



**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA**

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Order Instituting Rulemaking Regarding Policies,
Procedures and Rules for the California Solar
Initiative, the Self-Generation Incentive Program
and Other Distributed Generation Issues.

Rulemaking 10-05-004
(Filed May 6, 2010)

**APPLICATION OF THE SOLAR ENERGY INDUSTRIES ASSOCIATION,
CALIFORNIA SOLAR ENERGY INDUSTRIES ASSOCIATION,
SIERRA CLUB AND VOTE SOLAR INITIATIVE
FOR REHEARING OF DECISION 12-05-036**

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Pursuant to Public Utilities Code Section 1731 (b)(1)¹ and Commission Rule 16.1, the Solar Energy Industries Association,² the California Solar Energy Industries Association, the Sierra Club and Vote Solar Initiative (“the Joint Rehearing Parties”)³ respectfully submit this Application for Rehearing of Decision 12-05-036, Decision Regarding Calculation of the Net Metering Cap (“NEM Decision” or “Final NEM Decision”). The NEM Decision was issued in the above-referenced matter on May 24, 2012 and mailed to the parties on May 30, 2012. Section 1731 and Rule 16.1 provide that rehearing must be sought within thirty days of the date the decision is mailed. Accordingly, the last day to seek rehearing of Decision 12-05-036 is June 29, 2012. This pleading is thereby timely filed.

I. INTRODUCTION

The Joint Rehearing Parties seek rehearing to alert the Commission to a significant legal error in the Final NEM Decision. The Proposed Decision Regarding Calculation of the Net

¹ All statutory references herein are to the California Public Utilities Code unless otherwise indicated.

² The arguments made in this filing represent the position of the Solar Energy Industries Association as an organization, but not necessarily the views of any particular member with respect to any issue.

³ In accordance with Rule 1.8(d), Counsel for SEIA is authorized to sign and tender this document on behalf of California Solar Energy Industries Association, Sierra Club and Vote Solar Initiative.

Energy Metering Cap issued by Commissioner Peevey (“Proposed Decision”) provided clarification on the meaning of “aggregate customer peak demand” under Public Utilities Code Section 2827(c)(1) that bore a reasonable relation to the purpose and language of Section 2827 and fell well within the bounds of Commission discretion to interpret the Public Utilities Code. While the Final NEM Decision adopted the meaning of “aggregate customer peak demand” set forth in the Proposed Decision, it also included a last-minute addition requiring suspension of the net energy metering program (“NEM program”) effective for each investor owned utility (“IOU”) on the later of January 1, 2015, or when it reaches its megawatt targets under the California Solar Initiative (“CSI”) absent and until issuance of new NEM program rules. Such a suspension provision had not been the subject of the underlying proceeding, and no party had the opportunity to comment or raise legal objections before the provision was adopted as part of the Final NEM Decision.

The suspension provision violates Section 2827 of the Public Utilities Code. Section 2827(c)(1) unequivocally requires that electric utilities “shall” make NEM available “until the time that the total rated generating capacity used by eligible customer-generators exceeds 5 percent of the electric utility’s aggregate customer peak demand.”⁴ As a result of that statutory mandate, the Commission lacks the authority to suspend the program prior to the achievement of the 5% cap. Section 2827 contains no exceptions to this obligation and the Commission may not lawfully create one.

Moreover, potential suspension of the NEM program was beyond the Commission identified scope of issues in the proceeding. By approving such a suspension, the Commission failed to act in a manner required by law, with such failure being prejudicial to parties.

⁴ Pub. Util. Code § 2827(c)(1).

Accordingly, rehearing should be granted and the Commission should delete the suspension provisions from the Final NEM Decision.

II. STATEMENT OF FACTS

The subject rulemaking proceeding commenced on May 12, 2010, with the issuance of the Commission's order instituting rulemaking.⁵ The order included a preliminary scoping memo dividing the critical tasks of the proceeding into three issue areas (1) CSI Review, Evaluation, and Program Oversight, (2) SGIP Review, Evaluation, and Program Oversight, and (3) ongoing DG Policy Development and Review. Subsequently on November 11, 2010, a scoping memo was issued in the proceeding.⁶ The scoping memo listed the issues to be addressed, dividing them into three phases. The issues listed did not include potential suspension of the NEM program.

