

Decision PROPOSED DECISION OF ALJ MCKINNEY (Mailed 2/25/2013)

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

David Davis,

Complainant,

vs.

Southern California Edison Company (U338E),

Defendant.

Case 12-08-015
(Filed August 23, 2012)

DECISION GRANTING MOTION TO DISMISS

1. Summary

This decision grants defendant Southern California Edison Company's (SCE) motion to dismiss the instant complaint with prejudice on the grounds that the complaint is contrary to statutory provisions and Commission decisions governing net energy metering (NEM).

Complainant David Davis (Complainant or Davis) claims that his proposed solar photovoltaic (PV) installation is correctly sized to qualify for NEM and that SCE therefore violated Pub. Util. Code § 2827(c)(1)¹ when it refused to allow Davis to interconnect his solar PV installation under SCE's NEM

¹ Unless otherwise specified, all further Section references are to the California Public Utilities Code.

tariff. Complainant proposes a 95 kilowatt solar installation based on his anticipated peak demand including two electric vehicles and three electric vehicle fast chargers. The maximum size of a solar installation must be based on the customer's anticipated annual load. This decision finds that SCE properly denied Complainant's application to interconnect under NEM because the proposed system exceeds the size necessary to offset his annual load.

2. Overview

Under Section 2827(b)(4), to qualify as an eligible customer-generator, the customer's facility must be "intended primarily to offset part or all of the customer's own electrical requirements." This proceeding turns on the application of this clause as a size limit on Net Energy Metering (NEM) installations. Southern California Edison Company (SCE), in accordance with prior Commission decisions, applied the phrase "customer's own electrical requirements" to mean a maximum size corresponding to the customer's "actual and reasonably projected annual load."² David Davis (Davis or Complainant) argues that this interpretation is too narrow, and that a maximum based on a customer's anticipated peak demand is equally appropriate.

3. Factual Background

Complainant owns several apartment buildings in a mountainous desert area of Southern California. Complainant is a customer of SCE. SCE is an investor-owned utility providing electricity service under the jurisdiction of the Commission.

² If an increase in annual load is anticipated, for example from the planned installation of an electric vehicle charger, SCE can include this in the projection of anticipated annual load.

Complainant purchased two electric vehicles and three electric vehicle “fast chargers” to be installed at his apartment buildings. In addition to using an electric vehicle “fast charger” at his residence, Complainant hopes to allow his tenants and perhaps third parties to use the fast chargers for free.³ (Complaint at 2-3.)

Complainant proposes to build a solar photovoltaic (PV) system large enough to support the demand of a fast charger. A fast charger, as the name implies, charges an electric vehicle much faster than a regular electric vehicle charger and does so using direct current.^{4 5} Fast charging places a comparatively high demand of 50 kilowatt (kW) on the grid for a relatively short period of time. (Complaint at 3.) Complainant contends that this peak demand of 50 kW must be taken into account when determining whether his planned solar facility is sized primarily to offset his electricity requirements. This would result in a solar PV system larger than the size required to simply offset his total anticipated annual load.

³ Because this decision turns on interpretation of the size limit for NEM installations, we do not address whether Complainant’s planned use would fall under a commercial tariff instead of a residential tariff.

⁴ A recent Commission decision (Decision (D.) 11-07-029) establishing policies to overcome barriers to electric vehicle deployment discussed the use of “quick chargers.” The term “quick charger” describes a charging station that can complete recharging in as little as 30 minutes and draws between 20 kW and 200 kW of electricity. D.11-07-029 anticipated that such facilities would be “most commonly available at non-residential sites . . .” (D.11-07-029 at 29 and Finding of Fact 9.) The decision declined to develop rates specifically for customers with quick charging facilities. (*Id.* at Finding of Fact 10.)

⁵ According to Complainant, a standard 240-volt charge takes 7 hours to charge. (Complaint at 2.)

