

Decision 07-07-041 July 26, 2007

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Application of PACIFIC GAS AND ELECTRIC
COMPANY to Recover Incremental Costs
Related to the 2005-2006 New Year's Storms and
July 2006 Heat Storm Recorded in the
Catastrophic Event Memorandum Account
(CEMA) Pursuant to Public Utility Code
Section 454.9.

Application 06-11-005
(Filed November 13, 2006)

(See Appendix B for List of Appearances.)

OPINION DENYING APPLICATION IN PART

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OPINION DENYING APPLICATION IN PART

1. Summary

During the hot weather of July 2006, certain equipment of Pacific Gas and Electric Company (PG&E) failed. In part of this application, PG&E characterizes this event as catastrophic and seeks to have its expenses and investments in repairing the damage given the extraordinary ratemaking treatment allowed under certain circumstances through its Catastrophic Event Memorandum Account (CEMA). We find that PG&E has not satisfied the applicable eligibility standards for CEMA ratemaking treatment. We therefore deny the application.

Our denial means only that the expenses and investment do not qualify for CEMA treatment. Repairs for severe weather damage are expected to occur and are handled as a matter of course in general rate cases. This proceeding remains open, however, to consider the other part of the application, namely, PG&E's request to recover any incremental costs for the 2005-2006 New Year's storms pursuant to its CEMA tariff.

2. Background: General Ratemaking and CEMA

To help understand this application, we briefly discuss and contrast the two types of ratemaking that provide necessary background. Historically, the Commission sets rates through general rate cases on the basis of test year forecasts; we call this "general ratemaking" and we discuss it first.

We then discuss CEMA, which responds to some of the limited circumstances where the Commission calculates rates not on a forecast basis as in general ratemaking, but on the basis of recorded costs. We explain CEMA's rationale and trace its exposition in Commission resolution, PG&E's tariff and enactment by the California Legislature.

Finally, we discuss the prohibition against retroactive ratemaking, which limits the circumstances in which the Commission may use previously recorded costs to set rates.

2.1. General Ratemaking

Under general ratemaking principles, the Commission allows a utility such as PG&E to file a general rate case application to recover in base rates a forecast of its operating costs to provide customers safe and reliable service.¹ The Commission adopts a test year forecast based on the best information about expected future events and historical trends. By using a prospective forecast methodology PG&E has an opportunity to recover its costs and earn a return (profit) on its investment in plant in service. PG&E is expected to exercise discretion to expertly manage its operations during the test year and adapt as necessary to differences between the forecast and actual events. Included in the test year forecast are allowances for damages to plant, accidents, and general maintenance and repairs. Every subsequent general rate case allows PG&E to reflect its prior actual investment in plant as a part of the forecast for the next test year. Thus, when PG&E spends more money than forecast for capital projects during the prior test-period, it adjusts the next test year forecast to include the actual investment in utility plant.

2.2. CEMA

Following the October 17, 1989 Loma Prieta earthquake, the Commission adopted Resolution E-3238, dated July 24, 1991, which ordered that any utility, as defined by Pub. Util. Code § 216, was authorized to establish a “Catastrophic

Event Memorandum Account.” (Ex. 4.)² The resolution described the conditions for invoking CEMA and its general operation. In compliance, PG&E filed Advice Letter 1367-E (for the electric department) on August 7, 1991. PG&E’s initial CEMA tariff was effective on August 7, 1991.³

Resolution E-3238 described that the purpose of CEMA is:

... to record costs of: (a) restoring utility service to its customers; (b) repairing, replacing or restoring damaged utility facilities; and (c) complying with government agency orders resulting from declared disasters. (*Mimeo.*, p. 1.)

The resolution discussed the need for an established account which would ensure there was no issue of retroactive ratemaking – that an in-place mechanism would provide a legitimate vehicle to recover eligible costs.

The resolution specifically discussed eligibility:

Because the intent of such [CEMA] is to capture for consideration for later recovery only those costs associated with truly unusual, catastrophic events such as the Loma Prieta earthquake, their use will be restricted to events declared disasters by competent state or federal authorities. Other events not so officially designated are outside the scope and intent of this authority and will not be considered for recovery under this mechanism. (Resolution E-3238, *mimeo.*, p. 2.)

PG&E’s current tariff similarly states:

The purpose of the CEMA is to recover the costs associated with the restoration of service and PG&E facilities affected by a

¹ The Commission decided PG&E’s most recent general rate case in Decision 07-03-044 dated March 15, 2007.

² A catastrophe is “an event causing great damage or suffering.” (Compact Oxford English Dictionary.)

