

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA



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Everyday Communications Corp. d/b/a Everyday)
Energy,)
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Complainant,)
)
v.)
)
San Diego Gas & Electric Company (U 902-E),)
)
Defendant.)

Case No. C.11-09-013
(Filed September 19, 2011)

**REPLY OF SAN DIEGO GAS & ELECTRIC COMPANY (U 902 E) TO
COMPLAINANT'S RESPONSE TO DEFENDANT SAN DIEGO GAS & ELECTRIC
COMPANY'S MOTION TO DISMISS**

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December 22, 2011

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San Diego Gas & Electric Company (“SDG&E”) hereby submits its Reply to the Complainant Everyday Communications Corp. d/b/a Everyday Energy’s (“Complainant”) Response to SDG&E’s Motion to Dismiss (“Response”). In accordance with Rule 11.1(f) of the California Public Utilities Commission’s (“Commission”) Rules of Practice and Procedure, on December 15, 2011 Administrative Law Judge MacDonald granted SDG&E’s request by email to file its Reply to Complainant’s Response by December 22, 2011.

On November 7, 2011 Complainant filed Amended Complaint (“Amended Complaint”) 11-09-013 alleging that that SDG&E “violat[ed] Public Utilities Code section 532 and Decision (D.) 08-10-036 by refusing to allow virtual net metering for the benefit of low-income residents of master-metered non-profit affordable housing” located at the Los Robles Apartment complex, a 76-unit master-metered apartment building located at 1475 Oak Drive in Visa California (“Los Robles Apartment complex”).”¹ On November 28, 2011, SDG&E filed its Motion to Dismiss on

¹ Amended Complaint at p. 1.

the basis that there are no triable issues of material fact in this proceeding because: (1) SDG&E properly adhered to its applicable tariff provisions and Commission rules and decisions when it refused to allow the Los Robles Apartment complex to take service under its Schedule VNM-A, Virtual Net Metering for Multifamily Affordable Housing (“Schedule VNM-A”); and (2) Complainant is impermissibly using its Amended Complaint to collaterally attack Commission decisions and orders in violation of section 1709.

Complainant’s Response fails to rebut either argument. Even more troubling is Complainant’s refusal to acknowledge the fundamental purpose of virtual net metering, which is to provide those residents of multifamily buildings with solar installations who do not qualify for net energy metering (“NEM”) because of their individual meters, with a fair allocation of the solar installation’s benefits. In essence, virtual net metering was never, and still is not, intended for residents in buildings, such as the Los Robles Apartment complex, which are eligible to take service under Schedule NEM.²

Instead, without showing any wrongdoing by SDG&E, Complainant continues to chastise SDG&E for refusing to provide the Los Robles Apartment complex service under Schedule VNM-A for the sole benefit of Complainant and Community Housing – the owner of the Los Robles Apartment complex and Complainant’s customer. Complainant’s stubbornness is not only defeated by the tenets of interpretation, but also by the Commission’s rules prohibiting collateral attacks on Commission decisions and orders. Therefore, this matter should be dismissed with prejudice.

² As SDG&E mentioned in its Answer, not only is the Los Robles Apartment complex eligible to take service under NEM, but the complex submitted a signed Interconnection Agreement for NEM to SDG&E on October 31, 2011.

I. The Principles of Interpretation Prohibit SDG&E From Extending Its Schedule VNM-A to the Master-Metered Los Robles Apartment Complex

In its Response, Complainant persists with its irrational belief that Schedule VNM-A and D.08-10-036 somehow allow virtual net metering in master-metered buildings. The basic tenets of interpretation demonstrate that such a belief is confused and erroneous, however. The Commission recognizes that tariffs, as administrative regulations, are subject to the same rules that govern the interpretation of statutes.³ Therefore, to “interpret a tariff, the Commission must look first at its language, giving the words their ordinary meaning and avoiding interpretations which make any language surplus. The Commission must interpret the words of a tariff in context and in a reasonable, common-sense way.”⁴ If the language of a tariff is clear, the Commission can stop there.⁵ However, if “an ambiguity exists, the Commission may rely on sources beyond the plain language of the tariff, such as the regulatory history and the principles of statutory construction, to interpret the tariff.”⁶ If all else fails, “the final step is to apply reason, practicality, common sense, and extrinsic aids.”⁷

