Case No. D077271

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOURTH APPELLATE DISTRICT
DIVISION ONE

PROTECT OUR COMMUNITIES FOUNDATION

Petitioner,

v.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Respondent,

PACIFIC GAS & ELECTRIC COMPANY, 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

Real Parties In Interest.

From a Decision of the Public Utilities Commission of the State of California, No. 18-10-019 (October 19, 2018)

REPLY IN SUPPORT OF PETITION FOR WRIT OF REVIEW

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INTRODUCTION

The Legislature enacted AB 117 in 2002 to create the Community Choice Aggregation (CCA) system. By allowing local communities to become their own energy providers, CCAs present an affordable alternative to investor-owned utilities and empower communities to take more control over their energy portfolios. In order to ensure that CCAs remain financially accessible to the public and economically stable in their operation, the Legislature specified the costs that utilities may recover from those customers who depart for CCA service. It also required the utilities to credit those same customers with the full value of benefits they leave behind. The Legislature directed the California Public Utilities Commission to ensure that neither utility nor CCA customers pay for services that do not benefit them.

Notwithstanding AB 117's clear direction as to the costs and credits that may be allocated to customers who depart for CCA service, the Power Charge Indifference Adjustment ("PCIA") includes costs for which the Legislature has never authorized recovery—most significant, the costs of utility-owned generation ("UOG"). In support of this decision, the Commission and Real

Parties ask this Court to look beyond the plain language of the Public Utilities Code and sanction the Commission's decision to selectively disregard core elements of the Legislature's mandates. Because the Legislature intended to prevent cost shifts between bundled utility customers and departing CCA customers, they argue, the Commission has unfettered discretion to determine what costs may be allocated to CCA customers in the PCIA.

But this selective reading of the Public Utilities Code elevates one sentence in one subdivision of the Code over Legislature's specific direction enumerating the costs to be included in the PCIA. It does not square with the plain text and structure of the Public Utilities Code that limits the scope of recoverable costs. In establishing this exclusive list of costs, the Legislature limited the scope of the Commission's jurisdiction. Therefore, and contrary to the arguments of the Commission and Real Parties, this Court should not defer to the Commission's erroneous attempt to re-interpret its statutory mandate.

The Commission's inclusion of UOG in the PCIA also rests on false dichotomy: that any costs not borne by CCA customers must necessarily be shouldered by bundled utility customers. But as the Commission itself recognizes, it has the authority to

reduce stranded costs by mechanisms other than customer liability. The Commission has nonetheless chosen to include unauthorized costs in the PCIA—unilaterally expanding its jurisdiction—rather than consider other cost-reduction strategies. In so doing, the Commission shifts costs to CCA customers that are avoidable or that are not attributable to those customers.

Finally, the Commission attempts to sidestep its responsibility to credit CCA customers for the long-term and ancillary benefits of resources remaining with utilities. The Commission and Real Parties assert that CCA advocates failed to demonstrate the monetary value of these benefits in the proceeding below. But the Commission cannot ignore a statutory mandate by shifting the evidentiary burden onto CCA advocates. The Commission acknowledged that resources remaining with utilities retain long-term and ancillary values that are not captured in the PCIA. Therefore, the Commission had an obligation to identify a mechanism by which to identify long-term and ancillary benefits and credit CCA customers for the value of these resources. It cannot simply throw up its hands in the face of a difficult issue.

The Commission's position stands fundamentally at odds with the Legislature's mandate to ensure equity between bundled utility customers and departing CCA customers. In adopting AB 117, the Legislature never intended the PCIA to shift any and all costs onto the shoulders of CCA customers. It never assumed, as the Commission does here, that utility ratepayers and CCA customers are the only parties who may be held financially responsible for utilities' procurement decisions. And, critically, the Legislature never granted the Commission boundless power to authorize recovery of whatever costs it sees fit. Through blatant disregard of the Public Utilities Code, the Commission has issued a decision that unlawfully penalizes CCA customers and needlessly pits them against bundled utility customers. Because the Commission failed to proceed in the manner required by the Public Utilities Code when it modified the PCIA, its decision must be overturned.

ARGUMENT

I. Respondent and Real Parties Misstate the Standard of Review.

Relying on *Greyhound Lines, Inc. v. Public Utilities Commission* and its progeny, Respondent and Real Parties ask

this Court to defer to the Commission's "expertise" as a regulatory agency and presume the validity of the Commission's decision. (Answer to Petition for Writ of Review ("Real Parties' Answer"), filed April 27, 2020, at 30 [citing *Greyhound Lines, Inc. v. P.U.C.* (1968) 68 Cal.2d 406]; CPUC Answer to Petition for Writ of Review ("Commission Answer"), filed April 27, 2020, at 13.) But this Court owes no deference to the Commission.

The statutes at issue in this case establish the Commission's jurisdiction to allocate costs to CCA customers. But for the Legislature's express grant of authority, the Commission would have no power to regulate charges imposed through the PCIA. (Petition for Writ of Review ("Petition"), filed February 20, 2020, at 32-33.) And, critically, when the Legislature directed the Commission to establish a cost-recovery mechanism for CCA departures, it did not write the Commission a blank check. Instead, the Legislature authorized the Commission to act within a defined framework to ensure that bundled and departing customers pay only for those resources that actually benefit them. Because the statutes at issue "define[] the very scope of the [C]ommission's jurisdiction, *Greyhound* deference is not appropriate." (*New Cingular Wireless PCS, LLC v. P.U.C.* (2016)

246 Cal.App.4th 784, 807; *accord Pac. Bell Wireless, LLC v. P.U.C.* (2006) 140 Cal.App.4th 718, 729; *Pac. Gas & Electric, Corp. v. P.U.C.* (2004) 118 Cal.App.4th 1174, 1194-95.)

Moreover, while courts may consider agency interpretations of jurisdictional statutes, such interpretations "'are not binding or necessarily even authoritative.'" (*Pac. Gas & Electric, Corp.*, 118 Cal.App.4th at 1195 [quoting *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 7-8].) Instead, courts exercise their independent judgment, giving deference only where "appropriate to the circumstances of the agency action." (*Yamaha*, 19 Cal.4th at 8.) "The final word on questions of statutory interpretation always rests with the judiciary." (*New Cingular*, 246 Cal.App.4th at 807 [citing *Yamaha*, 19 Cal.4th at 7, 11].)

