Attachment #5

November 24, 2020 Verified Petition for a Writ of Review; Memorandum of Points and Authorities in Support of Petition (S265790)

S265790

CASE NO. _____

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

THE PROTECT OUR COMMUNITIES FOUNDATION,
PUBLIC ADVOCATES OFFICE
OF THE PUBLIC UTILITIES COMMISSION,
SOUTHERN CALIFORNIA GENERATION COALITION,

Petitioners,

v.

CALIFORNIA PUBLIC UTILITIES COMMISSION,

Respondent,

SAN DIEGO GAS & ELECTRIC COMPANY,
SOUTHERN CALIFORNIA GAS COMPANY,

Real Parties in Interest.

From a Decision of the California Public Utilities Commission,
Decision No. 20-02-024 (February 6, 2020)

VERIFIED PETITION FOR A WRIT OF REVIEW; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PETITION

[APPENDIX OF EXHIBITS FILED CONCURRENTLY]

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to California Rules of Court, Rules 8.488 and 8.208, Petitioners Southern California Generation Coalition and The Protect Our Communities Foundation certify that no entity or natural person has an ownership interest in them. However, one or more of the following entities may have a financial or other interest in the outcome of this proceeding that the Justices should consider in determining whether to disqualify themselves: San Diego Gas & Electric Company, Southern California Gas Company, and Sempra Energy.

Respectfully submitted this 24th day of November, 2020.

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INTRODUCTION

The California Public Utilities Commission (Commission) erroneously failed to evaluate under the California Environmental Quality Act (CEQA) a 43-mile pipeline construction project proposed by San Diego Gas & Electric Company (SDG&E) and Southern California Gas Company (SoCalGas) (collectively Utilities) before it approved the project on February 6, 2020. In a plan dated September 26, 2018, the Utilities proposed to construct 43 miles of new pipeline in a new right-of-way, but the Utilities failed to present the Commission with the prerequisite analysis and data necessary to approve the estimated $677,000,000 project. The Utilities provided neither a Proponent's Environmental Assessment (PEA) required to comply with CEQA pursuant to the Commission's own rules, nor an application for a Certificate of Public Convenience and Necessity (CPCN) required for pipeline construction under Public Utilities Code section 1001 et seq. As a result, approval of the Utilities' plan to construct the new pipeline project violates both CEQA and the requirements of Public Utilities Code section 1001 et seq.

The only PEA or CPCN application referenced in the record here involve the Utilities' CPCN application and the Utilities' CEQA analysis for a different pipeline project – Line 3602 – which the Commission appropriately *denied* in June 2018. (Appx. 0292.)[1] The Commission at that time determined that the Utilities failed to show "why it is necessary to build a very costly pipeline to substantially increase gas pipeline capacity in an era of declining demand and at a time when the state of California is moving away from fossil fuels." (Appx. 0288.)

[1] References to "Appx. #" are to Petitioners' Appendix of Exhibits in Support of Petition for Writ of Review filed concurrently herewith and the page number thereof located at the lower right hand corner. The yellow highlights have been added for ease of review.

When the Commission denied the Utilities' application for a CPCN for Line 3602 in June 2018, the Commission made clear that the Utilities would be required to file a new application and comply with CEQA should they propose to replace the existing pipeline—Line 1600—in a different location. However, the Utilities later proposed to pressure test only 13 miles of the existing 50-mile Line 1600 and to replace 37 miles of Line 1600 with 43 miles of entirely new pipeline located in a new right-of-way. For this new pipeline proposal the Utilities chose not to file a new or amended application and made no attempt whatsoever to file a PEA to commence the CEQA process at the Commission.

After learning that the Utilities intended to proceed with their plan to replace 37 miles of Line 1600 with 43 miles of new pipe outside the context of any established Commission process, Petitioners The Protect Our Communities Foundation, Southern California Generation Coalition, and others jointly filed a petition for modification of the decision denying the Utilities' application for a CPCN for Line 3602, requesting that the Commission clarify that the Utilities' plan would be subject to public review in a public process. (Appx. 0311-0519.)

Instead of providing for public review in a public process as required by CEQA, the Public Utilities Code, and the Commission's own rules and directives, in 2020 the Commission approved the Utilities' plan without a public hearing, limiting public scrutiny to review of the estimated costs of the Utilities' plan.

The Commission declined to conduct any environmental analysis under CEQA, concluding, instead, that the project could be chopped up into nineteen (19) pieces. The Commission also failed to require a CPCN or to engage in any CPCN-related fact-finding required by the Public Utilities Code as a condition precedent to pipeline construction.

The Commission's failure to consider much less make findings regarding the environmental impacts of the project before approving it, the Commission's determination to piecemeal the project instead of considering the environmental impacts of the project as a whole, and the Commission's failure to engage in the factual inquiry and make the findings required by the CPCN statutes, constitute errors of law which only this Court has authority to remedy.

The Commission's errors of law violate CEQA's fundamental precept that decision-makers and the public should be informed about the environmental consequences of a project before those consequences occur so as to prevent environmental damage. Likewise, the Commission's errors of law violate the basic premise of the CPCN statutes that the public interest in pipeline construction projects must be considered and addressed by the Commission before a utility may commence construction of a pipeline or pipeline extension.

Without this Court's review of the Commission's naked failure to comply with CEQA and CPCN statutory mandates, the Commission will flout basic statutory requirements that apply to all California agencies, as well as those that apply to the Commission specifically.

If allowed to stand, not only would the Utilities' pipeline project result in adverse environmental impacts, but the public would be deprived of CEQA's informational benefits and the corresponding meaningful ability to hold its public officials accountable for their decisions. Unless this Court requires adherence to the CPCN statutes, the Commission will sidestep its duty to supervise and regulate utility infrastructure projects; and the Utilities will proceed with unauthorized construction of a project that has not been assessed for local compatibility and consent, for need, or for its influence on the environment, which is expected to cost ratepayers more than half a billion dollars.

Absent intervention by this Court, the lack of need for and the adverse environmental impacts of massive utility infrastructure projects will go unrectified; and the Utilities will be enabled to continue to interfere with critical efforts by local jurisdictions to reduce greenhouse gas emissions and to avoid devastating foreseeable climate change impacts.

PETITION FOR WRIT OF REVIEW

A. Jurisdiction and Exhaustion of Administrative Remedies

1. On February 12, 2020, the Commission issued D.20-02-024,[2] *Decision Approving Limited Modifications to Decision 18-06-028.*

2. Petitioner The Protect Our Communities Foundation applied for rehearing of D.20-02-024 on February 24, 2020, as amended on March 13, 2020. (Appx. 1367-1435; Appx. 1497-1499.) Petitioner Public Advocates Office of the Public Utilities Commission, Petitioner Southern California Generation Coalition, and the Sierra Club applied for rehearing of D.20-02-024 on March 13, 2020. (Appx. 1467-1496.) The Commission has not acted on either application for rehearing.

3. Notwithstanding the Commission's failure to hold a hearing or give the notice required by law, Petitioners[3] have exhausted their administrative remedies under CEQA (Pub. Res. Code, § 21177); and all issues raised herein were brought to the attention of Respondent pursuant to the Public Utilities Code. (Pub. Util. Code, § 1731, subd. (b).)

4. This Court has jurisdiction under section 21168.6 of the Public Resources Code, which vests jurisdiction to issue writs of mandate brought under CEQA against the Public Utilities Commission only in this Court.

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[2] Commission decisions are identified by the letter "D" for decision, the first number after the "D" identifies the year, the second number identifies the month, and the third number identifies that specific decision number.

[3] Petitioners The Protect Our Communities Foundation, the Public Advocates Office, and the Southern California Generation Coalition, are collectively referred to as Petitioners.

5. Due to the COVID-19 Emergency, CEQA statutes of limitations were tolled statewide from April 6, 2020 until August 3, 2020. (Cal. Rules Ct., Emergency Rule 9, subd. (b).)

6. The Court has jurisdiction over this petition under sections 1733(b), 1756(a), and 1759 of the Public Utilities Code because more than 60 days have elapsed since Petitioners filed their applications for rehearing.

7. This Court also has jurisdiction over this action pursuant to sections 187, 526, 1068, and 1085 of the Code of Civil Procedure, and section 21168 of the Public Resources Code.

8. Pursuant to Public Resources Code sections 21167.5 and 21167.7, Petitioners mailed notice to Respondent of its intent to bring this action and Petitioners are notifying the Attorney General of this action. Copies of these notices are attached as Exhibits "A" and "B," respectively.

