BEFORE THE CALIFORNIA ENERGY COMMISSION

IN THE MATTER OF Diablo Canyon Power Plant	Docket No. 21-ESR-01 (Joint Agency Workshop Held August 12, 2022)

POST-WORKSHOP COMMENTS OF NATURAL RESOURCES DEFENSE COUNCIL, FRIENDS OF THE EARTH, AND ENVIRONMENT CALIFORNIA

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Pursuant to the Notice of Joint Agency Remote Access Workshop held on August 12, 2022, which provided for the filing of written comments within one week after the Public Workshop, Natural Resources Defense Council ("NRDC"), Friends of the Earth ("FOE"), and Environment California hereby submit these written comments concerning future operation of the Diablo Canyon Power Plant ("Diablo Canyon").

We appreciate the opportunity to submit these comments.

I. INTRODUCTION AND OVERVIEW

The undersigned parties have been actively involved for the past six years in California's major effort to retire Diablo Canyon at the end of its current operating licenses in 2024-2025, and to replace its output with clean, new, emissions-free resources. Our goal, which was fully embraced by the State of California, has been to retire Diablo Canyon in an orderly and planned manner, with a six-year glidepath designed to ensure that California does not experience any setbacks in public safety, system reliability, or emissions of greenhouse gases or other pollutants.

All three of our organizations were signatories to the landmark June 2016 "Joint Proposal," a multi-party agreement between Diablo Canyon's owner, Pacific Gas and Electric

Company ("PG&E"), and a coalition of environmental organizations, the unions that represent the workers at Diablo Canyon, and the community in San Luis Obispo County where the Diablo Canyon plant is located.[1] The Joint Proposal provides a detailed plan for retiring Diablo Canyon in at the end of its current Nuclear Regulatory Commission ("NRC") operating licenses in 2024 (Unit 1) and 2025 (Unit 2), and replacing its output with clean, new, emissions-free resources.

The Joint Proposal is not only a binding legal contract between PG&E and the other Signatory Parties. It is also the cornerstone of established and well-founded State policy and law in California. The Joint Proposal was endorsed in 2016 by then-Lieutenant Governor Gavin Newsom in his capacity as a voting member of the State Lands Commission, and in 2018 the Land Commission's approval was affirmed on judicial review by the Court of Appeal. The provisions of the Joint Proposal were approved in 2018 by the Public Utilities Commission (affirmed on judicial review in another Court of Appeal), and also by legislation enacted by large majorities in both Houses of the California Legislature and signed by then-Governor Brown (Senate Bill 1090 (Monning, 2018)). In 2020, pertinent aspects of the Joint Proposal were carried out, in accordance with these earlier approvals, by the State Water Board.

It would be a grievous mistake for the State now, in 2022, to suddenly abandon the careful plan laid out in the Joint Proposal and approved by the Legislature, then-Governor Brown, then-Lieutenant Governor Newsom, and multiple State agencies, and instead to attempt

[1] The full title of the 2016 agreement is "Joint Proposal of Pacific Gas and Electric Company, Friends of the Earth, Natural Resources Defense Council, environment California, International Brotherhood of Electrical Workers Local 1245, Coalition of California Utility Employees and Alliance for Nuclear Responsibility to Retire Diablo Canyon Nuclear Power Plant at Expiration of the Current Operating Licenses and Replace it with a Portfolio of GHG Free Resources."

to extend the operation of Diablo Canyon beyond its scheduled retirement dates in 2024-2025. There is no legitimate basis for such an abrupt turnaround in State policy. Doing so would be disruptive and harmful, at the very time when California needs to continue making steady forward progress in the program for replacing Diablo Canyon with new, clean, emissions-free resources. California has ample tools available to ensure that there are sufficient replacement resources in place by the time the Diablo Canyon reactors are retired in 2024-2025.

The correct solution is to stay the course charted in the Joint Proposal.

