

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



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Application of San Diego Gas & Electric Company (U 902-M), Southern California Edison Company (U 338-E), Southern California Gas Company (U 904-G) and Pacific Gas and Electric Company (U 39-M) for Authority to Establish a Wildfire Expense Balancing Account to Record for Future Recovery Wildfire-Related Costs

A.09-08-020  
(Filed August 31, 2009)

**JOINT OPENING BRIEF OF CENTER FOR ACCESSIBLE TECHNOLOGY,  
CONSUMER PROTECTION AND SAFETY DIVISION, DIVISION OF  
RATEPAYER ADVOCATES AND THE UTILITY REFORM NETWORK IN  
APPLICATION 09-08-020**

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**JOINT OPENING BRIEF OF CENTER FOR ACCESSIBLE TECHNOLOGY,  
CONSUMER PROTECTION AND SAFETY DIVISION, DIVISION OF  
RATEPAYER ADVOCATES AND THE UTILITY REFORM NETWORK IN  
APPLICATION 09-08-020**

**I. INTRODUCTION**

On August 31, 2009, San Diego Gas & Electric Company (“SDG&E”), Southern California Edison Company (“Edison”), Southern California Gas Company (“SoCalGas”), and Pacific Gas and Electric Company (“PG&E”) filed their initial application requesting Commission authorization to establish a Wildfire Expense Balancing Account (“WEBA”) to allow each utility to recover from ratepayers all costs paid by the utility arising from wildfires. This application followed catastrophic wildfires in San Diego in 2007, which raised the specter of utility costs that exceed available liability insurance.<sup>1</sup>

Edison and PG&E subsequently withdrew from this application,<sup>2</sup> leaving the remaining applicants, SDG&E and SoCalGas (“Applicants” or “Utilities”), to seek authorization for the proposed WEBA. Pursuant to Rule 13.11 of the Rules of Practice and Procedure of the California Public Utilities Commission (“Commission” or “PUC”), the Center for Accessible Technology, Consumer Protection and Safety Division, Division of Ratepayer Advocates, and The Utility Reform Network (collectively, “Intervenors”) respectfully submit this opening brief on the instant application. The Utility Reform Network will also submit a separate brief concerning the Wildfire Insurance Premium Balancing Account proposal and other matters not discussed jointly in this brief.

The Commission should reject this application because the Utilities already have existing processes to recover reasonably incurred costs related to wildfires, and the Utilities have not demonstrated any need to modify those existing processes. More importantly, the proposed cost recovery mechanism is severely flawed and wholly

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<sup>1</sup> While the initial application said nothing about costs stemming from the 2007 fires, counsel for SDG&E argued at hearing that the utility always intended to try to recover the 2007 fire costs through WEBA, if this application is approved. 1 RT 6:18-22, SDG&E/SoCalGas, Thorp.

<sup>2</sup> Edison and PG&E filed a motion to withdraw from this application on November 9, 2011 and were granted this request in an Assigned Commissioner’s ruling issued on January 10, 2012.

unreasonable. WEBA's many flaws, include, but are not limited, to the fact that it would result in higher costs for ratepayers, shift risks from shareholders to ratepayers, reduce shareholder risk without an appropriate and commensurate reduction in the Utilities' rate of return, reduce the Utilities' incentives to operate their systems safely, effectively condone noncompliance with Commission and statutory requirements for safe operation, allow recovery of unreasonable costs, and, unreasonably prevent the Commission from appropriately exercising its regulatory oversight over the Utilities in the future.

## **II. SUMMARY OF UTILITY PROPOSAL AND RELEVANT PROCEDURAL HISTORY**

The Utilities request an unprecedented cost recovery mechanism for all claims and defense costs associated with wildfires. In summary, the Utilities request:

- To record claims and defense costs associated with a wildfire in a Wildfire Expense Memorandum Account ("WEMA") until the costs exceed \$10 million, at which time the Utility may transfer the WEMA balance for that wildfire to a WEBA.<sup>3</sup>
- 100% ratepayer recovery of all wildfire costs if they relate to inverse condemnation or strict liability claims. These costs are considered Category A costs.<sup>4</sup>
- Ratepayer recovery of all wildfire costs up to \$1.2 billion (minus wildfire liability insurance coverage for each utility) for costs resulting from wildfires for which the utility is not found strictly liable and are not due to willful or intentional misconduct by utility management. Shareholders will absorb the first \$5 million for each wildfire event up to a \$10 million cap within any 12-month period.<sup>5</sup>

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<sup>3</sup> Updated Amended and Restated Testimony In Support of Joint Amended Utility Application for Authority to Establish a Wildfire Expense Balancing Account to Record for Future Recovery Wildfire-Related Costs (henceforth "Exhibit 1"), January 5, 2012, pp. 28.

<sup>4</sup> *Id.* at 29 and 31.

<sup>5</sup> *Id.* at 29-32.

These costs are considered Category B, Tier 1 costs. Category B includes costs for wildfires that are the result of negligence<sup>6</sup> and reckless behavior.<sup>7</sup>

- For wildfire costs in excess of \$1.2 billion<sup>8</sup>, 95% ratepayer recovery with the remaining 5% being absorbed by shareholders up to a \$20 million cap for all wildfires within a 12-month period.<sup>9</sup> Once the cap is reached, 100% ratepayer recovery of all costs with no upper limit cap on ratepayer exposure.<sup>10</sup> These costs are considered Category B, Tier 2 costs.
- The amounts received by a Utility from third party recoveries will be shared 90% to shareholders and 10% to ratepayers until the shareholders have been fully reimbursed for wildfire costs absorbed. Thereafter, 90% of third party recoveries will be credited to ratepayers and 10% will be retained by shareholders.<sup>11</sup>
- A 100% balancing account for wildfire insurance premium costs, the Wildfire Insurance Premium Balancing Account (“WIPBA”).<sup>12</sup>
- Establish an insurance procurement consultative process that would include DRA, Energy Division and interested stakeholder groups.<sup>13</sup>

As noted above, on August 31, 2009, an initial application was filed jointly by all the IOUs, requesting Commission authorization to establish a WEBA to allow each utility to recover from ratepayers all costs paid by the utility arising from wildfires. On

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<sup>6</sup> *Id.* at 29.

<sup>7</sup> Under the Applicant’s proposal, if an entire program were found to be reckless, a related fire event would be classified as Category C and not subject to recovery through WEBA. However, utility witness, Lee Schavrien, agreed that “there could be instances of reckless behavior within a program that overall is not designated in such a manner to be reckless that would allow for the classification of the overall event into Category B.” RT 332, lines 19-26, SDG&E/SoCalGas, Schavrien.

<sup>8</sup> For costs resulting from wildfires for which the utility is not found strictly liable and are not due to willful or intentional misconduct by utility management.

