

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA



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Application of San Diego Gas & Electric Company (U902M), Southern California Edison Company (U338E), Southern California Gas Company (U904G) and Pacific Gas and Electric Company (U39M) 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 REPLY 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 REPLY BRIEF OF CENTER FOR ACCESSIBLE TECHNOLOGY,
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I. INTRODUCTION

In accordance with Rule 13.11 of the Rules of Practice and Procedure of the California Public Utilities Commission (“Commission” or “CPUC”), the Center for Accessible Technology, Consumer Protection and Safety Division, Division of Ratepayers Advocates, and The Utility Reform Network (collectively, “Intervenors”) hereby submit this reply brief in the above-captioned proceeding, the application of San Diego Gas & Electric Company (“SDG&E”) and Southern California Gas Company (“SoCalGas”) (jointly, “Applicants” or “Utilities”) requesting authorization to establish a Wildfire Expense Balancing Account (“WEBA”).

Intervenors recommend that the Commission deny the Utilities’ WEBA application for the reasons discussed in Intervenors’ opening brief. Applicants have failed to provide any justification for their WEBA proposal that would warrant Commission approval of a mechanism that inappropriately shifts risks and costs from shareholders to ratepayers, reduces utility incentives to maintain safe operations, and undermines the Commission’s discretion and authority to determine the reasonableness of utility actions and associated costs. By approving this WEBA application, the Commission will effectively be stating that it believes the costs stemming from any wildfire that is caused by the negligent or reckless actions of the utility are reasonable and can be recovered from rates.

As shown in Intervenors’ opening brief, the Utilities have failed to demonstrate that their proposed cost recovery mechanism is necessary¹ and reasonable.² The Utilities in their opening brief readily acknowledge that they currently have the opportunity to seek rate recovery through a Z-factor or other stand-alone application³:

SDG&E and SoCalGas agree that there are existing processes that give them the ability to seek recovery of wildfire costs... SDG&E and SoCalGas have existing Z-factor authorization we could use to seek recovery of wildfire costs not covered by insurance. In fact, if WEBA is not approved, a Z-factor application is perhaps the most likely vehicle for SDG&E to seek recovery of 2007 wildfire costs....⁴

¹ See Joint Opening Brief, pp. 8-10.

² See Joint Opening Brief, pp. 10-19.

³ See 1 RT 197:22 to 198:24, SDG&E/SoCalGas, Schavrien.

⁴ Sempra Opening Brief, p. 37.

The Utilities, however, “do not agree that these existing processes are a reasonable substitute for the WEBA mechanism we have proposed in this proceeding.”⁵ This is because “the Z-factor process does not provide SDG&E or SoCalGas with certainty of rate recovery.”⁶ Effectively, the relief that the Utilities are seeking in the instant application is a guarantee of rate recovery. As the Assigned Commissioner and ALJ astutely observed: “The relief requested is unprecedented; no other public utilities have balancing account protection for any type of third party liability ... [E]xtraordinary relief requires a compelling showing of extraordinary facts.”⁷ Certainly, the ratemaking relief the Utilities request here is unprecedented and extraordinary. Yet despite being granted unique leeway in this proceeding to make a compelling showing in support of the relief sought, the Utilities have never done so.⁸ The facts underlying this application are that the Utilities currently have available to them existing Commission avenues through which to seek rate recovery of wildfire costs, but because such processes do not guarantee utility success, a new mechanism that facilitates virtually automatic recovery is somehow “needed,” according to the Utilities.

Other pertinent facts are that there is no longer an “insurance crisis,”⁹ and that SDG&E’s bond rating has not suffered as a result of the 2007 wildfire events and in the absence of a WEBA mechanism.¹⁰ As such, the Utilities have identified no problem or need that warrants the extraordinary rate relief they are seeking. These facts do not constitute “clear and convincing evidence”¹¹ of the reasonableness of the Utilities’ proposed WEBA mechanism; instead, they demonstrate the opposite: WEBA is not needed and is unreasonable. The proposed WEBA mechanism not only improperly guarantees cost recovery and protects utility shareholders at the expense of ratepayers, but it also improperly usurps the Commission’s discretion and authority to determine the reasonableness of proposals that impact rates.¹²

⁵ Sempra Opening Brief, p. 37.

⁶ Sempra Opening Brief, p. 38.

⁷ A.09-08-020, Ruling of the Assigned Commissioner and Administrative Law Judge Requiring Applicants to Show Cause Why Application Should Not Be Dismissed, Feb. 18, 2011, p. 4.

⁸ See Joint Opening Brief, pp. 6-7.

⁹ See Amended Opening Brief of Petitioner Ruth Henricks, Feb. 14, 2012, pp. 8-12.

¹⁰ See 2 RT 194:17 to 195:3, SDG&E/SoCalGas, Schavrien.

¹¹ See Joint Opening Brief, p. 13, n.59.

¹² See Joint Opening Brief, pp. 10-19.

