IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT

SIERRA CLUB,

Petitioner

v.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA,

Respondent.

On Review of the Public Utilities Commission
Decision No. 16-12-036, rehearing denied by Decision No. 17-06-031

PETITION FOR WRIT OF REVIEW (APPENDIX OF EXHIBITS FILED CONCURRENTLY/SEPARATELY)

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CERTIFICATE OF INTERESTED ENTITIES OR PARTIES

(Cal. Rules of Court, Rule 8.208)

Petitioner Sierra Club is a California non-profit corporation. No entity or person has an ownership interest in Sierra Club, and Sierra Club knows of no person or entity with a financial or other interest in the outcome of this proceeding that must be disclosed under Rule 8.208 of the California Rules of Court.

Dated: July 31, 2017

Respectfully Submitted,

By /s/ Sara Gersen
Sara Gersen

Attorney for Petitioner
Sierra Club

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PETITION FOR WRIT OF REVIEW

By this verified petition, Petitioner Sierra Club alleges:

INTRODUCTION AND STATEMENT OF THE CASE

This case presents a straightforward question of statutory interpretation. In 2013, the Legislature added Public Utilities Code Section 769 to require the California Public Utilities Commission ("PUC") to approve, or modify and approve, distribution resource plans prepared by each investor-owned utility that would identify optimal locations for distributed resources and propose mechanisms for their deployment.[1] That statute provides that for purposes of Section 769, "'distributed resources' means distributed renewable generation resources, energy efficiency, electric vehicles, and demand response technologies." (Pub. Util. Code § 769, subd. (a).) The only type of generation resources included in this definition are renewable. Yet despite the Legislature's explicit limitation, the PUC determined that the categories of resources eligible for deployment under Section 769 could also include distributed fossil-fueled generation. The PUC's expansion of Section 769 to encompass fossil-fueled generation violates the plain language of the statute and multiple cannons of statutory interpretation, has no policy justification that remotely merits overriding the unambiguous terms of Section 769, and must be rejected.

[1] All references to code sections are to the California Public Utilities Code unless otherwise noted.

In its Order Denying Rehearing ("Rehearing Decision"), the PUC makes a series of scattershot assertions purporting to support its discretion to expand the statutory definition of "distributed resources" to include distributed fossil-fueled generation. However, agencies are not afforded deference to disregard a statute's plain meaning. It is well-established that statutory definitions like Section 769(a), which employ the term "means" rather than "includes," are restrictive and cannot be expanded. Similarly, because Section 769(a) specifically references distributed renewable generation, the principle of *expressio unius est exclusio alterius* and the rule against surplusage militate against the PUC's determination that distributed fossil-fueled generation can be legitimately construed as falling within Section 769(a). The text of Section 769(a) is unambiguous and the PUC's misguided effort at expanding its meaning to include fossil-fueled generation exceeds its authority.

The PUC's claim that statutory purpose and policy considerations allow it to deviate from the clear text of Section 769(a) is equally flawed. This Court need not engage in inquiries into statutory purpose and policy where, as here, Section 769(a) is unambiguous. In any event, nothing in Section 769 can be read to promote the deployment of fossil-fueled generation. Indeed, a statute that specifically limits opportunities for distributed generation to renewable sources is entirely consistent with

California's increasing focus on decarbonization and achievement of aggressive reductions in greenhouse gas pollution.

Finally, the PUC's attempt to evade judicial review by asserting that Sierra Club is collaterally barred from challenging the PUC's interpretation of Section 769 because an earlier decision in this proceeding purportedly determined resource eligibility does not withstand scrutiny. Not only does the PUC's argument rely on inapposite statutory support, but courts have repeatedly found that prior unchallenged acts do not create a license for the PUC to continue an unlawful practice. Even if they could, the issue of resource eligibility had not been decided in a previous PUC decision. The earlier decision cited by the PUC did not address resource solicitations and nowhere states that fossil-fueled generation qualifies as a distributed resource under Section 769.

Sierra Club respectfully requests this Court grants its Petition for Writ of Review and find the PUC exceeded its authority and failed to proceed in the manner required by law when it determined the definition of "distributed resources" in Section 769(a) includes distributed fossil-fueled generation.

PETITION

A. JURISDICTION AND PARTIES

1. This Court has original jurisdiction to review the decisions of the PUC under Section 1756, subdivision (a) of the California Public Utilities

Code. That statute authorizes a party to petition the Court of Appeal for a writ of review within 30 days after the PUC issues a decision on rehearing.

2. On December 22, 2016, the PUC issued Decision 16-12-036, *Decision Addressing Competitive Solicitation Framework and Utility Regulatory Incentive Pilot* ("Incentive Pilot Decision" or D.16-12-036), in Rulemaking 14-10-003, the Integrated Distributed Energy Resources proceeding ("IDER proceeding"). (3 PA 19 at 000584-680.)[2] Sierra Club was an intervening party in the IDER Proceeding and timely filed its Application for Rehearing of the Incentive Pilot Decision on January 23, 2017 pursuant to Section 1731(b)(1). (3 PA 20 at 000681-693.) On June 30, 2017, the PUC issued Decision 17-06-031, *Order Denying Rehearing of Decision (D.) 16-12-036* ("Rehearing Decision") (3 PA 22 at 000698-710.) This Petition is timely filed pursuant to Section 1756(a) and California Rules of Court Rule 1.10.

3. Petitioner Sierra Club is entitled to a writ directing the PUC to annul the Incentive Pilot Decision insofar as it allows distributed fossil-fueled generation to participate in programs carried out under Section 769 and a declaration from this Court that distributed fossil-fueled generation is not within the meaning of Section 769(a) because the PUC has exceeded its

[2] Citations to Petitioner's Appendix of Exhibits in Support of Petition for Writ of Review are noted as Volume PA Tab at Bates. Thus 3 PA 19 at 584 is Volume 3, Tab 19, Bates 000584.

authority and failed to proceed in the manner required by law when it expanded the definition of distributed resources under Section 769(a).

