

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA



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Order Instituting Rulemaking to
Consider Authorization of a Non-
Bypassable Charge to Support
California's Wildfire Fund.

Rulemaking 19-07-017

**OPENING COMMENTS
OF THE PUBLIC ADVOCATES OFFICE**

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I. INTRODUCTION

On July 26, 2019, the California Public Utilities Commission (Commission) issued its *Order Instituting Rulemaking to Consider Authorization for a Non-Bypassable Charge to Support California's Wildfire Fund* (OIR) pursuant to the statutory requirements of Public Utilities Code Section 3289,¹ added by Assembly Bill (AB) 1054 (Holden, Ch. 79, Statutes of 2019) on July 12, 2019. Section 3289 directs the Commission to determine the appropriateness of using the Commission's Section 701 authority² to approve a non-bypassable charge on the customers of certain electrical corporations to support California's Wildfire Fund (Fund), if such a charge is just and reasonable.

Pursuant to Rule 6.2 of the Commission's Rules of Practice and Procedure and the *Assigned Commissioner's Scoping Memo and Ruling* (Scoping Memo), issued August 14, 2019,³ the Public Advocates Office at the Public Utilities Commission (Cal Advocates) provides these opening comments.

II. SUMMARY OF RECOMMENDATIONS

The Public Advocates Office recommends that the Commission should not find the non-bypassable charge just and reasonable unless changes are made to address the concerns raised in these comments. As proposed, the non-bypassable charge supports a Fund that would:

- Offer no known and measurable benefit to ratepayers;
- Enable future utility windfalls;
- Underwrite potential utility mismanagement;
- Reduce utilities' incentives to operate their systems safely;
- Reduce utilities' incentives to defend against future liability claims;

¹ Unless otherwise stated, all code section references herein are to the Public Utilities Code.

² Section 701 provides: "The Commission may supervise and regulate every public utility in the State and may do all things, whether specifically designated in this part or in addition thereto, which are necessary and convenient in the exercise of such power and jurisdiction."

³ Scoping Memo, pp. 7 and 9.

- Remain in rates until 2036, regardless of actual conditions and costs; and
- Impose charges on PG&E ratepayers, with no guarantee that PG&E can access the Fund.

Each of these points is discussed in more detail, under Section V, below. Section V is organized to respond to the Scoping Memo’s request for parties’ comment on the following five questions:⁴

1. “[C]larification of whether the Wildfire Fund bond charge revenue requirement should be based on the 2013-2018 average dollar amount collected per the revenue requirement, or the average amount of the adopted revenue requirements over that same period.”
2. “Whether it is just and reasonable for the Commission to impose the Wildfire Fund non-bypassable charge...”
3. “...the extent to which establishment of the Wildfire Fund non-bypassable charge as defined by AB 1054 will lower the electrical corporations’ cost of capital...”
4. “...whether it is reasonable and appropriate for the Commission to direct an electrical corporation to impose and collect the charge on its ratepayers if the electrical corporation has not met the conditions specified in Section 3292(b)(1) to participate in the Wildfire Fund.”
5. “...the extent to which Governor Newsom’s Task Force report and the report by the Commission on Catastrophic Wildfire Cost and Recovery bear on the Commission’s determination of whether it is just and reasonable to impose the Wildfire Fund non-bypassable charge...”

These comments respond to Questions 2 through 5. The Public Advocates Office may respond to Question 1 in reply comments.

Administrative Law Judge (ALJ) Doherty issued two additional rulings, which were served on August 21, 2019, and August 23, 2019. Both rulings solicit additional comments to be incorporated into parties’ Opening Comments on August 29, 2019. The general topics of these additional rulings include the proposed Rate Agreement between the Commission and the Department of Water Resources (DWR) and the calculation of the revenue requirement of the proposed non-bypassable charge. The Public Advocates

⁴ Scoping Memo at pp. 7-8.

Office is not commenting on these additional issues at this time but reserves the right to respond to comments made by other parties.

