Case No. _____

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION _____

CENTER FOR BIOLOGICAL DIVERSITY, ENVIRONMENTAL WORKING GROUP, and THE PROTECT OUR COMMUNITIES FOUNDATION

Petitioners,

v.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Respondent,

PACIFIC GAS AND ELECTRIC COMPANY, SAN DIEGO GAS & ELECTRIC COMPANY, and SOUTHERN CALIFORNIA EDISON COMPANY

Real Parties in Interest.

From a Decision of the Public Utilities Commission of the State of California, No. 22-12-056 (December 19, 2022)

PETITION FOR WRIT OF REVIEW; MEMORANDUM OF POINTS AND AUTHORITIES
[APPENDIX OF EXHIBITS FILED CONCURRENTLY]

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Pursuant to California Rules of Court, Rule 8.724(c) and Rule 8.208, Petitioners Center for Biological Diversity ("Center"), Environmental Working Group ("EWG"), and The Protect Our Communities Foundation ("PCF") (collectively, "Petitioners") hereby submit the following certificate of interested entities or persons:

1. The Center is a California non-profit corporation, and no entity or person has an ownership interest in the Center.

2. EWG is a non-profit corporation organized in Washington, D.C., and no entity or person has an ownership interest in EWG.

3. PCF is a California non-profit corporation, and no entity or person has an ownership interest in PCF.

4. Petitioners know of no other entity or person, other than the parties themselves, with a financial or other interest in the outcome of this proceeding that must be disclosed.

DATED: May 3, 2023

SHUTE, MIHALY & WEINBERGER LLP

By: /s/ Ellison Folk
ELLISON FOLK
Attorneys for The Protect Our Communities Foundation

DATED: May 3, 2023

CENTER FOR BIOLOGICAL DIVERSITY

By: /s/ Roger Lin
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DATED: May 3, 2023

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By: /s/ Caroline Leary
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INTRODUCTION

For the past 25 years, California has led the transition from fossil-fuel generation to clean, renewable power. Individual Californians have spearheaded the effort, installing rooftop solar on over one and a half million homes, schools, churches, and businesses. State policy encouraged this transition to clean power through the Net Energy Metering ("NEM") tariff, which allowed residents to earn a reasonable return on their substantial up-front investments in distributed energy resources,[1] such as rooftop solar systems. This local generation confers significant societal benefits, including reduced greenhouse gas emissions, resilience to extreme weather and power outages, and avoided land use impacts by decreasing the need for utility transmission infrastructure which also keeps electricity bills down.

Under California's existing NEM tariffs, owners of rooftop solar systems receive credit for energy they generate and use on-

[1] "Distributed energy resources" means "distributed renewable generation resources, energy efficiency, energy storage, electric vehicles, and demand response technologies." (Pub. Util. Code § 769.) These sources produce energy that can be used locally without the need for centralized transmission and distribution lines. Because rooftop solar is the predominant distributed resource in California, this petition will often refer to distributed generation as "rooftop solar."

site. The utilities also compensate NEM customers for excess clean energy they supply back to the grid, paying those customers the same rate that the customers themselves pay for energy from the grid. The NEM tariff reflects a new reality in electric utility regulation. Historically, energy flowed on the grid in one direction, from central power plants to customers. NEM acknowledges that energy now flows in multiple directions—from the grid to customers, and from customers' rooftop solar systems back to the grid—and ensures that rooftop solar customers are fairly compensated for the energy they generate.

Notwithstanding distributed generation's benefits, for-profit utilities across the country have targeted NEM programs. Because investor-owned utilities earn guaranteed returns on capital spending for transmission infrastructure, distributed energy resources, like rooftop solar, threaten the utility business model. Thus, for-profit utilities across the country have embarked on a multi-state campaign to gut NEM programs, promoting a false narrative that NEM causes a "cost shift" from wealthier NEM customers and increases rates for everyone else, ignoring completely the billions of dollars utilities spend on transmission infrastructure that drives increased rates.

Despite opposition from clean energy industry groups and hundreds of community and non-profit organizations, including Petitioners Center for Biological Diversity, Environmental Working Group, and The Protect Our Communities Foundation, the utilities' narrative found a receptive audience at the California Public Utilities Commission ("Commission"). In Decision 22-12-056 (Decision Revising Net Energy Metering Tariff and Subtariffs (Dec. 19, 2022) ("Decision"), the Commission adopted a successor to the current NEM tariff (the "successor tariff") that will dramatically decrease the growth of distributed generation. In doing so, the Commission failed to follow numerous requirements set out by the Legislature for a successor NEM tariff in Public Utilities Code section 2827.1.

To begin, the Decision disregards section 2827.1's fundamental requirement that the NEM tariff reflect the *total* costs and benefits of distributed generation. Instead, the Decision relies entirely on what is called the Avoided Cost Calculator ("ACC"), a tool the Commission uses to estimate *some* benefits of distributed generation, even though it acknowledged that the ACC did not fully account for *all* of the benefits of that generation. On the other side of the ledger, the Decision

arbitrarily calculates the cost of distributed generation by treating NEM customers' reduced consumption of energy from the grid as a *cost* that must be borne by other customers even though, in other contexts, the Commission treats such reduced energy usage from other distributed energy resources—for example, energy conservation from the use of more efficient appliances—as a benefit. By focusing on this purported cost shift from NEM customers to those customers who do not have distributed generation ("non-participants"), the Decision violates the statute's requirement that the Commission analyze cost-effectiveness to the electrical system as a whole. The Decision exaggerates the effects of the NEM tariff on non-participants by underestimating the benefits of distributed generation and overstating its costs.

Second, the Decision contravenes the Legislature's mandate in section 2827.1(b)(1) that the Commission ensure the continued, sustainable growth of distributed generation. The Decision makes the installation of new solar systems economically unattractive and, as a result, will dramatically decrease growth of NEM resources. The Commission justified its abandonment of the statutory mandate for sustainable growth on

the purported need to avoid costs to non-participants and balance other statutory directives. This justification not only ignores the real benefits of distributed generation, it contravenes the statutory language and legislative history, which command the Commission to achieve *all* of the statute's goals.

The Decision also abandons its obligation to "include specific alternatives designed for growth" in disadvantaged communities ("DACs") (§ 2827.1(b)(1)), who will be hit particularly hard by the decline in solar adoption under the successor tariff. First, the Decision declines to adopt specific funding to increase growth in DACs—an Equity Fund—as part of the successor tariff. Instead, the Decision improperly relies on an entirely *separate* state program with uncertain funding and dubious prospects to replace the Equity Fund. The Decision's other purported alternative to serve DACs, a small increase in compensation for power exported to the grid by DAC customers, is illusory. Because this compensation relies on a cost for installing solar that is far lower than actually paid by customers in DACs, the Decision fails to ensure adequate compensation that will foster growth among those customers.

Third, the Decision fails to adopt community solar programs that could serve DACs residents, the majority of whom do not own their roofs. With community solar, a centralized solar system is installed on schools, churches, community centers, or other public buildings to serve nearby residences that would not otherwise be able to reap the benefits of rooftop solar. By refusing to adopt any community solar program, the Commission passed up an ideal opportunity to satisfy section 2827.1's equity-enhancing requirements.

Finally, the Decision errs by gutting the non-residential NEM tariff. Non-residential customers with distributed generation already pay more than the cost to provide them utility service and the record demonstrates that the current tariff is cost-effective for the electrical system as a whole. However, the Decision ignores this evidence by again focusing exclusively on impacts to non-participants in violation of section 2827.1 and the Commission's own precedent.

These legal errors require that the Commission's Decision be reversed. Accordingly, this Court should grant review, set aside the Decision, and remand this matter to the Commission with instructions to comply with the Legislature's requirements

to fully and properly evaluate NEM's costs and benefits, promote growth in DACs, and ensure the continued sustainable growth of distributed renewable generation, so that California may continue to lead the way to a clean and equitable energy future.

PETITION FOR WRIT OF REVIEW

A. Jurisdiction

1. The Commission issued the Decision on December 19, 2022. Petitioners timely applied for rehearing on January 18, 2023. As of the date of this filing, more than 60 days after Petitioners' application for rehearing, the Commission has not acted on the application. Pursuant to Public Utilities Code section 1733,[2] Petitioners may treat the application as denied. Section 1733 "is permissive rather than mandatory, and appears to have been enacted solely for the benefit of the party making the application." (*Sokol v. Public Utilities Com.* (1966) 65 Cal.2d 247, 252.) Parties need not file their petitions within 30 days of the 60-day waiting period created by section 1733 expiring. (*Id.*) Thus, the Court has jurisdiction over this petition under section 1756(a).

[2] Unless otherwise noted, all statutory references are to the Public Utilities Code.

B. Parties

2. Petitioner Center for Biological Diversity ("Center") is a non-profit corporation formed and existing under the laws of the State of California. Its principal place of business in California is in the City of Oakland.

3. Petitioner Environmental Working Group ("EWG") is a non-profit corporation formed and existing under the laws of the District of Columbia and with a place of business in Sacramento, California.

4. Petitioner The Protect Our Communities Foundation ("PCF") is a nonprofit corporation formed and existing under the laws of the State of California and located in San Diego, California.

5. The California Public Utilities Commission ("Commission") is a state agency of constitutional origin charged with regulating public utilities under the Public Utilities Code and under article XII of the California Constitution.

6. Real parties in interest San Diego Gas & Electric Company ("SDG&E"), Pacific Gas and Electric Company ("PG&E"), and Southern California Edison Company ("SCE") are each a corporation formed and existing under the laws of the

State of California, an investor-owned electric utility, an "electrical corporation" under section 218, and a "public utility" under section 216.

C. Venue

7. Venue is proper in this District under section 1756(d) because the Center's principal place of business in California is in the City of Oakland, within Alameda County.

D. Exhibits

8. All exhibits in the appendix accompanying this petition are true copies of original documents before the Commission. The exhibits are incorporated by reference as though fully set forth in this petition. The appendix of exhibits ("App.") is paginated consecutively.

