

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



FILED

11-16-12
04:59 PM

Application of SAN DIEGO GAS &
ELECTRIC COMPANY (U 902 E) For
Authority To Update Marginal Costs, Cost
Allocation, And Electric Rate Design.

Application 11-10-002
(Filed October 3, 2011)

**OPENING BRIEF OF THE UTILITY REFORM NETWORK, THE NATIONAL
CONSUMER LAW CENTER, THE CENTER FOR ACCESSIBLE
TECHNOLOGY, AND THE GREENLINING INSTITUTE
ON SAN DIEGO GAS & ELECTRIC COMPANY'S PROPOSAL
FOR A NEW RESIDENTIAL PREPAY PROGRAM**

November 16, 2012

Hayley Goodson
Staff Attorney

The Utility Reform Network
115 Sansome Street, Suite 900
San Francisco, CA 94104
Phone: (415) 929-8876
Fax: (415) 929-1132
E-mail: hayley@turn.org

TABLE OF CONTENTS

- I. INTRODUCTION AND SUMMARY.....1**
 - A. Summary of Proceedings.....2**
 - B. Summary of Argument.....4**
- II. SDG&E’S PREPAY PROPOSAL, IF IMPLEMENTED, WOULD VIOLATE CALIFORNIA LAW AND MUST BE REJECTED.5**
 - A. The Prepay Program would deprive customers of the consumer protections mandated by Sections 779, 779.1 and 739.4 of the California Public Utilities Code, intended to prevent disconnections for nonpayment for all residential customers and otherwise protect low-income customers from loss of essential utility service.....5**
 - 1. The Prepay Program would fail to satisfy the notice requirements of Pub. Util. Code Sections 779 and 779.1.....6
 - 2. The Prepay Program would not satisfy the requirements of Pub. Util. Code Section 739.4.....9
 - B. These statutory utility consumer protections cannot and should not be waived.....12**
 - 1. It is well established that loss of utility service threatens the health, safety and well-being of residential utility consumers.12
 - 2. These statutorily-created protections cannot be waived, as a matter of law, and should not be waived, as a matter of public policy.13
- III. SDG&E’S PROPOSAL MUST BE REJECTED ON POLICY GROUNDS BECAUSE IT WOULD PLACE CUSTOMERS WHO ALREADY STRUGGLE TO KEEP UP WITH UTILITY BILLS AT INCREASED RISK OF DISCONNECTION.23**
 - A. Payment troubled customers will be more vulnerable on SDG&E’s proposed prepay program.23**
 - B. SDG&E’s proposal runs counter to the Commission’s policy of trying to reduce disconnections.27**
- IV. SDG&E’S PREPAY PROPOSAL SHOULD BE REJECTED BECAUSE ITS COSTS TO CUSTOMERS OUTWEIGH ITS BENEFITS.....28**
 - A. Prepay would provide inferior service at the same price as traditional, higher-value service.28**
 - B. There are better available ways to help customers who cannot establish utility service and which are less burdensome and risky for those customers.30**
 - C. Prepay is unnecessary to provide customers with information related to managing their energy costs.....34**
- V. CONCLUSION36**

TABLE OF AUTHORITIES

Federal Case Law

<i>Brooklyn Savings Bank v. O'Neil</i> , 324 U.S. 697, 65 S.Ct. 895 (1945).....	15
<i>Memphis Light, Gas & Water Division v. Craft</i> (1978) 436 U.S. 1	12
<i>Fairfax Gas & Supply v. Hadary</i> 151 F.2d 939 (4 th Cir. 1945)	16
<i>Massey v. On-Site Manager, Inc.</i> , 2011 WL 4356380, *4 (E.D.N.Y. 2011)	14
<i>Abercrombie v. Wells Fargo Bank, N.A.</i> , 417 F. Supp.2d 1006, 1008 (N.D. Ill. 2006)	14

Federal Statutes and Administrative Authorities

42 U.S.C. §§ 8621 – 8630	21
--------------------------------	----

California Case Law

<i>Tunkl v. Regents of University of California</i> , 60 Cal.2d 92, 96, 383 P.2d 441, 32 Cal.Rptr. 33 (1963)	14, 15, 16, 18
<i>City of Oakland v. Hassey</i> , 163 Cal. App. 4 th 1477, 78 Cal. Rptr.3d 621 (Ct. App. 1 st Dist. 2009)	14
<i>Benane v. International Harvester Co.</i> , 142 Cal.App.2d Supp. 874, 299 P.2d 750 (Super. Ct. App. Dep't. 1956)	14

California Statutes

Cal. Pub. Util. Code § 739.4	<i>passim</i>
Cal. Pub. Util. Code § 779	<i>passim</i>
Cal. Pub. Util. Code § 779.1	<i>passim</i>
California Stats 1975, ch. 1010, Section 1(a)	12

Commission Decisions

D.12-03-054	28
D.10-12-051	9, 28
D.10-07-048	28
O.I.R. 10-02-005	13, 28, 29
D.08-07-046	33, 34
D.07-09-041	12
D.06-10-051	19, 20

D.06-07-027	14, 19, 21
D.05-10-044	12, 13
<i>Faida Jama v. Pacific Gas & Electric Co.</i> , D.92-06-063, 1992 Cal. PUC LEXIS 1001	
D.02-02-051	17, 19
<i>Ethel Dobson v. Pacific Gas & Electric Co.</i> , D. 90-07-039, 1990 Cal. PUC LEXIS 782	
.....	17, 19

Other Authorities

2005 Mass. Acts Ch. 140, § 17(a)	33
Mass. Regs. Code tit. 220, § 27.00	31
N.Y. Comp. Codes R. & Regs., tit. 16, § 11.12	31
<i>Petition by the Western Massachusetts Electric Company for approval of a smart grid pilot program</i> , D.P.U. 09-34, “Order on Motion to Dismiss” (July 21, 2009)	17, 18

Commission Rules of Practice and Procedure

Rules 13.11	2
-------------------	---

SUMMARY OF RECOMMENDATIONS

The Consumer Groups recommend that the Commission reject SDG&E’s proposed Prepay Program because the utility acknowledges that it violates existing provisions of the Public Utilities Code, and those provisions cannot be waived as a matter of law. The proposal should also be rejected on its merits as bad public policy.

**OPENING BRIEF OF THE UTILITY REFORM NETWORK, THE NATIONAL
CONSUMER LAW CENTER, THE CENTER FOR ACCESSIBLE TECHNOLOGY,
AND THE GREENLINING INSTITUTE ON SAN DIEGO GAS & ELECTRIC
COMPANY’S PROPOSAL FOR A NEW RESIDENTIAL PREPAY PROGRAM**

I. INTRODUCTION AND SUMMARY

On October 3, 2011, San Diego Gas & Electric Company (SDG&E) filed the instant application, submitting Phase 2 of the utility’s 2012 Test Year General Rate Case (GRC). SDG&E proposes changes to electric marginal costs, marginal cost revenue responsibility, revenue allocation and rate design. Among proposals put forth by SDG&E is a new Prepay Program, which would be available to residential electric service customers beginning January 1, 2014.¹

SDG&E’s customers have always paid for their metered electricity usage after consumption. In contrast, customers participating in SDG&E’s proposed Prepay Program would pay for electricity service in advance of consumption. As the customer consumed electricity over time, the prepaid account balance would decline until the customer either ran out of credit or reloaded the account with more money. Customers taking service on the Prepay Program would pay the same rates as customers paying after consumption. However, by signing up for the Prepay Program, customers could avoid paying a deposit to establish credit, if required by SDG&E, and customers could additionally avoid being required to pay off the entirety of any bad debt with SDG&E prior to receiving service.² Under SDG&E’s proposal, Prepay customers would experience disconnection for nonpayment via remote disconnection when the sooner of

¹ Ex. SDG&E-9. SDG&E would exclude from program eligibility certain customers who are particularly vulnerable to the health and safety risks associated with the loss of utility service, such as “self-identified seniors (age 62 or older), self-identified disabled customers, Medical Baseline customers, Life Support customers or other customers who self-certify that they have a serious illness or condition that could become life threatening if service is disconnected,” as well as existing customers with arrears. Ex. SDG&E-9, p. DWC-3.

² Ex. SDG&E-9, pp. DWC-2 – DWC-3.

the following occurred: (1) the customer's balance had been below \$0 for four days, or (2) the customer's balance reached minus \$20.³ Prepay customers would not be provided with certain disconnection-related notices and other consumer protections intended to prevent disconnection that are required by California law.⁴

Pursuant to Rule 13.11 of the Commission's Rules of Practice and Procedure and the schedule established by Administrative Law Judge Yip-Kikugawa, The Utility Reform Network (TURN), the National Consumer Law Center (NCLC), the Center for Accessible Technology (CforAT), and the Greenlining Institute (Greenlining) (collectively, Consumer Groups) jointly submit this opening brief addressing the legal and policy issues associated with SDG&E's Prepay Program.⁵ SDG&E's Prepay Program falls under Section IV.B in the common briefing outline agreed to by parties in this proceeding. For the reasons provided below, the Commission should reject SDG&E's proposed Prepay Program as a matter of law and policy.