Moreover, as we will discuss below, any such attempt by the State of California to force a material deviation from the terms of the Joint Proposal would violate the Contracts Clause of the U.S. Constitution (Art. I, Sec. 10, Clause 1), which provides that "No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . ." Thus, attempting to extend Diablo Canyon's operations beyond 2024-2025, contrary to the express terms of the Joint Proposal, would not only be exceedingly bad State policy, it also would be unlawful.

Our strong and earnest recommendation is "don't go there."

This Commission and the California Independent System Operator ("CAISO"), along with the Public Utilities Commission and the other agencies of California State Government, as well as the Governor and the Legislature, need to pull back from the hastily-conceived and poorly-reasoned proposal to extend the operation of Diablo Canyon beyond its schedule retirement dates in 2024-2025. We are, of course, mindful of the reliability challenges California faces over the next several years. We have actively advocated for and supported the Public Utilities Commission's efforts to adopt and enforce procurement mandates for load-serving entities, to ensure that sufficient replacement resources are online by the time Diablo Canyon is

retired in 2024-2025 to protect system reliability, and to prevent any increase in emissions of greenhouse gases and other pollutants. While we would not minimize the challenges this presents, the State has ample tools at its disposal to achieve these goals.

II. BACKGROUND

STAFF PRESENTATION AT THE AUGUST 12 WORKSHOP, AND THE GOVERNOR'S PROPOSAL TO EXTEND DIABLO CANYON OPERATIONS BEYOND 2024-2025

The Notice referenced at the outset of these comments indicates that the Commission, at the urging of the Office of the Governor, wishes to "explore actions that are needed to preserve the option of extending, for a limited term, the operating license of the Diablo Canyon Power Plant." In a slide presentation at the August 12 Workshop entitled "Transition to a Clean Energy Future: Electric Reliability Outlook," representatives of the Commission and the CAISO suggested that difficulties in obtaining sufficient replacement resources for the output of Diablo Canyon present a "reliability challenge," the solution for which might be to extend Diablo Canyon's NRC operating licenses beyond their scheduled terminations in 2024-2025.

Similarly, a five-page Proposal released by the Governor's Office coincident with August 12 Workshop concluded: "In light of the urgency of transitioning away from fossil fuel generation to greater amounts of clean energy, with the goal of achieving 100 percent clean electric retail sales by 2045, and the need to ensure reliability through this challenging period, *a limited term extension of DCPP is warranted*." (Emphasis added.)

Although the Governor's Proposal referred to this as a "limited term extension," it calls for extending Diablo Canyon's operations for at least five years (until October 31, 2029, for Unit 1, and until October 31, 2030, for Unit 2), and would direct the Public Utilities Commission to consider an extension *for as long as ten years*, until October 31, 2035.

Another major feature of the Governor's Proposal is a General Fund "loan" to PG&E of up to $1.4 billion to cover the costs "associated with the relicensing" of Diablo Canyon. This very large "loan," however, would be "forgivable," so in effect it would constitute a grant of nearly a billion-and-a half dollars of taxpayer funds to PG&E to keep Diablo Canyon operating beyond 2024-2025.

The Governor's Proposal also calls for PG&E to apply to the U.S. Department of Energy for federal operating subsidies for Diablo Canyon under the Civil Nuclear Credit Program. The Governor describes this as a "funding opportunity," and refers to a deadline of September 6, 2022, for PG&E to submit such an application.

In these Comments, we explain why the Governor's Proposal is ill-advised and unwarranted in light of what is actually happening in California, and why it is also illegal under federal law, inasmuch as it would violate both the U.S. Constitution and a federal statute.

III. DISCUSSION

A. California Has Ample Tools at its Disposal to Ensure that the Joint Proposal Is Working as Intended to Provide Sufficient Resources to Replace Diablo Canyon by its Scheduled Retirement Dates in 2024-2025, So No Extension of Diablo Canyon's Operations is Warranted

While we agree with Governor Newsom and with the staff of this Commission and the CAISO that California faces significant reliability challenges in the coming years, we strongly and respectfully dispute that the fix is to extend Diablo Canyon's operations beyond the terms of its existing NRC operating licenses in 2024-2025. This is not the right solution.

