Case No. D077271

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT, DIVISION ONE

PROTECT OUR COMMUNITIES FOUNDATION

Petitioner,

v.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Respondent,

PACIFIC GAS & ELECTRIC COMPANY, SAN DIEGO GAS & ELECTRIC COMPANY, SOUTHERN CALIFORNIA EDISON, THE UTILITY REFORM NETWORK, COALITION OF CALIFORNIA UTILITY EMPLOYEES, CALIFORNIA LARGE ENERGY CONSUMERS ASSOCIATION, and DIRECT ACCESS CUSTOMER COALITION

Real Parties in Interest.

From a Decision of the Public Utilities Commission of the State of California, No. 18-10-019 (October 19, 2018)

APPLICATION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF; BRIEF OF *AMICI CURIAE* ALLIANCE FOR NUCLEAR RESPONSIBILITY AND SAN LUIS OBISPO MOTHERS FOR PEACE IN SUPPORT OF PETITIONER PROTECT OUR COMMUNITIES FOUNDATION

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TO BE FILED IN THE COURT OF APPEAL **APP-008**

COURT OF APPEAL 4th APPELLATE DISTRICT, DIVISION One	COURT OF APPEAL CASE NUMBER: D077271
ATTORNEY OR PARTY WITHOUT ATTORNEY: STATE BAR NUMBER: 219153 NAME: Sabrina Venskus FIRM NAME: Venskus & Associates, A.P.C. STREET ADDRESS: 1055 Wilshire Blvd., Suite 1996 CITY: Los Angeles STATE: ZIP CODE: 90017 TELEPHONE NO.: (213) 482-4200 FAX NO.: (213) 482-4246 E-MAIL ADDRESS: venskus@lawsv.com ATTORNEY FOR (*name*): San Luis Obispo Mothers for Peace, amicus curiae	SUPERIOR COURT CASE NUMBER: 19-10-019 (CPUC)
APPELLANT/ PETITIONER: PROTECT OUR COMMUNITIES FOUNDATION RESPONDENT/ REAL PARTY IN INTEREST: PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA	

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

(*Check one*): [x] INITIAL CERTIFICATE [ ] SUPPLEMENTAL CERTIFICATE

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1. This form is being submitted on behalf of the following party (*name*): San Luis Obispo Mothers for Peace

2. a. [x] There are no interested entities or persons that must be listed in this certificate under rule 8.208.
   b. [ ] Interested entities or persons required to be listed under rule 8.208 are as follows:

	Full name of interested entity or person	Nature of interest (*Explain*):
(1)		
(2)		
(3)		
(4)		
(5)		

[ ] Continued on attachment 2.

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Date: 7/3/2020

Sabrina Venskus
(TYPE OR PRINT NAME)

(SIGNATURE OF APPELLANT OR ATTORNEY)

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Table of Contents

Table of Authorities

Case Law

Decisions of the California Public Utilities Commission

Statutes

Rules of Court

TO THE HONORABLE PRESIDING JUSTICE OF THE COURT OF APPEAL OF THE STATE OF CALIFORNIA, FOURTH APPELLATE DISTRICT, DIVISION ONE:

Pursuant to Rule 8.200, subd. (c) of the California Rules of Court, proposed *amici curiae* Alliance for Nuclear Responsibility ("A4NR") and San Luis Obispo Mothers for Peace ("SLOMFP") respectfully request leave to file the accompanying *amici curiae* brief in support of Petitioner Protect Our Communities Foundation.

This application is timely made in compliance with rule 8.200, subd. (c)(1), as it is filed within 14 days of Petitioner's Reply brief. No party or any counsel for any party in the pending appeal authored any part of this brief or made any monetary contributions to fund the preparation or submission of the brief. No person or entity made any contribution other than the proposed *amici curiae*, their members or their counsel.

A. Relevant Background of Proposed *Amici Curiae*

A4NR is a California non-profit public benefit corporation formed in 2005. In recent years, its principal focus has been to represent utility ratepayer interests in various California state agency proceedings concerning the San Onofre Nuclear Generating Station or the Diablo Canyon Nuclear Power Plant. Its undersigned legal counsel, formerly an investment banker for 19 years, has an extended history in California electricity regulation, serving as the Executive Director of the California Energy Commission from 1979 to 1983; the Chair of the Board of Governors of the California Power Exchange from 1998 to 2002; a member of the Board of Governors of the California Independent System Operator in 2002; and a member of the California Energy Commission from 2002 to 2008.