³ D.03-04-058, 2003 Cal. PUC LEXIS 273 at *8 (citing *Lusardi Construction Company v. California Occupational Safety and Health Appeals Board*, 1 Cal. App. 4th 639 (Ct. App. 1991) (affirming trial court’s finding that defendant’s interpretation of agency regulation was not unreasonable).)

⁴ *Id.* at *8.

⁵ *Id.* at *8.

⁶ *Id.* at fn4.

⁷ D.97-11-020, 1997 Cal. PUC LEXIS 1033 at *7 (analyzing a statute to determine the meaning of “competitive”) (citing generally 58 Cal. Jur. 3d §§ 96-118); *see also* 2003 Cal. PUC LEXIS 273 at fn4 (noting that throughout the interpretation process, the Commission has the discretion to determine “whether an interpretation of a tariff sought by a party is reasonable.”).

A. The Plain Language of SDG&E’s Tariff Demonstrates that the Master-Metered Los Robles Apartment Complex Is Ineligible to Take Service Under Schedule VNM-A

The plain language of SDG&E’s tariff demonstrates that Schedule VNM-A only applies to individually-metered apartments.⁸ While technical, the tariff’s language is not ambiguous. Schedule VNM-A states that it is optionally available to Qualified Customers that are (a) “located on the same property as the Owner’s eligible customer-generator” and are “physically connected to the same Service Delivery Point (as defined by Rule 16) as the Owner’s eligible customer-generator”;⁹ or (b) “located on the same property as the Owner’s eligible customer-generator, and is physically connected to a different Service Delivery Point, where the Owner is a Multifamily Affordable Solar Housing Program Participant.”¹⁰ In addition, those customers wishing to take service under Schedule VNM-A must currently receive service on a rate schedule that would be applicable to a similar customer receiving service in combination with Schedule NEM.¹¹ Finally, building owners may take service under Schedule VNM-A for “common use areas and unoccupied units.”¹²

As SDG&E thoroughly explained in its Motion to Dismiss, the plain language of Schedule VNM-A precludes the Los Robles Apartment complex and its tenants from receiving service under Schedule VNM-A. For example, the plain language of Schedule VNM-A excludes the tenants of the Los Robles Apartment complex from taking service under SDG&E’s Schedule VNM-A. To take such service, the tenants would have to be “Qualified Customers” under SDG&E’s Schedule VNM-A. To qualify, a tenant must be currently receiving service on a rate

⁸ In addition, the plain language of D.08-10-036 unambiguously states that “VNM would only apply to buildings where tenants are individually metered utility customers,” D.08-10-036 at fn16, and “[a] VNM tariff can only work when tenants are individually metered,” *id.* at p. 34.

⁹ SDG&E Schedule VNM-A at ¶4 (a) (“Schedule VNM-A”).

¹⁰ *Id.* at ¶4 (b).

¹¹ *Id.* at ¶4.

¹² *Id.*

schedule that would be applicable to a similar customer receiving service in combination with Schedule NEM.¹³ However, because the Los Robles Apartment complex tenants are not currently individually metered, they are not SDG&E customers, and as such, they do not currently receive service on a rate schedule like Schedule NEM (or any other rate schedule). Therefore, a reading of the plain language of Schedule VNM-A demonstrates that SDG&E did not violate the tariff when it refused to provide service under virtual net metering to the tenants of the Los Robles Apartment complex.

