BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of Pacific Gas and Electric Company For Approval of the Retirement of Diablo Canyon and Recovery of Associated Costs Through Proposed Ratemaking Mechanisms (U39E)	)))	Application 16-08-006 (Filed August 11, 2016)

REPLY COMMENTS OF THE ALLIANCE FOR NUCLEAR RESPONSIBILITY RE THE *PROPOSED DECISION OF ALJ ALLEN*

Pursuant to Rule 14.3(d) of the Commission's Rules of Practice and Procedure, the Alliance for Nuclear Responsibility ("A4NR") files these reply comments in response to the opening comments of the San Luis Obispo Mothers for Peace ("SLOMFP"), the San Luis Obispo Unified School District ("the Schools") and the Green Power Institute ("GPI"), filed November 29, 2017, on the *Proposed Decision of ALJ Allen* ("*Proposed Decision*").

A. SLOMFP and the Retirement Date for Diablo Canyon Nuclear Power Plant ("DCNPP")

A4NR joins in SLOMFP's recommendation to modify Conclusion of Law 1 and Ordering Paragraph 1 of the *Proposed Decision* so as to indicate that DCNPP may be retired "by" the dates upon which the plant's current reactor operating licenses expire.[1] A4NR has used similar language to describe the time it expects DCNPP to cease power operations, *viz*., "no later than the expiration of the plant's current operating licenses."[2] Modifying Conclusion of Law 1 in either the manner recommended by SLOMFP or as suggested by A4NR's testimony and pleadings would bring it into greater conformity with the important admonition included in the *Proposed Decision* addressing this matter, to wit, "If in the interim the facts change in a manner that indicates Diablo Canyon should be retired earlier [than 2024 and 2025], the Commission may reconsider this determination."[3] A4NR therefore supports the modification of Conclusion of Law 1 and Ordering Paragraph 1 as described.

B. The Schools and the Community Impacts Mitigation Program

Although A4NR and the Schools both support the proposed community impacts mitigation program, A4NR is compelled to address the Schools' representations that (a) "no party has asserted the Commission is prohibited by statute from approving ratepayer funding" of the program and (b) "Senate Bill 968 … *suggests* the Legislature fully expected the Commission would approve the [program] (or at least review the [program] and approve or reject the program based on its merits)."[4]

[1] See *Opening Comments of San Luis Obispo Mothers for Peace on Proposed Decision*, Application 16-08-006, November 29, 2017, at p.7. Relatedly, SLOMFP further recommends that corresponding Ordering Paragraph 1 be modified in the same way and A4NR joins in this recommendation as well. (*Ibid*.)

[2] See *Prepared Direct Testimony of A4NR Witness Becker*, Exhibit A4NR-1, at p.4; also, *e.g*, *Opening Brief of the Alliance for Nuclear Power*, Application 16-08-006, at pp.3, 4, 5.

[3] *Proposed Decision*, at p.15.

[4] See *Opening Comments of San Luis Obispo Unified School District on Proposed Decision of ALJ Allen*, Application 16-08-006, November 29, 2017, at p.4 (emphasis added).

Contrary to the Schools' assertion, the Office of Ratepayer Advocates ("ORA") included the absence of express statutory authority among its reasons for opposing any funding of the program.[5] Additionally, ORA, joined by The Utility Reform Network ("TURN"),[6] submitted comments in opposition to the program, in part relying on the oblique legal argument that there were no prior Commission precedents holding that, as a matter of public policy, the Commission might include community impacts mitigation costs in rates.[7] From here, the *Proposed Decision* transmutes these scant legal arguments into a conclusion that, in the absence of *express* legal authorization to do so, the Commission cannot approve the program. A4NR submits there are two distinct legal bases upon which the Commission can act to approve the community impacts mitigation program: (1) the Commission's authorities inherent to its ratemaking jurisdiction and (2) an express legislative grant of authority. The Schools' legal argument fails to recognize the distinction between these two separate legal theories and from there significantly understates the Commission's jurisdiction to review and approve the recovery of the program's costs in rates.

First, as to the Commission's inherent authorities, the California State Constitution provides, "The commission may fix rates [and] establish rules for all public utilities subject to its jurisdiction."[8] This constitutional grant of broad regulatory authorities finds virtually unbridled expression in the various omnibus statutes establishing the extent of the Commission's ratemaking authorities, all of which are expansive and limited only to the extent provided otherwise in the Public Utilities Act.[9]

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[5] *Report of ORA Witness Logan*, Exhibit ORA-7, at p.13.

[6] Notably, TURN admits it did not submit any testimony or argument as to whether the Commission has the authority to approve the community impacts program. See *Opening Brief of The Utility Reform Network*, Application 16-08-006, at p.43.

