



**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
(Filed July 26, 2019)

**WILD TREE FOUNDATION
COMMENTS ON SCOPED ISSUED**

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Dated: August 29, 2019

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COMMENTS ON SCOPED ISSUES**

In accordance with the provisions of the Assigned Commissioner’s Scoping Memo and Ruling (“Scoping Memo”) and Administrative Law Judge’s Ruling Soliciting Party Comment On Revenue Requirement Calculation and Administrative Law Judge's Ruling Soliciting Party Comment On Proposed Rate Agreement Wild Tree Foundation (“Wild Tree”) submits the following comments.

The Commission cannot legally approve any rate increase in this proceeding, as described more fully below. While the Code mandates that the Commission reach a decision based upon a mandated schedule, it does not mandate what that decision must be. The Commission should, therefore, decline to adopt any rate increase as unjust and unreasonable, beyond the Commission’s authority, and in violation of the law. If the Commission acts otherwise and approves upwards of \$15 billion of rates it would be a taking of ratepayers’ property without due process in violation of the California and United States Constitutions. Imposition of rates under such circumstances is unquestionably unreasonable and unjust and would be in violation of the Public Utilities Code.

A decision based upon the proposed schedule that approves a rate increase as described in section 3289 will be an unconstitutional taking in violation of ratepayers’ due process rights to notice and an opportunity to be heard and would violate the Public Utilities Code and Commission Rules. The Legislature does not have the power to subvert constitutional due

process rights in enacting a law, as the Scoping Memo seems to imply.¹ The schedule proposed in the Scoping Memo does not allow ratepayers and ratepayer advocates notice and meaningful opportunity to be heard. If the Commission cannot provide ratepayers a process that provides notice and opportunity to be heard within the mandated 90 day schedule, it must deny any rate increased based upon AB 1054. The proposed schedule does not set a path by which a legitimate decision can be reached as there will be no record developed, no facts put into evidence, no hearings held, no legal briefing, and potentially no meaningful opportunity for comment on a proposed decision. The Governor Newsom’s Task Force report and the report by the Commission on Catastrophic Wildfire Cost and Recovery are not proper materials for official notice and, as uncorroborated hearsay, cannot be the sole basis for any findings of facts. Section 3289’s prohibition on the Commission’s ability to amend or modify the decision reached in this proceeding prior to 2036 is a further denial of due process.

The proposed rate increase should also be denied as unreasonable, unjust, unsafe, and unconstitutional because it would serve to wrongly socialize risk to all Californians while privatizing gains to the shareholders of the for-profit investor owned utilities (“IOUs”) as well as disincentivizing IOUs to invest in and prioritize safety. The Commission must examine the legality and safety implications of allowing the IOU’s to be enriched with ratepayer funds based upon a ministerial, staff-level decision, likely immune from judicial review. Unfortunately, the Scoping Memo did not adopt Wild Tree’s recommendation that the safety implications of its decision be added as a critical issue. The scheme whereby the Commission Executive Director will preemptively declare an IOU worthy of a get-out-of-jail free card in the form of a safety certificate is unconstitutional and unsafe. The taking and holding of ratepayers’ property to be used in such a fashion, whereby judicial review of the ministerial decision is difficult if not impossible to attain and where the burden has been shifted to intervenors to prove imprudent IOU behavior would be an unjust and unreasonable unconstitutional taking. The Commission will be remiss in its mission should it persist in refusing to evaluate the safety implications of approving the AB 1054 rate increase.

¹ Scoping Memo at p. 9.

ANSWERS TO QUESTIONS

1. SCE's PHC statement seeks clarification 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. While the OIR contains a revenue requirement estimate of \$880 million that is based on annual revenue requirement amounts adopted by the Commission from 2013-2018, SCE suggests that AB 1054 should be interpreted in such a way that the annual revenue requirement should be based on the average dollar amounts actually collected from 2013-2018 and therefore should be \$896 million. EPUC also sought clarification on the context for the OIR's estimated annual revenue requirement. Parties are requested to address this issue in their comments, including proper statutory interpretation. Comments from PG&E, SCE, and SDG&E should include their respective "annual amount of collections" for year 2013, 2014, 2015, 2016, 2017 and 2018.

