

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



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In the Matter of the Application of San Diego Gas &  
Electric Company (U 902 E) for Authorization to Recover  
Unforeseen Liability Insurance Premium and Deductible  
Expense Increase as a Z-Factor Event

A.09-08-019  
(Filed August 31, 2009)

**REPLY TO SAN DIEGO GAS & ELECTRICT RESPONSE TO RUTH HENRICKS  
REQUEST FOR INTERVENOR COMPENSATION  
RELATED TO DECISION 10-12-053**

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**PROTESTOR RUTH HENRICKS REPLY TO SAN DIEGO GAS & ELECTRICT  
RESPONSE TO RUTH HENRICKS REQUEST FOR INTERVENOR COMPENSATION  
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**I.  
INTRODUCTION**

Pursuant to Rule of Practice and Procedure 17.4(h), Protestor Ruth Henricks hereby submits this Reply to San Diego Gas & Electric's Response Ruth Henricks request for intervenor compensation related to Decision 10-12-053.

SDG&E put forth an application to recover \$28.8 million from ratepayers and in support its claims offered thousands of documents, more than 100 pages of witness testimony, numerous ex part meetings with Commissioners and staff, filed numerous motions and pleadings, and the administrative law judge ruled against them. Henricks should be awarded intervenor compensation for the following reasons:

1. Henricks' made a substantial contribution to the proceeding by providing a contextual factual background that assisted in Administrative Law Judge Proceeding
2. Henricks made a substantial contribution to the proceeding by preserving the record for appeal.

It is important to stress that proceeding in A.09-08-019, SDG&E requested something profound by asking the public to face rate increases by absorbing insurance increases caused by forces that SDG&E officials could not substantiate. In light of the extraordinary nature of the SDG&E's request and the potential tremendous financial burden facing ratepayers in the event that another calamitous utility-caused disaster should occur, it is reasonable for the ratepayers be afforded legal representation sufficient to collect, organize, analyze the massive amount of information required and establish the best defense possible in the instant proceeding.

## **II. HENRICKS MADE A SUBSTANTIAL CONTRIBUTION TO THE PROCEEDING**

Henricks' counsel were a vital force in opposing the application. Henricks' counsel attended and diligently asked questions at the deposition and hearing, and gathered evidence challenging the factual predicate of the application.

SDG&E seeks to draw compare the contributions made by Henricks in this case to the contributions another intervenor in D.04-05-004.

In that decision, the intervenor only filed an initial response and comments on an ALJ Draft Decision in a proceeding pertaining to recording transactions undertaken to consummate a plan of reorganization under Chapter 11 of the Bankruptcy code. 2004 Cal. PUC LEXIS 226, \*2.

There, the filings submitted by intervenor: (1) focused on intervenor's interest in protecting the need of immigrants and low-income families; and (2) recommended a public hearing. *Id.* The Commission noted that no public hearing was held. *Id.* Additionally, the Commission found that intervenor's input included a largely "obvious point...that [the Commission] would have formed the basis of our decision..." *Id.*

In contrast, in the instant proceeding, Henricks was the first to file a protest in the instant proceeding.<sup>1</sup> Henricks participated in numerous conversations with DRA throughout the proceeding pertaining to the separation of issues which intervenors would focus on.

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<sup>1</sup> 19 September 2009; "Protest of Ratepayer Ruth Henricks to the Application of San Diego Gas & Electric Company (SDG&E) for Authorization to Recover Liability Insurance Premium and Deductible Expense Increases."

At the administrative law judge hearing Henricks' counsel attended, diligently presented evidence, protected the record from evidence not based on personal knowledge or proper foundation, effectively cross-examined witness, and worked cooperatively with other counsel opposing the application.

Henricks' counsel objected to testimony unsupported by personal knowledge and precise citation to the record was based on due process and was well taken. The record for appeal on the issue of the amount SDGE spent on insurance was preserved by Ms. Henrick's counsel.

Henricks' counsel was successful in showing that SDG&E produced neither an insurance market specialist or documents or testimony authenticated by an insurance market specialist to explain the nature and extent of any insurance market changes.

Henricks was successful in disproving SDG&E's assertion that "claims filed against California utilities as a result of the 2007 California wildfires have split the market into wildfire liability and all other liabilities," as stated by Maury De Bont.<sup>2</sup> This was shown to be flat-out false as evidenced by Mr. De Bont's rebuttal testimony, in which he stated: "[W]e asked underwriters to segregate wildfire liability aggregate limits from the general liability limits in order to have dedicated wildfire limits for wildfire-only losses."<sup>3</sup>

Henricks also showed through deposition and examination that Lee Schavrien's allegation that the record shows the SDGE 10-K reported half the cost increase was paid in one year and the other half in the next was not supported by the record. The crux of Mr Schavrien testimony demonstrated that he had no personal knowledge to explain the disparity and SDGE chose not to put into the record any other evidence that explained the disparity: Q You didn't testify the increase was 47 million? I thought you said that ten times?

A I thought I said, your Honor, that the increase was --

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<sup>2</sup> See Prepared Direct Testimony of San Diego Gas and Electric Company; Maury De Bont; 5:3-5

<sup>3</sup> *Id* at MD 14: 23-26

Q I am not your Honor. She is. I am just a lawyer.

A -- that the increase went from 4.5 or the premium went from 4.5 to \$47 million, an increase of 42-1/2 million dollars.

Q 42-1/2. So we have got 42-1/2. And then you are saying that you only reported 15 million here on your 10K?

A For half of a year of 2009.

Q If I put 2 into 42.5, I get 21.2. So where is the missing 7?

A I don't have that -- I didn't calculate this, sir, but I will be happy for our finance organization to provide you how that number was calculated.<sup>4</sup>

No such testimony was offered by the finance organization on this point. In fact, SDG&E is still attempting to have evidence entered into the record to validate its claim.<sup>5</sup> SDG&E did not as a matter of law carry its burden of proof even if the preponderance of evidence standard is used.