4. This Court's review on the merits is needed to prevent the PUC from unlawfully expanding a distributed resources procurement program limited by statute to distributed renewable generation and other non-fossil resources to include distributed fossil-fueled generation. Section 769 of the Public Utilities Code was enacted in 2013 to increase deployment of distributed resources by requiring California's investor-owned utilities (hereinafter "utilities") to integrate cost-effective distributed resources into distribution system planning through distribution resource plans that would be subject to PUC modification and approval.[3] (See Assem. Bill No. 327 (2013 Reg. Sess.), § 8.) Although Section 769's definition of "distributed resources" eligible under this program excludes fossil-fueled generation, the PUC disregarded the statute's plain meaning and interpreted Section 769 to allow fossil-fueled resources to participate. The PUC's defiance of

[3] The electric system is divided between the transmission and distribution systems. The transmission system is overseen by the California Independent System Operator and carries electricity at high voltages that is produced by larger resources with significant operating capacity such as gas-fired power plants or utility-scale renewables. The distribution system is operated by the utilities in their respective service territories. The distribution system includes poles, wires, and equipment that transfers energy from one set of wires to another, and begins once electricity is delivered to substations that lower voltage from electricity delivered from the transmission system. Resources that connect to the distribution system to provide energy and grid services are smaller in scale and more numerous and decentralized as compared to transmission-level assets.

the limits of clear statutory direction is a matter of significant public importance. California's climate and air quality goals are undermined when a statute aimed at development of renewable generation and other zero-emissions resources is co-opted to enable additional procurement of fossil-fueled generation.

5. By statute, a writ petition to the Court of Appeal or the Supreme Court for writ of review is the sole means for judicial review of a PUC decision. (*Consumers Lobby Against Monopolies v. P.U.C.* (1979) 25 Cal.3d 891, 901 [citing Pub. Util. Code § 1756].) As in this case, when a petition for review is the only means of judicial review, a court may not summarily deny the petition "on policy grounds unrelated to [its] procedural or substantive merits." (*Id*. at 901, fn. 3.) An "apparently meritorious writ petition, timely presented in a formally and procedurally sufficient manner" may not be denied "merely because, for example … the court considers the case less worth of its attention than other matters." (*Utility Reform Network v. P.U.C.* (2014) 223 Cal.App.4th 945, 957-958.)

6. Petitioner Sierra Club is a nonprofit corporation formed and existing under the laws of the State of California with over 800,000 members nationwide and over 180,000 members living in California. Sierra Club's organizational mission is to advocate for the responsible use of the earth's ecosystem and resources. That mission includes reducing greenhouse gas pollution by increasing deployment of renewable generation and avoiding

new investments in fossil-fueled generation. Many of Sierra Club's California members take electrical service from the utilities under the PUC's jurisdiction. These members are affected by the potential for increased air and greenhouse gas pollution resulting from the PUC redefining a program intended for non-fossil resources to also allow for deployment of fossil-fueled generation on their utilities' distribution grids. The PUC has recognized that Sierra Club represents the environmental interests of residential customers before the PUC.

7. Respondent is the California Public Utilities Commission, the administrative agency charged with regulating public utilities under Article XII, Section 6 and related provisions of the California Constitution, and under the Public Utilities Act.

B. VENUE

8. Pursuant to Public Utilities Code section 1756, subdivision (d), venue lies in the First Appellate District because Petitioner Sierra Club's principle place of business is San Francisco County, which is within the First Appellate District.

C. EXHIBITS

9. Petitioner's exhibits are included in the Appendices of Exhibits filed concurrently with this Petition for Review.

D. PROCEEDINGS BEFORE THE PUC

10. The PUC is responsible for regulating utilities that operate electric distribution systems in California. Public Utilities Code Section 769 requires the PUC to approve, or modify and approve, each utility's plan to identify optimal locations for distributed resources and propose mechanisms for their deployment. Section 769(a) states that "'distributed resources' means distributed renewable generation resources, energy efficiency, energy storage, electric vehicles, and demand response technologies."[4] (Pub. Util. Code. § 769, subd. (a).)

11. Implementation of Section 769 is occurring in two separate PUC proceedings. The Integrated Distributed Energy Resources ("IDER") proceeding was originally instituted to coordinate the utilities' various efforts to manage demand for electricity. However, the PUC expanded the scope of the proceeding to include implementation of Sections 769(b)(2) and 769(b)(3). (1 PA 3 at 000070). These provisions require the utilities to do the following in their distribution resources plans:

> (2) Propose or identify standard tariffs, contracts, or other mechanisms for the deployment of cost-effective distributed resources that satisfy distribution planning objectives.

[4] The PUC and parties to the proceeding sometimes use the term "distributed energy resources" rather than distributed resources but there is no substantive distinction between these terms. (*See* 3 PA 22 at 000700, fn. 11 ["[t]he terms 'distributed energy resources' and 'distributed resources' are used interchangeably."].)

(3) Propose cost-effective methods of effectively coordinating existing commission-approved programs, incentives, and tariffs to maximize the locational benefits and minimize the incremental costs of distributed resources.

12. The other proceeding to implement Section 769 is Rulemaking 14-08-013, the Distribution Resources Plan ("DRP") proceeding. The PUC explained the relationship between the IDER and DRP proceedings in its decision expanding the scope of the IDER proceeding, stating that in the DRP proceeding, "the Commission will delineate the distribution system needs and how those needs can be optimally provided by distribution energy resources." (1 PA 3 at 000072.) Meanwhile, the IDER proceeding "should create the framework to determine how the resources, which are needed to fill the required characteristics and values developed in [the DRP proceeding] could be sourced." (*Id.* at 000073.) In other words, the focus of the DRP proceeding is on understanding the potential benefits of distributed resources, while the focus of the IDER proceeding is on deploying distributed resources to deliver those benefits.

13. In the decision that expanded the scope of the IDER proceeding to include implementing Section 769, the PUC stated in a footnote that the IDER and DRP proceedings use the same categories of distributed resources. (1 PA 3 at 000064, n.1 [Decision 15-09-022].)