Wild Tree's only comments in regard to the specifics of the fee at this point is that it is entirely inappropriate for parties to be making comments on a proposed Rate Agreement between the California Public Utilities Commission and the California Department of Water Resources at this time. This is a matter that should be addressed only if and when the Commission actually determines that a rate increase is just and reasonable. The presentation of this document at this point makes it appear that the Commission has already pre-determined the Decision without conducting even the bare minimum of due process.

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.

It is not just and reasonable for the Commission to impose the Wildfire Fund fee because 1.) with no notice and meaningful opportunity to be heard, imposition of the fee will be a taking in violation of constitutionally guaranteed due process, 2.) the availability of the funds for utility enrichment based upon ministerial granting of a permit declaring a utility "safe" 3.) the Fund will wrongly socialize risk and privatize gain unduly enriching the private, for-profit investor owned utilities while making utility bills increasing unaffordable.

A. A Rate Increase Must be Just, Reasonable, and Based upon a the Record Developed in a Proceeding that Provides Due Process

The California Constitution grants the Commission authority to “fix rates” and “establish rules” for public utilities.² “The PUC is not an ordinary administrative agency, but a constitutional body with far-reaching powers, duties and functions. The Constitution confers broad authority on the PUC to regulate utilities, including the power to fix rates, establish rules, hold various types of hearings, award reparations, and establish its own procedures.”³

Pursuant to Public Utilities Code Section 451, which has not been amended for over 40 years *including by AB 1054*, all charges, service, and rules must be just and reasonable.⁴ In furtherance of section 451’s just and reasonable standard, the Commission has long been granted the power, also undisturbed by AB 1054, to “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.”⁵ “The California Supreme Court ‘has endorsed the commission's position: ‘The basic principle [of ratemaking] is to establish a rate which will permit the utility to recover its cost and expenses *plus* a reasonable return on the value of property devoted to public use.’”⁶

The Commission’s ratemaking authority is not absolute – it must provide due process in compliance with the Public Utilities Codes and its own Rules. Although permitted to establish its own procedures, the Commission is “subject, of course, to the constitutional obligation to satisfy due process. . .”⁷ The Public Utilities Code explicitly provides for due process: “The assigned commissioner shall schedule a prehearing conference and shall prepare and issue by order or ruling a scoping memo that describes the issues to be considered and the applicable

² Cal. Const., art. XII, § 6.

³ *Utility Consumers' Action Network v. Public Utilities Com.* (2004) 120 Cal.App.4th 644, 654 (citations omitted).

⁴ “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.” (Pub. Util. Code, § 451.)

⁵ Pub. Util. Code, § 701.

⁶ *SFPP, LP v. Public Utilities Commission* (2013) 217 Cal. App. 4th 784, 790 *quoting Southern Cal. Gas Co. v. Public Utilities Com.* (1979) 23 Cal.3d 470, 476.

⁷ *Pac. Gas & Elec. Co. v. Pub. Utilities Comm'n* (2015) 188 Cal. Rptr. 3d 374, 410.

timetable for resolution and that, *consistent with due process*, public policy, and statutory requirements, determines whether the proceeding requires a hearing.⁸

Due process requires a fair proceeding whenever an individual is to be deprived of property for a public purpose. Ratepayers have a property interest in utility service: “Utility service is a necessity of modern life; indeed, the discontinuance of water or heating for even short periods of time may threaten health and safety.”⁹ Pursuant to the 14th Amendment, “No state shall ... deprive any person of life, liberty, or property, without due process of law.”¹⁰ Likewise, under the California Constitution, “A person may not be deprived of life, liberty, or property without due process of law.”¹¹ A fundamental requirement of due process is “the opportunity to be heard.”¹² “It is an opportunity which must be granted at a meaningful time and in a meaningful manner.”¹³