Further, Henricks requested oral hearings for the closing in the case, which was granted. It is worth pointing out that SDG&E opposed a motion of hearing noting that, "Given the complicated and often nuanced nature of the issues involved in this administrative proceedings conducted by the Commission, written briefing, which allows parties to provide a more thorough and well-organized explanation of the relevant issues, is a superior vehicle for articulating complex argument for the Commission's consideration."<sup>6</sup> It is ironic that the same party stating there was no need for oral argument to request and schedule three oral ex parte communications with the Commissioners.<sup>7</sup> It is this kind of duplicitous conduct that requires sufficient representation for the consumers in order to create a sufficient record.

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<sup>4</sup> Hearing Transcript, (113:23-114:12)

<sup>5</sup> San Diego Gas and Electric Company noticed a written Ex Parte communication with Commissioner Timothy Simon and Administrative Law Judge Maribeth Bushey on February 18, 2011.

<sup>6</sup> 15 April 2010; San Diego Gas & Electric Company Response to Request for Oral Argument, p. 2.

<sup>7</sup> 13 December 2010, San Diego Gas and Electric Company noticed three separate oral and written Ex Parte communications with Commissioner Bohn and Robert Kinosian, Advisor to Commissioner Bohn; Andy Campbell, Advisor to Commissioner Ryan; and Matthew Tisdale, Advisor to Commissioner Grueneich on December 7, 2010 respectively; 26 August 2010, San Diego Gas and Electric Company (SDG&E) noticed an oral ex parte

**A. HENRICKS CONTRIBUTED TO ALJ’S FINDING THAT INSURANCE PURCHASE WAS NOT EXOGENOUS.**

Henricks counsel argued throughout the proceeding in briefs and at hearings that the Z-Factor event at issues was not exogenous to SDG&E.

SDG&E argued that Henricks’ argument pertaining to the exogenous was essentially taken from other intervenors. However, SDG&E fails to cite to the record to establish its argument that Henricks “reply brief relied heavily on the arguments made by other intervenors.” SDG&E, in its 45-page document, fails to cite to what portion of Henricks “relied heavily on arguments made by other intervenors.” SDG&E also fails to cite to what portions of other intervenors briefs that Henrick relied upon. SDG&E ignores the passage in the Closing Brief of Ruth Henricks:

SDG&E controlled how much insurance to buy through the insurance procurement process. (Prepared Testimony of Maury De Bont, p. 6-7) As discussed above, the Commission has determined the opportunity to purchase disaster insurance to mitigate the resulting cost impact from a natural disaster is well within the control of a utility like SDG&E’s. 200 Cal. PUC Lexis 7, \*11 As Mr. De Bont explained in his testimony, SDG&E and its brokers were making decisions throughout the insurance procurement process regarding how to design its towers, methods and strategies to include competition between underwriters to lower prices, and, most importantly, the amount of insurance purchased.

Petitioner Henricks believes that SDG&E, as a rational actor in the market place, should engaged in an analysis of the marginal rate of substitution as it pertains to wildfire.<sup>8</sup>

These statements illustrate that Henricks counsel was investigating and actively vetting whether the event was exogenous to SDG&E. The intervenor compensation statues permit the Commission to award compensation even where a party’s participation has overlapped with the showings made by other parties.<sup>9</sup> Further, Henricks attempted to minimize the extent of overlap

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communication with Ken Koss, Chief of Staff, and Karen Shea, Advisor to Commissioner Simon, on August 23, 2010.

<sup>8</sup> Closing Brief of Protestor Ruth Henricks, p. 13.

<sup>9</sup> California Public Utilities Code Section 1802.5.

of argument by remaining in close contact with representatives of DRA throughout the course of the proceeding.

**B. HENRICKS' PARTICIPATION IN THE PROCEEDING WAS NECESSARY AND NOT DUPLICATIVE**

Henricks participation in the hearing was necessary and not duplicative as the representation of ratepayers would have been strained without Henricks participation. Henricks participation was important to assist in review of thousands of documents that SDG&E produced and testing SDG&E witness' knowledge of the claims.

The Department of Ratepayer Advocates was operating with a budget that was so severe it couldn't attend the deposition, hire experts, or conduct in-depth investigation.

Representatives from UCAN -- one not admitted to the California state bar and another who was admitted to the bar in June 2010 -- attended the deposition and was laughed at by SDG&E attorneys for his questions,<sup>10</sup> abruptly left a hearing shortly after it began without sending a replacement, and sent a green, first-year lawyers whose comments were so low as to render them unintelligible to all, including the court reporters.

In other words, Protestors and Intervenors in the instant proceeding were made up of a small non-profit organizations, one government funded consumer advocacy agencies within the auspices of the PUC, and Protestor Ruth Henricks. In total, the small legal team made up of public agency, a non-profit organization, a small law firm was opposing a large utility company with untold legal resource.<sup>11</sup>

It is of critical importance to stress that Henricks, in this hearing, submitted a data request to SDG&E seeking information on SDG&E's legal staffing on this proceeding, the number of lawyers working on this matter, the number of hours spent on each item, and the total number of hours and amount of funds.

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<sup>10</sup> January 14, 2010, Deposition of Maury De Bont (128:21-25; 129: 1-5)

<sup>11</sup> See Deposition Transcript of Maury De Bont.

