Decision 22-04-056 April 21, 2022

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking to Develop a Successor to Existing Net Energy Metering Tariffs Pursuant to Public Utilities Code Section 2827.1, and to Address Other Issues Related to Net Energy Metering.	Rulemaking 14-07-002
And Related Matter.	Application 16-07-015

ORDER DENYING REHEARING OF DECISION 20-08-007

I. SUMMARY

This decision addresses the application for rehearing of Decision (D.) 20-08-007 (Decision) filed by San Diego Gas & Electric Company (SDG&E). In D.20-08-007[1] we denied the petition to modify D.16-01-044 (Petition),[2] filed by California Solar & Storage Association (CALSSA) finding that CALSSA had not justified its late submission. Nonetheless, we modified D.16-01-044 to confirm that under the virtual net energy metering (VNEM) tariff, an eligible property may consist of contiguous parcels, as CALSSA had requested in its Petition.

In D.16-01-044, we established rules relating to the net energy metering successor tariff, sometimes referred to as NEM 2.0. D.16-01-044, in relevant part, adopted the CALSSA[3] proposal to make VNEM available to non-Multifamily Affordable

[1] Unless otherwise noted, citations to Commission decisions issued since July 1, 2000 are to the official pdf versions, which are available on the Commission's website at: http://docs.cpuc.ca.gov/DecisionsSearchForm.aspx.

[2] *Petition for Modification of the California Solar & Storage Association Regarding Clarification of Virtual Net Energy Metering Eligibility Requirements*, filed November 20, 2019.

[3] On February 8, 2018, the California Solar Energy Industries Association filed a notice of name change to California Solar & Storage Association (CALSSA).

Solar Homes (MASH)[4] program participants served by multiple service delivery points on a single property, "mirroring the same rule for low-income customers in the VNEM tariffs." (D.16-01-044, p. 99; *Proposal of the California Solar Energy Industries Association for the Net Energy Metering Successor Tariff*, filed August 3, 2015, p. 25.)

On November 20, 2019, CALSSA filed a petition to modify D.16-01-044, requesting that the Commission resolve ambiguity in the way that eligible properties are defined for purposes of participation in VNEM. (Petition, p. 1.) CALSSA alleged that PG&E was rejecting participating properties that spanned more than one tax parcel in violation of D.16-01-044. The Petition noted that SDG&E and SCE allowed participating properties to consist of multiple tax parcels, consistent with the low income VNEM and net energy metering aggregation (NEMA) tariffs of all three of the Investor-Owned Utilities (IOUs). (*Ibid*.)

As discussed above, D.20-08-007 denied the Petition as untimely. However, we modified D.16-01-044 to remove ambiguity regarding eligibility to take service on a VNEM tariff, stating:

> The modifications to Decision 16-01-044 confirm Commission policy to permit netting of energy from a single eligible renewable generating facility among customers or accounts behind multiple service delivery points and on multiple contiguous parcels, provided that those customers or accounts are part of the same multitenant or multi-meter facility (as specified).

(Decision, p. 1.) To ensure consistency among the IOUs' tariffs, we ordered PG&E and SCE to submit Tier 2 advice letters to conform their tariffs to SDG&E's tariff language which expressly identified contiguous parcels of land in its definition of Property.

In joint comments on the Proposed Decision (PD), the IOUs stated that requiring SCE and PG&E to adopt SDG&E's property definition would remove the

[4] D.08-10-036 established VNEM for MASH projects to substantially subsidize solar energy systems in multifamily housing, which will, in combination with energy efficiency measures, offset energy loads and provide economic benefits for both affordable housing property owners, managers, and building occupants. (D.08-10-036, p. 6.)

common function limitation from their tariffs and that the Petition had not raised this issue. (*Joint Comments of San Diego Gas & Electric Company, Southern California Edison Company, and Pacific Gas and Electric Company on Proposed Decision* (Joint Comments on PD), filed July 27, 2020, p. 2.) In the tariffs at issue, the common function limitation required that the facilities were built to serve a common function, such as a housing complex or a multi-tenant complex. The IOUs claimed that the common function limitation is necessary to prevent a customer from serving as a Load Serving Entity (LSE) without scheduling or other LSE responsibilities. (Joint Comments on PD, p. 3.) To address this concern raised by the IOUs, we permitted the IOUs to submit Tier 2 advice letters to propose modifications to their respective VNEM successor tariffs to specify the requirements for LSEs. We stipulated that, if the IOUs propose to include a common function requirement in their respective VNEM tariffs, each utility must propose a definition of common function that is consistent across all three IOUs. (Decision, pp. 15-16, Findings of Fact Nos. 3, 4, 5.)

