S283614

IN THE SUPREME COURT OF CALIFORNIA

CENTER FOR BIOLOGICAL DIVERSITY, INC. et al.,

Petitioners,

vs.

PUBLIC UTILITIES COMMISSION,

Respondent,

PACIFIC GAS AND ELECTRIC COMPANY et al.,

Real Parties in Interest.

After a Decision by the Court of Appeal
First Appellate District, Case No. A167721
From a Decision of the Public Utilities Commission of the State of California, No. 22-12-056 (December 19, 2022)

PETITIONERS' OPENING BRIEF

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ISSUES PRESENTED

1. Pursuant to the plenary authority granted to the Legislature by Article XII, Section 5 of the California Constitution, in 1998, the California Legislature amended Public Utilities Code sections 1757 and 1757.1 to significantly expand the scope of judicial review of Commission decisions. Did the Opinion's "uniquely deferential" standard of review conflict with the 1998 amendments and highlight a conflict in the caselaw resulting from the failure by some appellate courts to follow the Legislature's direction that judicial review of Commission decisions conform to review of other agencies' decisions?

2. By ignoring the acknowledged societal and other benefits of customer-sited renewable generation and assigning value solely to limited economic benefits, did the Commission fail to proceed in the manner required by section 2827.1(b)(3), which mandates that a net energy metering tariff must be "based on the costs and benefits of the renewable electrical generation facility?"

3. Section 2827.1(b)(1) requires that the net energy metering tariff "include specific alternatives designed for growth" of customer-sited renewable generation among customers in disadvantaged communities. Did the Commission fail to proceed

in the manner required by law when it ignored the specific barriers to growth facing these customers?

INTRODUCTION

Article XII, section 5 of the California Constitution grants the Legislature "plenary power, unlimited by the other provisions of this constitution … to establish the manner and scope of review of commission action in a court of record." Before 1998, the Legislature exercised this power by limiting judicial review of California Public Utilities Commission ("Commission") decisions to whether the Commission "regularly pursued its authority." Pursuant to its constitutional authority, in 1998, the Legislature amended the Public Utilities Code to direct that judicial review of Commission decisions conform to judicial review of other state agencies' decisions. Among other requirements, under the new provisions, courts must independently review Commission decisions to ensure that the Commission "proceeded in the manner required by law." (Pub. Util. Code §§ 1757(a)(2); 1757.1(a)(2).)[1] Unlike the deferential standard of review set forth

[1] All subsequent undesignated statutory references are to the Public Utilities Code.

in the earlier version of section 1757, whether the agency proceeded in the manner required by law presents a purely legal question that courts independently review de novo.

Despite the Legislature's directive, some appellate courts have continued to rely on pre-1998 cases to conclude erroneously that the Commission remains entitled to special deference. The appellate court's decision upholding the Commission's dramatic changes to the tariff for compensating customer-sited renewable generation exemplifies this failure to adhere to the standard of review required by the 1998 amendments to the Public Utilities Code. Instead of applying its independent judgment to interpret section 2827.1 and determine whether the Commission failed to proceed in the manner required by law, the appellate court applied a "uniquely deferential" standard of review, including a "strong presumption" that the Commission's decision was valid. In so doing, the appellate court not only failed to apply the correct standard of review, but also approved a Commission decision that reverses decades of progress in contravention of clear legislative mandates to value and encourage the growth of customer-sited generation.

Since 1996, the Legislature has supported customer-sited, renewable generation to transition from fossil-fuel generation to clean, renewable power. Individual Californians have spearheaded the effort, installing rooftop solar[2] on over one and a half million homes, schools, churches, and businesses. The Legislature initially encouraged this transition with the adoption of section 2827, establishing the first Net Energy Metering ("NEM") tariff.

In 2013, the Legislature enacted Assembly Bill 327, which directed the Commission to adopt a new tariff for customer-sited generation. Among other requirements, in adding section 2827.1, the Legislature mandated that this new tariff be based on "the costs and benefits" of customer-sited generation, that the total benefits of the tariff "to all customers and the electrical system" be approximately equal to the total costs, and that the new tariff include specific alternatives designed to encourage the growth of customer-sited generation in disadvantaged communities. (§ 2827.1(b)(1)-(b)(4).)

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[2] Because rooftop solar is the predominant customer-sited distributed generation resource in California, this petition will often refer to distributed generation as "rooftop solar."

Pursuant to its new statutory mandate, in 2016, the Commission adopted a new tariff, which continued to ensure that customers received a reasonable return on their substantial upfront investments and that rooftop solar continued to grow. The growth in customer-sited generation resulting from the 1996 and 2016 NEM tariffs has played a critical role in meeting California's greenhouse gas reduction mandates, reduced the need for and costs of utility infrastructure, and increased the resiliency of the electrical system.

Despite its success in achieving section 2827.1's mandate to encourage the growth of rooftop solar (see § 2827.1(b)(1)), in 2022, the Commission reversed course. The Commission ignored the Legislature's mandate that the system of compensation for customer-generators be "based on the costs and benefits" of the customer-sited generation, and it abandoned net energy metering in favor of a new net billing tariff ("2022 tariff"). The 2022 tariff dramatically reduces the compensation paid for energy exported to the grid by customer-sited renewable generation and is deliberately designed to slow the growth of rooftop solar. (See Decision 22-12-056, Decision Revising Net Energy Metering Tariff and Subtariffs (Dec. 15, 2022) ("Decision"), 21:App:797-

APP18242 – APP18501.)[3] This dramatic decrease in compensation conflicts with the Legislature's express direction to value all of rooftop solar's benefits and represents a sharp break with the Commission's own 2016 decision implementing the identical statutory language in Public Utilities Code section 2827.1. The 2022 tariff also fails to include alternatives designed for growth in disadvantaged communities.

Petitioners Center for Biological Diversity, Environmental Working Group, and The Protect Our Communities Foundation appealed the Commission's failure to comply with the express terms of section 2827.1. However, the appellate court applied a "uniquely deferential" standard of review to uphold the Commission's decision.

First, the appellate court ignored the plain meaning of section 2827.1 and the rules of statutory interpretation by deferring to the Commission's determination that it could compensate customer-sited generation without considering all of its benefits. By directing the Commission to account for "*the* costs

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[3] Citations to documents in the Appendix of Exhibits from the administrative proceeding, including the Decision, are in the format [Volume]:App:[Tab]-[Page].

and benefits" of customer-sited generation, section 2827.1 requires quantification of *all* such benefits. (See *In re Davis' Estate* (1908) 8 Cal.App. 355, 358 ["the" means "all"]; *Frazier v. Pioneer Americas LLC* (5th Cir. 2006) 455 F.3d 542, 546 [same].) But instead of valuing all benefits of customer-sited generation, the Commission assigned value to only certain costs that customer-sited generation avoids.

The appellate court acknowledged that the Commission could have valued the societal benefits of customer-sited generation. However, the court deferred to the Commission's erroneous view that section 2827.1 allowed the Commission to ignore acknowledged benefits of customer-sited generation in the name of reducing an alleged "cost shift" from customers with renewable generation facilities to those without them. While the Public Utilities Code is replete with examples of the Legislature directing the Commission to eliminate particular cost shifts, no such direction appears in section 2827.1. Instead, the Legislature required the Commission to ensure that the tariff's total costs and benefits "to all customers and the electrical system" be "approximately equal." As the Commission correctly determined

in 2016, Section 2827.1 makes no reference whatsoever to a cost shift.

Finally, the appellate court improperly deferred to the Commission's determination that the 2022 tariff satisfied section 2827.1(b)(1)'s command that the tariff include specific alternatives designed to foster the growth of rooftop solar in disadvantaged communities. The Commission's own findings demonstrate that residents in these communities face specific barriers to the adoption of customer-sited generation that must be addressed to ensure the growth of renewable generation. Yet, the 2022 tariff itself included only a small increase in compensation for the energy generated by low-income rooftop solar customers in disadvantaged communities. Providing a small increase in compensation only after a rooftop solar system has been installed and begins generating does nothing to address the barriers to installing systems in the first place.

Moreover, the Commission did not include any other program specifically designed to address these barriers. Instead, in its decision denying Petitioners' application for rehearing, the Commission asserted for the first time that three pre-existing programs—programs that had thus far failed to promote any

meaningful adoption of customer-sited generation in disadvantaged communities—satisfied its obligations under section 2827.1(b)(1). The Commission's post hoc argument that preexisting programs could meet the mandate of section 2827.1(b)(1) conflicts with the Commission's express finding that the status quo, which necessarily included the preexisting programs, was leaving disadvantaged community residents behind. (21:App:797-APP18458.)

The appellate court's undue deference to the Commission's decision not only upholds a tariff that fails to comply with the express requirements of section 2827.1, it also undermines both the constitutional power of the Legislature to dictate the scope of review of Commission actions and the role of the courts as the final arbiter of legislative intent. Petitioners respectfully request that the Court reverse the appellate decision, reject the erroneous "unique deference" standard of review, and remand to the Commission with instructions to comply with section 2827.1 by valuing all of the identified benefits of customer-sited generation and including alternatives designed to promote the growth of customer-sited generation in disadvantaged communities.

STATEMENT OF THE CASE

A. The Commission's 1996 and 2016 NEM tariffs implemented statutory directives to encourage rooftop solar.

In 1995, the Legislature established California's first NEM program to encourage private investment in renewable energy. (Sen. Bill No. 656 (1995-1996 Reg. Sess.) § 1; see also § 2827.) The resulting tariff adopted by the Commission in 1996 ("1996 tariff") charged customer-generators for only the *net* electricity they consumed each month, taking into account the power they took from the grid, the power they generated and consumed on-site, and the power they sent back to the grid (or "exported") when their facilities generated excess electricity. (D.16-01-044, Decision Adopting Successor to Net Energy Metering Tariff (Feb. 5, 2016), pp. 12-13.)[4] The 1996 tariff allowed customers to earn reasonable

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[4] The appellate court granted Petitioners' Request for Judicial Notice ("Appellate RJN") filed May 3, 2023, and Petitioners' Supplemental Request for Judicial Notice ("Appellate SRJN"), filed July 31, 2023, requesting notice of various Commission decisions and other documents. When first citing such a document, Petitioners will note its location in the appellate record and include a hyperlink to the decision's location on the Commission's website for the Court's convenience. D.16-01-044, Exhibit A to Petitioners' Appellate RJN, is available at https://docs.cpuc.ca.gov/PublishedDocs/Published/G000/M158/K285/158285436.pdf.

returns on their substantial up-front investments, all while benefitting the environment, society, and the electrical grid as a whole.

