CASE NO.

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

CALIFORNIA COMMUNITY CHOICE ASSOCIATION,

Petitioner

v.

CALIFORNIA PUBLIC UTILITIES COMMISSION,

Respondent

PACIFIC GAS AND ELECTRIC COMPANY,

Real Party in Interest

From Resolution No. E-5258 (April 28, 2023) and Decision No. 23-08-052 (September 5, 2023) of the California Public Utilities Commission of the State of California

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PETITION FOR WRIT OF REVIEW; MEMORANDUM OF POINTS AND AUTHORITIES

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CERTIFICATE OF INTERESTED ENTITIES AND PERSONS

Pursuant to California Rules of Court, Rules 8.208 and 8.496, Petitioner hereby states that no entities or persons have either (1) an ownership interest of 10% or more in the party or parties filing this Certificate (Cal. Rules of Court, rule 8.208(e)(1)), or (2) a financial or other interest in the outcome of the proceeding that the justices should consider in determining whether to disqualify themselves (Cal. Rules of Court, rule 8.208(e)(2)).

DATED: October 5, 2023

By: _____

Thomas J. MacBride, Jr.
Attorneys for California
Community Choice Association

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CALIFORNIA PUBLIC UTILITIES CODE

DECISIONS OF THE PUBLIC UTILITIES COMMISSION

PETITION FOR WRIT OF REVIEW

To the Honorable Justices of the Court of Appeal of the State of California, First Appellate District:

I.

PRELIMINARY STATEMENT

Pursuant to Rule 8.724 of the California Rules of Court and section 1756 et seq. of the California Public Utilities Code,[1] California Community Choice Association ("Petitioner" or "CalCCA") brings this Petition for Writ of Review.

Twenty years ago, after the crisis resulting from electricity deregulation in California, the Legislature enacted Assembly Bill 117 (Stats. 2002, ch. 838 ("AB 117")) stating that "[c]ustomers shall be entitled to aggregate their electric loads" through local government bodies which can procure electricity to meet their community's needs. (Cal. Pub. Util. Code, § 366.2(a)(1).) The government bodies organized under this statute, "community choice aggregators" or "CCAs," include cities, counties, cities and counties, or groups of local government bodies joined through a joint powers agency. (Cal. Pub. Util. Code, §§ 331.1(a)–(b); see

[1] All further statutory references are to the California Public Utilities Code unless otherwise specified.

also Gov. Code, § 6500 et seq.) CCAs purchase electricity and sell it to individuals or businesses within the boundaries of the CCA as an alternative to having their electricity provided by traditional regulated investor-owned electric utilities ("IOUs"), such as Pacific Gas and Electric Company ("PG&E"), Southern California Edison Company ("SCE"), or San Diego Gas & Electric Company.[2]

Since the enactment of AB 117, many local government bodies have formed CCAs. Petitioner's membership comprises of 24 CCAs formed by over 200 local government entities participating as individual government bodies and as joint powers agencies. Governed by local elected and appointed officials, CCAs in California provide electric service to approximately 14 million users of electricity in the State—equivalent to 33 percent of customers in the IOU territories.

A local government interested in forming a CCA must take legislatively mandated steps, focusing primarily on the local community but also involving a narrow role carved out for the

[2] While the CCA purchases and sells the electricity, the electricity continues to be delivered to the customer over the IOUs' transmission and distribution lines.

California Public Utilities Commission ("Respondent" or "Commission") in section 366.2. The local government entity passes an ordinance to implement a CCA or join an existing CCA, and the CCA develops a detailed implementation plan as required by section 366.2. After community adoption of the implementation plan, the CCA files the plan with the Commission. After receipt of the implementation plan, the Commission must complete legislatively mandated tasks to finalize CCA implementation, including: (1) certifying receipt of the plan; (2) providing the CCA with its findings regarding the cost recovery that must be paid by CCA customers to prevent a cost-shift onto remaining IOU customers, as provided in subdivisions (d), (e), and (f) of section 366.2; and (3) designating the "earliest possible date" for the CCA's implementation.

Petitioner's members Central Coast Community Energy ("CCCE") and East Bay Community Energy ("EBCE") both received approval of their implementation plans from their communities to expand, as of January 1, 2024, to the cities of Atascadero (CCCE) and Stockton (EBCE). The implementation plans were submitted to the Commission in 2022. The Commission certified in letters dated March 8, 2023, that CCCE's

and EBCE's implementation plans were complete and compliant with section 366.2, subdivision (c); however, the Commission failed to provide any cost recovery findings for charges beyond those already provided for in existing charges for departed CCA customers. In addition, the Commission did not designate the "earliest possible date," but rather rejected the requested January 1, 2024, expansion dates stating that it "will provide further guidance on the matter."

On March 27, 2023, without any prior notice or process, the Commission issued Draft Resolution E-5258 ("Draft Resolution") setting the "earliest possible effective date" for expansion as January 1, 2025, "subject to modification by further Commission Order." (Exhibit 4, p. 164.) In effect, the Commission failed to confirm an "earliest possible date," denying the communities of Atascadero and Stockton their statutory right to aggregate their electric loads with a CCA. In addition, the Draft Resolution still failed to provide any cost recovery findings required by section 366.2, subdivision (c)(7). CalCCA filed comments on the Draft Resolution on April 17, 2023. (Exhibit 5.)

On April 28, 2023, the Commission issued Resolution E-5258 ("Resolution"), without material change. Petitioner filed a

timely Application for Rehearing on May 30, 2023. In response, the Commission issued Decision 23-08-052 ("Rehearing Decision") on September 5, 2023, denying rehearing, while providing limited modifications to the Resolution.

The Rehearing Decision restates the Resolution's purported reasoning that the denial of the CCAs' expansion will prevent a potential "cost-shift" pursuant to sections 366.2, subdivision (a)(4), and 366.3. This cost-shift, the Commission claims, arises from the CCAs' deficiency in meeting requirements under the Commission's Resource Adequacy ("RA") program. However, the deficiencies advanced to support the Commission's Resolution and Rehearing Decision are unrelated to implementation, and the CCAs had already paid the requisite penalties under the RA program. To support its suspension of the implementation plans, the Commission unilaterally broadened and exceeded its statutory authority to prevent cost-shifts in the context of CCA implementation by creating from whole cloth a "new and distinct" type of cost-shift related to RA.

Further exacerbating its error, the Commission rendered findings to support its decision that were not supported by substantial evidence in light of the whole record. In fact, the

Commission was wholly unable to provide evidence showing causation between the RA deficiencies and the alleged cost-shifts. Further, the Commission failed to provide any evidence for its assertion that the CCAs' past RA deficiencies—in a market the Commission acknowledges was scarce—are indicators of the future for the expanded CCA.

The Commission has stepped boldly over its jurisdictional bounds, unilaterally and unlawfully broadening its authority over the government bodies that serve as CCAs. It has done so while failing to act in accordance with law and basing its decisions on findings not supported by substantial evidence. To prevent further abuse of the Commission's jurisdiction and its public processes, the Resolution and Rehearing Decision must be reversed.

Accordingly, this Court should grant review of the Commission orders blocking service to Stockton and Atascadero, set aside Resolution E-5258 and Decision 23-08-052, and remand this matter to the Commission. (Cal. Pub. Util. Code, §§ 1758(a)–(b).)

II.

JURISDICTION

Pursuant to section 1756, subdivision (a), this Court has original jurisdiction to review the decisions of the Commission. Section 1756, subdivision (a), authorizes any aggrieved party to petition the Court of Appeal for a writ of review within 30 days after the Commission issues an order denying an application for rehearing, for the purpose of having the lawfulness of the decision "inquired into and determined."

The Commission adopted the Resolution on April 27, 2023. Petitioner filed a timely application for rehearing of the Resolution on May 30, 2023. (Cal. Pub. Util. Code, § 1731(b)(1).) On August 31, 2023, by the Rehearing Decision, the Commission denied the application for rehearing; its "date of issuance" was September 5, 2023. (Cal. Pub. Util. Code, § 1756(c).) This Petition for Writ of Review is timely filed pursuant to section 1756, subdivision (a).

III.

ISSUES PRESENTED

1. Did the Commission exceed its limited jurisdiction over government bodies by delaying, potentially indefinitely, the ability of the cities of Atascadero and Stockton to offer CCA

service to their residents and businesses by joining, respectively, CCCE's and EBCE's lawfully formed existing joint powers authorities?

2. Did the Commission fail to proceed in the manner required by law when it did not conduct any proceeding in the manner required by section 1701.1 et seq., or as provided for in its Rules of Practice and Procedure ("Rules" or Cal. Code Regs., tit. 20, div. 1, ch. 1), or its formally adopted enforcement procedures, before issuing the Resolution and proscribing the extension of CCA service to the cities of Stockton and Atascadero?

3. Are the findings in the Resolution as modified by the Rehearing Decision, supported by substantial evidence in light of the whole record?

IV.

PARTIES

Petitioner, CalCCA, is a California nonprofit mutual benefit corporation organized pursuant to Part 3 of Division 2 of the Corporations Code. CalCCA represents the interests of (1) local government bodies that operate their own community choice aggregation entity, (2) joint powers agencies formed by local governments that operate CCAs, and (3) local government bodies

or joint powers agencies that have submitted an implementation plan with the Commission pursuant to section 366.2, whether individually or through an expansion of an existing CCA's scope of service, and are preparing to launch service. CalCCA's members include CCCE and EBCE, whose plans to expand their scope of service to include new local governments are addressed in the Resolution.

Petitioner's organizational mission is to foster a legislative and regulatory environment that supports the development and long-term sustainability of the provision of electric service by local governments through CCAs. Petitioner represents the interests of its members in numerous proceedings before the Commission. The Petition presents questions of law that affect all CalCCA members seeking now or in the future to expand their scope of service to incorporate new communities electing to receive electric service from a CCA. No individual member participation is necessary to adjudicate this Petition since the relief requested does not require participation of its individual members.

Petitioner served written comments on the Draft Resolution pursuant to Rule 14.5 and sought rehearing of the

Resolution on May 30, 2023 pursuant to Rule 16.2.

