

**A167721**

**IN THE COURT OF APPEAL  
OF THE STATE OF CALIFORNIA**

**FIRST APPELLATE DISTRICT, DIVISION THREE**

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**CENTER FOR BIOLOGICAL DIVERSITY, INC.,  
ENVIRONMENTAL WORKING GROUP, AND  
THE PROTECT OUR COMMUNITIES FOUNDATION,**

*Petitioners,*

*v.*

**PUBLIC UTILITIES COMMISSION,**

*Respondent;*

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

*Real Parties in Interest.*

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CAL. P.U.C. DECISION NO. 22-12-056;  
ON REMAND FROM CALIFORNIA SUPREME COURT CASE NO. S283614

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**PETITIONERS' SUPPLEMENTAL  
RESPONDING BRIEF**

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## INTRODUCTION

The Supreme Court held in this case that “the Legislature’s stated intention to make judicial review of the Commission’s decisions ‘consistent with judicial review of the other state agencies’ is best understood to include judicial review of the statutory interpretations underlying those decisions.” (*Center for Biological Diversity, Inc. v. Pub. Util. Com.* (2025) 18 Cal.5th 293, 307-308 (*CBD II*.) Accordingly, the Supreme Court instructed this Court to “address [on remand] in the first instance” the question “whether the challenged tariff should be upheld under the *Yamaha* standard” for reviewing agency interpretations of statutory language. (*Id.* at p. 309.) Answering that question requires the Court to carry out its “quintessential judicial duty—applying its independent judgment de novo to the merits of the legal issue before it,” beginning with the text of the statute. (*Id.* at p. 305.)

Petitioners have assisted the Court in performing that task. Based on a close parsing of the words of section 2827.1,<sup>1</sup>

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<sup>1</sup> Throughout this brief, unless otherwise indicated, (1) statutory citations are to the Public Utilities Code; (2) emphases were added to quotations while internal quotation marks, citations, brackets, ellipses, footnote references, and the like were omitted from them; (3) “Respondents” refers collectively to respondent California Public Utilities Commission (the Commission) and to the three utilities that are the real parties in interest (the Utilities); (4) “2022 Tariff” or “the Tariff” refers to the Commission’s December 15, 2022 decision identified as D.22-12-056, *Decision Revising Net Energy Metering Tariff and Subtariffs* (21 App 18242); (5) “2016 Tariff” or “NEM 2.0” refers to the Commission’s January 28, 2016 decision identified as D.16-01-044, *Decision Adopting Successor to Net Energy Metering*

Petitioners’ supplemental opening brief presented detailed statutory interpretations—summarized below in Part I—establishing that the Commission failed to proceed in the manner required by law (§ 1757.1, subd. (a)(2)) when it promulgated a successor tariff that violated the statute’s letter and overall purpose. That purpose was to make customer-sited generation a permanent fixture in California and to ensure its growth so that customer-sited generation that is primarily for local use by customer-generators and their neighbors would enable the state to meet increased electrical demand without forcing ratepayers to fund costly expansions of the utilities’ electrical grid.<sup>2</sup> This, Petitioners have shown, is the single, *best* judicial interpretation of the statutory language.

Respondents, by contrast, have *not* assisted the Court in performing the task that the Supreme Court assigned. Their supplemental opening briefs—like the 2022 Tariff itself—largely fail to present any competing statutory interpretation, much less commit to any single and purportedly *best* statutory interpretation. Instead, Respondents assert that the statute’s language is indeterminate<sup>3</sup> and that it therefore granted the

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*Tariff* (May 3, 2023 RJN, Exh. A); and (6) “PB,” “CB,” and “UB” refer respectively to Petitioners’, the Commission’s, and the Utilities’ supplemental opening briefs on remand.

<sup>2</sup> See PB 25-27 (explaining that customer-sited renewable generation facilities allow for increased consumption of clean electricity outside of the utilities’ grid).

<sup>3</sup> See CB 32-39 (Commission posits two “reasonable” interpretations of section 2827.1 without committing to either).

Commission carte blanche to draw upon its “expertise” by basing the Tariff on inapposite “cost-effectiveness” tests<sup>4</sup> that concededly were *not* developed with the purposes or requirements of section 2827.1 in mind and that actually violate the law and undermine the statute’s objectives.

Respondents thus have it all backwards: An agency must first interpret the statute and then develop and apply the analytical methods necessary and appropriate to carry out the statute as so interpreted. Instead, Respondents ask this Court to *infer* from the Commission’s (inapposite) methodological choices the existence of a statutory “interpretation” that the Commission never undertook. That approach cannot be accepted by a court exercising independent, de novo review of the Commission’s orders and decisions under article XII, section 5 of the California Constitution,<sup>5</sup> the judicial-review statute adopted in 1998 (§ 1757.1), and the Supreme Court’s remand order in this case.

To distract the Court from the statute’s actual words, Respondents offer three major arguments (and a welter of minor ones).

**First**, Respondents offer up a variety of “been there, done that” arguments to persuade the Court that it has already decided the (purportedly) few issues that remain in the case. But Respondents’ arguments for avoiding the merits are precluded by

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<sup>4</sup> See PB 33-36 (discussing fundamental difference between cost-benefit and cost-effectiveness tests).

<sup>5</sup> That provision grants the Legislature “plenary power” to “establish the manner and scope of review of commission action in a court of record.”

the Supreme Court’s sweeping remand instruction, which requires this Court to decide whether the 2022 Tariff should be upheld under a different and far more stringent standard of judicial review. That ruling set all of this Court’s previous statutory interpretations at large for plenary redetermination. (See Part II, *post*.)

**Second**, Respondents assert that the Commission’s statutory “interpretation”—whatever it might be—is entitled to “great weight” in the Court’s analysis. (CB 26.) Their deference arguments are nothing more than an attempt to resurrect the now-disapproved *Greyhound*<sup>6</sup> approach under another name in hopes of insulating the 2022 Tariff from meaningful judicial review.<sup>7</sup> Those arguments fail on multiple grounds (see Part III, *post*), including the following:

(1) The Commission’s development of the 2022 Tariff was not guided by any “interpretation” to which deference could attach. (See Part III.A, *post*.) The 2022 Tariff is largely devoid of any such interpretation (as are the Respondents’ supplemental opening briefs). The reason isn’t hard to guess: When its decisions were insulated from effective judicial review by the now-disapproved *Greyhound* approach, the Commission likely felt that there was little point in analyzing the statutory language, as any Commission “interpretation” was almost certain to be upheld.

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<sup>6</sup> *Greyhound Lines, Inc. v. Public Utilities Commission* (1968) 68 Cal.2d 406.

<sup>7</sup> See, e.g., UB 30 (asserting that the 2022 Tariff should be upheld because Commission’s choices were “*reasonable* and within its authority”).

But the era of virtually nonexistent judicial review is over, and the absence of any serious attempt to interpret the statutory language can no longer be excused.

(2) Under *Yamaha Corp. of America v. State Board of Equalization* (1998) 19 Cal.4th 1 and its progeny, the Commission’s vacillating position as to what section 2827.1 requires is entitled to no deference whatsoever. Petitioners demonstrate below that the Commission’s current position departs radically from the one it adopted in the 2016 Tariff under the same statutory language. (See Part III.B, *post.*)

(3) The Commission’s claim that the California Constitution entitles its “interpretations” to “great weight” (CB 26) ignores article XII, section 5 of that document, which granted the Legislature plenary authority not only to determine the Commission’s jurisdiction and powers, but also to formulate the standard for judicial review of Commission actions. The Legislature did just that in sections 1757 and 1757.1, using phrasing that deprives the Commission of any discretion when interpreting the statutes that govern its actions. The Commission’s repeated invocations of its own “expertise” therefore fall flat. A purported “expertise” in cost-benefit analysis does not equate to an expertise in statutory interpretation. On that subject, the Court, not the Commission, is the unquestioned expert, which is why the Court has been tasked with exercising independent, *de novo* review of the Commission’s statutory interpretations. (See Part III.C, *post.*)

*Third*, in lieu of textual interpretation, Respondents offer up a phony story that the Legislature’s purpose in enacting AB 327 (which included section 2827.1) was to “address the cost shift.” (UB 10, 17-18; see Part IV.A, *post.*)

That assertion is wrong, and transparently so. In fact, the Legislature *deleted* proposed “cost shift” language from section 2827.1, including language apparently referring to the RIM test on which the entire cost-shift theory rests. (See PB 29, 36-37, 43, 59; Parts III.B, IV.A, *post.*) Given Respondents’ heavy reliance on the fictional “cost shift,” that deletion is nearly as important to the proper resolution of this case as the words that the Legislature chose to include.

Tellingly, neither Respondent cites even once to the list of statutory purposes expressly codified into law by section 2827, subdivision (a)—which makes no mention of any “cost shift.” (See PB 25-27 [discussing those purposes].) Instead, Respondents point to legislative committee reports describing the cost-shift language that the Legislature *deleted* from section 2827.1. Respondents also point to an early report about a draft of a 2012 bill<sup>8</sup> that added former section 2827.3, a provision repealed in 2017 by operation of a sunset provision, which required the Commission to *study* whether the *original* net energy metering program (NEM 1.0) produced any disparate burdens. But calling for a study to determine whether any burdens existed was a legislative expression of *uncertainty* about the subject to be studied. In no way did it convey acceptance of any views on that

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<sup>8</sup> Assem. Bill No. 2514 (2011-2012 Reg. Sess.) (AB 2514).

subject, much less establish the legislative purpose of section 2827.1.

The idea that the Legislature enacted AB 327 to “address the cost shift” has never been subjected to any probing test of reality. The truth is that the “cost shift” manufactured by the 2022 Tariff was based on the Lookback Study’s use of inapposite RIM-test results instead of the analysis required by section 2827.1. And the theory makes no sense on its face. Customer-sited renewable-generation facilities not only reduce demand on the utilities’ existing electrical grid, reducing maintenance costs; they also generate clean electricity and allow California to consume more electricity without forcing ratepayers to fund costly grid expansions. (See PB 25-27.) Those savings give the lie to the Commission’s expressions of concern that customer-sited generation somehow victimizes the less affluent. Those emotional appeals are as phony as the so-called “cost shift” on which they are founded, and they represent yet another attempt to distract the Court’s attention from the statute’s words and stated intent. (See Part V, *post*.)

