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)

REPLY COMMENTS OF THE UTILITY CONSUMERS’ ACTION NETWORK TO THE COMMENTS SUBMITTED BY PG&E AND SCE ON THE PROPOSED DECISION OF ADMINISTRATIVE LAW JUDGES TSEN AND GOLDBERG

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I. INTRODUCTION ................................................................................................................................. 2
II. THE DENIAL OF SDG&E’S APPLICATION ARE BASED ON SOUND COMMISSION PRECEDENT AND STATUTORY AUTHORITY .................................................................................. 3
III. PUBLIC UTILITIES CODE SECTION 463 MANDATES THE COMMISSION DISALLOW EXPENSES THAT RESULT FROM UNREASONABLE ERRORS OR OMISSIONS RELATING TO THE OPERATION OF ANY PORTION OF AN ELECTRICAL CORPORATIONS’ PLANT ......................................................................................................................... 5
IV. CONCLUSION .................................................................................................................................... 6
I. INTRODUCTION

On September 25, 2015, SDG&E filed Application A.15-09-010 seeking Commission approval to recover $379 million recorded in its Wildfire Expense Memorandum Account (WEMA). The $379 million represents a portion of the total $2.4 billion in costs and legal fees incurred by SDG&E to resolve third-party damage claims arising from the Witch, Guejito and Rice Wildfires. The Scoping Ruling that was issued stated that prior Commission decisions indicate that a reasonableness standard should entail a review of the prudency of SDG&E’s actions leading up to the fire. The Scoping Ruling specifically referenced D.14-06-007 in which the Commission held that for costs to be found reasonable, the utility must prove that they were:

“prudently incurred by competent management exercising the best practices of the era, and using well-trained, well-informed and conscientious employees who are performing their jobs properly…[T]he Commission can and must disallow those costs: that is unjust and unreasonable costs must not be recovered in rates from ratepayers.”

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1 A.15-09-010, p. 1. Portions of the $2.4 billion were recovered from liability insurance coverage ($1.1 billion) and settlement payments from third parties (Cox Communications and three contractors totaling $824 million). Other portions of the costs were allocated to Federal Energy Regulatory Commission jurisdictional rates. In addition, SDG&E proposes to voluntarily contribute $42 million. (Id. at 7.)

2 Scoping Ruling at 6 citing D.14-06-007, p. 31.
The Scoping Ruling further stated that this standard is consistent with the Commission’s obligation under Pub. Util. Code § 451 to ensure that resulting rates will be just and reasonable and that service is provided in a safe manner. After examining all of SDG&E’s evidence as well as the entire evidentiary record in this proceeding ALJs Tsen and Goldberg found SDG&E’s conduct regarding the fires at issue to be unreasonable and imprudent, and their proposed decision (PD) recommends that the Commission deny SDG&E’s application.

In joint comments filed by PG&E and SCE on October 4, 2017, they argue that the PD errs by failing to address inverse condemnation, its state policy basis that utilities can socialize costs in rates, and that costs incurred as a result of claims subject to inverse condemnation are just and reasonable. PG&E and SCE are wrong. The PD’s conclusions are soundly based on Commission precedent and statutory authority, and the utilities cannot use inverse condemnation as a defense to avoid denial of cost recovery when imprudent conduct results in damage.

II. THE DENIAL OF SDG&E’S APPLICATION ARE BASED ON SOUND COMMISSION PRECEDENT AND STATUTORY AUTHORITY

PG&E and SCE argue that “The PD’s failure to discuss inverse condemnation, a state policy that presumes utilities will socialize costs through rates, including the kinds of costs at issue in this application, is legal error.” Specifically, they claim that:

“Recovery of the full costs of settlements and legal defense incurred by San Diego Gas & Electric Company (SDG&E) resulting from inverse condemnation claims that are not covered by its insurance meets the just and reasonable standard of Public Utilities Code Section 451 provided that the settlements and legal costs are reasonable.”

“The PD commits legal error by imposing a “prudence” condition on the recovery of reasonably incurred settlement and defense costs arising from inverse condemnation claims, which arbitrarily and disproportionately shifts the entire risk of any uninsured costs arising from a wildfire to the utility.”

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3 Joint Utility PD Comments, p. 1
4 ID., p. 1
5 Joint Utility PD Comments, p. 2
PG&E and SCE then cite legal error for Conclusion-of-Law 21 which holds “SDG&E has not justified recovering from ratepayers costs incurred to resolve third-party damage claims arising from the Witch, Guejito and Rice Wildfires.”\(^6\) They claim:

“When courts apply inverse condemnation to utilities based on the presumption that the utilities will be permitted to socialize costs in rates, permitting recovery of those costs is just and reasonable.”\(^7\)

UCAN disagrees. The evidence cited by the PD showing the numerous unreasonable errors and omissions by SDG&E regarding the fires at issue rebuts the implication that the Commission should socialize the costs and allow SDG&E to pass on damage liability. And even though the Commission may have other enforcement mechanisms, such as fines, the Commission should not abandon its longstanding policy of conducting reasonableness reviews for cost recovery applications.

The PD relies on both Commission precedent and statutory authority to deny SDG&E’s application, citing section 451 of the Public Utilities Code which requires that rates established by the Commission be just and reasonable. Allowing rates to increase for costs incurred as a result of utility conduct the Commission has found to be unreasonable and imprudent, would be both unjust and unreasonable.