SLOMFP is a California non-profit public benefit corporation formed in 1969 to address the health, safety, environmental, and economic impacts of nuclear weapons and nuclear power and encourage the development of alternative energy sources. To that end, SLOMFP has been an intervenor in a number of administrative proceedings concerning the operation of Diablo Canyon Nuclear Power Plant. SLOMFP, by and through its representatives and attorneys, has appeared before the U.S. Atomic Safety and Licensing Board, the U.S. Nuclear Regulatory Commission, the Federal Ninth Circuit Court of Appeals, and the California Public Utilities Commission ("CPUC") on matters related to the Diablo Canyon Nuclear Power Plant.

In 2016, A4NR joined with Pacific Gas & Electric ("PG&E") (one of the Real Parties in Interest in the instant case), and five other organizations to co-sponsor a Joint Proposal for the retirement of Diablo Canyon Nuclear Power Plant for the CPUC's consideration and approval, with A4NR agreeing to withdraw its challenges to PG&E's seismic analyses and PG&E agreeing to abandon efforts to relicense the plant. (CPUC Application No. 16-08-006.) SLOMFP filed a response to the Application and intervened in the proceeding. SLOMFP argued that Diablo Canyon Nuclear Power Plant would be uneconomic well before the expiration of its current operating licenses in 2024/2025, and should be shut down in 2019/2020. As a result of that proceeding, the CPUC adopted Decision No. 18-01-022, approving the permanent retirement of the Diablo Canyon Nuclear Power Plant's Unit 1 by 2024 and Unit 2 by 2025, and acknowledging the following:

- the possibility that "the more prudent and conservative approach" could shift in favor of a "shutdown before 2024 and 2025";
- the increased knowledge "(a)s we gain a clearer picture of future developments" was identified as a potential trigger of such a shift;

• the "relative cost of operating Diablo Canyon" was specifically cited as a pertinent example of such clearer picture of future developments;

• "(b)ecause there is a possibility that Diablo Canyon may cease operations earlier than 2024 and 2025, PG&E should prepare for that contingency;" and

• that "(i)f in the interim period the facts change in a manner that indicates Diablo Canyon should be retired earlier, the Commission may reconsider this determination."

(2018 Cal. PUC LEXIS 40 (Cal. P.U.C. January 11, 2018).)

B. Interests of Proposed *Amici Curiae* and How the Brief Will Assist the Court

Both A4NR and SLOMFP share the concern that, as applied to Utility-Owned Generation ("UOG"), the Power Charge Indifference Adjustment ("PCIA") has enabled an uneconomic, aging nuclear power plant to operate well past its prudent useful life. Because of the significant growth in market share of Community Choice Aggregators ("CCAs") within PG&E's service territory, non-customers now absorb the majority of above-market costs for all of PG&E's UOG and receive nothing in return for such payments. This external source of financial life-support for Diablo Canyon Nuclear Power Plant —*more than $2.8 billion over the past three years*— has relieved pressure on PG&E to reduce electricity generation costs, despite leaving PG&E's remaining customers exposed to the non-PCIA-subsidized portion of above-market costs. The distortive effect of similar cross-subsidization of uneconomic UOG— an artificial slowing of the utility equipment replacement cycle normally associated with market forces— will become apparent in Southern California as CCA market share increases in the San Diego Gas & Electric ("SDG&E") and Southern California Edison ("SCE") service territories.

Neither A4NR nor SLOMFP were a party to the CPUC rulemaking that resulted in D.18-10-019.

A4NR and SLOMFP have reviewed the briefs submitted by the parties in this case. The proposed *amici curiae* brief provides non-duplicative information about the case's California electricity market context, both historical and contemporary, that the parties' briefs did not address fully. Proposed *amici curiae* believe that this information will assist the Court in gleaning the legislative intent of AB 117 and assessing the ramifications for California's electricity supply system of its final decision on this case's merits.

Specifically, A4NR and SLOMFP argue that (1) contrary to the expansive, multi-part rationale of Respondent, this case is "narrowly focused on a purely legal issue," i.e., whether Respondent has exceeded its statutory authority by imposing UOG costs on CCA customers; (2) this determination will turn on the Court's *de novo* interpretation of a statute enacted in 2002, rather than a sifting of the multiple Commission decisions adopted in the two decades thereafter; (3) the plain language and legislative history of AB 117 leave no room for doubt about the Legislature's intentions, and even if there were any ambiguity contained in AB117, canons of statutory construction prohibit an interpretation that produces absurd results, as Respondent's construction certainly does; (4) assignment of Diablo Canyon Nuclear Power Plant (a textbook example of UOG) above-market costs to CCA customers epitomizes economic absurdity; and (5) moral hazard would metastasize as CCA market share increases if UOG were included in the PCIA.

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For the foregoing reasons, proposed *amici curiae* respectfully request this Court grant their Application.