In June 2021, in the Integrated Resource Plan ("IRP") Proceeding (Rulemaking 20-05-003), the Public Utilities Commission issued a major order entitled "Decision Requiring

Procurement to Address Mid-Term Reliability (2023-2026)" (Decision 21-06-035). The Decision requires jurisdictional load-serving entities to procure substantial new, emissions-free generating resources by 2026. This significant new procurement mandate for new, clean generating resources, issued in response to reliability concerns expressed by the CAISO, is specifically designed to replace the output of Diablo Canyon by its scheduled retirement dates in 2024-2025, and thus ensure continuing reliability of the electric grid.

The Governor's Proposal does not mention the Public Utilities Commission's June 2021 Decision, but it expresses concern that the procurement of new generating resources to replace Diablo Canyon may be lagging, stating:

> [S]upply chain disruptions and other factors are delaying the installation of new clean energy generation and storage systems, including solar and wind projects and battery storage. While the Administration and Legislature have taken critical actions to expedite new clean energy project permitting, there is a real risk that delays in the online dates of new clean energy generation over the coming years could result in challenges in keeping up with load growth and ensuring prudent power reserves to support reliability, especially in light of climate impacts and over 6,000 MWs of planned power plant retirements in 2024 and 2025.

To our knowledge, the Public Utilities Commission has not adopted any findings that the procurement efforts it ordered in June 2021 are lagging in the manner or to the degree suggested by the Governor's Proposal. For his part, the Governor has not cited any other sources for his conclusion that this is occurring.

But even assuming that the Governor and his staff are privy to non-public information supporting the conclusion that the Diablo Canyon replacement procurement effort is lagging, this does not justify the abrupt proposal to extend the operations of Diablo Canyon beyond 2024-2025. If lagging procurement is indeed a problem, there are obviously better solutions available.

For one thing, the Public Utilities Commission has not only the expertise to identify the causes of any problems, but also the legal authority over jurisdictional load-serving entities to make them do their job. The Governor's Proposal seems to overlook completely the expansive powers of the Public Utilities Commission to address the problem he believes he is seeing.

Another conspicuous flaw in the Governor's Proposal is that it focuses exclusively on energy-producing resources – that is, power generators and energy storage facilities – to meet the challenge of replacing Diablo Canyon. The Governor's Proposal ignores the Number One Resource in the Loading Order for California's electric system, namely, investments in Energy Efficiency. To the extent that delays might be experienced in procurement of generating and storage resources, the Public Utilities Commission, in concert with the Energy Commission, has a tremendous ability and the institutional expertise to pivot towards Energy Efficiency to make up any shortfall. There is plenty of time between now and 2024-2025 to do this.

It would frankly be an embarrassment to California, a world leader in Energy Efficiency, to grasp in desperation for nuclear power as a solution to a mid-term reliability challenge, without making any effort to step up its investments in Energy Efficiency. This deficiency in the Governor's Proposal is quite inexplicable.

Yet another tool available to the State is the expenditure of General Fund money to address the reliability concerns the Governor has identified. In his own Proposal, the Governor has proposed to spend up to $1.4 billion in General Fund money to extend Diablo Canyon's operations. This is an enormous sum of money. If such funds are indeed available, it would be far better to spend them on clean energy resources for the *future*. This could Energy Efficiency,

new clean generating and energy storage resources, and green-energy transmission lines. Those are far better investments than rather than propping up an aging, 40+-year-old nuclear plant.

The Governor has proposed an extravagant expenditure of taxpayer money on Diablo Canyon. The net effect would be to allow Diablo Canyon to continue hogging California's baseload for as long as another decade, which will suppress the uptake of new, flexible, clean energy resources during a critical timeframe. This is not a sensible plan for California.