II. THE UTILITIES' WEBA PROPOSAL AND SUPPORTING INFORMATION IS FULL OF CONTRADICTIONS AND INHERENTLY UNCLEAR

A. While the Utilities Assert That the Creation of a WEBA Mechanism Does Not Create a Presumption of Recovery, Their Key Arguments in Support of WEBA Rest on the Need for Assured Recovery of Costs in Rates

Throughout this proceeding, the greatest concern expressed on behalf of consumers is that a WEBA would result in virtually automatic recovery of wildfire costs from ratepayers, without adequate review or scrutiny. In response, the utilities have repeated a well-practiced refrain: this application would merely establish a mechanism for recovery; it would not create a presumption of recovery for any particular fire.¹³ One need only review the arguments in the Utilities' Opening Brief in support of WEBA to see how this non-response seeks to camouflage the truth of the intervenors' arguments that creation of a WEBA would lead to virtually automatic recovery of almost all wildfire costs through rates. Such automatic and assured recovery from ratepayers is the very point of WEBA, as demonstrated by the Utilities themselves, starting with the Utilities' argument heading in their Opening Brief that "Rate Recovery of Wildfire Costs Should Be Certain."¹⁴ The Utilities cannot have it both ways; if they need rate recovery of fire costs to be certain, then they cannot maintain with a straight face that WEBA does not guarantee recovery. If they truly believe that WEBA does not create a presumption of recovery, then all of their arguments based on the need for certainty of rate recovery must fail, because no such certainty would be established.

In fact, the Utilities' arguments based on "certainty of recovery" demonstrate beyond doubt that the Utilities see WEBA as an assurance of recovery in rates for all but some extremely minimal costs incurred as a result of wildfires. Examples of the Utilities' arguments that illustrate how WEBA would result in a presumption of recovery abound in their Opening Brief:

- "The Commission Should Make it Clear that SDG&E and SoCalGas *Will be Allowed to Recover* Wildfire Costs in Rates."¹⁵
- "It is important for the Commission to act now to *provide assurance* that SDG&E's and SoCalGas' financial well-being will be protected from the risk of wildfires. *Uncertainty about our ability to obtain full recovery of wildfire costs*

¹³ Utilities' Opening Brief at p. 57.

¹⁴ Utilities' Opening Brief at p. 29.

¹⁵ Utilities' Opening Brief at p. 30 (argument heading, emphasis added).

could undermine investor confidence in both the utilities and California’s regulatory regime.”¹⁶

- “The Commission can and should end this potential for higher financing costs by providing clear direction that SDG&E and SoCalGas *will be authorized to recover wildfire costs in rates.*”¹⁷)
- “Insurance Coverage Uncertainty Makes *Rate Recovery Certainty* Even More Important”¹⁸
- “Mandatory utility operations in wildfire-prone areas without sufficient insurance are a recipe for higher financing costs – *unless and until the Commission makes it clear that we will be authorized to recover uninsured wildfire claims costs in our rates as a normal cost of doing business.*”¹⁹
- “The Status Quo with Respect to Wildfire Cost Recovery *Does Not Provide the Necessary Certainty.*”²⁰
- “SDG&E and SoCalGas agree that there are existing processes [including Z-Factor] that give them the ability to seek recovery of wildfire costs. But we do not agree that these existing processes are a reasonable substitute for the WEBA mechanism that we have proposed in this proceeding. . . . [discussion of the alleged inadequacies of Z-factor for addressing wildfire costs] . . . More important, the Z-Factor process does not provide SDG&E or SoCalGas *with certainty of rate recovery.*”²¹
- “Our Proposed WEBA Mechanism Combines *Rate Recovery Certainty* with Appropriate Incentives”²²
- “One way for the Commission *to provide rate recovery certainty* is for it to simply authorize SDG&E and SoCalGas to establish a WEBA and recover 100% of the wildfire costs booked into the account on a regular basis. . . SDG&E and

¹⁶ Utilities’ Opening Brief at p. 32 (emphasis added, internal footnote omitted).

¹⁷ Utilities’ Opening Brief at p. 33 (emphasis added).

¹⁸ Utilities’ Opening Brief at p. 33(argument heading, emphasis added).

¹⁹ Utilities’ Opening Brief at p. 36 (emphasis added).

²⁰ Utilities’ Opening Brief at p. 36 (argument heading, emphasis added).

²¹ Utilities’ Opening Brief at pp. 37-38 (emphasis added).

²² Utilities’ Opening Brief at p. 43 (argument heading, emphasis added).

SoCalGas still believe that 100% rate recovery of all wildfire costs not covered by insurance is reasonable and consistent with Commission precedent.”²³

These examples provide ample demonstration that the Utilities see authorization of a WEBA mechanism as an assurance, to the level of certainty, that they will recover wildfire costs in rates. This is unprecedented, and would be an abdication of the Commission’s responsibility to ensure just and reasonable rates, and to ensure that the Utilities act properly to maintain safe and reliable systems.

B. The Utilities Improperly Transform the *Opportunity* to Recover Reasonable Wildfire Costs into a *Guaranteed* Recovery of Costs.

In the opening brief, the Utilities argue that their obligation to serve customers in fire-prone areas²⁴ as well as the potential for the Utilities to be liable for wildfire costs under the doctrine of inverse condemnation²⁵ entitle them to recover such costs from ratepayers. The Utilities stridently present arguments as to their rights and responsibilities under the regulatory compact and seem to imply that all parties that oppose this application seek to deny the Utilities their opportunity to recover wildfire costs.²⁶ The Utilities then present their proposed WEBA mechanism as the answer to this apparent problem.

No party, however, has ever argued that the Utilities are not entitled to an opportunity to recover reasonable wildfire costs. What the Intervenors object to is the Utilities’ demand to recover wildfire costs through the WEBA mechanism without any review of the reasonableness of the costs or underlying utility actions which may have led to the fire. The fact that the Utilities are entitled to the *opportunity* to recover reasonable wildfire costs should not be translated into a guaranteed recovery of costs with no reasonableness review. The Utilities currently have every opportunity to prove the reasonableness of any costs incurred due to wildfires through stand-alone, event-specific applications or through Z-factor filings. The WEBA mechanism is unnecessary, and the Commission should not be misled by the Utilities’ melodramatic handwringing and conflation of the issues.

