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06-29-12
04:59 PM

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

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)

JOINT APPLICATION FOR REHEARING OF DECISION NO. 12-05-036 OF PACIFIC GAS AND ELECTRIC COMPANY (U 39 E), SOUTHERN CALIFORNIA EDISON COMPANY (U 338-E), THE ENERGY PRODUCERS & USERS COALITION, AND THE CALIFORNIA LARGE ENERGY CONSUMERS ASSOCIATION

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Dated: June 29, 2012

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This Application for rehearing of Decision No. 12-05-036 is filed pursuant to Rule 16.1 of the California Public Utility Commission's ("CPUC") Rules of Practice and Procedure, and sections1731 and 1756 of the California Public Utilities Code. Pacific Gas and Electric Company ("PG&E"), Southern California Edison Company ("SCE"), The Energy Producers & Users Coalition ("EPUC"), and The California Large Energy Consumers Association ("CLECA") (collectively the "Moving Parties") jointly apply for rehearing of Decision No. 12-05-036 (the "Decision") on the grounds that it commits multiple errors of law and fact.[1] The Decision concluded that the Net Energy Metering ("NEM") Program cap of "aggregate customer peak demand" means "the aggregation, or sum of individual customer's peak demand, i.e., their non-coincident peak demands." It also concluded that the availability of NEM will be suspended on January 1, 2015, and that the CPUC will launch a new Rulemaking to set NEM policy rules. At the CPUC business meeting approving the Decision, several commissioners said this decision would increase the NEM cap for the three investor-owned utilities ("IOU") from 2640 MW to 5265 MW. The legislature, however, increased the NEM cap from 2.5% of the utilities total load to 5% to ensure that it would not hinder the achievement of the California Solar Initiative IOU

[1] In accordance with Rule 1.8, PG&E has been authorized by the Moving Parties to submit this application on their behalf.

MW goal of only 1940 MW.[2] This Decision made several key legal errors.

- First, it ignored the undisputed legislative and administrative history of the NEM statute, which are directly at odds with the conclusion in the Decision.

- Second, it wrongly concluded that the legislature must have meant "non-coincident" peak demand when it changed the statutory definition from a hard-coded number representing system peak demand to "aggregate customer peak demand." In fact, the legislature's explanation of why it was amending the statute, to account for direct access customers, is directly at odds with the one adopted in the Decision.

- Third, the Decision failed to explain why the CPUC reversed its own longstanding interpretation of the NEM statute.

- Fourth, the Decision did not proceed in the manner required by law, due process, and by the Commission's procedures.

These are all fatal legal errors.

Despite significant concern over these legal errors, the Moving Parties fully support solar power. Indeed, customers will seek to install solar power on their homes and businesses long after the correctly interpreted 5% cap is met. The Moving Parties agree that regulatory policy should find ways to accommodate such desires. However, this should not be accomplished by illegally repudiating the longstanding and accepted meaning of the NEM statute. The CPUC should vacate the Decision and the CPUC and the legislature should move forward with a measured process to design and implement a fair compensation basis for exports from projects exceeding the 5% cap. If an expansion of the cap is needed while this work is underway, as explained below PG&E is willing to voluntarily extend NEM to some additional projects beyond those that would fit within the correctly calculated 5% cap, as discussed in more detail below. SCE is far from meeting the cap.

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[2] See February 12, 2010 Assembly Floor bill analysis of AB 510 (http://www.leginfo.ca.gov/pub/09-10/bill/asm/ab_0501-0550/ab_510_cfa_20100212_162638_asm_floor.html)

I. 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."[3] Nowhere in its August 6, 2010 statement 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 statutory interpretation issue should take place. Notably, the Scoping Memo and Ruling of November 9, 2010 ("Scoping Ruling"), 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.[4] 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***."[5]

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.[6] 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

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[3] August 6, 2010, Prehearing Conference Statement of the IREC at 2-3.

[4] July 25, 2011, Motion for Clarification of the IREC.

[5] *Id.* at 4 (emphasis added).

[6] December 14, 2011, [ALJ's] Ruling Granting Motion of the IREC and Requesting Comment on California Solar Initiative Phase II and III Issues at 4 (emphasis added).