³ PG&E’s current CEMA tariff is included in Ex. PG&E-2, pp. 1-1 and 1-2.

catastrophic event declared a disaster or state of emergency by competent federal or state authorities. (Ex. PG&E-2, p. 1-1.)

In 1994, after the Commission first adopted CEMA tariffs for the energy utilities, the California Legislature enacted Senate Bill (SB) 1456 (1994 Legislative Session (Chapter 1156)), which added § 454.9 to the Pub. Util. Code:⁴

(a) The commission shall authorize public utilities to establish catastrophic event memorandum accounts and to record in those accounts the costs of the following: (1) Restoring utility services to customers. (2) Repairing, replacing, or restoring damaged utility facilities. (3) Complying with governmental agency orders in connection with events declared disasters by competent state or federal authorities.

(b) The costs, including capital costs, recorded in the accounts set forth in subdivision (a) shall be recoverable in rates following a request by the affected utility, a commission finding of their reasonableness, and approval by the commission. The commission shall hold expedited proceedings in response to utility applications to recover costs associated with catastrophic events.

2.2.1. Prohibition Against Retroactive Ratemaking

There was a specific need for the Commission to create a CEMA mechanism to avoid retroactive ratemaking issues.

It is a well established tenet of the Commission that ratemaking is done on a prospective basis. The Commission's practice is not to authorize increased utility rates to account for previously incurred expenses, unless, before the utility incurs those expenses, the Commission has authorized the utility to book those expenses into a memorandum or balancing account for

⁴ All statutory references are to the Pub. Util. Code, unless otherwise stated.

possible future recovery in rates. This practice is consistent with the rule against retroactive ratemaking. (43 CPUC 2d 596, 600.)

The courts have recognized this problem and found:

If the prohibition against retroactive ratemaking is to remain a useful principle of regulatory law and not become a device to fetter the commission in the exercise of its lawful discretion, the rule must be properly understood. In [PacTel]⁵ . . . we construed Public Utilities Code section 728 to vest the commission with power to fix rates prospectively only. But we did not require that each and every act of the commission operate solely in futuro; our decision was limited to the act of promulgating “general rates.” (Southern California Edison Co. v. Public Utility Commission, 20 Cal. 3d 813 (1978) at 816.)

Under § 728, the Commission is allowed to create various mechanisms that ensure that it meets its obligation to approve costs for recovery as well as to anticipate the unknown.⁶ Essentially, no utility can recover any cost without Commission approval. This approval takes several forms, for example: adopting forecast costs in general rate cases; adopting a balancing account to allow recovery of actual reasonable costs that cannot be accurately forecast; or in the case of catastrophic events, when we cannot predict when, or the nature of, an event which may happen, establishing a trigger mechanism and a process to recover reasonable costs.

⁵ *Pacific Telephone & Telegraph Co. v. Public Utilities Commission*, 62 Cal. 2d 634.

⁶ “Whenever the commission, after a hearing, finds that the rates or classifications, demanded, observed, charged, or collected by any public utility for or in connection with any service, product, or commodity, or the rules, practices, or contracts affecting such rates or classifications are insufficient, unlawful, unjust, unreasonable, discriminatory, or preferential, the commission shall determine and fix, by order, the just, reasonable, or sufficient rates, classifications, rules, practices, or contracts to be thereafter observed and in force.” Pub. Util. Code § 728.

3. Procedural History

Under the tariff PG&E is required to inform the Executive Director of the CPUC by letter within 30 days of a catastrophic event that PG&E has started booking costs in the CEMA. On August 21, 2006, the utility notified the Commission's Executive Director that it was recording costs in its CEMA in response to the hot weather experienced starting in mid-July 2006. (Ex. PG&E-2, pp. 1-3 - 1-5.) On September 12, 2006, the Executive Director responded to PG&E's letter and stated that according to PG&E's current CEMA tariff "the purpose of the CEMA is to recover the costs associated with the restoration of service and PG&E facilities affected by a catastrophic event declared a disaster or emergency by competent federal or state authorities." (Emphasis added in the letter.) (Ex. PG&E-5, p. 1, footnote 1.)

The Executive Director's letter also said that "PG&E's current tariff does not authorize recovery of such costs unless there has been a formal disaster declaration by the Governor or a competent federal authority."^{7, 8} (Ex. PG&E-5, p. 1.) While this interpretation of the tariff is technically inaccurate, the Executive Director was correct that previous CEMA claims had been accompanied by a declaration by the Governor or a competent federal authority. PG&E's claim related to the July 2006 heat was the first case in which a utility requested CEMA treatment for an event that was not declared an emergency by the Governor or President.