Dated: July 3, 2020

Respectfully submitted,

VENSKUS & ASSOCIATES

By: /s/ Sabrina D. Venskus

Attorneys for
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***AMICI CURIAE* BRIEF**

I. Introduction

The outcome of this case turns on the narrow legal question of what the Legislature intended in enacting AB 117 in 2002. In conducting its *de novo* review, the Court should apply the review standards of *Yamaha Corp. of America v. State Bd. Of Equalization* (1998) 19 Cal.4th 1 and reject Respondent's claim to "a strong presumption of validity" under *Greyhound Lines, Inc. v. Public Utilities Com.* (1968) 68 Cal.2d 406. (Respondent's Answer at pp. 13, 14.)

Courts have been especially vigilant in protecting local government agencies from assertions of California Public Utilities Commission (hereinafter "CPUC") jurisdictional authority absent express statutory direction for such regulation. Here, the plain language of AB 117 manifests a clear intent to promote the development of CCAs and specify a finite list of exit fees to be assigned to CCA customers, a list which does not include UOG costs. A review of the legislative history supports this plain language reading of the statute: UOG is not to be charged to CCA customers.

In contrast, adopting Respondent's and Real Parties in Interest's interpretation of the statute would foster a foreseeable spread in moral hazard as CCA market share grows. As is being demonstrated now in the PG&E service territory with the multi-billion dollar above-market costs of the Diablo Canyon Nuclear Power Plant, adding UOG to the PCIA is not what the Legislature could have possibly intended when it passed AB 117 and the Governor signed the bill into law. This Court should grant the writ of review, vacate the CPUC's decision, and remand it for reconsideration in adherence to the Legislature's intent.

II. Argument

A. Respondent exceeded its statutory authority in its Ratemaking Decision

Notwithstanding the CPUC's constitutional status, this Court should independently evaluate whether Respondent has properly applied AB 117 in its ratemaking decision (hereinafter "D.18-10-019" or "Decision") because that question is "narrowly focused on a purely legal issue." (*Do v. Regents of University of California* (2013) 216 Cal.App.4th 1474, 1489, citing *Sarka v. Regents of University of California* (2006) 146 Cal.App.4th 261.)

Respondent relies on *Greyhound Lines, Inc. v. Public Utilities Com.* (1968) 68 Cal.2d 406, 410 for its claim that its interpretation of AB 117 is entitled to "a strong presumption of validity" (Respondent's Answer at pp. 10, 11), but that reliance is misplaced, because here the Court is "reviewing the CPUC's interpretation of a statute that defines the reach of its power" regarding the very subject under review. (*New Cingular Wireless PCS, LLC v. Public Utilities Com.* (2016) 246 Cal.App.4th 784, 807.)

As the *New Cingular Wireless* court held:

> Where the statute subject to interpretation is one that defines the very scope of the CPUC's jurisdiction, *Greyhound* deference is not appropriate. (*San Pablo Bay Pipeline Co., LLC v. Public Utilities Com.* (2015) 243 Cal.App.4th 295, 310*; PG & E Corp. v. Public Utilities Com.* (2004) 118 Cal.App.4th 1174, 1194.) And the Commission may not exercise its jurisdiction in a manner inconsistent with other express provisions of the Public Utilities Code. (*PG & E Corp. v. Public Utilities Com.*, *supra*, 118 Cal.App.4th at pp. 1198–1199; see *Carmel Valley Fire Protection Dist. v. State of California* (2001) 25 Cal.4th 287, 299–300)."
>
> (*New Cingular Wireless* at 807.)

A statute's legal meaning and effect are questions lying within the constitutional domain of the courts. "Because an interpretation is an agency's legal opinion, however 'expert,' rather than the exercise of a delegated legislative power to make law, it commands a commensurably lesser degree of judicial deference." (*Yamaha, supra,* p. 6, citing *Bodinson Mfg. Co. v. Cal. Emp. Com.* (1941) 17 Cal.2d 321, 325–326.)

Under the appellate review standards articulated in *Yamaha Corp. of America v. State Bd. Of Equalization* (1998) 19 Cal.4th 1, Respondent's performance of its duties under Pub. Util. Code section 366.2, subd. (d), subd. (e), and subd. (f) as reflected in the Decision should be considered an exercise of its "interpretive" decisionmaking, because the Legislature did not delegate to the Commission any "substantive lawmaking" authority to alter in any way the specific list of exit fees that could be charged to CCA customers under those sections. (*Yamaha, supra,* pp. 10 – 11.) The Legislature's subsequent addition of Pub. Util. Code sections 365.2 and 366.3 did not change the "interpretive" nature of the Commission's decisionmaking as to what exit fees can be charged to CCA customers.