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 customer peak demand***. This demand interval is either 5, 30,or 60 minutes, depending on the utility."[7]

The ALJ's Ruling noted that the "Scoping Memo of November 9, 2010 . . . did not explicitly mention review of net metering caps"[8] and noted that "IREC's motion asks for clarification that the Commission will explicitly address this topic." The ALJ Ruling included figures for each utilities' understanding of their current NEM caps, which together added up to approximately 2,400 MW, and where each utility stood with respect to capacity installed under the cap, which then together added up to approximately 841 MW of NEM projects installed.[9] The ALJ's Ruling noted Solar Alliance's argument that the issue "should be addressed immediately as ***the utilities are rapidly approaching their individual net metering caps***." 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.***[10]

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

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[7] *Id.* at pp. 2-4.
[8] *Id.* at p. 2.
[9] See Table in ALJ Ruling, *Id.* at p. 3.
[10] *Id.* at p. 4.

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.

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 Commission proceeding, a group of solar parties including IREC ("Solar Parties")[11] raised a new proposal that the Commission should interpret "aggregate customer peak demand" to mean individual customers' aggregate non-coincident peak demand.[12] 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."[13] Solar Parties provided no explanation why they had not previously identified this issue in any prior pleading, arguing only that "The Ruling does not limit parties' comments to what the proper time interval should be in calculating the cap."[14]

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.[15] Replies were filed on January 27, 2011. No workshops were scheduled.

Despite the fact that this proposal was not described in any party's prehearing comments,

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[11] The Interstate Renewable Energy Council, The Vote Solar Initiative, California Solar Energy Industries Association, Solar Energy Industries Association, and the Sierra Club, hereinafter referred to as the "Solar Parties."

[12] January 17, 2012, Comments of the [Solar Parties] on the ALJ's Ruling Granting Motion of [IREC] ("Solar Parties' January 17, 2012 Comments").

[13] *Id.* at 3.

[14] *Id.*

[15] The Commission noted that it 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.

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 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 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 30, 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."[16]

A workshop was subsequently held in this proceeding on June 25th to evaluate how the new cap might be calculated. Estimated figures provided in the Commission's agenda for that workshop suggest that the new NEM cap for the three IOUs will be approximately 5,265 MW,[17] well over double the long understood figures in the ALJ's December 14, 2011 Ruling.

II. THE DECISION COMMITTED LEGAL ERROR BY IGNORING THE OVERWHELMING LEGISLATIVE AND ADMINISTRATIVE HISTORY DIRECTLY AT ODDS WITH ITS CONCLUSION

The Decision addresses the meaning of the words "aggregate customer peak demand" in Public Utilities Code section 2827(c)(1). The Decision concludes "we find the language of the statute itself to be ambiguous as to whether coincident or non-coincident peak demand should be used as the denominator for purposes of calculating the cap in NEM for the various utilities. We agree with The Utility Reform Network (TURN) that the words of the statute are 'inherently ambiguous' in this regard." (Decision, p. 11). Moving Parties do not dispute this conclusion. However, the CPUC's next action, to completely ignore the legislative and administrative history of this statute, is objectionable and errs under the law.

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[16] Decision at 1.

[17] The workshop agenda included figures for estimated utility annual non-coincident load, showing figures of 48,289 MW for PG&E, 44,775 MW for SCE, and 12,237 MW for SDG&E. Together these add up to 105,301 MW; five percent of that figure is 5,625 MW.

The California Courts have enunciated standards for courts or state agencies construing a statute:

> 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.

People v. Woodhead (1987) 43 Cal.3d 1002, 1007-1008 (emphasis added)(citations omitted). Similarly, in *Lewis v. Ryan* (1976) 64 Cal.App.3d 330, 333-35, the Court of Appeal concluded that when legislative history exists giving meaning to the legislative intent, it must be considered. *See also California Manufacturers Ass'n. v. Public Utilities Commission* (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* (2004) 125 Cal.App.4th 425, 437, 440 (legislative history entitled to "great weight"; long-continued administrative construction followed).

Thus, after determining that language is ambiguous and subject to alternative reasonable interpretations, the legislative and administrative history must be examined. The Decision illegally failed to consider either of these two requirements. It must be vacated.