Respondent, Commission, is an administrative agency of the State of California established by Article XII of the California Constitution.

Real Party in Interest, PG&E, is an "electrical corporation" as defined in section 218 and thereby a public utility pursuant to section 216.

V.

VENUE

The Petitioner's principal place of business in California is in Contra Costa County. Accordingly, venue is proper in the First Appellate District pursuant to section 1756, subdivision (d).

VI.

EXHIBITS

Pursuant to section 1756, subdivision (a), the Commission certifies the record in the proceeding below to the Court only after the writ issues. The documents referred to in this Petition are provided as exhibits in a separate volume. All exhibits accompanying this Petition are true and correct copies of original documents on file with the Commission. The exhibits are incorporated by references fully set forth in this Petition. The exhibits are paginated consecutively from pages 6 through 472,

and page references in this Petition are to the consecutive pagination.

VII.

STATEMENT OF THE CASE

A. The Legislature Enacted AB 117 to Enable Community Autonomy Over Electricity Procurement

The Legislature enacted AB 117 in 2002 enabling communities to purchase electricity on behalf of their resident customers who are otherwise served by an IOU. AB 117, codified in section 366.2, provides that "[c]ustomers *shall be entitled* to aggregate their electric loads as members of their local community with [CCAs]." (Cal. Pub. Util. Code, § 366.2(a)(1), emphasis added.) A CCA can be formed by (1) "[a]ny city, county, or city and county whose governing board elects to combine the loads of its residents, businesses, and municipal facilities in a communitywide electricity buyers' program," or (2) a group of local government bodies that do so in combination through a joint powers agency. (Cal. Pub. Util. Code, § 331.1; see also Gov. Code, § 6500 et seq.)

EBCE was formed by the County of Alameda and the cities of Albany, Berkeley, Dublin, Emeryville, Fremont, Hayward, Livermore, Newark, Oakland, Piedmont, Pleasanton, San

Leandro, Tracy, and Union City; EBCE also serves unincorporated areas of Alameda County (including Ashland, Castro Valley, Cherryland, Fairview, San Lorenzo, and Sunol). EBCE is governed by a Board of Directors comprised of elected officials from the communities it serves. EBCE customers receive transmission, distribution, and billing services from PG&E.

CCCE serves the cities of Capitola, Carmel-By-The-Sea, Carpentaria, Del Rey Oaks, Gonzales, Paso Robles, Pismo Beach, Salinas, San Juan Batista, San Luis Obispo, Santa Cruz, Santa Maria, Solvang, and Watsonville, as well as unincorporated portions of Monterey, San Benito, San Luis Obispo, Santa Cruz, and Santa Barbara counties. CCCE customers receive transmission, distribution, and billing services from PG&E or SCE, depending on their location.

EBCE and CCCE complied with the requirements set forth in section 366.2 and Commission orders regarding implementation. Both EBCE and CCCE began providing service in 2018. Today, EBCE serves over 600,000 accounts. CCCE serves over 500,000 accounts.

B. The Legislature Carved Out Limited Authority for The Commission in the Context of CCA Implementation

CCA implementation[3] involves several steps, including a narrow role carved by the Legislature for the Commission, as specified in section 366.2. First, and prior to the Commission's involvement, an ordinance is passed by a city, county, city and county, or joint powers agency to implement a CCA or join an existing CCA. (Cal. Pub. Util. Code, § 366.2(c)(3).) As part of that public process, the CCA must develop an implementation plan, detailing organizational structure, operations and funding, participant rights and responsibilities, descriptions of third-party contracting procedures, and other information regarding the planned CCA. (Cal. Pub. Util. Code, §§ 366.2(c)(3)(a)–(g).) The implementation plan is then considered for adoption at a community public hearing. (Cal. Pub. Util. Code, § 366.2(c)(3).)

After community adoption of an implementation plan, the CCA files the plan with the Commission "[i]n order [for the

[3] If an existing CCA is seeking expansion of its service territory, the CCA submits an addendum to an existing implementation plan. Implementation and expansion are referred to herein as "implementation," given the requirements are identical.

Commission] to determine the cost-recovery mechanism to be imposed on the [CCA] pursuant to subdivisions (d), (e), and (f) that shall be paid by the customers of the [CCA] to prevent shifting of costs . . . ." (Cal. Pub. Util. Code, § 366.2(c)(5).) Subsections (d), (e), and (f) detail the costs that must be recovered from customers departing IOU electricity service for the CCA to compensate the IOU for electricity purchases it made on behalf of the CCA customer when the customer departs IOU service for the CCA. (Cal. Pub. Util. Code, §§ 366.2(d)–(f).) Imposition of these costs, referred to as "nonbypassable costs," prevents remaining IOU customers from bearing costs incurred to serve a customer leaving IOU service for the CCA, which would be a "cost-shift" prohibited by section 366.2, subdivision (a)(4). (Cal. Pub. Util. Code, §§ 366.2(a)(4).) Section 366.3 also prohibits cost-shifts from CCA customers to IOU customers, and from IOU customers to CCA customers. (Cal. Pub. Util. Code, § 366.3.)

The scope of costs the Commission is authorized to address in CCA implementation is expressly defined in subdivisions (d), (e), and (f). (Cal. Pub. Util. Code, §§ 366.2(d)–(f).) Subdivisions (d) and (e) require recovery from CCA customers of costs incurred by the California Department of Water and Power stemming

from the 2000–2001 energy crisis. (Cal. Pub. Util. Code, §§ 366.2(d)–(e).) Subdivision (f) requires recovery of the IOU's past under-collections for energy purchases and a share of future new unavoidable electricity purchase costs from long-term contracts executed while the customer was an IOU generation customer. (Cal. Pub. Util. Code, § 366.2(f).) The Commission established a cost-recovery mechanism for such costs through its Power Charge Indifference Adjustment ("PCIA") proceeding, Rulemaking 17-06-026, in which an ongoing PCIA charge for CCA customers was created and repeatedly refined to ensure the charges are adequately recovered and cost-shifts prevented.

After receiving the implementation plan, the Commission must complete four express and statutorily required tasks in compliance with section 366.2, subdivisions (c)(5) though (7). First, within 10 days of the filing it must notify the IOU serving the customers proposed for CCA that an implementation plan has been filed. (Cal. Pub. Util. Code, § 366.2(c)(6).) Second, the Commission must certify that it has received the implementation plan (including the information necessary to determine a cost-recovery mechanism) within 90 days of receipt. (Cal. Pub. Util. Code, § 366.2(c)(7).) Third, after certification of receipt, the

Commission must provide the CCA with its findings regarding the cost recovery that must be paid as provided in subdivisions (d), (e), and (f). (Cal. Pub. Util. Code, §§ 366.2(c)(7).) Fourth, the Commission must designate the "earliest possible date" for the CCA's implementation, taking into consideration the impact on the IOU's annual procurement plan. (Cal. Pub. Util. Code, §§ 366.2(c)(8).) In doing so, the Commission is ensuring that the IOU's plans for procurement on behalf of its customers (including those leaving for CCA service) during that year are considered.

The Commission acknowledged its narrow role in CCA implementation in Decision Number 05-12-041, in which it issued regulations to implement AB 117.[4] The Commission concluded that AB 117 does not confer authority for "general regulatory oversight of CCAs," further clarifying that "we do not believe

[4] Pursuant to section 366.2's requirement that the Commission establish rules regarding CCA implementation, the Commission issued orders in 2004 and 2005 implementing CCA service in California. (See Cal. P.U.C., Dec. No. 04-12-046 (Dec. 16, 2004); see also Exhibit 1.) In addition, the Commission issued Resolution E-4907 in 2018, adopting an informal review process for CCA implementation plans pursuant to the requirements of section 366.2 and Decision 05-12-041 that coordinates the timing of the implementation plans with the timeline of the mandatory forecast filings for the Commission's RA electric procurement program. (Exhibit 3, p. 138; Exhibit 9, pp. 417–418.)

[that] AB 117 intended to give this Commission broad jurisdiction over CCAs . . . ." (Exhibit 1, pp. 24, 68.) The Commission also concluded: "AB 117 does not provide us with authority to approve or reject a CCA's implementation plan or to decertify a CCA . . . ." (*Id*. at p. 12.) Critically, it concluded that its jurisdiction was limited by the express terms of AB 117: "We assume that if the Legislature intended for us to regulate the CCA's implementation plan in other ways, the Legislature would have included explicit language in the statute with regard to its intent." (*Id*. at p. 23.)

In suspending the expansion of EBCE and CCCE through issuance of the Resolution and Rehearing Decision, the Commission has overstepped its limited authority over CCA implementation and impermissibly interfered with the rights of customers in Stockton and Atascadero allowed by AB 117 to receive service from CCCE and EBCE.

C. The Commission's Actions Unlawfully Suspend the Expansion of CCA Service to Stockton and Atascadero

CCCE and EBCE both received approval of their implementation plans from their communities to expand as of January 1, 2024, to Atascadero (CCCE) and Stockton (EBCE). In

accordance with section 366.2, in December 2022 EBCE and CCCE each filed their Implementation Plan Addenda[5] with the Commission to expand service to Stockton (EBCE) and Atascadero (CCCE) beginning January 1, 2024. (Exhibit 6, pp. 196–197.) The Commission certified in letters dated March 8, 2023, that CCCE's and EBCE's implementation plans were complete and compliant with the requirements of section 366.2, subdivision (c). The letters denied, however, the requested effective service dates without setting an alternative date. The letters gave no reason why, stating only that the Commission would "provide further guidance on the matter." The Commission also failed to provide the requisite cost recovery findings required by section 366.2, subdivisions (c)(7) and (8), and did not state how its decision took into account the impact on the IOUs' annual procurement plans as required by section 366.2, subdivisions (c)(8). In response, CCCE and EBCE requested that the Commission confirm the "earliest possible effective date" for their expansions. (Exhibit 6, pp. 196–197.)

