A167721

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT, DIVISION THREE

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

v.

PUBLIC UTILITIES COMMISSION,
Respondent;

PACIFIC GAS AND ELECTRIC COMPANY, SAN DIEGO GAS & ELECTRIC COMPANY, AND SOUTHERN CALIFORNIA EDISON COMPANY,
Real Parties in Interest.

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

PETITIONERS' OPPOSITION TO REAL PARTIES IN INTEREST'S SUPPLEMENTAL REQUEST FOR JUDICIAL NOTICE

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ARGUMENT[1]

Petitioners oppose the Utilities' Supplemental Request for Judicial Notice (RJN) of the Commission's July 2, 2021 Order Instituting Rulemaking (R.21-06-017) (Exhibit 1) because the document (1) is irrelevant to any issue material to the Court's resolution of this case and (2) lies outside the Commission-certified record and cannot properly be considered here.

In fact, the Utilities' RJN is just another attempt to distract the Court from its task of interpreting the words of Public Utilities Code section 2827.1.[2]

I. Exhibit 1 is irrelevant to any issue material to the Court's resolution of this case.

"It is true that, as a 'reviewing court' (Evid. Code, § 459, subd. (a)), [this Court] *must* take judicial notice of some matters (*id*., § 451) and *may* take judicial notice of others (*id*., § 452).

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[1] Throughout this Opposition, unless otherwise indicated (1) emphases were added to quotations while internal quotation marks, citations, brackets, ellipses, footnote references, and the like were omitted from them; (2) "Utilities" refers collectively to Real Parties in Interest Pacific Gas and Electric Company, San Diego Gas & Electric Company, and Southern California Edison Company; (3) "2022 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); and (4) "PB" refers to Petitioners' supplemental opening brief on remand.

[2] As T.S. Eliot might have put it, the Utilities seek a remand proceeding that is "[d]istracted from distraction by distraction / Filled with fancies and empty of meaning." Eliot "Burnt Norton," from *Four Quartets* (1943).

There is, however, a precondition to the taking of judicial notice in either its mandatory or permissive form—any matter to be judicially noticed must be *relevant to a material issue*." (*People ex rel. Lockyer v. Shamrock Foods Co*. (2000) 24 Cal.4th 415, 422, fn. 2, first and second italics in original.) In other words, "judicial notice, since it is a substitute for proof, is always confined to those matters which are relevant to the issue at hand." (*Mangini v. R. J. Reynolds Tobacco Co.* (1994) 7 Cal.4th 1057, 1063, overruled on another ground by *In re Tobacco Cases II* (2007) 41 Cal.4th 1257; see also *Sweeney v. California Regional Water Quality Control Bd*. (2021) 61 Cal.App.5th 1093, 1136, fn.10 [denying judicial-notice requests as "unnecessary to resolve the issues before us"].)

For two reasons, Exhibit 1 is not "relevant to the issue at hand" (*Mangini*, *supra*, 7 Cal.4th at p. 1063) and therefore should not be judicially noticed.

First, Exhibit 1 does not concern any relevant Commission proceeding or tariff. The Utilities invoke Evidence Code section 452, subdivision (c), as their basis for seeking permissive judicial notice of Exhibit 1. That provision grants courts the discretion to take judicial notice of "[o]fficial acts" of "the legislative, executive, and judicial departments" of "any state of the United States."

But the only "official act" documented in Exhibit 1 is the act of instituting a rulemaking that is unrelated to section 2827.1 or to the successor 2022 Tariff challenged in this proceeding.

Indeed, Exhibit 1 never refers to either of those subjects.[3] The 2022 Tariff was decided in Commission proceeding R.20-08-020—not R.21-06-017—and the Commission did not even mention the latter proceeding in the 2022 Tariff. Thus, even if the Court were to take judicial notice of Exhibit 1, the most it could take notice ***of*** is the fact that, on July 2, 2021, the Commission initiated an "official act" unrelated to the official act at issue here.

Second, and more fundamentally, Exhibit 1 is irrelevant to the proposition for which it is offered and is therefore, once again, not "relevant to the issue at hand." (*Mangini*, *supra*, 7 Cal.4th at p. 1063.)