<sup>9</sup> Exhibit 1, p. 32.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.* at 28.

<sup>12</sup> *Id.* at 75.

<sup>13</sup> *Id.* at 69.

December 21, 2009, Assigned Commissioner Simon and Administrative Law Judge (“ALJ”) Bushey issued a ruling directing the utilities to amend their original application to address three major issues.<sup>14</sup> The Joint Applicants filed their amended testimony on August 10, 2010.

After comparing the original application with the amended version, Assigned Commissioner Simon and ALJ Bushey issued a ruling on February 18, 2011, finding that the Applicants had failed to remedy the deficiencies identified in the original application and ruling that the application be dismissed.<sup>15</sup> The ruling, however, allowed the Applicants an opportunity to show cause why their application should not be dismissed through briefs.<sup>16</sup> In response, SDG&E, SoCalGas and Edison<sup>17</sup> filed a motion to stay the February 18<sup>th</sup> ruling ordering the utilities to show cause why their application should not be dismissed, requesting that the ruling be stayed in order to continue settlement negotiations and to allow the Applicants “the opportunity to develop of complete record that would enable the Commission to consider the merits of the Amended Application.”<sup>18</sup> In a ruling filed on March 14, 2011, Assigned Commissioner Simon granted the motion

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<sup>14</sup> The ruling required the utilities to address the three following issues in their amended application.

The limitless potential for ratepayers to fund third-party claims, including fire suppression and environmental damage, all but invite governmental entities and everyone else to submit claims to utilities;

Utilities have no incentive to defend against third-party claims, and ratepayers are without a practical means to protect their interests;

The presumption of recovery of third-party claims undermines financial incentives for prudent risk management and safety regulation compliance.

<sup>15</sup> A.09-08-020, Ruling of the Assigned Commissioner and Administrative Law Judge Requiring Applicants to Show Cause Why Application Should Not be Dismissed, February 18, 2011 (henceforth “February 18, 2011 Dismissal and Order to Show Cause”), p. 5, Ordering Paragraph 3.

<sup>16</sup> *Id.*, Ordering Paragraph 4.

<sup>17</sup> PG&E did not join in the motion for stay.

<sup>18</sup> A.09-08-020, Joint Motion of San Diego Gas & Electric Company, Southern California Gas Company, and Southern California Edison Company for Stay of Ruling and Establishment of Procedural Schedule, February 23, 2011 (henceforth “Joint Motion for Stay”), p. 1.

to stay based on his perception that the parties might resolve the issues through settlement.<sup>19</sup>

Edison and PG&E filed a motion to withdraw from this application on November 9, 2011 and were granted this request in an Assigned Commissioner's ruling issued on January 10, 2012. After several rulings setting and modifying the procedural schedule, evidentiary hearings were held on January 11 through January 13, 2012 with the remaining Applicants, SDG&E and SoCalGas.<sup>20</sup>

### **III. THE UTILITIES HAVE FAILED TO PROVE THE REASONABLENESS OF THEIR REQUEST**

The Applicants are requesting a balancing account mechanism through which almost all costs related to wildfires would be funneled to ratepayers via a formulaic structure that provides little, if any, opportunity to review the reasonableness of the costs and makes ratepayer payment of potentially billions in wildfire related costs virtually automatic.<sup>21</sup> The burden of proving the reasonableness of this request rests squarely on the Applicants,<sup>22</sup> and the potential impact and unique nature of the request only increases the importance of that burden. The Applicants, however, have failed to prove that their requested cost recovery mechanism is reasonable.

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<sup>19</sup> A.09-08-020, Assigned Commissioner's Ruling Granting Joint Motion for Stay of Ruling Requiring Applicants to Show Cause Why the Subject Application Should Not be Dismissed, March 14, 2011 (henceforth "March 14, 2011 ACR Granting Motion for Stay"), p. 2.

<sup>20</sup> A.09-8-020, Scoping Ruling of the Assigned Commissioner, June 8, 2011; Assigned Commissioner's Ruling modifying schedule, August 16, 2011; Assigned Commissioner's Amended Scoping Memo and Ruling, September 29, 2011.

<sup>21</sup> See *infra* Section IV. for a discussion of the unreasonableness of the Utilities' request.

<sup>22</sup> See D.06-05-016, p. 7.

Public Utilities Code § 451 provides, in part, that "all charges demanded or received by any public utility ... shall be just and reasonable." Section 454 provides, "Except as provided in § 455 no public utility shall change any rate or so alter any classification, contract, practice, or rule as to result in any new rate, except upon a showing before the commission and a finding by the commission that the new rate is justified." Where a utility fails to demonstrate that its proposed revenue requirements are just and reasonable, the Commission has the authority to protect ratepayers by disallowing expenditures that the Commission finds unreasonable. *Id.*

**A. SDG&E and SoCalGas did not cure the deficiencies in their request as ordered by the Assigned Commissioner and ALJ, despite multiple opportunities to do so.**

At the outset of this proceeding, the Assigned Commissioner and ALJ made it very clear that the balancing account requested in the original application was extraordinary and gave rise to serious issues concerning the safety of utility operations.<sup>23</sup> In an unusual ruling, the Assigned Commissioner and ALJ concluded that it would not be appropriate to go forward with the proceeding unless and until the Applicants addressed the issues of (1) limitless ratepayer liability for third-party claims, (2) lack of incentive for utilities to defend such claims, and (3) the potential to undermine utility incentives for prudent risk management and safety regulation compliance.<sup>24</sup> The Applicants were given an opportunity to address the problems with their showing through an amended application. However, after the amended application was filed, the Assigned Commissioner and ALJ found that the Applicants' amended application did little to address the fundamental issues identified in the earlier ruling. Therefore, as noted above, the Assigned Commissioner and ALJ rightfully concluded that the application failed to present a compelling showing of extraordinary facts that would warrant the unprecedented ratemaking relief requested by the Applicants and ruled that the application should be dismissed.<sup>25</sup>

When Assigned Commissioner Simon subsequently granted the Applicants' motion for stay, SDG&E and SoCalGas were given yet another opportunity to address the major issues raised by the Commissioner and ALJ through their rebuttal testimony,

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<sup>23</sup> A.09-08-020, Ruling Directing Applicants to Amend Application and All Parties to Meet and Confer, December 21, 2009 (henceforth "December 21, 2009 Ruling to Amend Application"), p. 6.

<sup>24</sup> *Id.* at 7.

<sup>25</sup> February 18, 2011 Dismissal and Order to Show Cause, p. 4.

The relief requested is unprecedented; no other public utilities have balancing account protection for any type of third party liability. In fact, applicants have only memorandum account protection for declared disaster events that damage utility facilities. As set forth in the December 2009 ruling, extraordinary relief requires a compelling showing of extraordinary facts. Increasing liability insurance costs is an issue to be addressed in each applicant's next general rate case as is retained risk or self insurance.

