

**CASE NO.** \_\_\_\_\_

IN THE COURT OF APPEAL FOR THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION ONE

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**UTILITY CONSUMERS' ACTION NETWORK,**  
Petitioner,

vs.

**THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF CALIFORNIA,**  
Respondent.

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**SAN DIEGO GAS & ELECTRIC COMPANY,**  
Real Party in Interest.

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**PETITION FOR WRIT OF REVIEW AND  
SUPPORTING MEMORANDUM OF POINTS AND  
AUTHORITIES  
(Rule 8.496)**

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Challenging Decision 08-12-058 of the PUC,  
Approving Construction of the Sunrise Powerlink, and Denial of Rehearing

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## **INTRODUCTION**

Petitioner, the Utility Consumers' Action Network ("UCAN") respectfully submits this petition for writ of review of the decision by the California Public Utilities Commission ("CPUC" or "Commission") to approve a Certificate of Public Convenience and Necessity submitted by San Diego Gas & Electric (SDG&E) for the construction of a transmission line (Sunrise Powerlink) from San Diego into Imperial County.

Pursuant to Section 1756 of the Public Utilities Code<sup>1</sup>, UCAN seeks this Court's review of Decision Numbers ("D.") 08-12-058 and 09-07-024 (collectively, the "Decisions"), submitted through the accompanying *Petitioner's Exhibits to Petition* as Exhibits 1 and 2.

The decision approving the CPCN should be vacated and remanded to the Commission for the following reasons:

1. The Commission failed to properly assess feasible and cost-effective alternatives, as required by Public Utilities Code Section 1002.3;
2. The Commission failed to impose a proper burden of proof upon the Applicant;
3. The Commission relied improperly upon extra-evidentiary material facts to support its findings.

## **VERIFIED PETITION**

By this Verified Petition, Petitioner Utility Consumers' Action Network alleges as follows:

1. This is a Petition for Writ of Review, filed as an original proceeding in this Court pursuant to Public Utilities Code §1756, to challenge Decision 08-12-058 of the Public Utilities Commission, issued on December 24, 2008, granting SDG&E a Certificate of Public Convenience

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<sup>1</sup> Unless specified otherwise, all statutory citations herein referencing the Code are to the California Public Utilities Code.

and Necessity for the construction of the Sunrise Powerlink. On July 13, 2009, the Public Utilities Commission issued an Order Modifying Decision (D.) 08-12-058 and Denying Rehearing of the Decision As Modified, in response to UCAN's Application for rehearing. Accordingly, this Petition is timely filed pursuant to Public Utilities Code §1756.

2. Petitioner Utility Consumers' Action Network (UCAN), a 501(c)(3) incorporated non-profit ratepayer advocacy organization, was a party of record in the proceedings below and, as an advocacy organization for ratepayers, is an aggrieved party pursuant to Public Utilities Code §1756. It has represented San Diego ratepayers since 1984 and appears regularly in proceedings before the Public Utilities Commission.

3. The Respondent to this Petition is the Public Utilities Commission (hereinafter the "PUC" or "the Commission").

4. San Diego Gas & Electric Company (hereinafter "SDG&E") was a respondent in the proceedings below before the PUC, and is named in this Petition as a Real Party in Interest. SDG&E is an investor owned utility. It is based in San Diego, and serves 1.3 million customers in San Diego and Orange Counties.

5. On December 14, 2005, SDG&E filed Application (A.) 05-12-014, its initial request for a CPCN for authority to construct Sunrise.

6. Commissioner Dian M. Grueneich was appointed the assigned Commissioner and she, along with ALJ Steven Weissman who served as the presiding officer, set two hearing phases, focusing Phase 1 on all issues that could be examined prior to issuance of the Draft Environmental Impact Report/Environmental Impact Statement (EIR/EIS), and Phase 2 on issues tied to the Final EIR/EIS. This Petition focuses primarily upon Phase 1, as all matters pertaining to the FEIR/FEIS are being appealed by Petitioner to the California Supreme Court.

7. On October 31, 2008, the Presiding Officer (the case was heard by ALJ Weissman but subsequently assigned ALJ Jean Vieth during the decision-writing stage) issued a proposed decision rejecting the project with no conditions. Assigned Commissioner Grueneich issued an alternate decision approving the CPCN with conditions.

8. On November 18, 2008, another Commissioner, Michael Peevey, issued an alternate decision that approved the line with no material preconditions imposed upon the applicant.

9. On December 24, 2008, the Commission issued its “Order Approving SDG&E’s application” (Decision 08-12-058; hereinafter the “Final Decision”). It is this Final Decision that Petitioner challenges on this Petition for Writ of Review. A true and correct copy of the Final Decision is provided as Exhibit 1 to Petitioner’s Accompanying Exhibits to Petition.

10. The vote of the Commission on the Final Decision was four in favor, one against; the one dissenting Commissioner was Assigned Commissioner Dian Grueneich. She issued a separate dissenting opinion, which is included as Exhibit 2.

11. On January 22, 2009, the two parties of record in the PUC proceedings, including Petitioner herein and the Center for Biological Diversity filed Applications for Rehearing of the Commission’s decision.

12. On July 13, 2009, the Commission denied all Applications for Rehearing. A true and correct copy of the Commission’s “Order Modifying Decision D. 08-12-058 and Denying Rehearing of the Decision, as Modified,” (hereinafter the Revised Decision) is included as Exhibit 3.

13. Petitioner UCAN files this Petition seeking review of the Commission’s Final Decision, as modified by the Revised Decision, approving the CPCN on the grounds cited above.

14. Accordingly, relief is warranted in this case because the

Commission has acted in excess of its powers and jurisdiction, has failed to proceed consistent with California law, and has abused its discretion. *See* California Public Utilities Code (“PUC Code”) §1757.1.

**PRAYER**

WHEREFORE, Utility Consumer Action Network prays as follows:

1. That this Court grant this Petition, overturn and/or remand the Decision of the Public Utilities Commission approving the CPCN and order that the Commission enter a new order and decision consistent with this Court opinion;
2. That UCAN be awarded its costs in this proceeding; and
3. That UCAN be granted such other and further relief that the Court may deem appropriate and just.

Dated: August 12, 2009

Respectfully submitted,

By: \_\_\_\_\_

Art Neill  
*Attorney for Petitioner*  
*Utility Consumers’ Action Network*

**VERIFICATION**

I, Art Neill declare as follows:

1. I am an attorney admitted to practice before all courts in this State.
2. As counsel for Petitioner UCAN, I have personally reviewed the decision of the Public Utilities Commission that is the subject of this Petition, as well as the underlying Decisions, the Denial of Rehearing, and other records, and decisions referred to herein. I have read the foregoing Petition, and know the facts set forth therein to be true and correct.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. This Verification was executed on August 12, 2009

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Art Neill

## **MEMORANDUM OF POINTS AND AUTHORITIES**

### **I. ISSUES PRESENTED**

1. Whether the Commission failed to assess alternatives, as required by Public Utilities Code Section 1002.3;
2. Whether the Commission applied proper burden of proof upon the Applicant;
3. Whether the Commission relied improperly upon extra-evidentiary material facts to support its findings.

### **II. STATEMENT OF PETITIONER'S STANDING AND INTEREST**

Utility Consumers' Action Network ("UCAN") is an unincorporated non-profit membership organization registered with the State of California. The organization was formed to represent and to advocate for the interests of residential and small commercial customers of electrical, gas, telephone and water corporations and agencies in California, to inform and to advise customers regarding utility issues, and to promote safe, reliable, and environmentally responsible utility service at reasonable, nondiscriminatory rates. Since its formation in 1984, UCAN has participated as an advocate for ratepayers in numerous major proceedings before the PUC every year since its formation. The director of the organization, Michael Shames has over 25 years of experience and expertise on utility-related issues and was a founder of UCAN.

UCAN was a party of record in the underlying proceedings before the PUC by virtue of having filed extensive evidence in both phases of the SDG&E application. Most of UCAN's contentions were accepted by the Presiding Officer's proposed decision and served as a basis for the proposed decision's rejection of the SDG&E application.