A. The Legislative History Is Directly At Odds With The Conclusion In The Decision And Compels An Opposite Result

The overwhelming and undisputed evidence shows that the Decision fails to address or

conform with the longstanding, consistent understanding of this statute by the legislature, the CPUC, the utilities, and the industry. Over the last 15 years, each time the Legislature authorized increases to the NEM cap, the increase was 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 coincident peak demand. As the lengthy legislative history demonstrates, at no time was the concept of redefining the words of the statute to cover the sum of individual customers' non-coincident maximum demands considered by the legislature, let alone adopted. It was never proposed or considered. Rather, legislative history refers only to the concept of coincident peak demand, which the IOUs have used since Section 2827 was enacted. Indeed, the Decision acknowledged that 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. (Decision, pp. 8-9).

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. The statute stated that 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 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.[18] That forecast was of coincident peak load.

Three years later, in Assembly Bill (AB) 1755 (Chapter 855, Statutes of 1998), the Legislature amended the PUC Section 2827 reference to the appropriate denominator for calculation of the cap. This amendment recognized that 1) utility peak demand would change over time, and 2) with electric industry restructuring, other load serving entities would be providing generation service to customers in IOU service areas.

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[18] The bill specifically set the cap at "0.1 percent of the utility's peak electricity demand forecast for 1996, as described by the following schedule:" Numbers specified in the bill for PG&E were 17,426 MW for PG&E (17 MW NEM cap), 19,725 MW for SCE (20 MW NEM cap), and 3,608 MW for SDG&E (3.6 MW NEM cap).

With this 1998 amendment, the statute's description of the cap changed from "utility's peak electricity demand forecast for 1996" to the language that is still in use today: "electric service provider's aggregate customer peak demand." At that time, the cap remained at 0.1 percent. Nothing in the legislative history of this bill suggests that the legislature planned any change in how to calculate the cap from the method in the original statute. Nor is there a single word suggesting that utilities should try to guess the maximum load of each of millions of different customers at different times. Instead, as discussed in more detail in section III below, the legislature was adjusting the statute and the description of the cap to accommodate the establishment of Direct Access (DA).

Most importantly, 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 its limit. For example, in 2006, as part of Senate Bill 1, the legislature raised the cap from 0.5 percent to 2.5 percent. It explained why an increase in the cap was needed, stating that:

> Because net metering creates an additional, substantial subsidy, the amount of PV capacity that can be net metered has been limited by statute. PG&E and Southern California Edison are *nearing their limit*. Consequently, a bill raising the net metering cap is required for any significant solar capacity to be added.[19] [emphasis added]

The conclusion that various utilities were nearing their caps was reached using the consistently applied calculation of the cap based on coincident peak demand.[20] There was no way, in 2006, for the legislature to know whether PG&E and SCE were "nearing their limit" if the cap were based on the sum of individual customers' maximum demands in different time periods. In 2006, as in prior time periods, as no such data existed or was provided to the legislature, or was even discussed in setting the new cap.[21]

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[19] 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 at page 5.

[20] As explained in PG&E's January 17, 2012 comments, PG&E's 2006 coincident peak load reached a high figure of just over 20,000 MW. Half a percent of this figure was only 100 MW.

[21] The Decision accepted as undisputed that in 1998, when the Legislature first used the phrase "aggregate customer peak demand," individual peak demand was only measured for medium and large commercial and industrial customers, and did not exist on an individual basis for other customers. Decision, p. 8.

When it passed SB 1, the legislature was very clear that it was not supporting solar at any cost. SB 1 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." See new section 2827(c)(4), added by SB 1. 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.[22] 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.

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.[23]

In fact, the same analysis notes that the bill's sponsor 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.

(*Id*., p. 3). Ironically, this sponsor (Solar Alliance) is 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." But, if the legislature had intended the

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[22] http://www.cpuc.ca.gov/NR/rdonlyres/0F42385A-FDBE-4B76-9AB3-E6AD522DB862/0/nem_combined.pdf.

[23] 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.

interpretation adopted by the Decision, 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. Based on these values, the legislature said the 5% was enough to meet the CSI goal. However, that goal was only 1940 MW for the three IOUs, as municipal utilities serve the 1060 MW remainder of the 3,000 MW CSI goal. D.06-12-033, p. 29. 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 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.[24] 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's coincident peak demand, not on anything else, and the legislature did nothing to change that understanding in any way.[25]

It is a well-established principle of statutory construction that 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 agreed with the previous construction. See, e.g., *In re Gladys R*. (1970) 1 Cal.3d 855, 868-869; *Richfield Oil Corp.* v. *Public Util. Com*. (1960) 54 Cal.2d 419, 430; *Buckley* v. *Chadwick* (1955) 45 Cal.2d 183, 200; cf. *Palos Verdes Faculty Assn.* v. *Palos Verdes Peninsula Unified Sch. Dist*. (1978) 21 Cal.3d 650, 659. The Decision violates this legal requirement as well.