A. Summary of Proceedings

SDG&E's Prepay Program is universally opposed by every party, other than the utility, taking a position on this issue in this proceeding.⁶ On October 27, 2011, Utility Consumers Action Network (UCAN) filed a motion for a preliminary ruling determining that SDG&E's application did not comply with the California Public Utilities Code (herein after Pub. Util. Code) and directing SDG&E, inter alia, to resubmit its application without the proposed Prepay Program.⁷ Then on November 7, 2011, four parties filed protests objecting to SDG&E's Prepay

³ Ex. SDG&E-9, p. DWC-5.

⁴ Ex. SDG&E-9, pp. DWC-4 – DWC-5; Ex. NCLC-1, pp. 5-7; Ex. SDG&E-18, p. 5.

⁵ *Administrative Law Judge's Ruling Regarding Further Revising Schedule*, issued July 10, 2012, p. 3.

⁶ The procedural history discussed here recounts events specific to SDG&E's Prepay Program and is not intended to be an exhaustive accounting of the procedural history of all issues in this proceeding.

⁷ *Assigned Commissioner's Scoping Memo and Ruling (Scoping Memo)*, issued January 18, 2012, p. 2.

Program, including TURN, Greenlining, UCAN, and the Division of Ratepayer Advocates (DRA). On November 17, 2011, SDG&E replied to protests. That same day, TURN and CforAT (jointly) and DRA filed responses to UCAN's motion, supporting UCAN's requested relief related to the Prepay Program, and SDG&E responded to UCAN's motion in opposition. UCAN replied to responses to its motion on November 22, 2012. After the Prehearing Conference on December 9, 2011, Assigned Commissioner Ferron issued the *Assigned Commissioner's Scoping Memo and Ruling (Scoping Memo)* on January 18, 2012, which concluded that the legal and factual issues surrounding SDG&E's Prepay Program should be considered in this proceeding.⁸

Pursuant to the schedule established in the *Scoping Memo*, DRA served testimony on May 18, 2012, opposing SDG&E's Prepay Program. On June 12, 2012, the Consumer Groups jointly served testimony opposing SDG&E's Prepay Program. CforAT additionally served its own testimony opposing Prepay based on issues specific to the disability community. The Black Economic Council, Latino Business Chamber of Greater Los Angeles, and National Asian American Coalition (participating collectively as Joint Parties) likewise served late-filed testimony opposing SDG&E's Prepay Program on June 19, 2012. On July 17, 2012, SDG&E served rebuttal testimony defending its Prepay Program, and the Joint Parties served rebuttal testimony further discussing their opposition to SDG&E's Prepay Program. On October 10, 2012, the Commission held one day of evidentiary hearings devoted to the Prepay Program.

The Commission held Public Participation Hearings (PPHs) in this proceeding on June 26, 27 and 28, 2012. All of the participants who addressed the proposed Prepay Program raised concerns about the adverse impacts of SDG&E's request, including 27 consumers, six advocates

⁸ *Scoping Memo*, p. 8.

for consumers (such as AARP representatives), and representatives of three parties to this proceeding.⁹

B. Summary of Argument

The Prepay Program, by SDG&E's own admission, would violate provisions of the Public Utilities Code. Those provisions – §§ 739.4, 779 and 779.1 – were adopted by the legislature to minimize the number of customers terminated for non-payment and reflect public policy that it is in the public interest to avoid termination of utility service, especially service provided to low-income customers. Were the utility's proposal to be adopted, customers on prepay would receive much less advance notice of termination and, depending on the communications means chosen (e.g., text message, automated phone message, or e-mail), might receive no advance notice at all since customers who are behind on their electric bills may also be behind on their internet or phone bills. Customers on prepay would also be deprived of other valuable notices, such as notices regarding the CARE program, the availability of payment plans and levelized payment programs, and the right to avoid termination if a public assistance agency has already pledged payment.

The utility asserts that these critical rights can be waived. They cannot, as a matter of law. Court precedents demonstrate that rights created by statute cannot be waived when doing so would adversely affect the public interest or be in violation of public policy. Numerous court cases – including the Supreme Court decision in *Memphis Light, Gas & Water Div. v. Craft* – as well as Commission decisions show that “utility service is a necessity of modern life; indeed, the discontinuance of water or heating for even short periods of time may threaten health and safety.” Because the provisions which SDG&E seeks to have waived would place vital utility

⁹ While it is not customary for parties to be permitted to speak at PPHs, ALJ Roscow permitted parties to make statements at each of the three PPHs in this proceeding.

service at greater risk, the public interest is indeed affected, and those provisions cannot be waived. Moreover, any purported waiver must be seen as made under duress, given that the utility's proposal would force payment-troubled consumers to choose between living without utility service or opting into the onerous prepay program. The Commission should not allow SDG&E to present customers with such a dilemma.

SDG&E's prepay proposal should also be rejected on policy grounds. Customers who are already payment troubled will be paying the same rates as previously and thus will be as likely to fall behind on their bills. As the prepay experience to date demonstrates, customers on prepay in fact experience much higher rates of termination given the relative ease with which companies can effectuate termination compared to customers on traditional post-paid service.

Finally, SDG&E's prepay proposal should be rejected because the disadvantages far outweigh the purported benefits, and the utility could provide those same benefits (e.g., account management tools) without imposing Prepay's harsher terms. There are better ways to help customers who cannot fully meet SDG&E's current deposit requirements or who cannot pay 100% of an arrearage in order to have service connected. Other states provide useful models which the Commission could follow.

II. SDG&E'S PREPAY PROPOSAL, IF IMPLEMENTED, WOULD VIOLATE CALIFORNIA LAW AND MUST BE REJECTED.

A. The Prepay Program would deprive customers of the consumer protections mandated by Sections 779, 779.1 and 739.4 of the California Public Utilities Code, intended to prevent disconnections for nonpayment for all residential customers and otherwise protect low-income customers from loss of essential utility service.

The California Legislature has placed clear limits on the authority of electric and natural gas utilities to disconnect customers for nonpayment by requiring utilities to meet the notice requirements in Pub. Util. Code Sections 779 and 779.1 prior to effectuating service termination.

The Legislature has likewise limited the ability of utility companies to effectuate residential service terminations by mandating in Pub. Util. Code Section 739.4(b) certain pre-disconnection practices intended to prevent loss of essential utility service. The disconnection practices contained in SDG&E's Prepay Program would exceed the utility's authority under the law and would violate the mandates of the Public Utilities Code.

1. The Prepay Program would fail to satisfy the notice requirements of Pub. Util. Code Sections 779 and 779.1.

Pursuant to Pub. Util. Code Section 779(a), a utility may not terminate residential service for nonpayment unless the utility first gives notice of the delinquency and impending termination, as provided in Section 779.1.¹⁰ Section 779.1(a) prohibits SDG&E from terminating the service of residential customers for nonpayment unless the utility

first gives notice of the delinquency and impending termination, at least 10 days prior to the proposed termination, by means of a notice mailed, postage prepaid, to the customer to whom the service is billed, ... and the 10-day period shall not commence until five days after the mailing of the notice.

A second notice is also required prior to service termination. Pub. Util. Code § 779.1(b) mandates:

Every corporation shall make a reasonable attempt to contact an adult person residing at the premises of the customer by telephone or personal contact at least 24 hours prior to any termination of service, except that, whenever telephone or personal contact cannot be accomplished, the corporation shall give, either by mail or in person, a notice of termination of service at least 48 hours prior to termination.

These disconnection notices must contain, in pertinent part, information about how to initiate a complaint or request an investigation concerning service or charges; how to request a payment extension or payment plan; how to obtain information on the availability of financial assistance from governmental and/or non-governmental sources; and the telephone number customers may

¹⁰ All references are to the Cal. Pub. Util. Code unless otherwise specified.

use to contact the CPUC with questions or concerns.¹¹

Under SDG&E's proposal, customers enrolled in the Prepay Program would receive notice when their account balance equals \$0, every day the account balance is below \$0, and when the balance reaches the default level triggering disconnection (the sooner of four days below \$0 or a balance of -\$20).¹² Customers could additionally elect to receive notice when their credit balances have fallen below a customer-selected threshold.¹³ Notices regarding account balance would be provided by the method the customer chooses when enrolling in the program, including automated phone call, text message, or e-mail.¹⁴ SDG&E provides no information about the content of the notices, other than that the notices will provide the customer's account balance.¹⁵ SDG&E intends to disconnect customers for nonpayment via remote disconnection when the sooner of the following occurs: (1) the customer's balance is below \$0 for four days, or (2) the customer's balance reaches minus \$20.¹⁶ When one of these conditions occurs, SDG&E will terminate the customer's service on the next business day during normal business hours.¹⁷

The Prepay Program notices fail to satisfy the legal requirements of Pub. Util. Code §§ 779 and 779.1 regarding the content, timing, and delivery method of disconnection notices. First, SDG&E does not intend to provide customers with information about payment plans, financial assistance, or how to initiate a complaint with the utility or contact the Commission

¹¹ Pub. Util. Code § 779(a); §§ 779.1(d)(4)-(8).

