



Chief Justice Tani Cantil-Sakauye  
The Honorable Associate Justices  
California Supreme Court  
350 McAllister Street  
San Francisco, CA 94102-4797

Re: Powers Engineering et. al. v. Public Utilities Commission  
Supreme Court Case No. S237487  
Court of Appeal Case No. B275901

Dear Chief Justice Cantil-Sakauye and Associate Justices:

Pursuant to California Rule of Court 8.500, subdivision (g), The Protect Our Communities Foundation, Center for Biological Diversity, Preserve Wild Santee, Cleveland National Forest Foundation, and Californians for Energy Choice respectfully submit this *amicus curiae* letter in support of the Petition for Review filed in the above-entitled case.

The Protect Our Communities Foundation (POC) is a 501(c)(3) nonprofit dedicated to protecting wild and rural communities and the people, plants, and animals that inhabit them from destructive, industrial energy infrastructure development. POC advocates on behalf of Southern California utility ratepayers against fossil fueled energy development and in support of the transition to sustainable energy systems. POC has appeared before the California Public Utilities Commission (PUC) and in the California courts for the past decade representing the unique perspective of small and medium-sized communities throughout Southern California.

The Center for Biological Diversity is a nonprofit, public interest environmental organization dedicated to the protection of native species and their habitats through science, policy, and environmental law. The Center's 50,186 members and over 900,000 online activists, including 31,862 members and 111,877 online activists in California are very concerned about greenhouse gas emissions and fossil fueled sources of power. The Center has been active before the PUC for over a decade and has attempted to bring many cases challenging the approval for new fossil fueled power plants in California.

Preserve Wild Santee is a volunteer community environmental organization that has worked to protect and enhance the quality of life in and around the City of Santee since 1994. PWS is committed to preserving the natural resources of Santee and surrounding areas in San Diego County. PWS members are SDG&E ratepayers and PWS was intensively involved in

advocating against CEC and PUC approvals of the gas power plants Quail Brush Generation Project and the Pio Pico Power Plant.

The Cleveland National Forest Foundation is a nonprofit group dedicated to preserving the plants, animals and other natural resources of Southern California mountains by protecting the land and water they need to survive. In furthering its mission to stem the tide of urban encroachment of our wild-lands, the Foundation has advocated before the PUC and U.S. Forest Service on a number of energy infrastructure projects.

Californians for Energy Choice is a statewide coalition which has been working since 2010 to support and expand the state's emerging Community Choice clean energy programs, and protect them from ballot and legislative attacks by the monopoly utilities and fossil fuel interests. California's Community Choice law AB-117 (Migden 2002) allows communities to group together their electricity customers into not-for-profit municipal programs and use their combined customer purchasing power to both buy and locally generate cleaner electricity at lower prices. Policies which increase or extend the life of unnecessary fossil fuel generation (often at subsidized prices) undermine the ability of California communities to competitively use Community Choice to shift to cleaner energy and increase local green jobs.

The PUC recently approved a proposal by Southern California Edison Company (SCE) to enter into 20-year contracts for the purchase of fossil fuel power from three new gas power plants to be constructed in the Los Angeles (LA) Basin. At a time when California seeks to be a leader in addressing climate change by mandating greenhouse gas reductions, these plants will triple greenhouse gas emissions from the region's power plants.

Since 2000, similar PUC decisions have resulted in the construction of numerous gas power plants throughout the State, leaving California awash in gas-fired generation. Despite the high stakes for our health, environment, and ratepayers and the clear violations of environmental protection laws, most of the PUC's new gas plant contract approvals have been immune from judicial review. A petition for writ of review to either the Court of Appeals or California Supreme Court is the only way that concerned parties can challenge a PUC decision. In the few cases where parties have had the significant financial resources and legal and engineering support to petition for a writ of review, the appellate courts have routinely denied review without any analysis of the competing arguments, as the Court of Appeal for the Second District, Division Five, did in the LA Basin case.

While the Second District's denial of the challenge in the LA Basin case exemplifies the problem with wrongful denials of meritorious petitions, a recent case brought by signatories to this letter demonstrates how the process is supposed to work. Just two weeks after the 2<sup>nd</sup> District denied review, the Court of Appeal, First District, Division Three, granted petition for review of a PUC decision involving another 20-year contract for another new gas plant to be

constructed on our coast in the small town of Carlsbad, just north of San Diego.<sup>1</sup> Striking similarities between the Carlsbad and LA Basin cases demonstrate that the First and Second Districts applied disparate standards in ruling on petitions for review.