III. BACKGROUND

The Scoping Memo provides that this proceeding is limited to the determination of whether the Commission should authorize ratepayer funding of the Wildfire Fund (Fund) established by AB 1054. The two main code sections at issue here are Section 3284 and 3289. However, the Commission’s consideration of this issue must look at the interplay between all of the provisions of AB 1054, which consists of a complex set of provisions designed to address the electrical corporations’ exposure to financial liability resulting from utility-caused wildfires.⁵

Section 3284 establishes the Wildfire Fund, to be accessed by utilities for payment of eligible wildfire claims, overseen by the Wildfire Fund Administrator (Fund Administrator). The Fund is set up to be a revolving liquidity fund reimbursable by the utilities.⁶ Section 3289 authorizes the Commission to consider imposing a non-bypassable charge on ratepayers to support the Fund, provided it determines that such a charge is “just and reasonable.” The non-bypassable charge is to be “collected in the same manner” as the DWR bond charges established after the 2000-01 California Energy Crisis.

Water Code Section 80550 requires that revenues from the non-bypassable charge be deposited in the DWR Charge Fund. The DWR Charge Fund may support the debt service of DWR bonds; the repayment of loans for the initial capitalization of the Wildfire Fund; any DWR reserves; other DWR contract obligations; and certain DWR administrative costs. DWR bonds may be issued up to the amount of \$10.5 billion in support of the Fund, following the defeasement or maturity of DWR’s outstanding bonds issued under Water Code Section 80134 to cover costs from the 2000-01 Energy Crisis.⁷

⁵ AB 1054, Findings, Section 1(a) 2.

⁶ Section 3291(a), (d).

⁷ Water Code Section 80544 and P.U. Code Section 3285.

Any remaining amounts from the proposed non-bypassable charge will be transferred to the Wildfire Fund.

Section 3292 governs the operation of the Wildfire Fund, should the state's three large electric utilities⁸ elect to make their respective initial shareholder contributions.² Under Section 3292, the Fund will operate as a substitute for excess utility insurance, at an attachment point¹⁰ of \$1 billion per calendar year.¹¹ A utility may seek payment from the Fund for eligible third-party liability claims that are settled or finally adjudicated, as long as they are determined by the Fund Administrator to be within the reasonable business judgment of the utility. Settlements of subrogation claims (those originated by an insurance carrier seeking to recover costs from a utility) would be authorized at the rate of 40% of total asserted claim value, unless the Fund Administrator finds sufficient reason to increase the payment rate. Pursuant to Sections 451.1 and 1701.8, the utility shall file a catastrophic wildfire cost recovery application with the Commission and reimburse the Fund for any costs that the Commission disallows.

Any utility that receives payments from the Fund shall file a cost recovery application under Sections 451.1(d) and 1701.8(b).¹² The Commission will allow

⁸ The three large electric utilities are San Diego Gas & Electric Company, Southern California Edison Company, and Pacific Gas and Electric Company (subject to additional conditions). Regional electrical corporations (such as PacifiCorp and Bear Valley Electric Service) may voluntarily participate in the Fund.

² AB 1054 provided a choice of two funds: a smaller liquidity fund under the terms of Section 3291, and a larger insurance fund under the terms of Section 3292. For purposes of these comments, the Public Advocates Office assumes that Section 3292 will be operative, given reporting on the decisions of San Diego Gas & Electric Company, Southern California Edison Company, and Pacific Gas and Electric Company to participate in the Fund (e.g., <https://www.bloomberg.com/news/articles/2019-07-25/pg-e-wants-in-on-wildfire-insurance-fund-but-others-will-decide>).

¹⁰ "Attachment point" refers to the aggregate amount of third-party claims above which the Fund may begin making payments. Below the attachment point, such claims would be met by a utility's commercial insurance coverage or self-retention, rather than the Fund. Section 3280(f) sets the attachment point at the greater of \$1 billion per calendar year or the amount of the insurance coverage required to be in place by the Fund Administrator, under Section 3293.

¹¹ See definition of "eligible claims" under Section 3280(f).