Unsurprisingly, SDG&E refused to comply thereby maintaining the cloak of secrecy they comfortably hide behind while they attack each hourly charge by an intervenor, absurdly, in the name of consumer protection. In contrast, a comparison of the different staffing levels at the depositions is instructive. SDG&E at each deposition staffed a team of four attorneys. For example, SDG&E makes an issue of Henricks sending two attorneys to deposition when SDG&E had four attorneys at each.<sup>12</sup> Meanwhile, each hearing was staffed by at least four SDG&E attorneys, all four senior level attorneys with more than 85 years of legal experience.<sup>13</sup>

An understaffed opposition incapable of allocating sufficient staffing to properly analyze the factual record is precisely the scenario SDG&E hope to achieve by blocking Protestors Henricks' compensation in the hopes of deterring involvement in future proceedings. SDG&E's response seems to be little more than an attempt to assert its will on the staffing of its opposition and limit its opposition to small non-profit legal teams facing tight budget constraints and lack of resources. As illustrated above, the work required to engage in the data request process, collect, organize and analyze data, issue reports, write motions and engage in the law in motion process against SDG&E is a tremendous undertaking. In contrast, the SDG&E seek to allow its legions of attorneys to feed off the ratepayer trough to support its massive legal department unchecked and unfettered while attempting to limit ratepayer resources available Protestors and Intervenors whose goal is to protect the public interest.

Henricks participation in the case was necessary to provide adequate representation for small, non-profit organizations which rely exclusively on a volunteer basis. Henricks participation in this case was also necessary in order to ensure that an adequate record was

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<sup>12</sup> See Deposition of Maury De Bont on 14 January 2010, p. 3; "For Sempra Energy: Kimberly A. McDonnell, Esq.; Aimee M. Smith, Esq.; C. Larry Davis, Esq.; Keith W. Melville, Esq. See Deposition of Lee Schavrien on 15 January 2010, p. 3; Kimberly A. Mc Donnell, Esq.; Keith W. Melville, Esq.; Aimee M. Smith, Esq.; Robert Borthwick, Esq.; See Deposition of Deborah Ann Yee on 20 January 2010, p. 3; Kimberly A. McDonnell, Esq.; Aimee M. Smith, Esq.; C. Larry Davis, Esq.; Keith W. Melville, Esq.

<sup>13</sup> C. Larry Davis admitted to the California State Bar in 1976; Aimees Smith admitted to the California State Bar in 1995; Kimberly McDonnell admitted to the California State Bar in 1991; and Keith Melville admitted to the California State Bar in 1990.

persevered should the case be appealed to the California Court of Appeal – where it appears to be headed. The intervenor compensation statutes allow the Commission to award compensation even where a party’s participation has overlapped with the showings made by other parties.<sup>14</sup>

SDG&E’s argument that Henricks does not represent interests that would otherwise be represented attempts to limit the scope of public representation through the judicial process and is without merit.

SDG&E would have the Commission interpret D.98-04-059, to mean that “rate-payer funded compensation is available only for customers whose interests would otherwise be underrepresented.” Following through on this logic, SDG&E’s assertion would mean that no other organization could receive intervenor compensation because the Department of Ratepayer Advocates representation is so broad as to include all ratepayers statewide.

This assertion is at cross purposes of the same decision stating the “[e]ligibility standards should encourage first-time and small-party intervenors.”<sup>15</sup> The Commission further found, “Eligibility standards should not unduly discourage first-time and small-party investors.”<sup>16</sup>

It would be an absurd outcome to assume that one agency has, essentially, a monopoly over an entire region of customers. This logic, however, while being argued for the supposed benefit of ratepayers, is blatantly self-serving to SDG&E.

It is hard to imagine a legal position more beneficial to SDG&E where they limit ratepayer advocate, to one or two lawyers and one or two experts. These few intervenors would be left to challenge the large legal team amassed by SDG&E – a legal team which has refused to open its books to the same level of critique that it is engaging in. It is outrageously ironic that the company states it makes this argument in the public interest.

### **C. HENRICKS INTERESTS NOT PROTECTED BY DRA AND UCAN**

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<sup>14</sup> California Public Utilities Code Section 1802.5

<sup>15</sup> D.98-04-059, 1998 Cal. PUC LEXIS 429, \*26

<sup>16</sup> D.98-04-059, 1998 Cal. PUC LEXIS 429, \*27

SDG&E argues that inclusion of DRA and UCAN in the proceeding, both with represent small commercial customers, prohibit Henricks' participation.

SDG&E undermines its own argument that "ratepayer-funded compensation is available only for customers that would otherwise be unrepresented" and then states that both DRA and UCAN both represent "small commercial customers." SDG&E seeks to separate the two by adding that UCAN represents small commercial customers "who receive bundled electric service from SDG&E." However, this is a distinction without a difference. Whether the small customer is bundled by SDG&E or another company, they would remain "small commercial customers" and receive coverage by DRA.

Henricks, as the operator of a small non-profit organization, with a limited budget based heavily on the participation of volunteers provides ample distinguishing factors from "small commercial customers." Additionally, Henricks claims would be unrepresented, as specified below, by the lack of resources available to DRA, by its own admission, to adequately perform in-depth discovery through taking deposition and involvement in the factual research to perform a thorough and diligent cross-examination.

It became clearer that Henricks involvement was important to assist in the factual development of the record when the representative from UCAN filed a petition in this proceeding that included six questions, appeared at the depositions for a total of about an hour and asked a series of question that drew the laughter of the SDG&E attorneys. Further, as explained in the Compensation Application, Henricks believed the proceeding would benefit from more experienced litigators applying investigative, briefing and argument strategies to the proceeding. This concern was enhanced by the Court of Appeal ruling that intervenors *in this action* failed to sufficient present evidence and adhere to the rules of court in pursuing an appeal. Specifically, the Court of Appeal found:

We begin by reminding the parties that this original proceeding is governed by the appellate rules. (*Cal. Rules of Court, rule 8.4.*) *California Rules of Court, rule 8.204(a)(1)(C)*, which applies to writ proceedings (*Cal. Rules of Court, rules 8.4, 8.486(a)(6)*), requires that the parties' briefs "[s]upport any reference to a matter in

the record by a citation to the column and page number of the record where the matter appears. ...’ Here, the parties omitted citations to the record or incorrectly cited numerous documents, or, when stating a single fact, cited an entire, sometimes lengthy, document.” *Utility Consumers’ Action Network v. Public Utilities Commission of the State of California* (2010) 114 Cal. Rptr. 3d 475, 479

Again, it should be noted that Mr. Shames is currently not admitted to practice by the California State Bar which further emphasizes the need for more experienced attorneys to ensure the proper record is being made.

