



**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE
STATE OF CALIFORNIA**

FILED

07-19-10
04:59 PM

Application of Southern California
Edison Company (U 338-E) for Authorization to
Recover Costs Related to the 2007 Southern
California Wind and Firestorms Recorded in the
Catastrophic Event Memorandum Account
(CEMA)

A.10-04-026
(Filed April 22, 2010)

**REPLY OF SOUTHERN CALIFORNIA EDISON COMPANY (U 338-E) TO PROTEST
OF THE DIVISION OF RATEPAYER ADVOCATES**

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Dated: **July 19, 2010**

#1738973

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I.

INTRODUCTION

On July 8, 2010, the Division of Ratepayer Advocates (DRA) filed a protest (Protest) to Southern California Edison Company's (SCE's) Amended Application under its Catastrophic Event Memorandum Account (CEMA) for authorization to recover incremental disaster-related expenses and capital costs incurred in responding to a qualifying catastrophic event, the 2007 Southern California wind and firestorms (Application). Pursuant to Rule 2.6(e) of the Commission's Rules of Practice and Procedure, SCE timely files this reply.

DRA proposes that the Commission disallow entirely, or in the alternative hold in abeyance, any consideration of costs associated with the Canyon Fire until after the Commission concludes its ongoing Order Instituting Investigation (OII)¹ related to the Canyon Fire.² DRA argues that "[u]nderstanding the nature of the linkage between SCE's facilities and practices and the ignition of the Malibu Canyon Fire is a critical prerequisite to any meaningful CEMA

¹ I.09-01-018.

² Protest of the DRA, July 8, 2010, at 2-3.

reasonableness analysis of the Malibu Canyon Fire–related costs.”³ In addition, DRA contends that the parties’ ability to adhere to conflicting *ex parte* rules in the OII and the instant proceeding might be put into jeopardy by the “interconnectedness between the issues to be resolved” in the two proceedings.⁴ DRA further argues that “pending governmental investigations and lawsuits” tangentially related to certain fires at issue in SCE’s application should factor into the reasonableness of the incremental costs associated with those fires.⁵

SCE opposes DRA’s proposal to halt or delay this CEMA proceeding and to inject inquiries into the Commission’s analysis that betray the purpose behind CEMA, the language of the governing CEMA statute, and the Commission’s own decisions. DRA’s proposal amounts to a drastic change in the reasonableness analysis in CEMA proceedings—one that should not be adopted by the Commission. Accordingly, SCE respectfully requests that the Commission reject DRA’s proposal to expand beyond recognition the CEMA analysis and that the Commission continue with proceedings in this matter on an appropriate schedule, such as that set forth in the Application.

SCE notes that it does not object to DRA’s indication that it will audit SCE’s costs reflected in the Application. In fact, DRA has been conducting its audit review of SCE’s costs since early June 2010, and SCE has completed all data requests that the DRA’s auditor has submitted to date. SCE pledges that it will continue to assist DRA in its review in a manner consistent with prior CEMA applications.

II.

THE CANYON FIRE

A. DRA’s Proposal Is Inconsistent with the Policy Driving CEMA

The Commission (in Resolution No. E-3238) and the Legislature (in codifying the Commission’s policy in —Public Utilities Code § 454.9) designed CEMA to create significant incentives for utilities to quickly and safely to restore service after a declared disaster. DRA’s proposal that the Commission disallow or delay consideration of SCE’s Canyon Fire costs recorded to CEMA cuts against that foundational policy.

³ *Id.* at 2.

⁴ *Id.* at 3.

⁵ *Id.*

Before the establishment of CEMA, utilities were unable to recover costs associated with their response to disasters because of the rule against retroactive ratemaking. During the pre-CEMA period, in order to attempt to recover costs associated with disaster response, a utility had to include the costs in its rate base showing in a future general rate case. A utility could also potentially include a portion of the disaster-related incremental costs in a showing of historical expenses. Even if the utility was successful in this effort, the utility would only recover *some* of the costs associated with the disaster response, and the recovery would sometimes come several years later in the next general rate case cycle.