In determining the size necessary to offset the peak load, Complainant argues that the solar installation must be of a sufficient size to meet his anticipated peak demand during the working hours of his business (8:00 a.m. to 4:00 p.m.). (Response to Motion to Dismiss at 5.) Solar is a variable resource dependent on weather and placement of the sun. Consequently, Complainant has proposed a 95 kW solar PV system, even though his anticipated annual load would be much lower.

NEM is a program for customers who install small solar, wind, biogas and fuel generation facilities to supply generation to their site. The program allows customer-generators to receive credit when energy generated at their site is fed back into the grid. The program is intended to incentivize customers to install onsite solar and other distributed generation. The key incentives are two-fold:

1. Allow the customer to net energy sent to the grid against energy used; and
2. Allow the customer to qualify for the Electric Tariff Rule 21, Section D.13 expedited interconnection process. To qualify, the facility must meet certain requirements, including being sized primarily to offset part or all of the customer's own electrical requirements.

The NEM program allows customers to be compensated by crediting generation sent to the grid against electricity used by the customer. The true-up was done annually, so that if a customer used more electricity on February evenings, but generated more electricity on July days, the amounts were balanced against each other. If the customer undergenerated – used more electricity for the year than it produced – the customer paid for the additional usage. Prior to 2011, if the customer overgenerated – sent a surplus of energy to the grid – the customer did not receive any additional compensation.

In 2009, Assembly Bill (AB) 920 was signed into law, requiring utilities to compensate NEM customers for electricity produced in excess of on-site load over a 12-month period. AB 920 directed the Commission to adopt a net surplus compensation (NSC) valuation.⁶ AB 920 also required that this NSC program be structured in a way that did not shift costs from solar customer-generators to other bundled service customers. (Section 2827(h)(4)(A); D.11-06-016, Conclusion of Law 5.)

A project that qualifies under NEM is eligible for the Fast Track Interconnection Review Process under Electric Tariff Rule 21. Fast Track is intended to be a screen-based, streamlined review process for which NEM, non-export, and very small exporting facilities are eligible. (D.12-09-018 at 22.) In addition, NEM facilities are eligible for the Electric Tariff Rule 21, Section D.13 expedited interconnection process. NEM facilities are not required to pay the same fees and costs as other generators. A system that does not qualify under NEM is subject to a different process which can be considerably more time consuming and costly. In some locations, such as the area around

⁶ The net surplus electricity compensation valuation shall be established so as to provide the net surplus customer-generator just and reasonable compensation for the value of net surplus electricity, while leaving other ratepayers unaffected. The ratemaking authority shall determine whether the compensation will include, where appropriate justification exists, either or both of the following components:

- (i) The value of the electricity itself.
- (ii) The value of the renewable attributes of the electricity.

In establishing the rate pursuant to subparagraph (A), the ratemaking authority shall ensure that the rate does not result in a shifting of costs between solar customer-generators and other bundled service customers. (Sections 2827 (h)(4)(A) and (B).)

SCE's Hi Desert Substation where Complainant is situated, the distribution system does not have sufficient capacity to accommodate new non-NEM generating facilities without extensive upgrades that will require both money and time. (SCE Answer at 3.) This treatment of NEM projects traces back to the requirement in Section 2827(g) that NEM customers not be charged rates higher than similarly situated non-generating customers. (See D.02-03-057.)

In March 2012, Complainant filed an Electric Tariff Rule 21 Generating Facility Application (Rule 21 Application) requesting interconnection under NEM. SCE reviewed Complainant's application to determine if he was eligible for NEM treatment. Because Davis's proposed system was not sized to anticipated annual load, SCE informed Davis that he did not meet the requirements for NEM interconnection.

Pursuant to Electric Rule 21, the parties attempted to resolve the dispute and participated in the Commission's voluntary mediation program in an attempt to reach resolution. When this failed, pursuant to G.2(c) of Electric Tariff Rule 21, Davis filed this complaint. (Complaint at 2.)

4. Procedural Background

On August 23, 2012, Davis filed this complaint. SCE filed its answer and a motion to dismiss on October 12, 2012. Davis filed a response to the motion to dismiss on October 23, 2012, and SCE filed a reply on November 8, 2012. A prehearing conference (PHC) was held on November 13, 2012.