B. The Regulatory History of Virtual Net Metering Demonstrates that the the Master-Metered Los Robles Apartment Complex May Not Take Service Under Virtual Net Metering

Assuming for the sake of argument that SDG&E’s Schedule VNM-A was ambiguous as to whether it applies to master-metered buildings (a characterization that SDG&E adamantly denies), the rules of interpretation would then allow the Commission to “rely on sources beyond the plain language of the tariff, such as the regulatory history.”¹⁴ Again, the regulatory history of virtual net metering demonstrates that SDG&E correctly interpreted its tariff when it refused to extend Schedule VNM-A to the master-metered Los Robles Apartment complex.

i. D.08-10-036 Established Virtual Net Metering for Individually-Metered Tenants to Provide Individual Credits

As Complainant admits in its Response, “the VNM concept was designed to address the problem of affording individual-metered tenants in multifamily housing complexes the benefits of on-site solar PV generation without the installation of potentially cost-prohibitive master metering hardware or site-specific infrastructure upgrades.”¹⁵ To overcome this problem,

¹³ *Id.* at ¶4.

¹⁴ 2003 Cal. PUC LEXIS 273 at fn4.

¹⁵ Complainant Response at p. 2 (citing D.08-10-036 at p. 33) (emphasis added).

“where each tenant’s unit has a separate meter,”¹⁶ the Commission created “virtual net metering,” which allows “the electricity produced by the system [to] be net-balanced against total building electricity consumption, as if the building had a single, or ‘virtual,’ master meter.”¹⁷ This arrangement “allow[s] the electricity produced by a single solar installation to be credited to the benefit of multiple tenants in the building.”¹⁸ In other words, virtual net metering was designed to assist solar customers who were ineligible for NEM still receive credit. As a result, the Commission ordered SDG&E¹⁹ to develop a virtual net metering tariff that would specifically “allow for the allocation of net energy metering benefits from a single solar energy system to all meters on an individually metered multifamily affordable housing property.”²⁰

The Commission recognized that the logistics of fairly allocating the net energy metering credit due to each tenant required that virtual net metering “can only work when tenants are individually metered” because otherwise it would be impossible to accurately and justly award credit to the individual tenants.²¹ As such (and contrary to the Complainant’s bizarre interpretation of the footnote), the Commission explicitly states in footnote 16 that “VNM would only apply to buildings where tenants are individually metered utility customers.”²²

¹⁶ D.08-10-036 at p. 31.

¹⁷ *Id.*

¹⁸ *Id.* at p. 3.

¹⁹ As well as Pacific Gas & Electric and Southern California Edison.

²⁰ *Id.* at OP 5; Appendix B; p. 38.

²¹ *Id.* at p. 34. The Commission also states “A VNM tariff would allow the utilities to monitor production of a single solar energy system in order to provide net energy metering benefits to tenants in multifamily affordable housing complexes. Under VNM, the utility would be required to meter solar system output separate and apart from metering of individual tenant and common area consumption.” *Id.* (emphasis added).

²² SDG&E is baffled that the Complainant inexplicitly reads footnote 16, which states in its entirety, “VNM would only apply to buildings where tenants are individually metered utility customers” as *not* “a directive to limit VNM to ‘buildings where tenants are individually metered utility customers.’” D.08-10-036 at fn 16; Complainant Response at p. 2 (citation omitted).

ii. D.11-07-031, Which Modified D.08-10-036 to Extend Virtual Net Metering To Other Customers, Did Not Extend it to Master-Metered Buildings

Subsequent regulatory history also demonstrates that virtual net metering does not apply to master-metered buildings like the Los Robles Apartment complex. D.11-07-031 modified D.08-10-036 to extend virtual net metering to “all residential, commercial and industrial multi-tenant and multi-meter properties.”²³ Like its predecessor, D.11-07-031 characterizes the virtual net metering arrangement as only applicable to common areas and individually-metered tenants:

“VNM [] allows electricity generated from a single solar energy system on a multifamily affordable housing property to be allocated as kilowatt hour (kWh) credits to either common areas of the property or to individually metered tenant accounts, without requiring the system to be physically interconnected to each tenant’s meter.”²⁴

