

Comments on and alternatives
to the proposed SMUD
electricity rates and charges for
2022 and 2023

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To be presented at the SMUD rate hearing on
August 31, 2021

Summary

The current TOD rates are taxes because they are slightly more than 9.2% higher than SMUD's marginal cost of providing electricity service. "SMUD uses marginal cost to set rates."

(SMUD's RT02 Rate Design Study, which I sent you on June 18.)

SMUD admits that it has not removed this scalar from its rates.

The current (2020) rate costing study is not a rate design study and does not show calculations for the proposed rates.

SMUD has failed to identify a California law or court opinion that supports or authorizes SMUD adding a 9.2% scalar – or any scalar - into its rates. Identify it tonight! Direct staff to identify it tonight.

Just because utilities in other states use scalars does NOT mean SMUD can use them. Article XIII C.

Just because the CPUC lets the investor owned utilities (IOUs) use scalars does NOT mean SMUD can use them. As you know CPUC does not regulate or authorize SMUD rates.

Therefore, the proposed rates are taxes, requiring voter approval.

SMUD failed to submit the proposed 2022 and 2023 rates to the electorate for a vote.

The only vote will be by the SMUD Board of Directors.

Argument

The current TOD rates are taxes because of the 9.2% scalar (2017). SMUD's proposed rates for 2022 and 2023 violate Article XIII C of the California Constitution, Voter Approval for Local Tax Levies, because without voter approval SMUD is:

1. extending and increasing current TOD rates, which exceed SMUD's reasonable costs to of providing electric service by about 10.7% as a result of the previous rate process; and
2. extending and increasing the System Infrastructure Fixed Charge (SIFC)

A short lesson on local government taxes.

The California Constitution, Article XIII C, section 2(d) says:

(d) No local government may impose, extend, or increase any special tax unless and until that tax is submitted to the electorate and approved by a two-thirds vote.

A tax is **extended** when an agency lengthens the time period during which it applies. *Gov. Code, § 53750, subd. (e)*. A tax is **increased** when an agency revises its methodology for calculating a tax and the revision results in increased taxes being levied on any person or parcel. *§ 53750, subd. (h)(1)*.

Webb v. City of Riverside, 23 Cal. App. 5th 244, 258.

A tax is “any levy, charge, or exaction of any kind imposed by a local government, except” for 7 exceptions. The most relevant of those exceptions is Article XIII C, Section 1 (e) (2):

“(2) A charge imposed for a specific government service or product provided directly to the payor that is not provided to those not charged, and which does not exceed the reasonable costs to the local government of providing the service or product.”

The original TOD rates exceeded your marginal cost of service by 9.2%. Now it is up to about 10.7%.

SMUD's Rate (RT02) Rate Design Study is proof that current residential TOD rates violate Article XIII C of the California Constitution.

The current (2021) rates and charges still contain that extra factor known as a scalar. SMUD told me by email that it has not removed or back that scalar out of its rates.

Extending and increasing these taxes without voter approval, as SMUD proposes to do in this rate action, would be a violation of the California Constitution, Article XIII C and would subject SMUD to legal action.

SMUD could potentially be ordered to refund the excess (the “scalar”) to all of its customers.

Alternative Recommendation #1

SMUD should comply with the California Constitution, Article XIII C (from Proposition 26 in November, 2010) by:

1. Removing the 9.2% “scalar”* from SMUD rates. Then raise rates by 1.5% and 2.0% for 2022 and 2023.
2. Eliminating the System Infrastructure Fixed Charge.

*(plus subsequent increases to it that SMUD added to inflate its rates when it created the TOD rates in June, 2017 and extended 4 times in the 2019 rate action)

SMUD does not have a choice whether to comply with Article XIII C (from Proposition 26) of the California Constitution.

Lying about your rates and claiming that they are not based on marginal cost, even when your CEO and GM Report says that they are (see page 98, “SMUD uses marginal cost to set rates.”) will not get you out of it. See also the 2017 and 2019 Reports.

Lying about the law and claiming that Article XIII C does not apply to SMUD rates will not get you out of it. I sued SMUD and your attorneys did not even claim this in any of their 23 affirmative defenses.

The rest of the slides in this file present background and supporting evidence on what I have said so far. You need to see this information. However I will not have time to talk about it during my presentation because your Board President has only allowed me two (2) additional minutes to speak to you even though I followed the procedures in Ordinance 15-1 and made my written request for a total of ten (10) minutes way back in June.

SMUD's first TOD rates were set on June 15, 2017 in Resolution 17-06-09. SMUD published a CEO and GM Report and Recommendation on Rates and Services (the "2017 Report").

That Report contained, as Appendix I, a letter dated December 6, 2016 from NERA Economic Consulting addressed to SMUD's Resource Planning and Pricing Department (RP&P).