As applied to implementation of Pub. Util. Code section 366.2, subd. (d), subd. (e), and subd. (f), Respondent's decisionmaking is not the "hybrid" type that would invite the two-track review described in *Ramirez v. Yosemite Water Co.* (1999) 20 Cal.4th 785. This is not a situation involving both quasi-legislative and interpretive decisionmaking, "as when an administrative agency exercises a legislatively delegated power to interpret key statutory terms" allowing it to "'fill up the details' of a statutory scheme." (*Ramirez, supra,* at p. 799.) Here the statute narrowly specifies the types of costs that can be charged to CCA customers – importantly, UOG is not among those types – and there are no gaps in the list that the Legislature has asked or

authorized Respondent to fill. Respondent's task under Pub. Util. Code section 366.2, subd. (d), subd. (e), and subd. (f) is computational, nothing more.

The courts have protected local public agencies—like CCAs—from CPUC assertions of jurisdictional authority in the absence of specific statutory direction conferring such authority over particular aspects—like liability for costs—of the operations of such agencies. For example, in *Santa Clara Valley Transportation Authority v. Public Utilities Commission* (2004) 124 Cal.App.4th 346, [*Santa Clara*] the court painstakingly applied the *Yamaha* standards to "examine the statutes in their context and with other legislation on the same subject" (*Id.,* p. 360, [citing *Collection Bureau of San Jose v. Rumsey* (2000) 24 Cal.4th 301, 310].) Consistent with the jurisdictional analysis applied by the Supreme Court in *County of Inyo v. Public Utilities Com.* (1980) 26 Cal.3d 154, the *Santa Clara* court determined that the Legislature had conferred jurisdiction to the CPUC over certain safety matters, but not exclusive railroad crossing jurisdiction over Santa Clara Valley Transportation Authority's light rail transit crossings.

Similarly, in *Monterey Peninsula Water Management District v. Public Utilities Commission* (2016) 62 Cal. 4th 693, [*Monterey Peninsula*] the Supreme Court applied *County of Inyo, supra,* in reversing a CPUC attempt to assert jurisdiction over the amount of a public agency's fee. Noting that the CPUC has exclusive jurisdiction to supervise and regulate public utilities, the Supreme Court held, "It has no authority, however, to regulate public agencies like the District, absent a statute expressly authorizing such regulation." (*Id.* at p. 698, citing *County of Inyo, supra.)*

The CPUC here in this case had no power to impose non-legislatively-approved costs, such as UOG, on CCA customers. Because its ratemaking

Decision does just that, Respondent has exceeded its jurisdiction and the writ should issue.

B. Respondent's interpretation of AB 117 defies the legislative intent of the statute to limit the exit fees that can be charged to CCA customers.

i. The statute's plain language makes obvious what the Legislature intended.

To determine the meaning of a statute, "the statutory language itself is the most reliable indicator." (*Giammarrusco v. Simon* (2009) 171 Cal.App.4th 1586, 1610 ["*Giammarrusco*"].) The fundamental goal of statutory interpretation is to ascertain legislative intent so that the purpose of the law may be effectuated. (*People v. Cruz* (1996) 13 Cal.4th 764, 782; *Walnut Creek Manor v. Fair Employment & Housing Com.* (1991) 54 Cal.3d 245, 268; *Palos Verdes Faculty Ass'n. v. Palos Verdes Peninsula Unified School District* (1978) 21 Cal.3d 650, 658.) "In determining such intent, the court turns first to the words themselves for the answer." (*Rodriguez v. Solis* (1991) 1 Cal.App.4th 495, 505 ["*Rodriguez*"].) Courts "are required to give effect to the statutes according to the usual, ordinary import of the language employed in framing them." (*Rodriguez, supra,* at 505.) "The terms of the statute must be given a reasonable and commonsense interpretation that is consistent with the Legislature's apparent purpose and intent." (*Kalnel Gardens, LLC. v. City of Los Angeles* (2016) 3 Cal. App. 5th 927, 938.)

The sole source of Respondent's statutory authority to impose UOG costs on CCA customers must be found within AB 117, as no subsequent legislation addresses the subject.

ii. Legislative History supports Petitioner's plain meaning arguments

To interpret the meaning of a law, courts may look to legislative history and historical context. "Both the legislative history of the statute and the wider historical circumstances of its enactment may be considered in ascertaining the legislative intent." (*Dyna-Med, Inc. v. Fair Employment & Housing Comm.,* (1987) 43 Cal.3d 1379, 1386-1387; *see Watts v. Crawford* (1995) 10 Cal.4th 743, 753.)