14. Sierra Club has been a party to the IDER proceeding since 2015. Sierra Club is not a party to the DRP proceeding.

15. In the spring of 2016, the PUC began implementing Section 769 in the IDER proceeding through two coordinated sets of activity: 1) the development of a competitive solicitation framework for utility procurement of distributed resources; and 2) the development of a pilot program that would give utilities an incentive to deploy distributed resources.

16. On March 24, 2016, the Administrative Law Judge ("ALJ") issued a *Ruling Establishing a Working Group to Develop the Competitive Solicitation Framework*. (1 PA 4 at 000132-136.) Parties to the IDER proceeding were encouraged to participate in the working group, which was tasked with identifying areas of consensus and dispute in the development of valuation methodologies and solicitation rules for the procurement of distributed resources that would target the reliability needs identified in the DRP proceeding. (*Id.* at 000133-134.)

17. The ALJ Ruling did not specifically order the working group to develop recommendations regarding what resources would be eligible to participate in the solicitation framework. Nonetheless, one issue that arose in the working group was whether fossil-fueled generation resources would be eligible to participate in a competitive distributed resource solicitation. Sierra Club was a member of the working group and argued that fossil-

fueled resources are prohibited from participation because Section 769(a) explicitly limits eligible resources to distributed renewable generation, energy efficiency, energy storage, electric vehicles, and demand response technologies. (2 PA 10 at 000262.) However, other participants referred to a guidance document issued in the DRP proceeding to support their position that fossil-fired generation resources are eligible to participate in a distributed resources solicitation under Section 769. (*Id.*)

18. The guidance document referenced by working group members supportive of fossil-fueled generation was included as an attachment to a February 6, 2015 Assigned Commissioner's Ruling in the DRP proceeding and titled *Guidance for Public Utilities Code Section 769 – Distribution Resource Planning* ("Guidance Document"). Assigned Commissioner Rulings are issued by a single commissioner and not approved by the entire Commission. The Guidance Document encouraged utilities to include certain fossil-fueled generation resources in their distribution resource plans, even though the ruling acknowledged those resources are outside the statutory definition of "distributed resources." (1 PA 2 at 000059-60.) The Guidance Document lists categories of resources that utilities should consider in developing their plans. The list includes stationary fuel cells, combined heat and power ("CHP"), and stationary internal combustion engine ("I-C engine") among other distributed generation technologies,

marking them with an asterisk. The Guidance Document provides the following explanation for including these asterisked resources:

> These three categories of [distributed generation] have the potential to be fueled by renewables, but to date most deployments have been natural gas fueled. Given that the statute defines distributed resources as having to be "renewable," the DRPs must first focus on the analysis of Fuel Cells, CHP and Internal Combustion engines that are fueled by renewables. That said, natural gas-fueled stationary Fuel Cells, CHP and stationary I-C engines have the potential to reduce GHG emissions, and so the utilities are encouraged to expand the scope of their DRPs to include any distributed generation that can produce GHG emissions reductions over its lifecycle.

(*Id.*) The Guidance Document does not attempt to reconcile the text of Section 769 with the consideration of natural gas-fueled resources that potentially reduce greenhouse gas pollution over their lifecycle.

19. The IDER working group's final report did not rely on the guidance document from the DRP proceeding and deferred a decision on the eligibility of fossil-fueled resources to the full Commission. The report summarized the working group discussions as follows:

> The question of whether fossil-fueled distributed generation resources are eligible to participate in a distributed resource solicitation was discussed in the Working Group. Parties supporting fossil fuel eligibility pointed to a February 5, 2015 Assigned Commissioner Ruling (ACR) in the DRP proceeding indicating fossil-fueled distributed generation resources could be eligible to participate in a distributed resource solicitation. Parties opposing the eligibility of fossil-fueled distributed generation resources noted that Public Utilities Code Section 769, the enabling legislation for distribution resource plans, specifically defines distributed resources as "distributed renewable generation" and therefore

> excludes conventional distributed generation under well-established principles of statutory interpretation and that the ACR in the DRP proceeding is inconsistent with the unambiguous statutory requirements of Public Utilities Code Section 769. Parties agreed that the issue of eligibility of fossil-fueled distributed generation resources is a legal question beyond the capacity of this Working Group and should be resolved in a decision by the full Commission.

(2 PA 11 at 000356.)

20. In comments on the competitive solicitation working group's final report, Sierra Club and the Natural Resources Defense Council ("NRDC") opposed including fossil-fueled technologies in the solicitations because the authorizing statute prohibits their inclusion. (2 PA 12 at 000439-441.)

21. While the working group process addressed the solicitation framework, a parallel effort to develop an incentive pilot program proceeded within the IDER proceeding. On April 4, 2016, the assigned commissioner in the IDER proceeding began the process of developing a utility incentive pilot program by issuing a *Draft Regulatory Incentives Proposal for Discussion and Comment* ("Regulatory Incentives Proposal"). (1 PA 5 at 000137-152.) The Regulatory Incentives Proposal aimed to give utilities a financial incentive to deploy cost-effective distributed resources that would displace or defer the utilities' investments in traditional distribution infrastructure. The Regulatory Incentives Proposal did not discuss what resources would be eligible to participate in the pilot program.

22. In its comments on the Regulatory Incentives Proposal, the gas-only utility Southern California Gas ("SoCalGas") raised the issue of resource eligibility, arguing that it was "premature to propose such a pilot without considering the inclusion of other technologies." (1 PA 8 at 000192.) SoCalGas urged the PUC to allow natural gas to participate in any distributed resources project "to the extent gas applications can demonstrate that they can play an effective an efficient role in such projects." (*Id.*) In reply, Sierra Club explained yet again that "[d]istributed renewable generation resources are the only generation resources eligible for participation in DRPs and other programs authorized by Section 769" because the statute's "explicit use of 'distributed renewable generation' is clearly intended to exclude fossil-fueled resources." (1 PA 9 at 000199.)