B. Parties

9. Petitioner The Protect Our Communities Foundation (PCF) [4] is a nonprofit public benefit corporation formed and existing under the laws of the State of California with headquarters in San Diego, and is organized for charitable and public purposes. PCF represents the interests of San Diego and Southern California residential ratepayers in proceedings before the Commission and other California agencies and in the courts. PCF advocates against unreasonably costly and unnecessary fossil-fueled utility projects, in support of just and reasonable utility rates, and in support of fair and reasonable energy practices, polices, rules, and laws. PCF seeks to obtain enforcement of the public duties that are the subject of this lawsuit. PCF has been an active participant at all stages of the proceeding that is the subject of this lawsuit and has invested substantial resources in participating therein.

[4] References in the Appendix are to "POC," an acronym which PCF no longer utilizes due to evolving awareness of the import of acronyms.

10. Petitioner Public Advocates Office of the Public Utilities Commission (Cal Advocates) is a statutory public body established as an independent office of the California Public Utilities Commission. Cal Advocates is charged with serving the public interest and, specifically, "to represent and advocate on behalf of the interests of public utility customers and subscribers within the jurisdiction of the commission." (Pub. Util. Code, § 309.5.) Cal Advocates represents the interests of customers, including customers of SDG&E and SoCalGas, who will be adversely affected by the environmental, safety, and economic impacts of the subject pipeline project if the public duties that are the subject of this lawsuit are not enforced. Pursuant to its statutory charge to advocate on behalf of utility customers, Cal Advocates urged the Commission to comply with CEQA and has been an active participant at all stages of the proceeding which is the subject of this lawsuit.

11. Petitioner Southern California Generation Coalition (SCGC) is a coalition of electric generators located in jurisdictions that rely on gas transmission service by Southern California Gas Company, and whose rates would each be impacted by the subject pipeline project. SCGC advocates on behalf of its members against unnecessary and unreasonable pipeline projects which unjustly lead to increased rates, and the interests SCGC seeks to protect in this lawsuit are germane to SCGC's advocacy. SCGC seeks to obtain enforcement of the public duties that are the subject of this lawsuit. SCGC has been an active participant at all stages of the proceeding that is the subject of this lawsuit and has invested substantial resources in participating therein.

12. Respondent California Public Utilities Commission (the Commission) is a state agency charged with regulating public utilities under the Public Utilities Code and Article XII of the California Constitution, and a public agency under Public Resources Code section 21063. The Commission is authorized and required by law to hold public hearings, to determine the adequacy of and certify environmental documents prepared pursuant to CEQA, and to take other actions in connection with the approval of projects within its jurisdiction. (*See e.g.* Cal. Code Regs., tit. 20, § 2.4.)

13. Real Party in Interest San Diego Gas & Electric Company (SDG&E) is a corporation formed and existing under California law, an investor-owned utility, a "public utility" under Public Utilities Code section 216, and one of the proponents of the proposed project challenged herein.

14. Real Party in Interest Southern California Gas Company (SoCalGas) is a corporation formed and existing under California law, an investor-owned utility, a "public utility" under Public Utilities Code section 216, the operator of the existing Line 1600, and one of the proponents of the proposed project challenged herein.

15. The true names and capacities of Respondents here identified as DOES 1 through 100 and Real Parties in Interest identified as ROES 101 through 200 are unknown to Petitioners, and Petitioners will seek the Court's permission to amend this pleading in order to allege the true names and capacities as soon as they are ascertained. Petitioner is informed and believes and thereon alleges that that each of the fictitiously-named Respondents 1 through 100 have jurisdiction by law over one or more aspects of the proposed project that is the subject of this proceeding and that each of the fictitiously named Real Parties in Interest 101 through 200 has some cognizable interest in the allegations or the proposed project challenged herein.

C. Exhibits

16. Petitioners' exhibits are included in the Appendix of Exhibits in Support of Petition for Writ of Review filed concurrently with this Petition for Review. The appendix is paginated consecutively.

D. Statement of the Case

1. Background

17. In 2011, after the tragic explosion of a Pacific Gas & Electric Company (PG&E) natural gas transmission line in San Bruno, California, the Commission issued D.11-06-017, which required California natural gas pipeline operators to propose Natural Gas Transmission Pipeline Comprehensive Pressure Testing Implementation Plans to ensure gas pipelines have been properly pressure tested. (Appx. 0040.)

18. In October of 2011, the Legislature enacted new gas pipeline safety requirements, including those codified by Assembly Bill 56. (Assem. Bill No. 56 (2011-2012 Reg. Sess.).) Section 958 required gas corporations to submit to the Commission "a proposed comprehensive pressure testing implementation plan for all intrastate transmission lines to either pressure test those lines or to replace all segments of intrastate transmission lines that were not pressure tested or that lack sufficient details related to performance of pressure testing." (Pub. Util. Code, § 958, subd. (a).) Section 958 neither requires nor authorizes construction of new pipelines in new rights-of-way.

19. On December 2, 2011, the Utilities submitted to the Commission a proposed "Pipeline Safety Enhancement Plan" (PSEP). (Appx. 0053.)

20. In their PSEP, the Utilities "were *not* seeking approval either to replace Line 1600 in the existing right-of-way, or to build a new pipeline [] that lies outside of the existing Line 1600 right-of-way." (Appx. 0173.)

21. Line 1600 is a natural gas transmission pipeline that runs 49.7 miles from an interconnection with SoCalGas pipelines at Rainbow Station in the north to SDG&E's Mission Station in the south. (Appx. 0375.)

22. In D.14-06-007, the Commission declined to approve the Utilities' PSEP in its entirety but adopted the analytical approach embodied in a "Decision Tree" (Appx. 0110) which required pressure testing of pipelines that can be inspected and can be taken out of service with manageable customer impacts (Appx. 0099, 0105).

23. However, notwithstanding the analysis prescribed in the Decision Tree, on September 30, 2015, the Utilities filed an application for a CPCN which sought to construct a new pipeline and to derate (decrease the capacity of) the existing Line 1600 to distribution service. (Appx. 0173.)

24. The new pipeline – Line 3602 – was proposed as an approximately 47-mile long transmission pipeline from Rainbow Station to Miramar with an estimated construction cost of $639 million. (Appx. 0168.)

25. After evidentiary hearings, public participation hearings, discovery, and testimony in Commission proceeding A.15-09-013, in June 2018 the Commission denied the Utilities' request for a CPCN to construct a new Line 3602. (Appx. 0292.)

26. The Commission explained that it was rejecting the Utilities' request to use ratepayer funds to construct a new gas pipeline because the Utilities failed to show "why it is necessary to build a very costly pipeline to substantially increase gas pipeline capacity in an era of declining demand and at a time when the state of California is moving away from fossil fuels." (Appx. 0288.)

27. At the time that the Commission rejected Line 3602, it found that the "Commission's requirement to have a hydrotest plan for Line 1600 is a necessary measure for compliance with Pub. Util. Code § 958." (Appx. 0290.)

28. In D.18-06-028, the decision rejecting Line 3602, the Commission directed the Utilities to submit to Commission staff "a hydrostatic test or replacement plan pertaining to the existing 49.7 miles of Line 1600 in its present corridor." (Appx. 0293.)

29. The Commission made clear in D.18-06-028 that the Utilities were required to file a new application with a new Proponents Environmental Assessment (PEA) to commence the Commission's CEQA process should they propose "a pipeline replacement of Line 1600, within a different ROW" (right-of-way), and that in such application the burden of proof would be on the Utilities. (Appx. 0274.)

30. The Commission specified that the Utilities "would necessarily be required to provide full documentation for any such new project, including a new PEA, new CEA (Cost Effectiveness Analysis), and PSEP compliance documentation" if the Utilities later proposed to replace Line 1600 in a different location. (Appx. 0274; Cal. Code Regs., tit. 20, § 2.4, subd. (b).)

31. The Commission also recommended "a series of pre-filing meetings and reviews with Energy Division's CEQA Unit in advance of filing," if the Utilities later proposed to replace Line 1600 in different location. (Appx. 0274.)

32. However, later that same year, the Utilities proposed to replace 37 miles of Line 1600 with 43 miles of new pipeline in a new right-of-way *without* making any attempt to file a new application or to amend their original application and to file a PEA and other documentation explicitly required by D.18-06-028.

33. Instead, unbeknown to Petitioners and the public, the Utilities presented their September 26, 2018 "Line 1600 Test or Replacement Plan" (Plan) to Commission staff. (Appx. 0362-0516.)

