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BEFORE THE PUBLIC UTILITIES COMMISSION

OF THE STATE OF CALIFORNIA

In the Matter of the Application of San Diego Gas & Electric Company (U902E) for Authority to Partially Fill the Local Capacity Requirement Need Identified in D.14-03-004 and Enter into a Purchase Power Tolling Agreement with Carlsbad Energy Center, LLC.	A.14-07-009

THE CENTER FOR BIOLOGICAL DIVERSITY'S APPLICATION FOR REHEARING

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INTRODUCTION

Pursuant to Public Utilities Code sections 1731- 1736 and Rule 16.1 of the Rules of Practice and Procedure of the California Public Utilities Commission, the Center for Biological Diversity ("the Center") applies for rehearing of Decision D.15-05-051 on A.14-07-009, Application of San Diego Gas & Electric Company (the "Applicant") for Authority to Partially Fill the Local Capacity Requirement Need Identified in D.14-03-004 and Enter into a Purchase Power Tolling Agreement ("PPTA") with Carlsbad Energy Center, LLC. The procedure used to reach this decision was not in compliance with the law and the resulting decision is void for material, procedural and substantive error including failure to comply with the Public Utilities Code and the California Environmental Quality Act ("CEQA").

Pursuant to Rule 16.2 and 14.5, the Center filed its protest on August 21, 2104 and the Center is a party to the proceeding and eligible to petition for rehearing. This application for rehearing is timely because it is filed and served on the first business day following 30 days of the Commission's May 29, 2015 notice of D.15-05-051.

Commission Rule of Practice 16.1(c) provides that "Applications for rehearing shall set forth specifically the grounds on which the applicant considers the order or decision of the Commission to be unlawful or erroneous." Pursuant to Public Utilities Code section 1757, a decision is unlawful where:

> (1) The commission acted without, or in excess of, its powers or jurisdiction.
> (2) The commission has not proceeded in the manner required by law.
> (3) The decision of the commission is not supported by the findings.
> (4) The findings in the decision of the commission are not supported by substantial evidence in light of the whole record.
> (5) The order or decision of the commission was procured by fraud or was an abuse of discretion.
> (6) The order or decision of the commission violates any right of the petitioner under the Constitution of the United States or the California Constitution.

Here, the Commission has acted in excess of its powers or jurisdiction; has not proceeded in the manner required by law; and has abused its discretion. Furthermore, the decision is not supported by the findings and the findings are not supported by substantial evidence in light of the whole record.

ARGUMENT

I. THE APPROVAL IS IN VIOLATION OF THE STATUTORILY MANDATED PREFERRED RESOURCES LOADING ORDER

Pursuant to Public Utilities Code section 454.5, unmet energy needs must be met in a statutorily-defined preferred resources loading order[1]. The Commission explains its duty to comply with the loading order as follows:

> The Commission also has a statutory mandate to implement procurement-related policies to protect the environment. Section 454.5(b)(9)(C) states that utilities must first meet their "unmet resource needs through all available energy efficiency and demand reduction resources that are cost-effective, reliable and feasible." Consistent with this code section, the Commission has held that all utility procurement must be consistent with the Commission's established Loading Order, or prioritization. . . In the 2008 Energy Action Plan Update at 20, the Commission further interpreted this directive to mean that the IOUs are obligated to follow the Loading Order on an ongoing basis. Once procurement targets are achieved for preferred resources, the IOUs are not relieved of their duty to follow the Loading Order. In D.07-12-052 at 12, the Commission stated that once demand response and energy efficiency targets are reached, "the utility is to procure renewable generation to the fullest extent possible." The obligation to procure resources according to the Loading Order is ongoing. (D.12-01-033 at 19.) [2]

This decision permitting the approval of 500 MW of fossil fuel generation in a unilateral process does not comply with section 454.5. The fact that the Commission added an additional 100 MW of preferred resources does not change the fact that the lion's share of permitted generation is not in compliance with the loading order.

II. THE COMMISSION HAS ILLEGALLY APPROVED A PROJECT WITHOUT FIRST HAVING CONDUCTED ENVIRONMENTAL REVIEW AS REQUIRED BY CEQA

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[1] "The 'Loading Order' established that the state, in meeting its energy needs, would invest first in energy efficiency and demand-side resources, followed by renewable resources, and only then in clean conventional electricity supply." (Energy Action Plan 2008 Update at p. 1, http://www.cpuc.ca.gov/PUC/energy/resources/Energy+Action+Plan/.)

[2] Decision 14-03-004, March 13, 2014, 2.2 Statutory Requirements, Energy Action Plan and the Loading Order, p.

Pursuant to the California Environmental Quality Act ("CEQA"), Public Utilities Code and Regulations, and Public Resources Code, the Commission cannot make a discretionary decision on a project unless and until environmental review has been completed. D.15-05-051 was issued prior to the completion of environmental review of a project, the approval of a power purchase agreement for a fossil fuel burning power plant. In issuing D.15-05-051, the Commission has acted in excess of its powers and its jurisdiction; has not proceeded in the manner required by law; and has abused its discretion. Because there was no environmental review conducted, the decision is not supported by the findings and the findings are not supported by substantial evidence in light of the whole record.