If the Carlsbad case merits plenary appellate review, which it does, so does the LA Basin case. The different result in the two cases, both raising issues with tremendous impact on California's environment, and in which billions of dollars are at stake, threaten to undermine confidence in the judicial system. This Court should grant review in the LA Basin case to ensure that PUC decisions are reviewed with the same level of scrutiny, despite which District a challenge is brought in. Whether high stakes PUC approvals of expensive fossil-fuel power plants are subjected to plenary judicial review or are summarily denied any review should not depend on where an objecting party is required to file its petition.

### **Judicial Review Of PUC Decisions Permitting Construction of New Gas-Fired-Power Plants Is Needed But Rarely Granted**

The people of California have called upon the State to be a leader in combatting climate change and, in recent years, the California Legislative has passed stronger and stronger laws requiring reductions in fossil-fuel consumption and increased reliance on clean energy alternatives.<sup>2</sup> Yet the PUC continues, as it has since the early 2000s, to approve many decades-long contracts for new fossil-fuel power plants throughout California.

The PUC's reliance on forecasts that dramatically over-estimate the need for new, dirty energy resources has brought California to where it is today – awash in dirty, excess generating capacity.<sup>3</sup> The PUC's fossil-fuel plant authorizations have been based on biased and unscientific forecasting by the investor owned utilities and the California Independent System Operator (CAISO) that have wrongly predicted that demand for electricity in California will increase. The utilities and CAISO forecasts fail to account for the past decade's decline in actual and projected peak demand, and slow-down of total annual usage, with some regions accomplishing a decline in total usage.

The PUC's approval of decades-long contracts for fossil-fueled power plants paid for by ratepayers creates harmful environmental, health, and financial consequences for California families and businesses. PUC approvals of contracts for power from new fossil-fuel plants hamper our ability to meet California's power needs with preferred resources and to achieve

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<sup>1</sup> *Protect Our Communities et. al v. Public Utilities Commission*, California 1st District Court of Appeal Case No. A146934.

<sup>2</sup> See Pub. Util. Code, § 399.11; Governor's Executive Order B-30-15 (Apr. 2015); Pub. Util. Code, § 399.11; Public Util. Code § 454.5, subd. (b)(9)(C).

<sup>3</sup> CAISO, *2015 Summer Loads & Resources Assessment*, May 7, 2015, Table 1, p. 6. CPUC planning reserve requirement is minimum of 15 percent. Planning reserve margins of California investor-owned utilities are greater than 35 percent.

required reductions in greenhouse gas emissions. Thus, to the extent that the PUC's approval of these fossil-fuel power plants are not reviewed by the courts, California ratepayers will continue to not only be forced to pay for expensive new fossil-fueled power plants that aren't needed, they will also be deprived of their right to a healthier and cleaner environment.

Yet, the PUC, a California administrative agency, enjoys limited judicial review of its actions, quite unlike the vast majority of the State's administrative agencies. The utilities, as entities regulated by the PUC, participate fulsomely in PUC proceedings. The utilities have all their costs of participation, including lawyers, experts, and the like, paid for in full by the ratepayers, pursuant to PUC order. However, the expense and expertise necessary to participate in PUC proceedings result in relatively few consumer and environmental parties participating in PUC proceedings. The substantial financial commitment necessary to take an appeal after exhaustion of administrative remedies in years' long proceedings further prevents parties from challenging PUC action in court.

This special treatment of PUC decisions is in part why this Court has held that review of PUC decisions should be liberally granted whenever the writ even appears meritorious.<sup>4</sup> The record in the LA Basin case clearly demonstrated that the PUC failed to act as required by law and abused its discretion by approving power from multiple new gas power plants. The petition for writ of review addressed to the Court of Appeal presented a "convincing argument" that "appeared meritorious," which is all this Court has held is required to merit plenary review of a PUC decision.<sup>5</sup> Nonetheless, the Second District summarily denied the petition without any explanation or analysis. Whether or not citizens can challenge high stakes PUC approvals of expensive fossil-fuel power plants should *not* depend on which appellate district the petition must be filed in. The LA Basin case should be heard in a court of law for many of the same reasons that the Carlsbad case should be and will be heard.