¹² Section 1701.8(b)(1)(A): "An electrical corporation may file an application pursuant to Section 451 or 451.1, as applicable, at any time after it has paid, or entered into binding commitments to pay, all or, if authorized by the commission for good cause, substantially all third-party damage claims, including payments made pursuant to judgments or settlement agreements related to a covered wildfire. Except as

recovery of just and reasonable costs and expenses.¹³ Utility conduct will be deemed reasonable when a utility holds a valid safety certification from the Commission during the period of time in which the fire in question ignited.¹⁴ A valid safety certification places the burden on parties to disprove the utilities' conduct.¹⁵

After the Commission makes its determination, a utility is only obligated to reimburse the Fund for the amount of disallowed costs, subject to a rolling three-year cap.¹⁶ The cap is set at 20% of the utility's transmission and distribution equity rate base, less any actual or pending reimbursements during the prior three-year "measurement period." For example, PG&E's shareholders face a reimbursement cap of approximately \$2.5 billion: $[20\% \times 53\%^{17} \times \$23.5 \text{ billion}^{18} = \$2.5 \text{ billion}]$. Under this cap, PG&E

authorized by the commission for good cause, before filing the application, the electrical corporation shall exhaust all rights to indemnification or other claims, contractual or otherwise, against any third parties, including collecting insurance proceeds, related to the covered wildfire. | (B) If an electrical corporation has received payments from the Wildfire Fund for a third-party damage claim for the covered wildfire, the electrical corporation shall file an application to recover the costs pursuant to subparagraph (A) no later than the earlier of the following: (i) The date when it has resolved all third-party damage claims and exhausted all right to indemnification or other claims, contractual or otherwise, against any third parties, including collecting insurance proceeds, related to the covered wildfire. | (ii) The date that is 45 days after the date the [A]dministrator requests the electrical corporation to make such an application." See also: Section 451.1(d).

¹³ Section 451.1(b).

¹⁴ Section 451.1(c): "An electrical corporation bears the burden to demonstrate, based on a preponderance of the evidence, that its conduct was reasonable pursuant to subdivision (b) unless it has a valid safety certification pursuant to Section 8389 for the time period in which the covered wildfire that is the subject of the application ignited. If the electrical corporation has received a valid safety certification for the time period in which the covered wildfire ignited, an electrical corporation's conduct shall be deemed to have been reasonable pursuant to subdivision (b) unless a party to the proceeding creates a serious doubt as to the reasonableness of the electrical corporation's conduct. Once serious doubt has been raised, the electrical corporation has the burden of dispelling that doubt and proving the conduct to have been reasonable."

¹⁵ Id.

¹⁶ Section 3292(h).

¹⁷ Pursuant to Ordering Paragraph 4 of D.12-12-034, PG&E's authorized capital structure includes 52% common equity and 1% preferred stock.

¹⁸ In its supplemental response to the Public Advocates Office's data request No. 16 in A.18-12-009 (PG&E's Test Year 2020 General Rate Case), PG&E reported its 2018 end-of-year electric transmission rate base as approximately \$7.5 billion, and its 2018 end-of-year electric distribution rate base as approximately \$16 billion.

would be obligated to reimburse the Fund only up to \$2.5 billion, regardless of whether it received more from the Fund for claims payments.

IV. GENERAL CONCERNS

The Commission must bear in mind its statutory obligation to protect ratepayers from unjust and unreasonable charges. Code Section 451 prohibits any public utility from demanding or receiving unjust or unreasonable charges:

All charges demanded or received by any public utility, or by any two or more public utilities, for any product or commodity furnished or to be furnished or any service rendered or to be rendered shall be just and reasonable. Every unjust or unreasonable charge demanded or received for such product or commodity or service is unlawful.

Every public utility shall furnish and maintain such adequate, efficient, just, and reasonable service, instrumentalities, equipment, and facilities, including telephone facilities, as defined in Section 54.1 of the Civil Code, as are necessary to promote the safety, health, comfort, and convenience of its patrons, employees, and the public.

All rules made by a public utility affecting or pertaining to its charges or service to the public shall be just and reasonable.

A. The Commission has discretion to not adopt the non-bypassable charge.

Section 3289(a) states that: “the Commission shall initiate a rulemaking proceeding to *consider* using its authority pursuant to Section 701 to require each electrical corporationto collect a non-bypassable charge from ratepayers of the electrical corporation to support the Wildfire Fund.....”¹⁹ Statutes and case law relating to statutory construction find that the plain language²⁰ of a statute should be used when that statute is interpreted. Given the plain language of Section 3289,²¹ the Legislature

¹⁹ Section 3289(a) (emphasis added.)

