BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

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And Related Matters	A.22-05-023 A.22-05-024

APPLICATION OF THE CENTER FOR BIOLOGICAL DIVERSITY FOR REHEARING OF DECISION 24-05-065

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Pursuant to Public Utilities Code section 1731(b)(1) and Rule 16.1 of the Commission Rules of Practice and Procedure, the Center for Biological Diversity ("the Center") submit this Application for Rehearing of Decision 24-05-065, issued on June 7, 2024 ("the Decision").

The Center is a party eligible to file an application for rehearing pursuant to Rules 1.4 and 16.2 of the Rules of Practice and Procedure. This application is timely filed and served 30 days after the Commission issued the Decision on June 7, 2024.

I. INTRODUCTION

In the Decision, the Commission adopts a community solar program that fails to meet the requirements for a community solar program set out in Public Utilities Code § 769.3. Contrary to regulatory requirements, the community solar program adopted in the Decision will neither ensure the continued sustainable growth of distributed renewable generation, nor encourage the spread of those resources to low-income communities. To cure this legal error, the Commission must grant this application for rehearing and reverse its adoption of the Decision.

The approach the Commission takes in its June 7 Decision to adopting a community solar program is legally flawed on a number of fronts. The Decision ignores Commission precedent and arguments raised in comments in finding that the Commission should not use the Avoided Cost Calculator to determine the avoided costs of community solar facilities. The Decision also wrongly concludes that an alternative proposed program, the Net Value Billing Tariff ("NVBT"), would create a cost shift. Record evidence, which the Commission disregarded, shows that any purported cost shift caused by the NVBT failed to take account of significant costs community solar facilities avoid.

Despite purporting not to reach a conclusion as to whether community solar facilities trigger the requirements of the Public Utility Regulatory Policies Act ("PURPA"), the Decision wrongly concludes that the Commission should adopt a community solar program that is compliant with PURPA and based on PURPA-compliant tariffs. In doing so, the Commission disregarded record evidence that community solar facilities do not trigger PURPA requirements.

In addition, the Decision unlawfully leaves low-income customers—who are the primary intended beneficiaries of community solar—behind. In violation of Pub. Util. Code § 769.3's requirements, the community solar program adopted in the Decision is based on tariffs that restrict community solar customers to compensation at significantly lower wholesale electricity prices, and have a demonstrated history of failing to bring about any significant development of solar projects at all, much less projects in low-income communities.

As a result, the adopted program does not fulfill the goals and requirements the Legislature put in place when it adopted § 769.3 of: (a) ensuring robust participation of low-income customers in community solar; (b) ensuring the development of a community solar program that complements the renewable energy goals in California's Building Code; and (c)

ensuring maximum use of state and federal incentives to make the program accessible to low-income residents.

As a result of these numerous legal errors, the Commission must grant the Center's application for rehearing and revise its decision to comply with Pub. Util. Code § 769.3's requirements.

II. STANDARD OF REVIEW

Rule 16.1(c) requires an application for rehearing to "set forth specifically the grounds on which the applicant considers the order or decision of the Commission to be unlawful or erroneous."[1] An application for rehearing "alert[s] the Commission to a legal error, so that the Commission may correct it expeditiously."[2] Pursuant to section 1757 a reviewing court must reverse a decision if, *inter alia*, "the commission has not proceeded in the manner required by law," its "decision . . . is not supported by the findings," the "findings . . . are not supported by substantial evidence in light of the whole record," or the decision "was an abuse of discretion."[3]

The Commission's decision must be reversed if its interpretation of the Public Utilities Code fails to "bear a reasonable relation to statutory purposes and language,"[4] or if it is not supported by the "plain meaning" of the statute.[5] The courts are the ultimate arbiter of statutory

[1] California Pub. Util Comm'n, Rules of Practice and Procedure, Rule 16.1; *see also* Cal. Code. Regs., tit. 20, § 16.1(c).
[2] Cal. Code Regs., tit. 20, § 16.1(c).
[3] Pub. Util. Code § 1757(a).
[4] *Greyhound Lines, Inc. v. P.U.C.* (1968) 68 Cal. 2d 406, 410-11.
[5] *Bd. of Trustees of Cal. State Univ. v. Pub. Employee Relations Bd.* (2007) 155 Cal.App.4th 866, 876 (vacating agency's decision where its interpretation of a statute it administers was not supported by the plain meaning of the statutory language).

interpretation.[6] Courts owe less deference to the Commission's interpretation of the Public Utilities Code than to its interpretation of its own regulations.[7]