SDG&E filed a timely application for rehearing of D.20-08-007 (Rehearing Application). In its application for rehearing, SDG&E alleges the Decision 1) improperly eliminated the common function requirement from Commission-approved tariffs without developing a properly litigated, factual record on which to base that order, and 2) improperly placed the common function requirement into a staff process, rather than considering the issue in the new NEM Rulemaking proceeding.[5]

The Coalition of California Utility Employees (CCUE) filed a response in support of SDG&E's application for rehearing. In its response, CCUE recommended the Commission grant SDG&E's rehearing application and address NEM inequities in its new NEM Rulemaking proceeding.

[5] Rulemaking (R.) 20-08-020, *Order Instituting Rulemaking to Revisit Net Energy Metering Tariffs Pursuant to Decision 16-01-044, and to Address Other Issues Related to Net Energy Metering* (September 3, 2020) (new NEM Rulemaking proceeding).

We have carefully considered the arguments raised in the application for rehearing and do not find grounds for granting rehearing. Rehearing of D.20-08-007 is denied.

II. DISCUSSION

A. The order to create consistency among the NEM tariffs is supported by the record.

In its rehearing application, SDG&E alleges the Decision improperly decided an important matter not in controversy, without a full record. More specifically, SDG&E argues that no party raised the issue of the common function requirement in the tariffs during this proceeding, therefore no record exists on which to base the removal of the common function requirement from the definition of property in the IOUs' VNEM tariffs.[6] (Rehrg. App., pp. 3-4.) SDG&E claims the only record in the proceeding are filings submitted after the Petition was filed. (Rehrg. App., p. 4, fn. 12.) To the extent SDG&E is arguing that the Petition created a new proceeding with a new record, it is mistaken. The record was established in the underlying proceeding, which resulted in D.16-01-044. Any filings as a result of the Petition merely expand the existing record.

Further, SDG&E misconstrues the issue raised by the Petition. SDG&E argues that no party raised the issue of the common function requirement in the tariffs during this proceeding. (Rehrg. App., p. 4.) In fact, CALSSA's Petition, while focusing on language in PG&E's VNEM tariff regarding parcels, brought to our attention the fact that certain IOUs' VNEM tariffs were not consistent with one another or the orders in D.16-01-044. CALSSA asked the Commission to modify D.16-01-044 to "resolve ambiguity in the way that eligible properties are defined for purposes of participation in [VNEM]." (Petition, p. 1.) Therefore, whether the definition of property in the IOUs' VNEM tariffs is consistent with D.16-01-044 is the issue that is properly addressed by the Decision.

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[6] SDG&E incorrectly cites to the Proposed Decision repeatedly in its rehearing application. A proposed decision is the recommendation of an assigned Administrative Law Judge and is not an official decision until the whole Commission votes on it and it is issued as a final decision.

We clarified our intent in issuing D.16-01-044:

> The Commission's intent is apparent from D.16-01-044, which adopted the CALSEIA (now CALSSA) proposal without modification: to make VNEM eligibility requirements for non-MASH multifamily and multitenant customers the same as for affordable housing tenants. Specifically, customers or accounts behind multiple service delivery points and on multiple contiguous parcels (whether tax /assessor or legal) may take service on a VNEM tariff, and thereby receive credits from the same eligible renewable generating facility, provided those customers or accounts are part of the same multitenant or multi-meter facility (as specified in each electric IOU's VNEM tariff).

(Decision, p. 15.) The Decision further stated that PG&E's implementation of its tariff contravened the clear intent of D.16-01-044 and the Decision would provide uniformity in terminology among the IOUs regarding the definition of property. (*Ibid.*)

Accordingly, we ordered PG&E and SCE to modify their general market VNEM tariffs to include the same definition of property as SDG&E's VNEM tariff because SDG&E had implemented D.16-01-044 according to Commission intent and no parties had raised issues or concerns with SDG&E's definition of property. (Decision, p. 15.) SDG&E's VNEM tariff reads as follows:

> Property: All of the real property and apparatus employed in a single multi-tenant or multi-meter facility on contiguous parcels of land. These parcels may be divided by a dedicated street, highway or public thoroughfare or railway, so long as they are otherwise contiguous, part of the same single multi-tenant or multi-meter facility, and all under the same ownership.