[5] As per the process noted in footnote 4, above, CCCE and EBCE are existing CCAs with already filed Implementation Plans. Therefore, CCCE and EBCE filed Addenda to the existing Implementation Plans to effectuate their expansions.

1. Resolution E-5258

The Commission's Energy Division then issued the Draft Resolution on March 27, 2023. Petitioner timely submitted comments on the Draft Resolution on April 17, 2023, identifying the legal errors and requesting its modification.

The Commission adopted the Resolution on April 28, 2023. Consistent with the Draft Resolution, the final Resolution set January 1, 2025, as the earliest possible effective date for the expansions of CCA service to the cities but left the date "subject to modification by further Commission Order." (Exhibit 6, p. 196.) The conditional nature of the January 1, 2025, implementation date leaves (1) the implementation plans suspended indefinitely, (2) the Cities of Stockton and Atascadero with no date certain as to when their CCA service will begin, and (3) the CCAs unable to plan the launch of the service sought by Stockton and Atascadero, including planning for power purchases, which in turn affects procurement compliance and compounds the problems the Commission seeks to address. The Commission's action effectively precludes residents and businesses in Stockton and Atascadero from exercising their rights under section 366.2, subdivision (a)(1) to "aggregate their

electric loads as members of their local community with community choice aggregators." (Cal. Pub. Util. Code, § 366.2(a)(1).)

The Commission justified its unprecedented foray outside its limited role in CCA implementation based on its "statutory duty to ensure that the implementation of CCA programs [do] not result in . . . cost shifting." (Exhibit 6, p. 196.) However, even though it asserted its concern over cost-shifting, the Commission did not follow the express requirements of section 366.2, subdivision (c)(7), and provide "its findings regarding any cost recovery that must be paid by customers of the [CCA] to prevent a shifting of costs as provided for in subdivision (d), (e), and (f)." (*Id*. at p. 197.) Instead, the Commission stated that it "find[s] it necessary to address a *new and distinct type of cost shifting* that is resulting from LSEs who fail to procure their required capacity under the [RA] program." (*Id*. at p. 204, emphasis added.) The Commission went on to state that it was "acting pursuant to its statutory authority requiring it to ensure that the implementation of CCA programs do not result in cost shifting and in recognition of the need to address the statutory *scheme as a whole*." (*Ibid*, emphasis added.)

The Commission's actions on the basis of its "new and distinct type of cost shifting" unlawfully expand its jurisdiction by tying CCA implementation to a separate set of requirements and enforcement mechanisms overseen by the Commission through the RA program. Section 380, subdivision (a), requires the Commission to "establish [RA] requirements for all load-serving entities [("LSEs")]." The Commission has established a program requiring all LSEs to procure sufficient electricity to meet its customer's actual needs (its load), as well as additional reserves or capacity (i.e., RA) to ensure reliability at all times. (Cal. Pub. Util. Code, § 380(c).) The Commission is required to "enforce the [RA] requirements . . . in a nondiscriminatory manner," and "exercise its enforcement powers to ensure compliance by all [LSEs]." (Cal. Pub. Util. Code, § 380(e).) Failure to meet the RA requirements results in penalties assessed pursuant to the penalty program established by the Commission. (See Exhibit 8, pp. 325–328.) As noted in the Resolution, both CCCE and EBCE have each in the past been assessed citations for violations of the RA program, and have timely paid the penalties assessed by the Commission—meaning the RA deficiencies were acknowledged, the penalties paid, and

the matter settled well before the issue of expanding into two new cities came before the Commission. (Exhibit 6, pp. 196, 199, 201.)

Despite recognizing that CCCE and EBCE paid their RA penalties, the Commission states in the Resolution that "payment of a [RA] violation does not fully redress harms caused by a failure to meet [RA] program requirements, most notably the CCA's failure to timely procure the required level of capacity." (*Id*. at p. 201.) Instead of addressing the shortcomings of the RA penalty program itself and modifying them, or focusing on addressing any cost-shift through the PCIA, the Commission improperly expanded its limited jurisdiction over CCAs in a different statutory context—CCA implementation. The Commission thereby reached back in time to reopen the settled issues of specific RA deficiencies to attach them to the current issue of expanded operations.

2. CalCCA Application for Rehearing

On May 30, 2023, Petitioner filed an Application for Rehearing of the Resolution. (Exhibit 7.) Petitioner's application for rehearing alleged, inter alia, that the Commission committed legal error by: (1) exceeding the Commission's limited jurisdiction

over CCA implementation plans and failing to act in the manner required by law by refusing to provide a firm "earliest possible date," making the required cost recovery findings under subsections (d), (e), and (f), and failing to limit its analysis to the impact on the IOUs' annual procurement plan; (2) exceeding the Commission's limited jurisdiction to address cost-shifts in the context of implementation by adopting a "new and distinct" cost-shift policy; (3) failing to support its findings with substantial evidence that the alleged cost-shifts occurred and that they will continue to occur; and (4) failing to act in a manner consistent with its own enforcement procedures, denying due process. (Exhibit 7, pp. 223–224.)

CCCE filed a separate Application for Rehearing on May 30, 2023. While the Commission's Rules permit any party to file an opposition or other response to such an application, no party did so for either rehearing application.

3. Rehearing Decision and Modified Resolution

On August 31, 2023, by the Rehearing Decision, the Commission modified the Resolution and denied rehearing of the Resolution as so modified. (Exhibit 9, p. 432 [Ordering ¶ 1].) While the Rehearing Decision modified the text and findings of

the Resolution, it did not modify the ordering paragraphs. The Rehearing Decision reaffirms the unsupported cost-shift allegations and expansive Commission jurisdiction put forward in the Resolution. The Rehearing Decision was issued on September 5, 2023.

VIII.
BASIS FOR RELIEF

Through the issuance of Resolution E-5258 and Decision 23-08-052, the Commission has exceeded its limited authority over government bodies, failed to proceed as required by law, and committed other legal error. Accordingly, Petitioner asks this Court to grant review of Resolution E-5258 and Decision 23-08-052 and set them aside. (Cal. Pub. Util. Code, §§ 1758(a)–(b).)

IX.
PRAYER FOR RELIEF

WHEREFORE, Petitioners respectfully ask this Court to grant relief, as follows:

1. Issue a writ of review, setting a date when Respondent Public Utilities Commission of the State of California shall file its return and a certified copy of the record in this matter, and a date when Petitioners may respond to that return.

2. Inquire into and determine the lawfulness of

Commission Resolution E-5258 and Decision 23-08-052.

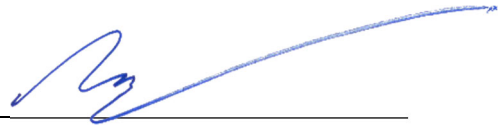
3. After review, set aside Resolution E-5258 and Decision 23-08-052.

4. Grant such other and further relief as the Court may deem just and proper.

Dated: October 5, 2023

Respectfully submitted,

DOWNEY BRAND LLP

By 

Thomas J. MacBride, Jr.

Attorneys for California Community Choice Association

VERIFICATION ON BEHALF OF CALIFORNIA COMMUNITY CHOICE ASSOCIATION

I, Elizabeth Vaughan, declare under penalty of perjury:

I am Chief Executive Officer of Petitioner California Community Choice Association. I am authorized to make this verification and do so on behalf of Petitioner. I have read the foregoing Petition for Writ of Review and know the contents thereof, and the facts therein stated, to be true to my own knowledge, except for those matters that are stated on information and belief, and as to those matters I believe them to be true.

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

Executed on October 5, 2023, at San Francisco, California.

/s/ Elizabeth Vaughan
Elizabeth Vaughan
Chief Executive Officer

MEMORANDUM OF POINTS AND AUTHORITIES

I.

INTRODUCTION

The Commission has exceeded its authority by issuing the Resolution and Rehearing Decision. While the Commission has broad, general jurisdiction over IOUs, its jurisdiction over CCAs as government bodies is limited to authority expressly authorized by the Legislature. Through the Resolution and Rehearing Decision, the Commission has acted outside of its jurisdiction by (1) failing to confine its actions over CCA implementation directed by section 366.2, and (2) expanding its limited jurisdiction to prevent cost-shifts in the context of CCA implementation by inventing a "new and distinct type" of cost-shift that would prevent CCA implementation or expansion based on past violations of a separate statutory requirement to procure capacity (RA). The Commission's actions not only violate the Public Utilities Code, but leave the CCAs unable to adequately coordinate with local governments and the customers that approved the proposed expansions, and set troubling precedent for future CCA implementation and expansion. Given the Commission's egregious overstep of its authority, the Court

should grant this Petition and set aside the Commission's actions.

II.

STANDARD OF REVIEW

Any party aggrieved by a Commission decision may petition for a writ of review in the Court of Appeal or Supreme Court. (Cal. Pub. Util. Code, § 1756(a).) A court ordinarily has no discretion to deny a timely-filed petition if it appears that the petition may be meritorious, because review by extraordinary writ is the exclusive means of judicial review. (*PG&E Corp. v. P.U.C.* (2004) 118 Cal.App.4th 1174, 1193 ("*PG&E*"); Cal. Pub. Util. Code, § 1759.)

Section 1757 prescribes the standard of review in this matter, which the Commission acknowledged as being categorized as ratesetting in the Rehearing Decision. (Exhibit 9, p. 428.) Section 1757 applies to "a complaint or enforcement proceeding, or . . . a ratemaking or licensing decision of specific application that is addressed to particular parties . . . ." As relevant here,[6] section 1757, subdivision (a), provides that a

[6] The Commission also arguably uses the Resolution and Rehearing Decision as a means of exercising licensing and enforcement authority over the CCAs. The Commission lacks

decision in a ratemaking proceeding is legally erroneous and subject to being set aside on appeal if:

> (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.