UCAN submitted extensive testimony and also filed Opening Briefs in both phases of the proceeding before the Commission. (Relevant excerpts of these extensive briefs included as Petitioner's Exhibits to Petition, Exhibits. 5 & 6) It subsequently filed an Application for Rehearing after the Decision's issuance in December 2008.

### **III. EXHIBITS**

The separately bound three volumes of Exhibits to Petition for Writ of Review contains true and correct copies of the Exhibits referred to in the Petition and the accompanying Memorandum of Points and Authorities. Upon issuance of the requested writ, UCAN requests the Court to direct the Commission to "certify its record in the case to the court" as required by Public Utilities Code Section 1756(a).

### **IV. STATEMENT OF THE CASE**

Before this appellate court is a Public Utilities Commission decision which brazenly challenges the willingness of the appellate courts to question the Commission. D. 08-12-058 (Hereinafter, "Decision") is a decision to approve Certificate for Public Convenience and Necessity (CPCN) sought by applications San Diego Gas & Electric (SDG&E) for a \$1.9 billion transmission line project. The decision largely disregards the evidentiary record and manufactures a politically desirable outcome that is at odds with the basic precepts of state law and regulatory precedent. It is followed by a Revised Decision (D. 09-07-024) which compounds the excesses of the Decision and relies upon inconsistent logic and false facts to affirm the original decision.

This is a case where an exhaustive administrative record, the informed opinions of two highly experienced administrative law judges and an assigned Commissioner were rejected in favor of a politically-mandated outcome i.e. the approval of an exceedingly expensive, environmentally-degrading powerline project.

By way of context, this is a proceeding that started in late 2005 and encompassed almost three years of evidentiary hearings. SDG&E revised its application three times and ultimately, its economic justification for the project was rejected by the Commission as being unsupportable. The case file is voluminous and parties filed thousands of pages of complex, arcane and often conflicting expert testimony.

Petitioner is not asking the court to impose its own judgment as to the merits of the Commission's decision, nor is it challenging whether the Commission has substantial evidence to support its decision. The Petitioner's challenges are focused upon three distinct issues of law:

1. The Commission failed to assess alternatives, as required by Public Utilities Code Section 1002.3;
2. The Commission failed to impose a proper burden of proof upon the Applicant;
3. The Commission relied improperly upon extra-evidentiary material facts to support its findings.

Petitioner requests that the Commission be obligated to assess and justify its rejection of at least three feasible, cost-effective alternatives presented by UCAN in this proceeding. While the Commission is not obligated to mention "every piece of evidence in the record" (Decision, p. 29), it is statutorily obligated to consider all cost-effective alternatives to a CPCN application. In this case, it did not observe that obligation.

## V. STANDARD OF REVIEW

The standard of review for this Court on a petition for writ of review is to determine whether, in light of the entire record, any of the following occurred: (1) the order or decision of the Commission was an abuse of discretion; (2) the Commission failed to proceed in a manner required by law; (3) the Commission acted without, or in excess of, its powers or jurisdiction; (4) the decision is not supported by the findings; (5) the challenged order or decision was procured by fraud; or (6) the order or decision violates any right of the petitioner under either the United States or California Constitutions. PUC Code §§1757.1; 1760; *see also Southern California Edison Co. v. Public Utilities Commission*, 85 Cal.App.4th 1086, 1096 (2000).

Although the PUC's decisions are presumed valid, *Greyhound Lines, Inc. v. Public Utilities Commission*, 68 Cal.2d 406, 410-11 (1968), the interpretation of a statute is a question of law subject to independent review. *Yamaha Corp. of America v. State Bd. Of Equalization*, 19 Cal.4th 1, 7-8 (1998). “Where the meaning and legal effect of a statute is the issue, an agency’s interpretation is one among several tools available to the court. Depending upon the context, it may be helpful, enlightening, even convincing. It may sometimes be of little worth.” *SCE v. PUC, supra*, 85 Cal.App.4th at 1106, quoting *Yahama Corp., supra*, 19 Cal.4th at 7-8.

## VI. ARGUMENT

### A. THE COMMISSION VIOLATED PUBLIC UTILITIES CODE SEC. 1002.3 BY FAILING TO CONSIDER FEASIBLE, COST-EFFECTIVE ALTERNATIVES.

#### 1. *The Commission failed to properly correct a \$368 million error that would have made a All-Source Generation Alternative more cost-effective than Sunrise.*

D. 09-07-024 (hereinafter, “Revised Decision”) purports to have evaluated all feasible alternatives to the proposed Sunrise project. It states that the All-Source Generation alternative was considered but found less cost-effective than Sunrise. (Petitioner’s Exhibits to Petition, Exhibit 3, Revised Decision, p. 337) It then goes on to make a number of flawed modifications to the PV costs relating to this alternative. By manipulating the numbers to favor Sunrise, the Revised Decision not only contradicts the reasoning of the final decision but it fully distorts the evidentiary record. As will be explained below, Petitioner avers that the Commission sought to hide significant error from appellate review. If the calculation were done properly, the Commission could not have authorized Sunrise and its \$1.9 billion price tag. So it performed the calculation improperly and inconsistently, as to as to salvage its CPCN decision.

The cost difference between Sunrise and the All Source Generation Alternative is entirely due to the inclusion of extremely high-priced PV in the in-area renewable alternative. Removing some or all of these PV projects, and their associated costs, would made the All Source Generation Alternative cheaper than the Sunrise alternative, while still meeting reliability goals.

**a) Legal Basis for UCAN's Contention**

UCAN offered a number of alternatives consistent with Public Utilities Code Sec. 1002.3 which states:

In considering an application for a certificate for an electric transmission facility pursuant to Section **1001**, the commission **shall** consider cost-effective alternatives to transmission facilities that meet the need for an efficient, reliable, and affordable supply of electricity, including, but not limited to, demand-side alternatives such as targeted energy efficiency, ultraclean distributed generation, as defined in Section 353.2, and other demand reduction resources. (emphasis added)

The appellate courts have dealt with such issues in the past. For example, in *Ventura County Waterworks v. PUC* (1964) 61 Cal.2d 462 , 464, the Supreme Court found that in a CPCN application, the PUC committed reversible error in failing to consider alternative proposals. (Id, p. 464) *Ventura*, along with *Southern Pacific Co. v. PUC* (1968) 68 Cal.2d 243, both stand for the proposition that the Commission has an obligation to consider alternatives and contain separately stated findings of fact on all material issues. In both cases, the appellate courts remanded on the basis of the Commission's failure to consider alternatives.

**b) Factual Basis for UCAN's Contention**

UCAN raised the issue of properly costing of solar power for purposes of fairly evaluating alternates to Sunrise four different times during the three year proceeding. Each time, the PUC declined to address UCAN's concern that the numbers upon which the Commission were relying were in error. To wit, UCAN wrote:

As to the ISO's calculations, UCAN pointed out that the ISO's Ex. Compliance-1 raised the alternative of using the ALJ-defined analytic base case plus renewables other than PV. That alternative includes an Encina combined cycle, but less CSI than the EIR, and is similar to but not quite the same as the low-PV UCAN alternative in the Phase 2 UCAN brief. (Petitioner's Exhibits to Petition, Exhibit 8 - UCAN Comments on the ISO Analysis, pages 661-671) UCAN also noted in that same document:

UCAN believes that some (or even all) of the \$115/million per year change in the Case 4, 9, and 13 results may be due to the ISO's previous incorrect use of SDG&E Exhibit 3-6 data for the cost of rooftop PV (the August 26th versions of Cases 4, 9, and 13 appear to use SDG&E 3/12/08 Chapter 11 data for rooftop PV costs), an error which UCAN pointed out in the August 22nd workshop. The ISO never says this directly, nor explains why two different SDG&E data sources from the same document (SDG&E's 3/12/08 Phase 2 testimony) would cause such huge differences in its results. (Petitioner's Exhibits to Petition, Exhibit 8 - UCAN Comments on the ISO Analysis p. 665)

In UCAN's Phase 2 Opening Brief (Petitioner's Exhibits to Petition, Exhibit 5, p. 560) UCAN explained specifically:

In both the original Phase 2 filing and in its revised exhibit done pursuant to the ALJ's order, SDG&E assumed that DEIR Alternative 1 would include the same cost for incremental CSI photovoltaic installations, \$2.197 billion in 2010 and -\$0.46 billion in 2016. But the \$1.737 billion net expense that SDG&E assumes for an incremental 85 Mw of rooftop PV is both wildly cost-ineffective and utterly unnecessary for reliability. Thus, UCAN asked SDG&E to update DEIR Alternative 1 "with the incremental CSI generation removed from Table 11-1 and with the associated PV capital cost removed from Table 11-6." SDG&E's response showed that removing the incremental CSI reduces the cost of DEIR Alternative 1 by \$125 million per year.