Pursuant to section 1705, Commission decisions must contain findings of fact and conclusions of law to assist a reviewing court "to determine whether [the Commission] acted arbitrarily" and thus abused its discretion.[8] The Commission must make its findings based on substantial evidence in the "whole record;" it must consider "all relevant evidence, including evidence detracting from the decision."[9] Substantial evidence is evidence of "ponderable legal significance"[10] that is "reasonable in nature, credible, and of solid value such that a reasonable mind might accept it as adequate to support a conclusion."[11] Ultimately, if the Commission "fail[s] to comply with required procedures, appl[ies] an incorrect legal standard, or commit[s] some other error of law," its decision will be reversed on appeal.[12]

III. ARGUMENT

a) The Commission commits legal error when it finds that it does not need to use the Avoided Cost Calculator to determine the avoided costs of the NVBT facilities

The Commission commits reversible legal error when it finds that it should not use the Avoided Cost Calculator ("ACC") to determine avoided costs for NVBT facilities.

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[6] *New Cingular Wireless PCS, LLC v. P.U.C.* (2016) 246 Cal.App.4th 784, 807 ("The final word on questions of statutory interpretation always rests with the judiciary.").
[7] *Util. Consumers Action Network v. P.U.C.* (2010) 187 Cal.App.4th 688, 698.
[8] *Cal. Manufacturers Ass'n. v. P.U.C.* (1979) 24 Cal.3d 251, 258-59 (citation omitted); *see also Cal. Hospital Ass'n. v. Maxwell-Jolly* (2010) 188 Cal. App. 4th 559, 567-68 (arbitrary and capricious decision will be reversed for abuse of discretion); *Roddenberry v. Roddenberry* (1996) 44 Cal.App.4th 634, 651-52 (purpose of substantial evidence review is to uncover "irrational findings and thus preclude the risk of affirming a finding that should be disaffirmed as a matter of law") (citation omitted).
[9] *The Utility Reform Network v. P.U.C.* (2014) 223 Cal.App.4th 945, 959 (citation omitted).
[10] *People v. Johnson* (1980) 26 Cal.3d 557, 576 (citation omitted).
[11] *S. Coast Framing, Inc. v. Worker's Compensation Appeal Bd.* (2015) 61 Cal.4th 291, 303 (citation omitted).
[12] *Pedro v. City of Los Angeles* (2014) 229 Cal.App.4th 87, 99.

As the Commission has made clear in multiple other decisions, the ACC is the tool that must be used when assessing the cost-effectiveness of distributed energy resources like community solar. *See* D.22-12-056 at 58 ("D.16-06-007 requires that cost-effectiveness evaluations for distributed energy resources shall use the most recent version of the Avoided Cost Calculator.") (quoting D.21-02-007); D.22-05-002 at 2-3 ("[T]he Commission uses the Avoided Cost Calculator to determine the primary benefits of distributed energy resources across Commission proceedings").

Yet, in contravention of the Commission's own clear precedent, the Decision finds that "the Commission should use the PURPA avoided costs for calculating avoided costs of the community renewable energy program facilities," instead of using the ACC.[13] This approach is factually and legally flawed.

As the Center argued in its comments on the Commission's Proposed Decision in this proceeding, while the ACC is not a perfect instrument, it is specifically designed to estimate the avoided costs of distributed energy resources—which is exactly what community solar installations are—and attempts to take into account things like environmental values, greenhouse gas costs, avoided transmission and distribution, and reduction in methane leakage.[14] The ACC is therefore a far better tool for accurately assessing the avoided costs represented by community solar resources than is FERC's definition in its regulations implementing PURPA, which looks solely at the incremental cost to the utility of producing or acquiring electricity.[15]

[13] Decision at 164, Conclusion of Law 9.
[14] Comments of the Center for Biological Diversity on Proposed Decision Modifying Green Access Program Tariffs and Adopting a Community Renewable Energy Program (March 25, 2024) at 8 [hereinafter "Center Opening Comments on Proposed Decision"].
[15] Decision at 108, n. 303.

Moreover, AB 2316 requires any "community renewable energy program" to "provide bill credits to subscribers based on the avoided costs of the program's facilities, as determined by the commission's methods for calculating the full set of benefits of distributed energy resources."[16] As TURN argued in its Comments on the Proposed Decision, the Commission has never identified any method other than the ACC for calculating the benefits of distributed energy resources.[17] AB 2316's requirement therefore must refer to the ACC. All legislators and stakeholders involved in the development of AB 2316 clearly shared this understanding; indeed, analysis performed by the Senate Committee on Energy, Utilities and Communications devotes an entire section to describing the Avoided Cost Calculator and explaining that this approach would be required under AB 2316.[18]