In defining the Commission's jurisdiction, the Legislature did not "employ[] open-ended statutory language" that left gaps for the Commission to fill. (*See New Cingular*, 246 Cal.App.4th at 810 [quoting *Yamaha*, 19 Cal.4th at 17].) Rather, the Legislature directed the Commission to develop a cost-recovery mechanism and established clear bounds on the Commission's power. (*See generally* Assem. Bill 117 (2001-2002 Reg. Sess.).) The

Commission's interpretation of the Public Utilities Code would expand its jurisdiction beyond the confines established by the Legislature; this Court should reject that interpretation. (*See Southern California Gas v. P.U.C.* (1979) 24 Cal.3d 653, 657-60 [the Commission cannot read past the Legislature's express language to exercise power "that the Legislature has not yet bestowed" on it].)

II. At Every Turn, the Commission's Decision Flips the Legislature's Cost-Shifting Prohibition on Its Head.

AB 117's cost-shifting prohibition arose from the concern that the departure of utility customers to CCAs could shift the burden of long-term power purchase contracts to the utilities' remaining customers and fail to credit departing customers for the full benefits of those same resources. (*See* Legis. Counsel's Dig., Assem. Bill No. 117 (2001-2002 Reg. Sess.) ¶1.) To prevent such shifts, the Legislature required CCA customers "to pay specified amounts for Department of Water Resources costs and electrical corporation costs, as described." (*Id.*)

The Legislature designed a two-part cost allocation system. First, it authorized the Commission to allocate certain costs to

departing customers. (Pub. Util. Code §§ 366.2(d), (e), and (f).)[1] Second, and equally important, in 2011 the Legislature mandated that the Commission credit departing customers for the value of the benefits remaining with bundled customers. (§ 366.2(g).)

The Commission and Real Parties go to great lengths to demonstrate that Public Utilities Code's cost-shifting prohibition is mandatory. (CPUC Answer at 17-18; Real Parties' Answer at 33-35 [parsing the definitions of "shall" and "any"].) Petitioner does not dispute that cost-shifting between customers is prohibited. But, as the Petition illustrated, the Commission has long recognized that the Legislature's directive to prevent cost shifting between bundled utility customers and departing CCA customers cuts both ways. (Petition at 30; *see also* 2 App. 2212-13 [D.18-10-019, noting "the Commission must ensure equity on both sides of the departing load transaction"].)[2] Yet despite

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[1] Unless otherwise noted, all statutory citations are to the Public Utilities Code.

[2] References to "App" are to the Appendix of Exhibits in Support of Petition for Writ of Review, filed concurrently with this petition. Each reference to "App" is preceded by the applicable volume number and followed by the page reference. For example, 1 App 0357 refers to the Appendix of Exhibits, volume 1, page 0357.

paying lip service to the "dual requirements" of the cost-shifting prohibition (2 App. 2213), the Decision consistently prioritizes the interests of bundled utility customers over those of departing CCA customers (*see* Petition at 31 [Commission unlawfully includes legacy UOG in the PCIA], 57-59 [Commission shifts post-2002 UOG costs to CCA customers], 60-64 [Commission fails to fully credit CCA customers for resource benefits]).

The Commission's failure to prevent cost-shifting to CCA customers is compounded by the Commission's unsupported assumption that a cost shift between customers will necessarily follow CCA departures. Since the inception of the CCA program, the Commission has repeatedly affirmed the utilities' obligation to forecast CCA departures and adjust their portfolios accordingly. (1 App. 265 [citing D.04-12-048 at 55-56]; 2 App. 1729 [quoting D.08-09-012 at 54-55]; D.04-12-048 at 55 ["Future IOU procurement plans *shall incorporate* reasonable anticipated CCA departing load." (emphasis added)].) As evidenced by the 10-year limit on post-2002 UOG recovery, the Commission has even used PCIA eligibility as a tool to incentivize prudent management. (2 App. 1729 [quoting D.08-09-012] [utilities can minimize stranded costs "by 'adjust[ing] their load forecasts and

resource portfolios to mitigate the effects of [DA, CCA, and any large municipalizations] on bundled service'"].) The Commission therefore understands that portfolio management weighs significantly on the magnitude of utilities' stranded costs.

Yet at each stage of this proceeding, the Commission has insisted on holding customers—whether bundled or departing—responsible for utilities' strategic business decisions. (*See, e.g.,* Commission Answer at 23 [rejecting out of hand Petitioner's argument that "the Legislature's intent to prevent *any* cost shifting" requires the Commission to consider other cost-reduction methodologies, including shareholder responsibility].) Rather than consider whether utilities should themselves bear any costs for their imprudent management to date, the Commission decided to consider shareholder responsibility only "for future portfolio mismanagement" in a later phase of this proceeding. (2 App. 2318.) In so doing, the Commission virtually ensured customers will pay avoidable costs each time a percentage departs for CCA service—a clear violation of the Commission's statutory duty to limit CCA customer responsibility for an electrical corporation's electricity purchase contract costs to "unavoidable" costs which are recoverable in

Commission-approved rates and attributable the CCA customer. (*See* § 366.2(f).)

III. Neither Statutory Text Nor Legislative History Support the Commission's Inclusion of UOG in the PCIA.

As in the proceeding below, the Commission and Real Parties place undue weight on the Legislature's general prohibition on cost shifting while failing to acknowledge the dual equities required to lawfully effectuate the Legislature's general prohibition. (Commission Answer at 16-22; Real Parties' Answer at 32-44.) In their view, the legislative mandate to prevent "any shifting of recoverable costs" conveys near-boundless authority to the Commission to allocate costs to departing CCA customers, but not the other way around. (Real Parties' Answer at 39; Commission Answer at 19; *see also* Real Parties' Answer at 35.)

Neither the statutory language nor the history of the PCIA support such broad deference to the Commission. To the contrary, the only way to make sense of the Legislature's two-sided cost-shifting prohibition is to read AB 117's list of recoverable costs as exclusive.

