BEFORE THE PUBLIC UTILITIES COMMISSION

OF THE STATE OF CALIFORNIA

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Order Instituting Rulemaking to Advance Demand Flexibility Through Electric Rates	Rulemaking 22-07-005 (Filed July 14, 2022)

OPENING BRIEF OF
THE SOLAR ENERGY INDUSTRIES ASSOCIATION
REGARDING STATUTORY INTERPRETATION OF AB 205

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Pursuant to the December 9, 2022, *Administrative Law Judge's Ruling Requesting Track A Briefs on Statutory Interpretation* ("Ruling"), as modified by the Administrative Law Judge's December 20, 2022, procedural email, the Solar Energy Industries Association ("SEIA") submits this brief responding to the questions on statutory interpretation set forth in the Ruling. As requested, SEIA responds to the questions from both a legal perspective and a public policy perspective, as appropriate.

I. INTRODUCTION

The California Public Utilities Commission ("Commission") is tasked with approving a fixed charge for residential default rates by July 1, 2024. This undertaking must conform with the statutory requirements of Public Utilities Code Sections 381, 739.1, and 739.9, as recently amended by AB 205. As highlighted at the November 29, 2022, Workshop hosted by the Commission's Energy Division, these statutory provisions are subject to varying degrees of interpretation. It is imperative, however, that the Commission have a clear understanding of the statutory provisions by which it is being guided prior to the assessment of parties' proposals on the formation of a fixed charge for residential default rates. The applicable code provisions are the guideposts by which the Commission must assess all such proposals. That said, the

Commission is not interpreting these statutes in a vacuum and must rely on its knowledge of the subject matter, its past deliberations on the issues in question, and the overall policy objectives which it has been tasked with helping the state achieve. Indeed, courts have long recognized that the Legislature may elect to defer to and rely upon the expertise of administrative agencies that are charged with administration of the statute.[1] In sum, the Commission is left with the task of interpreting the applicable statutes consistent with the established rules of statutory construction, but, where necessary, rely on its own underlying expertise to effectuate the overall objectives of the statutes.

II. FRAMEWORK FOR COMMISSON INTERPRETATOIN OF STATUTORY REQUIREMENTS

A. Statutory Construction

The rules of statutory construction under California law indicate that the Commission must first look to the plain language of the statute. The fundamental task of statutory construction is to ascertain the intent of the lawmakers so as to effectuate the purpose of the law.[2] This construction is initially confined within the four corners of the statute. Thus, statutory construction begins with the plain, commonsense meaning of the words in the statute because it is generally the most reliable indicator of legislative intent and purpose.[3] Moreover, one of the fundamental rules of statutory construction is that interrelated statutory provisions should be harmonized and, to that end, the same word or phrase should be given the same meaning within the interrelated provisions of the law. Accordingly, different

1 *See, e.g., Credit Ins. Gen Agents Assn. v. Payne* (1976) 16 Cal. 3d 651,656.

2 *Khajavi v. Feather River Anesthesia Medical Group* (2000) 84 Cal. App. 4th 32, 45 (quoting and citing *People v. Crus* (1996) 13 Cal.4th 764, 774-75; *Williams v. Sup. Ct.* (1993) 5 Cal.4th 337, 350 (quotation omitted)).

3 *People v. Skiles* (2011) 51 Cal.4th 1178, 1185, 126 Cal.Rptr.3d 456, 253 P.3d 546.

sections of a code must be read together and code provisions relating to the same subject must be harmonized to the extent possible.[4] Finally, when specific words follow general words in a statute or vice versa, the general term or category is "restricted to those things that are similar to those which are enumerated specifically"[5] and constructions that render words surplusage should be avoided.[6]

However, when the words of the statute are insufficient to determine legislative intent, the Commission can turn to "a variety of extrinsic aids, including the objects to be achieved, the evils to be remedied, legislative history, the statutory scheme of which the statute is a part, contemporaneous administrative construction, and questions of public policy."[7] Thus, when appropriate, the Commission can interpret the words of the statute in a manner consistent with the state's broader policy objectives, as discussed below.

B. Policy Framework

The Commission is implementing the fixed charge provisions of AB 205 within the broader framework of advancing demand flexibility through rates. The Commission has stated that the objectives of this undertaking are to: (a) enhance the reliability of California's electric system; (b) make electric bills more affordable and equitable; (c) reduce the curtailment of renewable energy and greenhouse gas emissions associated with meeting the state's future system load; (d) enable widespread electrification of buildings and transportation to meet the state's climate goals; (e) reduce long-term system costs through more efficient pricing of

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4 . *See Pacific Southwest Realty Co. v. County of Los Angeles* (1991) 1 Cal.4th 155, 167.

5 *See, e.g., International Federation of Professional Technical Engineers, Local 21, AFL-CIO v. Superior Court* (2007) 42 Cal.4th 319, 342.

6 *See, e.g., Lopez v. Superior Court* (2010), 50 Cal. 4th 1055.