⁷ The tariff language actually refers to a declaration "by competent federal or state authorities."

⁸ Subsequent to PG&E sending its notification letter to the Executive Director, the U.S. Department of Agriculture (USDA) and the U.S. Small Business Association (SBA) issued disaster declarations related to unusual heat in July 2006.

PG&E filed this application on November 13, 2006 requesting recovery of costs recorded in the CEMA for two events – the 2005-2006 New Year’s Storm and the July 2006 Heat Storm. At the January 4, 2007 prehearing conference, the Administrative Law Judge (ALJ) indicated that he found the application was unclear on the basis for PG&E’s request to recover costs for the hot weather in July 2006 as a catastrophic event, pursuant to PG&E’s tariff (Ex. PG&E-2, pp. 1-2) and Resolution E-3238 (Ex. 4). PG&E provided an explanation of its justification.⁹ After consultation with the assigned Commissioner, an ALJ ruling was issued on January 17, 2007 finding that based upon the preliminary review of the application, supporting exhibits, and the prehearing conference statements and transcript, PG&E had not proven its case and did not appear likely to demonstrate that the hot weather in July 2006 was an eligible catastrophic event.¹⁰ Nevertheless, the ruling provided for a further round of argument. Pursuant to the ruling, PG&E filed further argument on January 31, 2007 and on February 9, 2007, the Division of Ratepayer Advocates (DRA), The Utility Reform Network (TURN), and Southern California Edison Company (Edison) filed replies.¹¹

⁹ TR. pp. 8 – 11.

¹⁰ See Cal. Evid. Code § 500: Except as otherwise provided by law, a party has the burden of proof as to each fact the existence or nonexistence of which is essential to the claim for relief or defense that he is asserting.

¹¹ Notice of the application appeared in the Commission’s Daily Calendar on November 16, 2006. The Commission preliminarily categorized it as ratesetting in Resolution ALJ 176-3183, dated November 30, 2006 and also determined that hearings were necessary. DRA and TURN filed timely protests on December 18, 2006. PG&E replied timely on January 2, 2007. By a ruling dated December 1, 2006, PG&E was directed to serve copies of any and all documentation that support the assertion of government-declared disasters relating to the 2005-2006 New Year’s Storms and the

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4. Position of the Parties

4.1. PG&E

PG&E seeks to recover \$44.58 million in electric distribution and generation revenue requirements for the period 2005 - 2010 due to the \$61.96 million in costs it claims to have incurred or expects to incur to respond to these two events (\$22.86 million for the New Year's storms and \$39.1 million for the July 2006 heat wave). (See Application, p. 3. A subsequent update served on June 6, 2007 reduces the request to \$41.69 million.) PG&E states that the persistent high temperatures during the July 2006 heat caused a large number of distribution transformer failures in its service territory. The most damage occurred in Contra Costa, Alameda and Santa Clara counties. Damage was also experienced in Alpine, Amador, Calaveras, Colusa, Fresno, Glenn, Marin, Napa, Placer, Sacramento, San Joaquin, Solano, Sonoma, Stanislaus, Sutter and Yolo counties. (Application, p. 10.) PG&E's costs were incurred in restoring service and repairing the utility's electric distribution facilities. (Application, p. 11.)

PG&E's January 31, 2007 brief asserts why the hot weather of July 2006 is a CEMA-eligible event:

1. By the plain language of the statute, Public Utilities Code § 454.9 already permits the Commission to authorize recovery of the reasonable costs of restoring service and repairing damage to utility facilities in the wake of any catastrophic event.

July 2006 Heat Storm. In response to the ALJ's telephone request, PG&E served the relevant volume of workpapers on November 30, 2006 before service of the ruling. (Ex. PG&E-2.)

2. The July 2006 “heat storm” also meets the requirements of Resolution E-3238 in that it was the subject of disaster declarations by competent state and federal authorities.
3. PG&E’s costs meet the legal standard for recovery and should be recoverable on a public policy basis, as both PG&E and the Commission want PG&E to be able to provide the best possible service to customers. The costs are eligible for CEMA recovery.

4.2. Edison

Edison supports PG&E’s position. Edison argues that the hot weather of July 2006 was a statewide problem, and it cites operational impacts on its own system as well as the statewide electric transmission system operated by the California Independent Operating System (CAISO). (Edison Reply, pp. 3 - 4.) Edison notes that the CAISO declared several Stage 1 Emergency conditions and one Stage 2 condition, both of which have prescribed impacts on the transmission system and customers.

