BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

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REPLY COMMENTS OF THE COALITION OF CALIFORNIA UTILITY EMPLOYEES ON PROPOSED DECISION

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Pursuant to Rule 14.3 of the Commission's Rules of Practice and Procedure, the Coalition of California Utility Employees (CUE) submits these reply comments on the Proposed Decision Adopting Rates, Tariffs, and Rules Facilitating the Commercialization of Microgrids Pursuant to Senate Bill 1339 and Resiliency Strategies (PD).

I. The PD's Legal Analysis of Public Utilities Code Section 218 is Exactly Right

In comments on the Staff Proposal, some parties argued that the proposal did not go far enough to commercialize microgrids. Some of these parties wanted Public Utilities Code section 218 amended to allow unregulated entities to provide unregulated electric utility service. Sunrun, for example, wanted the Commission to exempt all microgrids from section 218.[1] Other parties argued that section 218 already allows unregulated entities to provide unregulated electric utility service. Google, for example, argued that staff's reading of section 218 as "requir[ing] any entity who wishes to sell power to more than two contiguous parcels or across a street to become an electrical corporation" is inconsistent with "the Public Utilities Code and a long history of Commission decisional law concerning the jurisdictional boundaries of electric utility regulation."[2] CUE explained that these arguments are incredibly poor policy, dangerous and legally flawed.[3]

While companies such as Google and Sunrun may not want to be regulated, the law is clear. Public utilities are "subject to the jurisdiction, control, and regulation of the commission."[4]

[1] Sunrun Comments on Staff Proposal, p. 3.
[2] Google Comments on Staff Proposal, p. 14.
[3] CUE Reply Comments on Staff Proposal, pp. 2-4.
[4] Pub. Utilities Code § 216(c).

Public utilities include electrical corporations[5] which are defined as "every corporation or person owning, controlling, operating, or managing any electric plant[6] for compensation within this state, except where electricity is generated on or distributed by the producer through private property solely for its own use or the use of its tenants and not for sale or transmission to others."[7] If a microgrid delivers electricity to any member of the public other than the electricity producer or its tenants, that microgrid is an electrical corporation subject to Commission regulation.

The PD correctly finds that the Commission has "no authority to change or modify any statute with the California Public Utilities Code on our own. Changes to statutes like Section 218 fall squarely within the powers of the California Legislature. Any modifications to Rules 18 and 19 must be made in conformance with Section 218."[8] Nevertheless, Google now argues that the plain language of Section 218 does not govern third-party owned and operated microgrids because, under common law, microgrids must be dedicated to public use before being subject to public utility regulation by the Commission.[9] Similarly, Sunrun argues that the Commission "should articulate the public dedication doctrine and commit the Commission…to prospectively articulating fact patterns/use cases under which a microgrid would not be subject to its jurisdiction under this doctrine."[10] Google's and Sunrun's arguments are inconsistent with California law.

Google and Sunrun rely on the 100-year old case *Story v. Richardson*,[11] which was issued before the California legislature enacted section 218. In *Story*, the court considered whether, ***under the California constitution***, a landlord supplying electricity to his tenants and some neighbors was a public utility. However, section 218 was enacted in 1951, ***after*** *Story.*[12] Section 218 gives the Commission broader responsibility to regulate public utilities than does the

[5] *Id*. §§ 216(a) and (b).
[6] "Electric plant" is defined as "all real estate, fixtures and personal property owned, controlled, operated, or managed in connection with or to facilitate the production, generation, transmission, delivery, or furnishing of electricity for light, heat, or power, and all conduits, ducts, or other devices, materials, apparatus, or property for containing, holding, or carrying conductors used or to be used for the transmission of electricity for light, heat, or power." Pub. Utilities Code § 217.
[7] Pub. Utilities Code § 218(a).
[8] PD, pp. 30-31.
[9] Google Comments on PD, p. 5.
[10] Sunrun Comments on PD, p. 9.
[11] *Story v. Richardson* (1921) 186 Cal. 162, 198.
[12] Stats. 1951, Ch. 764.

California constitution. Under section 218, a company "design[ing], build[ing] and operat[ing] large, fully functional microgrids … in campus-type settings at various locations in California"[13] is a public utility subject to Commission regulation. Under the statute, the constitutional requirement of "dedication to the public" is not required. Instead, the statute has the very specific terms of section 218.

After section 218 was enacted, California courts and the Commission have explained that the public dedication doctrine has little remaining applicability.[14] The California Supreme Court stated:

> [t]he requirement of dedication as a condition precedent to regulation is not found in the statutes. This judicial doctrine, in its pristine form, was buttressed by constitutional principles which have now passed into history. Dedication continues to perform important functions in the interstices of the Public Utilities Code. But its raison d'etre is attenuated, and it would be inappropriate to extend its restraining power further than logic and precedent require.[15]

Therefore, Google's and Sunrun's arguments that under the public dedication doctrine third-party owned and operated microgrids are not subject to public utility regulation are wrong.