¹² Ex. SDG&E-9, p. DWC-4; Ex. SDG&E-18, p. DWC-6.

¹³ Ex. SDG&E-9, p. DWC-4.

¹⁴ Ex. SDG&E-9, p. DWC-4. Customers could additionally elect to check their account balance as often as daily or receive notification when the balance reaches certain thresholds. *Ibid.*

¹⁵ Ex. SDG&E-9, p. DWC-4; Ex. SDG&E-18, p. DWC-6.

¹⁶ Ex. SDG&E-9, p. DWC-5.

¹⁷ Ex. SDG&E-9, p. DWC-5.

with concerns about SDG&E's service or charges, as required by Pub. Util. Code §§ 779.1(d)(4)-(8). Next, the utility would disconnect Prepay customers without sending a 15-day notice prior to disconnection (10 days commencing 5 days after mailing), which § 779.1(a) requires.

Needless to say, this non-existent notice would not be sent by U.S. Mail, as also required by the statute. Finally, while a Prepay customer would receive a notice 24- and/or 48-hours in advance of disconnection, as § 779.1(a) requires, this notice would not be in person, would not be by U.S. Mail, and might not even be by telephone, depending on the communication channel selected by the customer. Instead, the notice would be sent by automated phone call, text message, or e-mail.¹⁸ U.S. Mail and personal delivery are not among the delivery options for Prepay customers.

These differences are not academic. In contrast to U.S. Mail and personal contact by the utility, the delivery options SDG&E proposes to afford customers rely on technologies that are themselves subject to disconnection for non-payment. A Prepay customer would need an active cell phone or a landline to receive an automated telephone call. Receipt of a text message would require cell phone service. And access to e-mail (without going to a place with public internet access, such as a library) would require internet service at home or through a cell phone with a data plan. Yet a customer experiencing financial difficulties in making payments for electric service credits may also be experiencing difficulty in paying for cell phone, landline, or internet service.¹⁹ Loss of any of these services due to nonpayment would render ineffective the delivery of a disconnection notice using that communication channel.²⁰ As a result, a Prepay customer might not actually receive any notice of a \$0 account balance or impending disconnection.

¹⁸ Ex. SDG&E-9, p. DWC-4. Customers could additionally elect to check their account balance as often as daily or receive notification when the balance reaches certain thresholds. *Ibid.*

¹⁹ Ex. NCLC-1, p. 12.

²⁰ 10 RT 290: 19 – 291: 15 (SDG&E/David Cheng).

For all of these reasons, the notices that SDG&E would provide to Prepay customers prior to disconnection are legally deficient. Without meeting the statutory requirements for disconnection notices, the utility has no legal authority to terminate residential service for nonpayment.

2. The Prepay Program would not satisfy the requirements of Pub. Util. Code Section 739.4.

The Commission must, pursuant to Pub. Util. Code § 739.4(b)(3)(A), ensure that SDG&E meets all of the following requirements before “effecting any disconnection of service for nonpayment”:

Provide information about the CARE program and other assistance programs, and attempt to qualify customers for CARE, and provide information about individual payment arrangements that allow customers to pay the amounts due over a reasonable period of time, not to exceed 12 months, and attempt to enroll customers in a payment arrangement program.²¹

SDG&E must also “[a]dvice residential customers facing disconnection” of the “levelizing payment program that allows them to pay a monthly average bill based on 12 months of usage.”²²

These communications must be provided in multilingual formats to the extent printed and recorded information is provided.²³ Additionally, the Commission must prohibit SDG&E from disconnecting a delinquent residential customer when the utility receives a commitment pledge or other notification that a provider of energy assistance is forwarding payment sufficient to

²¹ Pub. Util. Code § 739.4(b)(3)(A).

²² Pub. Util. Code § 739.4(b)(3)(D)(i).

²³ Pub. Util. Code § 739.4(b). While not included in the statute, Commission decisions issued in R.10-02-005 concerning service disconnection also currently require oral and written communications to be accessible to customers with disabilities that impact their ability to use standard forms of communication. D.10-12-051, pp. 7-8 (summarizing provisions of approved settlement between consumer groups, SDG&E, and Southern California Gas Company, including need for accessible communication of information concerning shut-offs) and D.12-03-054, p.2 (summarizing obligations of non-settling IOUs regarding service disconnection, including obligations to provide accessible information).

prevent disconnection.²⁴ These consumer protections are intended to “facilitate better penetration rates for the CARE program and to protect low-income and senior households from unwarranted disconnection of necessary electric and gas services.”²⁵

SDG&E does not intend to have any contact with Prepay customers prior to disconnection other than through the notices regarding account balances discussed above. As previously explained, Prepay customers would be offered a “grace period” of up to 4 days, or shorter if the account balance reaches -\$20 before then.²⁶ No additional payment extension would be available. Once disconnection occurred, SDG&E would require all Prepay Program participants to make a payment that is sufficient to bring the credit balance to \$10 to have service reconnected.²⁷ For instance, a customer with a balance of -\$20 participating in the “75/25 Bad Debt Feature”²⁸ of the Prepay Program would need to make a \$40 payment in order to be reconnected since 25% of the payment, \$10, would be applied to the prior bad debt, \$20 would bring the balance to \$0, and \$10 would be needed for a positive \$10 credit.²⁹ No payment short of this universally applied minimum would be accepted by the utility, and the customer would be without service until making the requisite payment.

The Commission is prohibited from authorizing SDG&E’s Prepay Program because participating customers would not receive the mandated consumer protections prior to disconnection, contrary to Pub. Util. Code § 739.4(b)(3). SDG&E would not educate Prepay

²⁴ Pub. Util. Code § 739.4(b)(3)(C).

²⁵ Pub. Util. Code § 739.4(b).

²⁶ Ex. SDG&E-9, p. DWC-5.

²⁷ Ex. SDG&E-9, p. DWC-5.

²⁸ Customers with existing bad debt seeking service from the utility would be eligible if they agreed to participate in the Prepay Program’s proposed “75/25 Bad Debt Feature.” Such customers would see 75% of each payment applied to the Prepay account as credit, while 25% of each payment would be applied to prior bad debt until it is paid off. Ex. SDG&E-9, p. 4.

²⁹ Ex. SDG&E-9, p. DWC-5.

customers about CARE and attempt to enroll them in CARE if eligible. SDG&E would not inform Prepay customers of other assistance programs, such as the Energy Savings Assistance Program (ESAP), the Family Electric Rate Assistance Program (FERA), and sources of direct financial assistance, such as the Low Income Home Energy Assistance Program and SDG&E's Neighbor-to-Neighbor Program. The issue here is not simply whether Prepay customers could enroll in CARE, or FERA or ESAP, or be eligible for grants from the Neighbor-to-Neighbor program, as SDG&E suggests.³⁰ Rather, SDG&E must actually educate all residential customers about these sources of potential assistance in an attempt to help customers avoid an imminent disconnection.

Moreover, SDG&E would not work with Prepay customers in distress and offer payment extensions or other types of individual payment arrangements; the utility would automatically disconnect service when the triggering conditions were met.³¹ This omission violates not only § 739.4(b)(3)(C), but also § 779(c), which prohibits a utility from disconnecting service when any residential customer “has, before termination of service, made a request for extension of the payment period of a bill asserted to be beyond the means of the customer to pay in full within the normal period of payment.”³² Also, SDG&E would not educate Prepay customers facing disconnection about avoiding bill fluctuations through the levelized payment program.

Further, SDG&E has not explained how it would comply with the requirement of Pub. Util. Code § 739.4(b)(3)(C) that it not disconnect a customer with a pledge of financial assistance from a provider of energy payment assistance. This provision serves to protect

³⁰ Ex. SDG&E-18, p. DWC-7.

³¹ An exception to this automatic disconnection practice would exist under SDG&E's proposal for extreme hot or cold weather events in the customer's climate zone. Ex. SDG&E-9, p. DWC-5.

³² This provision requires the utility to defer disconnection while reviewing the customer's request for an extension, which “shall include consideration of whether the customer shall be permitted to amortize any unpaid balance of the delinquent account over a reasonable period of time, not to exceed 12 months.” Pub. Util. Code § 779(c)

customers during the lag in time between receiving a pledge of assistance and the actual payment being sent to the utility. It is conceivable, if not highly likely, that an energy assistance provider would not be able to transmit payment to SDG&E before the end of the 4-day / -\$20 balance “grace period,” yet SDG&E would automatically disconnect the customer under its Prepay proposal.