²³ Utilities’ Opening Brief at p. 43.

²⁴ Utilities’ Opening Brief at pp. 17-20.

²⁵ Utilities’ Opening Brief, at pp. 26-29.

²⁶ Utilities’ Opening Brief at p. 20 and 28.

C. While The Utilities Assert that There Is No Need For Reasonableness Review of Costs, They Ignore the Need for Reasonableness Review of Utility Actions

In this application, the Utilities seek the right to recover the vast majority of costs from wildfires in rates without reasonableness review. They try to support this proposal with analogies to the treatment of catastrophic events through Catastrophic Event Memorandum Accounts and the treatment of hazardous waste cleanup costs. What these analogies fail to acknowledge, however, is that wildfire review encompasses more than simply expenses incurred, and that the key issue in evaluating wildfires is the extent to which the utility may be at fault.

The Utilities' reliance on CEMA is misplaced. The Utilities believe that "[t]he principles embodied in CEMA, however, are applicable to wildfire claims: natural disasters cannot be predicted; therefore, it is appropriate to include costs resulting from these events in rates, after-the-fact, rather than on a forecast basis."²⁷ According to the Utilities' flawed logic, uninsured wildfire liability claims, even for instances where the utility was negligent, are recoverable in rates, based on the regulatory compact.²⁸ However, nothing in the CEMA mechanism permits recovery of liability claims.²⁹ The CEMA mechanism was designed to address the costs of restoring utility service after a natural disaster that causes damage to utility infrastructure. As such, there was a specific policy basis for CEMA that was directly related to the utilities' obligation to provide safe and reliable service: utility service must be restored as quickly as possible and there should be certainty as to recovery of the costs associated with restoring service. In contrast, the proposed WEBA is designed to provide ratepayer recovery for liability claims not covered by insurance.

Moreover, GRC ratemaking does not guarantee cost recovery of uninsured claims, consistent with the longstanding purpose of GRC authorization to provide "the opportunity of cost-of-service regulated utilities to earn a reasonable rate of return"³⁰ rather than a guaranteed return. Also indicative of the illogic of the proposed WEBA is the assertion that all costs associated with a wildfire are the result of a natural disaster, but should nevertheless be subject to an artificial \$10 million recovery threshold. SDG&E and SoCalGas state:

Wildfire Claims and Defense Costs up to \$10 million, which will be forecast in GRCs, are not eligible for recovery through WEBA in the Amended Proposal. The occurrence of a wildfire that results in Claims and Defense Costs greater than \$10 million, however, cannot be readily predicted and is not appropriate for test-

²⁷ Sempra Opening Brief, p. 24.

²⁸ See Ex. 18, DRA/Logan, pp. 3-4.

²⁹ See Cal. Pub. Util. Code § 454.9.

³⁰ Sempra Opening Brief, p. 38, citing D.10-12-053.

year ratemaking. Instead, Wildfire Costs associated with such fires should be afforded separate balancing account treatment.³¹

Under the proposed WEBA mechanism, with a demarcation point of \$10 million per wildfire occurrence, test-year ratemaking appears appropriate for wildfires under \$10 million, but not appropriate for \$10 million and greater. But why would test-year ratemaking be appropriate at all, if each wildfire is an unpredictable natural disaster? Obviously, wildfires do not meet the conditions for CEMA eligibility, but there is no factual or policy basis to apply “the principles embodied in CEMA” to wildfire costs.

Similarly, the Hazardous Waste Cleanup Program (“Hazwaste Program”), authorized by the Commission in Decision 94-05-020,³² is distinguishable from the WEBA proposal at issue in this proceeding. The Hazwaste Program was developed, at least in part, because of the difficulty in determining causation at hazardous waste sites. With wildfires, however, it is expected that the Commission will continue to determine utility involvement and assess utility actions at least for the purpose of determining corrective action and assigning penalties for violations of regulatory requirements. Furthermore, the Hazwaste Program was created to address the costs related to the cleanup of known hazardous waste sites that were specifically named in the settlement agreement accompanying D.94-05-020.³³ In this case, however, the Utilities are requesting unlimited ratepayer liability for an unknown number and magnitude of fires that they may have caused by their own actions.

If the Commission approves the WEBA mechanism, the Commission would give up its authority not only to evaluate whether the expenditures by a utility in the wake of a fire are reasonable, but also whether the utilities actions prior to and at the time of the fire were reasonable. If a utility did not appropriately take steps to operate its system safely, this should be a consideration in the Commission’s review of any application seeking cost recovery. The Utilities seek to take this option off the table, and prevent any inquiry into utility behavior as long as an event does not fall into the extremely constrained “Category C.”

³¹ Ex. 1, p. 16.

³² Under the Hazwaste Program 90% of the program costs were assigned to ratepayers and 10% of the costs were assigned to utility shareholders with no further reasonableness review. 1994 Cal. PUC LEXIS 379, p. 6.

³³ See 1994 Cal. PUC LEXIS 379, p. 29, Settlement Agreement, “Covered Costs and Recoveries”

Indeed, if the Commission were to forgo a review of the appropriateness of utility action and its implications for just and reasonable rates, the Commission would be abdicating its statutory responsibilities and utterly failing in its mandate to protect ratepayers.

