

**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 FOR REHEARING OF DECISION NO. 12-05-036  
OF SAN DIEGO GAS & ELECTRIC COMPANY (U-902-E)**

STEVEN D. PATRICK  
LAURA M. EARL  
San Diego Gas & Electric Company  
101 Ash Street,  
San Diego, CA 92101  
Telephone: (619) 696-4287  
Facsimile: (619) 699-5027  
Email: [learl@semprautilities.com](mailto:learl@semprautilities.com)

Attorneys for  
SAN DIEGO GAS & ELECTRIC COMPANY

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**TABLE OF CONTENTS**

**I. INTRODUCTION.....1**

**II. RELEVANT PROCEDURAL AND FACTUAL BACKGROUND.....3**

**III. THE DECISION COMMITTED SEVERAL ERRORS OF LAW AND FACT AND SHOULD BE CORRECTED EXPEDITIOUSLY. ....7**

**IV. THE DECISION IGNORED THE PLAIN MEANING OF THE UNAMBIGUOUS STATUTORY LANGUAGE, CONTRARY TO LEGISLATIVE INTENT AND IN EXCESS OF THE COMMISSION’S AUTHORITY. ....9**

**V. THE DECISION EXCEEDED THE COMMISSION’S JURISDICTION BY IGNORING STATUTORY CONSTRUCTION RULES FOR INTERPRETING AMBIGUOUS LANGUAGE.....13**

    A. The Legislative History Directly Contradicts the Decision, Compelling the Opposite Result. ....14

    B. Contemporaneous Administrative Interpretation Contradicts the Decision. ....19

    C. The Decision Erred in Reading “Non-Coincident” Peak Demand into the Statute, Contrary to Legislative History. ....22

**VI. THE DECISION IS NOT IN ACCORDANCE WITH LAW AND IS NOT SUPPORTED BY THE FINDINGS.....24**

**VII. THE DECISION IS NOT THE RESULT OF DUE PROCESS; THE COMMISSION DID NOT PROCEED IN THE MANNER REQUIRED BY LAW.....26**

**VIII. CONCLUSION .....31**

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**I. INTRODUCTION**

San Diego Gas & Electric Company (“SDG&E”), hereby files this application for rehearing of Decision No. 12-05-036 (the “Decision”), on the grounds that it commits multiple errors of law and fact. In short, the Decision erred substantively and procedurally by changing the statutory interpretation of “aggregate customer peak demand” in Pub. Util. Code § 2827(c)(1)<sup>1</sup> to mean “the aggregation, or sum of individual customer’s peak demand, i.e., their non-coincident peak demands.”<sup>2</sup> The changed interpretation effectively increases the statute’s Net Energy Metering (“NEM”) cap without additional legislative action, resulting in a calculation that “allow[s] for significantly more net metering capacity”<sup>3</sup> than under the statute’s prior interpretation. The Decision’s changed interpretation is unlawful and erroneous for several reasons:

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<sup>1</sup> All statutory references herein are to the California Public Utilities Code unless stated otherwise.

<sup>2</sup> Decision at 1.

<sup>3</sup> January 17, 2012, Comments of the Interstate Renewable Energy Council [“IREC”], the Vote Solar Initiative, California Solar Energy Industries Association, Solar Energy Industries Association, and the Sierra Club on the Administrative Law Judge’s Ruling Granting Motion of [IREC] (“Solar Parties’ January 17, 2012 Comments”) at 3.

- **The Decision ignored legislative intent demonstrated in the unambiguous statutory language, exceeding the Commission’s jurisdictional authority.<sup>4</sup>**

The Decision erred in failing to defer to the plain language of the statute without addition or alteration, as the law requires.<sup>5</sup> The Decision read the words “individual” and “non-coincident” into the statute where those words do not appear, and assigned the plain language of the statute a *practically impossible* meaning at the time 2827(c)(1) was enacted – a meaning which may yet prove excessively difficult to administer. This interpretation is unlawfully unreasonable.

- **The Decision also exceeds the Commission’s jurisdiction by ignoring statutory construction rules for interpreting ambiguous language.** Even if the plain language of the statute were ambiguous (and it is not) the Decision ignored basic statutory construction rules to interpret “aggregate customer peak demand.”

For example:

- The Decision failed to account for the undisputed legislative and administrative history of the NEM statute, which are directly at odds with the conclusion in the Decision;

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<sup>4</sup> Although the Commission’s authority is broad, it does not have authority to interpret statutes in a manner contrary to their legislative intent or to bypass legislative directives.<sup>4</sup> *Pacific Tel. & Tel. Co. v. Public Util. Com.*, 62 Cal. 2d 634, 653 (1965) (“Whatever may be the scope of regulatory power under [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.”), *quoted in Assembly of the State of California v. Public Utilities Commission* 12 Cal.4<sup>th</sup> 87, 103 (1995).

<sup>5</sup> The most basic principle of statutory construction requires that courts “must give effect to statutes according to the ordinary import of the language used in framing them.... If the words of the statute are clear, **the court should not add to or alter them to accomplish a purpose that does not appear on the face of the statute or from its legislative history.**” See *People v. Morris*, 46 Cal.3d 1, 15 (1988) (emphasis added); see also *Aaron v. Dunham*, 137 Cal. App. 4<sup>th</sup> 1244, 1251 (1<sup>st</sup> Dist 2006).

- The Decision failed to acknowledge the Legislature’s explanation of why it amended the statute, which is directly at odds with the Decision’s “non-coincident” peak demand interpretation.
- **The Decision is not in accordance with law and the findings do not support it.**  
The Decision failed to provide discussion and findings in support of the Commission’s reversal of its own longstanding interpretation of the NEM statute. The Decision’s evidence, analysis and findings do not support its result.
- **The Decision violates due process.** The relevant procedural and factual background shows that the Commission did not follow its own procedures, did not proceed in a manner required by law, and violated the due process rights of parties and ratepayers. The Commission did not schedule or consider a fully and fairly developed factual record to determine and consider the practical impact on ratepayers and parties, such that the Commission’s incorrect statutory interpretation may have unintentionally and without notice approved unlawful rates, with no appropriate factual evidence, analysis, or findings.

For all of the reasons addressed herein, SDG&E hereby requests the Commission grant rehearing. The prior interpretation of Section 2827(c)(1) is correct and should be reinstated.

## **II. RELEVANT PROCEDURAL AND FACTUAL BACKGROUND**

On May 12, 2010, the Commission issued an Order Instituting Rulemaking Regarding Policies, Procedures and Rules for the California Solar Initiative, the Self-Generation Incentive Program and Other Distributed Generation Issues. Interstate Renewable Energy Council (“IREC”) filed a prehearing conference statement in this rulemaking on August 6, 2010, noting that “utilities used different means of [calculating the NEM cap], demonstrating that there is

ambiguity in the terminology used in the net metering statute that needs to be resolved.”<sup>6</sup>

Nowhere did IREC state a belief that “aggregate customer peak demand” should be interpreted to mean “aggregate individual customer non-coincident peak demand,” or in any way suggest that briefing on that specific issue should take place. Notably, the Scoping Memo and Ruling of November 9, 2010 (“Scoping Memo”) did not explicitly mention review of the net metering cap.

Almost a year later, on July 25, 2011, IREC filed a motion seeking “clarification” on whether the appropriate method for calculating the net metering program cap was within the scope of the proceeding.<sup>7</sup> IREC referred back to statements made in its prehearing conference statement that “utilities have used different means of calculating this cap,” and stated that clarification was necessary because “the utilities *appear to be approaching their net metering program caps.*”<sup>8</sup>

Nearly five months later, on December 14, 2011, Administrative Law Judge (“ALJ”) Duda issued a ruling on the IREC motion (“ALJ’s Ruling”), stating: “Parties that *want to propose changes* to the current methodology for calculating the net metering cap, *as shown in this ruling*, should provide their proposals by January 17, 2012.”<sup>9</sup> The ALJ’s Ruling focused the purpose of the comments on standardizing the NEM cap calculation between PG&E, SCE and SDG&E, because *different demand intervals* had been used to calculate aggregate customer peak demand:

According to Energy Division, these three utilities currently calculate their progress toward the 5% net metering cap as the aggregate capacity of individual distributed generation systems divided by aggregate customer peak demand . . . . [and] *each utility uses a different demand interval to calculate aggregate*

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<sup>6</sup> August 6, 2009, Prehearing Conference Statement of the Interstate Renewable Energy Council at 2-3.

<sup>7</sup> July 25, 2011, Motion for Clarification of [IREC] (“Motion”).

<sup>8</sup> *Id.* at 4 (emphasis added).