E. Statement of the Case

1. California promoted the deployment of distributed renewable generation under the original NEM and NEM 2.0 tariffs.

9. In 1995, the Legislature established California's first Net Energy Metering ("NEM") program to encourage private investment in renewable energy. (SB 656 (Alquist), Stats. 1995, ch. 369.) Since 1996, utility customers seeking to combat climate change and reduce their reliance on utility-generated power have

been able to install renewable generation facilities on their own premises. State policy encouraged these contributions through a NEM tariff that 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) ("D.16-01-044"), p. 12-13.)[3] The NEM tariff allowed customers to earn reasonable returns on their substantial up-front investments, all while benefitting the environment and the electrical grid as a whole.[4]

10. California's NEM program has been a staggering success. As of 2019, more than one million customers in the State had installed NEM generators, representing over 8,000 MW of

[3] For the reasons set forth in the accompanying Request for Judicial Notice, Petitioners request this Court take judicial notice of Commission decisions cited in this Petition. D.16-01-044 is available at: https://docs.cpuc.ca.gov/PublishedDocs/Published/G000/M158/K285/158285436.pdf.

[4] *See, e.g.*, Center for Biological Diversity, *Rooftop-Solar Justice: Why Net Metering is Good for People and the Planet and Why Monopoly Utilities Want to Kill It* (Mar. 2023), available at https://www.biologicaldiversity.org/programs/energy-justice/pdfs/Rooftop-Solar-Justice-Report-March-2023.pdf.

renewable capacity.[5] (1:App:64-APP00787-88[6].) That year, NEM systems—mostly rooftop solar—provided 7% of the State's total electric supply with clean, distributed power. (10:App:350-APP08667.) The NEM program has empowered ordinary California residents to personally contribute to phasing out polluting fossil-fuel generation and has also benefited the grid as a whole by increasing resilience and reducing transmission and infrastructure costs. Recently, rooftop solar has become more widely accessible—in 2021, working-class Californians represented the largest demographic installing rooftop solar. (20:App:733-APP17623.)

11. Despite its public benefits, NEM has been a target of investor-owned utilities across the country, the vast majority of which operate as regulated monopolies. Their investors are guaranteed a return on capital investments, including spending on transmission and distribution infrastructure. By shifting generation closer to customers, NEM has decreased the need for utility transmission infrastructure and threatens utilities' profits.

[5] As of end of February 2023, approximately 1.7 million NEM systems had been installed: https://www.californiadgstats.ca.gov/
[6] Citations to the Appendix of Exhibits are in the format [Volume]:App:[TAB-Page].

Thus, corporate utilities have fought NEM policies nationwide, promoting a narrative that they raise rates for low-income customers by purportedly creating "cost shifts" from wealthier NEM customers to everybody else. At the same time, however, these same utilities have disconnected hundreds of thousands of low-income customers in the last several years[7] and spent billions of dollars on transmission infrastructure that drives significant rate increases for all customers.

12. In 2013 the California Legislature called for the Commission to establish a successor to the original NEM tariff and added a new section, section 2827.1, to the Public Utilities Code. (AB 327 (Perea), Stats. 2013, ch. 611.)

13. Section 2827.1 sets out the requirements for any successor NEM tariff, providing that, in developing a new tariff, the Commission "shall do *all* of the following"—including ensuring that:

> (1) customer-sited renewable distributed generation continues to grow sustainably and include specific alternatives designed for growth among residential customers in disadvantaged communities. . .

[7] Center for Biological Diversity, *Rooftop-Solar Justice*, *supra*, at p. 7.

> (3) the standard contract or tariff . . . is based on the costs and benefits of the renewable electrical generation facility.
>
> (4) 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) (emphasis added).)

14. An earlier draft of section 2827.1 called for the Commission to consider the costs and benefits of the tariff specifically to non-participating customers and to ensure that the NEM tariff did not shift any costs to non-participants. (D.16-01-044, p. 54.) The Legislature eliminated both references to non-participants, clarifying section 2827.1's focus on costs and benefits to *all customers and the electrical system*. (*Id.*, p. 55.)

15. In 2016, the Commission adopted the first successor to the original NEM tariff (see D.16-01-044), the "NEM 2.0" tariff. (21:App:797-APP18252 [("Decision") at 8].) The NEM 2.0 tariff required new residential NEM customers to take service on time-of-use rates—rates that vary depending on the time of day and incentivize usage that relieves stress on the grid. (D.16-01-044, pp. 91-92.) The NEM 2.0 tariff also required that NEM

customers, like any other customer, pay non-bypassable charges[8] on the "full amount of electricity" that they receive from the grid. (D.16-01-044, p. 89.)

16. The decision establishing the NEM 2.0 tariff also suggested that the Commission review and revisit the successor tariff in 2019. (*Id.*, p. 4.)

2. The Commission's current proceeding to revise the NEM tariff.

17. The Commission initiated a proceeding to review the NEM 2.0 tariff and develop a successor tariff in August 2020. (1:App:1-APP00058.)

18. PCF became a party to the proceeding on October 5, 2020. (1:App:14-APP00173; Rule 1.4 of the Commission's Rules of Practice and Procedure.[9]) EWG and the Center were granted party status on June 17, 2021, and June 7, 2022, respectively. (3:App:188-APP02890; 19:App:618-APP15955.)

[8] Non-bypassable charges typically fund public policy objectives (e.g., decommissioning nuclear facilities). (See 21:App:797-APP18360 [Decision at 116].)

[9] The Commission's Rules of Practice and Procedure are available at https://www.cpuc.ca.gov/-/media/cpuc-website/divisions/administrative-law-judge-division/documents/rules-of-practice-and-procedure-may-2021.pdf.

19. The Commission adopted guiding principles governing the successor tariff. (1:App:109-APP01335.) The guiding principles in D.21-02-007 emphasized that the successor tariff must comply with "the statutory requirements of Public Utilities Code section 2827.1." (1:App:109-APP01368, 1377.) The guiding principles also noted that the successor tariff should align with the State's energy policies and "ensure equity among all customers." (1:App:109-APP01380.) Additionally, the guiding principles required the Commission's analyses of costs and benefits to use the Avoided Cost Calculator ("ACC")—a tool developed by the Commission to evaluate the benefits of distributed resources by identifying the costs they obviate, or "avoid." (1:App:109-APP01372.) Although the Commission indicated that it would not entertain requests for changes to that tool in this proceeding, the Commission also noted that "the benefits of grid services provided by specific distributed energy resources should be addressed in resource-specific proceedings." (1:App:109-APP01372.)

20. The guiding principles also addressed how the Commission would assess the cost-effectiveness of the successor tariff and found that the "Total Resource Cost test," which

measures the cost-effectiveness of resources to the electrical system as a whole, would be "the primary cost-effectiveness test." (1:App:109-APP01370].) The Commission also found that a separate cost-effectiveness test, the Ratepayer Impact Measure ("RIM test"), which focuses on costs to non-participants in the NEM tariff, should not be the primary test used to evaluate the successor tariff. (1:App:64-APP00828 (citing to D.19-05-019, Decision Adopting Cost-Effectiveness Analysis Framework Policies for all Distributed Energy Resources (May 21, 2019); see also D.16-01-044, p. 56.)

21. Notwithstanding these general guiding principles, the Commission in D.21-02-007 made clear that they were intended to provide flexibility and did not supplant statutory mandates. (1:App:109-APP01371-72 [e.g. Findings of Fact Nos. 4, 5, 9], 1:App:109-APP01375 [Finding of Fact No. 36], 1:App:109-APP01377 [Conclusion of Law No. 5], 1:App:109-APP01378-79 [Conclusion of Law No. 18].)

22. The Commission also retained consultants to review the NEM 2.0 tariff (1:App:64-APP00772.) The consultants produced the *Net Energy Metering 2.0 Lookback Study* (1:App:64-APP00775.) The Lookback Study found that the NEM 2.0 tariff is

cost-effective for commercial, industrial, and agricultural ("non-residential") customers but purportedly not for residential customers. (1:App:64-APP00794.) The Lookback Study stated that an additional cost-effectiveness test, the Societal Total Resource Cost Test, "can account for other societal, environmental, and health benefits" of rooftop solar, but declined to apply that test because it is not yet finalized. (1:App:64-APP00828-29.)

23. Parties submitted proposals for the successor tariff in March 2021. PCF proposed community solar programs to serve renters and multi-unit building residents, including those in disadvantaged communities (2:App:133-APP01803-08, APP01813-21.) The Coalition for Community Solar Access ("CCSA") and the California Energy Storage Alliance ("CESA") also proposed community resource programs. (1:App:126-APP01605-07; 2:App:127-APP01671.) NRDC proposed a clean energy equity fund to promote access to clean energy in disadvantaged communities. (See, e.g., 2:App:132-APP01772-73.)

24. Other parties proposed successor tariffs that would dramatically decrease the value of rooftop solar, premised on the theory that NEM causes a "cost shift" from participating to non-

participating customers. (See, e.g., 10:App:350-APP08765 [discussing the investor-owned utilities' proposal].) This focus on NEM's purported impacts to non-participants discounted or ignored distributed generation's societal benefits. (See, e.g., 2:App:351-APP08987-94.)

25. The Commission received testimony from parties' expert witnesses and held evidentiary hearings. Key issues addressed by the parties included how to ensure the continued growth of distributed generation, how to fairly compensate NEM customers for electricity they export to the grid, how to value the benefits that distributed generation provides to the grid, and how to expand access to distributed generation in DACs.

26. EWG's witness testified that distributed generation cannot grow unless customers receive a reasonable economic value proposition. (8:App:301-APP06759-62.) EWG's witness further testified that the Lookback Study's cost-effectiveness analysis omitted numerous benefits of NEM systems, including societal health, environmental, and resilience benefits. EWG recommended use of the Societal Cost Test to address these benefits. (8:App:300-APP06696, APP06700-01.) Both PCF and EWG established that runaway transmission spending dwarfed

any NEM-related impacts on non-participants' electricity rates. (8:App:300-APP06697; 5:App:259-APP04527-29; 9:App:322-APP07654-55.)

