

BEFORE THE PUBLIC UTILITIES COMMISSION  
OF THE STATE OF CALIFORNIA



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Application of San Diego Gas & Electric Company (U 902-M), Southern California Edison Company (U338-E), Southern California Gas Company (U 904-G) and Pacific Gas and Electric Company (U 39-M) for Authority to Establish A Wildfire Expense Balancing Account to Record for Future Recovery Wildfire-Related Costs

A.09-08-020

**JOINT PROTEST  
OF THE DIVISION OF RATEPAYER ADVOCATES AND CONSUMER  
SAFETY AND PROTECTION DIVISION TO THE JOINT AMENDED  
APPLICATION OF SOUTHERN CALIFORNIA EDISON COMPANY,  
PACIFIC GAS AND ELECTRIC COMPANY SAN DIEGO GAS &  
ELECTRIC COMPANY, AND SOUTHERN CALIFORNIA GAS  
COMPANY**

**I. INTRODUCTION**

Pursuant to Rule 2.6 of the California Public Utilities Commission's (Commission) Rules of Practice and Procedure (Rules), the Division of Ratepayer Advocates (DRA) and the Consumer Protection and Safety Division (CPSD) jointly file this protest to the Joint Amended Application 09-08-020 (Amended Application), which was jointly filed by Southern California Edison Company (SCE), Pacific Gas and Electric Company (PG&E), San Diego Gas & Electric Company (SDG&E), and Southern California Gas Company (SoCalGas) (together, SDG&E/SoCalGas), (collectively, Applicants or Joint Utilities). In the Amended Application, the IOUs reassert that they are not able to obtain sufficient or reasonably priced insurance coverage against wildfire

related claims and request authority to (1) establish Wildfire Expense Balancing Accounts (WEBA) to record wildfire related costs, and (2) recover balances recorded in WEBA via retail rates. While the Amended Application makes some marginal improvements upon the original Application and addresses some of the concerns raised in DRA's and CPSD's prior protests, it does not go far enough in aligning the interests of shareholders with the interests of ratepayers and leaves unanswered significant questions about the necessity of a WEBA-type program. Section III, below, identifies immediate areas of concern to DRA and CPSD. DRA and CPSD reserve the right to identify other issues as they arise throughout discovery and in preparation for hearings. As submitted, the application should be rejected.

## **II. BACKGROUND**

On August 31, 2009 the IOUs filed joint application A.09-08-020 requesting Commission authorization to establish WEBA balancing accounts to allow for rate recovery of costs related to utility-caused wildfires in excess of existing insurance. On December 21, 2009 Assigned Commissioner Simon and Administrative Law Judge (ALJ) Bushey issued a Ruling (December 21, 2009 Ruling) directing the parties to A.09-08-020 to meet and confer on potential amendments to the application or, alternatively, develop a consensus proposal.<sup>1</sup> Following the ruling the parties met and conferred to discuss how the application might be amended but failed to develop a consensus proposal. Between February 2010 and July 2010 DRA, CPSD, and TURN issued multiple formal and informal data requests. In response the utilities produced over four thousand pages of documents. DRA, CPSD, and TURN are presently in the process of reviewing the documents produced. On August 10, 2010 the Joint Utilities filed their Amended Application and Amended and Restated Testimony in Support of the Amended Application.

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<sup>1</sup> A.09-08-020, Ruling of the Assigned Commissioner and Administrative Law Judge Directing Applicants to Amend Application and All Parties to Meet and Confer, p. 10 (December 21, 2009)

The December 21, 2009 Ruling characterized the relief requested as “extraordinary” and observed that creating a presumption of recovery from ratepayers undermines the present incentives for prudent risk management, safety regulation compliance, and claims defense.