34. The Plan identified an estimated $677 million project involving the construction of 43 miles of new pipeline in a new right-of-way to replace 37 miles of the existing Line 1600, with pressure testing of the remaining 13 miles, as the Utilities' preferred project (the Pipeline Project). (Appx. 0370, 0392.)

35. Notwithstanding the clear direction in D.18-06-028, the Utilities did not file a new application nor did they provide a PEA, CEA, or any other documentation expressly required to support the Plan.

36. Instead, they presented the Plan in a non-public meeting solely to Commission staff in the division known as the Safety and Enforcement Division, or SED. SED did not provide any public notice that the Utilities had submitted their plan, and Petitioners only discovered it through a Public Records Act request to the Commission.

37. After learning that the Utilities planned to proceed with the Pipeline Project outside the context of any established Commission process, Petitioners PCF, SCGC, and others jointly filed a Petition for Modification of Decision 18-06-028 (Petition for Modification) on June 3, 2019. (Appx. 0311-0519.)

38. The Petition for Modification requested that the Commission clarify that D.18-06-028 and due process required public scrutiny of and a hearing on the Utilities' Plan (Appx. 0314, 0315, 0341, 0343) and sought, among other things, that the Commission establish "a process for transparent and effective public review through the hearing process of the hydrostatic test or replacement plan that the Commission required in Ordering Paragraph 7 of D.18-06-028 and to provide the public with an opportunity to present potentially more effective alternatives." (Appx. 0341.)

39. Petitioners submitted the Utilities' secretly-presented Plan as Attachment 3 to their Petition for Modification in A.15-09-013. (Appx. 0361-0516.)

40. After the Utilities responded (Appx. 0522-0605), but without holding any hearing, the September 12, 2019 proposed decision of Administrative Law Judge Colette E. Kersten (ALJ Kersten), entitled Decision Approving Limited Modifications to Decision 18-06-028 (Proposed Decision), proposed to grant the Petition for Modification in part. (Appx. 0606-0661.)

41. On November 25, 2019, ALJ Kersten released a revised proposed decision entitled Decision Approving Modifications to Decision 18-06-028 (the Revised Proposed Decision). (Appx. 0742-0813.)

42. The Revised Proposed Decision recognized that staff review would not be adequate to assess fully the Utilities' preferred project, and granted in part Petitioners' request for public vetting of the Plan in a new, second phase of A.15-09-013 (Phase 2) which would include an analysis of the costs of the Utilities' preferred Pipeline Project and the other alternatives described in the Utilities' Plan. (Appx. 0808-0810.)

43. On November 26, 2019, Commissioner Liane M. Randolph issued an alternate proposed decision, entitled Decision Approving Limited Modifications to Decision 18-06-028 (the Alternate Proposed Decision). (Appx. 0816-0877.)

44. Unlike ALJ Kersten's Revised Proposed Decision, Commissioner Randolph's Alternate Proposed Decision proposed to limit the scope of Phase 2 exclusively to the costs of the Utilities' preferred Pipeline Project, precluding consideration of alternatives. (Appx. 0817.)

45. On January 10, 2020, the Commission published revisions both to ALJ Kersten's Revised Proposed Decision (Proposed Decision Rev. 2) and to Commissioner Randolph's Alternate Proposed Decision (Alternate Proposed Decision Rev. 1).

46. The Proposed Decision Rev. 2 addressed the parties' comments; detailed limits of staff's review; expanded the scope of Phase 2 by specifying the alternative of derating Line 1600 for inclusion among the alternatives to be analyzed; escalated the hydrotesting schedule proposed for portions of Line 1600 included in the Utilities preferred Pipeline Project; clarified that the Commission in D.18-06-028 found Line 1600 safe for use; raised concerns about the Utilities' presentation of untested extra-record hearsay evidence and due process violations; and cautioned the Commission "to pay attention to wider implications that replacing Line 1600 has on the potential future replacement of six other A.O. Smith gas pipelines located elsewhere in the southern system." (Appx. 1162-1167, 1171, 1174-1175, 1179, 1181-1182.)

47. The Alternate Proposed Decision Rev. 1 added language regarding the parties' comments (Appx. 1078-1082); and, specifically, in response to both CEQA concerns raised by Cal Advocates and concerns raised by PCF about the Utilities' inflated hydrotesting cost estimates, Alternate Proposed Decision Rev. 1 expressly declared that "this decision approves Design Alternative 1." (Appx. 1080, 1082). "Design Alternative 1" refers to the Utilities' preferred Pipeline Project described in the Utilities' Plan. (Appx. 1039.)

48. On January 13, 2020, the Commission deliberated in closed session at a Ratesetting Deliberative Meeting. (Appx. 1200-1203.)

49. On January 15, 2020, the Commission published its "Hold List" for Public Agenda 3454, which delayed consideration of the proposed decisions addressing the Petition for Modification from the Commission's January 16, 2020 meeting to the Commission's February 6, 2020 meeting. (Appx. 1215.) All Commissioners were present and voting at the January 16, 2020 Commission Meeting.

50. At the Commission meeting on February 6, 2020, Commission President Marybel Batjer was absent. (Appx. 1360-1364.)

51. With Commissioner Randolph presiding, the Commission deadlocked 2-2 on the Proposed Decision Rev. 2 and then approved 4-0 Commissioner Randolph's Alternate Proposed Decision Rev. 1 as Commission decision number D.20-02-024. (Appx. 1362; Appx. 1295.)

52. Petitioners have no plain, speedy, adequate remedy in the ordinary course of law. Petitioners, ratepayers, and the public will suffer irreparable harm as a result of the Commission's violations of CEQA and the CPCN statutes and the Utilities' unauthorized construction of the Pipeline Project.

2. The Commission Failed to Proceed in the Manner Required by CEQA.

53. The Commission must comply with CEQA whenever the Commission carries out, finances, or approves a non-exempt activity which has the potential for resulting in a direct or a foreseeable indirect physical change in the environment – a "project" as defined by CEQA. (*Union of Medical Marijuana Patients, Inc. v. City of San Diego ("Medical Marijuana Patients")* (2019) 7 Cal.5th 1171, 1191-1193; Pub. Res. Code, §§ 21065, 21080, subd. (a); Cal. Code Regs., tit. 14, § 15378, subd. (a).)

54. In determining whether an activity constitutes a "project," CEQA requires the Commission to assess "the whole of an action." (Cal. Code Regs., tit. 14, § 15378, subd. (a).)

55. In D.20-02-024, the Commission approved the Utilities' preferred Pipeline Project, which the Commission referred to in its decision as "Design Alternative 1," and the project involves the sort of activity "that is capable of causing direct or reasonably foreseeable indirect effects on the environment," but the Commission failed to consider the whole of the Pipeline Project as CEQA requires.

56. Instead of considering the Pipeline Project as a whole, the Commission erroneously determined that the Pipeline Project could be chopped up into nineteen (19) separate pieces (Appx. 1348), violating CEQA's prohibition against piecemealing.

57. The Utilities' preferred Pipeline Project does not qualify for any CEQA exemption.

58. The exemption for ministerial projects does not apply because the Commission is required to exercise its subjective judgment and has the authority to shape the Pipeline Project in response to environmental concerns. (*Protecting Our Water & Environmental Resources v. County of Stanislaus* ("*POWER*") (2020) 10 Cal.5th 479, 493-494.)

59. The exemption for the "inspection maintenance, repair, restoration, reconditioning, relocation, replacement, or removal of an existing pipeline" that meets specified conditions does not apply because, among other reasons, the Pipeline Project involves the construction of 43 miles of new pipe, in segments more than one-half mile long and located in new locations in new rights-of-way. (Pub. Res. Code, § 21080.23, subd. (a); Appx. 1400-1401; Appx. 1489-1492.)

60. The Commission violated CEQA by approving the Utilities' preferred Pipeline Project as proposed, without conducting an initial study or undertaking any analysis regarding the environmental effects of the Pipeline Project—or any part of it—before approving it.

61. The Commission violated CEQA by approving the Pipeline Project without making any findings regarding the Pipeline Project's environmental impacts.

62. The Commission violated CEQA by approving the Utilities' preferred Pipeline Project as proposed without first conducting any environmental review of the Utilities' Pipeline Project at all.

3. The Commission Failed to Proceed in the Manner Required by the CPCN Statutes.

63. The Public Utilities Code prohibits public utilities from beginning the construction of any pipeline or pipeline extension "without having first obtained from the commission a certificate that the present or future public convenience and necessity require or will require such construction." (Pub. Util. Code, § 1001.)

64. After obtaining a CPCN, public utilities may not exceed the maximum costs specified therein unless the Commission "finds and determines that the cost has in fact increased and that the present or future public convenience and necessity require construction of the project at the increased cost." (Pub. Util. Code, § 1005.5, subd. (b).)

