

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



FILED

5-26-16
04:59 PM

Application of San Diego Gas & Electric Company
(U 902 E) for Authorization to Recover Costs Related to
the 2007 Southern California Wildfires Recorded in the
Wildfire Expense Memorandum Account (WEMA)

Application 15-09-010
(Filed September 25, 2015)

**SAN DIEGO GAS & ELECTRIC COMPANY'S (U 902 E)
REPLY BRIEF ON THRESHOLD ISSUES**

James F. Walsh
Of Counsel
Andrews Lagasse Branch & Bell LLC
4365 Executive Drive, Suite 950
San Diego, CA 92121
Telephone: (619) 354-5080
Fax: (619) 699-5027
Email: jwalsh@albblaw.com

Christopher M. Lyons
San Diego Gas & Electric Company
8330 Century Park Court, #CP32D
San Diego, CA 92123
Telephone: (858) 654-1559
Fax: (619) 699-5027
Email: clyons@semprautilities.com

Attorneys for
SAN DIEGO GAS & ELECTRIC COMPANY

May 26, 2016

TABLE OF CONTENTS

I. INTRODUCTION 1

II. JOINT INTERVENORS’ CLAIMS THAT SDG&E SEEKS A WINDFALL ARE FALSE 3

III. JOINT INTERVENORS’ ARGUMENTS REGARDING OFFSETTING COST MECHANISMS ARE MERITLESS 10

IV. JOINT INTERVENORS HAVE FAILED TO DEMONSTRATE A MORAL HAZARD 13

V. JOINT INTERVENORS’ SO-CALLED “FAIRNESS” ARGUMENT MISREPRESENTS FACTS SURROUNDING THE 2007 WILDFIRES 17

VI. CONCLUSION 21

TABLE OF AUTHORITIES

CALIFORNIA COURT DECISIONS

So. Cal. Edison Co. v. Public Util’s Comm’n
85 Cal. App. 4th 1086 (2000)4

CALIFORNIA PUBLIC UTILITIES COMMISSION DECISIONS

D.02-04-051, 2002 Cal. PUC LEXIS 275 1
D.03-06-013, 2000 Cal. PUC LEXIS 11204
D.10-04-047, 2010 Cal. PUC LEXIS 14217
D.10-12-053, 2010 Cal. PUC LEXIS 55813
D.12-09-004, 2012 Cal. PUC LEXIS 4287
D.12-12-029, 2012 Cal. PUC LEXIS 5903, 5
D.12-12-034, 2012 Cal. PUC LEXIS 59310
D.16-03-013, 2016 Cal. PUC LEXIS 139 1
D.91-12-076, 1991 Cal. PUC LEXIS 9115, 7
D.92-11-030, 1992 Cal. PUC LEXIS 7817
D.94-05-020, 1994 Cal. PUC LEXIS 3797
D.96-12-066, 1996 Cal. PUC LEXIS 11118, 9

FEDERAL ENERGY REGULATORY COMMISSION DECISIONS

San Diego Gas & Elec. Co., 146 FERC ¶ 63,017 (2014)11, 20

OTHER AUTHORITIES

Commission General Order 9514
Commission General Order 96-B4

Commission General Order 128	14
Commission General Order 165	14
Commission Resolution E-4311 (July 29, 2010).....	2, 5, 9

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

Application of San Diego Gas & Electric Company
(U 902 E) for Authorization to Recover Costs Related to
the 2007 Southern California Wildfires Recorded in the
Wildfire Expense Memorandum Account (WEMA)

Application 15-09-010
(Filed September 25, 2015)

**SAN DIEGO GAS & ELECTRIC COMPANY’S (U 902 E)
REPLY BRIEF ON THRESHOLD ISSUES**

I. INTRODUCTION

In their opening briefs, Joint Intervenors¹ and the Office of Ratepayer Advocates (“ORA”) fail to justify their request that the Commission prematurely dismiss SDG&E’s “Application ... for Authorization to Recover Costs Related to the 2007 Southern California Wildfires Recorded in the Wildfire Expense Memorandum Account” (“Application”) without a full reasonableness review. If anything, Joint Intervenors and ORA have simply reinforced that such a reasonableness review – including further development of the record, an evidentiary hearing, and a Commission decision on the record – must take place.

First, Joint Intervenors and ORA have not shown that the Application is deficient as a matter of law, as required under the summary judgment or dismissal principles that the Commission applies.² They contend that the \$379 million in costs and legal fees SDG&E seeks to recover in the Application (“WEMA Costs”) should have been forecast and recovered through rates authorized in a General Rate Case. Joint Intervenors concede, however, that the

¹ For purposes of their opening brief on threshold issues, the Joint Intervenors consist of Mussey Grade Road Alliance, The Utility Reform Network, Utility Consumers’ Action Network, and Protect Our Communities Foundation. SDG&E cites to this opening brief as “JI Op. Br.” and cites to ORA’s opening brief as “ORA Op. Br.”

² See Decision (“D.”)16-03-013 at 45-46; D.02-04-051 at 6-7.