If DEIR Alternative 1 costs \$119 million per year more than the ENR alternative, as SDG&E's numbers show, and if removing the incremental CSI from DEIR Alternative 1 reduces its net cost by \$125 million, as SDG&E asserts, then DEIR Alternative 1 without incremental CSI must cost \$6 million less than the ENR alternative, using SDG&E's own assumptions. That would make it \$46 million per year cheaper than the GT Reference Case. The \$46 million

figure is based on SDG&E's own numbers, and does not take into account an apparent SDG&E overstatement of the cost of wind transmission in DEIR Alternative 1 by some \$19.9 million.

Again, UCAN addressed the lower cost of EIR Alternative 1 minus PV in both its Phase 2 brief and in our comments on the ISO analysis filing that underlies the Decision's conclusion that Sunrise will save ratepayers money. (Petitioner's Exhibits to Petition, Exhibit 6, pp. 570-571)

Finally, in UCAN's responses to the ALJ's PD, the Grueneich AD, and the Peevey AD, UCAN commented upon the failure of the PUC to have considered UCAN's variation on EIR Alternative 2 without PV (item 1 above), or UCAN's variation on the Analytic Baseline with non-PV in-area renewable. (Petitioner's Exhibits to Petition, Exhibit 9, UCAN Comments on Grueneich alternate decision, p 681)

UCAN's assertions in these various filings as well as in its expert testimony repeatedly revealed to the Commission that the All Source Generation Alternative, which itself contained 210 installed Mw of solar, would be more cost-effective than Sunrise if the excessive solar costs in that All Source Generation alternative were either removed, or treated as having no incremental cost because it was already being paid for through CSI.

In the Decision, the Commission ignored UCAN's plea of modifying the Mw composition of the All Source Alternative, but partially accepted the UCAN claim that the cost should be reduced to account for the portion of the All Source Alternative's PV that would be paid for through CSI. But then the Commission cleverly denied that CSI covered more than part of the cost of the PV in the All Source generation Alternative. So it only accepted enough of UCAN's modification to make the All Source Alternative come close to the Sunrise alternative (\$93 million/year benefit

vs. \$117 million/year benefit<sup>2</sup>) rather than accepting the full UCAN modification and risk making Sunrise look economically inferior.

When UCAN raised this matter again in its Application for Rehearing, the Commission further muddied the record in an attempt to survive appellate scrutiny. It offered a very complex calculation to appear to rectify the \$368 million error that UCAN had been repeatedly flagging. But in doing so, it manipulated numbers to arrive at an outcome that didn't undermine its conclusion. In summary, here's what it did.

The Revised Decision alleges to address the \$368 million error in a long and confusing footnote. (Petitioner's Exhibits to Petition, Exhibit 3, p. 342, footnote 7) But it got the adjustment wrong – dramatically wrong. The Commission failed to distinguish between Mw of installed PV capacity (what one pays for) and firm Mw of PV capacity (what is delivered at the time of peak demand), between Mw of PV capacity under the All Source Alternative versus Mw of PV capacity due just to the CSI program, and between Mw of PV in Ex. Complaine-1 versus Mw of PV in the Decision.

If the court were to compel CPUC to have its "footnote 7" calculations performed by an independent third party, that third party would confirm that the Commission's calculation at footnote 7 is wrong. According to D.09-07-024, it relies upon the following values:

- “1. Ratio of firm to installed CSI: 39%, per Ex. SD-27
2. Installed CSI: 180.3 Mw, per Ex. SD-27
3. Firm CSI: 70 Mw, per D.09-07-024, based on  $180.3 \text{ Mw} \times 39\%$  [ $180.3 * .39 = 70.3$ ]; the same calculation appears in D.08-12-058, p. 40, fn. 92. 70 Mw is the lower end of a range from 70-150 Mw (D08-12-058, p. 157, fn. 446). The CPUC says it is being "conservative" in using 70 Mw instead of a higher number, but the reality is that 70 Mw is the most favorable number for Sunrise out of the possible 70-150 Mw range.

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<sup>2</sup> see lines 12 vs. 13 of Table 15 on pp. 161-162 of the Decision, Exhibit 1

4. Firm CSI in Ex. Compliance-1: 33 Mw (D08-12-058, p. 157, fn. 446.)
5. "Extra" CSI whose costs are attributed to the All Source Alternative in Tables 12-13 on pp. 151-154 of D12-08-058, but needed to be removed in calculating Tables 13-14 of D12-08-058: 37 firm Mw [70 Mw firm CSI per Commission, minus 33 Mw of firm CSI per Ex. Compliance-1], as documented in D12-08-058, p. 157, fn. 446. UCAN notes that the reference to fn. 108 in fn. 446 is invalid - fn. 108 is does not refer to CSI.”

The items 1-5, identified in footnote 7 of the Revised Decision are devoted to calculating how much 37 Mw of firm PV would cost, so that number of dollars can be subtracted from the capital cost of the All Source generation Alternative. But the calculation fails to acknowledge that one doesn't buy PV by the “firm Mw”, it is purchased by the “installed Mw”. The Commission craftily chose to convert the 37 Mw of firm PV into the corresponding number of Mw of installed PV using a 50% factor rather than the 39% factor the Commission used in step 1. Footnote 7 identifies a 50% factor, from Ex. SD-6, p. IV-14. The result is that the \$368 million adjustment that the Commission calculates is based, de facto, on the cost of  $37/.5 = 74$  Mw of installed PV capacity, but it should have been based on the cost of  $37/.39 = 95$  Mw of installed PV capacity.

This sleight of hand matters. The \$368 million adjustment should really have been \$104 million bigger. If footnote 7 had used 39% (based on Ex. SD-27, and consistent with the text of the decision) where it uses 50% (based on Ex. SD-6), it would have calculated a \$472 million adjustment.<sup>3</sup> So its internally inconsistent approach netted a lower adjustment and kept Sunrise more cost-effective.

That same independent consultant would advise the court that the more appropriate approach to the solar cost adjustment would have netted an even larger adjustment for the All-Source Generation Alternative and

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<sup>3</sup>  $95/74 \times \$368 = \$472$  million

made it significantly more cost-effective than Sunrise. The court would be advised that an All Source Generation Alternative includes 210 Mw of installed (nameplate) PV capacity, per the Decision, (Exhibits to Petition, Exhibit 1, p. 156 and fn. 445). Of that, 180.3 Mw will be supplied by the CSI program, per D.09-07-024. Thus only 29.7 Mw of **installed** PV costs should be properly assigned to the All Source Generation Alternative. The Analytic Baseline assumed that  $210 - 66 = 144$  Mw of installed PV costs should be assigned to the All Source Generation Alternative (210 Mw installed, corresponding to 105 Mw firm (50%, not 39%) per the Decision, (Petitioner's Exhibits to Petition, Exhibit 1. p. 156); 33 Mw firm CSI (corresponding to 66 Mw installed), per the Decision, (Exhibit 1, p. 157, fn. 446). Thus the required adjustment to the Analytic Baseline is the capital cost of 114.3 Mw of installed PV capacity not the 74 Mw that is made in fn. 7 of the Revised Decision.

In addition to manipulating numbers by using erroneous adjustment factors, the Commission also contradicts itself. In the Decision it assumed that the ratio of firm capacity to installed capacity is 50% (Petitioner's Exhibits to Petition, Exhibit 1, p. 156; where in the space of 4 lines it refers to both 210 Mw of nameplate capacity and 105 Mw of firm capacity) but in the Revised Decision it is trying to retroactively claim that 100% implementation of CSI will only produce 70 Mw (39% ratio). However, EIS/EIR used the 50% ratio, and thus includes "only" 210 Mw of installed PV costs, all of it due to CSI. The Commission's attempt to characterize All Source Generation Alternative costs as non-CSI contradicts the Decision.