The Decision declines to give any weight to this committee analysis on the basis that "the language of the signed bill may be different from the language of the bill at the time of the analysis, as the analysis includes fewer than the final six requirements of the community renewable energy program."[19] However, a review of the legislative history shows that the relevant language requiring the use of the ACC analyzed by the Senate Committee on June 24, 2022 is identical to the language that was enacted into law.[20] Moreover, the committee analysis

[16] Cal. Pub. Util. Code §769.3(c)(5).
[17] Opening Comments of the Utility Reform Network on the Proposed Decision of Administrative Law Judge Hymes (March 25, 2024) at 11 [hereinafter "TURN Opening Comments on Proposed Decision"].
[18] Analysis of AB 2316 (Ward), Senate Committee on Energy, Utilities and Communications, June 24, 2022, at 7 [hereinafter "AB 2316 Committee Analysis"]; *see also* TURN Opening Comments on Proposed Decision at 11.
[19] Decision at 104.
[20] The version of AB 2316 considered by the Senate Energy, Utilities and Communications committee included the following language: "The community renewable energy program shall do all of the following . . . . 5) Provide bill credits to subscribers based on the avoided costs of the community renewable energy facility, as determined by the commission's methods for calculating the full set of benefits of distributed energy resources." TURN Opening Comments on Proposed Decision at 11.

compares the ACC (described as avoided costs) to retail rates and notes that "this bill's program compensates based on the far-less generous avoided cost."[21]

Nevertheless, despite this clear legislative intent, the Commission concluded that it should apply PURPA avoided costs instead of the ACC because it found that community solar resources do not avoid some costs that are factored into the ACC.[22] Specifically, the Commission found that font-of-the-meter resources like distributed solar do not offset load.[23] In doing so, the Commission failed to consider evidence the Center presented in the record that community solar resources do in fact act as load modifiers even though they are in front of the meter. As the Center pointed out in its comments on the Proposed Decision, community solar, like other distributed renewable energy resources, reduces peak demand for electricity and shifts daily peak loads later in the day.[24]

In finding that it should not use the ACC to determine avoided costs, the Commission also relied on a conclusion that NVBT resources will not avoid transmission and distribution costs.[25] In reaching this conclusion, the Commission ignored arguments the Center raised repeatedly during the proceeding that community solar resources do in fact reduce transmission and distribution costs. This is because, as they reduce peak demand and shift daily peak loads, community solar resources help eliminate the need for transmission to serve higher peaks in

[21] AB 2316 Committee Analysis at 7; *see also* TURN Opening Comments on Proposed Decision at 11-12.
[22] *See* Decision at 90.
[23] Decision at 99 ("If the resource is in front of the meter, a customer's load may not be offset. Instead, the energy will be sent directly to the distribution grid.").
[24] Center Opening Comments on Proposed Decision at 8; *see also Center for Biological Diversity v. Public Utilities Comm'n of California*, No. A167721, Petition for Writ of Review and Memorandum of Points and Authorities [hereinafter "Center v. PUC Petition for Writ of Review"], at 55, *available at*: https://www.biologicaldiversity.org/programs/energy-justice/pdfs/CA-Public-Utilities-Commission-Petition-Rooftop-Solar-05-03-2023.pdf?_gl=1*yp0t3c*_gcl_au*MTcwOTEyNTU2Ni4xNjg3Mzc5NzE4.
[25] *See* Decision at 92 ("Without the certainty that the NVBT resources would be located close to subscribers, the Commission finds that the avoided costs of transmission and distribution cannot be confirmed.").

demand.[26] By reducing peak load, community solar and other DERs can even result in specific planned transmission projects being cancelled.[27] Contrary to the Commission's conclusion that applying the ACC would give community solar projects credit for transmission and distribution costs they do not avoid, the ACC in fact significantly *undervalues* the avoided costs—and associated ratepayer impacts—of the transmission projects DERs render unnecessary by reducing peak load.[28]

Thus, in concluding that applying the ACC would result in ratepayers paying more than community solar resources are worth,[29] the Commission failed to meaningfully consider arguments raised by the Center that contradicted that conclusion. In doing so, the Commission committed reversible error.[30]

b) The Commission commits legal error when it finds that the NVBT would create a cost shift

Based on its faulty conclusion that the NVBT will not avoid all the costs reflected in the ACC, the Decision wrongly finds that the NVBT "will result in ratepayers compensating customers for avoided costs that are not truly avoided, which would result in a cost shift" in violation of Public Utilities Code Section 769.3.[31] In reaching this conclusion, the Commission