### **Appellate Courts Are Undermining Public Trust in the Judiciary by Applying Disparate Standards to Petitions for Review of PUC Decisions**

The Protect Our Communities Foundation, the Center for Biological Diversity, and the Sierra Club of California petitioned for review in a case involving a power purchase application arising from the same procurement authorization decision and raising very similar issues as the challenge to the LA Basin approval. The Carlsbad case involves PUC approval of a contract for the 500 MW Carlsbad Energy Center in San Diego County.<sup>6</sup> The First District granted review of

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<sup>4</sup> *PG&E Corp. v. Public Utilities Com.* (2004) 118 Cal. App. 4th 1174 citing *Powers v. City of Richmond* (1995) 10 Cal.4th 85, 114.

<sup>5</sup> *Ibid.*

<sup>6</sup> *Protect Our Communities et. al v. Public Utilities Commission*, California 1st District Court of Appeal Case No. A146934.

the writ petition on the Carlsbad plant just after the Second District denied review in the LA Basin case.

Both the Carlsbad and LA Basin projects were approved based on authorizations made in the 2012 Long Term Procurement Proceeding, (2012 LTPP). Every two years, the PUC engages in an LTPP evidentiary rulemaking proceeding to determine how much electricity various regions of California will need in the coming years and what kind of resources (energy efficient measures, renewable generation, gas fired generation, etc.) should be purchased to meet that need. Following the LTPP authorization, the PUC entertains applications for contracts for new resources. These applications for decades-long contracts must follow environmental and ratepayer protection laws and comply with the LTPP authorizations. At all stages of the procurement process, the PUC must follow the preferred resources loading order whereby it is to “first meet unmet resource needs through all available energy efficiency and demand reduction resources that are cost effective, reliable, and feasible,” then through the use renewable generation, and finally, only as a last resort, with fossil fueled power.<sup>7</sup>

The PUC’s approval process for both Carlsbad and LA Basin contained very similar procedural improprieties and violations of many of the same environmental statutes.

#### *Elimination of preferred resources from consideration based upon manufactured urgency*

In both the Carlsbad and LA Basin proceedings, preferred resources were dismissed from consideration and the PUC justified its wrongful approvals by relying on the utilities’ manufactured urgency to rush approval of gas. In both approvals, the PUC relied upon exaggerated claims about the length of time it takes to permit and built new energy infrastructure.<sup>8</sup>

In the LA Basin proceeding, Southern California Edison (SCE) claimed that, due to the long lead time alleged for gas-fired generation projects, it had to immediately commit to large amounts of gas-fired generation. SCE also exaggerated the development time for preferred resources based on claims that the technology had not matured sufficiently to fill the need, despite the fact that 1,000s of MW of these very same resources were already in operation throughout California and in SCE and SDG&E territory.

In Carlsbad, SDG&E convinced the PUC that gas fired generation was actually needed years earlier than determined in the 2012 LTPP. The 2012 LTPP found that there would be a need for new power resources by 2022. But SDG&E, in its Carlsbad application at the PUC, argued

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<sup>7</sup> Public Util. Code § 454.5, subd. (b)(9)(C).

<sup>8</sup> The ISO’s letter to the Court of Appeals in Carlsbad shows that the relied-upon urgency to build new natural gas plants instead of new renewable resources is manufactured, because the ISO admits that it has mitigation measures available that it can use if a delay in adding new capacity could impact grid reliability. The remedy identified by ISO is the continued operation of the existing gas-fired generation at the Carlsbad site.

that there was actually a need by 2018, based upon unsubstantiated claims in conflict with the 2012 LTPP order. SDG&E asserted that there was insufficient time to develop any projects other than gas-fired generation due to a de facto 2018 need allegedly created by the December 2017 shut down of an area power plant, the Encina Generating Station, under “once through cooling” laws. The planned shut-down of the Encina plant was part of the implementation of state law that calls for the end of ocean water cooling of power plants that harms marine life. But, prior to the approval of Carlsbad, the PUC has already approved the Pio Pico Power Plant to replace any need due to the shutdown of Encina<sup>9</sup> and CAISO acknowledged it had the authority to keep Encina running beyond the planned shutdown date if CAISO asserted that the shut down would threaten grid reliability.

Over the strenuous objection of Commissioner Catherine Sandoval from the dais that there was no need for Carlsbad because any alleged need from the shutdown of Encina has been filled with the approval of Pio Pico, the PUC nonetheless approved Carlsbad.

