



**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)

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

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Pursuant to Rule 16.1 of the Rules of Practice and Procedure of the California Public Utilities Commission, the Solar Energy Industries Association (SEIA),<sup>1</sup> Sierra Club and Vote Solar Initiative<sup>2</sup> respond to the Joint Application for Rehearing of Decision No. 12-05-036 of Pacific Gas and Electric Company, Southern California Edison Company, the Energy Producers & Users Coalition and the California Large Energy Consumers Association (Joint Parties Rehearing), the Application for Rehearing of Decision No. 12-05-036 of San Diego Gas & Electric Company (SDG&E Rehearing) and the Application for Rehearing by the Utility Reform Network of Decision 12-05-036 Reinterpreting Sections 2827(c)(1) (TURN Rehearing) (collectively, the Rehearing Applications). In short, the Rehearing Applications contend that by interpreting the language “aggregate customer peak demand” contained in Public Utilities Code section 2827(c)(1) to mean “the aggregation or the sum of individual customer’s peak demand” the Commission committed legal error. As illustrated below, the assertions of legal error made in

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<sup>1</sup> The comments contained in this filing represent the position of the Solar Energy Industries Association as an organization, but not necessarily the views of any particular member with respect to any issue.

<sup>2</sup> In accordance with Rule 1.8(d), Counsel for SEIA is authorized to sign and tender this document on behalf of Sierra Club and Vote Solar Initiative.

the Rehearing Applications are themselves erroneous. The Commission's interpretation of the statutory language should stand.

## I. INTRODUCTION

The term "aggregate peak customer demand" is not defined in the Public Utilities Code.

Accordingly, as recognized in the Decision:

[T]he responsibility falls upon this Commission to interpret and clarify the meaning of this phrase in the context of a program the Legislature has entrusted this agency to administer. The Commission, as the regulatory agency with access to relevant data and specialized expertise in this field, must consider a variety factors to interpret this provision.<sup>3</sup>

In this context, the Commission clarified that the term "aggregate customer peak demand" contained within the Net Energy Metering (NEM) statute which the Commission has been entrusted to administer, "means the aggregation, or sum, of individual customers' peak demands, i.e., their non-coincident peak demands."<sup>4</sup> The Rehearing Applications raise various claims of legal error associated with the Commission's interpretation, but the vast majority of the claims revolve around the core assertion that the Commission *changed* its interpretation of the statutory term. The record, however, shows that this is not the case. Prior to the Decision, the Commission had never rendered a definitive interpretation of the statutory language. Once this flawed factual predicate is removed, the Rehearing Applications' arguments that the Commission reached a determination at odds with administrative and legislative history evaporate and all that is left are arguments that the Commission failed to proceed in a manner required by law in rendering its interpretation of statutory language. As illustrated below, however, these arguments, are based on a contrived portrayal of the process which occurred prior to the Commission Decision and do not support a claim of legal error.

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<sup>3</sup> Decision 12-05-036, at pp. 11-12.

<sup>4</sup> *Id.* at p.1.

The Rehearing Applications failed to present any arguments which demonstrate legal error by the Commission. Accordingly, these Rehearing Applications should be denied.

## **II. THE COMMISSION’S INTERPRETATION OF THE STATUTORY LANGUAGE MUST BE AFFORDED GREAT DEFERENCE**

The judicial standard of review to determine the lawfulness of Commission action depends on the nature of the alleged violation. “In general, an agency’s interpretation of statutes within its administrative jurisdiction is given presumptive value as a consequence of the agency’s special familiarity and presumed expertise with satellite legal and regulatory issues.”<sup>5</sup> Therefore, in cases where the Commission is interpreting the Public Utilities Code, such as the meaning of “aggregate customer peak demand” under Section 2827(c)(1), the Commission interpretation “should not be disturbed unless it fails to bear a reasonable relation to statutory purposes and language.”<sup>6</sup>

In this instance, the Commission’s interpretation clearly bears a “reasonable relation” to both the statutory purpose of the NEM statute as well as to the language of the statute. Thus, in looking at the language of the statute, the Commission assessed that:

The phrase ‘peak demand’ is used in multiple instances in the Public Utilities Code to signify coincident peak demand. If the Legislature intended the language in Section 2827 to mean coincident peak demand, as distinct from non-coincident peak demand, it could have chosen the term ‘peak demand’ as used elsewhere in the Pub. Util. Code to avoid surplusage and internal inconsistency in the Pub. Util. Code.<sup>7</sup>

Similarly, in assessing the statutory purposes in light of the statutory language, the Commission noted that “Section 2827(a) enumerates several goals of the NEM program

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<sup>5</sup> *PG&E Corp. v. Public Utilities Com’n* (2004) 118 Cal.App.4th 1174, 1194 (citing *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 11).