[7] See *Comments of the Office of Ratepayer Advocates and the Utility Reform Network [on the Community Impacts Program] etc*., Application 16-08-006, January 27, 2017, at pp.7 to 8. It is in these comments that the only arguments regarding the precedential effects of Commission Resolution E-3535 appear in the record of this proceeding. ORA and TURN do not cite the Resolution for the proposition that the Commission has no authority to approve community impacts mitigation costs in rates, but to indicate that the Commission had done so, not as a matter of public policy, but to implement legislation. The *Proposed Decision* goes beyond this narrow legal argument to dredge up the precursor order (Decision 97-05-88) that led to the issuance of Resolution 3535, to find that, "Absent legislative authorization, utility rates should be used to provide utility services, not government services," and, further, "If legislation specifically directs this Commission to provide ratepayer funding for the [program], the Commission would do so." (*Proposed Decision* at pp.40 to 41.)

[8] *Cal.Const*. Article XII, Section 6.

[9] See, *e.g*., Public Utilities Code Sections 451 (jurisdiction to set "just and reasonable rates"), 454(a)(c) (authority to approve rates "upon a showing before the commission and a finding by the commission that the new rate is justified," the nature of such showing to be determined pursuant to rules the Commission "considers reasonable and proper for each class of public utility"), 728 (duty to protect against "unjust and unreasonable rates"), 761 (jurisdiction over "rules, practices, equipment, facilities, or service of any public utility" and "to fix the rules, practices, equipment, … facilities, services, or methods to be observed, furnished, constructed, enforced, or employed"), 768 (jurisdiction to require "every public utility to … operate its … plant, systems, … and premises in a manner so as to promote and safeguard the health and safety of its employees, … customers, and the public"), and the implementing authority by which these omnibus provisions are to be effectuated, 701 ("The commission may supervise and regulate every public utility in the State and may do all things, whether specifically designated in this part or in addition thereto, which are necessary and convenient in the exercise of such power and jurisdiction.")

It is in this light that the Commission should consider the Schools' legal argument that the absence of a prohibition against approval of the community impacts program is an important legislative omission – in the absence of an express statutory limitation, the Commission's full authorities, that is, *its inherent authorities to set rates and conditions of utility service*, may be brought to bear in determining whether (a) the costs of community impacts mitigation would result in just and reasonable rates, (b) the showing of the parties in support of the proposed program justifies the recovery of the program's costs through rates, (c) community impacts is a matter relevant to the rules, practices, equipment, facilities, or services provided by PG&E in the context of the company's nuclear power operations, and (d) the community impacts program would promote the health and safety of PG&E's employees, customers and the public.[10] The above-cited California statutes here provide the Commission with ample authority to address all of these issues as factual and policy matters within the Commission's jurisdictional reach. The *Proposed Decision* declines to address the merits of these issues, while every pertinent statute confers the jurisdiction, if not the duty, upon the Commission to do exactly that.

The extent of the Commission's inherent authorities involving ratemaking has been the subject of a long line of judicial opinions, dating to the Commission's origins, holding that ratemaking is a legislative act of this duly appointed Commission and will not be overturned unless the results are confiscatory or the Commission has failed to disallow expenditures the Commission has found to be unreasonable.[11] On these clear and longstanding principles of law, the Commission can rest assured that it has the authority to consider the community impacts program on the merits.

In addition to the Commission's inherent authorities to reach findings as to the reasonableness of the community impacts program, the Commission has express authorities to do so as well. Starting once again with the State Constitution, "The Legislature has plenary power … to confer additional authority and jurisdiction upon the commission."[12] The Legislature has obliged with respect to the Commission's ability to review the community

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[10] A4NR would ask the Commission to pay particular attention to the distinction between "customers" and "the public" in Public Utilities Code Section 768. The Commission's jurisdiction to set rates and the terms of utility services plainly encompasses the authority to require utilities to serve public interests lying outside the more parochial interest of customer-ratepayers.
[11] See, *e.g.*, *Market Street Railway Company v. Railroad Commission*, 24 Cal.2d 378, 397-399 (Cal.Sup.Ct., 1944); *Pacific Telephone & Telegraph Company v. Public Utilities Commission*, 62 Cal.2d 634, 647-648 (Cal.Sup.Ct., 1968); see also, *City of Los Angeles v Public Utilities Commission*, 7 Cal.3d 331, 345 (Cal.Sup.Ct., 1972), where the Court implied that the Commission could even include the costs of "gifts" in rates, so long as the Commission "told [the donor-ratepayers] how much they are giving," a position remarkably similar to the recommendation made by TURN in this proceeding. (*Opening Brief of The Utility Reform Network*, Application 16-08-006, at p.44.) While there certainly have been occasions where the courts have reined in regulatory frolics, no party has cited any judicial opinion as the source of any specific or apposite jurisdictional bar to approving the recovery of the costs of the community impacts program through rates, an omission which the *Proposed Decision* does not cure by citing to a Commission order that was later reversed by legislative action and thereby mooted.
[12] *Cal.Const*. Article XII, Section 5. This section is wholly separate and distinct from Section 6, *supra*. It should not be read, as the Schools arguments suggest, to be a superfluous appendage to the State Constitution.

impacts program and approve its reasonable costs in rates. The Schools erroneously and demurely argue that 2016 Senate Bill 968 "suggests" the Commission has such authority. (See *Stats.2016*, Ch.674.) But Senate Bill 968 travels far beyond being "suggestive." To the contrary, *Senate Bill 968 is quite emphatically instructive*.