27. Both EWG and PCF emphasized that distributed generation reduces transmission spending, with PCF demonstrating that the Lookback Study understated the value of this benefit. (8:App:300-APP06699; 5:App:259-APP04518-20; 9:App:322-APP07654-63.) For example, PCF demonstrated that if SDG&E's Sunrise Powerlink project had been replaced by distributed generation, each distributed 6 kW NEM system would have avoided over $1,000 per year in transmission costs. (9:App:322-APP07675-77.)

28. Parties filed briefs in the summer of 2021. PCF showed that a reasonable payback period—the time it takes for a customer to recoup the initial investment in a NEM system—is essential to ensuring the growth of distributed generation. (15:App:384-APP11752-59.) PCF also explained that using the Avoided Cost Calculator alone to measure NEM systems' benefits ignored their resiliency, climate, and air quality benefits, and significantly understated avoided transmission costs. (15:App:384-APP11734-44.) Instead, to comply with the statutory

mandate to account for the *total* costs and benefits of NEM systems to all customers and the electrical system (see § 2827.1(b)), PCF advocated for use of the Societal Cost Test and criticized prioritization of the RIM Test, which measures impacts to non-participants only. (15:App:384-APP11744-49.)

29. The assigned Administrative Law Judge ("ALJ") issued her first proposed decision on December 13, 2021. Notably, to satisfy the statutory requirement that the tariff include specific alternatives designed for growth in disadvantaged communities, the proposed decision established a $150 million per year Equity Fund to improve access to distributed resources for low-income customers. (17:App:463-APP14104.)

3. The Commission issued a Decision that fails to ensure the continued sustainable growth of distributed energy resources, fails to account for the full benefits of NEM systems, and fails to expand equity.

30. The ALJ withdrew the first proposed decision and issued a second proposed decision on November 10, 2022. (20:App:721-APP17378; 20:App:720-APP17138.)

31. The second proposed decision abandoned the Equity Fund, on the basis that AB 209, an unrelated bill adopted by the Legislature after the first proposed decision was issued,

separately authorized incentives for low-income customers to install storage systems (i.e., batteries) or solar paired with storage. (20:App:720-APP17310-12.)

32. The second proposed decision also failed to fully account for the benefits of distributed generation by relying exclusively on the ACC to determine the value of energy exported to the grid by NEM customers and by refusing to use the Societal Cost Test. (20:App:720-APP17206-11.)

33. The exclusive reliance on the ACC dramatically decreased the rate paid for export compensation, and as a result, reduced the bill savings NEM customers receive when they install rooftop solar systems. (20:App:720-APP17143.) This change (and others) also practically doubled the payback periods for rooftop solar; while NEM customers could previously expect to recover the costs of installing their systems within three to five years, the proposed decision targeted a nine-year payback period. (20:App:720-APP17216.) Despite evidence demonstrating that these payback periods would decrease growth of distributed generation and violate a statutory requirement that the tariff *ensure* the continued sustainable growth of distributed generation, the Commission justified the increased payback

periods by asserting that it had to prioritize addressing the purported cost-shift in balancing multiple competing statutory requirements. (20:App:720-APP17197-98, APP17215-16.)

34. Finally, despite finding the NEM 2.0 tariff for non-residential customers to be cost-effective for the electrical system as a whole under the required Total Resource Cost test, and despite evidence that non-residential NEM customers already pay more than the cost to serve them, the proposed decision reduced compensation for non-residential NEM as well. The proposed decision justified this change on the grounds that the Ratepayer Impact Measure test showed impacts to non-participants, even though the Commission previously determined that the RIM test should not drive decisionmaking regarding the cost-effectiveness of distributed generation. (20:App:720-APP17244; 1:App:64-APP00828 (citing to D.19-05-019; see also D.16-01-044, p. 56).)

35. Petitioners filed comments describing the proposed decision's flaws and failures to comply with section 2827.1. Specifically, Petitioners demonstrated that the proposed decision failed to account for NEM systems' total benefits by dismissing quantifiable societal benefits excluded from the ACC.

(21:App:747-APP17815-18; 21:App:741-APP17736-40; 20:App:733-APP17624-29.) Citing evidence that payback periods longer than seven years would fail to attract customers (see, e.g., 6:App:264-APP04657-58; 21:App:797-APP18317 [Decision at 73]), Petitioners also demonstrated that the proposed decision would fail to ensure the continued sustainable growth of distributed generation because customers would not undertake a substantial investment in rooftop solar if they could not recoup their investment for nearly a decade. (21:App:747-APP17823-25; 21:App:741-APP17735-36.) Finally, Petitioners argued that the Commission should reinstate the Equity Fund proposal to comply with section 2827.1's requirement to create alternatives designed for growth in disadvantaged communities. (20:App:733-APP17620-22.)

36. On December 15, 2022, the Commission largely adopted the second proposed decision in D.22-12-056. Among other changes, the Decision reduces compensation for energy exported to the grid from rooftop solar by almost 75 percent (21:App:797-APP18492 [Decision at A2]), it deliberately doubles the payback period for the installation of rooftop solar systems to 9 years (21:App:797-APP18323), and it declines to include within

the new tariff, a specific program to ensure growth of distributed generation in disadvantaged communities (21:App:797-APP18424-25 [Decision at 180-81]).

4. As of the date of filing, the Commission has failed to act on and constructively denied Petitioners' application for rehearing of D.22-12-056.

37. Pursuant to Public Utilities Code section 1731(b)(1) and Rule 16.1 of the Commission's Rules of Practice and Procedure, Petitioners filed a joint application for rehearing of D.22-12-056 on January 18, 2023. (22:App:799-APP18557.) The application asserted that the Decision violates section 2827.1's mandate to ensure continued sustainable growth of distributed resources, failed to account for the benefits of distributed generation, ignored the requirement to ensure the growth of distributed generation in DACs, and it failed to provide any evidence to support its changes to the tariff for non-residential NEM customers. (22:App:799-APP18607-08.)

38. Two parties to the proceeding, 350 Bay Area and the Clean Coalition, filed responses in support of the Application for Rehearing on February 1, 2023 and February 2, 2023, respectively. (22:App:802-APP19246; 22:App:804-APP19266.)

PG&E, SDG&E, and SCE (collectively, the "Joint Utilities") filed a response on February 2, 2023, arguing that the Commission should deny the Application for Rehearing.(22:App:805-APP19273.)

39. Californians for Renewable Energy filed a separate Application for Rehearing of the Decision on January 17, 2023. (21:App:798-APP18502.)

40. As of the date of this filing, the Commission has failed to act on Petitioners' application for rehearing and thus failed to address the legal flaws it describes.

PRAYER FOR RELIEF

Petitioners the Center, EWG, and PCF respectfully pray that this Court:

1. Issue a writ of review to determine the lawfulness of Commission Decision 22-12-056;

2. Direct the Commission to certify its record in the subject proceeding to this Court;

3. Enter judgment setting aside Decision 22-12-056 and remand with directions to adhere to the provisions of Public Utilities Code section 2827.1, which requires continuing rates of growth of distributed renewable generation; including specific

alternatives designed for the growth of distributed generation in disadvantaged communities; and accounting for the total costs and benefits of distributed renewable generation, including those benefits excluded from the Avoided Cost Calculator;

4. Enter judgment setting aside Decision 22-12-056's changes to the tariff for commercial, industrial, and agricultural customers, and remand with directions to adhere to prior decisions and the Standard Practice Manual's prioritization of the Total Resource Cost test as the primary measure of cost-effectiveness; and

4. Grant such other relief as the Court may deem just and proper.

DATED: May 3, 2023

SHUTE, MIHALY & WEINBERGER LLP

By: /s/ Ellison Folk
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DATED: May 3, 2023

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DATED: May 3, 2023

ENVIRONMENTAL WORKING GROUP

By: /s/ Caroline Leary
CAROLINE LEARY (*pro hac vice* pending)
Attorney for Environmental Working Group

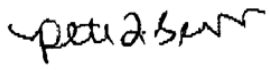
VERIFICATION

I, Peter Galvin, declare as follows:

I am the Director of Programs for Petitioner Center for Biological Diversity, and I make this verification on behalf of said non-profit corporation. I have read the foregoing Petition for Writ of Review and know the contents thereof, and the facts therein stated are true to my own knowledge, except as to those matters stated on information and belief, and as to those matters, I believe them to be true.

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

Executed on May 2, 2023, at Oakland, California.

Peter Galvin	
Print Name of Signatory	Signature

MEMORANDUM OF POINTS AND AUTHORITIES

STANDARD OF REVIEW

Any party aggrieved by a Commission decision may petition for a writ of review in the Court of Appeal or Supreme Court. (§ 1756(a).) A court ordinarily has no discretion to deny a timely-filed petition if it appears that the petition may be meritorious, because review by extraordinary writ is the exclusive means of judicial review. (*PG&E Corp. v. P.U.C.* (2004) 118 Cal.App.4th 1174, 1193; § 1759.)

Section 1757 establishes the scope of review in this ratesetting matter. As relevant here, subdivision (a) provides that a decision is legally erroneous and subject to reversal on appeal if (1) "[T]he [C]ommission has not proceeded in the manner required by law," (2) its "decision . . . is not supported by the findings," (3) the "findings . . . are not supported by substantial evidence in light of the whole record," or (4) the decision was "an abuse of discretion." (§ 1757(a).)

The Commission's decision must be reversed if its interpretation of the Public Utilities Code fails to "bear a reasonable relation to statutory purposes and language," (*Greyhound Lines, Inc. v. P.U.C.* (1968) 68 Cal.2d 406, 410-11), or

if it is not supported by the "plain meaning" of the statute. (*Bd. Of Trustees of Cal. State Univ. v. Public Employment Relations Bd.* (2007) 155 Cal.App.4th 866, 876.) The Commission's interpretation of the Public Utilities Code is not entitled to deference if it is not supported by the statutory text. (See *Southern Cal. Gas Co. v. P.U.C.* (1979) 24 Cal.3d 653, 657-60 [the Commission cannot read past the Legislature's express language to exercise power it has not been granted].) The courts are the ultimate arbiter of statutory interpretation. (*New Cingular Wireless PCS, LLC v. P.U.C.* (2016) 246 Cal.App.4th 784, 807 ["The final word on questions of statutory interpretation always rests with the judiciary."].) Statutory interpretation is a legal question subject to de novo review. (*Pac. Bell Wireless, LLC v. P.U.C.* (2006) 140 Cal.App.4th 718, 729.)