The Commission cannot authorize SDG&E to bypass these legally required steps, which are designed to prevent disconnections as a matter of state public policy. Accordingly, SDG&E’s Prepay Program must be rejected as unlawful.

B. These statutory utility consumer protections cannot and should not be waived.

1. It is well established that loss of utility service threatens the health, safety and well-being of residential utility consumers.

In California, “light and heat are basic human rights.”³³ The absence of energy utility services is a serious public health and safety issue. As the United States Supreme Court stated in *Memphis Light, Gas & Water Division v. Craft*, “Utility service is a necessity of modern life; indeed, the discontinuance of water or heating for even short periods of time may threaten health and safety.”³⁴ The Commission has likewise recognized that utility customers are physically harmed by the termination of electric and/or natural gas utility service for nonpayment.³⁵

For this reason, the Commission, in the face of anticipated increases in natural gas prices in the winter of 2005-2006, concluded in D.05-10-044 that the electric and gas utilities should take “extraordinary steps to ensure that residential customers struggling to pay higher bills this

³³ California Stats 1975, ch. 1010, Section 1(a).

³⁴ *Memphis Light, Gas & Water Division v. Craft* (1978) 436 U.S. 1, 18.

³⁵ D.07-09-041, issued in A.02-11-017 / I.03-01-012 / A.02-09-005, pp. 40-41.

winter are able to continue receiving gas and electric service.”³⁶ Preventing disconnections due to unaffordable bills was, according to D.05-10-044, “an urgent matter.”³⁷ Indeed, the Commission more recently opened Rulemaking 10-02-005, *Order Instituting Rulemaking on the Commission’s Own Motion to address the issue of customers’ electric and natural gas service disconnection*, in recognition of the importance of preventing residential disconnections for nonpayment because “utility service is a matter of health and safety.”³⁸

Participants at the Public Participation Hearings held in this proceeding also highlighted the essential nature of energy utility services. Andrea Skorepa, the executive director of a nonprofit serving a community in SDG&E’s service territory on the US-Mexico border, testified to this importance:

And also, utilities [referring to SDG&E’s utility services] aren’t like a cellular phone. You know, you can get along without a cellular phone even though you may think you can’t. But a basic need like utilities, it is a basic need. It is a basic need just like water and food is in our society now.³⁹

As Ms. Skorepa makes abundantly clear, and as this Commission, the California Legislature, and the United States Supreme Court have all acknowledged, the loss of utility service is a serious matter that threatens the health, safety and well-being of residential utility consumers.

2. These statutorily-created protections cannot be waived, as a matter of law, and should not be waived, as a matter of public policy.

A broad range of federal and state courts – including the Supreme Courts of the United State and California – have addressed the question of whether consumers can waive rights created under various statutes. Those cases consistently hold that statutory protections cannot be

³⁶ D.05-10-044, issued in R.04-01-006, p. 27.

³⁷ D.05-10-044, p. 6.

³⁸ Order Instituting Rulemaking 10-02-005, issued Feb. 5, 2010, pp. 1, 6.

³⁹ 2 RT 98: 23 – 99: 1 (Andrea Skorepa).

waived – even if the waiver is in writing and signed – where such a waiver is seen as violating public policy or the public interest. *See, e.g., Massey v. On-Site Manager, Inc.*, 2011 WL 4356380, *4 (E.D.N.Y. 2011) (New York courts allow waiver only if “waiver would not contravene public policy”; signed waiver of tenant’s rights under Fair Credit Reporting Act held unenforceable); *Abercrombie v. Wells Fargo Bank, N.A.*, 417 F. Supp.2d 1006, 1008 (N.D. Ill. 2006) (“a statutory right conferred on a private party, but affecting the public interest, may not be waived or released if such waiver or release contravenes the statutory policy”; waiver of rights under Truth in Lending Act [“TILA”] held unenforceable); *compare City of Oakland v. Hassey*, 163 Cal. App. 4th 1477, 78 Cal. Rptr.3d 621 (Ct. App. 1st Dist. 2009) (reversing summary judgment based on presumed waiver of employee’s rights; “it is questionable whether employees may enter into agreements authorizing unlawful [pay] deductions”). The California Supreme Court has noted that state courts have “consistently held” that an “exculpatory provision may stand only if it does not involve ‘the public interest’”. *Tunkl v. Regents of University of California*, 60 Cal.2d 92, 96, 383 P.2d 441, 32 Cal.Rptr. 33 (1963); *see also Benane v. International Harvester Co.*, 142 Cal.App.2d Supp. 874, 299 P.2d 750 (Super. Ct. App. Dep’t. 1956) (right to be paid for time taken from work to vote cannot be waived).

SDG&E’s proposal that customers should be allowed to waive their notice and other rights under provisions of the Public Utilities Code would violate these precedents. Moreover, the public interest in protecting against terminations which, under the utility’s proposal, would occur under shortened and potentially inadequate notice, is much stronger than the asserted public interest in protecting against possibly higher bills which were at issue in Decision 06-07-027, where the Commission found that voluntary waiver of protections under AB 1X was permissible.

One of the earliest decisions addressing the question of whether rights created under a statute can be waived is *Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697, 65 S.Ct. 895 (1945). The specific question in that case was “whether an employee, accepting from his employer a delayed payment of the basic statutory wages due under the [Fair Labor Standards] Act, can validly release and waive and [sic]⁴⁰ further right to recover liquidated damages” that were mandated under that Act. While arguably the labor act in question merely created individual rights that wronged employees could voluntarily waive, the Court held to the contrary, noting:

It has been held in this and other courts that a statutory right conferred on a private party, but affecting the public interest may not be waived or released if such waiver or release contravenes public policy. [Citations omitted]. Where a private right is granted in the public interest to effectuate a legislative policy, waiver of a right so charged or colored with the public interest will not be allowed where it would thwart the legislative policy which it was designed to effectuate.

324 U.S., at 704.

It is of course not self-evident in any particular context, including the present one involving termination procedures adopted by the legislature, that a “statutory right” is “affecting the public interest” and therefore may not be waived. In the context of deciding which exculpatory contract provisions are “within or without the category of those affected with a public interest,” the California Supreme Court has limned the factors that implicate the public interest, the following of which are present in the current case (quotations below from *Tunkl*, *supra*, 60 Cal.2d, at 98-99):

Factor 1. “The party seeking exculpation is engaged in performing a service of great importance to the public, which is often a matter of practical necessity for some members of the public.”

Utility service is unquestionably of “great importance to the public” and “a matter of practical necessity” for most consumers. This Commission has favorably quoted the legislative finding

⁴⁰ Presumably should be “any.”

expressed in AB 1X that the “furnishing of reliably reasonably priced electric service is essential for the safety, health and well-being of the people of California.” D.02-02-051, p. 65, Finding of Fact 1. All fifty states regulate utilities through extensive legislative enactments and regulatory commissions precisely because utility service is “a matter of practical necessity.” The *Tunkl* decision itself cited a case involving a gas utility as an example of a service that is of “great importance.”⁴¹ Factor 1 is met in the present case.

Factor 2. “The party holds himself out as willing to perform this service for any member of the public who seeks it, or at least any member coming within established standards.”

No one would question that utilities, as a matter of law, hold themselves as willing to provide their service to all members of the public who meet established standards; the corollary of a utility obtaining a monopoly franchise is that the utility has an obligation to serve. The *Tunkl* decision itself reinforces this point by citing cases and other legal authority regarding the obligations of “Public Service Companies” in support of factor #2 just quoted.⁴²

Factor 3. “As a result of the essential nature of the service . . . the party invoking exculpation possesses a decisive advantage of bargaining strength against any member of the public who seeks his services.”

While SDG&E will likely argue that it is “completely optional” for a customer to be on the Prepay Program (Ex. SDG&E-18, Cheng Rebuttal, DWC-1), a customer who faces being without utility service versus “choosing” to be in the Prepay is subject to the same “decisive advantage of bargaining strength” that the plaintiff faced in *Tunkl*. Being forced to choose between living without vital utility services or giving up valuable termination protections and notice rights is no choice at all, but rather the result of the “bargaining strength” that utilities can

⁴¹ *Tunkl*, 60 Cal.2d, at 99, n. 11 cites to *Fairfax Gas & Supply v. Hadary* 151 F.2d 939 (4th Cir. 1945), a case in which a purported waiver of claims by the utility customer was held unenforceable.

⁴²*Tunkl*, 60 Cal.2d, at 99, n. 12.

impose when financially vulnerable customers cannot pay their bills. *See, Faida Jama v. Pacific Gas & Electric Co.*, D. 92-06-063, 1992 Cal. PUC LEXIS 1001, *14 (“A utility customer is at an unfair advantage [sic]⁴³ when forced to negotiate with the lights out and the heat off.”); *Ethel Dobson v. Pacific Gas & Electric Co.*, D. 90-07-039, 1990 Cal. PUC LEXIS 782, *10 (where PG&E improperly terminated customer’s service before considering complainant’s request for an extension of time, it “placed itself in a position to take unfair advantage of complainant”; Commission “will not enforce the terms of an agreement that was bargained on unequal terms.”)

