



**Basin & Range Watch
Defending the Desert**



Chief Justice Tani Cantil-Sakauye
and the Honorable Associate Justices
California Supreme Court
350 McAllister Street
San Francisco, CA 94102-4797

Re: Powers Engineering et. al. v. Public Utilities Commission
Supreme Court Case No. S 5237487
Court of Appeal Case No. B275901

Dear Chief Justice Cantil-Sakauye and Associate Justices:

Pursuant to California Rule of Court 8.500, subdivision (g), Consumer Watchdog and Basin and Range Watch respectfully submit this *amici curiae* letter in support of the petition for review filed in the above-entitled case.

Consumer Watchdog advocates for consumers rights and seeks to hold corporations and government officials accountable in the courts and before regulatory agencies, including the Public Utilities Commission. Consumer Watchdog has created a website to track the scandals occurring at the PUC, gathering

hundreds of thousands of documents and emails that are coming into the public domain through the Public Records Act. Our searchable database allows consumers and all Californians to expose the webs of corruption between state energy regulators and the energy industry they regulate.

Basin and Range Watch is a nonprofit advocacy group working to conserve the deserts of Nevada and California. We advocate before many federal and state agencies, including the PUC, which are deciding whether to open up unspoiled habitat and public land to energy development. Our goal is to identify the problems of energy sprawl and find solutions that will preserve our natural ecosystems, open spaces and quality of life for local communities. We have participated in prior PUC proceedings concerning transmission lines, solar plants, wind projects and renewable energy efficiency rules, among other proceedings.

The petition for review challenges an order by the Court of Appeal for the Second Appellate District, Division Five, summarily denying a petition for a writ of review of a decision by the PUC to approve contracts proposed by Southern California Edison Company (“SCE”) for the construction of three new fossil fuel power plants in the Los Angeles Basin, which will operate for twenty years. The PUC approved the three new gas-plant even though, according to the PUC’s own findings and conclusions in a prior proceeding, SCE has more than enough power to meet demand in the L.A. Basin, and, if any need for more power exists, it can be filled with clean and renewable energy alternatives, as state law requires. (See Petition for Review, at pp. 17, 19.)

The L.A. Basin case is not the first time the PUC has approved contracts for new gas-fired power plants in the face of evidence that the plants are not needed. Consumer and environmental groups have been complaining for years that the PUC consistently accedes to new gas-plant contract proposals made by utilities, which profit from such contracts in myriad ways, despite the PUC’s mandate under state law to reduce reliance on gas-fired generation to meet power needs and to, instead, increase the availability of clean and renewable power sources.¹

¹ Governor’s Executive Order B-30-15 (Apr. 2015); Pub. Util. Code, §§ 399.11 454.5, subd. (b)(9)(C); Cal. Pub. Res. Code § 26001, directing the state to use all practical means to promote the prompt and efficient development of renewable energy sources; On September 8, 2016, § 38566 was added to the California Health and Safety Code

Recently, a public scandal erupted after secret emails between PUC officials and utility executives were disclosed exposing the PUC's decision-making as a product of its "cozy" relations with the utilities it is tasked with regulating.² Widespread news coverage led to a public outcry over "what critics have called a lax culture of regulatory oversight at the PUC."³ In response, federal prosecutors and the State Attorney General initiated still-ongoing investigations into corruption, influence-peddling, and other criminal and negligent conduct by the PUC, uncovering further evidence that PUC decisions are being made based on backroom deals with utilities and power plant developers outside the formal administrative process.⁴

A utility lawyer accused former PUC President Michael Peevey of engineering a secret quid pro quo, offering a utility approval of its then-pending power plant proposal in exchange for an agreement to support and build a \$740 million power plant that Peevey wanted.⁵ Both power plants were then built, although both were not needed. Testimony at a state Senate hearing later that revealed that improper favor trading was involved in the PUC's approval of several utility-proposed power plant projects.⁶ Peevey, whose personal residence was

providing that statewide greenhouse gas emissions are to be reduced to at least 40 percent below the statewide greenhouse gas emissions limit no later than December 31, 2030.

² Burke, *Outrage Over 'Cozy' Correspondence Between CPUC, PG&E*, KQED News (Jul.29, 2014) available at <http://ww2.kqed.org/news/2014/07/29/cpuc-pge-san-bruno-emails/>.

³ Avalos, *PG&E And The PUC Oust Several Key Officials In Wake Of Email Flap*, Contra Costa Times (Sept. 15, 2014) Available at http://www.contracostatimes.com/News/ci_26538266/PGE-and-the-PUC-oust-several-key-officials-in-wake-of-email-flap.