<sup>6</sup> *Utility Consumers’ Action Network v. Public Utilities Comm’n* (2010) 187 Cal.App.4th 688, 698 (citations omitted).

<sup>7</sup> *Decision 12-05-036* at p. 1.

including encouraging substantial private investment in renewable energy resources and stimulating in-state economic growth.”<sup>8</sup> A methodology which provides for a substantial amount of MW under the cap is consistent with this statutory purpose.

### **III. THE COMMISSION DID NOT COMMIT LEGAL ERROR BY REACHING A DETERMINATION “DIRECTLY AT ODDS” WITH LEGISLATIVE AND ADMINISTRATIVE HISTORY**

The Rehearing Applications assert that if the language of the statute is ambiguous as the Commission determined, then it was incumbent on the Commission to rely on legislative history -- both concurrent and subsequent -- as well as its contemporaneous administrative construction in order to interpret the meaning of the statute. The Rehearing Applications assert that the Commission failed to do so, thus committing legal error. The arguments made in the Rehearing Applications fall flat as (1) the contemporaneous legislative history provides no insight into the meaning of “aggregate peak customer demand,” (2) the subsequent legislative history, at best, illustrates legislative acquiescence on the utilities’ interpretation of the subject language, not the Commission’s interpretation, and (3) the principle of contemporaneous administrative construction is inapplicable because, prior to Decision 12-05-036, the Commission had not issued a definitive interpretation of the subject statutory language.

#### **A. Contemporaneous Legislative History Provides No Direct Insight into the Meaning of the Term “Aggregate Customer Peak Demand”**

As noted by TURN, “the majority of the contemporaneous legislative analyses do not even reference the issue of the NEM CAP.”<sup>9</sup> Similarly, TURN notes that the legislative history “does not attempt to define the phrase “aggregate customer peak demand.”<sup>10</sup> Thus, the best

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<sup>8</sup> *Id.* at 12.

<sup>9</sup> Application for Rehearing by the Utility Reform Network of Decision 12-05-036 Reinterpreting Section 2827(c)(1), R. 10-05-004 (June 29, 2012) (TURN Rehearing) at p. 8.

<sup>10</sup> *Id.* at p. 9

TURN could surmise after a “careful review” of the contemporaneous legislative history was that, given that one of the goals of the applicable statute was to “accommodate electricity deregulation” (i.e., that the distribution system now served the load of both bundled IOU customers as well as direct access customers purchasing generation from electric service providers), “the legislative history of AB 1755 indicates that the words ‘aggregate customer’ were added in 1998 not to institute a dramatic change from using the ‘utility’s peak demand’ in the NEM cap calculation. Rather this phrase was inserted to ensure a NEM cap calculation for every electric service provider.”<sup>11</sup> In short, TURN is trying to argue that the legislature added the words “aggregate customer” as a modifier to the term “peak demand” in order to encompass the collective demand from bundled, community choice and direct access customers in a utility service territory whereas “peak demand” is limited to bundled utility customers alone.

This assertion does not withstand scrutiny because it directly contravenes Commission interpretation and utility practice. For example, Public Utilities Code Section 399.20(f) requires an electrical corporation to make a feed-in-tariff available “based on the ratio of [its] *peak demand* compared to the total statewide *peak demand*.” The Commission has affirmed what is actually the investor owned utilities’ (IOU) practice of “including bundled service, direct access and community choice aggregation” in this “peak demand” calculation.<sup>12</sup> Indeed, the coincident peak demand of all customers in a service territory was again used to calculate “peak demand” in

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<sup>11</sup> *Id.*, at p. 11; *See also* comparable argument made in Joint Application for Rehearing of Decision No. 12-05-036 of Pacific Gas and Electric Company, Southern California Edison Company, the Energy Producers & User Collation and the California Large Energy Consumers Association Rehearing, R. 10-05-004 (June 29, 2012 (Joint Parties Rehearing) at p. 16 (“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 total peak demand).