The Commission went to great lengths to manipulate the calculations in the Revised Decision. It did so knowing that the reviewing court would likely not want to delve into the details of its manipulations, so it reserved the adjustment until the last possible moment – the decision

denying a rehearing. And it created the factual errors after UCAN had exhausted its opportunity to apply for a rehearing, yet again.

These are the kinds of material facts that a reviewing court is not well equipped to assess. Public Utilities Code Section 1002.3 gives the court the authority to remand to the Commission to correct the error. Petitioner suggests that in addition to the remand, the court should require the Commission to employ an independent third-party to evaluate the disputed calculations so as to ensure that the resulting comparison amongst alternatives was accurate.

## ***2. FAILURE TO CONSIDER UCAN'S NO-PROJECT ALTERNATIVE***

In addition to the sleight of hand used in addressing the All-Source Generation alternative proposal, the Commission also violated Public Utilities Code Section 1002.3 by simply refusing to consider an alternative advanced by UCAN. Again, Petitioner is not seeking to substitute the judgment of the Commission, but to show the court that the Commission simply refused to evaluate a feasible, alternative proposal, as so required by Pub. Util. Code Section 1002.3.

As part of its Phase 1 showing, UCAN accepted the Commission's request that parties present very specific alternatives to the Sunrise project that are more economical but allow utilities to import more energy out of the Imperial Valley. UCAN presented highly expert testimony which incorporated a more cost-effective set of strategies that SDG&E could affect without having to build a large, new transmission line.

In its Phase 1 testimony, UCAN presented the voluminous testimony of David Marcus, (Petitioners Exhibits to Petition, Exhibit 7, pp. 585-654, *confidential data redacted*) in which Mr. Marcus presented an

alternative which included increased demand-side efforts, additional distributed generation and upgrades to existing powerlines in SDG&E and SoCal Edison service territories that would add 800MW of capacity at a fraction of the \$1.9 billion price tag on the Sunrise Powerlink.

The Commission effectively ignored the UCAN alternative in its consideration of the SDG&E CPCN application by attempting to characterize the UCAN proposal as identical to or incorporated into the EIR process. But the Commission compounds this characterization by asserting that it could not glean any such UCAN alternative from the record. It states:

“UCAN’s arguments concerning inadequate consideration of its suggested No Project Alternative lack merit for other reasons as well. First, UCAN fails to present a coherent statement about the contents of its No Project Alternative”. Also, contrary to UCAN’s assertions, the EIR considers all of UCAN’s proposals to an appropriate extent. Beyond UCAN wanting the EIR to do more extensive analyses and agree with UCAN’s assessments, UCAN does not support its claim of legal error.” (Revised Decision, Exhibit 3, pp. 336-337, Footnote 6)

As the Court should be able to note from Exhibit 7 and from UCAN’s briefs, Petitioner presented coherent and expert alternatives that were not considered in the EIR/EIS nor evaluated by the Commission, as required by law.

The record in the Sunrise case shows that SDG&E admits that it only needs 300 Mw of new resources beyond the baseline level to meet its reliability needs in 2016, and no more than 106 Mw in 2010-12. (Petitioners Exhibits to Petition, Exhibit 7, p. 636) Notably, the Commission offers no finding that SDG&E required 1000MW of additional import capability in order to meet its needs.

In this proceeding, UCAN devised a set of low-cost, incremental and flexible alternatives which, taken as a package, provide more reliability and

comparable renewable benefits of Sunrise at a decidedly lower cost. In contrast, SDG&E chose to address its reliability needs wholly through the construction of a singular 500kV transmission line project through a desert state park.

In Phase I of the proceeding, UCAN set forth a substantially lower-cost, feasible means of increasing SDG&E's import capability by 350MW that could facilitate renewable imports combined with adding an additional 350MW of feasible supply which would address SDG&E's projected energy needs through 2018. UCAN's proposal would provide 350 Mw of new import capability from upgrading Path 44. Thus, UCAN's proposal would meet SDG&E's system reliability needs through the entire period of analysis covered by the EIR in a cost-effective manner while giving it access to Imperial Valley renewable power.

UCAN's alternative involved SDG&E's commitment to (a) post-2008 CPUC-ordered energy efficiency, (b) CPUC-approved AMI, (c) already contracted for dispatchable demand response, (d) already contracted for and CPUC-approved near term peaking capacity, and (e) one under-50 Mw CT from its current RFOs for peaking capacity in 2008 and 2010-2012.

<sup>4</sup> SDG&E's numbers in this proceeding ignored numerous demand-side alternatives which should either have been part of the baseline or were likely to be developed prior to 2018 (e.g. the existing EnerNoc contract; the CEC-approved 2008 building standards; post-2008 energy conservation not

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<sup>4</sup> In Phase I of the proceeding, UCAN set forth a substantially lower-cost, feasible means of increasing SDG&E's import capability by 350MW that could facilitate renewable imports combined with adding an additional 350MW of feasible supply which would address SDG&E's projected energy needs through 2018. UCAN's proposal would provide 350 Mw of new import capability from upgrading Path 44. Thus, UCAN's proposal would meet SDG&E's system reliability needs through the entire period of analysis covered by the EIR in a cost-effective manner while giving it access to Imperial Valley renewable power. UCAN's alternative involved SDG&E's commitment to (a) post-2008 CPUC-ordered energy efficiency, (b) CPUC-approved AMI, (c) already contracted for dispatchable demand response, (d) already contracted for and CPUC-approved near term peaking capacity, and (e) one under-50 Mw CT from its current RFOs for peaking capacity in 2008 and 2010-2012. Petitioner's Exhibits to Petition, Exhibit 5, UCAN Phase I Opening Brief, p. 474-560. Petitioner's Exhibits to Petition, Exhibit 6, UCAN Phase II Opening Brief, p. 570-574

embedded in the CEC forecast; SDG&E-proposed AMI savings not included in SDG&E's demand forecast).

Notably, the Decision concurs with much of UCAN's analysis, yet it was silent on the issue of whether the UCAN proposal constituted an acceptable alternative. UCAN believes the basis for the Decision's reluctance to accept the UCAN proposal as an alternative rests upon the feasibility of the proposed Path 44 upgrade. For example, the Decision issues an order requiring SDG&E to take the necessary steps to institute a review of Path 44's rating and, within 90 days of the effective date of this decision, shall report on the status of that review and shall serve the report on the parties (Ordering Paragraph #12). But it errs in that it does not incorporate the evidence in support of the upgrade presented by UCAN and agreed to by the CAISO. And it errs in that it doesn't conclude that if Path 44's rating is found to be upgradeable, that UCAN's proposal constitutes a comprehensive alternative to SDG&E's Sunrise proposal.

As set forth in UCAN's briefs in Phase 1 and Phase 2, UCAN showed that its No-Project, No-Action alternative is the optimal alternative on all grounds: cost, environmental impact, reliability and flexibility. Yet, the Commission's assessment of the UCAN No-Project alternative is expressly addressed in only one paragraph of the Decision and it ignores the cost-effectiveness arguments advanced by UCAN:

“UCAN states that the EIR/EIS fails to identify and consider factors that would reduce the environmental impacts of the No Project Alternative. According to UCAN, upgrades to Path 44, modifications at the Miguel Substation, and increases in energy efficiency and distributed generation beyond that envisioned in the Draft EIR/EIS are realistic assumptions, and would minimize the No Project Alternative's environmental consequences. More particularly, UCAN argues that a Path 44 upgrade is likely to occur due to other already proposed system upgrades and will increase SDG&E import capacity by 350 MW and that increasing the Miguel Substation capability to 1,900 MW would increase

SDG&E’s ability to import renewables from the Imperial Valley.”  
(Decision, Exhibit 1, p. 253)

Then UCAN’s alternative proposal is not mentioned again. The discussion of the no-project alternative doesn’t address the UCAN proposal. The Commission doesn’t reject the Petitioner’s No-Project Alternative; it simply doesn’t address it.

