

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



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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)

A.15-09-010
(Filed September 25, 2015)

**REPLY BRIEF ON THRESHOLD ISSUES FOR THE MUSSEY GRADE ROAD
ALLIANCE, THE UTILITY REFORM NETWORK, UTILITY CONSUMER ACTION
NETWORK, AND PROTECT OUR COMMUNITIES FOUNDATION
(JOINT INTERVENORS)**

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I. INTRODUCTION

Pursuant to the Scoping Memo and Ruling of the Assigned Commissioner and Assigned Administrative Law Judge issued on April 11, 2016,¹ the Joint Intervenors file this Reply Brief on threshold issues. The threshold issues raised in the Joint Intervenors opening brief require that San Diego Gas & Electric's (SDG&E) pending application to recover for the 2007 fire costs be denied.

In the Scoping Memo, the parties were asked to brief:

“Whether rate recovery would create a moral hazard . . . the fairness of imposing rate increases on San Diego customers, particularly those who were also victims of the fires . . ., and whether SDG&E has already been compensated for such risks in its rates and whether it warrants special recovery outside of the normal general rate case process . . .”²

¹A.15-09-010, SCOPING MEMO AND RULING OF ASSIGNED COMMISSIONER AND ASSIGNED ADMINISTRATIVE LAW JUDGE, April 11, 2016.

² Scoping Memo; p. 5.

Yet, despite the Commission’s threshold concerns, SDG&E’s opening brief argues that the Joint Intervenor’s arguments on these issues are meritless and should be disregarded:

Joint Intervenors have, to date, only presented one argument that could even reasonably be construed as a “legal” argument – namely, that SDG&E is already compensated for the WEMA Costs through its return on equity. . . . Joint Intervenors’ other arguments – concerning moral hazard, fairness, and precedent – are, at best, “policy” arguments.³

SDG&E is wrong. As was shown in the Joint Intervenor’s opening brief, and as will be shown below, the Commission can and should dismiss this application based on the threshold issues. Not only has SDG&E already been adequately compensated for the risks associated with running its utility through normal ratemaking processes, but approving this application would create a moral hazard and would violate basic principles of fairness to the ratepayers.

II. SDG&E FAILS TO REFUTE INTERVENORS’ SHOWING THAT ITS WEMA APPLICATION AMOUNTS TO A WINDFALL.

SDG&E presents a number of arguments in its opening brief as to why it should be allowed to recover costs booked into their Wildfire Expense Memorandum Account (WEMA) in this proceeding, yet, on closer inspection, SDG&E’s arguments serve only to undermine its position and reinforce Joint Intervenors’ showing that this application is unprecedented and should be dismissed.

A. SDG&E is Already Compensated for Estimated Insurance Costs and Litigation Damages in its General Rate Case Proceedings.

SDG&E first argues that its WEMA application is appropriate because even though utilities are already allowed to include costs for claims and lawsuits for property damages in their General Rate Case (GRC) revenue requirements, the Commission allows utilities to book costs for catastrophic events and natural disasters in memorandum accounts subject to reasonableness

³ SDG&E opening brief on Threshold Issues at p.4. SDG&E also notes in its brief that, to date, no evidence from any of the Joint Intervenors has been submitted in this proceeding. While this is true, in our opening brief, Joint Intervenors pointed to information citing data responses from SDG&E, facts found in Mussey Grade Road Alliances’ uncontested testimony in a prior Commission proceeding examining these wildfire issues, as well as statistics on evacuation impacts obtained from reliable governmental sources. Joint Intervenors do not anticipate that SDG&E will object to the recitation of these non-controversial facts that were either provided by SDG&E itself in a data response, appear in MGRA’s prior uncontested testimony before the Commission, or are based on figures produced by governmental agencies as to the wildfires’ impacts.

reviews. Yet, as Intervenor explained in our joint opening brief, the forward-looking nature of GRC proceedings is intended to incentivize utilities to “respond to cost increases in some areas by striving harder to achieve savings elsewhere.”⁴ The fact that SDG&E is allowed to include liability insurance premiums and litigation damages costs in its GRC Account 925 only underscores intervenors’ point: SDG&E already received authority from the Commission to fund risk mitigation and to cover potential damage claims from litigation through the GRC process and has funds it can apply to cover the 2007 wildfire litigation costs. Thus, SDG&E’s ability to seek funds to cover insurance costs and litigation damages during the GRC renders its WEMA duplicative and inappropriate.