B. The Governor's Proposal to Extend Diablo Canyon's Operations Beyond 2024-2025 Would Force a Material Deviation from the Joint Proposal, and Thus Would Violate the Contracts Clause of the U.S. Constitution

As explained below, the Joint Proposal is a legally binding contract among PG&E and the other Signatory Parties – including NRDC, FOE and Environment California. All of these Parties have rights and obligations under this ongoing contract. The Contract Clause of the U.S. Constitution prohibits the State of California from impairing these rights and obligations by unilaterally imposing a material deviation from the terms of the Joint Proposal – namely, an extension of the Diablo Canyon operating licenses beyond 2024-2025.

1. The Joint Proposal Is An Enforceable Contract Under Familiar Legal Principles

There is no reasonable basis for doubt that the Joint Proposal is a valid, binding contract, and that it is fully enforceable as among its Signatories. The key terms of this legal agreement are that, upon approval by the Public Utilities Commission, Diablo Canyon must be retired at the end of its current operating licensees in 2024-2025, and its output must be replaced by new, clean, emissions-free resources, so as to ensure continued reliability of the grid and no increase in emissions of greenhouse gases or other pollutants.

(a) The Joint Proposal Is A Straightforward Example of an Executory Contract

Black's Law Dictionary (11th Ed. 2019) defines an "executory contract" as an agreement "for which there remains something still to be done on both sides." This was the nature of the Joint Proposal when it was executed in June 2016.

Although it bore the title "Proposal," the document is clearly a multi-party *agreement* containing an assortment of mutual obligations to which the various Parties committed themselves. This is confirmed by the fact that the operative provisions of the Joint Proposal appear under a heading, in all capital letters (on p. 3), that reads: "AGREEMENT."

The contractual nature of the Joint Proposal is further confirmed by the language of Section 7.4, which states: "This Joint Proposal shall be governed by the laws of the State of California as to all matters, including but not limited to, matters of validity, construction, effect, performance, and remedies." All of these terms – "validity, construction, effect, performance, and remedies" – clearly signal that the Parties understood they were entering into a contractual agreement that was subject to legal interpretation as such.

The "executory" aspects of this agreement included such things as PG&E's obligation to file an Application with the Public Utilities Commission seeking approval of the Joint Proposal, and PG&E's agreement to suspend and later dismiss with prejudice its then-pending NRC relicensing application. Another example was the agreement of the Parties to support the Application with their best efforts, and to meet and confer in good faith in the event the Commission did not approve the Application "in its entirety without modification."

The subsequent history of the Joint Proposal, summarized below, confirms that it remains an enforceable legal agreement under familiar principles of contract law.

(b) The Requirement of Public Utilities Commission approval of the Joint Proposal ultimately was achieved in substantial part, sufficient to satisfy this contingency to the Joint Proposal's effectiveness.

In January 2018, in Decision 18-01-022, the Public Utilities Commission found that "PG&E's proposal to retire Diablo Canyon Unit 1 by 2024 and Unit 2 by 2025 is reasonable and should be approved." (D.18-01-022, p. 58, Conclusion of Law No. 1.) Accordingly, in Ordering Paragraph 1, the Public Utilities Commission ordered that "[PG&E's] proposal to retire Diablo Canyon Unit 1 in 2024 and Unit 2 in 2025 is approved." (*Id.*, p. 59.)

However, the Public Utilities Commission in the January 2018 Decision expressly declined to authorize three major components of the Joint Proposal, as amended: (1) the "Tranche 1" proposal by PG&E to acquire 2,000 gigawatt hours of incremental Energy Efficiency, (2) the Employee Retention and Severance Program, and (3) the Community Impacts Mitigation Program.