<sup>12</sup> Rulemaking 06-05-027, Dec. 07-07-027, Option Adopting Tariffs and Standard Contracts for Water, Wastewater and Other Customers to Sell Electricity Generated from RPS-Eligible Renewable Resources to Electrical Corporations ( July 26, 2007) at pp. 8-9.

the context of a bill credit program for local governments under Public Utilities Code Section 2830(h).<sup>13</sup> In short, as the IOUs know, the term “peak demand” has been defined to mean total coincident demand in a utility service territory. The terms “peak demand” and “aggregate customer peak demand” cannot mean the same thing.

**B. Subsequent Legislative History Does not Dictate an Interpretation of “Aggregate Customer Peak Demand”**

Both the Joint Rehearing and the SDG&E Rehearing assert that legislative history subsequent to the insertion of the term “aggregate customer peak demand” into the Public Utilities Code requires that term to be interpreted to mean coincident peak demand.<sup>14</sup> They base this assertion on two aspects of the subsequent legislative history. The first is 2010 legislative analyses that indicate that the NEM cap was being raised due to concern that the IOUs would reach the MW cap prior to achieving the MW goals under the California Solar Initiative (CSI).

As argued in these two Rehearing Applications:

But if the Legislature had intended the interpretation adopted by the Decision, there would have been no need to increase the cap beyond the 2.5% to accommodate the CSI. **This discussion of the need to increase the cap was based on the coincident peak numbers that had been presented to the legislature and the CPUC.**<sup>15</sup>

This argument, however, merely serves to underscore a point which SEIA, Sierra Club and Vote Solar have been making throughout this proceeding -- all prior estimates of MW available under the NEM cap have been based on calculations which have been made by the IOUs. However, it is not the IOUs, but the Commission, which is charged with interpreting the Public Utilities Code.

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<sup>13</sup> SCE, Schedule RES-BCT, Local Government Renewable Energy Self-Generation Bill Credit Transfer, filed Dec 2, 2011, ¶ 8 (referencing Decision 07-07-27).

<sup>14</sup> Joint Rehearing at pp. 10-11; Application for Rehearing of Decision No 12-05-036 of San Diego Gas & Electric Company, R. 10-05-004 (June 29, 2012) (SDG&E Rehearing) at pp. 18-19.

<sup>15</sup> Joint Rehearing at pp. 10-11.

The second argument advanced in both the Joint Rehearing and the SDG&E Rehearing regarding subsequent legislative history pertains to the 2011 amendment to the NEM law which modified the statute to add renewable projects to the list of technologies eligible for NEM. While this bill did not raise or change the cap, the Senate Analysis of the bill states that it “retains the total capacity for net metering at 5% of the utility’s aggregate peak demand,”<sup>16</sup> and, as noted in the Rehearing Applications, the analysis “specifically referred to CPUC report to the legislature which calculated that cap using coincident peak demand.”<sup>17</sup> Thus, the two Rehearing Applications argue the 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 have agreed with the previous construction.”<sup>18</sup> The cases relied upon for this principle are inapposite to the current situation.<sup>19</sup> The cited cases all involve instances where an agency or court has actively interpreted a statute to resolve a case or controversy and issued a legally binding decision or order. Other than D.12-05-036, as further discussed below, the Commission has never issued a binding order or decision regarding the calculation or interpretation of the NEM cap. To the contrary, the Commission had recognized that the appropriate interpretation of the statutory terminology” aggregate peak

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<sup>16</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>17</sup> Joint Rehearing at p.11; SDG&E Rehearing at p. 19.

<sup>18</sup> Joint Rehearing at p. 11.

<sup>19</sup> See Joint Rehearing at p. 11 *citing 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.

customer demand” was an open issue.<sup>20</sup> Accordingly there was no previous construction of which the legislature could “have been aware of” and “have agreed with.”