B. SDG&E Fails to Identify Authority Allowing It to Bootstrap Litigation Costs on Top of CEMA Recovery.

SDG&E seeks to distinguish its WEMA application from general ratemaking by arguing that the wildfire litigation costs are not susceptible to test year forecasting and are instead analogous to Catastrophic Event Memorandum Account (CEMA) recovery. This argument fails on multiple fronts. First, the Commission established CEMAs for the limited purpose of allowing utilities to recover the costs of restoring utility service to customers, repairing and restoring damaged utility facilities, and complying with government agency orders resulting from declared disasters.⁵ Nowhere in Resolution E-3238 or Public Utilities Code section 454.9(a) did the Commission or Legislature state that this type of unforeseeable disaster recovery should be extended to litigation costs associated with catastrophic events.

In support of its claim, SDG&E’s opening brief lists over 20 Commission decisions relating to recovery of CEMA costs, yet not one of those decisions authorize recovery for litigation-related costs. Only one decision even involves a request for litigation costs—and summarily denies it.⁶ In fact, all of the CEMA decisions listed in SDG&E’s brief strictly limit CEMA recovery to the express categories provided in Section 454.9(a). For example, in authorizing CEMA recovery of over \$40 million to repair distribution systems damaged by wildfire, the Commission excluded \$9,146 in advertising costs spent by SDG&E to publicly thank other utilities for their assistance

⁴ PG&E Rate Increase Application, D.96-12-066, p. 4.

⁵ Resolution E-3238, p. 2; Public Utilities Code § 454.9(a).

⁶ See D.95-12-040, p. 4, 8 (declining to authorize SoCalGas’s request for third party damage claims as part of the interim relief); see also D.97-06-064, p. 4 (SoCalGas no longer sought recovery of third party claims in final decision).

because “this cost was not necessary to restore service” and therefore “is not reasonably included in the Wildfire Account.”⁷ As the Commission has emphasized, CEMA was established “specifically for the purpose of promoting quick repairs for unexpected events.”⁸ If the Commission has previously refused to expand CEMA relief to less than \$10,000 of advertising costs it should not now take the unprecedented step of expanding CEMA recovery principles to \$379 million in litigation costs.

Furthermore, SDG&E has already recovered \$25.44 million through a CEMA settlement and \$28.884 million under Z-factor recovery of unforeseen liability insurance premiums and deductible expense increases related to the 2007 wildfires.⁹ The utility should not be allowed to bootstrap additional disaster-related costs beyond what the Commission intended for catastrophic events.

C. The Commission’s Decision to Authorize the WEMA Account in No Way Guarantees Recovery or Precludes the Commission from Starting Its Reasonableness Review with Consideration of Whether the Threshold Issues Bar Recovery.

SDG&E labors under the mistaken belief that the Commission’s decision to authorize a WEMA account somehow guarantees cost recovery or precludes consideration of these threshold issues. Neither is true. Intervenors do not dispute the creation of the WEMA account, nor do we refute that in denying SDG&E’s WEBA application, the Commission contemplated a future proceeding to determine the “appropriateness and reasonableness” of SDG&E’s WEMA costs. Instead, Joint Intervenors argue—as authorized by the Scoping Memo—that it is not appropriate or reasonable for SDG&E to claim the WEMA costs in light of the threshold issues outlined in our opening brief.¹⁰ The Commission previously ruled only that SDG&E may file an application requesting recovery of WEMA balances, subject to reasonableness review at a later time.¹¹ Moreover, the Commission did not rule on the merits of these threshold issues in D.12-12-029; thus, the authorization of a WEMA account provides no *collateral estoppel* or *res judicata* effect prohibiting the Commission from dismissing this application. In short, nothing in D.12-12-029 now

⁷ D.05-08-037, p. 48-49.

⁸ D.01-02-075, p. 25.

⁹ Prepared Direct Testimony of Lee Schavrien on Behalf of San Diego Gas & Electric Company, p. 8, 13 (citing D.10-12-053 (as modified by D.11-12-023) and D.10-10-004).

¹⁰ A.15-09-010 Scoping Memo, p. 5.

¹¹ D.12-12-029 at Ordering Paragraphs (“OP”) 2-3 (emphasis added).

requires the Commission to consider SDG&E's application given that the threshold issues of windfall, moral hazard, and fairness serve as a bar to recovery.