<sup>9</sup> December 14, 2011, [ALJ’s] Ruling Granting Motion of the Interstate Renewable Energy Council and Requesting Comment on California Solar Initiative Phase II and III Issues at 4 (emphasis added).

**customer peak demand.** This demand interval is either 5, 30, or 60 minutes, depending on the utility.”<sup>10</sup>

The ALJ’s Ruling noted that the “Scoping Memo of November 9, 2010 . . . did not explicitly mention review of net metering caps”<sup>11</sup> and noted that “IREC’s motion asks for clarification that the Commission will explicitly address this topic.” Further, the ALJ’s Ruling noted Solar Alliance’s agreement that the issue “should be addressed immediately as **the utilities are rapidly approaching their individual net metering caps.**” On this basis, the ALJ’s Ruling granted IREC’s motion for purposes of proposing methodology changes **as shown in the ruling:**

I will grant IREC’s motion and include the issue of calculation of net metering caps within Phase II of this rulemaking. **Parties that want to propose changes to the current methodology for calculating the net metering cap, as shown in this ruling,** should provide their proposals by January 17, 2012. Responses to these proposals may be filed no later than January 27, 2012. **If necessary, I will schedule a workshop once the proposals and responses are filed to understand the data inputs for the calculation, the data sources and their availability, the current calculation methodologies, and any new calculation proposals.**<sup>12</sup>

Neither IREC’s prehearing conference statement nor IREC’s motion supported a change to the statutory interpretation of “aggregate customer peak demand” to read “aggregate individual customer non-coincident peak demand”; nor did the ALJ’s Ruling. The focus of the ALJ’s Ruling was on: (1) determining what demand intervals should be used to calculate aggregate customer peak demand; and (2) doing so before PG&E and SDG&E reached the 5% NEM cap, which all parties appeared to agree was imminent.

On January 17, 2011, PG&E and SCE accordingly filed comments describing their current method of calculating the NEM cap, with focus on which demand interval each utility used to determine the system peak variable of the equation. However, for the first time in any

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<sup>10</sup> *Id.* at 2-4.

<sup>11</sup> *Id.* at 2.

<sup>12</sup> *Id.* at 4.

Commission proceeding, a group of solar parties including IREC (“Solar Parties”)<sup>13</sup> raised a new proposal that the Commission should interpret “aggregate customer peak demand” to mean individual customers’ aggregate non-coincident peak demand.<sup>14</sup> Solar Parties candidly admitted that the reason behind their proposed new interpretation was to increase the statutory NEM cap: “Were the utilities to actually aggregate customer peak demand, the resulting calculation would allow for *significantly more* net metering capacity than under the utilities’ system peak demand approach.”<sup>15</sup> Solar Parties provided no explanation why they had not previously identified this issue in any prior pleading, arguing only that “[t]he Ruling does not limit parties’ comments to what the proper time interval should be in calculating the cap.”<sup>16</sup>

Thus, with no prior notice of Solar Parties’ proposed change in statutory interpretation, other parties in this proceeding had only ten calendar days (eight business days) to consider and respond to the Solar Parties’ new proposal. This quick-turnaround response briefing ultimately became the only opportunity in which parties were allowed meaningful comment on Solar Parties’ proposal.<sup>17</sup> Replies were filed on January 27, 2011. No workshops, requests for additional data analysis, or evidentiary hearings were scheduled.

Despite the fact that this proposal was not described in any party’s prehearing comments, the Scoping Memo, IREC’s Motion or the ALJ’s Ruling, a Proposed Decision (“PD”) from the Assigned Commissioner was issued on April 11, 2012, accepting the Solar Parties’ new proposal

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<sup>13</sup> IREC, The Vote Solar Initiative, California Solar Energy Industries Association (“CALSEIA”), Solar Energy Industries Association (“SEIA”), and the Sierra Club, hereinafter referred to as the “Solar Parties.”

<sup>14</sup> January 17, 2012, Comments of the [Solar Parties] on the ALJ’s Ruling Granting Motion of [IREC] (“Solar Parties’ January 17, 2012 Comments”).

<sup>15</sup> *Id.* at 3.

<sup>16</sup> *Id.*

<sup>17</sup> The Decision noted that the Commission did not consider many of the arguments raised in comments on the proposed decisions in this case: “Where the comments suggested minor adjustments or clarifications to the decision, these changes have been incorporated throughout the decision. *Where comments reargued earlier positions or attempted to present new arguments or facts, they were not considered.*” Decision at 16.

to re-interpret Section 2827(c)(1). Comments on the PD were filed by the California Center for Sustainable Energy, Constellation New Energy, DRA, the Joint NEM Parties, PG&E, SCE, SDG&E, and The Utility Reform Network (“TURN”) on May 1, 2012 and reply comments were filed by IREC, PG&E, SCE, SDG&E, jointly by the Sierra Club and Vote Solar Initiative, and jointly by the SEIA, CALSEIA, and Constellation New Energy, on May 7, 2012. A final decision issued on May 24, 2012, reinterpreting Section 2827(c)(1)’s “aggregate customer peak demand” language to mean “the aggregation, or sum, of individual customers’ peak demands, i.e., their non-coincident peak demands.”<sup>18</sup>

### **III. THE DECISION COMMITTED SEVERAL ERRORS OF LAW AND FACT AND SHOULD BE CORRECTED EXPEDITIOUSLY.**

After an order or decision has been issued by the Commission, any party to the proceeding may apply for a rehearing in respect to any matters determined in the proceeding and specified in the application for rehearing Section 1731(b).<sup>19</sup> The purpose of an application for rehearing is to alert the Commission to an error, so that error may be corrected expeditiously by the Commission. Rule 16.1(c) of the Commission’s Rules of Practice and Procedure further requires that “[a]pplications for rehearing shall set forth specifically the grounds on which the applicant considers the order or decision of the Commission to be unlawful or erroneous, and must make specific references to the record or law.”<sup>20</sup>

As set forth below, the Decision contains numerous significant errors that must be corrected. The Decision exceeds the Commission’s jurisdiction by failing to interpret Section 2827(c)(1) as it has been interpreted for many years, in accordance with the commonly

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<sup>18</sup> Decision at 1.

<sup>19</sup> After an order or decision has been issued by the Commission, any party to the proceeding may apply for a rehearing in respect to any matters determined in the proceeding and specified in the application for rehearing Section 1731(b).

<sup>20</sup> Code of Regs., tit. 20, §16.1, subd. (c).

understood meaning of its plain language and legislative intent. It also exceeds the Commission's jurisdiction by failing to correctly apply statutory construction principles in interpreting the legislative intent of Section 2827(c)(1), upon its (incorrect) finding that its language is ambiguous. The Decision is vague, does not present adequate findings based on a full and fair evidentiary record and represents an abuse of the Commission's discretion. The Decision was not reached in the manner required by law and by the Commission's own rules and rulings, and thereby the Decision failed to provide constitutional due process to all affected parties.

For all of the reasons set forth below, the Commission should expeditiously grant rehearing and correct the Decision's erroneous and unlawful interpretation of Section 2827(c)(1). This timely application for rehearing sets forth specifically the grounds on which SDG&E considers the Decision to be unlawful<sup>21</sup> and fulfills the statutory requirements for judicial review.<sup>22</sup>

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<sup>21</sup> This timely application fulfills Section 1732's requirement that a rehearing applicant must "set forth specifically the ground or grounds on which the applicant considers the decision or order to be unlawful."

<sup>22</sup> "Because review by extraordinary writ is the only means of judicial review, a court ordinarily has no discretion to deny a timely-filed petition for writ of review if it appears that the petition may be meritorious." *Southern California Edison Co. v. Public Utilities Com.*, 140 Cal. App. 4th 1085, 1096 (2006).

If a party decides to challenge a Commission decision by petitioning for a writ of review in the Court of Appeal or the Supreme Court, the review by the court can not extend further than to determine, on the basis of the entire record which shall be certified by the Commission, whether any of the following occurred:

- 1) The order or decision of the commission was an abuse of discretion.
- 2) The Commission has not proceeded in the manner required by law.
- 3) The commission acted without, or in excess of, its powers or jurisdiction.
- 4) The decision of the Commission is not supported by the findings.
- 5) The order or decision of the Commission was procured by fraud.
- 6) The order or decision of the Commission violates any right of the petitioner under the Constitution of the United States or the California Constitution.

Cal. Pub. Util. Code Section 1757.1(a).

#### IV. THE DECISION IGNORED THE PLAIN MEANING OF THE UNAMBIGUOUS STATUTORY LANGUAGE, CONTRARY TO LEGISLATIVE INTENT AND IN EXCESS OF THE COMMISSION’S AUTHORITY.