### III. ISSUES

**A. The Joint Utilities have not demonstrated that they are in fact unable to obtain sufficient wildfire insurance at a reasonable cost.**

The Joint Utilities argue that establishing WEBA balancing accounts is necessary because they have been unable to obtain sufficient insurance at a reasonable cost to cover them against third-party claims arising from catastrophic wildfires. As the December 21, 2010 Ruling stated, however, the sort of extraordinary relief sought by the joint utilities requires a compelling demonstration of need.<sup>2</sup> While the Joint Utilities’ Amended and Restated Testimony offered in support of the Amended Application reasserts that the wildfire insurance market has fundamentally changed due to various factors, the Commission cannot give the utilities a blank check for potentially billions of dollars based solely on the Joint Utilities’ assertions regarding the state of the insurance market. The health of the insurance market as it relates to the need for a WEBA-type balancing account represents a genuine issue of material fact, for which the Joint Utilities bear the burden of proof, and on which hearings should be held.

**B. The Joint Utilities have not demonstrated that their inability to obtain sufficient wildfire insurance at a reasonable cost is justified by factual circumstances beyond the control of utility management.**

The Joint Utilities maintain that their present inability to procure sufficient and reasonably priced insurance for wildfire related costs is due to utility insurers’ “heightened awareness” of wildfire risks following the devastating 2007 wildfires in

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<sup>2</sup> A.09-08-020, December 21 Ruling, p. 7

Southern California.<sup>3</sup> The December 21, 2009 Ruling, p.9, stated that “a balancing account, as proposed by applicants, is extraordinary and must be carefully justified by factual circumstances manifestly beyond the control of utility management.” Three of the 2007 fires that the insurance industry is allegedly responding to – the Guejito, Witch, and Rice fires – may have been caused by safety violations on SDG&E’s electric system<sup>4</sup>. If the fires were caused by safety violations, the Commission must make a determination as to whether those violations were within the control of SDG&E’s management. While CPSD conducted an investigation into the question of whether SDG&E safety violations caused the 2007 fires, it failed to make a conclusive determination. The Settlement Agreement, which the Commission approved on April 22, 2010, preserved the question of SDG&E’s culpability for any future Commission proceeding in which it might be appropriate.<sup>5</sup> The Commission should not reward SDG&E management with a blank check for past or future wildfire related costs without first making a final determination regarding whether SDG&E was to blame for the 2007 fires.

**C. In the event that the Amended Application is approved, WEBA should be subject to a cap.**

The Joint Utilities propose that WEBA be established to allow for rate recovery of all Wildfire Costs, which they define to include “all uninsured Claims and Defense costs paid by a Utility that are not authorized for recovery in that Utility’s base rates and the cost of financing WEBA balances.”<sup>6</sup> Included in these costs are payments to satisfy claims for damages and any and all governmental claims including wildfire suppression costs.<sup>7</sup> The potential magnitude of such costs is in the billions of dollars. Insurers do not provide open ended, unspecified amounts of coverage. Neither should ratepayers be

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<sup>3</sup> A.09-08-020, AMENDED AND RESTATED TESTIMONY IN SUPPORT OF JOINT AMENDED APPLICATION, p. 5

<sup>4</sup> See generally, I.08-11-006, I.08-11-007

<sup>5</sup> The Settlement Agreement preserved all “positions connected to OII-related evidence”, without prejudice, for litigation in any other Commission proceeding. Decision 10-04-007 p. 6.

<sup>6</sup> Amended Application, p. 7

<sup>7</sup> Id.

expected to assume an unspecified amount of risk. In addition, the presence of a ceiling on WEBA would provide additional incentives to minimize the risk of fires and vigorously defend against claims. Historically the Utilities have been able to purchase between \$650 million and \$1.2 billion of general liability coverage. If WEBA is approved it should be capped at the appropriate historical level for each utility.

**D. WEBA should not include costs incurred as a result of events that predate the filing of A.09-08-020.**

The Utilities argue that establishing WEBA is necessary because of major changes in the insurance market. The changes described in the application include significantly increased premiums and a dramatic reduction in the total amount of wildfire-specific insurance capacity available to the utilities. In the case of SDG&E/SoCalGas these drastic market changes were fully realized during the course of the 2009 insurance procurement cycle. Since it is the present 2009 market shift that has precipitated the WEBA filing, only costs incurred for events that occurred after August 31, 2009 should be eligible. No costs incurred as a result of the 2007 fires, or any other fires that occurred prior to August 31, 2009, should be recorded in WEBA, in the event that the application is approved.