*PUC Acknowledges Changed Circumstances Only if it Benefits the Utilities*

The PUC considers changed circumstances only to the extent that such changes benefit the utility. Although the PUC, in its 2012 LTPP authorization, unambiguously stated that changed circumstances needed to be considered at the application stage to minimize the danger of over-procurement,<sup>10</sup> no such consideration took place in either Carlsbad or LA Basin. The PUC refused to perform any analysis of changed circumstances of any kind in the Carlsbad proceeding. And, changed circumstances were considered in the LA Basin case only to the extent that they justified SCE procurement of only the minimum amount of preferred resources of the range set in the 2012 LTPP.

In the recent application proceeding for power from another gas fired power plant, the 300 MW Pio Pico Plant, the PUC was explicit that changed circumstances would be considered only to the benefit of the utility. In that proceeding, The PUC stated “that when [a bidder] brings an application for approval of the RFO results, we will take into consideration material intervening events and circumstances.”<sup>11</sup> The CPUC permitted SDG&E to make a showing of changed circumstances with regards to the commencement date of the Pio Pico contract but disregarded all other evidence of changes circumstances that showed a decreasing need.<sup>12</sup>

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<sup>10</sup> PUC Decision D.14-03-004.

<sup>11</sup> PUC Decision D.13-03-029 at p. 18.

<sup>12</sup> PUC Decision D. 13-11-043 at p. 27.

*The PUC Has Based Many Decisions on a Misguided and Blind Reliance on the opinion of the CAISO about our State's power needs*

In the Carlsbad, LA Basin, Pio Pico, and many other PUC application proceedings, the PUC has wrongly deferred to the biased, unreliable and inaccurate opinion of CAISO. CAISO has a substantially narrower mission than the PUC – to assure grid reliability – that can be at odds with the PUC mission of protecting ratepayers and the environment. “A significant difference between the ISO’s reliability mission under § 345 and the Commission’s reliability emphasis under § 380(c) is that the Commission must balance its reliability mandate with other statutory and policy considerations. Primarily, these considerations are reasonableness of rates under § 451 and § 454 and a commitment to a clean environment under Pub. Util. Code sections including § 399.11 (Renewables Portfolio Standard) and § 454.5(b)(9)(C) (Loading Order),” the PUC explains.<sup>13</sup> CAISO’s opinions are biased by an institutional resistance to according grid reliability benefits to clean energy resources, despite California law mandating that clean energy resources be prioritized over gas-fired generation.

The PUC does not, as it should, take into account CAISO mission and bias against preferred resources, instead according CAISO complete deference on matters of need and reasonableness of applications. In both the Carlsbad and LA Basin, CAISO supported the prioritization of abundant gas-fired generation procurement while thwarting the procurement of clean energy resources. For example, in LA Basin, CAISO assisted SCE in dismissing bids for demand response contracts. After bidding had already been opened, the CPUC, with CAISO’s blessing, allowed SCE to change the bid specifications for demand response energy applications thereby eliminating all bids for demand response.

In Carlsbad, CAISO offered its opinion that the application should be approved based on need it had forecasted for all of Southern California by 2024 instead of just the LA Basin by 2022, the place and year addressed by the PUC 2012 LTPP. CAISO’s forecasts, for a different time period and different place was outside the scope of the application that was before the PUC and should not have been considered at all, much less be shown complete deference.

Unless this Court intervenes to require review of the LA Basin case, the consequences will be costly to the ratepayers of Southern California; to the environment and to the health of the many Angelenos living and working near these new fossil-fuel plants. Citizens of this State will be left feeling that our government has successfully undermined the “checks and balances” ensured in the foundations of our democracy: the Legislative Branch can pass laws with limited opportunity for judicial review, and the Executive Branch uses the opportunity to act without concern of challenges by the people they are supposed to represent. California’s commitments to mitigating climate change are thus shown to be nothing more than words on paper. Moreover,

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<sup>13</sup> PUC Decision D.13-02-053 at pp. 126-127.

unless the Court intervenes to require a full review, the public trust in the veracity and regularity of PUC decisions will remain at risk. Therefore, all the undersigned respectfully urge the Court to grant review in this case and send the petition back to the Court of Appeal for a merits review.

Respectfully submitted,

Dated: September 29, 2016

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