D. While the Utilities Imply That “Category B” Treatment Would Apply Primarily to Negligent Behavior, The Actual Definition of Category B is Extremely Broad

In a single sentence, the Utilities state, “Wildfire costs would fall within Category B if they do not fall within Categories A or C.”³⁴ This means that Category B is the catch-all categorization in which the vast majority of wildfire costs will fall, resulting in cost-sharing at a 95/5 split between ratepayers and shareholders, with the shareholders’ contribution capped at a modest level of \$20 million, even for a fire that may have costs running into the billions of dollars.

Except for that single sentence, all discussion of Category B implies that this classification will be used for fires that may result from ordinary negligence, and the utilities completely fail to address the fact that this classification would also cover certain types of reckless behavior or behavior that fails to comport with the utilities’ own safety requirements, even if the utility’s behavior may result in denial of insurance coverage. As discussed in the Consumer Groups’ Opening Brief, this leaves ratepayers open to absorbing extremely high costs, beginning at much lower cost levels than the utilities acknowledge.

The attempt to distract the Commission from acknowledging the breadth of category B begins immediately after the definition is provided: “Category B is intended to cover wildfire costs arising from acts of omissions (including ordinary negligence), that would typically be covered by liability insurance.”³⁵ While a true statement, this is only a fraction of the situations Category B would cover. In fact, and as discussed at length in the Opening Brief of the Consumer Groups, Category B would include reckless behavior by utility employees and all utility actions immunized from Category C based on low spending metrics and/or an advice letter process that would shift the burden of reasonable maintenance of the system from the Utilities to the Commission itself. In this way, the proposal virtually ensures rate recovery for all but the

³⁴ Utilities’ Opening Brief at 11.

³⁵ Utilities’ Opening Brief at 11.

most egregious or criminal behavior, exposing ratepayers to uncapped risk and insulating shareholders from harm even in the face of irresponsible utility action.³⁶

E. While the Utilities Assert that Uncertainty in Financial Markets Could Lead to Higher Rates, Which Would Be Bad for Ratepayers, They Ignore the Fact that Passing Through Wildfire Costs (Including 2007 Costs) Will Definitely Lead to Higher Rates

The utilities seek to portray themselves as looking out for the interests of their ratepayers by seeking “certainty” regarding rate recovery in order to avoid higher utility borrowing costs and thus higher utility rates.³⁷ However, as discussed in subsection G, below, a decision by the Commission to avoid providing “certainty” through WEBA does not inevitably result in higher borrowing costs and/or higher rates. In contrast, a decision to provide “certainty” through WEBA, particularly to the extent that it includes costs for the 2007 fires, virtually guarantees that at least 90% of the costs incurred in excess of liability insurance will be passed through to the ratepayers, resulting in higher rates. Raising rates now in order to avoid a risk of potentially raising rates in the future is akin to burning a village in order to save it.

F. While the Utilities Assert That They Do Not Need Incentives to Pursue Safety, They Simultaneously Recognize the Need for Incentives in Other Areas of Operation

The Utilities furiously assert that they do not need financial incentives in order to adequately promote safety, but rather they state that they will simply do the right thing because they are part of the communities in which they operate.³⁸ However, in other aspects of their application, they make clear the need for financial incentives rather than simple trust that the right thing will happen. If incentives are vital to ensure appropriate utility actions in some contexts, then there should also be safety incentives.

To be clear, no one believes that utility executives actively desire harmful wildfires. The question instead is whether, as a utility considers steps to take to reduce risk, it will come out on the side of increased fire safety without financial incentives to support this result. The Utilities themselves make clear that calculations weighing costs versus safety are a regular part of their

³⁶ As discussed below, the Utilities’ proposal allows them to seek rate recovery even in a “Category C” situation, though not through the WEBA mechanism. The alternate proposal would guarantee a 90% cost recovery from ratepayers (with no reasonableness review of any sort) even in a situation involving criminal action on the part of a utility.

³⁷ Utilities’ Opening Brief at 39.

³⁸ Utilities’ Opening Brief at p. 47 (“SDG&E and SoCalGas will never ignore fire safety, and the adoption of a recovery mechanism for wildfire costs will not change our approach to fire safety one bit”).

business.³⁹ Just as the Utilities note that the Commission’s compliance process is designed to provide “an incentive to engage in maximally effective preventative maintenance,”⁴⁰ any process by which a utility may seek rate recovery for wildfire costs must continue to include incentives for the utility to take reasonable actions in support of safety before any possibility of rate recovery can be considered.

In their further discussion of incentives in the context of safety, the Utilities recognize that financial penalties are intended to deter future noncompliant behavior following a utility failure to protect the public.⁴¹ However, such penalties are inherently backward-looking. A mechanism that predetermines that a utility will be protected from all but the most modest financial repercussions of behavior when something bad happens undermines the concurrent penalty structure and precludes use of a more forward-looking incentive structure by allowing decision-makers to factor out concerns regarding future costs to shareholders when making a safety cost-benefit calculation.

Finally, the Utilities recognize the need to align incentives between what is “appropriate” in the abstract with what provides financial benefit to the utility with regard to third party recoveries;⁴² the Commission should similarly ensure that financial incentives are aligned with what is right in the abstract in order to best encourage fire safety.

