CASE NO. D077271

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT, DIVISION 1

PROTECT OUR COMMUNITIES FOUNDATION,
Petitioner,

v.

PUBLIC UTILITIES COMMISSION,
Respondent,

PACIFIC GAS AND ELECTRIC CO., SAN DIEGO GAS & ELECTRIC CO., SOUTHERN CALIFORNIA EDISON CO., THE UTILITY REFORM NETWORK, COALITION OF CALIFORNIA UTITLITY EMPLOYEES, CALIFORNIA LARGE ENERGY CONSUMERS ASSOCIATION, AND DIRECT ACCESS CUSTOMER COALITION,
Real Parties in Interest

From a Decision of the Public Utilities Commission of the State of California,
No. 18-10-109 (October 19, 2018)

APPLICATION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE AND BRIEF OF AMICUS CURIAE CALIFORNIA COMMUNITY CHOICE ASSOCIATION IN SUPPORT OF PETITIONER PROTECT OUR COMMUNITIES FOUNDATION

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

(Cal. Rules of Court, rules 8.208, 8.488)

Amicus curiae California Community Choice Association (CalCCA) is a California non-profit corporation, whose members are local governmental entities, and no entity or person has an ownership interest in CalCCA. CalCCA knows of no person or entity, other than itself, with a financial or other interest in the outcome of this proceeding that must be disclosed.

DATED: July 6, 2020

KEYES & FOX LLP

By: /s/ *Ann Springgate*

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TO THE HONORABLE ADMINISTRATIVE PRESIDING JUSTICE

APPLICATION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

Pursuant to Rule 8.200(c) of the California Rules of Court, proposed amicus curiae California Community Choice Association respectfully requests leave to file the attached amicus curiae brief in support of Petitioner. This application is timely made in compliance with rule 8.200 (c)(1). No party or any counsel for any party in the pending proceeding authored any part of this brief or made any monetary contributions to fund the preparation or submission of the brief. No person or entity made any contribution other than the proposed amicus curiae, its members or its counsel.

Amicus curiae endeavors to provide this court with the perspective of community choice aggregators (CCAs) throughout the State regarding, specifically, whether the California Public Utilities Commission erred in its determination that California law permits the inclusion of the costs of so-called "utility owned generation" in the power charge indifference adjustment (PCIA) charged to customers who have departed electrical service from the investor-owned local utility. Amicus curiae believes it can provide additional perspective to this court that will be helpful in its decision.

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STATEMENT OF INTEREST

California Community Choice Association (CalCCA) represents the interests of 20 operational community choice electricity providers in California.[1] CalCCA's mission is to create a legislative and regulatory environment that supports the development and long-term sustainability of locally run community choice aggregation electricity providers in California (CCAs). The CCA model allows local governments to purchase electricity on behalf of their community members and to administer the program to provide competitive alternatives to investor-owned utility (IOU) sources. CCAs enable local governments to procure electricity that aligns with local interests, such as greenhouse gas reductions that exceed statewide targets. Today, 20 CalCCA members are operational and serving customers. Five CCAs are preparing to serve customers in the near future. Together, these CCAs will serve over 10,000,000 customers throughout California.

Although the Legislature authorized community choice in 2002, the California Public Utilities Commission (Commission) did not fully

[1] Apple Valley Choice Energy, CleanPowerSF, Clean Power Alliance, Desert Community Energy, East Bay Community Energy, Lancaster Choice Energy, MCE, Monterey Bay Community Power, Peninsula Clean Energy, Pico Rivera Innovative Municipal Energy, Pioneer Community Energy, Rancho Mirage Energy Authority, Redwood Coast Energy Authority, San Jacinto Power, San Jose Clean Energy, Silicon Valley Clean Energy, Solana Energy Alliance, Sonoma Clean Power, Valley Clean Energy, and Western Community Energy.

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implement this model until it issued decisions regarding the program in 2005 and 2006. It took another four years for the first CCA, Marin Clean Energy, to begin service in 2010. The Commission and Legislature attributed the slow launch of CCAs, in part, to counter-productive activities by the IOUs. Legislative and Commission action were required to prevent IOUs from engaging in costly and often misleading campaigns against CCAs.

In transitioning to the CCA model, the Legislature recognized the importance of requiring customers leaving the IOU to take service from a CCA to pay their share of certain IOU resources "stranded" by their departure, *i.e.*, resources the IOU may no longer need to serve the departing customers. The Legislature identified specifically the boundaries of the costs for which these customers would bear responsibility, which today are recovered through an "exit fee" – the Power Charge Indifference Adjustment (PCIA).

The Commission has stretched the scope of the costs included in the PCIA beyond statutory bounds. In particular, the Commission erred in concluding that the costs of utility-owned generation may be included in the PCIA calculation applicable to CCAs. As an active participant throughout the more than three years of the underlying proceeding, CalCCA has made the case against the inclusion of these costs in the PCIA. Amicus curiae CalCCA respectfully requests the court allow it

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to submit this brief on the question of whether the Commission's interpretation of statute is correct.

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INTRODUCTION AND SUMMARY OF ARGUMENT

The California Constitution and the Public Utilities Code[2] confer on the California Public Utilities Commission (Commission) broad authority to regulate investor-owned utilities (IOUs). The Commission's broad authority, however, is not without bounds. The Commission's exercise of its authority is "[s]ubject to statute and due process." (Cal. Const. art. XII, § 2.) In other words, the Commission must follow and give effect to the law.

In issuing Decision 18-10-019 (*Decision Modifying the Power Charge Indifference Adjustment Methodology*, Decision 18-10-019 (D.18-10-019), App. 2205[3]), the Commission failed to meet this requirement. Specifically, the Commission has erred by retaining the costs of utility-owned generation (UOG) in the Power Charge Indifference Adjustment (PCIA) imposed on departing load customers taking service from CCAs, contrary to statute and the Legislature's

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[2] Unless otherwise indicated, all statutory references herein are to the California Public Utilities Code.

[3] Each reference to Petitioner's Appendix of Exhibits is followed by the page reference.