[26] Center Opening Comments on Proposed Decision at 9; Center Comments on Net Value Billing Tariff Proposal (Nov. 27, 2023), at 7.
[27] Center v. PUC Petition for Writ of Review, *supra* note 24, at 54-56 ("The ACC assumes that capacity-related transmission projects for all three utilities will total $481,650,000 in the five year period from 2021 through 2025, but this value is a small fraction of actual transmission spending. In contrast, the transmission-related revenue requirements for the three utilities in 2021 alone were more than $4 billion dollars. The gross mismatch between the ACC's input and the utilities' actual spending suggests that the ACC does not adequately account for transmission spending.").
[28] *See* Center Comments on Net Value Billing Tariff Proposal.
[29] Decision p. 154, Finding of Fact 13.
[30] *See* Ohio v. Envt'l Protection Agency, 24 U.S. LEXIS 2846, at *24 (U.S. Sup. Ct. June 27, 2024) (commentors were likely to succeed on their claim that a federal agency action was arbitrary and capricious when the agency failed to address an objection that was raised with reasonable specificity during the period for public comment); *Motor Vehicle Manufacturers' Assn. of U.S. v. State Farm Mutual Automobile Ins. Co.* (1983) 463 U.S. 29, 43 (holding that an agency's action cannot be upheld when it "entirely fail[s] to consider an important aspect of the problem.").
[31] Decision at 103.

again ignored substantial evidence presented in the record by the Center explaining why concerns about a purported cost shift are likely overblown, and in any case must be set aside when considering distributed renewable energy programs in disadvantaged communities ("DACs").

As the Center argued in its Comments on Cost Effectiveness Considerations, any consideration of the cost effectiveness of community solar programs must include non-energy benefits.[32] Non-energy benefits "represent the array of diverse impacts of energy programs and projects beyond the generation, conservation, and transportation of energy."[33]

First, community solar has significant resilience and reliability benefits. It can reduce the length of outages from extreme weather events, or avoid them altogether, by providing capacity during peak demand. In addition, community solar can be used to create "islandable" generation that operates even when outages do occur.[34] Community solar thus reduces the risks that come with blackouts or brownouts for all customers, not just those participating in community solar.[35] This is especially important in the aftermath of wildfires, floods, and other disasters to ensure that power is available to critical infrastructure and facilities like hospitals and fire stations.[36]

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[32] Comments of the Center for Biological Diversity on Cost Effectiveness Considerations (July 31, 2023).
[33] *See* Center for Biological Diversity, Central California Asthma Collaborative, California Environmental Justice Alliance, Asian Pacific Environmental Network, Greenlining Institute, Local Clean Energy Alliance, Sierra Club California, The Climate Center, the Center on Race, Poverty and the Environment, Clean Coalition, 350 Bay Area, GRID Alternatives, The Protect Our Communities Foundation, the BEEP Coalition, the Local Government Sustainable Energy Coalition, and Environment California, Petition for Rulemaking to Integrate NEBs and Social Costs into Resource Planning and Investment Decision-Making ("Petition") (February 5, 2024) at 2, citing CEC 2022 IEPR Update at A-9, *available at* https://biologicaldiversity.org/programs/energy-justice/pdfs/Center-petition-CA-Energy-Commission-Net-Energy-Benefits-02052024.pdf.
[34] *See* Gridworks & GridLAB, *The Role of Distributed Energy Resources in Today's Grid Transition* 7-9 (Aug. 2018), http://gridlab.org/wp-content/uploads/2019/04/GridLab_RoleOfDER_online-1.pdf.
[34] American Council for an Energy-Efficient Economy, Distributed Energy Resources, https://www.aceee.org/topic/distributed-energy-resources.
[35] *See id.*
[36] *Id.*

Reliability and resilience represent significant avoided costs that the Commission did not take into consideration when it found that the NVBT would result in a cost shift.

Community solar projects can also reduce the need for generation and distribution of fossil fuel-based electricity, thereby deferring or avoiding costs of building or upgrading new power plants and transmission infrastructure,[37] and simultaneously avoiding emissions of associated air and water pollution.[38] This also has significant environmental justice implications. Because polluting fossil fuel infrastructure is often concentrated in communities of color and low-wealth communities,[39] the burden of the pollution associated with our fossil fuel-dominated energy system falls disproportionately on these communities.[40] In addition, by reducing the need for fossil fuel-based electricity, community solar projects can reduce greenhouse gas emissions and thus reduce the impacts of the climate crisis. Community solar programs are also economic force multipliers—for example, they can spur local job creation and new investment and spending in the local community, and reduce the cost of doing business, thus improving overall competitiveness, for local non-energy companies that participate.[41]

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[37] U.S. Envt'l Protection Agency, *The Multiple Benefits of Energy Efficiency and Renewable Energy*, 6, 9-10 (2018) [hereinafter "*EPA Renewable Energy Benefits Guide*"], https://www.epa.gov/sites/default/files/2018-07/documents/mbg_1_multiplebenefits.pdf; *see also* Alison Holm et al., *Distributed Solar Photovoltaic Cost-Benefit Framework Study: Considerations and Resources for Oklahoma*, Nat'l Renewable Energy Lab'y 22 (August 2019), https://www.nrel.gov/docs/fy19osti/72166.pdf; American Council for an Energy-Efficient Economy, Distributed Energy Resources, https://www.aceee.org/topic/distributed-energy-resources.