“probability” of a catastrophic wildfire “in any given year or even in any short span of years, is small” and a “relative rarity.” JI Op. Br. at 13-14. These unwitting acknowledgements reinforce SDG&E’s position that it could not have forecast the WEMA Costs prior to the 2007 wildfires. Where, as here, costs are not susceptible to test-year forecasting, the Commission routinely permits those costs to be recorded to a memorandum account, as it has on dozens of occasions – including with respect to litigation costs, hazardous waste cleanup liabilities, and catastrophic events – and as it authorized SDG&E to do in with respect to the WEMA Costs in Resolution E-4311.

Further, Joint Intervenors’ arguments about SDG&E’s rate of return and its recoveries for Z-Factor liability insurance premium cost increases and Catastrophic Event Memorandum Account (“CEMA”) costs are fundamentally misguided. These arguments are premised on a blatant attempt to collapse distinct categories of cost – which arise from different categories of expenditures and across different time periods – into a single bucket, and they boil down to an assertion that SDG&E is profitable or has received recoveries for other expenses, and so it should be denied WEMA Cost recovery. Joint Intervenors and ORA in effect contend that SDG&E is entitled to either cost recovery (of some but not all costs) or its return but not both. Under basic principles of utility regulation, however, utilities are entitled to recover their reasonably incurred costs *and* earn a fair return.

Joint Intervenors’ policy arguments are likewise deficient. Those arguments rely on unfounded factual assertions which show that – as the Commission observed in its “Scoping Memo and Ruling of Assigned Commissioner and Administrative Law Judge” (“Scoping Memo”) – there are “material issues of fact in dispute that will likely require evidentiary hearings.” Scoping Memo at 11. For instance, to bolster their claims that WEMA Cost recovery

poses a moral hazard, Joint Intervenors rely on boldly unsubstantiated assertions about the motivation underlying SDG&E's decision-making with respect to safety. There is no evidence whatsoever that SDG&E's management has not appropriately prioritized safety, either prior to the 2007 Wildfires or today, or that management makes safety decisions solely in relation to penalties or the potential that cost recovery will be denied. To the contrary, the only evidence that has been presented to date shows that safety has been and continues to be a key priority for SDG&E.

Perhaps most egregious is Joint Intervenors' fairness argument, where they claim that *all* of the consequences of the more than a dozen wildfires that broke out across Southern California in October 2007 – including evacuation of 515,000 residents, environmental damage, and other monetary damages – “were caused by SDG&E's equipment.” To date, no one (including Cal Fire or the Consumer Protection and Safety Division) has ever sought to attribute all of these wildfires and their consequences to SDG&E; the ignition of only three of these fires have been linked to SDG&E facilities. The Commission should not entertain such reckless and unfounded assertions, and it certainly should not dismiss the Application on that basis.

In sum, Joint Intervenors have not presented any valid justifications to summarily dismiss the Application. Accordingly, the Commission should follow its earlier decision to undertake a reasonableness review of the WEMA Costs.³

II. JOINT INTERVENORS' CLAIMS THAT SDG&E SEEKS A WINDFALL ARE FALSE

Joint Intervenors raise a series of flawed claims about the relationship of the WEMA Costs to Commission ratemaking. For instance, Joint Intervenors assert that the Application

³ D. 12-12-029 at Ordering Paragraph (“OP”) 2-3.

ignores the purpose of the Commission’s “incentivized, forward-looking GRC process” whereby a utility is supposed to respond to unanticipated cost increases in some areas by achieving savings in other areas. JI Op. Br. at 7-8. Joint Intervenors thus characterize the Application as a request for an “after-the-fact rate increase.” *Id.* Joint Intervenors also argue that recovery of the WEMA Costs would constitute a windfall because SDG&E “had every opportunity to include fire risk in its GRC application forecasts.” *Id.* at 8-9. Finally, Joint Intervenors contend that SDG&E is compensated for business risk through its rate of return. These claims inaccurately portray the Commission’s ratemaking process in several fundamental respects and provide no basis for dismissal of the Application.

First, Joint Intervenors ignore the fact that the Commission explicitly permits cost recovery outside of the context of a General Rate Case in certain instances. Specifically, the Commission has an established mechanism for memorandum accounts, as set forth in General Order 96-B. As noted by the California Court of Appeal:

A ‘memorandum account’ is an accounting device used by a utility to record various expenses and costs it incurs. The utility may later seek authorization from the PUC to recover the recorded amounts by passing them on to consumers in rates. The establishment of a memorandum account, and the recording of expenses in the account, do not guarantee that the utility will ultimately be authorized to recoup the tracked amounts in rates. However, a utility is precluded from attempting to recover amounts not recorded. According to the PUC, ‘[m]emorandum accounts are ratemaking tools within the authority of the Commission to authorize, on a case by case basis, when found to be reasonable and necessary. . . . They are designed to record expenses that the Commission subsequently reviews for possible inclusion in rates.’⁴

⁴ *So. Cal. Edison Co. v. Public Util’s Comm’n.*, 85 Cal. App. 4th 1086, 1091-1092 (2000); *see also* D.03-06-013.