Therefore, we conclude that the record should be closed and the matter submitted for a Commission decision dismissing the application.

despite the fact that the Commission has long held, “a party must place the full justification for a proposal in its written direct testimony, and may not wait until rebuttal to do so”<sup>26</sup> and that a “[utility’s] direct showing must provide the clear and convincing evidence”<sup>27</sup> that the relief sought in the application is appropriate. The Applicants, however, did not take advantage of this unusual opportunity to cure the deficiencies in their direct testimony and only made only a minor modification to the substantive portion of their amended application and testimony by removing the shareholder compensation proposal due to the negative reaction from intervenors.<sup>28</sup>

Other attempts to address the issues of concern to the Assigned Commissioner and ALJ were equally limited. In addressing the issue of the impact of the WEBA mechanism on utility safety, SDG&E and SoCalGas offered no changes to the proposal. Rather, they only responded that the existing potential for fines would increase the likelihood that they would conduct utility operations safely, and that the (capped) 95/5 cost-sharing provision proposed for Category B costs as well as the access fee would essentially keep the utilities in line.<sup>29</sup> These arguments, however, do not really address the issue that, by providing unlimited balancing account treatment for the cost of wildfires caused by utility negligence or even recklessness,<sup>30</sup> the potential financial repercussions for shareholders for the negligent actions of the utility are reduced by an order of magnitude. Without the WEBA mechanism, shareholders could be required to shoulder the entire cost of a wildfire caused by utility negligence or recklessness, a fact that could not help but have an impact on utility operations and safety protocol.

Furthermore, the rebuttal testimony was silent on the issue of unlimited ratepayer liability for third-party claims. SDG&E and SoCalGas did not attempt to modify their proposal, which provided some shareholder cost responsibility but limited shareholder liability to \$20 million in Category B, Tier 2 costs plus a \$5 million upfront access fee,<sup>31</sup>

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<sup>26</sup> D.07-11-037, Opinion Granting Rate Increases for the Region II Service Area and General Office Operations of Golden State Water Company, p. 116 (Nov. 6, 2007).

<sup>27</sup> D.08-01-020, Order to Show Cause on Why the Commission Should Not Fine Golden State Water Company \$50,000, p. 2 (Jan. 10, 2008).

<sup>28</sup> Exhibit 2, p. 11.

<sup>29</sup> *Id.* at 6.

<sup>30</sup> See footnote 7, above.

<sup>31</sup> Exhibit 1, p. 32.

which amounts to very little given the utilities have predicted that the claims from a major wildfire “can easily total billions of dollars.”<sup>32</sup>

**B. SDG&E and SoCalGas have continually failed to justify the need for the extraordinary ratemaking relief they seek.**

Despite being given multiple opportunities beyond the normal procedural standards, SDG&E and SoCalGas have failed to show that existing mechanisms available to the utilities are inadequate to address the potential for wildfire costs that may exceed the coverage provided by insurance policies. In the Assigned Commissioner and ALJ Ruling of December 21, 2009 that ordered the Utilities to amend their original application, the utilities were directed to consider alternatives to the proposed balancing account; the ruling gave several specific examples of alternatives that should be considered:

Alternatives to the proposed balancing account should also be considered. The Commission has adopted a number of mechanisms to assist public utilities when actual circumstances differ substantially from adopted general rate case forecasts. Memorandum accounts are one such mechanism; adjustments to the adopted post-test year ratemaking mechanisms are another.<sup>33</sup>

Contrary to the clear instructions in the December 21 ruling, the Applicants did not provide any discussion of alternatives to their proposed balancing account in their amended application, nor did SDG&E and SoCalGas cure this deficiency in their rebuttal testimony or during evidentiary hearings. In fact, cross examination of SDG&E and SoCalGas witnesses provided further evidence that the WEBA mechanism is unnecessary, and the utilities currently have ample opportunity to seek recovery of any costs related to wildfires in excess of their insurance coverage.<sup>34</sup>

For instance, witness Schavrien acknowledged that, if this instant application were denied and a wildfire occurred, SDG&E could request a memorandum account and

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<sup>32</sup> Exhibit 1, p. 7, line 26.

<sup>33</sup> December 21, 2009 Ruling to Amend Application, p. 9.

<sup>34</sup> 1 RT 197: 21-28, 198:1-24, SDG&E/SoCalGas, Schavrien.

file a subsequent application to recover the costs of the wildfire.<sup>35</sup> He also acknowledged that at no point after the 2007 fires and without a WEBA type mechanism in place, had SDG&E's bond rating suffered.<sup>36</sup> In addition, SDG&E admitted that they have other avenues for pursuing recovery of some of the costs related to the 2007 wildfires, and have, in fact, collected approximately \$8 million through FERC proceedings.<sup>37</sup> Finally, the existing Z-factor mechanism<sup>38</sup> enables SDG&E and SoCalGas to pursue recovery of the cost of increased insurance premiums<sup>39</sup> as well as third party claims related to wildfires. In fact, witness Schavrien admitted that the utilities have been tracking the costs of excess claims and increased insurance premium balances resulting from the 2007 wildfires in both their Z-factor memorandum account and the WEMA<sup>40</sup> and that, in the event that this application is denied, the utilities intend to seek recovery of the 2007 fires costs through their Z-factor mechanism instead.<sup>41</sup> He also acknowledged that the utilities are always free to file separate applications seeking recovery of unanticipated costs.<sup>42</sup>

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<sup>35</sup> 1 RT 198: 9-24, SDG&E/SoCalGas, Schavrien; *see also* 2 RT 290, lines 12-23, SDG&E/SoCalGas, Schavrien.

<sup>36</sup> 2 RT 194: 17-28, and 195:1-3, SDG&E/SoCalGas, Schavrien.

<sup>37</sup> 1 RT 202:7-10, SDG&E/SoCalGas, Schavrien.

<sup>38</sup> *See* D.10-12-053, Decision Granting Request, with Exceptions, of San Diego Gas & Electric Company for "Z-Factor" Treatment for Liability Insurance Premium and Deductible Expense Increases, p. 27:

SDG&E must prove by a preponderance of the evidence that the increased liability insurance premium and deductible expense are:

1. Caused by an event exogenous to SDG&E;
2. Caused by an event that occurred after the implementation of rates;
3. Costs that SDG&E cannot control;
4. Costs that are not a normal cost of doing business;
5. Caused by an event that affects SDG&E disproportionately;
6. Costs that have a major impact on SDG&E;
7. Costs that have a measureable impact on SDG&E; and
8. Costs that SDG&E has reasonably incurred.