65. The pipeline construction project described in the Utilities' Plan involves construction of 43 miles of new pipeline in a new right-of-way, of a pipeline project that, in combination with pressure testing 13 miles of the old Line 1600, the Utilities estimated would cost $677,000,000 (Appx. 0370), but the Utilities failed to apply for a CPCN or to present any evidence of an already existing CPCN which might arguably authorize the Utilities to construct such an extraordinarily expensive pipeline.

66. The Commission failed to undertake any examination of the need for a CPCN for the Pipeline Project in the factual context presented in the Plan, and failed to engage in any legislatively mandated factual inquiry.

67. The only determination in the administrative record addressing the need for any pipeline construction in a new right-of-way *denied* the Utilities' application for a CPCN for the proposed Line 3602 because, among other reasons, the Utilities failed to show "why it is necessary to build a very costly pipeline to substantially increase gas pipeline capacity in an era of declining demand and at a time when the state of California is moving away from fossil fuels." (Appx. 0288.)

68. The Commission failed to proceed in the manner required by law by failing to consider the factors and make the findings required by the CPCN statutes.

69. The Commission failed to address, much less to determine the ultimate issue required by the CPCN statutes: "that the present or future public convenience and necessity require or will require such construction." (Pub. Util. Code, § 1001.)

70. Among other things, the Commission failed to consider or make the requisite findings regarding the following factors:

- that the Utilities failed to submit evidence that they have "received the required consent, franchise, or permit" of the proper cities and other public authorities (Pub. Util. Code, § 1004);
- that the Commission failed to consider the state's need for natural gas supply (Pub. Util. Code, § 1002.5);
- that the Commission failed to consider community values, recreational park areas, historical and aesthetic values, and influence on environment (Pub. Util. Code, § 1002, subd. (a));
- that the Utilities failed to submit preliminary engineering and design information and a "cost analysis comparing the project with any feasible alternative sources of power" (Pub. Util. Code, § 1003, subds. (a), (d)); and
- that the Commission failed to consider every element of public interest that would be affected by the pipeline construction project (*Northern California Power Agency v. Public Utilities Com. ("N. Cal. Power")* (1971) 5 Cal.3d 370, 380).

71. In D.20-02-024 the Commission expressly declined to address the need for the pipeline construction (Appx. 1333; Pub. Util. Code, § 1002.5) or to consider the costs of any alternatives to the Pipeline Project (Appx. 1342; Pub. Util. Code, § 1003, subd. (d)).

72. Without considering the need (or lack thereof) for natural gas, whether alternative sources of power could supply energy needs more cost-effectively, or for the construction of the Pipeline Project at all, the Commission did not and could not conclude that the Pipeline Project is "necessary in the ordinary course of [the Utilities'] business" (Pub. Util. Code, § 1001) so as to invoke an exception to the CPCN requirements. Nor did the Commission make any other inquiry necessary to invoke an exception. (*Ibid*.)

73. The Commission neither issued a CPCN nor considered whether the Pipeline Project was exempt from the CPCN statues; failed to make the requisite findings; and, thus, did not lawfully authorize construction.

PRAYER FOR RELIEF

Petitioners respectfully pray for relief as follows:

1. For a writ of review to determine the lawfulness of Commission Decision 20-02-024;

2. For an order directing the Commission to certify its record in the subject proceeding to this Court;

3. For injunctive relief prohibiting Respondent and Real Parties in Interest (and any and all persons acting at the request of, in concert with, or for the benefit of one or more of them) from proceeding with construction of the Pipeline Project pending resolution of this petition and unless and until the Respondent complies with all applicable provisions of CEQA and the Public Utilities Code, as determined by the Court;

4. For a writ of mandate directing as follows:

   (a) that the Commission's decision to approve the Pipeline Project under CEQA is null and void;

   (b) that the Commission analyze, and mitigate or avoid potentially significant adverse environmental impacts before approving the Pipeline Project under CEQA;

(c) that the Commission consider and make the findings required by the CPCN statutes; and

(d) that Respondent and Real Parties (and any and all persons acting at the request of, in concert with, or for the benefit of one or more of them) suspend any and all construction and any and all activity that could result in an adverse change or alteration to the physical environment unless and until Respondent has complied with CEQA and the CPCN statutes of the Public Utilities Code;

5. For entry of judgment setting aside Decision 20-02-024 and remand with directions to adhere to CEQA and the CPCN statutes; and

6. For such other, different, or further relief as the Court may deem just and proper.

Respectfully submitted this 24th day of November, 2020.

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VERIFICATION

I, Loretta M. Lynch, declare:

I am a member of the Board of Petitioner The Protect Our Communities Foundation (PCF). I have been authorized by PCF, the Public Advocates Office of the Public Utilities Commission, and Southern California Generation Coalition to make this verification on the Petitioners' behalf. I have read the foregoing Petition for Writ of Review and know the contents thereof, and the facts therein stated are true to my own knowledge, except as to those matters stated on information and belief, and as to those matters, I believe them to be true.

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

Executed on November 24, 2020, at San Francisco, California.

By: /s/ Loretta M. Lynch
Loretta M. Lynch
On Behalf of All Petitioners

MEMORANDUM OF POINTS AND AUTHORITIES

STANDARD OF REVIEW

In reviewing CEQA claims, courts must determine whether an agency prejudicially abused its discretion by either: (1) failing to proceed in the manner required by law, or (2) reaching a decision that is not supported by substantial evidence. (Pub. Res. Code, §§ 21168, 21168.5; *Laurel Heights Improvement Assoc. v. Regents of the University of California ("Laurel Heights")* (1988) 47 Cal.3d 376, 392.)

A court "must adjust its scrutiny to the nature of the alleged defect, depending on whether the claim is predominately one of improper procedure or a dispute over the facts." (*Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 435.) A claim "that the lead agency approved a project with potentially significant environmental effects *before* preparing and considering an EIR for the project 'is predominantly one of improper procedure'…to be decided by the courts independently." (*Save Tara v. City of West Hollywood ("Save Tara")* (2008) 45 Cal.4th 116, 131.)

The Commission's failures to comply with CEQA's mandatory procedures as alleged herein comprise a category of CEQA violations considered "presumptively prejudicial." (*Sierra Club v. State Board of Forestry* (1994) 7 Cal.4th 1215, 1236-1237.) When an agency fails to comply with CEQA's mandatory procedures, a petitioner need not show that a different result would have resulted if the agency had complied. *Environmental Protection Information Center v. California Dept. of Forestry & Fire ("Environmental Protection")* (2008) 44 Cal.4th 459, 485.) Otherwise, an agency "could avoid compliance with various provisions of the law and argue that compliance would not have changed their decision." (*Ibid.* [internal quotations omitted].)

Thus, the Court reviews the Commission's decision here de novo. The Court owes no deference to the Commission.

And, when construing the obligations of CEQA, courts must "afford the fullest possible protection to the environment within the reasonable scope of the statutory language." (*Friends of Mammoth v. Board of Supervisors* (1972) 8 Cal.3d 247, 259.)

In addition to violating CEQA, the Commission also failed to conduct the review and make the findings required by the Certificate of Public Convenience and Necessary (CPCN) statutes. (Pub. Util. Code, § 1001 et seq.) In addressing such claims, the writ of mandamus issued to the Commission shall lie "as prescribed in Section 1085 of the Code of Civil Procedure." (Pub. Util. Code, § 1759, subd. (b).)

Under section 1757, which governs challenges to ratemaking decisions by the Commission of specific application which are addressed to particular parties, the writ may issue when the Commission failed to proceed in the manner required by law. (Pub. Util. Code, § 1757, subd. (a)(2).) The Commission's failure to proceed in the manner required by CEQA and its failure to proceed in the manner required by the CPCN statutes thus constitute grounds to issue the writ.

The Commission's unauthorized disregard of the clear legislative direction set forth in CEQA and in the CPCN statutes, and the Commission's associated failure to make the findings necessitated by those directives, comprise additional grounds for writ review. (Pub. Util. Code, § 1757, subd. (a)(1), (3); *Southern California Gas Co. v. Public Utilities Com. ("S. Cal. Gas")* (1979) 24 Cal.3d 653, 659 [Commission lacks authority to disregard specific provisions in legislation]; *N. Cal. Power*, 5 Cal.3d at 380 ["the Commission must make specific findings of fact and conclusions of law relevant to all material issues of a case"].)