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intent.[4] The Commission strains credulity by erroneously reading the explicit list of allowable costs set forth in statute as the *minimum* of costs that may be included in the PCIA rather than the *prescribed* list of costs the Legislature clearly intended. To reach this conclusion, the Commission gives preeminence to statutory language that is more properly read as the Legislature's expression of its general policy, while ignoring the plain and clear language of the law. In so doing, the Commission destroys the strict limitation on PCIA-eligible costs intended by the Legislature.

Real Parties in Interest Pacific Gas & Electric Co. (PG&E), San Diego Gas & Electric Co., Southern California Edison Co., The Utility Reform Network, Coalition of California Utility Employees, California Large Energy Consumers Association, and Direct Access Customer Coalition incorrectly allege California CCAs have "acquiesced" in the inclusion of UOG charges in the PCIA. That allegation is disingenuous.

There were no CCAs in existence when the Commission articulated the components of the original PCIA charge. The charge

[4] Utility-owned generation, sometimes referred to as UOG, are energy projects built and owned by utilities. Pre-2002 fossil-fuel utility-owned generation is often referred to as Legacy UOG and post-2002 fossil-fuel utility-owned generation is referred to as post-2002 UOG.

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was originally applicable to so called “direct access” (DA) customers, i.e., those who choose to purchase electricity not from a regulated utility, but from a private, competitive provider. That charge, applicable to an earlier category of departing customers, would eventually become the PCIA paid by CCA customers.

CalCCA and its CCA members have continuously questioned the assessment and calculation of the PCIA charge in various Commission proceedings. The underlying proceeding is the first comprehensive statewide proceeding since 2006 in which the Commission has agreed to address fundamental questions regarding the application of the PCIA to CCAs. CalCCA filed briefs in every stage possible of the underlying proceeding and sought rehearing of D.18-10-019. That Application for Rehearing was denied (*Order Modifying Decision 18-10-019 And Denying Rehearing Of The Decision, As Modified*, Decision 20-01-030 (D.20-01-030), App. 2638), leading to this proceeding.

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ARGUMENT

I. THE COMMISSION COMMITTED LEGAL ERROR BY INCLUDING UOG COSTS IN THE PCIA CHARGED TO CCA DEPARTING LOAD CUSTOMERS

In establishing the CCA model for California, the Legislature required customers leaving an investor-owned utility to take service from a CCA to pay their share of the costs of certain IOU resources "stranded" by their departure. These "stranded costs" are resources the IOU may no longer need due to the departure of customers for CCAs or, as the Commission has now concluded, resources whose costs are "above market." The Legislature created an "exit fee" structure whereby the IOUs would recover from departing customers those customers' share of these stranded costs. The "exit fee" payable by CCA customers is known as the PCIA.

In 2002, concurrent with its authorization to form CCAs, the Legislature laid out the exact scope of IOU costs that can and must be included in departing load charges now recovered through the PCIA. That list of costs is specified in Public Utilities Code section 366.2 subdivisions (d), (e) and (f), which mandate a cost recovery

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mechanism and set out the specific list of costs that may be recovered "to prevent shifting of costs. . . ." (§ 366.2(c)(5).)

Since then, any time the Legislature has supplemented this list of costs to be recovered through the PCIA, it has done so through specific statutory language. Clearly, the Legislature's continuing intent is for the list of PCIA-eligible resources to only be expanded through specific statutory language.

Costs associated with UOG – the category of costs in question here – are not included in any of the statutes permitting cost recovery through the PCIA. The law thus requires exclusion of UOG costs from the scope of PCIA-eligible costs recovered from CCA customers.

Contradicting the statutory language and legislative intent, the Commission erroneously concludes that UOG costs must be included to in the PCIA "prevent any shifting of recoverable costs between customers." (D.18-10-019, App. 2258.) To reach this conclusion, the Commission ignores the explicit terms of section 366.2, fundamental principles of statutory interpretation, and the history and policy considerations that led to the current PCIA.

The California Supreme Court has deemed the task of harmonization "fundamental" in any statutory construction if there is

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a conflict in statutory provisions, "without doing violence" to the various elements of legislation's "language or spirit." (*Wells v. Marina City Properties, Inc.* (1981) 29 Cal.3d 781, 788.) Although cloaking its conclusion in language claiming to "harmonize" the relevant statute with the Legislature's general "cost shift" policy, the Legislature's interpretation actually *overrides* the specific statutory language. Contrary to the Commission's labored attempt to "harmonize" them, the statutory provisions at issue do not conflict. The express lists of PCIA-eligible costs are the *mechanics* laid out by the Legislature to enact the general policy against cost shifting. They do not conflict with the general policy against cost shifting because they are the specific set of tools the Legislature established to implement it.

Even if the provisions did conflict and could not be harmonized, the Commission errs in its application of the canons of statutory interpretation and contradicts the Legislature's intent in finding that UOG costs are recoverable through the PCIA. In particular, the Commission ignores the canon of statutory construction that specific statutory provisions take precedence over more general

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provisions and, importantly, that this rule trumps the rule that later-enacted statutes have precedence.

The Commission also simply dispenses with the maxim *expressio unius est exclusio alterius* — the expression of one thing implies the exclusion of others. (*Dyna-Med, Inc. v. Fair Employment & Housing Com.* (1987) 43 Cal.3d 1379.) Under this maxim, the Legislature's detailed lists of CCA departing load costs are to be interpreted as an exclusive list unless a contrary legislative intent is expressed in the statute. Here, there is no such contradictory legislative intent.

The Commission merely states the "canons of statutory interpretation are only a guide and will not be applied if it would defeat legislative intent or produce an absurd result." (D.20-01-030, App. 2647, citing *In re J.W.* (2002) 29 Cal.4th 200, 209-210.) The Commission claims applying the *expressio unius* maxim would "defeat the legislative intent expressly articulated in the statute." (*Ibid*.) But the Commission's reasoning is based on its own choice of the "winning" interpretation, and not what constitutes the Legislature's intent. The Commission determined not to apply the *expressio unius* canon simply because they chose a different

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interpretation, one that counteracts the Legislature's clear and actual intent.

It is the Commission's province to apply, not rewrite, the law. UOG must be excluded from CCA customer cost responsibility.