<sup>39</sup> *See* D.10-12-053, Ordering Paragraph 1. SDG&E has been authorized to recover the 2009-2010 cost of increased insurance premiums related to the 2007 fires from ratepayers, amounting to \$28,884,000, through their Z-factor mechanism.

<sup>40</sup> 2 RT 401:22 to 402:8, SDG&E/SoCalGas, Schavrien.

<sup>41</sup> 2 RT 406:8-13, SDG&E/SoCalGas, Schavrien.

<sup>42</sup> 1 RT 197:22 to 198:24, SDG&E/SoCalGas, Schavrien.

Given the multiple alternatives available for SDG&E to pursue recovery for the only fires that have led to costs in excess of insurance, and the risks identified by the Assigned Commissioner and ALJ regarding the proposed WEBA, SDG&E and SoCalGas have failed to provide any clear rationale why such extraordinary relief would be appropriate or why existing mechanisms are inadequate to address excess wildfire costs now or in the future.

#### **IV. THE UTILITIES' WEBA PROPOSALS ARE UNREASONABLE AND WOULD BE BAD PUBLIC POLICY**

##### **A. The proposed WEBA mechanism would inappropriately deny the Commission discretion and authority.**

The Utilities are clear that the creation of a WEBA along the lines of the proposal set out in Exhibit 1 would create a mechanistic framework for allocation of costs not covered by liability insurance, leaving virtually no room for discretion or analysis of whether incurred costs are reasonable.<sup>43</sup> Rather, once a WEBA is in place, any future proceeding would address only the question of which category within WEBA is appropriate for costs from any given fire and verification that costs were actually incurred (i.e. reviewing receipts) without any consideration of whether such costs were appropriate. Moreover, the WEBA framework would prevent the Commission from addressing other key aspects of a potential qualifying event, leaving important issues of cost recovery virtually entirely outside of any review.

##### **1. WEBA would prevent adequate review of costs and system safety.**

In the proposal set forth in Exhibit 1, Applicants seek to record wildfire-related costs to WEBA, including “all amounts not authorized for recovery in that Utility’s base rates or otherwise, that are paid by a Utility for wildfire claims, the costs of defending such claims, and the costs of financing such amounts until recovered.”<sup>44</sup> Applicants state, “recording of Wildfire Costs in a WEBA does not create a presumption of recoverability;”<sup>45</sup> while technically true, this statement is fundamentally misleading. In

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<sup>43</sup> A detailed discussion regarding the costs that might be shifted to ratepayers through WEBA is below at §IV.2.b.

<sup>44</sup> Exhibit 1, p. 27.

<sup>45</sup> Exhibit 1, p. 10

fact, except for fires that are classified as “Category C,” recovery of costs recorded in WEBA would then flow to ratepayers “without reasonableness review.”<sup>46</sup> Once costs are recorded and a WEBA recovery application is filed, the Commission’s role would be limited to: “(a) allocating costs to Categories A, B, and C according to the criteria set forth [in the Application]; (b) verifying that the utility actually incurred the costs recorded, and (c) determining whether the timing of rate recovery proposed by the Utility is appropriate.”<sup>47</sup>

Under this proposal, once there is a determination that a wildfire was not Category C, rate recovery of at least 95% is assured, without regard for whether Utility’s behavior was reasonable or whether the actual costs incurred were reasonable. Recovery would be essentially guaranteed, and the distribution itself would be “mechanical,” subject only to documentation that costs actually were incurred.<sup>48</sup> Recovery would not be contingent on any determination that the utility operated its system safely, or whether it acted in compliance with the Commission’s General Orders. Rather, Witness Schavrien agreed that “assuming the utility did not intentionally or wrecklessly [sic] intend noncompliance with the General Order regarding safety, the question of whether or not it successfully complied would be irrelevant” to subsequent recovery.<sup>49</sup>

## **2. WEBA would deny the Commission control of what constitutes a qualifying event.**

Under the Applicants’ proposal, the Commission would not only relinquish control over cost recovery for a qualifying event, it would also relinquish control over the threshold issue of what constitutes a “qualifying event.” This is because the Utilities have proposed tying the definition of a qualifying wildfire to the terms of insurance negotiated between themselves and their lead insurer.<sup>50</sup> This ultimately gives authority over what constitutes a qualifying wildfire subject to WEBA recovery to the insurance companies. The Utilities’ lead witness agreed that neither SDG&E nor SoCal Gas would

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<sup>46</sup> Exhibit 1, p. 32.

<sup>47</sup> Exhibit 1, p. 32.

<sup>48</sup> 2 RT 334:21-335:14, SDG&E/SoCalGas, Schavrien.

<sup>49</sup> 2 RT 351:9-16 SDG&E/SoCalGas Schavrien.

<sup>50</sup> The term “wildfire” is defined in the application as having “the meaning set forth in the Utilities’ respective AEGIS policies.” Amended Application at p. 2 fn. 2, noted in transcript by utility counsel Mike Thorp at 2 RT 295:25-297:7.

have any control over the definition of a wildfire, because it would be based on AEGIS's definition, which could change over the years.<sup>51</sup> The utilities would have no incentive to negotiate the definition of a wildfire, because they would be able to recovery from ratepayers virtually all costs not covered by insurance.

Similarly, an "event" would be defined as "all Wildfires within a Utility's service territory that are ignited within 14 calendar days of each other."<sup>52</sup> The Utilities' witness clarified that this would include "two fires ignited in completely opposite ends of [the Utility's] service territory by different ignition sources" as long as they take place within 14 days of each other.<sup>53</sup> Because shareholder contributions are limited for each event, this effort to remove the Commission's ability to address separately wildfires that happen closely spaced in time but that are otherwise unrelated would restrict the Commission's options for reducing ratepayer reimbursement to the utility.

The definitions of "wildfire" and "event", and the way that these definitions are used to limit the Commission's oversight and authority, only reinforce the unreasonableness of this request. For example, it is unclear whether the Utilities could consider two wildfires within 14 days a single "event" that would be eligible for WEBA coverage where one wildfire was caused by utility negligence, and therefore considered under Category B, but where the second fire was caused by willful misconduct on the part of the utility and would otherwise be ineligible under Category C. While the Utilities may not have intended this result when filing this application, this is another example of how the supporting documents fail to fully and clearly delineate the liability to which ratepayers may be exposed under this proposal.

#### **B. The Utilities' WEBA proposal places too much risk on ratepayers.**

The risk of large claims against the utilities has existed before in other contexts, but the Commission has never previously authorized automatic recovery of large claims, and utilities have, in the past, not recovered the full cost of large claims from

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<sup>51</sup> 2 RT 300:3-13, SDG&E/SoCalGas, Schavrien. The witness also clarified that despite potential ambiguity in the wording of the Utilities' rebuttal testimony, the definition of wildfire under the proposed alternative mechanism (discussed in detail in §IV.D, below) would also track the AEGIS definition. 2 RT 302:3-6, SDG&E/SoCalGas, Schavrien.