The Utilities' sole argument in support of Exhibit 1's relevance is that Exhibit 1 "refers to customer-sited solar as a distributed energy resource" and therefore is "relevant to responding to Petitioners' argument" that "the Commission erred

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[3] Exhibit 1's "Preliminary Scope" section discloses that the rulemaking initiated therein had nothing to do with interpreting Public Utilities Code section 2827.1 or the formulation of a successor NEM tariff. Instead, Exhibit 1 envisioned three rulemaking "tracks" that would concern, respectively, (1) "high-level policy issues involving distribution system operator roles and responsibilities as well as IOU [investor-owned utility] and aggregator business models"; (2) "near-term evolution and improvement of the adopted DRP [Distribution Resources Plans] frameworks, analytic tools, and planning processes into a more holistic DPP [Distribution Planning Process]"; and (3) "grid modernization investments in the near term and medium term, operationalizing smart inverters to leverage advanced functionality to provide grid services, and furthering the alignment of GRC [General Rate Case] filings with the planned infrastructure investments identified during IOU distribution planning." (Exh. 1 at pp. 13-16.)

by relying on cost-effectiveness tests developed for distributed energy resources because rooftop solar is not a distributed energy resource." (RJN at p. 6, citing PB 35-36.)

But the Utilities mischaracterize the argument to which they anchor their claim of relevance. To begin with, Petitioners never said that "rooftop solar is not a distributed energy resource." In fact, Petitioners acknowledged that "the customer-sited renewable generation facilities referred to in section 2827.1, subdivision (b)(3) *are*, in fact, *distributed*." (PB 35.) But we then went on to point out that "the parsing of words here is important because an analysis that treats generation facilities as no different from energy-efficiency programs inherently fails to assess the benefits of generating electrons." (*Ibid.*)

Petitioners' point was not that the Commission has never referred to customer-sited generation as a distributed energy resource or that such generation is not "distributed." Our point was that *the Legislature*, by avoiding the term "distributed energy resources" in section 2827.1 and instead adopting the term "renewable electrical generation facility," sought to distinguish customer-sited generation from the broader universe of distributed energy resources, many of which (like energy-efficiency and demand-response programs) do not *generate* energy and are *utility-sponsored*, not *privately funded*.

As Petitioners pointed out, utility-sponsored programs are subjected to "cost-effectiveness" tests because of the inherent conflict between the utilities' interests and ratepayers' interests. While ratepayers are inherently interested in seeing that the

utilities spend as efficiently as possible, the utilities "are inherently incentivized to make investments to drive an increase in their rate base and therefore, their profitability." (PB 33-34, quoting 22 App 19315.) No such conflict of interest arises with respect to privately funded generation facilities, and cost-effectiveness tests are therefore inapposite as applied to those facilities.

It is therefore irrelevant whether the Commission sometimes lumped "customer-sited solar" in with other distributed energy resources in a document initiating a rulemaking that has nothing to do with interpreting section 2827.1 or formulating the 2022 Tariff. The point is that the Legislature *didn't* lump those terms together in section 2827.1, but instead *distinguished between them* by using the term "renewable electrical generation facility" and avoiding the term "distributed energy resources." Petitioners' argument about the inapposite nature of cost-effectiveness tests thus stands unaffected and unrebutted by Exhibit 1.

II. Exhibit 1 lies outside the Commission-certified record and cannot properly be considered here.

Relevance objections aside, there is another reason why the Court should deny the RJN—namely: "Appellate courts will not judicially notice evidentiary matters that cannot properly be considered on appeal." (Eisenberg et al., Cal. Practice Guide: Civil Appeals and Writs (The Rutter Group 2026) ch. 5-B, ¶ 5:156.1.) Exhibit 1 "cannot properly be considered" in this remand proceeding because Public Utilities Code § 1757.1,

subdivision (a) limits judicial review of Commission actions to the Commission-certified record. Exhibit 1 concededly lies outside that record and therefore cannot be judicially noticed.

CONCLUSION

For all the reasons stated above, the Court should deny the Utilities' request that the Court take judicial notice of Exhibit 1.

Respectfully submitted,

DATED: January 26, 2026

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