With respect to the Tranche 1 Energy Efficiency procurement, the Public Utilities Commission decided that the proposal was not justified from a cost-benefit perspective during the period leading up to the retirement of Diablo Canyon several years later in 2024-2025. The Commission found that the IRP Proceeding was the better forum for assessing what level of new, GHG-free resources would be needed to replace Diablo Canyon and achieve the goal (which the CPUC endorsed) of a zero increase in GHG emissions. (D.18-01-022, pp. 21-22.) However, in response to comments by NRDC and FOE on the original Proposed Decision, the Commission in its final decision added the following sentence in the discussion of the Tranche 1 Energy Efficiency proposal – with underscoring added by the Commission itself:

> It is the intent of the Commission to avoid any increase in greenhouse gas emissions resulting from the closure of Diablo Canyon.

(D.18-01-022, pp.20-21 (emphasis in original).)

With respect to the Employee Retention and Severance Program, the Commission found that such a program should not be funded at the full cost proposed. (D.18-01-022, pp. 23-30.) Likewise, the Commission declined to authorize ratepayer funding for the $85 million Community Impacts Mitigation Program, finding that the proposal "raise[d] legal as well as policy issues." (D.18-01-022, p. 36.) The Commission concluded that it would authorize such an expenditure only if specifically directed to do so by legislation. (*Id.*, p. 41.)

Accordingly, as of the issuance of Decision 18-01-022 in January 2018, the proponents of the Joint Proposal had yet achieved Public Utilities Commission approval of the agreement "in its entirety and without modification."

Nine months later, however, in September 2018, the Legislature enacted, and then-Governor Brown approved, Senate Bill 1090 ("SB 1090"), which directed the Public Utilities Commission to approve "the full funding" for both "the community impact mitigation settlement" and "the employee retention program," as proposed in Application 16-08-006. Thereafter, on October 1, 2018, the Commission issued Decision 18-09-052, carrying out the statutory directive to approve "full funding" for both programs.

This legislation, and the Public Utilities Commission decision carrying it out, brought the Signatory Parties very close to the point of having achieved approval of the Joint Proposal "in its entirety and without modification." As of October 2018, the only provision of the Joint Proposal that had not been approved was the Tranche 1 Energy Efficiency proposal.

However, the Signatory Parties acquiesced in the Public Utilities Commission decision to not adopt the Tranche 1 Energy Efficiency Proposal. This was understandable, because although the Commission declined to approve the Tranche 1 Proposal, the Commission was persuaded by the Signatory Parties to adopt strong, affirmative language that a replacement procurement effort would be undertaken in the IRP Proceeding, with a mandate that there be no increase in GHG emissions as a consequence of retiring Diablo Canyon.

The Public Utilities Commission's decisions in the Diablo Canyon proceeding were upheld on judicial review in the California Court of Appeal. *Californians for Green Nuclear Energy v. Public Utilities Commission*, Cal. Court of Appeal, Second Appellate District, Case No. B293420 (petition summarily denied by order, January 19, 2019).

This history should foreclose any argument at this stage that, because the Public Utilities Commission in 2018 fell somewhat short of approving the Joint Proposal "in its entirety and without modification" (specifically, by not adopting the Tranche 1 Energy Efficiency proposal), the Signatory Parties consequently were "released from their obligations under the Joint Proposal," as provided in Section 7.2 of the Joint Proposal.

(c) With the approval of State authorities, the Signatory Parties to the Joint Proposal proceeded in good faith to carry out its terms, including seeking a lease extension from the State Lands Commission, an extension of the once-through-cooling permit from the State Water Board, and PG&E's withdraw of its NRC license renewal application "with prejudice"

In 2016, PG&E obtained from the California State Lands Commission a lease extension for the lands on which the Diablo Canyon water cooling system is located. On June 21, 2016, shortly after execution of the Joint Proposal, PG&E and the other Signatory Parties jointly

submitted a letter to the Lands Commission, supporting a lease extension through the end of the Unit 2 NRC operating license in August 2025. The letter explained that the lease extension was contemplated by and consistent with the Joint Proposal.

Then-Lieutenant Governor Newsom, a voting member of the Lands Commission, led the effort at the Lands Commission to approve the lease. By unanimous vote, the Lands Commission granted the requested lease extension, and its decision later was upheld in a reported decision by the California Court of Appeal. *World Business Academy v. State Lands Commission*, 24 Cal. App. 4th 476 (2018).