<sup>52</sup> Exhibit 1, p. 32, fn. 46.

<sup>53</sup> 2 RT 301:6-12, SDG&E/SoCalGas, Schavrien.

ratepayers.<sup>54</sup> While the utilities may argue that shareholders are not well suited, or particularly inclined, to shoulder the risk of wildfires, ratepayers do not have unlimited resources and should not be viewed as an insurer for utility behavior that results in wildfires.<sup>55</sup> The Utilities’ initial WEBA proposal carefully limits the risks placed on shareholders, but it leaves ratepayers exposed to unlimited risk, and it removes Commission discretion to alter the balance in favor of ratepayers in any but the most extreme situation. The alternative proposal set forth in the Utilities’ rebuttal testimony provides slightly more risk to shareholders and removes overt caps on shareholder exposure; however, it removes all discretion to shift the balance of cost recovery entirely from the Commission and virtually guarantees recovery from ratepayers for any wildfire, even one that is caused by criminal behavior on the part of the utility.<sup>56</sup> Neither proposal is reasonable, and both are contrary to the Commission’s obligation to ensure that utilities provide “efficient, just, and reasonable service” and “promote the safety, health, comfort and convenience” of customers.<sup>57</sup>

**1. The risks to ratepayers go beyond costs in excess of liability insurance.**

The scope of costs that could be passed to ratepayers through WEBA have generally been characterized as costs in excess of liability insurance, which would only be reached if a wildfire were large enough to exhaust insurance coverage. However, the actual language of the proposal includes “all amounts not authorized for recovery in that Utility’s base rates or otherwise, that are paid by a Utility for wildfire claims, the costs of defending such claims, and the costs of financing such amounts until recovered.”<sup>58</sup> This could include many costs that would be incurred well before a complete payout of all insurance. To the extent that these costs would not be subject to WEBA recovery, the Applicants have failed to clearly meet their burden in support of their application.<sup>59</sup> To

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<sup>54</sup> Exhibit 5, pp. 8-9.

<sup>55</sup> Nor should the ratepayers be expected to serve as an insurer for behavior that traditional insurance specifically excludes from coverage.

<sup>56</sup> 2 RT 333:9-334: 20, SDG&E/SoCalGas, Schavrien

<sup>57</sup> Cal. Pub. Util. Code § 451.

<sup>58</sup> Exhibit 1, p. 27.

<sup>59</sup> As with any application, the burden is on the Utilities to demonstrate that its request, which would have a substantial impact on rates, is just and reasonable. Section 454 of the Public Utilities Code provides, “Except as provided in § 455 no public utility shall change any rate or so

the extent that the proposal means what it appears to say on its face, ratepayer exposure is substantially greater, and would begin substantially earlier, than has been openly addressed.

If WEBA includes all costs incurred by a utility that are not otherwise paid, this would appear to include costs that are denied by insurance, costs for actions that insurance is prohibited from covering, and self-insurance costs that are part of the “tower” of insurance described by Applicants and their witnesses. Additional costs that were not identified in the record of this proceeding may also fall into this sweeping definition.

For example, at hearing, the Applicants’ insurance witness from Marsh USA described changes to available wildfire coverage for utilities since the 2007 wildfires in San Diego. He specifically described reductions in the lowest level of coverage, provided for virtually all utilities by AEGIS; this insurance would be the first to be drawn upon in event of a future wildfire. The limits were described as follows:

If you look at AEGIS, for instance, the first layer, they were previously willing to provide \$35 million as many times as you needed it throughout the year for that exposure. They put an aggregate cap on that so that the most any client could get no matter how many times it happened in one year would be \$35 million. So that’s a reduction.

They also imposed on some of the placements co-insurance, meaning you can have 35 million, but you will pay half of it and we will pay half of it. So in essence you are actually only getting 17-and-a-half million.<sup>60</sup>

The Applicants never specifically addressed how they would account for these reductions, which could add \$17.5 million in costs not otherwise paid from the very first insurance claim, and could add an additional \$35 million in costs not paid if there were to be more than one wildfire event in a single year. However, the Applicants’ internal insurance witness appeared to imply that these costs would be booked into WEBA and passed through to ratepayers, stating that costs to be booked into WEBA would include

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alter any classification, contract, practice, or rule as to result in any new rate, except upon a showing before the commission and a finding by the commission that the new rate is justified.” Applicants must support each aspect of their request with clear and convincing evidence; the burden is not on intervenors to show that an application is unreasonable.

<sup>60</sup> 1 RT 79:8-21, SDG&E/SoCalGas, Ball.

“elements of self-insured retentions or deductibles, loss sharing, and then for liability that goes beyond the insurance limits which we have purchased.”<sup>61</sup>

Costs incurred by the utility that are not covered by insurance would also appear to be subject to WEBA; this would appear to include coverage for costs that are denied by insurance due to bad behavior that would nevertheless fall into Category B under the Applicants’ primary proposal.<sup>62</sup> Under the alternative proposal set forth in rebuttal, 90% of costs denied coverage by insurance due even to willful or criminal behavior would be recoverable from ratepayers.

Under either proposal, any costs from a fire that could be attributed to willful or criminal behavior would potentially be subject to recovery in WEBA from the first dollar. This is because such costs would not be covered by insurance. The California Insurance Code makes clear that insurance does not cover willful behavior on the part of the insured.<sup>63</sup> It also prohibits insurance coverage for criminal behavior.<sup>64</sup>

**2. Category B is unreasonably broad, and Category C is unreasonably restricted.**

As described above in Section II, the Application would require all costs booked to WEBA to be categorized, where the particular categorization would determine the amount of recovery from ratepayers. The Utility would make the initial determination of which category a cost should be booked in, with the final determination made by the Commission following an application by the Utility to recovery costs from WEBA, which could be made once \$10 million is booked into the balancing account. The Application’s entire discussion of the Commission’s review process states, in full:

The Utilities propose that they be authorized to file an application for recovery of wildfire costs (WEBA Application) at any time after net costs relating to a particular wildfire exceed \$10 million, and those costs have been transferred by the Utility to its WEBA. WEBA Applications may relate to more than one wildfire. In their WEBA Applications, the Utilities will seek a Commission determination regarding the appropriate cost recovery categorization – A (full WEBA recovery), B (partial

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<sup>61</sup> 3 RT 565: 3-7, SDG&E/SoCalGas, De Bont.

<sup>62</sup> See 2 RT 328:26-332:26 for a discussion of the extent to which “reckless” behavior would be classified as “Category B” and subject to 95/5 recovery from ratepayers.