The Commission is required to conduct environmental review of power purchase agreement applications independent of, but in coordination with, the California Energy Commission ("CEC") thermal power plant licensing process. The Commission failed to conducted any environmental review prior to issuing D.15-05-051 even though the Commission took discretionary action solely within its exclusive jurisdiction including determining the type of generation it would permit, how much generation is would permit, and if and how the statutorily required preferred resources loading order would be complied with.

The decision of what kind of resources (non-renewable, fossil fuel burning, pollutant emitting or preferred resources) that the Commission will permit a utility to fill need with has monumental environmental impacts and is not one that any other state agency, including the California Energy Commission ("CEC"), addresses in any fashion. The CEC, in fact, routinely denies arguments that it consider need in its evaluation of proposed thermal power plants on the grounds that this is strictly within the purview of the CPUC.

The PPTA approved in D.15-05-051 will act as a catalyst for foreseeable future development and operation of a non-renewable, fossil fuel, antiquated power plant located immediately adjacent to the Agua Hedionda Lagoon and Watershed, home to a wide variety of special status species including federally and state protected endangered species such as the San Diego thorn-mint, Del Mar manzanita, thread-leaved brodiaea, western snowy plover, San Diego button celery, tidewater goby, Moran's navarretia, coastal California gnatcatcher, light-footed

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12-16, http://docs.cpuc.ca.gov/PublishedDocs/Published/G000/M089/K008/89008104.PDF.

clapper rail, California least tern, and least Bell's vireo.

Approval of the PPTA has the potential to cause a direct or reasonably foreseeable indirect physical change in the environment including changes to air quality, the climate, wildlife and wildlife habitat, and water resources. Commission approval of this project will facilitate the development of Carlsbad Energy Center to fill identified need using inefficient, out-dated technology that will exploit ocean water and impact wildlife, wildlife habitat, human health, and the climate. Such approval would also foreclose on opportunities to fill need with preferred resources including energy efficiency, demand response, energy storage, load shedding, transmission line upgrades, or renewable generation.

The PPTA, approved by the Commission prior to the completion of the CEC environmental review and without the Commission having prepared as staged EIR, will likely be used, as is the stated policy of the CEC, as grounds to dismiss environmentally preferable alternatives and to override significant unmitigated environmental impacts.

Environmental review must be completed ***prior to*** the Commission taking action on this application. To this end, the Applicant applies for rehearing so that the Commission can undertake required CEQA review of this project prior to granting discretionary approval of an action with significant environmental impacts.

A. CEQA Applied to the Approval of Power Purchase Agreements

The California Environmental Quality Act, California Public Resources Code section 21000 et seq., implemented by California Code of Regulations, title 14, section 15000 et seq. ("CEQA"), requires all "discretionary projects" proposed to be carried out or approved by a public agency must receive environmental review. (Pub. Resources Code, § 21080, subd. (a).) Discretionary projects are those which require the exercise of judgment or deliberation. (Cal. Code Regs., tit. 14, § 15357; see also Cal. Code Regs., tit. 14, § 15369.) "Project" means any activity which has the potential to cause a direct or reasonably foreseeable indirect physical change in the environment either undertaken by a public agency or involving the issuance of a lease, permit, license, or other entitlement for use by a public agency. (Pub. Resources Code, § 21065; Cal. Code Regs., tit. 14, § 15378, subd. (a).)

1. Discretionary Approval

Here, the Commission, a public agency, exercised its judgment and deliberation in approving an application for a project which must receive the Commission's approval. The Applicant applied for Commission approval as follows:

> SDG&E respectfully requests authority to enter into a long-term power purchase tolling agreement ("PPTA") with the Carlsbad Energy Center, LLC ("Seller") to purchase the output of a new, efficient natural gas-fired facility ("Carlsbad Energy Center" or "Project") which would add approximately 600 MW (The Project has a nominal capacity of 600 MW. Since the amount of available capacity from a combustion turbine varies according to ambient conditions at the plant site, capacity payments are capped at 633 MW of needed local capacity in SDG&E's service area.) In addition, SDG&E seeks authority to recover the costs of the PPTA through the Commission-approved Cost Allocation Methodology ("CAM").

(Application at p.1.)

Pursuant to Public Utility Code section 454.5, contracts for power purchase by the regulated utilities require Commission approval. "The commission shall provide for expedited review and either approve or reject the individual contracts submitted by the electrical corporation to ensure compliance with its procurement plan. To the extent the commission rejects a proposed contract pursuant to this criteria, the commission shall designate alternative procurement choices obtained in the procurement plan that will be recoverable for ratemaking purposes." (Pub. Util. Code, § 454.5, subd. (c)(3).) Such approval is a discretionary action subject to environmental review.