Under section 1757, review must address whether the Commission exceeded its jurisdiction and proceeded in the manner required by law. (Cal. Pub. Util. Code, §§ 1757(a)(1)–(2).) The interpretation of statutes that define or circumscribe the Commission's jurisdiction is a question of law subject to independent judicial review. (*PG&E, supra*, 118 Cal.App.4th at 1194–1195, citing *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 7).) While an agency's interpretation of certain statutes is afforded presumptive value

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such licensing authority, and attempting to enforce RA compliance by creating a new rule without a formal proceeding or an evidentiary record is, as described more fully herein, improper.

given the agency's "special familiarity and presumed expertise with satellite legal and regulatory issues," such deference does not apply when the issue is the scope of the agency's jurisdiction. (*PG&E, supra*, 118 Cal.App.4th at 1194, citing *Kaiser Foundation Health Plan, Inc. v. Zingale* (2002) 99 Cal.App.4th 1018, 1028; *Santa Clara Valley Transportation Authority v. P.U.C.* (2004) 124 Cal.App.4th 346, 359 ("*Santa Clara Valley*").)

Under section 1757, the court must also determine whether the Commission's findings are supported by substantial evidence in light of the whole record. (Cal. Pub. Util. Code, §§ 1757(a)(3)–(4).) The record in this matter shows that the Resolution and Rehearing Decision are not supported by substantial evidence.

III.
THE COMMISSION ACTED IN EXCESS OF ITS JURISDICTION WHEN ISSUING RESOLUTION E-5258 AND DECISION 23-08-052

A. The Commission has no Jurisdiction over the Actions of Government Bodies Except as Expressly Authorized by the Legislature

The Commission acted outside of its narrow authority over CCAs through its issuance of the Resolution and Rehearing Decision. When the Legislature authorized CCAs through AB

117 (codified in section 366.2), it expressly provided the process for CCA implementation, carving a narrow and express role for the Commission to ensure costs incurred by the IOUs on behalf of the customers leaving for CCA service are reimbursed. Because the Commission is acting in the context of government bodies exercising their right to aggregate electric service through a CCA, the Commission may only act pursuant to the express authorization or direction of the Legislature. (*Monterey Peninsula Water Management Dist. v. P.U.C.* (2016) 62 Cal.4th 693, 698 ["[T]he Public Utilities Commission . . . has no authority, however, to regulate public agencies like the District, absent a statute expressly authorizing such regulation."] ("*Monterey Peninsula*"); *County of Inyo v. P.U.C.* (1980) 26 Cal.3d 154, 166–167 ("*County of Inyo*"), citing *Los Angeles Metropolitan Transit Authority v. P.U.C.* (1959) 52 Cal.2d 655, 661 ["In the absence of legislation otherwise providing, the Commission's jurisdiction to regulate public utilities extends only to the regulation of privately owned utilities."].)

The Commission may only take actions with respect to a government body pursuant to statutory authority that is "express," not simply inferred. (*Santa Clara Valley*, *supra*, 124

Cal.App.4th at 364 ["[I]n the absence of an express provision, we will not infer a legislative intent to confer PUC jurisdiction . . . ."].) Even where the activity of a government body has some relationship to an activity of a Commission-regulated utility, the Commission lacks jurisdiction over the activity of the government body in the absence of express legislative authority. In *Monterey Peninsula*, for example, the California Supreme Court held that the Commission lacked the jurisdiction to review a user fee imposed by a government body even though the user fee itself was billed and collected, on behalf of the government body, by a Commission-regulated utility. (*Monterey Peninsula*, *supra*, 62 Cal.4th at 699–700.)

The limitations on the Commission's narrow authority over government bodies stands in sharp contrast to its broad authority over public utilities. The Commission's failure to honor the contrasting levels of its jurisdiction over IOUs and CCAs pervades the Resolution and the Rehearing Decision. In the Rehearing Decision, for example, the Commission rejects Petitioner's argument that the Commission's authority to prevent "cost-shifting" is narrowly defined by statute. (Exhibit 9, p. 419.) It does so by relying on its previous Commission decisions in the

context of calculating rates for the IOUs' PCIA, rejecting Petitioner's attempts there to "subscribe the bounds of cost shift considerations." (Exhibit 9, p. 419, citing Cal. P.U.C., Dec. No. 18-10-019 (Oct. 11, 2018) and Cal. P.U.C., Dec. No. 20-01-030 (Jan. 16, 2020).) Even if the prior Commission acts on which it relies fell within its jurisdiction to prevent cost-shifting by setting *IOU* rates, that fact would not support the Commission's apparent position here that it enjoys the same broad latitude to abrogate *government bodies'* statutory right to aggregate their electric load based on a general finding of cost-shifting. Instead, the question turns on whether the statutes governing the matter provide the Commission with the "express" authority to do so. (*Santa Clara Valley*, *supra*, 124 Cal.App.4th at 364)

To further illustrate the difference between the Commission's broad authority over IOUs versus its limited authority over CCAs, the Court need only compare *Southern California Edison v. Public Utilities Commission* (2014) 227 Cal.App.4th 172 ("*SCE III*") with *Monterey Peninsula. SCE III* described the broad scope of the Commission's jurisdiction over utility rates stating that "section 701 . . . vests the PUC with 'expansive' authority to 'supervise,' to 'regulate every public

utility,' and '*do all things* . . . which are *necessary and convenient* in the exercise of such power and jurisdiction,' regardless of whether it is specifically designated in the Public Utilities Code 'or *in addition thereto*.'" (*SCE III*, *supra*, 227 Cal.App.4th at 186–187, emphasis in original, citations omitted.) *Monterey Peninsula,* decided by the California Supreme Court two years later, reached a different result with regard to government bodies, stating that the "Public Utilities Commission . . . has no authority, however, to regulate public agencies like the District, absent a statute expressly authorizing such regulation." (*Monterey Peninsula*, *supra*, 62 Cal.4th at 698; see also, *County of Inyo*, *supra*, 26 Cal.3d at 166–167.)

With respect to government entities, the jurisdictional tenet described in *Monterey Peninsula* and *County of Inyo* is the opposite of that governing the Commission's authority to set utility rates such as the PCIA and the EPIC rate at issue in *SCE III* (broad jurisdiction, tantamount to a presumption of jurisdiction, unless "a specific statutory directive . . . *prohibits* the PUC's action.") (*SCE III*, *supra*, 227 Cal.App.4th at 187, emphasis in original.) The Commission exceeded its narrow jurisdiction over government entities through the mechanism

employed at page 5 of the Rehearing Decision: (1) referring to judgments it has made in the exercise of its broad jurisdiction over public utility rates and then (2) simply stating that similar arguments, when raised in the context of the Commission's limited authority over a government body nonetheless "fail for the same reasons." Contrary to the Commission's broad interpretation of its jurisdiction in the Rehearing Decision, no express statutory text authorized the Commission to prohibit EBCE and CCCE from extending service to Atascadero and Stockton as a means of compelling CCA compliance with other procurement programs. (Exhibit 9, pp. 417–421.)

B. The Statutes on which the Commission Relies do not Expressly Authorize the Commission to Delay the CCAs' Plans to Expand Service Based on an Implicit "New and Distinct" Type of Cost-Shift

None of the statutes relied on by the Commission for its jurisdictional authority expressly authorize its actions based on what it describes as a "new and distinct" (i.e., not expressly defined by statute) type of cost-shift. Here, the scope of the Commission's jurisdiction over the government bodies turns on construction of the provisions of AB 117, as well as the later-enacted SB 790 (Stats. 2011, ch. 599), codified at section 366.2,

subdivision (a)(4), and SB 350 (Stats. 2015, ch. 547), codified at section 366.3, including (1) any that expressly authorize or direct the Commission to restrict the activities of CCAs, (2) those related to the term "cost-shifting," and (3) those other than (1) and (2) on which the Resolution nonetheless relies. The Resolution states that it was "issued pursuant to Public Utilities Code Sections 366.2 and 366.3." (Exhibit 6, p. 195.) None of the provisions of those two statutes, however, (nor others advanced in the Resolution) authorized the Commission to reject or delay the extension of CCA service to Stockton or Atascadero in the manner set forth in the Resolution.[7] And none support the Commission's determination that RA shortfalls posit "cost-shifting" within the meaning of the statutes enacted in AB 117 and the subsequent amendments addressed herein.

In addition, long-standing principles of statutory interpretation require that a statute that provides explicit guidance implies a limitation on any other exercise of authority. This doctrine, *expressio unius est exclusio alterius* (expression of the one is the exclusion of the other), remains a foundational

[7] Section 366.2 is comprised of nearly 4,000 words.

statutory interpretation principle today. (*Southern Cal. Gas Company v. P.U.C.* (1979) 24 Cal.3d 653, 659 [Under the rules of statutory construction, the Legislature's express requirement that the Commission authorize utilities to offer financing programs for home insulation "impliedly precludes" vesting the Commission with authority to require utilities to do so.] ("*SCE I*").) "The maxim *expressio unius est exclusio alterius* is applicable here. Clearly the express authorization of a permissive program impliedly precludes any authority to impose a mandatory program. Accordingly, we conclude that the commission lacks the authority to require the implementation of an insulation financing assistance program." (*Ibid*., emphasis in original.) In utilizing the doctrine to interpret section 366.2, subdivision (c), the Commission once stated:

> A general rule of statutory interpretation suggests that where a statute provides specific guidance – in this case on the Commission's role and authority – its silence in a related section or on related issues implies a limit on that role and authority. Here, the statute *does* require the CCA to file the plan here and gives the Commission authority to request information about the plan and to register the CCA. We assume that if the Legislature intended for us to regulate the CCA's implementation plan in other

> ways, the Legislature would have included explicit language in the statute with regard to its intent.

(Exhibit 1, p. 23, emphasis in original, citations omitted.)

The Resolution and Rehearing Decision suggest that the Commission has forgotten its earlier determinations regarding its authority over CCA implementation plans.

1. Section 366.2 does not authorize the Commission to prevent the extension of CCA service

The provisions of section 366.2 that govern submission of CCA expansion plans to the Commission do not expressly authorize the Commission to reject or delay a plan as it did in the Resolution and the Rehearing Decision. The Resolution claims that section 366.2, subdivision (c)(8), provides "unambiguous statutory authority to set the effective date for CCA implementation plans." (Exhibit 6, p. 198.) But that claim selectively cites one sentence from a lengthy statute that, when read in conjunction with the other relevant provisions governing CCA implementation, does not support the Commission's position.