[38] *EPA Renewable Energy Benefits Guide*, *supra* note 37 at 6, 10-11.

[39] *See* Robert D. Bullard, et al., *Toxic Wastes and Race at Twenty: 1987-2007* (March 2007), http://www.ejnet.org/ej/twart.pdf; Adrian Wilson et al., *Coal Blooded: Putting Profits Before People*, Nat'l Assoc. for the Advancement of Colored People, Indigenous Environmental Network & Little Village Environmental Justice Organization (2012), https://naacp.org/resources/coal-blooded-putting-profits-people; U.S. Env't Prot. Agency, EJ Screening Report for the Clean Power Plan (July 30, 2015), https://archive.epa.gov/epa/sites/production/files/2016-04/documents/ejscreencpp.pdf; Emanuele Massetti et al., *Environmental Quality and the U.S. Power Sector: Air Quality, Water Quality, Land Use and Environmental Justice*, Oak Ridge Nat'l Lab (Jan. 4, 2017), https://info.ornl.gov/sites/publications/files/Pub60561.pdf; PSE Healthy Energy, *Natural gas power plants in California's disadvantaged communities* (April 2017), https://www.psehealthyenergy.org/wp-content/uploads/2017/04/CA.EJ_.Gas_.Plants.pdf.

[40] Jean Su, *Climate, Environmental, and Energy Justice: Integrating Justice into Electricity System Design and Decision-making*, in Advancing Equity in Utility Regulation, Future Electric Utility Regulation, Report No. 12, Chpt. 4 (Lisa Schwartz, ed.) (Nov. 2021).

[41] *EPA Renewable Energy Benefits Guide*, *supra* note 37, at 14-15.

Although it may not be as easy to quantify and measure these benefits of community solar programs as it is to quantify and measure their costs, doing so is nonetheless both possible and necessary. A variety of tools for measuring benefits that may seem abstract or difficult to quantify, such as public health and climate benefits, are already available. To cite a few examples, the National Energy Screening Project, funded in part by the Department of Energy, has developed a National Standard Practice Manual for Benefit Cost Analysis of Distributed Energy Resources, that presents a comprehensive framework for identifying what benefits and costs should be accounted for in assessing the cost effectiveness of distributed energy resources.[42] A companion *Methods, Tools and Resources Handbook for Quantifying DER Impacts for Benefit-cost Analysis* provides technical guidance on *how* to quantify the benefits of investments in DERs like community solar.[43] The Environmental Protection Agency has also developed a tool to help state and local policymakers estimate the public health benefits of distributed energy resources like community solar.[44] Some jurisdictions have also started using some combination of proxies, multipliers, or input-output models to account for the economic development benefits of distributed renewable resources like community solar.[45]

The Center presented substantial evidence during this proceeding that the Commission must consider all these benefits as part of its overall assessment of the cost effectiveness of any

[42] Nat'l Energy Screening Project, National Standard Practice Manual (Aug. 2020), https://www.nationalenergyscreeningproject.org/national-standard-practice-manual/.
[43] Nat'l Energy Screening Project, Methods, Tools and Resources Handbook for Quantifying DER Impacts for Benefit-cost Analysis (March 2022), https://www.nationalenergyscreeningproject.org/resources/quantifying-impacts/.
[44] U.S. Envt'l Protection Agency, Estimating the Health Benefits per Kilowatt-hour of Energy Efficiency and Renewable Energy, https://www.epa.gov/statelocalenergy/estimating-health-benefits-kilowatt-hour-energy-efficiency-and-renewable-energy.
[45] Nat'l Assoc. of Regulatory Utility Commissioners, *Considering Non-Energy Benefits in PUC Decision Making: What Counts?*, Jan. 20, 2022, at 32, https://pubs.naruc.org/pub/B41DD61A-1866-DAAC-99FB-BF00C9795C82 ; *see also* American Council for an Energy Efficient Economy State Policy Toolkit: Guidance on Measuring the Economic Development Benefits of Energy Efficiency (March 2019), https://www.aceee.org/sites/default/files/Jobs%20Toolkit%203-8-19.pdf.

new or modified community solar program. As the Ninth Circuit stated in *Center for Biological Diversity v. National Highway Traffic Safety Administration* ("*NHTSA*"), where an agency must evaluate the costs and benefits of regulatory action, "it cannot put a thumb on the scale by undervaluing the benefits and overvaluing the costs" of that action.[46]