G. While the Utilities Assert that They Need Rate Recovery For Wildfire Costs To Satisfy Financial Markets, They Ignore the Fact that This Application is Not the Only Option

The Utilities attempt to portray this Application as the only available mechanism for addressing the risks of uncertainty in financial markets, pointing to a statement by witness Lee Schavrein during hearings that “a utility that has to pay all excess liability costs would then cause the financial markets to downgrade the utilities. . .” and continuing by describing resulting additional costs.⁴³ Of course, there are many options that neither grant the pending WEBA Application (and thus virtually ensure ratepayer recovery despite utility arguments to the contrary – see subsection A, above) nor require the utility to pay “all excess liability costs” as referenced in witness Schavrein’s testimony. As the Utilities note themselves in their Opening Brief, they always have the right to seek recovery in rates for any unexpected cost by filing an

³⁹ Utilities’ Opening Brief at p. 18.

⁴⁰ Utilities’ Opening Brief at p. 19 & fn. 28

⁴¹ Utilities’ Opening Brief at p. 45.

⁴² Utilities’ Opening Brief at pp. 50-51 (“This third party recovery provision simply provides SDG&E and SoCalGas with a strong incentive to pursue wildfire-related claims against third parties”).

⁴³ Utilities’ Opening Brief at p. 32.

application, which the Commission can review under its authority to establish just and reasonable rates.⁴⁴ For the 2007 fire costs, and potentially for future fires, they can also seek recovery through their Z-factor accounts.⁴⁵ Indeed, nothing prevents the utilities from filing a future application for a wildfire cost recovery mechanism that they can actually justify using clear and convincing evidence, the standard that they have failed to meet in the pending application.

The fact that the Utilities have not justified a near-pure pass-through of costs to ratepayers does not mean that shareholders would shoulder 100% of the costs of any fire. Rather, it maintains the status quo which allows recovery of costs based on a reasonableness review that encompasses both utility behavior as well as actual expenditures.

H. While the Utilities Seek to Persuade the Commission to Relinquish Authority to Review Utility Involvement in Wildfires, They Also Seek to Preserve their Own Authority To Pursue Rate Recovery in Multiple Forums

1. The Utilities Are Asking the Commission to Relinquish Authority

As set forth in detail above, the Utilities are asking the Commission to relinquish their authority to conduct reasonableness reviews of both utility behavior and the reasonableness of costs incurred in conjunction with wildfires. As noted in the Opening Brief of the Consumer Groups, the Utilities are also asking the Commission to relinquish authority over the universe of events for which this proposal will apply. Instead, the Utilities are seeking to define a qualifying event for WEBA recovery based on a definition established by their primary insurer and subject to change over time, completely outside of the authority or review of the Commission.⁴⁶ They recognize that the definition is broad, and encompasses “large urban fires as well as fires in rural and semi-rural areas.”⁴⁷ They further recognize that “the extent of the recovery sought is directly linked to the insurers’ definition of ‘wildfire.’”⁴⁸ If the Commission were to agree to this request, it would thus relinquish its ability to even determine the universe in which it allows virtual certainty of rate recovery for unscrutinized actions and costs.

2. The Utilities Simultaneously Seek to Maintain Authority to Pursue Rate Recovery and Other Mechanisms to Avoid Any Loss From Wildfires

⁴⁴ Utilities Opening Brief at pp. 39-40.

⁴⁵ Utilities Opening Brief at p. 37.

⁴⁶ Utilities’ Opening Brief at p. 4 and fn. 6.

⁴⁷ Utilities’ Opening Brief at p. 4 and fn. 6.

⁴⁸ Utilities’ Opening Brief at p. 4 and fn. 6.

The Utilities argue that the Commission maintains the right to review costs following a wildfire in that it will have an opportunity, in an ill-defined application process, to categorize qualifying events as falling into Category A, Category B, or Category C. However, as set forth above, the Utilities have put substantial constraints on the boundaries of Category C, virtually ensuring that all but the most overtly egregious behavior will still qualify for at least 95% recovery from ratepayers (more if the shareholder cap is reached).⁴⁹ In addition, in their primary proposal, the Utilities are clear that any costs from a wildfire that is classified as “Category C” is not subject to recovery through WEBA, but they nevertheless maintain their right to file a separate application for cost recovery, presumably through the Commission’s inherent power to establish just and reasonable rates, as discussed in the Utilities’ Opening Brief at pages 39-42. The Utilities do not, and cannot, explain why such traditional review is appropriate for a wildfire caused by willful or intentional misconduct by a utility, but is inadequate to review any other fire. In the alternative proposal, of course, ratepayers are responsible for 90% of the costs of any fire, whether or not the costs are reasonably incurred, and even if the fire is caused by criminal misconduct on the part of the utility.⁵⁰

Even for the 2007 fires, the Utilities are working diligently to ensure that they have multiple options for pursuing rate recovery of costs. As described in detail above below, they are inappropriately trying to recover costs for the 2007 fires through the as-of-yet-nonexistent WEBA mechanism. They are simultaneously recording costs in their Z-Factor Memorandum Accounts, and have clearly stated their intent to pursue recovery through that mechanism if their WEBA proposal is rejected.⁵¹ They have also indicated that they reserve their right to seek rate recovery under the Commission’s inherent powers through a free-standing application.⁵² Finally, they are also seeking recovery via transmission rates through FERC.