Further, the Commission stated in D.98-04-059, “The Commission should encourage the presentation of multiple points of view, even on the same issues, provided that the presentations are not redundant.”<sup>17</sup> The Commission noted that “Eligibility standards should encourage first-time and small-party intervenors.”<sup>18</sup> The Commission further found, “Eligibility standards should not unduly discourage first-time and small-party investors.”<sup>19</sup>

SDG&E also argues that DRA and UCAN are “far more experienced.” This argument is also not persuasive to prohibit the participation of other attorneys and flies in the face of the purpose of the intervenor compensation program. As discussed above, a guiding principle of the Commission’s intervenor compensation program is to “encourage first-time and small-party intervenors.”<sup>20</sup> The application of SDG&E’s logic that because a intervenor may not be experienced, they should not be awarded compensation is not consistent with this principle.

In fact, the application of the SDG&E logic would ensure that participation in Commission proceeding would be a cottage industry or an inside game, where public participation is deterred. Surely, this is not the spirit of the Commission in D.98-04-059.

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<sup>17</sup> D.98-04-059, 1998 Cal. PUC LEXIS 429, \*26

<sup>18</sup> D.98-04-059, 1998 Cal. PUC LEXIS 429, \*26.

<sup>19</sup> D.98-04-059, 1998 Cal. PUC LEXIS 429, \*27.

<sup>20</sup> D.98-04-059, 1998 Cal. PUC LEXIS 429, \*27.

Finally, SDG&E, meanwhile, argues that approving Henricks' compensation would lead to "each utility customer to secure representation on an individual basis."

SDG&E seems to imply that granting intervenor compensation to Henricks would somehow obliterate the PUC process of applying for intervenor status and procedure set forth in the intervenor compensation program. Looking through this supposition, which is absurd on its face and a back-handed swipe at the competence of the ALJ corp at the CPUC, it is clear that SDG&E seeks to limit the amount of ratepayer oversight and play a hand in managing its opposition by fielding a team that does little preparation which it can laugh at and intimidate in deposition – which is exactly what it did with UCAN.

While, as SDG&E and UCAN both point out, Henricks did suffer a few procedural stumbles. But, in each case, Henricks corrected its errors and was successful in maintaining all points and concerns in the record, thereby preserving the record for appeal.

#### **D. HENRICKS' PARTICIPATION WAS NOT BURDENSOME**

SDG&E argued that, "Mr. Aguirre's frivolous motions, his refusal to comply with the Commission's rules and his antics during the evidentiary hearing cause obstruction and delay, and greatly burdened the process." Section 1808 makes clear that this egregious conduct is not compensable.<sup>21</sup> However, SDG&E failed to cite to the record for any one of its accusations pertaining to Mr. Aguirre. While, as SDG&E points out, these objections and more in-depth lines of questions may be laborious in the administrative proceeding process, they are nonetheless important to make a record for appeal.

#### **E. CHRISTENSEN TESTIMONY ASSISTED IN ESTABLISHING THE FACTUAL CONTEXT WHICH SERVED AS BACKDROP FOR ALJ DECISION**

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<sup>21</sup> San Diego Gas & Electric Company (U 902 E) Response to Request for Intervenor Compensation Filed by Ruth Henricks. P. 25

The testimony of Kevin Christensen was crucial in showing that the concept of Wildfire Insurance was not forced upon SDG&E by the underwriters. Rather, as illustrated in the change in testimony of Maury De Bont which was chronicled by the work of Mr. Christensen, the concept of wildfire insurance was something that was generated within SDG&E.

The work of Mr. Christensen was instrumental in creating a record of inconsistencies in testimony by the experts offered up by SDG&E including Maury De Bont, Lee Schavrien, and Debroah Yee. Mr. Christensen's testimony illustrated the lack of personal knowledge of SDG&E proffered witnesses as to any portion of the insurance procurement process.

The work of Kevin Christensen was also instrumental in making the record that failed to provide an official from SDG&E and Sempra, nor did SDG&E provide any representatives from its insurance brokers Marsh USA, Inc. and Marsh Bowring, with personal knowledge as to the breakdowns of cost on the invoices. Again, Petitioner Henricks requested and was denied the production of a representative from Marsh USA, Inc. on a number of occasions. (Prepared Testimony of Kevin Christensen, p. 8-10)

SDG&E, in its rebuttal testimony, sought to establish the authenticity of the amounts of funds for "wildfire" insurance by pointing to "binders." Mr. De Bont's rebuttal testimony stated a break-down of insurance premiums is more typically included on insurance binders. (Prepared Rebuttal Testimony of Maury De Bont, p. 15) SDG&E again, however, failed to provide a representative with personal knowledge of the insurance procurement process that could authenticate the binders and whether or not the numbers in the binders were finalized. This fact is particularly important because a binder, by its definition by the California Department of Insurance, is a "short-term agreement put in effect by an agent to provide temporary insurance until the policy is written or delivered."

Again, the company both failed to provide any finalized documentation from an insurance company that stated the cost for the wildfire and failed to provide a witness with personal knowledge of the insurance procurement process.

It is also worth noting, the SDG&E asked the expert for DRA just two question pertaining to a spreadsheet comprised of figures, alleged to be insurance process, but could not validate through the presentation of evidence that the numbers were accurate.

