*. at pp. 113–114, 118.

The Commission also erred in drawing a preapproval requirement from the statute's direction that PG&E submit a "plan for prioritizing the uses of such compensation the next year." Pub. Util. Code § 712.8(s)(1). The Decision states that "[t]here would be no purpose in having the Commission review PG&E's proposed usage of funds if the Commission did not also have the ability to modify or reject PG&E's proposed spending." Decision, at p. 111. But the statute's requirement that PG&E submit its plan for prioritizing uses of compensation provides an avenue for the Commission and stakeholders to provide input on, and hence contribute to, PG&E's planning for the use of funds. In short, the process allows stakeholders to recommend to PG&E how it should allocate the funds toward the most pressing public purpose priorities without supplanting the discretion that the Decision recognizes PG&E has to allocate the funds among those priorities. Decision, at p. 114. The Decision also states that the Commission's role in a prospective review would be to "modify or reject PG&E's proposed spending." Decision, at p. 111. If this passage is meant to suggest that the Commission would direct how the compensation should be allocated among the public purpose priorities, the Decision would be internally contradictory: the Commission elsewhere correctly concludes that the statute gives PG&E the discretion to determine how to allocate the funding.

The Decision compounds that error by the mistaken assumption that prospective review is the correct vehicle for addressing whether spending "*properly* falls within" or "*actually* conforms with" one or more of the categories identified in Section 712.8(s)(1). Decision, at pp. 114–115 (emphasis added). That is a backward-looking question. The Commission can determine whether spending "actually" fell within the statutory categories only through review of how the compensation "was spent," not through review of an unexecuted "plan for prioritizing" future spending. Pub. Util. Code § 712.8(s)(1). The Decision's reasoning does not support its conclusion that the Commission must pre-approve spending.

Finally, these legal errors not only contravene the statute, but they also harm customers. Imposition of a prior approval requirement—particularly given the Commission's suggestion that parties may "litigate" over "a variety of proposals," Decision, at p. 115—invites drawn out proceedings over whether proposed spending falls in critical public purpose categories. Such proceedings will delay PG&E's ability to act quickly to address important problems in these areas, contrary to the Legislature's intent. For example, SB 846's legislative history recognizes that the electricity grid was "precariously close" to "rotating outages" in 2020 and 2021. SB 846 Senate Third Reading at 8. A lengthy approval process for spending on "[a]ccelerating actions needed to bring renewable and zero-carbon energy online," Pub. Util. Code § 712.8(s)(1)(B), hampers PG&E's ability to address similar issues as they arise. Likewise, the legislative history explained that "new [clean energy] resources were being developed" at an "insufficient pace," and that there was a pressing need to "take[] steps to accelerate other clean-energy resources to replace DCPP." SB 846 Senate Third Reading at 8, 11; *see also* Pub. Resources Code § 25548(c) (noting that "[d]uring the time the Diablo Canyon powerplant's operations are extended, the state will continue to act with urgency to bring clean replacement energy online to support reliability and achieve California's landmark climate goals"). Subjecting PG&E's spending on "bring[ing] renewable and zero-carbon energy online," "building decarbonization," and "customer and generator interconnections," to a prior approval requirement, Pub. Util. Code § 712.8(s)(1)(A), (B), (C), prevents the rapid move toward clean energy that the Legislature recognized the State needs. It would also slow the realization of the benefits of the spending for the very customers that have contributed most to the operating-risk payment. By contrast, retrospective review—as the statute, properly read, requires—would ensure expeditious spending and immediate customer benefits from that spending, while still allowing for appropriate oversight by the Commission.

C. The Decision Commits Legal Error By Requiring Operating-Risk Compensation to Offset Actual Operating Costs Over 115% Of Forecasted Costs.