Finally, this is not a case in which exercising independent, *de novo* review will plunge the Court into a morass of scientific and economic policymaking decisions—a groundless fear that both Respondents adroitly attempt to exploit. The question posed here is not “*what are the best technical means for addressing the (fictional) cost shift?*” or “*what is the best test for measuring costs and benefits to the utilities’ grid?*” but rather, “*under the best judicial interpretation of section 2827.1, did the Commission*

*proceed in the manner required by law?*” The Commission possesses no comparative advantage in answering the latter question, and whatever answer it offers is owed no deference by this Court. In this case, determining what the statute requires involves no technical or economic expertise beyond the ordinary tools of statutory interpretation.

For all the reasons set forth below and in Petitioners’ supplemental opening brief, the 2022 Tariff should be set aside.

## ARGUMENT

### **I. Petitioners’ supplemental opening brief offered a comprehensive interpretation of the words of the governing statute.**

When determining whether the Commission proceeded in the manner required by section 2827.1, the Court’s principal task is to identify the interpretation that “the court, after applying all relevant interpretive tools, concludes is *best*,” because “[i]n the business of statutory interpretation, if it is not *the best*, it is *not permissible*.” (*Loper Bright Enterprises v. Raimondo* (2024) 603 U.S. 369, 400.)<sup>9</sup> Petitioners’ supplemental opening brief provides that interpretation. For the Court’s convenience, Petitioners

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<sup>9</sup> *Loper Bright* involved the federal Administrative Procedure Act. Neither the federal nor the California Administrative Procedure Act apply in this case. (See § 1701, subd. (b); Gov. Code, § 11351, subd. (a).) But *Loper Bright*’s articulation of how courts use basic statutory-interpretation tools is instructive for the fundamental principle that courts exercising independent review must determine the statute’s *best* interpretation.

briefly summarize the key statutory interpretations (**bolded**) and supporting arguments set forth in that brief.

1. **Subdivision (b)(3) of section 2827.1 requires the Commission to base the tariff upon the costs and benefits of privately funded customer facilities that generate renewable electrical power for use on-site and locally, allowing more electricity to be consumed in the electrical system while preventing increased use and costly expansion of the utility’s grid.** (PB 10, 21.) Instead, however, the Commission required the consultant-authors of the “Lookback Study” to employ an Avoided Cost Calculator (ACC) that looked only at the benefits of reducing demand on *the utilities’ existing grid* (in terms of avoided costs). (PB 26-38.)<sup>10</sup> As a result, the 2022 Tariff is *not* “based on” *the customer-sited facility’s* costs and benefits.

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<sup>10</sup> Respondents’ briefs admit as much, stating that “[t]he Avoided Cost Calculator is a tool that calculates *the costs avoided by utilities* when customers use their rooftop solar panels to meet their consumption needs.” (CB 16-17; see also UB 9 [Avoided Cost Calculator “measures the economic *costs that a utility avoids* when a customer’s solar system provides power instead of the utility.”], 14 [claiming that section 2827.1 only requires the Commission to account for costs and benefits to customers and “*the [utilities’] electrical grid*”]; accord, UB 15 [claiming that “[s]tatutory context” demonstrates that “costs and benefits” in subdivision (b)(3) refers to “economic costs and benefits that accrue to customers and *the [utilities’] grid*”]; cf. PB 51 [explaining that customer-sited facilities and the utilities’ electrical grid are distinct components of the “electrical system”].)

**2. The first clause of subdivision (b)(1) of section 2827.1 requires the Commission to ensure that the tariff maintains at length, without interruption or weakening, the already expanding consumption of electricity generated by customer-sited generation facilities located on private property or used by neighbors.** (PB 39.) Instead, however, the Commission—citing the “undue and burdensome financial expense of nonparticipant ratepayers”—used the Lookback Study’s RIM-test results as a justification for *not* ensuring the continued sustainable growth of customer-sited generation. (PB 41.) As a result, the payback time for rooftop-solar systems doubled or tripled, *discouraging* investment in rooftop solar generation instead of ensuring its sustainable growth. (PB 42.)<sup>11</sup>

**3. The second clause of subdivision (b)(1) of section 2827.1 requires the Commission to include in the tariff—not elsewhere—specific alternatives (DAC Customer Alternatives) designed for growth of customer-sited renewable distributed generation among residential customers in “disadvantaged communities.”**

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<sup>11</sup> An industry amicus brief of which the Supreme Court took judicial notice demonstrated a 63 percent overall decline in solar installations under the 2022 Tariff, with at least nine distributed-generation-industry companies operating in California having filed for bankruptcy and many more being forced to either substantially cut back on their labor force or permanently close. (Brief of Amicus Curiae California Solar Energy Industries Association, Inc. (Dec. 30, 2024, No. S283614) at pp. 38-39 (hereafter CALSEIA Amicus).)

**“Disadvantaged communities” means areas disproportionately affected by environmental pollution and other hazards that can lead to negative public-health effects, exposure, or environmental degradation, as well as areas with concentrations of people that are of low income, high unemployment, low levels of home ownership, high rent burden, sensitive populations, or low levels of educational attainment.** (See PB 46-48.) Instead, however, the Commission substituted *low-income households* for *disadvantaged communities* and failed to include any DAC Customer Alternatives in the 2022 Tariff itself. (See PB 45-46.) The result was a reliance on programs, not included in the Tariff, that lack the certainty and reliability of in-tariff alternatives and that artificially constrict the scope of the statute’s DAC Customer Alternatives, inevitably excluding customers that the Legislature intended to benefit. (PB 45-46.)

Moreover, the so-called “adder” that Respondents cite as an in-tariff DAC Customer Alternative (CB 18-19) did not grant DAC Customers any “*alternative*” designed to encourage customer-sited generation growth in disadvantaged communities—instead, it imposed by fiat the same detrimental payback period on those customers that it imposed on everyone else. That’s not an “alternative.” (See PB 42; Part IV.E, *post.*)

**4. Subdivision (b)(4) of section 2827.1 requires the Commission to approximately equalize the *tariff’s* benefits and costs to “all customers” *and* to the entire “electrical system” (comprising both the customer-generators’**

**facilities and the utilities’ electrical grid).** (See PB 50.)

Instead, however, the Commission’s erroneous implementation of subdivisions (b)(3) and (b)(1) rendered it unable to accurately perform the (b)(4) analysis, and the Commission compounded that error by substituting the word “exports” for the word “tariff” and by excluding benefits to residential customers in disadvantaged communities. (See PB 43-49.) As a result, the Commission failed to perform the required (b)(4) analysis of the 2022 Tariff and limited its analysis of total benefits to those flowing from *exports* of excess energy to the *grid*, while ignoring the *primary* benefit of customer-sited generation: producing electricity for use on-site and locally, allowing for increased consumption of clean electricity in the electrical system without expanding the grid.<sup>12</sup>

Nearly as important as the language included in section 2827.1 is the language that the Legislature *deleted* from that section. As explained below, those deletions doom the Respondents’ core theory that section 2827.1’s purpose and effect is to “address the cost shift.” (See PB 58-59; Parts III.B, IV.A, *post.*)

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<sup>12</sup> The Utilities’ supplemental opening brief craftily acknowledges this benefit, leaving the impression that the 2022 Tariff does, too—but it doesn’t. (See UB 16 [“Customers, in their capacity as customers, receive economic benefits on their bills when a utility avoids costs that would otherwise be incurred to provide power to customers with rooftop solar. The electrical system similarly benefits when it does not need to provide power to customers with rooftop solar.”].)

Respondents’ supplemental opening briefs—like the 2022 Tariff itself—offer no correspondingly detailed and thorough parsing of the words of section 2827.1. Instead, as discussed below, Respondents offer only a series of distractions from those words.

**II. The Court should reject all of Respondents’ “been there, done that” arguments for avoiding the merits, because accepting them would violate the Supreme Court’s remand instruction.**

The Supreme Court’s remand instructs this Court to “address in the first instance” the question “whether the challenged tariff should be upheld under the *Yamaha* standard.” (*CBD II, supra*, 18 Cal.5th at p. 309.) The Supreme Court understood, and clearly expressed its understanding, that applying this far more rigorous standard of review would have a pervasive effect on all prior rulings in the case, throwing them open for plenary redetermination on remand.<sup>13</sup>

Respondents nevertheless offer two “been there, done that” arguments that mistakenly urge this Court to ignore the Supreme Court’s instruction on the theory that the change in the review standard makes no difference. Specifically, they contend that (1) the Court already decided most of Petitioners’ issues in

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<sup>13</sup> The breadth of the Supreme Court’s ruling is undeniable: The court disapproved of three longstanding appellate decisions that applied the same “highly deferential approach” adopted in *CBD I*. (*CBD II, supra*, 18 Cal.5th at pp. 308-309.)

*CBD I*<sup>14</sup> on grounds unaffected by the change in the review standard and those rulings constitute “law of the case,” and (2) Petitioners forfeited the right to reargue two issues on remand because they failed to raise those issues in the Supreme Court.<sup>15</sup>

Petitioners anticipate that the Respondents also may proffer an equally erroneous argument that the Petitioners’ opening brief fails to comply with California Rules of Court, rule 8.200(b)(2) because it raises issues that did not “aris[e] after” this Court’s *CBD I* decision. That is false.

As discussed below, it would violate the Supreme Court’s instruction to accept any of Respondents’ misguided arguments for avoiding the merits.

**A. The “law of the case” doctrine does not apply here because the Court’s remand left no prior interpretive rulings standing and because this proceeding is neither a retrial nor a second appeal.**

Respondents assert that this Court decided issues in *CBD I* that were not dependent on the judicial-review standard and that those rulings therefore remain unaffected by the Supreme Court’s

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<sup>14</sup> *Center for Biological Diversity, Inc. v. Pub. Util. Com.* (2023) 98 Cal.App.5th 20 (*CBD I*).

<sup>15</sup> “[T]he correct term is ‘forfeiture’ rather than ‘waiver,’ because the former term refers to a failure to object or to invoke a right, whereas the latter term conveys an express relinquishment of a right or privilege. As a practical matter, the two terms on occasion have been used interchangeably.” (*PGA W. Residential Assn., Inc. v. Hulven International, Inc.* (2017) 14 Cal.App.5th 156, 175, fn. 13.)

ruling and constitute “law of the case.” That argument fails on two grounds.