By changing the interpretation of “aggregate customer peak demand” in Section 2827(c)(1)<sup>23</sup> to mean “the aggregation, or sum of individual customer’s peak demand, i.e., their non-coincident peak demands,” the Decision ignored legislative intent as stated in the plain language of the statute and exceeded the bounds of the Commission’s authority. Legislative will and intent are all-important, controlling factors in interpreting a statute; and, in general, there is no greater sign of legislative intent than the statute’s words itself: “In determining intent, we look first to the words themselves....”<sup>24</sup> A court or agency cannot insert or omit words to cause the meaning of a statute to conform to a presumed intent that is not expressed.<sup>25</sup> Here, the Decision inferred additional words in interpreting the “aggregate customer peak demand” language in Section 2827(c)(1) to mean “the aggregation, or sum of individual customer’s peak demand, i.e., their non-coincident peak demands.” This is clear error.

The Decision’s new “aggregate individual customer non-coincident peak demand” interpretation *cannot* be the plain meaning of the statutory language, because the ability to measure non-coincident peak demand for most customers *did not exist at the time the statutory language was written*.<sup>26</sup> The Decision notes that “the Joint NEM Parties’ proposed denominator

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<sup>23</sup> While the Decision states it has only *clarified* the statutory language (*see* p. 11), the *change* in statutory interpretation is evident throughout the Decision and the record. *See, e.g.*, D.12-05-036 at 4-5 (stating the Joint Parties proposed a “new method” and “change” in calculating the NEM cap); May 1, 2012, [PG&E’s] *Opening Comments of (U 39 E) on the Proposed Decision of President Peevey Revising the Method of Calculating the [NEM] Cap* at 3-8 (providing several pages and numerous examples of instances where the Legislature, the Commission, and affected parties interpreted and commonly understood “aggregate customer peak demand” to mean the utility’s system peak demand).

<sup>24</sup> *People v. Woodhead* 43 Cal.3d 1002, 1007-1008 (1987) (emphasis added) (citations omitted).

<sup>25</sup> *City of Cotati v. Cashman*, 29 Cal. 4th 69, 75 (2002) (“This court has no power to rewrite the statute so as to make it conform to a presumed intention which is not expressed.”), *quoting California Teachers Assn. v. Governing Bd. of Rialto Unified School Dist.*, 14 Cal.4th 627, 632-633 (1997).

<sup>26</sup> *See, e.g.*, Decision at 8; May 1, 2012, *Opening Comments of [PG&E (U39E) on the Proposed Decision of President Peevey Revising the Method of Calculating the Net Energy Metering Program Cap* at 11-12 (showing

relies on data that was non-existent for millions of customers in 1998, when the Legislature first used the phrase ““aggregate customer peak demand,””<sup>27</sup> but offers no analysis, finding or resolution of the logical inconsistency inherent in accepting the Solar Parties’ proposal.

Statutory language may only be “regarded as ambiguous if it is capable of two constructions, both of which are reasonable.”<sup>28</sup> The Decision’s interpretation is not a reasonable construction of the language, given the apparently undisputed fact that “aggregate individual customer non-coincident peak demand” *would have been impossible to measure at the time the statutory language was written.* The Decision also notes that “aggregate individual customer non-coincident peak demand” is *still* a vague concept that would be difficult to define and measure even using the smart meter data that is currently or soon-to-be available.<sup>29</sup> Legislative intent should not be assumed to be an unreasonable, impracticable or unachievable result,<sup>30</sup> as the Decision has done here. The Commission may not “rewrite” the law to change its meaning.<sup>31</sup>

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that basing “aggregate customer peak demand” data on “individual customer demand data” makes no sense, because that data did not exist for most customers at the time of the statute’s amendment); January 27, 2012, [PG&E’s] (U39E) Reply Comments on the Appropriate Method of Calculating the [NEM] Program Cap, (“[F]or most of the years this phrase has existed in statute, the data to support IREC’s interpretation (individual customer demand data) did not even exist for the vast majority of PG&E’s customers.”); January 27, 2012 Reply Comments of [SDG&E] (U902M) on Calculation of the [NEM] Cap at 5 (“[U]p until the recent rollout of smart meters, utilities could not measure non-coincident peak demand for the vast majority of its customers.”).

<sup>27</sup> Decision at 8.

<sup>28</sup> *Hughes v. Bd. Of Architectural Examiners*, 17 Cal. 4th 763 (1998); *Branciforte Heights, LLC v. City of Santa Cruz*, 138 Cal. App. 4th 914 (6th Dist. 2006);

<sup>29</sup> For this reason, the Decision has interpreted the statute in a way that is unlawfully vague – yet another reason why the Decision’s interpretation is unreasonable and should be corrected. The Decision acknowledges (but does not resolve) several areas in which the concept of “aggregate individual customer non-coincident peak demand” is unavoidably vague:

[E]ven if it could be measured, it would change frequently as there are likely to be some customers who reach new individual peak demands on any given day. Moreover, it is unclear whether or how the aggregate non-coincident customer peak demand value would be adjusted when customers move or go out of business.

Decision at 3, *see also* Ordering Paragraph 3.

<sup>30</sup> *People v. Zambia*, 51 Cal. 4th 965, 972 (2011) (“A statute must be given a **reasonable and common sense interpretation** consistent with the apparent purpose and intention of the lawmakers, **practical rather than technical in nature**, which upon application will result in wise policy **rather than mischief or absurdity.**”) (emphasis added). Further, “[w]here more than one statutory construction is arguably possible, [the Commission’s] policy has long been to favor the construction that leads to the more reasonable result. This

Rather, the Commission is required to correctly interpret a statute to determine legislative intent, and such interpretation is subject to independent judicial review:

Even in cases not questioning the jurisdiction of an agency, the interpretation of statutes is ***a question of law subject to independent judicial review***. In interpreting statutes, [a court is] are free to take into account agency interpretations, but such agency interpretations are not binding or necessarily even authoritative. The weight we attach to agency interpretations is ***contextual***, and depends on factors such as ***the thoroughness evident in the agency's consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.***<sup>32</sup>

Thus, although the Commission's interpretation of the Public Utilities Code is given "presumptive value" due to its "special familiarity and presumed expertise with satellite legal and regulatory issues,"<sup>33</sup> such deference is limited by the Commission's own jurisdiction.<sup>34</sup> The Commission does not have authority to "disregard ... express legislative directions to it, or restrictions upon its power found in other provisions of the act or elsewhere in general law."<sup>35</sup>

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policy derives largely from the presumption that the Legislature intends reasonable results consistent with the apparent purpose of the legislation."D.10-01-012, 2010 Cal. PUC LEXIS 4, at \*10-\*11 (quotations omitted).

<sup>31</sup> *City of Cotati v. Cashman*, 29 Cal. 4th 69 (2002) (cited by 58 Cal. Jur. 3d *Statutes* § 85 *Effect of literal or plain meaning* ("A court may not, under the guise of statutory construction, rewrite the law . . .").

<sup>32</sup> *PG&E Corp. v. PUC*, 118 Cal. App. 4th 1174, 1194-95 (1st App. Dist. 2004) (internal citations and quotations omitted)(emphasis added), *See also Bonnell v. Medical Board*, 31 Cal. 4th 1255, 1265 (2003) ("Courts must, in short, independently judge the text of [a] statute . . . . We determined that ***the weight accorded to an agency's interpretation is fundamentally situational and turns on a legally informed, commonsense assessment of [its] contextual merit*** . . . . We do not accord deference to an interpretation that is clearly erroneous.) (internal citations and quotations omitted) (emphasis added), *quoting Yamaha Corp. Corp. of America v. State Bd. of Equalization*, 19 Cal.4th 1 at 5-14 (1998) and *People ex rel. Lungren v. Superior Court*, 14 Cal.4th 294, 309 (1996).

<sup>33</sup> *See PG&E Corp. v. PUC*, 118 Cal. App. 4th 1174, 1194 (1st App. Dist. 2004), *quoting Yamaha Corp. of America v. State Bd. of Equalization* 19 Cal.4th 1, 11 (1998).

<sup>34</sup> *PG&E Corp. v. PUC*, 118 Cal. App. 4th 1174, 1194 (1st App. Dist. 2004, *quoting Kaiser Foundation Health Plan, Inc. v. Zingale*, (2002) 99 Cal.App.4th 1018, 1028 ("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").