A. Only Petitioner's Construction Gives Effect to Each Provision of the Public Utilities Code.

As the Commission acknowledges, this Court's analysis begins—and should end—with the plain language of the Public Utilities Code. (Commission Answer at 17 ["The words in question must be considered in context, 'keeping in mind the statutes' nature and obvious purposes.'"] [quoting *People v. Cole* (2006) 38 Cal.4th 964, 975].) But rather than consider the full text of the statutes, the Commission and Real Parties implore this Court to selectively read some of the statutory language, disregard other language, and allow the Commission to add additional language so as to broaden the scope of recoverable costs under the PCIA. This approach violates accepted rules of statutory construction, contradicts the statutory language, and invites the very cost shifts the Commission has an obligation to prevent.

1. The Relevant Provisions of the Public Utilities Code Work Together to Define the Scope of the PCIA.

Through sections 366.2(d), (e), and (f) the Legislature provided an explicit set of costs that may be allocated to departing customers. First, the PCIA may include Department of

Water Resources' ("DWR") electricity purchase contract costs and "electricity purchase contract obligations incurred as of the effective date of the act adding this section, that are recoverable from electrical corporation customers in commission-approved rates." (§ 366.2(d)(1).) Second, the PCIA may include (1) DWR bond charges (§ 366.2(e)(1)) and (2) CCA customers' share of DWR's "estimated net unavoidable electricity purchase contracts" (§ 366.2(e)(2)). Third, the PCIA may include utilities' electricity purchase contract costs, including (1) utilities' "unrecovered past undercollections for electricity purchases" (§ 366.2(f)(1)) and (2) CCA customers' share of utilities' "estimated net unavoidable electricity purchase contract costs attributable to [CCA customers]" (§ 366.2(f)(2)).

Nowhere does this exclusive list authorize recovery of UOG costs. Nor is there any reason to read an implied authorization into this list. The Legislature notably did not make this list illustrative, as it did with similar lists in AB 117. (Petition at 39-40; *compare* § 366.2(c)(3)(E) ["including but not limited to"] *with* §§ 366.2(e), (f).) And no other evidence exists in the text of the Public Utilities Code that would suggest the Legislature intended to authorize recovery of other, unidentified costs. (*See generally*

§§ 366.2, 366.3, and 365.2.) To the contrary, the Public Utilities Code repeatedly affirms the Legislature's intent to restrict cost recovery to its enumerated costs. (*See* § 366.2(c)(5) [acknowledging the cost-recovery mechanism is imposed "pursuant to subdivisions (d), (e), and (f)"]; *see also* § 366.2(k)(1) [prohibiting imposition of costs other than those identified in subdivisions (d), (e), (f), and (h) that do not benefit CCAs or their customers].)

Real Parties' claim that Petitioner's interpretation requires the Court to read additional language into the Public Utilities Code is therefore incorrect. (*See* Real Parties' Answer at 40 [claiming the list can only be read as exclusive if the court reads a limiting word, such as "only," into the statute].)[3] The plain language and structure of the Public Utilities Code demonstrate that the Legislature authorized the Commission to allocate to

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[3] Real Parties' citation to *Arneson v. Royal Pacific Funding Corp.* (2015) 239 Cal.App.4th 1275, 1280, does not help its position. (Real Parties' Answer at 38.) In that case, the court's "nonexclusive reading of the statute [found] support in the surrounding text," and an exclusive reading would have produced an absurd result. (*Arneson*, 239 Cal.App.4th at 1280.) As Petitioner has demonstrated, the present case presents the exact opposite situation.

CCA customers only those costs that the Legislature expressly identified.

Treating the Public Utilities Code's list of recoverable costs as exclusive comports with the Legislature's understanding of UOG at the time it adopted AB 117. The same assets now characterized as "Legacy" UOG[4] were originally the subject of the Competition Transition Charge authorized by AB 1890. (2 App. 1883; *see also* § 367.) AB 1890 authorized recovery of stranded costs of these assets to the extent the assets may become uneconomic as a result of the transition to a competitive generation market. (*Southern California Edison Co. v. Peevey* (2003) 31 Cal.4th 781, 788.) However, this authorization was not open-ended; the Legislature provided that recovery should sunset by December 31, 2001. (*Id.*) Because the Legislature knew utilities could not recover stranded costs of legacy UOG after 2001, its decision not to authorize recovery of UOG after that

[4] Legacy UOG encompasses utility owned generation constructed before 2002.

date demonstrates a clear intent to disallow recovery through the PCIA.[5]

2. Section 366.2 (d) Does Not Authorize the Inclusion of UOG in the PCIA.

Notwithstanding the exclusive list of costs in sections 366.2 (d), (e), and (f), the Commission misinterprets and takes out of context a single sentence in section 366.2(d)(1) and elevates the misinterpreted sentence over the remainder of the statute. (Commission Answer at 20.) However, the second sentence in subdivision 366.2(d)(1) simply prohibits any shifting of the same "recoverable" costs it identified earlier in that same section. (*See* § 366.2(d)(1) [allowing allocation of certain costs "that are *recoverable* from electrical corporation customers in commission-approved rates" and prohibiting "any shifting of *recoverable* costs between customers"] (emphasis added).) The Commission and

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[5] That a "structural reason" existed "for the Legislature to mention utility-owned generation" in AB 1890 only strengthens this conclusion. (Real Parties' Answer at 49.) As Real Parties acknowledge, "[t]he situation had changed radically by the time the Legislature adopted AB 117." (*Id.*) Specifically, the Legislature expected the utilities to have already accounted for the above-market stranded costs of UOG resources through the Competition Transition Charge. Therefore, no reason would have existed for the Legislature to reauthorize recovery of those costs in AB 117.

Real Parties have not made and cannot make any showing that UOG costs are included in the categories of recoverable costs identified in subdivision (d)(1). UOG costs are neither DWR electricity purchase costs nor electricity purchase contract obligations incurred as of January 1, 2003 recoverable in "commission-approved rates." (*See* § 366.2(d)(1) [authorizing recovery of "the Department of Water Resources' electricity purchase costs," as well as "electricity purchase contract obligations incurred as of the effective date of" AB 117].)