⁴⁹ In addition to the other constraints placed on Category C, the proposal includes a further one-sided restriction that spending at the levels of specified metrics would completely insulate utility action from being placed in Category C, but spending below the specified level would not prove that an officer’s spending decisions were reckless. Utilities’ Opening Brief at p. 15.

⁵⁰ While the Utilities noted at hearing that the Commission retains its inherent power to open a separate proceeding and take different action for any particular event, there is no dispute that the WEBA alternate proposal, as drafted, would set the expectation of 90% recovery.

⁵¹ Utilities’ Opening Brief at pp. 37-39.

⁵² Utilities’ Opening Brief at pp. 39-40. Amusingly, the Utilities argue that such a proceeding could turn into “a very lengthy, expensive sideshow,” ignoring the fact that a WEBA Application regarding nothing but classification under their preferred proposal would inevitably be “a very lengthy, expensive sideshow” in which unspecified procedures would be used to conduct a review in lieu of a civil trial most likely to determine nothing more than whether ratepayers pay 95% (or more, if the shareholder cap is reached) or 100% of costs of a wildfire.

3. The Utilities Seek to Provide Compensation to Shareholders, Even Where They Claim to Be Dropping the Incentive Payment Provision of the Application

In the amended proposal provided in 2010 in this proceeding, the Utilities sought a shareholder compensation element consisting of annual payments to shareholders to “compensate” them for the extremely modest risks that they would retain (compared to guaranteed 100% rate recovery). In the face of “a very strong negative reaction from intervenors”⁵³ the Utilities dropped this portion of their proposal. However, they continue to maintain that such compensation would be appropriate, and note that “there are other ways of compensating utilities for the risks we undertake to provide service to our customers.” At the same time, the Utilities are asking ratepayers to become insurers of last resort, to cover costs that insurance would refuse to cover, and to forgo any opportunity for reasonableness review of any costs incurred. There is no proposal to compensate ratepayers in any way for the risks to which they would be exposed under WEBA.

III. THE WEBA MECHANISM ONLY AMELIORATES SHAREHOLDER RISK, AND IT DOES NOT INCREASE UTILITY FIRE SAFETY OR DEAL WITH THE EFFECTS OF CLIMATE CHANGE OR THE EXPANSION OF UTILITY SERVICE TERRITORY

At the all-party meeting in this proceeding on February 23, 2012, Assigned Commissioner Simon highlighted several issues of particular concern for him and presumably the Commission as a whole, such as climate change, utility infrastructure and fire safety. While these are vitally important issues that warrant the focused attention of the Commission, the WEBA proceeding is not the appropriate forum in which to consider or resolve them. Utility infrastructure impacted by natural disasters is addressed by CEMA, fire safety is addressed in the rulemaking for that issue, and climate change issues are addressed in the greenhouse gas proceeding and related Commission activities. Indeed, as discussed throughout the Intervenor’s pleadings, adopting the proposed WEBA, rather than enhancing safety, would more likely have a negative effect on it.⁵⁴

The purpose of SoCalGas and SDG&E’s WEBA application, “according to the applicants, is ... to reduce the financial uncertainty associated with damaging and costly wildfires which have or could occur in the utilities’ respective service territories.”⁵⁵ The WEBA application was brought by the Utilities, not to address any infrastructure, safety or climate

⁵³ Utilities’ Opening Brief at p. p.55.

⁵⁴ See Joint Opening Brief, pp. 10-11 and 18-19.

concerns, but to provide “certainty” for the Utilities by establishing a cost recovery mechanism that would enable them to effectively pass through to their ratepayers wildfire costs not covered by insurance, regardless of utility fault, and without reasonableness review by the Commission.

IV. THE COMMISSION SHOULD NOT APPLY THE WEBA MECHANISM TO THE 2007 FIRE COSTS BECAUSE DOING SO WOULD BE CONTRARY TO THE COMMISSION APPROVED SETTLEMENT BETWEEN CPSD AND SDG&E

Regardless of whether the WEBA mechanism is approved, the Commission should not allow SDG&E to use the mechanism to address the excess fire costs stemming from the 2007 San Diego wildfires. On October 30, 2009, CPSD and SDG&E entered into a settlement agreement whereby the parties explicitly stated and the Commission approved the following:

SDG&E and CPSD enter into this settlement agreement without prejudice to any positions that any party might take in any Commission proceeding relating in any way to the Witch, Rice, and Guejito fires or to the remedial measures contained in this Settlement Agreement.⁵⁶

If the Commission were to authorize the recovery of any of the 2007 excess wildfire costs through any type of WEBA mechanism, it would result in the illegal abrogation of the terms of the settlement. The Settlement Agreement clearly and specifically sets forth: (1) the agreement “may be amended only by a written agreement signed by all the Settling Parties”⁵⁷; and (2) the “Settling Parties intend the Settlement Agreement to be interpreted as a unified, interrelated agreement.”⁵⁸ Based on the above quoted language, and on the document as a whole, the Commission, as required by law, found that the settlement was reasonable in light of the record, consistent with the law, and in the public interest. Consequently, the Commission would, if it approved the WEBA mechanism, legally make meaningless or undercut CPSD’s ability to challenge the reasonableness of cost recovery. The Commission should not (and arguably cannot) do so. Simply put, SDG&E and SoCalGas are attempting to improperly bind this Commission’s ability to comply with its (constitutional and) statutory mandate to ensure that SDG&E and SoCalGas provide safe and reliable service at just and reasonable rates.