In 2013, the Legislature directed the Commission to establish a successor to the 1996 tariff. (§ 2827.1). Section 2827.1 provides that, in developing a new tariff, the Commission *shall*:

> (1) Ensure that … customer-sited renewable distributed generation continues to grow sustainably and include specific alternatives designed for growth among residential customers in disadvantaged communities….
>
> (3) Ensure that the standard contract or tariff ... is based on the costs and benefits of the renewable electrical generation facility.
>
> (4) Ensure that the total benefits of the standard contract or tariff to all customers and the electrical system are approximately equal to the total costs.

(§ 2827.1(b).)

Pursuant to section 2827.1, the Commission adopted the first successor tariff in 2016 ("2016 tariff"). (21:App:797-APP18252.) The 2016 tariff achieved the statutory directive to ensure the continued growth of customer-sited generation, in part by compensating customers for energy they exported to the grid

at the retail rate—the rate customers themselves pay for energy from the grid. (D.16-01-044 at p. 110.) In establishing the 2016 tariff, the Commission also rejected arguments that section 2827.1 required the elimination of an alleged cost shift between nonparticipants and participants in the NEM program. (D.16-01-044 at p. 55.) The Commission's 2016 decision examined the legislative history and found that the Legislature *removed* all references to any cost shift in section 2827.1. Instead, the Legislature directed the Commission to ensure that the tariff's total costs and benefits to all customers and the electrical system were approximately equal. (*Id.*) The 2016 decision acknowledged that "the benefits to the electrical system and all customers are not fully known" (*id.* at p. 58), but stated that the Commission would rectify that gap in the next tariff (*id.* at pp. 61).

B. In 2022, the Commission adopted a successor tariff specifically designed to decrease the growth of customer-sited renewable generation.

The Commission initiated a proceeding to review the 2016 tariff in August 2020 and adopted the new successor tariff in December 2022. (1:App:1-APP00058; 21:App:797-APP18242.) Although section 2827.1 had not changed, this 2022 tariff

completely changed the system of compensation for customer-sited generation.

Despite the statutory directive to ensure the continued growth of rooftop solar, the 2022 tariff dramatically decreased the compensation paid to NEM customers, approximately doubling the time it takes to pay back the initial investment in a rooftop solar system. (21:App:797-APP18323 [targeting nine-year payback period]; see 10:App:350-APP08675 [estimating payback period under 2016 tariff of "five years or less"].) The Commission decreased the attractiveness of customer-sited generation to address a purported "cost shift" from participating to non-participating customers. (21:App:797-APP18292, 18321.) The Commission claimed that section 2827.1(b)(4)'s requirement to balance the costs and benefits of the tariff "to *all customers* and the electrical system" required avoiding alleged "disproportionate impacts" to *some* customers—i.e., nonparticipants. (21:App:797-APP18294 (emphasis added), APP18304.) Yet the Commission identified the purported cost shift without first accounting for the total benefits of rooftop solar. (21:APP:797-APP18311-12.)

The 2022 tariff decreases compensation to rooftop solar customers primarily by reducing the value of the energy they

generate and export to the grid. Rather than compensate customers for exported energy at the retail rate, the Commission now compensates customers solely based on numbers generated by a Commission-created model called the Avoided Cost Calculator. (21:App:797-APP18348.) The Commission created the Avoided Cost Calculator to approximate the value of the generic benefits of distributed energy resources based on some of the costs that they allow a utility to avoid. (D.20-04-010, 2020 Policy Updates to the Avoided Cost Calculator (Apr. 24, 2020), p. 4.)[5] The model "does not determine if a particular distributed energy resource[ ] avoids a particular cost" and was not intended to consider benefits for any one resource, such as rooftop solar. (*Id.* at pp. 5, 78.)

The Commission acknowledged that the Avoided Cost Calculator does not include values for *all* benefits of customer-sited generation. (21:APP:797-APP18311-12.) The Commission has also acknowledged that its Avoided Cost Calculator may not

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[5] D.20-04-010, Exhibit E to Petitioners' Appellate RJN, is available at https://docs.cpuc.ca.gov/PublishedDocs/Published/G000/M334/K734/334734544.PDF.

accurately model the value of avoided transmission costs conferred by customer-sited generation. (D.22-05-002, Decision Adopting Changes to the Avoided Cost Calculator (May 6, 2022), p. 74.)[6] Nevertheless, as described below, the Commission in its 2022 tariff declined to value several societal and other benefits that had been excluded from the Avoided Cost Calculator's model and relied on the model despite questioning its accuracy in estimating avoided transmission costs. (21:App:797-APP18311-12; 21:App:797-APP18348; D.22-05-002, at p. 74.)

First, the Commission's 2022 tariff omitted the value of resiliency benefits—that is, the ability to maintain power during a blackout or other grid disruption. Customer-sited generation provides resiliency that prevents adverse health consequences during heat waves, avoids food spoilage, and ensures continuity of education during remote schooling. (See 11:App:356-APP09383:6-9, APP09385:5-APP09386:5; 5:App:251-APP04175:16-22, APP04177:15-24, APP04178:19-23,

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[6] D.22-05-002, Exhibit B to Petitioners' Appellate RJN, is available at https://docs.cpuc.ca.gov/PublishedDocs/Published/G000/M474/K624/474624547.PDF.

APP04179:5-16; 13:App:361-APP10297:5-10298:10.) The Commission dismissed these benefits (21:App:797-APP18313-14), despite their demonstrated value to the electrical system (9:APP:304-APP06848).

Second, the Commission omitted the value of the benefits of avoided out-of-state methane leakage (21:App:797-APP18314), despite the Commission's recognition that customer-sited renewable generation avoids such leakage and its attendant climate harms (4:App:231-APP03606; D.22-05-002 at p. 47).

Third, the Decision omits the benefits of avoided land-use impacts from transmission (21:App:797-APP18314-15), despite the Commission's acknowledgment that customer-sited generation avoids the need to build new transmission (D.20-04-010 at p. 60).

Fourth, consistent with the Commission's earlier acknowledgment that the Avoided Cost Calculator model may not accurately estimate the transmission costs avoided by distributed resources (D.22-05-022 at p. 74), the Decision dramatically underestimates the value of avoided transmission projects (compare 9:App:322-APP07677 [estimating potential avoided costs of $1,000 per rooftop solar system] with 15:App:384-

APP11736 [deriving avoided cost of $87 per system from Avoided Cost Calculator model]).

Although the Avoided Cost Calculator model used by the Commission does not value these societal and other benefits, the Commission acknowledged the existence of the Societal Cost Test, a tool to accomplish this valuation; but the Commission declined to use it when setting its 2022 tariff. (21:App:797-APP18310.)

Finally, the Commission discussed customers in disadvantaged communities. The Commission found that these customers faced significant barriers to adopting rooftop solar, including financial challenges related to installation and a lack of up-front financing options. (21:App:797-APP18469-70.) Because of these unaddressed barriers, the Commission correctly concluded that customers in disadvantaged communities were being left behind. (21:App:797-APP18458.)

In the face of these admitted disparities, the Commission adopted a modestly higher rate of compensation for customers in disadvantaged communities "to ensure simple payback periods of [ ] nine years or less on average." (21:App:797-APP18419). The Commission also noted that AB 209, new legislation separate

from the tariff, would offer rebates to subsidize customer-sited generation accompanied by storage in disadvantaged communities. (21:App:797-APP18425.) However, the Commission did nothing to address what it recognized as the primary barrier to customer-sited generation in disadvantaged communities—the lack of financing for the high upfront costs of upgrades and system installation.

C. The Court of Appeal deferred to the Commission's statutory interpretation of section 2827.1 and upheld the Commission's decision.

Petitioners applied for rehearing of the Commission's decision adopting the 2022 tariff. When the Commission failed to act on the application within 60 days, Petitioners timely petitioned for review in the Court of Appeal. (§§ 1733, 1756.) The appellate court granted review.

The petition for writ of review demonstrated that the Commission failed to proceed in the manner required by law by, as relevant here, (1) failing to account for all of the recognized benefits of customer-sited renewable generation in violation of section 2827.1(b)(3), and (2) failing to include specific alternatives designed for growth among residential customers in

disadvantaged communities in violation of section 2827.1(b)(1). (Court of Appeal Case No. A167721, Petition for Writ of Review (filed May 3, 2023), pp. 41-62, 78-88.) Petitioners requested that the court issue a writ of mandate reversing the decision adopting the 2022 tariff and remanding to the Commission with instructions to comply with the requirements of section 2827.1. (*Id.* at pp. 36-37.)

The Commission filed its answer in the Court of Appeal and, roughly one week later, denied Petitioners' administrative application for rehearing. (See Court of Appeal Case No. A167721, Commission's Answering Brief (filed June 21, 2023); D.23-06-056, Order Denying Rehearing of Decision 22-12-056 (June 30, 2023).)[7] The Order Denying Rehearing largely reiterated the decision adopting the 2022 tariff and the Commission's answering brief. (*Id.*)

The appellate court issued its Opinion on December 20, 2023. The court applied a "uniquely deferential standard of review" that would "disturb the Commission's interpretation [of

[7] The Commission attached D.23-06-056 to a letter submitted to the appellate court on June 30, 2023.

the Public Utilities Code] only if 'it fails to bear a reasonable relation to the statutory purposes and language.'" (Opinion at pp. 12, 10.)[8] The court applied a "strong presumption favoring the validity" of the Commission's statutory interpretations. (*Id.* at p. 12.)

The court deferred to the Commission's interpretation of section 2827.1(b)(3), accepting the Commission's reading that the mandate to develop a tariff "based on the costs and benefits" of customer-sited generation did not require the Commission to quantify *all* of those benefits. (*Id.* at pp. 12-13 [noting that "nothing in the statutory text [ ] *indisputably* requires the Commission to take account of '*all* costs and benefits' of 'distributed renewable generation.'" (emphasis added)].) The court then deferred to the Commission's decision to limit its analysis of benefits to the values generated by the Avoided Cost Calculator model (*id.* at pp. 9-15), dismissing evidence of higher avoided transmission costs and despite acknowledging the Commission's concession that it could have quantified societal

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[8] Citations to the Opinion are to the slip opinion attached to the Petition for Review as Exhibit A.

and other benefits not captured by the Avoided Cost Calculator model (*id.* at pp. 14, 16-17).