Although this Court, theoretically, could sever Petitioners' CPCN-related claims from Petitioners' CEQA claims (Pub. Res. Code, § 21167.1, subd. (c)), only this Court may issue a writ to the Commission for noncompliance with CEQA (Pub. Res. Code, § 21168.6). Thus, with respect to Petitioners' CEQA claims, this writ of review exists as Petitioners' only means of appellate review; and "it would be an abuse of discretion to refuse it." (*Powers v. City of Richmond* (1995) 10 Cal.4th 85, 113-114 ["...when writ review is the exclusive means of appellate review of a final order or judgment, an appellate court may not deny an apparently meritorious writ petition, timely presented in a formally and procedurally sufficient manner, merely because, for example, the petition presents no important issue of law or because the court considers the case less worthy of its attention than other matters."].)

ARGUMENT

I. THE COMMISSION VIOLATED CEQA BY FAILING TO CONDUCT ANY ENVIRONMENTAL REVIEW BEFORE APPROVING THE PIPELINE PROJECT.

CEQA[5] requires every state agency, including the Commission, "to perform their duties 'so that major consideration is given to preventing environmental damage'" whenever it "undertakes, approves, or funds a project." (*POWER,* 10 Cal.5th at 488.; Pub. Res. Code, § 21006; Cal. Code Regs., tit. 20, § 2.4.) "CEQA was enacted to (1) inform the government and the public about a proposed activity's potential environmental impacts; (2) identify ways to reduce, or avoid, those impacts; (3) require project changes through alternatives or mitigation measures when feasible; and (4) disclose the government's rationale for approving a project." (*POWER,* 10 Cal.5th at 488.)

[5] CEQA comprises Division 13 of the Public Resources Code. (Pub. Res. Code, § 21050; Pub. Res. Code, § 21000 et seq.)

To implement CEQA, lead agencies complete a multistep process. (*Medical Marijuana Patients*, 7 Cal.5th at 1185.) The agency must determine if an activity is a "project," and if so, whether it is exempt from CEQA. (*Id.* at 1185-1186.) The agency must evaluate whether non-exempt projects may cause potentially significant impacts to the environment. (*Id.* at 1186.) Depending on that evaluation, the agency must prepare either a negative declaration, a mitigated negative declaration, or an environmental impact report (EIR) to consider at the same time as any decision on the proposed project. (*Id.* at 1186-1187.) The environmental review process required by CEQA serves to ensure that all potentially significant adverse environmental impacts are evaluated; and, when feasible, avoided or mitigated. (*Id.* at 1184-1187; Pub. Res. Code, §§ 21002, 21002.1.)

Here, the Utilities' preferred Pipeline Project that they describe in their Plan constitutes a non-exempt "project" under CEQA, but the Commission failed to conduct any environmental review or make any findings about the environmental impacts of the Pipeline Project before approving it. Instead – without actually committing to perform environmental review at any time – the Commission concluded that the Utilities' pipeline project could be chopped up into 19 separate pieces with environmental considerations of each of the 19 pieces addressed independently of the other pieces. (Appx. 1348.)

The Commission's decision to chop up the Pipeline Project into 19 pieces violates CEQA's prohibition against piecemealing, and constitutes grounds to set aside the Commission's decision. The Commission's failure to study and make findings about the Pipeline Project's environmental impacts violates CEQA's mandatory requirement that an agency must consider the environmental impact of a project before the agency may approve the project, and constitutes an additional ground to set aside the Commission's decision. (*Laurel Heights,* 47 Cal.3d at 396, 401-402.)

A. The Commission Erroneously Chopped Up the Pipeline Project Into Nineteen Pieces.

The first of three tiers in the decision-making process mandated by CEQA "requires the agency to conduct a preliminary review to determine whether the proposed activity constitutes a 'project' for purposes of CEQA." (*Medical Marijuana Patients*, 7 Cal.5th at 1185.) CEQA defines "project" as the whole of "an activity (1) undertaken or funded by or requiring the approval of a public agency that (2) 'may cause either a direct change in the environment, or a reasonably foreseeable indirect physical change in the environment.'" (*Medical Marijuana Patients,* 7 Cal.5th at 1187, citing Pub. Res. Code, § 21065; Cal. Code Regs., tit. 14, § 15378, subd. (a).) As made clear below, the Commission violated CEQA because rather than conclude that the Pipeline Project as a whole meets the definition of a "project" under CEQA, the Commission found that the Pipeline Project could be chopped up into nineteen (19) pieces.

1. The Commission concedes that it approved the Pipeline Project in its Decision, D.20-02-024.

Agency approvals comprise one of the various types of governmental activities that have long been considered to satisfy the governmental activities prong of the definition of "project" under CEQA. (*Medical Marijuana Patients,* 7 Cal.5th at 1187.) Here, in the only discussion of CEQA throughout the entirety of D.20-02-024, the Commission expressly declares that "this decision approves Design Alternative 1," (Appx. 1344), which is the term the Commission utilizes in D.20-02-024 to refer to the Utilities' preferred Pipeline Project described in the Utilities' Plan (*see* Appx. 1298). Thus, the Pipeline Project satisfies the governmental activities prong of the definition of "project" under CEQA because the Commission approved the Pipeline Project. (*Medical Marijuana Patients,* 7 Cal.5th at 1187; Cal. Code Regs., tit. 14, § 15378, subd. (a).)

Although elsewhere in D.20-02-024 the Commission uses the term "SED-approved" to describe actions taken by staff in the Commission's Safety and Enforcement Division with respect to the Plan, the Commission does not contend that SED staff "approved" the Pipeline Project within the meaning of CEQA. Nor could SED staff have "approved" the Project under CEQA, as CEQA prohibits the Commission from delegating to its staff the final CEQA decision. (Cal. Code Regs., tit. 14, § 15025, subd. (b); *see, also, Save Tara,* 45 Cal.4th at 132 ["an agency has no discretion to define approval so as to make its commitment to a project precede the required preparation of an EIR" or other environmental review].)

In June 2018, when the Commission denied the Utilities' originally proposed project – Line 3602, the Commission appropriately concluded that "CEQA does not apply to projects which a public agency rejects or disapproves." (Appx. 0290, citing Cal. Code Regs., tit. 14, § 15270.) In contrast, in D.20-02-024, instead of rejecting the Pipeline Project, the Commission affirmatively represented that "this decision approves Design Alternative 1." (Appx. 1344.) In section I.C., below, Petitioners explain why the Commission should not have approved the Pipeline Project. However, for purposes of CEQA's first tier analysis, the Commission's concession that it approved the Pipeline Project in D.20-02-024 necessarily satisfies the governmental activities prong of the definition of "project."

2. The Pipeline Project, by its nature, will result in a change to the physical environment.

An activity satisfies the environmental effects prong of the definition of "project" under CEQA when the activity, "by its general nature" would result in a change to the environment. (*Medical Marijuana Patients,* 7 Cal.5th at 1197-1198.) The inquiry is limited to whether the activity "is the sort that is capable of causing direct or reasonably foreseeable indirect effects on the environment." (*Id.* at 1198.)

The "somewhat abstract nature" of determining whether an activity meets the environmental effects prong of the definition of "project" under CEQA "is appropriate to its preliminary role in CEQA's three-tiered decision tree" because it should occur "at the inception of agency action." (*Id.* at 1197-1198.)

Here, no dispute exists that the Pipeline Project involves an activity that could, "by its nature," cause a change in the physical environment. The Utilities propose to re-route nearly all of the 43 miles of new pipeline, and themselves acknowledge in their Plan that the Pipeline Project involves potential environmental impacts, work in high density urban areas, excavation, trenching, and construction in streets where traffic flows, and "potential impacts to environmentally sensitive areas" including habitat for endangered or listed species. (Appx. 0389, 0391, 0392-0393, 0403, 0407, 0426, 0430, 0433.) The Pipeline Project meets the environmental effects prong of the definition of "project" under CEQA because the Pipeline Project "is the sort that is capable of causing direct or reasonably foreseeable indirect effects on the environment." (*Medical Marijuana Patients,* 7 Cal.5th at 1198.)

3. The Commission violated CEQA's prohibition against piecemealing the Pipeline Project.

A third and overarching concept in assessing whether an activity constitutes a "project" under CEQA requires that an agency consider "the whole of an action." (Cal. Code Regs., tit. 14, § 15378, subd. (a) ["'Project' means the whole of an action…"].) Here, although the Commission expressly acknowledged that the Commission in D.20-02-024 approved the Pipeline Project, the Commission nonetheless failed to adhere to CEQA's definition of "project" because the Commission found that the Pipeline Project could be chopped up into nineteen (19) pieces instead of considering the project as a whole. (Appx. 1348.)