The Commission's approval of a power purchase agreement is a discretionary approval of a project. The term "project" is given a broad interpretation to accomplish the statutory goals of CEQA:

> " 'Project' is given a broad interpretation ... to maximize protection of the environment." (*McQueen v. Board of Directors* (1988) 202 Cal.App.3d 1136, 1143, 249 Cal.Rptr. 439, disapproved on another ground in *Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 576, fn. 6, 38 Cal.Rptr.2d 139, 888 P.2d 1268.) "Project" refers to "*the whole of an action,* which has a potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment...." (Cal.Code Regs., tit. 14, § 15378, subd. (a), italics added.) "The term 'project' refers to the activity which is being approved and which may be subject to several discretionary approvals by governmental agencies. The term 'project' does not mean each separate governmental approval." (Cal.Code Regs., tit. 14, § 15378, subd. (c).)

(*Riverwatch v. Olivenhain Mun. Water Dist.* (2009) 170 Cal.App.4th 1186, 1203.)

The Supreme Court of California has dictated that CEQA must be interpreted in a manner to provide the fullest possible protection to the environment within statutory mandates: "Addressing what constitutes a project for purposes of CEQA, the Supreme Court has stated that CEQA is "to be interpreted in such manner as to afford the fullest possible protection to the environment within the reasonable scope of the statutory language." (*Association for a Cleaner Environment v. Yosemite Community College Dist.* (2004) 116 Cal.App.4th 629, 637 quoting *Friends of Mammoth v. Board of Supervisors* (1972) 8 Cal.3d 247, 259, 104 Cal.Rptr. 761, 502 P.2d 1049.)

The Commission's approval in this case was a discretionary action on a project and there exists not exception to CEQA, and so the Commission was and is required to comply with CEQA.

2. The Commission's Approval Involves Much More than a Rate Increase

The Applicant did not just seek approval of a rate increase but has applied for, and been granted, Commission discretionary approval of a contract to purchase power from a specified power plant at a defined location, using a defined technology with a defined capacity (MW), expected deliveries (GWh/yr), contract start date, and contract term:

> The Carlsbad Energy Center PPTA will provide approximately 600 MW of nominal capacity from a new and efficient natural gas-fired, simple cycle peaking generating facility, which will be located in SDG&E's service territory on previously disturbed land adjacent to the existing Encina Power Station ("Encina") in Carlsbad, California. The Project will consist of six generating units utilizing efficient GE LMS100 technology, providing state of the art flexibility with each unit capable of multiple starts and stops per day. The expected online date is November 1, 2017 and is expected to provide power for 20 years.

(Application at p. 4.)

Accepting a decrease in the number of MW's, the applicant's power purchase agreement was approved in D.15-05-051as is: "The purchase power tolling agreement with Carlsbad Energy Center, LLC is amended to reduce the contract capacity from 600 MW to 500 MW, and is otherwise subject to the same per-unit price, and other terms and conditions." (D.15-05-051 at p.

2.) Any argument that this was "just" a ratemaking proceeding that will not have any impact on the environmental and is thereby exempt from environmental review is easily overcome; the scoping memo detailed the numerous discretionary decisions that the Commission made in approving the application and there is no question that these individual decisions and the project as a whole will have environmental impacts. The Commission's ultimate decision was, as stated in D.15-05-051 was based upon the Commission making discretionary determinations on the following:

- Has LCR need been appropriately determined and is it within the Commission's authority to authorize SDG&E to fill said LCR need through the proposed power purchase tolling agreement or generation from the proposed Carlsbad Energy Center ("PPTA")?[3]
- Is 633 MW of generation from the Carlsbad Energy Center, a simple cycle natural gas fueled power plant utilizing GE LMS100 technology to be constructed on the beach in Carlsbad, CA and online by November 2, 2017, a reasonable way to fill said LCR need?[4]
- Will the proposed PPTA be safe and reliable?[5]
- Does the PPTA represent the best fit, least cost alternative?[6]

(Scoping Memo at p. 2-3.)

B. Physical Change in the Environment

A PPTA is a project in of itself but, when an applicant applies for CEC or other agency approval for the physical plant that is the subject of the PPTA, the PPTA becomes part of a development proposal, also a project. The PPTA has the potential for resulting in a reasonably foreseeable indirect physical change in the environment and the development proposal will result in a direct physical change in the environment. Both the PPTA and development proposal meet the requirement for CEQA applicability that action by a public agency is subject to CEQA only if

[3] "Does the application comply with SDG&E's procurement authority as granted by D.14-03-004?" (Scoping Memo at p. 2.) "Should the LCR identified in D.14-03-004 be adjusted to account for transmission projects identified in the CAISO's 2013-2014 TPP? If so, how?" (*Ibid*.)

[4] "Is the Carlsbad PPTA a reasonable means to meet the 600 megawatt (MW) of identified LCR that D.14-03-004 determined may be met by conventional resources? This issue includes consideration of the following: Should the Carlsbad PPTA be required to submit to SDG&E's request for offers Refueling Outage process, whether for the entirety of SDG&E's LCR need or only for the 600 MW identified as permissibly to be met by nonpreferred resources? . . . Does the Carlsbad PPTA provide additional benefits above and beyond the identified need? . . .Are any other commitments made by SDG&E that are contingent on approval of the Carlsbad PPTA reasonable?" (Scoping Memo at p. 2-3.)