²⁰ Section 3289(a) (1).

²¹ Code of Civil Procedure, Section 16 et al.

gave the Commission the discretion to use its authority to impose a non-bypassable charge or to refrain from doing so.

B. The expedited nature of this proceeding raises due process concerns.

The Commission should not authorize billions of dollars in long-term bond costs to be repaid by ratepayers in a 90-day expedited proceeding without properly considering the consequences. The Commission's usual timeline set by statute for a ratesetting proceeding is 18 months.²² Here, where tens of billions of dollars in expenditures are under consideration, the schedule provides for only 90 days from the opening of the rulemaking to the date of the final decision.²³ The OIR originally contemplated a phased approach to this proceeding, as explained in and supported by the Public Advocates Office's Prehearing Conference statement.²⁴ A phased approach continues to be appropriate. The current procedural schedule alone runs afoul of the fundamental protections of due process, which require notice of a proposed deprivation of property right, and a meaningful opportunity to be heard.²⁵ It is incumbent upon the Commission to carefully consider the fairness and consequences of the imposition of the proposed non-bypassable charge.²⁶

C. The proposed non-bypassable charge creates perverse incentives for utilities.

The proposed charge and the Fund that it supports will fundamentally alter the regulatory compact. Under traditional cost-of-service regulatory principles and the law, the provision of safe service is an ongoing legal obligation of the utility. Rates charged for service include the costs of operations and the safety of those operations.²⁷ Under the

²² Section 1701.5.

²³ Scoping Memo, p. 9.

²⁴ See OIR at p. 3 and Prehearing Conference Statement of the Public Advocates Office at p. 4.

²⁵ Due process requires the opportunity to be heard "at a meaningful time and in a meaningful manner." (*Mathews v. Eldridge* (1976) 424 U.S. 319 at 333.)

²⁶ *Id.* at 334-335.

²⁷ Section 451. Excerpt: "Every public utility shall furnish and maintain such adequate, efficient, just, and

combined standard of the *Bluefield Water Works & Improvement Co. v. Public Service Comm'n.* and *Federal Power Comm'n v. Hope Natural Gas Co.* precedents, the utility is entitled to the recovery of its operating expenses and capital costs, including a return on equity investment commensurate with returns on comparable investments of similar risk.²⁸ The utility's shareholders are at risk for mismanagement and subject to disallowance for imprudently incurred costs. Any disallowance can serve to reduce the effective return on equity. This provides a basic incentive for the company to comply with the safety requirement of Section 451, lest its shareholders absorb costs that are disallowed due to safety incidents.

As described by other parties,²⁹ in Application (A.) 09-08-020 the Commission previously considered and rejected a proposed Wildfire Expense Balancing Account (WEBA) that would have altered these basic incentives in similar ways to the proposed charge currently before the Commission. Decision (D) .12-12-029 offers precedential guidance regarding some of these points, in its rejection of the WEBA due to overarching deficiencies:

*Specifically, the limitless potential for third-party claims, including fire suppression and environmental damage, all but invite governmental entities and everyone else affected by a wildfire to submit wildfire claims to utilities. The utilities, in turn, would have no financial motivation to defend such claims, and ratepayers, who ultimately must bear the cost of claims, are without any practical means of defense in the proposed scheme. Financial incentives for prudent risk management and safety regulation compliance are substantially undermined by the presumption of recovery from ratepayers.*³⁰

reasonable service, instrumentalities, equipment, and facilities, including telephone facilities, as defined in Section 54.1 of the Civil Code, as are necessary to promote the safety, health, comfort, and convenience of its patrons, employees, and the public.”

²⁸ *Bluefield Water Works & Improvement Co. v. Public Service Commission of the State of Virginia.*, 262 U.S. 679 (1923); *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591 (1944).

²⁹See, e.g., R.19-07-017, Prehearing Conference Statement of Ruth Henricks at p. 5-10.

³⁰ D.12-12-029 at p. 14.