4.3. DRA

DRA opposes applying CEMA to PG&E’s July 2006 weather-related problems. DRA makes the point that PG&E must establish CEMA-eligibility based on the tariff that was in effect at the time of the event. DRA also argues that the disaster declarations by county governments, SBA, and USDA do not constitute disaster declarations by competent federal or state authorities. DRA asserts that the types of disaster declarations that are issued by these entities are for limited purposes and do not qualify as declarations by competent state or federal authorities for CEMA purposes. Furthermore, the language of the declarations bears no meaningful nexus to utility facility damage.

In the case of the county declarations, DRA emphasizes that because the county declarations primarily related to the removal of livestock carcasses, the

county declarations do not qualify as competent declarations for CEMA purposes. Additionally, recognizing county declarations as CEMA declarations would lower the standard for CEMA.

The SBA's disaster declarations trigger the availability of loans for small businesses. DRA does not believe that the type of disaster that triggers small business loans is a CEMA-related disaster. Similarly, the USDA declarations trigger certain federal loans. (DRA Reply, pp. 6-8.)

Furthermore, DRA emphasized in its reply that the Commission should establish a high standard for CEMA eligibility:

If there were no specific criteria for the type of catastrophic events that implicate CEMA-eligibility, such as disaster declarations by competent state or federal authorities, then PG&E could file for recovery of costs between rate cases any time it merely alleges that a catastrophic event occurred. Thus, after a Commission decision approving a rate case settlement or a ruling in favor of DRA or other consumer advocates on various issues in a litigated decision, PG&E could file to recover costs it simply had not forecasted, attempt to double recover costs, or not spend ratepayer-funded amounts on certain items, and then claim these items in a CEMA account for repairing, replacing or restoring damaged utility facilities. Consequently, absent this specific criteria for a catastrophic event, PG&E could nullify the benefit to PG&E's ratepayers of a compromise, which PG&E agreed to in a rate case settlement, or the favorable rulings for ratepayers in a litigated rate case. Conversely, there is no remedy for ratepayers between rate cases for decreasing PG&E's rates if it forecasted higher costs than what it subsequently incurred. (DRA Reply, p. 13.)

4.4. TURN

TURN opposes PG&E's application of CEMA to the events of July 2006. First, TURN argues the Commission has always interpreted § 454.9 as requiring a

declaration by state or federal officials. TURN contends § 454.9 did not remove or override the declaration requirement.

TURN makes this argument about the purpose of CEMA:

It is not the purpose of CEMA to allow cost recovery for damaged properties. For example, if a fire destroyed only PG&E's building and damaged very expensive computer equipment, such damage would not at all qualify for CEMA cost recovery. Just because the heat wave resulted in local emergencies does not, likewise, qualify such costs for CEMA purposes. PG&E, as always, can repair and replace transformers and add those to rate base; it just cannot change its approved revenue requirement until after the next rate case review of the reasonableness of its capital additions. (TURN Reply, p. 12.)

TURN also argues (Reply, p. 10) that PG&E did not have Commission approval of the pending Advice Letter 2771-G/2918-E¹² and therefore it would constitute retroactive ratemaking to allow PG&E to invoke CEMA without a competent declaration of an emergency.

TURN is opposed to expanding the definition of a competent declaration for CEMA purposes to include the county, SBA, and USDA declarations. TURN points out that the Governor's request that the Secretary of Agriculture declare a disaster only referred to agricultural impacts. TURN sees no rationale to expand the definition of a competent authority for CEMA-purposes to include financial disasters that impact a particular industry, such as the agricultural industry. (Reply, pp. 14-15.) TURN argues that the Commission should require a direct link between the nature of a declared emergency and the utility response. In this case TURN sees no direct link between the disaster declarations and the

¹² PG&E filed Advice Letter 2771-G/2918-E on October 18, 2006 to change the terms of its CEMA tariff, after these two events.

transformer replacements made by PG&E. For example, the counties that declared emergencies were primarily in hot valley climates while transformer outages were concentrated in the Bay Area counties of Santa Clara, Contra Costa, Alameda, and Sonoma. TURN maintains that CEMA recovery is intended for events that are highly likely to damage utility facilities. The Commission should have to find a nexus between the disaster and costs incurred by the utility.

TURN sees no such nexus here. (Reply, pp. 15-16.)

