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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

SIERRA CLUB, Petitioner, v. PUBLIC UTILITIES COMMISSION, Respondent.	A152005 (CPUC Decision Nos. 16-12-036 & 17-06-031)

In 2014, the Legislature put into effect a law requiring electrical utilities to submit proposed plans for "distributed resources" to the Public Utilities Commission (CPUC or Commission). (Pub. Util. Code, § 769, subd. (a), all statutory references are to the Public Utilities Code unless otherwise specified.) The CPUC determined that these plans could consider energy produced from non-renewable sources. Petitioner Sierra Club challenges that determination because section 769 defines "distributed resources" to exclude energy produced from non-renewable sources. We agree with Sierra Club on the definition of the term but nonetheless conclude that its petition lacks merit. Although section 769 requires the utilities' plans to address energy produced from renewable sources, it does not prohibit them from also taking into account energy produced from non-renewable sources. We therefore affirm the Commission's decision.

I.
FACTUAL AND PROCEDURAL BACKGROUND

The Legislature passed Assembly Bill No. 327, effective January 1, 2014, to promote a wide range of electricity reforms such as reducing rate inequalities, protecting low-income customers, and maintaining robust incentives to invest in renewable energy. (Stats. 2013, ch. 611; Governor's signing message on Stats. 2013, ch. 611 (A.B. 327), 57 pt. 1 West's Ann. Pub. Util. Code (2019 supp.) foll. § 382, p. Supp. 131.) The part of this legislation that gives rise to this case is the enactment of section 769, which requires each electrical corporation to "submit to the commission a distribution resources plan proposal to identify optimal locations for the deployment of distributed resources." (§ 769, subd. (b).) These proposals are required to take five actions addressing "distributed resources": (1) evaluate their "locational benefits and costs," (2) propose or identify tariffs or other methods "for the deployment of cost-effective distributed resources that satisfy distribution planning objectives," (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," (4) identify any additional spending necessary "to integrate cost-effective distributed resources into distribution planning consistent with the goal of yielding net benefits to ratepayers," and (5) identify any barriers to deploying distributed resources, including but not limited to safety standards and reliability. (§ 769, subd. (b)(1)-(5).) Section 769 was enacted to "create a truly successful model for future distribution infrastructure planning" and deployment of distributed energy resources while taking into consideration utilities' financial incentives by setting up "a pilot regulatory incentive structure and process designed to harmonize the utilit[ies]' financial objections with the [CPUC]'s desire to foster the cost-effective deployment of" distributed energy resources.

The issues in this case turn on the meaning of the term "distributed resources" as used in section 769 (though the parties use the term interchangeably with "distributed

energy resources"). For purposes of the statute, " 'distributed resources' means distributed renewable generation resources, energy efficiency, energy storage, electric vehicles, and demand response technologies." (§ 769, subd. (a).)

Some of the terms used in section 769 are not used in common parlance, and our review of the record and the parties' brief does not reveal a nontechnical description for them. According to a manual cited by Sierra Club, "There is no single definition for a distributed energy resource."[1] (Nat. Assn. of Reg. Utility Comrs. (NARUC) Staff Subcom. on Rate Design, Distributed Energy Resources Rate Design (Nov. 2016) < https://pubs.naruc.org/pub/19FDF48B-AA57-5160-DBA1-BE2E9C2F7EA0> [as of Mar. 6, 2019], p. 41.) Our understanding is that in general, distributed resources are part of an overall trend of relying less on traditional, centralized sources of power and more on separate resources that may be then connected to the distribution grid. (*Id.* at pp. 41-42.)

In August 2014, the CPUC opened a rulemaking proceeding (No. 14-08-013, hereafter the Distribution Resources Plan proceeding) to establish a framework for utilities to develop their distribution resources plans under section 769. Sierra Club is not a party to this proceeding. But in it, in February 2015, the CPUC adopted a guidance document titled Guidance for Section 769 – Distribution Resources Planning (hereafter Guidance Document), which describes what the plans submitted under section 769 should include.