23. Based on stakeholder comment, the assigned commissioner issued a *Revised Proposal for Distributed Energy Resource Incentives* ("Revised Incentive Proposal") on September 1, 2016. (2 PA 13 at 000452-000465.) The Revised Incentive Proposal included an increased financial incentive level and proposed a new advisory group to guide utilities in developing their pilot projects but did not clarify whether fossil-fueled generation resources would be eligible to participate. (*Id.*) The PUC did not address whether distributed fossil-fueled resources could participate in the projects until the Incentive Pilot Decision that is the subject of this petition.

24. Given the continued assertions of certain parties that fossil-fueled resources should be eligible to participate in a distributed resource solicitation despite the clear language of Section 769, the Sierra Club and NRDC asked the PUC through formal comments on the Revised Incentive Proposal to clarify that fossil-fueled generation resources would not be eligible to participate in a pilot program carried out under Section 769's statutory authority. (2 PA 14 at 000472-473.)

25. On November 10, 2016, the PUC issued its proposed *Decision Addressing Competitive Solicitation Framework and Utility Regulatory Incentive Pilot* ("Proposed Incentive Pilot Decision"). (3 PA 16 at 000488-570.) Under the Proposed Incentive Pilot Decision, utilities would use the consensus recommendations of the competitive solicitation framework working group to acquire distributed resources in an incentive pilot. (*Id.* at 000491.) The Proposed Incentive Pilot Decision contained no discussion of resource eligibility.

26. In comments on the Proposed Incentive Pilot Decision, Sierra Club again requested the PUC clarify that fossil-fueled distributed resources are not eligible to participate in the solicitation framework because they do not fall within Section 769(a)'s definition of a "distributed resource." (3 PA 17 at 000574-576.)

27. On December 22, 2016, the Commission issued its Incentive Pilot Decision. The decision acknowledged comments by Sierra Club and

included a new footnote, which states in its entirety: "Decision (D.) 15-09-022 stated that R.14-10-003 would use the same categories of distributed energy resources as those used in R.14-08-013. *See* R.14-08-013 Assigned Commissioner's Ruling, April 6, 2016, Attachment A at 14-15." (3 PA 19 at 000588, fn. 5, 000648.) D.15-09-022 is the decision that expanded the scope of the IDER proceeding to include implementation of Section 769. (See, *supra*, ¶¶ 12-13.) Both the Incentive Pilot Decision and D.15-09-022 merely refer to the Guidance Document in footnotes. (*Ibid.*; 1 PA 3 at 000064, fn. 1.) Neither decision specifically states fossil-fueled resources can participate in a distributed resource solicitation or makes any such determination in their respective Finding of Facts or Conclusions of Law. (See 3 PA 19 at 000588, fn. 5, *id.* at 000649-661; 1 PA 3 at 000064, fn. 1, *id.* at 000087-90.) Despite repeatedly raising the statutory conflict in the course of the proceeding, the Incentive Pilot Decision does not attempt to reconcile the inclusion of fossil-fueled resources with the text of Section 769(a).

28. On January 23, 2017, Sierra Club filed an application for rehearing of the Incentive Pilot Decision. (3 PA 20 at 000681-693.)

29. No party to the IDER proceeding filed a response in opposition to Sierra Club's application for rehearing.

30. NRDC, Environmental Defense Fund, and Clean Coalition filed a joint response supporting Sierra Club's application for rehearing. Their

response "urge[d] the Commission to act quickly to prevent the unlawful participation of fossil-fueled generation resources in the utility regulatory incentive pilot and any other sourcing conducted under the authority of Public Utilities Code Section 769(a)." (3 PA 21 at 000695.)

31. On June 30, 2017, the PUC issued its Rehearing Decision, which denied Sierra Club's application for rehearing in a 4-1 ruling. (3 PA 22 at 000698-710.)

32. The Rehearing Decision marked the first time a PUC decision attempted to reconcile participation of fossil-fueled resources in a distributed resource solicitation with the definition of eligible "distributed resources" under Section 769(a). The PUC justified its expansion of Section 769 to include fossil-fueled generation on the grounds that "[t]he Legislature did not put language in [S]ection 769 that would bar or limit our consideration of natural gas-fueled distributed resources." (*Id.* at 000703.) The PUC further claimed that "the Commission is not always bound by the literal wording of a statute" and that it would be contrary to the purpose of Section 769 to exclude natural gas-fueled resources if doing so would impede policy objectives. (*Id.* at 000704.)

33. The Rehearing Decision also found that Sierra Club's application for rehearing was untimely and barred by sections 1709 and 1731(b) because D.15-09-022 had referenced the Guidance Document in a footnote and

stated that that the DRP and IDER proceedings would use the same categories of resources. (*Id.* at 000702.)

E. IMPORTANCE OF THE ISSUE

34. The PUC plays a critical role in achieving state clean energy and climate objectives.[5] Among its unique duties, the PUC is responsible for implementing Section 769's mandates for deploying distributed resources—a statutorily defined category of resources that excludes fossil-fueled generation. Lawful implementation of Section 769 can create new markets for distributed resources, accelerate their deployment, and modernize the electric grid by making distributed resources a cornerstone of utility planning. The statute makes clear that fossil-fueled generation has no place in these programs. The PUC implements Section 769 and must follow the law by limiting participation to the resources specifically listed in Section 769(a).

[5] Under Executive Order B-30-015, "[a]ll state agencies with jurisdiction over sources of greenhouse gas emissions shall implement measures, pursuant to statutory authority, to achieve reductions of greenhouse gas emissions to meet the 2030 and 2050 greenhouse gas emissions reductions targets." Under Senate Bill 350, the PUC is required to focus energy procurement decisions on reducing greenhouse gas emission by 40 percent below 1990 levels by 2030, including efforts to achieve at least 50 percent renewable energy procurement, doubling of energy efficiency, and promoting transportation electrification. Senate Bill 350 (2015); s*ee also* PUC, Clean Energy Pollution Reduction Act of 2015 (SB 350), http://www.cpuc.ca.gov/sb350/ (last visited July 28, 2017).