As opposed to the statements made by SDG&E and SoCalGas, the purpose of the WEBA mechanism is to *restrict* the Commission’s and intervenors’ ability to review and judge costs included in a WEBA application. Ney, even restrict is too generous a word; a better word would

⁵⁵ Ex. 18, DRA/Logan, p.1.

⁵⁶ See, D.10-04-047, Appendix 1, pp. 5-6, section 5.

⁵⁷ See, D.10-04-047, Appendix 1, p. 4, section 1.

⁵⁸ Id.

be: *prevent* as prevent is what WEBA does best. SDG&E states that it is not “requesting a ‘blank check’ with respect to the 2007 wildfire costs”⁵⁹ [and that] recording costs in a WEBA would not create a presumption of recoverability.”⁶⁰ Nothing could be further from the truth. Nothing in the proposed WEBA mechanism(s) allows for this Commission (or intervenor) to conduct a reasonableness review of the costs SDG&E would be seeking to recover. The only discretion ceded to the Commission is the discretion to determine into which bucket the costs should reside; depending on the bucket, the utility would either be fully reimbursed for all excess wildfire costs or the utility would have to pay a small portion of the excess costs.⁶¹ Put another way, if the WEBA mechanism does not create a presumption of recoverability, what does it do?

Moreover, WEBA would remove and utterly restrict CPSD’s ability to investigate and prosecute the underlying cause(s) of the 2007 San Diego wildfires as WEBA only allows parties to dispute the “bucket” designation and whether the amounts sought are supported by receipts or their equivalent. The Settlement Agreement is abundantly clear: the settlement was a compromise.⁶² Had CPSD known that its ability to prosecute the underlying cause(s) of the 2007 wildfires would be prevented by a future SDG&E filing, CPSD would never have agreed to the terms of the settlement and would have instead litigated SDG&E’s role in the 2007 fires at that time.

SDG&E states that under the WEBA proposal and with regards to reckless or intentional behavior on the part of the utility, intervenors are “free to pursue their claims and theories in a public forum.”⁶³ This statement is somewhat disingenuous. In any application, the proffering party has the burden of proof to justify its request. Here however, the utility would file a WEBA application in which the utility would designate the bucket into which the costs should be placed, leaving it up to intervenors to prove that the costs stem from reckless and/or intentional and/or criminal behavior. This makes a mockery of the entire concept of “burden of proof”.

If the utility wants to recover costs from its ratepayers it should have to prove that the costs were not only reasonably incurred, but did not stem from reckless or criminal behavior on

⁵⁹ See, SDG&E/SoCalGas Opening Brief, p. 57.

⁶⁰ Id.

⁶¹ Under SDG&E’s first WEBA proposal, costs arising from, for example, criminal behavior would not qualify for WEBA treatment. However, under this approach, SDG&E retains the right to file a separate application for costs stemming from criminal actions. Under SDG&E’s second and newer proposal, SDG&E would recover 90% of the excess wildfire costs regardless of the underlying utility behavior; here the Commission would have zero discretion.

⁶² See, D.10-04-047, Appendix 1, p. 11, section 11.

⁶³ See, SDG&E/SoCalGas Opening Brief, p. 58.

the utility's part. As devised by the utility, under WEBA, the utility would not have to do so (with regards to the 2007 fires, or any excess costs associated with a future wildfire).⁶⁴

V. SDG&E'S ARGUMENT VIS A VIS RECOVERY OF SOME 2007 EXCESS WILDFIRE COSTS AT THE FERC IS MISLEADING AND FALLACIOUS

As SDG&E states, in 2011, as part of SDG&E's Transmission Owner rate case at the Federal Energy Regulatory Commission (FERC), the FERC approved for recovery costs not covered by insurance. However, the FERC's approval of, and the CPUC's non-opposition to such recovery do not support SDG&E's arguments that (1) FERC's decision is "strong support for the concept that 2007 wildfire costs should be included in [SDG&E's] new WEBA mechanism"⁶⁵; and (2) "it does not make sense for the [CPUC] to expressly decline to oppose SDG&E's recovery of 2007 wildfire costs in the *transmission* component of [SDG&E's] customers' rates, but then turn around and oppose recovery of such costs in the *distribution* component of the very same rates."⁶⁶

Firstly, FERC's decision to allow for the recovery of excess wildfire costs resulting from the 2007 fires does not equate to strong support for the concept that at the CPUC, excess 2007 wildfire costs should be recovered through a WEBA mechanism. FERC's decision merely illustrates that SDG&E had an opportunity to seek recovery of certain costs through transmission rates. SDG&E does not have a federal or transmission WEBA mechanism or special mechanism that prevents and prohibits a review of costs as to their reasonableness. All parties/intervenors at the FERC have the ability to protest the inclusion of costs, wildfire-related or not, as being unreasonable and unjust, and SDG&E would have the burden to prove otherwise. Moreover and of major import and distinction, the FERC maintains its ability to ascertain whether the costs are indeed just and reasonable. SDG&E's WEBA prevents such as it intentionally prohibits any party, including the Commission, from ascertaining whether the costs are indeed just and reasonable. The FERC's decision vis a vis 2007 excess wildfire costs has zero bearing on this proceeding before the CPUC.

⁶⁴ It is important to note, that as proposed, WEBA rewards the violation of Commission rules and decisions as long as the behavior on the part of the utility was neither reckless nor criminal. Put another way, as long as the behavior was *merely* negligent or grossly negligent, the utility would receive an automatic recovery of excess fire costs (minus some utility money depending on whether the costs are assigned to bucket A versus bucket B).