The court also deferred to the Commission's claim that section 2827.1 prioritized reducing a purported cost shift. (*Id.* at pp. 13-14.) Relying primarily on select aspects of legislative history, the court concluded that section 2827.1(b)(4)'s requirement to ensure the total costs and benefits of the tariff "to all customers and the electrical system" were approximately equal allowed the Commission to "balance the equities *among* all customers." (*Id.* at pp. 5, 14-15, emphasis added; see also *id.* at pp. 20-21 ["The implication of [subdivision (b)(4)] ... is to ensure the successor tariff does not grant unwarranted benefits or impose unwarranted costs on any particular group of ratepayers."].) In reaching this conclusion, the court did not confront the statutory scheme or contrary legislative history showing that 2827.1(b)(4) concerned the tariff's overall cost-effectiveness, not its effects on particular ratepayer groups.

Finally, the court found that the Commission complied with section 2827.1(b)(1)'s requirement that the tariff "include specific alternatives designed for growth among residential customers in disadvantaged communities." (*Id.* at pp. 25-27.) The court

deferred to the Commission's post hoc position that a mix of pre-existing programs (raised for the first time after Petitioners sought writ relief) and the 2022 tariff's small increase in compensation for energy produced by low-income customers were sufficient to help customers in disadvantaged communities pay back the upfront costs of system installation. (*Id.*) The court acknowledged that any program with benefits that "accrue only after a system is installed … cannot directly overcome the primary barrier to the growth sought by the statute—the initial cost of solar system installation." (*Id.* at p. 27.) It nevertheless accepted the Commission's reliance on programs that do not overcome that barrier.

Petitioners filed a petition for rehearing on January 4, 2024. The court denied rehearing and modified the Opinion on January 16, 2024, without changing the judgment. The Opinion became final on January 19, 2024. (Cal. Rules of Court, rule 8.490(b)(2).)

ARGUMENT

I. The Court of Appeal applied an obsolete and erroneously deferential standard of review to the Commission's interpretations of the Public Utilities Code.

The Legislature's 1998 amendments to sections 1757 and 1757.1 required courts to review Commission decisions for a failure to proceed in the manner required by law de novo, using the same independent judgment standard applied to other agencies. However, the appellate court here applied an obsolete standard of review inconsistent with the amended sections 1757 and 1757.1. The court's erroneous application of a "uniquely deferential" standard of review prejudiced the outcome of its decision and warrants reversal.

A. Pursuant to the plenary authority granted to the Legislature by the California Constitution, in 1998, the Legislature amended Sections 1757 and 1757.1 to expand the scope of judicial review of Commission decisions.

The provisions of the California Constitution that create the Commission expressly subject the agency to the will of the Legislature. In particular, the Constitution grants the Legislature "plenary power, unlimited by the other provisions of this constitution[,] ... to establish the manner and scope of review

of commission action in a court of record." (Cal. Const., art. XII, § 5.)

Prior to 1998, the Legislature exercised its authority over judicial review of Commission decisions through then-existing section 1757. That section limited judicial review to a determination of whether the Commission "regularly pursued its authority." (*Toward Utility Rate Normalization v. PUC* (1978) 22 Cal.3d 529, 537.)

In 1998, however, the Legislature amended sections 1757 and 1757.1 to expand significantly the scope of judicial review of Commission decisions and to eliminate the special restrictions previously imposed on the courts' review of Commission actions. (SB 779, §§ 1.5, 12.) In enacting SB 779, the Legislature expressed its unambiguous intent that "decisions by the commission ... be subject to review on grounds similar to those of other state agencies." (*Id.* at § 1.5.)

To achieve the Legislature's direction, the amended sections 1757 and 1757.1 expressly identified new grounds for

review of Commission decisions.[9] (SB 779, §§ 11-14.5.) These new grounds included whether the Commission proceeded in the manner required by law—a standard that parallels the standard of review set forth in Code of Civil Procedure section 1094.5 and Public Resources Code sections 21168 and 21168.5, all of which predated the 1998 amendments. (Code Civ. Proc. § 1094.5 ["The inquiry ... shall extend to the questions … whether there was any prejudicial abuse of discretion. Abuse of discretion is established if the [agency] has not proceeded in the manner required by law."]; Pub. Resources Code § 21168 [incorporating the standards of Code of Civil Procedure section 1094.5]; *id.* § 21168.5 [incorporating the "failure to proceed in the manner required by law" standard]; see also Bus. & Prof. Code § 23084 [same].)

By adopting the "proceed in the manner required by law" language from section 1094.5 into sections 1757 and 1757.1, the

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[9] The Commission asserted that section 1757.1 applies here. (Court of Appeal Case No. A167721, Commission's Answering Brief at p. 15, fn. 3.) The appellate court, however, cited section 1757. (Opinion at p. 31.) Although the two sections treat the Commission's factual findings differently, the issues presented here concern a legal question: whether the Commission proceeded in the manner required by law. Because the provisions relevant to this question are identical (*see* § 1757(a)(2) and § 1757.1(a)(2)), the same analysis applies under either section.

Legislature directed the courts to apply the same standard of review to Commission decisions that the courts apply to other agencies in determining whether they proceeded in the manner required by law. (*See People v. Harrison* (1989) 48 Cal.3d 321, 329 ["Where a statute is framed in language of an earlier enactment on … an analogous subject, and that enactment has been judicially construed, the Legislature is presumed to have adopted that construction."].) That standard—the standard that applies in this case—requires that courts review agency decisions de novo and apply their independent judgment to questions of law.

B. The 1998 amendments require the courts to apply de novo review and exercise their independent judgment in determining whether the Commission proceeded in the manner required by law.

The new grounds identified in sections 1757 and 1757.1 significantly expanded the scope of judicial review of Commission decisions, including the Commission's legal conclusions and statutory interpretations. Courts no longer restrict their review to whether the Commission "regularly pursued its authority." Instead, they must now determine whether the Commission violated one or more of the specific grounds for review in section

1757 or 1757.1, including the relevant question here: whether the Commission proceeded in the manner required by law.

Whether an agency proceeded in the manner required by law presents a purely legal question that courts review de novo. (*City of Marina v. Bd. Of Trustees of Cal. State Univ.* (2006) 39 Cal.4th 341, 355, 365-66; *Stewart Enterprises, Inc. v. City of Oakland* (2016) 248 Cal.App.4th 410, 420 ["Generally, whether an agency has proceeded lawfully is a legal question that the trial court and appellate court both review de novo."].) In applying de novo review, the Court reviews the Commission's action, and not the decision of the appellate court. (*Natural Resources Defense Council, Inc. v. City of Los Angeles* (2023) 98 Cal.App.5th 1176, 1203.)

Whether an agency failed to proceed in the manner required by law embraces both whether the agency has followed statutorily mandated procedures and whether the agency's decision was based on erroneous conclusions of law. (See *City of Marina*, *supra*, 39 Cal.4th at pp. 355, 365-66 [agency's incorrect legal determination that the California Environmental Quality Act ("CEQA") required certain guarantees for mitigation to be considered "feasible" constituted failure to proceed in the manner

required by law]; *Family Health Centers of San Diego v. State Dept. of Health Care Services* (2023) 15 Cal.5th 1, 10, 19 ("*Family Health*") [agency failed to proceed in the manner required by law by misunderstanding the legal principles underlying which healthcare costs are eligible for reimbursement]; *City of San Diego v. Bd. Of Trustees of Cal. State Univ.* (2015) 61 Cal.4th 945, 956 [finding that mitigation was not feasible constituted a question of law requiring de novo review]; *McAllister v. California Coastal Com.* (2009) 169 Cal.App.4th 912, 954 [erroneous interpretation of substantive requirements constituted failure to proceed in the manner required by law]; *Sky Posters, Inc. v. Dept. of Transportation* (2022) 78 Cal.App.5th 644, 660-63 [same]; *California Renters Legal Advocacy & Education Fund v. City of San Mateo* (2021) 68 Cal.App.5th 820, 845 [same].)

When failure to proceed in the manner required by law involves a question of statutory interpretation, courts must apply their independent judgment and reverse when an agency bases its decision on an erroneous interpretation. (*Family Health*, *supra*, 15 Cal.5th at p. 10; *McAllister, supra,* 169 Cal.App.4th at pp. 921-22.) When applying independent judgment, "courts are

the ultimate arbiters of the construction of a statute." (*California Assn. of Psychology Providers v. Rank* (1990) 51 Cal.3d 1, 11 ["[F]inal responsibility for the interpretation of the law rests with the courts." (citations omitted)].)

Courts applying their independent judgment must not presume the validity of an agency interpretation; nor may courts defer to an interpretation that merely reasonably relates to a statute if the interpretation is incorrect. (See *Santa Clara Valley Transportation Authority v. PUC* (2004) 124 Cal.App.4th 346, 359, 362, 365 (*"VTA"*) [rejecting "great deference" to the Commission's statutory interpretation and exercising independent judgment; rejecting the Commission's reading of "unclear" statutory text].) Rather, the courts' task is to use all of the tools of statutory interpretation at their disposal—beginning with the plain text, and including, if necessary, legislative history, and statutory context—to determine the statute's meaning. (*Bonnell v. Medical Bd. of Cal.* (2003) 31 Cal.4th 1255, 1261-65.)

C. The standard of review under sections 1757 and 1757.1 cannot be reconciled with the deferential standard applied prior to 1998.

1. Before 1998, judicial review of the Commission's legal decisions was highly deferential and did not require courts to determine whether the Commission proceeded in the manner required by law.

Prior to the 1998 amendments, section 1757 limited judicial review of the Commission's legal conclusions to "whether the commission has regularly pursued its authority." (*Toward Utility Rate Normalization*, *supra*, 22 Cal.3d at p. 537.) Addressing that question in *Greyhound Lines, Inc. v. PUC* (1968) 68 Cal.2d 406 ("*Greyhound*"), this Court applied "a strong presumption of validity" to the Commission's decisions, including its legal conclusions. (*Id.* at p. 410.) The Court stated that the "commission's interpretation of the Public Utilities Code should not be disturbed unless it fails to bear a reasonable relation to statutory purposes and language." (*Id.* at pp. 410-11.)

Greyhound's articulation of the standard applicable to whether the Commission "regularly pursued its authority" occupies an extreme end of the spectrum of deference to agency decisions. Just short of unreviewability, the standard applied under the former section 1757 required courts to affirm the

Commission's statutory interpretations as long as they were reasonably related to the statutes, even when a court's independent review established that a different reading of the statutes more faithfully adhered to statutory language and intent. Under the former section 1757, unless the Commission's interpretation was entirely unmoored from the statute, a court would presume the validity of the Commission's decision and would not substitute its judgment for that of the Commission even *as to purely legal questions*.