A. CALIFORNIA LAW DOES NOT INCLUDE UOG IN PCIA COST RESPONSIBILITY

1. AB 117 Specifies Four Categories of Costs, and UOG is Not Included in These Categories

In Assembly Bill 117 (AB 117) of 2002 the Legislature authorized the CCA program and set out the means by which the program would be implemented. The Legislative Counsel's Digest for AB 117 notes the Commission will determine a cost-recovery mechanism for CCA departing load "to prevent a shifting of costs to an electrical corporation's bundled customers." (Legis. Counsel's Dig., Assem. Bill No. 117 (2001-2002 Reg. Sess.), §(1).) The operative section of the legislation further illuminates this intent:

> After certification of receipt of the implementation plan and any additional information requested, the commission shall then provide the community choice aggregator with its findings regarding any cost recovery that must be paid by customers of the community choice aggregator ***to prevent a shifting of costs as provided for in subdivisions (d), (e), and (f)***.

(§ 366.2(c)(7), emphasis added.) Notably, the Legislature did not give the Commission free reign in developing a cost recovery mechanism

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for CCA departing load. Instead, it limited cost recovery to the categories "provided for in subdivisions (d), (e), and (f)." (*Ibid*.) These costs include the following:

- California Department of Water Resources (CDWR) bond charges (§ 366.2(e)(1));
- CDWR "estimated net unavoidable electricity purchase contract costs" (§ 366.2(e)(2)) ;
- "[U]nrecovered past undercollections for electricity purchases. . . . ." (§ 366.2(f)(1)); and
- A CCA customer's "share of the electrical corporation's estimated net unavoidable electricity purchase contract costs attributable to the customer" (§ 366.2(f)(2).)

In glaring absence, the statute has no references to UOG costs, despite the Legislature's express acknowledgement of UOG in other circumstances. For example, in 1996 the Legislature explicitly acknowledged and authorized IOUs, for a "reasonable transition period" that has long since expired, to recover "costs for generation-related assets and obligations. . . ." (Assem. Bill No. 1890 (1995-1996 Reg. Sess.)) (AB 1890), § 330(s).) In so doing, the Legislature specifically defined those "transition costs" to include the costs of then-existing UOG. (§840(f).)

Thus, the concept of recovering costs of UOG existed when the Legislature enacted section 366.2, and up to that time the costs of

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UOG had been expressly called out in statute. Had the Legislature intended to include UOG in the costs to be recovered through the PCIA in section 366.2, it most certainly knew how to do so.

The addition of language prohibiting "cost shifts" and "cost increases" added in later statutes lacks the specificity present in AB 117 and indicates no intent to repeal that statute. Nothing in the key statutory frameworks at issue in this proceeding provides authority for allocation of UOG to CCA departing load customers.

2. The Legislature Has Consistently Delineated the Scope of Costs That May Be Imposed on CCA Customers

The Legislature has established a clear and unambiguous set of costs that may be recovered from departing load customers served by CCAs. Nothing in any of these statutes permits the Commission to impose the costs of UOG, regardless of the date the UOG became operational, on CCA customers. Each time the Legislature has added costs which may be recovered through the PCIA, it has done so explicitly in statute.

From these legislative actions it is clear the Legislature intended that any increases in departing load costs must be authorized by specific statutory language. The Legislature has been fully aware of UOG cost recovery since long before the advent of the CCA

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program; the Legislature's failure to specifically authorize the recovery of UOG costs from CCA departing load indicates its determination that such costs be excluded from the calculation.

The Commission may impose UOG-related costs on CCAs only to the extent costs fall within the scope explicitly delineated in statute. With respect to costs recoverable through the PCIA, the allowable costs are those that are specifically listed in section 366.2(d), (e), and (f). Not one of these provisions supports the inclusion of UOG costs in the PCIA.

a) The Legislature Permitted the Recovery of Legacy UOG Stranded Costs in AB 1890 but Directed an End to Such Recovery by 2005

AB 1890, enacted in 1996, first addressed the issue of cost recovery for utility generation assets in the context of the planned transition to a competitive retail market. AB 1890 allowed the utilities to recover above-market sunk costs of resources that would become uneconomic in the transition through a nonbypassable charge payable by all customers, the "Competition Transition Charge" or "CTC." The Legislature expressly included UOG within the scope of the CTC. (§ 367.) The Legislature also made clear that such costs were to be fully recovered within a set period. (*Ibid*.) In fact, in implementing AB

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1890, the Commission observed: "With the exception of CTC arising from existing contracts, *no further accumulation of CTC will be allowed after 2003 and collection will be completed by 2005*." (*Re Proposed Policies Governing Restructuring California's Electric Services Industry and Reforming Regulation*, Decision 95-12-063, 1995 Cal. PUC LEXIS 1034, 325, Conclusion of Law 69, emphasis added.)

The utilities were given clear notice that California was transitioning to a more competitive retail market structure and had a chance at that time to address stranded UOG. (*See, e.g., Id*. at 494; *see also* § 367(b).) Public Utilities Code section 367 is still in force and the Legislature has not rescinded the limits on cost recovery for UOG. There exists a legitimate question as to whether any of the Legacy UOG costs are recoverable from any customers.

b) The Legislature Was Fully Aware of Legacy UOG When AB 117 Was Enacted but Declined to Include the Associated Costs in the Specific List of Costs That May Be Recovered from CCA Customers Through the PCIA

In 2002, the Legislature authorized Community Choice Aggregation through the enactment of AB 117. The statute includes an unambiguous directive regarding the costs that must be recovered

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from CCA customers to prevent a cost shift to bundled customers. The Legislature mandated a "cost-recovery mechanism to be imposed on the community choice aggregator pursuant to subdivisions (d), (e), and (f) [of section 366.2] . . . ." (§ 366.2 (c)(5).) Those subdivisions require CCA departing load customers to bear responsibility for several specific categories of costs, including Department of Water Resources bond charges (§ 366.2(e)(1)), Department of Water Resources' "estimated net unavoidable electricity purchase contract costs" (§ 366.2(e)(2)), "unrecovered past undercollections for electricity purchases, including any financing costs" (§ 366.2(f)(1)), and a CCA customer's share of the electrical corporation's "[e]stimated net unavoidable electricity costs ….reduced by the value of any benefits that remain with bundled service customers . . . ." (§ 366.2(f)(2).)