7 *In re Derrick B.* (2006) 39 Cal.4th 535, 539.

electricity; and (f) enable participation in demand flexibility by both bundled and unbundled customers.[8] These objectives are consistent with the state's overarching energy policy goals. Thus, the Commission must assess how each component of a rate could impact achieving these objectives. While the Commission must comply with the mandates of AB 205 – i.e., approve an income-graduated fixed charge for default residential rates, it must do so while keeping in mind these objectives. Establishing a fixed charge or set of fixed charges which serve to work against these objectives will not serve California's interests in the long run.

In addition, the Commission cannot lose sight of its Rate Design Principles. While these principles are currently being modified in this proceeding, certain core tenets pervade the existing principles and those under consideration – affordability, cost causation, use of marginal costs, and customer understanding and acceptance. As will be discussed in more detail below, in prior instances of the Commission's assessment of fixed charge proposals, issues of customer understanding and acceptance have proven to be significant hurdles.

III. RESPONSE TO QUESTIONS

Question 1: **Section 739.9(a) defines a "fixed charge" as "any fixed customer charge, basic service fee, demand differentiated basic service fee, demand charge, or other charge not based on the volume of electricity consumed." Section 739.9(e)(1) provides "For the purposes of this section and Section 739.1, the commission may authorize fixed charges for any rate schedule applicable to a residential customer account. The fixed charge shall be established on an income-graduated basis with no fewer than three income thresholds so that a low-income ratepayer in each baseline territory would realize a lower average monthly bill without making any changes in usage. The commission shall, no later than July 1, 2024, authorize a fixed charge for default residential rates."**

a. Does "no fewer than three income thresholds" mean a minimum of three or four tiers of fixed charge levels?

Key to answering this question is determining the legislative intent behind the terms

[8] Assigned Commissioner Phase 1 Scoping Memo and Ruling, *Order Instituting Rulemaking to Advance Demand Flexibility Through Electric Rates*, R. 22-07-005 (November 2, 2022), p. 1.

"thresholds" and "income." Consistent with the rules of statutory construction, the Commission must look first at the plain, commonsense meaning of these terms. The term "threshold" is commonly defined as "a limit at which an arrangement changes" [9] or, similarly, "a level, point, or value above which something is true or will take place and below which it is not or will not."[10] The term "income" is commonly defined as "a gain or recurrent benefit usually measured in money that derives from capital or labor."[11] Thus, in the context of the application of the fixed charge specified in Section 739.9(e), an "income threshold" should be interpreted as a level of recurring monetary benefit from employment or investment above which the fixed charge assessment would change.

With these concepts in mind, the statutory language of "no fewer than three income thresholds" should be interpreted to mean a minimum of three fixed charge levels. The first threshold would be > $0.00. Based on the statutory language, any customer which has any income (employment or investment) is subject to a fixed charge. Once a customer makes any income, a fixed charge value will apply. Thus, any income above $0.00 is the first "limit at which the arrangement changes." The second and third thresholds will need to be established by the Commission. For example, the second threshold could be set at the maximum income level to qualify for CARE. If a customer makes more than that threshold level, then the customer would pay a higher fixed charge. The final threshold level at which the fixed charge would once again increase would be determined by the Commission based upon the rules of just and reasonable ratemaking.

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9 https://www.macmillandictionary.com/us/dictionary/american/threshold

10 https://www.merriam-webster.com/dictionary/threshold

11 https://www.merriam-webster.com/dictionary/income

In addition to the basic tenet of statutory construction, the Commission should also be cognizant of the current residential rate structure into which the legislature has introduced an income-graduated fixed charge. As a result of the CARE program, there already exists an overarching income graduated rate structure with two tiers in residential rates. By using the phrase "no fewer than three income thresholds," it appears the legislature was expressing a desire to expand the construct beyond its current two tiers, to a minimum three-tier structure, but granting the Commission the discretion to make the ultimate determination in line with its adopted rate design principles.

b. What types of current or potential residential charges and service fees should be considered a "fixed charge" subject to the income-graduation requirements of Section 739.9(e)?

b. 1. Current Fixed Charges

Currently, pursuant to authorization received in Decision 96 -04-050, Southern California Edison Company ("SCE") assesses a small, fixed charge on its residential customers. As described by the Commission, this charge was intended to capture the marginal cost of billing, accounting and other ongoing customer-related services, costs which "do not relate to a customer's demand or energy use on the system, and are relevant to all customers, those with existing or new hook ups."[12] The other two major investor-owned utilities do not have comparable authorization. Thus, while SCE's fixed charge *may* be a current fixed charge subject to the income-graduation requirements of Section 739.9(e), given its approval more than 15

[12] *Re Southern California Edison Co.*, 65 CPUC 2d 362, 1996 WL 1045025 (Cal.P.U.C.), p . 41.

years prior to the adoption of AB 327, it should be reexamined to make sure it meets all the requirements for a fixed charge set forth in Section 739.9 of the Public Utilities Code.