Moreover, the Commission cannot impose the PCIA pursuant to subdivision (d) because, as subdivision (d)(2) makes clear, the entirety of subdivision (d) merely restates the law existing in 2003. (§ 366.2(d)(2).) Neither the Commission nor Real Parties attempt to argue that UOG costs are recoverable under Division 27 of the Water Code or Section 360.5 of the Public Utilities Code. (§ 366.2(d)(2) [finding that Section 366.2(d) is a restatement of existing law].) Thus, no basis exists for the Commission's argument that because it imposed the PCIA pursuant to section 366.2(d), it is necessarily consistent with all

relevant sections of the Public Utilities Code. (Commission Answer at 20.)[6]

3. Limiting Recoverable Costs Does Not Create a Conflict with the Legislature's General Cost-Shifting Prohibition.

Notwithstanding this evidence of Legislative intent and express statutory language, the Commission and Real Parties counter that treating AB 117's list of recoverable costs as exclusive would tie the Commission's hands and force a violation of the cost-shifting prohibition. (*E.g.,* Real Parties' Answer at 41 [quoting D.18-10-019].) Not so. While sections 366.2(d), (e), and (f) specify the exclusive list of costs that may be assigned to departing customers, the Commission's limited jurisdiction over CCA customers and the scope of the PCIA does not deprive it of its "general power to prevent a utility from passing on . . . unreasonable costs" to the utility's own ratepayers. (*City and County of San Francisco v. P.U.C.* (1971) 6 Cal.3d 119, 127 [recognizing Commission's authority to find that an unreasonable

[6] As Petitioner explained in its Petition, subdivision (h) does not expand the list of recoverable costs, but rather clarifies the ownership of costs recovered pursuant to subdivisions (e) and (f). (Petition at 39, fn. 6; *see also* § 366.2(h).)

expense "was due to an imprudent management decision"]; *City of Los Angeles v. P.U.C.* (1975) 15 Cal.3d 680, 694.) And, the Commission must consider lawful alternatives in the public interest. (*Id*; *Southern Pacific Co. v. Spring Valley Water Co.* (1916) 173 Cal. 291, 298 [power to reform contracts to conform to the public interest].) Therefore, the Commission and Real Parties are incorrect when they assume that UOG costs must be borne exclusively by either bundled or departing customers. (Commission Answer at 23 [arguing the Commission need not consider shareholder responsibility because there is no explicit mandate that it do so].) The Commission, however, failed to consider alternatives to saddling CCA customers with UOG costs and failed to assess whether UOG costs resulted from imprudent management.

In fact, the Commission did not even make any findings that the UOG constitutes uneconomic or stranded costs that should be borne by ratepayers (CCA or utility) in the first place. (*See* 2 App. 2359-65 [D.18-10-019 findings of fact and conclusions of law]; 2 App. 2661-62 [D.20-01-030 modifications to D.18-10-019].) The failure to make adequate findings is a fatal defect in the Commission's Decision. (*Northern California Power Agency v.*

P.U.C. (1971) 5 Cal.3d 370, 380 ["Even if we were to assume . . . that the Commission did in fact take into account [the material issue] [], we would still be compelled to annul the decision because . . . the Commission must make specific findings of fact and conclusions of law relevant to material all issues of a case."].) When the Commission established the ten-year maximum on recovery for UOG costs, the Commission made clear that only stranded UOG costs would be recoverable from all customers. (2 App. 2264 ["The Commission concluded that the utilities should be allowed to recover the net costs of these commitments from all customers, including departing customers, but 'only the uneconomic portion' and specified that 'the utilities must take appropriate steps to minimize their costs by selling excess energy and capacity needs into the marketplace.'"].)

Here, however, the Commission did not and could not make any findings that UOG costs are stranded costs that should be assigned to both IOU ratepayers and CCA customers. To make such a finding, the utilities would have first been required to justify the reasons why they failed to "take appropriate steps to minimize their costs by selling excess energy and capacity needs into the marketplace" as they managed their portfolios over the

years (D.04-12-048 at 60); they would have been required to explain why they failed to meet the Commission's "expectation that there should be little if any stranded costs" (*id.*); and they would have been unable to justify why they failed "to justify in their applications, on a case-by-case basis, the desirability of adopting a cost recovery period of longer than ten years" (*id.* at 61). (*See also* 2 App. 2490-98.)

The Commission could easily prevent a cost shift between customers while staying within the confines of the express limits on its statutory authority. Instead, the Commission failed to consider and make findings about whether UOG costs should be attributable to shareholders instead of IOU ratepayers and CCA customers—an obvious solution and alternative to unlawfully shifting costs onto CCA customers by unilaterally expanding the list of costs it assigns to departing customers contrary to legislative directives.

B. Even If the Statutory Language Were Ambiguous, the Canons of Interpretation Foreclose the Commission's Approach.

The plain language of the Public Utilities Code excludes UOG from the PCIA. (*See* §§ 366.2(d)-(f).) Therefore, no reason remains for this Court to consider extrinsic evidence of legislative

intent. (*See, e.g., Lopez v. Sony Electronics, Inc.* (2018) 5 Cal.5th 627, 640.) Nevertheless, as the Petition demonstrated, accepted canons of interpretation underscore the Legislature's intent to limit the costs that may be imposed on departing CCA customers. (Petition at 42-55.)

The Commission and Real Parties read the two-sided cost-shifting prohibition contained in Sections 366.2(a)(4), 365.2, and 366.3 as a one-sided prohibition that can be read out of context so as to govern the scope and effect of more specific provisions. (*E.g.,* Commission Answer at 23-24; Real Parties' Answer at 33.) But this interpretation is precisely the opposite of how statutes operate. Where, as here, "one of the statutes involved deals generally with a subject and another relates specifically to particular aspects of the subject," harmonization requires the provisions to be "read together and so construed as to give effect, when possible, to all the provisions thereof." (*Dept. of Public Health v. Superior Court* (2015) 60 Cal.4th 940, 955 (citation omitted).) And "when a general and particular provision are inconsistent, the latter is paramount to the former." (Code Civ. Proc. § 1859 ["a particular intent will control a general one that is inconsistent with it"].)