As A4NR has previously discussed in its pleadings and testimony, Senate Bill 968 codifies Public Utilities Code Section 712.5, which directs the Commission to conduct a study to determine the net adverse economic impacts the DCNPP retirement will have on the local community. That study is to identify and recommend the actions state and local government should take to mitigate those impacts. In construing the nature of those actions and Section 712.5, the Legislature specifically declared its intent in Section 2 of the bill: these actions are "further," *i.e.*, additional, to the community impacts proposal in the Joint Proposal pending before the Commission. Taking into consideration Section 2 of the legislation, Public Utilities Code Section 712.5 simply cannot be read to say that the Legislature understood the Commission to be without jurisdiction under the State Constitution or the Public Utilities Act to consider the reasonableness of the proposal. Section 712.5 can only be construed to be adverse or silent on the question of the Commission's jurisdiction if and only if Section 2 is ignored altogether, which is precisely the legal tack taken by ORA and TURN in their evidentiary showings and legal analyses: *ORA and TURN to date have wholly failed to mention Senate Bill 968 or Section 712.5 in any of their testimony or pleadings.*

The *Proposed Decision* commits legal error in declining to address fully, on jurisdictional grounds, the merits of the community impacts program. The Commission should cure the error by asserting its jurisdiction under its inherent authorities to set rates and terms of utility services and/or as provided under Senate Bill 968. Upon reviewing the merits, virtues and public policies served by the program, A4NR believes the Commission will find that the evidentiary record in this proceeding fully supports the approval of rates reflecting the costs of the program.

C. GPI and the Use of DCNPP as a Load-Following Resource

GPI raises what it styles as a "technical correction" in the *Proposed Decision* and proposes to add language to the Commission's final order regarding whether DCNPP could be operated in a load-following mode.[13] A4NR submits that GPI's proposed language is based upon factual errors and inconsistent with the evidence in this proceeding.

To begin, the passage GPI seeks to "correct" is a direct quote from PG&E's reply brief. In responding to the Californians for Green Nuclear Power's assertion that DCNPP could be operated as a "flexible resource" subject to daily and hourly ramping, PG&E argues that this "would take Diablo Canyon outside of the currently authorized NRC license conditions and would require extensive technical feasibility studies, redesign of procedures, processes

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[13] See *Opening Comments of the Green Power Institute on the Proposed Decision of ALJ Allen,* Application 16-08-006, November 29, 2017 ("GPI Opening Comments"), at pp.9 to 10.

and systems, maintenance practices and nuclear fuel redesign."[14] PG&E goes on to question whether DCNPP could be "retrofitted to safely and reliably operate" in load-following mode, or whether PG&E would receive regulatory approvals, or whether the reductions in energy outputs portended by ramping DCNPP energy production would be offset by the value of transmuting DCNPP into a flexible resource.[15] In addressing PG&E's substantial concerns as DCNPP's owner-operator, GPI asserts that the operation of nuclear power plants in load-following mode has been done in France and Spain, "demonstrating" that "[t]here is no question that it is technically feasible."[16] GPI's assertion bears no merit.

Plainly, GPI misinterprets the passage to which it objects. PG&E did not indicate it was *per se* "technically infeasible" to operate DCNPP in load-following mode as GPI seems to believe. Rather, PG&E was enumerating the substantial obstacles it would need to overcome in implementing this significant change in DCNPP's mode of operations, as well as the absence of compelling reasons for doing so. These obstacles were buttressed by A4NR's testimony as well, which cited and incorporated an internal PG&E engineering and economic analysis of the safety and reliability issues posed by operating DCNPP in load-following mode.[17] GPI's vague "evidence" regarding the operation of nondomestic nuclear power plants of different design and under distinctly different safety regimes is wholly inferior to the competing evidence in this proceeding specific to DCNPP's age, design, contractor recommendations, operating licenses, and applicable safety regulations provided by PG&E and A4NR. The preponderance of the evidence fully supports PG&E's conclusions as cited in the *Proposed Decision* that operation of DCNPP in load-following mode is, simply stated, a very bad idea.[18]

Respectfully submitted,

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[14] *Proposed Decision*, at p.12, citing PG&E's Reply Brief at p.7.
[15] *Ibid*.
[16] *GPI Comments*, at p.9.
[17] See *Prepared Direct Testimony of A4NR Witness John Geesman*, Exhibit A4NR-2, at p.36. In citing its own brief to support the assertion that "all that would be required to operate Diablo Canyon in load-following mode would be *some relatively* modest equipment modifications, relicensing, and personnel training," GPI only proves that it is unfamiliar with the record evidence. (*GPI Comments*, at p.9, emphasis added.)
[18] To put it more bluntly, it is "technically feasible" to use an eighteen-wheeled commercial truck-and-trailer to bus students between their homes and school, but the merits of the idea are not settled by its "technical feasibility."