35. The PUC unlawfully included fossil generation resources in its first mechanism for deploying distribution resources in the IDER proceeding even though fossil generation falls outside the clear statutory definition of distributed resources. This Incentive Pilot Decision creates an impermissible opening to burden California with more fossil-fueled generation and resulting pollution. The PUC's unlawful interpretation of Section 769(a) would allow fossil fuels to crowd the Legislature's chosen resources out of the program. Moreover, if the PUC's disregard for unambiguous statutory direction goes uncorrected, it will embolden the PUC to routinely defy clear legislative mandates with impunity.

F. ALLEGATION OF ERROR

36. The PUC's Incentive Pilot Decision makes two critical errors. First, the PUC acted in excess of its powers by including non-renewable distributed generation in a competitive solicitation framework and Incentive Pilot Program established under the authority of Section 769. The statute bars those resources from participating and, therefore, the PUC has no authority to make them eligible.

37. Second, the PUC failed to proceed in a manner required by law. In a proceeding with a designated scope of implementing key sections of 769, the PUC was required to comply with the statute's limits on resource eligibility. The PUC's failure to do so is a prejudicial abuse of discretion.

PRAYER FOR RELIEF

WHEREFORE, pursuant to Section 1756(a) of the Public Utilities Code, Petitioner Sierra Club respectfully prays for judgment as follows:

A. That this Court issue a writ of review;

B. That this Court direct the PUC to certify its record in the subject proceeding to this Court;

C. That this Court enter judgment setting aside D.16-12-036 insofar as it allows non-renewable distributed generation to participate in the competitive solicitation framework and utility regulatory incentive pilot;

D. That this Court declare that the only resource types eligible to participate in resource solicitations pursuant to Section 769 are those expressly listed in Section 769(a); and

E. That this Court grant such other, different or further relief as the Court may deem just and proper.

Dated: July 31, 2017

Respectfully submitted,

Sara Gersen (SBN 277563)

By /s/ Sara Gersen
Sara Gersen

Attorney for Petitioner
Sierra Club

VERIFICATION

I, Alison Seel, declare:

I am an attorney duly licensed to practice before the courts of the State of California. I am Associate Attorney for petitioner Sierra Club. I am authorized by petitioner Sierra Club to make this verification on its behalf. I have read the foregoing Petition for Writ of Review and know the contents thereof, and the facts therein stated are true to my own knowledge, except as to those matters 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 July 31, 2017, at Oakland, California.

By: _____
Alison Seel

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR REVIEW

STANDARD OF REVIEW

Any party aggrieved by an order or decision of the PUC may petition for a writ of mandamus or review in the Court of Appeal or Supreme Court. (Pub. Util. Code § 1756, subd. (a).) A writ of review or mandamus in the Court of Appeal or Supreme Court is the exclusive means of judicial review of an order or decision by the Public Utilities Commission. (*Ibid*.) A court ordinarily has no discretion to deny a timely-filed petition for writ of review 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; see also Pub. Util. Code § 1759.)

Public Utilities Code Section 1757 establishes the scope of review in a ratemaking matter such as this one. The Court's review under section 1757(a) is limited to determining whether, *inter alia*, "[t]he commission acted without, or in excess of, its powers or jurisdiction" (Pub. Util. Code § 1757, subd. (a)(1)) and whether "[t]he commission has not proceeded in the manner required by law." (Pub. Util. Code § 1757(a)(2).) An agency fails to "proceed in the manner required by law" if it "prejudicially abuse[s] its discretion." (*Pedro v. City of Los Angeles* (2014) 229 Cal.App.4th 87, 99.) In other words, if an agency has "fail[ed] to comply with required

procedures, appl[ied] an incorrect legal standard, or commit[ted] some other error of law," then that decision is erroneous. (*Ibid.*)

In this matter, the standard for judicial review of the PUC's interpretation of Section 769 "is the independent judgment of the court, giving deference to the determination of the agency appropriate to the circumstances of the agency action.'" (*New Cingular Wireless PCS, LLC v. P.U.C.* (2016) 246 Cal.App.4th 784, 808 [quoting *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 12 ("*Yamaha*")].) Ordinarily, the PUC's interpretation of the Public Utilities Code may not be "disturbed absent a manifest abuse of discretion or unreasonable interpretation of the relevant statute[.]" (*Id.* at 806.) However, that deferential standard of review is inapplicable in challenges pertaining to whether the PUC "has acted in excess of its authority" in its "interpretation of a statute that defines the reach of its power." (*Id.* at 807 [no deference in PUC's interpretation of "detailed statutory scheme defining the CPUC's jurisdiction in an area"].) Here, the PUC has acted in excess of its authority under Section 769. In determining the extent of the PUC's authority, "the PUC's interpretation of the statutes … is accorded weight commensurate with" and therefore limited by, "the thoroughness, validity, and consistency of the PUC's reasoning." (*PG&E Corp., supra,* 118 Cal.App.4th at p. 1195.)

"In construing any statute, [w]ell-established rules of statutory construction require [the Court] to ascertain the intent of the enacting legislative body so that [it] may adopt the construction that best effectuates the purpose of the law." (*Utility Consumers' Action Network v. P.U.C.* (2004) 120 Cal.App.4th 644, 657) [internal quotation marks omitted].) The Court must "first examine the words themselves[,] . . . [which] should be given their ordinary and usual meaning and should be construed in their statutory context." (*Id*. at 657-58 [internal citation and quotation marks omitted].)

ARGUMENT

I. The PUC Acted in Excess of its Powers and Failed to Proceed in the Manner Required by Law by Expanding the Definition of Distributed Resources in Section 769 to Include Fossil-Fueled Generation.

In its Rehearing Decision, the PUC sets forth a range of theories in defense of its expansion of the definition of distributed resources under Section 769(a) to include distributed fossil-fueled generation. The PUC's various efforts to justify its abuse of authority in exceeding the unambiguous statutory language of Section 769 are all without merit. A reading of Section 769(a) that includes distributed fossil-fueled generation within the meaning of distributed resources is flatly inconsistent with the express terms of this provision and must be rejected.

A. The PUC's Assertion that Fossil-Fueled Generation Is Contemplated Within Section 769(a) Directly Contravenes Multiple Well-Established Principles of Statutory Interpretation.