The petition in this case challenges a later CPUC decision in a different proceeding, but the central issue is the Guidance Document's definition of "distributed

[1] On December 17, 2018, the court provided the parties with notice that it was considering taking judicial notice of a definition provided in a law review article. (Evid. Code, §§ 452, subd. (h) [permissive judicial notice of information not reasonably subject to dispute], 455, subd. (a), 459, subd. (c).) Sierra Club opposed taking judicial notice of any definition outside the statute. And it argued that there is no definition of distributed energy resources that is not reasonably subject to dispute, as explained in NARUC's manual. To aid our understanding of how the term is generally used, but not to inform our interpretation of the statutory definition, we shall rely on the materials cited to us by Sierra Club.

energy resources" for purposes of submitting proposals. The Guidance Document notes that the statute defines "distributed resources" to include five "somewhat broad categories," and it directs utilities to consider various examples of each category. For example, for the category of "electric vehicles" (§ 769, subd. (a)), the Guidance Document directs utilities to consider residential charging, workplace/public charging, managed charging, and bi-directional power flow electric vehicles. For the "distributed renewable generation resources" category (§ 769, subd. (a)), the document lists the following five examples: (1) solar photovoltaic, (2) wind, (3) stationary fuel-cell, (4) combined heat and power, and (5) stationary I-C engine. As for the latter three examples, the Guidance Document goes on to say that they "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 [distribution resources plans] must first focus on the analysis of Fuel Cells, [combined heat and power] and Internal Combustion engines that are fueled by renewables. That said, natural gas-fueled stationary Fuel Cells, [combined heat and power] and stationary I-C engines have the potential to reduce [greenhouse gas] emissions, and so the utilities are encouraged to expand the scope of their [distributed resources plans] to include any distributed generation that can produce [greenhouse gas] emissions reductions over its lifecycle."

In October 2014, the CPUC opened a separate rulemaking proceeding (No. 14-10-003, hereafter the Integrated Demand-Side Management proceeding) to consider adopting a regulatory framework to review "demand-side resource programs" with a goal of electric and gas utilities reducing demand "using integrated demand-side management resources." Sierra Club is a party to this proceeding. In a decision issued in September 2015 (No. 15-09-022), the CPUC expanded the scope of this second proceeding to consider the source of "the required characteristics and values" to be determined in the separate Distribution Resources Plan proceeding. In so doing, the CPUC acknowledged that the two proceedings were "extensively intertwined," and it noted that this proceeding would use the same categories of distributed energy resources

as in that proceeding (i.e., the ones described in the Guidance Document). Decision 15-09-022 was not challenged.

An assigned commissioner later requested comments in the Integrated Demand-Side Management proceeding regarding a proposal for a pilot program that would offer regulatory incentives for utilities to deploy cost-effective distributed energy resources. Southern California Gas Company (SoCalGas) submitted comments the following month. The company was concerned that the CPUC not "arbitrarily exclude" any technology from the pilot program that could meet the state's energy-efficiency and greenhouse-gas goals. SoCalGas, "a gas-only investor-owned utility," believed the state would benefit from the CPUC allowing natural gas to be included in the pilot "to the extent gas applications can demonstrate that they can play an effective and efficient role in such projects." Sierra Club disagreed that natural gas should be included. In its reply comments, Sierra Club opposed the inclusion of any resources that did not meet the statutory definition of "distributed resources" under section 769, subdivision (a).

In a ruling issued in September 2016 in the Integrated Demand-Side Management proceeding, the assigned commissioner attached a revised proposal for incentives for distributed energy resources. The proposal discussed incentives to encourage utilities to deploy distributed energy resources to defer or displace capital expenditures in the distribution system or otherwise reduce system operational costs. The proposal did not, however, clarify whether energy from fossil-fueled sources were permitted in the pilot. In its filed comments on the revised proposal, Sierra Club argued that the CPUC "must clarify that fossil-fueled distributed generation resources are not eligible to participate in this pilot program." The CPUC issued a proposed decision in November 2016. Sierra Club objected that the proposed decision failed to define "distributed energy resources" and insisted that the term must be interpreted consistent with section 769, subdivision (a).

In December 2016, the CPUC issued its decision, which was entitled Decision Addressing Competitive Solicitation Framework and Utility Regulatory Incentive Pilot (D.16-12-036). The decision approved a pilot program and directed three utilities—Pacific Gas and Electric Company, San Diego Gas & Electric Company, and Southern

California Edison Company—to each identify one project "where the deployment of distributed energy resources on the system would displace or defer the need for capital expenditures on traditional distribution infrastructure." In a footnote, the decision addressed Sierra Club's objections by stating the pilot would use the same categories of distributed energy resources as those used in the related Integrated Demand-Side Management proceeding, and referring to the CPUC Guidance Document from the separate Distribution Resources Plan proceeding.

Sierra Club filed an application for rehearing of the decision, which the CPUC denied (No. D.17-06-31). This petition followed.