SDG&E also points to the Commission's involvement in related 2007 wildfire cost recovery proceedings before the Federal Energy Regulatory Commission (FERC) as evidence of the Commission's intention to substantively review the utility's WEMA application, but this argument lacks merit. The Commission's desire to preserve its jurisdictional authority with respect to a federal counterpart agency should not be seen as an indication of the Commission's intention to grant SDG&E's application or to conduct this proceeding in any specific way.¹² If anything, the Commission's request that FERC temporarily suspend its authorization of wildfire recovery to allow the Commission to address the same issue cuts against SDG&E's position and suggests that the Commission wanted to make sure it had the jurisdictional space to decide the matter the other way, even on the threshold issues.¹³

D. SDG&E Shareholders Can and Should Cover the Remaining Costs Related to the 2007 Wildfires.

As Intervenors outlined in our opening brief, SDG&E shareholders receive a generous return on equity and SDG&E often earns a higher rate of return than the Commission-authorized rate. For example, in 2013, Sempra's shareholders earned a 9.64% CPUC-regulated return for SDG&E operations¹⁴ which was substantially higher than the 7.8% CPUC authorized return rate for SDG&E. This means that Sempra could have spent an additional \$73 million on SDG&E in 2013 alone while still providing its shareholders with the authorized rate of return.¹⁵ These figures go to Intervenors' larger point that SDG&E can and should pay the remaining 2007 wildfire litigation costs, all without seriously jeopardizing its ability to provide its shareholders with the authorized rate of return.

¹² See, e.g., "Request for Rehearing of the California Public Utilities Commission, "Docket No. ER 15-553-001 (Oct. 26, 2015).

¹³ *San Diego Gas & Elec. Co.*, 152 FERC ¶ 62,233, *62,131 (2015) ("...the CPUC argues that to preserve its ability to remain impartial [regarding 2007 wildfire cost recovery], the [FERC proceeding regarding] recovery of such costs should be held in abeyance.") (refusing the CPUC's request); see also *San Diego Gas & Elec. Co.*, 155 FERC ¶ 61,045 at p. 3 (2016) (denying the CPUC's request for rehearing regarding FERC's previous refusal to hold its wildfire proceeding in abeyance).

¹⁴ SDG&E-SoCalGas 2016 GRC, A.14-11-003-004, UCAN Data Request-001, Received Jan. 22, 2015, Responded Feb. 13, 2015.

¹⁵ Prepared testimony of Laura Norin for the Utility Consumers' Action Network in A.14-11-003 at pages 19-20, citing UCAN Data Request -001, question 2.

III. SDG&E FAILS TO ADDRESS MORAL HAZARD ISSUES

SDG&E fails to adequately respond to issues regarding moral hazard. In its threshold brief, it claims that the Joint Intervenor claims are “unsupported and should be disregarded.”¹⁶ However, the Joint Intervenor Threshold Brief relies on evidence regarding moral hazard included in the record of A.09-08-020 WEBA proceeding, which SDG&E did not refute. This empirical evidence shows that shielding an entity from the consequences of its actions encourages risky behavior.¹⁷ Far from being “purely speculative and cynical,” as SDG&E asserts,¹⁸ the evidence shows that moral hazard is a natural consequence of organizational behavior in the absence of proper incentive (or disincentive) structures. By law, both the Commission and regulated utilities are responsible for creating a culture of safety in utility companies.¹⁹ However, as MGRA noted in its initial Protest, SDG&E’s current incentive compensation program threatens the bonuses of SDG&E employees *should they fail to prevail in the present proceeding*.²⁰

SDG&E also claims that it “has no incentive to undertake risky actions with respect to fire safety.”²¹ While it is true that the nature of general rate-making disincentivizes such “risky actions,” SDG&E’s WEMA application undermines this incentive structure. As explained in the Joint Intervenor’s Opening Brief,²² utilities are given a measure of discretion on how to spend their approved revenues during the three year period, and can retain any savings as profit. This provides a natural incentive to be “efficient” about safety spending. SDG&E’s arguments about their increases

¹⁶ *Id.* p. 15.

¹⁷ See Direct Testimony of the Mussey Grade Road Alliance, A09-08-020 (WEBA Application), Sept. 11, 2011, pp. 31-33.

¹⁸ *Op. Cite*, p.16.

¹⁹ In Public Utility Code § 961(e), the Legislature has charged the Commission and utilities with the creation of a “culture of safety that will minimize accidents, explosions fires, and dangerous conditions.”