The United State Supreme Court has long held that due process in ratemaking proceedings by the Commission requires a fair hearing. In *Railroad Com. of California v. Pacific Gas & Electric Co.*, the Court explained that the requirements of procedural due process are met only where “the rate-making agency of the State gives a fair hearing, receives and considers the competent evidence that is offered, affords opportunity through evidence and argument to challenge the result, and makes its determination upon evidence and not arbitrarily.”¹⁴

Due process also calls for a decision to be based on a record. “[T]he decisionmaker’s conclusion . . . must rest solely on the legal rules and evidence adduced at the hearing. To demonstrate compliance with this elementary requirement, the decisionmaker should state the reasons for his determination and indicate the evidence he relied on, though his statement need not amount to a full opinion or even formal findings of fact and conclusions of law.”¹⁵

Commission decisions must go further: Commission decisions “shall contain, separately stated, findings of fact and conclusions of law by the commission on all issues material to the order or

⁸ Pub. Util. Code, § 1701.1.

⁹ *Memphis Light, Gas Water Div. v. Craft* (1978) 436 U.S. 1, 18.

¹⁰ U.S. Const., 14th Amend.

¹¹ Cal. Const., art. I, § 7, subd. (a).

¹² *Grannis v. Ordean* (1914) 234 U.S. 385, 394.

¹³ *Armstrong v. Manzo* (1965) 380 U.S. 545, 552.

¹⁴ *Railroad Com. of California v. Pacific Gas & Electric Co.* (1938) 302 U.S. 388, 393-394.

¹⁵ *Goldberg v. Kelly* (1970) 397 U.S. 254.

decision.”¹⁶ “Every issue that must be resolved to reach that ultimate finding is ‘material to the order or decision,’ and findings are required of the basic facts upon which the ultimate finding is based. . . [S]uch findings afford a rational basis for judicial review and assist the reviewing court to ascertain the principles relied upon by the [PUC] and to determine whether it acted arbitrarily, as well as assist parties to know why the case was lost and to prepare for rehearing or review, assist others planning activities involving similar questions, and serve to help the [PUC] avoid careless or arbitrary action.”¹⁷

Commission decision are subject to being overturned by judicial review where the Commission has demonstrated an abuse of discretion whereby: (1) the commission has not proceeded in the manner required by law, (2) the decision of the commission is not supported by the findings, (3) the findings in the decision of the commission are not supported by substantial evidence in light of the whole record, or (4) the order or decision of the commission violates any right of the petitioner under the Constitution of the United States or the California Constitution.¹⁸

The review is broader where constitutional issues are presented. “Notwithstanding Sections 1757 and 1757.1, in any proceeding wherein the validity of any order or decision is challenged on the ground that it violates any right of petitioner under the United States Constitution or the California Constitution, the Supreme Court or court of appeal shall exercise independent judgment on the law and the facts, and the findings or conclusions of the commission material to the determination of the constitutional question shall not be final.”

B. Ratepayers Will be Denied Due Process Under the Proposed Schedule

The proposed schedule includes no testimony, no evidentiary hearings, no public participation hearings, and no legal briefing. Ratepayers will, therefore, be denied the process they are due to prevent an unconstitutional taking of their property. The OIR stated that “AB

¹⁶ Pub. Util. Code, § 1705; See also *Clean Energy Fuels Corp. v. Public Utilities Com.* (2014) 227 Cal. App. 4th 641.

¹⁷ *Clean Energy Fuels Corp. v. Public Utilities Com.* (2014) 227 Cal. App. 4th 641 quoting *Greyhound Lines, Inc. v. Public Utilities Com.* (1967) 65 Cal.2d 811 (citation omitted.)

¹⁸ Pub. Util. Code, § 1757, subd. (a); see *Save Our Peninsula Comm. v. Monterey Cnty. Bd. of Supervisors* (2001) 87 Cal.App.4th 99, 116–117.