II.
DISCUSSION

A. Writ Review Is Appropriate Even Though the Commission Did Not Err.

Any aggrieved party may petition for a writ of review in the court of appeal "for the purpose of having the lawfulness of the original order or decision or of the order or decision on rehearing inquired into and determined." (§ 1756, subd. (a).) Writ review is appropriate where a petition has merit or where it presents important and unsettled legal questions. (*PG&E Corp. v. Public Utilities Com.* (2004) 118 Cal.App.4th 1174, 1193.) We are not compelled to issue a writ if the Commission did not err, but we did so here because the petition presents an unsettled legal question that would go unresolved if we did not grant review. (*Ibid.*)

B. Sierra Club Timely Challenged the Commission's Statutory Interpretation.

We quickly dispose of the CPUC's argument that Sierra Club's challenge to the CPUC's interpretation of section 769 is untimely. In its September 2015 decision expanding the scope the Integrated Demand-Side Management proceeding, the Commission stated in a footnote that it would "use[] the same categories of distributed energy resources as those in [the Distribution Resources Plan proceeding]." In its order denying Sierra Club's rehearing petition, the Commission briefly noted that because the September 2015 decision was never challenged, it became final and Sierra Club's challenge was untimely and barred by sections 1709 and 1731, subdivision (b). True,

Commission orders and decisions that have become final shall be conclusive. (§ 1709; see also § 1731, subd. (b) [rehearing procedures for CPUC orders or decisions].) But as we explain more fully below, it is this court's ultimate responsibility to interpret statutes. And in general, because statutory interpretation is a question of law, it may even be raised for the first time on appeal. (*Retzloff v. Moulton Parkway Residents' Assn., No. One* (2017) 14 Cal.App.5th 742, 747-748.) This court is not precluded from considering the issue of statutory interpretation presented here simply because the Commission's interpretation of section 769 went previously unchallenged in this proceeding and in the Distribution Resources Plan proceeding.

C. Although "Distributed Resources" Does Not Include Energy Produced from Natural Gas Sources, the Commission Did Not Err.

Sierra Club argues that the CPUC erred in expanding the definition of "distributed resources" to include fuel sources not contemplated by section 769. We agree with Sierra Club that the definition of the term excludes localized energy produced by natural gas sources, but we disagree that the statute as a whole requires the CPUC to prohibit plans from discussing such energy.

1. Statutory Interpretation and the Standard of Review.

This court is authorized to determine whether the Commission "acted without, or in excess of, its powers or jurisdiction" and whether it "has not proceeded in the manner required by law." (§ 1757, subd. (a)(1) & (2).) When asked, as we are here, to review an administrative agency's interpretation of a statute, " '[t]he appropriate mode of review in such a case is one in which the judiciary, although taking ultimate responsibility for the construction of the statute, accords great weight and respect to the administrative construction.' " (*Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 12.) "Whether judicial deference to an agency's interpretation is appropriate and, if so, its extent—the 'weight' it should be given—is . . . fundamentally *situational*. A court assessing the value of an interpretation must consider a complex [set] of factors material to the substantive legal issue before it, the particular agency offering the interpretation, and the comparative weight the factors ought in reason to

command." (*Ibid.*) Those factors turn on whether " 'the agency has expertise and technical knowledge, especially where the legal text to be interpreted is technical, obscure, complex, open-ended, or entwined with issues of fact, policy, and discretion. A court is more likely to defer to an agency's interpretation of its own regulation than to its interpretation of a statute, since the agency is likely to be intimately familiar with regulations it authored and sensitive to the practical implications of one interpretation over another.' " (*Ibid.*) "Courts must, in short, independently judge the text of the statute, taking into account and respecting the agency's interpretation of its meaning, . . . whether embodied in a formal rule or less formal representation. Where the meaning and legal effect of a statute is the issue, an agency's interpretation is one among several tools available to the court." (*Id.* at p. 7.) Stated differently, the Commission's decisions are presumed valid and its interpretation of the Public Utilities Code "should not be disturbed unless it fails to bear a reasonable relation to statutory purposes and language." (*Greyhound Lines, Inc. v. Public Utilities Com.* (1968) 68 Cal.2d 406, 410-411.)

The rules of statutory construction are well settled. " 'Our primary task in interpreting a statute is to determine the Legislature's intent, giving effect to the law's purpose. [Citation.] We consider first the words of a statute, as the most reliable indicator of legislative intent. [Citation.]' [Citation.] We construe the statute's words in context, and harmonize statutory provisions to avoid absurd results. [Citation.] If we find the statutory language ambiguous or subject to more than one interpretation, we may look to extrinsic aids, including legislative history or purpose to inform our views. [Citation.] We also strive to avoid construing ambiguous statutes in a manner that creates doubts as to their validity." (*John v. Superior Court* (2016) 63 Cal.4th 91, 95-96.)