b. 2. Potential Fixed Charges

With respect to determining the "potential" charges which could be considered a "fixed charge" subject to the income graduation requirements of Section 739.9 (e), the Commission must undertake a multifaceted analysis that considers: (1) whether the charge meets the statutory definition of a fixed charge as set forth in PU Code Section 739.9 (a); (2) whether the charge is designed to only recover a "reasonable portion of fixed costs" as required by PU Code Section 739.9 (d) ; and (3) whether the charge is designed in a manner which meets the three criteria enumerated in PU Code Sections 739.9 (d) (1) – (3).

b. 2. (a) Definition of "Fixed Charge"

Section 739.9 (a) defines the term "fixed charge" as: "Any fixed customer charge, basic service fee, demand differentiated basic service fee, demand charge, or other charge not based on the volume of electricity consumed." This is not the first occasion on which the Commission has been faced with interpreting this statutory definition. In the Residential Rate Reform Rulemaking (R.12-06-013), the Commission applied the rules of statutory construction to reach the following conclusion regarding the breadth of the statutory definition:

> Section 739.9(a) defines a fixed charge in two ways: by enumerating a list of different types of fees ("any fixed customer charge, basic service fee, demand differentiated basic service fee, [or] demand charge") and by generally describing a fixed charge as "not based upon the volume of electricity consumed." When general words follow an enumeration of different items, those words apply only to things of the same kind or class, and the meaning of each is determined by reference to the others. Thus, the statute treats basic service fees, demand charges, and demand differentiated basic service fees as non-volumetric.
>
> Examining the non-volumetric charges, we find that a basic service fee is added to a bill regardless of demand or volume, while the other charges depend on peak demand (maximum kW being consumed by the customer over the relevant

> interval). Since general words at the end of a list apply only to things of the same kind or class, it follows that Section 739.9(a) refers *exclusively to non-volumetric charges that apply based on demand or the mere existence of a customer account*.[13]

Thus, the Commission has already determined that PU Code Section 739.9 (a) limits the universe of charges that could be subject to the income graduated requirements of Section 739.9 (e) to those that are not based on usage and apply by virtue of (1) the existence of a customer account, or (2) the maximum possible demand that could be provided to the customer (not the customer's individual maximum demand).[14] This language would exclude the common demand charges found in many utility rate designs, which are based on the customer's maximum *volumetric* consumption in any 15- or 60-minute period of the month.

b. 2. (b) Definition of "Fixed Cost"

Section 739.9 (d) provides that the "The commission may adopt new, or expanded existing, fixed charges for the purpose of collecting a reasonable portion of the *fixed costs* of providing electrical service to residential customers" (emphasis added). Thus, whatever fixed charge is approved by the Commission pursuant to the terms of Section 739.9 (e) must be limited to collecting "a reasonable portion of fixed costs," i.e., not all the IOUs' costs which are ultimately determined to be fixed.

While referenced in Section 739.9 (d), the term "fixed cost" is not defined in the statute. Thus, the Commission must once again rely on the canons of statutory construction. Starting first with the plain, commonsense meaning of the words in the statute as the most reliable indicator of legislative intent and purpose, the word "fixed" means predetermined and not subject to or able

13 Decision 15-07-001, pp. 221-222 (citations omitted).

14 *See* response to question 1.c. discussing the types of charges that cannot be "fixed charges".

to be changed.[15] Moreover, consistent with the statutory construction principle that interrelated statutory provisions should be harmonized and the same word should be given the same meaning within the interrelated provisions of the law, the term "fixed" is used elsewhere in the same section of the statute (§739.9 (a)) to express the concept that the charge should not be based on electricity usage – i.e., it should be stable and not change.

As a descriptor to the word costs, and in conjunction with the definition of fixed charge provided in the statute – i.e., a charge not based on the volume of electricity consumed – the rules of statutory construction require that the term "fixed cost" be interpreted as a cost that will not change based on the volume of electricity consumed. Indeed, the Commission has previously reached this conclusion.[16] In this regard, the Commission has stated that "fixed costs should be calculated in a manner that *truly reflects customer-specific costs* and minimizes regressive impacts of this cost collection method."[17]

b.2 (c) Compliance with Statutory Criteria

As the final part of its analysis as to what potential charges can be considered a "fixed charge" subject to the income-graduation requirements of Section 739.9(e), the Commission must ensure that the charge meets the statutory criteria of Sections 739.9 (d) (1)-(3) :

> (1) Reasonably reflect an appropriate portion of the different costs of serving small and large customers.
>
> (2) Not unreasonably impair incentives for conservation, energy efficiency, and beneficial electrification and greenhouse gas emissions reduction.
>
> (3) Are set at levels that do not overburden low-income customers.

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15 https://www.merriam-webster.com/dictionary/fixed

16 Decision 15-07-001, p. 190 (defining fixed costs as those to not change as a result of individual customer usage).

17 *Id.*, p. 191 (emphasis added).