*First*, the Supreme Court’s *CBD II* ruling left in its wake no previously established “law” on which the “law of the case” doctrine could operate.

Respondents ignore the scope of the Supreme Court’s holding and remand instruction, which set all prior statutory interpretations at large for plenary redetermination. The *Greyhound* approach to judicial review that the Supreme Court disapproved was radically different from the *Yamaha* independent judgment, de novo review standard that this Court was ordered to apply when interpreting section 2827.1 on remand. And the Supreme Court’s remand instruction singled out no specific issue for review on remand. Accordingly, the Supreme Court’s ruling necessarily affects *all* statutory interpretations that the Court made in *CBD I*, without exception.<sup>16</sup>

The Supreme Court’s opinion itself refutes Respondents’ assertions that some of *CBD I*’s statutory interpretations remain

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<sup>16</sup> As the leading California appellate treatise observes, “[t]he Supreme Court can decide fewer than all issues encompassed in the grant of review and then remand the case to the court of appeal for a decision on the issues left undecided. . . . Such a disposition is likely to occur, e.g., if the appellate court did not reach certain issues *because it decided the appeal on an overriding ground that the supreme court determines to have been erroneous.*” (Eisenberg et al., Cal. Practice Guide: Civil Appeals & Writs (The Rutter Group 2025) ch. 13-E, ¶ 13:188.) Here, the Supreme Court decided “fewer than all issues encompassed in the grant of review” because it decided the appeal on the “overriding ground” that this Court had applied the wrong standard of judicial review.

untouched by the change in review standards. The Supreme Court specifically held that this Court’s judgment in *CBD I* was erroneous *because* it “*relied on Greyhound*,” and the court “remand[ed] for [this Court] to conduct the appropriate inquiry under current law.” (*CBD II, supra*, 18 Cal.5th at p. 299; see also *id.* at p. 308 “[W]e conclude that the Court of Appeal erred *by relying on [Greyhound’s] highly deferential approach.*”).)

And the Supreme Court didn’t stop there: In a lengthy passage, it discussed this Court’s pervasive reliance on the *Greyhound* approach: “In reviewing [the Commission’s] decision, the court [of appeal in *CBD I*] asked the question set forth in *Greyhound*: namely, whether the Commission’s interpretation of section 2827.1 ‘fails to bear a reasonable relation to statutory purposes and language.’ The [*CBD I*] court upheld the Commission’s decision under this ‘uniquely deferential standard of review’” and concluded that the standard “‘allow[ed] for no further inquiry.’” (*CBD II, supra*, 18 Cal.5th at pp. 300-301.)<sup>17</sup>

In short: The Supreme Court clearly expressed its intention that on remand, this Court should revisit *all* of the statutory-interpretation issues in the case. Thus, there simply is no “law of the case” to apply here.

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<sup>17</sup> The Supreme Court likewise observed, with respect to this Court’s ruling regarding the DAC Customer Alternatives requirement of section 2827.1, subdivision (b)(1), that this Court “upheld the Commission’s approach on the ground that it ‘bears a reasonable relation to the statutory purposes and language.’” (*CBD II, supra*, 18 Cal.5th at p. 301.)

**Second**, Respondents’ “law of the case” argument also fails because this is neither a retrial nor a second appeal in the case.

“The doctrine of ‘law of the case’ deals with the effect of the *first appellate* decision on the subsequent *retrial or appeal*: The decision of an appellate court, stating a rule of law necessary to the decision of the case, conclusively establishes that rule and makes it determinative of the rights of the same parties in *any subsequent retrial or appeal in the same case*.” (*Leider v. Lewis* (2017) 2 Cal.5th 1121, 1127, original italics.)

But this is not a “subsequent retrial,” as it is not occurring in a trial court and appellate courts do not conduct “trials.” Rather, this is a remand to an *appellate* court after an initial proceeding on *writ of review* under section 1756—effectively a do-over of that proceeding. Nor is it a second “appeal,” as evidenced by the fact that the parties are engaged in “supplemental” briefing under California Rules of Court, rule 8.200(b), as opposed to following the normal briefing schedule and rules that would apply in a true second appeal. This failure to satisfy the retrial/second-appeal prerequisite for applying the “law of the case” doctrine provides a second ground for rejecting the Respondents’ “law of the case” argument.

But even if the present proceeding could be considered a retrial or second appeal, the fact remains that, with respect to the statutory-interpretation issues in this proceeding, the only “law of the case” is that laid down by the Supreme Court in *CBD II*—namely, that the *Greyhound* approach to judicial review of the Commission’s statutory interpretations has been supplanted by

independent, de novo judicial review. Viewed in that light, Respondents’ arguments for avoiding the merits amount to an invitation to *violate* the “law of the case” doctrine.

**B. The Supreme Court’s sweeping remand instruction negates any claim that the Petitioners forfeited two arguments presented here.**

The Utilities further argue that Petitioners’ omission of two issues from their Supreme Court review petition constitutes some sort of forfeiture of Petitioners’ right to reargue those issues here, on remand, under the proper review standard. (UB 24-25.) This bid to avoid the merits fails at the threshold because, as previously discussed, the Supreme Court’s ruling set *all* statutory-interpretation issues at large for plenary redetermination under the proper review standard—whether or not all of those issues were expressly presented to the court. The court’s sweeping remand instruction thus negates any claim of forfeiture.

If accepted, the Utilities’ meritless forfeiture argument would prevent the Court from considering Petitioners’ arguments that the Commission violated (1) the requirement in section 2827.1, subdivision (b)(1) that the Tariff ensure that customer-sited renewable distributed generation “continues to grow sustainably,” and (2) the requirement in section 2827.1, subdivision (b)(4) that the Commission approximately equalize “the total benefits of the standard contract or tariff to all customers and the electrical system.”

But even if Petitioners’ review petition *had* separately identified those two issues, the Supreme Court would have reached the exact same result: It still would have decided only the standard-of-review issue and then remanded for a thoroughgoing reevaluation of all other issues, “consistent with [its] usual practice and with appropriate regard for the structure of appellate decisionmaking.” (*CBD II, supra*, 18 Cal.5th at p. 309.)

Moreover, the Supreme Court may decide “any issues that are *raised or fairly included* in the petition [for review] or answer.” (Cal. Rules of Court, rule 8.516(b)(1).) Equally important and relevant here, it is black-letter law that statutory provisions cannot be read in isolation. (See *People v. Murphy* (2001) 25 Cal.4th 136, 142.) The two issues in question were “raised” by and “fairly included” within the issues raised in Petitioners’ review petition and are intertwined with and derivative of those issues. (See, e.g., Petn. for Review (Jan. 29, 2024, No. S283614) at p. 23.)

The first derivative issue—the Commission’s violation of subdivision (b)(1)’s continued-sustainable-*growth* requirement—must be considered as part of analyzing the Commission’s violation of subdivision (b)(1)’s requirement that the successor tariff include specific alternatives *designed for growth* among residential customers in disadvantaged communities and the overall purpose of section 2827.1.

And the second derivative issue—the Commission’s violation of subdivision (b)(4)’s requirement that it equalize the

tariff's total costs and benefits to customers and the electrical system—is a natural consequence of the Commission's violations of subdivisions (b)(1) and (b)(3), which rendered it incapable of undertaking the analysis that subdivision (b)(4) requires.

Additionally, it would be inappropriate to avoid the merits of the issues allegedly forfeited in the Supreme Court, as they are ones of pure law based on a fixed administrative record (cf. *In re Marriage of Priem* (2013) 214 Cal.App.4th 505, 510-511; Eisenberg et al., Cal. Practice Guide: Civil Appeals & Writs (The Rutter Group 2025) ch. 8-D, ¶ 8.237) and involve “important questions of public policy or public concern” (*id.* at ¶ 8.239, italics omitted [collecting cases]).

In short, the derivative issues are ones of law necessary to determine the meaning of section 2827.1 under the review standard required by the Supreme Court. The Court should decide them on the merits.

**C. Petitioners' supplemental opening brief complies with California Rules of Court, rule 8.200(b)(2).**

Petitioners anticipate, based on Respondents' heavy reliance on “been there, done that” arguments, that Respondents' supplemental responding briefs may argue that Petitioner's opening brief should be stricken or ignored for purportedly violating California Rules of Court, rule 8.200(b)(2). That rule limits supplemental briefs to “matters arising after the previous Court of Appeal decision in the cause.”

Any such argument must fail. As previously explained, the Supreme Court viewed the *CBD I* decision as having relied pervasively on the now-disapproved *Greyhound* approach to judicial review of Commission decisions. Accordingly, *all* of the statutory-interpretation issues raised in Petitioners’ supplemental opening brief effectively “ar[o]se after the previous Court of Appeal decision in the cause,” and *all* are fair game for supplemental briefing on remand.<sup>18</sup>

Respondents have presented no legitimate rationale for ignoring the Supreme Court’s sweeping remand instruction. All of their arguments for avoiding the merits should be rejected.

**III. The Commission’s statutory “interpretation” is not entitled to any weight, let alone “great” weight.**

Like the 2022 Tariff itself, Respondents’ supplemental opening briefs are strikingly devoid of statutory interpretation—the actual parsing of the words in the statute. Instead, Respondents try to distract attention away from those words with arguments about the Commission’s expertise and a spurious claim that the Legislature enacted the statute with the purpose of “address[ing] the cost shift.” (UB 10, 17; see also CB 14.)<sup>19</sup>

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<sup>18</sup> Petitioners do not seek to expand the scope of the remand beyond the issues previously litigated; they seek only to have those issues evaluated under the legally correct standard mandated by the Supreme Court.

<sup>19</sup> Petitioners discuss the latter argument at Part IV.A, *post*.

At the same time, though, Respondents assert that the Commission’s unstated “interpretation,” whatever it may be, is entitled to judicial deference and should even be granted “great weight” by this Court. (CB 26.) Their deference arguments are nothing more than an attempt to resurrect the now-disapproved *Greyhound* approach under another name in hopes of insulating the 2022 Tariff from meaningful judicial review. Indeed, the Commission proclaims this, writing: “[E]ven setting deference under *Yamaha* aside, the Commission’s *reasonable, expertise-driven decision* would satisfy the statute under any standard of review.” (CB 10.)