⁶⁵ See, SDG&E/SoCalGas Opening Brief, p. 61.

⁶⁶ *Id.*

Secondly, and perhaps most troubling, SDG&E misrepresents⁶⁷ the CPUC's non-opposition to the recovery of certain 2007 excess wildfire costs through transmission rates. In its Notice of Intervention and Protest, the Commission stated that it did not oppose SDG&E's *attempt* to recover costs through its transmission rates. Similarly, Intervenor's have not taken the position at the Commission that SDG&E should be prohibited from seeking recovery of excess costs; Intervenor's are simply opposed to the manner in which SDG&E wants to prevent a proper and full review of the costs, by passing them through the proposed WEBA mechanism(s).

SDG&E goes on to state that the "costs do not change in nature or character just because [SDG&E is] seeking to recover them through one component of our rates versus another."⁶⁸ While it is true that the nature of the costs do not change whether they are recovered through transmission rates versus distribution rates, this is not the issue. The issue is how and in what manner the rates are recovered, and the level of scrutiny provided to requests for rate recovery. At the FERC, excess wildfire costs, 2007 or other, are subject to a reasonableness review. At the CPUC, SDG&E is attempting to prevent a reasonableness review by having the rates pass through a WEBA mechanism; a mechanism that prevents the Commission or any intervenor from ruling or arguing that the costs incurred are unreasonable because, for example, the utility violated General Order 95. The WEBA mechanism prevents this discussion from taking place. Under the WEBA mechanism, the Commission's only role is to determine into which bucket the costs go and whether the utility's math is correct. An intervenor's role is limited to arguing that costs belong in a certain bucket and making certain that the utility's math is correct. SDG&E's attempts, by way of this WEBA application, to limit the abilities of the Commission and intervenor's to make sure that rates are just and reasonable are wholly inappropriate and should be rejected.

VI. IF WEBA IS APPROVED, THE COMMISSION SHOULD REDUCE SDG&E'S AND SOCALGAS' RETURN ON EQUITY

As Commissioner Simon and ALJ Bushey have recognized, SDG&E and SoCalGas are requesting extraordinary relief that, if approved, will result in ratepayers becoming the Utilities' insurer of last resort, potentially resulting in liabilities of hundreds of millions of dollars. Such a

⁶⁷ Rule 1.1 of the Commission's Rules of Practice and Procedure states: Any person who signs a pleading or brief, enters an appearance, offers testimony at a hearing, or transacts business with the Commission, by such act represents that he or she is authorized to do so and agrees to comply with the laws of this State; to maintain the respect due to the Commission, members of the Commission and its Administrative Law Judges; and never to mislead the Commission or its staff by an artifice or false statement of fact or law.

⁶⁸ See, SDG&E/SoCalGas Opening Brief, p. 61.

request should be balanced by a commensurate reduction in the Utilities authorized return on equity (ROE). As SDG&E/SoCalGas admit: “our proposed WEBA mechanism is a reasonable response to the *risks and challenges* presented by wildfires in Southern California.”⁶⁹ (Emphasis added). This statement is followed by “SDG&E and SoCalGas should not be put at *potentially devastating financial risk* simply because we provide the utility service we are required to provide to customers located in high fire risk fire zones.”⁷⁰ (Emphasis added). This begs the question: why is it okay to subject SDG&E’s and SoCalGas’ ratepayers to potentially devastating financial risk for payments which ratepayers would have no choice but to pay? Surely, what is good for the goose is good for the gander. Indeed, the Commission was formed for this very specific reason: to protect ratepayers from monopoly utilities.

SDG&E’s and SoCalGas’ opposition to CPSD’s proposal that the utilities’ ROE be reduced is simply disappointing and reveals their true colors: SDG&E’s and SoCalGas’ allegiance is first and foremost to their shareholders and not to their ratepayers. This entire proceeding/WEBA application is based around reducing the Utilities’ risk surrounding excess wildfire costs. Consequently and clearly, CPSD’s reduced ROE proposal is well within the scope of the proceeding and should be addressed commensurately with the WEBA proposal(s).⁷¹

VII. THE COMMISSION SHOULD NOT OPEN A PHASE 2 TO THIS PROCEEDING TO DISCUSS LIMITATIONS ON LIABILITY

SDG&E and SoCalGas propose that the Commission consider adoption of a limitation on civil liability from wildfires in a second phase to this proceeding. The fact that DRA, CPSD, and TURN stated that a discussion on the limitation of liabilities did not belong in Rulemaking 08-11-005 did not, in any way, bind those parties in this proceeding. Furthermore, the Utilities have failed to justify the need for a WEBA mechanism and have not provided sufficient evidence to support the conclusion that Commission should limit their liability from wildfires.

VIII. CONCLUSION

For the reasons stated above and in Intervenors’ various pleadings, Intervenors respectfully request that the Commission dismiss the utilities’ WEBA application.

⁶⁹ See, SDG&E/SoCalGas Opening Brief, p. 56.

⁷⁰ See, SDG&E/SoCalGas Opening Brief, p. 58.

⁷¹ Compare CPSD’s reduced ROE proposal with SDG&E’s and SoCalGas’ proposal that would have ratepayers cover excess wildfire costs stemming from the utilities’ criminal behavior; which is more reasonable? One reduces financial reward based on reduced risk; the other has ratepayers paying for costs that insurers do not and will not cover. Is this not the definition of hubris?

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Respectfully submitted,

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