AB 117 was enacted in 2002, well after the Legislature addressed the issue of UOG in AB 1890. Thus, at the time of AB 117's passing, the Legislature was well aware of the existence of UOG, and whether and how such costs could be recovered from departing load. Despite this, nothing in AB 117 directs or permits the Commission to impose these costs on CCA customers.

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c) Including UOG in the PCIA Contravenes the Legislature's Approach to Establishing Departing Load Charges that Prescribes the Costs to be Included in Each Charge

The Legislature has imposed additional charges on departing load, separate and distinct from the PCIA. When the Legislature has established a new departing load charge, it has expressly defined the costs that may be included in each charge. In some cases, the charges were created after the PCIA was created, and include costs for UOG that CCA customers would have to pay. The inclusion of UOG costs in these later departing load charges indicates the Legislature follows a prescriptive framework for delineating the recovery of different resource costs via different charges. Including in the PCIA UOG costs that are excluded from section 366.2 would contravene this framework.

In 2005 the Legislature enacted a resource adequacy (RA) mandate to be applied to all load serving entities (LSEs), including CCAs, and added certain RA costs to the costs directed to be recovered from CCA departing load. (§ 380.) The statute provides that reasonable system and local area reliability costs incurred by a utility "shall be fully recoverable from those customers on whose behalf the

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costs are incurred, as determined by the commission, at the time the commitment to incur the cost is made, on a fully nonbypassable basis . . . ." (§ 380(g).) Significantly, unlike the specific list in section 366.2, costs recoverable under this nonbypassable charge include the "costs of meeting or reducing resource adequacy requirements," (*Ibid.*) including UOG costs. That is, specific RA-related costs must be recovered from CCA customers, and, in this case, the Legislature defines the category of costs broadly to include UOG.

Equally significantly, to avoid duplicating its prior directive in AB 117, the Legislature required the Commission to "exclude any amounts authorized to be recovered pursuant to Section 366.2 when authorizing the amount of costs to be recovered from customers of a community choice aggregator . . . ." (*Id.*) DA customers, the other class of departed load customers, did not receive this specific exclusion. The care given by the Legislature in carving out this exclusion for CCA customers regarding section 366.2 costs demonstrates how the Legislature intended to limit the scope of charges assessable to CCA customers to those it expressly specifies in statute.

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In addition, in 2015 the Legislature adopted the requirement for LSEs to submit Integrated Resource Plans (IRPs). In so doing, the Legislature created another nonbypassable charge, separate and distinct from the PCIA. The statute provides that certain "net costs of any incremental renewable energy integration resources" (§ 454.51(c)), including costs of UOG if the Commission authorizes, will be allocated "on a fully nonbypassable basis consistent with the treatment of costs identified in paragraph (2) of subdivision (c) of Section 365.1" (*Ibid*.) Here again, the Legislature defines the category of costs, *i.e.*, "renewable integration costs," to include in the nonbypassable charge. This authorization includes recovery of some specified UOG costs to the extent CCAs and other LSEs do not satisfy their share of any identified need and avoid the IOU allocated costs. (§ 454.51(d).)

The recently established RA and IRP nonbypassable charges demonstrate a legislative framework that defines the costs that can be included in each charge. Under that framework, while UOG costs can be assigned to CCA customers for the RA and IRP purposes, those costs cannot be assigned to CCA customers via the PCIA because section 366.2 does not include them in scope.

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3. The Use of "Cost Shifting" Language Does Not Authorize the Addition of Costs to the PCIA

Real Parties in Interest argue that the list of costs in section 366.2 (d)), (e), and (f) is not an exclusive list of costs that may be recovered through the PCIA, based on the "intent of the Legislature to prevent any shifting of recoverable costs between customers" as provided in section 366.2(d)(1). Real Parties in Interest also cite to the legislation detailed above, from 2011 and 2015. (Real Parties in Interest *Answer to Petition for Writ of Review* at 23.) Such reliance is misplaced. The mere fact that language regarding the prevention of a possible "cost shift" does not indicate the Legislature's intention to overthrow the precise and detailed bounds of costs that may be recovered through the PCIA.

The legislation creating the CCA program in 2002 both listed specific costs that may be recovered through the PCIA, and included general statements regarding the Legislature's intent to prevent "any shifting of recoverable costs between customers." (§ 366.2(d)(1.) This language, ppearing as it does at the end of a section regarding the costs of electricity purchase contracts, provides no reason to read the legislative intent as applying to the entire universe of costs that could

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potentially be deemed to "shift costs." The same legislation includes specific provisions listing the *exact* categories of costs that are to be recovered through the PCIA. (§ 366.2 (e), (f).) The inclusion of this one phrase to establish a general policy cannot be read to overthrow the Legislature's intention to establish the listed costs as the specific costs to be recovered through the PCIA.

That the Legislature addressed a cost shift in the context of electricity purchase contracts and other *unrelated* circumstances also does not and should not be used to indicate its intent to increase the scope of costs recoverable through the PCIA. For example, in enacting the resource adequacy mandate applicable to all LSEs, the Legislature required the Commission to "[e]quitably allocate the cost of generating capacity and prevent shifting of costs between customer classes." (§ 380(b)(3).) The Legislature created an entirely separate nonbypassable charge to collect these costs. The Legislature created another nonbypassable charge in 2015 to prevent cost shifting in either direction as a result of the requirement that LSEs submit IRPs. (§ 454.51(c).) Neither of these statutes mentions recoverable costs under the separate and distinct PCIA, and indeed, they need not.

SB 350 includes more generic language:

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

(§ 366.3.) Tellingly, this statement of general intent does not even use the phrase "cost shift." Had there been any intention to repeal AB 117, the Legislature, it is presumed, would have done so — or at the very least, used the same terms. The phrase "cost increase" indicates no intent to repeal AB 117.