**E. Ratepayers should not pay for premium increases that result from an insurer's negative assessment of a utilities' failure to adequately maintain utility infrastructure.**

The Utilities argue that [i]nsurance carriers have dramatically limited coverage in response to claims experience and a negative perception of a legal doctrine known as “inverse condemnation”, which is similar to strict liability. The Utilities also state that “[w]ildfires are inevitable” and that “like other natural disasters, the magnitude of damage depends on factors outside the Utilities’ control, such as weather, demography, and local fire-fighting capabilities.”<sup>8</sup> While DRA recognizes that catastrophic wildfires are, to a large degree, “natural” disasters, they are not inevitable in the same way that earthquakes or hurricanes are inevitable. A fire that is caused or exacerbated by utility

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<sup>8</sup> Id.

facilities might, in some instances, have been avoided if the utility had done a better job of preventative maintenance, brush clearing, or taking other steps to mitigate fire risk. While wildfires are certainly complex events with several variables working as contributing factors, the Utilities' insurers are certainly cognizant of the relationship between the proper maintenance of utility facilities and the incidence of wildfires. It is unclear from the testimony included in the application whether some portion of the increase in premiums could be attributed to an insurers' negative assessment of the utilities' maintenance records. DRA objects to having ratepayers pay for any increase in premium that is due to a utilities negligence to properly maintain their facilities, failure to comply with GO-95 requirements, or other applicable rules and regulations.

**F. It is unclear how the Joint Utilities propose tracking changes to wildfire insurance premiums for WIPBA**

The Joint Utilities also seek authorization to establish a separate Wildfire Insurance Premium Balancing Account (WIPBA) "to protect both the Utilities and the customers from fluctuations in the insurance market".<sup>2</sup> Specifically the Utilities propose recording in WIPBA "all increases or decreases from the amounts authorized in the Utility's GRC in insurance premiums attributable to coverage for Wildfire-related claims".<sup>10</sup> At present PG&E only has general liability coverage.<sup>11</sup> In the case of all three utilities, but for PG&E in particular, it is unclear how such a balancing account would work. DRA questions how the Joint Utilities or the Commission would determine which changes to insurance premium rates are due to wildfires and which are due other factors.

**G. The proposed amount of shareholder responsibility for costs recorded in WEBA is insufficient to ensure that ratepayer and shareholder interests are properly aligned, the shareholder contribution**

The Amended Application proposes a framework where recoverability of costs would depend on the degree of Utility fault. In all cases except for those where the costs

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<sup>2</sup> Amended Application, p. 9

<sup>10</sup> Id., p. 9.

<sup>11</sup> Amended Testimony, p. 85

incurred were the result of inverse condemnation (in which case the Utility proposes 100% recovery) and/or strict liability or intentional or reckless misconduct (in which the Utility may not recover the costs through WEBA), the Joint Utilities propose that the Utility should be allowed to recover its costs in full up to \$1.2 billion and 95% of costs above \$1.2 billion.<sup>12</sup> The Utility also proposes that it pay \$5 million per fire up to a maximum of \$10 million per year and that the 5% shareholder contribution above \$1.2 billion be capped. While DRA appreciates that the Utilities have put some shareholder “skin in the game”, the amounts and caps proposed are insufficient to properly incentivize utility management to safely maintain the system and vigorously defend against claims. Of particular concern is the proposed \$10 million cap on the \$5 million per fire deductible payment. The merit of a \$5 million deductible is that it would apply to any fire that exceeds \$10 million in damages, not just the truly catastrophic ones. It may be the case that the size and therefore cost of any fire is beyond a utility’s control. The number of fires in a given fire season, however, are not entirely beyond a utility’s control. The more fire-related safety violations that exist on a utility’s system when high fire risk weather event occurs, the more likely it is that multiple fires will occur. Capping the \$5 million per fire deductible at two events per year undermines the incentivizing effect that the deductible creates.