<sup>35</sup> *Assembly of the State of California v. PUC*, 12 Cal. 4th 87, 103 (1995) (overturning a Commission decision that disregarded the legislative mandates of Section 453.5), *quoting Pacific Tel. & Tel. Co. v. PUC*, 62 Cal. 2d 634, 653 (1965); *see also State Comp. Ins. Fund v. Workers' Comp. Appeals Bd.*, 44 Cal. 4th 230, 236 ("While we typically give great weight to the [agency's] administrative construction of the statutes it is charged to enforce and interpret, ***we will annul clearly erroneous interpretations.***" (emphasis added)). Arguably, deference may also be lessened where, as here, an agency interpretation is not the result of a formal adversarial proceeding conducted in accordance with due process of law (as shown below) and is conducted at the request of an

Here, the “aggregate customer peak demand” language of Section 2827(c)(1) has provided a clear statutory directive – setting the NEM cap in accordance with a utility’s system peak. This language has been consistently interpreted as system peak demand for many years – by the Legislature, the Commission, and all interested parties (as discussed in more detail below) – with no question regarding its commonly accepted meaning and no hint of ambiguity. The record is replete with examples showing a clear and consistent history of interpreting “aggregate customer peak demand” to mean utility system peak demand, thus demonstrating the statutory language as a commonly accepted, plainly understood term.<sup>36</sup> Indeed, if the Legislature had intended for the NEM cap to be flexible at the Commission’s discretion, the effect of the cap would have had no meaning at all. But the statutory language describing the NEM cap was a clear legislative directive that has held meaning – consistently, the same “system peak demand” meaning – for many years.

Even IREC’s prehearing conference statement, IREC’s Motion, and the ALJ’s Ruling did not question the universally long-held “system peak demand” interpretation of the clear statutory language.<sup>37</sup> The ALJ’s Ruling suggested no ambiguity in the term “aggregate customer peak demand,” used the term “aggregate customer peak demand” synonymously with the utilities’ “system peak demand” interpretation, and noted only differences in the demand intervals used by

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organization representing private industry interests. *See, e.g., People ex rel. Lungren v. Superior Court*, 14 Cal. 4th 294, 311 (1996) (“[T]he views of an administrative agency that are ‘the product of a nonadversarial, ex parte process, conducted at the request of an organization that exclusively represents the interests’ of a private industry group are entitled to less deference than administrative decisions made after formal proceedings in which adversarial views are aired.”), *citing Hudgins v. Neiman Marcus Group, Inc.*, 34 Cal. App. 4th 1109, 1125-1126 (1995) (cited by *Bonnell v. Medical Board*, 31 Cal. 4th 1255, 1265 (2003)).

<sup>36</sup> *See, e.g.,* May 1, 2012, *Opening Comments of [PG&E (U39E) on the Proposed Decision of President Peevey Revising the Method of Calculating the Net Energy Metering Program Cap* at 3-8 (providing a detailed description and bullet-point list of numerous instances where “aggregate customer peak demand” has been commonly interpreted as a utility’s system peak); *see also* January 27, 2012, *[PG&E’s] (U39E) Reply Comments on the Appropriate Method of Calculating the [NEM] Program Cap*, (discussing the long-held interpretation and legislative history of Section 2827(c)(1).

<sup>37</sup> *See* December 14, 2011, *[ALJ’s] Ruling Granting Motion of the Interstate Renewable Energy Council and Requesting Comment on California Solar Initiative Phase II and III Issues* at 2, 3.

PG&E, SCE, and SDG&E in calculating system peak demand. For example, the ALJ's Ruling stated: "According to Energy Division, these three utilities currently calculate their progress toward the 5% net metering cap as the aggregate capacity of individual distributed generation systems divided by aggregate customer peak demand." The ALJ Ruling itself requested no clarification or comments on what "aggregate customer peak demand" means – suggesting that its meaning is, indeed, plain and unambiguous.<sup>38</sup>

In short, Section 2827(c)(1) provides a clear statutory directive from the Legislature that has held a consistent meaning for many years with no question regarding its commonly accepted meaning. The Decision has replaced this commonly understood, plain language interpretation of Section 2827(c)(1) with an unreasonable and unlawful interpretation that may yet prove itself practically unworkable.

#### **V. THE DECISION EXCEEDED THE COMMISSION'S JURISDICTION BY IGNORING STATUTORY CONSTRUCTION RULES FOR INTERPRETING AMBIGUOUS LANGUAGE.**

Even if the language of the statute were ambiguous, the Decision incorrectly applied rules of statutory construction to interpret Section 2827(c)(1) and arrived at an incorrect result. If statutory language is ambiguous, a court or agency must use statutory construction tools at its disposal to try to determine legislative intent, and must follow certain rules in doing so:

In determining intent, we look first to the words themselves. . . . When the language is clear and unambiguous, there is no need for construction. . . . When the language is susceptible of more than one reasonable interpretation, however, we look to a variety of extrinsic aids, including the ostensible objects to be achieved, the evils to be remedied, *the legislative history*, public policy, *contemporaneous administrative construction*, and the statutory scheme of which the statute is a part.<sup>39</sup>

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<sup>38</sup> ALJ Ruling at 2. The Ruling only instructed parties to comment *if* they wanted "to propose changes to the current methodology for calculating the net metering cap as shown in this Ruling [i.e., changes to the demand intervals used by the utilities]. . . ." *Id.* at 4.

<sup>39</sup> *People v. Woodhead* 43 Cal.3d 1002, 1007-1008 (1987) (emphasis added) (citations omitted).

It is well-settled that legislative intent is the primary goal of statutory interpretation.<sup>40</sup> Legislative intent is first sought in the plain words of a statute, but is also found in a statute's historical background.<sup>41</sup> When legislative history and background exists giving meaning to the legislative intent, it **must** be considered.<sup>42</sup> Thus, upon determining that language is ambiguous and subject to alternative reasonable interpretations, the legislative and administrative history must be examined. Further, as discussed above, “[w]here uncertainty exists, consideration should be given to the consequences that will flow from a particular interpretation.”<sup>43</sup> The Decision illegally failed to consider and apply these statutory construction rules.<sup>44</sup>

#### **A. The Legislative History Directly Contradicts the Decision, Compelling the Opposite Result.**

The Decision ignored the extensive legislative history of Section 2827(c)(1) and its long-held interpretation by the Legislature, the Commission, the utilities, and the industry. Over the

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<sup>40</sup> The fundamental goal of statutory interpretation is to “ascertain the intent of the lawmakers so as to effectuate the purpose of the law.” *Lockheed Martin v. Workers’ Comp. Appeals Bd.*, 96 Cal. App. 4th 1237, 1241 (1st Dist. 2002).

<sup>41</sup> See, e.g., *id.* at 1241-42 (“In determining legislative intent, courts must look first to the plain words of the statute, but **statutes must also be construed in light of their historical background and evident objectives**, especially if the statutory language is ambiguous, *i.e.*, susceptible of more than one reasonable interpretation.”); *H.S. Mann Corp. v. Moody*, 144 Cal. App. 2d 310 (2d Dist. 1956) (“The guiding star of statutory construction is the intention of the Legislature. To the end that it be correctly ascertained the statute is to be read in the light of its historical background and evident objective.”).

<sup>42</sup> See, e.g., *id.*; *Hughes v. Bd. Of Architectural Examiners*, 17 Cal. 4th 763,780 (1998) (when a statute is ambiguous, it is appropriate to examine its legislative history, including the historical development of the act); *Lewis v. Ryan*, 64 Cal.App.3d 330, 333-35 (1976).

<sup>43</sup> *People ex rel. Lungren v. Superior Court*, 14 Cal. 4th 294, 305 (1996) (“W]here the language of a statutory provision is susceptible of two constructions, one of which, in application, will render it reasonable, fair and harmonious with its manifest purpose, and another which would be productive of absurd consequences, the former construction will be adopted. . . . (internal citations and quotations omitted) (emphasis added).

<sup>44</sup> *PG&E Corp. v. PUC*, 118 Cal. App. 4th 1174, 1194-95 (1st App. Dist. 2004) (internal citations and quotations omitted)(emphasis added); see, e.g., *California Manufacturers Ass'n. v. PUC* (1979) 24 Cal.3d 836, 844 (1979) (both the legislative history of the statute and the wider historical circumstances of its enactment are legitimate and valuable aids in divining the statutory purpose) (annulling CPUC decisions); *Pacific Gas & Electric Co. v. Department of Water Resources* (2003) 112 Cal.App.4th 477, 495 (when the statutory language is ambiguous on its face or is shown to have a latent ambiguity such that it does not provide a definitive answer, we may resort to extrinsic sources to determine legislative intent); *Independent Energy Producers v. State Board of Equalization* 125 Cal.App.4th 425, 437, 440 (2004) (legislative history entitled to “great weight”; long-continued administrative construction followed). As noted in the above Section IV, the Commission does not have jurisdictional authority to interpret a clear legislative directive contrary to legislative intent and the rules of statutory construction.

last 15 years, each time the Legislature authorized increases to the NEM cap based on the aggregate customer peak demand. In each of these cases, the legislative analyses and the CPUC's own analyses indicated the cap was based on the utilities' system peak demand. At no time did the Legislature consider basing the NEM cap on the sum of individual customers' non-coincident maximum demand. When the Legislature amends a statute without altering portions of the provision that have previously been construed, the Legislature is presumed to have been aware of and to have acquiesced to the previous construction.<sup>45</sup> The Decision ignored this basic statutory construction principle, as well as Section 2827's legislative history.