California law is also clear that "all presumptions are against a repeal by implication." (*Schatz v. Allen Matkins Leck Gamble & Mallory LLP* (2009) 45 Cal.4th 557, 573.) Absent an express declaration of legislative intent, courts will find an implied repeal "only when there is no rational basis for harmonizing the two potentially conflicting statutes [citation], and the statutes are 'irreconcilable, clearly repugnant, and so inconsistent that the two cannot have concurrent operation.' " (*Ibid*., citing *Merrill v. Navegar, Inc*. (2001) 26 Cal.4th 465, 487.)

As explained in more detail below, the "cost shifting" provisions cited by Real Parties in Interest are statements of general

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legislative intent. The expression of a general legislative intent does not override the limited tools the Legislature gave the Commission in section 366.2 to enact its intent.

4. The Commission Incorrectly Ignores the History and Policy Behind the Treatment of UOG Costs in the PCIA

The Commission goes beyond legal interpretation and concludes "[w]e cannot find a principled justification to exclude [UOG] costs for CCA customers because they are now above-market." (D.18-10-019, App. 2260.) To exclude these costs, the Commission explains, "amounts to an invitation to shift costs to bundled customers that were incurred to serve CCA customers who later departed." (*Ibid.*) The failure to find a "justification" for excluding UOG costs from the PCIA ignores the history and policy on which decisions regarding UOG costs in the PCIA were originally based.

These same UOG assets were originally the subject of the Competition Transition Charge. (§ 367.) Recovery of stranded costs of these assets on a nonbypassable basis was permitted to the extent the assets "may become uneconomic as a result of a competitive generation market . . . ." (*Ibid.*) The Legislature provided that collection of the Legacy UOG costs "shall not extend beyond

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December 31, 2001 . . . .” (§ 367(a).) Public Utilities Code section 367 is still in force and the Legislature has not rescinded the limits on cost recovery for UOG.

The PCIA itself was initially instituted to facilitate the recovery of energy crisis costs incurred by CDWR from DA customers and *not* to recover UOG costs. Assembly Bill 1X enabled the CDWR to begin to procure resources to serve the utilities’ load following the energy crisis, and suspended customers’ ability to enter into DA transactions. In order to recover the CDWR costs from DA customers, the Commission imposed a direct access surcharge or exit fee to recover CDWR costs — the PCIA. (*Opinion Rejecting An Earlier Date Than September 20, 2001, For The Suspension Of Direct Access, And Implementing The Suspension, As Adopted in Decision (D.) 01-09-060, As Modified By D.01-10-036*, Decision 02-03-055, 2002 Cal.PUC LEXIS 195, 41, Finding of Fact 6.) However, in imposing these costs on DA customers, the Commission recognized that other resources — UOG resources — were at that time below market. (*Opinion*, Decision 02-11-022, at 18-19.) Notably, DA customers explicitly asked the Commission to *include* UOG costs in the PCIA. (*Id*. at 20.) DA customers did so solely because at that time the lower

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cost UOG provided a beneficial offset to the newly signed, expensive CDWR contracts. The Commission ultimately agreed with DA Customers that the above-market CDWR costs should be offset by including the lower cost UOG in the calculation of the PCIA. (*Id*. at 24.) There was no "principle" or citation to Legislative directive for this action; it was implicitly a "deal" approved by the Commission at the time. CCAs, of course, were not parties to this agreement, because the first CCA did not begin service until 2010.

The Commission reexamined the issue of including utility generation in departing load charges in D.08-09-012 (*Decision on Non-Bypassable Charges For New World Generation And Related Issues*, Decision 08-09-012), and again the assumption was made that UOG costs would be lower than the costs of other resources, and therefore would have a mitigating or netting effect on overall departing load charges.[5] This fact was acknowledged by PG&E, which asserted that "departing customers should not receive the

[5] *See, e.g.*, D.08-09-012 at 49, n.52 ("For purposes of this decision, 'pre-restructuring resources' refers to those current IOU resources that existed prior to March 31, 1998 and are not subject to ongoing CTC treatment. These resources consist principally of the IOUs' retained generation (i.e., hydro, coal and nuclear plants). Power from these resources tends to be cheaper when compared to the costs related to ongoing CTC, the DWR contracts and new generation.").

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benefits of existing generation after they leave bundled service." (*Id*. at 49.) In other words, PG&E argued *against* including UOG in the PCIA when it inured to its own benefit.

While the Commission originally included Legacy UOG in the PCIA to address the interests of DA customers, it extended theses costs to departing CCA customers in 2004. (*Order Resolving Phase 1 Issues On Pricing And Costs Attributable To Community Choice Aggregators And Related Matters*, Decision 04-12-046.) Amicus argues there was no statutory authority for this extension. As noted, neither CalCCA nor any individual CCA was in existence in 2004 to raise any objection.

The utilities continue to earn a return and to recover "uneconomic" costs through the life of the assets under the PCIA. In 2002 the Legislature and the Commission could not have begun to imagine that Legacy UOG would continue to generate stranded costs more than 20 years later. The history and policy behind the treatment of UOG support the legal conclusion that UOG should not be included in the PCIA.

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B. THE COMMISSION ERRS IN ITS ATTEMPT TO HARMONIZE KEY STATUTES

The cardinal rule in statutory construction is to ascertain the Legislature's intent. (*Young v. Haines* (1986) 41 Cal.3d 883, 894; *Coulter v. Pool* (1921) 187 Cal. 181, 185.) As the court of appeal has noted, "[w]hen two statutes potentially conflict, our first task is not to declare a winner, but instead to find a way, if possible, to avoid the conflict." (*Newark Unified School District v. Superior Court* (2015) 245 Cal.App.4th 887, 904.) In a shift from its reading in D.18-10-019, the Commission declared a winner in the Order Denying Rehearing, while attempting to camouflage its reading as "harmonization." "Reading the list of costs as those that must be recovered rather than as an exclusive list, harmonizes section 366.2(a)(4) and 366.2(d)(1) provisions requiring the Commission to prevent any cost shifting to bundled customers." (D.20-01-030, App. 2645.) Of course, it does no such thing. It merely chooses one interpretation of statutory language in favor of another, and makes the explicit list surplusage.