On July 25, 2011, the Interstate Renewable Energy Council (IREC) filed a motion for clarification regarding the scope of the rulemaking. In particular, IREC requested that the Commission clarify that the determination of the appropriate method for calculating the NEM program cap established in Public Utilities Code § 2827(c)(1) is within the scope of the proceeding. In December 2011, the Commission granted IREC's motion specifically providing that "the issue of calculation of net metering caps [was] within Phase II of this rulemaking." The

⁵ Rulemaking 10-05-004, Order Instituting Rulemaking Regarding Policies, Procedures and Rules For the California Solar Initiative, the Self-Generation Incentive Program and Other Distributed Generation Issues, at 4 (May 12, 2010), http://docs.cpuc.ca.gov/word_pdf/FINAL_DECISION/117826.pdf.

⁶ Rulemaking 10-05-004, Scoping Memo and Ruling of Assigned Commissioner and Administrative Law Judge and Request for Comment on Phase I Issues (Nov. 11, 2010), <http://docs.cpuc.ca.gov/efile/RULC/126217.pdf>.

ruling did not provide for the addition of any other issues to the proceeding pertaining to net metering.⁷

Section 2827(c)(1) of the Public Utilities Code requires electric utilities to make NEM available to eligible customer-generators until total generating capacity “exceeds 5 percent of the electric utility’s aggregate customer peak demand.”⁸ Because the term “aggregate customer peak demand” is not defined in the Public Utilities Code, had not been defined by the Commission, and was subject to different interpretations, Commission clarification of this statutory term was needed to provide certainty as to when the cap on NEM participation would be reached.

In April 2012, Commissioner Peevey issued a Proposed Decision interpreting “aggregate customer peak demand” to mean “the sum of all customers’ non-coincident peak demands.”⁹ A final decision on the NEM cap was scheduled for consideration by the full Commission on May 24, 2012. On May 23rd, absent any opportunity for public comment, the Commission released a revised proposed decision that not only substantially modified the Proposed Decision, but addressed an issue which had never been contemplated as being within the scope of the proceeding – i.e., the suspension of the NEM program.

Specifically, while the revised Proposed Decision continued to affirm that “aggregate customer peak demand” was correctly interpreted as the sum of all customers’ non-coincident peak demands, it also went on to order a comprehensive study of the NEM program, to be

⁷ Rulemaking 10-05-004, Administrative Law Judge’s Ruling Granting Motion of the Interstate Renewable Energy Council and Requesting Comment on California Solar Initiative Phase II and III Issues (Dec. 14, 2011), <http://docs.cpuc.ca.gov/efile/RULINGS/155419.pdf>.

⁸ Pub. Util. Code § 2827(c)(1).

⁹ Rulemaking 10-05-004, Proposed Decision of Commissioner Peevey, Decision Regarding Calculation of the Net Energy Metering Cap, at 11, (April 11, 2012), <http://docs.cpuc.ca.gov/EFILE/PD/163814.htm>.

completed by October 1, 2013, to provide a better understanding of program costs and benefits.

The revised Proposed Decision then stated (emphasis added):

Further, to ensure that our policy appropriately reflects what we learn from this study, we hereby put all parties on notice that the *Commission will suspend the NEM program for new customer-generators at the end of calendar year 2014, pending the outcome of further Commission proceedings to be undertaken in the wake of the study.* Existing customers receiving service under NEM tariffs prior to January 1, 2015 will not be affected by this suspension. We anticipate this temporary suspension in the NEM program, effective January 1, 2015, will remain in place pending the issuance of new rules at the conclusion of a rulemaking proceeding we will commence once the study described above is completed.

The revised Proposed Decision further provided:

In order to ensure that each utility achieves its CSI solar PV targets, the suspension of the NEM obligation should not apply to any utility if the CSI target has not been met. Any utility that has not yet reached its CSI target should continue to offer full-retail NEM to renewable customer-sited generation until its CSI solar PV target has been reached.

