BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

FILED
10/10/22
04:59 PM
A2209002

Application of Sunnova Community Microgrids California, LLC for a Certificate of Public Convenience and Necessity to Construct and Operate Public Utility Microgrids and to Establish Rates for Service.	A.22-09-002 (Filed September 1, 2022)

PROTEST OF SAN DIEGO GAS & ELECTRIC COMPANY (U 902-E)

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October 10, 2022

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Pursuant to Rule 2.6 of the Rules of Practice and Procedure of the California Public Utilities Commission ("Commission"), San Diego Gas & Electric Company ("SDG&E") submits this protest to the *Application of Sunnova Community Microgrids California, LLC for a Certificate of Public Convenience and Necessity to Construct and Operate Public Utility Microgrids and to Establish Rates for Service* ("Application") filed September 1, 2022.

I. SUMMARY – THE APPLICATION WOULD EVADE PUBLIC UTILITY REGULATION DESIGNED TO PROTECT CUSTOMERS AND FURTHER THE STATE'S RELIABILITY AND OTHER POLICY GOALS

SDG&E is a strong supporter of using renewable resources and battery energy storage systems ("BESS"), including strategically-positioned microgrids, to better serve customers in its service territory. This is especially true in new developments where it is possible to integrate such technologies directly into the foundations of new communities. Including these technologies in the design and development of new communities, however, must be non-discriminatory and consistent with California law and the reliability, safety, and affordability policy objectives that form the basis of utility regulation in California.

In the Application, Sunnova Community Microgrids California, LLC ("SCMC" or "Sunnova") proposes to provide bundled retail service (*i.e.*, commodity and distribution services) as a "microutility" established under Public Utilities Code Section 2780.[1] To this end, it requests a certificate of public convenience and necessity ("CPCN") authorizing it to construct and operate a series of "microgrids" throughout California. Finally, it requests authority to establish market-based rates for service.

As detailed below, SCMC fails to demonstrate that it is qualified to provide bundled retail service to customers as a microutility under Section 2780 or as a public utility under Section 216. Indeed, the Application lacks basic information regarding SCMC's ability to comply with the framework of laws and regulations that govern utility operations in California, which are designed to ensure safe and reliable service to the public. Absent this information, the Commission cannot find that SCMC's proposal to provide utility service is in the public interest. Likewise, SCMC's showing in support of the request for grant of a CPCN is inadequate as a matter of law. Finally, the Application fails to offer a reasonable justification to support its request for authority to establish what it calls "market-based rates," which by all appearances would shift costs to other customers in the state to benefit the more affluent SCMC customers. SCMC's proposals are contrary to law and would contravene key policy goals of the state. Accordingly, the Application should be dismissed without prejudice as premature and incomplete.

No doubt the Commission will see other proposals for new types of "lightly regulated" utility services. While the Commission should encourage innovation within

[1] Application, pp. 1-2. All references to "sections" herein are to the California Public Utilities ("P.U.") Code unless otherwise noted.

the evolving energy services landscape, it must remain focused on its primary obligations: promoting a safe, clean, and reliable electric grid, protecting consumers, and ensuring reasonable and affordable utility rates. The Commission should send a clear signal now that new proposals for utility services, however well-intentioned, must comply with the law and fit within California's existing regulatory construct. Put simply, allowing new utility entrants to side-step requirements that are designed to protect customers and further the state's reliability and other policy goals does not serve the public interest. Promoting microgrids and other new technologies does not necessitate hollowing out of the protections established under existing public utility regulation.

II. OVERVIEW OF THE APPLICATION

The Application proposes to establish several individual microutilities[2] to own and operate an unspecified number of greenfield, standalone distribution systems[3] connected to distributed and community solar photovoltaic ("PV") systems, BESS, and emergency generation. The individual microutilities would be limited liability companies ("LLCs") owned by the parent, SCMC. SCMC will initially be funded by its parent company Sunnova Energy International Inc. ("SEI") and may seek investors for each specific microgrid project. SEI is a public company listed on the New York Stock

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[2] SCMC's characterization of each proposed development as a "microutility" is used herein for convenience. As discussed below, however, Sunnova's proposal does not meet the requirements to qualify as a microutility under P.U. Code § 2780 *et seq*.

