IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

CALIFORNIANS FOR GREEN NUCLEAR POWER, Petitioner, v. PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, Respondent.	Court of Appeal No. B293420 Petition for Writ of Review of California Public Utilities Commission Decisions 18-01-022 and 18-09-052

ANSWER OF REAL PARTIES IN INTEREST IN OPPOSITION TO PETITION FOR WRIT OF REVIEW

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November 28, 2018

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Pursuant to rule 8.208, subdivision (b)(2), of the California Rules of Court, Pacific Gas and Electric Company, a Real Party in Interest, is a subsidiary of PG&E Corporation. PG&E Corporation has a 10 percent or greater ownership interest in in Pacific Gas and Electric Company.

In addition, the following additional Real Parties in Interest, likewise have an interest in the outcome of this case:

Friends of the Earth

Natural Resources Defense Council

Coalition of California Utility Employees

IBEW Local 1245

Pacific Gas and Electric Company will file a supplemental certificate as required by rule 8.208, subdivision (f) if necessitated by any changed or additional information.

Dated: November 28, 2018

/s/ *Frank R. Lindh*
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Attorney for Real Parties in Interest

Friends of the Earth,
Pacific Gas and Electric Company,
Natural Resources Defense Council, Coalition of California Utility Employees, and
IBEW Local 1245

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CALIFORNIANS FOR GREEN NUCLEAR POWER, Petitioner, v. PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, Respondent.	Court of Appeal No. B293420 Petition for Writ of Review of California Public Utilities Commission Decisions 18-01-022 and 18-09-052

Pursuant to rule 8.496(b) of the California Rules of Court, Real Parties in Interest Friends of the Earth, Pacific Gas and Electric Company ("PG&E"), Natural Resources Defense Council, Coalition of California Utility Employees, and IBEW Local 1245 (collectively, the "Joint Parties") respectfully submit this Answer in Opposition to the Petition for Writ of Review of Californians for Green Nuclear Power ("CGNP").

STATEMENT OF THE CASE

The Joint Parties were signatories to an historic, arms-length settlement in June 2016, known as the "Joint Proposal," to resolve the future of the Diablo Canyon Power Plant ("Diablo Canyon"), California's last remaining operational nuclear generating station. In the proceedings below, the Joint Proposal was presented to the respondent Public Utilities Commission ("Commission") for approval.

The Commission approved the Joint Proposal in part, but not in its entirety. In the first of its two decisions below (Decision ("D.") 18-01-022), the Commission authorized PG&E to retire the two generating units at Diablo Canyon at the end of their current operating licenses in 2024-2025, as provided in the Joint Proposal. While expressing an intent that no increase in greenhouse gas ("GHG") emissions be allowed to occur as a consequence of retiring the Diablo Canyon generating units, the Commission rejected a proposal to for implementation of new energy efficiency programs, and ruled that all decisions regarding

replacement resources be deferred and taken up in an industry-wide rulemaking proceeding known as the Integrated Resource Plan ("IRP") proceeding (Rulemaking ("R.") 16-02-007). The Commission also declined to approve certain other provisions of the Joint Proposal governing the transition, namely, a community impact mitigation program and an employee retention program for Diablo Canyon workers (which the Commission funded only in part).

Subsequent to the issuance of the underlying Commission decisions, the Legislature took the matter into its own hands, and adopted Senate Bill ("S.B.") 1090,[1] ***legislation that endorsed the Joint Proposal***, including requiring the Commission to approve aspects the Commission had rejected. Governor Brown signed the bill on September 19, 2018.

In these circumstances, we respectfully deny that the requested writ should issue, for two reasons.

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[1] Senate Bill No. 1090 (Monning), Diablo Canyon Power Plant (approved by the Governor on September 19, 2018; chaptered by the Secretary of State, Chapter 561, Statutes of 2018, on September 19, 2018.

First, the issues CGNP seeks to raise before this Court are rendered moot because of the enactment of S.B. 1090. The Commission does not have discretion under the law to change its findings approving the retirement of Diablo Canyon. Thus, there is no judicial remedy available to CGNP. The case is moot.