1054 mandates that the Commission adopt a decision in this proceeding no later than 90 days after the initiation of the rulemaking. Therefore, the preliminary schedule for this proceeding is as follows . . .”¹⁹ The Scoping Memo also warns that the parties may not have a meaningful opportunity to comment on the proposed decision: “Parties should note that, due to the mandated expedited nature of this proceeding, the Commission may shorten the normal 30-day comments period for a proposed decision.”²⁰

The Commission is correct that the proceeding is mandated to be held in an unreasonably expedited fashion – section 3289 commands that “notwithstanding any other law, no later than 90 days after the initiation of the rulemaking proceeding, the commission shall adopt a decision regarding the imposition of the charge.”²¹ The Commission is further limited in its future actions in regard to this proceeding: “Notwithstanding Section 455.5 or 1708, or any other law, the commission shall not revise, amend, or otherwise modify a decision to impose a charge made pursuant to this section at any time prior to January 1, 2036.”²² The Commission is even further limited in what precisely it can approve: it can approve rate increase for large electrical corporations equal to an amount sufficient to fund the revenue requirement, as established pursuant to Section 80524 of the Water Code, and .005 cents/kWh for regional electric corporation customers.²³

Section 3289 thus limits the Commission in both how it conducts this proceeding and precisely what type of rate increase it can approve. But, the Commission is not mandated to approve any rate increase and should not do so. Section 3289 states that the Commission “shall initiate a rulemaking proceeding to consider using its authority. . . to collect a nonbypassable charge from ratepayers. . .”²⁴ and, if, only and if, “the commission determines that the imposition of the charge described in paragraph (1) is just and reasonable, and that it is appropriate to exercise its authority pursuant to Section 701 to do so” should the Commission approve the rate increase.²⁵

¹⁹ R.19-07-017, OIR at p. 3.

²⁰ Scoping Memo at p. 9.

²¹ Pub. Util. Code, § 3289, subd. (b).

²² *Id.* at subd. (c).

²³ *Id.* at subd. (a)(1).

²⁴ *Ibid.*

²⁵ *Id.* at subd. (a)(2).

The Commission should issue a decision that denies any rate increase based upon AB 1054. If the Commission acts otherwise, it would do so in violation of the United States Constitution, the California Constitution, the Public Utilities Code, and Commission rules that require a decision be supported by the findings and that findings are supported by substantial evidence in light of a record developed with notice and meaningful opportunity to be heard. Here, there would be no hearing, no evidence accepted, no record developed, and no meaningful opportunity for ratepayers to be heard. There will be no evidence to support conclusions of facts and thus no facts to support conclusions of law. The Commission cannot, under these circumstances, issue a legal decision.

The Scoping Memo wrongly determines that there are no procedural or due process issues in this proceeding:

While some parties raised procedural and due process concerns due to the expedited nature of the OIR's preliminary schedule, the schedule set out in this scoping memo and ruling provides due process consistent with the legislative mandates requiring that "the commission shall adopt a decision regarding the imposition of the charge" within 90 days after the initiation of the rulemaking proceeding. Parties have not demonstrated in prehearing conference statements that there are any material issues of fact in dispute that are necessary to resolve in this proceeding, and this scoping memo and ruling determines that a hearing is not necessary at this time. Accordingly, the process and schedule required, while expedited, meet minimum due process requirements and the Commission may modify the schedule if needed.²⁶

The Legislature does not have the ability to legislate away due process rights. The fact that the legislature has set an unreasonably expedited schedule and wrongly limited the ability for any changes to the decision in this proceeding does not mean that the Commission is absolved of its duty to provide due process. If the Commission cannot guarantee due process rights in the mandated schedule then it must not act to engage in a taking of ratepayer property and must deny any increase in rates.

The Scoping Memo provides not discussion of evidentiary hearings other than to state, "It is determined that an evidentiary hearing is not needed at this time."²⁷ As explained below, exactly how much ratepayer's utility bills will be raised by the imposition of the fee under different scenarios (i.e. an IOU does not participate, increase in behind the meter generation leading to decreasing basis for imposition of fees for some ratepayers, etc.) is a matter of fact

²⁶ Scoping Memo at p. 9.

²⁷ *Id.* at p. 8.

that should be modeled and examined in evidentiary hearings. The Commission cannot make a legally defensible decision that the rate increase will be just and reasonable if it has not made any findings of fact regarding how the increase will impact ratepayers' bills.