In accordance with D.16-01-044, SDG&E's definition of property is consistent with the low-income VNEM tariffs of all three IOUs which state:

> All of the real property and apparatus employed in a single low income housing enterprise on contiguous parcels of land. These parcels may be divided by a dedicated street, highway or public thoroughfare or railway, so long as they are otherwise contiguous and part of the same single low-income housing enterprise, and all under the same ownership.

(Decision, p. 3, citing D.11-07-031, p.65.)

In contrast, PG&E and SCE's definition includes limitations not included in the low-income VNEM tariffs:

> A Property is defined as: A cluster of multi-tenant and multi-meter buildings, facilities or structures that are under the control of a single Owner or Operator built to serve a common function, such as a housing complex or a multi-tenant complex, on an integral parcel of land undivided, unless the division is a street, highway, or similar public thoroughfare, which is permissible provided no other unrelated Single Enterprises (defined as a separate business or other individual activity carried on by a customer but does not apply to associations or combinations of customers) break up the otherwise integral parcel and cluster of multi-tenant and multi-meter buildings, facilities or structures.

(Decision, pp. 4-5, emphasis added.)

SDG&E asserts that ordering PG&E and SCE to conform their VNEM tariffs to SDG&E's VNEM tariff had the effect of removing an important requirement in PG&E and SCE tariffs – that the parcels must serve a common function. SDG&E argues that the Commission's reasoning is erroneous and procedurally improper. (Rehrg. App., p. 4.) It is worth noting that the Decision did not order any changes to SDG&E's tariffs and, although the Decision ordered PG&E and SCE to modify their respective tariffs, neither of those utilities applied for rehearing of the Decision. SDG&E fails to cite to any specific statute or Commission rule supporting its argument. Thus, they have failed to comply with Public Utilities Code section 1732 and Rule 16.1(c) of the Commission Rules of Practice and Procedure.[7] Section 1732 requires the rehearing application to specify the grounds of legal error. (Pub. Util. Code, § 1732.) Rule 16.1(c) states that "[a]pplications for rehearing shall set forth specifically the ground on which the applicant considers the order or decision of the Commission to be unlawful or erroneous, and make specific references to the record or law." (Code of Regs., tit. 20, § 16.1, subd. (c).)

[7] All subsequent section references are to the Public Utilities Code, unless otherwise specified. All subsequent rule references are to the Commission Rules of Procedure and Practice, unless otherwise noted.

Next, SDG&E argues that it was improper for the Decision to adopt, from the PD, a position not advocated by any party, i.e., removal of the common function requirement and consistency among IOUs' VNEM tariffs. (Rehrg. App., p. 5.) SDG&E misconstrues the Decision. The issue was whether the IOUs' VNEM tariffs complied with D.16-01-044. The orders to make the tariffs consistent with D.16-01-044, resulting in the elimination of the common function, is our method of resolving the issue raised by the Petition. SDG&E identifies no rule or statute that limits the Commission's options for resolving issues to only those advocated by a party.

Finally, SDG&E claims that the revision to SCE and PG&E's tariffs removing the common function language from those tariffs, effectively precludes SDG&E from proposing to modify its tariffs to include this limiting principle. (Rehrg. App., p. 4.) This claim is inaccurate. The Decision permits the IOUs to request authorization to modify their tariffs to include the common function, but requires the three IOUs to include a proposed definition of common function that is consistent among the three IOUs' tariffs. (Decision, pp. 11, 15-16, ordering paragraph 5.) Again, SDG&E has failed to identify legal error.