The deference applied under the old section 1757 no longer applies. As described above, the amendments to sections 1757 and 1757.1 required that judicial review of Commission decisions pertaining to the energy industry conform to judicial review of decisions of other state agencies. (SB 779, § 1.5(b).) The amendments also subjected Commission decisions to review on grounds similar to those applied to other agencies' decisions. (*Id*.) Thus, since 1998, determining whether the Commission failed to proceed in the manner required by law has required de novo review and the application of the court's independent judgment to questions of statutory interpretation. (See *City of Marina*, *supra*, 39 Cal.4th at pp. 355, 365-66.) Conducting this review requires

courts to act as the final arbiters of statutory construction and to reverse decisions based on erroneous legal conclusions. (*Family Health*, *supra*, 15 Cal.5th at pp. 10, 19.)

The deference applied under the old section 1757 cannot be reconciled with this new standard. Rather than presume the validity of the Commission decision and defer to the Commission's interpretation so long as it reasonably relates to the statute, a court applying independent judgment must not defer to the agency if it disagrees with the agency's interpretation. (*See Carmona v. Division of Industrial* Safety (1975) 13 Cal.3d 303, 311 [rejecting agency interpretation of ambiguous statute]; *VTA*, *supra*, 124 Cal.App.4th at pp. 359, 365 [same].) If the court in its independent judgment concludes that the agency's decision rests on erroneous conclusions of law, it must reverse. (*Family Health, supra*, 15 Cal.5th at 10.)

Determining whether the Commission "regularly pursued its authority" and whether the Commission failed to proceed in the manner required by law require different inquiries. *Greyhound* addressed only the former when it presumed the validity of the Commission's decision and limited review to whether the Commission's statutory interpretation bore a

reasonable relation to the statute. *Greyhound* does not apply when addressing whether the Commission proceeded in the manner required by law under the amended sections 1757 and 1757.1.

2. Despite the 1998 amendments, courts have continued to erroneously apply special deference to Commission decisions.

This Court has not construed sections 1757 or 1757.1 since 1998. It did, however, cite to *Greyhound* in *Southern California Edison Co. v. Peevey* (2003) 31 Cal.4th 781, 796 ("*Peevey*"). *Peevey* involved the Commission's interpretation of which costs were "uneconomic" and thus ineligible for recovery within the meaning of sections 367 and 368, which were added to the Public Utilities Code in 1996. (*Id.* at pp. 792-96.) At the end of a lengthy discussion of both the statutory text and legislative history, the Court observed that section 367 expressly delegated authority to the Commission to "identify uneconomic costs." (*Id.* at p. 796) Thus, after conducting its own independent review of the statute, *Peevey* upheld the Commission's determinations as to which costs were eligible for recovery. (*Id.*)

Peevey did not apply sections 1757 or 1757.1. Rather, the case, which was before the Court on questions certified from the

Ninth Circuit (*id.* at p. 787), involved a section of the Public Utilities Code that both expressly delegated an interpretive decision to the Commission, (§ 367 ["The commission shall identify and determine those costs and categories of costs for generation-related assets and obligations … that may become uneconomic."]), and expressly limited judicial review of the Commission's decision. In contrast to sections 1757 and 1757.1's treatment of the Commission's legal conclusions, section 367(b) states that the Commission's determination of which costs are eligible for recovery "shall be final, and notwithstanding … any other provision of law, may not be rescinded, altered or amended." The Court's analysis in *Peevey* was consistent with the limits imposed by section 367.

Given that *Peevey* did not apply sections 1757 or 1757.1, and given that this Court actually conducted its own independent review of the statutory requirements at issue there, *Peevey*'s citation to *Greyhound* constitutes dicta and has no bearing on the standard under sections 1757 and 1757.1 to determine whether the Commission proceeded in the manner required by law. Unfortunately, *Peevey*'s citation to *Greyhound* has led many courts to erroneously apply the obsolete deferential standard

when it no longer applies under the amended sections 1757 and 1757.1. For example, *Southern California Edison Co. v. PUC* (2004) 117 Cal.App.4th 1039, 1050 ("*SCE*") "afford[ed] considerable deference" to the Commission's interpretation of statutes governing awards of intervenor compensation. In reviewing the Commission's decision, the court asked only whether the Commission's interpretation of the statute bore a reasonable relationship to the statute, not whether, in the court's judgment, the Commission's interpretation was correct. (*Id.* at pp. 1044, 1047, 1050, 1053.) *SCE* made no reference to sections 1757 or 1757.1, the recent amendments to those statutes, or their expansion of the scope of judicial review. Neither did the *SCE* court acknowledge or discuss the independent analysis actually undertaken by this Court of the unique statutory language at issue in *Peevey*.

SCE is just one example. Many courts have cited *Greyhound*'s reasonable relation standard, some with awareness of its tension with the independent judgment standard (*New Cingular Wireless PCS, LLC v. PUC* (2016) 246 Cal.App.4th 784, 808 ["[A]pplying the *Greyhound* test here would effectively swallow the statutory scheme in whole, rendering its limitations

subordinate to the [Commission's] interpretation of the statute."]; *Pacific Gas & Electric Co. v. PUC* (2015) 237 Cal.App.4th 812, 852 [concluding that "minimal" deference is owed the Commission's inconsistent interpretations, but nevertheless stating that the court must defer to Commission interpretations that "bear[ ] a reasonable relation to the statutes' language and purposes."]); and others, like *SCE*, without confronting that tension (*SCE*, *supra*, 117 Cal.App.4th at p. 1047; see also, e.g., *Ames v. PUC* (2011) 197 Cal.App.4th 1411, 1418). The Court should resolve this confusion by instructing the appellate courts to apply the standard of review dictated by sections 1757 and 1757.1 as they stand today.

D. Rather than considering the Commission's statutory interpretation de novo using its independent judgment, the appellate court here erroneously applied "unique deference" to the Commission's statutory interpretations, warranting reversal.

The appellate court here emphasized the extreme form of deference it employed, characterizing its standard as "uniquely deferential." (Opinion at p. 12.) Citing *Peevey*'s invocation of *Greyhound*, the court stated that it would "disturb the Commission's interpretation only if 'it fails to bear a reasonable

relation to statutory purposes and language'" and applied a "strong presumption favoring the validity" of the Commission's statutory interpretations. (Opinion at p. 10; *id.* at p. 12 ("[W]e are permitted to overturn [the Commission's] interpretation of a statutory mandate only if the interpretation 'fails to bear a reasonable relation to statutory purposes and language.'"].) Reaching back to the standard that applied before the 1998 amendments to sections 1757 and 1757.1, the court stated that it applied such a "uniquely deferential standard of review" because of the Commission's special status as a constitutional body. (*Id.*)

However, since the 1998 amendments to sections 1757 and 1757.1 conformed judicial review of Commission decisions to that of other agencies, the Commission's constitutional origins no longer provide any basis for affording the Commission unique deference or applying any special presumption of validity to Commission decisions. Rather, in giving the Legislature plenary power to dictate the scope of review of Commission decisions, the constitution and sections 1757 and 1757.1 now require courts to *avoid* any special deference to the Commission. By applying the same standard of review to Commission actions that applies to

other agency decisions, the Legislature eliminated the special treatment previously afforded Commission decisions.

The appellate court failed to grasp the significance of the 1998 amendments. Whether the Commission complied with the explicit mandates of section 2827.1 presents a question of whether the Commission proceeded in the manner required by law, a legal question subject to de novo review and requiring the court's independent judgment. (§ I.B, *supra*.) In applying unique deference (Opinion at pp. 12-15, 17), the appellate court employed an outdated and incorrect standard of review. The court did not determine the merits of Petitioners' central textual argument concerning the meaning of section 2827.1's mandate to value all the benefits of customer-sited generation or address the rules of statutory interpretation and case law that supported it. Nor did it address the statutory context. (See § II, below.) Instead, the court merely concluded that the statute did not "indisputably" require Petitioners' interpretation. (Opinion at p. 13.) The court's invocation of unique deference decided the rest: because the court considered the Commission's contrary interpretation to be "reasonabl[y] relat[ed] to statutory purposes and language," the

court erroneously deferred to that interpretation. (*Id.* at pp. 14-15, 17.)

The appellate court's application of the incorrect standard of review prejudiced its review of the Commission's action and led to the incorrect decision to uphold the Commission's 2022 tariff. As explained in the following sections, had the court exercised its independent judgment and conducted a complete analysis of the statutory text, legislative history, and statutory context, it would have reached a different result.

II. As a matter of law, the Commission must ensure the 2022 tariff reflects all the acknowledged benefits and costs of customer-sited renewable generation.

In 2013, the Legislature directed the Commission to ensure that the tariff for customer-sited renewable generation is "based on *the* costs and benefits of the renewable electrical generating facility." (§ 2827.1(b)(3), emphasis added). Notwithstanding this requirement, when it adopted the 2022 tariff, the Commission failed to value all of the benefits of customer-sited generation, including some that the agency itself acknowledged existed. Benefits ignored by the Commission include: societal benefits reflected in the Commission's Societal Cost Test, benefits from

reduced out-of-state methane emissions, benefits from increased resiliency, and the full scope of avoided transmission costs, including the land use benefits realized when new transmission projects are no longer necessary.

The appellate court deferred to the Commission's interpretation that section 2827.1 allowed it to omit acknowledged societal and other benefits because "nothing in the statutory text [ ] indisputably requires the Commission to take account of '*all* costs and benefits' of 'distributed renewable generation.'" (Opinion at p. 13.)[10] The appellate court also justified its deference based on a purported statutory directive for the Commission to reduce an alleged cost shift, reasoning that

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[10] The appellate court relied on the statute's use of the term "renewable electrical generation facility" to find that the Commission was not required to value the benefits of customer-sited distributed generation more generally. (Opinion at p. 13.) However, the "renewable electrical generation facility" referenced in section 2827.1(b)(3) is necessarily customer-sited. (§ 2827.1(b) [directing the Commission to develop a tariff "for eligible customer-generators with a renewable electrical generation facility"]; § 2827(b)(4)(A) [defining "eligible customer-generator" to mean a customer with a renewable electrical generation facility "located on the customer's … premises"].) Customer-sited generation, in turn, is a subset of "distributed generation." (§ 769.) It confers all of the same values of distributed renewable generation in general, as well as the specific values of customer-sited generation in particular.

valuing additional benefits would shift additional costs. (Opinion at pp. 14-15.)

Contrary to the appellate court's conclusions, the plain language of section 2827.1 obligates the Commission to value all of the benefits of customer-sited generation and does not require the Commission to reduce any alleged cost shift. The courts' role is to determine the Legislature's intent using the tools of statutory interpretation. (*Bonnell*, *supra*, 31 Cal.4th at pp. 1261-64.) However, in reviewing the Commission's compliance with section 2827.1, the appellate court did not confront Petitioners' central textual argument concerning the meaning of section 2827.1's mandate to value all the benefits of customer-sited generation or the caselaw supporting it. The appellate court also never grappled with the Legislature's deliberate decision to delete from the statutory text any requirement to eliminate an alleged cost shift, or the Commission's only formal interpretation of section 2827.1(b)(4), which found that the Legislature did not intend for the Commission to focus on any alleged cost shift.