As noted, the statute provides that operating-risk "compensation, to the extent it is not needed for Diablo Canyon, shall be spent" on the critical public purpose priorities. Pub. Util. Code § 712.8(s)(1). Based on that "needed for Diablo Canyon" language, the Decision holds that PG&E must use operating-risk compensation to "offset any costs above" "more than fifteen percent above PG&E's approved forecast." Decision, at pp. 110-112. That was legal error. The statute states that the Commission "shall" authorize recovery of "all reasonable costs and expenses" from rates as an "operating expense," Pub. Util. Code § 712.8(h)(1), and it does not allow operating-risk compensation to substitute for recovery of reasonable costs through rates, even if those costs are greater than forecasted costs. Instead, the phrase "needed for Diablo Canyon" must be construed to refer to non-operating costs that cannot be recovered as reasonable operating costs under Section 712.8(h)(1).

Requiring PG&E to use operating-risk compensation to offset costs above 115% of the forecast reads the statutory requirement that the Commission "*shall* authorize [PG&E] to recover *all* reasonable costs and expenses necessary to operate [DCPP]" from rates out of the statute. Pub. Util. Code § 712.8(h)(1) (emphasis added). "An interpretation that renders related provisions nugatory must be avoided." *Kono v. Meeker* (2011) 196 Cal.App.4th 81, 88. "The words of the statute must be construed in context, keeping in mind the statutory purpose, and . . . statutory sections relating to the same subject must be harmonized, both internally and with each other, to the extent possible." *Grassi v. Superior Court* (2021) 73 Cal.App.5th 283, 291. The terms "shall" and "all" in Section 712.8(h)(1) are absolute: they require the Commission to allow PG&E to recover reasonable operating costs from rates, even if those operating costs are above—or well above—the forecasted costs.[6/] *See People v. Standish* (2006) 38 Cal.4th 858, 869, *as modified* (Aug. 23, 2006) ("Ordinarily, the term 'shall' is interpreted as mandatory and not permissive. Indeed, 'the presumption [is] that the word "shall" in a statute is ordinarily deemed mandatory and "may" permissive.'"); *State Farm Mutual Automobile Ins. Co. v. Garamendi* (2004) 32 Cal.4th 1029, 1044, *as modified* (June 9, 2004) (concluding that the "use of the inclusive term 'all'" establishes an "absolute rule in favor of public disclosure"); *In re Anthony C.* (2006) 138 Cal.App.4th 1493, 1514, *as modified* (May 26, 2006) (holding that "all" has an "inclusive commonsense meaning" and must be literally applied). Nothing in the text of Section 712.8(h) indicates that reasonable operating costs above 115% of forecasted costs would instead be recovered through operating-risk compensation provided to PG&E. The Commission thus must permit PG&E to recover reasonable operating costs above 115% of the forecast via the cost recovery mechanism of Section 712.8(h)(1) independent of the operating-risk payment, and it may not require PG&E to pay those costs out of the earned operating risk payment it collects as compensation under Section 712.8(f)(5).

The Decision's approach in interpreting "to the extent not needed" to require PG&E's compensation to offset reasonably incurred costs exceeding 115 percent of forecast also cannot be squared with the statute's "unprecedented" approach of fixing PG&E's compensation outside of Commission review. SB 846 Senate Third Reading at 11. The phrase "needed for Diablo Canyon," Pub. Util. Code § 712.8(s)(1), "must be read not in isolation but in the light of the

[6/] Where actual costs are greater than 115 percent of forecast, the Commission may undertake a review of costs for reasonableness. Pub. Util. Code § 712.8(h)(1).

statutory scheme," *Lungren v. Deukmejian* (1988) 45 Cal.3d 727, 735. Ordinarily, the Commission is responsible for determining the amount a utility earns over costs through its authority to review rates, which include a return on investment. *See* Pub. Util. Code § 451 (providing statutory authority to the Commission to ensure that charges are "just and reasonable"). In SB 846, the Legislature, however, took it upon itself to fix the amount that PG&E would recover above its reasonably incurred operating costs, including setting a volumetric rate of $6.50 per megawatt-hour (2022) generated by DCPP from customers of all load-serving entities and an additional payment of $6.50 per megawatt-hour (2022) from customers in the service territory of PG&E. *Id*. § 712.8(f)(5).[7/]