The universe of potential charges which could be subject to the income graduated requirements of Section 739.9 (e) is constrained by these criteria.

Reasonably reflect an appropriate portion of the different costs of serving small and large customers.

Turning first to the requirement that any fixed charge adopted reflect the difference in the costs of serving large and small customers, the Commission must first ascertain the meanings of the terms “large” and “small.” In general vernacular they mean “of more than average size, quantity, degree, etc.”[18] and “limited or below average in number or quantity or magnitude or extent,”[19] respectively. Applying these commonsense meanings of the terms, the Commission has previously determined that “in the context of fixed charges for residential customers, “large” and “small” most likely refers to “a customer’s usage level or type of dwelling”[20]

In Decision 17-09-035, the Commission explored how to fashion a fixed charge to meet the criteria of Section 739.9 (d)(1). Therein, based on the extensive record developed in that proceeding, the Commission determined that the “the differences in the fixed costs among customers arise from differences in capital related costs, especially transformers and service drops, as these differences are attributed to both the size of the customer and density of customers”[21] (e.g., single family vs. multi-family dwellings). Thus, in developing a fixed charge the Commission must differentiate between the level of fixed capital costs attributable to large customers and those attributable to small customers.

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18 https://www.dictionary.com/browse/large

19 https://www.vocabulary.com/dictionary/small

20 Decision 15-07-001, p. 209.

21 Decision 17-09-035, p.46.

Not unreasonably impair incentives for conservation, energy efficiency, and beneficial electrification and greenhouse gas emissions reduction.

Looking next at the requirement that the adopted fixed charge cannot "unreasonably impair incentives for conservation, energy efficiency, and beneficial electrification and greenhouse gas emissions reduction," it is important to note that the statutory language does not place a complete prohibition on a fixed charge impairing incentives for conservation energy efficiency, electrification and greenhouse gas reduction, but rather such impairment cannot be "unreasonable" -- "exceeding the bounds of reason or moderation."[22] This allows the Commission some flexibility to weigh the varying impacts of a proposed fixed charge on each of the state policies enumerated in Section 739.9 (d) (2).

The Commission has previously examined proposed fixed charges to see if they unreasonably impair incentives for conservation and energy efficiency. Thus, for example in D.11-05-047, the Commission rejected Pacific Gas and Electric Company's ("PG&E") application for a residential fixed charge on the basis that because a "fixed charge cannot be avoided by a customer's reducing usage or being more energy efficient," it offers no conservation price signal.[23] Subsequently, in D.14-06-007, the Commission rejected San Diego Gas & Electric Company's ("SDG&E") request for a $5 fixed customer charge for residential gas service, holding that SDG&E's argument that the "$5 per month charge sends a "significant cost causation signal for fixed costs" is "not persuasive when weighed against the dilution of conservation and energy efficiency price signals."[24] In Rulemaking 12-06-013, the Commission, in assessing the IOUs' proposals for a $10.00 fixed charge, again recognized that "a fixed

22 https://www.merriam-webster.com/dictionary/unreasonable

23 Decision 11-05-047, p. 33.

24 Decision 14-04-007, p. 41.

charge, as a rate design element, would not encourage additional conservation," but determined that the "impact is likely to be small."[25] In other words, the Commission determined that an impact of a fixed charge in the $10.00 range would not be and unreasonable impairment on conservation.

In this instance, the Commission must also evaluate fixed charge proposals within the broader framework of this proceeding which is structured to advance demand flexibility. Customers must be able to respond to reduce their use of electricity, and thus their electric bills. Fixed charges perform poorly in this regard. First, as noted above, fixed charges reduce the portion of the monthly bill that a customer can manage by reducing or shifting their loads. Second, customers have no ability to avoid fixed charges except by moving their entire demand off the grid – a type of demand flexibility that is not desirable, but that may become increasingly economic in California due to the combination of the state's rising electric rates and the declining costs of solar and battery technologies. Thus, from both the standpoint of statutory compliance - the impacts of the fixed charge cannot be unreasonable - and to advance the objectives of this proceeding – demand flexibility - the magnitude of the fixed charge will be critical.

The amount of the fixed charge may also negatively impact beneficial electrification and greenhouse gas ("GHG")emissions reductions. It is worth noting that the statutory prohibition against unreasonable impacts on electrification and GHG emission reductions was added to the statute as part of the AB 205 (while the prohibitions against unreasonable impacts on conservation and energy efficiency were adopted in 2013 with the passage of AB 327). The

[25] Decision 15-07-001, p, 214.

addition of these two criteria underscores that, as the state draws closer and closer to the target date for meeting its GHG reduction goals, rate design will play a critical role.