Section 366.2, subdivision (c)(5), requires that a CCA file its implementation plan with the Commission, along with any other necessary information, to allow the Commission to develop the cost-recovery mechanism in subdivisions (d), (e), and (f). Section 366.2, subdivision (c)(7), provides that the Commission must certify the CCA implementation plan within 90 days of submission; the Commission must then provide the CCA with its findings regarding any cost recovery that must be paid by the CCA's customers, in accordance with the cost-shifting provisions of subdivisions (d), (e), and (f). Finally, section 366.2, subdivision (c)(8), provides that no CCA shall provide electricity to customers until the Commission determines the cost recovery that must be paid by the CCA's customers under subdivisions (d), (e), and (f), and the Commission is required to designate the earliest possible effective date for a CCA program, taking into account any impact on the incumbent IOU's procurement plan.

Subdivisions (d), (e), and (f) tether the Commission's action on an expansion plan submitted under subdivision (c) to the "cost-shifting" described in subdivisions (d), (e), and (f). Section 366.2, subdivision (d), provides that all retail electric customers must pay a fair share of the Department of Water Resources'

electricity purchase costs and obligations. Section 366.2, subdivision (e), provides that CCA customers must continue to be responsible for their fair share of the costs in subdivision (d). And section 366.2, subdivision (f), requires CCA customers to reimburse the IOU that previously served them for the IOU's electricity purchase and related costs attributable to the departed customers. The Resolution, however, did not rely on subdivisions (d), (e), and (f) when it refused to permit the extension of service to Stockton and Atascadero. Indeed, the Resolution contains no reference to subdivisions (d), (e), and (f), and for good reason.

First, subdivisions (d), (e), and (f) contain no reference to alleged shortcomings in RA procurement, the justification advanced in the Resolution to bar the scheduled service to Stockton and Atascadero on January 1, 2024. The Resolution ties RA to cost-shifting. Subdivisions (d), (e), and (f) do not.

Second, by the time the Resolution was issued, the Commission had, long ago, certified CCA service generally and had approved dozens of individual CCA plans in the fashion prescribed in its decisions implementing CCA service. When it described its role implementing the requirements of section 366.2, subdivision (c)(8) (which includes references to the "cost-

shifting" provisions of subdivisions (d), (e), and (f)), the Commission stated that:

> [W]e apply Section 366.2(c)(8) by herein finding that the earliest possible implementation date for the CCA *program* was the effective date of the tariffs filed pursuant to D.04-12-046 in Phase 1 of this proceeding. The utilities shall immediately undertake to affect the system changes required to satisfy the tariffs as soon as it receives a binding commitment from a single CCA. It should complete its work within six months for the first CCA in its territory. The earliest possible implementation date for a CCA's provision of service would be the date of the completion of all tariffed requirements, but no later than six months after notice from the first CCA or the date the CCA and the utility agree is reasonable.

(Exhibit 1, p. 55, emphasis in original.)

Setting the "earliest possible implementation date for a CCA's provision of service" is essentially a ministerial act, a view consistent with the Commission's statement that "AB 117 does not give the Commission discretion to approve or disapprove a CCA implementation plan." (Exhibit 1, pp. 55, 80.)

Moreover, the Commission has continued to adjust rates to address cost-shifting on an ongoing basis through a means falling

squarely within its jurisdiction: its proceedings setting the PCIA, a rate charged by public utilities such as PG&E.

The Resolution cannot, and does not, point to any requirements in subdivisions (d), (e), and (f) that are violated by the proposed extension of service to Stockton and Atascadero. Accordingly, nothing in section 366.2, subdivision (c)(8), nor subdivisions (d), (e), and (f), expressly authorized the Commission to reject or delay the extension of service to Stockton and Atascadero.

2. Section 366.2, subdivision (a)(4), does not expressly authorize the Commission to limit CCA expansion to Stockton and Atascadero

The Commission relies on section 366.2, subdivision (a)(4), which provides that "[t]he implementation of a community choice aggregation program shall not result in a shifting of costs between the customers of the community choice aggregator and the bundled service customers of an electrical corporation." (Exhibit 6, pp. 196, 204, 210 [Finding 13].) But the statutory prohibition against cost-shifting does not function independently of subdivisions (d), (e), and (f) to give the Commission authority to delay CCA implementation. To the contrary, subdivision

(a)(4), which contains no reference to the Commission, states a general principle that is informed by the more detailed provisions of subdivisions (d), (e), and (f). The canons of statutory construction that require reading together the different sections within a statutory provision demonstrate the legislative intent that the CCA customer cost-responsibility methodologies in subdivisions (d), (e), and (f) are the means of preventing the cost-shifting prohibited in subdivision (a)(4). (*SCE I*, *supra*, 24 Cal.3d at 659.) Moreover, since the Commission is vested with broad jurisdiction over utility rates but only very limited jurisdiction over the actions of government bodies, the preservation of "'the integrity' of both earlier and late-enacted statutes" sought at page 7 of the Rehearing Decision is achieved by the Commission continuing to construe the term broadly in its exercise of its unchallenged authority to set the PCIA rate while adhering to the expressly stated definition in subdivisions (d), (e), and (f) as it plays its limited role in CCA implementation.

The Commission may not exercise authority over a government body under color of a statute that does not itself expressly authorize the Commission to do so. (*Monterey Peninsula, supra*, 62 Cal.4th at 699.) Section 366.2 does not

contain any express provisions that allow the Commission to delay CCA implementation or expansion based on a CCA's RA procurement shortfalls.

3. The Commission may not create a "new and distinct" type of cost-shifting that abrogates its obligation to set the earliest possible CCA implementation date

Because the Commission cannot tie the new service to Stockton and Atascadero to "cost-shifting" as described in subdivisions (d), (e), and (f), the Resolution states that the Commission "find[s] it is necessary to address a *new and distinct type* of cost shifting that is resulting from LSEs who fail to procure their required capacity under the [RA] program." (Exhibit 6, p. 204, emphasis added.)

The Commission, however, may not rely on a new and distinct type of alleged cost-shifting to deny CCA service to Stockton and Atascadero. First, a Commission order restricting an action by a government body must rest on express statutory authority. Here, the terms of subdivision (c)(8), *the only statute addressing the Commission's designation of "the earliest possible effective date" of the expansion to Stockton and Atascadero*, conditions that action solely on (1) the satisfaction of the terms of

subdivisions (d), (e), and (f) and (2) "consideration [of] the impact on any annual procurement plan of the electrical corporation that has been approved by the commission."

The "shifting of costs" proscribed in subdivision (a)(4) must be read in a manner consistent with later subdivisions (d), (e), and (f) if it is to be employed to restrict an action of a government body. Subdivision (a)(4) cannot be viewed in a vacuum as a broad grant of authority to the Commission to generally prevent "cost-shifting" as the Commission may choose to enlarge the scope of the term over time in any given proceeding. A court might well conclude that subdivision (a)(4) read in combination with section 701, authorized the Commission to charter precisely such a course. In cases reviewing the scope of the Commission's jurisdiction over public utilities, courts have found section 701 to provide the analytical pathway to a broader construction of other statutes. (See, *Pacific Bell Wireless, LLC v. P.UC.* (2006) 140 Cal.App.4th 718, 736–737; *PG&E Corp.*, *supra*, 118 Cal.App.4th 1174.) Section 701, however, is inapplicable to actions affecting government bodies, and subdivision (a)(4) can only be read within its statutory context.

Second, the comprehensive statutory plan in section 366.2 does not include any provision vesting the Commission with the authority or direction to define "cost-shifting" for purposes of section 366.2. (Compare, Cal. Pub. Util. Code, § 1093(b) ["The commission shall define financial interest and significant amount of annual compensation for purposes of this subdivision."]; Cal. Pub. Util. Code, § 1701.1(e)(2) ["The commission shall by rule adopt and publish a definition of decisionmakers and interested persons for purposes of this article . . . ."]; Cal. Pub. Util. Code, § 7939(b) ["The commission, for purposes of this section, shall define 'not in use.'"].)

Third, the Commission's "new and distinct" construction of "cost-shifting" may not be used to broaden the limited scope of the statute. Rules of statutory construction require harmonization of subdivisions within a statute. (*Moyer v. Workmen's Comp. Appeals Bd.* (1973) 10 Cal.3d 222, 230–231 ["[T]he various parts of a statutory enactment must be harmonized by considering the particular clause or section in the context of the statutory framework as a whole."], citing *Select Base Materials v. Bd. of Equalization* (1959) 51 Cal.2d 640, 645 ("*Select Base Materials*").) One construing the term found in

section 366.2, subdivision (a)(4) should accord "significance . . . to every word, phrase, sentence and part of an act in pursuance of the legislative purpose." (*Select Base Materials*, *supra*, 51 Cal.2d at 645.) After harmonizing the subdivisions of section 366.2, the legislative intent is clear: subsections (d), (e), and (f) describe the cost-shifting of legislative concern and the means of preventing it. Subdivision (a)(4) does not enlarge the scope of the term to embrace the Commission's "new and distinct" cost-shifting from that described in subdivisions (d), (e), and (f).

The Commission's authority over CCA implementation is expressly set forth in section 366.2, which prescribes the rights and obligations of CCA customers, the responsibilities of the CCA, and the Commission's narrow and largely administrative role in the implementation process. Section 366.2 allows the Commission to: notify the IOU serving customers that a CCA has filed an implementation plan (*id.* at § 366.2(c)(6)); seek information necessary to develop the cost-recovery mechanism in subdivisions (d), (e), and (f) (*id.* at § 366.2(c)(5)); certify that it has received the implementation plan and any additional necessary information within 90 days (*id.* at § 366.2(c)(7)); provide the CCA with findings regarding any cost recovery to be paid by CCA

customers to prevent cost-shifting as provided for in subdivisions (d), (e), and (f) (*ibid.*); authorize implementation only if the cost recovery mechanism is imposed (*id.* at § 366.2(i)); designate the earliest possible effective date for CCA implementation, taking into consideration the impact on any approved IOU annual procurement plan (*id.* at § 366.2(c)(8)); and oversee electrical corporation cooperation in the implementation of the CCA program (*id.* at § 366.2(c)(9)). It does not authorize the Commission to delay the expansion of CCA service by government bodies because the Commission is dissatisfied with the government bodies' energy purchasing practices.