The *expressio unius* canon is an outgrowth of this rule. (*See In re Pardue's Estate* (1937) 22 Cal.App.2d 178, 181.) This canon applies "when there is reason to believe a legislative omission was intentional, such as when the statute contains a specific list or presents a facially comprehensive treatment." (*Lopez*, 5 Cal.5th at 636 (citation omitted); *see also Southern California Gas* 24 Cal.3d at 659.) And as the Petition demonstrates, both are true here. The Legislature provided a facially comprehensive list of costs that are recoverable from departing customers, and chose not to make this list illustrative as it did in other related provisions of the Public Utilities Code. (*Compare* §§ 366.2(e) & (f) *with* § 366.2(c)(3)(E) ["including, but not limited to"].) Thus, *expressio unius* requires the Commission to treat AB 117's list of recoverable costs as exclusive. (*See Lopez*, 5 Cal.5th at 636.)

The Commission's attempt to distinguish *Lopez v. Sony Electronics* misconstrues both Section 366.2 and the *expressio unius* canon. (*See* Commission Answer at 24.) While it is true that *Lopez* applied *expressio unius* to a list of statutory exemptions (*see* 5 Cal.5th at 635-36), here the costs attributable to CCA customers consist of exemptions to the general rule that CCA customers may not be required to pay for costs for goods,

services, and programs that do not benefit CCA customers. (§ 366.2(k) [stating that "[*e*]*xcept* for nonbypassable charges imposed by the commission pursuant to subdivisions (d), (e), (f), and (h) (emphasis added)].)

In any event, the *Lopez* court never implied—as the Commission does here—that the canon *only* applies to exemptions (*see id.* at 635-36 [*expressio unius* applies whenever "there is reason to believe a legislative omission was intentional, such as when the statute contains a 'specific list' or presents a 'facially comprehensive treatment'"]; Commission Answer at 24 [rejecting *expressio unius* because "[h]ere, there are no exemptions"].)

To the contrary, courts have long held that "[i]f a statute enumerates the persons or things to be affected by its provisions, there is an implied exclusion of others." (*CPF Agency Corp. v. Sevel's 24-Hour Towing Service* (2005) 132 Cal.App.4th 1034, 1049 [quoting *In re Pardue's Estate*, 22 Cal.App.2d at 180-81].) And in such cases, "the court is without power to supply an omission." (*CFP Agency Corp.*, 132 Cal.App.4th at 1049 [quoting *In re Pardue's Estate*, 22 Cal.App.2d at 180-81] [Legislature revised two subdivisions to express intent, but did not do so to a

third]; *see also Gikas v. Zolin* (1993) 6 Cal.4th 841, 852 [where statute expressly provided that acquittal in a criminal proceeding precluded an administrative sanction, Court would not find additional preclusive effect].) Because the Legislature provided a list of specific costs that may be allocated to CCA customers through the PCIA, "there is an implied exclusion" of unlisted costs, including UOG costs. (*CFP Agency Corp.*, 132 Cal.App.4th at 1049.)

Additionally, while *expressio unius* "can be overcome by a strong indication of legislative intent" (*Reise v. St. Mary's Hospital & Medical Center* (1987) 209 Cal.App.3d 1303, 1316), no contrary intent exists here. Indeed, the only measure of Legislative intent identified by the Commission is contained in section 366.2(d)(1)'s cost-shifting prohibition. (Commission Answer at 25.) And as Petitioner has explained at length, reading this prohibition to expand the list of recoverable costs renders that list meaningless and creates needless tension in the Code. (*See* Petition at 35-40, 46-51.) When read in the appropriate context of AB 117's limits on cost recovery, the cost-shifting prohibition reinforces the exclusive nature of that list and the plain language of Section 366.2. (*Id.*)

C. The Legislature Has Never Acquiesced to the Commission's Blanket Inclusion of UOG Costs in the PCIA.

Recognizing that the Commission has allowed recovery of UOG costs without any express authorization, Real Parties now assert that the Legislature's failure to chastise the Commission should be viewed as an implicit endorsement of its behavior. (Real Parties' Answer at 22-24.) This argument is not only illogical, but also stands at odds with accepted rules of statutory interpretation.

As an initial matter, Real Parties inappropriately rely on committee reports to manufacture a conflict in statutory language where none exists. (*See* Real Parties' Answer at 23.) A cardinal rule of statutory interpretation is that courts may not reach beyond the plain meaning of a statute unless the statutory language is ambiguous. (*Lopez*, 5 Cal.5th at 640.) Courts must follow the plain language "even if it appears probable that a different object was in the mind of the Legislature" (*Id.* (citations omitted)), and cannot resort to legislative history or other extrinsic aids (*see Kavanaugh v. West Sonoma County Union High School Dist.* (2003) 29 Cal.4th 911, 919).

As Petitioner has demonstrated from the outset of this proceeding, the plain language of the Public Utilities Code unambiguously limits the costs that are recoverable under the PCIA to those enumerated in sections 366.2(d), (e), and (f). (*See generally* Petition.) Because the statutory language is unambiguous, this Court must judge legislative intent on that basis alone. Whatever the committee reports might indicate, they cannot overcome the plain language of the Public Utilities Code. (*See Lopez*, 5 Cal.5th at 640.)[7]

However, even if Real Parties' theory had merit, the legislative history and Commission decisions do not support their conclusion. (*See generally* SB 790; D.03-12-059; D.04-12-048.) The Senate passed SB 790 in 2011. The committee report cited by Real Parties as evidence of purported acquiescence was published that same year. (Real Parties' Answer at 23.) And while the Commission did authorize recovery of UOG resources prior to the adoption SB 790, it did not do so without restriction. Rather,

[7] While Petitioner explained legislative history in its Petition, it did so only to demonstrate that the Legislature never amended the text of the Public Utilities Code to authorize recovery of UOG costs.

since 2004, the Commission has only authorized recovery of new UOG resources for a limited period of ten years or the length of the contract, whichever is less. (Petition at 57 [quoting D.04-12-048]; *see also* 2 App. 2473-74; 2 App. 2262-63.) Thus, if the Legislature acquiesced to *anything*—and it did not—it was only to the recovery of UOG costs within the same ten-year maximum period employed by the Commission since 2004.