5. Discussion

PG&E must prove that the costs incurred in responding to the hot weather in July 2006 are eligible for CEMA recovery. The record for this application is composed of all filed documents and pleadings and the exhibits identified at the prehearing conference.¹³

5.1. PG&E Must Comply with Resolution E-3248 and PG&E's Tariff

To receive CEMA recovery PG&E must comply with Resolution E-3238 and its effective tariff. As discussed below, we disagree with PG&E's assertion that § 454.9 supersedes Resolution E-3248 and PG&E's tariff.

The legislative intent of SB 1456, which added § 454.9, was primarily to address the concern expressed by regulated water utilities that the Commission's process was untimely. The California State Assembly's floor bill analysis for SB 1456, dated August 13, 1994, stated:

¹³ On January 4, 2007, at the prehearing conference, the assigned ALJ identified five documents as exhibits: Ex. PG&E-1, Prepared Testimony; Ex. PG&E-2, Workpapers Supporting Chapter 1; Ex. PG&E-3, Workpapers Supporting Chapters 2 through 6; Ex. 4, Resolution E-3238; and, Ex. 5, September 12, 2006 letter, Commission Executive

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This bill seeks to make the CPUC procedures for rate recovery of expenses incurred by water utilities during disasters more predictable and certain. Sponsored by the California Water Association, this bill responds to uncertainty and inconsistency in the CPUC decisions about cost recovery expenses incurred during and after the Loma Prieta and Northridge earthquakes. Since the bill's initial introduction, the CPUC has adopted regulations which are not in conflict with the bill's current provisions. (<http://www.leginfo.ca.gov>.)

The identical language above was in the Senate's analysis dated August 16, 1994. The Senate analysis further noted:

Following the 1989 Loma Prieta earthquake, the PUC issued a resolution authorizing public utilities to establish special accounts to record the costs of restoring utility service, repairing or replacing damaged facilities, and complying with government agency emergency response orders. Almost all utilities adversely affected by the 1994 Northridge earthquake will be establishing these special accounts. A number of utilities have indicated that the PUC's special disaster account system may not be sufficiently flexible to address utility emergency response concerns, and does not ensure expeditious approval action on the part of the PUC. (Ibid.)

Indeed, all the bill analyses emphasize the issue of speedy review. The Senate's analysis differs slightly on speedy review. The Assembly analysis said: "(SB 1456) Provides for immediate recovery of those utility costs upon a request and a finding of reasonableness..." The Senate's analysis stated: "The bill would allow utilities, on an expedited basis, to recover catastrophic event costs,

Director to PG&E. PG&E's CEMA Tariff is included in Ex. PG&E-2 at pp. 1-1 and 1-2. Resolution E-3238 was marked as Ex. 4.

including capital costs, in rates upon a commission finding of their reasonableness, and approval by the PUC.”

The Legislature was aware that the Commission’s existing ratemaking mechanism and Resolution E-3248 were effective at the time the Legislature enacted SB 1456 and added § 454.9 to the Pub. Util. Code. If the Legislature had intended to specifically prohibit or modify the Commission’s threshold requirement of a disaster declaration by a competent state or federal authority, it could have done so in the text of the bill and could have disclosed the intention in the various analyses. Instead, the analyses indicate that the Commission had already adopted regulations which were not in conflict with the bill's provisions, i.e., there was nothing in the current provisions (Resolution E-3248) to eliminate or modify.¹⁴

The Commission first adopted a CEMA procedure for water utilities in Resolution W-3474 dated November 22, 1989 after the 1989 Loma Prieta earthquake. This resolution predates Resolution E-3248. Then, in 1992 the Legislature enacted § 325 (Stats 1992 ch 752 § 1 (AB 2919)) directing the Commission to “...review existing rules, regulations, and orders and develop and adopt new rules, regulations, or orders, as may be appropriate or necessary to establish expedited procedures to be followed in the event that a determination is made by the President of the United States that an emergency exists ...” Section 325 also directed the Commission to consider expeditious treatment. As a result, the Commission adopted D.93-11-071 (52 CPUC 2d 223)

¹⁴ This conclusion is consistent with Pub. Util. Code § 454.9 which provides the Commission “shall authorize public utilities to establish catastrophic event

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finding: “[b]ased upon the comments received, we determine that existing authority, regulations, and procedures already permit and encourage the Commission and affected utilities to respond in the most expeditious fashion to emergency situations, whether or not declared by the President of the United States. We therefore do not modify our existing regulations or procedures.” And finally, in 1994 while SB 1456 was pending, the Commission adopted D.94-06-033¹⁵ that found the water utilities were protected from financial risk as a result of the CEMA tariff (Finding 25, (55 CPUC 2d 158, 193)). Thus, by 1994, the legislature was assured that the water utilities were protected from financial risk by the Commission’s existing practices which were not in conflict with the SB 1456 provisions, except for the need for expeditious treatment, which was included in § 454.9(b) discussed below.