[3] The Application refers to the proposed individual distribution systems as "microgrids." This is fine for marketing, but use of microgrid distracts from the fact that SCMC proposes individual stand-alone utilities, and SCMC's "microgrids" cannot be distinguished from a public utility distribution system that is fully integrated with the rest of the grid. In any event, the statutory definition of "microgrid" is so broad as to not be useful here. Under that definition, SDG&E could qualify as a microgrid of Southern California Edison Company. *See* P.U. Code § 8370(d).

Exchange.[4] The Application requests that the Commission waive its affiliate transaction rules for certain transactions between SCMC and the LLCs.[5]

Under the construct envisioned in the Application, each microutility will build and operate its own electric distribution grid. Every home within the area served by each microutility will have behind-the-meter ("BTM") rooftop solar and battery storage. Additionally, each microutility will include an in-front-of-the-meter ("IFM") community solar and battery array. Finally, each microutility will physically interconnect with an adjacent investor-owned utility's ("IOU's") distribution system for the purpose of participating in the California Independent System Operator ("CAISO") wholesale markets to purchase and sell power as necessary to maintain a balance between load and generation, and as would be commercially advantageous for the microutility owner.[6] The microutility would not rely on commodity or other retail services from the local IOU.[7]

To receive electric service, residential customers of the microutility would execute a "microgrid service agreement" with SCMC. The agreement will include: (1) a fixed monthly charge to cover utility assets and operation of the microutility; (2) a per kWh charge for electricity the customer consumes from the microutility; (3) a charge allocating the cost of energy procured through the CAISO market to serve microutility

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4 Application, p. 50.

5 Application, pp. 52-55.

6 Application, pp. 3-4.

7 Application, pp. 9-10.

customers; and (4) per kWh credits for electricity that the customer provides to the microutility.[8]

While SCMC indicates an intent to "make a rate and tariff filing with the Commission for each microutility community,"[9] it proposes that the rates charged to its residential customers be "market-based" and negotiated rather than subject to Commission jurisdiction, and suggests that customer protection-type issues, including concerns related to predatory pricing and/or other anticompetitive behavior, would be addressed solely through the Commission's complaint or investigatory process.[10] Customers would not be permitted to opt-out of microutility service.

As a load-serving entity ("LSE") within the CAISO Balancing Authority Area, the microutility would assume responsibility for ancillary service obligations and transmission cost recovery, along with the regulatory requirements associated with serving retail load in California. These requirements are not addressed in the Application. The Application, likewise, makes no reference to California's Public Purpose Programs ("PPPs") or other non-bypassable charges ("NBCs") or explain whether or how customers of the microutilities will bear a fair portion of those costs. Nor does the Application address the risk of utility distribution costs that may be stranded since the interconnecting utilities' planning processes are premised on the understanding that the utility has distribution service responsibility for all future loads within its historical footprint.

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8 Application, pp. 45-46.

9 Application, p. 42.

10 Application, p. 43.

In sum, the Application presents the apparent opportunity to see how a greenfield development including the latest distributed resource technologies can serve customers in an environment free of traditional Commission regulation.

III. THE APPLICATION IS LEGALLY AND FACTUALLY DEFICIENT AND SHOULD BE DISMISSED

Neither SDG&E nor the Commission can constructively evaluate the Application because its legal and factual deficiencies cannot be remedied with the mere offer of additional information. The Application seeks approval of a proposal that is fundamentally inconsistent with how public utilities are regulated by the Commission. The Application is fatally flawed because it: (1) does not establish that SCMC is eligible or qualified to provide bundled retail service as a microutility or public utility in California; (2) fails to satisfy the criteria established for CPCN approval; and (3) presents a rate proposal that is manifestly unreasonable and discriminatory. Other issues, such as the affiliate transaction waiver and affordability questions, also weigh in favor of dismissal without prejudice.

A. Sunnova's Proposal Does Not Legally Qualify as a "Microutility"

The Application requests microutility status and relief under Section 2780.[11] While, for convenience, this protest uses the Application's characterization of each proposed development as a "microutility," Sunnova's proposal does not qualify as a microutility under P.U. Code § 2780 *et seq*.[12] Accordingly, the Commission lacks

[11] Application, p. 55.