To date, the Commission has approved several optional residential rate schedules intended to incent electrification. The approved rate designs remove costs from the volumetric rate and placed them in a fixed charge. This type of rate structure presumably allows a customer to charge their electric car or use their electric appliances at a volumetric electric rate that is lower than the cost of fossil fuels. Accordingly, the guiding presumption is that in order to incent electrification, the fixed charge must result in a meaningful reduction of the off-peak volumetric rate – the lowest rate available to the customer for electrification uses.[26] Within the context of this demand flexibility proceeding, however, the Commission should look at this presumption more closely. Raising fixed charges often lowers rates evenly across all time periods, which may encourage greater electric use, but fail to convey the critical price signal of *when* that additional electricity should be consumed. If higher fixed charges result in more on-peak energy use, reliability may be threatened, or capacity-related costs may increase. Lower volumetric rates can result in the greater use of electricity in less efficient or wasteful applications that do not reduce carbon emissions. Thus, the Commission cannot assess a fixed charge proposal in a vacuum but must evaluate it in relation to its impact on the volumetric components of the rate, and the ultimate impact on customer usage patterns. Such evaluation comports with the Staff's proposed Rate Design Principal No. 9 - rates should encourage customer behavior that improves system reliability.

Are set at levels that do not overburden low-income customers.

Finally, turning to the last element of Section 739.9 (d) – set at a level that does not

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26 *See, e.g.,* Decision 22-11-022.

unreasonably burden low-income customers – this element will be addressed through the requirement of Section 739.9(e) which requires that the Commission ensure that low-income customers pay a lower fixed charge than high-income customers.

c. What types of residential charges and service fees should not be considered a "fixed charge" and therefore should not be subject to the requirements of Section 739.9(e)?

Any charge that includes costs based on individual customer demand (co-incident or non-coincident peak) cannot be considered a fixed charge, income-graduated or otherwise. As explained above, the Commission has previously determined that the statutory definition of fixed charge encompasses only non-volumetric charges – i.e., charges not based on usage. The term "usage" is not confined to energy usage (i.e., kWh) and necessarily includes capacity usage in the form of peak demand (kW). Capacity costs can vary because of individual customer demand on the system or circuit capacity. Demand charges designed to recover the costs needed to meet the capacity consumption demands of a customer do not recover fixed costs and therefore cannot be a fixed charge subject to 739.9 (e).

Moreover, the continued use of coincident or noncoincident demand charges in rate design has come under increasing scrutiny at the Commission. The Commission has found that such charges are inconsistent with cost causation[27] as well as with the state's energy policy goals.[28] Commission staff recently expounded on the findings of the Commission, reaching the following conclusions regard the negative impacts of demand charges:

- **Demand Charges, as currently designed, impede BTM DER and EV charging infrastructure deployment.** Demand charges, by effectively ignoring the grid's temporal needs, promote inefficient deployment and dispatch of energy storage and EV charging. Demand charges can also

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27 Decision 14-12-080, Finding of Fact 8; Decision 18-08-013, p. 49.

28 Decision 18-08-013, pp. 47-48.

undercut the financial benefits of building and transportation electrification since electrified end-uses can increase a customer's peak load. As such, demand charges are incompatible with State GHG reduction and electrification goals.

- **Coincident Demand Charges (CDCs) do not incentivize customer peak load reductions when most needed by the system.** As currently implemented, CDCs are based on a customer's single 15-minute peak demand over a month during a predefined peak period window. However, a customer's single peak measurement may not occur on a day when the net system demand is at peak, which is typically on hot summer days.
- **Non-coincident Demand Charges** (**NCDCs) arguably represent a deviation from the cost causation principle and can lead to increased GHG emissions.** NCDCs, by penalizing demand even when timed to be beneficial to the grid, can send an economically inaccurate and inefficient signal that is disconnected from the factors that drive system costs.
- **Demand charges can perversely incentivize customers to worsen grid conditions.** Monthly demand charges can result in counter-productive behavior. Once a demand charge has been incurred, the incentive to conserve. is removed; the customer will pay the demand penalty regardless of usage for the remainder of the month. [29]

In short, demand charges structured to recover capacity costs based on individual customer capacity usage do not meet the statutory criterion for fixed charges contained in Section 739.9 (d) (2) nor are they consistent with recent Commission findings regarding the negative impact of such charges on beneficial electrification, GHG emissions reduction, and system reliability.

d**. Section 739.9(e)(1) provides that the Commission may authorize "fixed charges" for any residential rate, and that "[t]he fixed charge shall be established on an income-graduated basis with no fewer than three income thresholds so that a low-income ratepayer in each baseline territory would realize a lower average monthly bill without making any changes in usage." Do you agree that the statute permits**

29 *Advanced Strategies for Demand Flexibility Management and Customer DER Compensation*, Energy Division White Paper and Staff Proposal (June 2022), pp.34-35, available at: https://www.cpuc.ca.gov/-/media/cpuc-website/divisions/energy-division/documents/demand-response/demand-response-workshops/advanced-der---demand-flexibility-management/ed-white-paper---advanced-strategies-for-demand-flexibility-management.pdf

the Commission to authorize a bundle of fixed charges for a residential rate (e.g., one rate with both a basic service fee and a demand-differentiated service charge) that, collectively, comply with the requirement for income graduation with no fewer than three income thresholds so that a low-income ratepayer in each baseline territory would realize a lower average monthly bill without making any changes in usage?