At the PHC the parties agreed on the following formulation of the issue:

Section 2827(b)(4) says that to be an eligible customer-generator, the customer's facility must be "intended primarily to offset part or all of the customer's own electrical requirements." Davis's proposed solar facility is sized to supply sufficient generation for his anticipated peak demand, but the proposed solar facility would generate significantly

more energy than his anticipated annual load. SCE bases “electrical requirements” on Davis’s actual and reasonably projected annual load, not on anticipated peak demand. By refusing to allow Davis to interconnect his proposed solar facility under the NEM Tariff, did SCE violate Section 2827(c)(1)?

Given this formulation of the issue, the parties agree that the complaint can be resolved as a matter of law and that no further factual issues remain. A factual determination of Complainant’s reasonably projected annual load or peak demand (as appropriate) would be determined after the Commission rules on whether SCE’s use of “annual load” is the correct measure for determining maximum size.

On November 19, 2012, Davis filed a Motion for Summary Judgment (MSJ). SCE filed a response on December 4, 2012. On December 11, 2012, Davis filed a reply. Complainant also filed a Motion for Sanctions on December 11, 2012 and SCE filed a response on December 20, 2012.

Prior to filing this complaint, Davis filed a Petition for Modification of D.11-06-016 (PFM). D.11-06-016 implemented the NSC for NEM customers.⁷ Like this complaint, the PFM addressed the sizing for solar installations under NEM. On November 29, 2012, Davis filed a Motion to Dismiss his PFM, and on January 24, 2013, the Commission granted the motion.

The instructions to answer preliminarily determined that hearings are necessary in this case. As discussed below, this case can be resolved on the

⁷ Currently NEM programs are included in Rulemaking (R.) 12-11-005, Order Instituting Rulemaking Regarding Policies, Procedures and Rules for the California Solar Initiative, the Self-Generation Incentive Program and Other Distributed Generation Issues.

motion to dismiss and therefore hearings are not necessary. We therefore change the initial determination that hearings are necessary and conclude that hearings are not necessary.

5. Standard of Review

A motion to dismiss essentially requires the Commission to determine whether the party bringing the motion wins based solely on undisputed facts and on matters of law. The Commission treats such motions as a court would treat a motion for summary judgment in civil practice. (*See* D.06-04-010 at 3.)

6. Discussion

To be an eligible customer-generator, the customer's facility must be "intended primarily to offset part or all of the customer's own electrical requirements." For purposes of NEM, to determine whether a system size is "intended primarily to offset part or all of the customer's own electrical requirements" we look to the anticipated annual load.⁸ (D.11-06-016 at 34.)

D.11-06-016 ruled on the applications by each of the utilities for implementation of NSC.⁹ Importantly, D.11-06-016 revisited the question of maximum size to qualify for NEM and confirmed that the existing method for determining size eligibility should not be changed. The utilities argued, and the Commission agreed, that NSC and NEM are intended to address "random, modest, inadvertent net exports." The decision also stated that "NEM customers

⁸ Under specific circumstances, a period of less than a year may be applicable, but the measure always compares use and generation over a period of time.

⁹ In 2010, each utility applied for approval to implement NSC (Application (A.) 10-03-001, A.10-03-010, A.10-03-012, and A.10-03-013, A.10-03-017). The applications were consolidated and addressed in a single decision.

are required to size their systems to be no larger than onsite load and for most NEM customers, there is little or no surplus generation over a 12-month period.” (D.11-06-016 at 34.)

Although the decision was clear that it was not changing the size eligibility, it requires us to go back to prior decisions to determine what method was currently in place.