[12] Assembly Bill ("AB") 2509, Stats. 2003-2004, Ch. 639, Section 1 (Cal. 2004), *codified at* P.U. Code § 2780.

authority to grant the requested relief. The Application's reliance on that statue is misplaced, on two separate grounds.

First, per P.U. Code § 2780, "'electric microutility' means any electrical corporation that is regulated by the Commission and organized for the purpose of providing *sole-source* generation, distribution, and sale of electricity exclusively to a customer base of fewer than 2,000 customers" [emphasis added]. D.06-06-066 recognizes that the statute's "sole source" characterization means that an "…[e]lectric microutility is not connected to the [CA]ISO controlled transmission grid and thus has no relationship with the [CA]ISO nor any ability to import or export power."[13] However, the Application clearly establishes that each microutility will interconnect with the local utility for the purpose of participating in the CAISO's wholesale markets.[14] This plainly disqualifies the microutility as a "sole-source" entity; *i.e*. the loads connected to Sunnova's distribution facilities will not be solely served by power provided from generation within the microutility. The statute's legislative history confirms the Commission's definition of microutility and the meaning of the phrase "sole source." The Bill Analysis for AB 2509 (later codified in § 2780 *et seq*.) states:

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[13] D.06-06-066, Appendix 3, adopts the definitions agreed by the parties, including *id*. at 3:

> **Electric Microutility** Any electrical corporation that is regulated by the California Public Utilities Commission and organized for the purpose of providing sole-source generation, distribution, and sale of electricity exclusively to a customer base of fewer than 2,000 customers. (Public Utilities Code § 2780.) An Electric Microutility is not connected to the ISO controlled transmission grid and thus has no relationship with the ISO nor any ability to import or export power.

[14] Application, pp. 2-4 and p. 20. AB 1890, Stats. 1995-1996, Ch. 854, Section 1(c) (Cal. 1996), the electricity restructuring statute, created the "independent system operator" - or ISO. Subsequently, to distinguish itself from other ISOs established in the United States, the California ISO changed its shorthand designation to "CAISO."

> As defined in this bill, the term "electric micro-utility" applies only to Mountain Utilities (MU), a tiny, vertically integrated utility owned by Kirkwood Mountain Resort in Alpine County and serving the ski area and the immediate vicinity. MU has approximately 500 customers, many of whom are seasonal residents, and a service area of less than two square miles. According to MU, the closest transmission lines are over 30 miles away. MU is not part of the grid managed by the Independent System Operator and its generation portfolio consists of six diesel engines with a capacity of 4,800 kilowatts.[15]

In sum, the Application's use of "microutility" does not square with the statutory definition, the legislative history, or the Commission's decisional interpretation of the statute. The statute simply does not apply to Sunnova's proposal.

Second, equally disqualifying is that the Application proposes to create a nexus of individual microutilities that in aggregate could exceed the statute's 2000 customer limit. The statute, however, does not exempt qualifying microutilities from any statutory requirements, including the 2000 customer cap; it merely admonishes the Commission to weigh whether to subject these small utilities to the administrative expense of appearing as a respondent in Commission matters.[16] Per P.U. Code § 2780, electric microutilities are "any electrical corporation that is regulated by the Commission and organized for the purpose of providing sole-source generation, distribution, and sale of electricity exclusively to a customer base of fewer than 2,000 customers." Section 2780.1 states:

> [i]t is the intent of the legislature that the commission consider the legal, administrative, and operational costs that an electric microutility faces if it is named as a respondent in a hearing generally applicable to electrical corporations. The limited resources of a microutility are disproportionately strained by the cost of response. Further, it is the intent of the legislature that the commission consider the costs described in subdivision (a) before

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[15] California Legislative Information, AB 2509 Electric Microutilities Bill Analysis, Senate Floor Analysis (July 8, 2004) p. 2, Background, available at https://leginfo.legislature.ca.gov/faces/billAnalysisClient.xhtml?bill_id=200320040AB2509.

[16] *Id.*, p. 3.