Similar concerns arise in considering whether the proposed non-bypassable charge is just and reasonable. Rather than incentivizing prudent utility practices, the Wildfire Fund limits shareholders' exposure to the risk that utility mismanagement causes a catastrophic wildfire.³¹ If authorized, the proposed charge would function much in the same way by allowing utilities to avoid risk with no financial consequences.

These comments address these specific consequences in greater detail, below. Each subsection challenges the proposed charge as unjust and unreasonable. Taken together, they illustrate the full danger of adopting the charge: rates will increase, but the Fund may actually serve to reduce the achievement of safety outcomes by incentivizing negative utility behaviors regarding safety. These concerns must be addressed before the proposed charge can be found just and reasonable.

V. ANSWERS TO QUESTIONS IN THE SCOPING MEMO

This section is organized to respond to Questions 2 through 5 of the Scoping Memo.³² The Public Advocates Office may comment on Question 1 in reply comments.

A. Question 2: “Whether it is just and reasonable for the Commission to impose the Wildfire Fund non-bypassable charge as defined by AB 1054, with an explanation as to why or why not.”

The Public Advocates Office recommends that the Commission find the non-bypassable charge unjust and unreasonable, unless changes are made to address the concerns raised herein. As proposed, the non-bypassable charge is unjust and unreasonable, for the following reasons.

³¹ See Section VI(C), below.

³² Scoping Memo at pp. 7-8.

1. The proposed charge offers no known and measurable benefit to ratepayers.

The proposed non-bypassable charge does not recover any actual cost of electricity service that is known and measurable, let alone a cost whose recovery could be found just and reasonable. The proposed charge does not provide for any operating expense or any capital cost for used-and-useful plant necessary for the provision of safe, reliable electricity service. Instead, the proposed charge supports a Fund that addresses future wildfire-related claims that are unknown and unmeasurable. The proposed charge may or may not be utilized to meet such claims.

Although the Fund would function as a substitute excess insurance policy, the Fund's benefits are not shared with ratepayers, unlike the utilities' commercial insurance policies. Those policies, which ratepayers pay for, provide benefits that are indirectly shared with ratepayers. In particular, the potential magnitude of wildfire-related costs that might appear in a utility's cost recovery application is reduced by the applicable insurance coverage. In contrast, the insurance benefits of the Fund accrue to utility shareholders, not ratepayers. These shareholder benefits include the excess insurance itself, access to liquidity that requires no reimbursement (to the extent that costs are prudently incurred), and the cap on reimbursements.

2. The proposed charge enables future utility windfalls.

Once a utility seeks cost recovery for the payment of claims, it may receive payments both from the Fund and through cost recovery authorization from the Commission. The utility is not required to use the cost recovery revenues to reimburse the Fund, except for disallowed amounts up to the cap. Section 3292(h)(1) expressly requires the utility to reimburse the Fund (without cost recovery from ratepayers) for any amounts that are *disallowed* by the Commission after review of an application for cost recovery. In contrast, Section 3292(h)(2) prohibits any additional reimbursement of the Fund, within any three-calendar-year period.³³

³³ Section 3292(h)(2)(E): "Except as provided in paragraph (3), the electrical corporation shall not be

With respect to any prudent costs, the utility would satisfy its third-party claims through payments from the Fund, and then receive new revenues from customers as a result of the Commission’s cost recovery authorization.³⁴ Under this ratemaking structure, ratepayers must contribute twice: once to the Fund itself through the proposed non-bypassable charge, and a second time – directly to the utility – for any cost recovery authorized under Section 451.1.³⁵ A utility, therefore, can satisfy its wildfire claims costs through Fund payments – supported by the proposed charge – and then receive recovery of these same claims costs from ratepayers. Thus, the utility is paid twice for the same claims. In such cases, the utility would receive new incremental revenues from customers despite no corresponding obligation to reimburse the Fund.

Section 451.3 does provide for fines in the event that a utility requests recovery of previously authorized costs. However, this provision is limited to costs previously authorized by the *Commission*. In contrast, the *Fund Administrator* authorizes Fund payments. AB 1054 does not make it clear that this provision applies to Fund payments.