As a “ratemaking tool,” memorandum accounts are appropriate for use when costs are not susceptible to the type of forecasting that is used in test-year ratemaking.⁵

The Commission has authorized memorandum accounts for myriad categories of expense, and like other California utilities, SDG&E has been authorized to open dozens of memorandum accounts.⁶ SDG&E was specifically authorized to open and record costs to the WEMA.⁷ The Commission has also determined that SDG&E could seek a reasonableness review of those costs in D.12-12-029. If recovery of costs recorded to memorandum accounts constituted “after-the-fact rate increase[s],” as Joint Intervenors suggest, the Commission would not have permitted the establishment of such accounts in the first place.⁸ The time to challenge either the establishment of the WEMA or the Commission’s conclusion in D.12-12-029 that a reasonableness review would take place has passed, and Joint Intervenors’ argument that the Commission should now find otherwise is merely a collateral attack on those decisions.

Moreover, the Commission has authorized use of memorandum accounts for costs similar to the WEMA Costs. In its opening brief, SDG&E provided more than a dozen examples of Commission decisions authorizing recovery of costs booked to CEMAs. SDG&E Op. Br. at 7-10. Joint Intervenors suggest that SDG&E is seeking to impermissibly expand the scope of CEMA to include the WEMA Costs. JI Op. Br. at 11. This argument misses the point –

⁵ See, e.g., D .91-12-076, 1991 Cal. PUC LEXIS 911, *188-89.

⁶ See Preliminary Statements to SDG&E’s Electric Tariff Book, available at <http://www.sdge.com/rates-regulations/current-and-effective-tariffs/current-and-effective-tariffs>.

⁷ Resolution E-4311 (July 29, 2010).

⁸ In addition, the Commission also has an established mechanism for balancing accounts. Certain balancing accounts are “one-way” balancing accounts. In a one-way balancing account, any year-end credit is returned to ratepayers, but a year-end deficit is not collected from ratepayers and is funded by SDG&E. See, e.g., SDG&E Tree Trimming Balancing Account, available at http://regarchive.sdge.com/tm2/pdf/ELEC_ELEC-PRELIM_TTBA.pdf.

SDG&E is not seeking CEMA recovery in the Application. Rather, SDG&E simply pointed out that the basis underlying CEMA recovery also applies here – namely that costs attributable to natural disasters cannot be predicated or controlled, and they are appropriate for recovery in rates because they are part of the utility’s cost of doing business. SDG&E Op. Br. at 10. The costs attributable to the Witch, Rice and Guejito Fires could not be predicted or controlled, and they were made a part of SDG&E’s business by the California courts’ application of inverse condemnation.⁹

Likewise, ORA’s claim that the Commission once dismissed a CEMA application because the utility failed to support it with the appropriate disaster declarations is irrelevant. ORA Op. Br. at 1-2. The Commission’s CEMA procedures require certain disaster declarations as a threshold matter, and in the case cited by ORA, the Commission found that the utility failed to provide them. But that threshold showing applies to CEMA proceedings, and ORA never even contends that such a showing should have been made here since, as noted, SDG&E is not seeking CEMA treatment for the WEMA Costs. While ORA claims that the Commission *may* dismiss a memorandum account application, it never identifies any comparable threshold issues that might support dismissal of the Application in this matter. Instead, ORA summarily claims that litigation costs should be determined in General Rate Cases, which, as discussed below, is wrong because the WEMA Costs are not susceptible to test-year forecasting.

Furthermore, the Commission has recognized that litigation costs may be appropriate for memorandum account treatment: “Thus for example we have sometimes authorized memorandum accounts for pending litigation costs where we have yet to determine whether it

⁹ See A.15-09-010, Prepared Direct Testimony of Lee Schavrien, pp. 15-20, 23-27.

would be reasonable for the company to recover any of the costs it incurs for that litigation.”¹⁰

As noted in SDG&E’s advice letter requesting establishment of the WEMA, the costs to be recorded include payments to satisfy wildfire claims and outside legal expenses, which are litigation costs.¹¹

Similarly, in the late 1980s and early 1990s, the Commission authorized utilities to record the costs of hazardous waste cleanup costs in memorandum accounts because forecasts of such costs were not possible.¹² The Commission characterized hazardous waste cleanup costs as “liabilities associated with ownership of utility property, and the costs are recovered entirely from ratepayers.”¹³ The WEMA Costs are ultimately attributable to “liabilities associated with ownership of utility property.” The Commission subsequently approved a settlement whereby these hazardous waste cleanup costs would be allocated 90% (ratepayer)/10% (shareholder) and recovered accordingly.¹⁴ In sum, use of a memorandum account for the WEMA Costs is entirely appropriate and consistent with Commission practices and precedent, and as SDG&E noted in its opening brief, the appropriate time for Joint Intervenors to challenge this approach has passed. *See* SDG&E Op. Br. at 12.