> naming an electric microutility as a respondent in a hearing generally applicable to electrical corporations.

Nothing in the statute suggests that the formation of separate LLCs owned and controlled by a parent company for the sole purpose of providing retail electric service, can evade the 2000 limit or otherwise changes the fact that the parent company is an electrical corporation subject to the laws and regulations of the state of California. In short, Section 2780.1 merely directs the Commission to consider the expense of making a small utility of limited means a respondent to a Commission proceeding. It says nothing about relieving such a utility from the statutory showings necessary for issuance of a CPCN. So, even if the Application's individual developments are microutilities (which they plainly are *not*), invoking the microutility statute does nothing to relieve SCMC of the P.U. Code's substantive requirements for a CPCN or other statutory and Commission directives.

B. The Application Fails to Establish that SCMC is Prepared to Accept the Legal Obligations Applicable to Public Utilities in California

Although SCMC has yet to negotiate franchise agreements with the affected local governments, the Application contemplates that SCMC, and each of its LLCs, will own "electric plant for compensation" within California and, thus, become "electrical corporations" under Section 218[17] and, by extension, "public utilities under Section 216. SDG&E notes that other types of requests to provide retail electrical service – *e.g.*, as an electric service provider ("ESP") or Community Choice Aggregator ("CCA") – subject applicants to a Commission review process. The Commission has made clear, for

[17] *See* Application, p. 6, n.6 ("SCMC's proposal in this application is to serve as a certified electrical corporation under Section 1001 ...").

example, that it will closely scrutinize CCA Implementation Plans to determine whether they meet statutory requirements.[18] However, even assuming it is eventually authorized to provide service as a microutility, that designation would not exempt SCMC from meeting mandatory statutory requirements, as noted above.

Allowing SCMC to implement its service strategy in a manner that ignores relevant law is simply not in the public interest. The Commission has exercised its jurisdiction to adopt regulations aimed at furthering state policy goals; SCMC fails to demonstrate why the regulations applicable to public utilities and, more broadly, to other Commission-jurisdictional LSEs would not apply to its operations. While this protest is not the appropriate place for an exhaustive summary of all legal and regulatory requirements that apply to public utilities in California, SDG&E provides a few illustrative examples below of key requirements (among many) that would apply to SCMC's microutilities, but that are not considered in the Application.

For example, the Application contemplates that each microutility will participate in the CAISO wholesale markets to purchase energy to serve its customer load. However, in addition to procuring energy to serve its customers, SCMC would *also* be required under Section 380 and the Commission's Resource Adequacy ("RA") program to comply with the Local, System and Flexible capacity procurement obligations that are applicable to all LSEs in California.[19] These requirements aim to protect reliability by ensuring that enough resources are available statewide to produce energy to serve

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[18] *E.g.*, D.05-12-041, pp. 4-5. *See also*, P.U. Code § 454.52 (CCAs' integrated resource plans shall be provided to the Commission for certification).

[19] *See* Rulemaking ("R.") 21-10-002, *Order Instituting Rulemaking to Oversee the Resource Adequacy Program, Consider Program Reforms and Refinements, and Establish Forward Resource Adequacy Procurement Obligations* (October 7, 2021).

forecasted customer demand plus a specified additional planning reserve margin ("PRM"). Satisfying the Commission's RA procurement requirements is critical to ensure grid reliability. Indeed, LSEs face enforcement action and penalties for their failure to comply with these requirements. Nevertheless, the Application does not address these requirements or indicate SCMC's awareness of their existence. Failure by SCMC's microutilities to comply with RA program requirements would threaten grid reliability, and capacity procurement obligations and costs could be unfairly shifted to the IOUs and, ultimately, their bundled service customers.

Similarly, the state's Integrated Resource Plan ("IRP") process established pursuant to Sections 454.51 and 454.52 obligates all LSEs to participate in the statewide resource planning process conducted by the Commission, which is designed to identify an optimal statewide resource mix that meets state reliability and greenhouse gas ("GHG") emission reduction goals at least cost. As part of the IRP process, all LSEs must propose portfolios and actions to meet stated goals and the Commission must aggregate individual LSE plans into a single system-wide portfolio and consider whether further action, including procurement of new resources, is necessary to ensure reliability and achieve emission reductions. The IRP process does not offer exemptions for individual LSEs; and an LSE's failure to participate in the statewide planning process could jeopardize the reliability of the system and shift costs to IOU bundled customers and customers of other non-IOU LSEs. Given the importance of the IRP process to reliability planning and achievement of the state's clean energy goals, SCMC's failure to address or even acknowledge the applicable IRP requirements is a fatal flaw in the Application.