**C. Claims of “Contemporaneous Administrative Construction” Are Fatally Flawed Because the Commission Has Not Previously Issued a Definitive Interpretation of “Aggregate Customer Peak Demand”**

Both the Joint Rehearing and the SDG&E Rehearing raise the argument of “contemporaneous administrative construction” to support the argument that the statutory language “aggregate customer peak demand” means coincident peak load. As support for this argument, these parties rely on their own purported interpretation of the language as well as their own account of how the Commission has historically interpreted the term. The former argument is simply immaterial, while the latter is simply inaccurate.

Thus, in both the Joint Rehearing and the SDG&E Rehearing the assertion is made that:

For years the IOUs have been calculating and reporting the aggregate customer peak demand based on coincident peak load... this forms a continuing “contemporaneous administrative construction” from 1998 to the present -- fourteen years of consistent administrative construction of the term.<sup>21</sup>

The principle of affording some degree of deference to “contemporary administrative construction,” however, applies only where the *agency*, not the regulated entity, actively interprets a statute in a definitive manner, such as through a regulation.<sup>22</sup> The fact that the IOUs have purportedly been calculating “aggregate customer peak demand the same way for the past 14 years is irrelevant.<sup>23</sup>

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<sup>20</sup> See discussion in Section III. C, *infra*.

<sup>21</sup> See Joint Rehearing at p.12 ; SDG&E Rehearing at p. 19.

<sup>22</sup> See, e.g., *International Business Machines v. State Bd. of Equalization* (1980) 26 Cal.3d 923, 930-31 (applying principle of contemporary administrative construction to evaluation of agency regulation interpreting statute).

<sup>23</sup> Moreover, the assertion that all the IOUs have been calculating “aggregate peak customer demand” the “same way” for the past 14 years is suspect. See *Interstate Renewable Energy*

The two Rehearing Applications also cite a number of Commission reports, *e.g.*, the CSI Staff Progress Reports and Net Energy Metering Program Reports, in which the NEM cap was calculated using coincident peak demand.<sup>24</sup> They then use these reports as conclusive evidence that the Commission had rendered a definitive interpretation of the term aggregate peak customer demand which coincides with their interpretation. This is simply not the case.

The fact is that until Decision 12-05-036, the Commission has never interpreted the denominator of the net metering cap calculation, *i.e.*, the phrase “aggregate customer peak demand.” Almost three years prior to that decision the Interstate Renewable Energy Council (IREC) had sought Commission resolution of this issue. All parties to this proceeding were fully aware of IREC’s efforts and thus the unsettled nature of the net metering cap calculation.

Specifically, IREC raised this issue in a protest to PG&E Advice Letter 3555-E, in which PG&E proposed to voluntarily increase its net metering cap from the statutory level of 2.5 % to 3.5% of its aggregate customer peak demand.<sup>25</sup> In its protest letter, IREC stated as follows:

IREC notes that the terminology ‘aggregate customer peak demand’ is not a defined term within the net metering statutes. Accordingly, the Commission is left with some discretion in interpreting the meaning of this term. However, IREC is not aware of the Commission having reached any prior decision regarding the interpretation of this phrase. Against this backdrop, IREC questions whether the use of coincident system peak demand is the most reasonable basis for calculating “aggregate customer peak demand.” Another, and perhaps more reasonable,

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Council’s Reply Comments on the Proposed Decision Regarding Calculation of the Net Energy Metering Cap, R. 10-05-004 (May 7, 2012) at pp. 3-4.

<sup>24</sup> See Joint Rehearing at pp.112-13; SDG&E Rehearing at pp. 20-21.

<sup>25</sup> In the Joint Rehearing (at p. 13), the parties raise the argument that the PG&E advice filing raising the cap “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.” What the Joint Rehearing fails to point out is that the Commission’s acceptance was conditional, stating that “[u]ntil such time as the Commission may properly consider this issue, the definition of “aggregate customer peak demand” in Advice Letter 3555-E shall apply for PG&E.” See Letter from Cal. Pub. Util. Comm’n to PG&E re Revisions to Electric Schedule NEM—Net Energy Metering to Voluntarily Increase Pacific Gas and Electric Company’s Cap to 3.5 Percent, and Related NEM Administrative Matters (Dec. 7, 2009).

interpretation of the statutory language is that the Legislature intended that individual customer peak demands be aggregated.<sup>26</sup>