In fact, the evidentiary record makes it very clear that the UCAN No-Project Alternative does reduce the cost of energy in the region. The Decision cites indirectly to the UCAN proposal when it wrote:

UCAN contends that SDG&E understates the import capability of the Southwest Powerlink and, as a result, overstates the need for resources within its service area. In short, UCAN asserts that increasing the assumed transfer capability of the Southwest Powerlink would allow more energy to flow into SDG&E’s service area, reducing the need for either in-area generation, Sunrise, or both. Consequently, UCAN has made several proposals to increase the transfer capability of various parts of the SDG&E system, as summarized below, and the parties spent significant time and effort debating the merits of those proposals in Phase 1. (Decision, p. 73-74)

As to costs (second criteria), the Decision notes UCAN’s findings:

UCAN claims that SDG&E overstates the benefits of Sunrise, understates its costs, and overstates the costs of the baseline combustion turbine case. In Phase 1, UCAN projected Sunrise would cost ratepayers \$81 million per year more than its combustion turbine reference case. In Phase 2, UCAN projects Sunrise will cost ratepayers \$74 million per year more than its combustion turbine reference case and “up to” \$120 million per year more than other alternatives. In contrast, UCAN estimates positive net benefits for its own all-source generation alternative. (Decision, p. 144-145)

But then the Commission makes no factual findings on UCAN’s assertions in the final decision.

The crux of UCAN’s proposal is based upon four major proposals:

1. Upgrading the output limit of Miguel substation
2. Upgrading Path 44
3. Development of the NRG Carlsbad plant
4. The availability to SDG&E of out-of-state renewables.

The Decision concurs with UCAN on each of these points:

- We agree with UCAN that the Carlsbad Energy Center, in permitting at the Energy Commission, has a high likelihood of coming online by 2012 or 2013. For that reason, we assume a net increase of 222 MW before Summer 2013 as a result of including the Carlsbad Energy Center in the Analytical Baseline. (Decision, Petitioner's Exhibits to Petition, Exhibit 1, p. 53)
- We agree with UCAN that many out-of-state renewables will be deliverable to California without new transmission facilities, as demonstrated by SDG&E's Advice Letter filing requesting approval of two Montana wind contracts for a total capacity of 210 MW. (Decision, Petitioner's Exhibits to Petition, Exhibit 1, p. 69)
- Neither SDG&E nor CAISO claims that the Miguel Import Limit Upgrade proposal is infeasible. They concede it has promise and that they planned to study it to ensure that other systems are not affected. (Decision, Petitioner's Exhibits to Petition, Exhibit 1, Petitioner's Exhibits to Petition, Exhibit 1, p. 77)
- UCAN predicts that implementing the Miguel Output Limit Upgrade would require a number of upgrades and potential implementation of another Remedial Action Scheme and estimates that the incremental cost of this upgrade would be between \$4 million and \$35 million. SDG&E has not rebutted this evidence. We find UCAN's Miguel Import Limit Upgrade proposal to be reasonable. (Decision, Petitioner's Exhibits to Petition, Exhibit 1, p. 77)
- We are not convinced at this time that UCAN's Path 44 proposal presents a viable means to increase import capability into the SDG&E load area and do not adopt it for the Analytical Baseline. However, we agree that a review of Path 44's rating is warranted, particularly since the last one occurred in 2001, and UCAN presents credible evidence that an increase in Path 44's rating may be possible. We direct SDG&E to take the necessary steps to institute a review of Path 44's rating, and to report within 60 days of the

effective date of this decision. (Decision, Petitioner's Exhibits to Petition, Exhibit 1, p. 80)

Yet, after an acknowledgement and acceptance of each of UCAN's key points, the Decision declines to accept or reject the UCAN No-Project Alternative proposal. There is simply no further discussion. The Commission also ignores the fact that SDG&E never evaluated the cost-benefits of the UCAN No Project Alternative or that offered in the EIR. Thus, this is not an issue where the Commission evaluated and rejected a party's proposal – it simply declined to make a finding on a feasible, cost-effective alternative.

UCAN raised these points in its Application for Rehearing. The Commission's response was fleeting and evasive. It does not mention *UCAN's no project alternative* --- only the one evaluated by the EIR which was not UCAN's alternative. At page 26, the PUC asserts a sufficient basis for concluding that the Sunrise project is "more cost-effective than the No Project alternative". (Revised Decision, Petitioner's Exhibits to Petition, Exhibit 3, pgs. 337) It doesn't address the UCAN no-project alternative.

At the following page, the PUC asserts that "an EIR need only consider a reasonable range of alternatives and not every conceivable variation of alternatives stated." (Revised Decision, Petitioner's Exhibits to Petition, Exhibit 3, pgs. 338) Thus, the Revised Decision confirms that it did not require an evaluation of UCAN's no-project alternative.

But, the Commission truly reveals its disregard for the evidentiary record in a footnote at that page. As referenced above, the Commission found that Petitioner "fails to present a coherent statement about the contents of its No Project Alternative" (Revised Decision, Petitioner's Exhibits to Petition, Exhibit 3, pgs. 338-339, Footnote 6)

This footnote borders on scandalous. As shown in Exhibits 5, 6 & 7, UCAN's expert testimony and briefs in this case offer extensive

descriptions of the UCAN No Project Alternative and the reasons why the EIR's evaluation did not consider the specific mix of alternatives that UCAN had presented. In the UCAN Opening Brief, the Commission is informed that the economic benefits offered by UCAN's alternative (not even including the Path 44 upgrade and instead relying on just AMI and future CTs to meet SDG&E reliability needs) would be levelized costs for consumers \$80.9 million per year less than Sunrise. (Petitioner's Exhibits to Petition, Exhibit 5, p. 474-559)

The UCAN No-Project alternate also offered cost savings estimates of \$81-92 million per year from not building Sunrise were based on a resource plan which adds more Mw of new CTs than UCAN expected would be needed. (Id, p. 545)

### ***3. FAILURE TO CONSIDER THE POWERS ENGINEERING/UCAN IN-BASIN OPTION***

In addition to the failure to consider the UCAN No-Project alternative and the All Source Generation alternative with realistic PV costs, The Decision also failed to consider the hybrid offered by UCAN and Powers Engineering that would use in-basin PV and transmission upgrades in lieu of Sunrise.

As explained repeatedly by UCAN in its Opening Briefs and in its Comments upon the proposed and alternate decisions, the CPUC's failure to address these more cost-effectiveness and less environmentally damaging alternatives constitute significant legal error pursuant to Pub. Util. Code Section 1002.3.

In its Comments on the Proposed Decision and Alternate Decision, UCAN notified the Commission that:

“Both UCAN and Powers Engineering submitted researched and feasible options by which distributed generation might serve the San Diego region more cost-effectively than Sunrise and the centralized renewable paradigm it furthers. Specifically, the Commission was asked to consider the value of a \$1.7+ transmission line to import \$6+ per watt power compared to an expenditure of approximately the same to generate distributed PV power within the region. The PD acknowledges the UCAN argument. And both of them acknowledge that :

San Diego’s service area contains sufficient renewable resources to pursue this alternative. Aggressive projections show that the San Diego region has approximately 7,400 MW of solar PV potential on commercial and residential structures; more modest projections show a potential for over 4,100 MW of solar rooftop PV. Regardless of the wide range between these estimates, even the low end represents substantial potential. As of January 2006, SDG&E had 18 MW of solar PV installed in its service area; SDG&E’s recently filed solar PV application seeks authority for 77 MW, and SDG&E has acknowledged that its service area could support a program similar to one that Edison has proposed (250 MW, with the potential to expand to 500 MW). (Petitioner’s Exhibits to Petition, Exhibit 9, p. 681.5)

Yet, the Decision fails to fully assess the \$23 billion project-life cost of Sunrise in comparison to a \$700 million deployment of in-basin PV, as set forth in the UCAN/Powers Alternate. UCAN presented a case in which SDG&E could deploy PV similar to that contained within the Smart Energy 2020 report. This, combined with UCAN’s No-Action plan would provide greater in-basin generation along with increased import capacity that would address all of SDG&E’s reliability and renewable needs at a fraction of the costs contemplated by the Alternate Decision.” (Id)

Similarly, in UCAN’s 206-page Phase 2 Opening Brief (Petitioner’s Exhibits to Petition, Exhibit 6), UCAN explained to the Commission:

UCAN contends that an enlightened SDG&E could discern a means by which PV deployment plan similar to that contained within the Smart Energy 2020 report could well be incorporated into UCAN’s

No-Action plan that provides greater in-basin generation along with increased import capacity. (Petitioner's Exhibits to Petition , Exhibit 6, p.574.5)

Yet, again, none of the proposed, alternative or final decisions addressed UCAN's specific proposal to combine the increasing cost-effective photovoltaic options with UCAN's No-Project Alternative. The Decision is bereft of any mention of this cost-effective alternate, as required by law.