SCMC also fails to address which entity it expects will be the Provider of Last Resort ("POLR") for its customers. The Commission's current POLR rulemaking, R.21-03-011, generally accepts that the IOU in each service area is currently obligated to act as the POLR for customers located therein.[20] This is based on Section 387(b), which directs that "[t]he provider of last resort shall be the electrical corporation in its service territory unless provided otherwise in a service territory boundary agreement . . . or unless another load-serving entity is designated by the commission pursuant to subdivision (c)."[21] To the extent SCMC seeks electrical corporation status for each of its microutilities, would each microutility act as its own POLR under Section 387(b)? The Application does not acknowledge or discuss the cost and customer protection implications of this outcome.

In addition, the discussion of SCMC's funding approach included in the Application ignores statutory provisions applicable to public utilities' financing arrangements. SCMC notes that it "will initially be funded by its parent company SEI and may seek investors for each specific microgrid project."[22] Under Section 818, however, a public utility must seek Commission approval to issue stocks and stock certificates, or other evidence of interest or ownership, or bonds, notes, or other indebtedness payable at periods of more than 12 months after the date of issuance. Similarly, Section 851 prohibits public utilities from encumbering property without

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[20] *Order Instituting Rulemaking to Implement Senate Bill 520 and Address Other Matters Related to Provider of Last Resort* (March 18, 2021) pp. 2-4. Per P.U. Code § 451, the POLR, in essence, must reliably serve and plan for the existing and foreseeable load in the service area. *Id*., p. 5 and n.5.

[21] Phase 2 of R.21-03-011 will consider potential processes for designating a non-IOU LSE to act as POLR. *Id*., pp. 5, 17.

[22] Application, p. 50.

Commission authorization. These provisions are in place to ensure ratepayer protection; it is hard to see how permitting SCMC to disregard them would serve the public interest.

Although SDG&E agrees that in certain circumstances (such as minimizing the impacts of outages in areas prone to wildfires) "microgrids can improve the safe and reliable operations of the electric grid …,"[23] it is not necessary or advisable to hollow out the rules applicable to public utilities to promote microgrid development. That said, certain policy elements of the Application may be the proper subject for exploration in pending Commission proceedings, such as POLR (R.21-03-011), microgrids and resiliency (R.19-09-009), affordability (R.18-07-006), and interconnection (R.17-07-007).

C. SCMC Fails to Satisfy the Criteria for Grant of a CPCN

The CPCN-related analysis offered in the Application is premature since no specific projects have yet been identified. The CPCN statutes upon which SCMC relies in seeking approval require a location-specific showing that is not possible to make here. Contrary to Section 1003, no Proponent's Environmental Assessment was furnished with the Application and the Application fails to discuss project alternatives, as is required by statute. The Application requests that California Environmental Quality Act ("CEQA") review be deferred until individual developments are proposed. Thus, it is not clear what, precisely, the Commission would be authorizing if it granted the CPCN request included in the Application. In addition, the CPCN request made in the Application is premised upon several erroneous and unsupported claims.

[23] Application, p. 36.

First, in arguing that the construction and operation of the microgrids as proposed in the Application would avoid interfering with existing public utilities, SCMC asserts that "under Section 1001 of the Public Utilities Code, SCMC is not 'a public utility of like character' to any existing public utility in California because its offering focuses on microgrids deployed as an integral part of new housing developments and providing customers with the unique benefits of microgrids as compared to standard electric service."[24] SCMC offers no support for this claim, which is illogical and incorrect. The definition of "public utility" established in Section 216 is unambiguous. As retail bundled electric service providers, SDG&E and SCMC, if it were to be authorized to provide service, would be providing the same type of utility service (as opposed to a water or telecommunications utility). SCMC points to no statute or Commission decision to support the notion that differences in electric system configuration, including the existence of facilities capable of forming and operating a microgrid, affect the designation of electric public utilities under Section 216.