Section 769(a) provides that "[f]or purposes of this section, 'distributed resources' means distributed renewable generation resources, energy efficiency, energy storage, electric vehicles, and demand response technologies." In its Rehearing Decision, the PUC does not attempt to argue that fossil-fueled resources fall within any of the resources expressly listed in Section 769(a). (3 PA 22 at 000703-708.) Instead, the PUC claims that reading Section 769(a) to prohibit fossil-fueled resources from participating in distributed resource solicitations is "overly restrictive" because "[t]he Legislature did not put language in [S]ection 769 that would bar or limit our consideration of natural gas-fueled distributed resources." (*Id.* at 000703.) The PUC's position is contrary to multiple principles of statutory interpretation, which compel the conclusion that the language in Section 769 does in fact bar the PUC's consideration of fossil-fueled distributed resources in solicitations initiated under this statute.

By using the term "means," Section 769(a) limits the definition of "distributed resources" to the Legislature's specified resources. "As a rule, a definition which declares a term 'means' excludes any meaning that is not stated." (*Burgess v. US* (2008) 553 U.S. 124, 130 [quoting *Colautti v. Franklin* (1979) 439 U.S. 379, 392093, fn. 10].) The California Supreme

Court has long understood that the use of the term "means" in a definition is restrictive, whereas the term "includes" is a term of enlargement. (*Am. Nat'l Ins. Co. v. Fair Employment & Hous. Com.* (1982) 32 Cal.3d 603, 608 ["Because in that clause the word the drafters chose was 'includes' (rather than 'means' or 'refers to,' say) we infer that the Legislature did not endorse a restrictive definition."]); *City of San Jose v. Super. Ct.* (2017) 2 Cal.5th 608, 622, fn. 6.) Accordingly, the PUC's unsupported assertion that 769(a) would need to state "'means only,' or 'is limited to' renewable, energy efficiency, energy storage, electric vehicles and demand" in order to exclude fossil-fueled resources is unavailing. (3 PA 22 at 000704 [emphasis omitted].) As both the Federal and California Supreme Courts have made clear, the use of "means" alone compels restriction of a statutory definition to listed terms.

The PUC's inclusion of fossil-fueled generation within the meaning of Section 769(a) also violates the statutory construction principle *expressio unius est exclusio alterius* (the expression of one thing is the exclusion of another). (See *People v. Johnston* (2016) 247 Cal.App.4th 252, 257 [a statute's designation of specific offenses as misdemeanors gave "rise to a strong inference of a deliberate legislative choice to exclude any items not mentioned, absent a compelling indication of legislative intent to the contrary"] [quoting *Strang v. Cabrol* (1984) 37 Cal.3d 720, 725]; see also *Imperial Merchant Services, Inc. v. Hunt* (2009) 47 Cal.4th 381, 390 ["the

fact that the Legislature expressly designated specific damage remedies while omitting others, such as prejudgment interest, reflects that it intended the prescribed remedies to be exclusive"]; see also *Southern California Gas Company v. P.U.C.* (1979) 24 Cal.3d 653 [court applied the maxim to prevent the Commission from creating mandatory program where express statutory authorization was permissive program].) The inclusion of "renewable" to define distributed generation means the exclusion of fossil-fueled distributed generation resources. Accordingly, a definition explicitly limited to "renewable distributed generation" cannot be legitimately expanded to include fossil-reliant distributed generation.

The PUC's interpretation of Section 769(a) to include non-renewable distributed generation also violates the rule against surplusage. (See *City of Emeryville v. Cohen* (2015) 233 Cal.App.4th 293, 304 ["a construction making some words surplusage is to be avoided."] [quoting *Moyer v. Workmen's Comp. Appeals Bd.* (1973) 10 Cal.3d 222, 230]; see also Civ. Code § 3541 ["An interpretation which gives effect is preferred to one which makes void."].) The PUC's implementation of Section 769 to encompass fossil-fueled distributed generation resources would improperly render the word "renewable" in Section 769(a) superfluous in direct contravention of the rule against surplusage.

Finally, "[w]hen the Legislature uses materially different language in statutory provisions addressing the same subject or related subjects, the

normal inference is that the Legislature intended a difference in meaning." (See *People ex rel. Lockyer v. R.J. Reynolds Tobacco Co.* (2005) 37 Cal.4th 707, 717, *as modified* (Jan. 18, 2006) [quotation omitted].) In contrast to Section 769, in the authorizing Legislation for the Self-Generation Incentive Program, the Legislature more generally limited eligibility incentives to distributed generation that the Commission determines "will achieve reductions in emissions of greenhouse gases." (Pub. Util. Code § 379.6, subd. (b)(1).) Unlike Section 769, Section 379.6 does not include the word "renewable" to qualify eligible distributed generation. In Section 769, the Legislature's specific use of "distributed renewable generation" reflects a distinct, deliberate decision to exclude distributed fossil-fueled resources that the PUC has no authority to override.

B. The PUC's Invocation of "Gap-Filling" Authority is Without Merit Because Section 769 is Complete and Unambiguous.

In an attempt to justify inserting fossil-fueled resources into Section 769(a), the Rehearing Decision invokes the PUC's purported "gap-filling authority" that can arise with "somewhat open-ended statutory authority." (3 PA 22 at 000707.) But Section 769's definition of distributed resources and exclusion of fossil-fueled generation is neither open-ended nor ambiguous. On this issue, there are no gaps for the PUC to fill.

C. The PUC's Assertion that it May Override the Statutory Limits of Section 769(a) to Meet the Overall Purpose and Intent of the Statute is Without Merit.