When the Massachusetts Department of Public Utilities (“DPU”) addressed similar legal questions in the face of a “Pay-As-You-Go Program” proposed by the Western Massachusetts Electric Company, the DPU rejected the proposal because “[t]he statutory rights of customers against the shut-off of electric service are addressed in statute,” and the “Department has no authority to grant a waiver” of notice requirements “as it would be contrary to statute.” *Petition by the Western Massachusetts Electric Company for approval of a smart grid pilot program*, D.P.U. 09-34, “Order on Motion to Dismiss” (July 21, 2009), at 14-15.⁴⁴ The Department went even further, noting that to the extent it had the authority to “consider other deviations” from its billing and termination rules, to the extent those rules were not mandated by statute, it “would do so only in the context of a proceeding that comprehensively addressed our consumer protection regulations.” “Order on Motion to Dismiss,” at 15. “It would be inappropriate for the Department to consider making targeted revisions to these important consumer protections in an investigation of a company’s smart grid pilot program.” *Id.* The same could be said of SDG&E’s proposal to waive consumer protections in an application relating to marginal costs, cost allocation and rate design.

⁴³ Presumably, “disadvantage”.

⁴⁴ Available at: <http://www.env.state.ma.us/dpu/docs/electric/09-34/72109dpuord.pdf>

As is the case with SDG&E's proposal, Western Massachusetts Electric Company's (WMECO's) proposal was in the nature of a pilot⁴⁵ and would only have enrolled customers voluntarily.⁴⁶ Despite the pilot and voluntary nature of this prepay proposal, the DPU found that it had no authority to waive statutory protections. The Commission should find the same here.

As Consumer Groups witness John Howat testified:

SDG&E's prepaid service proposal would deprive consumers of many existing consumer protections related to service termination and set forth by the California legislature.

Ex. NCLC-1, p. 5. SDG&E's prepay proposal unquestionably provides for a disconnection notice time frame that "is much shorter than the disconnection period for traditional post-pay customers," as SDG&E witness Cheng himself so testified. Ex. SDG&E-9, DWC-5. SDG&E's proposal also would fail to comply with a host of other requirements included in Pub. Util. Code §§ 739.4, 779, and 779.1, including: sending the multiple pre-termination notices and making contacts required by § 779.1(a) & (b); sending to the customer the information described in § 779.1(d)(4) – (8) regarding complaints, customer assistance, and contact information; and providing information about CARE and the availability of payment arrangements, prior to effecting any termination, as mandated by § 739.4(b)(3)(A).⁴⁷

Based on the reasoning of the many cases cited above, including the California Supreme Court's decision in *Tunkl*, Consumer Groups maintain that rights created by these statutes "affect the public interest" and allowing waiver of these rights should be seen as violating the legislature's public policy intent. Consumer Groups are aware, however, of the Commission's

⁴⁵ "On April 1, 2009, WMECO submitted its smart grid pilot program proposal to the Department . . ." D.P.U. 09-34, "Order on Motion to Dismiss," *supra*, at 1.

⁴⁶ "2009 Smart Grid Pilot Plan DPU 09-34 April 1, 2009", at 10 ("WMECO proposes to test this technology with its customers that choose to participate in the pilot."), available at: <http://www.env.state.ma.us/dpu/docs/electric/09-34/4109wmesgpln.pdf>.

⁴⁷ Mr. Howat's testimony lists other requirements as well, Ex. NCLC-1, p. 7.

decision D.06-07-027 regarding the Critical Peak Pricing program (“CPPP”) proposed by Pacific Gas & Electric in A.05-06-028.⁴⁸ In that case, DRA “question[ed] whether a customer can waive its statutory protections under AB 1X” regarding limits on increases in electricity charges. D.06-07-027, § 10.1.1., p. 34. DRA had argued that these protections cannot be waived, but the Commission concluded that AB 1X was merely intended to protect “individual residential customers from being forced to pay more for electricity usage . . . than they would have paid for the same usage prior to the enactment of AB 1X.” *Id.*, at 35.

Consumer Groups believe that the facts presented by the CPPP are sufficiently distinct from the facts of the present case so that the reasoning and conclusion of D.06-07-027 should not be applied here. First, a decision that an existing customer makes to choose critical peak pricing will not be made under the duress of living without utility service, whereas the decision to opt for prepay will quite often be made by low-income customers suffering the duress of not presently having utility service and who otherwise cannot obtain service due to SDG&E’s deposit requirements and rules regarding arrearages. Ex. SDG&E-9, DWC-2 (alleged “benefits” of prepay include not having to pay a deposit and prepay service being available to those with bad debt). In those circumstances, and unlike the CPPP circumstances, customers are at an “unfair disadvantage” relative to the utility. *See, Faida Jama v. PG&E, supra; Ethel Dobson v. PG&E, supra.*

Further, as D.06-07-027 notes, the relevant language from AB 1X merely capped the increases on the amounts that “individual residential customers” could be “forced to pay.” *Id.* While waiving the rights under AB 1X to enroll in the CPPP could create financial burdens on cash-strapped customers to the extent their bills might increase, those increases would not hit all

⁴⁸ The Commission denied the application of DRA for rehearing on this issue in D.06-10-051 (2006).

customers who chose to enroll nor would any increases necessarily be significant. As the Commission noted in response to an application for rehearing by DRA in that case:

If a customer elects to try CPP pricing, their overall electric rates could remain the same, decrease, or increase in relation to the standard E-1 rate, depending on the customer's actual individual usage and consumption pattern.

D.06-10-051 (2006), at 3 – 4. Given that opting into the CPPP might have no adverse impact on the customer, and at worst could increase bills somewhat, the Commission's conclusion that waiver of rights under AB 1X only affects "individual residential customers" (and, implicitly, does not affect the public interest) arguably was correct.

Here, however, waiver of rights created by Pub. Util. Code §§ 739.4, 779 and 779.1 would have far broader implications so that the public interest would be affected and waiver of those rights should be seen as violating sound public policy. SDG&E's prepay proposal makes it far easier for the company to terminate customers because various statutorily-mandated notices need not be sent. Any customer who chooses to enroll in the prepay program will be at much greater risk of a termination that occurs with much more limited notice than customers on traditional post-paid service face. In addition, given the very structure of a prepay program, it is most likely to attract low-income customers because one of its primary draws is the avoidance of paying a deposit.⁴⁹ Yet low-income customers are more likely to be disconnected in a prepay model than a traditional post-paid model, given that termination can occur so quickly after a customer is unable to make a payment. As Mr. Howat testified:

It would be fundamentally inappropriate for the Commission to retreat from the gains made in the service disconnection proceeding, which was intended to reduce the risk of short-term service disconnections based on non-payment, by implementing a program that would provide fewer consumer protections and result in an increase in the number of service disconnections.⁵⁰

⁴⁹ Ex. SDG&E, Cheng testimony, DWC-2.

⁵⁰ The limited evidence that has been available regarding terminations under prepay programs demonstrates that terminations will in fact increase. Ex. NCLC-1, pp. 24 – 25.

Ex. NCLC-1, pp. 10 – 11.

Unlike the facts faced by the Commission in D. 06-07-027 regarding a critical peak pricing program, where the only potentially adverse impact was higher bills, SDG&E's present proposal implicates the health, safety and well-being of customers (especially low-income customers) and the broader public. Loss of utility service poses a number of threats. A customer who is healthy prior to the termination but who now may be living in the cold and dark may develop health problems, some of which may require medical treatment or even a visit to the emergency room at public expense. A parent with young children may not be able to provide warm and healthy food for her or his children. Older children may find it daunting to complete homework if the lights are out. Seniors in particular may find it extremely stressful to live without utility service.⁵¹ Customers who choose to use candles if the electricity supply has been terminated create a great risk of fire, not only to themselves but their neighbors as well. Avoiding these harms is not only in the interest of the individuals affected but is in the broader public interest as well.

Prepay also presents unusual risks for low-income customers who depend on the Low-Income Home Energy Assistance Program ("LIHEAP")⁵² for help in paying their bills. In its Data Request 02, Question 1, Greenlining asked SDG&E "whether a customer who participates in the proposed prepaid program would be eligible to receive crisis assistance from the Low-Income Home Energy Assistance Program (LIHEAP)." This is a highly germane question since

⁵¹ While SDG&E's proposal excludes "self-identified seniors," Ex. SDG&E-9, DWC-3, there are no doubt many seniors who have not identified themselves as such, for any number of reasons. Also, customers who opt for prepay when they are, e.g., 60 or 61 years could of course still be in the program when they turn 62, and would face the risk of remote termination on shortened notice even if the customer's ability to make payments had worsened or the customer's health had declined. SDG&E's self-imposed limitation regarding seniors who self-identify thus will not in practice protect all seniors from adverse outcomes. The testimony of Bob Prath of AARP at the PPH on June 27, 2012, echoed this concern about the practical limits of self-identification. 2 RT 62: 6-17 (Bob Prath).