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 establishment of the Wildfire Fund will not lower the electrical corporations' cost of capital, enhance the electric corporations' financial viability, and reduce costs to ratepayers. The way this question is framed seems to indicate that it is assumed that the Fund will accomplish these things seems to indicate a disturbing results oriented decision has already been made in this proceeding. The Scoping Memo states, "The legislative findings supporting AB 1054 explain the intent for the Wildfire Fund. Specifically, they illustrate how the fund is but one of several significant efforts to address the danger of devastating wildfires related to utility infrastructure, by ensuring California maintains financially healthy electric utilities and reducing costs to ratepayers of utility-caused catastrophic wildfires."²⁸ This statement represents both findings of fact and conclusions of law that should not be made at this point in the proceeding. As discussed above and below, the actual impact on ratepayers' bills is an unsettled issue of material fact and Wild Tree objects to the conclusion that ratepayers costs will be reduced. Wild Tree also objects to the conclusion that the fund will "address the danger of devastating wildfires." The Fund will serve only to disincentivize the IOUs from prioritizing safety and will not therefore address the dangers of utility-caused fires. The safety impact of the Fund is an issue of material fact that should be examined in this proceeding through evidentiary hearings.

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.

This question highlights the problems with the way this proceeding is being administered. Without evidentiary hearings or any record development and without legal briefings, this and many other critical issues will not be addressed and the Commission has no recourse to make any

²⁸ *Id.* at p. 4.

adjustments to the fee in the future. Under these circumstances, the Commission must deny the rate increase.

While the contributions of the IOUs are based upon a formula set in AB 1054²⁹, the “fund allocation metric,” the amount set for the ratepayer fee is not based on a formula but is a set fee defined as an amount sufficient to fund the revenue requirement, as established pursuant to Section 80524 of the Water Code, and .005 cents/kWh for regional electric corporation customers.³⁰ Water Code section 80524 defines the revenue requirement as: “equal to the average annual amount of collections by the department with respect to charges imposed pursuant to the revenue requirements established by the department under Section 80110 of Division 27 for the period from January 1, 2013, through December 31, 2018.”³¹ The proposed annual revenue requirement of \$880,000,000 is approximately the average of the 2013-2018 revenue requirements (\$883,000,000 average per 2013-2018 Department of Water Resources Determinations of Revenue Requirement.)

Because the total ratepayer funded portion of the fund is a set amount, if it is determined that ratepayers from an IOU that has not met the participation requirements should not have to pay into the fund, this could substantially increase utility bills for the remaining ratepayers. If it is determined that all IOU ratepayers should have to pay even if an IOU has not met the participation requirements, then ratepayers of the participating IOU are subsidizing the non-participating IOU which seems unfair. Such scenarios should be modeled and explored in evidentiary hearings so that the potential impacts on ratepayers can be analyzed. But, this information has value only so far as the Commission can use the information.

AB 1054 prohibits the Commission from taking any future action in regards to the rate increase: “Notwithstanding Section 455.5 or 1708, or any other law, the commission shall not revise, amend, or otherwise modify a decision to impose a charge made pursuant to this section at any time prior to January 1, 2036.”³² Due to the fact that AB 1054 leaves many matters unaddressed including how the fee should be administered should an IOU not be eligible to participate, what happens if the fund runs out of money, what happens if there are competing claims and not enough in the fund for both, etc. the impact on ratepayers cannot truly be known.

²⁹ Pub. Util. Code, § 3280.

³⁰ *Id.* at subd. (a)(1).

³¹ Water Code, § 80524, subd.(a).

³² Pub. Util. Code, § 3289, subd. (c).

Because the Commission cannot make any changes in the future to adjust the fee if it becomes unreasonably high for some or all ratepayers, it cannot approve a rate increased pursuant to AB 1054 that is just and reasonable. The rate increase must, therefore, be denied.

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.

Governor Newsom’s Task Force report and the report by the Commission on Catastrophic Wildfire Cost and Recovery are, at best, hearsay evidence and have no bearing on the Commission’s determination of the reasonableness of the proposed \$15+ billion rate increase. As uncorroborated hearsay evidence is insufficient to support a finding of fact, the reports are of no use in this proceeding and should not be officially noticed.