SDG&E failed to recognize that the unredacted testimony was sent to presiding judge, ALJ Bushey, through the service process. Further, documents filed by Henricks later in the proceeding referenced the numerous incongruities in SDG&E expert prepared testimony, deposition testimony, and testimony at the hearing. This task, preparing a record of comparing the various inconsistent statement, is crucial.

Mr. Christensen's testimony, while much assailed, was never cross-examined by SDG&E during the proceeding.

It is also worth pointing out that redacted versions of the document were forwarded to SDG&E and DRA, as SDG&E forcefully required that documents remain confidential.

### **III.**

#### **HENRICKS' COUNSEL'S PARTICIPATION IN THE PROCEEDING MADE A SUBSTANTIAL CONTRIBUTION TO PRESERVING THE RECORD FOR APPEAL**

On one hand, SDG&E attacks the effectiveness of Henricks representation but their steady stream of Ex Parte appearances – requested and attended after the close of the hearing – and late filed exhibits show they were deeply concerned about the points.

#### **A. IN PROCEEDINGS WHERE THE APPLICANT IS REQUESTING EXTRAORDINARY RELIEF, THE STANDARD OF PROOF REQUIRED BY THE COMMISSION SHOULD BE HIGHER**

The Commission has relied solely on circumstantial and secondary evidence in its decision to award SDG&E \$28.8 million in D.10-12-053. In proceedings where the applicant is requesting extraordinary relief and huge sums of money from ratepayers, the standard of proof required by the Commission should be higher.

There is a strong public policy purpose to require a stricter adherence to rule of reasoning. To apply the evidence rules raise the standard of the rules of evidence is consistent with the extraordinary request of \$28.8 million from ratepayers. The method of proof applied in this proceeding is incongruous with the extraordinary nature of the request. The Commission

does not want to establish a precedent where a low standard for evidence is used for extraordinary requests. In other words, the Commission should not set a precedent of accepting low grade evidence rules in a high grade proceeding.

SDG&E, in the instant proceeding, was challenged by Henricks' counsel on three areas: (1) whether there was actually an insurance crisis as the company pled in its application; (2) whether the insurance industry created a new classification of insurance, called wildfire insurance; and (3) whether SDG&E spent the money. The company withdrew its claim that there was an "insurance crisis;" the company noted in rebuttal testimony that it was SDG&E, not the insurance underwriters, who sought the creation of a separate category called "wildfire insurance;"<sup>22</sup> and the company is still trying to submit evidence into the record to prove it spent the amount it claimed on insurance after SDG&E's star witness, Lee Schavrien, illustrated his lack of knowledge about the fact.<sup>23</sup>

When weak evidence is used when stronger evidence is available, the evidence should be viewed with skepticism. The basic goal of these proceedings must be to get to the truth, based on fact. In this case, the request was extraordinary. In past applications before the PUC, SDG&E called their insurance broker as an expert witness to justify their request.<sup>24</sup> These facts trigger the application of *Cal. Evid. Cd. § 412*, which states:

If weaker and less satisfactory evidence is offered when it was within the power of the party to produce stronger and more satisfactory evidence, the evidence offered should be viewed with distrust.

*Cal. Evid. Cd § 412*. In the instant proceeding, SDG&E failed to produce a single witness or a single document or report authored by an individual with personal knowledge of the issue. This

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<sup>22</sup> See Rebuttal Testimony of Maury De Bont, MD 14

<sup>23</sup> Hearing Transcript, (113:23-114:12)

<sup>24</sup> See Testimony of Jonathan E. Ball, managing director of Marsh USA; Testimony in Support of Joint Application for Authority to Establish a Wildfire Expense Balancing Account to Record for Future Recover Wildfire-Related Costs; August 31, 2009.

is particularly striking when SDG&E has in the past produced representatives from its insurance brokers to provide testimony in general rate case proceedings.

Further, the fact that SDG&E's star witnesses had no personal knowledge of the facts they testified to significantly undermines the trustworthiness of the case. These facts trigger *Cal Evid Cd* § 702, which states:

(a) Subject to Section 801, the testimony of a witness concerning a particular matter is inadmissible unless he has personal knowledge of the matter. Against the objection of a party, such personal knowledge must be shown before the witness may testify concerning the matter.

(b) A witness' personal knowledge of a matter may be shown by any otherwise admissible evidence, including his own testimony.

As illustrated repeatedly throughout the proceeding, neither Mr. De Bont nor Mr. Schavrien had any personal knowledge about the insurance procurement process. Providing context for this lack of personal knowledge as to their testimony, Mr. De Bont testified that he did not even write his own testimony. In other words, SDG&E is essentially arguing that whatever they say must be taken at face value and not be challenged.

SDG&E based every assertion in the case by offering the expert witness testimony by individuals who have no knowledge of what they were testifying to. This lack of knowledge puts squarely at issue the credibility of the witnesses. These facts trigger *Cal Evid Cd* § 780, which states:

Except as otherwise provided by statute, the court or jury may consider in determining the credibility of a witness any matter that has any tendency in reason to prove or disprove the truthfulness of his testimony at the hearing, including but not limited to any of the following:

- (a) His demeanor while testifying and the manner in which he testifies
- (b) The character of his testimony.
- (c) The extent of his capacity to perceive, to recollect, or to communicate any matter about which he testifies.
- (d) The extent of his opportunity to perceive any matter about which he testifies.
- (e) His character for honesty or veracity or their opposites.

- (f) The existence or nonexistence of a bias, interest, or other motive.
- (g) A statement previously made by him that is consistent with his testimony at the hearing.
- (h) A statement made by him that is inconsistent with any part of his testimony at the hearing.
- (i) The existence or nonexistence of any fact testified to by him.
- (j) His attitude toward the action in which he testifies or toward the giving of testimony.
- (k) His admission of untruthfulness.