In omitting acknowledged benefits of customer-sited generation, the Commission failed to proceed in the manner

required by law, and the resulting 2022 tariff fails to comply with the mandate of section 2827.1.

A. The plain language of section 2827.1 requires the Commission to value all of the recognized benefits of customer-sited renewable generation.

In adopting section 2827.1, the Legislature directed that the tariff be based on "the" costs and benefits of customer-sited generation. The Commission, however, decided to value only certain benefits, creating a tariff based on limited economic costs *avoided* by customer-sited generation as reflected in the Commission-created "Avoided Cost Calculator" model. In failing to consider all the acknowledged benefits of customer-sited generation, the Commission read into section 2827.1(b)(3) an intent to limit the benefits that does not reflect the statutory text.

1. Section 2827.1 requires that the tariff be based on the costs and benefits of customer-sited generation, not merely some costs and some benefits.

The Legislature did not direct the Commission to create a tariff based on "avoided," "economic," "certain," or "some" costs and benefits of customer-sited generation; it required a tariff based on "the" costs and benefits. Under established rules of statutory interpretation, the use of the definite article in "the

costs and benefits" means that the clause refers to *all* costs and benefits. (See *Frazier*, *supra*, 455 F.3d at p. 546 [holding that, by "using the definite article before the plural nouns" in a statute requiring that "the primary defendants are States," Congress required that *all* primary defendants must be States].) For example, in *In re Davis' Estate*, *supra*, the court held that a judge's reference to "the papers and orders" necessarily meant "all the papers and orders" in the case. (8 Cal.App. at p. 358 ["[B]y the employment of the definite article 'the' as descriptive of the papers and orders ... the judge intended to and does certify that said papers and orders were in fact *all* the papers and orders."]; see also *Kaufman v. Allstate New Jersey Ins. Co*. (3d Cir. 2009) 561 F.3d 144, 155 ["the definite article preceding the term 'claims' indicates that 'the claims asserted' means *all* the claims asserted"]; *Macrovision Corp. v. Dwight Cavendish Developments Ltd.* (N.D. Cal. 2000) 105 F.Supp.2d 1070, 1073 [the term "the effects" was "plural and all inclusive" and meant "all the effects" described in a patent claim].)

The appellate court justified its deference to the Commission's contrary interpretation of section 2827.1(b)(3) because "the Commission's expertise in energy regulation" and its

status as a constitutional body purportedly required the court to presume the validity of the Commission's decision. (Opinion at p. 12.) But the presumption of validity applicable under former section 1757 no longer applies. (Section I, *supra*.) Rather, the court had an obligation to independently construe the statute. (*Id.*; *Center for Biological Diversity v. Dept. of Fish & Wildlife* (2015) 62 Cal.4th 204, 236 ["Even in substantive areas of the agency's expertise, [the court's] deference to an agency's statutory interpretation is limited; determining statutes' meaning and effect is a matter 'lying within the constitutional domain of the courts.'"].)

2. The Legislature did not direct the Commission to limit its analysis to only the avoided costs of customer-sited generation.

Had the Legislature intended to limit the consideration of costs and benefits to only certain costs and benefits, it could have done so. Indeed, the Legislature knows how to direct the Commission specifically to use avoided costs as a means of valuing benefits. For example, section 379.6(*l*) requires the Commission to evaluate a program based in part on "[t]he value to the electrical transmission and distribution system *measured*

in avoided costs of transmission and distribution upgrades and replacement." (§ 379.6(*l*)(6), emphasis added; see also § 399.32(d) [requiring publicly owned utilities adopting certain tariffs to "consider avoided costs for distribution and transmission upgrades"]; § 328.2 ["If the Commission establishes credits … , [they] shall be equal to the billing and collection services costs *actually avoided* by the gas corporation." (emphasis added)]; § 963(c)(3) [same].) The Legislature also knows how to limit consideration of costs when it wants to. For example, section 769.3(c)(3) requires the Commission to "prohibit[ ] the program's costs from being paid by nonparticipating customers in excess of the *avoided* costs." (Emphasis added.) Section 2827.1(b)(3) contains no language limiting the consideration of costs and benefits to avoided costs.

3. Analogous federal law requires the Commission to quantify all non-zero benefits.

Federal law recognizes that agencies performing cost-benefit analyses cannot simply dismiss acknowledged benefits, even when they are difficult to quantify. 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. (*NHTSA* (9th Cir. 2008) 538 F.3d 1172, 1198-1201.)

In *NHTSA*, the court rejected as arbitrary the agency's decision to ignore the benefits of carbon emissions reductions from increased gas mileage standards when the agency admitted the benefits' value was not "zero." (*NHTSA,* 538 F.3d at 1198, 1200; see also *High Country Conservation Advocates v. U.S. Forest Service* (D. Colo. 2014) 52 F.Supp.3d 1174, 1190-93 [finding an analysis of costs and benefits arbitrary where an agency "effectively zeroed out [a] cost" by deciding not to quantify it].) In another example, *California v. Bernhardt* rejected the Bureau of Land Management's ("BLM") cost-benefit analysis to establish a 2018 rule, reasoning that "BLM's scant recognition of foregone benefits demonstrates that BLM did not appropriately weigh the costs against the benefits." ((N.D. Cal. 2020) 472 F.Supp.3d 573, 615-16, *appeal docketed*, No. 20-16801 (9th Cir. Sept. 17, 2020).) BLM had recognized the negative impacts posed by air pollution on human health and welfare, but "made no attempt to evaluate" them or "weigh them against the purported

benefits." (*Id.*) The court held that BLM "cannot short shrift the benefits side of the equation by failing to monetize certain benefits." (*Id.*) Allowing an agency to cherry-pick favored benefits does not result in an accurate cost-benefit analysis.

B. The Commission violated section 2827.1 by failing to value several acknowledged benefits of customer-sited generation.

Compliance with section 2827.1's mandate necessarily requires an accurate assessment of the value provided by customer-sited generation. The Commission, however, relied entirely on its Avoided Cost Calculator model to determine these values. (21:App-797:APP18461, APP18477 [relying exclusively on Avoided Cost Calculator model to value electricity exported to the grid]; see also Opinion at p. 15 [finding "no error in the Commission's decision to restrict the calculator to economic benefits conferred on the grid by exported power"].)

The Avoided Cost Calculator is an Excel-based spreadsheet model created by the Commission that purports to identify the benefits of distributed generation in general. This model assigns value to distributed generation resources based on the cost "that a utility would avoid in any given hour if a distributed energy resource avoided the provision of energy during that hour." (D.20-

04-010 at p. 5.) The model was not intended to evaluate the costs and benefits for any particular resource, like rooftop solar. (D.20-04-010 at pp. 5, 78 ["Considering the benefits for one resource in the Avoided Cost Calculator is not consistent with Commission intention."].)

Like all models, the Avoided Cost Calculator is only as accurate as its inputs. Here, the model omits societal benefits resulting from reduced air pollution and greenhouse gas emissions captured by the Commission's own Societal Cost Test—a tool that the Commission specifically designed to measure societal costs. The Avoided Cost Calculator model also omits other acknowledged and quantifiable benefits related to increased resiliency, avoided out-of-state methane leakage, avoided land use impacts, and the full scope of avoided transmission costs. The Commission failed to proceed in the manner required by section 2827.1 when it omitted these benefits.

1. The Decision improperly dismisses the Societal Cost Test.

Prior to adopting the 2022 tariff, the Commission developed a test, known as the Societal Cost Test, to calculate and weigh

the *societal* benefits of distributed resources, such as customer-sited generation. (D.19-05-019, Decision Adopting Cost-Effectiveness Analysis Framework Policies for All Distributed Energy Resources (May 21, 2019), pp. 66-67.)[11] The benefits considered by the Societal Cost Test include reduced externalities, including climate and air quality benefits. (*Id.* at pp. 10-12.) The Societal Cost Test measures these benefits through a societal discount rate that more heavily weighs the interests of future generations, a social cost of carbon that values the damage caused by carbon emissions, and an "adder" that accounts for health-related benefits from improved air quality. (*Id*. at pp. 10-12, 42.) The Commission, however, rejected the use of the Societal Cost Test in developing the 2022 tariff on the basis that the Commission is still refining the test in another proceeding. (21:App:797-APP18310.) The appellate court, erroneously applying the "uniquely deferential" standard of review, affirmed the Commission's approach. (Opinion at p. 17

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[11] D.19-05-019, Exhibit C to Petitioners' Appellate RJN, is available at https://docs.cpuc.ca.gov/PublishedDocs/Published/G000/M293/K833/293833387.PDF.

["[W]e find the commission's approach to bear a reasonable relation to its statutory mandate. Our standard of review allows for no further inquiry."].)

The Commission's decision to reject its own Societal Cost Test and ignore the value of the benefits the test would measure results in an inadequate and legally deficient accounting of the benefits of customer-sited generation. The Commission cannot ignore a tool that accounts for benefits with acknowledged value. In *High Country Conservation Advocates*, *supra*, the court set aside the Forest Service's analysis of costs and benefits for failing to include an estimate of climate impacts. ((52 F.Supp.3d at pp. 1190-93.) The Forest Service had claimed that "the degree of impact any single emitter of [greenhouse gases] may have on global climate change ... cannot be quantified or predicted at this time." (*Id.* at p. 1190.) The court disagreed, noting that "a tool is and was available: the social cost of carbon protocol," even though the protocol was "provisional." (*Id.*) The court determined that the Forest Service's analysis of costs was arbitrary where the record suggested non-zero costs, but "by deciding not to quantify the costs at all, the agencies effectively zeroed out the cost." (*Id.* at p. 1192.) Similarly, here, the Commission's refusal to employ

the Societal Cost Test violates the plain language of section 2827.1 requiring that the tariff be based on the costs and benefits of customer-sited generation. As in *High Country Conservation Advocates,* the Commission admittedly possesses a tool, but chose not to use it, justifying that failure by claiming that its tool was not yet perfect. "[B]y deciding not to quantify the [societal benefits] at all," despite having a tool to do so, the Commission improperly "zeroed out" their value. (See *id*.)

2. The Commission improperly discounted multiple other benefits of customer-sited generation identified during the administrative process.

a. The Commission improperly dismissed the value of resiliency.