Second, even on their merits, the claims of legal error asserted by CGNP are easily refuted.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

This case comes before the Court on review of decisions issued by the Commission concerning the Diablo Canyon nuclear power plant. In the proceedings below, the undersigned Joint Parties presented the Commission with a plan, known as the Joint Proposal, to retire the generating units at Diablo Canyon in a phased, orderly manner, and to replace its output with GHG-free resources.

A. The June 2016 "Joint Proposal"

The Joint Proposal was a landmark agreement involving parties with a long history of adversity concerning the Diablo Canyon nuclear plant. The parties included PG&E (the plant's owner and operator), labor unions representing the plant's workers, and environmental and community groups. In the Joint Proposal, the parties laid their differences aside, and agreed on a plan for the orderly retirement of the generating units at Diablo Canyon.

Under the Joint Proposal, PG&E agreed to suspend its efforts to renew the operating licensees for the two generators, and to retire them at the end of their current operating licensees in 2024-2025. The parties also agreed on a package of transition measures, including a community impact mitigation program and an employee retention and retraining program for the Diablo Canyon workers. Finally, the Joint Proposal adopted the guiding principle that no increase in GHG emissions be allowed to occur as a consequence of the plant's retirement, and that a program be

instituted by the Commission to develop GHG-free replacement resources.

B. The Commission Proceedings

In the proceedings below, PG&E presented the Joint Proposal to the Commission for approval. This was done by means of an application submitted by PG&E (Application No. ("A.") 16-08-006), which the other members of the Joint Parties group supported.

The Commission initiated formal proceedings, including discovery and evidentiary hearings before an administrative law judge, to consider PG&E's application. Numerous parties, including Petitioner CGNP, were afforded the opportunity to intervene, participate and present their views to the Commission.

With the support of the other signatories to the Joint Proposal, PG&E asked the Commission to approve the Joint Proposal without modification. The application met with opposition from several constituencies. Consumer advocates protested PG&E's proposal to recover the costs it had incurred

prior to June 2016 in seeking to relicense the generators at Diablo Canyon, as well as the costs of the community impact mitigation and employee retention and retraining programs. CGNP, the sole party favoring continued operation of Diablo Canyon beyond its current operating licenses, opposed the proposed retirement. Other participants, in contrast, sought an immediate closure rather than the proposed gradual retirement of the generating units in 2024-2025.

C. Settlement Increasing The Funding Level For The Community Impacts Mitigation Program

In the course of the Commission proceedings, PG&E and its fellow Joint Parties reached a settlement with local government authorities and school districts in San Luis Obispo County, where the Diablo Canyon plant is located. The settlement concerned the proposed community impacts mitigation program, which was designed to ease the burden the community would suffer from diminished property tax revenues once the generating units at Diablo Canyon were retired.

The settlement provided an increase in the budget for the community program, from $49.5 million to $85 million. The modified proposal was presented to the Commission for approval.

D. GHG-Free Replacement Resources

An important and innovative aspect of the Joint Proposal was its commitment to replace the output of the Diablo Canyon generating units with GHG-free resources, to avoid an increase in GHG emissions as a consequence of the units' retirement. As initially executed in June 2016, the Joint Proposal included three proposed "tranches" of replacement resources for immediate approval by the Commission, while deferring most of the replacement procurement issues to the broader IRP proceeding.

After protests and testimony by other parties in opposition to the three-tranche procurement proposal were submitted, in March 2017 the Joint Parties agreed to a revised approach, which was memorialized in a "First Amendment" to the Joint Proposal.

Under the First Amendment to the Joint Proposal, only one of the original three tranches – a proposal for a package of energy efficiency resources, referred to as "Tranche 1" – was left in play in the Diablo Canyon docket. It was proposed that all other issues regarding replacement procurement be deferred to the IRP proceeding.

Notwithstanding this First Amendment, the Joint Parties continued to advocate that the Commission adopt a binding policy decision that no increase in GHG emissions be allowed to occur as a consequence of retiring the Diablo Canyon generating units. They urged that such a policy, in turn, be used guide the decision-making process in the IRP proceeding with respect to the fleet of resources needed to replace the output of the Diablo Canyon generating units.

Thus, the goal of avoiding any increase in GHG emissions remained unchanged. Also unchanged was the Joint Proposal's recognition that the bulk of the replacement resources were best handled in the IRP proceeding. The only difference

was that the Joint Parties agreed to withdraw their request for immediate Commission approval of two of the original three proposed tranches of replacement resources. The sole tranche remaining for immediate consideration by the Commission, and not deferred to the IRP proceeding, was the so-called Tranche 1 energy efficiency proposal.