Similarly, in 2020 the California State Water Resources Control Board adjusted the expiration dates for PG&E's once-through-cooling permits at Diablo Canyon, expressly to conform with the NRC license expiration dates (November 2024 for Unit 1 and August 2025 for Unit 2), as set forth in the Joint Proposal and as approved by the Public Utilities Commission. This request was supported by a joint letter to the Water Board from several of the Joint Proposal Signatory Parties, including NRDC and FOE, dated August 4, 2020.

In both of these respects, PG&E enjoyed the benefit of its bargain under the Joint Proposal in achieving its objectives – namely, obtaining state permits without which PG&E could not continue operating Diablo Canyon until 2024-2025. In both instances, PG&E also enjoyed substantial, public support by several of the Signatory Parties. This support was not something that these Signatory Parties would otherwise have been obligated to provide, were it not for the mutual commitments made in the Joint Proposal.

Indeed, it is fair to say that, if not for the continuing vitality of the Joint Proposal as a binding contract, pursuant to which PG&E was able to secure the State permits needed to

continue operating Diablo Canyon's once-through cooling system, the Diablo Canyon power plant would not be able to operate today.

Likewise, on March 7, 2018, after the Public Utilities Commission approved the proposal to retire the Diablo Canyon plant at the end of its operating licenses in 2024-2025, PG&E submitted a letter to the NRC requesting authority to withdraw "with prejudice" its then-pending license renewal application. On April 17, 2018, the NRC granted PG&E's request, effective April 23, 2018. The NRC notice explained that, "[b]y withdrawing the license renewal application, the current operating licenses will expire on November 2, 2024, for DCPP Unit No. 1, and on August 26, 2025, for Unit No. 2."

In short, it is not reasonably in question that the Joint Proposal is a binding legal contract. By its plain terms, the agreement requires that Diablo Canyon be retired at the end of its operating licenses in 2024-2025, and that its output replaced with new, clean, emissions-free resources, sufficient to ensure reliability of the grid, and no increase in emissions of greenhouse gases or other pollutants.

2. The Contracts Clause of the U.S. Constitution Prohibits the State From Unilaterally Altering the Terms of the Joint Proposal – Specifically From Ordering PG&E to Seek Continued Operation of Diablo Canyon Beyond 2024-2025

The "Contracts Clause" of the U.S. Constitution (Art. I, Sec. 10, Clause 1) provides that "No State shall . . . pass any . . . Law impairing the Obligation of Contracts . . ." It has long been

established that a cause of action can be asserted under the Contracts Clause for actions by a state government that have the effect of impairing existing contracts.[2]

If California state officials, whether by a state statutory enactment or, some form of executive directive by the Governor, or by a regulatory agency decision, were to take an action that attempted to force a deviation from the terms of the Joint Proposal, this would violate the Contracts Clause. In particular, if the State attempted to order PG&E to file with the NRC for a license extension for Diablo Canyon, this would clearly be a material deviation from the Joint Proposal, and as such it would be unlawful under the Contracts Clause.

All State officials in California, including the Governor, the members of the Legislature, and the leaders of this Commission and other State agencies, are required to take an Oath of Office, which states in pertinent part that:

> I will support and defend the Constitution of the United States and the Constitution of the State of California against all enemies, foreign and domestic; that I will bear true faith and allegiance to the Constitution of the United States and the Constitution of the State of California; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties upon which I am about to enter.

We respectfully urge that the Governor and the honorable members of this Commission refrain from taking an action that would violate the U.S. Constitution. Specifically, we ask that they not attempt to order PG&E to submit to the NRC an application to extend beyond their existing terms the operating licenses for the Diablo Canyon reactors (November 2024 for Unit 1

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[2] *See*, e.g., *Trustees of Dartmouth College v. Woodward,* 17 U.S. 518 (1819) (violation found); *Proprietors of the Charles River Bridge v. Proprietors of the Warren Bridge*, 36 U.S. 420 (1837); *Energy Reserves Group v. Kansas Power & Light Co.*, 459 U.S. 400 (1983).

and August 2025 for Unit 2). This would be unlawful for our State officials under the Contracts Clause of the U.S. Constitution, and as such it would violate their oaths of office.