⁴ Lifsher, *Federal prosecutors probe relationship between regulators and PG&E*, L.A. Times (Oct. 6, 2014) available at <http://www.latimes.com/business/la-fi-puc-prosecutor-20141007-story.html>; Matthews, *'It's a Slap in the Face to Taxpayers': CPUC Requests \$6 Million to Pay Legal Bills from Corruption Investigation*, NBC (Apr. 5, 2016) available at <http://www.nbcbayarea.com/news/local/CPUC-Requests-6-Million-to-Pay-Legal-Bills-from-Corruption-Investigation-374687111.html>; McDonald, *Whose utilities commission is it anyway*, San Diego Union Trib. (Nov. 15, 2014) available at: <http://www.sandiegouniontribune.com/news/watchdog/sdut-cpuc-regulator-contacts-utility-executives-san-ono-2014nov15-htmlstory.html>; McDonald, Young, *State investigator lays out developing criminal case against former PUC president*, L.A. Times (Dec. 29, 2015) available at: <http://www.latimes.com/business/la-fi-watchdog-peevey-20151230-story.html>; McDonald, *It's not just the steam generators that failed*, San Diego Union Trib. (January 30, 2016) available at <http://www.sandiegouniontribune.com/news/watchdog/sdut-san-onofre-anniversary-2016jan30-htmlstory.html>.

⁵ According to an insider, Peevey told San Diego Gas & Electric Company that it would receive approval to acquire the Palomar Energy Center in Escondido if the utility agreed to a large power purchase from a different plant in Otay Mesa, even though SDG&E only needed 300 MW of electricity total. See letter written by Attorney Kelly Foley, March 10, 2015, available at <https://assets.documentcloud.org/documents/2891194/Kelly-Foley-Testimony.pdf>

⁶ McDonald, *Lawyer: CPUC boss made power deal*, San Diego Union Trib., (Mar. 11, 2015) available at: <http://www.sandiegouniontribune.com/news/watchdog/sdut-lawyer-cpuc-boss-made-power-play-2015mar11->

searched for evidence under subpoena by law enforcement, announced his retirement the day after a state Senate bill was introduced that would have removed him from his post if he had been reappointed after his term expired in December 2015.⁷

Shortly after the Court of Appeal’s summary denial of the writ petition in this case, the State Auditor issued a scathing report confirming the PUC has engaged in improper communications with regulated utilities on pending PUC matters.⁸ The State Auditor found that PUC disclosure rules do not require PUC “decision makers to take responsibility for disclosing ex parte communications” with parties in pending PUC proceedings but that the PUC failed to implement its own consultant’s recommendations for guarding against such inappropriate contacts.⁹ The consultant found that the PUC’s ex parte contacts with interested parties made it an outlier compared to other California agencies and other state PUCs.¹⁰ The Auditor focused on specific recent cases before the PUC, concluding that inappropriate private communications between PUC commissioners and interested parties “cast doubt on how well [the PUC’s decisions] protect[ed] ratepayers” and led to questions about “the integrity of [the decisions.]”¹¹ Other inappropriate practices that the Auditor criticized included Commissioners’ acceptance of international travel, meals and gifts from entities whose board members are high-level employees of utilities and other parties with financial interests in matters before the PUC. The Auditor found that interested parties used the gifts as opportunities to access and influence commissioners, opportunities the commissioners granted.¹²

The L.A. Basin case was no exception to the back-room deal-making engaged in by key Commissioners. In the L.A. Basin case, the PUC approved contracts worth an estimated \$100 million between SCE and a company founded by political-insider Susan Kennedy.¹³ Ms. Kennedy is a former PUC commissioner who also served as

[htmlstory.html](#); see also letter written by Attorney Kelly Foley, Mar. 10, 2015, available at <https://assets.documentcloud.org/documents/2891194/Kelly-Foley-Testimony.pdf>.

⁷ Brekke, *Amid Uproar Over PG&E Emails, CPUC Chief Michael Peevey Says He’ll Leave*, KQED News (Oct. 9, 2014) available at <http://ww2.kqed.org/news/2014/10/09/cpuc-president-michael-peevey-pge-controversy>.

⁸ California State Auditor, Report Number: 2016-104 (Sept. 22, 2016) available at <https://www.bsa.ca.gov/reports/2016-104/index.html>

⁹ *Id.* at p.18.

¹⁰ *Id.*

¹¹ *Id.* at p.15.

¹² *Id.* at p.18 and 21.