The legislative history includes no consideration of basing the NEM cap on the sum of individual customers' non-coincident maximum demands. The concept was never proposed or considered, and the Decision does not claim otherwise. The legislative history only refers to the concept of utility system peak demand, which has been commonly accepted since Section 2827 was enacted. As previously noted, the data necessary to calculate the sum of individual customers' non-coincident maximum demands did not even exist for most of the time the statute has been in place, and does not even fully exist today.<sup>46</sup> The Decision recognized this serious flaw in the Solar Parties' claim – but did not resolve the discrepancy in its new statutory interpretation.

The first NEM legislation in California, Senate Bill (SB) 656 (Chapter 369, Statutes of 1995), clearly intended the cap to be calculated using the utility coincident peak. NEM capacity could be added “until the time that the total rated generating capacity owned and operated by eligible customer-generators in each utility's service area equals 0.1 percent of the utility's peak

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<sup>45</sup> See, e.g., *In re Gladys R.*, 1 Cal.3d 855, 868-869 (1970); *Richfield Oil Corp. v. Public Util. Com.*, 54 Cal.2d 419, 430 (1960); *Buckley v. Chadwick*, 45 Cal.2d 183, 200 (1955); cf. *Palos Verdes Faculty Assn. v. Palos Verdes Peninsula Unified Sch. Dist.* 21 Cal.3d 650, 659 (1978).

<sup>46</sup> Decision at 8-9.

electricity demand forecast for 1996... ” In fact, the statute included the *exact* figures for the 1996 system peak forecast for each utility and the corresponding MW cap figure for each utility as well. That forecast was of coincident peak load.

Three years later, in Assembly Bill (AB) 1755 (Chapter 855, Statutes of 1998), the Legislature amended Section 2827’s language describing the denominator of the NEM cap calculation from “utility’s peak electricity demand forecast for 1996” to “electric service provider’s aggregate customer peak demand.” This change did not affect the NEM cap calculation, except to accurately reflect the facts that: (1) utility peak demand would change over time; and (2) with the advent of electric industry restructuring, other load serving entities would be providing generation service to customers in IOU service areas. The cap itself remained at 0.1 percent.

There is not a single word in the legislative history or language of the statute to suggest that utilities should try to guess the maximum load of each of millions of different customers at different times. This is the meaning the Decision effectively, and incorrectly, adopts. The legislative history reveals no legislative intent to change the NEM cap calculation from the previous statute. The Legislature merely adjusted the description of the cap to accommodate Direct Access.

Further, the legislative history reveals that each time the Legislature raised the NEM cap; it did so because one or more of the IOUs was nearing the limit – *under the utility system peak demand calculation*. For example, the Legislature raised the cap from 0.5 percent to 2.5 percent in 2006, as part of Senate Bill 1, because “PG&E and Southern California Edison are *nearing their limit*.”<sup>47</sup> The Legislature reached this conclusion because it agreed with the way utilities

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<sup>47</sup> See Senate Floor Analysis dated Sept. 9, 2006, at [http://www.leginfo.ca.gov/pub/05-06/bill/sen/sb\\_0001-0050/sb\\_1\\_cfa\\_20060809\\_135407\\_sen\\_floor.html](http://www.leginfo.ca.gov/pub/05-06/bill/sen/sb_0001-0050/sb_1_cfa_20060809_135407_sen_floor.html) at page 5 (emphasis added).

were measuring their NEM caps.<sup>48</sup> The Legislature certainly could not have reached this conclusion based on “aggregate individual customer non-coincident” peak demand” data, because such data was not known, estimated or discussed in setting the new cap. This repeated legislative reenactment of the same “aggregate customer peak demand” statutory language without change *must* be interpreted as legislative *acceptance* and *adoption* of the language’s interpretation in practice – the utility system peak demand interpretation.<sup>49</sup>

The Legislature made very clear that it did not support solar at any cost, in passing Senate Bill (“SB”) 1. SB1 expressly provided for declining California Solar Initiative (CSI) incentives and incentive cost caps. A similar but less detailed concept was expressed for NEM. In addition to including a cap, the statute required the CPUC, by January 1, 2010, in consultation with the Energy Commission, to submit a report to the Governor and Legislature on the costs and benefits of net energy metering to participating customers and nonparticipating customers and “with options to replace the economic costs of different forms of net metering with a mechanism that more equitably balances the interests of participating and nonparticipating customers.”<sup>50</sup> As discussed in more detail in Section B. below, the CPUC’s 2010 report updated the Legislature on progress toward the NEM cap calculated using coincident peak demand.<sup>51</sup> Of course, while the CPUC made a report to the Legislature, the CPUC has yet to propose any options to more equitably strike that balance.

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<sup>48</sup> Even IREC’s Motion, the ALJ’s Ruling, and the Solar Parties’ January 17, 2012 Comments all stated that a main rationale for needing to examine the NEM cap calculation was that the caps had almost been reached for some if not all of the utilities. This suggests a common understanding of what “aggregate customer peak demand” means. Differences in demand intervals for calculating “aggregate customer peak demand” (as noted by IREC’s Motion and the ALJ’s Ruling) would not affect whether a utility was about to reach its NEM cap.

<sup>49</sup> *Richfield Oil Corp. v. Public Util. Com.*, 54 Cal.2d 419, 430 (1960) (where a Legislature has repeatedly reenacted statutory language without change, it must be concluded that the Legislature has accepted and adopted its practical interpretation).

<sup>50</sup> See new Section 2827(c)(4), added by SB 1.

<sup>51</sup> [http://www.cpuc.ca.gov/NR/rdonlyres/0F42385A-FDBE-4B76-9AB3-E6AD522DB862/0/nem\\_combined.pdf](http://www.cpuc.ca.gov/NR/rdonlyres/0F42385A-FDBE-4B76-9AB3-E6AD522DB862/0/nem_combined.pdf).

Similarly, in 2010, the Legislature increased the cap from 2.5% to 5%, by adopting AB 510. The Assembly Analysis stated:

SB 1 implemented CSI which has the goals of installing 3,000 megawatts (MW) [including municipal utilities] of distributed generation sized solar energy system.... If the goals of CSI are to be met, the 2.5% cap on net-metering must be increased or a similar buy back program must be put into place.<sup>52</sup>

In fact, the same analysis notes that the bill's sponsor, and ironically one of the parties now arguing that the Legislature intended that "aggregate customer peak demand" clearly meant "the sum of individual customer non-coincident maximum demands," was of exactly the same mind on this issue:

The sponsor of this bill, Solar Alliance, and other supporters believe that since CSI has been successful and net-metering is a key part of that success, the cap on net metering should be eliminated entirely or increased to a level that exceeds the 3,000 megawatt goal of CSI this year.<sup>53</sup>

If the Legislature had intended the interpretation proposed in the PD, there would have been no need to increase the cap beyond 2.5% to accommodate CSI. This discussion of the need to increase the cap was based on the coincident peak numbers that had been presented to both the Legislature and the CPUC; no "non-coincident" figures or estimates were presented. The Legislature said the 5% was enough to meet the CSI goal. However, that goal was only 1940 MW for the three investor owned utilities, as municipal utilities serve the 1060 MW remainder of the 3,000 MW CSI goal.<sup>54</sup> The claim that the Legislature really intended to increase the NEM cap for the three IOUs alone to 5265 MW to help meet the CSI goal is simply not believable.

The most recent amendment to the NEM law, SB 489, enacted in October 2011, added renewable projects to the list of technologies eligible for NEM. This bill did not raise or change

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<sup>52</sup> See Assembly Floor Analysis dated Feb. 12, 2010, at p. 3, which can be found at [http://www.leginfo.ca.gov/pub/09-10/bill/asm/ab\\_0501-0550/ab\\_510\\_cfa\\_20100212\\_162638\\_asm\\_floor.html](http://www.leginfo.ca.gov/pub/09-10/bill/asm/ab_0501-0550/ab_510_cfa_20100212_162638_asm_floor.html).

<sup>53</sup> *Id.* at 3.