Amici support Petitioner's legislative history analysis, and make an additional clarifying point. Real Parties in Interest's Answer refers to the veto of a predecessor bill to AB 117, claiming, "In his veto message, the Governor explained that the bill needed 'more concise cost-containment provisions for the remaining IOU customers.'" (Real Parties in Interest Answer at p. 51). But this reference is incomplete. A fuller explanation of the relevance to AB 117 of this earlier veto message is found in the Sen. Energy, Utilities, and Commerce Com. Bill Analysis of AB 117:

> AB 9XX (Migden), approved by this committee on August 29, 2001 and vetoed by the Governor on October 14, 2001, changed the procedures governing community aggregation in the same way as this bill, but contained more general provisions intended to ensure cost recovery from departing customers.
>
> According to Governor's veto message, 'rapid growth in direct access necessitates more concise cost-containment provisions for the remaining IOU customers than those contained in (AB 9XX), and those provisions should apply to all direct access contracts.'
>
> The cost-containment provisions in this bill are agreeable to the Administration and essentially identical to those adopted by this committee for AB 80. (Sen. Energy, Utilities and Commerce Com., June 25, 2002 Analysis of Ass. Bill No. 117 (2001-2002 Reg. Sess.) as amended June 19, 2002.)

(*Amici Curiae* Alliance for Nuclear Responsibility and San Luis Obispo Mothers for Peace's Motion for Judicial Notice; Exhibit Thereto.)

Courts may consider vetoed bills relating to the same subject to help determine legislative intent of the subsequent legislation. (*Freedom Newspapers, Inc. v. Orange County Employees Retirement System* (1993) 6 Cal.4th 821.) Like AB 117, the version of AB 9XX vetoed by the Governor in 2001 would have authorized the CPUC to allocate certain unavoidable power purchase costs to departing CCA customers. But unlike AB 117, AB 9XX would have granted the CPUC broad discretion to determine what those costs might include. (Ass. Bill No. 9XX (2001-2002 Reg. Sess.) § 2 ["The commission shall develop rules to ensure that the net unavoidable costs of power procurement by an electrical corporation are not shifted onto the electrical corporation's remaining customers"].)

The Legislature pointedly did not retain this discretion in AB 117. Instead, the Legislature developed a targeted and exclusive set of cost-containment provisions. (*See* Sen. Energy, Utilities and Commerce Com., June 25, 2002 Analysis of Ass. Bill No. 117 (2001-2002 Reg. Sess.) as amended June 19, 2002 [noting AB 117's cost-containment provisions are "essentially identical to those adopted . . . for AB 80"]; *see also* Ass. Bill No. 80 (2001-2002 Reg. Sess.) § 2 [authorizing electrical corporations to recover only "unrecovered past undercollections" and "the share of the electrical corporation's estimated net unavoidable *power purchase contract costs* attributable to the [CCA] customer" (emphasis added)].) The cost-containment provisions—the proposed new Pub. Util. Code section 366.2, subd. (c)(5), subd. (c)(7), subd. (c)(8), subd. (d), subd. (e), subd. (f), subd. (g), subd. (h), subd. (i)(1), and subd. (i)(2))—in the June 19, 2002 amended version

of AB 117 are identical to those in the version of the bill signed by the Governor.

Thus, the legislative history of AB 117, including the Governor's veto message pertaining to its predecessor, corroborates interpretation of the cost-containment provisions of AB 117 as a coherent whole, reflecting agreement between the Legislature and the Governor on the cost-containment provisions at issue here: a separate statutory specification of costs to be borne by CCA customers; and no change in CPUC authority over costs to be borne by customers of non-CCA forms of direct access. The Governor—and, subsequently, the Legislature—rejected AB 9XX's grant of broad discretion to the CPUC to determine what costs may be recovered from CCA customers. The inference by Real Parties in Interest that AB 117 was instead a potpourri of incomplete thoughts, requiring further regulatory interpretation over the ensuing years to properly assign costs to CCA customers, should be conclusively dispelled. (Real Parties in Interest Answer at pp. 18 – 22.)

iii. Canons of statutory construction support the position that AB 117 must be read to exclude UOG costs.