In its letter declaring AL 3555-E effective, the Commission acknowledged IREC's protest and stated that it "may, at a later date, consider an appropriate definition of 'aggregate customer peak demand' for the purposes of calculating the net energy metering (NEM) cap."<sup>27</sup>

The Commission indicated that "[s]uch consideration would likely occur" in R.08-03-008,<sup>28</sup> the predecessor docket to R.10-05-004. Thus the Commission clearly acknowledged in November 2009 that it had not previously rendered a definitive determination of the terminology "aggregate customer peak demand." Until the issuance of Decision 12-05-036, such a determination had not been made. Thus the assertions made in the Rehearing Applications that various reports prepared by Commission Staff and outside consultants represented a final Commission resolution of the issue are clearly erroneous.<sup>29</sup>

#### **IV. THE COMMISSION DID NOT ASSIGN THE LANGUAGE OF THE STATUTE A "PRACTICALLY IMPOSSIBLE" MEANING AT THE TIME IT WAS ENACTED**

SDG&E argues that the meaning of the statutory term "aggregate peak customer demand" cannot be considered ambiguous, as determined by the Commission, because a finding

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<sup>26</sup> Letter from IREC to Cal. Pub. Util. Comm'n re Support and Protest of Interstate Renewable Energy Council to Advice Letter 3555-E (Nov. 25, 2009).

<sup>27</sup> See Letter from Cal. Pub. Util. Comm'n to PG&E re Revisions to Electric Schedule NEM—Net Energy Metering to Voluntarily Increase Pacific Gas and Electric Company's Cap to 3.5 Percent, and Related NEM Administrative Matters (Dec. 7, 2009) (emphasis added).

<sup>28</sup> *Id.*

<sup>29</sup> Both the Joint Rehearing (at pp. 17-18) and the SDG&E Rehearing (at pp. 24-26) argue that the Commission failed to meet the requirements of Public Utilities Code Section 1705 by failing to set forth findings of fact and conclusions of law supporting the material issue of why it "changed its interpretation of Section 2827(c)(1)." As demonstrated herein the Commission did not change its interpretation. It had not previously made any interpretation of the statutory language. The Findings of fact and conclusions of law in the Decision are adequate to support the interpretation rendered.

of ambiguity requires that the language be “capable of two constructions, both of which are reasonable.”<sup>30</sup> SDG&E asserts that the Decision’s interpretation “is not a reasonable construction of the language given the apparently undisputed fact that ‘aggregate individual non-coincident peak demand’ would have been impossible to measure at the time statutory language was written.”<sup>31</sup> SDG&E is simply wrong -- the record of this proceeding -- which the Commission relied on in rendering its interpretation -- demonstrated that the non-coincident peak demand was a concept which the IOUs were very much familiar at that time the language was inserted into the Public Utilities Code and was a metric that not only was measured through load research but also was a standard tool in electric ratemaking.<sup>32</sup>

Even a cursory review of electric utility General Rate Case decisions from the early 1990s, *before* AB 1755 was enacted, shows that non-coincident demand was widely used in utility ratemaking – particularly for revenue allocation – and the utilities regularly calculated non-coincident demand for all types of customers. Thus, for example, the Commission decision addressing SCE’s 1996 General Rate Case contained the following discussion:

Edison proposes to characterize loads on its T&D system by a weighting of coincident and non-coincident demands, *an approach which was adopted in Edison’s last GRC*. As discussed above, coincident demand represents customer demand at the time of system peak, as measured by the probability of a generation outage, or LOLP. ***Non-coincident demand is the customer or customer group’s maximum demand on the system, as measured by the maximum loading on final line transformers or other points of connection to Edison’s T&D grid.*** Edison assigns 90 percent of marginal transmission costs to coincident and 10 percent to non-coincident demands. For marginal distribution costs, Edison assigns 32 percent to coincident and 68 percent to non-coincident demands.<sup>33</sup>

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<sup>30</sup> SDG&E Rehearing at p.10

<sup>31</sup> *Id.*

<sup>32</sup> See, e.g., Reply Comments of the Solar Energy Industries Association, California Solar Energy Industries Association and Constellation New Energy Inc. on the Proposed Decision Regarding Calculation of the Net Energy Metering Cap, R. 10-05-004 (May 7, 2012) at pp. 3-4.