Specifically, despite referring to the Utilities' preferred Pipeline Project as a "Plan" which necessarily connotates a whole, the Commission erroneously divided the Plan into nineteen (19) separate projects:

> The Applicants' Plan is comprised of 19 groupings of 19 independent project sections that can be completed independently to address safety, operational, community, environmental, constructability, and cost considerations associated with each distinct portion of Line 1600.

(Appx. 1348.) The Commission's finding directly violates CEQA's prohibition against piecemealing, which has been described as "the flip side of the requirement that the whole of a project be reviewed under CEQA." (*Lighthouse Field Beach Rescue v. City of Santa Cruz* (2005) 131 Cal.App.4th 1170, 1208, citing Cal. Code Regs., tit. 14, § 15378, subd. (a).) Put simply, "[t]he requirements of CEQA cannot be avoided by piecemeal review which results from 'chopping a large project into many little ones…" (*Environmental Protection,* 44 Cal.4th at 503.)

This Court rejected a similar agency effort to environmental review in *Medical Marijuana Patients.* There, the Respondent City had argued no environmental review of an ordinance permitting medical marijuana dispensaries was necessary in part because environmental review could be conducted in connection with each separate permit for an individual dispensary. (*Medical Marijuana Patients,* 7 Cal.5th at 1200.) The Court withheld "comment on the significance of this argument for tiers two and three of the CEQA decision tree," and rejected the Respondent City's assertion reiterating that "a local agency 'cannot argue' that approval of a regulation is not a project 'merely because further decisions must be made' before the activities directly causing environmental change will occur." (*Ibid.*)

Moreover, although the Commission does not promise to consider environmental impacts at all, the fact that one or more elements of the Pipeline Project might be reviewed in the future could not absolve the Commission of its obligation to consider the significant environmental effects of the Pipeline Project as a whole prior to approval of the Pipeline Project, as discussed below. (*See* Section I.C, *infra*; *Bozung v. Local Agency Formation Com. ("Bozung")* (1975) 13 Cal.3d 263, 283-284; Cal. Code Regs., tit. 14, §§ 15064, 15165, 15355.)

B. The Pipeline Project is Not Exempt from CEQA.

"Once an activity is determined to be a project, the next question is whether the project is exempt." (*POWER,* 10 Cal.5th at 488.) Where, as here, "the project is discretionary and does not qualify for any other exemption, the agency must conduct an environmental review." (*Ibid.*) Here, the Commission did not make any finding that the Pipeline Project qualifies under any CEQA exemption. (*See* Appx. 1344-1351.)

The Utilities, too, tacitly concede the Pipeline Project is not exempt from CEQA. Although Commission rules require that an "application for authority to undertake a project that is statutorily or categorically exempt from CEQA requirements shall so state, with citation to the relevant authority," the Utilities did not claim any exemption from CEQA in any application or even in the Plan submitted to SED staff. (Cal. Code Regs., tit. 20, § 2.4, subd. (c); *see* Appx. 0362-0516.)

The Commission did not find any exemption applicable to the Pipeline Project because the Pipeline Project does not qualify for any exemption. For example, the Commission could not have applied the ministerial exemption, because the Utilities could not have compelled the Commission to allow them to proceed with the Pipeline Project. (*POWER,* 10 Cal.5th at 493-494.)

To the contrary, and specifically in the pipeline safety context, the Commission has recognized the considerable discretion involved in exercising its Constitutional and statutory duties, and has required "forthright and timely explanations of the issues, as well as comprehensive analysis of the advantages and disadvantages of potential actions." (Appx. 0026.) Even the Utilities' Plan itself purported to assess, albeit erroneously and inadequately, various purported options with varying environmental impacts. (*See e.g.* Appx. 0384.)

Additionally, the Commission did not and could not have applied the exemption in Public Resources Code section 21080.23, which exempts the "inspection maintenance, repair, restoration, reconditioning, relocation, replacement, or removal of an existing pipeline" that meets specified conditions. (Pub. Res. Code, § 21080.23, subd. (a); Appx. 1400-1401; Appx. 1489-1492.) Section 21080.23 does not apply to the Pipeline Project on its face, as it applies only to projects of less than "8 miles in length" when "actual construction and excavation activities…are not undertaken over a length of more than one-half mile at any one time." (Pub. Res. Code, § 21080.23, subd. (a)(1)(A).) The Pipeline Project consists of 43 miles of new pipeline construction and 13 miles of pressure testing of the existing pipeline—a total project length of 56 miles, with actual construction and excavation activities undertaken in lengths greater than one-half mile at a time. (Appx. 0385-0388, 0392.)

Additionally, while section 21080.23 also applies only to "project activities undertaken within an existing right-of-way" (Pub. Res. Code, § 21080.23 (a)(5)), the Utilities themselves claim that most of the 43 miles of the Pipeline Project will be constructed in a new right-of-way in a different location than the location of the existing Line 1600. (Appx. 0392 ["Of the approximately 43 miles of new pipeline planned for installation… approximately 41 miles will be routed in nearby streets…"].)

Notably, section 21080.23 does not apply to any project for which an exemption was granted for another nearby segment of that pipeline within the last year. (Pub. Res. Code, § 21080.23, subd. (a)(2).) This limitation helps prevent the improper segmentation of pipeline projects so that agencies cannot do what the Commission and the Utilities envision doing here—chopping the project up so as to escape environmental review.

Section 21080.23 also requires notice to various agencies and persons, consent from underlying property owners, and imposes various additional requirements. (Pub. Res. Code, § 21080.23, subd. (b); Cal. Code Regs., tit. 14, § 15284, subd. (b), (c).) The Commission did none of this.

In summary, the Pipeline Project constitutes a non-exempt "project' under CEQA, and the Commission should have proceeded to the environmental review stage of CEQA's multi-step decision tree. (*POWER,* 10 Cal.5th at 488.) As set forth below, the Commission's failure to do so before approving the Pipeline Project violates CEQA and necessitates this Court's intervention.

C. The Commission Failed to Analyze or Make Any Findings Regarding the Pipeline Project's Environmental Impacts.

The timing of environmental review becomes critical when considered in the context of protecting the environment. Under CEQA, an agency may not predetermine project approval or pre-commit to carrying out a project in advance of its environmental analysis. (*Laurel Heights*, 47 Cal.3d at 394.) Environmental review must occur before the decision to approve a project as "a matter of logic." (*Id.* at 401.) "If postapproval environmental review were allowed, EIRs would likely become nothing more than *post hoc* rationalizations to support action already taken." (*Id.* at 394.) That environmental review must be "furnished and considered at the earliest possible stage" has been recognized as a bedrock principle of CEQA for over forty years. (*See Bozung,* 13 Cal.3d at 282.)

When the Commission originally denied the Utilities' application to construct a new proposed pipeline Line 3602, the Commission found that the Utilities would be required to file a new application and comply with CEQA if they were to propose to replace Line 1600 within a different right-of-way. (Appx. 0274.) In addition to stating explicitly that the Utilities "would necessarily be required to provide full documentation for any such new project, including a new PEA," the Commission recommended "a series of pre-filing meetings and reviews with Energy Division's CEQA Unit in advance of filing." (*Ibid.*; Cal. Code Regs., tit. 20, § 2.4.)

Flouting this express direction, the Utilities decided to install 43 miles of new pipeline in a different location to replace 37 miles of the existing Line 1600 *without* filing a new application, or amending their original application for the proposed Line 3602 pipeline project, to include the requisite CEQA documentation. Instead, under the guise of complying with the hydrotesting requirements of D.18-06-028 and section 958, the Utilities submitted their Plan – a new proposal to build 43 miles of new pipeline in locations different from the location of the existing Line 1600. (Appx. 0370, 0392.)

However, rather than reject the Utilities' proposal for failure to comply with CEQA and the Commission's express directives, the Commission approved the Pipeline Project without any environmental review, and restricted any further review to the reasonableness of the Utilities' preferred Pipeline Project's costs. (Appx. 1298-1299.) In so doing, the Commission violated a most essential CEQA function: to consider environmental impacts before a project is approved. (*Save Tara*, 45 Cal.4th at 134.) If an agency's decision would commit the agency to a definite course of action or preclude consideration of alternatives and mitigation measures, the agency *must* complete CEQA review in advance of the approval. (*Ibid.*; Cal. Code Regs., tit. 14, § 15004.)

