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

PROTECT OUR COMMUNITIES FOUNDATION'S REPLY COMMENTS ON PROPOSED DECISION

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INTRODUCTION

SDG&E has attempted to muddy the waters by questioning, based upon no authority or record evidence, the Commission's duty to conduct a reasonableness review of a utility's actions and the ability of Presiding Officers to judge the credibility of witnesses. SDG&E demonstrated no factual, legal or technical errors, so its comments should be "accorded no weight."[1]

SDG&E's application to recover costs voluntarily incurred by settling lawsuits for damages it caused presents straightforward questions of reasonableness; the purpose of this proceeding is to address those questions.[2] Administrative Law Judges (ALJs) Tsen and Goldberg properly weighed the evidence in the record and applied Commission precedent and law to determine that SDG&E acted unreasonably and must not recover Wildfire Expense Memorandum Account (WEMA) costs.[3] Accordingly, the Commission should reject SDG&E's proposed changes and adopt the proposed decision (PD), with the modifications suggested by Protect Our Communities Foundation (POC), Mussey Grade Road Alliance (MGRA), Office of Ratepayer Advocates (ORA), and San Diego Consumers' Action Network (SDCAN).[4]

REPLY COMMENTS

I. Inverse Condemnation Is Irrelevant to this Proceeding.

SDG&E erroneously claims that the PD should address inverse condemnation.[5] No evidence in the record supports this claim, and inverse condemnation is properly excluded.[6]

[1] Public Utilities Commission Rules of Practice and Procedure, Rule 14.3(c).
[2] *See* Scoping Memo and Ruling of Assigned Commissioner and Assigned ALJ, A.15-09-010 (Apr. 11, 2016) (Scoping Memo) at 3-6; POC Comments, A.15-09-010 (Sept. 11, 2017) at 2.
[3] Proposed Decision (PD), A.15-09-010 (Aug. 22, 2017) at 58-65.
[4] *See* POC Comments at 1, App.; MGRA Comments, A.15-09-010 (Sept. 11, 2017), App.; ORA Comments, A.15-09-010 (Sept. 11, 2017), App.; SDCAN Comments, A.15-09-010 (Sept. 11, 2017), App.
[5] *See* SDG&E Comments, A.15-09-010 (Sept. 11, 2017) at 1-5.

No court ruled against SDG&E on an inverse condemnation claim.[7] Rather, a superior court simply ruled that fire victims could *plead* inverse condemnation.[8] SDG&E decided to cut its losses and settle, without admitting liability. In SDG&E's words, "[t]hrough its settlement approach, SDG&E avoided considerable litigation risk, including the risk that it would have been required to pay far greater damages through trial judgments."[9] Thus, the WEMA costs SDG&E seeks to recover resulted from SDG&E's decision to settle, not from inverse condemnation.[10] SDG&E, and its shareholders, must now face the consequences of the path it chose.

Moreover, even if inverse condemnation had any bearing on this proceeding, SDG&E's theory of recovery is fundamentally incompatible with the Commission's role as the regulator. The California Constitution grants the Commission authority to "fix rates" and "establish rules" for public utilities,[11] and Public Utilities Code section 451 requires that "[a]ll charges demanded or received by any public utility . . . be just and reasonable."[12] A blanket rule allowing utilities to recover all costs associated with inverse condemnation judgments, regardless of the reasonableness of their actions, would conflict with the Commission's constitutional and statutory authority to set reasonable rates. Such a rule would allow the investor owned utilities (IOUs) to "socialize risk and privatize profit,"[13] and run contrary to state law[14] and policy.[15]

Further, the potential injustice that SDG&E imagines[16] is unlikely to materialize and is prohibited by existing law. SDG&E claims that the Commission "believes it is appropriate" for utilities to incur costs "through a strict liability regime premised upon the utility's ability to

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[6] *See* Reply Brief on Threshold Issues for MGRA, TURN, UCAN, and POC, A.15-09-010 (May 26, 2017) (Threshold Issues Reply Brief) at 9-11; POC Phase One Opening Brief, A.15-09-010 (Mar. 24, 2017) at 24-28.

[7] *See* Application of SDG&E (U 902 D) for Authorization to Recover Costs Related to the 2007 Southern California Wildfires Recorded in the Wildfire Expense Memorandum Account, A.15-09-010 (filed Sept. 25, 2015) (SDG&E Application) at 3; *cf* SDG&E Comments at 2 (claiming SDG&E was "liable for damage caused by a public improvement under inverse condemnation").