Uncontroverted record evidence demonstrates that distributed renewable systems with solar and paired storage generate resiliency-related benefits that accrue to society as a whole, and not just to individual participants. These benefits include the ability to generate onsite power during a heat wave. (11:App:356-APP09383:6-9.) Maintaining power—and the ability to cool one's home—during a heat wave prevents adverse health consequences including emergency room visits and deaths. (5:App:251-APP04175:16-22, APP04177:15-24; 11:App:356-

APP09385:5-APP09386:5; 13:App:361-APP10297:5-21.) Benefits of resilience from energy storage also include avoiding food waste due to loss of refrigeration, as well as continuity of education during times of remote schooling or otherwise. (13:App:361-APP10298:3-10; 5:App:251-APP04178:19-23, APP04179:5-16.)

The record showed that resiliency benefits of distributed generation had a value to society greater than zero. (13:App:361-APP10298:3-22; 5:App:251-APP04178:19-23, APP04179:5-16.) Parties presented specific values to account for this resiliency benefit. (9:App:304-APP06848, APP06988 - APP06991; 21:App:797-APP18312.) The Commission, however, declined to adopt any value for resiliency, stating that resiliency benefits are "either private benefits or highly speculative and limited to unique circumstances" (21:App:797-APP18313), despite the uncontroverted evidence that resiliency benefits exist.

The Commission's refusal to value resiliency benefits constitutes legal error. While there may be disagreement over the specific value of resiliency, the Commission acknowledged that resiliency has *some* value. (21:App:797-APP18313 – APP18314 [stating that the Commission may consider quantifying resiliency benefits in the future].) Thus, the Commission's treatment of

resiliency benefits as though they have *no* value constitutes legal error.

California law recognizes that facilities may have both private and general public benefits. For example, the constitutional requirement that property assessments for new public facilities be based only on "special benefit[s]" recognizes that these facilities can benefit both the public and private individuals. (*Golden Hill Neighborhood Assn., Inc. v. City of San Diego* (2011) 199 Cal.App.4th 416, 439; *Broad Beach Geologic Hazard Abatement District v. 31506 Victoria Point LLC* (2022) 81 Cal.App.5th 1068, 1087.) Resiliency benefits from customer-sited generation are no different. Public education most directly benefits the individual student. But society as a whole also benefits when individuals receive an education. (*Hartzell v. Connell* (1984) 35 Cal.3d 899.) The person receiving treatment at a publicly-subsidized emergency room receives the direct benefit of that treatment, but society benefits when medical conditions are treated; and society avoids socialized costs when the person avoids the emergency room in the first place. (See, e.g., 42 U.S.C. § 18091(2)(F); 42 U.S.C. § 1395dd.) While the extent to which a

benefit is private or public may affect its value, the Commission erred in ignoring altogether the value of these benefits.[12]

b. The Commission improperly omitted the value of avoided out-of-state methane leakage.

California procures approximately 90% of its natural gas from out-of-state, and undisputed facts demonstrate that methane leakage from this natural gas production and transmission contributes to climate change. (4:App:231-APP03605 - APP03606.) The Commission has recognized that distributed generation avoids the costs of methane leakage by reducing the need for natural gas production and transmission. (21:App:797-APP18314.) The Avoided Cost Calculator modeling, however, accounts for the avoidance of only in-state methane leakage. (*Id.*) The model assigns no value to the benefit achieved by avoiding out-of-state methane leakage, even though the vast majority of natural gas in California comes from out of state.

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[12] Both *Golden Hill* and *Broad Beach* address the constitutional requirement to separate public benefits from private benefits. But they also emphasize that an agency may not ignore "even minimal" benefits. (*Golden Hill,* 199 Cal.App.4th at p. 439; *Broad Beach,* 81 Cal.App.5th at p. 1091 [agency could not exclude acknowledged benefits from its analysis].)

The Commission has acknowledged that benefits related to reduced out-of-state methane leakage have a non-zero value that could be quantified. "[O]ut-of-state methane leakage could, in theory, be incorporated as a societal cost [in the Avoided Cost Calculator], paired with a societal carbon price." (4:App:231-APP03606.) Notwithstanding this acknowledgement, in adopting the 2022 tariff, the Commission continued to rely exclusively on its Avoided Cost Calculator model, which excludes any value for avoided out-of-state methane leakage. Because the Commission has acknowledged that avoided out-of-state methane leakage has a quantifiable benefit, the Commission should not have treated it as having no value.

c. The Commission improperly omitted the value of avoided land use impacts.

The Commission similarly dismissed the value of avoided land-use impacts, stating that parties do not "offer any evidence that increased net energy metering installations will directly result in decreased utility scale projects." (21:App:797-APP18314-15.) The Commission's narrow reasoning is insufficient and ignores avoided land use impacts from avoided *transmission*

projects, which the Commission admits constitutes a benefit of distributed generation like rooftop solar.

The Commission recognizes that distributed resources in general displace the need for certain transmission infrastructure costs. (D.20-04-010 at p. 60 ["We acknowledge that distributed energy resources avoid transmission costs."].) Because transmission infrastructure must be built somewhere, avoiding building substantial new transmission infrastructure necessarily avoids associated land use impacts. Yet, the Commission made no effort to quantify this benefit in violation of its obligations under section 2827.1. The Commission in its 2022 tariff commits legal error in disregarding avoided land use impacts despite acknowledging that rooftop solar results in avoided transmission projects.

d. The Commission improperly included only a fraction of avoided transmission costs.

By relying only on its Avoided Cost Calculator model to value the benefits of avoided transmission, the Commission vastly understated the value of customer-sited generation. The record demonstrates that a typical solar rooftop system has the potential to avoid as much as $1,000 per year in transmission

costs. (9:App:322-APP07677.) This value far exceeds the $87 per year number derived from the Commission's revised Avoided Cost Calculator model. (15:App:384-APP11736 [calculations in footnote 41].)

Even before issuing the 2022 tariff, the Commission acknowledged that its Avoided Cost Calculator model may not accurately reflect the value of avoided transmission costs. Specifically, in its 2022 update to its Avoided Cost Calculator model, the Commission found that "additional studies are needed to ensure the Commission is accurately measuring avoided transmission costs." (D.22-05-002 at p. 74.) More recently, the Commission confirmed that "the current method of estimating avoided transmission costs needs improvement," and that "a study on avoided [transmission and distribution] costs is needed to more accurately estimate these costs." (Petitioners' Request for Judicial Notice in Support of Opening Brief ("Petitioners' RJN"), Ex. A (R.22-11-013, Administrative Law Judge's Ruling Requesting Party Comments On Funding for an Avoided Transmission and Distribution Cost Study (Dec. 8, 2023), p. 1); Petitioners' RJN, Ex. B (D.24-04-010, Decision Approving

Funding For Transmission and Distribution Avoided Costs Study (Apr. 19, 2024), p. 1).)

Transmission spending represents a significant driver of increased electricity bills. (21:App:797-APP18290 - APP18291.) Overall new utility transmission spending totaled more than $4 billion in 2021 alone (22:App:806-APP19327.) Yet, the Avoided Cost Calculator model assumes that capacity-related transmission spending for the entire period between 2020-2025 will total only $481 million and that distributed generation has the ability to avoid only a fraction of those costs. (15:App:364b-APP10983:6-17.) Given the scale of the costs involved, even small underestimates of transmission spending that can be avoided result in substantially lower estimates of the value of customer-sited generation. The gross mismatch between the input to the Avoided Cost Calculator and the utilities' actual spending shows that the Avoided Cost Calculator does not adequately account for transmission spending.[13]

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[13] The appellate court noted that the $4 billion total spending in 2021 also includes operation and maintenance costs that would not be avoided by customer-sited generation. (Opinion at p. 16.) However, those operation and maintenance costs are just a small
(footnote continued on next page)

C. The Commission improperly elevated purported costs to nonparticipants over cost-effectiveness to the electrical system as a whole.

In addition to section 2827.1(b)(3)'s requirement to value all the benefits of customer-sited generation, section 2827.1(b)(4) requires the Commission to ensure that the "total benefits of the … tariff to all customers and the electrical system are approximately equal to the total costs." In explaining away the Commission's failure to value all of the benefits of customer-sited generation as required by section 2827.1(b)(3), the appellate court deferred to the Commission's view that subdivision (b)(4) required the Commission to ensure that the 2022 tariff did not shift costs from owners of customer-sited generation to those who do not have their own renewable generation facility ("nonparticipants"). Deferring to the Commission's legal interpretation, the court suggested that valuing societal benefits would increase the compensation paid to participating customers. Under the court's "zero-sum" view (Opinion at p. 14), the

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amount of the total transmission spending. (22:App:806-APP19328, Table 8 [showing operation and maintenance costs of $674.6 million in 2021].) Even without operation and maintenance costs, transmission costs far exceed those assumed by the Avoided Cost Calculator model.

Commission's *omission* of societal benefits furthered statutory purposes and language by reducing the perceived cost shift. (*Id.* at pp. 14-15.)

As set forth above, however, the Commission failed to value several identified benefits of customer-sited generation that accrue to all customers. Without an accurate accounting of the value of customer-sited generation, it is not possible to find that it results in a cost shift.[14]

The Commission's focus on eliminating an alleged cost shift also constitutes an error of law. Nothing in the plain language of section 2827.1 requires the Commission to eliminate an alleged cost shift. In fact, the legislative history and the Commission's own interpretation of the law demonstrate that the Legislature *did not* intend for the Commission to focus on alleged costs to nonparticipants. As a result, the appellate court—like the

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[14] Indeed, the record demonstrates that customer-sited generation is not a "zero sum" game. If the Commission had adequately valued the benefits of customer-sited generation and compared it to the actual cost of serving customers with renewable generation facilities, the Commission would have found that customer-sited generation provides substantial benefits that outweigh its costs. (See Court of Appeal No. A167721, Petition for Writ of Review, pp. 65-66.)

Commission—erred in allowing concerns related to an alleged cost shift to influence its interpretation of which costs and benefits the tariff must include in order to comply with section 2827.1(b)(3).

1. The Legislature knows how to draft statutes that prohibit cost shifts and did not do so in Section 2827.1(b)(4).

Section 2827.1(b)(4) requires the Commission to ensure that the "total" costs and benefits of the tariff "to all customers and the electrical system" are approximately equal. This direction requires the Commission to balance the costs and benefits of the tariff to ensure that it is cost-effective from the perspective of the utilities and their customers as a whole. Section (b)(4) contains no reference to ensuring equity *between* specific customer classes.