The Commission approved the revised Proposed Decision its May 24th meeting. The Final NEM Decision was formally issued on May 30, 2012.

III. SPECIFIC GROUNDS FOR REHEARING

The specific grounds for rehearing are as follows:¹⁰

1. The Final NEM Decision's determination to suspend the NEM program effective January 1, 2015, or at such time that the IOUs meet their CSI MW targets, unless new policy

¹⁰ Section 1757.1(a) of the Public Utilities Code authorizes appeal of decisions when:

- (1) The commission acted without, or in excess of, its powers or jurisdiction.
- (2) The commission has not proceeded in the manner required by law.
- (3) The decision of the commission is not supported by the findings.
- (4) The findings of the decision of the commission are not supported by substantial evidence in light of the whole record.
- (5) The order or decision of the commission was procured by fraud or was an abuse of discretion.

rules for the program have been issued by that time, exceeds the jurisdictional powers of the Commission. (Section 1757 (a)(1)).

2. By ruling that NEM program will be suspended effective January 1, 2015, or at such time that the IOUs meet their CSI MW targets, unless new policy rules for the program have been issued by that time, the Commission failed to proceed in a manner required by law. (Section 1757(a)(2)).

3. By adopting provisions for suspension of the NEM Program – an issue which was not identified in the scoping memo and on which parties had no opportunity to comment – the Commission failed to proceed in a manner required by law. (Section 1757(a)(2)).

IV. STANDARD OF REVIEW

The purpose of an Application for Rehearing is to alert the Commission to legal error by “set[ting] forth specifically the ground or grounds on which the applicant considers the decision or order to be unlawful.”¹¹

The judicial standard of review to determine the lawfulness of Commission action depends on the nature of the alleged violation. “In general, an agency’s interpretation of statutes within its administrative jurisdiction is given presumptive value as a consequence of the agency’s special familiarity and presumed expertise with satellite language and regulatory issues.”¹² Therefore, in cases where the Commission is interpreting the Public Utilities Code, such as the meaning of “aggregate customer peak demand” under Section 2827(c)(1),

¹¹ Pub. Util. Code § 1732; *see also* Commission Rule 16.1.

¹² *PG&E Corp. v. Public Utilities Com’n* (2004) 118 Cal.App.4th 1174, 1194 (citing *Yamada Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 11).

Commission interpretation “should not be disturbed unless it fails to bear a reasonable relation to statutory purposes and language.”¹³

However, “the general rule of deference to interpretations of statutes subject to the regulatory jurisdiction of agencies does not apply when the issue is the scope of the agency’s jurisdiction.”¹⁴ Here, the Application for Rehearing challenges the Commission’s statutory authority to prematurely suspend the NEM program. Unlike its interpretation of Section 2827(c), the Commission is afforded no deference on this aspect of the NEM Decision. Where “a court concludes that the administrative action transgresses the agency’s statutory authority, it need not proceed to review the action for abuse of discretion; in such a case, there is simply no discretion to abuse.”¹⁵

V. ARGUMENT

A. The Potential Suspension of the Net Metering Program Contemplated Under the NEM Decision Violates Public Utilities Code Section 2827

The NEM Decision’s contemplated suspension of the NEM program is unlawful because it contravenes Section 2827(c)(1)’s requirement that every electric utility “shall” make the NEM program available “until the time that the total rated generating capacity used by eligible customer-generators exceeds 5 percent of the electric utility’s aggregate customer peak demand.”¹⁶ Section 2827(c)(1) plainly requires continuous availability of customer enrollment in the NEM Program until the statutory cap is reached. This mandatory language provides for no

¹³ *Utility Consumers’ Action Network v. Public Utilities Comm’n* (2010) 187 Cal.App.4th 688, 698 (citations omitted).

¹⁴ *PG&E Corp*, 118 Cal.App.4th at 1194 (citations omitted).

¹⁵ *Ass’n for Retarded Citizens v. Dept. of Developmental Services* (1985) 38 Cal.3d 384, 391.