Finally, AB 1054 renders these windfalls more likely by requiring a different standard for the determination of prudence. Under Section 451.1, the Commission will deem wildfire costs to have been prudently incurred if the utility in question maintained a valid safety certification at the time of the fire’s ignition. The Commission is further required to consider a variety of mitigating factors in its reasonableness review. To maintain a safety certification, the utility must provide documentation of its implementation of its approved wildfire mitigation plan; its agreement to implement the findings of its most recent safety culture assessment, if applicable; its linkage of executive compensation to performance metrics, and its establishment of a safety committee of its board of directors, with board-level reporting to the Commission on safety issues.³⁶ The exact nature of these requirements is inexplicit, posing further risk

required to reimburse the fund for any additional amounts in any three-calendar-year period.”

³⁴ Section 451.1.

³⁵ Section 451.1(b) and (c).

³⁶ Section 3289(e).

that the proposed non-bypassable charge is not just and reasonable. For example, the performance metrics have not yet been specified, and poor metrics design could lead to perverse incentives.³⁷

The significance of this burden-shift cannot be understated. The AB 1054 list of requirements and approvals significantly alters the existing prudence review standard, and the *prima facie* finding of prudence for utilities with safety certifications stands in contrast to the fact-specific inquiry required under existing CPUC precedents for determining whether the utility acted reasonably and prudently in managing or operating its facilities.³⁸

3. The proposed charge underwrites potential utility mismanagement.

The proposed charge supports a Fund that undermines financial incentives for prudent management and safe operations and that condones utility mismanagement. In the event that the Commission disallows cost recovery for a wildfire event, the utility's obligation to reimburse the Fund is capped at 20% of the utility's transmission and distribution equity rate base.³⁹ The utilities' exposure is further reduced by the amount of actual and pending reimbursements for disallowances during the relevant three-year "measurement period." Only "[i]f the [Fund] [A]dministrator determines that the electrical corporation's actions or inactions that resulted in the covered wildfire constituted conscious or willful disregard of the rights and safety of others"⁴⁰ or the utility fails to maintain a valid safety certification⁴¹ would the reimbursement cap be lifted.

³⁷ See, "Could BP's safety incentives backfire?," available at <<https://www.industryweek.com/public-policy/could-bps-safety-incentives-backfire>>.

³⁸ See, e.g., *Appl. of SCE*, D.87-06-021 (1987) Cal. PUC LEXIS 588, *28-29; 24 CPUC 2d 476, 486 [the prudent manager "exercises reasonable judgment in light of the facts known or which should have been known at the time the decision was made."].

³⁹ Section 3292(h)(2).

⁴⁰ Section 3292(h)(3)(A).

⁴¹ Section 3292(h)(3)(B).

Instances of utility mismanagement could easily fall short of the “conscious or willful disregard” standard yet nonetheless cause a series of catastrophic wildfire events within any three-year period, producing a collective liability amount that could exceed the cap on shareholders’ liability. This cap is enabled by the Fund, which in turn is enabled by the proposed non-bypassable charge on ratepayers. Such caps subvert cost of service ratemaking, as true costs of service are necessarily and exclusively prudent. Requiring ratepayers to underwrite imprudent utility costs is unjust and unreasonable.

4. The proposed charge reduces utilities’ incentives to operate their systems safely.

The proposed non-bypassable charge supports a Fund that reduces utilities’ incentives to operate their systems safely. With the Fund, utility shareholders’ potential responsibility for liabilities associated with imprudently incurred wildfire costs is capped at 20% of the utility’s transmission and distribution equity rate base, less the amount of actual and pending reimbursements for disallowances during the relevant three-year “measurement period.”⁴² As the hypothetical costs of future fires approach the cap, the utilities have less of an incentive to prioritize safety: utilities’ shareholders’ exposure to the consequences of mismanagement is limited by the cap. The damage caused by recent wildfires and the recent track record of utility safety failures in California⁴³ make any charge that reduces the incentive to prioritize safety unjust and unreasonable.

5. The proposed charge reduces utilities’ incentives to defend against future liability claims.

The cap on shareholder exposure reduces utilities’ incentives to defend against future claims. Utilities facing hypothetical costs at the level of the cap have no incentive to defend against claims. This is because once the cap is reached, shareholders will not be responsible for reimbursing the Fund for any additional amounts, following a finding

⁴² Section 3292(h)(2).