<sup>54</sup> Decision at 29.

the cap. The Senate Analysis of the bill noted that it “Retains the total capacity cap for net metering at 5% of the utility's aggregate peak demand” and specifically referred to the CPUC’s March 2010 Report to the Legislature on the costs of Net Metering.<sup>55</sup> Again, the Legislature relied on the CPUC’s reports in making each of these legislative changes. As the CPUC and the utilities made clear, they believed the cap was based on the utility coincident peak, not on anything else, and the Legislature did nothing to change that understanding in any way.

**B. Contemporaneous Administrative Interpretation Contradicts the Decision.**

As noted above, courts look to an agency’s history of interpreting a statute in determining whether a statutory interpretation is reasonable.<sup>56</sup> For years, the IOUs have been calculating and reporting the aggregate customer peak demand based on a coincident peak load that accounts for the IOUs’ bundled customers, the direct access customers, and community choice aggregation customers. This forms a continuing “contemporaneous administrative construction” from 1998 to the present – fourteen years of consistent administrative construction of the term. For many of these same years, the utilities, the CPUC, and the Legislature have all understood that this denominator to be a measure of the “coincident” load of all the customers of a utility.

Moreover, as explained above, the Legislature has several times demanded reports from the CPUC on net metering, and the Commission’s reports to the Legislature have calculated the NEM cap by using coincident peak demand. Assembly Bill 58 (2002) required that the CPUC

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<sup>55</sup> The Senate Floor Analysis of SB 489 dated August 30, 2011 can be found at [http://www.leginfo.ca.gov/pub/11-12/bill/sen/sb\\_0451-0500/sb\\_489\\_cfa\\_20110830\\_101610\\_sen\\_floor.html](http://www.leginfo.ca.gov/pub/11-12/bill/sen/sb_0451-0500/sb_489_cfa_20110830_101610_sen_floor.html).

<sup>56</sup> *People v. Woodhead* 43 Cal.3d 1002, 1007-1008 (1987) (looking to contemporaneous administrative construction, among other means, to determine legislative intent). *PG&E Corp. v. PUC*, 140 Cal. App. 4th 1085, 1194-95 (1st App. Dist. 2004) (“The weight we attach to agency interpretations is contextual, and depends on factors such as ***the thoroughness evident in the agency's consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control.***”) (internal citations and quotations omitted) (emphasis added); *PG&E Corp. v. PUC*, 118 Cal. App. 4th 1174 (2004), citing *Yamaha Corp. Corp. of America v. State Bd. of Equalization*, 19 Cal.4th 1 at 14-15 (1998) (agency interpretations are entitled to greater weight when an agency has been consistent in its approach).

submit such a report, and in 2005, the CPUC reported to the Legislature on the progress of the NEM program as requested by that statute. Page 8 of that report included a table showing how each utility was doing compared with the NEM cap, which was 0.5% at that time, and the CPUC report showed PG&E's cap as approximately 100 MW.<sup>57</sup> This report on the cap was based on the utilities' system peaks, not on the sum of every single customer's maximum load on different hours, days, months, or years. The CPUC stated that "Policymakers should continue to monitor statewide net metering levels, and consider legislation to increase the maximum cap to 5% of aggregate customer peak demand."<sup>58</sup>

The CPUC did monitor net metering levels. It issued many reports showing the cap based on coincident peak. For example, its CSI CPUC Staff Progress Report, issued in January 2009 included a table of installed NEM projects for each utility, and where each utility stood against the cap.<sup>59</sup> It was based on coincident peak. Similarly, later in 2009, the CPUC sent to the Legislature its analysis of AB 560, which would have raised the cap to 10%. That report included specific figures for where the utilities stood with respect to the cap.<sup>60</sup> These figures were based on utility coincident peak, not a sum of each customer's maximum demands across different time periods.

In March 2010, the CPUC gave a report to the Legislature on the cost of net metering. That report includes a NEM Program Overview section, which understood the cap to be a coincident peak cap, stating that "Under the statute, utilities must make NEM available to

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<sup>57</sup> "Update on Determining the Costs and Benefits of California's Net Metering Program as Required by Assembly Bill 58," which is available on the CPUC web site at [http://docs.cpuc.ca.gov/WORD\\_PDF/REPORT/45133.PDF](http://docs.cpuc.ca.gov/WORD_PDF/REPORT/45133.PDF).

<sup>58</sup> *Id.* at 15.

<sup>59</sup> <http://www.cpuc.ca.gov/NR/rdonlyres/05448F68-F10D-492F-BD1E-6AF96854C15D/0/Jan09.pdf>, at page 15.

<sup>60</sup> The CPUC's analysis of AB 560 can be found at [ftp://ftp.cpuc.ca.gov/OGA/2010%20position%20letters/LEG%20MEMO%20090507%20AB%20560%20%20\(8501\)%20090421-1.pdf](ftp://ftp.cpuc.ca.gov/OGA/2010%20position%20letters/LEG%20MEMO%20090507%20AB%20560%20%20(8501)%20090421-1.pdf).

customers until the total NEM rated generating capacity exceeds 2.5 percent of the utility aggregate customer peak demand. PG&E voluntarily extended the cap to 3.5 percent in 2009.”<sup>61</sup> Again, this 3.5% figure was based on PG&E’s coincident peak load. Indeed, the advice filing raising the cap to 3.5% included the precise methodology by which the coincident peak cap was calculated, which the Commission accepted, and that method became part of PG&E’s tariff.<sup>62</sup>

In 2011, the Commission gave another report to the Legislature. It stated that the 5% cap adopted the prior year would be enough to meet the CSI goal. It stated:

We assume that all CSI customers in our forecast period will be eligible for and will enroll in NEM rates. AB 510 expanded each utilities cap on NEM to **5% of aggregate customer demand, which should be adequate to accommodate the MW in the CSI program. For example, assuming PG&E’s current peak load, the 5% cap is equivalent to over 1,040 MW.**<sup>63</sup>

Thus, the Commission told the Legislature when the cap was 0.5% that this cap was equal to approximately 100 MW for PG&E.<sup>64</sup> When the Legislature increased the cap to 5%, the Commission told the Legislature this added up to about 1040 MW for PG&E.<sup>65</sup> The Legislature said it was relying on these and many other similar reports and that it understood the statute the same way. The solar parties agreed. To now claim that the Legislature really meant an interpretation that more than doubles this cap to over 2400 MW for PG&E is legal error.<sup>66</sup>

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<sup>61</sup> CPUC NEM Report at 14, available at [http://www.cpuc.ca.gov/NR/rdoonlyres/0F42385A-FDBE-4B76-9AB3-E6AD522DB862/0/nem\\_combined.pdf](http://www.cpuc.ca.gov/NR/rdoonlyres/0F42385A-FDBE-4B76-9AB3-E6AD522DB862/0/nem_combined.pdf).

<sup>62</sup> Energy Division letter dated December 7, 2009, accepting PG&E Advice Letter 3555-E.

<sup>63</sup> See CPUC’s April 2011 report to the Legislature at 66, available at [http://ftp.cpuc.ca.gov/gopherdata/energy\\_division/csi/CSI%20Report\\_Complete\\_E3\\_Final.pdf](http://ftp.cpuc.ca.gov/gopherdata/energy_division/csi/CSI%20Report_Complete_E3_Final.pdf).

<sup>64</sup> CPUC NEM Report at 14.

<sup>65</sup> CPUC’s April 2011 report to the Legislature at 66.

<sup>66</sup> See also May 1, 2012 *Comments of [SDG&E] (U902M) on the Proposed Decision of Commissioner Peevey Regarding the Calculation of the [NEM] Cap* at 8-9 (showing that the Decision’s change in interpreting Section 2827 would more than double SDG&E’s cap).

The Decision acknowledges this history, but offers not one word of explanation of why the longstanding understanding by the CPUC and the Legislature is being overturned, let alone explain why it adopted a fictional statement of what the Legislature intended. This is legal error.

**C. The Decision Erred in Reading “Non-Coincident” Peak Demand into the Statute, Contrary to Legislative History.**

The Decision’s conclusion<sup>67</sup> that the Legislature intended to include a non-coincident demand value in the NEM cap calculation has no support in legislative history. To the contrary, extensive legislative history shows that the language modification was intended to serve a different purpose, to address electric deregulation, including direct access service. The term “aggregate customer” was added in 1998 along with electric industry restructuring, and simply reflected the fact that electric utilities were not the only entities serving customers.