ARGUMENT

I. The Commission committed legal error by failing to account for the total benefits and costs of distributed generation.

The Public Utilities Code directs the Commission to (1) ensure that any NEM tariff is "based on the costs and benefits" of distributed generation (§ 2827.1(b)(3)), and (2) ensure that the tariff's "*total* benefits . . . to all customers and the electrical

system are approximately equal to [its] *total* costs." (§ 2827.1(b)(4) [emphasis added].) Implementing this directive requires an accurate assessment of all benefits NEM systems provide and the actual costs of serving NEM customers.

The Commission relies entirely on the Avoided Cost Calculator to quantify the benefits of distributed renewable generation. (21:App797:APP18302 [Decision at 58].) As explained below, however, the record demonstrates multiple benefits of distributed generation excluded by the ACC. The Decision acknowledges these benefits have values greater than zero, yet gives them no weight. On the cost side, the Decision improperly focuses on costs to non-participants over the cost-effectiveness to the electrical system as a whole, in contravention of the statutory mandate and Commission precedent.

By ignoring demonstrated benefits and overstating costs, the Commission violates section 2827.1's mandate to ensure that the tariff is "based on the costs and benefits" of distributed generation.

A. As a matter of law, the Commission must ensure the successor tariff reflects all of the benefits and costs of distributed generation.

The Legislature's unambiguous direction to ensure that the tariff is "based on the costs and benefits" of distributed generation does not confer any discretion on the Commission to consider "certain" costs, or "relevant" benefits—it says "*the*" costs and benefits of distributed renewable generation. The use of the definite article in "the costs and benefits" means that the clause refers to *all* costs and benefits. (See *Frazier v. Pioneer Americas LLC* (5th Cir. 2006) 455 F.3d 542, 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].) Section 2827.1(b)(4)'s related requirement that the Commission ensure that the NEM tariff reflect the "total" benefits and costs of any successor tariff reinforces the Legislature's intent to capture *all* benefits of distributed generation. (§ 2827.1(b)(3).)

The failure to properly account for the costs and benefits of distributed generation in violation of section 2827.1 constitutes legal error requiring that the Decision be set aside. 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; see also *California v. Bernhardt* (N.D. Cal. 2020) 472 F.Supp.3d 573, 615-16 ["Where an agency chooses to engage in a cost-benefit analysis, it cannot short shrift the benefits side of the equation by failing to monetize certain benefits."], *appeal docketed*, No. 20-16801 (9th Cir. Sept. 17, 2020).)

In *NHTSA*, the court rejected as arbitrary the agency's decision to ignore the benefits of carbon emissions reductions from increased gas mileage standards even though the agency admitted the 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 analogous contexts, California courts have also held that an agency required by law to evaluate a project's benefits must quantify all acknowledged benefits. (*Golden Hill Neighborhood*

Assn., Inc. v. City of San Diego (2011) 199 Cal.App.4th 416, 439 [where law required agency to take into account project benefits, agency could not ignore "even minimal" benefits]; *Broad Beach Geologic Hazard Abatement Dist. V. 31506 Victoria Point LLC* (2022) 81 Cal.App.5th 1068, 1091 [agency could not exclude acknowledged benefits from its analysis].)

B. The Commission's analysis of the benefits of NEM systems fails to comply with section 2827.1 because it omits several acknowledged benefits of distributed generation.

The Decision omits quantifiable benefits related to increased resiliency, avoided out-of-state methane leakage, avoided land use impacts, and avoided transmission costs. The Commission errs by improperly undervaluing or zeroing out these benefits.

1. The Decision improperly omits the value of resiliency.

The Decision gives short shrift to the societal benefits of increased resiliency—that is, the ability to maintain power during a blackout or other grid disruption—and reliability conferred by distributed renewable generation. Despite record evidence of resiliency's public health benefits, the Decision

improperly dismisses these benefits as "individual." (21:App:797-APP18313 [Decision at 69].)

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 even 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 spoilage and 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.)

In the *NHTSA* case, the Ninth Circuit found the agency's cost-benefit analysis deficient for omitting the value of carbon emission reductions, even though parties had introduced values into the record. The agency had argued that there was an

"extremely wide variation" in the estimates of avoided carbon emissions, and that parties "did not reliably demonstrate that the unmonetized benefits . . . would alter the agency's assessment." (*NHTSA*, 538 F.3d at 1200.) The Ninth Circuit held that this reasoning was "arbitrary and capricious for several reasons." In particular, the Ninth Circuit stated that, "while the record shows that there is a range of values, the value of carbon emissions reduction is certainly not zero." (*Id.*) Importantly, the agency had conceded that the value was not zero, and "[b]y presenting a scientifically-supported range of values that does not begin at zero, Petitioners have shown that it is possible to monetize the benefit." (*Id.*)

Similarly, here, 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; 21:App:797-APP18312 [Decision at 68].) The Decision, however, declines 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 [Decision at 69].)

Although the Decision asserts that the societal benefits of resilience are "speculative and limited to unique circumstances," it still acknowledges that they have some value greater than zero. (21:App:797-APP18313-14 [Decision at 69-70].) Just as in the *NHTSA* case, while there may be disagreement over the specific value of resiliency, the Commission acknowledged that resiliency has *some* value, and it is thus legal error to treat resiliency benefits as though they have *no* value. (See also *Golden Hill Neighborhood Assn.*, 199 Cal.App.4th at 439 [where agency had duty to account for a project's benefits and acknowledged a benefit, agency erred by failing to quantify that benefit].)

2. The Decision improperly omits the value of societal benefits including avoided out-of-state methane leakage.

California procures approximately 90% of its natural gas from out-of-state; methane leakage from this natural gas production and transmission contributes to climate change. (15:App:384-APP11742.) 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 [Decision at 70].) The ACC, however, only accounts for the avoidance of in-state methane leakage. (*Id.*) It

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. The Decision commits legal error in disregarding these significant benefits despite acknowledging their value.

In *High Country Conservation Advocates v. U.S. Forest Service*, the court set aside the Forest Service's analysis of costs and benefits for failing to include an estimate of climate impacts. (*High Country Conservation Advocates*, 52 F.Supp.3d at 1190-93.) The Forest Service had claimed that "[p]redicting 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 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 1192.)

Here, the Commission acknowledged that benefits related to reduced out-of-state methane leakage have a non-zero value

that could be quantified. "Out-of-state methane leakage could, in theory, be incorporated as a societal cost [in the ACC], paired with a societal carbon price." (4:App:231-APP03606.) Notwithstanding this acknowledgement, the Commission continued to rely on the current version of the ACC, which excludes any value for avoided out-of-state methane leakage. The Commission claimed this omission was justified because out-of-state emissions reductions do not count towards the State's greenhouse gas reduction goals. (*Id.*) But actual reductions in methane emissions have real climate benefits, and the Commission does not have the discretion to carve out an entire category of benefits. Because the Commission has acknowledged that avoided out-of-state methane leakage has a quantifiable societal benefit, the Decision should not have treated it as having no value.

The Decision's remaining reasons for excluding a value for out-of-state methane leakage are deficient. First, the Decision dismisses this benefit because it is not unique to NEM. (21:App:797-APP18314 [Decision at 70].) However, the ACC's inclusion of a value for in-state methane reductions demonstrates the internal inconsistency in the Commission's reasoning. If in-

state methane reductions have value, the reduction from the much larger out-of-state reductions also have value. This rationale is also legally irrelevant. Section 2827.1 mandates that any successor tariff be based on all costs and benefits of *distributed renewable generation*. It does not specify that such benefits must be *unique* to distributed renewable generation. The Commission does not have the discretion to ignore the statute's mandate.

Second, the Decision reasons that the Commission declined to adopt a proposal to include out-of-state methane leakage in the 2022 update of ACC. However, the Commission did not reject the existence of this benefit; rather, it directed the Energy Division to provide an "update during the next update of the [ACC]." (D.22-05-002, Decision Adopting Changes to the Avoided Cost Calculator (May 6, 2022) p. 47.)[10]

Third, the Commission stated that counting out-of-state methane leakage would result in double-counting because the ACC includes a value for *in-state* methane leakage. (21:App:797-APP18314 [Decision at 70].) But decreased out-of-state methane

[10] See RJN, Exh. B (https://docs.cpuc.ca.gov/PublishedDocs/Published/G000/M474/K624/474624547.PDF)

leakage is an additional, independent benefit apart from reduced in-state methane leakage; there is no double-counting. (4:App:231-APP03606 [Commission's acknowledgment that out-of-state methane leakage is a separate benefit].)

This Decision's reasoning, coupled with the Commission's own finding that it is possible to quantify the benefit of avoided out-of-state methane leakage, emphasizes that its value is not zero. "By deciding not to quantify the [benefit] at all," (52 F.Supp.3d at 1192), the Commission effectively zeroed it out, contrary to the requirements of section 2827.1.

3. The Commission improperly omits the value of avoided land use impacts.

The Commission similarly dismisses 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 [Decision at 70-71].) This narrow reasoning is insufficient and ignores avoided land use impacts from *transmission*.

Agencies performing cost-benefit analyses cannot simply dismiss acknowledged benefits, even when those benefits are difficult to quantify. For example, in *California v. Bernhardt*, the

court 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." (*Bernhardt*, 472 F.Supp.3d at 616.) 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.*)

Here, the Decision similarly fails to evaluate avoided land use impacts from reduced transmission projects due to distributed generation. (21:App:797-APP18314-15 [Decision at 70-71].) By utilizing the ACC, which includes a value for avoided transmission costs, the Decision recognizes that NEM systems displace the need for certain transmission infrastructure costs. There is only disagreement as to the extent of those costs. Because transmission infrastructure must be built somewhere, avoided transmission infrastructure buildout necessarily avoids associated land use impacts. Just as with the health benefits at issue in *Bernhardt*, the Decision cannot provide scant recognition

of avoided (transmission) land use impacts, and then "short shrift the benefits side of the equation." (*Bernhardt*, 472 F.Supp.3d at 616.)