⁵² Authorized by 42 U.S.C. §§ 8621 – 8630.

the LIHEAP program traditionally requires information obtained from a customer's bills and requires a disconnection notice in order to access crisis assistance.⁵³ Yet SDG&E could only state that a “customer who participates in the proposed Prepay Program **may or may not be eligible to receive crisis assistance.**” Ex. Greenlining-3, SDG&E Response 1 (emphasis added). Thus, in addition to the risk of termination occurring on short notice, the Prepay Program also may create new barriers for low-income households seeking to access LIHEAP.

Any increased terminations that befall customers in these circumstances, as a result of being on the Prepay Program, “affect the public interest.” The legislature has mandated a range of notice and other requirements prior to a termination because termination of utility service has impacts that concern all of society. Waiver of those requirements affects the public interest and should not be allowed, especially because waiver on the part of any financially vulnerable customer would often be made under the duress of otherwise living without utility service. Such a waiver cannot be considered “voluntary.”

Even if the Commission concludes that voluntary waiver of these statutory protections is legal, which Consumer Groups maintain is contrary to controlling case law, any such waiver must still be truly voluntary and knowing. SDG&E has provided no evidence to demonstrate that it will educate consumers in a manner that could result in a knowing waiver. The utility's assertion that it “is committed to ensuring that customers are making well informed decisions for their families” falls woefully short of the necessary factual showing.⁵⁴

Mr. Cheng acknowledged, in responding to a question from the Bench, that “this [prepay] program can't work unless the customer waives their protections that they'd otherwise be offered under the Public Utilities Code.” 5 RT 316, l. 14 – 18. In response to a subsequent question,

⁵³ See 5 RT 304: 18 – 305: 4 (SDG&E/Cheng).

⁵⁴ Ex. SDG&E-18, p. DWC-6.

Mr. Cheng stated that he had not provided any “sample tariffs or sample program agreements” as part of his testimony. 5 RT 318, l. 17 -20. Consumer Groups believe that it would be impossible for the Commission to decide that consumers will be able to knowingly and voluntarily opt into the Prepay Program (assuming such waivers could be allowed, as a matter of law) without knowing in detail how SDG&E proposes to educate customers about the risks of prepay and the rights that they will be waiving. To the extent the Commission is willing to consider implementing SDG&E’s proposal, it must require the utility to first file the actual materials and tools it will use to educate customers considering the prepay option.

III. SDG&E’S PROPOSAL MUST BE REJECTED ON POLICY GROUNDS BECAUSE IT WOULD PLACE CUSTOMERS WHO ALREADY STRUGGLE TO KEEP UP WITH UTILITY BILLS AT INCREASED RISK OF DISCONNECTION.

A. Payment troubled customers will be more vulnerable on SDG&E’s proposed prepay program.

SDG&E’s Prepay Program is designed to appeal to customers who struggle to keep up with bills, including low income customers and others with financial constraints.⁵⁵ Customers who have previously fallen behind on paying SDG&E could avoid paying a deposit and paying off previous bad debt to the utility by signing up for Prepay.⁵⁶ Additionally, new customers who have struggled financially and have bad credit as a result, or relatively little credit, could avoid paying a deposit by signing up for Prepay.⁵⁷

Prepaid service programs in other jurisdictions also demonstrate that low income households are disproportionately drawn to the prepaid model. For instance, most participants in

⁵⁵ Ex. NCLC-1, pp. 7-8.

⁵⁶ Ex. NCLC-1, p. 7; Ex. SDG&E-18, p. DWC-4. SDG&E would exclude customers with current, as opposed to previous, arrearages from eligibility for Prepay. Ex. SDG&E-9, p. DWC-3.

⁵⁷ 5 RT 314: 8-22 (SDG&E/Cheng)(explaining that SDG&E decides whether to require a deposit from a new customer based on the customer’s credit score).

the Salt River Project's prepaid service program, the largest such program in the United States, are low income and people of color.⁵⁸ The majority of prepayment meter users in Great Britain, which introduced prepaid utility service in the 1980s, have historically been and continue to be low income.⁵⁹ Similar to the Salt River Project experience, average income among prepaid service customers in Great Britain is declining.⁶⁰

Participants in the Public Participation Hearings expressed concern about the allure SDG&E's Prepay Program for financially troubled customers. Bob Prath, a member of the AARP California executive council, expressed his opinion that Prepay would "take[] advantage of the families in a bind by offering them an easy out..."⁶¹ Jay Montenegro, a real estate agent concerned about this financially distressed clients who approach him to "short-sale" their homes, has similar fears:

I'm afraid that my clients, after completing a short sale, let alone the other homeowners who lose their house to a foreclosure, they're going to find the prepay program very attractive. So I'm scared that they prepay program is going to serve as a "too good to be true" carrot to attract financially distressed homeowners in participating in a program.⁶²

Consumer Groups likewise take little comfort in the appeal of SDG&E's proposed Prepay Program to low income and other payment troubled customers because there is no reason to expect that these customers would be more likely to avoid disconnection for nonpayment on Prepay. To the contrary, the limited data available on disconnection rates among prepaid service customers elsewhere suggests that that increased disconnections are likely. Consumer Groups'

⁵⁸ Ex. NCLC-1, p. 22; Ex. SDG&E-20, Electric Power Research Institute, *Paying Upfront: A Review of Salt River Project's M-Power Prepaid Program*, Table 4-3, p. 4-6.

⁵⁹ Ex. NCLC-1, pp. 23-24.

⁶⁰ Ex. NCLC-1, p. 24.

⁶¹ 2 RT 60: 19-21 (Bob Prath).

⁶² 2 RT 94: 28 – 95: 8 (Jay Montenegro).

witness John Howat presented data on disconnections in the United Kingdom based on customer surveys, which shows an alarming frequency. According to Mr. Howat's testimony, in 1997, 28% of prepaid service customers in Great Britain experienced service disconnection over the past year, with over half of those customers enduring loss of service up to three times that year.⁶³ In 2008, 9% of prepaid electric service customers in the UK experienced disconnection during the previous twelve months, compared to a 0.1% disconnection rate for post-paid customers.⁶⁴ And in 2010, 16% of prepaid service customers in Great Britain experienced disconnection during the previous year.⁶⁵ In stark contrast, SDG&E currently disconnects between 2 and 3.5% of its residential customers for nonpayment each year.⁶⁶

Nothing in the record of this proceeding suggests that the experience of SDG&E's customers would be different on the proposed Prepay Program than that observed abroad. First of all, SDG&E would charge Prepay customers the same rates for utility service as traditional customers, the same rates that previously proved to be difficult for many of these customers to pay.⁶⁷ Prepay customers also could easily face increased monthly costs as a result of making multiple monthly payments using payment channels that involve transaction service fees. Among the Prepay payment options proposed by SDG&E are making payments using a credit card or debit card through SDG&E's payment processing vendor, BillMatrix, which adds a service fee of \$1.50 for each payment.⁶⁸ Customers making payments through a linked bank

⁶³ Ex. NCLC-1, p. 25.

⁶⁴ Ex. NCLC-1, pp. 24-25.

⁶⁵ Ex. NCLC-1, p. 25.

⁶⁶ Ex. DRA-1, p. 7-5.

⁶⁷ Ex. NCLC-1, p. 8; Ex. SDG&E-18, p. 8.

⁶⁸ Ex. NCLC-1, p. 18; 5 RT 325: 11-18 (SDG&E/Cheng).

account may additionally incur service fees charged from their banks.⁶⁹ Based on the patterns of prepaid service customers of Arizona’s Salt River Project’s M-Power prepaid service program, who made an average of 7.1 payments during the summer months and 3.6 payments during off-peak winter months according to a 2009 study, it is reasonable to expect that the average SDG&E customer would likewise make multiple payments per month.⁷⁰ If customers are paying transaction fees, the frequency of payments among Prepay customers would become highly significant. For example, if a customer makes four payments per month and incurs a transaction fee of \$1.50 per payment, that customer would pay \$6 dollars extra per month, which equates to a 10% increase in monthly costs for the average CARE customer.⁷¹

Furthermore, customers receiving Prepay service could lose access to certain sources of emergency financial assistance with utility bill payment because of problems with timing (i.e., a delay between a pledge of support and actual payment to the utility) or requirements that a customer have a bill showing arrears.⁷² Even if a Prepay account balance of \$-20 would satisfy this requirement, the customer would forego a much larger grant that post-paid customers could access.⁷³ According to Mr. Howat, an SDG&E customer not on the Prepay Program “might be eligible for a LIHEAP crisis grant of hundreds of dollars, money which a prepaid service customer might need just as much to buy service credits but would not be able to use.”⁷⁴

SDG&E witness Cheng testified that the LIHEAP limit for SDG&E customers might even be as

⁶⁹ Ex. NCLC-1, p. 18.