The legislative history of SB 846 confirms that this is an "unprecedented" approach that the Legislature intended to be "outside of a CPUC process." SB 846 Senate Third Reading at 11 ("Ratepayer protections are present in this bill, such as requiring that the costs to operate DCPP during the extension be reasonable and necessary. … However, this bill does take unprecedented steps to authorize various rates for all LSE ratepayers outside of a CPUC process."); *see also* SB 846 Senate Floor Analysis at 11 ("Instead of traditional rate review by the CPUC, this bill includes a myriad of rate mechanisms to collect costs associated with the ongoing operations of the DCPP, with some limitations on the ability for the company to earn profits."). The Commission failed to follow that statutory approach by providing that reasonable operating costs could eat into the legislatively set volumetric compensation rate. Under the Decision, when such costs are over 115% of the forecast, PG&E will not earn compensation of $13 per megawatt-hour (2022). This outcome is not what the Legislature intended and the statute requires. The Legislature went out of its way to deviate from the ordinary method that utilities earn compensation by fixing the amount of compensation PG&E would earn from extended DCPP operations "[i]n lieu of a rate-based return on investment and in acknowledgment of the greater

[7/] With regard to the operating risk-compensation, the Commission is only tasked with "adjust[ing] annually . . . using commission-approved escalation methodologies and adjustment factors," § 712.8(f)(5), *e.g.*, adjustments for inflation. The Commission may not alter the baseline $13 (2022) aggregated volumetric payment.

risk of outages in an older plant that the operator could be held liable for." Pub. Util. Code § 712.8(f)(6)(A). The Decision contravenes that intentional approach and carefully set operating-risk compensation rate.

Moreover, the statute's direction that operating-risk compensation must be spent in certain ways demonstrates that the Legislature did not intend that it be used to cover PG&E's reasonably incurred operating costs. SB 846 requires that operating-risk compensation be spent to "accelerate, or increase spending" on "critical public purpose priorities" principally related to sustainability, clean energy, and grid modernization. Pub. Util. Code § 712.8(s)(1). Operating-risk compensation is also accompanied by an independent review mechanism with guardrails aimed at preventing shareholder enrichment. *See ibid*. Put simply, the Legislature had a clear vision for how operating-risk compensation would be used—and that vision did not include covering PG&E's reasonable operating costs. By requiring compensation to be spent on PG&E's reasonably incurred operating costs, rather than the statutorily specified categories, the Decision impedes the Legislature's goals of accelerating spending on and improvement of critical areas for the State's energy system.

Contrary to the Decision's interpretation, the phrase "needed for Diablo Canyon" can only be understood to require PG&E to use the funds for non-operating costs, *i.e.*, costs that it either has not forecasted or cannot recover from customers as reasonable operating costs. Whether certain costs are "needed" for Diablo Canyon is a question subject to PG&E's discretion for the reasons explained in Section IIIB.[8/] Examples of such costs, for purposes of illustration, include those associated with relicensing that cannot be recovered from customers,[9/] or that may be ineligible – or exceed amounts available – for reimbursement from government

[8/] As described in Section IIIB, because § 712.8(s)(1) uses the tense of "earned" and "spent" and because there is no language indicating a role for prior Commission approval, the determination on whether to spend on costs "needed" for Diablo Canyon rests with PG&E.

[9/] *See* Pub. Util. Code § 712.8(c)(1)(C) (clarifying that the Commission "[s]hall not allow the recovery from ratepayers of costs incurred by the operator to prepare for, seek, or receive any extended license to operate by the United States Nuclear Regulatory Commission").

funding sources. Compensation may provide a source of funding to support the reasonable operating costs for Diablo Canyon, prior to such time that those incurred costs are recovered by PG&E in rates, subject to refund.[10/] There also may be other unforeseen non-operating costs that are ineligible for recovery through the nonbypassable charge or reimbursement from government funding. Operating-risk compensation is meant to address those contingencies. In other words, the "needed for Diablo Canyon" language is intended to make clear that PG&E was not rigidly limited to just the six priority uses and could use the operating-risk payment to pay for non-operating costs associated specifically with Diablo Canyon.