B. D.16-01-044 does not limit the applicability of VNEM tariffs to residential customers.

SDG&E asserts that the common function requirement supports D.16-01-044's focus on residential customers and is necessary to limit the applicability of the tariff to residential customers because of the "substantial subsidy from bundled customers." (Rehrg. App., p. 9.) SDG&E misconstrues the language from the Decision that it quotes to support this assertion. Nowhere in the Decision does it state that the VNEM tariffs are restricted to residential customers. We did not limit the applicability of VNEM tariffs to residential customers. In fact, in a prior decision, we specifically stated ". . . we accepted the staff recommendation to offer [VNEM] to all multi-tenant and multi-meter properties, which opens [VNEM] to residential, commercial, and industrial customers." (D.11-07-031, p. 18.) Moreover, section 2827 subdivision (b)(4)(A) states that the definition of an eligible customer-generator means a residential customer, small

commercial customer or commercial, industrial, or agricultural customer of an electric utility. Parties are precluded from relitigating issues in an application for rehearing, that were decided in past Commission decisions. Under section 1709, the Commission's decision on this issue is not subject to collateral attack, and is final and conclusive.

C. The common function requirement is not necessary to prevent a customer from serving as an LSE without assuming the attendant responsibilities.

SDG&E contends that the Commission should not eliminate the common function requirement from the IOUs' tariffs because it helps prevent a customer from serving as an LSE without assuming the attendant responsibilities. (Rehrg. App., p. 10.) This issue was fully addressed in the proceeding. The Decision noted that CALSSA disputed this argument, stating that the definition of property in the general market VNEM tariffs prevented customer-generators from acting as LSEs. (Decision, p. 7.) Moreover, to address the IOUs' concern, the Decision permits the IOUs to propose modifications to their respective general market VNEM tariffs to specify the requirements for LSEs. (*Id*., at p. 11.)

SDG&E fails to "set forth specifically the ground on which the applicant considers the order or decision of the Commission to be unlawful or erroneous, and make specific references to the record or law." (Code of Regs., tit. 20, § 16.1, subd. (c).) Rather than identifying legal error, SDG&E is actually requesting that the Commission reconsider the arguments SDG&E raised during the proceeding, i.e., reweigh the evidence. A rehearing application is not a permissible vehicle for a party to ask the Commission to reweigh the evidence. Such a request does not constitute an allegation of legal error. (Pub. Util. Code, § 1732.)

D. Consideration of the VNEM tariffs under the Tier 2 advice letter process is appropriate.

Finally, SDG&E argues that by ordering the IOUs to submit their tariff changes through the Tier 2 advice letter process, the Decision evades the close coordination with the instant NEM proceeding sought by the new NEM Rulemaking

proceeding and preempts direct Commission consideration of this important, unlitigated issue affecting the scope of NEM and the cross subsidies. (Rehrg. App., pp. 11-12.)

SDG&E misconstrues the issue in this phase of the proceeding and its impact on future Commission proceedings. As discussed above, the Decision addressed the issue raised by the Petition regarding whether the VNEM tariffs were in compliance with D.16-01-044. Cross subsidies and the broader scope of NEM were not at issue here. Those issues were addressed in prior Commission decisions that are now final and may not be raised in an application for rehearing. (Pub. Util. Code, § 1756 [parties have 30 days to file a petition for writ of review of Commission decisions].)

The intent of SDG&E's argument that the Decision "preempts direct Commission consideration of this important issue" is unclear. (Rehrg. App., p. 12.) If it asserts that the Tier 2 advice letter process evades Commission consideration of the elimination of the common function requirement, then SDG&E is incorrect. The full Commission addressed that issue when it issued D.16-01-044 and D.20-08-007. Alternatively, if SDG&E intended to argue that D.20-08-007 preempts future Commission consideration of those issues, it is again incorrect. SDG&E provides no statutes or Commission rules that preclude the Commission from revisiting issues in future proceedings. In fact, SDG&E noted our intent to address VNEM in the new NEM Rulemaking proceeding. (Rehrg. App., p. 12.) In fact, VNEM has been an active issue in that proceeding.

III. CONCLUSION

For the reasons discussed above, rehearing of D. 20-08-007 is denied as SDG&E has not shown legal error.

THEREFORE, IT IS ORDERED that:

1. Rehearing of Decision 20-08-007 is denied.
2. This proceeding, Rulemaking (R.) 14-07-002 is closed.

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This order is effective today.

Dated April 21, 2022, at San Francisco, California.

ALICE REYNOLDS
President
CLIFFORD RECHTSCHAFFEN
GENEVIEVE SHIROMA
DARCIE L. HOUCK
JOHN R.D. REYNOLDS
Commissioners