²⁰ MGRA Protest “...a failure to successfully execute the WEMA application (‘wildfire litigation’) could result in up to 10% of the revenue impacts (which would total \$37.9 million of the requested \$379 million) would be subtracted from the compensation plans. What this clause effectively means is that if the WEMA application fails the Sempra Board of Directors can, and may, punish employees by reducing their take-home pay... This means that SDG&E is incentivizing its staff to litigate against ratepayers through this application, using ratepayer money to provide this incentive.” (pp. 11-12)

²¹ *Id.* p. 15.

²² Joint Intervenor’s Opening Brief; p. 7; “The Commission then approves these cost estimates to the extent that utilities show that they are ‘just and reasonable’ under Public Utilities Code section 451, but generally does not limit the utility’s discretion regarding allocation of the approved rate revenue during the three-year rate period. ‘Once rates are set, the utility has the discretion and responsibility to spend its funds in the most cost effective manner to provide safe and reliable service.’ To the extent that the allocated money is not spent, the utility gets to retain the difference as profit.

in safety spending and expansion of safety programs do not lessen this point, since SDG&E has all along intended to recover its 2007 fire costs and has been on “best behavior” since the 2007 fires. Since that time the interests of shareholders and the interests of safety have been in alignment, as SDG&E could recover increased reasonable safety spending from ratepayers but would be less likely to recover litigation costs if it did not show a dedication to safety. WEMA recovery, however, would break this symmetric relationship and create an unbalanced incentive structure where SDG&E could be fairly confident in future cost recovery from wildfires regardless of its fire safety spending. This does not mean that present management would immediately shift their perspective regarding safety, but it would create a headwind that does not now exist and that could over time affect the perspective of senior management and the rest of the company as future staffing and prioritization decisions are made.

IV. ALLOWING WEMA RECOVERY VIOLATES BASIC PRINCIPLES OF FAIRNESS

A. SDG&E’s Liability Under Inverse Condemnation Doctrine Does Not Entitle the Utility to Ratepayer Recovery.

In its opening brief, SDG&E ignores the Scoping Memo’s inquiry into the fairness of allowing SDG&E to raise rates to recover WEMA costs, particularly against ratepayers who were victims of the fires. Instead, SDG&E recasts the question and argues how unfair it would be to SDG&E to deny its \$379 million request because, “[r]atepayers who received settlements from SDG&E in connection with the Witch, Rice and Guejito Fires were aided by the doctrine of inverse condemnation because it put SDG&E in the position of having to settle their claims, irrespective of fault.”²³ Throughout this proceeding, in SDG&E’s application and witness testimony, and now in its opening threshold issues brief, the utility argues that inverse condemnation did not allow SDG&E to defend against the lawsuits because the issues of “fault” were not going to be considered. But SDG&E misuses the doctrine of inverse condemnation in this proceeding to claim that because SDG&E could not argue in court about fault for all the damage in the claims they paid, the ratepayers are therefore responsible for the bill.

Despite SDG&E’s reliance on previous inverse condemnation cases in its opening brief, none of these decisions require the Commission to approve ratepayer recovery under the circumstances

²³ SDG&E Threshold Brief, p. 18

presented here. SDG&E points to dicta in *Pacific Bell v. Southern California Edison Company*, but that case merely notes that the utility has not shown that rate recovery for litigation liability was impossible.²⁴ Nothing in any of the cases SDG&E cites affirmatively requires the Commission to grant SDG&E's application, nor would a denial of the application on threshold issues be unlawful or unfair. Moreover, the *Pacific Bell* case is further distinguishable in that it involved roughly \$75,000 in damages (caused by bird strikes outside the utility's control), rather than the \$379 million SDG&E now seeks.²⁵

SDG&E claims that inverse condemnation "put SDG&E in the position of having to settle" the claims against them for the wildfires. While not directly stating why they were forced into a settling position, SDG&E implies that, because of the doctrine of inverse condemnation, they could not challenge how much damage their equipment really caused, and that there might have been concurrent fault with another potential defendant. SDG&E also seems to imply that because of inverse condemnation that they had to pay out money that they otherwise would not have paid.

These implications are at odds with SDG&E's own testimony, both in what their testimony said and did not say. SDG&E states in testimony that they have received payments from other third parties for the wildfire damage totaling \$824 million,²⁶ and SDG&E's testimony fails to state that they would have paid less had the doctrine of inverse condemnation not been applied in the lawsuit that resulted from the fires that started from SDG&E equipment.