The Court need not resort to canons of statutory construction to determine the meaning and intent of AB 117 because the plain meaning of the statute is clear. (See *People v. Boyd* (1979) 24 Cal.3d 285, 295.) However, even if the terms of AB117 were considered to be ambiguous, canons of statutory construction dictate that the statute cannot be interpreted in the manner advanced by Respondent and Real Parties in Interest. "If the terms of a statute provide no definitive answer, then courts may resort to extrinsic sources." (*Giammarrusco, supra,* 171 Cal.App.4th at 1610.) As the Supreme Court of this state has held:

[C]ourts may consider various extrinsic aids, including the

> purpose of the statute, the evils to be remedied, the legislative history, public policy, and the statutory scheme encompassing the statute. In the end, we must select the construction that comports most closely with the apparent intent of the Legislature, with a view to promoting rather than defeating the general purpose of the statute, and avoid an interpretation that would lead to absurd consequences.
> (*Torres v. Parkhouse Tire Service, Inc.* (2001) 26 Cal.4th 995, 1003 [citations omitted].)

If this Court feels compelled to consult extrinsic aids for guidance on the legislative intent of AB 117, it should recognize that a primary unifying factor across the canons of statutory construction is the avoidance of statutory interpretations that produce absurd consequences. (*Pacific Legal Foundation v. Unemployment Ins. Appeals Bd.* (1981) 29 Cal.3d 101, 114 ["When uncertainty arises in a question of statutory interpretation, consideration must be given to the consequences that will flow from a particular interpretation. [Citation.] In this regard, it is presumed the Legislature intended reasonable results consistent with its expressed purpose, not absurd consequences."]; *People v. Ventura Refining Co.,* (1928), 204 Cal. 286, 290 ["When a statute is fairly susceptible of two constructions, one leading inevitably to mischief or absurdity and the other consisting of sound sense and wise policy, the former should be rejected and the latter adopted."]; see also *Cory v. Board of Administration* (1997) 57 Cal.App.4th 1411, 1423-1424.)

As this court observed in *Petrou v. South Coast Emergency Group* (2004) 119 Cal.App.4th 1090, 1095:

> "'[I]t is presumed the Legislature intended reasonable results consistent with its expressed purpose, not absurd consequences. [Citations.]'" (*Jurcoane v. Superior Court* (2001) 93 Cal.App.4th 886, 893.) We will "not add language to a statute that runs afoul

> of its statutory purpose." (*FNB Mortgage Corp. v. Pacific General Group* (1999) 76 Cal.App.4th 1116, 1132, (italics omitted.)

Here, Respondent and Real Parties in Interest would have this Court insert the phrase "above-market costs of utility owned generation" into the statute that identifies costs to be assigned to CCA customers. Doing so would ignore the fundamental distinction between costs associated with the Department of Water Resources bond charges and power purchase contracts (which are pass-through expenses on which utility shareholders earn no return), and costs associated with UOG assets that produce earnings for shareholders. The utility's interest in collecting the former evaporates when the expense disappears, and no loss of earnings will result from ceasing such collections. Collecting UOG-related expenses, on the other hand, arouses considerably more utility self-interest because it is a source of earnings for shareholders. Extending and expanding such collections from non-customers is a logical utility objective under such a statutory construction, but far afield from AB 117's legislative purpose to promote the development of CCAs.

This qualitative fissure (between the costs specified in Pub. Util. Code section 366.2 and the UOG-related costs that Respondent and Real Parties in Interest would add) becomes foreseeably absurd, given the clear objective of AB 117, as the market share of CCAs and other direct access providers grows. A widely publicized report from the CPUC staff in mid-2017 projected that non-utility providers in the mid-2020s could provide up to 85 percent of the electricity in California's investor-owned utility service territories. (*See* "Consumer and Retail Choice, the Role of the Utility, and an Evolving Regulatory Framework," California Public Utilities Commission Staff White

Paper, May 2017, p. 3.)[1] This loss of utility market share is currently most pronounced in PG&E's service territory, and the consequences of the extra-statutory PCIA are most visible at the Diablo Canyon Nuclear Power Plant, the largest and most expensive UOG asset in California.

1. The Diablo Canyon Nuclear Power Plant is an exemplar of the absurdity of Respondent's interpretation of AB 117

In the aftermath of Respondent's ratemaking Decision at issue in this case, PG&E provided discovery responses to A4NR in its 2020 General Rate Case[2] that enable calculation of the above-market UOG costs attributable to Diablo Canyon Nuclear Power Plant as $410 million in 2018, $1.168 billion in 2019, and $1.258 billion in 2020.[3]

PG&E's discovery responses provided to A4NR identify the combined market share of CCAs and other direct access providers within PG&E's service territory as 18 percent in 2017, 41 percent in 2018, 53 percent in

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[1] This estimate includes CCAs, direct access, and customer-sited generation like rooftop solar.

https://www.cpuc.ca.gov/uploadedFiles/CPUC_Public_Website/Content/News_Room/News_and_Updates/Retail%20Choice%20White%20Paper%205%208%2017.pdf [as of June 25, 2020]