#### 4. ***SEISMIC RISK***

The Commission's disregard was not limited to potential alternatives. It also violated Public Utilities Code Sec. 1002.3 by failing to consider reliability of supply. Again, Petitioner is not asking the court to substitute whether the Commission had substantial evidence to support its position. Petitioner avers that the Commission simply chose to disregard evidence that the project would not provide reliable service. As will be shown below, in its Revised Decision, the Commission attempted to cover this deficiency with citations to the record. But the Commission's citations to the record are wrong and do not justify its conclusion.

In its Application for Rehearing, Petitioner pointed out that the Decision did not address the potential for seismic activity to compromise the integrity of this project. (Petitioner's Exhibits to Petition, Exhibit 4, pp. 419-420) During the proceeding, Petitioner had pointed out that the very pronounced danger of seismic activity in the Imperial Valley is magnified by the fact that SDG&E proposes to place the *terminus* of almost 3000MW of capacity in one of the most seismically active areas in the United States. (Petitioner's Exhibits to Petition, Exhibit 6, pp. 575-579)

In other words, the PUC was approving a power line that would start and end at the same location as the other major powerline that serves San

Diego. The fact that the two powerlines commence at the same substation creates the potential for very serious and prolonged power outages if the substation were ever compromised. Notably, there is no evidence in the evidentiary record that rebuts UCAN's contentions about seismic risk but for a self-serving statement by an SDG&E engineer which is not referenced in either the Decision or the Revised Decision as justification for rejecting UCAN's seismic risk concerns.

The Commission rejected UCAN's concerns with a one-sentence reference to the EIR at the end of its decision. This tacked-on rejection states: "We disagree. The Final EIR/EIS (hereinafter, EIR) addresses seismic risk impacts at Imperial Valley Substation in Section D.13.5". It then cited the EIR language upon which it relies:

Although the Imperial Valley Substation is subject to seismic risks related to groundshaking from the nearby active San Andreas and San Jacinto fault zones, and the Brawley seismic zone, no new geologic or seismic impacts would result at the existing Imperial Valley Substation due to the operation of new line structures and equipment similar to the respective structures already in place within the existing fenced area of the substation. (Decision, p. 280-281)

In its Application for Rehearing, Petitioner pointed out how this reference to the EIR is flatly wrong in a number of ways. First, the EIR is addressing whether the project would impact the geologic integrity around the Imperial Valley Substation. UCAN never suggested that the Sunrise line would *cause* an earthquake. Such a claim would be nonsensical.

Second, the Decision blatantly ignored the evidentiary-supported fact that an earthquake at the Imperial Valley substation can only cause an N-1 outage of SWPL, an outage which is planned for and survivable by the SDG&E system. Once Sunrise is built, an earthquake at the Imperial Valley substation could cause an N-2 outage of both Sunrise and SWPL together. Such an event would be a category C event that could lead to large

load dropping on the SDG&E system. SDG&E has testified that an N-2 of both SWPL and Sunrise would require it to drop up to 1000 Mw of customer load. That is a new impact to the viability of the transmission system that does not exist at present in the absence of Sunrise. (Id, p. 62)

Thus, rather than squarely address the issue raised by Petitioner in the hearings, the CPUC miscited the EIR and avoided addressing this material issue. When Petitioner pointed out this deficiency in its Application for Rehearing, the Commission references two other passages in the EIR upon which it relies to dismiss UCAN's seismic risk concerns. (Revised Decision, Petitioner's Exhibits to Petition, Exhibit 3, p. 336) These additional cites are similarly unresponsive. The first notes that the transmission lines must meet the requirements of GO 95 which sets standards for overhead lines and that the lines are flexible, thus not damaged in earthquakes. (Id) Again, this has no bearing on the substation location – which is the focus of UCAN's contention. Second, the decision references an EIR finding that if the line or substation were damaged, SDG&E could re-route electricity. (Petitioners Exhibits to Petition, Exhibit 10, p. 682; *Excerpt from FEIR, p. 10-171*)

However, the PUC misconstrues the EIR. It made no such finding. In fact, the language at EIR page D-10-171 reads:

**Impact PS-5: Transmission or substation facilities can suffer an outage (Class III)**

If the Sunrise Powerlink transmission line or a substation along the transmission line were damaged (e.g., from terrorism or a major wildfire) and this resulted in a power outage, SDG&E would re-route electricity using other components of the regional transmission system. This was demonstrated in the October 2007 wildfires, when the 500 kV Southwest Powerlink was out of service for several days due to the proximity of the Harris Fire. Even though this transmission line generally imports the majority of San Diego's power, SDG&E was able to maintain service (to areas not directly burned) by re-routing electricity to lines that connect its system to the Southern California Edison system. The regional transmission system is interconnected in such a way that it is not possible to say that a single line outage would cause an outage at a specific hospital, airport, security facility, etc. In addition, although most facilities of this type may receive

power from the SDG&E transmission system supplied by the proposed Sunrise line, major facilities would also have back up power/generators to prevent electricity interruptions in the event of an outage. Therefore, this impact is considered to be adverse, but less than significant (Class III). (Id, Exhibit 10)

This passage relied upon by the PUC to justify its rejection of UCAN's contention does not mention seismic damage and discusses only the kind of short-term (a few hours to two days) of line interruption. Yet, the evidence submitted by UCAN showed how substations in Northern California were out of service for many months after they were hit by earthquakes far less severe than those that have been recorded in Imperial Valley. Petitioner asserts that the Commission's own reliance upon non-authoritative, generic language in an EIR that makes no mention of seismic damage to the substation violates the statutory requirement to address reliability in a CPCN application.

The court will find that the evidentiary record doesn't support the PUC contention. Petitioner showed that if an earthquake were to completely disable the Imperial Valley substation, both the SWPL and Sunrise lines would be removed from service for a lengthy period of time. (Petitioner's Exhibits to Petition, Exhibit 6, p. 575-579) All parties agreed that SDG&E's import limit after a SWPL outage is currently 2500 Mw. (Id) Thus an earthquake could reduce SDG&E's import capability to 2500 Mw. But pre-earthquake, SDG&E plans to be importing as much as 4000 Mw once Sunrise is in service. Thus up to 1500 Mw of imports would be incapable of being re-routed to serve SDG&E loads. Petitioner showed how an outage of both SWPL and Sunrise (such as after an earthquake near the Imperial Valley substation) could require load dropping in the SDG&E area in order to reduce flows south of SONGS to their 2500 Mw limit. (Id) The Commission's failure in both its Decision and Revised Decision to address this reliability risk constitutes legal error warranting a remand.

## B. A LESSER BURDEN OF PROOF REQUIRED OF APPLICANTS

In its Application for Rehearing, UCAN alerted the PUC that the Decision wrongly applies a preponderance of the evidence standard of review and rejects numerous parties' assertions that the CPCN should be evaluated based upon a clear and convincing standard.

The Commission asserts that the burden of proof it chose to impose upon the applicant (SDG&E) is dictated by Evidence Code Section 115. (Revised Decision, Petitioner's Exhibits to Petition, Exhibit 3, p. 314-315)

This code section reads:

"Burden of proof" means the obligation of a party to establish by **evidence** a requisite degree of belief concerning a fact in the mind of the trier of fact or the court. The burden of proof may require a party to raise a reasonable doubt concerning the existence or nonexistence of a fact or that he establish the existence or nonexistence of a fact by a preponderance of the **evidence**, by clear and convincing proof, or by proof beyond a reasonable doubt. Except as otherwise provided by law, the burden of proof requires proof by a preponderance of the **evidence**.