[5] "Will the Carlsbad PPTA enhance the safe and reliable operation of SDG&E's electrical services?" (Scoping Memo at p. 3.)

[6] "Is the Carlsbad PPTA the best fit for the identified need? This, in turn, encompasses consideration of whether there are better and available alternatives to meet this need." (Scoping Memo at p. 3.) "Are the price, terms and conditions of the Carlsbad PPTA reasonable?" (Ibid.)

it may cause either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment. (Pub. Resources Code, § 21065; Cal. Code Regs., tit. 14, §15378.)

The Applicants did not file a Preliminary Environmental Assessment, and so the Center is unable to fully address the reasonably foreseeable indirect physical changes that will result from project approval but there are a number of such impacts that are clear from the available information. First, D.15-05-051 was based upon a determination that there is LCR need and that this need should be filled by generation from a non-renewable, fossil fueled, antiquated, polluting power plant as opposed to cleaner preferred resources. The extraction and burning of fossil fuels will result in emissions, including greenhouse gases, hazardous to human and environmental health. The PPTA specifies that Carlsbad Energy Center will be a less efficient simple cycle plant as opposed to a combined cycle plant thereby requiring more natural gas and emitting more pollutants.

The PPTA also specifies that the generation will be from a plant built at a specific cite. As explained above, this location is rich in biodiversity including many protected species that will be impacted by the construction and operation of a large-scale, fossil-fuel burning power plant and resultant noise, towering stacks, heat, light, and other plant characteristics harmful to the nearby wildlife.

The PPTA will be a "catalyst for foreseeable future development" and the "achievement of its purpose would almost certainly have significant environmental impact." (*City of Antioch v. City Council* (1986) 187 Cal. App. 3d 1325, 1334.) Under the current regulatory regime, a power plant will not be built if a power purchase agreement is not approved as the plant will be unable to sell its generation and the developers will not be able to attract investors. Upon the approval of power purchase agreements, the utilities and developers aggressively pursue CEC approval for new power plants. In its decision on the originally proposed Carlsbad Power Plant (made part of this administrative record by ALJ order dated December 1, 2014), the CEC explains:

> The Energy Commission does not generally consider the level of need for a project. Rather, it reviews proposals submitted for environmental impacts and compliance with LORS. Other regulatory agencies and market forces then determine whether an approved project will go forward. Only if the market decides that it is likely that a project will be able to generate sufficient revenue from sales of its electricity to cover its costs of

> construction capital and operating expenses, (fuel, wages, etc.) will a project be built. As a practical matter in these times, that assurance comes in the form of a power purchase agreement (PPA). Without a PPA, a project is unlikely to be constructed.
>
> In cases such as this where we must consider whether to override instances of LORS inconsistency or significant unmitigated CEQA impacts, need is one of the factors to be considered. It informs both the LORS override question of whether "the facility is required for public convenience and necessity and that there are not more prudent and feasible means of achieving public convenience and necessity" and the CEQA balancing of "specific overriding economic, legal, social, technological, or other benefits of the project" against its "significant effects on the environment."

(CEC Carlsbad 2012 Final Decision at p. 9-5.)

So, according to the CEC, Commission approval of a power purchase agreement along with the underlying determination that the agreement will fill a legitimate need, is not only a prerequisite for the initiation of a power plant development, but also grounds for a CEC override of significant unmitigated CEQA impacts.

In a proposed decision approving a project that the CEC acknowledged would result in high, unmitigated bird mortality, the CEC recently demonstrated how it utilizes the Commission approval of power purchase agreement to dismiss environmentally preferable alternatives and override unmitigated environmental impact:

> Petitioner states that the CPUC approved the PPA, in part, because this technology represented a means to diversify the renewable energy generation sources on the grid and advance an important alternative generation source. Thus, a change in technology is prohibited by the terms of the PPA barring first counterparty and then CPUC approval. Petitioner concludes that the PV alternative is infeasible because it would have the effect of rendering the project's PPAs void and incapable of being executed. This would effectively negate the main objective of the project.

(Revised Presiding Members' Proposed Decision, September 2014, CEC-800-2014-002-PMPD-REV, 09-AFC-7C– Palen Solar Electric Generating System; TN#203061.)

As the CEC baldly admits and the case history demonstrates, Commission approval of a power purchase agreement is a "catalyst for foreseeable future development" and is also grounds upon which the CEC excuses unmitigated environmental impacts of the power plant development. This type of piece meal review has long been dismissed by the courts as a

violation of CEQA. *City of Antioch v. City Council, supra,* 187 Cal. App. 3d at pp. 1333-1334 discusses a number of examples:

> In [*County of Inyo*] the county approved a general plan amendment and zoning on the basis of a negative declaration. As described by the court in *City of Carmel-by-the-Sea*, "The rationale behind the decision was similar to that advanced by the agency in *Bozung* and rejected by the Supreme Court, namely that preparing an EIR would be premature at the zoning stage since the tentative map for the project, a shopping center, was not before the agency. In *County of Inyo*, when the tentative map was in fact before the Board it was again recommended that no EIR was needed since the proposed use now conformed to the existing zoning. The court of appeal, citing *Bozung*, found that this approach--division of the project into two parts with 'mutually exclusive' environmental documents--was 'inconsistent with the mandate of CEQA' and constituted an abuse of discretion.