Below, Petitioners demonstrate that no such deference is owed and that no “weight” attaches to the Commission’s “interpretation” because (1) there simply is no agency “interpretation” that guided the Commission’s formulation of the 2022 Tariff and thus no interpretation to which any “weight” could attach; (2) an agency’s vacillating position—like the one challenged here, which diverges materially from the Commission’s 2016 statutory interpretation—is entitled to “no deference” under *Yamaha*; and (3) contrary to the Commission’s assertions, the California Constitution does *not* require the Court to grant Commission interpretation “great weight”—in fact, as implemented by the Legislature in section 1757.1, it requires the Court to grant that interpretation *no* weight.

**A. There is no agency “interpretation” to which any “weight” could attach.**

Respondents’ supplemental opening briefs are largely devoid of any textual interpretation of section 2827.1, and they don’t even mention section 2827, subdivision (a), the Legislature’s codified statement of its purposes for encouraging the growth of customer-sited generation. There’s a reason for that: *The 2022 Tariff was not guided by or based upon any Commission interpretation of the statutory language.* The Commission never parsed the words of either statute, let alone attempted to ground the provisions of the 2022 Tariff in such a parsing.

The reason for that omission is easy to guess: There is a “widespread consensus” that, under the now-disapproved *Greyhound* approach, “judicial review of Commission decisions [was] virtually nonexistent.” (*CBD II, supra*, 18 Cal.5th at p. 308, fn. 1.) The Commission likely concluded that there was little point in conducting a diligent analysis of statutory language when any position it adopted was almost certain to be upheld.

Instead of interpreting the statute’s words, the Commission chose to use methods untethered to any statutory interpretation—and it now offers those methods in lieu of the interpretation it never performed.<sup>20</sup>

To put it another way—because the point is so crucial—Respondents are asking this Court to *infer* from the

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<sup>20</sup> See, e.g., UB 20 (claiming that the Commission “interpreted” the statute when it held that the statute would be “satisfied” by using the Avoided Cost Calculator).

Commission’s inapposite methodological choices about which tests or tools it would use to develop the 2022 Tariff that the Commission actually undertook some sort of statutory interpretation—when it manifestly did not, as evidenced by the near-absence of any such interpretation in the 2022 Tariff or in the Respondents’ supplemental opening briefs. Instead, the Commission’s supplemental opening brief prates on endlessly about the Commission’s “expertise” in developing cost-benefit tests,<sup>21</sup> when the only expertise relevant here is the ability to parse statutory language—an expertise in which the courts have no equal.

To justify these moves, Respondents baselessly assert that the statutory language is so indeterminate that it gave the Commission *carte blanche* to apply inapposite cost-effectiveness tests that concededly were *not* developed with the statute’s express purposes and requirements in mind and that were actually antithetical to those purposes and requirements. (CB 29-39 [positing two “reasonable” statutory interpretations but committing to neither of them]; UB 30; see PB 27-37, 41-43.)

As our opening brief demonstrates, however, the words of the statute actually *do* matter; they *can* be parsed; and once parsed, they yield up a single, *best* judicial interpretation. (See Part I, *ante* [summarizing that interpretation].)

A yawning interpretive chasm thus separates the language of section 2827.1 from the methodological choices that determined the features of the 2022 Tariff. The Commission

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<sup>21</sup> See, e.g., CB 9-10, 21, 25-31.

made no attempt to bridge that chasm by anchoring the Tariff<sup>22</sup> in a close reading of the statutory language. Accordingly, there is no agency “interpretation” to place on the interpretive scales. Even if the Court were so inclined, it could not grant the Commission’s (non)interpretation any weight, let alone “great weight.”

Of course, Petitioners cannot know what Respondents will argue in their supplemental responding briefs. Perhaps their lawyers will try to prop up the 2022 Tariff by committing, for the first time, to some textual analysis of section 2827.1. But any such post hoc rationalization, cooked up by litigation counsel in response to Petitioners’ textual analysis, should not be granted any weight, let alone “great weight,” under *Yamaha*.

For *Yamaha*’s “situational” factors<sup>22</sup> (such as the agency’s claimed expertise) to shed any light on the value of an agency’s interpretation, those factors must have contemporaneously guided the making of that interpretation, *before* it was officially promulgated. Before the agency commits itself to an interpretation through official action, it remains at least theoretically capable of bringing its expertise to bear on the task of undertaking a neutral and unbiased analysis of the statutory text. After the agency has committed itself—and especially after its interpretation has been challenged in court—its interpretation inevitably will be skewed by its reflexive instinct to defend its

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<sup>22</sup> See *Yamaha, supra*, 19 Cal.4th at p. 12 (describing “situational” factors for assessing the value of an agency interpretation); Part III.B, *post*.

own actions and prevail in the case. *Yamaha*'s situational factors lend no support to such an interpretation.

Accordingly, the Court should not mistake Respondents' belatedly developed statutory interpretations (if they offer any) for genuine interpretations entitled to any form of deference under *Yamaha*.

**B. The Commission's "expertise" arguments fall flat because *Yamaha* and its progeny establish that a vacillating position like the one at issue here warrants "no deference."**

The 2022 Tariff warrants no deference under *Yamaha* because it represents a near-total departure from the interpretation that the Commission articulated in its 2016 Tariff. The Commission does not and cannot offer any persuasive justification for its inconsistent positions. The words of section 2827.1 were the same in 2022 as they were in 2016. The Legislature's statement of its own purposes, codified in section 2827, subdivision (a), was the same. The legislative history was the same.

Yet Respondents argue that the Court should afford "great weight" to the Commission's ever-shifting, implicit interpretation. (CB 26; cf. UB 20 ["the Commission's interpretation should have some 'persuasive' value"].) Their legal hook for that assertion is *Yamaha*'s description of various "situational" factors that determine "[w]hether judicial deference to an agency's interpretation is appropriate and, if so, its extent—the 'weight' it should be given." (*Yamaha, supra*, 19 Cal.4th at p. 12.) Those factors tend to show either that an agency has "a comparative

interpretive advantage over the courts” when interpreting the statute in question or that the agency’s interpretation is “probably correct.” (*Ibid.*)

Respondents rely heavily on *Yamaha*’s “situational” factors as a basis for granting the Commission’s statutory (non)interpretation “great weight.” In so doing, they appear to forget the California Supreme Court’s admonition in this case that a court “cannot abdicate [its] quintessential judicial duty—applying its independent judgment de novo to the merits of the legal issue before it.” (*CBD II, supra*, 18 Cal.5th at p. 305.)

More to the point, Respondents fail to take note of a “situational” factor identified in *Yamaha* that overrides all the other factors where it is shown to exist—namely, “a vacillating [agency] position is entitled to *no* deference.” (*Yamaha, supra*, 19 Cal.4th at p. 13). The phrase “no deference” used in *Yamaha* and in later cases<sup>23</sup> signifies that *vacillation is invariably fatal to deference even if other situational factors favor deference*. Petitioners know of no case in which significant vacillation was found to have occurred and yet the agency interpretation was afforded substantial weight or deference.

The “vacillation/no deference” rule disposes of any claim to deference here because the Commission’s “position” on the meaning of section 2827.1—to the extent that one can be inferred

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<sup>23</sup> See, e.g., *California Fair Plan Assn. v. Lara* (2025) 116 Cal.App.5th 869 [2025 WL 3496664, at \*10]; *State Bldg. & Constr. Trades Council of California v. Duncan* (2008) 162 Cal.App.4th 289, 303; *Van Wagner Communications, Inc. v. City of Los Angeles* (2000) 84 Cal.App.4th 499, 510.

from the Commission’s methods—has vacillated wildly over the years. A comparison of the Commission’s first effort to implement section 2827.1 in D.16-01-044 and D.16-09-036 with the challenged 2022 Tariff reveals a sharp swerve by the Commission—precisely the sort of inconstancy that results in “no deference” under *Yamaha* and its progeny.

When interpreting section 2827.1 in 2016, the Commission *rejected* the notion of a cost shift for three separate reasons.

**First**, the 2016 Commission recognized that the Legislature had *deleted* from the statute any reference to the cost-shift theory, including language that appeared to refer to the RIM test.

Specifically, the Legislature had eliminated language proposed in earlier versions of the bill that would have required that the tariff be “based on the electrical system costs and benefits received by *nonparticipating customers*” and “[p]reserve *nonparticipant ratepayer indifference*,” and had replaced those deleted provisions with the requirements of section 2827.1, subdivisions (b)(1), (b)(3), and (b)(4).<sup>24</sup> The Commission has

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<sup>24</sup> May 3, 2023 RJN, Exh. A [D.16-01-044], pp. 54-55; see also Sen. Amend. to AB 327 (2013-2014 Reg. Sess.) Sept. 3, 2013, pp. 53-55 [showing strikethrough and new language]. The Legislature sometimes requires the Commission to ensure that a tariff does not affect ratepayers that do not participate in the tariff. (See, e.g., § 2841, subd. (b)(4) [“The commission shall ensure that ratepayers not utilizing combined heat and power systems are held indifferent to the existence of this tariff.”]; see also §§ 2831, subds. (g), (h), 2833.)

acknowledged that “[t]he Rim test [*sic*] has been described as the *Non-Participant Test*.”<sup>25</sup>

The 2016 Commission explained that, in deleting this cost-shift language, “[t]he Legislature deliberately expanded the scope of statutory concern from ‘nonparticipating customers’ to ‘all customers and the electrical system.’”<sup>26</sup> And the Commission explicitly rejected proposals to evaluate the tariff “in terms of their impact on nonparticipants (i.e., utility customers who are not using the NEM successor tariff),” because doing so would erroneously promote “a standard that does not fully reflect the actual legislative requirement.”<sup>27</sup>

The Commission also rejected the Utilities’ arguments attributing significance to bill analyses that had erroneously continued to reference cost-shift language *after* the Legislature had deleted that language. The Commission correctly concluded that “consideration of the legislative history is secondary to the plain language of the statute.”<sup>28</sup> Thus, the Commission understood that extrinsic materials could not be used to contradict the statutory language. (See *In re Abigail A.* (2016) 1 Cal.5th 83, 94.) An end-of-session committee report by a single, unknown author, referencing the pre-deletion version of section 2827.1, cannot be read to resurrect language that the Legislature

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<sup>25</sup> 21 App 18259.