This interpretation of "needed for Diablo Canyon" is consistent with the statutory requirement that the Commission will review the reasonableness of actual costs over 115% of the forecast for recovery from rates. *See* Pub. Util. Code § 712.8(h)(1). That provision is meant to streamline reasonableness review. If actual costs fall under the 115% threshold, then SB 846 eliminates the requirement of reasonableness review for recovery. But if actual costs are at or above 115% of forecasted costs, SB 846 contemplates that the Commission will undertake "further review" of those costs for potential recovery to determine the reasonableness of cost recovery through rates because the Commission "shall" allow recovery of "all" reasonable costs. Pub. Util. Code § 712.8(h)(1). And, if those costs are reasonable, then PG&E can recover them through rates. *See ibid.* In contrast, the Decision moots review of the reasonableness of actual costs over 115% of the forecast.

Finally, in emphasizing the need to protect against "unexpected DCPP extended operation cost increases," Decision, at p. 110, the Decision overlooks numerous customer protections in SB 846. Importantly, all operating costs reflected in rates must be reasonable. *See* Pub. Util. Code §§ 712.8(f)(1), (l)(1). The nonbypassable charge is to be equitably allocated among all customers of load-serving entities in the State of California subject to the

[10/] PG&E's ability to use the operating risk payment to pay for necessary DCPP costs in between cost recovery proceedings provides financial flexibility so that the operator can move quickly to make upgrades or repairs and maintain operations for the benefit of customers and reliability of the grid, even in the face of uncertain cost recovery.

Commission's jurisdiction, including community choice aggregators, energy service providers, and investor-owned utilities, minimizing its impact on individual customers. *Id.* §§ 712.8(f)(1), (l)(1). Recovery of costs is based on gross consumption of electricity from the grid regardless of any offset or credit status protecting rooftop solar owners. *Id.* § 712.8(l)(1). Shareholder enrichment is barred in numerous ways. *Id.* § 712.8(s). Excess market revenues over operating costs are returned to ratepayers. *Id.* § 712.8(h)(3). Ratepayer funds are generally prohibited from repaying the loan from the Department of Water Resources. *Id.* In other words, the statute already includes significant protections to shield customers from unduly high costs related to extended operations at DCPP.

The Commission's outsized focus on "unexpected DCPP extended operation cost increases" undercuts the "critical public policy priorities" of the Legislature. As previously described in Section III.B, SB 846 and its legislative history are replete with language recognizing the pressing need to "take[] steps to accelerate other clean-energy resources to replace DCPP," SB 846 Senate Third Reading at 12; *see also supra* Section III.B. In this respect, the Decision correctly concludes that "applying [operating-risk] funds as a full offset to any and all DCPP operational costs as a matter of standard, annual practice . . . would result in little to no funding for the public purpose priorities enumerated in Section 712.8(s)(1), effectively rendering this section moot." Decision, at pp. 109–110, 124 ¶ 58. Although the Decision does not ultimately offset all operating costs, the underlying concern remains. If DCPP experiences unexpected increases in reasonable operating costs exceeding 115% of PG&E's forecast, the offset from operating-risk compensation will come at the expense of critical public purpose initiatives. SB 846 clearly does not contemplate such a tradeoff.

IV. CONCLUSION

The Decision is contrary to law because it imposes a prior approval requirement on spending operating-risk compensation, barring PG&E from spending such compensation as it is received subject to retrospective review, and because it requires operating-risk compensation to offset actual operating costs above 115% of the forecasted costs, contrary to the statute's direction that PG&E may recover all reasonable operating costs in rates. The Commission should grant rehearing to correct those legal errors.

Respectfully Submitted,

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Dated: January 16, 2024