<sup>63</sup> Cal. Ins. Code § 533.

<sup>64</sup> Cal. Ins. Code §533.5(a).

recovery), or C (no WEBA recovery) – of past and future costs relating to such wildfires, and will provide detailed information regarding the relevant wildfire(s), and wildfire-related costs and recoveries to that date.<sup>65</sup>

The Application does not discuss the process or standards to be used by the Commission for such a WEBA Application, nor does it provide any further information about how a request for recovery would be handled.

While there is no information about WEBA Applications, the application does provide information about WEBA categories. As described above, Category A, which would allow 100% recovery, would include “inverse condemnation or strict liability claims to the extent the Claims and Defense Costs result from circumstances in which the Utility was not at fault and/or that were beyond the Utility’s ability to control.”<sup>66</sup> Category C, which would not allow recovery under WEBA, would include “Wildfire Costs resulting from acts or omissions intentionally engaged in or directed by an officer with an intent to cause harm,” or “Wildfire Costs resulting from acts or omissions intentionally engaged in or directed by an officer of a Utility who knew or should have known of the probable dangerous consequences of those actions and willfully and deliberately disregarded those consequences,” so long as certain exceptions are not met.<sup>67</sup> Under the specified exceptions, an act could not be classified as “Category C” if certain spending metrics are met or if the utility disclosed a plan of action to the Commission in advance and the Commission did not direct the utility to take a different course of action.<sup>68</sup> All other costs would be classified as “Category B” and subject to recovery from ratepayers at a 95/5 split, up to a cap on shareholder responsibility.<sup>69</sup>

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<sup>65</sup> Exhibit 1, pp. 73-74.

<sup>66</sup> *Id.* at 29. To the extent that there is no determination of fault in a civil action (for example, if the matter were to settle), the Commission would be required as part of an Application for recovery under WEBA to conduct an evaluation of the “relative strength” of the inverse condemnation claims compared to other claims and make an allocation to Category A based on its determination. *Id.* Again, no information is provided about the process by which the Commission would be asked to evaluate the “relative strength” of such claims when they were not considered by a court.

<sup>67</sup> *Id.* at 30.

<sup>68</sup> *Id.* at 30.

<sup>69</sup> *Id.* at 29-30; *see also* 2 RT 328:26-329:4, SDG&E/SoCalGas, Schavrien (Category B is a “catchall” that includes everything that is not Category A or Category C).

As acknowledged by Applicants' witness Schavrien, this means that Category B would include reckless action by utility employees, as long as such action did not take place "within a program that is reckless as a whole."<sup>70</sup> The witness further agreed that "the utility can undertake an action with reckless disregard for safety and still seek to recover 95 percent of costs in excess of insurance from ratepayers for harms that result from such reckless behavior."<sup>71</sup>

Even intentional or willful behavior might be classified as Category B if it were to fall within one of the two articulated exceptions to the Category C definition. Namely, if the utility spent an average of at least 70% of authorized spending for identified accounts during the three calendar years preceding a wildfire, then the programs covered by those accounts could be not be eligible to be found operated recklessly as a whole, and would not fall into Category C.<sup>72</sup> This would be the case even if the utility were given a specific recommendation that higher levels of spending were needed in order to operate safely.<sup>73</sup>

Similarly, any action (or decision to decline to act) taken by a utility and addressed in a Wildfire Program Advice Filing would not be eligible to be classified into Category C, even if the result were a destructive wildfire. The Application's discussion of the process by which a utility could submit a Wildfire Program Advice Filing, in full, provides:

Wildfire Program Advice Filings are voluntary filings by a utility to update the Commission on decisions pertaining to wildfire mitigation. A Utility may (but is not required to) submit Wildfire Program Advice Filings to disclose decisions by Utility officer(s) regarding wildfire mitigation activities (which may include Utility officer(s) decisions not to undertake certain activities) that are not described in either the Utility's most recent GRC application or an application by the Utility for approval of capital or Operations and Maintenance (O&M) expenditures that are

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<sup>70</sup> 2 RT 330:21-27, SDG&E/SoCalGas, Schavrien. The determination of whether a program is "reckless as a whole" would take place by the Commission within the framework of an application for recovery of funds from WEBA following a qualifying event. *Id.* at 331:20-332:18.

<sup>71</sup> 2 RT 331:6-15, SDG&E/SoCalGas, Schavrien.

<sup>72</sup> Exhibit 1, pp. 83-86 (regarding spending metrics, stating "if a Utility's spending falls within these metrics, decision by Utility officers with respect to spending cannot be regarded as meeting the recklessness standard). The 70% standard was selected in order to give the utility "flexibility" in its operations. 3 RT 486:27-487:17, SDG&E/SoCalGas, Kohls.

<sup>73</sup> 3 RT 490:27-491:22, SDG&E/SoCalGas, Kohls.

designated by the Utility in the application as wildfire mitigation measures. Wildfire Program Advice Filings are solely at a Utility's discretion, and shall be Tier 2 filings with a 45-day protest period. If the Commission directs a Utility to make additional expenditures in response to a Wildfire Program Advice Filing, the Utility would be authorized to record such expenditures in a memorandum account for potential future recovery;. If a wildfire results from an action or omission described in and occurring after the submission of a Wildfire Program Advice Filing, and before the Commission directed the Utility to behave in a different manner, the Wildfire Costs associated with such wildfire should not be deemed to fall within Category C.<sup>74</sup>

This proposal would allow a utility to inoculate any decision from classification in Category C, and would transfer the obligation to ensure that utility actions are not reckless from the utility itself to the Commission; at the same time, it would transfer the risk of the consequences of a utility acting in a reckless manner from the utility shareholders to the ratepayers (at a 95/5 split).

Overall, the vast sweep of Category B, the lengths to which the utility is permitted to go to avoid any classification of any activity into Category C, and the mechanical review of recovery once costs are booked to WEBA create unreasonable risk for ratepayers.

**C. The Utilities' proposal does nothing to increase the safety from wildfires and may actually diminish Utility focus on safety by insulating shareholders from liability.**

As stated above, this application should be rejected because the Commission already has processes in place that adequately allow for recovery of reasonably incurred costs related to wildfires, and the Utilities have not demonstrated any need to modify those existing processes or proved the reasonableness of their severely flawed proposal. Yet, perhaps the most important reason for rejecting the WEBA application is that it creates perverse incentives that would undercut system safety. The Commission's Consumer Protection and Safety Division is the enforcement arm of the Commission, tasked with ensuring that the safety obligations of the utilities are fulfilled pursuant to PU Code section 451. Safety and issues of safety are paramount to CPSD. Of particular concern to CPSD is that the WEBA proposal would so thoroughly insulate the Utilities

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<sup>74</sup> Exhibit 1, p. 31.

from the potentially catastrophic results of operating their systems in an unsafe manner, that it will diminish the Utilities' focus on operating their systems safely. In recent years, a number of fires have resulted from utility actions and inactions that were not in compliance with regulations and safe business practices. Indemnifying the Utilities from the costs resulting from their own failures will not promote safe operation and protection for ratepayers.