In the Rehearing Decision, the PUC briefly asserts that exclusion of gas-fired resources from procurement under Section 769 would be contrary to the purpose of the statute and various purported policy objectives. (3 PA 22 at 000703.) As an initial matter, when a court attempts to discern the meaning of a statute, "it is well settled that we must look first to the words of the statute, 'because they generally provide the most reliable indicator of legislative intent.' If the statutory language is clear and unambiguous our inquiry ends." (*Meyer v. Sprint Spectrum L.P.* (2009) 45 Cal.4th 634, 639-40 [quoting *Murphy v. Kenneth Cole Productions, Inc.* (2007) 40 Cal.4th 1094, 1103] [citation omitted].) Because the definition of distributed resources under Section 769(a) is clear and unambiguous, this Court need not entertain the PUC's asserted purpose and policy justification for expanding eligible resources to include fossil-fueled generation. Even if the Court were to engage is such an inquiry, the PUC's asserted statutory purpose and policy justifications are baseless and fall far short of a rationale that could remotely justify overriding the clear text of Section 769(a).

First, Section 769 does not state its purpose. It simply establishes a framework for deploying cost-effective distributed resources and modifying the utilities' plans to maximize ratepayer benefit from investments in distributed resources. (Pub. Util. Code §§ 769(b)(2) & (c).) Because the

Legislature expressly defined the term "distributed resources" for the purposes of this section, to the extent statutory purpose can be imputed, it is to deploy and maximize benefits from the distributed resources in Section 769(a). Including fossil-fueled generation in the solicitation framework and pilot program does nothing to promote these goals. To the contrary, the PUC's decision to include fossil-fueled generation in the pilot program threatens to divert investment from permissible resources to polluting resources. Rather than further the purpose of Section 769, inclusion of fossil-fueled generation would undermine its objectives and provides no basis for departing from the plain meaning of the statute.

The PUC's claim that inclusion of fossil-fueled generation is necessary to fulfill its "fundamental statutory obligation is to ensure safe and reliable electric service at reasonable costs to ratepayers" is equally flawed. (3 PA 22 at 000705.) The PUC has never found that it could not ensure safety, reliability, or reasonable costs unless it included fossil-fueled generation resources in the solicitation framework and incentive pilot. Indeed, Section 769 directs utilities to explore deployment of the distributed resources defined under Section 769(a) as an alternative to traditional investments in distribution grid infrastructure. Even if the distributed resources identified under Section 769(a) could not provide safe and reliable service in particular instances, the utility would simply default to the infrastructure investment historically implemented to meet safety and

reliability standards. There is no tension between Section 769's exclusion of fossil-fueled generation and the PUC's other statutory objectives that come close to rising to a level that could justify departure from the clear statutory text of Section 769(a).

Finally, in the Rehearing Decision, the PUC mistakenly relies on two cases—*People v. Belton* and *Goodman v. Lozano*—to justify disregarding the plain meaning of Section 769. (3 PA 22 at 000704, fn. 24.) In *Belton*, the court interpreted a statute that was enacted in 1872 and found that literal construction of the term "testimony" would conflict with the legislative purpose because the scope of admissible testimony had changed since the statute's enactment. (*People v. Belton* (1979) 23 Cal.3d 516, 525-26.) This precedent does not allow the PUC to flout the plain meaning of the technologies identified in Section 769, which have not materially changed since Section 769 was added to the Public Utilities Code in 2013. In *Goodman*, the court applied the plain meaning of the statutory term "net monetary recovery" because the plain meaning of the statute was consistent with its purpose and other provisions. (*Goodman v. Lozano* (2010) 47 Cal.4th 1327, 1332.) This Court must do the same here.

D. The PUC's Authority to Modify Distribution Resource Plans Does Not Extend to Changing Eligible Resources.

The Rehearing Decision asserts that the PUC can include fossil-fueled generation in a distributed resource solicitation under Section 769

because it has the "authority to modify Distribution Resources Plans as needed." (3 PA 22 at 000708.) Once again, the PUC's arguments bear no relation to the text of the statute itself. Section 769(c) provides, in pertinent part, that the PUC "may modify any plan as appropriate to . . . maximize ratepayer benefit from investments in distributed resources." When read in conjunction with the applicable definition of distributed resources is section (a), the provision enables the PUC to modify the plans to "maximize ratepayer benefit from investments" in "distributed renewable generation resources, energy efficiency, energy storage, electric vehicles, and demand response technologies." Section 769(c) cannot be legitimately read to vest the PUC with authority to modify distribution resource plans to allow investment in fossil-fueled distributed generation.

E. The PUC Cannot Rely on a Guidance Document From Another Proceeding to Justify the Unlawful Inclusion of Fossil-Fueled Generation in the Incentive Pilot Decision.

The PUC attempts to justify inclusion of fossil-fueled generation in the solicitation framework and incentive pilot for the sake of consistency between the IDER proceeding and the DRP proceeding by referring to the Guidance Document adopted through an Assigned Commissioner's Ruling in the DRP proceeding that encouraged utilities to include certain fossil-fueled generation in their distribution resource plans. (3 PA 22 at 000702.) The PUC does not have authority to violate Section 769 in the IDER

proceeding to ensure its violations of the statute are consistent across proceedings.

A guidance document does not change the law or bind a reviewing court. (Cf. *Yamaha, supra,* 19 Cal.4th 1 at p. 10 [discussing quasi-legislative rules that have the dignity of statutes].) While a reviewing court may give the opinions set forth in the document some weight based on their power to persuade, the conclusion that activities authorized by Section 769 can include non-renewable generation will not move a court because it contradicts the statute. (*See id.* at 14-15.) The guidance, like the Incentive Pilot Decision itself, cannot sway the court's interpretation of Section 769 because it makes no attempt to reconcile its action with the law and, thus, gives the court "nothing to which [it] can meaningfully defer." (*So. Cal. Edison Co. v. P.U.C.* (2000) 85 Cal.App.4th 1086, 1106 [where a PUC decision gives "no explanation of how it squares" the law with its practice, "we have nothing to which we can meaningfully defer"].)

II. This Petition is a Timely Challenge to the Commission's Unlawful Inclusion of Fossil-Fueled Generation Resources in the Solicitation Framework and Incentive Pilot.