CalCCA has consistently maintained that there is no conflict or need to choose a "winner" between the provisions. The "cost-shifting" provisions are statements of general legislative intent. The general references to "cost shift" and "cost increase" in 366.2(a) and 365.2 are

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a high-level expression of a principle that can be applied in many ways. The *application* of that principle is set forth in section 366.2 (d), (e) and (f). This section lists out the specific costs allowed and details the mechanics for implementing that high-level principle. Thus, it does not conflict with the "cost shift" provisions. The more specific language of section 366.2 sets out the manner in which the general concept is to be applied.

In contrast, the Commission has chosen a winner, disingenuously cloaking its decision in purported "harmonization" principles. The Commission attempts to harmonize the statutes by reading section 366.2(f) as the *minimum* costs that must be recovered, together with "any other costs that would result in cost shifting." (D.20-01-030, App. 2646.) According to the Commission, the statutes do not conflict if the general language against cost-shifting is interpreted to give the Commission authority to take *any possible action* to prevent cost-shifting. Under this interpretation, the specific list of recoverable costs in merely illuminates what the Commission "must" do, rather than an exclusive list. (*Id*. at App. 2645.) Had the Legislature intended the list of costs to be recoverable through the PCIA as a non-exhaustive list, it would have stated so explicitly.

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Effectively, the Commission inserts the provision “at a minimum” into section 366.2(d), (e), and (f) to serve its own version of fairness, which is in conflict with the Legislature’s prescribed version of fairness.

The Commission argues that if the Legislature had listed all recoverable costs in 366.2(f), “there would be no need to include additional cost shifting language in section 366.2(a)(4) and 366.2(d)(1).” (*Id.*) The Commission is incorrect. The general prohibition on cost-shifting is not rendered ineffectual because the statute also sets out a specific list of costs that may be included in the PCIA as a means of implementing this intent.

It is the Commission’s torturous reading that would violate the long-standing principle of California law that “courts do not construe statutory provisions ‘so as to render them superfluous’.” (*In re J. W.* (2002) 29 Cal.4th 200, 210, quoting *Shoemaker v. Myers* (1990) 52 Cal.3d 1, 22; *Dyna-Med, Inc. v. Fair Employment & Housing Com.*, *supra*, 43 Cal.3d 1379, 1397.) Those interpreting statutes must also presume that an interpretation which would render terms of a statute surplusage should be avoided, and "every word should be given some significance, leaving no part useless or devoid of meaning."

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(*California State Employees' Assn. v. State Personnel Bd.* (1986) 178 Cal.App.3d 372, 378, citing *City and County of San Francisco v. Farrell* (1982) 32 Cal.3d 47, 54.) To interpret the general language of legislative intent as covering any possible cost – *regardless of category or time of incurrence* – renders the enumeration of specific cost categories in section 366.2(d), (e), and (f) "surplusage." If, as suggested by the Commission, any cost may be passed on to CCAs by virtue of the general prohibitions on cost shifting, the specific delineation of costs that may be included in the PCIA set out in 366.2(d), (e), and (f) becomes completely ineffectual.

The reading proposed by the Commission also contravenes another principle it claims to follow: a statute must be interpreted "with reference to the entire scheme of law of which it is part so that the whole may be harmonized and retain effectiveness." (*Clean Air Constituency v. State Air Resources Board* (1974) 11 Cal.3d 801, 814.) The reading that gives effect to all of the applicable statutes is that costs eligible for recovery from CCA departing load are limited to those expressly enumerated by the Legislature.

The Commission also claims that CalCCA's interpretation would "subordinate a later-in-time statute to an earlier-in-time one,"

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(D.18-10-019, App. 2258; D.20-01-030, App. 2646) and therefore conflicts with a principle of statutory construction. But this is also incorrect. When read, as is required, to give effect to all provisions, the statute's general policy against cost shifting does not conflict with section 366.2(d), (e), and (f) because the latter contains the specific set of tools the Legislature established to implement its policy with regard to the PCIA.

There is nothing in the legislative history of the cost shifting language of SB 350 to suggest or support the contention that the Legislature ever intended to repeal AB117, or alter the includable costs for departing load. However, the Commission would in effect allow SB 350 to repeal the Legislature's express language in AB 117 and presuppose the Legislature's intention. Such a result is contrary to the canons of statutory interpretation and, as noted above, in violation of court holdings that an implied repeal of a statute is only appropriate when there is no possible way to harmonize the statutes. [6]

[6] "Absent an express declaration of legislative intent, courts will find an implied repeal 'only when there is no rational basis for harmonizing two potentially conflicting statutes and the statutes are irreconcilable, clearly repugnant, and so inconsistent that the two cannot have concurrent operation.' " *State Dept. of Public Health v. Superior Court, supra,* 60 Cal.4th 955, quoting *Pacific Palisades Bowl Mobile Estates, LLC v City of Los Angeles* (2012) 55 Cal.4th 783, 805.)

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Further, concluding that SB 350 broadened the scope of includable costs would be to rewrite AB 117 and § 454.52(c). California courts have refused such a result. "[T]he requirement that courts harmonize potentially inconsistent statutes when possible is not a license to redraft the statutes to strike a compromise that the legislature did not reach." (*State Dept. of Public Health v. Superior Court* (2015) 60 Cal.4th 940, 955; *Lopez v. Sony Electronics* (2018) 5 Cal.5th 627, 634.) UOG has not been added to the list of recoverable costs by the Legislature and it may not be added by the Commission on its own initiative.

C. EVEN IF RELEVANT STATUTES COULD NOT BE HARMONIZED, THE APPLICATION OF LONG-STANDING PRINCIPLES OF STATUTORY INTERPRETATION REQUIRE THE EXCLUSION OF UOG COSTS FROM THE PCIA

In California "it has long been the rule" that statutes relating to the same subject matter are to be construed together and harmonized if possible. (*County of Placer v. Aetna Casualty & Surety Co*. (1958) 50 Cal.2d 182, 188-189.) If, however, harmonization is not possible, and an ambiguity remains, courts turn to the rules of statutory interpretation. (*Jauregui v. City of Palmdale* (2014) 226 Cal.App.4th 781, 805.) The Commission errs in the application of the rules of

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statutory interpretation that must be applied where multiple interpretations are possible. In these circumstances, well-established maxims lead to the conclusions that the Legislature intended to exclude UOG costs from the list of costs recoverable from CCA departing load customers. Thus, even if the Commission had been forced to pick a winner among the various statutory provisions, it chose the wrong one under California law.