The utilities urge the Commission to find that all costs subject to inverse condemnation be deemed to be reasonably incurred. They argue that no matter how bad a utilities conduct may be, or how much damage is caused by a utility’ imprudent conduct, if those costs are subject to inverse condemnation then cost recovery should be allowed and the ratepayers should pay. Applying that standard to the present case, whether the fires were started as a result of conduct that was imprudent, grossly negligent, or even intentional would not matter. As Commissioner Rechtschaffen noted at the all party meeting on September 28, 2017, such a standard would create a “perverse incentive” for the utilities.

It cannot be the policy of this Commission to reward bad conduct and authorize rate increases that the Commission would otherwise find to be unjust and unreasonable, just because those costs were subject to inverse condemnation. If this Commission accepts the PD and denies

\(^6\) Id, p. 2
\(^7\) Joint Utility PD Comments, p. 4
SDG&E’s application because they find the costs incurred resulted from SDG&E being imprudently managed, then SDG&E’s shareholders will justly bear the responsibility for the costs that resulted from their managements’ actions and inactions. Unjust and unreasonable incurred costs must not be recovered in rates from ratepayers.

III. PUBLIC UTILITIES CODE SECTION 463 MANDATES THE COMMISSION DISALLOW EXPENSES THAT RESULT FROM UNREASONABLE ERRORS OR OMISSIONS RELATING TO THE OPERATION OF ANY PORTION OF AN ELECTRICAL CORPORATIONS’ PLANT

One code section not mentioned in the PD that provides statutory support for the Commission’s reasonableness review of costs in this proceeding, even those subject to inverse condemnation, is Public Utilities Code section 463. The statute provides:

(a) For purposes of establishing rates for any electrical or gas corporation, the commission shall disallow expenses reflecting the direct or indirect costs resulting from any unreasonable error or omission relating to the planning, construction, or operation of any portion of the corporation's plant which cost, or is estimated to have cost, more than fifty million dollars ($50,000,000), including any expenses resulting from delays caused by any unreasonable error or omission. Nothing in this section prohibits a finding by the commission of other unreasonable or imprudent expenses. This subdivision is a clarification of the existing authority of the commission, is not intended to limit or restrict any power or authority of the commission conferred by any other provision of law, and applies to all matters pending before the commission. This section does not prohibit the commission from establishing rates for an electrical or gas corporation on a basis other than an allowed rate of return on undepreciated capital costs.

(b) Whenever an electrical or gas corporation fails to prepare or maintain records sufficient to enable the commission to completely evaluate any relevant or potentially relevant issue related to the reasonableness and prudence of any expense relating to the planning, construction, or operation of the corporation's plant, the commission shall disallow that expense for purposes of establishing rates for the corporation. This subdivision does not apply where the commission determines that a reasonable person could not have anticipated either the relevance or potential relevance, to an evaluation of costs incurred on the project, of preparing or maintaining the records or the extent of recordkeeping required to adequately evaluate those costs.

(c) For purposes of this section:

(1) “Planning” includes, but is not limited to, activities related to the initial and subsequent assessments of the need for a plant construction project; the selection of contractors and the negotiation of contract provisions; certification; project organization; and site selection, including the investigation and interpretation of environmental factors such as seismic conditions and other external factors affecting the construction, operation, and safety of the plant.

(2) “Construction” includes, but is not limited to, activities related to engineering such as the development and use of specifications, drawings, and procedures; the preparation and use of
construction plans, including blueprints; procurement activities; repairs, replacement, redesign, or repositioning of equipment and facilities; startup activities; and quality assurance and quality control activities.

(3) “Operation” includes, but is not limited to, activities related to decisions affecting the timing and nature of the use of the plant; dispatch and control activities and decisions; and plant operation, fuel loading, and maintenance.

(4) “Error” includes, but is not limited to, any action or direction which causes an avoidable (i) increase in the time required to bring the plant to full commercial operation, (ii) change in the number or types of personnel or firms required to bring the plant to full commercial operation, (iii) increase in the number of worker hours required to complete any portion of the plant construction project, or (iv) change of equipment, configuration, design, schedule, or program.

(5) “Omission” includes, but is not limited to, any failure to act or to provide direction which causes an avoidable (i) increase in the time required to bring the plant to full commercial operation, (ii) change in the number or types of personnel or firms required to bring the plant to full commercial operation, (iii) increase in the number of worker hours required to complete any portion of the plant construction project, or (iv) change of equipment, configuration, design, schedule, or program.8 (emphasis added)

While this statute uses language suggesting that it applies to the construction of an electrical plant, it also notes that (1) it applies to all matters pending before the Commission, (2) it applies to the operation of any portion of an electrical corporations’ plant, including control activities and decisions, and its operation and maintenance, and (3) while providing a list of items included in the definitions of “planning” “construction” “operation” “error” and “omission” the legislature specifically noted that the meaning of those words is not limited to the examples provided in the statute itself.

This statute uses the word “shall” which requires the Commission to deny cost recovery if its conditions are met. This statute is explicit and mandatory and does not allow the Commission discretion to carve out exemptions just because costs may be subject to inverse condemnation. As such, the utilities need to go to the legislature for the remedy they seek. Expenses that are incurred as a result of unreasonable errors or omissions, are to be denied.

IV. CONCLUSION
For the foregoing reasons UCAN respectfully urges that the PD be adopted.

8 UCAN would note that this code section provide persuasive authority of the legislative intent to make sure that unreasonable errors or omissions that result in costs should not be recovered.
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Respectfully submitted,

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