(Ibid. citing *City of Carmel-by-the-Sea v. Board of Supervisors* (1986) 183 Cal.App.3d 229; *Citizens Assn. for Sensible Development of Bishop Area* v. *County of Inyo* (1985) 172 Cal.App.3d 151; *Bozung* v. *Local Agency Formation Com.* (1975) 13 Cal.3d 263.)

The Commission cannot look at the project in a vacuum; the argument fails that EIR preparation is premature and unnecessary because other phases of development will be accorded appropriate environmental review in due course. (*Ibid.*)

C. Environmental Review Must be Completed Prior to a Commission Decision

Environmental review of the PPTA must be done and it must be done prior to any Commission decision on the project. Such review has not occurred in this case. Where the project is a development, for which various governmental approvals are necessary, all phases of project planning, implementation, and operation must be considered in the initial study of the project and an EIR must address all phases. (Cal. Code Regs., tit. 14, § 15063, subd. (a)(1)); *City of Carmel-by-the-Sea, supra*, 183 Cal.App.3d at pp. 242-243.)

Environmental review pursuant to CEQA is intended to inform the public and decision-makers of the environmental consequences of a decision ***before*** it is made. "[A]t a minimum an EIR must be performed before a project is approved, for '[i]f postapproval environmental review were allowed, EIR's would likely become nothing more than post hoc rationalizations to support action already taken.'" (*Save Tara v. City of West Hollywood* (2008) 45 Cal. 4th 116, 130 quoting *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.

3d 376, 394.) Accordingly, CEQA requires agencies to prepare EIRs and negative declarations "as early as feasible in the planning process to enable environmental considerations to influence project program and design and yet late enough to provide meaningful information for environmental assessment." (Cal. Code Regs., tit. 14, §15004, subd. (b).)

D. Previous CEC Environmental Review for a Different Project is Irrelevant in the Context of the Commission's Duty to Comply with CEQA

The Applicant requested and was granted an expedited schedule for these proceedings. At the same time, the Applicant is only partially through a years' long process at the CEC. The CEC proceedings for the former Carlsbad Energy Center plan took four and a half years. Although the Applicant has submitted an amendment to their prior Application for Certification, what they are really asking for is an entirely different project – the old proposal was for a combined cycle 540 MW plant and the new proposal is for a 630 MW simple cycle plant at a nearby, but different, location. And here, the Commission approved a third, different project – a 500 MW plant. Even if the CEC review was sufficient to address the issued in the Commission proceedings, which it is not as those proceedings do not take into consideration need or funding, D.15-05-051 was issued prior to the CEC decision, thus leaving these proceedings entirely without environmental review. Commission approval of this application cannot legally be granted without CEQA or CEQA equivalent review of the actual project the Commission is reveiwing.

E. The Commission Is Statutorily Prohibited From Relying On CEC Environmental Review Prior To The Issuance Of The CEC's Final Approval Of A Project

For projects requiring Commission and CEC approval, pursuant to Public Resources Code, section 21080.5 and the California Code of Regulations, title 14, section 15251,

subdivision (j), the CEC is permitted to conduct its own CEQA functionally equivalent review as a certified agency. But, the Commission can rely upon such review only in limited circumstances. The Commission is ***not*** permitted to rely on the CEC's certified ***prior to*** the CEC's issuance of its final approval. (Cal. Code Regs., tit. 14, § 15253; *City of Morgan Hill v. Bay Area Air Quality Management Dist.* (2004) 118 Cal. App. 4th 861, 875-876.) "The conditions under which a public agency shall act as a responsible agency when approving a project using an environmental analysis document prepared under a certified program in the place of an EIR or negative declaration are as follows . . . The certified agency is the first agency to grant a discretionary approval for the project." (Cal. Code Regs., tit. 14, § 15253, subd. (b)(1).)

In *City of Morgan Hill*, the Bay Area Air Quality Management District ("Air District") attempted to rely upon the CEC's environmental review before it was complete. (*City of Morgan Hill v. Bay Area Air Quality Management Dist., supra,* 118 Cal. App. 4th 861.) The Court found that, pursuant to Section 15253, the District was not permitted to issue a Clean Air Act permit prior to the issuance of the CEC's environmental review. (*Ibid*; see Cal. Code Regs., tit. 14, § 15253, subds. (a)-(b)(1).) But, in that case, unlike here, the Air District has been operating under an executive order temporarily suspending the requirement that the CEC first finalize its environmental review and so, while "in other times, the [petitioner] might prevail," it did not given the highly unusual circumstances. (*Ibid.*)

There is no such executive order in force that permitted the Commission to rely upon a future environmental review by another agency on a *different* project (500 MW vs. 630 MW) in making a discretionary approval on a PPTA. Numerous parties to these proceedings, including the Center, requested that these proceedings be stayed pending the CEC decision and the Commission did not do so, choosing instead to move ahead with the Applicant's requested, expedited schedule. The Commission has failed its duty to "consider the cumulative environmental effects of its action before a project gains irreversible momentum" and should take immediate action to rectify this oversight. (*City of Antioch v. City Council, supra,* 187 Cal. App. 3d at p. 1333.)