¹⁶ Pub. Util. Code § 2827(c)(1).

exceptions and the Commission may not lawfully create one.¹⁷ Thus, in *Southern California Gas Company v. Public Utilities Commission*, the Supreme Court annulled portions of a Commission decision that purported to *require* utility companies to implement a home insulation financing program.¹⁸ Public Utilities Code § 2782 directed the Commission to *permit* utility companies to institute home insulation assistance and financing programs, and the court held the Legislature's express decision to enact a permissive program could not reasonably be attributed to have included an intent to allow the Commission to institute mandatory programs. As stated by the Court:

The maxim *expressio unius est exclusio alterius* is applicable here. Clearly the express authorization of a permissive program impliedly precludes any authority to impose a mandatory program.¹⁹

The same principle applies here. The clear expression of a suspension date for the NEM program under statute precludes any authority by the Commission to impose an alternate date.²⁰ Indeed, the NEM Decision fails to provide any legal basis to support its circumvention of Section 2827(c)(1). “Administrative action that is not authorized by, or is inconsistent with, acts of the Legislature is void.”²¹ By allowing for a suspension in the NEM program prior to the NEM cap being reached, this aspect of the NEM Decision is inconsistent with Section 2827(c)(1).

¹⁷ See *Southern California Gas Company v. Public Util. Com.* (1979) 24 Cal.3d 653 (the express statutory authorization of a permissive program impliedly precludes any authority to impose a mandatory program); *Burnsed v. State Bd. of Control* (1987) 189 Cal.App.3d 213, 217 (“if a statute announces a general rule and makes no exception thereto, the courts can make none.”); *Independent Home Support Service v. Sup. Ct.* (2006) 145 Cal.App.4th 1418, 1436 (same).

¹⁸ *Southern California Gas Company*, 24 Cal.3d at 659.

¹⁹ *Id.*

²⁰ Furthermore, while the suspension is characterized as “temporary,” it is not limited by a date certain; it would continue until the new policy rules are issued, whenever that occurs. This means that suspension of the NEM program could continue indefinitely, something that clearly is not contemplated by the statute.

²¹ *Ass'n for Retarded Citizens*, 38 Cal.3d at 391.

B. Section 701 of the Public Utilities Code Does Not Provide the Commission the Authority to Suspend the NEM Program

Section 701 of the Public Utilities Code provides that “[t]he commission may supervise and regulate every public utility in the State and may do all things, whether specifically designated in this part or in addition thereto, which are necessary and convenient in the exercise of such power and jurisdiction.” While conferring upon the Commission broad authority, this authority is not sufficient to suspend the NEM program in an IOU’s service territory prior to that IOU reaching its statutorily imposed five percent cap.

Section 2827 establishes the criteria for when each IOU can stop making its NEM tariff available to eligible customers in its respective service territory. Section 701 does not allow the Commission to ignore this statutory dictate. In framing the scope of the Commission’s authority under Section 701, courts have determined that “[w]hatever may be the scope of regulatory power under this section [701], it does not authorize disregard by the commission of express legislative directions to it, or restrictions upon its power found in other provisions of the act or elsewhere in general law.”²²

C. The Commission Committed a Prejudicial Abuse of Discretion by Violating its Own Procedural Rules Concerning the Scope of Issues Addressed in the Rulemaking Proceeding

The issue of suspension of the NEM program was never within the defined scope of this proceeding. By adopting an order which effects a suspension of the NEM program on a date certain absent further action by the Commission the Commission failed to proceed as required by law and committed a prejudicial abuse of discretion.

²² *Pacific Tel. & Tel. Co. v. Public Util. Com.* (1965) 62 Cal.2d 634, 653 (commission could not ignore specific provisions of Section 728 on rate fixing); *see also Southern California Gas Company v. Public Util. Com.* (1979) 24 Cal.3d 653 (the commission lacks the authority to disregard the specific financing provisions set forth in the Home Insulation Assistance and Financing Act); *Assembly of the State of California vs. Public Util. Com.* (1995) 12 Cal.4th 87 (commission’s partial refunding of the monies placed in its care for refunding to ratepayers was not in compliance with Section 453.5).