Furthermore, in D.11-07-031, the Commission noted that it had entertained various suggestions from Staff to “either to modify aspects of it under MASH or to expand the benefits offered by a VNM tariff beyond the MASH Program to other utility customers” during the R.10-05-004 proceedings.²⁵ However, there is no mention in D.11-07-031 of any suggestions to extend virtual net metering to master-metered buildings. Furthermore, nowhere in D.11-07-031 does the Commission extend virtual net metering to master-metered buildings. Therefore, the Commission’s failure to extend virtual net metering to master-metered buildings in D.11-07-031 indicates that the Commission never intended, and still does not intend, for master-metered buildings like the Los Robles Apartment complex to receive service under virtual net metering.²⁶

²³ D.11-07-031 at *13; Ordering Paragraph 2 (directing the IOUs to file advice letters “containing modifications to their Net Energy Metering tariffs to allow Virtual Net Metering (VNM) to apply to all multi-tenant and multi-meter properties . . .”).

²⁴ D.11-07-031 at *5 (emphasis added).

²⁵ D.11-07-031 at *5.

²⁶ *C.f.*, 2004 Cal. PUC LEXIS 137 at *13 (finding statutory history showing that while one incarnation of the bill contained language that beyond dispute modifies the phrase “electricity charges” to apply only to a portion of rates, the version of the bill that became law did not, to be persuasive).

C. Complainant’s Broad Readings of D.08-10-036 and Schedule VNM-A Are Defeated By the Canons of Construction

If the regulatory history is inconclusive, the Commission may also rely on the principles of statutory construction.²⁷ According to the Complainant, SDG&E’s Schedule VNM-A and D.08-10-036 should be interpreted as allowing master-metered buildings to take service under virtual net metering solely because they do not explicitly preclude it. Such an argument conflicts with canon of construction *expressio unius est exclusio alterius* (“*expressio unius*”). While not a rigid rule of interpretation for the Commission or California courts, *expressio unis* is an instructive “Latin maxim stating that the mention of one thing in a statute implies the exclusion of another thing.”²⁸ In the instant case, the Commission has frequently and explicitly mentioned that virtual net metering applies to individually-metered tenants. It has never explicitly (nor implicitly) stated that virtual net metering applies to master-metered buildings. Therefore, in accordance with *expressio unis*, the Commission’s explicit mention of the individual metering requirement for multi-tenant buildings implies the exclusion of the opposite, *i.e.*, master-metered multi-tenant buildings are prohibited from taking service under virtual net metering.

D. Defining Community Housing as Both the Owner and Qualifying Customer Under Schedule VNM-A Would be Contrary to Rationality and Common Sense

Finally, when all other tools of interpretation fail, the Commission may “apply reason, practicality, and common sense to the language at hand . . . in accord with common sense and justice, to avoid an absurd result.”²⁹ Complainant’s suggestion that the owner of the Los Robles

²⁷ 2003 Cal. PUC LEXIS 273 at fn4.

²⁸ D. 10-07-050, 2010 Cal. PUC LEXIS 298, *52-53 (citing *Estate of Banerjee v. Bank of America*, 21 Cal. 3d 527, 532, 540 (1978).)

²⁹ 1997 Cal. PUC LEXIS 1033 at *16 (noting that the last step in interpretation “is to apply reason, practicality, and common sense to the language at hand. If possible, the words should be interpreted to make them workable and reasonable, in accord with common sense and justice, to avoid an absurd result.”)(citing *Lumber v. Lucky Stores*, 6 Cal. App. 4th 1233, 1239-40 (1992)); *see also* 2003 Cal. PUC LEXIS 273 at fn4 (“[t]he Commission has discretion to determine whether an interpretation of a tariff sought by a party is reasonable.”).

Apartment complex – Community Housing – can be both the owner and the Qualified Customer under Schedule VNM-A,³⁰ is an unreasonable interpretation that, if adopted, would lead to absurd results contrary to the Commission policy behind virtual net metering.