<sup>26</sup> May 3, 2023 RJN, Exh. A [D.16-01-044], p. 55.

<sup>27</sup> *Ibid.*

<sup>28</sup> Sept. 13, 2024 RJN, Exh. 8 [D.16-09-036], p. 6.

eliminated. (See *Martinez v. Regents of University of California* (2010) 50 Cal.4th 1277, 1293.)

**Second**, the 2016 Commission also understood that the Legislature viewed net energy metering as a *good thing* that was to be encouraged and expanded on, not something terrible to be constrained, as Respondents would now have this Court believe.

The Commission’s 2016 Tariff concluded that “encouraging growth and expansion of customer-sited renewable [distributed generation] has been, and continues to be, a central theme behind NEM legislation and the Legislature’s expressed intent,” including in section 2827, subdivision (a).<sup>29</sup> The Commission interpreted section 2827.1 as building on the Legislature’s objective of encouraging growth and expansion of customer-sited renewable distributed generation “by not only continuing the NEM program, but envisioning development of options for NEM participation to expand to disadvantaged residential communities” and “eliminat[ing] the cap on eligible [distributed-generation] system size so the program can grow through the inclusion of projects over one megawatt.”<sup>30</sup> And the Commission’s 2016 Tariff likewise *rejected* the Utilities’ argument that the Commission should limit growth because of a “countervailing need to reduce or eliminate the [Utility-alleged] cost-shift to non-NEM customers.”<sup>31</sup> An advantage of maintaining net energy metering, the Commission explained, was its “demonstrated

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<sup>29</sup> Sept. 13, 2024 RJN, Exh. 8 [D.16-09-036], p. 13.

<sup>30</sup> *Id.* at pp. 13-14.

<sup>31</sup> *Id.* at p. 15.

success in supporting the growth of customer-sited renewable [distributed generation].”<sup>32</sup>

*Third*, the 2016 Commission believed that the RIM test could not satisfy the analytical requirements of subdivision (b)(4) and that the Commission had yet to quantify the benefits of customer-sited generation in serving growing on-site load.<sup>33</sup> The Commission committed to including information about those benefits in proceedings then underway and in future studies.<sup>34</sup> And it *rejected* the idea that RIM-test results yield reliable conclusions about impacts to nonparticipants, explaining that “the conventional way of looking at costs to nonparticipants is not fully functional for the NEM successor tariff.”<sup>35</sup>

The Commission’s skepticism about the RIM test dated back at least to 2009, when the Commission decided on a cost-benefit methodology for state-funded distributed-generation programs.<sup>36</sup> At that time, the Commission required use of the *non*-RIM tests, including the societal test, to capture the benefits

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<sup>32</sup> May 3, 2023 RJN, Exh. A [D.16-01-044], p. 80.

<sup>33</sup> May 3, 2023 RJN, Exh. A [D.16-01-044], pp. 55, 58.

<sup>34</sup> *Id.* at pp. 107 (Finding of Fact No. 12), 177 (Conclusion of Law No. 22).

<sup>35</sup> *Id.* at p. 58. In determining that it could not yet perform the subdivision (b)(4) analysis with respect to the 2016 Tariff [NEM 2.0], the Commission concluded that “the large majority of costs of [that] tariff are currently known and relatively easy to quantify, while the benefits to the electrical system and all customers are not fully known, and thus not able to be put in equivalent form on the other side of the equation with costs.” (*Ibid.*)

<sup>36</sup> See June 21, 2023 RJN, Exh. 10 [D.09-08-026].

of distributed generation.<sup>37</sup> And even as recently as 2019, the Commission subordinated the RIM test to the Total Resource Cost test.<sup>38</sup>

But the Commission’s 2022 Tariff swerved in a completely different direction that elevated the RIM test to primacy, furnishing yet another example of the Commission’s vacillation.<sup>39</sup> The 2022 Tariff was based on the revealingly titled Lookback Study instead of the forward-looking initiatives to which the Commission had committed itself in 2016.<sup>40</sup> When it began this proceeding (R.20-08-020) in 2020, the Commission had recited a head-spinning number of other forward-looking proceedings that it intended to coordinate.<sup>41</sup> But the 2022 Tariff failed to resolve *any* of the issues examined in those proceedings. Instead, the Commission admitted that the Lookback Study on which it had relied did *not* address consumption patterns or the supply used to meet that consumption—the *raison d’être* for the on-site

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<sup>37</sup> *Id.* at pp. 3, 30 (acknowledging that benefits should not be limited to avoided costs), 35 (acknowledging location-specific transmission and distribution benefits), 64, 66.

<sup>38</sup> May 3, 2023 RJN, Exh. C [D.19-05-019], pp. 65-66.

<sup>39</sup> 21 App 18294 (2022 Tariff: “[T]he Commission should place more weight on the results of the RIM test.”).

<sup>40</sup> May 3, 2023 RJN, Exh. A [D.16-01-044], p. 58.

<sup>41</sup> 1 App 65 (citing R.12-11-005 and R.20-05-012 on renewable distributed generation programs, R.19-09-009 on Microgrids, R.14-08-013 on Distribution Resources Planning, R.17-07-007 on Rule 21 and the interconnection of distributed generation resources, R.14-10-003 on IDER, R.19-11-009 on Resource Adequacy, and R.14-07-002 on development of a successor to the original NEM tariff).

generation that the Legislature sought to promote in section 2827.1.<sup>42</sup>

Thus, even if one accepts Respondents’ notion that the Commission’s various “cost-effectiveness” tests qualify as an implicit statutory “interpretation,” the Commission’s vacillating approaches, methods, and positions as to the use and prioritization of those tests ensure that its implicit interpretation warrants “no deference.” (*Yamaha, supra*, 19 Cal.4th at p. 13.) There is accordingly no merit to any claim that the Commission’s technical expertise, formal manner of proceeding, top-level approval of the 2022 Tariff, or any other “situational” factor mentioned in *Yamaha* entitles the Commission’s “interpretation” to “great weight” in the Court’s analysis.

In sum: There is no Commission “interpretation” to speak of; but even if one could be inferred from the Lookback Study and the inapposite methodological choices on which the Tariff is based, it would be so different from the Commission’s 2016 “interpretation” as to warrant “no deference.”

**C. The California Constitution does not require the Court to grant the Commission’s statutory interpretations “great weight”—in fact, as implemented by the Legislature in section 1757.1, it requires the Court to grant that interpretation *no weight*.**

Respondents assert that a provision of the California Constitution that has nothing to do with the standard of judicial

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<sup>42</sup> See, e.g., 21 App 18458 (Findings of Fact Nos. 77-80).

review dictates that the Court accord “great weight” to the Commission’s interpretation of section 2827.1. As discussed below, however, the reality is that a different section of the California Constitution specifically governs the standard of review in Commission cases and requires the Court to give the Commission’s interpretation no deference at all.

The Commission claims a *constitutional* prerogative to have its interpretations afforded “great weight” in the courts. (See CB 26-27.) The Commission locates this prerogative in article XII, *section 6* of the California Constitution, which says nothing about judicial-review standards and merely provides that the Commission “may fix rates, establish rules, examine records, issue subpoenas, administer oaths, take testimony, punish for contempt, and prescribe a uniform system of accounts for all public utilities subject to its jurisdiction.”

By contrast, article XII, *section 5* of the California Constitution establishes the Legislature’s “plenary” authority to define the Commission’s powers and to “establish the *manner and scope of review* of commission action in a court of record.” As explained below, the standard that the Legislature promulgated thereunder in section 1757.1 effectively eliminates any judicial deference to the Commission’s interpretations of the statutes that govern its actions.

In claiming a constitutional right to have its interpretations accorded “great weight,” the Commission misstates the source of its powers and, as a result, gets the judicial-review standard and *its* source wrong as well. The

Commission omits any mention of article XII, section 3 of the California Constitution, which provides that stationary utilities like the electricity providers in this case are “subject to control by the *Legislature*,” not the Commission. The Commission likewise ignores article XII, sections 5 and 9, which establish that the Legislature’s authority to (1) confer “powers respecting public utilities” upon the Commission and (2) “establish the manner and scope of [judicial] review” of Commission actions is “‘plenary’ and ‘unlimited by any provision of this Constitution.’” (*County of Sonoma v. State Energy Resources Conservation and Development Com.* (1985) 40 Cal.3d 361, 367-368; accord, *CBD II, supra*, 18 Cal.5th at p. 307 [citing *County of Sonoma*]; see also Brief of Amicus Curiae Martha Escutia et al. (Dec. 30, 2024, No. S283614) at pp. 13, 16-41 [setting forth history of California Constitution’s provisions regarding judicial review of Commission actions].)

In 1998, the Legislature exercised its article XII, section 5 power when it enacted Senate Bill No. 779 (1997-1998 Reg. Sess.). That bill repealed and reenacted section 1757 and added a new section 1757.1, which applies here. Subdivision (a)(2) of both statutes now requires courts to determine whether “[t]he commission has not proceeded in the manner required by law.”

Although the same phrase appears in the general administrative mandamus statute (Code Civ. Proc., § 1094.5, subd. (b)),<sup>43</sup> it appears there as one of three grounds for finding a

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<sup>43</sup> See *CBD II, supra*, 18 Cal.5th at pp. 304, 307 (recognizing that in both 1757 and 1757.1, the Legislature

“prejudicial abuse of discretion.” By contrast, in sections 1757 and 1757.1, the Legislature *separated* the phrase “abuse of discretion” from the phrase “has not proceeded in the manner required by law” by placing them in two distinct subdivisions— subdivisions (a)(1) and (a)(2), respectively, in section 1757.1, and subdivisions (a)(5) and (a)(2), respectively, in section 1757. And in both sections, the Legislature declined to require the showing of prejudice that Code of Civil Procedure section 1094.5 requires.