F. The Commission Should Prepare a Staged EIR

1. Reliance Upon a Certified Agency's CEQA Equivalent Review

While the Commission could fulfill its duty to conduct environmental review of this project by staying the proceedings until the CEC completes its review and acting as a responsible party to the CEC review, the sufficiency of the Commission's review will depend upon the CEC's compliance with Section 15253. "Certified agencies are not required to adjust their activities to meet the criteria in [this section] " and "Where a certified agency does not meet the criteria . . . (1) The substitute document prepared by the agency shall not be used by other permitting agencies in the place of an EIR or negative declaration." (Cal. Code Regs., tit. 14, § 15253, subd. (c).) If the Commission were to rely upon the CEC's review, the CEC will need to analyze alternatives and propose mitigation measures for the significant environmental effects within the jurisdiction of the Commission, as a responsible agency. This would include a review of LCR need determination and other issues not within the purview of the CEC.

If the CEC review is insufficient, the Commission will have to "comply with CEQA in the normal manner and prepare an EIR." (Cal. Code Regs., tit. 14, § 15253, subd. (c); see also *Save Tara v. City of West Hollywood, supra,* 45 Cal. 4th at p. 142-143 (Where the Court set aside a completed and otherwise sufficient EIR because it was completed after a project approval was issued.)

2. Staged EIR

Alternatively, the Commission can prepare a staged EIR pursuant to California Code of Regulations, title 14, section 15167. "Where a statute such as the Warren-Alquist Energy Resources Conservation and Development Act provides that a specific agency shall be the lead agency for a project and requires the lead agency to prepare an EIR, a responsible agency which must grant an approval for the project before the lead agency has completed the EIR may prepare and consider a staged EIR." (Cal. Code Regs., tit. 14, §15167, subd. (c).)

This section may only apply to large capital project that will require a number of discretionary approvals from government agencies and one of the approvals will occur more than two years before construction. (See Cal. Code Regs., tit. 14, §15167, subd. (a).) These requirements are met. While the Applicant has claimed an online date of November 1, 2017, the testimony of Robert Sarvey, and common sense, show that this is not possible and that construction is at least two years two away. (Direct Testimony of Robert Sarvey at pp. 2-5.)

III. THE DECISION DOES NOT PROVIDE ANY LEGALLY COGNIZABLE ARGUMENT AS TO WHY CEQA DOES NOT APPLY IN THIS CASE

Commission approval in D.15-05-051 of a power purchase agreement for Carlsbad Energy Center was granted without any agency, including the Commission, having first conducted environmental review. The entire argument in D.15-05-051 that the Commission is not responsible for conducting CEQA review for power purchase agreements is based entirely upon a 1979 denial of a writ and 1986 Commission decision that cites only to the 1979 denial. The denial of a writ has no precedential value and dicta in the 1986 Commission denying another power purchase agreement has no precedential value. This argument demonstrates only that the Commission has a long history of flouting the requirements of CEQA, not that CEQA does not apply to the Commission's discretionary action on such projects.

A. The 1979 denial of a writ via an unpublished minute order is not precedent for anything

In D.15-05-051 the Commission argues that "It is well-settled that "[s]uch a ratemaking order is not 'project' under CEQA. All Commission orders concluding that CEQA does not apply to a ratemaking proceeding have been upheld. (*E.g., Samuel C. Palmer, III v. Public Utilities Commission* SF# 23980, writ denied 5/10/79.)" (D.86-10-044 at 16-17, 1986 Cal. PUC LEXIS 642, 16-17 (Cal. PUC 1986).)22 FN 22 In its reply brief, CBD challenges this precedent as being stale . . ." (D.15-05-051 at p. 30.)

First, this is an inaccurate statement of the Center's position – while this argument is indeed stale, it is not based upon any precedent. Second, while the Commission clearly believes this to be "well-settled," neither the California Supreme Court, the California Attorney General's Office, nor the Center agree.