The purpose of virtual net metering is to ensure that the residents of multifamily buildings with a solar installation receive a fair allocation of that solar installation’s net energy metering benefits. In accordance with D.10-08-036, Schedule VNM-A requires that each Qualified Customer receive a credit for building’s single solar installation.³¹ Under the terms of the tariff, SDG&E allocates the credits based on the size of the tenant’s unit and the monthly energy delivered (kWh) to each residential unit (or common area) to ensure a fair allocation of the solar installation’s benefits to all residents.³²

Adopting Complainant’s tariff interpretation that a building owner such as Community Housing may qualify both as the owner and as a Qualified Customer on behalf of all tenant units and “receiv[e] the [entire] credit for tenant usage” would frustrate the purpose of virtual net metering and common sense.³³ Under this interpretation, the owner of a multi-tenant building, such as Community Housing, would receive 100% of the solar generation credits for the entire building. Without individual tenant meters, and without a subsequently record of each residential unit’s monthly energy delivered (kWh), it would be logistically impossible for Community Housing to ensure that each tenant received an accurate credit amount. It would also be logically impossible for SDG&E to determine whether an individual tenant qualified for compensation under AB 920. Furthermore, there would be no transparency to guarantee that

³⁰ Complainant Response at p. 5.

³¹ *See, e.g., id.* at p. 1 (“Optionally available to Qualified Customers . . . owning, renting or leasing in Multi-Family Affordable Housing Accommodations . . . where the Owner of the complex has installed a solar ‘eligible customer generator’ . . . and contracts with the Utility for the purpose of providing a credit to the Qualified Customer within the complex.”).

³² Schedule VNM-A at ¶¶ 8, 9 (b).

³³ Complainant Response at p. 5.

Community Housing fairly allocated the credits to all tenants in compliance with D.10-08-036 and Schedule VNM-A. Therefore, such an interpretation of the tariff must be rejected as unreasonable and contrary to common sense.

II. Complainant Continues to Collaterally Attack Commission Decisions in Violation of Section 1709

The Response continues Complainant's collateral attack on Commission decisions and orders in violation of section 1709.³⁴ Instead of focusing solely on the facts specific to the Los Robles Apartment complex, Complainant broadens its argument in its Response to a policy argument raised on behalf of all multi-tenant master-metered buildings:

VNM can be as useful in overcoming the need for potentially cost-prohibitive upgrades at older, master-metered multifamily housing facilities as it is in overcoming such cost barriers at individually-metered developments. Moreover, tenants can benefit equally from on-site solar PV generation, whether they are served through individual metering arrangements or through a master meter. Thus, the application of VNM at the Los Robles Apartment complex is not only possible, it would actually further the overarching purpose of VNM, which is to help facilitate the ability of tenants in multifamily low income housing to enjoy the benefits of solar PV generation.³⁵

In this complaint proceeding specific to the Los Robles Apartment complex, it is neither the parties' nor the Commission's prerogative to pass judgment on whether extending virtual net metering to master-metered facilities would be useful, beneficial or in keeping with the purpose of virtual net metering. If the Complainant's true intention is to alter the Commission's virtual net metering policy to apply to master-metered buildings, it must file a petition to modify D.08-

³⁴ Section 1709 provides that "[i]n all collateral actions or proceedings, the orders and decisions of the commission which have become final shall be conclusive." In a collateral action or proceeding, such as a complaint case, final orders of the Commission are, by virtue of Section 1709, conclusive and "they may not be attacked or modified in a collateral proceeding." *Gleason, et al. v. Del Oro Water Company*, D.92-03-083, 1992 Cal. PUC LEXIS 246 (dismissing a complaint that sought to modify a final order of the Commission as barred by section 1709).

³⁵ Complainant Response at p. 2.

10-036 and D.11-07-031 under Rule 16.4, but it should not continue to unlawfully prosecute this case against SDG&E in violation of section 1709.

III. CONCLUSION

SDG&E respectfully reaffirms its Motion to Dismiss and asks that the Motion be considered and acted on before a prehearing conference with the hopes that the Commission will dismiss the Complaint with prejudice to conserve both the Commission's and the parties' time and resources.

Dated at San Diego, California, this 22nd day of December, 2011.

Respectfully submitted,

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