These differences from Code of Civil Procedure section 1094.5 underscore the fact that the Commission has no discretion, much less any special constitutional or statutory dispensation, to violate the law. And the similar wording of sections 1757 and 1757.1 ensure that *a single, unified, non-deferential review standard* applies to nearly all Commission actions and proceedings.<sup>44</sup>

By contrast, the variable-deference approach elucidated in *Yamaha* posits a “continuum” running from quasi-legislative regulations (which attract the most judicial deference) to interpretive regulations (which garner less deference). (*Yamaha, supra*, 19 Cal.4th at pp. 6-7 & fn. 3.) At the same time, though, *Yamaha* teaches that a court assessing the value of an agency interpretation must consider, inter alia, “*the particular agency offering the interpretation.*” (*Id.* at p. 12.)

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adopted a statutory standard of review that borrowed from Code of Civil Procedure section 1094.5).

<sup>44</sup> The sole exception is judicial review of water-utility regulations. (See §§ 1757, subd. (c), 1757.1, subd. (b).)

That admonition is crucial here, because any consideration of “the particular agency” in a Commission case leads right back to the Legislature’s plenary article XII, section 5 authority over the Commission and to the unique judicial-review standard that the Legislature, exercising that authority, codified in section 1757.1. Thus, to the extent that the legislatively created, unified, non-deferential judicial-review standard of section 1757.1 differs from the judicially created variable-deference approach outlined in *Yamaha*, *Yamaha itself* suggests that the Legislature’s unified standard must prevail—and under that standard, no deference is owed.<sup>45</sup>

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<sup>45</sup> Vacillation aside, another *Yamaha* “situational” factor cuts strongly against treating the Commission’s 2022 interpretation as “probably correct”—namely, “indications of careful consideration by senior agency officials.” (*Yamaha, supra*, 19 Cal.4th at p. 13.) Respondents invoke this factor based on the fact that the Commission directed its consultants to perform the Lookback Study and held evidentiary hearings. (UB 23; CB 30-31.)

But Respondents fail to disclose that (1) no evidentiary hearings were held with respect to the Lookback Study and (2) the Commission’s analysis of the 2022 Tariff was not the subject of any testimony or any hearing. The evidentiary hearings were limited to issues related to parties’ proposals and certain “other issues.” (1 App 451-452 [Issues 3-6]; 21 App 453 [evidentiary hearings not held on Issue 2], 451 [Issue 2: “What information from the Net Energy Metering 2.0 Lookback Study should inform the successor and how should the Commission apply those findings in its consideration?”].) The Commission’s 2022 analysis of the 2022 Tariff (21 App 18411-18415, 18495-18497) was not the subject of testimony or hearings, which had concluded by mid-2021 (21 App 18255).

In sum: For all the reasons stated above—absence of any guiding Commission interpretation; the Commission’s vacillating positions; and the unique statutory review standard applicable to Commission decisions under the California Constitution, *Yamaha*, and *CBD II*—the Commission’s (non)interpretation of section 2827.1 warrants no deference whatsoever from this Court.

**IV. Respondents’ “substantive-correctness” arguments fail because the Commission’s statutory interpretation, if one ever existed, was wrong.**

Respondents assert that, even if the Commission’s statutory interpretation is owed no deference, it should be upheld because it is correct.

Not so. Petitioners’ supplemental opening brief demonstrated that the Commission failed to proceed in the manner required by section 2827.1. Our analysis was based on a detailed parsing of the language of section 2827.1 and of the statutory definitions of the terms used therein, viewed in light of the statutory purposes codified in section 2827, subdivision (a). (See Part I, *ante* [summarizing Petitioners’ interpretations].)

Petitioners will not repeat those arguments here but will respond briefly to Respondents’ “correctness” arguments, beginning with their warped account of the statute’s legislative purpose.

**A. Respondents substitute a made-up legislative purpose (“addressing the cost shift”) for the legislative purposes codified in section 2827, subdivision (a).**

Instead of being grounded in a careful parsing of the statute, Respondents’ claim to interpretive correctness leans heavily on the provably false assertion that the Legislature’s “purpose” in enacting section 2827.1 was *not* any of the ones expressly set forth in subdivision (a) of section 2827, but rather, a desire to “address the cost shift.” (UB 10, 16-17; see also CB 12-14.) That argument represents yet another attempt by the Respondents to distract from the actual words of the statute.

It strains credulity to suppose that a Legislature that took unusual care to spell out its purposes in a provision that it *codified into law* would somehow fail to mention that its sole, overriding purpose in enacting the statute was to “address the cost shift.” Moreover, as previously discussed, the Legislature in AB 327 *deleted* cost-shift language from an earlier version of section 2827.1. These deliberate drafting choices preclude courts from reading any “cost shift” language into section 2827.1. (See PB 57-59; Part III.B, *ante*.)

The Utilities’ sole textual hook for the “cost shift purpose” argument is the word “sustainably” in the clause of section 2827.1, subdivision (b)(1) requiring that the successor tariff ensure that customer-sited renewable distributed generation “continues to grow *sustainably*.” The Utilities assert that this one word imported their entire cost-shift theory into the statute. (UB 17-18.)

But “sustainably” cannot bear that weight. If the Legislature had intended subdivision (b)(1) to import a complex “cost shift” economic theory into the statute and to anoint that theory as the statute’s overriding purpose, “we doubt they would have been so opaque in their draftsmanship. The Legislature does not, one might say, hide elephants in mouse-holes.” (*Starbucks Corp. v. Superior Court* (2008) 168 Cal.App.4th 1436, 1451.) Nor did it do so here.

The ordinary meaning of the adjective “sustainable” is “capable of being maintained at length without interruption or weakening.” (PB 40, citing Merriam-Webster.com Dict. <<https://www.merriamwebster.com/dictionary/continue>> [as of Nov. 21, 2025].) The statutory text furnishes no indication that the Legislature intended to assign that word a non-standard, technical definition that implied a “cost shift” theory. The Court therefore should apply the interpretive canon that courts give the words of a statute “their ordinary, everyday meaning unless, of course, the statute itself specifically defines those words to give them a special meaning.” (*U.D. Registry, Inc. v. Municipal Court* (1996) 50 Cal.App.4th 671, 674.) In short, there is no textual hook for asserting that the statute’s legislative purpose was to “address the cost shift.”<sup>46</sup>

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<sup>46</sup> The Utilities urge that courts should ignore the ordinary “colloquial” meaning of a statutory term, even if it “seem[s] subject to judicial knowledge,” if the agency proffers a more arcane definition drawn from its area of expertise. (UB 21 [discussing meaning of “costs and benefits”].) But the Utilities’ cases do not support this implausible interpretive canon. The statutory term at issue in *American Coatings Assn. v. South*

Resorting improperly to extrinsic evidence, the Utilities locate the purported “cost shift purpose” in legislative committee reports describing cost-shift language that the Legislature *eliminated* from section 2827.1. (UB 8, 18.) As previously mentioned, the Legislature *deleted* language requiring that the tariff “be based on the electrical system costs and benefits received by nonparticipating customers” and that the tariff “[p]reserve nonparticipant ratepayer indifference.” (May 3, 2023 RJN, Exh. A [D.16-01-044], pp. 54-5; see Part III.B, *ante*.) The Legislature’s rejection of a specific provision in an act as originally introduced “is most persuasive to the conclusion that the act should not be construed to include the omitted provision.” (*People v. Soto* (2011) 51 Cal.4th 229, 245.)

As evidence of the purported “cost shift purpose,” Respondents also point to a legislative committee report of a different bill—AB 2514—that enacted former section 2827.3. But

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*Coast Air Quality Management Dist.* (2012) 54 Cal.4th 446, was not the “colloquial” word “*available*,” as the Utilities assert, but rather, the obviously technical phrase “*best available retrofit control technology*,” which has no ordinary or “colloquial” meaning. (*Id.* at p. 469.) And the Utilities’ other case concerned an agency’s interpretation of non-technical language *in its own regulation*, where “[a] court is more likely to defer” because “the agency is likely to be intimately familiar with regulations it authored and sensitive to the practical implications of one interpretation over another.” (*Diablo Valley College Faculty Senate v. Contra Costa Community College Dist.* (2007) 148 Cal.App.4th 1023, 1035, quoting *Yamaha, supra*, 19 Cal.4th at p. 12.) By contrast, “sustainably” is just an ordinary word in a statute.

that argument fares no better. Former section 2827.3<sup>47</sup> required the Commission to complete a study by October 1, 2013 “to determine who benefits from, and who bears the economic burden, *if any*, of, the net energy metering program.” Section 2827.3 was repealed as of July 1, 2017 by operation of a sunset provision.<sup>48</sup>

Former section 2827.3 lends zero support to Respondents’ theory that the Legislature enacted section 2827.1 to “address the cost shift.” It proves only one thing: In 2013, when the Legislature enacted section 2827.1, it had drawn no conclusions as to whether the original net energy-metering program (NEM 1.0) had burdened anyone.

In short, the Court should reject Respondents’ attempt to substitute a cost-shift motivation for the legislative purposes expressly set forth in subdivision (a) of section 2827.

**B. Respondents misread subdivision (b)(1)’s continued sustainable-growth requirement.**

The Legislature directed the Commission to craft a tariff that would “ensure that [rooftop solar] continues to grow sustainably.” (§ 2827.1, subd. (b)(1).) Instead, the Commission came up with a tariff that strangled that growth, causing new rooftop solar-generation installations in California to fall off a cliff and decimating the solar-power industry in California.<sup>49</sup>

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<sup>47</sup> AB 327 renumbered what was then referred to as section 2827.1 to section 2827.3. (Stats. 2013, ch. 611, § 10.)

<sup>48</sup> Stats. 2012, ch. 609, § 1 (AB 2514).

<sup>49</sup> See CALSEIA Amicus 38-39.

Apart from their mistaken argument that “sustainably” imports the cost-shift theory,<sup>50</sup> Respondents’ briefs barely mention the sustainable-growth requirement. Perhaps they mistakenly assume that Petitioners forfeited their argument that the Commission violated that requirement.<sup>51</sup> To that extent, Respondents arguably have forfeited *their* arguments regarding the sustainable-growth requirement (as well as any arguments regarding the (b)(4) requirement). Any such arguments belatedly presented in their supplemental responding briefs should therefore be ignored.

The Commission does claim that it is “not at all clear” that it could have adopted Petitioners’ “preferred methodology” without violating (b)(1)’s continued-sustainable-growth requirement. (CB 38.) Apparently, this is just another way of asserting that the way the Petitioners read the statute would render solar growth unsustainable by exacerbating the (fictional) cost shift. Petitioners have already addressed that mistaken contention. (See also Part V, *post*.)