Assembly Bill (AB) 1755 was introduced by Assembly members Fred Keeley and Nao Takasugi on February 4, 1998, to modify Section 2827, established in 1995. The relevant existing language of Section 2827 was modified as follows:

~~Every electric utility in the state, including any privately owned or publicly owned public utility, municipally owned utility, and electrical cooperative that offers residential electrical service, whether or not the entity is subject to the jurisdiction of the commission, *electric service provider* shall develop a standard contract or tariff providing for net energy metering, and shall make this contract available to eligible customer-generators, *upon request*, on a first-come, first-served basis until the time that the total rated generating capacity ~~owned and operated~~ *used* by eligible customer-generators in each utility's service area equals 0.1 *equals one-tenth of 1* percent of the utility's *state's* peak electricity demand forecast for 1996, as described by the following schedule...~~

Section 1755, February 4, 1998. (Italics and strikeouts in original.)

The legislative history of Section 2827 confirms that AB 1755 was intended to reflect the realities of the new electricity market. For example, in a position paper prepared for Assemblyman Fred Keeley, CALSEIA explained that the references to *electric utility* in Section

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<sup>67</sup> Decision p. 11.

2827 were being changed to electric service provider (ESP) to account for the restructured electric business in California.<sup>68</sup> In addition, after passage of AB 1755, in a letter of explanation to California Governor Pete Wilson, Assembly Member Fred Keeley asserts that the bill's purpose was to update the 1995 net metering law to accommodate electricity deregulation.<sup>69</sup>

The original proposed amendment of Section 2827 made the amount of net metering capacity that any given ESP must make available to its customers dependent on a percentage of the total amount of net metering capacity installed in the state. In the first amendment of AB 1755, dated March 9, 1998, the language in this subsection was amended to the language that remained the same until passage of the bill:

Every electric service provider shall develop a standard contract or tariff providing for net energy metering, and shall make this contract available to eligible customer-generators, upon request, on a first-come, first-served basis until the time that the total rated generating capacity used by eligible customer-generators equals one-tenth of 1 percent of the ~~state's peak electricity demand~~ *electric service provider's aggregate customer peak demand*. Amended AB 1755, dated March 9, 1998. [Italics and strikeouts in original.]

This language changed the denominator from the state's peak electricity demand to the ESP's *aggregate customer peak demand*. This accounted for the fact that the restructured electric industry envisioned that a variety of ESPs could provide electric service to the customers in an IOU's service territory so the statute had to apply the required percentage to each ESP's *aggregate customer peak demand* to account for each ESP's proportionate share of the state's peak electricity demand. Thus, the 1998 amendment was structured to apply the NEM requirements to each individual ESP, so the *state's peak electricity demand*, which was easily obtainable, was no longer applicable. The Legislature had to change the language to *aggregate*

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<sup>68</sup> See quotes in Opening Comments of Southern California Edison on Proposed Decision filed May 1, 2012, p. 4, fn. 3.

<sup>69</sup> Letter from Assembly Member Fred Keeley to Governor Wilson, dated September 3, 1998 (Legislative History of AB 1755, p. 1008) ("the bill updates the 1995 net metering law to accommodate electricity deregulation").

*customer peak demand* to account for the fact that each ESP would have its own peak demand, based on its aggregate customers, to use in calculating its statutory obligation. There is no basis for concluding that the Legislature intended to shift from the use of coincident peak to non-coincident peak demand in calculating the percentage cap. Such a significant change in the net metering cap would have been included in the legislative intent language, or the various analyses produced by the Legislature at the time. Since it was not, the only logical conclusion is that the Legislature did *not* intend to change the cap.

## **VI. THE DECISION IS NOT IN ACCORDANCE WITH LAW AND IS NOT SUPPORTED BY THE FINDINGS.**

The Decision radically changed the way the Commission had repeatedly interpreted the statutory cap, without any discussion, findings, or explanation as to why. The Commission’s historic interpretation of 2827(c)(1)’s “aggregate customer peak demand” has consistently been the same as the utilities’ interpretation, as described in detail in Section I.B above and in this proceeding’s comments and briefs. The Decision notes these comments<sup>70</sup> but offers no explanation, discussion, or findings on why it reversed its own longstanding interpretation – stating only that the Decision clarified the language. This is clear legal error, for several reasons.

Section 1705 requires that any Commission decision “contain separately stated, findings of fact and conclusions of law by the commission on all issues material to the order or decision. . .” Commission decisions must be supported by findings and conclusions stated with sufficient clarity that a reviewing court may understand the bases for the action the Commission has taken in the decision.<sup>71</sup> The Commission itself has interpreted Section 1705 as requiring “sufficient findings and conclusions in order to assist the Court in ascertaining the principles relied upon by

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<sup>70</sup> Decision at 7-8.

<sup>71</sup> See *Greyhound Lines, Inc. v. PUC* (1967) 65 Cal.2d 811; *California Motor Transport Co. v. PUC* (1963) 59 Cal.2d 270; *California Manufacturers Assn. v. PUC* (1979) 24 Cal.3d 251.

the Commission, and assist the parties in preparing for rehearing or court review.”<sup>72</sup> And, “Findings of fact and conclusions of law must be based on the evidence in the proceeding.”<sup>73</sup>

The Decision does not comply with these requirements. Although it contains nine findings of fact and ten conclusions of law, it utterly fails to address “all issues material to the order or decision” as required by law. For example, as noted above, the Decision offers no explanation, discussion, or findings on why it reversed its own longstanding interpretation. Courts have held that “[A]n agency changing its course ... is obligated to supply a reasoned analysis for the change.”<sup>74</sup> “[R]easoned decision making ... necessarily requires the agency to acknowledge and provide an adequate explanation for its departure from established precedent.”<sup>75</sup> And an agency that neglects to do so acts arbitrarily and capriciously.<sup>75</sup> “A gross abuse of discretion occurs where the public agency acts arbitrarily or capriciously.”<sup>76</sup>

Further, the Decision offers no analysis or finding on why the statute’s legislative and administrative history was ignored. The Decision acknowledges that determining “aggregate individual customer non-peak demand” was impossible at the time the statute was written, and difficult to determine now, but offers no finding on why adopting this new interpretation could be reasonable in light of those facts. There is no explanation, evidence, or finding on why the Commission more than doubled the cap without any consideration of the resulting cost impacts.<sup>77</sup>

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<sup>72</sup> D.06-05-019.

<sup>73</sup> *Id.*

<sup>74</sup> *Jicarila Apache Nation v. United States Dept. of the Interior* (D. C. Cir. 2010) 613 F.3d 1112, 1119 (quoting *Motor vehicle Manufacturers Ass’n of the United States, Inc. v. State Farm Mutual Automobile Ins. Co.* (1983) 463 U.S. 29, 42) (alteration in original)).

<sup>75</sup> *Id.* (quoting *Dillmon v. NTSB* (D.C. Cir. 2009) 588 F.3d 1085, 1089-1090) (alteration in original). *See also Williams Gas Processing-Gulf Coast Co., L.P. v. Federal Energy Regulatory Commission* (D.C.Cir. 2006) 475 F.3d 319, 326 (“[I]t is axiomatic that [agency action] must either be consistent with prior [action] of offer a reasoned basis for its departure from precedent”).

<sup>76</sup> *City of Stockton v. Marina Towers LLC* (2009) 171 Cal. App. 4<sup>th</sup> 93, 114.

<sup>77</sup> In contrast, in 2003, the CPUC in D.03-02-068 concluded that NEM caps were included to minimize potential financial impacts of the program.

Nor does the Decision offer any evidence, analysis, or findings on whether its new interpretation of the law will result in just and reasonable rates (in accordance with Section 451), or on whether it is non-discriminatory (in accordance with constitutional protections and Section 453). The California Court of Appeals has repeatedly noted the importance of such material Commission findings and conclusions for appellate review, and held that the Commission cannot insulate itself by failing to make such findings.<sup>78</sup> These issues are clearly material, and the Commission is legally obligated to resolve them by setting forth findings of facts and conclusions of law supporting its position.

#### **VII. THE DECISION IS NOT THE RESULT OF DUE PROCESS; THE COMMISSION DID NOT PROCEED IN THE MANNER REQUIRED BY LAW.**

As demonstrated above in the relevant factual and procedural background, there are numerous reasons why the process leading up to the Decision did not comport with the applicable procedural rules, in violation of the parties' due process rights and prejudicing the interests of the parties. Courts have overturned decisions where the Commission failed to follow due process, its own procedures and "proceed in a manner required by law."<sup>79</sup>

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<sup>78</sup> In *Los Angeles v. P.U.C.*, the Court noted:

In *California Motor Transport Co. v. Public Utilities Com.*, 59 Cal. 2d 270, 273-275 [28 Cal. Rptr. 868, 379 P.2d 324], this court reviewed a commission order applying the new scope of review dictated by the amendment of section 1705. We held that a finding of "public convenience and necessity" was an ultimate finding and that to be sustained by the court "[every] issue that must be resolved to reach that ultimate finding is 'material to the order . . .'" and must be separately stated.