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[24] 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.

[25] See section II.B below for the CPUC history.

B. The Decision Ignores Contemporaneous Administrative Construction of The Statute.

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 service customers, the DA customers, and community choice aggregation customers. This forms a continuing "contemporaneous administrative construction" from 1998 to the present — fourteen (14) years of consistent administrative construction of the term. For many of these same years, the utilities, the CPUC, and the legislature have all understood this denominator to be a measure of the "coincident" load of all 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 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 the CPUC's 2005 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.[26] This report on the cap was based on the utilities' coincident peak demands, not on the sum of every single customer maximum load on different hours, days, months, or years.[27] 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." (page 15).

The CPUC did monitor net metering levels. It issued many reports showing the cap based on utilities' coincident peak demands. For example, its CSI CPUC Staff Progress Report, issued in January 2009 included a table of installed NEM projects for each utility, and where

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[26] 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.

[27] As explained above, PG&E's coincident peak demand at this time was only a little above 20,000 MW, so 0.5% of this figure was only 100 MW.

each utility stood against the cap.[28] It was based on coincident peak demand. 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.[29] These figures were based on utility coincident peak demand, not a sum of individual customer's maximum demands across different time periods.[30]

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 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." CPUC NEM Report, p. 14.[31] 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.[32]

In 2011, the CPUC 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.

See CPUC's April 2011 report to the legislature.[33]

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[28] http://www.cpuc.ca.gov/NR/rdonlyres/05448F68-F10D-492F-BD1E-6AF96854C15D/0/Jan09.pdf, at page 15.

[29] The CPUC's analysis of AB 560 can be found at http://docs.cpuc.ca.gov/word_pdf/REPORT/100317.pdf. The CPUC vote to support this report to the legislature was 5-0. See results of May 7, 2009 CPUC meeting, agenda item 42, at http://docs.cpuc.ca.gov/published/agenda/docs/3233_results.pdf.

[30] See Table 1 in the CPUC report on Estimated NEM penetration required to achieve CSI goals, which is at page 3 of the legislative report above.

[31] It may be found at http://www.cpuc.ca.gov/NR/rdonlyres/0F42385A-FDBE-4B76-9AB3-E6AD522DB862/0/nem_combined.pdf.

[32] Energy Division letter dated December 7, 2009, accepting PG&E Advice Letter 3555-E.

[33] This report can be found at ftp://ftp.cpuc.ca.gov/gopher-data/energy_division/csi/CSI%20Report_Complete_E3_Final.pdf, p. 66.

Thus, the CPUC told the legislature when the cap was 0.5% that this cap was equal to approximately 100 MW for PG&E. When the legislature increased the cap to 5%, the CPUC told the legislature this added up to about 1040 MW for PG&E.[34] 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 doubled this cap to over 2400 MW for PG&E is legal error.

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

III. THE DECISION ERRED IN CONCLUDING THAT THE LEGISLATURE INTENDED THE WORDS OF THE STATUTE TO MEAN "NON-COINCIDENT" PEAK DEMAND.

In briefing on the Decision, the Joint NEM Parties argued that the "non-coincident" interpretation was legally correct because the legislature could have just said "peak demand." By adding the words "aggregate customer" before "peak demand", the Joint NEM Parties contended, the legislature must have meant to adopt the sum of individual customers' non-coincident maximum demands. They argued that this meaning avoids making the words "surplusage." With little explanation, the Decision appeared to adopt this conclusion. It stated that "it seems unlikely, given the choice of words, that the Legislature intended the words 'aggregate customer peak demand' to simply mean coincident peak demand" (Decision p. 11), and instead adopted the sum of individual customers' non-coincident maximum demands. However, this conclusion is factually and legally inaccurate. There is absolutely no evidence the legislature intended these words to adopt a non-coincident demand measure, and overwhelming evidence that the language modification was intended to serve a different purpose, that of addressing electric deregulation, including DA service. The term "aggregate customer" is not surplusage, as these words were added in 1998 along with electric industry restructuring, and

[34] See citations in footnotes 26 and 33 above.

simply reflected the fact that the IOUs were not the only entities serving customers.