The most important plain language impact of the enactment of SB 1456 and the addition of § 454.9 to the Code is found in this provision of § 454.9(b): “The commission shall hold expedited proceedings in response to utility applications to recover costs associated with catastrophic events.”

PG&E argues that the “plain language” of § 454.9, enacted after the Commission adopted Resolution E-3248, supersedes the resolution and its provisions. Specifically, according to PG&E, § 454.9 eliminates the requirement of a disaster declaration by a competent state or federal authority. (PG&E Brief, pp. 5-6.) But the statute is silent on this point. We find the statute did not

memorandum accounts...”. The Commission had already authorized such accounts and the statute does not require the Commission to amend these existing CEMA tariffs.

¹⁵ Investigation on the Commission's own motion into the financial and operational risks of Commission regulated water utilities, and whether current ratemaking procedures and policies require revisions.

mandate that we eliminate anything in the Commission's existing CEMA process.

We note PG&E did not seek authority to modify its CEMA tariff upon the 1994 enactment of SB 1456. PG&E only proposed to change its tariff when it filed Advice Letter 2771-G/2918-E on October 18, 2006. This was 12 years after the enactment of SB 1456, one month before it filed this application, and three months after the hot weather of July 2006. Because we reject PG&E's argument that SB 1456 superseded Resolution E-3248 to eliminate the disaster declaration requirement, we will direct the Commission's Energy Division to reject Advice Letter 2771-G/2918-E without prejudice.¹⁶ Consistent with our prior policy, we find no merit to eliminating or modifying the trigger mechanism for CEMA. A disaster declaration by a competent state or federal authority is required.

In the years following the adoption of Resolution E-3248, the Commission has rendered many decisions pursuant to the CEMA tariffs of several jurisdictional utilities, including several by PG&E (see Appendix A). Catastrophic event costs are recoverable only after the Commission makes a finding of their reasonableness and approves them following an expedited proceeding in response to the utility's filed application (§ 454.9(b)).

All of the approved CEMA applications have two common features: (1) a disaster declaration by a competent state or federal authority; and (2) citations to both Resolution E-3238 and § 454.9 for authority to recover reasonable costs on an expedited basis. (See a partial list of CEMA applications in Appendix A.)

¹⁶ We note that, due to the important policy issues presented, the correct vehicle for PG&E to request a change to an industry-wide CEMA policy would be to file a petition for a rulemaking, and not an informal advice letter.

PG&E, for example, recovered CEMA costs for seven separate disasters in D.00-04-050, all of which had been declared disasters, for events between 1991 and 1998.¹⁷ Thus, while several occurred after the enactment of § 454.9, PG&E relied on both its original tariff and the declarations. Two other examples include the responses by San Diego Gas & Electric Company (SDG&E) and Edison to declared disasters where the Governor's disaster declaration requested that the Commission direct the utilities to remove dead, dying, and diseased trees due to a catastrophic infestation of bark beetles and thereby invoke § 454.9(a)(3), to comply with a governmental order. In these cases the Commission allowed them to invoke the CEMA. (D.06-10-032 and D.06-10-038.)

5.2. Disaster Declaration by a Competent State or Federal Authorities

Resolution E-3238 and PG&E's effective tariff require a declaration by a competent federal or state authority, so we must determine if a qualifying declaration was made relating to the July 2006 Heat Storm.

A review of the Commission's decisions¹⁸ reveals that each event for which the Commission has authorized recovery of CEMA costs has been declared a disaster or state of emergency by the Governor of California and/or the President of the United States. Prior to this application, no utility has requested authorization to recover CEMA costs for events declared disasters by other state or federal governmental entities.

¹⁷ PG&E's qualified CEMA events included: (1) the February 1998 Storms, (2) the 1997 New Year's Flood, (3) the March 1995 Storms, (4) January 1995 Storms, (5) January 17, 1994 Northridge Earthquake, (6) the 1992 Calaveras and Shasta County Fires, and (7) the October 20, 1991 Oakland/Berkeley Hills Fire. (5 CPUC 3d, 663, 665-667.)

¹⁸ See as specific examples the decisions cited in Appendix A.

For July 2006, PG&E maintains that we should accept the USDA September 7, 2006 disaster declaration (Ex. PG&E-2, p. 1-14), the SBA declaration, and the eight county declarations included in Ex. PG&E-2.