¹³ Advanced Microgrid Solutions, *Advanced Microgrid Solutions Selected for Groundbreaking Clean*

Chief of Staff to former Governor Schwarzenegger and is a confidante of current PUC President Picker.¹⁴ During the proceedings in this case, Kennedy, then also a lobbyist for PUC-regulated utility companies, engaged in regular backchannel communications with Commissioner Picker about her company and other relevant topics at issue in the pending proceeding.¹⁵ Kennedy only founded her energy storage company two months *after* SCE issued its request for offers, so the company had no operating history, no specifically identified technology, no creditor collateral, and no site control.¹⁶ The bid evaluation criteria explicitly included bidder experience¹⁷, yet the PUC nonetheless approved contracts worth approximately \$100 million with Kennedy's fledgling company.¹⁸

During the pendency of the L.A. Basin proceeding, Kennedy co-hosted a tribute dinner for Peevey, who was still PUC President at the time, but under investigation. Kennedy worked with Commissioner Picker, the assigned commissioner in the L.A. Basin case, to solicit donations from parties with financial

Energy Project in Southern California, Available at <http://advmicrogrid.com/assets/docs/press/pr-clean-energy.pdf>; McDonald, *CPUC Approves Edison Energy Deal*, San Diego Union Trib. (Nov. 19, 2015) available at: <http://www.sandiegouniontribune.com/news/watchdog/sdut-ams-energy-storage-edison-cpuc-2015nov19-htmlstory.html> (“The price Edison is paying will not be made public for up to three years, although industry estimates have pegged the Advanced Microgrid share around \$100 million.”)

¹⁴ McDonald, *Power player got energy deal*, San Diego Union Trib. (Apr. 27, 2015), available at <http://www.sandiegouniontribune.com/news/watchdog/sdut-power-player-got-energy-deal-2015apr27-htmlstory.html>.

¹⁵ McDonald, *CPUC Boss had Backchannel Dealings*, San Diego Union Trib. (Mar. 25, 2015) available at <http://www.sandiegouniontribune.com/news/watchdog/sdut-cpuc-boss-tried-not-to-disclose-party-role-2015mar25-htmlstory.html>; Young, *Insider Pushed her Firm's Grid Service*, San Diego Union Trib. (June 29, 2015) available at <http://www.sandiegouniontribune.com/news/watchdog/sdut-ams-susan-kennedy-picker-email-ex-parte-2015jun29-htmlstory.html>; Secretary of State Business Entity status, available at: <http://kepler.sos.ca.gov/> (Showing Advanced Microgrid Systems date of incorporation as Nov. 19, 2013; see also Avalos, *PUC Critics Site Concerns Over Revolving Door* Mercury News (March 21, 2015) available at <http://www.mercurynews.com/2015/03/21/puc-critics-cite-concerns-over-revolving-door/>. Copies of emails that Kennedy and Picker exchanged during the proceeding are available at Consumer Watchdog's PUC Papers website, <https://www.pucpapers.org/>.

¹⁶ Advanced Microgrid Solutions, Inc. incorporated on Nov. 19, 2013, according to the CA Secretary of State's website (accessed Sept.29, 2016, at <https://businessfilings.sos.ca.gov/>).

¹⁷ SCE's LA Basin Application, Appendix D, Independent Evaluator Report by Sedway Consulting, Inc., available at [http://www3.sce.com/sscc/law/dis/dbattach5e.nsf/0/EBE7FE0049EFB86788257D980006ADA4/\\$FILE/A.14-11-XXX%20-%20SCE-2%20PUBLIC%20Appendices%20A-D%20to%20SCE-1%20Testimony.pdf](http://www3.sce.com/sscc/law/dis/dbattach5e.nsf/0/EBE7FE0049EFB86788257D980006ADA4/$FILE/A.14-11-XXX%20-%20SCE-2%20PUBLIC%20Appendices%20A-D%20to%20SCE-1%20Testimony.pdf) at p.37.