CEMA markedly changed this lengthy and uncertain method of disaster cost recovery. The Commission, and soon after, the Legislature recognized that in order to ensure the quick and safe restoration of service to the public after a disaster, utilities needed assurance *ex ante* that they would be able to recover the associated costs in a timely, focused manner. DRA's proposal to disallow SCE's recovery of the costs related to the Canyon Fire without proper hearing in this proceeding violates SCE's due process rights. Further, DRA's request to hold in abeyance recovery of the Canyon Fire costs until the Commission resolves I.09-01-018 is inconsistent with the legislative and Commission intent behind the CEMA statute. DRA's proposal would cause significant and unnecessary delay in SCE's disaster cost recovery, which would undermine and even negate the purpose of CEMA. This delay would harm SCE in the present context, but more importantly, would do a great disservice to the public at large, for CEMA's incentivizing principles would be significantly diminished should delay and uncertainty be injected back into disaster response cost recovery.

B. DRA's Proposal Runs Counter to the Language of the CEMA Statute, Which Provides for Expedited Recovery of Reasonable Incremental Costs

The CEMA statute provides for expedited recovery of disaster-related O&M and capital costs associated with a qualifying catastrophic event. Specifically, Public Utilities Code §454.9(a) states:

- (a) The commission shall authorize public utilities to establish catastrophic event memorandum accounts and to record in those accounts the costs of the following:
 - (1) Restoring utility services to customers.
 - (2) Repairing, replacing, or restoring damaged utility facilities.

(3) Complying with governmental agency orders in connection with events declared disasters by competent state or federal authorities.

Public Utilities Code §454.9(b) further details that the costs recorded “shall be recoverable in rates following a request by the affected utility, a commission finding of their reasonableness, and approval by the commission. The commission *shall hold expedited proceedings* in response to utility applications to recover costs associated with catastrophic events.” (emphasis added). Thus, on its face, the CEMA statute provides for expedited recovery of reasonable costs recorded in association with a qualifying declared disaster.⁶ SCE is entitled to expedient recovery under this rubric, notwithstanding DRA’s proposal to drastically change the procedure for and analysis of CEMA cost recovery.

First, DRA does not dispute that the Canyon Fire qualifies as a declared disaster. As explained in the Application, the 2007 California wildfires were declared disasters by both Governor Schwarzenegger and President Bush.⁷ Thus, the Canyon Fire is the proper subject of a CEMA application.

Second, the language of the statute expressly requires that the Commission “*shall hold expedited proceedings*”⁸ to consider the Application, including SCE’s request for the recovery of costs recorded in conjunction with the Canyon Fire. The Legislature specifically included the requirement for “expedited proceedings” because it recognized that the utilities needed a process by which they could recover disaster-related costs without delay and that the public would benefit from such prompt proceedings.⁹ Thus, there can be no doubt that DRA’s proposal to deny or delay consideration of the costs associated with the Canyon Fire betrays the express language and intent of the CEMA statute. DRA’s proposal also cuts against Commission decisions that reflect the requisite expedited nature of CEMA proceedings. For example, in PG&E’s 2008 Storms CEMA Application (A.08.03-017), the ALJ denied a request by the DRA to hold a CEMA application in abeyance because “it is intent of the statutory language that the

⁶ See also Resolution No. E-3238.

⁷ Application, at 3.

⁸ Pub. Util. Code §454.9(b) (emphasis added).

⁹ See SB 1456, Comments (“This measure is intended by the author . . . to ensure that the PUC and utilities have adequate authority to fully repair, replace or restore damaged utility facilities on an expedited basis.”)

Commission ‘hold expedited proceedings’ in CEMA matters.”¹⁰ The Commission concurred with the ALJ’s Ruling and held that “the statute envisions an expedited processing of the CEMA application. The fact that the prior Commissions have failed to act expeditiously is inapposite to our current decision.”¹¹ In its final decision approving the settlement between PG&E and the DRA, the Commission further held that the “public interest lies in the *timely resolution* of this matter in a way that enables PG&E to respond to public emergencies while protecting the interest of ratepayers that all rates remain reasonable.”¹² A timely resolution is appropriate and necessary here.