E. Commission Decision 18-01-022

In the principal decision CGNP seeks to challenge in this Court (D.18-01-022), the Commission approved the Joint Proposal in part, but not in its entirety as the Joint Parties had requested.

First, the Commission found that retiring the Diablo Canyon generating units at the end of the current operating licenses in 2024-2025, as proposed in the Joint Proposal, was the most cost-effective solution for PG&E's customers, and on this basis the Commission approved the proposed retirement.[2] The Commission analyzed the opposing testimony and arguments of

[2] D.18-01-022, pp. 8-10.

CGNP in favor of keeping the generators operating beyond their license terms, but was not persuaded and did not adopt CGNP's proposal.[3] Likewise, the Commission did not adopt a proposal by other parties calling for an immediate shut-down of the plant.[4]

Second, with respect to GHG emissions, the Commission expressed a general intent that no increase in GNG emissions be allowed to occur as a consequence of retiring the Diablo Canyon generating units, as follows: "It is the intent of the Commission to avoid any increase in greenhouse gas emissions resulting from the closure of Diablo Canyon."[5]

Third, the Commission ordered that questions regarding replacement resources be considered in the IRP proceeding.[6] The Commission also declined to approve the Tranche 1 energy efficiency procurement called for in the Joint Proposal.[7] The Commission found:

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3 *Id.*, pp. 11-13.
4 *Id.*, pp. 13-15.
5 *Id.*, pp. 21-22 (underscoring in original).
6 *Id.*, pp. 19-21.
7 *Id.*, pp. 1-13.

> Overall, practical and policy reasons indicate that it is better for potential replacement procurement issues to be addressed in the Commission's IRP process, rather than addressing it in a more piecemeal fashion in this proceeding. Accordingly, the need for and authorization of any replacement procurement should be addressed in the IRP proceeding.[8]

Fourth, the Commission approved, in concept, the Joint Proposal's program for the employees at Diablo Canyon, but at a significantly reduced funding level.[9] While an employee retraining program was fully funded at the proposed amount of $11.3 million, the budget for employee retention payments was cut by the Commission from $352.1 million to $211.3 million.[10]

Fifth, the Commission declined to approve the community impacts mitigation program, finding that it lacked legislative authorization to do so.[11]

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8 *Id.*, p. 22. In a footnote, the Commission added: "Or in another proceeding as determined in the IRP proceeding."

9 *Id.*, pp. 23-30.

10 See *id.* and p. 60, Ordering Paragraphs 7 and 9.

11 *Id.*, pp. 30-41.

Finally, the Commission approved a settlement between PG&E and ratepayer groups regarding recovery of the costs PG&E incurred for relicensing the generating units at Diablo Canyon (the effort that was suspended when the Joint Proposal was executed in June 2016).[12]

In a subsequent decision issued on October 1, 2018, the Commission denied a rehearing request submitted by CGNP.[13]

F. Enactment of S.B. 1090

In S.B. 1090, signed by Governor Brown on September 19, 2018, the Legislature overruled the Commission's decision to pick apart the Joint Proposal and approve only portions of it.[14] The legislation made a formal finding that:

> The joint proposal entered into between PG&E and interested parties governing the retirement of the Diablo Canyon Units 1 and 2 powerplant at the expiration of its current

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12 *Id.*, pp. 41-45.

13 D.18-09-052.

14 S.B. 1090 added a new Section 712.7 to the Public Utilities Code. The full text of Section 712.7 is included in Appendix 1 to this brief.

> operation license period, the replacement of electrical generation capacity lost due to the closure with a portfolio of greenhouse-gas-free resources, the retention of highly skilled nuclear powerplant workers prior to the retirement, and the mitigation of the impacts of the closure on local communities, as modified by the community impact mitigation settlement, is in the interest of utility customers.

(S.B. 1090, Section 1.)