The interpretation of Evidence Code Section 115 is a question of law subject to independent judicial review. (*Associated Builders & Contractors, Inc. v. San Francisco Airports Com.* (1999) 21 Cal.4th 352, 361.) The question for the reviewing court is whether the "preponderance of the evidence" burden is appropriate for a project whose cost and scope far exceed general rate cases upon which the Commission has imposed a "clear and convincing" burden of proof.

Citing D.07-04-049, SDG&E asserted that the Commission has applied the higher, clear and convincing standard only in general rate cases and reasonableness reviews, and has expressly rejected its use for other

purposes.<sup>5</sup> The Commission accepts the SDG&E argument. UCAN submits that the Court must require the PUC to justify its use of a lesser standard for CPCN cases that pose very large cost exposure to ratepayers.

The intervening parties pointed to several rate case decisions and reasonableness review decisions to support their contention that clear and convincing evidence is the correct standard of review for Sunrise. For example, *Southern California Edison's Application for Approval of Summer 2007 New Generation RFOs and Cost Recovery*, D.07-04-049. The decision, which modified D.07-01-041 and denied rehearing, among other things determines that the preponderance of the evidence standard applies to review of the contract at issue, whereby Long Beach Generation will repower 260 megawatts of peaking capacity at Long Beach and make this capacity available to Edison for ten years. Similar CPUC cases, such as *Pacific Gas & Electric Co. Energy Cost Adjustment Clause Application*, D.82486, 701 (1980) 4 CPUC2d 693; D.00-02-046, *Southern California Edison General Rate Case*, D.83-05-036, (1983) 11 CPUC2d 474, 475 stood for the same proposition: where a utility sought to increase rates, the standard of proof applied was “clear and convincing”.

The Commission claims that no party referenced the burden of proof for a CPCN, and thus this is apparently a case of first impression. The Commission ruled that the lesser preponderance standard is the “default” standard in administrative proceedings and cites Evidence Code Sec. 115 to justify that it is therefore the appropriate standard.<sup>6</sup> But it makes no logical justification for its use of a statutory default standard for a high-stakes CPCN application and yet imposes the “clear and convincing” standard on

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<sup>5</sup> *Southern California Edison's Application for Approval of Summer 2007 New Generation RFOs and Cost Recovery*, D.07-04-049. The decision, which modified D.07-01-041 and denied rehearing, among other things determines that the preponderance of the evidence standard applies to review of the contract at issue, whereby Long Beach Generation will repower 260 megawatts of peaking capacity at Long Beach and make this capacity available to Edison for ten years.

<sup>6</sup> D. 09-07-024, p, 3-4

any application for a general rate increase, no matter how minimal the increase sought.

UCAN submits that the standard or “burden” of proof to which the applicant is to be held is an integral question that warrants addressing by the Commission in this case. The CPUC is charged with ensuring that “All charges demanded or received by any public utility... shall be just and reasonable.” (Public Utilities Code § 451) Where a utility fails to demonstrate that its proposed revenue requirements are just and reasonable, the Commission has the authority to protect ratepayers by disallowing expenditures that the Commission finds unreasonable. D.00-02-046, p. 32 (citing *Pacific Telephone and Telegraph Company v. Public Utilities Commission* (1950) 34 Cal.2d 822, 826; *Pacific Telephone and Telegraph Company v. Public Utilities Commission* (1965) 62 Cal.2d 634, 647; *City and County of San Francisco v. Public Utilities Commission* (1971) 6 Cal.3d 119, 126.)

To demonstrate the reasonableness of its application, SDG&E should have been required to its justification of the Powerline through clear and convincing evidence. To wit:

*See i.e.* D.01-10-031 Ordering Paragraph 26 (“Conclusion of Law 6 [in D.00-02-046] is modified to read: Under the clear and convincing evidence standard, it is PG&E’s obligation to support all aspects of its application through clear and convincing evidence.”); D.00-02-046, pp. 64-65 (“We must insist upon PG&E demonstrating, for each component of its proposed revenue requirements, that it produce clear and convincing evidence. To the extent it fails to do so, we cannot grant its requested revenue increase.”)<sup>7</sup>

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<sup>7</sup> The Commission laid to rest any question concerning the applicability of this evidentiary burden - the clear and convincing evidence test - to ratemaking cases in D.01-10-031 (Order Granting Rehearing of and Modifying Decision 00-02-046) and D.00-02-046 (PG&E’s GRC). Rejecting PG&E’s contention that the Commission could have applied a less stringent standard, e.g. the “preponderance of the evidence standard,” the Commission stated, “We have historically, though not wholly consistently, applied the clear and convincing burden of proof to utilities seeking general rate increases. ... This standard is applicable to all aspects of PG&E’s showing.” D.01-10-031, pp. 3-4.

Consistently, the Commission has held that whenever the utility comes before this Commission seeking affirmative rate relief, where it faces opposition, its reasonableness showing requires a higher burden of proof. Decision 00-02-046, p.37, citing D.87-12-067, 27 CPUC2d 1 at 21 (Id.)

As reiterated in D. 00-02-046:

“The staff sets forth the long-standing and proper rule. It is settled that in order to raise rates it is incumbent on the utility to justify the increase before the Commission. (*Northern Cal. Power Company* (1912) 1 CRC 315.) The utility seeking an increase in rates has the burden of showing by clear and convincing evidence that it is entitled to such increase. The presumption is that the existing rates are reasonable and lawful. Any doubts must be resolved against the party upon who rests the burden of proof.” (*Southern Counties Gas Company* (1952) 51 CPUC 533; *Citizens Utilities Company* (1953) 52 CPUC 637; *Park Water Company* (1955) 54 CPUC 498.)

The Commission reaffirms its commitment to a “clear and convincing” burden of proof when it concludes, “PG&E claims that the clear and convincing standard applies only in after-the-fact reasonableness review proceedings, not in test-year ratemaking proceedings. As an initial statement of the law we resolve this dispute in favor of ORA’s position.” (Decision 00-02-046, p. 36)<sup>8</sup>

Additionally, in PG&E’s test year 1999 general rate case, the Commission concluded: “Under the clear and convincing evidence standard, it is PG&E’s obligation to support all aspects of its application

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<sup>8</sup> To meet its evidentiary burden, the Commission ruled that SoCalGas must “produce evidence having the greatest probative force.” D.00-02-046, p. 38 (quoting *Railroad Commission v. Pacific Gas & Electric Company* (1938) 302 US 388). SoCalGas must overcome the “presumption . . . that the existing rates are reasonable and lawful. Any doubts must be resolved against the party upon whom rests the burden of proof.” D.00-02-046, p. 38 (citing *Southern Counties Gas Company* (1952) 51 CPUC 533; *Citizens Utilities Company* (1953) 52 CPUC 637; *Park Water Company* (1955) 54 CPUC 498.) To the extent SDG&E fails to persuade the Commission with clear and convincing evidence of the reasonableness of its revenue forecast, the Commission cannot grant its requested revenue increase. D.00-02-046, pp. 64-65.

through clear and convincing evidence”.<sup>9</sup> Clear and convincing evidence provides proof beyond a reasonable doubt; it is a higher degree of proof than a preponderance of evidence.

The corollary to the “clear and convincing” evidence burden is the Commission’s own evidentiary obligation. Public Utilities Code § 1757(a)(4) provides that the Commission’s findings in a decision must be supported by substantial evidence in light of the whole record. The Commission has interpreted this substantial evidence standard as follows:

We have a regulatory responsibility to ensure [SoCalGas] provides adequate service at just and reasonable rates, and we must view the facts accordingly. Our legislative mandate encompasses promoting the “safety, health, comfort, and convenience of [SoCalGas’] patrons, employees, and the public.” *See* §451. In construing substantial evidence, we must consider all factors that may have a bearing on this goal. D.01-10-031, p. 5.

Similarly, the Commission must have “adequately considered all relevant factors, and [have] demonstrated a rational connection between those factors, the choice made, and the purposes of the enabling statute” to survive judicial review. *See* D.01-10-031, p. 5 (citing *Calif. Hotel & Motel Assoc. v. Industrial Welfare Comm’n* (1979) 25 Cal.3d 200, 212.)