**C. Respondents’ failure to even begin to interpret the statute shows up starkly in their conflation of “costs and benefits” in subdivisions (b)(3) and (b)(4) of section 2827.1.**

Respondents persistently conflate subdivision (b)(3) with subdivision (b)(4), ignoring the stark differences they specify in

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<sup>50</sup> See UB 17-18; Part IV.A, *ante* (refuting that assertion).

<sup>51</sup> See Part II.B, *ante* (refuting that assertion).

the costs and benefits “of what.”<sup>52</sup> Subdivision (b)(3) requires the tariff to be based on the costs and benefits *of the renewable electrical generation facility* (the “of what”). Subdivision (b)(4) requires the Commission to equalize the total costs and total benefits *of the tariff* (the “of what”) to all customers and the electrical system. Respondents’ confusion over the most basic statutory terms bespeaks a fundamental failure to parse the words of, and thus *interpret*, the statute. It provides powerful confirmation that the Commission never “interpreted” the statute at all but is instead attempting to pass off its bad methodological choices as a form of implicit “interpretation.” (See Part III.A, *ante*.)

Subdivision (b)(3) requires the tariff to be based on the costs and benefits *of the generation facility itself* (the “of what”), thus focusing on the costs and benefits of privately funded facilities that generate clean electricity for on-site and local use. While the costs of the generation facility remain the responsibility of the customer-generator, the facility provides tremendous benefits to all customers and the electrical system. (See PB 25-27; Part V, *post*.)

By contrast, subdivision (b)(4) requires the Commission to approximately equalize the total costs and total benefits *of the tariff as a whole* (the “of what”). Conflating these distinct

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<sup>52</sup> See, e.g., UB 16 (“Subdivision (b)(3)’s reference to costs and benefits refers to [the] *same types* of economic costs and benefits as subdivision (b)(4)—nothing broader.”); CB 29-30 (referring to (b)(3)’s “direct[ion] to base the successor tariff on the costs and benefits *of solar*”).

inquiries collapses two separate statutory requirements into one and defeats the Legislature’s carefully differentiated scheme. It thus violates the statutory-interpretation canon requiring courts to attribute significance to every word and to avoid treating any words as surplusage. (See *People v. Woodhead* (1987) 43 Cal.3d 1002, 1010.)

Besides mistakenly conflating the two provisions, the Commission’s 2022 Tariff violates them individually. Subdivision (b)(3) requires evaluating *the privately funded facility that generates clean electricity for use on-site and locally* (whether that be solar panels, solar panels paired with storage, or facilities using any of the other resources identified in Public Resources Code section 25741). Instead of basing the tariff on those locational generation costs and benefits of the subject facility, the Commission valued only exports—estimating only the costs that the utilities avoid when customer-generators’ excess supply reduces demand on the utilities’ existing grid. (See PB 53-54.)

And the Commission did not even pretend to comply with subdivision (b)(4)’s requirement that it total, much less balance, the tariff’s costs and benefits to all customers and the electrical system. Respondents concede that instead of considering benefits to the *electrical system*, the Commission looked exclusively at benefits *to the electrical grid*.<sup>53</sup> Additionally, although subdivision

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<sup>53</sup> See UB 5, 14, 16, 19 (repeatedly misinterpreting section 2827.1 as requiring an analysis of costs and benefits that accrue to customers *and the grid*), 9 (admitting export compensation is based solely on Avoided Cost Calculator); CB 34 (Commission admitting it used “demand-side” tests); see also 11 App 9272 (Utilities’ witness testifying the Avoided Cost Calculator

(b)(4) uses inclusive language and refers “to all customers and the electrical system,” the Commission excluded from its (b)(4) analysis any benefits to the two customer groups expressly mentioned in section 2827.1—(1) eligible customer-generators and (2) residential customers in disadvantaged communities. (See PB 51-52.)

In short, Respondents’ claim that the Commission adopted the “correct” interpretation of subdivisions (b)(3) and (b)(4) cannot survive even the most casual inspection of the statutory text.

**D. Contrary to Respondents’ assertions, Petitioners’ interpretation of the costs and benefits referenced in section 2827.1, subdivision (b)(3) *does* have “a logical stopping point.”**

As we have shown, Respondents are extraordinarily sloppy when identifying the “of what” in section 2827.1, subdivision (b)(3). That same sloppiness leads them to assert that, under Petitioners’ interpretation, subdivision (b)(3) would require the Commission to count “all” costs and benefits of “*renewable energy*” or “*rooftop solar*”—a requirement with “virtually no logical stopping point,” as it could extend to such diverse considerations as “economic development, national security, and job creation.” (CB 36; see also CB 7, 34; UB 16-17, 21.)

But subdivision (b)(3) doesn’t require the Commission to base the successor tariff on the costs and benefits of “renewable

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“assumes all the values it’s calculating are for load reduction behind a retail meter, essentially a reduction in load.”).

energy” or of “rooftop solar.” It specifically requires the Commission to base that tariff on the costs and benefits of “*the renewable electrical generation facility*.” (§ 2827.1, subd. (b)(3); PB 18-21.) This means, at a minimum, that the Commission must count all the quantifiable benefits that accrue when customer-generators invest in private facilities to generate and use renewable energy on-site and locally. The Legislature listed some of those benefits in section 2827, subdivision (a). (See PB 25-26.) But the Commission largely ignored them.

Might the Commission identify other costs and benefits to count? Certainly—but that’s beside the point. Lots of ingredients could go into chicken soup—salt, basil, and oregano, perhaps. Or not. But one thing that *must* go in is chicken. The Commission’s “interpretation” leaves out the chicken and therefore cannot be “correct.”

**E. Respondents fail to establish that the 2022 Tariff includes the DAC Customer Alternatives required by section 2827.1, subdivision (b)(1).**

The second clause of section 2827.1, subdivision (b)(1) requires that the Tariff “include specific alternatives designed for growth among residential customers in disadvantaged communities.” Petitioners’ supplemental opening brief demonstrated that the Commission violated this DAC Customer Alternatives requirement by failing to include any such alternatives in the 2022 Tariff. (PB 43-49.)

Respondents offer four meritless counterarguments.

*First*, the Utilities erroneously characterize Petitioners’ DAC-related statutory-interpretation arguments as a collateral attack on a prior Commission decision. (UB 32.) Wrong. Petitioners are attacking only the 2022 Tariff, not any prior tariff or decision or any program incorporated into any prior tariff or decision. The 2022 Tariff did *not* include or incorporate in any way any of the programs that Respondents now claim are being “collaterally attacked.”

*Second*, Respondents claim that four programs *not* included in the 2022 Tariff nevertheless satisfy the DAC Customer Alternatives requirement. (See CB 41-43; UB 32-33.) But not being included in the Tariff is an immediate disqualification,<sup>54</sup> as a DAC program incorporated in a tariff offers customers a degree of certainty and reliability that a non-tariff program cannot approach. (See PB 45.) Moreover, the non-tariff programs that Respondents cite were expressly *excluded* from the 2022 Tariff. (See PB 44-45, fn. 41.) Any benefits that those programs offer residential customers in disadvantaged communities were thus also excluded from the analysis of the 2022 Tariff required by section 2827.1, subdivision (b)(4).

The Utilities attempt to address this lack-of-inclusion problem with a threshold argument that subdivision (b)(1) of

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<sup>54</sup> While the Legislature provided that the Multifamily Affordable Housing Solar Roofs Program codified in section 2870 may “*count toward* the satisfaction of the commission’s obligation” to include DAC alternatives (§ 2870, subd. (b)(1)), the program’s reach is far too narrow to *satisfy* that obligation by itself. (See § 2870, subs. (c) [funds expired in 2020, conditional until mid-2026], (f)(1) [program megawatt cap].)

section 2827.1 merely requires the Commission to include DAC Customer Alternatives *somewhere*, but not necessarily *in* the successor tariff. (UB 33.) But the Utilities fail to specify where that “somewhere” might be.

Crucially, none of Respondents’ non-tariff programs is supported by a *factual finding* that the program satisfies the DAC Customer Alternatives requirement. The only relevant finding of fact in the 2022 Tariff states that “[t]he combination of *the ACC Plus [i.e., the “adder”]* and *an equity fund* could assist the Commission in meeting” the DAC Customer Alternatives requirement. (21 App 18471 [Finding of Fact No. 205].) But the Commission made no factual finding that any other program (including the adder standing alone) or combination of programs could help to satisfy that requirement. Indeed, the Commission expressly *declined* to incorporate an analysis of the nontariff programs or their benefits in the 2022 Tariff.

The Court therefore should grant no weight to the assertions made in Respondents’ briefs that various non-tariff programs satisfy the DAC Customer Alternatives requirement. The findings of fact in the 2022 Tariff reveal the contrary.

***Third***, Respondents mistakenly assert that the DAC Customer Alternatives requirement is satisfied by the 2022 Tariff’s inclusion of the so-called “adder,” which the Commission admits subjects DAC Customers to the same doubled or tripled

payback period that now afflicts every other tariff-eligible customer.<sup>55</sup>

But Respondents’ reliance on the adder fails because the adder was based on the Lookback Study’s analysis of *low-income households*, not the “*disadvantaged communities*” referenced in subdivision (b)(1). (See PB 45-48; 21 App 18419.) The Utilities admit that the eliminated discount to which they refer applied only to low-income communities (UB 31) and thus fails for the same reason.

The adder therefore was not designed to assist many of the customers whom the Legislature expressly intended to benefit, including ones who—even if they do not meet the “low income” definition—reside in areas disproportionately affected by environmental pollution and other hazards that can lead to negative public health effects, exposure, or environmental degradation.<sup>56</sup> (See PB 46-48.) An “alternative” that, on its face,

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<sup>55</sup> Petitioners have explained that doubling or tripling the payback period violates subdivision (b)(1)’s textually adjacent requirement of ensuring that customer-sited renewable distributed generation “continues to grow sustainably.” (See PB 41-43; Part IV.B, *ante*.)