Subsequent amendments to section 218 show that the legislature understands the scope of section 218 and knows how to enact carve-outs.[16] For example, the legislature chose to exempt

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[13] Google Comments on PD, p. 3.

[14] *See Pacific Gas & Electric Co. v. Dow Chem. Co.*, D.94-07-063, 55 CPUC 2d 430, 439 (1994) ("as time passes the needs of society often change… the dedication requirement has survived, but only narrowly"); *Richfield Oil Corp. v Public Utilities Commission* (1960) 54 Cal. 2d 419, 428 ("[i]f we were called upon to decide the question for the first time in the light of modern principles of constitutional law, we would have serious doubts that the broad language of the . . . Public Utilities Act should be interpreted as including the limitation of dedication that the Court found in the constitutional provision it construed in the Thayer case").

[15] *Greyhound Lines, Inc. v Public Utilities Commission* (1968) 68 Cal. 2d 406, 413.

[16] *See* Pub. Utilities Code § 216(d) (owning cogeneration facility which employs landfill gas technology does not make a public utility), § 216(e) (distributing, delivering or selling heat from geothermal or solar resources or from cogeneration technology does not make a public utility), § 216(f) (owning or operating a facility that sells compressed natural gas or hydrogen for motor vehicle fuel does not make a public utility), § 216(g) (owning or operating a facility that is an exempt wholesale generator does not make a public utility), § 216.2 (a motor carrier of property is not a public utility), § 218(b) (excludes from the definition of electrical corporation subject to public utility regulation generating electricity from cogeneration technology or a non-conventional source for a corporation's or person's own use or use of its tenants, using or selling electricity to no more than two others on the same or adjacent property), §§ 218(c) and(d) (excludes from the definition of electrical corporation generating electricity from landfill or digester gas technology for a corporation's or person's own use or up to two others on the same property

from public utility regulation owning, controlling, operating or managing an electric plant for direct transactions, sales into the CAISO market or other wholesale electricity market.[17] Although the legislature obviously understands and knows how to create exceptions to the broad definition in section 218, and seeks expanded use of microgrids, it did not enact a "campus-style" exception or a "community microgrid" exception or a "microgrid" exception.

Finally, Google argues that the PD "falls short of meeting the goal of Senator Stern and the Legislature in Senate Bill 1339."[18] Similarly, Sunrun cites a letter from Senator Stern (the author of SB 1339) and other members of the legislature to argue that the PD fails to carry out the intent of SB 1339.[19] But Senator Stern keenly understands the limits of section 218 and SB 1339; as a result, he later proposed amending section 218 to exclude microgrids from public utility regulation.[20] If Google and Sunrun were correct that section 218 does not limit their desired activity, there would have been no need for Senator Stern to propose this amendment to section 218. The bill amending section 218 to exclude microgrids did not pass, and there is no mention of section 218 in Senator Stern's letter to the Commission – because the PD's analysis of section 218 is exactly right.

II. Conclusion

Section 218 exists for a good reason. Section 218 ensures safe and reliable electricity for all customers. If an entity is a public utility as defined by section 218, that entity has obligations to the public. These obligations include ensuring resource adequacy,[21] RPS,[22] providing just and

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or for an electrical corporation or public agency), § 218(e) (excludes independent solar energy producers from the definition of electrical corporation), § 216(i) (excludes from the definition of electrical corporation supplying electricity for light duty electric vehicle charging).

[17] Public Utilities Code § 216(h).

[18] Google Comments on PD, p. 1.

[19] Sunrun Comments on PD, p. 8.

[20] SB 1215, amended May 12, 2020, available at: http://leginfo.legislature.ca.gov/faces/billNavClient.xhtml?bill_id=201920200SB1215 *("Electrical corporation" does not include a corporation or person generating electricity from a microgrid that includes any component of electric generation that has received an incentive for the installation of energy storage and other eligible distributed energy resources from the self-generation incentive program pursuant to Section 379.9 or an award from the Electric Program Investment Charge program pursuant to Section 25711.5 of the Public Resources Code, and that provides electricity to one or more corporations or persons for use on any real property whether or not the portions of real property are adjacent to each other or intervened by a public street.)*

[21] *See* Pub. Utilities Code § 380.

[22] *Id*. § 399.11.

reasonable service in a manner that complies with legislation and regulation,[23] and abiding by Commission-approved rates[24] – even when doing so is not profitable. The Commission has no authority nor should it want to weaken these protections so that third party microgrid operators, such as Sunrun and Google, can profit. The PD's legal analysis of section 218 is exactly right. If Google and Sunrun want to become unregulated electric utilities, they must convince the California legislature to amend the Public Utilities Code.

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Respectfully submitted,

/s/

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[23] *Id.* §§ 761, 762 and 768.
[24] *Id.* §§ 454, 728.