Second, Joint Intervenors’ argument (echoed by ORA) that SDG&E should have somehow anticipated and forecast the WEMA Costs in a General Rate Case is spurious. *See* JI Op. Br. at 9; ORA Op. Br. at 2. No one could have predicted the magnitude of the WEMA Costs, or even that they would arise, prior to the 2007 wildfires. Joint Intervenors unwittingly

¹⁰ D.12-09-004 at 13.

¹¹ *See* Advice Letter 2109-E-A (approved September 2, 2010 and effective July 29, 2010).

¹² D.91-12-076, 1991 Cal. PUC LEXIS 911, 188-89; D.92-11-030.

¹³ D.91-12-076, 1991 Cal. PUC LEXIS 911, 188-89.

¹⁴ D.94-05-020.

acknowledge this fact later in their brief: “While consequences of power line firestorms can be catastrophic and SDG&E is certainly aware of those potential consequences, the probability of having such an event occur in any given year, or even in any short span of years, is small.” JI Op. Br. at 14. Indeed, Joint Intervenors deem wildfires linked to utility facilities “a relative rarity” and “low-probability events,” arguing that this means that utility executives, with an average tenure ranging from 3.7 to 6.2 years, will not even factor appropriate safety expenditures into their decision-making because that tenure is shorter than “the time interval between catastrophic events.” *Id.* at 14-15. Thus, if SDG&E had sought to include \$379 million for payment of wildfire claims and related legal fees in its General Rate Case test year forecast, setting rates for a three year period, prior to the 2007 wildfires (or in subsequent rate cases), intervenors would have undoubtedly opposed that request as being inconsistent with historical cost incurrence and as extraordinary costs. They would have argued that “as a relative rarity,” such “low probability events” should be excluded from the test-year forecast.¹⁵ Thus, these arguments are completely disingenuous.

Third, the single decision Joint Intervenors repeatedly cite to support their argument about maintaining the General Rate Case incentives for utilities to control costs is inapposite. *See* JI Op. Brief at 7-8 (*citing* D.96-12-066). In the cited decision, the Commission denied Pacific Gas and Electric Company’s (“PG&E”) request for waiver of the Commission’s rate case

¹⁵ *See, e.g.*, D.12-11-051 at 294-96. In this Southern California Edison Company (“Edison”) General Rate Case, Edison forecasted claims write-offs based on a five-year average of recorded expenses. ORA and TURN argued that the write-off expense associated with a Catalina fire should be excluded from the forecast because they viewed the damages “as unusual, non-recurring, infrequent, and unusual.” *Id.* at 295. The Commission found that “for purposes of developing an appropriate and reasonable test year forecast of third party claims write-offs, this expense is so far outside [Edison’s] historical costs that it unfairly skews the forecast going forward” and thus excluded a substantial portion of the Catalina fire write-off expense. *Id.* Undoubtedly, these same arguments and findings would have been made had SDG&E sought to include the WEMA Costs in a General Rate Case forecast.

plan, pursuant to which base revenues approved in a General Rate Case remain in effect for three years. More specifically, the Commission had issued a decision in December 1995 establishing PG&E's base revenues, but three months later, PG&E filed an application seeking an annual increase in those revenues, contending that its costs had gone up since the issuance of the decision. The Commission rejected the application and waiver request, finding that circumstances did not warrant deviating from its triennial General Rate Case plan.¹⁶ Here, SDG&E is not seeking a waiver of the Commission's General Rate Case plan. As discussed above, the WEMA Costs are not the type of costs that are appropriate for inclusion in a test-year forecast (and could not have been forecast), and SDG&E sought and was granted authority to record the costs in a memorandum account.¹⁷ SDG&E is thus seeking a reasonableness review of those costs.

Fourth, SDG&E takes issue with Joint Intervenors' claim that "SDG&E could potentially attempt to recover twice for the same costs, or withhold ratepayer-funded amounts approved for certain items as profits and then claim these same items in a separate post hoc application for additional funds." JI Op. Brief at 9. In a General Rate Case, SDG&E's costs are thoroughly scrutinized by ORA and intervenors, involving extensive discovery, written testimony, an evidentiary hearing, and a Commission decision on the record. So too are costs that, like the WEMA Costs, are recorded to a memorandum account for a reasonableness review. Furthermore, Joint Intervenors have cited to no instances where SDG&E actually tried to recover WEMA Costs in a General Rate Case. Thus, Joint Intervenors' speculative allegation of

¹⁶ See D.96-12-066, 1996 Cal. PUC LEXIS 1111, *1-7.

¹⁷ See Resolution E-4311 (July 29, 2010).

potential misconduct unfairly impugns not only SDG&E, but also ORA and the entire Commission regulatory process and is meritless.

Lastly, Joint Intervenors' contentions regarding SDG&E's rate of return are similarly misguided. As discussed in SDG&E's opening brief, these arguments ignore the well-established distinction between cost recovery and rate of return. SDG&E Op. Br. at 13-15. Contrary to Joint Intervenors' assertions, the WEMA Costs are not properly characterized as "business risks" since the Commission defines "business risk" as "new uncertainties resulting from competition and the economy." *Id.* at 14 (*citing* D.12-12-034 at 30). Rather, the WEMA Costs are actual costs that have been incurred to resolve damage claims and associated legal costs incurred in connection with the Witch, Rice and Guejito Fires. By arguing that SDG&E's rate of return should compensate it for the WEMA Costs, it is Joint Intervenors who are double-counting – they would have SDG&E's rate of return apply to both its return on investment and the costs it has incurred. That violates the regulatory compact, which is based on constitutional principles.