4. Statutory Resource Adequacy procurement obligations applicable to CCAs do not expressly authorize the Commission to reject the proposed service to Stockton and Atascadero

The Commission attempts to extend, blend, and harmonize statutory provisions regarding cost-shifting and general RA procurement obligations to justify its delay of CCA expansion on a failure to meet RA procurement requirements. (Exhibit 6, pp. 197–198.) The Commission cites to a cobbled-together array of authorities in support of its position: section 366.2, subdivision (a)(4) (prohibiting cost-shifting from CCA service); section 366.2,

subdivision (c)(4) and section 380, subdivision (e) (requiring CCAs to provide for statutory and regulatory requirements in their implementation plans, and the basic directive that all load-serving entities be subject to the same requirements for RA and other procurement programs); section 366.2, subdivision (a)(5) (making CCAs solely responsible for all electric procurement for their customers); section 366.2, subdivision (c)(8) (directing the Commission to establish the earliest possible date for CCA implementation, accounting for impacts on IOU procurement plans); and Resolution E-4907 (expressly tying CCA implementation schedules to the filing of two annual load forecasts). (Exhibit 6, pp. 197–198.) Because none of the cited statutes or regulations individually expressly authorize the Commission to delay CCA implementation based on RA procurement shortfalls, the Commission asks that they be harmonized. (Exhibit 9, pp. 418–421.)

5. The Commission's Own Decisions Cannot Provide Express Legislative Authority

The Resolution selectively quotes Commission Resolution E-4907 to give the impression that the question of the Commission's ability to delay CCA implementation based on RA

procurement cost-shifts has already been settled. (Exhibit 6, p. 198.) A review of the entirety of Resolution E-4907 shows that the premise of, and directives adopted in, that Resolution do not extend to the indefinite delay of expansion to Stockton and Atascadero the Commission is attempting here. Resolution E-4907 aligned CCA implementation plan filing and launch dates with two specific RA filings—a preliminary forecast in April and a revised forecast in August. (Exhibit 3, pp. 143–144.) The forecasts were to prevent cost-shifting from CCA to IOU customers. (*Id.* at pp. 144–145.) In order to comply with the year-ahead RA process, the Commission required that CCA implementation plans be filed by January 1 to begin serving customers the following year. (*Id.* at p. 148.) EBCE and CCCE both complied with this requirement when they submitted their implementation plans for service expansion.

6. Section 366.3 does not expressly authorize the Commission to delay CCA expansion due to the CCA's Resource Adequacy deficiencies

Section 366.3 was enacted in 2015 as part of Senate Bill 350 ("SB 350"). (Stats. 2015, ch. 547.) Section 366.3 provides that:

> Bundled retail customers of an electrical corporation shall not experience any cost increase as a result of the implementation of a community choice aggregator program. The commission shall also ensure that departing load does not experience any cost increases as a result of an allocation of costs that were not incurred on behalf of the departing load.

On June 29, 2017, the Commission opened a Rulemaking, R.17-06-026 ("PCIA Rulemaking") in part to comply with section 366.3 and other provisions of SB 350. The PCIA Rulemaking set forth a list of "Guiding Principles," the first of which was that "[b]undled IOU customers" should be neither worse off nor better off as a result of customers departing the IOU (electrical corporation) for other energy providers (such as a CCA). (Exhibit 2, p. 111.)

The PCIA Rulemaking then set forth a list of issues to be resolved in the Rulemaking, the first of which was "[i]mplementation of SB 350 language discussing bundled customer indifference and protection of departing customers from allocation of costs not incurred on their behalf." (*Id.* at p. 112 [footnote omitted].) Accordingly, many of the substantive decisions issued by the Commission in the PCIA Rulemaking

acknowledge and address section 366.3 to ensure that the PCIA rate set by the Commission for IOUs satisfies the requirement of section 366.3. (See Cal. P.U.C., Dec No. 18-07-009 (July 12, 2018); Cal. P.U.C., Dec. No. 18-10-009 (Oct. 11, 2018); Cal. P.U.C., Dec. No. 20-01-030 (Jan. 16, 2020); Cal. P.U.C., Dec. No. 20-08-004 (Aug. 6, 2020).)

The Commission's authority to set the PCIA rate so that "[b]undled retail customers of an electrical corporation shall not experience any cost increase as a result of the implementation of a community choice aggregator program" is not subject to dispute. (Exhibit 2, p. 134.)

As the Resolution indicates, the Commission now requires that CCA expansion plans are submitted at least a year in advance, to ensure that IOUs are able to recover costs through the PCIA. (Exhibit 6, p. 198.) EBCE's and CCCE's expansion plans complied with that timeline. Nothing in section 366.3 expressly permits the Commission to delay or deny expanded CCA service. Moreover, nothing in the Resolution explains why the Commission's broad authority to set the PCIA rate charged by PG&E and other IOUs to CCA customers is an inadequate means to prevent the "cost-shifting" described in the Resolution.

7. Section 380 does not expressly permit the Commission to delay or deny expanded CCA service

While the Resolution states that it is issued pursuant to sections 366.2 and 366.3, it purports to also act under color of section 380. (Exhibit 6, p. 208.) Section 380 directs the Commission to "establish [RA] requirements for all load-serving entities" and to "exercise its enforcement powers to ensure compliance by all load-serving entities." (Cal. Pub. Util. Code, §§ 380(a), (e); Exhibit 6, pp. 197–198, 208.) The RA program is to be designed to "[m]inimize enforcement requirements and costs." (Cal. Pub. Util. Code, § 380(b)(4).)

Section 380 does not expressly authorize the Commission to deny or delay expanded CCA service for failure to meet a RA requirement. Had the Legislature intended to vest the Commission with such authority, text to that effect would have been included in the 1,144-word detailed statutory scheme that comprises section 380. Today, the Commission enforces its RA requirement under an established framework. (Exhibit 6, pp. 199–201.)

8. Nothing in the electrical corporations' annual procurement plans permits the Commission to deny or delay CCA service

When setting the earliest possible effective date for CCA implementation, the Commission must first determine that the requirements of section 366.2, subdivision (d), (e), and (f) have been met.

The only other factor section 366.2, subdivision (c)(8), allows the Commission to consider when setting the earliest possible effective date for CCA implementation is the impact of CCA implementation on any IOU annual procurement plan that has been approved by the Commission. The Commission approves the procurement plans of IOUs under section 454.5. The Resolution does not, however, state that the Commission's refusal to approve the extension of service to Stockton and Atascadero on January 1, 2024, is based on a procurement plan it has approved. Indeed, the Resolution contains no reference to section 454.5 nor identifies any annual procurement plan it has approved pursuant to section 454.5.

The Resolution instead turns on EBCE's and CCCE's RA compliance. (See Exhibit 9, pp. 424–425; Exhibit 6, pp. 208–209.)

By basing its adverse action on factors other than those identified in subdivision (c)(8), the Resolution contravenes subdivision (c)(8)'s limited, express authorization.

9. The Commission is not vested with unambiguous statutory authority to set the effective date for CCA implementation plans

In its 2005 Decision implementing the CCA program, the Commission stated that "AB 117 does not give the Commission discretion to approve or disapprove a CCA implementation plan." (Exhibit 1, p. 80.) The Commission may believe that it has not "disapproved" the plan to extend service to Stockton and Atascadero by simply rejecting January 1, 2024, as the scheduled date service was to commence. That benign construction of the Resolution is belied by the text of the Resolution. The Resolution states that the Commission "has unambiguous statutory authority to set the effective date for CCA implementation plans" and "finds that January 1, 2025, is the earliest possible effective date on which these CCAs may begin expanded service, unless the Commission acts to revise the earliest effective dates pursuant to a further Commission Order." (Exhibit 6, pp. 198, 204.) The Resolution provides consumers of electricity in

Stockton and Atascadero no way of knowing when CCA service will be available; as such, it disapproved the scheduled service expansion.

IV.

THE COMMISSION FAILED TO PROCEED AS REQUIRED BY LAW

The Resolution effectively indefinitely suspends EBCE's and CCCE's extension of CCA service to Stockton and Atascadero. With respect to that directive, the Commission did not proceed in the manner required by law.

A. The Commission Did Not Adhere to Statutory Requirements Governing Its Proceedings

The procedure resulting in the adverse outcome now before the Court did not comply with applicable statutory requirements, the Commission's own Rules of Practice and Procedure, or the Commission's adopted procedures for enforcement matters.

1. The Commission was required to comply with section 1701.1 et seq. before issuing the Resolution

In 1996, the Legislature enacted section 1701.1 et seq. as part of Senate Bill 960 (Stats. 1996, ch. 856), an omnibus measure governing proceedings before the Commission. Section 1701.1 directs the Commission to "determine whether *each*

proceeding is a quasi-legislative, an adjudication, a ratesetting, or a catastrophic wildfire proceeding," a process known as "categorization." (Cal. Pub. Util. Code, § 1701.1(a), emphasis added.) After the proceeding is categorized, the balance of the proceeding is governed by sections 1701.1 through 1701.9.

In adjudication, ratesetting, or quasi-legislative proceedings, the Commission is required to assign one or more commissioners to oversee the case and an administrative law judge when appropriate. (Cal. Pub. Util. Code, §§ 1701.1(b)(1), (c).) The "Assigned Commissioner" then prepares and issues by order or ruling a scoping memo that describes the issues to be considered and the timeline for resolution; that, consistent with due process, public policy, and statutory requirements, determines whether the proceeding requires a hearing. (*Ibid.*) In adjudication and ratesetting proceedings, the "assigned commissioner shall schedule a prehearing conference . . . ." (*Id.* at § 1701.1(b)(1).)