Governor Schwarzenegger sought the USDA relief by letter dated August 1, 2006. (Ex. PG&E-2, p. 1-12.) He cited the “record setting heat wave that caused severe damage and tragedy to our state’s agricultural industry.” The governor did not issue a declaration of emergency himself or request a declaration from any federal and state governmental entity due to broader impacts. The USDA’s declaration only refers to agricultural impacts of the heat wave. The USDA declaration states, “This designation makes farm operators in both primary and contiguous counties eligible to be considered for low-interest emergency loans. ...” (Ex. PG&E-2, p. 1-15.) The Governor’s request and the USDA’s declaration make no reference to more general property damage that could be expected to include damage to utility property. We find no direct link between the agricultural impacts that led to the USDA’s declaration and the costs that PG&E incurred to restore service. Furthermore, the sixteen counties designated by the USDA as primary natural disaster areas did not include the Bay Area counties where PG&E claims to have incurred the greatest costs.¹⁹ The lack of a geographic nexus further weakens the argument that the USDA declaration constitutes a declaration by a competent federal authority for the purposes of triggering CEMA. Thus, we cannot accept the USDA declaration as a reasonable trigger to invoke CEMA.

¹⁹ Butte, Calaveras, Fresno, Glenn, Imperial, Kern, Kings, Madera, Merced, San Bernardino, Solano, Sonoma, Stanislaus, Sutter, Tehama, and Tulare Counties were

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The SBA's declaration related solely to financial impacts to small businesses and covered the same inland counties that were covered by the USDA declaration. There is no direct link between the impacts to small businesses that were covered by the SBA's declaration and the costs that PG&E incurred. Thus, we cannot accept the SBA's declaration as a reasonable trigger to invoke CEMA.

The counties exercised discretionary judgment within their jurisdictions to address primarily agricultural impacts and the need to temporarily exempt livestock producers from required carcass disposal practices.²⁰ For example, Merced County waived various rules to expedite removal and burial of animal carcasses. (Ex. PG&E-2, pp. 1-54 & 1-55.) The counties where PG&E incurred the greatest costs were not covered by county disaster declarations. We cannot accept these county declarations as a reasonable trigger to invoke CEMA because there is no direct link between the county's declarations and the costs that PG&E incurred to restore service.

We therefore reject PG&E's argument that for July 2006 there was a declaration by a competent state or federal authority to invoke CEMA as prescribed in PG&E's tariff and Resolution E-3248. Accordingly, we deny the application to recover under the CEMA procedures the costs associated with the hot weather in July 2006. This proceeding remains open to consider PG&E's request to recover any incremental costs for the 2005-2006 New Year's storms pursuant to its CEMA tariff.

designated as primary disaster areas. PG&E's costs were concentrated in counties adjacent to San Francisco Bay, including Contra Costa, Alameda, and Santa Clara.

²⁰ Kern County's proclamation of local emergency only refers to electrical outages in connection with the use of county facilities "as cooling facilities during these periods of extreme heat." It also addresses livestock carcass disposal. (Ex. PG&E-2, p. 1-56.)

6. Comments on Alternate Proposed Decision

The alternate proposed decision of Commissioner Rachelle B. Chong was mailed to the parties on June 29, 2007 in accordance with § 311(e) of the Pub. Util. Code. All parties stipulated to reduce the period for public review and comment by three days in accordance with Rule 14.6(b) in the Commission's Rules of Practice and Procedure. Opening comments on the alternate proposed decision were filed by PG&E on July 13, 2007 and by TURN on July 16, 2007. Reply comments were filed by DRA on July 23, 2007.

7. Assignment of Proceeding

John A. Bohn is the assigned Commissioner and Douglas M. Long is the assigned ALJ in this proceeding.

Findings of Fact

1. The Commission adopted Resolution E-3238 following the Loma Prieta earthquake to provide jurisdictional utilities a ratemaking mechanism to recover the reasonable costs incurred to (a) restore utility service to customers; (b) repair, replace or restore damaged utility facilities; and (c) comply with government agency orders resulting from declared disasters. The jurisdictional utilities were authorized to include a CEMA in their tariffs.

2. Resolution E-3238 states "[b]ecause the intent of such [CEMA] accounts is to capture for consideration for later recovery only those costs associated with truly unusual, catastrophic events such as the Loma Prieta earthquake, their use will be restricted to events declared disasters by competent state or federal authorities." It also states "[t]he costs eligible for entry into such a memorandum account are those necessary for: (a) restoring utility service to customers; (b) repairing, replacing or restoring damaged utility facilities; and (c) complying with government agency orders resulting from declared disasters."