In *Consumers Lobby Against Monopolies v. Public Utilities Commission*, 25 Cal. 3d 891, (Cal. 1979), the California Supreme Court very clearly directed the Commission that its attempts

to rely upon the denial of a writ as precedent for a holding of law was entirely without merit. Yet, the Commission persists, over 30 years later, in ignoring the Supreme Court's very clear and direct holding on this point:

> At the outset we address a contention that is often presented to us in response to a petition for writ of review, but nevertheless misapplies the authority on which it relies and ignores the realities of our rulings on such petitions. Both the commission and Pacific assert that we have previously decided the issue now before us -- i.e., the commission's authority to award attorney fees and costs to public interest participants in its proceedings -- and imply that we should follow those decisions under the doctrine of stare decisis. The decisions in question, however, are not embodied in published opinions of this court, but rather in minute orders in which we denied without opinion petitions for writs of review on two occasions several years ago. . .
>
> For different reasons we also conclude the prior cases invoked by the commission and Pacific should not be given stare decisis effect. The doctrine of stare decisis applies only to judicial precedents, i.e., to the ratio decidendi or actual ground of decision of a case cited as authority. (*Hart* v. *Burnett* (1860) 15 Cal. 530, 598-599.) It follows, of course, that a case is not authority for a point that was not actually decided by the court. (*Ibid.*; accord, *In re Tartar* (1959) 52 Cal. 2d 250, 258 [339 P.2d 553], and cases cited.) The ratio decidendi of an appellate decision is ordinarily discovered by examining the opinion of the court. But we deal here, by definition, with cases in which this court rendered its decision without opinion, summarily denying petitions for writs of review. By relying on such cases as authority for points of law, the commission and Pacific imply that our ratio decidendi in each instance was necessarily a ruling on the substantive grounds presented by the writ and answer. The code itself demonstrates this is not so." . . .
>
> In short, although a summary denial by this court of a petition for writ of review is "a decision on the merits" for res judicata purposes (*Western Air Lines*), it is not stare decisis.

(*Consumers Lobby Against Monopolies v. Public Utilities Com.*, 25 Cal. 3d 891, 902-905 (Cal. 1979.)

The Commission sites only to *Samuel C. Palmer, III v. Public Utilities Commission* SF# 23980, writ denied 5/10/79 as support for the argument that CEQA does not apply to any ratemaking proceeding. (see Exhibit A, *Samuel C. Palmer, III* was apparently a challenge by concerned parties to the Commissions' approval of a rate increase for a water district that was issued without any environmental review. Because the writ was summarily denied in an unpublished minute order, there is no published record of the decision. The Center was able to obtain the Commission's Demurrer and Answer in this case from the Los Angeles County Law

Library brief depository but unfortunately, the writ could not be found.

In *Samuel C. Palmer, III*, the Commission demurrered to the writ, claiming that the writ had not been filed within the statutory deadline and should therefore be denied. (See Public Utilities Demurrer and Answer of Respondent to Petition for Writ of Review in S.F. No. 23980). Because the writ was summarily denied in an unpublished minute order, we will never know the grounds upon which it was denied but, there is a high likelihood that the writ was denied based on the failure of the Petitioner to comply with the filing deadline. This situation is precisely contemplated in *Consumers Lobby*: "As we have seen, the merits of the decision may well be procedural rather than substantive; yet because there is no opinion, its ratio decidendi does not appear on its face. It would therefore be sheer speculation for litigants to rely on such decisions as precedents. In addition, such reliance may well prove a trap for the unwary: members of the public who have potentially meritorious petitions for review to present to this court may be dissuaded from doing so by the mere fact that we declined to take an earlier case allegedly raising the same question. For the foregoing reasons, the prior cases relied on herein by the commission and Pacific are neither binding nor persuasive on the issue now before us." (*Consumers Lobby Against Monopolies v. Public Utilities Com., supra* at p. 905.)

The likelihood that *Samuel C. Palmer, III* was denied based upon a procedural defect is greatly increased by the fact that the only argument the Commission made in its Answer relies upon *People v. Western Airlines.* The Commission argued "Under the principles established by this court in People v. Western Air Lines, Inc. 42 Cal.2d 621, 633 (1954), the denial of a petition for writ of review of a Commission decision is ' . . . a decision on the merits both as to the law and the facts presented in the review proceeding. This is so even though the order of this Court is without opinion.'" (Public Utilities Demurrer and Answer of Respondent to Petition for Writ of Review in S.F. No. 23980 at p. 13.) The Commission's Answer continues to refer to the "clear legal precedent" of previously summarily denied writs. (Id. at p.13, 15.) This argument was entirely disproved in *Consumers Lobby:* "In support of their contention the commission and Pacific then quote the following language of *People* v. *Western Air Lines, Inc*. (1954) 42 Cal. 2d 621, 630-631 [268 P.2d 723]: "It is established . . . that the denial by this court of a petition for review of an order of the commission is a decision on the merits both as to the law and the facts presented in the review proceedings. [Citation.] This is so even though the order of this court is

without opinion." The reliance is misplaced: *Western Air Lines* is not a stare decisis case but a res judicata case, and hence is governed by very different considerations. . . ." (Id. at p. 904.)