[2] California Public Utilities Commission ("CPUC") Case No. A.18-12-009

[3] See Exhibit 253, p.1, and Exhibit 256, p. 3, line 12, admitted into evidence in CPUC Case No. A.18-12-009, located at http://pgera.azurewebsites.net/Regulation/ValidateDocAccess?docID=583336 and http://pgera.azurewebsites.net/Regulation/ValidateDocAccess?docID=583206, respectively. [as of June 25, 2020]

2019, and 57 percent in 2020.[4] The stark meaning of these evidentiary disclosures, which PG&E has not chosen to modify or dispute in the several cases before the California Public Utilities Commission where they have been introduced, is that non-customers subject to the PCIA methodology adopted in Respondent's ratemaking Decision are deemed responsible for $168 million of the nuclear power plant's 2018 above-market costs, $619 million of its 2019 above-market costs, and $717 million of its 2020 above-market UOG costs.

These non-customers receive no electricity from the nuclear power plant despite their forced absorption of a majority of its above-market costs.

Cross-subsidization from non-customers through Respondent's Decision has largely immunized the Diablo Canyon Nuclear Power Plant from ordinary economic pressures. In 2016, PG&E identified an anticipated loss of customers to CCAs and direct access as the primary reason to retire the nuclear power plant in 2025, and the company's load estimate last year for 2020 represents a collapse below even its previous worst-case scenario for 2025. As PG&E acknowledged in 2017, a "Low Load" scenario where PG&E retained only 44 percent of service territory load would reduce the need for Diablo Canyon Nuclear Power Plant to 26 percent of the plant's output.[5]

PG&E's most recent Form 10-K reported that Diablo Canyon Nuclear Power Plant output supplied 45.0 percent of PG&E bundled retail sales in

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[4] See Exhibit 254, p. 1 and Exhibit 256, p. 5, lines 18 – 19, 25, admitted into evidence in CPUC Case No. A.18-12-009, located at http://pgera.azurewebsites.net/Regulation/ValidateDocAccess?docID=583337 and http://pgera.azurewebsites.net/Regulation/ValidateDocAccess?docID=583206 respectively. [as of June 25, 2020]

[5] See Exhibit 256, p. 6, lines 12 – 13, admitted into evidence in CPUC Case No. A.18-12-009 located at: http://pgera.azurewebsites.net/Regulation/ValidateDocAccess?docID=583206 [as of June 25, 2020]

2019, but that the company also sold surplus electricity from its supply portfolio amounting to 44.6 percent of its bundled retail sales.[6] PG&E incurred above-market costs of $1.168 billion to produce that electricity, while simultaneously disposing of a similar amount of electricity in the market. This much churn in PG&E's supply portfolio is a strong indicator that something other than provision of needed electricity motivates the plant's operation. Local reliability considerations are not a factor, as the CPUC has noted PG&E's assurances that "Diablo Canyon is considered a system resource only, and is not needed for local reliability." (*Pacific Gas and Electric Company* (2018) Cal.P.U.C. Dec. No. 18-01-022, p. 8)

Under such circumstances, does it make any sense to incur substantial new, avoidable expenses for an increasingly uneconomic power plant that – because of PG&E's loss of customers – can only justify about one-quarter (and perhaps much less, considering the Form 10-K disclosures) of its output? As described in its pending General Rate Case (A.18-12-009), PG&E is forecasting *additional new expenditures at Diablo Canyon Nuclear Power Plant of $1.124 billion* during the 2020 – 2022 General Rate Case cycle.[7]

Why does PG&E continue to operate such a power plant? Because it can; it is able to recover a 10.25 percent return (*Pacific Gas and Electric*

[6] See February 18, 2020 PG&E Corporation Form 10-K, p. 21, admitted into evidence as Exhibit A4NR-X03 in CPUC Case No. I.19-09-016, located at http://pgera.azurewebsites.net/Regulation/ValidateDocAccess?docID=597169 [as of June 25, 2020]

[7] See Exhibit 146, p. 3-5, Table 3-1 and p. 3-7, Table 3-2, admitted into evidence in CPUC Case No. A.18-12-009 located at: http://pgera.azurewebsites.net/Regulation/ValidateDocAccess?docID=583093 [as of June 25, 2020]

Company (2019) Cal.P.U.C. Dec. No. 19-12-056, Ordering Paragraph 2) on its shareholders' investment, whether the plant is cost-effective or needed or not.

Respondent, the company's *de facto* conservator, having nurtured PG&E's exit from bankruptcy twice since the passage of AB 117, is at least partially insulated from ratepayer pushback by the generous subsidy obtainable from non-customers. If PG&E customers alone were responsible for the Diablo Canyon Nuclear Power Plant's above-market costs, the uneconomic burden on them would be more than 2.3 times (i.e., 100 ÷ PG&E's 43 percent market share) the 2020 level.