When the Legislature wants to prohibit cost shifts or ensure equity between customer classes, it does so expressly and unambiguously. Indeed, the 1995 statute creating the *first* NEM tariff expressly required the Commission to ensure that the

compensation for surplus generation[15] under that tariff "does not result in a shifting of costs between eligible customer-generators and other ... customers." (§ 2827(h)(5)(B).) The Public Utilities Code is replete with other examples of express language addressing cost shifts:

- § 366.2(a)(4): a program "shall not result in a shifting of costs between the customers of the community choice aggregator" and other customers.
- § 367.7(d): "The methodology ... shall not result in any shifts in costs between customer classes."
- § 380(b)(3): requiring action "in a manner that prevents the shifting of costs between customer classes."
- § 384.5(b): a tariff shall accomplish its objectives "without shifting costs to nonparticipating ratepayers."

See also §§ 399.20(d)(4), 454.51(d)(3), 454.52(c), 740.11, 769.3(c)(3), 2828(h)(7), 2831(h), 2832(d), 2833(q), 2795, 8371(b),

[15] Surplus generation is the energy produced, annually, by a customer-sited facility that is in excess of all the power used by that customer. (§ 2827(b)(8)).

9607(a) [all unambiguously prohibiting cost shifting in other aspects of Commission ratemaking].)

The Legislature's omission of any language prohibiting a cost shift in section 2827.1(b)(4) strongly indicates that the Legislature did not intend to include any cost shift prohibition in the Commission's establishment of the successor NEM tariff. (*PG&E*, *supra*, 237 Cal.App.4th at pp. 842-44 [Legislature's use of "unmistakable language" in Public Utilities Code provisions means that its "decision not to include" such language in a statute is significant].)

2. The Legislature deliberately removed language from section 2827.1 that would have required a focus on costs to nonparticipants.

The legislative history of section 2827.1 shows that the Legislature in fact deliberately removed language that would have required a focus on nonparticipants or cost shifts. Earlier versions of the statute required that the tariff be based on the "costs and benefits *received by nonparticipating customers*" and required the Commission to "[p]reserve nonparticipant ratepayer indifference." (D.16-01-044 at p. 54, quoting August 21, 2013 draft of Assem. Bill No. 327 (1993-1994 Reg. Sess.) ("AB 327").)

The Legislature removed these references from the final bill. (*Id.* at p. 55; *see also* § 2827.1(b).)

In the same version of the bill that contained the amendments eliminating references to nonparticipant indifference, the Legislature added the requirement that the successor tariff "ensure[ ] that customer-sited renewable distributed generation continues to grow sustainably." (AB 327, Sept. 3, 2013 version, §§ 10, 11 (at pp. 53-54); see also § 2827.1(b)(1).) The Legislature also directed the Commission to include specific alternatives designed to ensure the growth of customer-sited generation in disadvantaged communities. (*Id.*) These changes, which were enacted as the final language of AB 327, prioritized the growth of customer-sited generation, particularly in disadvantaged communities, and they *eliminated* any requirements to reduce a cost shift.[16] (See *Wilson v. City of*

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[16] Notwithstanding the statutory text, some legislative analyses of AB 327 referenced reducing cost shifts even after the amendments removing the nonparticipant language. (See D.16-09-036, Order Modifying Decision (D.) 16-01-044 and Denying Rehearing, As Modified (Sept. 22, 2016), p. 6 (Exhibit H to Petitioners' Appellate RJN, available at https://docs.cpuc.ca.gov/PublishedDocs/Published/G000/M162/K043/162043082.PDF).) While those subsequent analyses include
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Laguna Beach (1992) 6 Cal.App.4th 543, 555 [a statute should not be construed to include a specific provision that was eliminated from the act as originally introduced].)

The legislative history establishes that the statutory purposes and text did not include addressing a cost shift; rather, section 2827.1 requires a full accounting of all recognized costs and benefits.

3. The Commission's decision represents a radical shift in legal interpretation.

The Commission's decision adopting the 2016 tariff represents the only time the Commission formally interpreted its obligations under section 2827.1. There, the Commission found that the August 21, 2013 draft of section 2827.1 included in AB 327 contained language on "nonparticipants." (D.16-01-044 at p. 54.) That August 21, 2013 version of AB 327 was then "completely rewritten" as part of the Senate's September 3 amendments. (*Id*.) In its decision adopting the 2016 tariff, the Commission found that these references to "nonparticipants" were removed from the statutory language. (*Id*. at pp. 54-55.)

"cost shift" language, they are near exact copies of earlier analyses that were prepared before the amendments that deleted cost shift language from the bill text.

Rather, the Commission concluded, the Legislature "deliberately expanded the scope of statutory concern from 'nonparticipating customers' to 'all customers and the electrical system.'" (*Id.*)

Based on its interpretation of the final version of AB 327, the Commission in its 2016 NEM decision determined that proposals emphasizing alleged impacts to nonparticipants did "not fully reflect the actual legislative requirement" in section 2827.1(b)(4). (*Id.* at p. 55.) The Commission confirmed this determination in its decision modifying and denying rehearing of its 2016 decision:

> The draft legislation's original single focus on nonparticipant interests was also broadened to consideration of costs and benefits to *all customers and the electrical system*. Had the Legislature intended to mandate the Commission completely prevent the potential for all cost-shifting, or that we base our determination solely on nonparticipant interests, it could have done so in the statute itself. It did not.

(D.16-09-036 at p. 7, emphasis in original.)

The Commission's reliance on alleged costs to nonparticipants to support its Decision cannot be reconciled with the express language of section 2827.1, its legislative history, or the Commission's only formal interpretation of its obligations under 2827.1.

D. Dramatic declines in installation of customer-sited generation confirm the Commission's failure to value all the benefits of customer-sited generation.

In adopting a new tariff designed to eliminate perceived impacts to nonparticipants, the Commission deliberately decided to slow the installation of customer-sited generation. The Commission reduced the value assigned to customer-sited energy generation and more than doubled the time it takes customers to pay back their initial investments. (21:App:797-APP18323 [targeting nine-year payback]; see also 10:App:350-APP08675 [asserting payback of five or fewer years under 2016 tariff].) The record demonstrates that the adoption of similar tariffs reducing compensation for customer-sited generation caused precipitous declines in its adoption in other states. For example, new installations decreased 94% from their peak after Nevada changed its NEM tariff. (10:App:335-APP08008, APP08010.) After adoption of a similar tariff in Hawaii, new installations decreased 80%. (10:App:336-APP08031-32.) And a National Renewable Energy Laboratory analysis showed that customer willingness to adopt solar drops precipitously as the payback period increases from 4 to 10 years. (6:App:264-APP04658-60.)

Events since the 2022 tariff's adoption demonstrate the 2022 tariff's catastrophic impacts to the solar industry. Sales data reviewed by the California Solar + Storage Association ("CALSSA") shows that rooftop solar sales decreased between 77% and 85% in the year after the Decision. (Case No. S283614, CALSSA, Amicus Curiae Letter in Support of Petition for Review (Feb. 20, 2024) at p. 3.) CALSSA estimated that this decline would result in the elimination of 17,000 solar industry jobs in California, or 22% of all solar jobs in the state, by the end of 2023. (*Id.*)

This decline comes at a time when California needs almost double the current amount of rooftop solar installed on homes to meet the State's mandate for net-zero retail electricity sales by 2045. (§ 454.53(a)).[17] California cannot possibly meet this target

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[17] SB 100 sets a goal of achieving 100% renewable electricity by 2045. (Petitioners' Appellate SRJN, Ex. A (Cal. Energy Com., 2021 SB 100 Joint Agency Report, Achieving 100 Percent Clean Electricity in California: An Initial Assessment (Mar. 15, 2021), p. 1).) The California Air Resources Board ("CARB") has modeled how the State may achieve this goal; its model assumes 29,208 MW of "additional customer solar" would be needed by 2045. (Petitioners' Appellate SRJN, Ex. B (CARB, 2022 Scoping Plan for Achieving Carbon Neutrality (Nov. 16, 2022), p. 202, fn. 369).) As of June 2024, California has roughly 16,600 MW of installed
(footnote continued on next page)

under the 2022 tariff. Requiring the Commission to value all the benefits of customer-sited generation and accurately compensate customers for those benefits, as required by section 2827.1(b)(3), is essential to the continued growth of customer-sited generation and the state's efforts to meet its climate goals.

III. The Commission failed to include specific alternatives designed for growth of customer-sited generation in disadvantaged communities.

Section 2827.1(b)(1) requires the Commission to include "specific alternatives designed for growth [of customer-sited generation] among residential customers in disadvantaged communities." As the Commission itself previously determined, this mandate requires affirmative steps to address the specific financial, structural, and outreach barriers that disadvantaged community residents face in accessing rooftop solar (the predominant form of customer-sited generation), including in particular the high up-front costs of new systems. (D.18-06-027, Alternative Decision Adopting Alternatives to Promote Solar Distributed Generation in Disadvantaged Communities (June 21,

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rooftop solar. (Petitioners' RJN, Ex. C (California Distributed Generation Statistics, available at https://www.californiadgstats.ca.gov/).)

2018), pp. 10, 19, 27.)[18] By failing to address the specific barriers to the adoption of customer-sited generation in disadvantaged communities and failing to make alternatives part of the 2022 tariff itself, the Commission violated section 2827.1(b)(1).

A. The Commission failed to design an alternative that addresses the specific barriers to growth in disadvantaged communities.

In 2018, the Commission concluded that section 2827.1(b)(1) required programs that addressed the specific barriers to adopting rooftop solar facing customers in disadvantaged communities. (D.18-06-027 at p. 10.) These barriers include the lack of upfront capital and financing available to low-income residents, outdated building stock that requires roof repair and electrical panel upgrades before a renewable energy system can be installed, and the need for marketing, education, and outreach. (D.18-06-027 at p. 27 [identifying "additional costs that cannot be financed," including "required roof repair or replacement or an electrical service upgrade"]; *id.* at p. 19 [identifying "marketing, outreach and

[18] D.18-06-027, Exhibit D to Petitioners' Appellate SRJN, is available at https://docs.cpuc.ca.gov/PublishedDocs/Published/G000/M216/K789/216789285.PDF.

linguistic barriers"].) Notably, residents in disadvantaged communities experience financing challenges *different* from those faced by the general rooftop solar customer. (22:App:799-APP19132 ["[T]raditional financing has little value to low-income homeowners because they cannot take on additional debt, [and] they face high competing demands for their income[;]" concluding alternative financing methods are required].)

The 2022 tariff does not address the specific barriers to solar adoption faced by residents in disadvantaged communities that the Commission identified in 2018. The only aspect of the 2022 tariff that specifically applies to customer-sited generation in disadvantaged communities is a small increase in export compensation for low-income customers in those communities. (22:App:805-APP19283.) This additional payment, referred to as an "adder," will be reduced over time and is intended to deliver a 9-year payback for low-income customers with solar-only systems. (21:App:797-APP18367.)