III. JOINT INTERVENORS' ARGUMENTS REGARDING OFFSETTING COST MECHANISMS ARE MERITLESS

According to Joint Intervenors, SDG&E's reduction of the \$2.4 billion in Wildfire Costs to the \$379 million in WEMA Costs supports dismissal of the Application. JI Op. Br. at 10-12. This argument turns logic on its head. SDG&E has indeed substantially reduced the \$2.4 billion in Wildfire Costs incurred in resolving claims and paying associated legal fees associated with the Witch, Rice and Guejito Fires through several major credits or deductions, including insurance recoveries (\$1.1 billion), third-party contractor recoveries (\$824 million), FERC-

allocated amounts (\$80 million), as well as a \$42 million voluntary reduction.¹⁸ Joint Intervenors are correct that the remaining \$379 million in WEMA Costs represents merely one-sixth of the Wildfire Costs. JI Op. Br. at 10. But if anything, these cost mitigation measures support recovery of the WEMA Costs because they demonstrate that SDG&E has acted aggressively to reduce the amount of costs for recovery in the Application, and that the decisions leading to the incurrence of the WEMA Costs were reasonable and prudent, as they were found to be by the Federal Energy Regulatory Commission with respect to a portion of the costs allocated to federal jurisdictional rates.¹⁹ In other words, SDG&E's mitigation measures should be applauded, not held against it.

While Joint Intervenors claim that SDG&E “fails to explain” why “it should *not* have to cover this last one sixth of expense” (JI Op. Br. at 10, emphasis in original), the opposite is true. In the Application and supporting testimony, SDG&E demonstrated that the actions and decisions it made were reasonable and prudent and thus consistent with the applicable legal standard for recovery, including its decision to pursue settlement of the wildfire claims in light of the applicability of inverse condemnation (which applies irrespective of fault) and the accompanying strict liability standard that California courts have imposed on the basis that utilities can spread costs through rates; the process SDG&E employed to settle those claims at the lowest reasonable cost; and SDG&E's efforts to substantially reduce the \$2.4 billion in Wildfire Costs to \$379 million.²⁰ SDG&E further demonstrated that significant other factors beyond its control contributed to the ignition and spread of the Witch, Rice and Guejito Fires,

¹⁸ See A.15-09-010, Prepared Direct Testimony of R. Craig Gentes, Appendix 4.

¹⁹ *San Diego Gas & Elec. Co.*, 146 FERC ¶ 63,017 at PP 55-62 (2014).

²⁰ See Application, pp. 1-17.

including extreme Santa Ana winds, the dryness of vegetation in the path and vicinity of those fires, and the limited availability and effectiveness of firefighting resources.²¹ SDG&E also showed that its operational and engineering decisions and actions prior to the 2007 wildfires – while not critical to the Commission’s inquiry in light of the application of inverse condemnation – were also reasonable and prudent with respect to the facilities linked to the ignition of each fire.²² Joint Intervenors ignore this uncontroverted evidence in their attempt to dismiss the Application.

Joint Intervenors also err in their claim that SDG&E’s CEMA and Z-Factor recoveries should somehow count against SDG&E in the Commission’s assessment of WEMA Cost recovery. JI Op. Br. at 10-11. As noted in its opening brief, SDG&E recovered \$25.44 million (or 79% of the requested amount) through a settlement of its CEMA application related to the 2007 wildfires. SDG&E Op. Br. at 9. The costs recorded to the CEMA were incremental costs for the repairing, replacing, or restoring of electric and gas utility facilities damaged in all of the October 2007 wildfires (and not just the Witch, Rice and Guejito Fires), whereas the WEMA Costs include costs of resolving damage claims and related legal fees associated with the Witch, Rice and Guejito Fires.²³ Thus, the CEMA costs comprise a fundamentally distinct category of costs from the WEMA Costs, which is why they are recorded in a separate account.

Similarly, as SDG&E noted in its opening brief, the Z-Factor application concerned increases in its 2009 liability insurance premiums which took place after the 2007 wildfires. SDG&E Op. Br. at 10-11. Recovery of those increased insurance premiums also has no bearing

²¹ *Id.*

²² *Id.*

²³ See A.09-03-011, *Application of [SDG&E] Under of the Catastrophic Event Memorandum Account* (March 6, 2009) at 1-6.

on the recovery of the WEMA Costs. For its part, ORA claims that SDG&E has already been compensated through the Z-Factor mechanism for “inaccurate insurance predictions” and should not now seek an “additional layer of protection.” ORA Op. Br. at 2-3. In making this argument, however, ORA confuses SDG&E’s liability insurance *coverage* at the time of the 2007 wildfires with the increased liability insurance *premium costs* it sought in the Z-Factor application for 2009 and subsequent years. *Id.* at 2-3. In connection with the 2007 wildfires, SDG&E received \$1.1 billion in liability insurance coverage, which Ms. Sedgwick showed was a reasonable amount.²⁴ The costs authorized in the Z-Factor decision²⁵ are used to pay the increased premiums going-forward, not, as ORA suggests, to increase retroactively the amount of liability insurance coverage SDG&E received in 2007.