¹⁸ McDonald, *CPUC Approves Edison Energy Deal*, San Diego Union Trib. (Nov. 19, 2015) available at: <http://www.sandiegouniontribune.com/news/watchdog/sdut-ams-energy-storage-edison-cpuc-2015nov19-htmlstory.html>

interests before the PUC.¹⁹ Commissioner Picker admitted that he acted at the request of Ms. Kennedy.²⁰

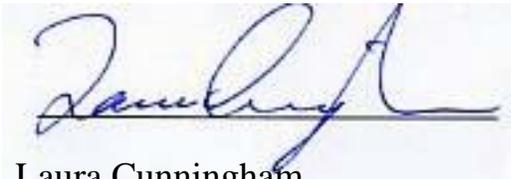
That the PUC engages in a practice of secretly communicating with utilities and other insiders about matters pending before it, and issues decisions influenced by these improper contacts, demonstrates that PUC decisions need to be subjected to careful scrutiny. Yet obtaining meaningful judicial review of PUC decisions is virtually impossible, as this case illustrates. Because a petition for writ of review is the sole means of challenging a PUC decision, and the appellate courts typically summarily deny such petitions without plenary consideration of their merits, the PUC's decisions are essentially immune from challenge. . (*Pacific Bell v. Public Utilities Com.*, (2000) 79 Cal. App. 4th 269 [Holding that a petition for a writ of review to challenge a decision of the Public Utilities Commission is not equal to an appeal to the Court of Appeal as a matter of right.]; Cal. Pub. Util. Code §§ 1756, 1757; Cal. Const. art. XII, § 5). Indeed, the Court of Appeal for the First Appellate District, Division Two recently held that, while a statutory right exists to challenge by superior court action the failure of any other public agency to produce documents requested under the Public Records Act, Gov. Code §§ 6250-6270.5 ("PRA"), the PUC's failure to comply with PRA requests seeking disclosure of documents revealing its improper communications with regulated utilities is reviewable only by means of petition for extraordinary writ. (*Pub. Util. Com'n v. Superior Court* (Aug. 31, 2016), Case No. A147570.) Thus, opponents of the PUC's gas plant contract approvals face a difficult hurdle just to get the evidence they need to challenge the approvals. If they succeed and the PUC denies it did anything wrong, opponents must take their chances with a second writ petition. A petition for review of this PRA opinion by the First District, Division Two, is currently pending before this Court as Case Number S237199.

¹⁹ Van Derbeken, *How banquet for ex-PUC head Peevey went sour for UC Berkeley*, San Francisco Chronicle (April 1, 2015) Available at: <http://www.sfgate.com/bayarea/article/How-dinner-for-ex-PUC-head-Peevey-hit-nerve-at-UC-6166762.php>.

²⁰ Email from S. Kennedy to M. Picker, dated Jan. 19, 2015, obtained by San Diego Union Trib., available at <https://cdn.sandiegouniontrib.com/news/documents/2015/03/27/you.pdf> McDonald, *Where did Peevey party proceeds go?* San Diego Union Trib. (June 12, 2015) Available at <http://www.sandiegouniontribune.com/news/watchdog/sdut-peevey-party-proceeds-mystery-2015jun12-htmlstory.html>; Lifsher, *Dinner for ex-PUC chief Peevey nets \$55,000 in gifts for UC Berkeley*, L.A. Times (February 25, 2015) Available at: <http://www.latimes.com/business/la-fi-peevey-dinner-report-20150224-story.html>.

The L.A. Basin case presents the Court with an ideal opportunity to restore public confidence in the judicial process and the PUC. The Court should grant review in the L.A. Basin case to signal the appellate courts that, because judicial review of PUC decisions is available solely by means of petition for extraordinary writ, such petitions should not be summarily denied unless they clearly lack merit. The writ petition in this case raised at least plausible arguments that the PUC failed to proceed in the manner required by law and abused its discretion in approving the three new gas power plant contracts, despite the PUC's own findings and conclusions in its previous decision indicating that the plants are not needed. (See Petition for Review, pp. 22-23.) At minimum, the petition made a sufficient showing to warrant plenary review. Therefore, we respectfully urge the Court to grant review, even if only for the purpose of transferring the matter back to the Court of Appeal for a full merits review.

Respectfully submitted,



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**PROOF OF SERVICE
STATE OF CALIFORNIA,
CITY AND COUNTY OF SAN FRANCISCO**

I am employed in the city and county of San Francisco, State of California. I am over the age of eighteen years and not a party to the within action; my business address is: 595 Market Street, San Francisco, California 94105.

On September 29, 2016, I served a copy of the following document(s) described as:

AMICI CURIAE LETTER

on the interested party(ies) to this action as follows:

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BY MAIL: By placing a true copy thereof enclosed in a sealed envelope(s) addressed as above, and placing each for collection and mailing on that date following ordinary business practices. I am “readily familiar” with this business’s practice of collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the U.S. Postal Service in San Francisco, California, in a sealed envelope with postage fully prepaid.

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

Executed on this 29th day of September 2016, at San Francisco, California.



Yien San Juan