In reality, far from acquiescing to any imposition of UOG costs on CCA customers, in 2011 the Legislature added to Section 366.2 subdivisions (g) and (k). (SB 790, Sec. 5.) The former subdivision requires that the "[e]stimated net unavoidable electricity costs paid by [CCA customers] shall be reduced by the value of any benefits that remain with bundled service customers, unless the [CCA customers] are allocated a fair and equitable share of those benefits." (§ 366.2(g).) The latter provision confirms that "[e]xcept for nonbypassible charges imposed pursuant to subdivisions (d), (e), (f), and (h), and programs authorized by the [C]ommission to provide broader statewide or regional benefits to all customers," CCA customers must not be required to pay for "nonbypassable charges for goods, services, or programs" that do not benefit them or the CCA.(§

366.2(k).) Thus, in passing SB 790, the Legislature reaffirmed its intent to limit the PCIA to those costs identified in the Public Utilities Code and ensure CCA customers would not be overcharged.

Real Parties' argument that section 366.2(k)(1) confirms "that there is no restriction on holding CCA customers accountable for costs of resources that benefit them" cannot be squared with the statutory language. (Real Parties' Answer at 40, fn. 6.) Section 366.2(k)(1) reaffirms that the PCIA must be imposed "pursuant to subdivisions (d), (e), (f), and (h)," and that the Commission has no authority to charge CCAs or their customers for costs that do not benefit CCAs or their customers. Utility-owned generation does not benefit CCA customers because CCA customers are no longer served by the utilities that own the UOG and that can use it as they see fit.

D. Community Choice Aggregators Have Not Acquiesced to the Commission's Interpretation.

Setting aside the fact that CCAs' opinions cannot demonstrate Legislative intent, Real Parties' final attempt to paint Petitioner as "the lone defender" of its position is disingenuous and ahistorical. (Real Parties' Answer at 52-53.)

Relying solely on a 2004 statement by the Commission, Real Parties conclude that "[u]ntil these proceedings, CCAs themselves had approved of the Commission's" inclusion of UOG resources in the PCIA. (*Id.* at 52.) But this conclusion is demonstrably wrong.

Most notably, the first CCA did not come online until 2010. (2 App. 2395.) That the Commission earlier referred to selected interests as "CCAs or prospective CCAs" for the sake of convenience does not change this reality. (*See* D.04-12-046 at 7, fn. 3.) No CCA could have acquiesced to a determination made in 2004 as no CCA was yet in existence. Furthermore, as CalCCA noted in its application for rehearing, "*CCAs have not been able to raise the inclusion of UOG in the PCIA until this rulemaking* because the Commission has in [other] proceedings repeatedly rejected any challenges to the methodology." (2 App. 2385 (emphasis added).) "*The treatment of UOG for CCAs is a new issue*." (*Id.* (emphasis added).)

Second, at every stage of this proceeding, CCAs have advanced substantially the same arguments that Petitioner advances here with respect to legacy and post-2002 UOG resources. (*See, e.g.,* 1 App. 864 [opening brief of Solana Energy

Alliance]; 1 App. 990, 994 [CalCCA reply brief]; 2 App. 1883-84 [CalCCA comments on Proposed Decision].) Thus, to the extent CCAs' actions weigh on the validity of the Commission's interpretation, those actions cut uniformly against inclusion of UOG costs in the PCIA.

IV. Eliminating the Commission-Imposed Ten-Year Maximum on Post-2002 UOG Recovery Would Violate the Legislature's Cost-Shifting Prohibition.

The Commission and Real Parties contend that there is no statutory basis for the 10-year maximum limit on post-2002 UOG recovery. Because the Public Utilities Code does not expressly require the Commission to impose a time limit on new UOG recovery, they argue, the Petition presents little more than a policy dispute with the Commission. (Real Parties' Answer at 55; *see also* Commission Answer at 27-28.) The Commission's argument, of course, fails to acknowledge that the Public Utilities Code provides no authorization for the inclusion of UOG in the PCIA at all. The Commission also ignores its obligation to ensure that departing customers pay only for those costs that are both unavoidable and attributable to CCA customers. (*E.g.,* §§ 366.2(e), (f), (g).) By definition, costs for resources utilities acquired knowing that they would not be recoverable from all

customers after a maximum of ten years are avoidable costs that cannot be attributable to CCA customers.

A. Because Utilities Have Been on Notice of the Ten-Year Limit since 2004, Any Costs for Post-2002 UOG After Ten Years Are Avoidable Costs.

In 2004 the Commission adopted a rebuttable presumption limiting the allocation of the cost of post-2002 UOG resources to CCA customers to a maximum of ten years. (Commission Answer at 26.) In adopting this limit, the Commission sought to ensure that the departure of customers to CCAs did not result in "stranded costs" from UOG that would burden ratepayers. (D.04-12-048 at 61; *see also* D.03-12-059 at 32.) The Commission also built in a safety net that "allow[ed] the utilities the opportunity to justify" cost recovery over a longer period of time on a case-by-case basis. (D.04-12-048 at 61.) Every action the Commission took from 2004 until this proceeding treated post-2002 UOG as an avoidable cost after the first ten years of operation. (*See, e.g., id.*; D.08-09-012 at 55.) The Commission expected utilities to forecast CCA departures and incorporate those forecasts into their long-term procurement plans. (1 App. 265; D.04-12-048 at 55 ["Future IOU procurement plans *shall incorporate* reasonable anticipated CCA departing load."].) And the Commission relied on the ten-

year recovery limit as one tool to incentivize compliance. (*See* D.08-09-012 at 54-55 [“By the end of a 10-year period, we assume the IOUs would be able to make substantial progress in eliminating such effects for customers who cease taking bundled service during that period.”].)

The Commission complains that Petitioner “does not cite any record evidence to support its contention that utilities have embedded the prior ten-year limitation in their planning and procurement decision[s].” (Commission Answer at 27.) In fact, the Petition cited utility testimony indicating that the utilities based their procurement decisions in part on the ten-year maximum recovery period. (Petition at 57-58 [citing 1 App. 471] [utility witness Shults testifying that IOUs have adjusted their load forecasts to mitigate the effect of the ten-year limit].) Therefore, utilities should not have procured post-2002 resources with the intent of recovering those costs from customers beyond a ten-year period.