Finally, the meaning of “reasonable” costs is well established and does not comport with DRA’s proposal that the subject of the OII somehow bears on this proceeding. To begin with, the statutory language of §454.9(b) makes clear that the reasonableness analysis involves a consideration of whether the *recorded costs* are reasonable. Section §454.9(b) reads in relevant part: “The *costs*, including capital costs, recorded in the accounts set forth in subdivision (a) shall be recoverable in rates following a request by the affected utility [and] a commission finding of *their* reasonableness”¹³ The word “their,” which modifies “reasonableness,” refers to “costs.” As such, the Commission may only consider the reasonableness of the costs incurred, and *must* (as dictated by the word “shall”) allow recovery of *costs* it finds them to be reasonable.

Further, the Commission’s interpretation of “reasonable” costs is well settled. The Commission applies a prudent manager standard to a utility’s response to a disaster *after* it has struck.¹⁴ The Commission’s focus (and indeed, the driving public interest consideration) is whether the utility has properly managed its response to a disaster once it has already started—an issue entirely separate from the focus of an OII, which centers on the root cause of the disaster itself. For example, in Decision (D.)05-08-039, the Commission clearly detailed the relevant reasonableness inquiries, all of which focused on the reasonableness of the “management of the

¹⁰ A.08-03-017, Assigned Commissioner Ruling and Scoping Memo, at p. 6.

¹¹ *Id.*

¹² D.08-11-045, at p. 5 (emphasis added).

¹³ Pub. Util. Code §454.9(b) (emphasis added).

¹⁴ *See e.g.* D.08-11-045; D.05-08-039; D.05-08-037

restoration of service” and the reasonableness of the actual cost amounts recorded.¹⁵ None of the reasonableness topics considered any conduct or actions that occurred before the start of the declared disaster. Further, in D.95-09-073, the Commission explicitly stated that costs may be recoverable under CEMA, “even if they may have resulted from deferred maintenance, infrequent or faulty inspections, or reductions in employees who perform service and safety functions.”¹⁶ Thus, considerations of causation, which bear on the subject of the OII, are entirely irrelevant to the question whether a utility may recover costs recorded to CEMA.¹⁷

Accordingly, SCE respectfully requests that the Commission apply longstanding CEMA principles to the Application: the Commission should conduct expedited proceedings in which it considers whether the *costs* recorded to the CEMA are reasonable, using the prudent manager standard to consider SCE’s response to the 2007 fires once they began.

III.

THE BURDEN OF PROVING REASONABLENESS

In an argument both reminiscent of and expanding upon its protest regarding costs associated with the Canyon Fire, DRA further argues that because a utility must demonstrate that its costs recorded to CEMA are reasonable, SCE has the burden of defending its practices with respect to alleged fire causation in instances where the Commission has not even initiated an OII.¹⁸ DRA cites the Grass Valley Fire, which is the subject of an unrelated action, as a fire for

¹⁵ D.05-08-039 at p. 2.

¹⁶ D.95-09-073, at p. 8.

¹⁷ SCE notes that in D.01-02-075, the Commission considered a settlement of a CEMA application seeking recovery of costs associated with the 1998 El Nino storms. *Id.* at p. 1. The Commission stated that it might be relevant to consider whether some of the costs recorded to CEMA could have been avoided by actions that could have been taken before the start of the storms. *Id.* at p. 10. This decision is distinguishable on two primary bases. First, D.01-02-075 involves the Commission’s consideration of the propriety of a settlement, as opposed to a Commission determination of the reasonableness of costs recorded to CEMA. Thus, the posture of the Commission’s review in D.01-02-075 is not the same as a reasonableness review under §454.9(b). Second, in D.01-02-075, the Commission noted its skepticism about whether El Nino storms, which are predictable in advance, are properly the subject of CEMA, because CEMA is intended for truly *unexpected* catastrophic events. *Id.* at p. 9-10. Thus, the Commission likely decided that a reasonableness review that took into consideration the predictability of the El Nino event—and the question whether the utility had planned appropriately for it—was in order due to the specific nature of the relevant disaster. Here, it is undisputed that the 2007 wildfires, including the Canyon Fire, were true unexpected catastrophic events.