In any event, the arguments by Joint Intervenors and ORA that SDG&E has already recovered under CEMA and Z-Factor, and that these recoveries should count against WEMA Cost recovery is another instance of double-counting on their part. They would have the Commission collapse distinct categories of costs – which arise from different categories of expenditure and across different time periods – into a single bucket. As noted above, Joint Intervenors condemn the idea that a utility might seek to recover twice for the same category of expense, but their proposal to have a utility (under) recover once for multiple categories of expense is exactly comparable, from a ratemaking perspective, to what they condemn.

IV. JOINT INTERVENORS HAVE FAILED TO DEMONSTRATE A MORAL HAZARD

Joint Intervenors rely on unfounded speculation and assertions, and inappropriate and misleading comparisons, in their claims that recovery of the WEMA Costs poses a moral hazard.

²⁴ See A.15-09-010, Prepared Direct Testimony of Karen Sedgwick, pp. 9-10.

²⁵ D.10-12-053.

According to Joint Intervenors, it is appropriate to compare SDG&E's annual average profit with SDG&E's proposed \$42 million voluntary deduction, which allegedly shows that SDG&E's future management will not be sufficiently deterred from risky decisions. JI Op. Br. at 13. Similarly, they suggest that it is appropriate to compare Commission penalties to utility profits, and that such a comparison shows that penalties are not large enough to merit a change in utility safety behavior. *Id.* at 13-14. Next, Joint Intervenors claim that wildfire losses fall outside of the average executive's planning horizon, and that recovery of the WEMA Costs would thus disincentive safety improvements. *Id.* at 14-16. Lastly, Joint Intervenors contend that SDG&E will cease its post-2007 efforts to improve fire safety if the WEMA Costs are recovered. *Id.* at 16-17. These arguments should be rejected for a number of reasons.

First, each of these arguments is wrongly premised on the assumption that SDG&E bases its safety decision-making solely on potential penalties or revenue reductions. These allegations are both offensive and wrong. Mr. Geier, SDG&E's Vice President of Electric Transmission and System Engineering, testified that SDG&E is "keenly aware of its responsibility to operate its system in a responsible and safe manner" and that safety has always been one of SDG&E's key operational and engineering priorities.²⁶ Both Mr. Geier and Messrs. Weim, Walters and Akau explain how, both before and after the 2007 wildfires, SDG&E has striven to design, construct, and maintain its facilities safely and in accordance with applicable regulatory requirements, including General Orders 95, 128 and 165, which are specifically intended to promote public safety, and they discuss the detailed policies and procedures to ensure safety and compliance.²⁷ Setting aside the fact that Joint Intervenors neither acknowledge nor rebut this testimony with

²⁶ See A.15-09-010, Prepared Direct Testimony of David L. Geier, pp. 3, 9-15.

²⁷ *Id.* See also Prepared Direct Testimony of Darren Weim, pp. 3-16; Prepared Direct Testimony of Greg Walters, pp. 3-14; Prepared Direct Testimony of Don Akau, pp. 3-16.

any evidence, they also fail to explain what motivation SDG&E would have for disregarding safety. As noted by Mr. Geier, SDG&E employees live and work in the community SDG&E serves and directly bear the consequences of its safety decision-making.²⁸

Likewise, Joint Intervenors' argument about the planning horizons of utility executives is unfounded. Once again, this argument shows no understanding of how SDG&E operates. SDG&E's safety decisions, including spending decisions, are not made solely by a CEO and president, as Joint Intervenors suggest – they are made on a daily basis by numerous executives with various responsibilities over portions of SDG&E's extensive facilities, and hundreds (if not thousands) of employees who design, inspect and maintain those facilities.²⁹ Among the witnesses in this case – who comprise merely a handful of SDG&E's approximately 5,000 employees – Mr. Schavrien and Mr. Geier, both executives, have been with the company for more than 30 years. Messrs. Weim, Walters and Akau each have more than 15 years of experience at SDG&E. Thus, Joint Intervenors can hardly contend that these and other executives and employees are “unlikely to face consequences for safety problems that are unlikely to arise during the executive's tenure.” *See* JI Op. Br. at 15.

If SDG&E were to argue that Joint Intervenors only raise and seek to address safety issues to the extent it bolsters their claims for intervenor compensation, the outrage would be palpable. But that is directly comparable to the allegation they are making about SDG&E's executives: “[utility executives] are primarily rewarded for the financial performance of their companies. While a catastrophic fire could potentially have an impact on financial performance, a utility executive may ask why the company should divert profits to a problem that is very

²⁸ *See* A.15-09-010, Prepared Direct Testimony of David L. Geier, pp. 2-3.