C. Federal Funds Cannot Lawfully Be Awarded to Diablo Canyon Under the Civilian Nuclear Credit Program, Because Diablo Canyon is Not Financially Distressed

Although the Governor's Office has indicated that federal subsidies under the Civilian Nuclear Credit Program present a "funding opportunity" for continued operation of Diablo Canyon beyond 2024-2025, a review of the statutory criteria for such subsidies reveals that the Secretary of Energy does not have legal authority to award subsidies for Diablo Canyon. This is because the DOE funds by law are limited to nuclear plants that are financially distressed, and it is clear that PG&E faces no financial distress with respect to the cost of operating Diablo Canyon. Simply put, the Secretary of Energy cannot award funds to a nuclear plant whose owner, like PG&E, recovers virtually all of the plant's operating costs in its retail rates.

The statutory provisions establishing the Nuclear Credit Program, and setting forth the qualification requirements for prospective applicants, are contained in Section 40323 of the Infrastructure and Jobs Act, codified at 42 U.S.C. § 18753 (2022).

To begin, the definitions section for the Civilian Nuclear Credit Program in the statute specifies that "[t]he term 'certified nuclear reactor' means a nuclear reactor that . . . competes in a competitive wholesale market[.]" (§ 18753(a)(1)(A).)

Diablo Canyon cannot meet this baseline definition, because it does not compete against other electricity sellers in any competitive wholesale market. The electricity generated by Diablo Canyon is entirely committed to PG&E's procurement portfolio that it uses to provide electricity

service to its retail customers. PG&E faces no competitive wholesale market risk with respect to the power generated by Diablo Canyon.

Moreover, the statute provides that "[t]he Secretary shall establish a civil nuclear credit program . . . to evaluate nuclear reactors *that are projected to cease operations due to economic factors* . . ." (§ 18753(b)(1) (emphasis added).)

Diablo Canyon also conspicuously fails to meet this requirement. Diablo Canyon is scheduled to be retired at the end of it current operating licenses in 2024-2025, but this is for sound policy reasons, not because of "economic factors."

The statutory requirements for applicants under the Nuclear Credit Program likewise preclude PG&E from qualifying. The statute requires the applicant to make a series of showings to confirm that its nuclear plant "is projected to cease operations due to economic factors[.]" (§ 18753(c)(1)(A).) This is further confirmation that Congress intended this program to subsidize nuclear plants that are financially distressed. Diablo Canyon does not fit the mold.

We are aware that the Secretary of Energy, at the request of Governor Newsom, issued a revised "Guidance" document on June 30, 2022, purporting to ease the requirements for a showing of financial distress by applicants for the federal subsidies.[3] The Secretary, however, made no attempt to reconcile this action with the statutory criteria explained above. We believe the Secretary cannot lawfully award funds to PG&E, for the simple reason that Diablo Canyon is not financially distressed. If the Secretary were to do so, this would be subject to legal challenge in the federal courts, and we do not believe it could survive such a challenge.

[3] Microsoft Word - US DOE CNC Guidance-Revision 1-June 2022 (energy.gov)

III CONCLUSION

For the foregoing reasons, the Commission should cease all efforts to promote an extension of Diablo Canyon's operating licenses beyond their scheduled termination in 2024-2025. The State of California should adhere to the previously-approved terms of the Joint Proposal to retire Diablo Canyon in 2024-2025, and replace its output with new, clean, emissions-free resources. The State should double down on these efforts, including Energy Efficiency investments, rather than extend operation of Diablo Canyon beyond 2025.

Respectfully submitted,

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