Here, SDG&E's attempted invocation of the doctrine of inverse condemnation would have the ratepayer foot the bill every time and under all circumstances any utility gets sued for damage under an inverse theory, whether they were diligent, negligent, reckless or imprudent in the operation of their utility. For example, should SoCalGas be underinsured to cover all damage that resulted from the evacuation of Porter Ranch due to the Aliso Canyon gas leak, it is likely that SoCalGas will face the doctrine of inverse condemnation for lawsuits filed by residents who had to evacuate their homes for several months, and whose property values are likely in decline. Under SDG&E's theory in this WEMA application, SoCalGas could argue that because inverse condemnation attached liability even though there may have been concurrent factors leading to damages for Porter Ranch residents, the ratepayers (not the shareholders) should pay the entire bill. This would be true even if, like SDG&E here, SoCalGas failed to show that another concurrent cause increased the amount

²⁴ 208 Cal.App.4th 1400, 1407 (2012).

²⁵ *Id.* at 1403.

of damages the utility had to pay. It would also be true where, like SDG&E here, SoCalGas recovers from third parties whose conduct was a concurrent cause. And finally, it would be true even if, like SDG&E here, in SoCalGas's last GRC that risk and risk mitigation funding was approved by the Commission.

Even though inverse condemnation assumes the spreading of the costs resulting from damage caused by a public improvement, the ratepayers have already been paying SDG&E to cover both risk and risk mitigation through the normal GRC process, and should not now have to pay higher rates to cover these particular wildfire expenses. Just because the courts allowed the plaintiffs in the 2,500 lawsuits against SDG&E to use the doctrine of inverse condemnation does not mean that SDG&E is absolved of responsibility for wildfire damages or that ratepayers should have to pick up the bill. SDG&E has not presented any evidence or case law regarding inverse condemnation to overcome the threshold arguments surrounding prior compensation, moral hazard, and fairness to the ratepayers. The Commission, therefore, should not require the ratepayers to absorb the costs that SDG&E paid for plaintiffs' litigation damages that resulted from SDG&E's operations.

B. Victims of the Wildfires Should Not Pay for WEMA Expenses

Even though SDG&E's opening brief sidesteps the issue of ratepayer fairness, its application seeks to raise rates on all ratepayers throughout its service territory, even on those 515,000 people who faced evacuation orders. This is unfair and should not be allowed by the Commission. As was pointed out in Joint Intervenor's opening brief, the massive evacuation effort displaced numerous vulnerable populations and left countless people unsure of whether they would have homes to which to return. Requiring wildfire victims to pay the costs of SDG&E's wildfire litigation adds insult to the mental, physical, and financial injury they have already suffered.²⁷

Even if SDG&E is correct that the notion of basic ratepayer fairness is a policy argument and not a legal one, it is a policy argument that should carry substantial weight and be considered every time the Commission examines an application seeking ratepayer funding. The Joint Intervenor asks the Commission to recognize the basic unfairness of collecting large rate increases from San Diego County residents and businesses, and we urge the Commission to dismiss this application.

²⁷ Joint Intervenor's opening brief, p. 4

C. Recovery Here Would Set a Bad Precedent

In its opening brief, SDG&E claims that it would be wrong to presuppose that allowing recovery here could set a precedent which would be used in another proceeding for a utility seeking cost recovery. Yet, SDG&E's argument is not particularly compelling, especially when the utility cited to over 20 previous CEMA decisions in an attempt to bootstrap its WEMA recovery argument. If SDG&E is allowed to recover its WEMA expenses in this proceeding, then it and other utilities could and would point to the WEMA proceeding as precedent in seeking recovery for any uninsured costs that may result from litigation damages caused by their utilities' operations without needing to cobble together an argument based on tangentially related (or wholly inapposite) decisions.

The Joint Intervenors seek to prevent a precedent that would allow utilities to continually seek ratepayer recovery for litigation damage expenses that result from utility operations, especially where the utilities are compensated through the ratemaking process and where recovery leads to both moral hazard and unfairness to the ratepayers.

IV. CONCLUSION

In sum, Joint Intervenors urge the Commission to reject SDG&E's application on the basis of the threshold issues of SDG&E's prior compensation in its general rates, moral hazard, and fairness to the ratepayers.

Dated: May 26, 2016

Respectfully submitted,

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