The Commission's Rules of Practice and Procedure define "scoping memo" in pertinent part as "an order or ruling describing the issues to be considered in a proceeding and the timetable for resolving the proceeding."²³ The rules require the Commission to issue a preliminary scoping memo in a rulemaking proceeding and provide for objections to the preliminary scoping memo.²⁴ The assigned commissioner then must issue a ruling that "determine[s] the schedule ... and issues to be addressed" in the proceeding."²⁵

As noted above, this process occurred, with a scoping memo being issued in this rulemaking on November 11, 2010 and a revision to that scoping memo being issued on December 11, 2011. Neither the preliminary scoping memo contained within the order instituting rulemaking, the scoping memo, or the ruling revising the scoping memo suggested that the scope of issues to be addressed included suspension of the NEM program. This issue first arose in a revised proposed decision, released one day prior to the adoption of the Final NEM Decision, with no party being provided an opportunity for comment.

The last minute injection of a critical issue formed the basis for annulment of the Commission decision in *Southern California Edison v. Public Utilities Commission* (2006) 140 Cal.App.4th 1085. In that case, the Court of Appeals annulled that portion of a Commission decision in a rulemaking proceeding directing that utilities pay "prevailing wage" on construction projects. The Court concluded that the prevailing wage issue was beyond the scope of issues identified in the scoping memo and the minimal comment period afforded parties on the issue (three business days) was insufficient.²⁶ Therefore, by failure to comply with their own rules, the Commission had not "proceeded as required by law" and such failure was prejudicial.

The same analysis applies to the case at hand. By adopting provisions for suspension of the NEM Program -- an issue which was not identified in the scoping memo and on which

²³ Commission Rule 7.3.

²⁴ Commission Rules 6.2 and 7.1(d).

²⁵ Commission Rule 7.3.

²⁶ *Southern California Edison*, 140 Cal.App.4th at 1106.

parties had no opportunity to comment – the Commission has not proceeded as required by law and such failure is prejudicial.

D. Premature Suspension of the NEM Program Undermines the Intent of D.12-05-036 to Support Renewable Market Growth.

The Commission thoughtfully considered the legislative intent of Section 2827 and concluded that the legislature’s goal of “encouraging substantial private investment in renewable energy resources and stimulating in-state economic growth” supported its interpretation of the NEM cap.²⁷ The overall thrust of the NEM Decision demonstrates that one reason that the Commission interpreted the cap to mean the sum of customers’ non-coincident peak demand was because that methodology, consistent with the statutory goals, provides certainty to the market that the NEM program will continue for a significantly longer period of time than it would under the IOUs’ proposed interpretation. The suspension of the NEM program at a date certain, irrespective of whether the cap is met, undermines the faith of market participants in the continued availability of California’s foundational policy to support distributed generation. Installers and developers must make investment, hiring, and operational planning decisions with a long-term perspective. The prospect that, beginning in 2015, the NEM program may be suspended for some indeterminate amount of time wreaks havoc on these business assumptions. Because the Commission lacks the legal authority to suspend the NEM program in the first place, this element of the NEM Decision unnecessarily confuses the marketplace. The Commission should correct its legal error expeditiously, remove this cloud of uncertainty and continue to support the goals of Section 2827 to promote in-state economic growth and encourage customer investment in renewable, distributed generation.

²⁷ See NEM Decision at 12 and 16 (Finding of Fact No. 2).

E. Request for Oral Argument

Pursuant to Commission Rule 16.3, the Joint Rehearing Parties hereby request oral argument for the Application for Rehearing. As evidenced by the large number of comments from the public in support of the Proposed Decision, the NEM Decision presents legal issues of exceptional public importance.²⁸

VI. CONCLUSION

For the reasons set forth above, the Joint Rehearing Parties respectfully request the NEM Decision be corrected to ensure consistency with the Public Utilities Code.

Respectfully submitted this June 29, 2012 San Francisco, California.

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²⁸ See Commission Rule 16.3(a)(3).