⁴³ Notably including the wildfire events in 2007, 2015, 2017, and 2018.

of imprudence.⁴⁴ Regardless of how robustly the utility defends against claims beyond the cap amount, its shareholders will be unaffected.

In contrast, ratepayers' exposure to those potential wildfire liabilities is not capped. The failure of a utility to mount a robust defense against claims beyond the cap amount will expose ratepayers to significant costs. Under Section 451.1(c), a utility that maintains its valid safety certification, as required to access the Fund, would be "deemed to have been reasonable" in its conduct, with the burden to demonstrate otherwise falling to intervenors.

6. The proposed charge may remain in rates until 2036, regardless of the success of ongoing risk reduction efforts.

The proposed non-bypassable charge supports a Fund that will be used to expedite claims payments in the event of a future wildfire. Such costs are not known and measurable. The proposed non-bypassable charge supports the debt service of a potential bond issuance, but the utilization of the bond proceeds is hypothetical. The utilities have begun implementing their Wildfire Mitigation Plans, which include risk reduction measures, including enhanced vegetation management and capital expenditures for grid hardening. If these measures are effective, they will reduce the incidence of future catastrophic wildfires, in turn reducing payouts from the Fund. AB 1054 does not clarify the disposition of the Fund balance, including any ratepayer refunds, in the event that the Fund is not drawn down.

Regardless of whether or not conditions result in the drawdown of the Fund, the proposed charge may nonetheless remain at the same level in rates until 2036.⁴⁵ The proposed non-bypassable charge is independent of the actual incidence of future fires, the actual operation of the Fund, and the actual utilization of the future bond proceeds. Without these details, the only known and measurable result of the charge – the only effect upon which the charge might be judged just and reasonable – is the estimable debt

⁴⁴ Section 3292(h)(2)(E).

⁴⁵ P.U. Code Section 3289(c) and Water Code Sections 80524(a) and 80544(b).

service capacity that the charge enables. Without any assurance that the bond proceeds will serve just and reasonable costs, the proposed charge cannot be known to be just and reasonable.

B. Question 3: “Explain the extent to which establishment of the Wildfire Fund nonbypassable charge as defined by AB 1054 will lower the electrical corporations’ cost of capital, enhance the electric corporations’ financial viability, and reduce costs to ratepayers.”

The impact on electrical corporations’ cost of capital can be addressed in future cost of capital proceedings. The scope of this OIR does not include the many issues that would need to be addressed to resolve this question fully. It is not the responsibility of ratepayers or the Commission to “enhance the electric corporations’ financial viability,” only to provide a reasonable return commensurate with returns on comparable investments of similar risk.⁴⁶

Nonetheless, the reactions of the credit ratings agencies to AB 1054 do not support the question’s assumption that the Fund will reduce costs to ratepayers by dint of a lower cost of capital. For example, S&P did not change its ratings for either Southern California Edison Company (SCE) or San Diego Gas & Electric Company in response to AB 1054 and the commitment of both companies to participate in the Fund.⁴⁷ In both ratings affirmations, S&P warned of potential reasons to downgrade the utility within the

⁴⁶ *Bluefield Water Works & Improvement Co. v. Public Service Commission of the State of Virginia*, 262 U.S. 679 (1923); *Federal Power Commission v. Hope Natural Gas Co.*, 320 U.S. 591 (1944). See also: *Covington & Lexington Tpk. Rd. Co. v. Sandford*, 164 U.S. 578, 596-97 (1896) (“If a corporation cannot maintain such a highway and earn dividends for stockholders, it is a misfortune for it and them which the Constitution does not require to be remedied by imposing unjust burdens on the public.”); *Market St. Ry. Co. v. R.R. Comm’s of Cal.*, 324 U.S. 548, 567 (1945) (“The due process clause has been applied to prevent governmental destruction of existing economic values. It has not and cannot be applied to ensure values or restore values that have been lost by the operation of economic forces.”).