⁷⁰ Ex. NCLC-1, pp. 18-19.

⁷¹ Ex. SDG&E-18, p. 7 (explaining that the typical monthly bill for a CARE customer is \$60).

⁷² Ex. NCLC-1, pp. 12-13. *See also* 5 RT 304: 6 – 305: 28 (SDG&E/Cheng).

⁷³ Ex. NCLC-1, p. 13.

⁷⁴ Ex. NCLC-1, p. 13.

high as \$1,000.⁷⁵ As a result, a Prepay customer could be without service, while a traditional customer with the exact same budgeting constraints could have received assistance covering potentially hundreds of dollars of usage and been able to avoid disconnection.

Finally, disconnection for nonpayment would be fast and automatic. As discussed above, consumer protections surrounding disconnection for Prepay customers would be substantially weaker, including fewer notices, containing less information, and transmitted through less-reliable means than those provided to traditional customers. Prepay customers would also lose the opportunity to seek a payment extension or another extended payment arrangement with SDG&E, a service that payment troubled customers rely on to avoid disconnection.⁷⁶

For all of these reasons, Mr. Howat concluded that the disconnection rates of SDG&E's low income and payment troubled customers can be expected to dramatically rise with the introduction of SDG&E's proposed Prepay Program.⁷⁷ As such, the Commission should decline the utility's request to offer a "too good to be true" program that puts financially vulnerable customers at greater risk of losing essential utility services.

B. SDG&E's proposal runs counter to the Commission's policy of trying to reduce disconnections.

The Commission in recent years has devoted considerable effort to reducing the incidence of disconnection of residential customers for nonpayment. Following an En Banc

⁷⁵ 5 RT 332: 26 – 333: 6 (SDG&E/Cheng).

⁷⁶ See, *i.e.*, 2 RT 84-85 (Victor Bocaya, an SDG&E customer and landlord with very low-income tenants, testifying at the PPH that he has gotten "pink slips" from SDG&E when he could not pay his own bills and his tenants could not pay their bills, and he has appreciated the leeway SDG&E affords him); 2 RT 88-89 (Zen Bocaya, an SDG&E customer on a limited, fixed income, testifying at the PPH that she would be without utility services but for the flexibility afforded her through payment plans); 2 RT 87-88 (Jackie Carreon, an SDG&E CARE customer, testifying at the PPH about her experiences with disconnection notices and being "helped out" by SDG&E afterward); 3 RT 139: 17-18 (Bill Mascal, an SDG&E customer and low income single father with two children, testifying at the PPH about the value of payment arrangements for customers who fall behind).

⁷⁷ Ex. NCLC-1, pp. 26-27.

hearing in December 2009, the Commission opened R.10-02-005 for the express purpose of reducing the number of residential gas and electric utility service disconnections due to nonpayment.⁷⁸ Specifically, the Commission sought to “to identify more effective ways for the utilities to work with their customers and develop solutions that avoid unnecessary disconnections.”⁷⁹ The Commission has since issued three decisions in that docket, D.10-07-048, D.10-12-051, and just earlier this year, D.12-03-054. These decisions adopted policies intended to reduce service disconnections in general and among low income customers in particular.⁸⁰

Contrary to the Commission’s policy of trying to reduce service disconnections through increased consumer protections, the Prepay Program would provide fewer consumer protections and place customers who already struggle to keep up with utility bills at increased risk of disconnection. It would be inappropriate and counterproductive for the Commission to retreat from the gains made in the service disconnections proceeding by authorizing SDG&E to implement the Prepay Program. The Commission should reject SDG&E’s proposal.

IV. SDG&E’S PREPAY PROPOSAL SHOULD BE REJECTED BECAUSE ITS COSTS TO CUSTOMERS OUTWEIGH ITS BENEFITS.

A. Prepay would provide inferior service at the same price as traditional, higher-value service.

Consumer Groups witness John Howat underscored the fact that customers who might opt for the Prepay Program would likely be disproportionately low-income, as the program “appears to be designed to appeal to customers who cannot afford to pay a deposit or who are required to pay a deposit because of past credit and collection activities.” Ex. NCLC-1, p. 7. The Commission, which has recently shown great concern about the termination risks low-

⁷⁸ R.10-02-005, p. 1.

⁷⁹ R.10-02-005, p. 1.

⁸⁰ See, *i.e.*, D.10-07-048, Ordering Paragraphs 1, 3, 4; D.10-12-051, p. 7; D.12-03-054, pp. 39-40.

income consumers face,⁸¹ should thus consider, among other questions, whether the proposed Prepay Program will make utility service more – or, conversely, less – affordable for low-income households and whether the proposed rates for prepay service are just and reasonable.

Mr. Howat notes that “the prepaid service program . . . would charge prepaid customers the same rates for utility service as are paid by standard, post-paid customers.” *Id.*, p. 8. Because the very customers who are most likely to be steered towards prepay are those who cannot afford the current rates, have bad debt with the company, and cannot meet SDG&E’s deposit requirements, customers on prepay “will continue to be at risk of service disconnection for nonpayment.” Ex. NCLC-1, p. 8. Prepay does not solve the problem that for many customers rates are unaffordable.

Moreover, these customers will be provided inferior service compared to customers on traditional, post-paid service because they will have forfeited valuable protections. They will be “without the disconnection notice and prevention-related consumer protections that are afforded to SDGE&E’s other residential customers.” *Id.*⁸² Because notice periods are shortened, customers on prepay will also have their utility service terminated much more quickly than other residential customers. Of equal concern to Consumer Groups, customers on prepay may spend more than other residential customers for the same volume of consumption due to the additional payment transaction fees some will likely incur, as discussed in Section III.A.

One significant and troubling way that prepay could result in inferior service for low-income customers in particular involves the manner in which the Low-Income Home Energy Assistance Program (“LIHEAP”) determines the assistance a low-income household will receive.

⁸¹ R. 10-02-005, “Order Instituting Rulemaking on the Commission’s Own Motion to address the issue of customers’ electric and natural gas service disconnection”

⁸² See the discussion in II.A., *supra*, regarding the rights that prepay customers will forfeit.

As discussed in Section III.A above, Mr. Howat raised the problem that to the extent programs such as LIHEAP “pledge support before money is actually paid to the utility, the structure of prepaid service may functionally preclude meaningful assistance.” Ex. NCLC-1, pp. 12 – 13. Moreover, a customer on traditional service can avoid a termination simply by obtaining a pledge from LIHEAP that payment is forthcoming. Pub. Util. Code § 739.4(b)(3)(C). “SDG&E’s prepaid service proposal makes no such accommodation.” Ex. NCLC-1, p. 13. When Greenlining asked SDG&E in Data Request 02, Question 1, “whether a customer who participates in the proposed prepaid program would be eligible to receive crisis assistance from the Low-Income Home Energy Assistance Program (LIHEAP),” the utility could only reply that the customer “may or may not” be eligible. Ex. Greenlining-3. Even if the customer can clear the hurdle of becoming eligible for crisis assistance, the amount of that assistance will likely be quite limited compared to low-income customers on traditional service because “the customer’s arrearage [for which assistance might be provided] would never exceed \$20.” Ex. NCLC-1, p. 13.

For all of these reasons, low-income customers who opt for prepay will experience inferior overall service but pay the same rates charged traditional service customers. Due to the transaction fees that prepay customers can readily incur, their total bills could actually be higher than those on traditional service. The Commission should not approve a proposal that allows for these results.

B. There are better available ways to help customers who cannot establish utility service and which are less burdensome and risky for those customers.

SDG&E asserts that the program is still advantageous to payment-troubled customers because, inter alia, “prepay customers will not be required to provide a deposit” and customers in

arrears will not be required to “pay off the entire bad debt prior to establishing service.” Ex. SDG&E-9, DWC-2. But SDG&E unfairly posits that consumers should be forced to choose between harsh and inflexible deposit requirements, or prepay service that makes it far easier for the utility to terminate service. This is little better than the choice Odysseus faced between Scylla and Charybdis.

Regarding deposit requirements, nothing in California statutes or Commission regulations requires SDG&E to have harsh and inflexible deposit requirements. Other jurisdictions provide models of more flexible and reasonable approaches that recognize the barriers that deposit requirements can place in the way of customers – especially low-income customers – trying to establish a service account. For example, Massachusetts flatly prohibits utilities from charging deposits on residential accounts, although it does require the applicant for service to first make an acceptable payment arrangement if that applicant owes money to the company from a prior account.⁸³ New York does not allow utility companies to require deposits from those who receive “public assistance, supplemental security income SSI, or additional State payments” and restricts the ability of companies to seek deposits if the customer is 62 or older.⁸⁴ Moreover, New York flatly prohibits a utility from requiring “any new residential customer to post a security deposit as a condition of receiving utility service, unless such new customer is a seasonal or short-term customer,” or “if the commission after investigation and hearing so authorizes such practice,” based on specified factual findings.⁸⁵

Put simply, SDG&E does not have an unalterable obligation to impose harsh deposit requirements on its customers. Rather than offering an unpalatable Prepay Program as the

⁸³ Mass. Regs. Code tit. 220, § 27.00, available at: <http://www.mass.gov/eea/docs/dpu/cmr/220cmr2700.pdf>.