1. A General Provision Must Be Subordinated to a More Specific Provision

Even if the specific list in 366.2 is viewed as inconsistent with the general language of sections 366.3(g) and 365.2, the rules of statutory construction would require the specific statute to take precedence. Section 1859 of the Code of Civil Procedure codifies a well-established maxim of statutory construction regarding specific provisions that conflict with general provisions:

> "In the construction of a statute the intention of the Legislature, and in the construction of the instrument the intention of the parties, is to be pursued, if possible; and when a general and particular provision are inconsistent, the latter is paramount to the former. So a particular intent will control a general one that is inconsistent with it."

As set out in case law, "[a] specific provision relating to a particular subject will govern in respect to that subject, as against a general

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provision, although the latter, standing alone, would be broad enough to include the subject to which the more particular provision relates." (*People v. Superior Court* (2002) 28 Cal.4th 798, 808, quoting *Miller v. Superior Court* (1999) 21 Cal.4th 883, 895.)

Thus, even assuming the provisions at issue here could not be reconciled, the specific list of PCIA-eligible costs provided in 366.2(f) must be considered to be a limitation on the Commission's ability to add costs to the PCIA. The California Supreme Court has as recently as July 2018 reiterated the rule that specific statutory provisions take precedence over more general provisions and, importantly, that the rule trumps the rule that later-enacted statutes have precedence. (*Lopez v. Sony Electronics, supra,* 5 Cal.5th 627,634-635, quoting *State Department of Public Health v. Superior Court*, *supra,* 60 Cal. 4th at 960, which in turn cited *People v. Gilbert* (1969) 1 Cal.3d 475, 479.)

2. *Expressio Unius* Leads to the Conclusion That the Legislature's Delineation of Specific Departing Load Charges Was Intended to Be Exclusive

As CalCCA has repeatedly urged, the maxim *expressio unius est exclusio alterius* — the expression of one thing implies the exclusion of others — applies in this case. (*Dyna-Med, Inc. v. Fair*

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Employment & Housing Com., *supra*, 43 Cal.3d 1379.) This maxim requires the Legislature's detailed lists of CCA departing load costs to be interpreted as an exclusive list unless a contrary legislative intent is expressed in the statute. (*Fields v. March Fong Eu* (1976) 18 Cal.3d 322, 332; *CPF Agency Corp. v. Sevel's 24 Hour Towing Service* (2005) 132 Cal.App.4th 1034, 1049.) Here, there is no such contradictory legislative intent. On the contrary, the Legislature has repeatedly indicated that additions to the short list of PCIA-eligible costs must be effectuated by specific statutory authorization. The absence of language including UOG costs in the statutes authorizing cost recovery from CCA departing load customers must be read as further evidence of the Legislature's intent not to include them.

The Commission errs in failing to observe this maxim and in dispensing with this argument summarily. The Commission simply states the "canons of statutory interpretation are only a guide and will not be applied if it would defeat legislative intent or produce an absurd result." (D.20-01-030, App. 2647, citing *In re J.W.*, *supra*, 29 Cal 4th 200, 209-210.) The Commission claims applying the *expressio unius* maxim would "defeat the legislative intent expressly articulated in the statute." (*Ibid*.) But there is no clear legislative intent to include

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UOG costs in the PCIA. In fact, as Amicus has put forward, the legislative intent appears to be the opposite. The Commission determined not to apply the *expressio unius* canon simply because they *chose* to interpret the statutory scheme differently. The Commission cannot now claim the application of the maxim is inapposite simply because it would contradict their preferred interpretation.

The Commission cites in a footnote to one case that discusses the *expressio unius* maxim. The cited case simply holds that the maxim does not apply in the particular circumstances in that case. (*Association of California Ins. Companies v. Jones* (2017) 2 Cal.5th 376, 398.) However, the facts of that case are distinct from the situation at issue here, where the application of e*xpressio unius* would be appropriate and would lead to the conclusion that UOG should be considered excluded.

In *Association of California Ins. Companies v. Jones* the California Supreme Court reviewed the interplay of two provisions in the Unfair Insurance Practices Act. The Supreme Court held that *expressio unius* did not apply. In that case, the two provisions regulate different activity. Thus, the existence of a specific list of *practices*

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deemed unfair does not indicate the intent of the Legislature to exclude any particular type of untrue *statement.* (*Id*.) In other words, the two statutes at issue address different matters, so the maxim simply did not apply. A very different situation is presented here, as the provisions deal with *exactly* the same costs. The principle of *expressio unius* is designed for precisely this situation and should be applied here.

3. The Legislative History Indicates the Desire to Constrain PCIA Costs to the Specific list in 366.2(f)

Real Parties in Interest PG&E, San Diego Gas & Electric Company, Southern California Edison, The Utility Reform Network, Coalition of California Utility Employees, California Large Energy Consumers Association, and Direct Access Customer Coalition (together, Real Parties in Interest) contend that the legislative history supports their claims. They claim there was a "structural reason" the Legislature mentioned UOG in particular in AB 1890 – and the absence of that reason, in their opinion, explains why the Legislature failed to mention UOG in later-enacted AB 117.

These claims are unfounded, and in fact, prove the reverse. Real Parties in Interest point to AB 9XX (Assem. Bill No. 9XX (2001-2002 Reg. Sess.), passed by the Legislature in 2001, but vetoed by the

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Governor. AB 9XX authorized the formation of CCAs and provided for recovery of CDWR contract costs, and, according to the Real Parties in Interest, left it to the Commission to "develop rules to ensure that the net unavoidable costs of power procurement by an electrical corporation are not shifted onto the electrical corporation's remaining customers." (Real Parties in Interest *Answer to Petition for Writ of Review* at 51.) But the Governor vetoed AB 9XX, and, as the Real Parties in Interest also explain, the Governor stated that the bill needed "more concise cost-containment provisions for the remaining IOU customers." (*Ibid*.) The Legislature then drafted and passed AB 117, which includes section 366.2's specific list of recoverable costs.