²⁹ *Id.* at pp. 1-15.

unlikely to affect them or the company during their term of service?” JI Op. Br. at 15. Again, there is simply no evidence to support this allegation.

There is also no evidence to support Joint Intervenors’ equally cynical contention that SDG&E’s post-2007 fire safety improvements occurred in the “shadow” of this case and SDG&E’s request for recovery of the WEMA Costs. As explained by Mr. Geier, no stakeholder, including SDG&E, wants to see a recurrence of the 2007 wildfires, and that is the driving motivation behind SDG&E’s efforts to reduce wildfire risk.³⁰ As noted in SDG&E’s Fire Prevention Plan:

The catastrophic wildfires which devastated San Diego County in 2007, unprecedented in their sheer magnitude, resulted in an enduring culture change reflected throughout SDG&E’s utility operations, system and facilities, organization, and corporate goals and objectives. As evidenced in this Fire Prevention Plan, SDG&E has a company-wide, single-minded focus on addressing and minimizing wildfire-related risks to public health, safety and welfare. SDG&E’s commitment to fire safety, prevention, mitigation, control, and recovery is a central tenet of our corporate culture.³¹

Neither in the Fire Prevention Plan, nor elsewhere, are SDG&E’s wildfire risk mitigation efforts tied to recovery of the WEMA Costs, and Mr. Geier explicitly rejected such a link.³² Tellingly, Joint Intervenors admit that they “can only speculate” as to how SDG&E’s fire prevention efforts might change after this case, and it is exactly this “speculation,” despite evidence to the contrary, that drives their whole argument. The Commission should not base its decisions on Joint Intervenors’ “speculation.”

³⁰ *Id.* at 2, 19-25.

³¹ *See id.* at Appendix 2, p. 5.

³² *Id.* at 25.

Second, Joint Intervenors' comparisons of utility profits to either SDG&E's \$42 million voluntary deduction or Commission penalties are meaningless. As Mr. Schavrien testified, the \$42 million voluntary deduction is intended to reduce the costs to be recovered and to reflect the 90%/10% ratepayer/shareholder allocation of costs that the Commission approved in a similar context – the hazardous waste cleanup cost settlement referenced above.³³ It is intended to be a contribution, not a penalty.

Additionally, Joint Intervenors' comparison of utility profits to Commission penalties is simply irrelevant to this case. According to Joint Intervenors, the penalties the Commission has levied in prior enforcement and wildfire proceedings were not sufficient. JI Op. Br. at 13-14. That complaint is merely a collateral attack on those prior Commission decisions. Joint Intervenors also overlook the fact that penalties should be compared to the severity of the violation or the circumstances surrounding the violation, not to utility profits, which arise from a host of actions, decisions, costs and revenues most of which have nothing to do with such a violation. Lastly, this case is not about penalizing SDG&E for conduct related to the Witch, Rice and Guejito Fires. Penalties are assessed in Commission investigation proceedings, and the Commission has already held such a proceeding with respect to the Witch, Rice and Guejito Fires, which led to a settlement agreement (including a settlement payment) that the Commission found to be reasonable, consistent with law, and in the public interest.³⁴

V. JOINT INTERVENORS' SO-CALLED "FAIRNESS" ARGUMENT MISREPRESENTS FACTS SURROUNDING THE 2007 WILDFIRES

Joint Intervenors make a number of assertions regarding the 2007 wildfires that are plainly intended to convince the Commission that, despite the legal justifications SDG&E has

³³ See A.15-09-010, Prepared Direct Testimony of Lee Schavrien, p. 21.

³⁴ D.10-04-047 at Conclusions of Law 1-3.

presented in support of its Application, the Commission should nonetheless dismiss the Application on fairness grounds. JI Op. Br. at 17-19. Intervenors' appeal to "fairness" is no basis to ignore the law. In any event, this fairness argument is premised on fundamentally misleading presentation of "facts" related to the WEMA Costs at issue.

For example, Joint Intervenors repeatedly emphasize that the 2007 wildfires caused the evacuation of 515,000 San Diego residents, leading to suffering and hardship. *Id.* at 4, 18. Joint Intervenors assert that "SDG&E seeks recovery from the same ratepayers who were impacted by and experienced losses resulting from the wildfires *caused by SDG&E's equipment*. The wildfires forced evacuation of 515,000 San Diego residents, many of whom found shelter in QUALCOMM football stadium while the fires ravaged their communities." *Id.* at 4 (emphasis added). They further assert that "[e]ven though SDG&E details that they faced litigation in 2,500 lawsuits, the damage to San Diego County from the fires *caused by SDG&E equipment* far exceeded the damage caused to the litigants in the 2,500 lawsuits, as more than a half million people faced evacuation orders." *Id.* at 18 (emphasis added).