<sup>56</sup> See, e.g., July 31, 2023 RJN, Exh. D [D.18-06-027], p. 19 (“Those proposals that seek to refocus on low-income individuals, or add criteria in order to allow low-income individuals not living in [disadvantaged communities] to participate, *miss the mark*. . . . [Section 2827.1] is about ‘residential customers in *disadvantaged communities*.’”); see also *id.* at pp. 19-20 (“[E]conomic barriers such as insufficient access to capital and credit as well as marketing, outreach and linguistic barriers,” are “some of the barriers specific to low-income communities,” whereas “property

purportedly is designed for growth among low-income households cannot be equated with an alternative designed for growth “among residential customers in disadvantaged communities.” (§ 2827.1, subd. (b)(1).) In short, such an “alternative” cannot satisfy the DAC Customer Alternatives requirement.

And there is yet another reason why the adder can’t qualify as a “specific alternative” designed for customer-sited generation growth among DAC Customers: It’s not an “alternative” of any kind.

Merriam-Webster.com defines “alternative” as “offering or expressing a choice” (as in “several *alternative* plans”) or as “different from the usual or conventional” (as in “*alternative* newspaper” or “*alternative* lifestyle”).<sup>57</sup> But the “adder” offers low-income households no “choices.” It’s take-it-or-leave-it. The Commission admits—indeed, asserts—that the “adder” subjects low-income households (by fiat) to the same elongated payback period that now confronts every other eligible customer under the 2022 Tariff. (CB 40.) If that’s true, the “adder” is, by the Commission’s own logic, no “different” from the “usual or conventional” deal that the 2022 Tariff offers to every other tariff-eligible customer. Even if the adder-augmented deal offered in the 2022 Tariff were better for DAC Customers than the deal they were offered under NEM 2.0, it is not an “alternative” deal.

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structure and property ownership barriers” are more specific to disadvantaged communities.).

<sup>57</sup> Merriam-Webster.com Dict. <<https://www.merriam-webster.com/dictionary/alternative>> [as of Jan. 7, 2026].

It just means that they and other non-DAC customers will have an equally difficult time making their rooftop-solar investments pay off.

*Fourth*, in defiance of the Supreme Court’s *CBD II* ruling, the Utilities try to resurrect “reasonableness” as the pertinent judicial inquiry here. Specifically, they assert that the issues raised by Petitioners’ DAC arguments are not ones of statutory *interpretation* reviewed de novo, but rather, ones of statutory *implementation* subject to the *Yamaha* test for reviewing quasi-legislative regulations. (UB 31-33.)

But it misses the mark to characterize the Commission’s DAC choices in this article XII case as “quasi-legislative.” As previously explained,<sup>58</sup> when the Legislature exercised its article XII authority by enacting section 1757.1, it chose a unified “not proceeded in the manner required by law” standard for reviewing Commission decisions as opposed to a *Yamaha*-like “continuum” approach that entails varying levels of deference. (*Yamaha, supra*, 19 Cal.4th at pp. 6-7.) Thus, the quasi-legislative/interpretive continuum has no bearing here. Indeed, the questions that *Yamaha* instructs courts to consider in a quasi-legislative case are simply not part of the court’s inquiry under section 1757.1, subdivision (a)(2).<sup>59</sup>

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<sup>58</sup> See Part III.C, *ante*.

<sup>59</sup> In quasi-legislative cases, the Court considers whether (1) “the rule in question lay within the lawmaking authority delegated by the Legislature,” and (2) was “reasonably necessary to implement the purpose of the statute.” (*CBD II, supra*, 18 Cal.5th at p. 305.) In contrast, this case requires the Court to determine whether the Commission “has not proceeded in the

Moreover, the Utilities’ argument mischaracterizes the nature of Petitioners’ DAC arguments, which are ones of statutory interpretation, not statutory implementation. Contrary to the Utilities’ assertions, Petitioners do not advocate for any specific “means” or “preferred approaches” for satisfying the DAC Customer Alternatives requirement. (UB 33-34.) There may be many different ways to satisfy that requirement. But that’s beside the point. As a matter of statutory interpretation, the requirement *cannot* be satisfied by means that (1) are not included in the 2022 Tariff, or (2) target low-income households instead of “residential customers in disadvantaged communities.” (§ 2827.1, subd. (b)(1).)

Thus, the Commission failed to proceed in the manner required by the disadvantaged-communities clause of section 2827.1, subdivision (b)(1).

**V. The “cost shift” theory is a spurious distraction from the need to interpret the statute.**

At the previous oral argument and in its *CBD I* opinion, the Court treated the “cost shift” as the overriding concern in evaluating the 2022 Tariff. Respondents predictably reprise that theme in their supplemental opening briefs.

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manner required by law.” (§ 1757.1, subd. (a)(2); see *CBD II*, at pp. 303-304 [detailing the statutory standards in sections 1757 and 1757.1 and recognizing that the Legislature borrowed from Code of Civil Procedure section 1094.5].) Code of Civil Procedure section 1094.5 does not apply to quasi-legislative cases. (See, e.g., *Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 566-567.)

Petitioners have already pointed out that (1) the Legislature *deleted* cost-shift language from the part of AB 327 that became section 2827.1, and (2) the cost shift is an artifact of the inapposite RIM test.<sup>60</sup> That ought to be the end of the matter. But Respondents have jammed so much anxiety-tweaking cost-shift propaganda into their supplemental opening briefs that Petitioners have no choice but to attempt to clear away some of the smoke, even though doing so is extraneous to the task of statutory interpretation.

The Commission’s cost-shift theory posits that utilities incur large “fixed costs”—such as building power lines—to ensure that all customers enjoy on-demand access to power from the grid. Historically (the story goes), utilities have recovered these “fixed costs” from all customers through retail electricity rates. But because customers with rooftop solar self-generate much of their own power, they take less service from electric utilities and contribute less toward utilities’ “fixed costs.” As a result, customers without rooftop solar must pay higher rates to make up the difference. (CB 17-18.)

For at least four reasons, the cost-shift theory lacks any basis in reality and is argued improperly here. Much more could be said, but we lack the space.

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<sup>60</sup> It is beyond dispute that the cost-shift theory results from and depends upon the legally irrelevant RIM-test results (also known as the “nonparticipant test”). The Commission’s 2022 Tariff cited cost-shift estimates on page 23 of the Joint Utilities Opening Brief (21 App 18288 & fn. 54), which, in turn, were derived from RIM-test figures listed in Table 5-1 of the Lookback Study (15 App 11821).

**First**, the Commission improperly supports its arguments about a growing cost shift by citing to materials outside the record, created years after the proceedings closed. (See CB 10, 15, 27, 28.) That’s obviously improper. By statute, judicial review of Commission decisions is conducted solely on the basis of the Commission-certified record. (See § 1757.1, subd. (a).) And that record is long closed.

**Second**, the cost-shift theory rests on a misunderstanding of “fixed costs” that exaggerates their size and ignores the savings from customer-sited renewable generation facilities.

“Fixed costs,” being *fixed*, don’t grow with increased electricity consumption. In contrast, the costs of *grid-expansion projects* are *not* fixed but rather, *do* grow with increased consumption. So when on-site generation enables customers to increase their own electricity consumption and that of their neighbors without triggering the need to expand the grid, it does *not* affect “fixed” costs but *does* reduce variable costs—a lot.<sup>61</sup> The Commission’s “cost shift” story gets this totally wrong and caused it to ignore real cost drivers<sup>62</sup> while minimizing real savings

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<sup>61</sup> See, e.g., 9 App 7656-7681.

<sup>62</sup> 21 App 18291. The Commission’s Affordability Report explained that utilities are inherently incentivized to increase their profits by investing in capital projects; and the report identified capital expenditures, like utility self-approved transmission projects, as a primary driver of rate increases. (22 App 19298, 19315, 19329-19330 [Cal. P.U.C., Utility Costs and Affordability of the Grid of the Future (Feb. 2021)].)

resulting from customer-sited generation.<sup>63</sup>

*Third*, and relatedly, customer-sited renewable generation facilities have avoided growth in the peak electricity demand that drives grid expansion. Peak and overall electricity consumption served by the utilities has remained more-or-less flat over the past 20 years despite increased economic activity, temperatures, and use of electronics.<sup>64</sup> Avoiding costly grid expansions lowers costs for *all* ratepayers.

*Fourth*, under net metering, the Utilities get something from their customers while doing virtually nothing. Every electron that a customer-generator exports flows immediately to a neighbor who, in turn, pays the utility a full retail rate for it—even though the utility did nothing to produce the electron and

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<sup>63</sup> The record contains unrefuted evidence establishing the value of customer-sited generation to offset grid expansions. (See, e.g., 9 App 7675-7681.) The Commission did not reject this evidence but simply deemed it legally immaterial. It therefore remains undisputed on the record in this case that the Commission attributed no value to avoiding the costs of cancelled transmission projects. (15 App 11736-11737 [Protect Our Communities Foundation (POCF) opening brief describing evidence quantifying value of specific avoided transmission projects identified by the California Independent System Operator]; 9 App 7656-7658 [POCF expert explaining no specified transmission value was included in the ACC]; 11 App 9379-9380 [Commission witness conceding that the ACC does not calculate when specific transmission projects are avoided].)

<sup>64</sup> 10 App 8477; PB 31 & fn. 21. California's electricity usage peaks around 2 p.m. on hot summer days. That's also when solar facilities work best. And when those facilities don't work as well, such as at night or on winter days, California's utilities are flush with power and incur no additional costs to serve that off-peak load. (10 App 8477.)

almost nothing to transmit it to the neighboring house.<sup>65</sup> The Commission’s “cost shift” story falsely asserts that, even though the Utilities are made whole (under NEM 2.0) or realize a windfall (under the 2022 Tariff), customer-generators are somehow shirking their duty to help support the electrical grid. In fact, however, they are exceptional grid-citizens helping lower costs for everyone and bringing more clean energy into the system.

The Court should not allow a spurious economic theory with no basis in reality to distract it from the task of statutory interpretation.

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<sup>65</sup> The electron travels on the existing small wires between homes, and the utility incurs no or extremely minimal additional costs because the customer-generator is sharing electricity with their neighbor. (10 App 8537.)

## CONCLUSION

For all the reasons stated above and in Petitioners' Supplemental Opening Brief, and in accordance with section 1758, the Court should set aside the 2022 Tariff and order the Commission to reinstate the 2016 Tariff (NEM 2.0).

DATED: January 12, 2026

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