Second, SCMC asserts that its proposal "will not interfere with existing utility's facilities or operation."[25] This claim is manifestly false. The operational approach contemplated in the Application will have a material impact on the IOU (and other LSEs) and could improperly shift cost to IOU bundled service customers. SCMC claims that "[b]ecause the microgrid will operate independently, fund any required transmission or distribution system upgrades, and charge rates only to the customers within the microgrid

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[24] Application, p. 36. The "microgrids" SCMC proposes are garden-variety distribution systems integrated with the rest of the grid, albeit with distributed energy resources ("DERs") and community solar and BESS assets integrated *ab initio*.

[25] Application, p. 37.

boundary, there will be no cost shifting as required under Public Utilities Code Section 8372 and no increase to an existing utility's rate base."[26] However, this conclusion ignores the impact that SCMC's exemption from statewide resource planning and procurement obligations would have on the IOUs. As discussed above, IRP and RA program requirements are key to ensuring reliability. SCMC's failure to shoulder its allotment of these requirements would impermissibly shift burdens and costs to the IOUs and their bundled service customers.

The Application also ignores SDG&E's potential obligation under Section 387 to serve microutility customers as the POLR,[27] as well as its duty under Section 451 to provide retail service and to plan its distribution system based on the load forecast within its historical footprint. While the nature of the responsibilities conferred by these two statutory provisions is distinct, both could require SDG&E to be prepared to provide service to SCMC's microutility customers and SDG&E would incur costs to do so. Unless the Commission finds that SDG&E is not obligated to act as POLR for microutility customers, SDG&E would be required to provide service to microutility customers in the event the microutility either failed to provide or denied service to customers, or otherwise failed to meet its obligations. Likewise, SDG&E's duty to serve under Section 451 means that it must "furnish and maintain such adequate, efficient, just, and reasonable service, instrumentalities, equipment, and facilities . . . as are necessary to promote the safety, health, comfort, and convenience of it, employees, and the public." Thus, SCMC's proposal imposes a burden on SDG&E and its customers related to its

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[26] Application, p. 37.

[27] As discussed above, the microutilities might be required to operate as POLR for their customers rather than SDG&E.

potential obligation to serve microutility customers, and it also disregards SDG&E's obligation to plan for the existing and foreseeable customer demand in their respective service areas.

Similarly, the Application does not address how each microutility would cover Commission interconnection-related reliability requirements. The Application proposes that each of its microutility developments would interconnect with the nearby local IOU for the purpose of participating in CAISO markets. The Application indicates that such participation will allow the microutility to buy and sell power as may be commercially beneficial.[28] This will require the interconnecting microutility to take service under SDG&E's Wholesale Distribution Access Tariff ("WDAT").[29] However, the Application is silent as to cost responsibility for the utility's role as POLR – providing reliable service as well as planning for the microutility load. If the microutility fails to cover its system reliability needs – either through its own resources or through market participation – the very nature of the interconnection means that power would flow to serve the microutility load whether or not POLR arrangements exist to ensure that the costs of service are appropriately allocated to those benefitting customers.

Nor can the utility's WDAT provide the proper compensation. To implement direct access and the nondiscriminatory grid access provisions of AB 1890, the California restructuring statute, the IOUs developed and filed the WDAT, a Federal Energy Regulatory Commission ("FERC") tariff. While the WDAT includes a mechanism for

[28] Application, pp. 10, 38.

[29] The Application (p. 16) recites that each utility will obtain interconnection and delivery service "through the local utility's wholesale distribution tariff."

seeking recovery of stranded costs from WDAT customers,[30] it is questionable whether that mechanism would compensate the IOU for resource planning and procurement attendant to the POLR role for new loads, as the Application implies. This is not a *de minimis* issue, especially since the Application contemplates an unspecified number of such microutility developments and obviously intends to achieve substantial scale.