¹⁸ Protest of the DRA, at 3.

which SCE must demonstrate that it did not contribute to the cause before SCE can recover costs associated with it.¹⁹ DRA’s proposal is untenable for the same reasons that its argument regarding the Canyon Fire must fail: CEMA was designed to allow for expedited recovery of reasonable costs, defined as those that resulted from prudent management *response* to a disaster. The fact that certain fires may be the subject of unrelated government investigations, particularly where that government entity is not even the Commission, or indeed any *California* state entity, cuts against the purpose and language of the CEMA statute.

In addition, DRA’s proposal would prove unworkable in practice. If a utility had to account for and explain every investigation or claim involving a disaster—whether or not that separate investigation or claim had anything to do with the reasonableness of management’s response to the disaster—the utility would almost certainly need to wait until all potential civil and criminal limitation periods had run before it could be assured that no entity or individual would bring a claim against it. In addition, even if the utility did not wait to file its CEMA application, the Commission would potentially require those limitations periods to run before allowing cost recovery, just to be sure that no entity or individual would call into question the “reasonableness,” as DRA defines the term, of the utility’s request. Such a scenario is untenable, particularly considering that the intent and express language of the CEMA statute requires *expedited* proceedings. DRA’s attempt to insert unrelated inquiries into the traditional and well-established CEMA analysis is therefore ill-founded and illogical. SCE respectfully requests that the Commission decline to adopt DRA’s unsupportable argument.

Furthermore, with respect to the Grass Valley Fire in particular, DRA attaches an unrelated Complaint to its Protest.²⁰ That Complaint details that SCE enjoys an easement on federal land that provides for *strict liability* for damage to the occupied land.²¹ Thus, DRA’s belief that SCE’s alleged contribution to the ignition of the Grass Valley Fire could be the subject of inquiry in that suit may very well not come to fruition under the black letter definition of strict liability.

¹⁹ *Id.*

²⁰ Protest of the DRA, Ex. 1.

²¹ *Id.* ¶ 21.

IV.

EX PARTE COMMUNICATIONS

DRA's concern²² about *ex parte* communications is based upon a fundamental misunderstanding: there is no overlap or "interconnectedness" between this proceeding and the OII, and there is therefore no risk that any communications that take place within this proceeding will have any effect on the entirely separate OII. As detailed above, the OII centers on causation issues involving the Canyon Fire, while this proceeding is focused on the distinctly different matter of whether SCE responded reasonably and prudently to the 2007 wildfires once they began and whether the amount of the costs recorded are appropriate. Thus, any discussions that occur within the context of this Application should be of no concern to the OII or to the attorneys involved in that proceeding.

V.

CONCLUSION

WHEREFORE, DRA's proposal to change the fundamental reasonableness analysis in CEMA proceedings should be rejected, and these proceedings should continue on an expedited schedule, as set forth in the Application, as required by the CEMA statute and Commission decisions interpreting that statute, and for the further reasons described herein. SCE has and will continue to assist the DRA by providing information needed to assess the reasonableness of costs incurred in its response to the 2007 wildfires.

²² Protest of the DRA, at 3.

Respectfully submitted,

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July 19, 2010

CERTIFICATE OF SERVICE

I hereby certify that, pursuant to the Commission's Rules of Practice and Procedure, I have this day served a true copy of REPLY OF SOUTHERN CALIFORNIA EDISON COMPANY (U 338-E) TO PROTEST OF THE DIVISION OF RATE PAYER ADVOCATES on all parties identified on the attached service list(s). Service was effected by one or more means indicated below:

Transmitting the copies via e-mail to all parties who have provided an e-mail address. First class mail will be used if electronic service cannot be effectuated.

Executed this **22th day of July 2010**, at Rosemead, California.

/s/ Alejandra Arzola _____
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