Astoundingly, the Real Parties in Interest claim "nothing in the legislative history of AB 117 indicates that the Legislature meant to override its initial grant of broad authority to the Commission in AB 9XX." (*Id*.) Except, of course, that AB 117 *does not include* the broad language regarding the Commission's authority that was in AB 9XX. And, once again, AB 9XX *was never enacted.*

Real Parties in Interest claim, however, that the broad, general language in AB 117 that the Commission must "prevent any shifting of recoverable costs" (§ 366.2 (d)(1)) somehow "underscores" the

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Legislature's aim to avoid constraining the Commission's authority. ((Real Parties in Interest *Answer to Petition for Writ of Review* at 51.) Such an interpretation surely defies common sense. It is clear the Legislature was tasked with defining the "cost containment" mechanism, and it did so, in section 366.2. Far from indicating a desire to "avoid constraining the Commission's authority in this regard," (*ibid*.) the final language of AB 117 must be interpreted to contain the entire list of costs intended to be recovered from departed load.

II. CCAS HAVE NOT ACQUIESCED IN THE COMMISSION'S INTERPRETATION OF THE SCOPE OF COSTS IN THE PCIA

The Real Parties in Interest also baselessly claim the CCAs have "readily agreed" with the Commission's interpretation. (*Id*. at 52.) They go so far as to claim that "[u]ntil these proceedings, CCAs themselves had approved of the Commission's interpretation." (*Ibid*.) This claim is both untrue and impossible. CCAs could not have, and did not, approve of the Commission's interpretation because they did not exist when this interpretation was first put forward.

Real Parties in Interest also cite to the fact that the Commission's interpretation is "consistent with [its] prior

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interpretations." (*Id*. at 46.) That the Commission's decision in the underlying proceeding comports with its prior decisions is hardly surprising, but it is not evidence that the prior interpretations were properly founded. It is only evidence that CCAs that were not formed until 2010 at the earliest could not have challenged the Commission's inclusion of UOG costs when they were folded into the PCIA in 2002.

A. NO CCAS EXISTED WHEN AB 117 WAS PASSED

Marin Clean Energy, the first CCA in operation, did not exist until 2010, some six years after Real Parties in Interest claim CCAs somehow recorded their "acceptance" of the Commission's 2004 decision including the costs of UOG in departing load charges. Real Parties in Interest claim the Commission agreed that "no party disputes these cost elements." (*Id.*, at 52, citing D.04-12-046 at 24.). But of course, the parties who would bear these costs did not exist at that time. Real Parties in Interest claim that a small group of cities and counties "represented" CCA interests in that proceeding. (*Ibid*.) Given that this group had no authority to represent the interests of future CCAs, formed in diverse areas of California and outside their jurisdictions, Real Parties in Interest's claim strains credulity.

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B. THIS IS THE FIRST STATEWIDE PROCEEDING IN WHICH THE COMMISSION HAS COMPREHENSIVELY REVIEWED THE PCIA CALCULATION SINCE CCAS HAVE BEEN IN EXISTENCE

Prior to the underlying proceeding, the Commission's interpretation of what costs can properly be included in the PCIA have not been the subject of a statewide proceeding since 2006. Instead, the Commission has required that these discussions should take place in each utilities' annual Energy Resource Recovery Account (ERRA) proceeding. However, when the issue is raised in such a proceeding, the Commission has rejected all challenges put forward by CCAs to the Commission's methodology. (See, e.g., *Decision Adopting Pacific Gas & Electric Company's 2018 Energy Resource Recovery Account Forecast and Generation Non-Bypassable Charges and Greenhouse Gas Forecast Revenue and Reconciliation*, Decision 18-01-009 at 10; *Scoping Memo and Ruling of Assigned Commissioner*, A.17-06-005, at 3-4) .

As detailed in Section I.A.4 above, the treatment of UOG in the PCIA has been based on decisions originally applicable to DA customers, then carried forward to CCAs as they began operations. The issue of inclusion of UOG with respect to DA customers is rooted

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in the economics applicable at that time and the specific circumstances of DA customers when departure was first contemplated and then suspended. Neither the policy nor the logic pertains to CCAs departing now, and those decisions should not dictate the treatment of departing CCA customers.

There has also been no systematic review of the inclusion of UOG in the PCIA until the underlying proceeding. And contrary to Real Parties in Interest's allegations, CCAs have actually continued to argue that the inclusion in the PCIA is unlawful. It is at best disingenuous for Real Parties in Interest to claim that CCAs' *nonexistence* when the PCIA was originally adapted to new types of departing load somehow constitutes their acquiescence in the Commission's unlawful interpretation of California law.

CONCLUSION

For the reasons above, Amicus Curiae CalCCA respectfully requests the court overturn the Commission's Decision 18-10-019.

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Dated this 6th day of July, 2020

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CERTIFICATE OF WORD COUNT

I certify this brief of Amicus Curiae California Community Choice Association in support of the Petition for Writ of Review of Protect Our Communities Foundation contains 9,494 words. In completing this word count, I relied on the "word count" function of the Microsoft Word program.

July 6, 2020

KEYES & FOX LLP

By: /s/ *Ann Springgate*
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PROOF OF SERVICE

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of San Francisco, State of California. My business address is 580 California Street, 12th Floor San Francisco, California 94115.

On July 6, 2020, I served true copies of the following document(s) described as:

APPLICATION FOR LEAVE TO FILE BRIEF OF AMICUS CURIAE AND BRIEF OF AMICUS CURIAE CALIFORNIA COMMUNITY CHOICE ASSOCIATION IN SUPPORT OF PETITIONER PROTECT OUR COMMUNITIES FOUNDATION

on the parties in this action as follows:

SEE ATTACHED SERVICE LIST

BY **ELECTRONIC SERVICE**: I served the document by submitting an electronic version of the document to TrueFiling, through the user interface at www.truefiling.com.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on July 6, 2020, at San Francisco, California.

/s/ Ann Springgate

Ann Springgate

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