But whether utilities *actually* embedded the ten-year maximum into their planning decisions does not change the Commission’s responsibility to CCA customers. If the utilities failed to adhere to the Commission’s mandate that they plan for a

maximum ten year recovery for UOG costs—as the Commission and Real Parties seem to suggest (*see* Commission Answer at 27; Real Parties' Answer at 55)[8]—then lifting the ten-year limit would saddle departing customers with avoidable costs that should have been incorporated into the utilities' planning in violation of the Public Utilities Code. (*Supra*, Part IV.A; *see, e.g.,* §§ 366.2(f), (g) [authorizing recovery of only "net unavoidable" costs].) The Commission cannot now claim those same costs were unavoidable merely because Real Parties may not have met their obligations, or without having made any relevant findings.

B. The Commission and Real Parties Could Easily Avoid a Cost Shift, But Have Instead Chosen to Create One.

When the Commission adopted the ten-year limit, it created an ongoing obligation for utilities to forecast CCA departures and to reduce potential stranded costs within the ten-year recovery window, or to justify in an application the need for

[8] In fact, the record is replete with evidence that the utilities did not meaningfully incorporate load departures into their long-term planning. (*E.g.,* 1 App. 987 [small departures were not captured because utilities refused to change their procurement or portfolio management strategy until departing load reaches between 10-20 percent of load].)

cost recovery in excess of 10 years. (*See* D.08-09-012 at 55; D.04-12-048 at 60-61.).

In removing this limit, the Commission never undertook any analysis of whether the continuation of the ten-year limit would actually create any stranded assets whose costs unfairly burden utility customers. (*See* 2 App. 2260-65.) Nor did the Commission make any findings to this effect. (*See* 2 App. 2359-65 [D.18-10-019 findings of fact and conclusions of law]; 2 App. 2661-62 [D.20-01-030 modifications to D.18-10-019]. Under the Commission's rationale for attributing UOG costs to CCA customers in the first instance, this failure would constitute legal error. (*Northern California Power Agency,* 5 Cal.3d at 380 ["the Commission must make specific findings of fact and conclusions of law relevant to all issues of a case."].)

PG&E's Humboldt generation facility is the only meaningful example in the record of UOG that may have been acquired for the benefit of departing CCA customers. (*See* 2 App. 2265.) The Commission asserts that because the plant was acquired for local reliability needs, its acquisition could not have been affected by forecast departures. (*Id.*) But the Commission fails to take the next step to consider and make findings as to

whether the Humboldt plant provides value to utility customers and therefore its costs should not be borne by CCA customers, as required by Section 366.2(g). In any event, other UOG acquisitions were not constrained to local reliability. For instance, in 2012, SDG&E exercised its discretion to purchase the 480 MW El Dorado Power Plant—renamed the Desert Star Energy Center—from a Sempra Energy affiliate. (2 App. 2147.) Located in Nevada, Desert Star provides no such local reliability benefits to SDG&E customers. (*Id.*) Even if the Commission had made the appropriate findings regarding the Humboldt plant, the Commission cannot base its decision on one facility that is not representative of post-2002 UOG resources.

In fact, the Commission's reference to the Humboldt generation facility reveals its disregard of the safety valve the Commission itself built into the ten-year maximum, allowing utilities "to justify in their applications, on a case-by-case basis" an extended cost recovery period. (D.04-12-048 at 61.) If PG&E had been concerned about local reliability needs, it should have petitioned for an exemption from the ten-year limit for the Humboldt plant. Yet this option has never been exercised. (2 App. 2148.)

The Commission's removal of the ten-year limit without any findings that retaining it would in fact result in impermissible cost shifts and without consideration of the cost-control safety valve it incorporates reveals the false dichotomy that permeates the Commission's Decision. As the Commission tells it, some class of customer—whether bundled or departing—must bear the cost of these UOG resources. (*See, e.g.,* Commission Answer at 23 [rejecting alternative methodologies to limit cost shifting].) However, as Petitioner has demonstrated at length, AB 117 and its progeny are best read as (1) directing the Legislature to prevent cost shifting between customer classes and (2) delimiting the costs that are recoverable from departing CCA customers. (*E.g.,* Petition at 34-55.) If cost recovery is limited to those costs enumerated in section 366.2(d), (e), and (f), it follows that the Commission must make up the difference through other mechanisms, such as shareholder responsibility. Considering shareholder responsibility at this stage would not only avoid the Commission's false dichotomy, but would also align with the Commission's historic decisions and its obligation to consider alternatives in the public interest. (*See, e.g.,* D.08-09-012 at 55 [incentivizing portfolio management via the ten-year recovery

limit]; *Northern California Power Agency,* 5 Cal.3d at 380; *Los Angeles v. PUC,* 15 Cal.3d at 694.) The Commission should therefore revisit the PCIA and consider the full breadth of cost-reduction strategies within its jurisdiction.

V. The Commission Cannot Evade Responsibility for Long-Term Valuation by Casting It as an Evidentiary Issue.

The Commission and Real Parties advance two arguments to support the Commission's use of short-term resource valuation: first, that the Commission is under no statutory obligation to consider the long-term value of generation resources; and second, that the Commission's choice of short-term metrics is supported by record evidence. (Commission Answer at 29-31; Real Parties' Answer at 57-59.) However, as Petitioner has demonstrated—and as the Commission concedes (*see, e.g.,* 2 App. 2212-13)—the Commission must prevent cost shifts from bundled to departing customers by crediting departing customers with "the value of *any benefits* that remain with bundled service customers" (§ 366.2(g) (emphasis added).) While the Commission strains to show that the record supports its use of short-term valuation metrics (Commission Answer at 29-30), it fails to adequately explain why it rejected every attempt to capture the long-term

value of energy resources. By recognizing the existence of a long-term benefit while failing to credit departing customers with that benefit, the Commission has failed to proceed "in the manner required by law." (§ 1757(a)(2); *see also* 2 App. 2399 [quoting D.18-10-019 at 35-36] [acknowledging that the PCIA may not capture the full, long-term value of generation resources]; 2 App. 2401 [the Scoping Memo in this rulemaking required that the final methodology "accurately reflect and seek to preserve all short, medium, and long-term value of the resources procured by the utilities"].)