The Commission commits reversible error by failing to meaningfully consider this substantial evidence in reaching its determination about the purported cost shift caused by the NVBT.

c) The Commission commits legal error when it finds that it should adopt a program that is PURPA-compliant

The Commission's Proposed Decision in this proceeding addressed arguments from SCE and PG&E that the NVBT was inconsistent with PURPA.[47] The Proposed Decision agreed, and improperly concluded that the NVBT proposal needed to, and failed to, comply with federal law.[48]

When the Commission issued its Decision, it changed its approach and declined to reach the question of whether the NVBT conflicted with federal law, including PURPA, relying on its finding that the NVBT proposal did not comply with state law requirements.[49]

Nonetheless, the Commission found that it should adopt a community solar program that *is* compliant with PURPA and that uses PURPA-complaint tariffs as its foundation.[50] As detailed above, the Decision also wrongly applies a PURPA avoided cost measure.[51] In taking this approach, the Commission has *de facto* maintained its conclusion that it should not adopt the

[46] 538 F.3d 1172, 1198-1201 (9th Cir. 2008); *California v. Bernhardt*, 472 F. Supp. 3d 573, 615-16 (N.D. Cal. 2020) ("Where an agency chooses to engage in a cost-benefit analysis, it cannot short shrift the benefits side of the equation by failing to monetize certain benefits.") (*appeal docketed*, No. 20-16801 (9th Cir. Sept. 17, 2020)).
[47] Proposed Decision (March 4, 2024), at 82.
[48] *Id.* at 85, 92-93.
[49] Decision at 109-110.
[50] *See* Decision at 165, Conclusions of Law 15, 18.
[51] *See infra* at pp. 6-9.

NVBT because of concerns about conflict with PURPA and other federal law, despite the Decision facially declining to reach this question.

In doing so, the Commission has committed reversible legal error. As the Center argued in its Comments on the Proposed Decision, under the proposed NVBT, federal jurisdiction is limited to transactions that involve interstate commerce and net sales.[52] As proposed in the NVBT, facilities would be distribution connected, located behind a customer meter, not treated as Qualifying Facilities for purposes of PURPA, and not engaging in wholesale sales for resale.[53] Particularly given that, as proposed, NVBT resources would not participate in the CAISO market,[54] and the generation would be fulfilled by in-state subscribers, the NVBT involves neither the compensation provided for "net sales," nor the transmission of electricity in interstate commerce required to trigger federal jurisdiction.[55]

The NVBT was modeled on a successful community solar program adopted in New York, and examples of such community renewable energy programs can be found in twenty-two states and the District of Columbia. None of these has been found to implicate federal jurisdiction or PURPA.[56]

The Commission commits reversible legal error when it implicitly concludes that community solar resources trigger PURPA requirements and rejects the NVBT in favor of a PURPA-compliant program.

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[52] Center Opening Comments on Proposed Decision at 3; *see also Ark. Power & Light Co. v. Fed. Power Comm'n*, 368 F.2d 376, 379 (8th Cir. 1966); *Pa. Water & Power Co. v. Fed. Power Comm'n*, 343 U.S. 414, 419-20 (1952); *Fed. Power Comm'n v. S. Cal. Edison Co.*, 376 U.S. 205, 208-09 (1964); *Northern States Power Company v. Fed. Energy Reg. Comm'n*, 176 F.3d 1090, 1094-95 (8th Cir. 1999).
[53] Center Opening Comments on Proposed Decision at 3-4.
[54] Proposed Decision at 99; s*ee also Sun Edison*, 129 FERC ¶ 61,146, EL09-31-000, ¶18 (Nov. 19, 2009) ("Where there is no net sale over the billing period, the Commission has not viewed its jurisdiction as being implicated.").
[55] Center Opening Comments on Proposed Decision at 4.
[56] *Id.*

d) The Commission commits legal error in finding that the program it has adopted meets the requirements of Public Utilities Code Section 769.3

1. The adopted program does not ensure the robust participation of low-income customers

Subdivision (c) of Pub. Util. Code § 769.3 requires that a community solar program must "[e]nsure that at least 51% of the program's capacity serves low-income customers." The Legislature included this requirement because it "intend[ed] to support robust low-income customer participation" in a community solar program established pursuant to § 769.3. The Decision fails to support this goal.