D. The Application Fails to Justify SCMC's Request for "Market-Based" Rates

Sunnova's rate proposal is best summed with this Application excerpt:

> SCMC proposes to make a rate and tariff filing with the Commission for each microgrid community since each microgrid will have different rates and terms and conditions of service based on the specific physical requirements of the community and the number of customers. … However, to obtain regulatory certainty to proceed as a microutility and commence incurring the significant investments required to commercialize its microgrid plan, SCMC requests that the Commission authorize SCMC to enter into agreements for market-based, negotiated rates and terms and conditions with its customers for electric supply and microgrid services. … [T]he Commission has the authority to grant this request under its broad discretion to approve rate structures under the 'just and reasonable' standard set forth in ... [P.U. Code § 451]. Good cause exists to grant this request. Unlike existing customers of a utility, SCMC's customers will affirmatively exercise the choice of whether to live in a microgrid community and sign up for the rates and terms and conditions of service offered …. The Commission has previously approved market-based, negotiated rate requests where the public utility (1) is a newcomer to the market; (2) starts out with a customer base of zero; and (3) is not in a position to force any competitor to exit the market. Each of those factors are present here.[31]

Sunnova's argument fails because its market pricing analysis gets wrong the nature of public utility regulation as applied to a retail electric service monopoly.

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[30] SDG&E FERC Open Access Distribution Tariff, Vol. No. 6, § 22.

[31] Application, p. 42 (citation omitted).

Electric corporations (*i.e.*, investor-owned utilities) have a monopoly on distribution service – electricity delivery – to customers in each service area. The rates are regulated precisely because such distribution is deemed a natural monopoly (*i.e.*, it would offend the public interest to have duplicative, competing wires) and electricity is deemed such an essential public service that the serving IOU has the obligation to serve and to plan for all of the existing and foreseeable customer demand in its service area.

Sunnova's monopoly analysis ignores the public utility nature of distribution service. It treats the monopoly problem as solved by presenting the illusion of choice and competition in the form of rate negotiations with developers and the ability of potential homeowners to decline buying into the development if they object to the rates negotiated. Also, "not [being] in a position to force any competitor to exit the market" and "start[ing] out with a customer base of zero"[32] are irrelevant to the proposed public utility monopoly. That is, there are no competitors for the distribution service proposed by the Application, and the Application contemplates that there will be a substantial number of customers paying rates to the monopoly provider. "Market-based" is a misnomer - there is no "market" of competing options that applies to the arrangement between developer and potential end-use customer. It is simply a "take-it-or-leave-it" offer by a monopoly supplier. Under these circumstances, the Commission is not free to find that rates negotiated with a developer for retail electric service are just and reasonable.

[32] Application, p. 42 (citation omitted).

Nor do the Commission decisions cited by the Application in support of "market-based rates" apply. The proposed rates for a new jet fuel pipeline,[33] where airports are currently supplied with jet fuel by truck, do not implicate an obligation to serve or a natural monopoly. The telecommunications cases cited concerned discrimination against competing switched-service providers by a company with a monopoly bottleneck.[34] These cases do not involve an obligation to serve a natural monopoly at retail.[35]

In addition, FERC confers market-based rate authority for wholesale sellers to transact with other market participants, based on an explicit finding that the seller *lacks* monopoly power.[36] This contrasts with the Application, which proposes a retail distribution monopoly for each development.

In sum, there is no legal or factual basis for exempting the SCMC's developments from Commission public utility rate regulation.

E. The Application Raises Affordability, Undue Discrimination, and Cream-Skimming Issues

The Application's proposal to exempt the individual developments from Commission rate regulation has affordability impacts that also implicate undue

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[33] Application, p. 42, n.42, *citing* D.15-07-011, *Decision Granting Application for Authorization to Establish Market-Based Rates and Conditions of Service and for Approval of Exemptions Related to Secured Financing Transactions* (July 23, 2015).

[34] Application, p. 43 and n.43.

[35] The Application quotes a Commission finding that negotiated contacts, as opposed to tariffs, were appropriate, "when the contracts were responses to emerging competition for what had historically been monopoly services." Application, p. 43, and n.43.