If the Commission’s use of the “preponderance of the evidence” standard is applied, then SDG&E needs only demonstrate a 51% chance of Sunrise being used to develop cost-effective Imperial Valley renewable power and it reaps the enhanced rate base and healthy, guaranteed profit upon a \$2 billion expenditure of state ratepayer monies. This lesser burden of proof is inappropriate and should not have been used by the Commission in the Decision. SDG&E’s showing in the instant CPCN case poses a \$1.9 billion expenditure to be paid by the state’s ratepayers.

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<sup>9</sup> (D.01-10-031, Ordering Paragraph 6, slip op. at 45, modifying D.00-02-046, Conclusion of Law 6, 4 CPUC3d 315, 554.)

In the Revised Decision, the PUC summarily rejected UCAN's arguments in a one-page discussion. It stated that although it does apply the more stringent "clear and convincing" standard in rate cases it chooses not to apply it in a case in which the applicant is receiving permission to build a \$1.9 billion project. By way of offering context, the cost of this project dwarfs the cumulative total amount of rate increases that SDG&E has received from the CPUC since UCAN began intervening in cases. Over 25 years of rate case applications have resulted in Commission rate increases totaling less than \$1 billion. In most all cases, the rate increases approved were less than \$100 million. Yet, in a case which exposes the state's ratepayers to a significant expenditure, the Commission chooses to apply a different standard without justification.

**C. THE COMMISSION VIOLATED ITS OWN PROCEDURAL DUE PROCESS BY BASING ITS DECISION UPON EXTRA-EVIDENTIARY DATA.**

Petitioner offers examples of the Commission's reliance upon extra-evidentiary material facts to justify its decision. This use of evidence that is either inexpert, oral argument or is received by the Commission after the close of the evidentiary record violates the Commission's own Rules of Practice and Procedure. These facts are sufficiently material to justify remand of the decision for additional evidentiary scrutiny of these material facts.

**1. *Legal Basis for UCAN's Contention***

Public Utilities Code Section 1757.14 provides that a final Commission decision issued in a quasi-legislative proceeding will be

overturned if it is not supported by the findings or if the Commission did not follow the proper process.

The Commission's own Rules of Practice and Procedure provides that comments on draft decisions "shall make specific references to the record." Thus, any new factual information . . . shall not be relied on as the basis for assertions in post-publication comments. Parties' comments on draft decisions in this matter cannot be, and are not, part of the record as such comments could only make "references *to* the record." ( Commission Rules of Practice & Procedure Rule 14.3).

## 2. ***Factual Basis for UCAN's Contention***

The Commission has improperly relied upon a material extra-evidentiary representation upon which to base its approval of the CPCN. These facts, if not adopted, would have precluded the approval of the CPCN.

### a) **The Commission relied upon inexperienced representations made in oral argument**

In an example of extra-evidentiary reliance, the PUC relies solely on one sentence of testimony from CAISO for its claim that *regulatory* constraints make a renewable requirement "unworkable." That testimony was given during oral argument, after the record was closed for submitting new evidence. Furthermore, the CAISO testimony does not support the PUC's contention:

You cannot expect the developers to, you know, financially committing, financially binding contracts now, many years ahead of time even at the difficult times we have now, within the time frame that we – that is suggested in the alternate decision. You can't.

(Petitioner's Attachment, 11, CAISO CEO Mansour Testimony, T.6249:15-19 , cited in Rehearing Decision, Exhibit 3, p. 323). This one sentence with one opinion without analysis or foundation, from the CAISO representative at oral argument.

In addition to improperly relying upon this oral argument, the CPUC also misinterpreted the statement. The CAISO did not represent that a renewable requirement would be unworkable. Instead, the CAISO CEO opines that it would be difficult to have financially binding contracts within the *timeline* specified in Assigned Commissioner's Alternate Decision. (Petitioner's Exhibits to Petition, Exhibit 2, pp.309-311) Nor did CAISO claim that the PUC lacked authority to impose such a measure.

Had the Commission not made this finding, it could not justify the approval of the CPCN without imposing a renewable power condition such as that proposed in the Grueneich dissent. (Id, p. 303)

**b) Another material finding by the Commission is based upon extra-evidentiary representations.**

In Finding of Fact #39 of the Decision, the Commission finds:

SDG&E has committed to (1) not contract, for any length of term, with conventional coal generators that deliver power via Sunrise, (2) replace currently approved renewable energy contract deliverable via Sunrise that fails with a viable contract with a renewable generator located in Imperial Valley, and (3) voluntarily raising SDG&E's RPS goal to 33 percent by 2020. (Petitioner's Exhibit to Petition, Exhibit 1, p. 289)

Yet, there is no such commitment in the evidentiary record. The commitment referenced is found in SDG&E's oral arguments before the Commission after the evidentiary record had closed and the case had been submitted.

Had the Commission not been able to reference SDG&E's extra-evidentiary and unenforceable "commitment", it would not have had a basis to reject the conditions suggested by the Grueneich dissent.

**c) The Commission relied upon inexpert representations made in oral argument.**

The Commission bases its decision upon extra-evidentiary data tendered by the CAISO. As explained in depth in UCAN's Reply Comments to the ISO Analysis, the Commission jettisoned all of the Phase 1 cost-analysis and accepted a new analysis proffered, for the first time in the proceeding, in August 2008, by the CAISO. This new, post-hearing analysis abandoned CT costs and adopted a 33% RPS standard after the CAISO acknowledged that Sunrise cannot be cost-justified based on anything less than a 33% RPS. (Petitioner's Exhibits to Petition, Exhibit 9, p. 677). And, as UCAN explained in depth to the Commission, the CAISO rejected much of the evidentiary record to justify Case 12 (relied upon by the Commission for the decision) and inflating the non-Sunrise Case 13 data. (Petitioner's Exhibits to Petition, Exhibit 9, pp. 678-679). The Commission never explained its rejection of the Case 13 data.

Had the Commission not relied upon this post-submission evidence, it would not have had a basis to reject the non-Sunrise Case 13 analysis.

**d) The Commission creates its own post-hearing data upon which it relies in its Decision.**

In its Decision, the Commission references CAISO modeling and CARB *Climate Change Scoping Plan* to conclude that whether or not the Sunrise line carries renewables, when projects across the rest of the region are considered, there is no substantial difference in the ultimate GHG

impacts. (Revised Decision, Petitioner's Exhibits to Petition, Exhibit 3, p. 320) But the only evidentiary reference to CARB estimates is found in the Decision which explains that the Commission provided estimates to CARB which then relied upon the PUC estimates to adopt a 33% RPS recommendation. (Decision, Petitioner's Exhibits to Petition, Exhibit 1, p. 6) In essence, the Commission created its own factual basis that CARB relied upon to issue a 33% guideline and then references CARB estimates that are, in fact, unsubstantiated CPUC estimates

Finally, the Commission argues that the fact that the Decision does not discuss certain record evidence does not demonstrate that there is legal error. There is no legal requirement that every piece of evidence in the record be mentioned in the Decision. (Revised Decision, Petitioner's Exhibits to Petition, Exhibit 3, p. 340) As Petitioner has shown, there is a legal requirement that the Commission's demonstrate that it considered cost-effective alternatives, which means that on issues that contribute to its decision (e.g. the cost of alternatives, or the composition of alternatives), the PUC must demonstrate that alternatives were considered. The failure of the Commission to have demonstrated, or even referenced, consideration of alternatives in its final decisions on the CPCN constitute legal error.

## VII. CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that this Court grant this Petition for a Writ of Review

Dated: August 12, 2009

Respectfully submitted,

By: \_\_\_\_\_

Art Neill  
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**CERTIFICATE OF COMPLIANCE**

Pursuant to rule 8.204(c) of the California Rules of Court, I hereby certify that this brief contains 11,358 words, including footnotes. In making this certification, I have relied on the word count of the computer program used to prepare the brief.

By \_\_\_\_\_  
Art Neill

**CERTIFICATE OF INTERESTED ENTITIES**

Petitioner, UCAN, certifies pursuant to Rule 8.208 of the California Rules of Court that UCAN is a non-profit corporation in which there are no ownership or shareholders, only a Board of Directors. However, UCAN consists of over 31,000 members. Members do not have any voting interests.

Dated: August 12, 2009

\_\_\_\_\_  
Art Neill