The Utilities' proposal to allow recovery of nearly all costs related to wildfires does not support efforts to improve safety. For example, under the Utilities' proposal, costs incurred due to repeated, and prolonged failure to comply with Commission safety standards, the Utilities' own standards and/or reasonable business practices are all recoverable from ratepayers without reasonableness review, unless it can be demonstrated that the Utilities intentionally took these actions with an intent to harm or recklessly ignored the consequences. Even in those two circumstances, the Utilities' proposal would still allow costs to be recovered without reasonableness review under two substantial exemptions.

This proposal to limit Commission review of utility actions to allow recovery of unreasonable costs and to put extremely low limits on the liability of shareholders regardless of the Utilities' actions would undermine the incentive for Utilities to operate their systems in a safe manner and to comply with safety rules and regulations. In fact, it would create an incentive to cut corners that might jeopardize safety. Utilities could increase profits by cutting expenditures on safety with little risk to shareholders, due to the protections for shareholders embedded in the WEBA proposal.

There are many actions Utilities can take to reduce the risks of wildfires resulting from utility service. Preventing fires is the best means of reducing potential wildfire related costs. Unfortunately, the WEBA proposal does not support increased actions to prevent fires, but instead serves only to protect Utilities from the financial consequences of wildfires, even when they are at fault for causing the fires. SDG&E's and SoCalGas' WEBA proposal does nothing to protect ratepayers or California residents.

**D. New evidence and the alternative WEBA proposal presented in rebuttal testimony would increase ratepayer liability for wildfires beyond the exposure contemplated in the amended application.**

In their rebuttal testimony, SDG&E and SoCalGas addressed the issue of ratepayer liability for third-party claims by presenting new evidence and an alternate proposal that would actually increase ratepayer liability beyond the exposure contemplated in the initial proposal presented in the amended application. In addition, for the first time in this proceeding, SDG&E and SoCalGas explicitly stated in their rebuttal testimony that they intended the WEBA mechanism to apply to costs from the 2007 San Diego wildfires.<sup>75</sup> As of December 31, 2011, SDG&E had approximately \$62 million in costs from the 2007 fires recorded in the Wildfire Expense Memorandum Account (“WEMA”).<sup>76</sup>

Under the terms of the alternative WEBA proposal provided in rebuttal, all wildfire related costs for any qualifying fire whatsoever would be subject to a 90/10 split between ratepayers and shareholders.<sup>77</sup> While this alternative would increase shareholder liability in some circumstances as compared to the original proposal, it also increases ratepayer liability by making all costs,<sup>78</sup> including costs that would have otherwise be considered Category C costs,<sup>79</sup> fully eligible for recovery via the WEBA mechanism. This means that ratepayers could be required to cover 90% of the costs of fires due to the willful or even criminal actions of the utilities<sup>80</sup> even though insurance companies will not insure against such actions.<sup>81</sup> The Commission should ask itself whether ratepayers should insure shareholders against behavior that even the insurance companies refuse to insure against.

Additionally, utility witness Schavrien acknowledged that the alternative proposal “allowed no discretion to the Commission whatsoever in evaluating a recovery request . .

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<sup>75</sup> Ex. 2, p. 15; 1 RT 188, lines 7-17, SDG&E/SoCalGas, Schavrien.

<sup>76</sup> 1 RT 202, line 1-6, SDG&E/SoCalGas, Schavrien.

<sup>77</sup> Ex. 2, p. 15, Appendix A, p. A-2.

<sup>78</sup> *Id.*

<sup>79</sup> 2 RT 303: 4-10, SDG&E/SoCalGas, Schavrien.

<sup>80</sup> 2 RT 333:9-334: 20, SDG&E/SoCalGas, Schavrien.

<sup>81</sup> 2 RT 44:14-18, SDG&E/SoCalGas, Ball; see also 2 RT 194:10-16, SDG&E/SoCalGas, Schavrien.

. except to verify that expenses were in fact incurred.”<sup>82</sup> Thus, not only would the total dollars to be recovered from ratepayers through WEBA increase with the inclusion of the 2007 wildfire costs, but ratepayers would also be responsible through a virtually automatic mechanism for the cost consequences of utility wrongdoing going forward. Because of this expansion of potential ratepayer liability, the alternative proposal fails entirely to address any of the three concerns identified in the February 18, 2011 Dismissal and Order to Show Cause and should not be approved.

#### **V. SDG&E AND SOCALGAS REQUEST TO USE THE WEBA MECHANISM TO RECOVER 2007 FIRE COSTS SHOULD BE DENIED**

As noted above, SDG&E and SoCalGas did not explicitly state their intent that the proposed WEBA mechanism apply to the costs of the 2007 San Diego wildfires until they served their rebuttal testimony on December 2, 2011. The Utilities have admitted that that the costs related to the 2007 fires were not explicitly included in the initial WEBA application filed in 2009, in the amended application filed in 2010, or in the direct prepared testimony offered in support of the application and amended application.<sup>83</sup>

Prior to the service of the December 2011 rebuttal testimony, the Utilities’ showing was entire unclear about the application of WEBA to the 2007 fire costs. Indeed, the Utilities’ witness, when asked on the stand whether the direct testimony in support of the application mentioned the 2007 fires, could point only to references to WEMA and Resolution E-4311:

To the best of my knowledge, there is not an explicit statement of that nature other than line 12 where it says: in the event of a wildfire, each utility will first record all claims and defense costs as they are paid in a

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<sup>82</sup> 2 RT 334, lines 9-20, SDG&E/SoCalGas, Schavrien. The witness did note that the Commission could initiate a separate action to prohibit recovery of expenditures in a circumstance of criminal action on the part of a utility. *Id.*

<sup>83</sup> 1 RT 188:7-17, 204:13-28 to 205:1-2, SDG&E/SoCalGas, Schavrien.

subaccount in the Wildfire Expense Memorandum Account, Footnote 13.<sup>84</sup>

Omission of the 2007 fire costs does not appear to have been a simple mistake.<sup>85</sup> The Commission has recognized that “it is not permissible for utilities to hold back on the presentation of salient information until the submission of rebuttal testimony.”<sup>86</sup>

As the scoping ruling in this proceeding provides, this proceeding “will include all factual and legal issues necessary to determine whether the applicants have met their burden of justifying the proposed ratemaking mechanism, as required by Pub. Util. Code § 454, and that the [proposed] rates will be just and reasonable, as required by § 451.”<sup>87</sup> Whether or not DRA or other parties may have known or assumed that WEBA could encompass the 2007 fire costs does not relieve Sempra of its burden to provide a complete application with full justification in support thereof. As discussed above, Sempra has failed to meet this burden. There is no policy reason or objective served through the WEBA process that cannot already be addressed in ways that are less restrictive of Commission review. In the absence of WEBA, SDG&E has the opportunity to submit a request for memorandum account treatment for excess wildfire costs

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<sup>84</sup> 1 RT 188:7-17, 204:25-28 to 205:1-2, SDG&E/SoCalGas, Schavrien.