3. The California Legislature enacted SB 1456 (1994 Legislative Session (Chapter 1156)) which added § 454.9 to the Pub. Util. Code. Section 454.9(b) added the requirement for the Commission to hold expedited proceedings for cost recovery.

4. PG&E's currently effective CEMA tariff includes the requirement that there be a declaration of emergency by a competent state or federal authority.

5. PG&E's proposed Advice Letter 2771-G/2918-E would eliminate the need for a disaster declaration by a competent state or federal authority.

6. Prior to this application, no utility has requested CEMA recovery for events declared disasters by governmental entities other than the Governor of California or President of the United States.

7. The USDA's and counties' declarations only relate to agricultural impacts or the need for cooling centers.

8. The SBA's declaration related solely to financial impacts to small businesses.

9. The primary counties covered by the USDA, SBA, and county declarations were different than the counties where PG&E incurred the greatest costs.

10. There is no direct link between the declarations of the USDA, SBA, counties and the costs that PG&E incurred to restore service.

Conclusions of Law

1. The Commission has broad discretion to set the terms and conditions included in PG&E's tariffs, including the CEMA, so long as they are not inconsistent with statutory requirements.

2. The Commission's practice and requirements for CEMA, as adopted in Resolution E-3248, conform to the requirements of § 454.9.

3. The legislative history of § 454.9 shows that the existing CEMA tariffs “are not in conflict with” the statute’s requirements.

4. The Commission’s Energy Division should be directed to reject Advice Letter 2771-G/2918-E without prejudice.

5. The part of this application that pertains to recovery of costs under CEMA related to the hot weather of July 2006 should be denied as PG&E has failed to satisfy the standards for eligibility set forth in the PG&E tariff and Resolution E-3248.

6. This order should be effective as soon as possible.

O R D E R

IT IS ORDERED that:

1. Pacific Gas and Electric Company’s (PG&E) request to recover incremental costs incurred due to the July 2006 Heat Storm is dismissed.

2. This proceeding remains open to consider PG&E’s request to recover any incremental costs for the “2005-2006 New Year’s storms” pursuant to its Catastrophic Event Memorandum Account tariff.

3. The Energy Division shall reject PG&E’s proposed Advice Letter 2771-G/2918-E without prejudice.

This order is effective today.

Dated July 26, 2007, at San Francisco, California.

MICHAEL R. PEEVEY
President
DIAN M. GRUENEICH
JOHN A. BOHN

RACHELLE B. CHONG
TIMOTHY ALAN SIMON
Commissioners

I reserve the right to file a concurrence.

/s/ JOHN A. BOHN
Commissioner

I reserve the right to file a concurrence.

/s/ RACHELLE B. CHONG
Commissioner

APPENDIX A

Table 1 Recent CEMA Proceedings		
Decision	Application	Proceeding
D.06-10-038	A.05-12-018	Southern California Edison Company, for authorization to recover costs incurred in 2004 and recorded in the Bark Beetle Catastrophic Event Memorandum Account.
D.06-10-034	A.06-06-020	Southern California Edison Company, for Authorization to Recover Costs Incurred in 2005 and recorded in the Rainstorm Catastrophic Event Memorandum Account.
D.06-10-032	A.06-07-012	San Diego Gas & Electric Company for Recovery of Costs related to the California Bark Beetle Infestation Under the Catastrophic Event Memorandum Account (CEMA).
D.06-01-036	A.05-09-001	Pacific Gas and Electric Company, to recover additional costs related to the 1997 New Year's Flood and 1998 February Storms recorded in the Catastrophic Event Memorandum Account (CEMA) pursuant to Ordering Paragraph 1 of Decision 04-09-020.
D.05-08-039	A.04-12-003	Southern California Edison Company, for authorization to Recover Costs Recorded in the Catastrophic Events Memorandum Account. (2003 Firestorms.)
D.05-08-037	A.04-06-035	San Diego Gas & Electric Company, under the Catastrophic Event Memorandum Account (CEMA) for recovery of costs related to the 2003 Southern California Wildfires.
D.00-04-050	A.99-01-011	Pacific Gas and Electric Company, to recover costs recorded in the Catastrophic Event Memorandum Account effective January 1, 2000.

(END OF APPENDIX A)

APPENDIX B
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Last Update on 23-MAY-2007 by: JVG
A0611005 LIST

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(END OF APPENDIX B)