⁴⁷ See “San Diego Gas & Electric Co. Ratings Affirmed, Outlook Revised To Stable From Negative,” July 30, 2019, available at < https://www.standardandpoors.com/en_US/web/guest/article/-/view/type/HTML/id/2274607>, and Edison International And Subsidiary Ratings Affirmed, Off Watch; Outlook Stable, July 26, 2019, available at < https://www.standardandpoors.com/en_US/web/guest/article/-/view/type/HTML/id/2272762>.

next 18 months. For SCE, S&P specifically warned that an upgrade within the next year is “unlikely.”

The proposed non-bypassable charge will increase costs to ratepayers. The current DWR bond-related revenue requirement pays for outstanding DWR bonds with final maturities in 2022. As these bonds are finally defeased or paid in full at maturity, the corresponding revenue requirement declines to zero. Imposing the proposed non-bypassable charge would require ratepayers to pay more than they otherwise would pay. As described above in Section VI, this proposed non-bypassable charge does not insulate ratepayers from further rate increases for the recovery of actual wildfire costs, and it may increase costs by incentivizing negative utility behaviors with regard to safety.

C. Question 4: “If the Commission determines that the imposition of the nonbypassable charge is just and reasonable, whether it is reasonable and appropriate for the Commission to direct an electrical corporation to impose and collect the charge on its ratepayers if the electrical corporation has not met the conditions specified in Section 3292(b)(1) to participate in the Wildfire Fund.”

The potential imposition of the non-bypassable charge under the conditions specified in Section 3292(b)(1) further illustrates that the proposed non-bypassable charge is not just and reasonable. PG&E ratepayers could be required to pay the proposed charge even if PG&E is ultimately precluded from accessing the Fund. At the prehearing conference of August 8, 2019, PG&E explained that the Commission may reach a decision on the proposed charge before it is known whether or not PG&E’s eventual plan of reorganization will satisfy the conditions that Section 3292 places on bankrupt utilities.⁴⁸ It is unclear if the bankruptcy court will consider the requirements of Section 3292 in affirming a plan of reorganization. The plan may fail to meet the Section 3292 conditions, prohibiting PG&E from accessing the fund.⁴⁹

⁴⁸ R.19-07-017, Reporter’s Transcript, Prehearing Conference of August 8, 2019, p. 34: 16-25.

⁴⁹ Section 3292(b).

Were this scenario to occur, the Commission may nonetheless be unable to remove or revise the proposed charge, given certain prohibitions in AB 1054.⁵⁰ Moreover, the Commission may not be able to require refunds from the Fund or a revenue requirement true-up from DWR. As AB 1054 includes no such provision for refunds, any requirement for PG&E's ratepayers to support the Fund without assurance that PG&E can access the Fund would be unreasonable on its face.

D. Question 5: “Explain the extent to which Governor Newsom’s Task Force report and the report by the Commission on Catastrophic Wildfire Cost and Recovery bear on the Commission’s determination of whether it is just and reasonable to impose the Wildfire Fund non-bypassable charge as defined by AB 1054.”

These reports cannot lawfully bear on the Commission’s determination of whether the proposed non-bypassable charge is just and reasonable. These documents were developed to inform the Legislature and the Governor.⁵¹ They provide high-level strategic alternatives aimed towards legislative action. In contrast, the Commission’s determination requires detailed analysis of the legal, institutional, and policy-related implications of the proposed non-bypassable charge.

VI. CONCLUSION

The Public Advocates Office recommends that the Commission should not find the non-bypassable charge just and reasonable, unless changes are made to address the concerns raised in these comments. As proposed, the non-bypassable charge supports a Fund that would:

- Offer no known and measurable benefit to ratepayers;
- Enable future utility windfalls;
- Underwrite potential utility mismanagement;
- Reduce utilities’ incentives to operate their systems safely;
- Reduce utilities’ incentives to defend against future liability claims;

⁵⁰ P.U. Code Section 3289(c) and Water Code Sections 80524(a) and 80544(b).

⁵¹ See, e.g., Public Resources Code Section 4205(b).

- Remain in rates until 2036, regardless of actual conditions and costs; and
- Impose charges on PG&E ratepayers, with no guarantee that PG&E can access the Fund.

Respectfully submitted,

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