Here, the Commission both expressly committed the agency to the Pipeline Project, which it refers to as Design Alternative 1, and disavowed any obligation to conduct CEQA review: "Because this decision approves Design Alternative 1, it is not necessary to undertake a CEQA review of the other Design Alternatives." (Appx. 1344.) In doing so, the Commission violated the fundamental CEQA principle "that before conducting CEQA review, agencies must not 'take any action' that significantly furthers a project 'in a manner that forecloses alternatives or mitigation measures that would ordinarily be part of CEQA review.'" (*Save Tara*, 45 Cal.4th at 138.)

CEQA's fundamental precept requiring environmental review of a project "as early in the planning process as possible to enable environmental considerations to influence project, program or design" functions to serve CEQA's chief goal – "mitigation or avoidance of environmental harm." (*Laurel Heights*, 47 Cal.3d at 395, 403.) The Commission's failure to study or make findings regarding the Pipeline Project's environmental impacts before approving the Pipeline Project violates CEQA. (*No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 81; *Save Tara*, 45 Cal.4th at 134.)

In summary, the Pipeline Project constitutes a non-exempt project under CEQA, the Commission's rules and directives required the Utilities to submit a PEA, and CEQA required the Commission to conduct an independent analysis of the environmental impacts of the Pipeline Project prior to approval. (Cal. Code Regs., tit. 20, § 2.4, subd. (b); *Medical Marijuana Patients,* 7 Cal.5th at 1187-1188; Pub. Res. Code, § 21082.1, subd. (c)(1).) The Commission conducted no environmental review whatsoever prior to the approving the Pipeline Project. Instead, the Commission expressly determined in D.20-02-024 that it would not consider the environmental impacts of the Pipeline Project as a whole, in direct violation of CEQA's prohibition against piecemealing.

II. THE COMMISSION FAILED TO COMPLY WITH THE APPLICABLE CPCN STATUTES.

In addition to failing to conduct any environmental review under CEQA, the Commission failed to conduct any of the analyses required by the provisions of the Public Utilities Code which prohibit public utilities from constructing pipelines or pipeline extensions without a Certificate of Public Convenience and Necessity, or CPCN.[6] The Commission has no authority to disregard the legislative mandate requiring utilities to obtain a CPCN, as a necessary prerequisite to the construction of a pipeline or extension thereof, and the factors necessary for the Commission to consider prior to issuance. (*See Motor Transit Co. v. Railroad Com. of California* (1922) 189 Cal. 573, 581 [CPCN statutes "proper exercise by the state of its police power"]; *S. Cal. Gas,* 24 Cal.3d at 659 [Commission lacks authority to disregard specific provisions in legislation].) The CPCN statutory mandates explicitly list a myriad of analytical and informational requirements that must be submitted to and reviewed by the Commission before a utility may commence construction of a pipeline or pipeline extension, as discussed below. But here, the Commission neither issued a CPCN nor engaged in any of the fact-finding analyses required by the Public Utilities Code.

A. The CPCN Statutes Direct the Commission to Consider and Make Findings Regarding Specific Factors Before Utilities May Begin Pipeline Construction.

Before beginning construction of a pipeline or an extension of a pipeline, utility companies are statutorily required to obtain "a certificate that the present or future public convenience and necessity require or will require such construction." (Pub. Util. Code, § 1001.)

[6] The CPCN statutes comprise Division 1, Part 1, Chapter 5 of the Public Utilities Code. (*See, generally,* Pub. Util. Code, Div. 1, Part 1, Ch. 5.)

In considering whether to issue a CPCN, the Commission must both consider "every element of public interest affected by facilities which it is called upon to approve" and "make specific findings of fact and conclusions of law relevant to all material relevant issues of a case." (*N. Cal. Power,* 5 Cal.3d at 380.) The Commission must consider and make findings with respect to the evidence CPCN applicants are statutorily required to submit as a prerequisite to CPCN issuance. (Pub. Util. Code, § 1004 [utility must prove it "has received the required consent, franchise, or permit" from the proper authorities]; Pub. Util. Code, § 1003 [utilities must provide engineering and design information, cost comparisons comparing proposed construction costs with costs of alternative sources of power].)

When issuing a CPCN, the Commission may attach conditions "as in its judgment the public convenience and necessity require" (Pub. Util. Code, § 1005, subd. (a)); but must "specify the operating and cost characteristics… including, but not limited to, the size, capacity, cost, and all other characteristics" specified in section 1003. (Pub. Util. Code, § 1005, subd. (b).) Additional factors the Commission must consider and make findings on before issuing or refusing to issue a CPCN include community values, recreational and park areas, historical and aesthetic values, influence on the environment, and the state's need (or lack thereof) for natural gas. (Pub. Util. Code, § 1002, subd. (a), § 1002.5.)

Moreover, when the estimated costs of the new construction exceeds fifty million dollars ($50,000,000), the Commission must specify in the CPCN "a maximum cost determined to be reasonable and prudent for the facility." (Pub. Util. Code, § 1005.5, subd. (a). After issuance, the Commission may not authorize any increase in the specified maximum unless "it finds and determines that the cost has in fact increased and that the present or future public convenience and necessity require construction of the project at the increased cost." (Pub. Util. Code, § 1005.5, subd. (b).)

Subject to the cost-increase limitations in section 1005.5, a utility need not obtain additional CPCNs for extensions of pipelines (1) "necessary in the ordinary course of its business" and (2) that will be constructed (a) "within any city or city and county within which it has theretofore lawfully commenced operations," (b) "into territory either within or without a city or city and county contiguous to its street railroad, or line, plant, or system, and not theretofore served by a public utility of like character," or (c) "within or to territory already served by it." (Pub. Util. Code, § 1001.) Here, however, as discussed below, the Commission expressly declined to engage in the necessary factual inquiry required to find the Pipeline Project exempt from the CPCN statutory mandates. (Pub. Util. Code, § 1001.)

If a hearing is requested, the Commission must hold a hearing "before issuing or refusing to issue" a CPCN. (Pub. Util. Code, § 1005, subd. (a).) Here, Petitioners requested a hearing, but none was held. (Appx. 0341; Appx. 1403-1406.) As detailed below, the Utilities failed to apply for a CPCN for the Pipeline Project, and the Commission failed to consider any of the factors or make any of the findings required by the Public Utilities Code to either issue or refuse to issue a CPCN. No CPCN was issued, and thus construction remains unauthorized.

B. The Commission Violated the CPCN Statutes By Declining to Consider and Address the Myriad Factors Statutorily Required for Pipeline Construction Projects and Thus Did Not Lawfully Authorize Construction.

The only application for any CPCN in the record consists of the application for a CPCN for Line 3602 that the Commission denied (Appx. 0292) for reasons including that the Utilities had failed to show "why it is necessary to build a very costly pipeline to substantially increase gas pipeline capacity in an era of declining demand and at a time when the state of California is moving away from fossil fuels" (Appx. 0288).

In denying the Utilities' CPCN application in D.18-06-028, the Commission made clear that the Utilities would be required to file a new application in the future if the Utilities were to propose to replace Line 1600 in a new right-of-way, and that in such application the burden of proof would be on the Utilities. (Appx. 0274.)

In addition to requiring specific CEQA documentation as discussed in detail in Section II above, the Commission also specified that the Utilities "would necessarily be required to provide full documentation for any such new project, including a new PEA, new CEA (Cost Effectiveness Analysis)…" if the Utilities later proposed to replace Line 1600 in a different location. (Appx. 0274.) Both the Proponent's Environmental Assessment, or PEA, and the Cost Effectiveness Analysis, or CEA, that the Commission expressly required in D.18-06-028 would have provided the Commission with key information required by the CPCN statutes. (Pub. Util. Code, § 1002, subd. (a) [requiring consideration of community values, recreational and park areas, historical and aesthetic values, and influence on environment]; Pub. Util. Code, § 1003, subds. (c), (d) [requiring cost estimates for financing, construction, and operation; and "cost analysis comparing the project with any feasible alternative sources of power"].)

However, when the Utilities proposed the estimated $677 million Pipeline Project to replace 37 miles of the existing Line 1600 with construction of 43 miles of new pipeline in a different location (Appx. 0370, 0392) while hydrotesting the remaining 13 miles of Line 1600, they made no attempt to file a new application or even to amend their original application to include the PEA, CEA, or other documentation explicitly required by D.18-06-028 and the CPCN statutes. Without the requisite information, the Commission could not and did not consider the statutorily-mandated CPCN factors.