As CalCCA summarized in its application for rehearing, the Commission conceded that its chosen benchmarks may not "completely capture the long-term value of portfolio resources." (2 App. 2399 [quoting D.18-10-019 at 35-36]; *see also* 2 App. 2241 ["We do not dismiss the analysis and contentions of POC and other parties."]; 2 App. 2401.) And no party disputes that generation resources inherently provide long-term value. (*See, e.g.,* 2 App. 2403-04 [quoting utilities and other parties discussing the long-term value of capacity, the "premium price paid to reduce long-term uncertainty," the "hedge value inherent in bilateral contracts," etc.].)

Indeed, "the Commission has great depth in portfolio valuation and has regularly estimated long-term attribute values in [other] proceedings." (2 App. 2402.) For example, the Commission has determined avoided capacity costs to price the sale of electric power; it has developed valuation tools based on long-term resource values; and it has estimated the marginal cost of generation capacity to inform its ratemaking process. (*Id.*) The Commission therefore understands the inherent long-term value of generation attributes, including those at issue in this proceeding. (*Id.*)

The Commission only declined to act on that understanding in this case because it could not "get comfortable with any of the many [long-term] values CalCCA offered for consideration." (2 App. 2400.) But the Commission cannot wash its hands of its statutory duty simply because it is difficult. At minimum, if the Commission truly cannot capture long-term resource values in the market price benchmark, it must at least chart a path towards full compliance. Yet the Commission has not done so. (2 App. 2404-05.)

Instead, in its decision on rehearing, the Commission added a conclusion of law to the effect that its "PCIA methodology and

annual true up will provide departing load customers with a fair and equitable share of benefits that remain with the bundled service customer to the extent benefits are determined by the Commission to exist." (2 App. 2662.) This conclusion further acknowledges that generation resources may provide as-yet unaccounted-for benefits, such as the long-term benefits the Commission recognizes but claims it cannot quantify (*See* 2 App. 2400-06). But this conclusion does not provide any new mechanism capable of capturing those benefits.

Instead, as the Commission acknowledges, the PCIA methodology relies exclusively on short-term valuation metrics. (*See, e.g.,* Commission Answer at 29-30.) No party disputes that these short-term metrics fail to capture long-term benefits. (*See, e.g.,* Real Parties' Answer at 58 [arguing the Commission has no obligation to account for long-term values].)

The true-up mechanism that adjusts the PCIA to the actual sales of PCIA-eligible resources does not fill this gap. (Commission Answer at 31; Real Parties' Answer at 59-60.) The true-up values long-term portfolio assets based on receipts from the sale of these assets in short-term markets. (Real Parties' Answer at 59-60 [citing 2 App. 2367 for the proposition that the

true-up will be based on "net California Independent System Operator market revenues associated with energy and ancillary services"]; *see also* Commission Answer at 31 [citing 2 App. 2367].) Like the PCIA methodology itself, the short-term markets used in the true-up cannot capture the full, long-term value of generation resources.

Because the Commission recognized that utility resources provide long-term benefits but abrogated its duty to credit departing customers with the full value of those benefits, the Decision violated section 366.2(g) and authorized an improper cost shift from bundled customers to CCA customers in violation of sections 365.2, 366.2, and 366.3.

VI. The Commission Cannot Evade Responsibility for Ancillary Services by Claiming They Are Not Material to This Proceeding.

Energy generating resources provide ancillary services—such as voltage regulation and reserve power—that constitute real benefits for utility customers. Because section 366.2(g) requires the Commission to credit CCA customers for the full "value of any benefits that remain with bundled service customers" (§ 366.2(g)), the Commission must credit CCA customers for the value of ancillary services provided by any

generation resources that were acquired when CCA customers were still with utilities. Yet in their final rebuttal, the Commission and Real Parties assert that the Commission was not required to consider the value of these ancillary benefits because the Commission referenced them—in passing—in its annual true-up mechanism. (Commission Answer at 31; Real Parties' Answer at 59-60.) This argument is flawed in two respects.

First, as Real Parties implicitly recognize (*see* Real Parties' Answer at 59), this argument was *not* part of the Commission's justification for excluding ancillary services from its adopted price benchmark. In the proceeding below, the Commission took the position that ancillary services were not a "material issue for the purposes of [its] Decision," and concluded it need not make findings of fact or conclusions of law on that issue. (2 App. 2656-57.) Because the Commission refused to credit CCA customers for a benefit the Commission acknowledges exists, the Commission violated section 366.2(g).

The Commission's new position—that it *did* account for ancillary services as required by law by incorporating them in the true-up mechanism—does not correct the Commission's violation.

To the contrary, the Commission's new argument creates a conflict with its original position. Because "an agency's order must be upheld, if at all, on the same basis articulated in the order by the agency itself" (*New Cingular*, 246 Cal.App.4th at 820 (internal quotations omitted)), this Court must reject the Commission's argument.

Finally, even if the true-up mechanism could theoretically credit CCA customers for the full value of ancillary services, the existing true-up adopted by the Commission does not do so. As all parties acknowledge, the true-up values long-term assets based on the sale of those assets in short-term markets. (Real Parties' Answer at 59-60 [citing 2 App. 2367]; *see also* Commission Answer at 31 [citing 2 App. 2367].) No one disputes these short-term markets do not capture the long-term value of any resource. Thus, the true-up cannot account for the full, long-term value of ancillary services. (*See supra*, Part V.)

Because the Commission failed to establish a benchmark for the full value of ancillary services, the Commission violated its statutory duties to reduce the PCIA by the value of the benefits that remain with the bundled service customers and to

ensure equity between bundled and departing customers.

(§§ 365.2, 366.2(g).)

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court grant writ relief as prayed for in its Petition.

DATED: June 22, 2020

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CERTIFICATE OF COMPLIANCE

In accordance with California Rules of Court Rule 8.204, I certify that the text of this brief contains 8,354 words, as determined by the word count of the computer used to prepare this brief and exclusive of this certification and the other exclusions referenced in Rule of Court 8.204(c)(3).

DATED: June 22, 2020

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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 396 Hayes Street, San Francisco, California 94102.

On June 22, 2020, I served true copies of the following document(s) described as:

REPLY IN SUPPORT OF PETITION FOR WRIT OF REVIEW

on the parties in this action as follows:

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BY ELECTRONIC SERVICE: I served the document(s) by submitting an electronic version of the document(s) 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 June 22, 2020, at San Francisco, California.

/s/ Patricia Larkin
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