Under Section 2827(b)(4), to be an eligible customer-generator for NEM, the customer’s facility must be “intended primarily to offset part or all of the customer’s own electrical requirements.” As part of the implementation of Section 2827 in 1995, the statute required the Commission to “assess the environmental costs and benefits of net metering to customer-generators, ratepayers, and utilities, including any beneficial and adverse effects on public benefit programs and special purpose surcharges.” (Section 2827(n).) The Commission has done so through a series of different rulemakings, including R.12-11-005, R.10-05-004, R.08-03-008, R.06-03-004 and R.04-03-017. Most recently, as part of this process, the Commission has directed the utilities to track costs involved in interconnecting these small renewable installations.¹⁰

During the same time period, and often in the same proceedings, the Commission has looked at other programs that customer-generators can participate in, such as the California Solar Initiative (CSI) and the Self-Generation Incentive Program (SGIP). These proceedings found that a small renewable generation project that is eligible for CSI or SGIP incentive payments is also

¹⁰ Pursuant to AB 2514 and D.12-05-036, the Commission is studying the costs and benefits of NEM. Phase 1 will examine ratepayer impacts (including distribution and transmission cost implications) and Phase 2 will be a white paper comparing alternatives to NEM.

eligible for NEM. The measure of maximum system size has been examined under each of these programs.

SGIP began in 2001 (D.01-03-073) to provide incentives for installing renewable onsite generation, including solar. CSI was established in 2006, and today solar projects apply for incentives under CSI not SGIP.

(Section 379.6(a)(3).) At the time CSI was adopted, SGIP allowed systems to be sized up to 200% of peak load. D.06-01-024 set the limit for solar systems under CSI at 100% of historic peak load. Shortly thereafter, in D.06-07-028, the Commission responded to concerns from solar industry representatives that the limit of 100% of historic peak load would result in reduced net energy metering credits on an annual basis. The new measure set by the Commission for solar facilities is 100% of historical usage for CSI. (D.06-07-028 at 5.)

Although CSI¹¹ and NEM were instituted by different statutes, the two programs have evolved together. The logic behind setting the limit for solar installations based on historical load, rather than peak demand, has flowed through to the NEM policies used by the utilities to determine eligibility. For the CSI program, a customer installing an oversized system is not entitled to CSI incentive payments for the larger system. For the NEM program, the utility is not required to pay NSC for energy generated above the anticipated annual load and the utility cannot use the Electric Tariff Rule 21, Section D.13 expedited interconnection process for oversized facilities.

¹¹ The CSI program, adopted by the legislature under SB 1 in 2006, required systems to be sized “primarily to offset part or all of the consumer’s own electricity demand.” (Cal. Pub. Resource Code Section 25782(a)).

Complainant cites other California programs, the Emerging Renewables Buydown Program (ERBP) and its successor the Emerging Renewable Program (ERP)¹² for support of his proposition that 200% of peak load is an accepted measure for size. ERBP was implemented by the California Energy Commission pursuant to AB 1890 and Senate Bill 90 in 2000. However, Complainant's reliance on this program is misplaced. Although the Guidebooks for ERBP and ERP use similar language – “the system must be sized so that the amount of electricity produced by the system primarily offsets part or all of the customer's electrical needs at the site of installation” (MSJ Exhibit A, CEC Emerging Renewables Resources Account Guidebook, September 2001 (2001 Guidebook) at 12; CEC Emerging Renewables Program Guidebook, January 2006 (2006 Guidebook) at 5) – the purpose of the program is different from CSI, SGIP and NEM. For purposes of ERBP and ERP, systems were allowed to be sized up to 200% of annual energy usage. (2001 Guidebook at 13; 2006 Guidebook, Appendix 4 at 2.) These size limits are not applicable to NEM and do not offer a useful comparison. First, ERBP and ERP policy goals were different from those of NEM.¹³ Second, EBRP and ERP do not address the procedure for a system to be interconnected to the grid.¹⁴

¹² Complainant cited the Emerging Renewables Program (ERP) in the MSJ, but attached the guidebook for EBRP (Emerging Renewables Resources Account Guidebook, Revised September 2001) to support his arguments. ERP is the successor program to EBRP. Both ERP and EBRP were administered by the CEC. Complainant included portions of the Sixth Edition of the ERP guidebook with his comments on this decision. Although the ERP guidebook was not previously part of the record, we have included cites to both guidebooks in the final decision.

