BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

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Order Instituting Rulemaking to Revisit Net Energy Metering Tariffs Pursuant to Decision 16-01-044, and to Address Other Issues Related to Net Energy Metering.	Rulemaking 20-08-020 (Filed August 27, 2020)

COMMENTS OF PENINSULA CLEAN ENERGY AUTHORITY, SONOMA CLEAN POWER, AND SAN DIEGO COMMUNITY POWER ON PROPOSED DECISION ADOPTING GUIDING PRINCIPLES FOR THE DEVELOPMENT OF THE SUCCESSOR TO THE CURRENT NET ENERGY METERING TARIFF

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Pursuant to Rule 14.3 of the California Public Utilities Commission ("Commission") Rules of Practice and Procedure, Peninsula Clean Energy Authority ("PCE"), Sonoma Clean Power, and San Diego Community Power ("Joint CCAs") respectfully submit these opening comments concerning Administrative Law Judge Hymes' Proposed Decision Adopting Guiding Principles for the Development of the Successor to the Current Net Energy Metering Tariff ("Proposed Decision"), mailed January 5, 2021.[1]

Peninsula Clean Energy Authority is a joint powers authority operating numerous programs to achieve our mission to reduce greenhouse gas emissions by expanding access to sustainable and affordable energy solutions. In support of our mission, PCE offers a comprehensive suite of transportation and building electrification programs and operates a community choice aggregation program. At present, PCE provides all customers with 100% carbon-free energy along with a goal of providing renewable energy on a time coincident-basis by 2025. PCE strongly supports the right of energy consumers to invest in clean energy resources. To support our customers in their choice to invest in behind the meter renewable generation resources PCE offers a net excess compensation

[1] Representatives of Sonoma Clean Power and San Diego Community Power have given representatives of Peninsula Clean Energy Authority to sign these comments on their behalf.

rate that is equal to the rate charged for PCE's ECO 100 product. PCE appreciates the opportunity to address the principles stakeholders will use to assess proposals for continued reform of the net metering programs of the investor-owned utilities.

When SCP formed in 2013 it adopted a net metering energy (NEM) program, later branded as NetGreen. When launched, it was the second most generous NEM program in the state behind Marin Clean Energy's NEM program. The original NetGreen program offered a variety of benefits over the IOU's program. First, like the IOUs' programs, SCP matched the customer's respective retail rates for the time-of-use period and season during the course of each month. Because SCP's retail generation rates were significantly cheaper than the IOU's, our program offered a NetGreen Bonus Generator of one cent per kilowatt-hour of over generation. SCP also used monthly billing. Instead of receiving one net bill at True-Up, our customers received a bill each month. If the customer generated more than she used, her credits were banked to off-set future usage. If instead she consumed more than she generated, first her banked credits would be used and if no credits were available, then she would pay for that month's usage. Because customers never owe us any more than one month of charges, we have an annual cash out instead, in which each spring we cash out customers with a credit balance of $100 or more and automatically send the customer a check. If the balance was below $100, the balance was rolled to the following month to off-set future charges.

San Diego Community Power ("SDCP") is a newly formed CCA program that will serve customers in the City of San Diego, City of Encinitas, City of La Mesa, City of Chula Vista, and the City of Imperial Beach later this year. By the end of 2022, SDCP is forecast to serve the greatest share of load out of all other LSEs in the San Diego Gas & Electric Company

("SDG&E") service territory.[2] Reducing greenhouse gas emissions generated by its member cities' residents and businesses was a key driving factor in SDCP's formation. In furtherance of this goal, SDCP intends to offer a variety of energy-related programs that support the right of energy consumers to invest in clean energy resources, including behind the meter renewable generation resources. SDCP welcomes the opportunity to help shape guiding principles that will encourage and allow a greater share of SDCP's diverse community to participate in these programs.

I. The Proposed Decision Should Include a Guiding Principle Respecting a Customer-Generator's Right to Self-Generate and Consume Electricity On-Site.