None of the statutory procedural requirements set forth in section 1701.1 et seq. were observed before the issuance of the Resolution. The Commission did not assign one or more commissioners to oversee the case. Nor did the Commission or

any of its members conduct a pre-hearing conference or issue a scoping memo. Neither the Commission nor any of its members determined whether, consistent with due process, public policy, and statutory requirements, the proceeding required a hearing.

Instead, EBCE and CCCE each simply received a letter from a member of the Commission's staff rejecting the planned date of expansion of service to Stockton and Atascadero. (Exhibit 6, pp. 196–197.) The Commission issued the Resolution six weeks later. The Resolution does not explain why the Commission did not adhere to the procedures set forth in section 1701.1 et seq. In fact, not until the Rehearing Decision did the Commission specify the type of proceeding—ratesetting.

2. The Commission did not comply with the procedures required by section 366.2, subdivision (c)(7)

Section 366.2, subdivision (c)(5), provides that a CCA must file its implementation plan with the Commission, and provide any other information the Commission requests that it determines is necessary to develop the cost-recovery mechanism in subdivisions (d), (e), and (f). The Commission is then required to certify that it has received the implementation plan and any

necessary additional information within 90 days of receipt of the CCA's load aggregation files. (Cal. Pub. Util. Code, § 366.2(c)(7).) After the Commission certifies receipt, it must then provide the CCA with its findings regarding any cost recovery that must be paid by the CCA's customers to prevent cost-shifting. (*Ibid.*)

The Commission failed to take the steps required by section 366.2, subdivision (c)(7), other than certifying receipt of the implementation plans. The Commission did not certify that it had received any additional information necessary to determine a cost-recovery mechanism, as required by the statute. Nor did the Commission "provide the community choice aggregator with its findings regarding any cost recovery that must be paid by customers of the community choice aggregator to prevent a shifting of costs as provided for in subdivisions (d), (e), and (f)." (*Ibid.*)

B. <u>The Commission failed to adhere to its established Rules and procedures before issuing the Resolution</u>

The Commission may not depart from its own Rules or other established procedures to the prejudice of a party. (*Calaveras Telephone Co. v. P.U.C.* (2019) 39 Cal.App.5th 972 ("*Calaveras*"); *City of Huntington Beach v. P.U.C.* (2013) 214

Cal.App.4th 566, 592–593 ("*City of Huntington Beach*"); *Southern Cal. Edison v. P.U.C.* (2006) 140 Cal.App.4th 1085, 1105–1106 ("*SCE II*").) In *SCE II*, the court concluded that the Commission improperly expanded the scope of issues set forth in the scoping memo required by section 1701.1, subdivision (b)(2). (*SCE II*, *supra*, 140 Cal.App.4th at 1106.) In *City of Huntington Beach,* the Court concluded that the Commission had decided an issue in a rehearing decision that the parties (and the scoping memo) had agreed to reserve for resolution in a state court. (*City of Huntington Beach, supra*, 214 Cal.App.4th at 591–593.) In both cases, the court concluded that the departure from the scoping memo prejudiced the Petitioner. (*Id*. at 592–593; *SCE II*, *supra*, 140 Cal.App.4th at 1105–1106.)

In *Calaveras*, the Commission had established a set of procedures for recovery of certain costs by a rural telephone company but then refused to follow those procedures, directing the company to another procedural course; the Court held that by not adhering to its own rules, the Commission had failed to proceed in the manner required by law and had abused its discretion. (*Calaveras*, *supra*, 39 Cal.App.5th 972.)

1. The Commission did not adhere to its Rules of Practice and Procedure

The Commission did not conduct a pre-hearing conference, required by Rule 7.2, at which parties could present arguments with regard to the matters to be included in the scoping memo directed by Rule 7.3, including, critically, the need for an evidentiary hearing to address the factual issues ultimately resolved in the Resolution. (Cal. Code Regs., tit. 20, §§ 7.2–7.3.)

2. The Commission did not comply with its own enforcement policy

The Resolution rests in part on the Commission's belief that section 380, subdivision (e), directs it to "exercise its enforcement powers" to compel compliance with RA requirements. (Exhibit 6, pp. 196–197, 209.) Yet the Commission did not comply with its own enforcement procedures.

On November 5, 2020, the Commission issued Resolution M-4846 adopting the Commission Enforcement and Penalty Assessment Policy. Resolution M-4846 permits Commission staff to propose an "Administrative Enforcement Order" as an alternative to a formal Order Instituting Investigation governed by section 1701.2. (Cal. P.U.C., Res. No. M-4846 (Nov. 5, 2020), p. 15 [Finding 7].) The Enforcement Policy addresses due process

requirements, notably the right to request an evidentiary hearing before an Administrative Enforcement Order becomes final. (*Id.* at p. 9.) The draft Administrative Enforcement Order is served on the affected entity and must include information about how to request a hearing. (*Id.* at Attachment, pp. 12–13.)

Resolution E-5258 fails to comply with either the applicable statutory requirements or the alternative enforcement procedures established in Resolution M-4846.

C. The Commission's Failure to Proceed in the Manner Required By Law Prejudiced the CCAs

Commission decisions are set aside when the Commission's failure to proceed in the manner required by law prejudices a party or works to its detriment. (*Calaveras*, *supra*, 39 Cal.App.5th 972; *SCE v. P.U.C.* (2000) 85 Cal.App.4th 1086, 1090, 1105–1106; *City of Huntington Beach*, *supra*, 214 Cal.App.4th at 593.)

Here, the Commission's failure to proceed in the manner required by law prejudiced CCCE and EBCE. The two CCAs filed plans to expand service to Stockton and Atascadero, a type of filing historically approved on a ministerial basis, since the Commission long ago addressed cost-shifting as described in

subdivisions (d), (e), and (f). Yet the Commission rejected the proposed expansion based on (1) the "new and distinct" form of "cost-shifting" never previously employed and (2) a factual determination—that the CCCE and EBCE RA shortfalls resulted in cost-shifting and will result in future cost-shifting—never established in an evidentiary record. (Exhibit 6, p. 208.) Statutory requirements and the Commission's own rules are crafted to prevent such an outcome. They were not followed here.

Instead, because the Commission failed to hold a prehearing conference as required by section 1701.1, subdivision (b)(1), CCCE and EBCE were not permitted to address at the outset whether the proceeding that led to the Resolution should have been treated as an adjudicatory matter pursuant to section 1701.1, subdivision (d)(2), and thus governed by section 1701.2. They were denied the opportunity to address, at the outset, whether the Commission could enlarge the scope of "cost-shifting" from that described in subdivisions (d), (e), and (f) of section 366.2 to embrace a "new and distinct" form of "cost-shifting grounded in RA. Finally, CCCE and EBCE were denied the opportunity to address the question of whether "due process, public policy, and

statutory requirements . . . requires a hearing." (Cal. Pub. Util. Code, § 1701.1(b)(1).)

Moreover, because the Commission failed to adhere to its own Enforcement Policy, CCCE and EBCE were not offered a hearing at which they could have contested the factual predicate underpinning the Resolution suspending the expansions—the assertions that failure to meet specific RA targets resulted in cost-shifting and that neither CCCE and EBCE are likely to mitigate any future cost-shifting. (Cal. Pub. Util. Code, §§ 366.2(d)–(f).)

Finally, CCCE and EBCE were denied any realistic opportunity to address the "new and distinct" theory of "cost-shifting" before the Commission acted to proscribe their scheduled expansion of service to Stockton and Atascadero. Because the Commission failed to proceed as required by subdivisions (c)(5), (c)(7), and (c)(8), CCCE and EBCE were never asked for "any other information . . . that the commission determines is necessary to develop the cost-recovery mechanism in subdivisions (d), (e), and (f)." (Cal. Pub. Util. Code, § 366.2(c)(5).) Nor did the Commission "provide the [CCAs] with its findings regarding any cost recovery that must be paid by

customers of the [CCAs] to prevent a shifting of costs as provided for in subdivisions (d), (e), and (f)." (Cal. Pub. Util. Code, § 366.2(c)(7).) As a result, the Commission failed to proceed in the manner required by law.

D. The Commission Failed to Proceed in the Manner Required Through Its Application of an Incorrect Legal Standard

The Commission's incorrect construction of the statutes governing CCA implementation and its own jurisdiction, as discussed in Section III, *supra*, constitutes a failure to proceed in a manner required by law. (Cal. Pub. Util. Code, § 1757(a)(2).) In *City of Marina v. Board of Trustees of California State University*, the California Supreme Court held that "an agency's 'use of an erroneous legal standard constitutes a failure to proceed in a manner required by law.'" (*City of Marina v. Bd. of Trustees of Cal. State Univ*. (2006) 39 Cal.4th 341, 355, quoting *No Oil, Inc. v. City of Los Angeles* (1974) 13 Cal.3d 68, 88.)

V.

CRITICAL FINDINGS ARE NOT SUPPORTED BY

SUBSTANTIAL EVIDENCE IN LIGHT OF THE WHOLE RECORD

The Rehearing Decision modified the Resolution in several respects, but none of the changes remedied the fact that the Resolution's critical determinations were not supported by substantial evidence in light of the whole record. The Commission's failure to support its Findings is not surprising, however, given that such Findings are premised on several unsupported fallacies.

At the outset, the Commission attempted to make up for the overall evidentiary shortcomings in the original Resolution by (1) providing "a more extended discussion of the RA program requirements in the context of our excess incremental procurement directives and our finding of a cost shift," and (2) striking Finding 9 from the original Resolution "because the record does not support the conclusions therein." (Exhibit 9, p. 424.) Original Finding 9 provided support for the Commission's finding of a cost-shift in that it stated that "expensive and extraordinary measures" paid for by bundled customers had to be used to ensure grid reliability because the CCAs failed to procure

their RA.[8] (Exhibit 6, p. 209.) Petitioner agrees with the Commission that the stricken finding is not supported by the record. However, the modifications made by the Commission did not go far enough to remedy the lack of substantial evidence to support the critical findings, particularly in the final Resolution's Findings 9, 11, 12, and 14.