The 515,000 evacuees undoubtedly experienced suffering and hardship, as SDG&E knows first-hand, since its own employees were among the evacuees, including Messrs. Schavrien, Geier and many others, and SDG&E in no way seeks to downplay that suffering. But 515,000 evacuations did *not* result from just the Witch, Rice and Guejito Fires, which are at issue in this proceeding. Rather, that is the total number of evacuations that resulted from more than a dozen wildfires that broke out in October 2007, as the very document Joint Intervenors reference for the 515,000 figure demonstrates, and not from wildfires allegedly "caused by SDG&E

equipment.”³⁵ Similarly, Joint Intervenors attribute the air pollution and other hardships citizens suffered in October 2007 wholly to SDG&E’s equipment. *Id.* at 18. In other words, Joint Intervenors have wrongly sought to blame SDG&E for *all* of the damage caused by the October 2007 wildfires in their attempt to have the Application dismissed.

As the various lessons learned, and after action reports prepared by federal and state agencies and authorities in the aftermath of the 2007 Wildfires demonstrate, those fires were not an isolated event triggered by powerline-related ignitions, even though that is exactly the impression Joint Intervenors seek to create. Mr. Schavrien indicated that various agencies have tallied between 17 and 24 major wildfire incidents (among several hundred fire ignitions) in late October 2007, which is why he characterized it as a “natural disaster.”³⁶ The *California Fire Siege Report* called it “an unusually severe fire weather event characterized by intense, dry, gusty Santa Ana winds,” which “drove a series of destructive wildfires.”³⁷ As discussed by Mr. Schavrien, based on the reports he attached to his testimony, these wildfires had numerous sources of ignitions but the damage they caused had several common denominators including the “strength of the winds, the local geography and terrain, the dryness and density of fuel, the density (and value) of the real estate or other property in the fire’s path, the number of other fires that may be simultaneously in progress, and the availability of local firefighting resources.”³⁸ As discussed by Mr. Vanderburg, one of SDG&E’s meteorologists, the 2007 wildfires were the most

³⁵ See “2007 San Diego Wildfires: Lessons Learned,” County of San Diego Health and Human Services Agency, at slide 4 (noting that “Over 12 Fires burned during the Emergency”), available at http://www.arb.ca.gov/carpa/meetings/summit08/presentations/firestorm07_wwooten.pdf

³⁶ A.15-09-010, Prepared Direct Testimony of Lee Schavrien, pp. 6, 27.

³⁷ *Id.* at 6; *see also* Appendix 2.

³⁸ *Id.* at 24.

severe fire weather event in San Diego County since at least 1984.³⁹ Consequently, Joint Intervenors' assignment of all blame for the 2007 Wildfires and related damages and evacuations to SDG&E is simply a misrepresentation of facts and cannot support dismissal of the Application.

With respect to damage that has been attributed to ignitions linked to SDG&E facilities, any consideration of "fairness" must take into account the doctrine of inverse condemnation. As explained in SDG&E's opening brief, inverse condemnation – under which a public utility may be held strictly liable, irrespective of fault, where a public improvement constitutes a substantial cause of injury, even if only one of several concurrent causes – drove SDG&E's decision to settle the wildfire claims asserted against it, which led to the WEMA Costs. SDG&E Op. Br. at 17-18. The fact that SDG&E now seeks recovery of the WEMA Costs comports with the rationale courts used in extending inverse condemnation to privately-owned public utilities like SDG&E – the costs of damages linked to a public improvement should be spread through rates so that no single property owner disproportionately bears the loss. *Id.* It is the California legislature and courts, not SDG&E, that created and applied inverse condemnation in this manner.⁴⁰

Any consideration of fairness principles also must take into account SDG&E's obligation to serve customers in high-risk areas, SDG&E's limitations regarding de-energizing customers when under a fire threat, the impossibility of ensuring that no fires are ever linked to electrical equipment, the extraordinary conditions that existed in 2007, and the temptation for intervenors to engage in hindsight review. In any event, the ultimate legal question the Commission must

³⁹ A.15-09-010, Prepared Direct Testimony of Steve Vanderburg, pp. 2, 13-16.

⁴⁰ See 146 FERC ¶ 63,017 at PP 60-61.

resolve in its review of these threshold briefs is whether Joint Intervenors and ORA have established, as a matter of law, that SDG&E has no right to even seek a reasonableness review of the WEMA Costs. As demonstrated above, they have not made such a showing.

VI. CONCLUSION

WHEREFORE, for the foregoing reasons, SDG&E respectfully requests the Commission find that (1) the Joint Intervenors have failed to provide an adequate basis to dismiss the Application, and (2) this matter should proceed to evidentiary hearings and a Commission decision.

James F. Walsh
Of Counsel
Andrews Lagasse Branch & Bell LLC
4365 Executive Drive, Suite 950
San Diego, CA 92121
Telephone: (619) 354-5080
Fax: (619) 699-5027
Email: jwalsh@albblaw.com

Respectfully submitted,

/s/ Christopher M. Lyons

Christopher M. Lyons
San Diego Gas & Electric Company
8330 Century Park Court, #CP32D
San Diego, CA 92123
Telephone: (858) 654-1559
Fax: (619) 699-5027
Email: clyons@semprautilities.com

Attorneys for
SAN DIEGO GAS & ELECTRIC COMPANY

May 26, 2016