The legislation required that additional aspects of the Joint Proposal be approved, including full funding of the community impacts mitigation program and the employee program.[15] It also expressly required that the Commission in the IRP proceeding "ensure that integrated resource plans are designed to avoid any increase in emissions of greenhouse gases as a result of the retirement of the Diablo Canyon Units 1 and 2 powerplant."[16]

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[15] The only aspects of the Commission's decision left undisturbed by the legislation were (1) the decision to authorize retirement of the Diablo Canyon generating units at the end of their current operating licenses in 2024-2025 (including the associated ratemaking to recover plant costs), and (2) the decision to not approve the Tranche 1 energy efficiency proposal.

[16] Pub. Util. Code § 712.7(b) (added by S.B. 1090).

RELATED CASE

In a case captioned as *World Business Academy v. California State Lands Commission*, Case No. B284300, in Division Four of the Second Appellate District, this Court denied an appeal from a State Lands Commission decision granting a lease extension for the cooling system equipment at the Diablo Canyon power plant. The lease extension was sought by PG&E and supported by the other Joint Parties under the terms of the Joint Proposal described above.

PARTIES

PG&E was the applicant in the proceedings before the Commission. Each of the other undersigned Joint Parties (all of whom were signatories to the Joint Proposal) was granted party status in the Commission proceedings. Accordingly, all of the undersigned Joint Parties qualify as real parties in interest under rule 8.496 (a)(2) of the California Rules of Court.

ISSUES PRESENTED

The issues before this Court are as follows:

(1) Has the Petition been rendered moot as a result of the enactment of S.B. 1090, in which the Legislature overrode the Commission decisions on review and mandated approval of the Joint Proposal, through a statutory amendment?

Answer: Yes. S.B. 1090 renders the Petition moot. The legislation overrides the Commission action in D.18-01-022, which approved only some aspects of the Joint Proposal but not others, and instead requires implementation of the Joint Proposal, including the decision to retire Diablo Canyon at the expiration of its operating licenses in 2024 for Unit 1 and 2025 for Unit 2. Under S.B. 1090, the Commission does not have discretion under to change its findings approving the retirement of the Diablo Canyon generating units. Thus, the remedy CGNP seeks from this Court, namely, vacating and remanding the Commission's decisions, is not available. The case, therefore, is moot.

(2) Even setting aside the problem of mootness (which CGNP failed to address in its Petition), has CGNP made

the requisite showing that the Commission committed legal error in the decisions on review?

Answer: No. CGNP has not shown legal error.

More particularly:

(A) Did the Commission act in accordance with its procedural rules, and the due process rights of CGNP, with regard to the sequencing of testimony about replacement resources?

Answer: Yes, the Commission's actions were entirely proper and routine, and CGNP suffered no prejudice of any kind. This is fully explained in the Commission's rehearing order (D.18-09-052).

(B) Was it proper for the Commission to decline to await the issuance of Coastal Development Permit by the California Coastal Commission before authorizing PG&E to retire the generating units at Diablo Canyon?

Answer: Yes, since no "development" was authorized, the Commission was under no obligation to await the issuance of a Coastal Development Permit. Again, this is fully explained in the Commission's rehearing order (D.18-09-052).

(C) Was it reasonable for the Commission to defer to the IRP proceeding the actions needed to carry out the stated policy goal of not allowing any increase in GHG emissions as a consequence of retiring the Diablo Canyon generating units?

Answer: Yes, having established in its decision here (D.18-01-022) the policy goal of allowing zero increase in GHG emissions as a result of retiring the Diablo Canyon generating units, it was both reasonable and necessary as a practical matter for the Commission to defer

to the IRP proceeding the specific actions that will be needed to carry out this policy directive. This, too, was explained in the Commission's rehearing order (D.18-09-052).

STANDARD OF REVIEW

With respect to the threshold question of mootness, the standard in California's appellate courts is whether a dispositive ruling by the court, be it a reversal or an affirmance, will have any effect on the parties' substantive rights. If not, the case is moot. *Lincoln Place Tenants Ass'n v. City of Los Angeles*, 155 Cal. App. 4th 425, 454 (2007). The courts have a duty to decide actual controversies, and a concomitant duty to avoid rendering opinions on moot questions. As the California Supreme Court has held, the proper disposition of a case that has become moot is dismissal. *Paul v. Milk Depots, Inc.*, 62 Cal.2d 129, 132 (1964).