SEIA does not agree that the statute allows the Commission to "authorize a bundle of fixed charges for a residential rate" that "collectively, comply with the requirement for income graduation with no fewer than three income thresholds." Rules of statutory construction do not comport with such an interpretation of the statute. Moreover, having multiple income-graduated fixed charges adds further complexity to the implementation of AB 205 and the potential difficulties of achieving ratepayer understanding and acceptance of such a construct.

d.1. Statutory Construction

Under the general rules of statutory construction, the use of a word in the singular form is interchangeable with the use of the word in the plural form, but only when that interpretation is "clearly ascertainable" [30] The language structure of the section must be considered.[31] In this case, a conclusion that legislature intended that the singular and plural forms of the term "fixed charge" be interchangeable is not clearly ascertainable. To the contrary, within the same statutory section, the legislature used the term "fixed charge" both in the singular and the plural. Specifically, in discussing the Commission's overall authority, the statute uses the term in the plural – "the Commission may authorize fixed <u>charges</u> for any rate schedule applicable to a residential customer account." The use of the plural form of the word in indicative of the fact that

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30 *Mills v. City of Elsinore* (1928) 93 Cal. App. 753, 764.

31 *People v. Kunitz* (2004) 122 Cal.App.4th 652, 655 (interpreting section of Penal Code: "the language and structure of section 1202.4(b) indicates that this general r rule was not intended to apply").

the statute allows for the establishment of varying fixed charges for differing rate schedules. However, when discussing the design or assessment of a fixed charge on any specific rate schedule, the statute uses the singular term of the word – "the fixed charge shall be established on an income-graduated basis" and "authorize a fixed charge for default residential rates." The statutory language provides no indication that the legislature intended that the Commission adopt multiple fixed charges for each residential rate schedule.

d.2. Customer Understanding and Acceptance

In examining the possible means to implement AB 205, the Commission must be acutely cognizant of the ultimate recipients of its efforts – i.e., residential ratepayers. For the first time, the ratepayers of the IOUs will be subject to a fixed charge of more than minor amounts. Moreover, the statute requires that the charge be income-graduated with at least three income tiers – to date, rates have had at most two income tiers, with a simple percentage discount for deriving rates in the low-income tier. To turn a fixed charge into a "bundle of fixed charges" is asking for a consumer protection nightmare.

In prior proceedings in which the Commission has taken the implementation of a fixed charge under consideration, the record has been replete with evidence of negative customer reactions to fixed charges.[32] In those instances the Commission has repeatedly stated that "considerable weight must be given to the ability of residential customers to both understand the principles behind the rates they are charged and accept those principles as reasonable."[33] In the last instance in which the Commission considered the implementation of residential fixed charges it noted that "It is apparent that the history of the application of default fixed charges to

[32] *See, e.g.,* D. 15-07-001, p. 226 ("it is beyond dispute that the record in this proceeding shows substantial customer hostility to fixed charges on residential bills").

[33] D.15-07-001, p.216 *citing* D. 88-07-023 , p.5; *see also,* Decision 20-03-003, p.13.

residential customers of the IOUs is checkered, the Commission is gravely concerned with the potential for a negative customer reaction to residential fixed charges and inadequate utility communications in general."[34] The Commission ultimately determined not to approve the fixed charges proposed by the IOUs because "The ME&O plans offered by the IOUs in this proceeding do not adequately describe how residential customers will be prepared to accept and understand a charge that they cannot avoid." [35]

The fact is that nothing has changed in the three years since the Commission last issued a decision on fixed charges. Residential customers are no more educated on this type of charge than they were then. The modified rate design principles which are under consideration by the Commission in this proceeding still include the concepts of customer understanding and acceptance. The Commission should be cognizant of that fact prior to interpreting AB 205 in a manner which will raise the complexity level of the charges imposed in a way that even the most educated customer would have problems grasping.

e. How should "a low-income ratepayer in each baseline territory" be defined in the context of this paragraph?

SEIA does not have any comments on how the term "a low-income ratepayer in each baseline territory" should be defined for the purposes of Section 739.9(e)(1) at this time but reserves the right to respond to other parties' comments.

Question 2. Section 739.9(e)(2) states "For purposes of this subdivision, 'income-graduated' means that low-income customers pay a smaller fixed charge than high-income customers." How should "customers" be defined in the context of this paragraph? Should the Commission define a customer as a household, and if so, how should the Commission define a household?

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34 D. 20-03-003, p. 13.

35 *Id*., p. 20.

SEIA does not have any comments on how the term "customer" should be defined for the purposes of Section 739.9(e)(2) at this time but reserves the right to respond to other parties' comments.