4. The Decision improperly underestimates avoided transmission costs.

The ACC vastly understates the value of rooftop solar's avoided transmission costs. The ACC assumes that capacity-related transmission projects for all three utilities will total $481,650,000 in the five year period from 2021 through 2025 (15:App:364b-APP10983:6-17), but this value is a small fraction of actual transmission spending. In contrast, the transmission-related revenue requirements for the three utilities *in 2021 alone* were more than $4 billion dollars. (22:App:806-APP19327.) The gross mismatch between the ACC's input and the utilities' actual spending suggests that the ACC does not adequately account for transmission spending. The Decision entirely fails to address this mismatch.

The Decision and the ACC also understate the transmission costs avoided when distributed generation reduces the need for transmission that would have otherwise been needed to transmit electricity from centralized utility generation. (See

10:App:345-APP08477 [concluding that NEM deferred 6,500 MW in capacity additions since 2006].) Distributed generation also decreases demand for electricity (or "load" on the system) during peak usage periods and also shifts these peak loads to later in the day. (9:App:322-APP07660-62.) By decreasing peak loads, NEM solar helps eliminate the need for transmission upgrades to serve higher peaks in demand. (5:App:259-APP04520-22; 11:App:357-APP09505:1-APP09506:7.)

While the ACC includes a generic value for avoided transmission costs, the Commission and the ACC undervalue NEM's avoided transmission benefits by failing to address specific projects cancelled as a result of NEM solar. (See 8:App:295-APP06167 [ACC does not include a value for specific projects cancelled].) Instead of crediting these actual cancelled transmission costs, the ACC presumes proposed transmission projects will be built and only attributes a modest hypothetical value to distributed generation for deferring transmission construction into the future. (11:App:356-APP09380:19-APP09381:9.)

For example, the Decision dismisses the value of actual cancelled transmission costs, arguing that the cancellation of

over $2.6 billion worth of transmission projects could not be attributed to NEM solar alone. (See 21:App:797-APP18448-49 [Decision at 204-05].) The Decision also fails to address entirely evidence in the record that a typical rooftop solar system has the potential to avoid as much as $1,000 per year in transmission costs. (15:App:384-APP11736.)[11] This avoided cost is significantly higher than the avoided transmission value of less than $87 per year per value included in the Avoided Cost Calculator.[12] The Commission did not refute the general point that NEM systems may cancel—and avoid—specific transmission costs and ignored evidence of the demonstrated value of such cancelations. Even if distributed generation accounted for only half of the avoided cost of those canceled transmission projects, that number is still far higher than accounted for by the ACC.

The Commission also declined to consider avoided transmission costs excluded by the ACC because such benefits "can be attributable to resources other than [NEM systems],

[11] PCF-24 at p. 37 [Rebuttal Testimony of B. Powers].
[12] PCF-76 at p. 53, Table 20 [2021 Distributed Energy Resources ACC Documentation, V. 1b, (June 22, 2021)] (SDG&E Marginal Transmission Capacity Cost = $14.44/kW-yr). Therefore, the ACC's avoided transmission capacity value of 6 kW NEM system in SDG&E territory = 6 kW x $14.44/kW-yr = $86.64/yr.

thus, it is not appropriate to determine values only for [NEM] resources." (21:App:797-APP18314 [Decision at 70].) The Commission's justification is legally flawed. As noted above, section 2827.1(b) directed the Commission to consider all benefits of NEM resources, not only those benefits *unique* to NEM resources. The Commission erred by undervaluing avoided transmission costs and their benefit to the electrical system as a whole.

5. The Decision improperly dismisses the Societal Cost Test.

The Commission is developing an alternative cost-effectiveness test, known as the Societal Cost Test, to calculate and weigh the *societal* benefits of distributed resources. (D.19-05-019, Decision Adopting Cost-Effectiveness Analysis Framework Policies for All Distributed Energy Resources (May 21, 2019) p. 66-67.)[13] The benefits considered by the Societal Cost Test include some of the same values excluded from the ACC described above, including climate and air quality benefits. (21:App:797-APP18310 [Decision at 66].) The Decision, however,

[13] RJN, Exh. C (https://docs.cpuc.ca.gov/PublishedDocs/Published/G000/M293/K833/293833387.PDF)

rejected the use of the Societal Cost Test on the basis that it is still under development. (*Id*.)

The Commission's decision to reject the Societal Cost Test and ignore the value of the benefits it would measure results in an inadequate and legally deficient cost-effectiveness determination. As demonstrated above, the Commission has determined that the societal benefits have a non-zero value. And the Commission is developing a tool to quantify them. In fact, the Commission's 2016 decision specifically addressed the need to account for the manifold benefits of distributed generation and indicated that the 2019 proceeding (*this proceeding*) would be the appropriate one to address the benefits of distributed generation:

> At that time, we hope and expect that it will be possible to develop a valuation of exports from customer-sited renewable DG [distributed generation] that reflects the full locational and temporal value of the services provided to the grid by those exports, as well to develop a more accurate valuation of the services provided by the grid when a customer-sited DG facility is importing from the grid.

(D.16-01-044, p. 61.)

The Commission's decision to punt this issue once again violates its statutory obligation. "By deciding not to quantify the [benefits] at all," despite having a tool to do so, the Decision

effectively and improperly "zeroed out" their value. (*High Country Conservation Advocates*, 52 F.Supp.3d at 1192.)

C. The Decision's failure to account for all of the benefits of distributed generation is inconsistent with prior Commission precedent.

The Commission justifies its decision to ignore demonstrated benefits beyond those included in the ACC on the grounds that prior Commission decisions endorsed the use of the ACC. (21:App:797-APP18302-APP18303 [Decision at 58-59].) Those prior decisions, however, cannot displace the obligations of section 2827.1, which requires the Commission to address the *total* costs and benefits of distributed generation when establishing a successor tariff.

Further, the Commission never intended the ACC to be used in isolation. Nevertheless, the Decision relies upon three prior decisions to support exclusive use of the ACC in this proceeding: D.19-05-019 (adopting a cost-effectiveness analysis framework for all distributed generation (also referred to as "distributed energy resources"); D.16-06-007, Decision to Update Portions of the Commission's Current Cost-Effectiveness Framework (June 15, 2016) (updating portions of the

Commission's cost-effective framework)[14]; and D.20-04-010, 2020 Policy Updates to the Avoided Cost Calculator (April 24, 2020) (the 2020 updates to the ACC)[15]. (21:App:797-APP18302-03 [Decision at 58-59].) Although these three decisions require use of the ACC, none recommends the *exclusive* use of the ACC to determine the benefits of distributed generation.

In fact, D.20-04-010 demonstrates that the avoided costs of distributed generation calculated in the ACC represent only the "primary," but not total, benefits of those resources. (D.20-04-010, p. 4.) In addition to the avoided costs measured by the ACC, D.20-04-010 relies on "energy savings and other program characteristics to [then] estimate program benefits." (*Id.* at 5.) Commission guidance makes clear that determining these benefits requires multiple steps, including (1) identifying "overall, generic avoided costs" through the ACC, and (2) determining "other benefits (e.g., tax credits, non-energy benefits)." (22:App:799-APP19235.) Such non-energy benefits excluded from the ACC include local job creation, associated economic

[14] RJN, Exh. D (https://docs.cpuc.ca.gov/PublishedDocs/Published/G000/M163/K338/163338441.PDF)
[15] RJN, Exh. E (https://docs.cpuc.ca.gov/PublishedDocs/Published/G000/M334/K734/334734544.PDF)

development, and resiliency or reliability. (20:App:733-APP1761.) Pursuant to AB 327 and SB 350, the Commission *must* consider these benefits. (§ 2827.1(b); § 400 (a) ["The [C]ommission . . . shall . . . [t]ake into account the use of distributed generation to the extent that it *provides economic and environmental benefits in disadvantaged communities*."] (emphasis added).) The Commission commits legal error by skipping this second step, departing from its own processes, and equating generic avoided costs measured by the ACC to "total benefits," in contravention of section 2827.1 and the Commission's own guidance.

The Decision compounds this error by setting compensation for exported energy supplied by distributed generation to values derived from the ACC alone. (21:App:797-APP18348 [Decision at 104].) Because the ACC sets compensation for exports at a value lower than the actual value of distributed generation, the successor tariff does not comply with section 2827.1's mandate to ensure that the NEM tariff reflect the actual benefits of distributed generation.

In addressing the absence of non-energy benefits from the ACC, the Decision simply defers consideration of these benefits to a "successor proceeding to R.14-10-003." (21:App:797-APP18310

[Decision at 66].) However, the successor NEM tariff is already in effect. Speculative future refinements to the ACC cannot cure a violation of section 2827.1 that has already occurred.

D. The Decision commits legal error in arbitrarily treating NEM customers' reduced use of grid-supplied energy as a cost of distributed generation.

Turning from benefits to costs, the Decision measures the cost of distributed generation by looking at how much money NEM customers save as a result of the consumption of renewable power generated on-site. (21:App:797-APP18290 [Decision at 46].)

By relying on customer bill savings, the Decision treats any action by NEM customers that reduces their use of energy supplied by grid as a cost. (See 14:App:364a-APP10869:6-8; 13:App:361-APP10283:19-26.) In other words, the Decision assumes that any time customers reduce their electric bill—whether through energy efficiency, conservation, use of an alternative fuel (e.g., gas), or use of a customer owned generator—they shift the cost of grid maintenance to other customers.

The Commission's assumption that customer bill savings are a cost to the electrical system is inconsistent with its

treatment of similar efforts to reduce energy use from the grid (such as energy efficiency improvements) as a *benefit* to the system. California does not rely on bill savings to measure the cost of energy efficiency, another distributed energy resource. (See, e.g., D.21-05-031, Assessment of Energy Efficiency Potential and Goals and Modification of Portfolio Approval and Oversight Process (May 26, 2021) pp. 21-22 [treating energy savings as benefits, rather than costs].)[16] Other than NEM solar customers, utility customers are not accused of increasing costs when they reduce their use of utility-supplied electricity. These non-NEM actions could be drying clothes on a clothesline instead of in an electric dryer, or switching out an incandescent light bulb for an efficient LED.