Although Public Utilities Code Section 2827.1[3] only applies to large electrical corporations,[4] thereby excluding community choice aggregators, like the Joint CCAs, the Proposed Decision raises a foundational issue to public utility regulation for which the Joint CCAs believe a guiding principle should be added to guide future discussion in this proceeding. The Joint CCAs understand the intent in adopting the guiding principles is "to assist in the development and evaluation of a successor to the current net energy metering tariff."[5] However, the Proposed Decision also makes clear its intent to avoid predetermining "contested issues of fact and law."[6]

The Joint CCAs agree that it would be inappropriate to adopt guiding principles that prejudge material *facts* without first requiring testimony and evidentiary hearings to establish those

[2] *See Administrative Law Judge's Ruling Correcting April 15, 2020 Ruling Finalizing Load Forecasts and Greenhouse Gas Benchmarks for Individual 2020 Integrated Resource Plan Filings,* R. 16-02-007, dated May 20, 2020 Attachment A at 2 (By 2022, SDCP will serve approximately 7,407 GWh, SDG&E will serve 5,359 GWh, Clean Energy Alliance will serve 929 GWh, and DA programs will serve 3,940 GWh).
[3] Further references to California code in these comments are to the Public Utilities Code, unless otherwise stated.
[4] See P.U. Code 2827.1(a). See also P.U. Code 2827(b)(5), 218.
[5] Proposed Decision, p. 4. See also, OIR, p. 8; Scoping Memo, pp. 5-6.
[6] Proposed Decision, p. 7.

facts.[7] However, the Joint CCAs believe the Commission should seek at the earliest stages of this proceeding to focus discussion in the docket on outcomes that are consistent with California law. This includes compliance with Public Utilities Code Section 2827.1, as the Proposed Decision recognizes in determining to "delete proposed principles 1, 2, and 4 and instead adopt one guiding principle that requires the successor to the net energy metering tariff to comply with the statutory requirements of Public Utilities Code Section 2827.1."[8] However, the guiding principles should also address compliance with other California law that limits the outcomes that are achievable in this proceeding. Specifically, the Proposed Decision should include a guiding principle that respects a customer's right to both self-generate and self-consume electricity that is generated onsite, as proposed by SEIA/Vote Solar and as discussed in the Proposed Decision.[9]

Moreover, while the Joint CCAs believe a customer's right to self-generate and self-consume electricity should be included in the guiding principles, the Joint CCAs believe this principle should be modified slightly from the SEIA/Vote Solar proposal to more fully reflect the outcomes that California law will allow. Specifically, the Joint CCAs propose that the Commission adopt the following:

> A successor to the net energy metering tariff shall allow a customer-generator to consume electricity that is self-generated onsite and to determine what amount of onsite generation, if any, to deliver to the utility under a standard contract or tariff.

Focusing future discussion on outcomes that are consistent with California law will improve the efficiency of reaching outcomes in this proceeding and will help parties to understand and apply the other guiding principles. For example, the impacts of the successor standard contract or tariff on the "competitive neutrality amongst Load Serving Entities" is a very different

[7] *Id*.
[8] Proposed Decision, p. 9. *See also*, guiding principle (a), p. 39 ("A successor to the net energy metering tariff shall comply with the statutory requirements of Public Utilities Code Section 2827.1")
[9] Proposed Decision, p. 26.

discussion if one assumes that the successor standard contract or tariff will be a "buy-all, sell-all" arrangement,[10] which the Joint CCAs believe cannot be mandated, versus an arrangement in which a customer-generator's right to self-generate and consume electricity onsite is respected. The Joint CCAs believe the other guiding principles will be similarly benefited if the Commission establishes an early understanding among parties regarding limitations on proposals they may advance. There are numerous examples of net meter programs that have addressed the cost-shift concerns animating stakeholders advocacy to date. For example, Hawaii offers a suite of options to customers depending on their desire to self-supply or export energy to the grid.[11]

II. The Commission Cannot Compel a Customer-Generator to Deliver Self-Generated Electricity to a Utility and Must Allow for Self-Consumption.