<sup>33</sup> Decision 96-04-050 at p. 57 (emphasis added); See also, Decision 92-06-020, 44 CPUC 2d 471, at p. 19 and Findings of Fact 21 and 22.

Similarly, in the 1990s, PG&E used non-coincident demand at the final line transformer to allocate secondary distribution costs, a practice which it continues today.<sup>34</sup>

Finally, it should be noted that the fact that non-coincident demand is readily calculated by the use of traditional load research techniques was recently reaffirmed at the workshops held in response to Decision 12-05-036. As presented at the workshop, the IOUs stated that “[i]n the NEM Cap calculation formula, for the total non-coincident peak value, the IOU’s approach is to use the value calculated in the annual class load studies” and that “[t]he availability of more interval data will help enhance the sampling design and sample size to ensure that the estimated load profiles have the desired levels of precision. After a certain point, adding more samples does not significantly improve the precision levels.”<sup>35</sup> The fact that non-coincident peak demand can be determined from annual load studies further supports the fact that it was capable of being calculated when the term “aggregate customer peak demand” was inserted into the statute.

Thus, the Commission’s interpretation of the statutory language to mean aggregate individual customer non-coincident peak demand did not, as SDG&E states, assume a legislative intent that is an “unreasonable, impracticable or unachievable result.”<sup>36</sup>

## **V. IN DETERMINING THE MEANING OF THE STATUTORY LANGUAGE THE COMMISSION DID NOT VIOLATE ITS OWN PROCEDURES**

In both the Joint Parties Rehearing and the SDG&E Rehearing the argument is made that the Commission, by issuing a decision in this proceeding which interpreted the meaning of the statutory language which sets the cap for the net metering program, violated its own procedures

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<sup>34</sup> See D. 92-12-057 at pp. 270-271; *see also* Decision 93-06-087, at p. 161 (referring to “the system-wide coincident and non-coincident demand factors that have been used since PG&E’s 1987 GRC).

<sup>35</sup> “Estimation of Total of Non-Coincident Peak Demand” CPUC NEM Cap Calculation Workshop Joint IOU Presentation June 25, 2012, at slide 3.

<sup>36</sup> SDG&E Rehearing at p.10.

and thus did not proceed in a manner required by law.<sup>37</sup> This argument, which is premised on the assertion that issue of the methodology for determining the net metering cap was not within the scope of this proceeding, is ill-founded, and is undercut by the record of the proceeding. Indeed, the argument made in the Rehearing Applications is a strained interpretation of the procedural record in an effort to create a denial of due process where there was none.

The Joint Parties Rehearing and the SDG&E Rehearing are correct on one matter -- the initial scoping memo issued in this proceeding on November 9, 2010 did not specifically delineate the issue of the appropriate method for calculating the net metering program cap established in Section 2827 (c)(1). It was this lack of clear delineation which drove IREC to file a Motion in July 2011 seeking clarification on the scope of this proceeding, in particular requesting that the scope of the proceeding include the resolution of the appropriate method for calculating the net metering program cap established in Public Utilities Code § 2827(c)(1).<sup>38</sup> The Commission responded to this motion through a ruling issued on December 14, 2011 which provided that:

***This ruling grants a motion*** by the Interstate Renewable Energy Council (IREC) requesting the ***Commission consider the appropriate method of calculating the net metering cap within Phase II of this proceeding.***<sup>39</sup>

Despite IREC's clear request that the issue of the methodology calculating the net metering cap as established by statute be considered within the scope of the proceeding and the Commission's clear granting of the request, the Rehearing Applications argue that because IREC, at that point in the proceeding, had not made the specific proposal that the applicable

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<sup>37</sup> See Joint Rehearing at pp. 18-22; SDG&E Rehearing at pp. 26-30.

<sup>38</sup> Motion for Clarification of the Interstate Renewable Energy Council, R. 10-05-004 (July 25, 2011) (IREC Motion).