In these examples, the customer offsets electricity usage at the retail rate, the same framework used with NEM 2.0. But rather than accusing these customers of increasing costs, the Commission prioritizes these non-NEM actions by identifying energy efficiency and reduced demand ("demand response") as the first resources to be relied upon to meet new demand. (D.12-

[16] RJN, Exh. F (https://docs.cpuc.ca.gov/PublishedDocs/Published/G000/M385/K864/385864616.PDF)

01-033, Decision Approving Modified Bundled Procurement Plans (Jan. 18, 2012) p. 17.)[17] Rooftop solar, like energy efficiency, also permanently reduces peak load. (9:App:322-APP07660-62.) This reduction is a benefit, not a cost.

The Decision's treatment of NEM customers' bill savings from reduced use of grid-supplied energy as costs is inconsistent with the Commission's prior decisions on energy conservation efforts and unreasonably attributes more costs to NEM customers than to other customers who reduce energy use from the grid. By penalizing NEM customers and treating their behavior as a cost to the system while encouraging substantially similar behavior from other customers and treating it as a benefit to the system, the Decision improperly applies section 2827.1(b)(3)'s requirement that the tariff be based on the costs and benefits of distributed generation and fails to proceed in the manner required by law. (§ 1757(a)(2).)

In attempting to justify the disparate accounting of NEM customer bill savings, the Decision states that "the grid must be always prepared for the intermittent decrease and increase of

[17] RJN, Exh. G (https://docs.cpuc.ca.gov/PublishedDocs/WORD_PDF/FINAL_DECISION/157640.PDF)

usage" by NEM customers. (21:App:797-APP18358-59 [Decision at 114-15].) The Decision's statement, while true, does not justify the differential treatment of NEM customers. The grid provides increasing and decreasing energy to *all* customers based on each customers' instantaneous demand. Moreover, the utilities plan for both energy efficiency-related *and* load reductions resulting from distributed generation. (14:App:364a-APP10886:6-12.) As with energy conservation, utilities are able to adjust their distribution and transmission need projections to account for the growth of distributed generation. The Commission provides no logical reason to treat NEM customers' bill savings, but not those of other customers, as a cost shift to non-participants.

The Decision's focus on bill savings also ignores evidence in the record demonstrating the actual cost to serve NEM customers, identified by the Lookback Study. (7:App:280-APP05619 [determining the actual costs to serve NEM customers based on a comparison of "the customer bill from the analysis year to the utility's costs of servicing the customer in that year"].) The Commission routinely relies on cost of service when setting rates. (1:App:29- [RT Vol. 1, 87:12-22; 10:App:350-APP08678-79.) In rejecting PCF's proposal that the actual cost of serving NEM

customers be used to set their rates, the Decision incorrectly asserts that PCF requested that the cost-of-service be used "in place of the Avoided Cost Calculator." (21:App:797-APP18305 [Decision at 61].) The ACC purports to measure the *benefits* of distributed generation, but PCF's argument is that cost-of-service should replace the Commission's assessments of distributed generation's *costs*.

By treating NEM customers' behaviors as costs while treating the same behaviors by other customers as benefits, the Commission acts arbitrarily and fails to adhere to section 2827.1's requirements to accurately evaluate the costs and benefits of distributed generation. Combined, the Decision's overemphasis on non-participant effects as a cost and its failure to quantify the "total" benefits of distributed generation result in a deficient evaluation that violates the requirements of section 2827.1(b)(4).

Accordingly, the Commission improperly "put a thumb on the scale by . . . overvaluing the costs" of BTM generation. (*NHTSA*, 538 F.3d at 1198.) The Court should grant the writ of review, reverse the Commission's cost-effectiveness determinations, and remand with instructions to properly

consider *all* benefits of distributed generation to all customers and the electrical system as a whole.

II. The Decision's cost-effectiveness analysis improperly elevates purported costs to non-participants over cost-effectiveness to the electrical system as a whole.

In addition to its arbitrary assignment of costs to distributed generation, the Decision commits legal error by improperly focusing on costs to non-participants over the cost-effectiveness to the electrical system as a whole. To begin, the Commission erroneously interprets sub-paragraphs section 2827.1(b), which requires consideration of costs and benefits "to all customers and the electrical system." This sub-section addresses NEM's cost-effectiveness for the system as a whole, not effects on one ratepayer group. In focusing on non-participants, however, the Decision's reading of section 2827.1(b)(4) replaces "all" customers with "some" customers.

The legislative history of section 2827.1 underscores the Commission's error. Previous drafts of AB 327 focused on non-participants, but those references were removed in the final version. (D.16-09-036, Order Modifying Decision (D.) 16-01-044

And Denying Rehearing, As Modified (Sept. 22, 2016) p. 7.)[18] Notably, as the Commission found in an earlier NEM decision, prior drafts of AB 327 had a "single focus on non-participant interests." (*Id.*)) The Legislature, however, "broadened" the bill's focus to include "consideration of costs and benefits to *all customers and the electrical system*." (*Id.*) (emphasis in original.) The Commission acknowledged that this broadened scope meant that the Legislature prioritized cost-effectiveness to all customers over non-participant impacts. As the Commission itself held in that 2016 decision, "[h]ad the Legislature intended to mandate the Commission completely prevent the potential for all cost-shifting, or that we base our determination solely on non-participant interests it could have done so in the statute itself. It did not." (*Id.*)

Notwithstanding this Commission's earlier acknowledgement of this legislative history, the Commission places a heavy emphasis on non-participant effects throughout the Decision. (21:App:797-APP18290-91 [Decision at 46-47] [explaining that, while electricity rate increases have been

[18] RJN, Exh. H (https://docs.cpuc.ca.gov/PublishedDocs/Published/G000/M162/K043/162043082.PDF

"driven, in part, by rising transmission investments" by the utilities, "this proceeding focuses on . . . a significant cost shift from solar customers" to non-participants]; 21:App:797-APP18287-92, APP18295-98 [Decision at 43-48, 51-54] [analyzing non-participant impacts].) In fact, the Commission relies almost entirely on purported impacts to non-participants when it substantially modified the successor tariff for non-residential customers—even though those customers pay more than the actual cost to serve them and the non-residential tariff is cost-effective to the electrical system as a whole by the Commission's own standards. (See section V, *infra.*)

The Decision's focus on addressing the purported cost shift ignores the legislative history and plain language of section 2827.1.

III. The Decision violates the statutory mandate that any successor tariff maintain the robust growth of distributed generation in California.

A. The successor tariff fails to ensure the continued growth of distributed renewable generation.

In setting forth the parameters for a net metering tariff in section 2827.1(b), the Legislature directed the Commission to ensure that any such tariff "shall do *all* of the following,"

including ensuring "*that customer-sited renewable distributed generation continues to grow sustainably*." (§ 2827.1(b)(1) (emphasis added).) The successor tariff, however, is specifically designed to decrease bill savings and increase payback periods for new entrants to nine years. (21:App:797-APP18320, APP18456 [Decision at 76, 212 (Finding of Fact ("FoF" 56)].) These changes will devastate solar adoption rates, especially for working-class Californians. The Commission committed legal error by imposing a new tariff that fails to comply with its obligation to ensure continued growth in distributed generation.

Ample evidence in the record demonstrates that the adoption of similar tariffs caused precipitous declines in solar adoption. 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 the National Renewable Energy Laboratory analysis shows that customer willingness to adopt solar drops precipitously as the payback period increases from 4 to 10 years. (6:App:264-APP04658-60.)

Indeed, the Commission effectively conceded that, despite the Legislature's command, *the successor tariff will decrease solar adoption rates*, particularly in low-income communities. (See 21:App:797-APP18470 [Decision at 226 (FoF 197) [finding 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-APP18456 [*id.* at 212 (FoF 53)] ["studies show that consumers look at monthly bill savings when making an economic decision on adopting solar"]; 21:App:797-APP18319-21 [*id.* at 75-77] [detailing decreased bill savings calculated by a longer, nine-year payback period, contrasted with three to five years under NEM 2.0]; 21:App:797-APP18468 [*id.* at 224 (FoF 177)] ["the successor tariff will require longer payback periods in comparison with the NEM 2.0 tariff"].)

This dramatic impact on the adoption of distributed resources cannot be squared with the plain meaning of the statute. The word "continue" means "to maintain without interruption a condition, course, or action." (See "Continue," Merriam-Webster.com Dictionary, Merriam-Webster, https://www.merriamwebster.com/dictionary/continue [accessed Apr. 8, 2023]); *Stephens v. County of Tulare* (2006) 38 Cal.4th

793, 801-02 [explaining that statutory interpretation looks to "the plain meaning of the actual words of the law"].) Accordingly, by requiring that distributed generation growth "continue," the Legislature directed that any successor tariff may not materially reduce the continued uptake of—and thus demand for—these solar systems.

Further, by using the phrase "continues to grow *sustainably*," the Legislature determined that the existing rates of renewable generation are sustainable and should continue. Put another way, the Legislature's inclusion of "continues to grow sustainably" means that, at the time this legislation was enacted, distributed generation was growing at sustainable rates—otherwise, there would be no sustainable growth to "continue."

Maintaining existing rates of rooftop solar adoption is also consistent with the legislative history of section 2827.1, which shows that the Legislature intended to ensure the continued sustainable growth of the solar industry. For example, the Assembly Committee on Utilities and Commerce's analysis of AB 327 emphasized the successor tariff's relationship to solar companies. It stated that, in evaluating successor tariffs, the Commission will need to "assess whether [ ] changes to NEM will

impact the sustained growth of the industry." (6:App:264-APP04657 [quoting Assembly Committee on Utilities and Commerce (Steven Bradford, Chair), Bill Analysis: AB 327 (Perea) (Date of Hearing: Sept. 11, 2012)].) Similarly, the legislative findings in section 2827(a) found and declared that the NEM program will "encourage substantial private investment in renewable energy resources" and "stimulate in-state economic growth."