Question 3. Section 739.9(f) states "Notwithstanding the requirements of subdivision (d) of Section 739 and Section 739.7, the commission shall not apply the composite tier method to the treatment of any revenues resulting from any fixed charge adopted pursuant to this Section." This Section was amended to prohibit the use of the composite tier method, which is the concept of including the fixed charge amount as part of the Tier 1 rate for purposes of calculating the tier differential. Do you have any comments about interpreting Section 739.9(f)?

SEIA does not have any comments regarding the interpretation of Section 739.9(f) at this time but reserves the right to respond to other parties' comments.

Question 4. Section 381(a) states "To ensure that the funding for the programs described in subdivision (b) and Section 382 are not commingled with other revenues, the commission shall require each electrical corporation to identify a separate rate component to collect the revenues used to fund these programs. The rate component shall be a nonbypassable element of the local distribution service." This section was amended to remove the requirement that nonbypassable charges (NBCs) are collected on the basis of usage. Are there any remaining statutory restrictions for specific NBCs (e.g., wildfire charges) that would prevent recovery through a fixed charge?

Currently there are approximately 13 nonbypassable charges ("NBCs") which are assessed on ratepayers in California.[36] Sections 381(a) and 382 of the PU Code are limited to the recovery of costs for low-income assistance, energy efficiency, and research & development – i.e., costs that are recovered in the Public Purpose Programs ("PPP") NBC. Thus, the premise of the question is incorrect. Section 381(a) was not amended to "remove the requirement that nonbypassable charges ("NBCs") are collected on the basis of usage." The section was amended to remove the requirement that the PPP NBC be collected on the basis of usage. It did not

[36] *See* Decision 22-12-056, p. 118-119 (listing all the NBCs). Certain of the NBCs are inapplicable to ratepayers in the service territories of one or more of the IOUs (e.g., the local generation charge is only applicable to customers in SDG&E's service territory).

address the other 12 currently applicable NBCs. Moreover, while the requirement to collect the PPP surcharge on the basis of usage was removed, the *option* for the Commission to do so remains.

To address the specific question as to whether there exist any statutory restrictions to the collection of these program costs, or the costs currently recovered through any of the other NBCs, through a fixed charge, the answer is yes. Whether the costs currently recovered through any of the NBCs can be recovered through a fixed charge is dependent on whether they are in fact "fixed costs". As discussed in response to question 1, fixed charges are statutorily limited to recovering a reasonable portion of the utility's "fixed costs."[37] The Commission will need to evaluate the costs currently recovered through each NBC and determine whether they meet the determined definition of fixed costs. If they do, then the Commission has the *option* of allowing the IOUs to recover those costs in fixed charge. If they do not, then PU Code Section 739.9(d) prohibits their recovery in that manner.

Finally, there are statutory restrictions on certain NBCs which prohibit their recovery through a fixed charge, irrespective of whether the charges are designed to recover fixed costs.

- The Competition Transition Charge (CTC), created to allow the IOUs to recoup the costs of stranded assets resulting from the restructuring of the electric services industry almost 30 years ago, is governed by statute. P.U. Code Section 369 which authorizes this Commission to establish a nonbypassable mechanism to ensure recovery of what are known as "transition costs," while Section 371 provides that the collection of such transition costs will be based on "*the amount of electricity purchased by the customer* from an electrical corporation or

[37] PU Code Section 739.9 (d).

an alternate supplier of electricity," subject to changes in usage occurring in the normal course of business.

- The Wildfire Fund NBC was established by the Commission pursuant to Public Utilities Code Section 3289(a)(2). This code section provides that "The charge *shall be collected in the same manner* as that for the payments made to reimburse the Department of Water Resources pursuant to Division 27 (commencing with Section 80000) of the Water Code." The costs to reimburse DWR were collected from ratepayers on the basis of usage. Thus, the Wildfire Fund NBC must continue to be assessed on the basis of usage.

Question 5. **Section 739.1(a)(1) states "The average effective CARE discount shall not be less than 30 percent or more than 35 percent of the revenues that would have been produced for the same billed usage by non-CARE customers. The average effective discount determined by the commission shall not reflect any charges for which CARE customers are exempted, discounts to fixed charges or other rates paid by non-CARE customers, or bill savings resulting from participation in other programs, including the medical baseline allowance pursuant to subdivision (c) of Section 739. The average effective CARE discount shall be calculated as a weighted average of the CARE discounts provided to individual customers." Note that CARE exempt charges include the CARE surcharge, Wildfire Fund charge, the Self Generation Incentive Program, and the Wildfire Hardening Fixed Recovery Charge.**

a. Does the statute prevent recovery of CARE-exempt charges through a fixed charge?

SEIA does not have any comments regarding the recovery of CARE-exempt charges through a fixed charge at this time but reserves the right to respond to other parties' comments.

b. If CARE-exempt charges are recovered through a fixed charge, should the CARE discount be applied as a line-item discount to the entirety of the bill (fixed and volumetric components) after the CARE-exempt charges are subtracted from the fixed charge?