A. *California law clearly and unambiguously authorizes customer self-generation*.

Promotion of customer self-generation is a clear and unambiguous goal of AB 327 (2013, Perea). With AB 327, the Legislature enacted Section 2827.1 to replace the net energy metering program that has existed in California's Public Utilities Code in some version since 2001.[12] However, whereas the net metering program in Section 2827 limits customer enrollment, the Legislature removed such limits in Section 2827.1 by directing the Commission to establish a successor standard contract or tariff that "ensures that customer-sited renewable distributed generation continues to grow sustainably…"[13] The unambiguous intent is to provide for continued growth of customer self-generation in California.

[10] A "buy-all, sell-all" arrangement is one in which a customer-generator would be required to sell the full output of its onsite, self-generation to a large electrical corporation.
[11] See for example, https://www.hawaiianelectric.com/products-and-services/customer-renewable-programs/private-rooftop-solar.
[12] *See* AB 58, (2002. Keeley).
[13] P.U. Code § 2827.1(b)(1).

B. *California has provided customers with a statutory right to self-generate and self-consume electricity without regulation or utility interference since 1976.*

Californians have always had a right to self-generate their own electricity,[14] but beginning in the 1970s, the California Legislature, and later Congress, began enacting statutes to prevent utilities from interfering with that right. According to a 1987 law review article published by PG&E Senior Director and Counsel, William Manheim:[15]

> "Prior to the passage of [Public Utilities Regulatory Policies Act of 1978 ("PURPA")], an independent cogenerator or small power producer seeking to interconnect with an electric utility was confronted with three obstacles. First, utilities were not required to purchase power generated from such sources. Second, some utilities charged cogenerators and small power producers discriminatory rates for supplementary, back-up, and maintenance services. Third, interconnected cogenerators were potentially subject to plenary federal and state public utility regulation. Congress designed sections 201 and 210 [of PURPA] to encourage cogeneration and small power production by eliminating these obstacles."

Accordingly, the Joint CCAs agree with SEIA/Vote Solar that PURPA provides federal protections against regulatory and utility interference with the right to self-generate and self-consume electricity.[16] However, it is important to recognize that California enacted statutory protections for self-generators even before the Congressional enactment of PURPA.[17]

Section 2827.1, which the Commission is implementing in this proceeding, exists within Chapter 7 of the California Public Utilities Act. Chapter 7 of the Act addresses "Private Energy

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[14] *See, e.g.*, *Story v Richardson*, 186 Cal. 162, 198 P. 1057 (1921) (recognizing the ability of Californians to self-generate electricity and to provide self-generated electricity to tenants and others without public utility status).

[15] *See* MANHEIM, WILLIAM. (1987). TRANSFORMING THE ENERGY SYSTEM: CALIFORNIA'S PLAN TO DEVELOP COGENERATION AND SMALL POWER PRODUCTION. *High Technology Law Journal, 2*(1), 91-123. Retrieved January 22, 2021, from http://www.jstor.org/stable/24122381 (noting that 60% of all electricity was self-generated in the United States in 1900 but that by 1973 utilities supplied 95.8% of all United States electric capacity).

[16] *See also FERC v. Mississippi*, 456 U.S. 742, 750 (1982) (finding that Congress enacted PURPA because "two problems impeded the development of nontraditional generating facilities: (1) traditional electric utilities were reluctant to purchase power from, and to sell power to, the nontraditional facilities, and (2) the regulation of these alternative energy sources by state and federal utility authorities imposed financial burdens upon the nontraditional facilities and thus discouraged their development.")

[17] *See, e.g.*, CPUC Decision No. 82-01-103 (Jan. 21, 1982) (explaining California's development of law and policy to support cogeneration and small power production prior to PURPA's enactment).