The inextricable link between the economic value of rooftop solar installations—whether through bill savings or payback period—and demand for additional systems was not reasonably disputed. For instance, the California Solar and Storage Association identified a reasonable payback period as "[t]he best measure of whether growth in distributed generation can be steady." (6:App:264-APP04657.) SEIA/Vote Solar likewise stated that sustainable growth "requires reasonable economics for participants." (9:App:304-APP06857.) Even the Joint Utilities admitted that more attractive economic returns would generally increase solar adoption rates, and, conversely, less attractive economic returns could decrease adoption rates. (4:App:235-APP03701:1-8.)

The Decision's deliberate extension of the payback period to at least nine years—an increase that will dramatically reduce the adoption of distributed generation—violates the Commission's obligation under section 2827.1 to ensure the continued, sustainable growth of distributed generation.

B. The Commission's effort to justify its departure from the statutory mandate highlights the legal error mandating this Court's review and reversal.

The Commission's effort to defend its failure to adopt a tariff that ensures the continued growth of distributed generation neither corrects nor excuses its violation of the statute. The Decision justifies its failure by claiming that the statute makes purportedly competing demands of the successor tariff that the Commission must "balance." (21:App:797-APP18301-02 [Decision at 57-58].) In doing so, the Decision rewrites the Legislature's unambiguous command that it "shall do *all* of the following" in designing a net metering tariff and replaces it with a directive to "balance" the items listed in Section 2827.1. (*Id.*) Even the for-profit, private utility companies who so strenuously oppose net metering criticized the Decision's overemphasis on balancing. (22:App:805-APP19281 [Joint Utilities' Response to Application

for Rehearing (Feb. 2, 2023), at 5, noting the Decision "*states this intent to balance no less than 20 times throughout the Decision*." (emphasis added)].) Thus, the Commission found that doubling the payback periods for rooftop solar systems "presents *a balanced approach* to promoting the adoption of solar systems paired with storage." (21:App:797-APP18456 [Decision at 212 (FoF 56)] (emphasis added); 21:App:797-APP18319 [*id*. at 75] [the payback period for NEM 2.0 is three to five years; the Commission's target for the successor tariff is nine years].)

Section 2827.1 does not, however, call on the Commission to balance among the various listed requirements. Instead, the Section mandates that the Commission "*shall* do *all* of the following." (§ 2827.1(b) (emphasis added).) Accordingly, since the Commission effectively conceded that the successor tariff will not ensure that distributed solar will continue to grow sustainably, the Court must reverse the Decision and order the Commission to comply with the Legislature's command.

The Commission also suggested that complying with the Legislature's mandate would somehow conflict with other provisions of Section 2827.1(b). (See 21:App:797-APP18461 [Decision at 217 (FoF 107)].) The purported conflict, however, is

of the Commission's own making. In particular, the Commission erroneously interprets section 2827.1(b)(1)'s "continues to grow sustainably" requirement to mandate reducing the supposed cost shift, stating: "[a]llowing the net energy metering tariff to result in growing costs shifted to non-participant ratepayers *is not sustainable to the overall health of net energy metering*." (21:App:797-APP18302 [Decision at 58] (emphasis added).)

However, nothing in these provisions refers to a purported cost-shift. To the contrary, balancing costs and benefits "to all customers and the electrical system" requires analyzing effects on all customers as a collective whole, rather than addressing claimed cost shifts among particular customers. **(See section II, *supra*.)

Moreover, as a factual matter, no conflict exists between ensuring the continued sustainable growth of renewable generation and balancing the total costs and benefits of the tariff. Had the Commission taken into account the full benefits of distributed generation, as it was required—and failed—to do (see section I, *supra*), it would have determined NEM 2.0 is cost-effective from the perspective of all customers and electrical system as a whole.

In short, rather than follow basic rules of statutory construction, which mandate that the Commission make every effort to satisfy all statutory requirements, (see, e.g., *Cacho v. Boudreau* (2007) 40 Cal. 4th 341, 352; *People v. Guzman* (2019) 8 Cal.5th 673, 682 [agency must "give effect wherever possible to every word" of a statute]), the Commission misinterprets multiple sub-paragraphs of Section 2827.1 to generate a purported conflict that it resolves by devastating the future adoption of distributed solar for working-class Californians.

The Commission's interpretation of the Public Utilities Code is not entitled to deference if it is not supported by the plain meaning of the statute. (*Southern California Gas v. P.U.C.*, 24 Cal.3d at 657-60; *Bd. of Trustees of Cal. State Univ. v. Public Employee Relations Bd.*, 155 Cal.App.4th at 876). Here, the Commission's reading of section 2827.1(b) runs contrary to that provision's plain text. The Court should reverse the decision and remand with instructions for the Commission to give full effect to each requirement in Section 2827.1(b), including the mandate for continued distributed solar growth in California.

IV. The Commission erred as a matter of law by failing to include specific alternatives designed for growth among residential customers in disadvantaged communities.

Section 2827.1(b)(1) requires the successor tariff to "include specific alternatives designed for growth among residential customers in disadvantaged communities." The Commission recognized that the statute requires *affirmative* steps to "increase participation by [those] in low-income households and [DACs]." (21:App:797-APP18336 [Decision at 92].) However, the Commission failed to fulfil this statutory mandate by (1) eliminating the proposed Equity Fund, (2) underestimating the actual cost of solar installation for low-income customers, and (3) improperly deferring consideration of the benefits of NEM community solar systems and other benefits of distributed generation that particularly accrue to DAC and other low-income community residents.

A. The Commission failed to design an alternative for growth among residential customers in disadvantaged communities by improperly relying on an uncertain and separate legislative program to replace the Equity Fund.

The Decision acknowledges that DACs "should not continue to be left behind with respect to clean energy options, including

electrification and storage." (21:App:797-APP18336 [Decision at 92].) To fulfill this guiding principle, parties proposed—and the Commission's first proposed decision adopted—an "Equity Fund" that would rely on the tariff's rate structure to promote access to distributed solar in DACs and fulfill the Legislature's mandate to specifically serve those communities. (21:App:797-APP18422-23 [Decision at 178-79].) However, the Commission ultimately rejected the Equity Fund on the grounds that the Legislature passed AB 209, a separate bill designed to encourage battery storage adoption in DACs. (21:App:797-APP18424-25 [Decision at 180-81].) The reliance on AB 209 to fulfill its statutory mandate constitutes legal error for the reasons below.

First, section 2827.1(b) mandates that *the tariff itself* ensure distributed solar growth among residential customers in DACs. The statute sets forth requirements the Commission must accomplish "[i]n developing the standard contract or tariff" itself; among those goals, the tariff must "include" specific alternatives for growth in DACs. (§ 2827.1(b)(1).) The Equity Fund satisfied this mandate by relying on the tariff to raise funds for growth in DACs. However, AB 209 is undisputedly not part of the successor

tariff. Thus, as a matter of law, it cannot satisfy the Legislature's mandate for solar growth in DACs.

By concluding that AB 209 satisfies Section 2827.1(b)'s mandate that the tariff itself serve DACs, the Commission implicitly found that AB 209 repealed the statute's express command. However, the Decision makes no finding or demonstration that AB 209 represented such a repeal by implication. (See *Tuolumne Jobs & Small Business Alliance v. Superior Court* (2014) 59 Cal.4th 1029, 1039 [reiterating the "strong presumption against repeal by implication"].) Nothing in AB 209 suggests the Legislature intended to relieve the Commission of the obligation in "developing the standard contract or tariff" to "include specific alternatives designed for growth among residential customers in" DACs.

Second, AB 209 cannot satisfy the Commission's mandate because AB 209 funding is not guaranteed. In fact, the Decision concedes that AB 209 funds are still subject to legislative appropriation. (21:App:797-APP18424 [Decision at 180].) The State's anticipated budget shortfall jeopardizes this funding, and AB 209 incentives are only earmarked for 2023-24. (22:App:799-APP18574; 22:App:799-APP18612; 22:App:799-APP18635.) In

fact, Governor Newsom has already cut $270 million from the AB 209 funding due to the budget shortfall. (22:App:799-APP18574; 22:App:799-APP18693.) Despite the uncertainty and actual budget cuts, the Commission simply declared that AB 209 funding *will* be provided, "given the climate crisis and the important climate policies [in the] budget." (21:App:797-APP18424-25 [Decision at 180-81].) This unsupported declaration does not satisfy the Commission's obligation to satisfy the Legislature's command to serve low-income households and DACs.

Third, reliance on AB 209 violates the Commission's Rate Design Principles, which recommend, among other things, adequate outreach and engagement to ensure continuous growth of programs, especially in DAC and low-income communities. (D.15-07-001, Decision on Residential Rate Reform for PG&E, SCE, and SDG&E and Transition to Time-of-Use Rates (July 13, 2015) pp. 27-28 ["Transitions to new rate structures should emphasize customer education and outreach that enhances customer understanding and acceptance of new rates."].)[19] AB

[19] RJN, Exh. I (https://docs.cpuc.ca.gov/PublishedDocs/Published/G000/M153/K110/153110321.PDF)

209, however, lacks the Equity Fund's critical elements for community engagement that specifically target eliminating barriers and increasing access to renewable resources in DACs.

As presented in the Commission's first proposed decision, the Equity Fund would have included "an inclusive process with disadvantaged communities, environmental justice groups, and consumer advocates to determine how the funds should be spent to address barriers to adoption in these communities." (17:App:463-APP14101-04.) By contrast, AB 209 funds technologies alone and fails to provide adequate marketing, education, and outreach strategies. (§ 379.10 [detailing the uses of AB 209 funding to increase individual customer and grid resiliency, reduce electric ratepayer costs, and to reduce air pollution, but not to increase access to distributed resources].)

Addressing barriers to increased distributed generation in DACs is essential to satisfying the mandate of § 2827.1(b). As the Commission recognizes, "[l]ow income households have financial challenges *and barriers* to adoption of behind-the-meter resources." (21:App:797-APP18469 [Decision at 225 (FoF 192)] (emphasis added).) Thus, even if the AB 209 funds were guaranteed, a finite amount of state subsidies could not reach the

root cause of the problem before the Commission—the barriers facing DACs. Absent funding for critical educational and outreach initiatives to directly tackle these barriers, AB 209 will not allow distributed generation to grow in DAC and other low-income communities, as evidenced by the progress of other Commission initiatives. (22:App:799-APP18801 ["The advanced energy community design and financing approach aims to address longstanding structural and programmatic barriers."]; 22:App:799-APP18923 [describing the benefit of "Community Energy Navigators" in increasing program participation through effective community outreach and education].)