The meaning of the words "aggregate customer" arises from electric industry restructuring in the late 1990s. 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…~~

AB 1755, draft of February 4, 1998. (Italics and strikeouts in original.) This language was modified in the March 9, 1998 version of the bill to make clear that, in 1998 when restructuring was implemented, utilities were not the only providers of electric service.[35]

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 2827 were being changed to electric service provider (ESP) to account for the restructured electric business in California.[36] In addition, after passage of AB 1755, in a letter of explanation

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[35] See revised version of bill dated March 9, 1998 at http://www.leginfo.ca.gov/pub/97-98/bill/asm/ab_1751-1800/ab_1755_bill_19980309_amended_asm.pdf, adding the definition of "electric service provider" and further revising the text of what is now at section 2827(c)(1). The legislative report dated June 8, 1998 stated that "The bill changes the buy back cap to 0.1% of each sellers' peak demand and further caps the buy back to 0.1% of the demand in each utility's service area." http://www.leginfo.ca.gov/pub/97-98/bill/asm/ab_1751-1800/ab_1755_cfa_19980608_130127_sen_comm.html. There was no mention of adding up the separate peak demands of each customer in different hours.

[36] See legislative report dated June 23, 1998, which stated "Current law was written in the context of monopoly utility generation. Those days have changed with customers now purchasing power from a variety of providers. This bill updates the wording of the statute to reflect this." That report may be found at http://www.leginfo.ca.gov/pub/97-98/bill/asm/ab_1751-1800/ab_1755_cfa_19980623_143102_sen_comm.html. See also additional quotes in Opening Comments of Southern California Edison on Proposed Decision filed May 1, 2012, p. 4, fn. 3.

to California Governor Pete Wilson, Assembly Member Fred Keeley stated that the bill's purpose was to update the 1995 net metering law to accommodate electricity deregulation.[37]

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 customer peak demand* to account for the fact that the calculation of the statutory obligation would require aggregation of each ESP's peak demand to reach a total peak demand.

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 cap. Such a significant change in the net metering cap would have been included in the legislative intent language, or the

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[37] 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").

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 measure of customer demand to which the percentage cap applied.

IV. THE DECISION FAILED TO EXPLAIN WHY THE CPUC REVERSED ITS OWN LONGSTANDING INTERPRETATION OF THE NEM STATUTE

Up until the Decision, the CPUC repeatedly stated that it understood the statutory cap the same way everyone else did, as described in detail in section II.B above.

This was pointed out in detail in briefs by several of the Moving Parties. These comments were mentioned on pages 7-8 of the Decision, but the Decision offers not one word of explanation for the reversal of the CPUC's longstanding interpretation, other than a claim that this is what the legislature must have intended (addressed above). This is clear legal error for several reasons.

Public Utilities Code 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.[38] The CPUC has itself interpreted Section 1705 as requiring "sufficient findings and conclusions in order to assist the Court in ascertaining the principles relied upon by the Commission, and assist the parties in preparing for rehearing or court review."[39] Furthermore, "Findings of fact and conclusions of law must be based on the evidence in the proceeding." *Id*.

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. These issues are clearly material, and the Commission is legally obligated to resolve them by setting forth findings of facts and conclusions of law

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[38] *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.

[39] D.06-05-019.

supporting its position.

Other authorities compel a similar result. "'[A]n agency changing its course … is obligated to supply a reasoned analysis for the change.'" *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)). "'[R]easoned decision making … necessarily requires the agency to acknowledge and provide an adequate explanation for its departure from established precedent,' And an agency that neglects to do so acts arbitrarily and capriciously." *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] or offer a reasoned basis for its departure from precedent"). "A gross abuse of discretion occurs where the public agency acts arbitrarily or capriciously." *City of Stockton v. Marina Towers LLC* (2009) 171 Cal.App.4th 93, 114.

As noted, the Decision does not explain why the Commission changed its interpretation of Section 2827(c)(1). For example, in 2003, the CPUC in D.03-02-068 concluded that NEM caps were included to minimize potential financial impacts of the program. It offered no explanation now why it more than doubled the cap, long before receiving the report requested in the Decision on the impacts of this decision on the rates for other customers.