Even assuming a 9-year payback period were adequate to encourage solar adoption in disadvantaged communities, additional bill credits do not address the acknowledged barriers facing disadvantaged community residents—specifically, the lack

of upfront capital and financing to fund the installation of a renewable energy system.[19] (See D.18-06-027 at p. 27 [describing the barriers].) Additional bill credits provide a small increase in compensation after installation; they do not provide the essential upfront capital necessary to install the system in the first place.

An agency's action cannot be upheld when it "entirely fail[s] to consider an important aspect of the problem." (*Center for Biological Diversity v. United States Fish & Wildlife Service* (9th Cir. 2023) 67 F.4th 1027, 1035, quoting *Motor Vehicle Manufacturers' Assn. of U.S. v. State Farm Mutual Automobile Ins. Co.* (1983) 463 U.S. 29, 43.) Here, the Commission identified the substantial barriers that limit successful uptake of rooftop solar in disadvantaged communities, but failed to adopt an alternative specifically designed to address them. In failing to

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[19] The Commission calculated the level of support needed to achieve a 9-year payback based on a $3.30 per watt cost of solar—the cost of solar that applies to all customers. However, after taking into account the higher financing and other costs associated with serving low-income customers, the actual cost to install solar in disadvantaged communities is $4.28 per watt. (21:App:743-APP17764-65; see also 9:App:304-APP06858; 14:App:362b-APP10590:8-16.) This underestimation of the cost of solar makes the small increase in export compensation even more inadequate as a tool to increase the adoption of customer-sited generation in disadvantaged communities.

consider the admittedly important aspects of the problem, the Commission issued a decision that fails to comply with its legal obligation under section 2827.1(b)(1).

B. The Commission cannot rely on three pre-existing programs to fulfill its obligation under section 2827.1(b)(1) because it found these programs inadequate to ensure the growth of customer-sited generation in disadvantaged communities.

The Commission's decision approving the 2022 tariff claimed that AB 209—a separate rebate program established by the Legislature in 2022 to promote distributed energy resources—satisfied its obligations under section 2827.1(b)(1). (See 21:App:797-APP18471; § 379.10.) After Petitioners sought writ review on the grounds that the 2022 tariff itself did not include a specific alternative designed for growth among customers in disadvantaged communities, the Commission claimed that three pre-existing programs would ensure these customers could access customer-sited generation. (D.23-06-056 at pp. 19-20.)

The Commission's post hoc reliance on three pre-existing programs cannot remedy the inadequacy of the small increase in export compensation adopted as the only mechanism to comply

with the Commission's obligations under section 2827.1(b)(1). The Commission's 2022 decision adopting the tariff determined that customers in disadvantaged communities were not able to access customer-sited generation, even though these three programs had been in place since 2018. (See 21:App:797-APP18336, APP18458.) As a simple matter of logic, the Commission's own determination demonstrates that these three 2018 programs were insufficient to promote the growth of solar in disadvantaged communities.

"[I]f a public entity changes its view, it must explain its rationale." (*Boatworks, LLC v. City of Alameda* (2019) 35 Cal.App.5th 290, 303, citing *Motor Vehicle Manufacturers' Assn.*, *supra*, 463 U.S. at pp. 33-34.) The Commission's Order Denying Rehearing in which it relied on the three programs, however, provided no basis for concluding that the programs would be successful in promoting the future adoption of customer-sited generation in disadvantaged communities. As the Commission has failed to explain its reliance on the three currently unsuccessful programs, the Commission's post hoc rationale cannot overcome its own prior determination that the status quo

including the three programs failed to promote growth of solar in disadvantaged communities.

Because the Commission did not identify these programs until after the rehearing application was filed, Petitioners had no opportunity to demonstrate their inadequacy. But the Commission's own actions confirm that the identified programs do not satisfy the Commission's obligation under section 2827.1(b)(1). Two of these programs—the Disadvantaged Communities-Green Tariff program ("DAC-GT"), and the Community Solar Green Tariff Program ("CS-GT") are limited by a megawatt cap. (D.18-06-027 at p. 53 [DAC-GT can only generate up to 158 megawatts]; *id.* at p. 65 [CS-GT is similarly limited to a total of 41 megawatts].) Programs limited to a miniscule fraction of installed rooftop solar capacity (199 megawatts totals less than two percent of current installed capacity) are not "designed for growth"—they are inherently limited. More importantly, the CS-GT program had, as of August 2021, enrolled *no customers*. (Petitioners' Appellate SRJN, Ex. F (Process Evaluation of the Disadvantaged Communities Green Tariff and Community Solar Green Tariff Programs (Mar. 31, 2022), pp. 2, 3, 66).)

Because of these programs' lack of success in promoting customer-sited generation in disadvantaged communities, the Commission has acknowledged that they have failed. (See Petitioners' RJN, Ex. D (Proposed Decision Modifying Green Access Program Tariffs and Adopting Community Renewable Energy Program (Mar. 4, 2024) Rev. 1, Agenda Decision, Meeting 5/30/2024 Item #49 (May 28, 2024), p. 52 [showing "the existing DAC-GT program is under-subscribed and under-procured"]; *id.* at p. 57 ["The Commission agrees with numerous parties that the current CS-GT program has failed"].) The Commission even discontinued the CS-GT program. (*Id.* at p. 169.)[20]

The third program—the Disadvantaged Communities-Single Family Solar Homes ("DAC-SASH") program—has similarly failed to meaningfully expand rooftop solar in disadvantaged communities. The DAC-SASH program has installed 3.5 megawatts of solar in disadvantaged communities,

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[20] The Commission adopted the proposed decision attached as Exhibit D to Petitioners' RJN on May 30, 2024. (Petitioners' RJN, Ex. E (Results of Commission Meeting (May 30, 2024) [showing that the Commission signed the proposed decision, item #49].) At the time the exhibits to Petitioners' RJN were compiled, the Commission had not yet mailed the final decision.

less than 0.1% of the amount of total rooftop solar capacity installed in the state. (Petitioners' Appellate SRNJ, Ex. G (Process and Load Impact Evaluation of the Disadvantaged Communities-Single-Family Affordable Solar Housing Program (DAC-SASH) (Apr. 28, 2023), p. 1).) The program also sunsets in 2030. (D.18-06-027 at p. 30.)

The failure of these programs demonstrates the importance of the Legislature's mandate that "[i]n developing the standard contract or tariff, the commission shall … include specific alternatives designed for growth" in disadvantaged communities. (§ 2827.1(b)(1).) Programs that bear no relationship to the tariff for customer-sited generation cannot be relied on to address a problem that the tariff itself must address. The Legislature may not fully fund the programs, as is the case with the AB 209 program that the Commission originally claimed would satisfy the obligations of section 2827.1(b)(1).[21] (See 21:App:797-

[21] The Commission's disavowal of prior reliance on AB 209 may be due to the fact that the Legislature cut half of the funding for the AB 209 program in 2023 and has proposed even further cuts in the 2024 budget. (Petitioners' Appellate SRJN, Ex. E (AB 102, Budget Act of 2023, p. 317); Petitioners' RJN, Ex. F (California State Assembly Budget Subcommittee No. 4, Agenda (May 22, 2024) at p. 9 [describing proposal to cut $350 million from funding, leaving $280 million]).)

APP18423 – APP18425 [relying on AB 209].) Or the Commission could decide to end programs that do not constitute an integral component of the tariff, as the Commission has proposed for the CS-GT program. Thus, by failing to include an alternative specifically designed to promote the growth of customer-sited generation in the tariff itself, the Commission violated the plain language of section 2827.1(b)(1).

Finally, none of the programs, nor the bill credits, address the Commission's fundamental failure to protect disadvantaged community and low-income residents from the effects of gutting net metering itself. The Commission recognizes that "[t]he inability to achieve higher bill savings and reasonable payback periods are barriers to increased participation by low-income customers." (21:App:797-APP18470.) But despite providing low-income customers with limited, additional compensation for exports, the successor tariff is deliberately designed to achieve a payback period that is insufficient to encourage adoption among customers in disadvantaged communities. (6:App:264-APP04658-60 [showing low adoption rates at payback periods near 10 years]; 21:App:797-APP18419 [targeting payback period of 9 years for customers in disadvantaged communities].) This

approach violates section 2827.1's requirement that the successor tariff include alternatives "designed for *growth*" in disadvantaged communities.

CONCLUSION

For the reasons stated above, Petitioners respectfully request that the Court reverse the appellate decision and remand to the Commission with instructions to value all of the benefits of customer-sited generation (§ 2827.1(b)(3)) and include specific alternatives designed for growth of customer-sited generation among customers in disadvantaged communities (§ 2827.1(b)(1)).

DATED: June 10, 2024 SHUTE, MIHALY & WEINBERGER LLP

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CERTIFICATE OF WORD COUNT

In accordance with Rule 8.520 of the California Rules of Court, I certify that, exclusive of this certification and the other exclusions referenced in Rule 8.520(c)(3), this **PETITIONERS' OPENING BRIEF** contains 13,795 words, including footnotes, as determined by the word count of the computer used to prepare this brief.

DATED: June 10, 2024 SHUTE, MIHALY & WEINBERGER LLP

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S283614

IN THE SUPREME COURT OF CALIFORNIA

CENTER FOR BIOLOGICAL DIVERSITY, INC. et al.,

Petitioners,

vs.

PUBLIC UTILITIES COMMISSION,

Respondent,

PACIFIC GAS AND ELECTRIC COMPANY et al.,

Real Parties in Interest.

After a Decision by the Court of Appeal
First Appellate District, Case No. A167721
From a Decision of the Public Utilities Commission of the State of California, No. 22-12-056 (December 19, 2022)

PROOF OF SERVICE

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Case No. S283614
Center for Biological Diversity et al. v. Public Utilities Commission of the State of California
In The Supreme Court Of California

At the time of service, I was over 18 years of age and **not a party to this action**. I am employed in the County of San Francisco, State of California. My business address is 396 Hayes Street, San Francisco, California 94102.

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PETITIONERS' MOTION REQUESTING JUDICIAL NOTICE

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/s/ Patricia Larkin
Patricia Larkin

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Case No. S283614
Center for Biological Diversity et al. v. Public Utilities Commission of the State of California
In The Supreme Court Of California

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STATE OF CALIFORNIA
Supreme Court of California

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STATE OF CALIFORNIA
Supreme Court of California

Case Name: **CENTER FOR BIOLOGICAL DIVERSITY v. PUBLIC UTILITIES COMMISSION (PACIFIC GAS AND ELECTRIC COMPANY)**
Case Number: **S283614**
Lower Court Case Number: **A167721**

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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

6/10/2024

Date

/s/Ellison Folk

Signature

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