Applying these factors, the credibility of SDG&E's proffered witness is unquestionably low when considering that the neither witness had any "capacity to perceive, to recollect" the matter about which they testified because they had no personal knowledge of the facts. Further, as both are employees of under Sempra, both are clearly biased.

To illustrate the significance of SDG&E's proffered witnesses, both Mr. De Bont and Mr. Schavrien, is their testimony as to underwriter's concern over the California court's enforcement of the doctrine of inverse condemnation. Neither Mr. De Bont nor Mr. Schavrien are legal experts qualified to make that conclusion. There is also nothing in the record that illustrates that Mr. De Bont and Mr. Schavrien were told that by any representative of the insurance industry. Rather, it appears the lawyers at SDG&E got together after their weakest legal positions were exposed in the aftermath of the wildfires. SDG&E's legal team realized they had to live by a rule of law that SDG&E lawyers did not like. SDG&E then proffered alleged experts Mr. De Bont and Mr. Schavrien who said the insurance market changed based on this esoteric legal rule that they knew nothing about. More significantly, no expert testified to the fact that this rule of law had any impact on underwriters, the insurance policies or the insurance markets. What's more, there is no factual evidence in the record to substantiate the claim that inverse condemnation had any effect on the insurance procurement process whatsoever.

This is a good opportunity for the Commission to tighten up the rules, which are problematic as evidenced by the Court of Appeal's ruling in *Utility Consumers' Action Network v. Public Utilities Commission of the State of California* (2010) 114 Cal. Rptr. 3d 475, 479.<sup>25</sup>

**B. SDG&E FAILED TO ENTER INTO RECORD PROPER DOCUMENTARY EVIDENCE TO COMPLY WITH COMMISSION EVIDENTIARY STANDARDS**

Henricks evidentiary objections were appropriate and crucial to making a record because evidence presented by SDG&E falls outside the bounds of hearsay permitted by past Commission decisions thereby violating Henricks' substantial rights.

The California Government Code Gov Code sets broad standards for the adjudication of administrative hearings. First, in *Cal. Gov. Cd.* § 11513(c), the statute states: "The hearing need not be conducted according to technical rules relating to evidence." The statute cautions that the standards of "relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of the evidence over objection in civil actions." Second, the Government Code is especially weary of the admission of hearsay evidence as the sole evidence for which the administrative body bases its decision. The legislature states in *Cal. Gov Code* § 11513(d): "Hearsay evidence may be used for the purpose of supplementing or explaining other evidence but over timely objection shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions." Crucially, the statute permits the admission of hearsay evidence "for the purpose of supplementing or explaining." Specifically, the statute requires that hearsay evidence "shall not be sufficient itself to form a finding."

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<sup>25</sup> "In that case, the Court of Appeal found that, "We begin by reminding the parties that this original proceeding is governed by the appellate rules. (*Cal. Rules of Court, rule 8.4.*) *California Rules of Court, rule 8.204(a)(1)(C)*, which applies to writ proceedings (*Cal. Rules of Court, rules 8.4, 8.486(a)(6)*), requires that the parties' briefs '[s]upport any reference to a matter in the record by a citation to the column and page number of the record where the matter appears. ...' Here, the parties omitted citations to the record or incorrectly cited numerous documents, or, when stating a single fact, cited an entire, sometimes lengthy, document." *Utility Consumers' Action Network v. Public Utilities Commission of the State of California* (2010) 114 Cal. Rptr. 3d 475, 479

The legislature statutorily codified Pub Util Cd § 1701 (a) which stated that “the technical rules of evidence need not be applied” in “hearings, investigations, and proceedings” before the Commission. However, the Commission has limited the admission of hearsay evidence over hearsay objections to documentary evidence in instances where the substantial rights are preserved.<sup>26</sup> Further, the Commission has further limited the admission of hearsay evidence to situations where “a responsible person would rely upon it in the conduct of serious affairs.”<sup>27</sup>

SDG&E cites to D.86-12-101 to buttress its proposition that the Commission may admit hearsay evidence into the record and rely solely upon that evidence in reaching a conclusion.

The issue presented before the Commission in D.86-12-101 was whether accounting information entered into the record to show that reasonableness of expenditure were excludable from evidence based on hearsay objection.

While citing *Pub Util Cd 1701* to assert that technical rules of evidence need not apply, the Commission noted that the “state’s legislature has recognized that the fact finders in administrative proceedings are far more sophisticated than a lay jury and has relaxed the standards for the admissibility of evidence in such forums.”<sup>28</sup> However, the Commission cautioned that despite the fact that the legislature’s adoption of *Pub Util Cd 1701(a)*, administrative hearings are still governed by Rule 64: “The Commission has adopted Rule 64 to implement Section 1701. It states, ‘Although technical rules of evidence ordinarily need not be applied in hearings before the Commission, substantial rights of the parties shall be preserved.’”

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More importantly, the Commission’s focus in D.86-12-101 was the admission of “documentary evidence” which relied on a California Court of Appeal case, *Hughes v. Alexis*

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<sup>26</sup> D.86-12-101, 1986 Cal. PUC LEXIS 867, \*7-8

<sup>27</sup> D.98-05-019, 1998 Cal. PUC LEXIS 348, \*18.