At this time, SEIA does not have any comments regarding the application of the CARE discount but reserves the right to respond to other parties' comments.

<u>Question 6</u>. Do you have any other comments about interpreting AB 205 statutory requirements?

In examining its obligation under AB 205, the Commission should be cognizant of its mandatory obligations and its discretionary authority. In its entirety Section 739.9 (e)(1) reads:

> For the purposes of this section and Section 739.1, the commission ***<u>may</u>*** authorize fixed charges for any rate schedule applicable to a residential customer account. The fixed charge ***<u>shall</u>*** be established on an income-graduated basis with no fewer than three income thresholds so that a low-income ratepayer in each baseline territory would realize a lower average monthly bill without making any changes in usage. The commission ***<u>shall</u>***, no later than July 1, 2024, authorize a fixed charge for default residential rates.

The use of the varying words "may" and "shall" are of significance. When used in legislation, the word "may" has been interpreted as permissive and the word "shall" as mandatory, particularly when a single statute uses both terms.[38] In other words, "[w]hen the Legislature has, as here, used both 'shall' and 'may' in close proximity in a particular context, we may fairly infer the Legislature intended mandatory and discretionary meanings, respectively."[39] Section 739.9 (e) (1) gives the Commission two mandatory directives and one permissive. The Commission <u>must</u> authorize a fixed charge for default residential rates by July 1, 2024. Any fixed charge for residential customers approved by the Commission <u>must</u> be assessed on an income-graduated basis. The Commission <u>may</u> authorize fixed charges for non-default residential rate schedules, and, if it does so, those fixed charges <u>shall</u> be on an income graduated basis.

Thus, looking at the statute in terms of the most immediate actions which must be performed, the Commission must approve income-graduated fixed charges for the IOUs'

[38] *Common Cause v. Board of Supervisors* (1989) 49 Cal.3d 432, 443.

[39] *In re Richard E.* (1978) 21 Cal.3d 349, 353–354.

"default residential rates." Again, applying the rules of statutory construction, the plain, common sense meaning of the term "default" is "an option that is selected automatically unless an alternative is specified ."[40] Currently the default residential rate schedules in the IOUs' service territories are time-of-use rate schedules. These schedules are E-TOU-C, TOU-D and TOU-DR for PG&E, SCE and SDG&E, respectively. Residential customers are automatically placed on these rates unless they take action to affirmatively notify the utility to opt-out. Thus, a strict reading of the statute, and one which gives appropriate credence to the use of the varying terms "shall" and "may" in close proximity, is that the only legal obligation directly placed on the Commission by the legislature is to approve income-graduated fixed charges for the IOUs' *default* TOU rate schedules by July 1, 2024. Indeed, interpreting the Commission's legal obligation as requiring the adoption of an income-graduated fixed charge for all residential rate schedules by July 1, 2024, would render the term "default," as used in the statute, surplusage. The Commission cannot assume that the insertion of that language by the legislature was unintentional.

Confining statutory construction to the four corners of the statute, the Commission's legal obligation is clear – it can confine its current examination of income tiered fixed charges solely to default rate schedules. However, while this is all the Commission is obligated to do, it is not prohibited from going further and there may be good reason to do so. The IOUs' default TOU rates do not serve the majority of residential customers. A large portion of those customers remain on increasing block rates or, in some instances, are taking service under a TOU rate that is not the default rate. Thus, broadening the current examination of income-graduated rates to rate schedules that serve a large percentage of residential customers may make sense.

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40 https://www.vocabulary.com/dictionary/default

Conversely, expanding the examination to all residential rate schedules does not. The Commission cannot overlook the July 1, 2024, deadline. While such a deadline may accommodate expanding the task to look at income-graduated fixed charges for a handful of additional rate schedules, it will not accommodate a review and assessment of an income-graduated fixed charge for all the IOUs' rate schedules. SEIA urges the Commission to address first those residential schedules that currently do not have a fixed charge, and then to review at a later date those schedules for which the Commission has recently adopted a fixed charge, such as the electrification rate schedules. The consideration of changes to the fixed charges for those residential rate schedules that already include a fixed charge should be deferred to future applications filed by the IOUs for such specific purpose.

IV. CONCLUSION

As detailed above, establishing a fixed charge for default residential rates will be a complex process. While, to date, a great deal of focus has been placed on the required income-graduated element of this charge, the enabling statute contains several provisions to which the Commission must adhere. These provisions, which are addressed in full in SEIA's response to question 1.b. cannot be overlooked. Indeed, compliance with the statutory criteria of Section 739.9(d) will help to ensure that the fixed charges ultimately set for each IOU will not interfere with achieving the state's energy policy goals. Similarly, the Commission must be cognizant that achieving demand flexibility in rates is the ultimate goal towards which it is working. The Commission should ensure that the fixed charges approved in this proceeding do not work to undermine that objective.

Respectfully submitted, this 23rd day of January 2023, at San Francisco, California.

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By *___/s/ Jeanne B. Armstrong_____*
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