In their *Samuel C. Palmer, III* Answer, the Commission also relied upon this losing argument in a weak attempt to disregard the official opinion of the Office of the Attorney General of the State of California that "CEQA's definition of "project" includes the PUC's approval of utility rate changes" (58 Ops. Cal. Atty. Gen. 708 - 58 Ops. Cal. Atty. Gen. 708, Exhibit B at p. 3) and "CEQA applies to rate making" (Id. at p. 5). The Commission wrote: "The cited opinion attempts to avoid the obvious precedential value of this Court's repeated denials of the above-mentioned petitions . . ." (Public Utilities Demurrer and Answer of Respondent to Petition for Writ of Review in S.F. No. 23980 at page 15.) The Commission was wrong then and they are wrong now – CEQA applied to Commission approval of power purchase agreements in this case and all others.

B. Dicta In A 1986 PUC Decision Denying A Power Purchase Agreement Based Solely Upon A 1979 Minute Order Is Not Precedent For Anything

The single Commission decision that the Commission cites as evidence that CEQA is not applicable (D. 86-10-044) is based only upon unsupported allegations and the summary denial of the writ in *Samuel C. Palmer, III.* D. 86-10-044 was actually a denial of an application for approval of a power purchase agreement. The denial of an application is, by definition, not a project so CEQA would not have been applicable. Any discussion of CEQA in D. 86-10-044 is purely dicta, and dicta in a 1986 Commission decisions denying an application for some other power purchase agreement is not precedent in any way for the Commission's unsupported position that they do not need to abide by CEQA for power purchase agreements in this or any other case. The reliance on dicta in the Commission's denial of a single application almost 30 years ago is without merit.

Furthermore, D. 86-10-044 is, by its own terms, limited to its facts. The decision concludes that "*This application* is not a "project" under CEQA" and "The Commission is not a 'responsible agency' under CEQA *for the Dinkey Creek Project*" (emphasis added). While the Commission was incorrect in D. 86-10-044, even if it were not so, there are no grounds upon

which D. 86-10-044 can be relied upon as precedent for future decisions on the applicability of CEQA to power purchase agreements generally or in a specific case.

A. 86-02-008, the proceeding where the Commission *denied* a power purchase agreement approval in D.86-10-044, precisely demonstrates why the Commission's approval of a power purchase agreement is thereby subject to CEQA review. As explained above, the approval of a power purchase agreement is a "catalyst for foreseeable future development" for which the "achievement of its purpose would almost certainly have significant environmental impact" (*City of Antioch v. City Council* (1986) 187 Cal. App. 3d 1325, 1334.) Such projects must undergo CEQA review and D.15-05-051 makes no cognizable argument to the contrary.

In D.86-10-044, the Commission denied PG&E's application for approval of a power purchase agreement with the Kings River Conservation District for purchase of power from the Dinkey Creek Hydroelectric Project. According to the Kings River Conservation District, "The Dinkey Creek Project was a fully designed 120-megawatt hydroelectric facility that was licensed and approved for construction on Dinkey Creek, a tributary of the Kings River in Fresno County. The project progressed nearly to the point of construction before it was halted in 1986 due to a decision by the Pacific Gas and Electric Company to withdraw from the power purchase agreement." (Kings River Conservation District, *Dinkey Creek*, http://www.krcd.org/power/other_power_studies/dinkey_creek.html, accessed April 27, 2015)

PG&E, of course, withdrew from the power purchase agreement because the Commission denied approval. Without the "catalyst for foreseeable future development" of an approved power purchase agreement, the development of the damn could not proceed.

C. Changes To CEQA And PUC Jurisprudence And Procedure Are Relevant

The Commission also challenges the fact that CEQA jurisprudence, the Public Utilities Code, and Commission regulations and procedure have changed drastically since 1979. While it is impossible to detail the myriad ways in which such changes have taken place, the relevance of the Center's point that the Commission needs to stop relying upon the tired and wrong argument that dicta in a 1986 Commission decision and a 1979 unpublished minute order excuses Commission non-compliance with CEQA, is easily made by highlighting one key change: in 1986, the preferred resources loading order did not exist.

The preferred resources loading order is found in Public Utilities Code section 454.5, promulgated in 2002 and amended four times since. The Commission's Energy Action Plan 2008 Update established that "The 'Loading Order' established that the state, in meeting its energy needs, would invest first in energy efficiency and demand-side resources, followed by renewable resources, and only then in clean conventional electricity supply." (Energy Action Plan 2008 Update at p. 1, http://www.cpuc.ca.gov/PUC/energy/resources/Energy+Action+Plan/.)

As explained above, the Commission is the only agency with the jurisdiction to decide how need will be filled. Where, as here, the Commission fails to comply with the statutorily mandated preferred resources loading order and permits fossil fueled generation over all other resources types, the Commission has made a discretionary decision with irrefutable environmental impacts and this decision is subject to environmental review under CEQA. Because the California Energy Commission ("CEC") is not charged with and refuses to take into account the loading order in its licensing of thermal power plants over 50 MW, the Commission cannot rely upon the CEC's CEQA equivalent review to address this environmental impact.

WHEREFORE, the Center submits that the Commission should rehear this matter and deny the application with prejudice.

Respectfully submitted,

Center for Biological Diversity

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By: /s/ April Rose Sommer

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