<sup>28</sup> D.86-12-101, 1986 Cal. PUC LEXIS 867, \*9

<sup>29</sup> D.86-12-101, 1986 Cal. PUC LEXIS 867, \*5

(1985) 170 Cal. App. 3d 800, which focused entirely upon “documentary evidence.” The Commission, citing *Hughes* found:

The **admission of documentary evidence** without requiring the author of the document to be present at the hearing does not infringe on the due process rights of the party against whom the evidence is being offered at an administrative proceeding. We are guided by the holding in *Hughes v. Alexis* (1985) 170 Cal. App. 3d 800 (1985). There, the **court reviewed the admission of hearsay in the form of the sworn statement** of the arresting officer at the hearing to suspend a driver's license. It found that no violation of the licensee's constitutional right to confront and cross-examine adverse witnesses resulted from allowing the statement in evidence.<sup>30</sup>

A more thorough analysis illustrates the Court in *Hughes* applied the exception specifically to “hearsay in the form of a sworn statement.” The *Hughes* Court was focused on the admissibility of the sworn statement of an arresting police officer in an administrative hearing related to the suspension of a driver’s license. The arresting officer’s sworn statement was admitted into evidence despite the failure of the police officer to appear to provide foundation. The Court found “the statutory scheme allowing admission of the **arresting officer’s sworn statement** does not violate due process rights...”<sup>31</sup>

A review of further Commission cases shows that documentary evidence has been admitted in situations where a hearsay exception was available for “official records.” Specifically, in D. 98-06-084, the Commission allowed into evidence, over a hearsay objection, a memo written by a deputy attorney general to a director at the State Board of Equalization. Similar to the ruling in *Hughes*, the Commission determined the letter was admissible. However, in finding the evidence was admissible, the Commission found the “portion of the Milam memo falls within the ‘official record’ exception to the hearsay rule.”<sup>32</sup> The Commission found:

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<sup>30</sup> D.86-12-101, 1986 Cal. PUC LEXIS 867, \*8-9

<sup>31</sup> *Hughes v. Alexis*, 170 Cal. App. 3d at 811 (citing *Burkhart* and *Mackler*).

<sup>32</sup> D.98-06-084, 1998 Cal. PUC LEXIS 493, \*5.

However, ‘the inclusion of conclusions and opinions in record does not render it inadmissible per se. The overriding consideration is whether the record is trustworthy’ (*People v. Flaxman* (1977) 74 Cal.App.3d Supp. 16, 20 (citations omitted)). Trustworthiness is established if the record is made by public employees who are under a duty to observe the facts and report and record them correctly. (*Gananian v. Zolin* (1995) 33 Cal.App.4<sup>th</sup> 634, 640.)<sup>33</sup>

It is important to stress, that the Commission stated the trustworthiness of the letter was rooted in the writer being a public servant.

The instant case is distinguishable from the cases set forth by SDG&E. The testimony provided by SDG&E witnesses -- which included no supporting evidentiary support -- does not (1) fall within “documentary evidence” as contemplated by *Hughes*; (2) does not qualify for any exceptions to the hearsay rules; (3) and is not supplemental or supporting evidence to any non-hearsay evidence. The testimony submitted by SDG&E also lacks supplemental evidence to buttress its reliability to relieve the applicability of the hearsay rule.

SDG&E relied on the sworn testimony of its two star witnesses, Maury De Bont, a risk manager at SDG&E, and Lee Schavrien, a regulatory affairs manager at SDG&E. In their testimony, these experts testified about in the insurance markets and the disinterest of underwriters to write insurance policies. The crucial factor that distinguishes the case at bar from *Hughes* is, as documented in the record by Henricks’ counsel, neither of SDG&E’s witnesses had any personal knowledge of these underlying facts. This testimony was offered as SDG&E sole evidence to support its assertions that it met the standards of Z-Factor reimbursement. The reasoning provided by the Commission permitting the admissibility of documentary evidence is not applicable to the instant case.

It is important to note that the Commission’s justification for permitting a more relaxed application of the evidence rules – based on the idea that “fact finders in administrative proceedings are far more sophisticated”<sup>34</sup> – is irrelevant where the authenticity of the evidence is unreliable.

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<sup>33</sup> D.98-06-084, 1998 Cal. PUC LEXIS 493, \*6

<sup>34</sup> D.86-12-101, 1986 Cal. PUC LEXIS 867, \*9

The Commission’s reasoning in D.96-12-101 requiring that parties adhere to the spirit of Government Code Section 11513(c) is instructive. The Commission found that parties before the Commission should “observe spirit of *Government Code Section 11513(c)* and ensure that the evidence is at least the sort of on which reasonable persons were accustomed to reply. If the evidence is not reliable either on its own merits or as corroborated by other evidence, then it is of no use either to the propounding party or to the Commission.”

In the instant proceeding, the evidence offered by SDG&E, testimony from individuals who have no personal knowledge of the facts they are testifying to, are not reliable on their own merits. Crucially, the testimony was never corroborated by other evidence about the changes in the insurance markets or the actions of management in the insurance procurement process.

### **C. HENRICKS’ SUBSTANTIAL RIGHTS ARE VIOLATED BY DECISION**

Henricks’ substantial rights are violated by Decision 10-12-053 because the decision was based solely on the consideration of hearsay evidence that was not supplemented by more reliable, non-hearsay evidence. In fact, not one witness proffered by SDG&E has any personal knowledge at all of the underlying facts of the insurance procurement process. California courts have held that an administrative may not make a ruling justified solely on hearsay evidence without the corroboration from any additional evidence.

In *Walker v. San Gabriel* (Cal. 1942) 20 Cal.2d 879 the Court found an abuse of discretion where an administrative body made a ruling “without competent evidence establishing just cause for revocation, and that hearsay evidence alone is insufficient to support the revocation....” *Walker v. San Gabriel* 20 Cal.2d at 881. In that case, the administrative board’s decision to revoke a license based solely on a letter by a police chief was reversed by the Court of Appeal.

The *Walker* court found that seeking efficiency in the administrative hearing process does not permit a decision based solely on hearsay evidence. The *Walker* cited the United States Supreme Court’s ruling in *Consolidated Edison Co. v. National Relations Board* which found, “assurance of a desirable flexibility in administrative procedure does not go so far as to justify orders without a basis in evidence having rational probative force. Mere uncorroborated hearsay or rumor does not constitute substantial evidence.” *Walker v. San Gabriel* (Cal. 1942) 20 Cal. 2d 879, 881-882 (citing *Consolidated Edison Co. v. National Labor Relations Board*, 305 U.S. 197).