The public policy behind a statutory scheme is another tool to help decipher legislative intent. (*Ohio Farmers Ins. Co. v. Quin* (1988) 198 Cal.App.3d 1338, 1348 ["the favored construction of a statute is one which is consistent with established public policy"].) If the Legislature had intended this anomalous result stemming from inclusion of UOG in the PCIA, would it not have directly said so?

2. Respondent's interpretation of AB 117 creates a moral hazard, which could not have been intended by the Legislature.

The Diablo Canyon Nuclear Power Plant may be an extreme example, but the underlying moral hazard that gifted PG&E with such outsized cross-subsidies from non-customers is an inherent attribute of including UOG in the PCIA. Simply put, recovering UOG costs from non-customers encourages a growing indifference by electric utilities and their regulator to incurring avoidable above-market costs as utility market share diminishes. Encouraging the growth of CCAs, and thereby reducing utility market share, was the indisputable purpose of AB 117. As CCA market share increases in Southern California, the accompanying growth in moral hazard will become

apparent if the Court imputes to the Legislature an implausible intent to create it.

III. Conclusion

As articulated by Real Parties in Interest, the rationale used by Respondent that UOG above-market costs can be recovered from CCA customers derives from the Alternate Proposed Decision of then-Commissioner Carla J. Peterman: "Because the "[a]ssets built to serve load that later departs was ... benefitting those customers," there was no "principled justification to exclude those costs for CCA customers." (Real Parties in Interest Answer, pp. 24 – 25.)[8] But as *amici* have explained, the "principled justification" for such exclusion is clear: a conspicuous absence of statutory authority and a demonstrable legislative intent to the contrary.

For the foregoing reasons, *amici* respectfully urge this Court to grant the Petition for Writ of Review and the relief requested therein.

Dated: July 3, 2020

Respectfully submitted,

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[8] Southern California Edison Company (SCE) announced on August 23, 2019 that it had named former Commissioner Peterman its new senior vice president of Regulatory Affairs, and that "under the Political Reform Act she will be will be restricted from lobbying at the PUC through the remainder of 2019 and prohibited permanently from advising SCE on any regulatory proceedings that she participated in at the Commission." https://www.businesswire.com/news/home/20190823005342/en/Peterman-Join-Southern-California-Edison-Powell-Anderson [as of June 25, 2020]

CERTIFICATE OF WORD COUNT

I certify that, pursuant to California Rules of Court, rule 8.204(c)(1), the foregoing APPLICATION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF; BRIEF OF *AMICI CURIAE* ALLIANCE FOR NUCLEAR RESPONSIBILITY AND SAN LUIS OBISPO MOTHERS FOR PEACE IN SUPPORT OF PETITIONER PROTECT OUR COMMUNITIES FOUNDATION is proportionately spaced, has a typeface of 13 points or more, and contains 5,149 words, as determined by a computer word count.

July 2, 2020

Respectfully submitted,

VENSKUS & ASSOCIATES, A.P.C.

Sabrina Venskus

/s/ Sabrina D. Venskus
Sabrina Venskus

1260638.1

PROOF OF SERVICE

I am employed in the County of Ventura, State of California. I am over the age of 18 and not a party to this action. My business address is: Venskus & Associates, A.P.C., 603 West Ojai Avenue, Suite F Ojai, CA 93023. On July 3, 2020, I served the foregoing document described as:

APPLICATION FOR LEAVE TO FILE *AMICI CURIAE* BRIEF; BRIEF OF *AMICI CURIAE* ALLIANCE FOR NUCLEAR RESPONSIBILITY AND SAN LUIS OBISPO MOTHERS FOR PEACE IN SUPPORT OF PETITIONER PROTECT OUR COMMUNITIES FOUNDATION

on the interested party/parties below addressed as follows:

SEE ATTACHED SERVICE LIST

/ X/ (BY MAIL) I placed the envelope for collection and mailing on the date shown above, at this office, in Ojai, California, following our ordinary business practices. I am readily familiar with this office's practice of collecting and processing correspondence for mailing. On the same day that the correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the U.S. Postal Service in a sealed envelope with postage fully prepaid.

/X/ (BY ELECTRONIC TRANSMISSION) I served the document(s) on the persons listed in the Service List by submitting an electronic version of the document(s) to True Filing through the user interface at www.truefiling.com.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct and that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on July 3, 2020, at Ojai, California.

/s/ Rachael Kimball

Rachael Kimball

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