[8] SDG&E Application at 3-4.

[9] *Id.* at 4; *see, e.g., Barham v. So. Cal. Edison Co.* (1999) 74 Cal.App.4th 744, 747-48 (litigation over fire traced to SCE lines resulted in judgments for inverse condemnation, negligence, nuisance, trespass).

[10] SDG&E Comments at 2. SDG&E presented no evidence regarding the role inverse condemnation played in the settlements, so the record contains no factual basis for an inverse condemnation conclusion.

[11] Cal. Const., art. XII, § 6.

[12] Pub. Util. Code § 451.

[13] POC Comments at 7.

[14] *See Serrano v. Priest* (1971) 5 Cal.3d 584, 596 ("Elementary principles of construction" dictate that constitutional provisions must construed to avoid a conflict.).

[15] *See* POC Comments at 6-8 (detailing fairness and moral hazard concerns posed by recovery).

[16] *See* SDG&E Comments at 4.

spread costs, irrespective of fault," while "recovery of costs depends on a reasonableness review where the standard of reasonableness assesses fault with hindsight bias and a perfection standard."[17] The Commission has obviously not adopted this hypothetical approach. As the PD correctly states, reasonableness review looks to the "prudent manager standard."[18] Thus, a utility's inverse condemnation liability could only exceed its permitted reasonable recovery if the utility fails to act prudently. There is nothing "unjust" or "illogical" about denying cost recovery where a utility does not comply with its fundamental mandate.[19] To the contrary, allowing IOUs to recover all costs associated with disasters caused by their facilities, regardless of the reasonableness of their actions, would create a moral hazard and put the public's safety at risk.

Accordingly, this entire proceeding has properly focused on reasonableness.[20] The Scoping Memo recognized that SDG&E's costs would not be reasonable – and recovery would not be on the table – if SDG&E's actions prior to the fire were not prudent.[21] This approach is plainly compatible with state law, including the limited cases that have applied inverse condemnation to IOUs. Both *Pacific Bell* and the unpublished superior court ruling on the Butte Fire that SDG&E cites, only mention recovery of inverse condemnation liability in dicta.[22] In both cases, the IOU "presented no evidence" that the Commission would not permit recovery of costs, so the courts assumed recovery would be available through regular rate-setting.[23] These cases include no analysis of the role of Public Utilities Code section 451 or the Commission's rate-setting authority. In addition, inverse condemnation only applies where damage arises from a public improvement "functioning . . . as deliberately conceived, altered and maintained."[24]

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[17] *Id.* at 4 (emphasis in original).
[18] PD at 9.
[19] *Compare* SDG&E Comments at 4 *with* Pub. Util. Code § 451.
[20] Scoping Memo at 4-5.
[21] *Id.*; *see also* D.12-12-029 at 19 (memorandum accounts subject to reasonableness review). Even SDG&E's application (at 2) acknowledges this is the correct approach; it notes WEMA costs will be "subject to reasonableness review" and SDG&E will need to demonstrate reasonableness and prudence.
[22] *Cf* SDG&E Comments at 3-4 (citing *Pacific Bell Telephone Co. v. So. Cal. Edison Co.* (2012) 208 Cal.App.4th 1400, 1407; Application of PG&E (U 39) for Authority to Establish the WEMA, A.17-07-011 (filed July 26, 2017), Attachment B (Butte Fire Ruling) at 17).
[23] *Id.*; *see Pacific Bell*, 208 Cal.App.4th at 1407 ("Edison has not pointed to any evidence" to support claim that Commission would not allow it to pass on damages liability during periodic review); Butte Fire Ruling at 17 (citing evidence issue in *Pacific Bell* and noting, "[s]uch evidence is similarly lacking here").
[24] *Barham*, 74 Cal.App.4th at 755.