SDG&E argues that should the Commission require an applicant to present “utility personnel with relevant knowledge of a particular issue... it would be impossible for the Commission to ensure efficient administration of duties.”<sup>35</sup>

This argument is not persuasive as all SDG&E had to do was trade out Mr. De Bont with either Mr. Lathers or Mr. Phillips – the individuals with actual, personal knowledge of the insurance procurement process. It is an absurd argument that requiring either Mr. Lathers or Mr. Phillips to come in the place of Mr. De Bont would render it “virtually impossible for the Commission to ensure efficient administration of its duties.”

**D. SDG&E’S OFFER TO PRODUCE PHILLIPS WAS PREJUDICIAL TO INTERVENORS AND WOULD NOT HAVE PROVIDED THE REQUISITE STANDARD OF EVIDENCE TO SATISFY Z-FACTOR REQUIREMENTS**

SDG&E’s offer to produce Phillips was not a reasonable attempt to provide an expert at trial with personal knowledge of the insurance procurement process at issue and the insurance industry sufficient to provide the factual context required to meet the standards of proof that the Z-Factor required.

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<sup>35</sup> San Diego Ga7 Electric Company (U 902 E) Response to Request for Intervenor Compensation Filed by Ruth Henricks, 21 March 2011.

Specifically, at the eleventh hour, three weeks before the \_\_\_ hearing, SDG&E offered Mr. Phillips as a fact witness based on the following conditions<sup>36</sup>:

Richard Rose, attorney for Marsh USA, stated that, “Mr. Phillips will not be appearing as an expert witness. Rather, his testimony will be purely that of a fact witness. Speculative or hypothetical questions will not be acceptable.”<sup>37</sup> Mr. Rose further stated, “The subject matter of the testimony must be limited to the placement that is the underlying Proceeding. Mr. Phillips will not be permitted to provide testimony regarding any other Marsh business.” This, however, is not the same as offering up for testimony because, in order to meet the Z-Factor requirement, SDG&E needed to prove up that changes in the insurance markets were outside of the management’s control. An expert that cannot testify as to the matters at issue in the proceeding is not admissible because it is lay testimony or is not admissible because he is not an expert.

Mr. Rose stated that, “Given time constraints, Mr. Phillips’ testimony must be limited to no more than three hours of testimony.”<sup>38</sup> SDG&E’s offer to limit the time available for question to three hours on a Z-factor request seeking \$26 million is prejudicial to intervenors.

Mr. Rose stated that, “Mr. Phillips is willing to go to the Intervenor in San Diego, California, but the time and expenses of his travels require reimbursement. Please advise on those costs.”<sup>39</sup> SDG&E’s demand requiring intervenors to pay the travel expenses is highly prejudicial especially in light of the fact that intervenors have not had to pay travel expenses for insurance witnesses in GRC cases.

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<sup>36</sup> 8 February 2010, letter from Richard C. Rose, counsel for Marsh USA, to Aimee M. Smith; Subject: “Re: Testimony of Joseph E. Phillips”

<sup>37</sup> 8 February 2010, letter from Richard C. Rose, counsel for Marsh USA, to Aimee M. Smith; Subject: “Re: Testimony of Joseph E. Phillips”

<sup>38</sup> 8 February 2010, letter from Richard C. Rose, counsel for Marsh USA, to Aimee M. Smith; Subject: “Re: Testimony of Joseph E. Phillips”

<sup>39</sup> 8 February 2010, letter from Richard C. Rose, counsel for Marsh USA, to Aimee M. Smith; Subject: “Re: Testimony of Joseph E. Phillips”

Henricks countered the letter by seeking that SDG&E produce him at the hearing for Mr. Phillips to testify under oath before the ALJ and have that testimony and the cross-examination become part of the record.

Motion was withdrawn at the hearing because SDG&E expert witnesses were unable to show that there was an “insurance crisis.” Specifically, SDG&E failed to show produce evidence that California Governor found a crisis or that the Department of Insurance found there was a crisis. Rather, the alleged crisis was specific to SDG&E because it was forced to pay out claims related to its negligent maintenance of its power infrastructure and its proximate cause of the wildfires.

#### **IV. CONCLUSION**

Ms. Henrick counsel were a vital force in opposing the application. Henricks’ counsel attended and diligently asked questions at the deposition and hearing, and gathered evidence challenging the factual predicate of the application. Henricks counsel assisted in the thousands of documents, more than 100 pages of witness testimony, numerous ex part meetings with Commissioners and staff, filed numerous motions and pleadings, and the administrative law judge ruled against them. Henricks should be awarded intervenor compensation for the following reasons: (1) Henricks’ made a substantial contribution to the proceeding by providing a

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contextual factual background that assisted in Administrative Law Judge Proceeding; and (2) Henricks made a substantial contribution to the proceeding by preserving the record for appeal.

Respectfully Submitted,

*/s/ Michael J. Aguirre*

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**CERTIFICATE OF SERVICE**

I hereby certify that I have this day served a copy of the foregoing **REPLY TO SAN DIEGO GAS & ELECTRICT RESPONSE TO RUTH HENRICKS REQUEST FOR INTERVENOR COMPENSATION RELATED TO DECISION 10-12-053** by electronic mail to each party listed in the attached CPUC Service List for Proceeding A0908019.

Dated this 15th day of April, 2011, at San Diego, California.

*/s/ Maria E. Byrnes*

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Maria E. Byrnes

## CALIFORNIA PUBLIC UTILITIES COMMISSION

### Service Lists

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**PROCEEDING: A0908019 - SDG&E - TO RECOVER U**  
**FILER: SAN DIEGO GAS & ELECTRIC COMPANY**  
**LIST NAME: LIST**  
**LAST CHANGED: FEBRUARY 8, 2011**

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