Turning to the merits – assuming for discussion purposes that the case is *not* moot – the standard of review for

this case is prescribed by Public Utilities Code section 1757, subdivision (a). Pertinent here are section 1757, subdivision (a)(2) (failure to proceed in the manner required by law), section 1757, subdivision (a)(3) (inadequate findings to support the decision), section 1757, subdivision (a)(5) (abuse of discretion), and section 1757, subdivision (a)(6) (violation of petitioner's constitutional rights).

Review of a Commission decision in this Court is discretionary with the Court, and should be denied "if the petitioning party fails to present a convincing argument for annulment of the PUC's decision." *Pacific Bell v. Public Utilities Com.,* 79 Cal.App.4th 269 at pp. 272, 276-280.

ARGUMENT

By enacting S.B. 1090, the Legislature overruled the Commission's decision to pick apart the Joint Proposal and approve only portions of it. Instead, Section 712 of the Public Utilities Code, which was added by S.B. 1090, requires approval of the remaining aspects of the Joint Proposal. This action by the

Legislature renders moot the Petition filed with this Court by CGNP. But even if CGNP's claims of legal error were to be considered by the Court on their merits, it is clear that CGNP has not demonstrated legal error. The writ should not issue.

A. S.B. 1090 Has Rendered The Petition Moot

The passage of S.B. 1090 by the Legislature, and its signature by the Governor, leaves this Court with nothing to decide. CGNP seeks review of a Commission decision that has been validated and modified by subsequent legislation. The remedy requested in the Petition – vacating and remanding the Commission decision – is unavailable because of the supervening legislative enactment. Under S.B. 1090, the Commission does not have discretion to change its findings approving the retirement of the Diablo Canyon generating units.

Because the relief sought by Petitioner CGNP is unavailable, the case has become moot and the Petition, accordingly, should be dismissed. *Paul v. Milk Depots, Inc.*, *supra*, 62 Cal.2d at 132.

B. The Commission Acted In Accordance With The Law

Even if CGNP's various challenges to the Commission's decisions below were to be considered by the Court on their merits, it is clear the requested writ should not issue.

The Commission in its rehearing order (D.18-09-052) considered and addressed each of the three points of legal error asserted by CGNP. The Commission also refuted these assertions of error in its Answer to the Petition in this Court, filed November 27, 2018. We need not duplicate here the Commission's persuasive defense against CGNP's allegations of error. It is clear CGNP has not sustained its burden of persuading this Court to grant the requested writ.

CONCLUSION

For the foregoing reasons, this case is moot and the Petition accordingly should be dismissed. In the alternative, the writ should be denied on the ground Petitioner has failed to demonstrate legal error.

Respectfully submitted,

/s/ *Frank R. Lindh*
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Attorney for Real Parties in Interest

Friends of the Earth,
Pacific Gas and Electric Company,
Natural Resources Defense Council, Coalition of California Utility Employees, and
IBEW Local 1245

Dated: November 28, 2018

APPENDIX 1: TEXT OF S.B. 1090, SECTION 2

Section 2 of California Senate Bill 1090 enacted a new Section 712.7 of the Public Utilities Code, as follows:

712.7

(a) The commission shall approve both of the following:

(1) The full funding for the community impact mitigation settlement proposed in Application 16-08-006.

(2) The full funding for the employee retention program proposed in Application 16-08-006.

(b) The commission shall ensure that integrated resource plans are designed to avoid any increase in emissions of greenhouse gases as a result of the retirement of the Diablo Canyon Units 1 and 2 powerplant.

(c) The commission shall establish an expedited advice letter process for the approval and implementation pursuant to subdivision (a) of the community impact mitigation settlement and the employee retention program.

CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court, rule 8.204, subdivision (c)(1), I certify that this Answer in Opposition to the Petition for Review contains 4,403 words, calculated using the "word count" function of the Microsoft Word program.

Dated: November 28, 2018

/s/ *Frank R. Lindh*
Frank R. Lindh (157986)

PROOF OF SERVICE

I hereby certify that I am a citizen of the United States and over the age of eighteen years.

My business address is 110 Taylor Street, San Rafael, California.

On November 28, 2018, I electronically filed the attached *Answer of Real Parties in Interest in Opposition to Petition for Writ of Review* using the TrueFiling system which served all the parties to this action.

In addition, this document was emailed to the following two parties not included on the TrueFiling distribution list:

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

Executed on November 28, 2018.

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