<sup>85</sup> See, e.g., D.04-07-022 p.157: “SCE obviously made a simple mistake. Its failure to include the justification with the application was clearly not part of a litigation strategy whereby SCE would wait until rebuttal to spring this information on unsuspecting parties.” Here, the Utilities’ failure to make clear their intent to seek recovery of costs from the 2007 fires appears to be a deliberate strategy. When they chose to directly state this intent, they were able to do so quite clearly, as they did in describing their desire to include the 2007 fires in the alternative WEBA proposal included with the rebuttal testimony. In the description of the alternative proposal, the utilities stated “The new mechanism would apply to all SDG&E and SoCAL Gas wildfire costs that meet the criteria for inclusion in the utilities’ WEBAs, including costs from the 2007 wildfires that SDG&E has been recording in its WEMA.” Exhibit 2 at p. 15. The Utilities’ choice to avoid such direct language prior to service of their rebuttal testimony must be assumed to be deliberate.

<sup>86</sup> D.04-07-022 *mimeo.*, p. 157 and n.50: “It is unacceptable for utilities to ‘offer only the most minimal support for their rate requests, choosing instead to wait to see what subjects appear to be of interest to [ORA],’ then, in response to ORA’s concerns, provide focused rebuttal. (D.92-12-019, 46 CPUC 2d 538, 764.)”

<sup>87</sup> A.09-08-020, Scoping Memo and Ruling of the Assigned Commissioner, June 8, 2011, p. 2.

associated with the 2007 events.<sup>88</sup> Sempra's witness agrees regarding the availability of memorandum accounts:

If there were not a memorandum account, San Diego could file requesting a memorandum account at which time, depending on when the Commission acted, which can take many months, establish a memorandum account. But it would only be for costs on a going forward basis on the date that the Commission authorizes the memorandum account.<sup>89</sup>

Moreover, under the Commission-authorized settlement agreement concerning the Witch, Rice and Guejito fires,<sup>90</sup> CPSD has the right to litigate SDG&E's violations of, among others, General Order 95 and Public Utilities Code section 451, and SDG&E's contribution to the fires, if SDG&E seeks to recover any fire-related costs in any Commission proceeding. In Investigation ("I.") 08-11-006 and I.08-11-007, the Commission opened enforcement proceedings against SDG&E to "determine whether SDG&E was in violation of any provision of the Public Utilities Code, general orders, other rules, or requirements, regarding its facilities linked to the Witch Fire ... the Rice Fire"<sup>91</sup> and the Guejito Fire.<sup>92</sup> In D. 10-04-047, the Commission approved a proposed settlement of I.08-11-006 and I.08-11-007 that included the following provision:

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<sup>88</sup> See Ex. 18, DRA/Logan, p. 4. SDG&E has also indicated its intent to seek recovery through its Z-factor memorandum account if no WEBA is authorized. See also Ex. 2, p. 3 ("SDGE& and SoCalGas agree that there are existing processes such as Z-Factor applications or emergency applications that give them the ability to seek recovery of wildfire costs.") See also 1 RT 200:8 to 207:27, SDG&E/SoCalGas, Schavrien.

<sup>89</sup> 1 RT 198:9-21, SDG&E/SoCalGas, Schavrien.

<sup>90</sup> See Decision 10-04-047, Decision Approving and Adopting the Witch/Rice and Guejito Fires, April 22, 2010, Attachment 1, Settlement Agreement Between the Consumer Protection and Safety Division of the California Public Utilities Commission and San Diego Gas & Electric Company Regarding I.08-11-006 and I.08-11-007; the Orders Instituting Investigation ("OII") Into the Witch, Rice and Guejito Fires.

<sup>91</sup> I.08-11-006, Investigation on the Commission's Own Motion into the Operations and Practices of San Diego Gas & Electric Company Regarding the Utility Facilities linked to the Witch and Rice Fires of October 2007, Order Instituting Investigation, Notice of Hearing, and Order to Show Cause, Nov. 6, 2008, p. 4.

<sup>92</sup> I.08-11-007, Investigation on the Commission's Own Motion into the Operations and Practices of San Diego Gas & Electric Company Regarding the Utility Facilities linked to the Guejito Fire of October 2007, Order Instituting Investigation, Notice of Hearing, and Order to Show Cause, Nov. 6, 2008, p. 3: "This proceeding shall seek to ... determine whether any of the utility facilities linked to the Guejito Fire were in violation of any provision of the Public Utilities Code, general orders, other rules, or requirements."

SDG&E and CPSD enter into this Settlement Agreement without prejudice to any positions, including positions related to OII-related evidence, that any party might take in any other proceeding, including but not limited to SDG&E's CEMA proceeding (A.09-03-011) and any Commission proceedings relating in any way to the Witch, Rice, and Guejito fires or to the remedial measures contained in this Settlement Agreement.<sup>93</sup>

Thus, not only was inclusion of the 2007 fire costs beyond the scope of the WEBA proceeding based upon the application, amended application and direct testimony, it is trial by ambush and contrary to due process principles for SDG&E to present evidence supporting its recovery of the fire-related costs at the rebuttal stage of this proceeding. Therefore, if the Commission sees fit to authorize the Utilities' request for a WEBA mechanism despite its obvious flaws, the Commission should still disallow any recovery of the Utilities' 2007 fire related costs.

## **VI. CONCLUSION**

The Utilities do not need the WEBA cost recovery mechanism to address wildfire costs in excess of insurance. The proposal merely insulates utility shareholders from the impacts of wildfires, even those fires that may be caused by the actions of utility itself. The WEBA mechanism places an unlimited risk on ratepayers and leaves no discretion for the Commission to determine the reasonableness of the requested costs or flexibility to deal with the specific circumstances of a particular fire. For these reasons and the reasons set forth above, the Commission should reject the instant application and deny SDG&E and SoCalGas' request for a Wildfire Expense Balancing Account and associated cost recovery mechanism.

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<sup>93</sup> D.10-04-047, Attachment 1, Settlement Agreement, pp. 5-6, Paragraph 5.

Dated: February 17, 2012

Respectfully submitted,

/s/ Nina Suetake

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