The subject of the letter was NERA's independent review of SMUD's 2016 Marginal Cost of Service (MCS) Study and its proposed residential Time of Use (TOU) rates for the period 2017 – 2019. That letter was pages 109 – 112 of the Report.

NERA wrote that it had reviewed SMUD documents including the 2018 Residential Time-of-Use Rate (RT02) Design Study (“Rate (RT02) Design Study”).

That study quantified the marginal cost components of SMUD’s then proposed residential Time of Day (TOD) rates.

Marginal cost components were: Generation, Capacity, RPS, Transmission, Subtransmission, Distribution, Distribution Facilities, Meter and Services. (page 3)

The problem is that after carefully accounting for each Marginal Cost Component SMUD unconstitutionally added a “scalar” of 9.2% to set rate revenues equal to budget revenues.

In other words SMUD had a target for how much money it wanted to take in via residential TOD rates and to reach that target it added 9.2% to its marginal cost.

Compare Table L to Table M, both on page 14 in the Rate (RT02) Design Study.

Table L:

Table L: Time-of-Use Energy Marginal Cost

Time-of-Use		Energy, Ancillary Service & RPS Cost	Generation Capacity	Trans & Dist	Residual Distribution Facilities	Public Good	Total Energy Marginal Cost
Rates Time Of Use	Summer Peak	\$0.0713	\$0.0680	\$0.0689	\$0.0371	\$0.0096	\$0.2548
	Summer Mid-Peak	\$0.0580	\$0.0253	\$0.0248	\$0.0270	\$0.0096	\$0.1447
	Summer Off-Peak	\$0.0484	\$0.0126	\$0.0102	\$0.0239	\$0.0096	\$0.1048
	Winter Peak	\$0.0612	\$0.0096	\$0.0000	\$0.0398	\$0.0096	\$0.1202
	Winter Off-Peak	\$0.0491	\$0.0013	\$0.0000	\$0.0271	\$0.0096	\$0.0872

Table M:

Table M: Proposed Energy Charge

Time-of-Use		Total Energy Marginal Cost	Scalar 9.2%	2017 Energy Charges
Rates Time Of Use	Summer Peak	\$0.2548	\$0.0235	\$0.2783
	Summer Mid-Peak	\$0.1447	\$0.0133	\$0.1580
	Summer Off-Peak	\$0.1048	\$0.0097	\$0.1145
	Winter Peak	\$0.1202	\$0.0111	\$0.1313
	Winter Off-Peak	\$0.0872	\$0.0080	\$0.0952

SMUD's explanation of this 9.2% "scalar" is:

“The proposed time-of-use energy rate is completed by setting proposed rate revenues equal to rate revenues for the budget year. The reconciliation of marginal costs to rate revenues is accomplished through increasing final marginal cost energy charges by a scalar of 9.2%.”

Rates must be based on SMUD's reasonable costs, not on its budget wishes, according to the California Court of Appeal.

“However, if a local government body chooses to impose tiered rates unilaterally without a vote, those tiers must be based on cost of service for the incremental level of usage, not pre-determined budgets.”

(Capistrano case, Order modifying opinion; no change in judgment, dated May 19, 2015.)

CAPISTRANO TAXPAYERS ASSOCIATION, INC., v. CITY OF SAN JUAN CAPISTRANO, G048969, COURT OF APPEAL OF THE STATE OF CALIFORNIA, FOURTH APPELLATE DISTRICT, DIVISION THREE, (Super. Ct. No. 30-2012-00594579)

There is no point doing a Rate Design Study if you add to your marginal cost a 9.2% “scalar” in order to “set[] proposed rate revenues equal to rate revenues for the budget year”.

That defeats the purpose of the Rate Design Study.

A rate design study can only include your real marginal costs. You are not allowed to inflate your rates by adding in things like scalars.

The second question is, “Do fixed charges violate Article XIII C of the California Constitution?”

The proposed rates also violate the California Constitution in that SMUD is extending and increasing the System Infrastructure Fixed Charge (SIFC). Page 38 of the CEO and GM Report.

California Constitution, Article XIII C, Section 1:

“The local government bears the burden of proving by a preponderance of the evidence that a levy, charge, or other exaction is not a tax, that the amount is no more than necessary to cover the reasonable costs of the governmental activity, and that the manner in which those costs are allocated to a payor bear a fair or reasonable relationship to the payor’s burdens on, or benefits received from, the governmental activity.”

Emphasis added.

Consider two hypothetical SMUD customers: a single man and a married man with 5 children. The single man's "burdens on, or benefits received from" SMUD's electric service are much less than the married man's. Yet they both pay the same System Infrastructure Fixed Charge.

The SIFC is unfair to the single man and unconstitutional.