<sup>39</sup> Administrative Law Judge's Ruling Granting Motion of the Interstate Renewable Energy Council and Requesting Comment on the California Solar Initiative Phase II and Phase III Issues, R. 10-05-004 (December 14, 2012) at p. 1.

statutory language setting the cap should be interpreted to mean the sum of individual customer's peak demand, that the issue was not properly identified within the scope. As support for this contorted argument the Rehearing Applications provide their interpretation of the IREC Motion and the Commission's response thereto. Thus, the argument is made that "IREC's Motion itself identified what appeared to be wholly separate issue -- whether the utilities demand intervals used to measure aggregate customer peak demand should be consistent statewide"<sup>40</sup> -- and that the ALJ's ruling was on "determining what demand intervals should be used to calculate aggregate customer peak demand."<sup>41</sup> Neither of these assertions, however are correct.

The IREC Motion never mentioned the term "demand intervals." Rather three times within a short four page pleading IREC mad its request very clear:

IREC requests that the Commission clarify that the determination of the appropriate method for calculating the net metering program cap established in Public Utilities Code § 2827(c)(1) is within the scope of the proceeding. (IREC Motion at p.1) .....

Commission should clarify that it intends to address the very important, but as yet unresolved, issue of what constitutes "aggregate customer peak demand" for the purposes of calculating the net energy metering cap in Phase 2 of this current proceeding (IREC Motion at p.3 ) .....

Consequently, IREC urges the Commission to clarify the scope of the proceeding to include resolution of the appropriate method for calculating the net metering program cap established in Public Utilities Code § 2827(c)(1) by setting this issue for comment and decision in the upcoming Phase 2 of R.10-05-004. (IREC Motion at p.4 )

Despite IREC's repeated request in its Motion, if the Rehearing Parties were uncertain as to the breadth of IREC's Motion, they could have submitted a response to the Motion setting

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<sup>40</sup> Joint Rehearing at p. 21; SDG&E Rehearing at p. 29.

<sup>41</sup> Joint Rehearing at p. 20; SDG&E Rehearing at p.28.

forth their interpretation or seeking further clarity. With the exception of the Solar Alliance, which filed in support of IREC, no party responded to the IREC Motion.<sup>42</sup> Apparently IREC's Motion was sufficiently clear to the Rehearing Applicants at the time it was filed.

Moreover, as noted above, the Commission's response to IREC's Motion was to grant the motion -- *i.e.*, grant the request to address and resolve the appropriate method of calculating the net metering cap. While the December 14 Ruling mentioned that one of the issues to be addressed in resolving appropriate manner in which to calculate the cap was the use of differing demand intervals among the three IOUs, there is nothing in the Ruling which could be read to mean that this was the sole issue which the Commission was intending to address. The Ruling clearly granted IREC's request and directed that parties "may provide proposals for calculation of the net metering cap." There was no restriction on what those proposals could contain. Again, if the IOUs were unclear as to the scope of the Commission's ruling, they could have filed for clarification. They did not.

Finally, the Rehearing Parties assert that the time period afforded to file responsive comments to the proposals for calculation of the net metering cap which were submitted in response to the December 14 Ruling - eight business days -- was insufficient, given that the proposal submitted by IREC (in conjunction with other interested parties) "unlawfully" altered the scope of the proceeding. As illustrated above, the proposal did not alter the scope of the proceeding. If however, the IOUs truly believed the ruling had altered the scope, then there were clear procedural options available to them -- e.g., a motion to strike, a motion for additional responsive time -- none of which the IOUs availed themselves. Nor did the utilities state in their

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<sup>42</sup> Response of the Solar Alliance to Motion for Clarification of the Interstate Renewable Energy Council, R. 10-05-004 (August 9, 2010) .

responses to the December 14 Ruling that the Commission was failing to adequately develop the necessary record to make this determination.

The Commission correctly followed its own procedures. It issued a revised scoping ruling which set the determination of the methodology for calculating the net metering cap at issue. It provided parties the opportunity to file proposals and responses to those proposals prior to issuing a determination. There was no violation of the Commission's procedural rules with respect to its determination of the appropriate methodology for determining the IOUs' aggregate peak customer demand.

## **VI. CONCLUSION**

As demonstrated above, the Rehearing Applications have failed to demonstrate legal error in the Commission's interpretation of Public Utilities Code Section 2827(c)(1).

Accordingly the Rehearing Applications should be dismissed.

Respectfully submitted July 16, 2012 at San Francisco, California.

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