....

It has been repeatedly emphasized that separate findings are essential to "afford a rational basis for judicial review and assist the reviewing court to ascertain the principles relied upon by the commission and to determine whether it acted arbitrarily, as well as assist the parties to know why the case was lost and to prepare for rehearing or review, assist others planning activities involving similar questions, and serve to help the commission avoid careless or arbitrary action." (*Greyhound Lines, Inc. v. Public Utilities Com.* 65 Cal. 2d 811, 813 [56 Cal. Rptr. 484, 423 P.2d 556]; *Pacific Tel. & Tel. Co. v. Public Util. Com.*, *supra*, 62 Cal. 2d 634, 648; *California Motor Transport Co. v. Public Utilities Com.*, *supra*, 59 Cal. 2d 270, 274-275.) We must review the findings accordingly.

*Los Angeles v. P.U.C.*, (1972) 7 C.3d 331; *see also California Motor Transport, supra*.

<sup>79</sup> *Southern Cal. Edison Co. v. PUC*, 140 Cal. App. 4th 1085, 1106 (2006) (annulling the Commission's decision where the Commission failed to proceed in the manner required by law, in departing from the scoping memo and

For example, in *Southern California Edison*,<sup>80</sup> the Court of Appeal annulled a portion of a Commission decision in a rulemaking proceeding directing that utilities pay “prevailing wage” on construction projects. The Court concluded that, in reaching the decision under review, the Commission failed to proceed in the manner required by law in that it violated its own procedural rules. The decision departed from the original scoping memo<sup>81</sup> in allowing comments on a new issue that was not defined in the scoping memo. Laborer intervenors “offered new proposals by suggesting for the first time in [the] proceeding that the PUC should require project labor agreements or the payment of prevailing wages.”<sup>82</sup> The comments were accepted “10 months after the opening comments were due, more than nine months after the scoping memo was issued, and more than seven months after the responsive comments were due.” The parties ultimately were offered an additional three business days to respond to the new comments, which included “issues of public policy, economic effects, legal implications, and effective administration and implementation of the proposed new rules.” The court held that this process was prejudicial, insufficient, and did not follow due process of law:

In summary, the prevailing wage proposal was beyond the scope of issues identified in the scoping memo, the PUC violated its own rules by considering the new issue, and three business days was insufficient time for the parties to respond to the new proposals. We therefore conclude that the PUC failed to proceed in the manner required by law (*Pub. Util. Code, § 1757.1, subd.(a)*) and that the failure was prejudicial.<sup>83</sup>

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violating its own regulations) (cited by *The Utility Reform Network v. PUC*, 2012 Cal. App. Unpub. LEXIS 2049 (March 16, 2012) (setting aside Commission approval of a project where the Commission expanded the scope of the case beyond the scoping memo, failed to follow its own rules, and thereby prejudiced the parties)); *see also, Environmental Protection Information Center, Inc. v. Johnson*, 170 Cal.App.3d 604, 622 at 623(1985) (failure to follow regulations prejudices public process).

<sup>80</sup> 140 Cal. App. 4th 1085 (2006).

<sup>81</sup> *See* Section 1701.1(b).

<sup>82</sup> 140 Cal. App. 4th 1085, 1106.

<sup>83</sup> 140 Cal. App. 4th 1085, 1106.

The instant case is analogous. As clearly noted in the ALJ's December 2011 Ruling, the Scoping Memo of November 9, 2010 did not even mention review of net metering caps – much less suggest re-defining them. Here, the relevant procedural and factual background shows that neither IREC's prehearing conference statement nor IREC's motion proposed a change to the statutory interpretation of Section 2827(c)(1)'s "aggregate customer peak demand" language to read "aggregate individual customer non-coincident peak demand." Accordingly, the Scoping Memo and the ALJ's Ruling did not identify the issue as within the scope of the proceeding. The focus of the rationale behind the ALJ's Ruling was on: (1) determining what demand intervals should be used to calculate aggregate customer peak demand; and (2) doing so before PG&E and SDG&E reached the 5% NEM cap, as all parties appeared to agree was imminent.

IREC should have described its new statutory interpretation proposal in its prehearing conference statement in order for the issue to be included in the scoping memo and considered in the case. Section 1701.2 requires that "[t]he assigned commissioner or the assigned [ALJ] shall hear the case in the manner described in the scoping memo." The Commission has long held that: "... a party that does not bother to participate in the scoping process ... will run the risk that the hearings held (if any) and the issues considered in the proceeding will differ from what the party expected. We will not indulge belated requests from such a party to add hearings or issues."<sup>84</sup> As the ALJ's Ruling noted, the "Scoping Memo of November 9, 2010 . . . did not explicitly mention review of net metering caps."<sup>85</sup> Regardless, the Solar Parties were permitted to offer a brand-new, unexpected proposal on how to interpret the "aggregate customer peak demand" language of Section 2827(c)(1), for the first time in comments that purported (in IREC's Motion) to address interval differences between the utilities in measuring aggregate

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<sup>84</sup> D.97-11-021, mimeo p. 14.

<sup>85</sup> ALJ Ruling at 2.

customer peak demand. – 17 months after prehearing conference statements were filed and 14 months after the Scoping Memo issued. Even IREC’s Motion and the ALJ’s Ruling (filed 8 months and 13 months after the Scoping Memo issued, respectively) did not identify the “aggregate individual customer peak demand” issue that parties would eventually be called upon to brief in only 8 business days. Similar to *Southern California Edison v. PUC*, this briefing period was far too short to adequately allow parties to address this new proposal that raised “issues of public policy, economic effects,<sup>[86]</sup> legal implications, and effective administration and implementation of the proposed new [law].”

In granting IREC’s Motion, the ALJ’s Ruling specifically noted that comments should propose NEM cap methodology changes *as shown in the ruling*. The ALJ’s Ruling did not request that the parties brief the Solar Parties’ new interpretation of “aggregate customer peak demand.” It could not have, because none of the Solar Parties identified the issue until after IREC’s Motion had been granted. IREC’s Motion itself identified what appeared to be a wholly separate issue – whether the utilities’ demand intervals used to measure aggregate customer peak demand should be consistent state-wide. The ALJ’s Ruling gave no suggestion that the comments would address anything else. The scope was changed midstream; and a different issue was decided than the one on which the parties were asked to file comments.

What the Commission thus unlawfully permitted in response to this Motion was altering the scope of the proceeding and proposing a brand-new interpretation of Section 2827(c)(1). The parties had no fair opportunity to fully brief this issue for complete consideration, in the ALJ Ruling’s brief (8-business-day) response schedule. The Commission also could have, but did

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<sup>86</sup> Several parties noted in the brief commenting period allowed that this proposed new statutory interpretation would have a significant impact on non-NEM ratepayers, specifically, greatly increased cross-subsidies. *See, e.g., May 1, 2012 Comments of [SDG&E] (U902M) on the Proposed Decision of Commissioner Peevey Regarding the Calculation of the [NEM] Cap* at 8-10.

not, request or consider a fully and fairly developed factual record to determine the practical impact on ratepayers and parties, such that the Commission's incorrect statutory interpretation may have unintentionally approved rates that are not just and reasonable or non-discriminatory, with no appropriate notice, factual evidence, analysis, or findings. Instead, a proposed decision issued on cursory briefing and no opportunity to present evidence.<sup>87</sup>

Further, the Commission did not allow parties to supplement this briefing in comments on the proposed decisions, in violation of its own rules. Commission Rule 14.3 states that “[c]omments shall focus on factual, legal or technical errors in the proposed or alternate decision and in citing such errors shall make specific references to the record or applicable law.” Here, the parties did not have a true evidentiary record to cite to – thus making it impossible to note factual errors in full compliance with the rule. But the Decision appears to have ignored not just new factual arguments, but legal ones as well, stating: “Where comments reargued earlier positions or attempted to present new arguments or facts, they were not considered.” But nothing in Rule 14.3 proscribes a party from presenting new arguments to point out errors. This is clear legal error and denial of due process as well.

In short, the Commission did not follow its own procedures, did not proceed in a manner required by law and violated the due process rights of parties and ratepayers. This process was prejudicial, unlawful and veered from Commission procedures, the Scoping Memo, and the ALJ's Ruling at every turn.

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<sup>87</sup> SDG&E noted in comments how additional evidence and different processes could have benefited the record in this proceeding and enhanced due process in accordance with law. *See also* May 1, 2012 *Comments of [SDG&E] (U902M) on the Proposed Decision of Commissioner Peevey Regarding the Calculation of the [NEM] Cap* at 8-10.