¹³ As Complainant points out, the goal of ERBP and ERP is to “stimulate demand and increased sales of such systems” and the goal of NEM is to “encourage substantial

Footnote continued on next page

Although Complainant has identified several places where 200% of peak load has been the measure of maximum size, no evidence in this proceeding shows that these measures were ever used for NEM or that they should be.

In addition to citing interpretations of “customer electrical requirements” from different programs, Complainant makes a number of other arguments against SCE’s application of the statute to limit eligible size to anticipated annual load. These arguments include applying canons of statutory interpretation, comparison with NEM statutes in other states, and California stated policy goals of increased renewable and distributed energy.

While these are interesting arguments, the Commission has already spent considerable time in multiple proceedings interpreting the statute. The Commission has determined through reasoned analysis that the correct measure for determining eligibility of solar PV installations for NEM is to use the customer’s anticipated annual load. Because the Commission has already reasoned through any policy and statutory interpretation issues in open proceedings with multiple participants, it is not necessary to revisit possible alternative interpretations today. Moreover, any significant change to such a policy should be made through a similarly open proceeding with multiple participants. A complaint case, such as this one, is not the appropriate place to change well settled principles.

private investment in renewable energy resources.” Comments at 5-6. The goals are similar, but not identical.

¹⁴ The procedure for interconnection is set forth in Electric Tariff Rule 21.

In addition, there are strong reasons for why the current interpretation is sensible. Unlike non-NEM customer-generators, NEM customers are not required to pay for system upgrades, interconnection studies, distribution system modifications, and Electric Tariff Rule 21 application fees. If NEM customers are permitted to size their systems larger than annual load, there will be an increase in costs to non-NEM ratepayers.

In addition, participation in the NEM program is capped at “5% of the electrical utility’s aggregate customer peak demand.” (Section 2827(c).) Thus, allowing one customer to have an unusually large installation impacts the number of other customers who can participate.

There are other avenues for Complainant. He could install the solar PV system and not connect it to the grid. He could participate in a different program, such as the feed-in tariff (although this would not allow Complainant to use the simplified interconnection process). Finally, this decision does not mean it is not possible for Complainant to advocate through more appropriate channels for an exception to the Rule 21 interconnection process that encourages customers to size renewable systems specifically for demands of electrical vehicle fast chargers. Currently, there is an active proceeding for electric vehicles (R.09-08-009 (Order Instituting Rulemaking on the Commission’s Own Motion to Consider Alternative-fueled Vehicle Tariffs, Infrastructure and Policies to Support California’s Greenhouse Gas Emissions Reduction Goals).) In that proceeding, on December 28, 2012, the three electric utilities filed their joint Load Research Final Report evaluating cost impacts and behavior patterns related to electric vehicle charging. (Compliance Filing of Pacific Gas and Electric Company (U39E), Southern California Edison Company (U338E) and San Diego

Gas & Electric Company (U902M) Pursuant To Ordering Paragraph 7 of D.11-07-029.)

Because the undisputed facts and relevant law support a conclusion that SCE has not violated any provision of law or rule of the Commission with respect to the actions alleged in the complaint, SCE's motion to dismiss should be granted and this complaint should be dismissed. In determining eligibility for interconnection as a NEM facility, SCE followed prior Commission decisions when it applied the phrase "customer's own electrical requirements" to mean a maximum size corresponding to actual or reasonably projected annual load. The parties do not dispute the fact that the Complainant's proposed solar PV facility is sized larger than necessary to meet projected annual load. Based on this, SCE was correct to deny Complainant's application to interconnect as a NEM facility under Electric Tariff Rule 21 and this complaint should be dismissed.

7. Motions

Complainant's Motion for Sanctions is denied.

Rule 1.1 of the Commission's Rules of Practice and Procedure requires that parties not "mislead the Commission, or its staff by an artifice or false statement of fact or law." Complainant argues that certain statements contained in SCE's pleadings were false, and that SCE was intentionally misleading the Commission. After carefully reviewing Complainant's arguments and SCE's reply, we do not agree that the statements cited by Complainant are misleading. Rather, they are assertions supporting SCE's interpretation of the applicable law in this case.