[36] FERC grants market-based rate authorization for wholesale sales of electric energy, capacity and ancillary services by sellers that can demonstrate that they and their affiliates lack or have adequately mitigated horizontal and vertical market power. *See*, FERC Order Nos. 697 through 697-D, 119 FERC ¶ 61,295 (June 21, 2007), 123 FERC ¶ 61,055 (April 21, 2008), 125 FERC ¶ 61,326 (December 19, 2008), 127 FERC ¶ 61,284 (June 18, 2009) and 130 FERC ¶ 61,206 (March 18, 2010), respectively.

discrimination and "cream-skimming." By way of background, note that all basic electric utility regulations imposed by the Commission apply to smaller utilities (*e.g.*, Bear Valley Electric):

- General orders governing the establishment of tariff schedules, numerous safety standards, emergency preparedness, supplier diversity, confidentiality of documents, and various reporting requirements related to finances, operations, employee compensation, dues, donations, etc.

- Publicly available tariff schedules governing service application, establishment of credit, service installation, service delivery, metering, rates, deposits, notices, billing, disputes and complaints, discontinuance of service, interruption of delivery, etc.

- Programs related to wildfire mitigation and safety, affordable rates (CARE, FERA, MBL, etc.), low-income programs ("ESAP"), energy efficiency, demand response, dynamic pricing, PPP cost recovery, RPS compliance, integrated resource planning, transportation electrification, etc.

- Various proceedings including GRC, RAMP, S-MAP, Cost of Capital, CEMA recovery, etc.

Many of the foregoing provide benefits to all customers – and to the public at large. There is no way to insulate SCMC's future customers from these broader benefits, nor is there statutory blessing for an exemption in some cases. SCMC's market-based rates proposal makes no provision for the state's public utility programs as reflected in rates. This in and of itself makes the Application's rate proposal unduly discriminatory under P.U. Code § 454.

In addition, P.U. Code § 382(b) states "that electricity is a basic necessity, and that all residents of the state should be able to afford essential electricity and gas supplies, the commission shall ensure that low-income ratepayers are not jeopardized or overburdened by monthly energy expenditures." Accordingly, the Commission has

convened a rulemaking to develop metrics to evaluate affordability in its proceedings.[37] SCMC's proposal conflicts with the Commission's affordability initiatives. That is, while SCMC broadly asserts that its proposal will benefit low-income communities,[38] the proposed microutilities favor the affluent, given that new developments and expensive cutting-edge DERs are contemplated, and that the proposed market-based rates could be interpreted as an attempt to free each microutility from Commission policies designed to assist disadvantaged communities ("DACs"), such as PPP, CARE and non-bypassable cost allocation. For the affluent to avoid costs that benefit all ratepayers or the general public unfairly increases the rate burden on the less affluent.

An apt phrase applies to the Application and its discriminatory impact - cream-skimming. The Application proposes communities for the affluent, where they may supply their energy needs free from legacy equipment, rates, and possibly PPP costs, as well as the costs and responsibilities of a POLR. SCMC and the developer can thereby attract customers who presumably are of lower credit risk and can afford the latest distributed energy technology. There is no place for such discrimination on a public utility network.

The Commission should not forget its current dilemma on Net Energy Metering ("NEM"). The discriminatory cross subsidies/cost shifting of NEM rate design were seen as *de minimis* twenty-five years ago. That is not the case today. In deciding whether to permit the discrimination inherent in the Application for the sake of testing other putative

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[37] R.18-07-006, *Order Instituting Rulemaking to Establish a Framework and Processes for Assessing the Affordability of Utility Service* (July 12, 2018).

[38] Application, p. 5 ("These technologically advanced community microgrids could also help disadvantaged communities that disproportionately suffer from pollution and other burdens by reducing reliance on fossil fuels and deploying local sources").

benefits, the Commission should keep the NEM experience in mind. If the Commission entertains this Application, it can surely expect other such proposals with similar flaws.

IV. CONCLUSION

While the goal of evaluating the green field deployment of the latest DERs is laudable, the approach proposed by the Application is deeply flawed and directly contrary to the public interest. The Application's deficiencies are too profound to remedy through further action in this proceeding. For these reasons, the Commission should dismiss the Application without prejudice as premature and incomplete.

Respectfully submitted,

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October 10, 2022