As Commissioner Houck's Concurrence and Dissent points out, the program adopted by the Decision uses a federally determined PURPA avoided cost measure modeled after the Renewable Market Adjusting Tariff ("ReMAT").[57] As TURN illustrates in its opening comments on the Proposed Decision:

> [t]he ReMAT program has only resulted in contracts with eight projects (totaling 12.4 MW) since 2017 and none since the program reopened in 2020 and the PURPA Standard Offer Contract program has only yielded a single new project (20 MW solar) in the last five years.[58]

Given that the tariffs that form the basis of the program adopted by the Decision have generated so few projects, there is no evidence whatsoever that the adopted program will ever support robust low-income participation in community solar.

While the NVBT would have created a compensation structure for community solar projects similar to net metering,[59] the proposal adopted in the Decision reduces future

[57] Commissioner Houck Concurrence and Dissent at 4.
[58] TURN Opening Comments on Proposed Decision at 3-4.
[59] *See Proposal of the Coalition for Community Solar Access to Establish a Net Value Billing Tariff* (March 15, 2020), at 4 (explaining that the NVBT "is a modified version of the Commission's already approved virtual net metering tariff," and "[c]redits would be based upon the value of the hourly net exports for the project.").

compensation for community solar projects,[60] and restricts them to earning wholesale rates that are five to six times less than the retail rate of electricity in California that is showing up on ratepayers' bills.[61]

The Decision thus fails to adopt a structure that will incentivize the building of new community solar projects at all, much less ensure the significant deployment of—and robust participation in—these projects in low-income communities, as Pub. Utilities Code § 769.3 intended.

Further, the Decision relies on a requirement that 51 percent of each participating facility's capacity be reserved for low-income customers—and that "in order for the project's low-income customers to be eligible for additional external funding or subsidies," 51 percent of each project's capacity must be subscribed to low-income customers—as a basis for finding that the adopted program complies with § 769.3. But these superficial guardrails will do very little to actually advance the legislature's intent of ensuring robust participation in community solar by low-income customers if the program fails to actually facilitate the development of community solar projects in those communities in the first place.

In adopting a community solar program that will so clearly fail to carry out the legislature's intent in adopting § 769.3, the Decision fails to "bear a reasonable relation to statutory purposes and language,"[62] and accordingly must be reversed.

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[60] Julie Cart, *California sides with big utilities, trimming incentives for community solar projects*, CalMatters , May 30, 2024, https://calmatters.org/environment/2024/05/california-community-solar-incentives/.
[61] Jeff St. John, *California regulators reject plan that would've boosted community solar*, Canary Media, June 3, 2024, https://energynews.us/2024/06/03/california-regulators-reject-plan-that-wouldve-boosted-community-solar/.
[62] *Greyhound Lines, Inc. v. P.U.C.* (1968) 68 Cal. 2d 406, 410-11.

2. The adopted program does not complement California's Building Code

The Decision fails to address substantial evidence submitted by the Center that the adopted program is not consistent with and complementary to California's Building Code, as required by Pub. Util. Code § 769.3(c)(1).

As the Center details in its Comments on the Proposed Decision, the Building Code mandates new and altered buildings comply either with performance or prescriptive standards, which are designed to align with the state's energy efficiency and decarbonization goals.[63] The California Building Association testified in this proceeding that about 250 to 400 MW of community solar will be necessary each year for builders to effectively meet existing Building Code requirements.[64] For that reason, the Legislature mandated in § 769.3(c)(1) that an adopted community solar program must "be *complementary to, and consistent with*, the requirements of Section 10-115" of the Building Code (emphasis added).

The Decision fails to comply with that mandate. The Decision states that "homebuilders ultimately have the obligation of ensuring the buildings they build are compliant with the building code whether through traditional compliance options or via acting as, or relying on, [community renewable energy program] administrators operating projects and managing compliance on their behalf."[65] The Commission appears to conclude that this is sufficient for compliance with the requirements of § 769.3(c)(1). This is reversible legal error.

As the Center has argued in its Comments on the Proposed Decision, the statute does not merely require that community solar projects comply with the technical elements of the Building Code—it mandates that the community solar *program* be "*complementary to*" Section 10-115 of

[63] Center Opening Comments on Proposed Decision at 11; *see also* Cal. Code Regs. tit. 24 § 150.1.
[64] California Building Industry Association Opening Brief at 7 (May 17, 2023) (citing Exh. CBIA-01 at 8).
[65] Decision at 112.

the Building Code.[66] In order to meet the statutory mandate, the Commission must specifically find that the community solar program *as a whole* will complement the Building Code's efforts by increasing the development of community solar facilities throughout the state.[67] As already referenced, the record is clear that the adopted community solar program must achieve at least 250 to 400 MW of new community solar *per year* in order to "complement" the Building Code. Instead, as articulated in section III(d)(1) above, the Decision adopts a program that has resulted in the deployment of just over 30 MW of new community solar since 2017.