2. The Commission's Guidance to Utilities Does Not, as a Whole, Violate Section 769.

We agree with Sierra Club insofar as it contends that the term "distributed resources" refers only to those items listed in section 769, subdivision (a); i.e., "distributed renewable generation resources, energy efficiency, energy storage, electric vehicles, and demand response technologies." Because the Legislature drafted section 769, subdivision (a), to say that the term " 'distributed resources' *means*" those categories of resources (italics added), we may infer that the term was meant to have a restrictive definition. (See *American National Ins. Co. v. Fair Employment & Housing Com.* (1982) 32 Cal.3d 603, 608; see also *Burgess v. United States* (2008) 553 U.S. 124, 130 [" 'As a rule, [a] definition which declares what a term "means" . . . excludes any meaning that is not stated.' "].) The Commission's own CPUC Guidance Document, which was adopted in the section 769 proceedings, acknowledges this definition, stating plainly that "the statute defines distributed resources as *having to be 'renewable'* " and that submitted plans thus "must first focus on the analysis of Fuel Cells, CHP [Combined Heat and Power] and Internal Combustion engines that are fueled by renewables." (Italics added.) The parties dispute how much weight this court should give to the Guidance Document. But no matter how much weight we might give this document, we conclude that "distributed resources" *must be* renewable under the statutory definition and as the CPUC Guidance itself acknowledges.

The real question we must answer, then, is whether the Commission erred when it concluded that proposals may consider localized natural gas-fueled energy sources so long as they can produce lower greenhouse gas emissions. We conclude that it did not. (*Utility Consumers' Action Network v. Public Utilities Com.* (2004) 120 Cal.App.4th 644, 657-659 [although CPUC misinterpreted phrase in statute, it did not contravene statute as a whole in approving settlement with utility].) Although section 769, subdivision (a), narrowly defines "distributed resources," subdivision (b) of the statute provides more broadly that each electrical corporation shall submit "a distribution resources plan proposal to identify optimal locations for the deployment of distributed resources," and

directs such proposals to include five specific components analyzing various aspects of deploying distributed resources. We see no reason to conclude that these terms necessarily preclude plans from including energy sources that do not qualify as distributed resources under section 769.

In this case, the CPUC ordered three parties to identify one project "where the deployment of distributed energy resources on the system would displace or defer the need for capital expenditures on traditional distribution infrastructure." True, any proposed project submitted under this order that *omitted* any statutorily-defined distributed resources (i.e., renewable energy sources) would not comply with the statute's mandate. But there is nothing in the statute that prohibits the CPUC from soliciting plans that may *also* discuss non-renewable energy sources, including natural gas-fueled energy sources.

The parties argue at length over the purpose of section 769, whether the Commission has the "gap-filling authority . . . and discretion to fill in the details of somewhat open-ended statutory language," and how much deference this court should give to the Commission's interpretation of the statute. Their different approaches to the issue were highlighted at oral argument. Counsel for the CPUC seemed to suggest that it could consider a distributed resources plan that did not include renewable resources because we must read subdivision (b) of section 769 (summarizing plan requirements) in harmony with the rest of the statute. But there is simply no way to harmonize the statute to expand the definition of distributed resources contained in subdivision (a) of the statute. Counsel for Sierra Club, meanwhile, suggested the Commission lacks any authority whatsoever to consider plans that discuss anything other than renewable resources, yet she provided no authority for that proposition.

The parties' arguments are mostly based on the premise that the wording of section 769 leaves some ambiguity that we must clear up. We find no such ambiguity that would lead us to set aside the Commission's decision. The statute provides that electrical corporations shall submit proposals "to identify optimal locations for the deployment of distributed resources." (§ 769, subd. (b).) Each proposal shall undertake

five tasks, including proposing or identifying "standard tariffs, contracts, or other mechanisms for the deployment of cost-effective distributed resources that satisfy distribution planning objectives." (§ 769, subd. (b).) It may be that deploying cost-effective distributed resources that satisfy distribution planning objectives includes natural gas-fueled resources as part of that proposal. Such a proposal would comply with section 769 so long as it also included distributed resources, as defined by section 769, subdivision (a).

Our holding is a narrow one. We conclude that "distributed resources" includes only those energy sources listed in section 769, subdivision (a), but that the Commission may, consistent with the statute, solicit plans that might also discuss localized natural gas-fueled resources.

III.
DISPOSITION

The CPUC's decisions Nos. D.16-23-036 and D.17-06-31 are affirmed. Sierra Club's October 16, 2017 request to take judicial notice of three advice letters filed with the Commission after the entry of the decisions on review is denied. Respondent shall recover its costs.

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Humes, P.J.

We concur:

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Margulies, J.

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Banke, J.