In its Rehearing Decision, the PUC concluded that because a footnote in an earlier decision—D.15-09-022—stated that the IDER proceeding would use the same categories of distributed resources as in the DRP proceeding and D.15-09-022 "was never challenged and is now final," Sierra Club's "challenge is untimely and barred by section 1709 and

1731(b)." (3 PA 22 at 000702.) The PUC's effort to preclude judicial review of its unlawful interpretation of Section 769(a) does not withstand scrutiny.

Sections 1709 and 1731(b) provide no support for the PUC's position. Section 1709 states in its entirety: "*In all collateral actions or proceedings*, the orders and decisions of the commission which have become final shall be conclusive." (Emphasis added.) This statutory rule is consistent with the common law rule that "[r]es judicata gives conclusive effect to a former judgment only when the former judgment was in a different action." *Philips v. Sprint PCS* (2012) 209 Cal.App.4th 758, 770 [quoting 7 Witkin, Cal. Procedure (5th ed. 2008) Judgment, § 334, p. 939].) Here, the PUC cites a decision in the very same proceeding. Thus, Section 1709 does not insulate the PUC from this challenge to the Incentive Pilot Decision.

Even if the PUC had issued D.15-09-022 in a collateral action or proceeding, it would not bar this challenge to an unlawful exercise of the PUC's legislative power. PUC decisions have the conclusive effect of res judicata when the PUC exercises its judicial power, but not when the Commission sets rates or exercises other legislative power. (*Camp Meeker Water Sys., Inc. v. P.U.C.* (1990) 51 Cal.3d 845, 852, fn. 3 [overturned on other grounds due to legislative action] [a PUC determination did not have res judicata effect because it was an exercise of the PUC's legislative

power, and therefore "subject to relitigation in any court of law which is asked to determine these interests"].) The PUC has classified the IDER proceeding as "mainly quasi-legislative in nature." (3 PA 22 at 000707-708 [also noting that the PUC has categorized the IDER proceeding as a rate-setting proceeding].) Allowing fossil-fueled generation to participate in the incentive pilot under the authority of Section 769 was an unlawful exercise of the PUC's legislative authority, not its judicial power. Accordingly, any such decision is not conclusive in a collateral proceeding.

Section 1731(b) is similarly unhelpful to the PUC. That statute provides that interested parties may apply for rehearing of PUC decisions and that a cause of action will only accrue to parties who do so. Here, Sierra Club followed the procedures set out in section 1731(b) and filed a timely application for rehearing of the Incentive Pilot Decision.

Moreover, the PUC's suggestion that only its first decision to use an alternative definition of "distributed resources" is subject to challenge is fundamentally misplaced. (3 PA 22 at 000702.) Prior, unchallenged acts do not give the PUC license to continue an unlawful practice. (*So. Cal. Edison, supra,* 85 Cal.App.4th at p. 1105 [setting aside a decision where the PUC's requirements for approving memorandum accounts contravened the law, "even assuming the PUC had a well-established practice" for approving memorandum accounts in the contested manner]; see also *Cal. Trucking Assn. v. P.U.C.* (1977) 19 Cal.3d 240, 245 [finding that the PUC

failed to follow the clear statutory requirement to hold a hearing, where the PUC had acted "many times in the past" without hearings].) Accordingly, a prior decision to procure fossil-fueled generation under Section 769 would not shield the PUC from this challenge.

Regardless, there is no such decision for the PUC to hide behind. In this petition, Sierra Club seeks review of the IDER proceeding's first decision to unlawfully authorize the procurement of fossil-fueled generation under the authority of Section 769. While the Rehearing Decision assumes that D.15-09-022 settled the question of whether the PUC would authorize procurement of non-renewable generation in the IDER proceeding, Sierra Club did not challenge that decision because it did not impermissibly allow the acquisition of fossil-fuel generation under the authority of section 769. In D.15-09-022, the PUC expanded the scope of the IDER proceeding to include implementation of section 769(b)(2) and -(b)(3), and adopted a definition and goal for the integration of distributed energy resources. (1 PA 3 000070, 000090.) These decisions are within the PUC's authority and consistent with law.

Further, in D.15-09-022, the PUC did not commit to including fossil generation in future programs in the IDER proceedings. D.15-09-022 does not even mention fossil-fuel generation and merely states in a footnote that the IDER proceeding "uses the same categories of distributed energy resources as those in [the DRP proceeding]." (1 PA 3 at 00064, fn. 1.)

There is no error in the two proceedings using the same categories of resources, assuming the categories are lawful. The footnote's "*See*" citation to a guidance document in the DRP proceeding is not an adoption of the document's conclusions. PUC decisions must include findings of fact and conclusions of law on all material issues. (See Pub. Util. Code § 1705.) None of the findings of fact or conclusions of law in D.15-09-022 remotely suggest an intention to disregard the statutory definition of distributed resources in future orders. Thus, there was no violation in D.15-09-022 for Sierra Club to challenge.

The PUC's spurious conclusions about the justiciability of this challenge do not allow the PUC to evade review of its unlawful interpretation of Section 769(a).

CONCLUSION

For the foregoing reasons, the writ should issue.

DATED: July 31, 2017

/s/ Matthew Vespa

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CERTIFICATE OF COMPLIANCE

WITH RULE 8.204

I certify that, pursuant to Rule 8.204(c)(1) of the California Rules of Court, the attached Petition for Writ of Review has a typeface of 13 points or more, and contains 8,042 words, as determined by a computer word count.

Dated: July 31, 2017

/s/ Matthew Vespa

MATTHEW VESPA
Attorney for Petitioner
Sierra Club

CERTIFICATE OF SERVICE

I hereby certify that I am a citizen of the United States, over the age of eighteen years. My business address is 50 California Street, Suite 500, San Francisco, California 94111, and am not a party to the within action.

On July 31, 2017, I electronically filed the foregoing *Petition for Writ of Review; and Petitioner's Appendix of Exhibits in Support of Petition for Writ of Review Volumes 1 to 3 (filed concurrently/separately)* using the TrueFiling system which served all of the parties to this action. I also emailed copies of the *Petition* and *Appendices* to the following email addresses:

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

Executed on July 31, 2017, at San Francisco, California.

/s/ Rikki Weber
Rikki Weber