Here, the PD concluded that SDG&E facilities were not "deliberately . . . maintained" in the state that resulted in the fires. Rather, the fires resulted from SDG&E's imprudent management.[25]

Finally, SDG&E's version of the inverse condemnation doctrine omits a key difference between public entities and the IOUs: while public entities are funded by the public alone, the IOUs have shareholders who must accept financial risks along with benefits. The same fairness issues that POC raised throughout this proceeding negate SDG&E's claim that spreading costs among ratepayers is appropriate here.[26] Requiring wildfire victims to pay SDG&E for settling litigation with those victims would add insult to the mental, physical, and financial injuries they have already suffered.[27] The victims would have to "contribute more than [their] proper share to the public undertaking" – precisely the circumstances inverse condemnation seeks to avoid.[28] Further, if the Commission grants recovery, SDG&E will have triple-dipped into the wildfire victims' pockets: first by causing loss of life, health, and property in the fires; again in the general rate case where rates rose over $60 million to cover insurance premium increases resulting from SDG&E's fire claims[29]; and yet again to cover SDG&E's fire litigation costs. Fortunately, charging ratepayers for the costs SDG&E chose to incur in settling litigation from those ratepayers is not the only option. Instead, SDG&E's shareholders must bear these costs.[30]

II. The Proposed Decision Properly Reflects Evidence Weighed by the Fact Finders.

SDG&E's attack on the ALJs' assessment of the evidence is unjustified. The ALJs, as Presiding Officers and primary fact finders in this proceeding, are responsible for judging the credibility of witnesses and weighing the evidence.[31] Accordingly, the PD properly addresses the credibility of various experts, noting SDG&E's evidence was "not persuasive."[32] SDG&E's disagreement with the ALJs does not create a factual or legal error, and the Commission should not, therefore, second-guess the ALJs' factual findings.[33]

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[25] *See* PD at 27, 34, 43.
[26] *See* SDG&E Comments at 3.
[27] Threshold Issues Reply Brief at 11.
[28] *House v. Los Angeles Co. Flood Control District.* (1944) 25 Cal.2d 382, 397.
[29] *See* D.13-05-010 at 150, 836, 850 (describing insurance increases).
[30] SDG&E even argues, without support, that denial of recovery would be an unlawful taking. SDG&E Comments at 5. This claim flies in the face of the Commission's authority. Cal. Const., art. XII, § 6.
[31] D.01-11-002 at 8-9 (ALJ acts as the delegated finder of fact); D.97-01-023 at 2-3 (ALJ determines credibility of witnesses); *see also Marshall v. Dept. of Water & Power* (1990) 219 Cal.App.3d 1124, 1141 ("All issues of credibility are [] within the province of the trier of fact.") (quotation omitted).
[32] PD at 54.
[33] D.09-04-036 at 90-91 (Commission reluctant to disturb a findings of primary fact finder).

III. PG&E and SCE's Comments Should Not Be Considered.

PG&E and SCE sought party status – on the due date for opening comments on the PD[34] – to echo SDG&E's arguments.[35] Numerous parties, including POC, objected to PG&E and SCE's motions because it is wholly inappropriate for them to join the proceeding at this late date.[36] Their comments are nearly identical to SDG&E's, which demonstrates that SDG&E adequately represents the IOU interests in this proceeding.[37]

IV. The Commission Should Vote at the September 28, 2017 Meeting in Chula Vista.

The Commission should reject SDG&E's request to hold this matter.[38] The devastating Witch, Guejito, and Rice fires burned a full ten years ago, and this proceeding has already lasted two years. The community needs closure.

The issues raised in SDG&E's comments were addressed in several rounds of briefing and warrant no new attention. Accordingly, this matter should be taken up at the Commission's September 28 meeting in Chula Vista, in geographic proximity to those harmed by the fires, so the community may directly witness the Commission's decision.

CONCLUSION

In the interests of public safety and fairness, and as mandated by law, the Commission should adopt the proposed decision, with the modifications proposed by POC, MGRA, ORA, and SDCAN. The Commission should reject the proposals of SDG&E, PG&E, and SCE.

DATED: September 18, 2017 SHUTE, MIHALY & WEINBERGER LLP

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[34] Motions for Party Status of PG&E (U 39 E) and SCE (U 338-E), A.15-09-010 (Sept. 11, 2017).
[35] PG&E (U 39 E) and SCE (U338-E) Joint Comments on the Proposed Decision of ALJs Tsen and Goldberg, A.15-09-010 (Sept. 11, 2017).
[36] Responses of ORA, TURN, UCAN, and POC to PG&E and SCE's Motions for Party Status, A.15-09-010 (Sept. 13, 2017).
[37] *Id.* at 1.
[38] *See* SDG&E Comments at 15.