Producers". According to the Public Utilities Code, a "private energy producer" includes "every person… producing electricity not generated from conventional sources or natural gas for energy either directly or as a byproduct *solely for its own use or the use of its tenants*…"[18] The Legislature's intent in enacting this statute – by its plain terms – was to carve out a right for Californians to invest in renewable resources to use to self-generate and consume electricity on their premises without interference from the Commission or California utilities.[19]

The California Legislature first enacted the definition of private energy producer in 1976,[20] two years before PURPA, which as SEIA and Vote Solar discuss granted all Americans protections against utility interference with their right to self-generate and consume electricity onsite. Section 2827.1, and Section 2827 that preceded it, remove a potential disincentive to customer self-generation by requiring a utility to compensate a customer-generator for electricity that is in excess of what the customer-generator needs for self-consumption purposes.[21] Section 2827.1 must, however, be understood within the context of Chapter 7 of the Public Utilities Act within which it resides, which is intended to facilitate both self-generation and self-consumption.[22] This overall statutory construction demonstrates a legislative intent to provide customer-generators that participate in the Section 2827.1 standard contract or tariff with the continued right to self-consume

[18] P.U. Code § 2802 (italics added).
[19] *See* P.U. Code § 2801 ("The Legislature hereby finds and declares that in order to promote the more rapid development of new sources of natural gas and electric energy, to maintain the economic vitality of the state through the continuing production of goods and the employment of its people, and to promote the efficient utilization and distribution of energy, it is desirable and necessary to encourage private energy producers to competitively develop independent sources of natural gas and electric energy not otherwise available to California consumers served by public utilities, to require the transmission by public utilities of such energy for private energy producers under certain conditions, and remove unnecessary barriers to energy transactions involving private energy producers.")
[20] Stats 1976 ch 915 § 1.
[21] See *FERC v. Mississippi*, 456 U.S. at 751 (finding that Congress required utilities to purchase electricity from qualifying small power production facilities to overcome the problem of utilities being reluctant to purchase power from nontraditional utilities).
[22] *See* P.U. Code § 2801; CPUC Decision No. 82-01-103 (Jan. 21, 1982).

electricity that is generated onsite and to determine what amount of onsite generation, if any, to make available to a large electrical corporation under the standard contract or tariff.

The net energy metering successor program implemented pursuant to Section 2827.1 is the only PUC program with which the Joint CCAs are aware that generally facilitates self-generation by large electrical corporation customer-generators that employ small onsite renewable generation. If the Commission requires all customers participating in the standard contract or tariff developed pursuant to Section 2827.1 to sell all of their onsite generation to the large electrical corporation, then the Commission would be impermissibly revoking a customer's right to consume electricity that is self-generated onsite. The Joint CCAs believe such an outcome would violate long-standing California law and policy.

C. *California law prohibits the Commission from regulating self-generators*.

Section 2827.1 does not authorize the Commission to regulate customer-generators. In fact, as noted above, Section 2827.1 exists within Chapter 7 of the Public Utilities Act, which addresses "Private Energy Producers". Section 2802 within Chapter 7 states: "[n]otwithstanding any other provision of law, a private energy producer shall not be found to be a public utility subject to the general jurisdiction of the commission solely because of conducting any activity authorized by this chapter."[23] As noted above, activities authorized by this Chapter 7 include the successor program that is the subject of this proceeding. Accordingly, private energy producers, such as customer-generators participating in the successor program implemented pursuant to Section 2827.1, are statutorily exempt from Commission regulation.

Instead, Section 2827.1 directs the Commission to establish a contract or tariff that a large electrical corporation must offer to its eligible customer-generators. As such, the legislative focus

[23] *Id*.

is on the Commission's regulation of the large electrical corporation and the terms of service that such utilities must offer to a customer-generator for excess power that a customer-generator delivers to the utility. Nothing in Section 2827.1 grants the Commission authority to regulate the behavior of a customer-generator, which the Commission would be doing if it attempted to compel a customer-generator to deliver electricity that is self-generated on the customer's premises to a utility.

The Legislature has also exempted from regulation "independent solar energy producers" that provide power for their own use, for the use by tenants, or for the sale to at most more than two other persons on the real property on which the electricity is generated or on real property adjacent thereto.[24] As with customer-generators, Public Utilities Code Section 218(e) expressly exempts such independent solar energy producers from regulation as electrical corporations. This further reinforces the fact that the Commission lacks jurisdiction to regulate the generation and consumption of energy that takes place behind the meter on a customer's premise.