Simply put, the Commission's core assertion—that RA deficiencies of CCAs have and will cause "cost-shifting"—is not supported by substantial evidence in light of the whole record.

A. The critical Findings of Fact are not supported by substantial evidence

The Commission has failed to support its critical findings of fact with substantial evidence. While many of the Findings in the Resolution are matters of public record, the critical Findings, including new Finding 9, and Findings 11 and 12, are not.

First, Finding 9 in the Resolution, as modified by the Rehearing Decision, asserts that: "Due to [RA] program procurement deficiencies in 2022, incremental excess resources,

[8] It should be noted that while the Commission struck the Finding, it did not strike the paragraph in the Resolution expanding upon these "expensive and extraordinary measures" and how they contributed to the overall cost-shift. (Exhibit 9, p. 424.)

paid for by all [LSE] customers, functioned in part as backfill to make up for specific [LSE] deficiencies, rather than being available to provide the full system reliability benefit that was intended, which caused a cost shift." (Exhibit 9, p. 447 [Finding 9].) The determination in Finding 9 that RA procurement shortfalls negatively affected emergency electricity procurement resources elides the actual circumstances under which those resources were procured and the specific rate treatment of the associated costs. (See, *ibid*.) The Commission ordered the IOUs to procure the resources necessary to remedy the inadequacy of existing electric supplies to serve customers during potential extreme heatwaves; those resources were in addition to capacity procured under the RA program. (*Id*. at p. 423.) The Commission Decision ordering that procurement made it clear that the net costs would be passed on to all benefitting customers, including IOU and CCA customers. (*See ibid*.) There is no evidence cited in the Resolution or Rehearing Decision that CCA RA deficiencies drove or even influenced that procurement or the associated costs. There is also no evidence that, if RA deficiencies did have an impact, a cost-shift to IOU customers occurred, particularly because all customers—including CCA customers—

pay their fair share of excess incremental procurement under Commission-approved mechanisms that have nothing to do with the RA program. (*Ibid.*; see, e.g., Exhibit 2.)

Second, Finding 11 states that because (1) CCCE and EBCE have experienced RA deficiencies and (2) RA deficiencies "*can* lead to cost shifting," then (3) CCA and EBCE "*have* contributed to cost shifting." (Exhibit 9, p. 448, emphasis added.) Yet no evidence supports either finding of a past or prospective cost-shift—only the Commission's conclusory finding of a cost-shift. Nothing in the Resolution quantifies or even estimates the level of alleged cost-shifting to which CCCE and EBCE have purportedly contributed—indeed, the Commission never provided them any "findings regarding any cost recovery that must be paid by customers of the [CCA] to prevent a shifting of costs" as required by section 366.2, subdivision (c)(7).

Third, Finding 12 states that the Commission "*has concerns* regarding the ongoing ability of [CCCE] and [EBCE] to meet [RA] requirements and is not aware of any evidence that demonstrates that the risk of cost shifting continuing has been adequately mitigated." (Exhibit 9, p. 448 [Finding 12], emphasis added.) Having "concerns" without any concrete evidence, however, is not

a sufficient basis for a decision depriving customers of their express right to choose CCA service. Additionally, not being "aware of" evidence mitigating such concerns is not enough to bolster such a decision. The Commission never asked for proof of CCCE's and EBCE's ability to meet RA requirements in the future.

Fourth, the Commission's argument that there is a dollar-for-dollar or megawatt-for-megawatt correlation between RA procurement and the electricity procured by the IOUs misrepresents the complexity of energy procurement obligations, California's wholesale energy market, and the mechanisms for calculating customer cost responsibility to avoid cost-shifting. IOUs and CCAs are required to procure electricity for multiple purposes, under multiple Commission mandates, covering multiple time periods. (See, e.g., Exhibit 9, p. 444–445.) The IOUs and CCAs also buy and sell electricity in the day-ahead and real-time wholesale energy market. And the history of the PCIA proceeding shows that calculating actual cost responsibility and quantifying potential cost-shifts is an extraordinarily complicated process. The Resolution and Rehearing Decision do not contain

any evidence to support the claimed one-for-one cost-shift, nor could they.

Similarly, Finding 10 states that fines paid by CCCE and EBCE for their past RA shortfalls are inadequate to "reimburse ratepayers for cost shifting that may be caused by an entity failing to meet its [RA] requirements." (Exhibit 9, pp. 447–448 [redlined Resolution].) Again, the Resolution does not explain how RA deficiencies "contributed to cost shifting," nor does it explain why the mechanisms presently authorized by the Legislature and implemented by the Commission are inadequate to prevent or redress cost-shifting.

There is a reason the Resolution never provides evidence of the causal link between RA deficiencies and the alleged cost-shifting. (*Id*. at p. 447 [Finding 9].) It is the same reason the Resolution does not quantify, even in the broadest of terms, the extent of the alleged cost-shift. The reason is that the Commission failed to provide a forum, such as instituting an investigation or evidentiary proceeding, under which those assertions could have been tested or quantified.

That failure leaves the Court with nothing to weigh to determine whether the Resolution and Rehearing Decision satisfy section 1757, subdivision (a)(4).

B. Uncorroborated factual claims do not satisfy the substantial evidence test in section 1757, subdivision (a)(4)

A reviewing court's assessment of whether a Commission finding is supported by substantial evidence in light of the whole record requires some weighing of the evidence. The Rehearing Decision recasts the "substantial evidence test" as far more deferential than the actual test, which requires that findings be "supported by substantial evidence in light of the whole record." (Cal. Pub. Util. Code, § 1757(a)(4); Exhibit 9, p. 422.) The authority offered in the Rehearing Decision to support the notion that the Commission's factual findings are almost always treated as conclusive, final, and not subject to review is largely drawn from case law that pre-dates the enactment of legislation that expressly overruled the deferential standard described in *Camp Meeker Water System, Inc. v. Public Utilities Commission* (1990) 51 Cal.3d 845, 863–864. (Exhibit 9, p. 422.)

Therefore, instead of the highly deferential review described at page 8 of the Rehearing Decision, the "in light of the whole record" language means that:

> [T]he court reviewing the agency's decision cannot just isolate the evidence supporting the findings and call it a day, thereby disregarding other relevant evidence in the record. (*Bixby v. Pierno* (1971) 4 Cal.3d 130, 149 [93 Cal.Rptr. 234, 481 P.2d 242].) Rather, the court must consider *all relevant evidence, including evidence detracting from the decision, a task which involves some weighing to fairly estimate the worth of the evidence.*

(*Lucas Valley Homeowners Assn. v. County of Marin* (1991) 233 Cal.App.3d 130, 141–142, citing *County of San Diego v. Assessment Appeals Bd. No. 2* (1983) 148 Cal.App.3d 548, emphasis added.) The deference referred to in the Rehearing Decision refers to a legal standard that has been replaced with the requirement that the Commission weigh "all relevant evidence." (*Ibid.*)

C. <u>The CCAs were never provided an opportunity to refute or test the assertions of the Commission's</u>

theory that resource deficiencies caused cost-shifting

The Resolution is a proposal of the Commission's Energy Division that the Commission adopted in its entirety. (See Exhibit 9, pp. 453–469.) Through the entire course of the Draft Resolution, final Resolution, and Rehearing Decision, the Commission set January 1, 2025, as the earliest possible effective date for the expansions of CCA service to Stockton and Atascadero and left the date "subject to modification by further Commission Order." Yet neither Petitioner nor any other party were given the opportunity to formally question Energy Division staff regarding its theory of cost-shift causation. Under these circumstances, Energy Division's opinion cannot be deemed "evidence" sufficient to satisfy the requirement that Commission findings be supported by "substantial evidence in light of the whole record." (Cal. Pub. Util. Code, § 1757(a)(4).)

The First District spoke to this issue when it annulled a Commission decision for lack of sufficient evidence. (*The Utility Reform Network v. P.U.C.* (2014) 223 Cal.App.4th 945 ("*Utility Reform Network*").) The Court held that "uncorroborated hearsay evidence does not constitute substantial evidence to support an

administrative agency's finding of fact." (*Id.* at 949.) The Commission had conducted evidentiary hearings and admitted a declaration supporting the need underlying PG&E's request to acquire a gas-fired power plant. (*Id.* at 952–953.) The declarant, however, did not testify at the hearing and his core assertion was not corroborated by other evidence admitted at the evidentiary hearing. (*Id.* at 959, 962.) The Court concluded that the Commission could not base a finding of fact solely on hearsay evidence where the truth of the extra-record statement was disputed. (*Id.* at 959.) The Court also reviewed other material advanced by PG&E and the Commission as corroborative of the declaration but the Court found none to be competent, noting that the material was either unsworn, itself hearsay, or irrelevant to the issue addressed in the declaration at issue. (*Id.* at 962–966.)

The Resolution and Rehearing Decision point to no concrete, substantial, or corroborated evidence supporting Energy Division's theory of cost-shift causation, articulated in Findings of Fact 9 through 12, that meets the test stated in *Utility Reform Network*; they should therefore be set aside. (Cal. Pub. Util. Code, §§ 1757(a)(4), 1758(a)–(b).)

VI.

CONCLUSION

For the foregoing reasons, Resolution E-5258 and Decision 23-08-052 do not meet the statutory requirements for a defensible or sound Commission order and they must therefore be set aside.

DATED: October 5, 2023 DOWNEY BRAND LLP

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CERTIFICATE OF COMPLIANCE PURSUANT TO CALIFORNIA RULES OF COURT RULE 8.204(c)(1)

Pursuant to California Rules of Court Rule 8.204, subdivision (c)(1), I certify that according to Microsoft Word the attached brief is proportionally spaced, has a typeface of 13 points and contains 13,994 words.

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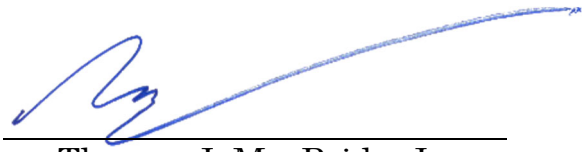
By: 

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