**H. The Joint Utilities proposal to be rewarded for pursuing claims against third parties is against the public interest.**

The Utilities proposal to retain 90% percent of third-party recoveries until utility-absorbed Wildfire Costs have been fully reimbursed undermines whatever incentive is established by putting the utility on the hook for a percentage of costs recorded in WEBA (Third Party Recovery Proposal). The Third-Party Recovery Proposal places the interests of ratepayers second to the interests of Utility shareholders. If approved, the Third Party Recovery Proposal would allow the Utility to be made whole, even in cases where the

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<sup>12</sup> Amended Application, p. 9.

costs resulted from Utility negligence so long as it could prove that another entity with deep-pockets contributed to the fire.

**I. The Commission should direct the Utilities to establish a reimbursable account in order to provide funding so that DRA can hire an expert consultant**

The Commission should direct the Joint Utilities to setup a reimbursable account in order for DRA to hire an outside consultant with expertise in insurance markets. This will enable DRA to more fully develop a record upon which the Commission can base a decision. Due to budgetary constraints, DRA does not have the resources to hire a consultant and DRA does not have the appropriate in-house expertise to properly determine whether there is WEBA is needed, what safeguards may be appropriate, and whether the Utilities proposals are reasonable.<sup>13</sup> Public Utilities (“P.U.”) Code § 309.5(c) requires the Commission to provide for the assignment of personnel to, and the functioning of, DRA. This can be done effectively and expeditiously by requiring the Utilities to draft a letter of understanding (“LOU”) for the purpose of providing funding to DRA so that it can hire an insurance expert.<sup>14</sup>

**IV. Categorization and proposed schedule**

DRA and CPSD support the proposed categorization of ratesetting. Since there are disputed issues of fact concerning the need for WEBA, DRA believes that hearings will be necessary. DRA and CPSD oppose an expedited schedule, due to staffing constraints, and proposes that the schedule be set at the pre-hearing conference.

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<sup>13</sup> Not only does DRA’s regular budget not include funds for this type of application, DRA cannot not, due to the lack of a State budget hire a consultant with the appropriate expertise.

<sup>14</sup> A similar approach, between PG&E and DRA was taken in the recent PG&E GRC Phase 2 (A.10-03-014) proceeding. *See also* Pacific Gas and Electric (PG&E) Rate Increase (A.97-12-020): PG&E funded DRA for an outside consultant to assess the reasonableness of the rate increase requests; Pacific Telesis Spin-off (I.93-02-028)(Pacific Telesis funded ORA for an outside consultant to evaluate the impact to ratepayers due to the spin-off); Pacific Bell Communications (PBCOM) (A.96-03-007)(Pacific Bell provided funding to ORA for an outside expert witness to evaluate whether PBCOM should be granted a certificate of public convenience and necessity (CPCN)); SBC/Pacific Telesis Merger (A.96-04-038) (Pacific Telesis funded DRA for retaining consultants for the merger valuation.)

Respectfully submitted,

/s/ JACK STODDARD

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Dated: September 8, 2010

**CERTIFICATE OF SERVICE**

I hereby certify that I have this day *re served* a copy of **JOINT PROTEST OF THE DIVISION OF RATEPAYER ADVOCATES AND CONSUMER SAFETY AND PROTECTION DIVISION TO THE JOINT AMENDED APPLICATION OF SOUTHERN CALIFORNIA EDISON COMPANY, PACIFIC GAS AND ELECTRIC COMPANY, SAN DIEGO GAS & ELECTRIC COMPANY, AND SOUTHERN CALIFORNIA GAS COMPANY** to the official service list in **A.09-08-020** by using the following service:

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Executed on **September 9, 2010** at San Francisco, California.

/s/           JAIME VADO

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