Finally, AB 209 does not address the Commission's fundamental failure to protect DAC and other 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 [Decision at 226 (FoF 197)].) But despite providing CARE customers with limited, additional compensation for exports, the successor tariff is deliberately designed to *increase* the number of years to payback for all customers, including low-income

customers. (21:App:797-APP18321 [Decision at 77].) As a result, the Commission increased the same barriers to lower-income customer adoption that it ostensibly aims to reduce. This approach violates section 2827.1's requirement that the successor tariff include alternatives "designed for *growth*" in DACs.

Based on the foregoing, to remedy the Commission's legal errors, this Court should reverse and remand with instructions to either reinstate the Equity Fund or include another specific alternative that achieves the requisite growth of customer-sited renewable distributed generation in DACs.

B. The Commission's successor tariff fails to provide an alternative for growth in disadvantaged communities because its proposed alternative is based on an inaccurate cost of installing solar in those communities.

The Joint Utilities' response to Petitioners' Application for Rehearing argued that the Decision's inclusion of a small increase in export compensation for low-income customers in disadvantaged communities (the "ACC Plus adder") constitutes a specific alternative for growth. (22:App:805-APP19283.) Under the ACC Plus adder, low-income customers would receive fixed cents per kilowatt-hour in addition to the ACC-based hourly export credits available to all NEM customers. This additional

payment, referred to as an "adder," will step down over time and is designed to deliver a 9-year payback for low-income customers with solar-only systems. (21:App:797-APP18367 [Decision at 123].)

Even assuming a 9-year payback period were adequate to encourage solar adoption, the ACC Plus adder is illusory. 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, the record demonstrates that, after taking into account the higher financing and other costs associated with serving low-income customers, the actual cost to install solar in DACs is $4.28 per watt. (9:App:304-APP06858; 14:App:362b-APP10590:8-16; 21:App:743-APP17764-65.)

GRID Alternatives, an organization experienced in serving low income communities,[20] testified that low-income households often do not have the available capital to purchase their systems outright or to reduce system cost through the Investment Tax

[20] (See 20:App:733-APP17621 fn. 13, citing https://gridalternatives.org/sites/default/files/2022-04/DAC-SASH%202022%20MEO%20plan_March%202022%20FINAL.pdf)

Credit, so financing and third-party ownership provides the only viable pathway to access rooftop solar and storage. (*Id.*) Financing costs increase payback periods and raise the cost of installing solar. (4:App:235-APP03710; 14:App:362b-APP10590-91.) Challenges obtaining upfront financing—whether because of poor credit, lack of collateral, insufficient access to private funding, or inability to take on additional debt—prevents access to clean energy resources in DACs and other low-income communities. (22:App:799-APP19099-101, APP19132-33.) As a result, the ACC Plus adder is too low, and the Commission's determination that the ACC Plus adder will encourage *growth* in disadvantaged communities is unsupported by any evidence in violation of the Commission's obligations under sections 1751 (a)(3) and (a)(4).

The Commission claims that the $3.30 per watt estimate contemplates financing costs, but provides no evidence to support this claim. Instead, it arbitrarily estimates the cost of installation by picking a number that falls between the National Renewable Energy Laboratory and the Lawrence Berkeley National Laboratory's *Tracking the Sun* reports' estimated values. (21:App:797-APP18326 [Decision at 82].) Both reports are based

on the "average" solar customer, and they do not focus exclusively on low-income customers.[21]

To design an alternative for continuous growth in DACs, the Commission must examine costs for low-income customers, especially if the Commission is to adhere to the mandate to design a "*specific* alternative" for DACs. (§ 2827.1(b)(1) (emphasis added).) Based on the foregoing, the Commission's determination that $3.30 reflects the cost of solar for low-income customers is not supported by substantial evidence in the record, and the program built on that assumed cost fails to provide a viable alternative for growth in disadvantaged communities.

C. By improperly deferring consideration of community solar and storage, the Commission erred as a matter of law by failing to ensure distributed generation growth among residential customers in disadvantaged communities.

The Commission failed to comply with its mandate to include specific alternatives for growth in DACs by improperly deferring consideration of community solar systems. The record details the importance of community solar and the benefits more

[21] See *Tracking the Sun* (2020), https://emp.lbl.gov/publications/distributed-solar-2020-data-update at slides 27-28 (analyzing "national median installed prices".)

affordable systems can confer to DAC and other low-income communities. (15:App:384-APP11778-81.) NEM-based community solar programs provide a meaningful opportunity to expand access to customers who would otherwise be unable to participate. This includes renters, who generally have lower incomes than homeowners, and who have been historically under-represented among NEM participants. Well-designed community solar and storage programs could realize considerable grid and ratepayer benefits. (See 10:App:337-APP08103-04.)

The Commission recognized "that a community renewable energy program tariff has the potential to benefit the grid and ratepayers." (21:App:797-APP18432 [Decision at 188].) Despite this evidence, the Commission deferred considering community solar and community storage proposals, reasoning that such programs are "premature" considering scheduled proceedings. (*Id*.) By postponing its determination on community solar, the Commission fails to expand access to NEM to lower-income customers as required by section 2827.1(b).

V. The Decision's Changes to the Tariff for the Commercial, Agricultural and Industrial Sectors Are Based on Erroneous and Unsupported Findings.

The Commission abused its discretion by making drastic changes to the NEM tariff for commercial, agricultural, and industrial (non-residential) sectors; these changes dramatically reduce compensation for non-residential customers who export power to the grid and it makes those changes effective immediately, without any transition period. (21:App:797-APP18402 [Decision at 158].) The Decision justifies these changes with a finding that the non-residential tariff was not cost-effective. That finding, however, is the result of a legally erroneous analysis, and thus cannot support the Commission's decision. (§ 1757(a)(3); see also *Pedro v. City of Los Angeles* (2014) 229 Cal.App.4th 87, 99 [a decision that "fail[s] to comply with required procedures, appl[ies] an incorrect legal standard, or commit[s] some other error of law," will be reversed on appeal].)

Specifically, by finding the NEM 2.0 tariff for non-residential customers to be not cost-effective based on its impacts to non-participants, the Commission departs from prior decisions regarding requiring a focus on the cost-effectiveness of the tariff

as a whole. It also violates the express requirements of section 2827.1.

The Decision determines that the Commission's "cost-effectiveness analysis should be conducted in the manner directed by D.19-05-019." (21:App:797-APP18302 [Decision at 58].) Under that framework, as stated by the Decision, the total resource cost test ("TRC test") is the "primary test" to determine cost-effectiveness of the successor NEM tariff to the electrical system as a whole. (21:App:797-APP18454 [Decision at 210 (FoF 36)]; 1:App:109-APP01371-72; D.19-05-019, p. 58 (FoF 4, 6); see also § 2827.1(b)(4) [requiring an analysis of costs and benefits to the electrical system as a whole].) The Commission's Standard Practice Manual, which describes the Commission's cost-effectiveness analysis tools, further warns against relying solely on one test: "[t]he Standard Practice Manual states that the cost-effectiveness tests should *not* be used individually, but instead [the Commission should] consider the tradeoffs between the tests." (21:App:797-APP18454 [Decision at 210 (FoF 35)] (emphasis added).)

Here, the Decision acknowledges that the NEM 2.0 tariff for the commercial, agricultural and industrial sectors in every

utility service area scores higher than 1.0 under the TRC test—a score that demonstrates the program *is* cost effective from the perspective of all customers and the electrical system as a whole. (21:App:797-APP18292-94, APP18453 [Decision at 48-50, 209 (FoF 23)] ["commercial, agricultural, and industrial sectors of the NEM 2.0 tariff had TRC test and PCT results of 1.0 or better"].) The Decision also acknowledges that the non-residential tariff showed favorable participant cost test scores, showing it was cost-effective for participating customers. (See 21:App:797-APP18292-93 [Decision at 48-49].)[22]

Notwithstanding its own admonition that the TRC should be prioritized when assessing cost-effectiveness, when evaluating the non-residential tariff, the Commission determined it "should place more weight on the results of the RIM test," which is focused on impacts to non-participants. (21:App:797-APP18294 [Decision at 50].)

[22] These tests are discussed in Commission Decision D.19-05-019, Decision Adopting Cost-Effectiveness Analysis Framework Policies for All Distributed Energy Resources (May 21, 2019) at 8, 10.

This decision to elevate the results of the RIM test and ignore the cost-effectiveness of the non-residential tariff to the system as a whole represents a stark departure from precedent and the approach dictated by the Decision itself.

While the Decision concludes that the cost-effectiveness tests "should not be used individually," (21:App:797-APP18309, APP18454 [Decision at 65, 210 (FoF 35, 36)]), the Commission determined the NEM tariff for commercial, agricultural and industrial sectors is not cost-effective based on its RIM test scores *alone* (21:App:797-APP18453 [Decision at 209 (FoF 23, 24)].) Beyond this legal error, the record demonstrates that commercial and industrial customers pay more than the cost to serve them. As determined by the Lookback Study, "after the installation of the NEM generator, NEM 2.0 nonresidential customers pay approximately $117.5 million higher utility bills than the estimated cost for the utilities to provide them service." (1:App:64-APP796.) In other words, even after installing a distributed generation system and producing their own power on site, non-residential customers pay far more in utility bills than the actual cost to provide them energy from the grid.

Accordingly, the Commission did not proceed in the manner required by prior Commission decisions and committed an abuse of discretion. (§ 1757(a)(2).) The Decision also violates the requirements of section 2827.1 that the successor tariff be based on the benefits and costs of distributed generation. As a result, the findings do not support any proposed changes to the NEM 2.0 tariff for commercial, agricultural, and industrial customers. (§ 1757(a)(3).)

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that the Court grant writ relief as prayed for in this petition.

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CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court, Rule 8.204, I hereby certify that the text of this Petition for Review contains 13,742 words, as determined by the word processing software used to prepare this brief and exclusive of this certification and the other exclusions referenced in Rule of Court 8.204.

DATED: May 3, 2023

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