⁸⁴ N.Y. Comp. Codes R. & Regs., tit. 16, § 11.12(f) & (g).

⁸⁵ *Id.*, 11.12(b) & (e).

purported solution, it (or the Commission) could decide to follow the models provided by Massachusetts and New York. As Mr. Howat testified:

Such a [revised deposit] program design could include waiver of security deposits for CARE-eligible customers, amortization [over several months] of security deposit costs [to make the deposit affordable], a reduction in the deposit amount requested from low-income customers, or payment assistance targeted specifically towards deposit costs, such as through SDG&E's Neighbor-to-Neighbor financial assistance fund.

Ex. NCLC.1, p. 16. SDG&E has chosen the inappropriate solution of the Prepay Program to address the problem that its deposit requirements are too onerous for so many customers.

Similarly, while the Prepay Program would overcome the current barrier customers in arrears face when trying to establish new service (i.e, they must first pay the entire debt to establish service), there are again solutions that are far less onerous for low-income households. Mr. Howat proposed “a program that allows customers to write down a previous arrearage over an extended period of time while paying current bills timely,” without adopting the “rapid, automated disconnect feature of SDG&E’s prepaid service proposal.” Ex. NCLC-1, pp. 16 -17. “Providing customers the opportunity to pay an affordable installment toward past debt at the time of service establishment, with the remainder subject to a payment plan, would also be an improvement.” *Id.*, p. 17. As with its security deposit requirements, SDG&E could take a more flexible approach with its requirements that apply when a customer with bad debt seeks new service.

In wrestling with the problem of how to balance the public interest in making it possible for low-income customers with bad debt to obtain or maintain service, and the interest of a utility and its other ratepayers in collecting as much as possible from low-income customers in arrears, the Massachusetts legislature took a far different approach than SDG&E. Rather than offering customers in arrears a prepay program, Massachusetts utilities are required by state law to offer

customers “arrearage management programs,” defined as “a plan under which companies work with eligible low-income customers to establish affordable payment plans and provide credits to those customers toward the accumulated arrears where such customers comply with the terms of the program.”⁸⁶ By providing the low-income customer with the prospect of avoiding shut-offs and being able to dig out of a debt hole by staying current with monthly bills, the company is likely to see more low-income customers making those current payments, even if arrearages are written off as credits to match the payments. The carrot of arrearage write-offs is a much better tool than the stick of prepaid service.⁸⁷

In sum, there are a number of ways companies can help low-income customers in arrears, short of pushing them towards prepay programs, by offering alternatives to refusing to establish new service unless the customer pays 100% of the overdue amount.⁸⁸

In the past, this Commission put the brakes on a program that was premised on the notion that it would help low-income customers, but which also imposed what the Commission deemed unacceptable risks or burdens. In D.08-07-046, a ruling in the SDG&E and Southern California Gas Company General Rate Cases, the Commission addressed the issue of “authorized non-utility payment locations,” including “pay day lenders.” The applicants had argued “that these businesses are regulated by the state and they are willing, unlike many other businesses, to

⁸⁶ 2005 Mass. Acts Ch. 140, § 17(a), available at: <http://www.malegislature.gov/Laws/SessionLaws/Acts/2005/Chapter140>.

⁸⁷ For the current rules governing arrearage management programs in Massachusetts, see Massachusetts Department of Public Utilities dockets 12-AMP-01 through 12-AMP-07. Those dockets can generally be found here: http://www.env.state.ma.us/DPU_FileRoom/frmDocketListSP.aspx. As one specific example, the arrearage management program rules for National Grid, the state’s largest electric utility, can be found here: <http://www.env.state.ma.us/dpu/docs/gas/12-amp-05/22412ngrq.pdf>.

⁸⁸ In addition to the programs and tools described above, the Consumer Groups note an innovative program offered by National Grid to some of its customers in New York state, the “Consumer Advocates Team.” The company’s web site describes it thusly: “National Grid’s Consumer Advocates are here to assist customers experiencing financial hardship by providing customized case management services, energy education, advocacy and outreach. “ The details are available at: http://www.nationalgridus.com/niagaramohawk/home/payment/4_conadvocate.asp.

undertake payment functions.” D. 08-07-046, p, 21. The argument could be made that pay day lenders, which are located almost exclusively in low-income neighborhoods, therefore provide a valuable service to low-income consumers if allowed to accept utility payments.

But the Commission found to the contrary:

‘[P]ayday lenders’ or check-cashing outlets are problematic locations for customers to pay their bills. We, therefore, impose a moratorium on further pay-day lender non-utility authorized payment locations. . . . [W]e agree that these payday lender businesses are problematic because of the potential for customers to enter into legal but costly loans in the process of paying their utility bills.

Id. The Commission has thus barred a “legal” option, one “regulated by the states”, that utilities had proposed purportedly to assist low-income customers in paying their bills in their own neighborhoods because that option posed the risk of customers incurring “costly loans.” Here, SDG&E is proposing a currently illegal option and asking that customers be allowed to waive their existing legal rights, even though SDG&E’s proposal again poses serious risks to low-income customers. As in the prior case, SDG&E’s proposal, however well-intentioned, should be rejected.

C. Prepay is unnecessary to provide customers with information related to managing their energy costs.

SDG&E asserts that one of the key values of the Prepay Program is its “account management and notifications” features, including the ability to “view . . . daily balance[s]” and to make payments through a number of different routes. Ex. SDG&E-9, DWC-4. All of the parties who commented on this were critical of the notion that a prepaid utility service program is necessary to gain these advantages. SDG&E’s customers already have many options for bill payment and have the ability to manage their energy usage using AMI data. DRA witness Lee-Whei Tan testified that “the various attendant features offered with SDG&E’s Prepay program can be independently offered without being limited to the Prepay program framework.” Ex.

DRA-1, Tan testimony, p. 7-8. She went further, underscoring that since “[a]ll SDG&E residential customers are paying for the AMI investment . . . it is essential for them to be able to have the opportunity to reap the benefits that can be realized through AMI.” *Id.*, p. 7-9. Ms. Tan’s testimony suggests that SDG&E has the obligation to offer the enhanced account management and notification features to all of its customers, rather than conditioning those benefits on a customer agreeing to opt for the Prepay Program.

Mr. Howat raised very similar criticisms of SDG&E’s arguments regarding flexibility and account management features:

Sponsoring Parties [i.e., the Consumer Groups] note that each of the payment options is currently available to standard post-paid residential customers.

Ex. NCLC-1, p. 17. Like Ms. Tan, he notes that all residential customers with AMI – not just those on the Prepay Program – “can access detailed information regarding their energy consumption.” *Id.*, p. 18. Mr. Cheng himself agrees the budgeting tools proposed for the Prepay Program “are either already available or will become available for **all** customers by January 1, 2014.” Ex. SDG&E-9, DWC-9 (emphasis in original).

What SDG&E conspicuously fails to note is that a prepay program is likely to lead to a significantly increased rate of utility terminations. While information about disconnection among prepay customers is not generally collected or easily obtained, the limited data provides a highly cautionary note, as discussed, *supra*, in Section III.A.

The utility’s proposed Prepay Program should thus be rejected on the basis that it will provide inferior service at the same rates paid by traditional post-paid customers. Moreover, many of the purported benefits can be obtained without having to impose the onerous provisions that inhere to a prepay program.

V. CONCLUSION

The Consumer Groups recommend that the Commission reject SDG&E's proposed Prepay Program because the utility acknowledges that it violates existing provisions of the Public Utilities Code, and those provisions cannot be waived as a matter of law. The proposal should also be rejected on its merits as bad public policy.

Date: November 16, 2012

Respectfully submitted,

_____/s/_____
Hayley Goodson
Staff Attorney

The Utility Reform Network
115 Sansome Street, Suite 900
San Francisco, CA 94104
Phone: (415) 929-8876
Fax: (415) 929-1132
Email: hayley@turn.org

_____/s/_____
Charles Harak, Esq.

National Consumer Law Center Inc.
7 Winthrop Square, 4th floor
Boston, MA 02110
Phone: (617) 542-8010
Fax: (617) 542-8028
Email: charak@nclc.org

_____/s/_____
Melissa W. Kasnitz

Attorney for **Center for Accessible
Technology**
3075 Adeline Street, Suite 220
Berkeley, CA 94703
Phone: (510) 841-3224
Fax: (510) 841-7936
Email: mkasnitz@cforat.org

_____/s/_____
Enrique Gallardo
Legal Counsel

The Greenlining Institute
1918 University Ave.
Berkeley, CA 94704
Phone: (510) 926-4017
Fax: (510) 926-4010
Email: enriqueg@greenlining.org