V. THE DECISION DID NOT PROCEED IN THE MANNER REQUIRED BY LAW AND VIOLATED DUE PROCESS.

As demonstrated above in the 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' rights and prejudicing the interests of the parties. Courts have overturned decisions where the Commission failed to follow its own procedures and "proceed in a manner required by law."[40]

[40] *Southern Cal. Edison Co. v. PUC*, 140 Cal.App.4th 1085, 1106 (2006) (annulling the Commission's

For example, in *Southern California Edison*,[41] 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[42] 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."[43] 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.[44]

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

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decision where the Commission failed to proceed in the manner required by law, in departing from the scoping memo and 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).

41 140 Cal. App. 4th 1085 (2006).

42 *See* Section 1701.1(b).

43 140 Cal. App. 4th 1085, 1106.

44 140 Cal. App. 4th 1085, 1106.

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.

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."[45] As the ALJ's Ruling noted, the "Scoping Memo of November 9, 2010 . . . did not explicitly mention review of net metering caps."[46] 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 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

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[45] D.97-11-021, mimeo p. 14.
[46] ALJ Ruling at 2.

"issues of public policy, economic effects,[47] 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 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.

Evidence that should have been considered in making a policy determination about whether to change or recommend an in increase the NEM cap included rate impacts on non-participating customers, the estimated MW increase resulting from the proposed new measure, how that measure compared with legislative and CPUC statements on the NEM cap, how close the industry was to meeting the cap, the need for full retail compensation under NEM in time of

[47] 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.

falling solar prices, and the alternatives available. None of these were considered.

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." 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.

VI. THERE ARE MANY LAWFUL WAYS THE COMMISSION CAN CONTINUE TO SUPPORT THE EXPANSION OF SOLAR POWER WITHOUT VIOLATING THE NEM STATUTE

Notwithstanding the fact that this decision contains multiple significant legal errors, the Moving Parties recognize the laudable intent of the Commission to support continued customer-side renewable generation growth in California, as well as signaling its willingness to consider and address the issues of shifting costs between NEM and other customers. The Commission should advance its goals through a deliberate and methodical review of NEM.

Moving Parties submit that there are means available to the Commission to undertake a review of NEM while preventing interference with solar power development in the near term. Even if that does not occur soon enough, compromises are available if needed. PG&E is willing to voluntarily increase the combined cap on the total rated generating capacity used by eligible

customer-generators from the 1044 MW in its current tariff to 1600 MW, or as needed to accommodate projects satisfying the current tariff requirements through December 31, 2014, whichever is reached earlier. If the December 31, 2014 date is reached first and the level of installations has not yet reached the 1044 MW level, the NEM program would remain open until the 1044 MW level is reached. SCE is far away from reaching the cap. The Moving Parties recognize that providing both certainty with regard to the net energy metering cap and an increase in its level will ensure that rooftop solar investment in the state of California by homeowners and businesses is not slowed by any concern regarding legal challenges to the Commission's implementation of the NEM program.

These proposals allow California policymakers including the Governor, the Legislature, the Commission, the utilities and others to continue on the important work outlined in several recent decisions addressing and examining the cost burden absorbed by non-solar customers when solar customers significantly reduce or effectively zero out their bills.[48] The State must address the policy issues, rate design and the framework for a sustainable successor program to the current retail net metering compensation method for solar customers, including ensuring that any cost shifts be addressed. The continued proliferation of roof-top solar should create sustainable benefits without placing an undue burden on nonparticipating customers.

VII. CONCLUSION

The Moving Parties urge the Commission to vacate its unlawful Decision and reaffirm its longstanding prior approach to calculating the NEM cap. Only the legislature can rewrite this statute. The Moving Parties therefore request that the Commission grant rehearing, accept the proposed compromise and move forward with the legislature to find new ways to compensate solar and other renewable projects for the power they export to the grid.

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[48] This cost shift was addressed in D.11-12-053 at page 23 (adopting non-residential rates for PG&E in its 2011 General Rate case, Phase 2, rejecting claims that solar rates subsidize other customers) and in the Order Instituting Rulemaking 12-06-013 to Examine Residential Rate Design, issued June 28, 2012, at pages 14-18.

Respectfully submitted,

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June 29, 2012