By making no findings as to how the adopted program as a whole will complement the Building Code, and by failing to address the substantial evidence presented by the Center that the adopted program fails to meet the requirements of 769.3(c)(1), the Commission's Decision commits reversible legal error.

3. The adopted program does not ensure maximum use of state and federal incentives

Section 769.3(c)(6) of the Public Utilities Code requires that the community renewable energy program "maximize the use of state and federal incentives and accelerate implementation of the program to ensure that time- or quantity-limited federal incentives can be obtained for the benefit of subscribers."

Given that AB 2316 was passed the month after the Inflation Reduction Act[68] was signed into law, the California Legislature surely had particularly in mind to ensure that California's community solar program should be able to take advantage of incentives and benefits available

[66] Center Opening Comments on Proposed Decision at 13.
[67] *See, e.g.*, *Cacho v. Boudreau*, 40 Cal. 4th 341, 352 (2007); *People v. Guzman*, 8 Cal. 5th 673, 682 (2019) (agency must "give effect wherever possible to every word" of a statute).
[68] Pub. L. 117-169 (Aug. 16, 2022).

in the IRA. In order to do so—and in so doing, meet the requirements of § 769.3(c)(6)—California needs a viable community solar program in place.

Nonetheless, the Decision adopts a program that is highly unlikely to result in successful, sustainable uptake of community solar projects, and therefore will not allow maximum use of available benefits and incentives for those projects. The Decision acknowledges this concern, but glosses over it—and the requirements of section 769.3(c)(1)—arguing that "the statute does not require the community renewable energy program to attain any specific procurement target,"[69] and relying on $33 million of external appropriations to temporarily make community solar projects financially viable under the program,[70] without addressing concerns about how the program will grow community solar access in the long term.

The Commission's failure to put a viable community solar program in place may cause California to lose out to other applicants vying for available IRA funding. This is in direct contravention of § 769.3(c)(6)'s mandate that the program maximize available federal and state incentives.

e) The Decision Violates California's Civil Rights Statute

The Decision also violates Government Code § 11135 by adopting a program that will create a disparate impact on renters, who disproportionately come from communities of color.

California Government Code section 11135, enacted in 1977, is California's civil rights analogue to Title VI of the Federal Civil Rights Act. Section 11135 states that:

> "[n]o person in the State of California shall, on the basis of race, national origin, ethnic group identification, religion, age, sex, sexual orientation, color, genetic information, or disability be unlawfully denied full and equal access to the benefits of, or be unlawfully subjected to discrimination under,

[69] Decision at 114.
[70] Decision at 117-118.

> any program or activity that . . . is funded directly by the state, or receives any financial assistance from the state[.]"[71]

Section 11135's implementing regulations further define discriminatory practices prohibited by the statute. Section 98101 of the regulations states that "[i]t is a discriminatory practice . . . to utilize criteria or methods of administration that . . . have the purpose or effect of subjecting a person to discrimination on the basis of ethnic group identification[.]"[72] A state program or activity that has a discriminatory effect violates § 11135 even if there is no discriminatory intent.[73]

The primary intended beneficiaries of a more effective community solar program in California are renters—who are disproportionately Black and Latino residents, as well as tribal communities.[74] The Decision has a disparate impact on these communities, because it authorizes a specific alternative to Net Metering for Disadvantaged Communities ("DACs") that compensates DAC participants at a lower avoided cost rate than homeowners receive for rooftop solar under the Net Billing Tariff. In doing so, the Decision puts access to the benefits of distributed renewable energy even more out of reach for Black, Latino, and Tribal communities in California.

The Center raised this concern in its comments on the Proposed Decision,[75] but the Decision fails to address this issue at all. By failing entirely to address this significant concern, the Commission commits reversible legal error.[76]

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[71] Cal. Gov. Code. § 11135(a).
[72] 22 Cal. Code Regs. § 98101 (i)(1).
[73] *See Darensburg v. Metropolitan Transp. Com'n*, 636 F.3d 511, 518 (9th Cir. 2011).
[74] *See e.g.,* Public Pol'y Inst. of California, California's Housing Divide (May 13, 2022), https://www.ppic.org/blog/californiashousing-divide/.
[75] *See* Center Opening Comments on Proposed Decision at 9-11.
[76] *See* Ohio v. Envt'l Protection Agency, 24 U.S. LEXIS 2846, at *24 (U.S. Sup. Ct. June 27, 2024); *Motor Vehicle Manufacturers' Assn. of U.S. v. State Farm Mutual Automobile Ins. Co.*, 463 U.S. 29, 43 (1983).

IV. CONCLUSION

For all the foregoing reasons, the Center respectfully requests that the Commission grant this application for rehearing.

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Respectfully submitted,

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