It is important to recognize that these statutory sections reflect long-standing California Supreme Court precedent that holds that a person is not subject to regulation as a public utility unless that person has dedicated private property to public use. For example, in *Story v Richardson*, 186 Cal. 162, 198 P. 1057 (1921), the California Supreme Court determined as early as 1921 that the owner of a 12-story office building in downtown Los Angeles did not act as a public utility in supplying electricity and steam to tenants in the building and certain other individuals in enjoining property. The court reasoned that self-generation for private consumption does not result in a dedication of private property to public use, and accordingly does not subject the person providing such service to public utility regulation by this Commission.

[24] P.U. Code § 2868.

Given the express language of Section 2827.1, the overall statutory construction of Chapter 7 of the Public Utility Act, and long-standing California Supreme Court precedent, the Joint CCAs can identify no authority by which the Commission can direct self-generators to deliver to a utility electricity that a customer-generator otherwise desires to self-consume onsite.

D. *The Commission cannot compel a customer-generator participating in the Section 2827.1 standard contract or tariff to deliver electricity to a utility that the customer otherwise wishes to use onsite.*

As discussed above, California provides a statutory right for customer-generators to self-generate and consume electricity that they generate onsite without regulation or utility interference. The Commission has no legal basis on which to regulate self-generators that choose to participate in the Section 2827.1 standard contract or tariff. To the contrary, the Legislature has placed self-generators and independent solar energy producers outside the reach of the Commission's jurisdiction, consistent with California Supreme Court precedent, and has directed the Commission's focus to the regulation of large electrical corporations and the terms and conditions of a standard contract or tariff that such utilities must provide to customer-generators that choose to deliver some amount of self-generated electricity to the utility.

Given this, the Commission lacks any authority upon which to compel a customer-generator participating in the Section 2827.1 standard contract or tariff to sell electricity to a utility that the customer otherwise wishes to use onsite. As such, any tariff or standard contract that is developed to implement the mandates of Section 2827.1 should allow a customer-generator to consume electricity that is generated onsite and for the customer-generator to determine the amount of onsite generation, if any, to deliver to the utility under the standard contract or tariff.

In recognition of these legal requirements, the Joint CCAs propose that the Commission adopt the following guiding principle:

A successor to the net energy metering tariff shall allow a customer-generator to consume electricity that is self-generated onsite and to determine what amount of onsite generation, if any, to deliver to the utility under a standard contract or tariff.

III. Conclusion.

The Joint CCAs appreciate the opportunity to file these opening comments on the Proposed Decision.

Respectfully submitted,

*/s/ Jeremy Waen*_____

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APPENDIX

The Joint CCAs propose to add the following guiding principle as a new Ordering Paragraph 1(b), with Ordering Paragraphs 1(b)-(h) renumbered accordingly:

> A successor to the net energy metering tariff shall allow a customer-generator to consume electricity that is self-generated onsite and to determine what amount of onsite generation, if any, to deliver to the utility under a standard contract or tariff.

The Joint CCAs propose to modify Finding of Fact #44, as follows:

> SEIA/Vote Solar's proposed principle to protect the customer's right to self-consume and store clean energy generated onsite ~~conflicts with our previous finding that guiding principles should not predetermine the resolution of contested issues of fact and law~~ *is consistent with California law and will help focus future discussion in this proceeding on standard contract or tariff design that can be lawfully implemented*.

The Joint CCAs propose to modify Finding of Fact #23, as follows:

> The Commission should ~~not~~ adopt SEIA/Vote Solar's proposed principle to protect the customer's right to self-consume and store clean energy generated onsite*, as follows: "A successor to the net energy metering tariff shall allow a customer-generator to consume electricity that is self-generated onsite and to determine what amount of onsite generation, if any, to deliver to the utility under a standard contract or tariff."*