Despite acknowledging that, according to the Utilities, "work will commence during the first quarter of 2020" and that "[c]onstruction and testing are anticipated to span approximately four years" (Appx. 1347), the only findings in D.20-02-024 referencing any CPCN consists of the Commission's findings that the Commission *denied* the Utilities' application for a CPCN for the proposed Line 3602 project (Appx. 1344, 1345). In other words, although aware that the Utilities intended to commence construction, the Commission failed to make any findings that would authorize lawful construction of the Pipeline Project described in the Utilities' Plan. (*N. Cal. Power*, 5 Cal.3d at 381 ["Every issue that must be resolved to reach that ultimate finding is 'material to the order or decision'" and must be set forth].)

For example, the Commission made no findings that the Utilities received "the required consent, franchise, or permit" from the appropriate public authorities. (Pub. Util. Code, § 1004.) In the City of San Diego, where the Utilities' propose to construct substantial portions of the Pipeline Project, the Utilities' franchises expire on January 17, 2021. (Appx. 1389.)

Rather than making findings regarding community values, recreational and park areas, historical and aesthetic values, influence on the environment, etc., only "safety, technical, and reliability factors" were purportedly considered. (Appx. 1349; Pub. Util. Code, § 1002, § 1004.)

Instead of considering the state's need (or lack thereof) to supply natural gas, or for construction of the Pipeline Project at all, the Commission expressly declined to address the need for natural gas. (Pub. Util. Code, § 1002.5; Appx. 1333; *see also, e.g.* App. 0281.) The Commission also expressly declined to consider the costs of any alternatives to the Project, much less whether alternative sources of power could supply energy needs more cost-effectively. (Appx. 1342; Pub. Util. Code, § 1003, subd. (d).)

In expressly declining to consider the need for the Pipeline Project and whether more cost-effective alternatives render the Pipeline Project unnecessary (Appx. 1333; Appx. 0281; Appx. 1342), the Commission necessarily declined to find the Pipeline Project exempt from CPCN statutory mandates. (Pub. Util. Code, § 1001.) In other words, without assessing the need for the Pipeline Project in the first place, the Commission could not have concluded the Pipeline Project is "necessary in the ordinary course of [the Utilities'] business." (*Ibid*.) Nor did the Commission engage in any other factual inquiry necessary to find the Pipeline Project exempt from all the required CPCN statutory mandates: the Commission made no inquiry as to whether the Pipeline Project could be construed as a pipeline extension, much less whether it was "within any city or city and county within which" the Utilities had "theretofore lawfully commenced operations," (2) "into territory either within or without a city or city and county contiguous to" the Utilities' pipeline or system "and not theretofore served by a public utility of like character," or (3) "within or to territory already served by" the Utilities. (*Ibid*.)

After the Commission rejected the Utilities' application for a new CPCN for the proposed Line 3602 project (Appx. 0292), the Utilities chose not to present the Commission with any further CPCN-related evidence, documentation, or application whatsoever. The Commission's acknowledgement that the Utilities intended to commence construction of the Pipeline Project (Appx. 1347) should have at a minimum triggered the Commission to require the Utilities to present the requisite information so that the Commission could consider, address, and make findings required by the CPCN statutes – or the Commission should have rejected the Pipeline Project outright. Without the required information, the Commission could not and did not issue a CPCN; and, thus, did not lawfully authorize construction.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that this Court grant writ relief as prayed for in this petition.

Respectfully submitted this 24th day of November, 2020.

/s/ Malinda Dickenson
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THE PROTECT OUR COMMUNITIES FOUNDATION
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Attorneys for Southern California Generation Coalition

CERTIFICATION OF COMPLIANCE

In accordance with California Rules of Court Rule 8.204 and 8.486, I certify that the text of this Petition for Writ of Review and Memorandum of Points and Authorities contains 11,517 words, as determined by the word count of the computer used to prepare this document and exclusive of this certification and the other exclusions referenced in the aforementioned rules.

Respectfully submitted this 24th day of November, 2020.

/s/ Malinda Dickenson
Malinda Dickenson, General Counsel
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(8585) 521-8492 | malinda@protectourcommunities.org
Attorney for The Protect Our Communities Foundation

REQUEST FOR A HEARING

TO THE COURT AND TO ALL PARTIES AND THEIR ATTORNEYS:

PLEASE TAKE NOTICE that Petitioners THE PROTECT OUR COMMUNITIES FOUNDATION, the PUBLIC ADVOCATES OFFICE OF THE PUBLIC UTILITIES COMMISSION, and SOUTHERN CALIFORNIA GENERATION COALITION hereby request a hearing on the merits of their petition. California Public Resources Code section 21167.4(a) mandates that in any proceeding alleging noncompliance with CEQA, "the petitioner shall request a hearing within 90 days from the date of filing the petition or shall be subject to dismissal…" (Pub. Res. Code, § 21167.4, subd. (a).) Petitioners' request for a hearing is timely.

Respectfully submitted this 24th day of November, 2020.

/s/ Malinda Dickenson
Malinda Dickenson, General Counsel
THE PROTECT OUR COMMUNITIES FOUNDATION
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/s/ Joseph Como
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EXHIBIT A

The Protect Our Communities Foundation
4452 Park Boulevard #309
San Diego, California 92116

November 23, 2020

Rachel Peterson, Acting Executive Director
California Public Utilities Commission
505 Van Ness Avenue
San Francisco, CA 94102

Arocles Aguilar, General Counsel
California Public Utilities Commission
505 Van Ness Avenue
San Francisco, CA 94102

Via United States Mail

Re: Notice of Intent to file CEQA Petition

Dear California Public Utilities Commission:

On behalf of The Protect Our Communities Foundation, the Public Advocates Office of the Public Utilities Commission, and Southern California Generation Coalition (collectively, Petitioners), this letter provides notice under Public Resources Code section 21167.5 that Petitioners intend to file a petition for writ of review in the California Supreme Court.

The Petition will allege that the California Public Utilities Commission failed to comply with the California Environmental Quality Act (CEQA) and the Certificate of Public Convenience and Necessity (CPCN) statutes set forth in the Public Utilities Code in issuing D.20-02-024, *Decision Approving Limited Modifications to Decision 18-06-028* (February 6, 2020). If you have any questions, please do not hesitate to contact me.

Sincerely,

Malinda Dickenson

EXHIBIT B

The Protect Our Communities Foundation
4452 Park Boulevard #309
San Diego, California 92116

November 24, 2020

Office of the Attorney General
P.O. Box 944255
Sacramento, CA 94244-2550

Via United States Mail

Re: Challenge to California Public Utilities Commission Decision

Dear Honorable Attorney General:

On behalf of The Protect Our Communities Foundation, the Public Advocates Office of the Public Utilities Commission, and Southern California Generation Coalition (collectively, Petitioners), this letter provides notice under Public Resources Code section 21167.7 and Code of Civil Procedure section 388 that Petitioners are filing a petition for writ of review in the California Supreme Court. A copy of the petition is enclosed with this notice.

The Petition alleges the California Public Utilities Commission failed to comply with the California Environmental Quality Act (CEQA) and the Certificate of Public Convenience and Necessity (CPCN) statutes set forth in the Public Utilities Code in issuing D.20-02-024, *Decision Approving Limited Modifications to Decision 18-06-028* (February 6, 2020). If you have any questions, please do not hesitate to contact me.

Sincerely,

Malinda Dickenson

Encl.

PROOF OF SERVICE

At the time of service, I was over 18 years of age and not a party to this action. My residence or business address is 4452 Park Blvd. #309 San Diego, California 92116 and my electronic service address is malinda@protectourcommunities.org. On November 24, 2020, I served true copies of the following documents:

VERIFIED PETITION FOR A WRIT OF REVIEW; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PETITION;

PETITIONERS' APPENDIX OF EXHIBITS IN SUPPORT OF PETITION FOR WRIT OF REVIEW

on the parties in this action as follows:

Arocles Aguilar, General Counsel
California Public Utilities Commission
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arocles.aguilar@cpuc.ca.gov
Attorney for Respondent California Public Utilities Commission

Rachel Peterson, Acting Executive Director
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Respondent California Public Utilities Commission

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Sacramento, CA 95833
Registered Agent for Real Party in Interest
San Diego Gas & Electric Company

Corporation Service Company
2710 Gateway Oaks Drive, Suite 150-N
Sacramento, CA 95833
Registered Agent for Real Party in Interest
Southern California Gas Company

BY HAND DELIVERY: I caused a copy of such documents to be hand delivered to the office of the addressees.

BY ELECTRONIC SERVICE: I caused a copy of such documents to be emailed to the recipients' email addresses set forth above; and I caused such documents to be served by submitting an electronic version of the documents to TrueFiling through the user interface at www.truefiling.com.

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

Executed on November 24, 2020, at San Diego, California.

/s/ Malinda Dickenson
Malinda Dickenson