Complainant's Request to Take Judicial Notice is granted. Under the Commission's Rule 13.9, the Commission may take "official notice" of matters as may be judicially noticed in the courts of the State of California. Complainant

requests that the Commission take official notice of the dictionary definitions of (1) certain terms used in the phrase “intended primarily to offset customer electrical requirements” and (2) the net metering codes from six other states. SCE did not object to the motion. Although this decision finds that it is not appropriate to revisit the statutory interpretation of the California net metering code in this decision, we nonetheless grant the motion.

Comments on Proposed Decision

The proposed decision of the Administrative Law Judge in this matter was mailed to the parties in accordance with Section 311 and comments were allowed under Rule 14.3 of the Commission’s Rules of Practice and Procedure. Comments were filed on March 14, 2013 by both parties, and reply comments were filed on March 25, 2013 by SCE.

After review of the comments and reply comments, we have made changes to the proposed decision as necessary to correct or clarify references to the CEC’s ERP and EBRP and to the current version of Electric Tariff Rule 21. In addition, in his comments Complainant again argues that NEM eligibility should be based on peak demand not annual load. As discussed above, the Commission has already examined the issue of maximum system size for NEM eligibility and this proceeding is not the proper forum for changing existing law. Therefore, no further changes to the proposed decision are necessary.

Assignment of Proceeding

President Michael R. Peevey is the assigned Commissioner and Jeanne M. McKinney is the assigned Administrative Law Judge in this proceeding.

Findings of Fact

1. Complainant owns several apartment buildings and plans to install three electric vehicle fast chargers.

2. Complainant anticipates a peak demand of over 50 kW.
3. The Complainant's proposed 95 kW system is sized larger than Complainant's anticipated annual load.
4. A project that qualifies under NEM is eligible for expedited interconnection treatment under Electric Tariff Rule 21, Section D.13.
5. NEM facilities are not required to pay the same interconnection fees and costs as other generators.
6. In determining if Complainant's proposed solar PV facility was sized appropriately under Section 2827(b)(4), SCE evaluated Complainant's projected annual load.

Conclusions of Law

1. Complainant's request to take official notice of definitions of certain words and net metering codes from other states should be granted.
2. To prevail on a motion to dismiss, the outcome must be based solely on undisputed facts and on matters of law.
3. Under Section 2827(b)(4), NEM facilities must have a system size intended primarily to offset part of the customer's own electrical requirements.
4. The Commission, through the rulemaking process, has previously issued decisions interpreting the application of Section 2827(b)(4) when determining maximum size for a NEM facility.
5. Over a 12-month period, NEM systems are expected to generate only small amounts of net exports.
6. The measure of "customer's own electrical requirements" for purposes of NEM eligibility under Section 2827(b)(4) is the customer's anticipated annual load, not the customer's anticipated peak demand.

7. A customer-generator that does not meet NEM eligibility requirements may not use the Electric Tariff Rule 21, Section D expedited interconnection process.

8. The complaint should be dismissed with prejudice because the undisputed facts establish that SCE is entitled to judgment in its favor as a matter of law.

9. Complainant's Motion for Summary Judgment should be denied.

10. The initial determination in the instructions to answer that hearings are necessary should be changed, because we now conclude that hearings are not necessary.

11. Complainant's Motion for Sanctions should be denied because SCE's statements do not constitute violations of Rule 1.1.

O R D E R

IT IS ORDERED that:

1. The request of David Davis, Complainant, for judicial notice is granted.
2. The motion for sanctions and the Motion for Summary Judgment by David Davis, Complainant, are denied.
3. The motion to dismiss by Southern California Edison Company, Defendant, is granted.
4. Case 12-08-015 is dismissed with prejudice.
5. Hearings are not necessary to resolve this matter.
6. Case 12-08-015 is closed.

This order is effective today.

Dated _____, at San Francisco, California.