If this proceeding proceeds as stated in the Scoping Memo, with no submission of any competent evidence and no record development, there will be no basis to support any findings of facts. If the Commission enters a decisions based solely upon the uncorroborated hearsay evidence of the reports, it will be an abuse of discretion as the decision will not supported by the findings because the findings in the decision of the commission will not be supported by substantial evidence.³³

The Scoping Memo implies that the Commission can supplant supposed “extensive hearings, reports, and debates conducted well over a year and a half”³⁴ for its own just and reasonableness review. As discussed herein, Wild Tree strongly disagrees with this contention – parties to this proceeding and ratepayer retain their right to constitutional due process and compliance with the Code and Commission Rules, regardless of any such external factors. The Commission must conduct a full and thorough review of the reasonableness of a \$15+ billion rate increase. Furthermore, the Scoping Memo does not accurately describe the relevant history. Most of AB 1054, including the wildfire fund sections, was introduced, passed, and enacted in

³³ See Pub. Util. Code, § 1757, subd. (a).

³⁴ Scoping Memo at p. 2 (“Establishment of the Wildfire Fund was informed by several significant statewide efforts to examine the growing risk of wildfires and solutions to mitigate that risk. This includes extensive hearings, reports, and debates conducted well over a year and a half, including Governor Newsom’s Task [sic] Force report and the report by the Commission on Catastrophic Wildfire Cost and Recovery.”)

two weeks. This is an extraordinarily rushed process that was expedited as emergency legislation. The legislation does not provide any solutions to the emergency that it purports to address – payment of damages to wildfire victims and prevention of future utility-caused fires. How and when wildfire victims from past fires, in particular the 2017 Napa Sonoma Fires and 2018 Camp Fire, will be compensated is still entirely up in the air.

The Scoping Memo indicates that the Commission intends to take notice of the reports and invites comments on the material within the report. “The Commission may take official notice of the Task [sic] Force report and the final report of the Commission on Catastrophic Wildfire Cost and Recovery in its decision in this proceeding. This scoping memo and ruling alerts parties that such notice may be taken, and the parties are invited to comment on material contained in the reports.”³⁵ It would be in violation of the Commission’s own rules for the Commission to accept into evidence the report in the fashion suggested in the Scoping Memo and for the Commission to base any findings of fact, absent other evidence, on materials contained within the report.

The reports cannot be properly admitted pursuant to official notice. Rule 13.9 limits the taking of official notice to material which “may be judicially noticed by the Courts of the State of California pursuant to Evidence Code section 450 et. seq.”³⁶ Evidence Code section 452 permits judicial notice of “official acts of the legislative, executive, and judicial departments of the United States and of any state of the United States.”³⁷ First, the reports, in particular the Strike Force report, are not official acts and there are no other relevant Evidence Code sections. Secondly, even if the reports were official actions they are not relevant to the Commission’s just and reasonableness review of increase in rates as proposed in AB 1054. “Although a court may judicially notice a variety of matters (Evid. Code, § 450 et seq.), only *relevant* material may be noticed. ‘But judicial notice, since it is a substitute for proof [citation], is always confined to those matters which are relevant to the issue at hand.’”³⁸ The reports do not provide evidence regarding whether or not the increased rates will be just and reasonable and are, therefore,

³⁵ Scoping Memo at p. 2.

³⁶ Rule 13.9.

³⁷ Evidence Code, § 452, subd. (c).

³⁸ *Mangini v. R.J. Reynolds Tobacco Co.* (1994) 7 Cal. 4th 1057, 1063 quoting *Gbur v. Cohen* (1979) 93 Cal.App.3d 296, 301.

irrelevant. They were prepared prior to drafting of AB 1054 sections on the Fund and provide only opinions, not official government action, that are of no probative value in this proceeding.

Finally, even if the reports can be properly noticed, the contents therein cannot. The Scoping Memo specifically requests parties to “comment on material contained in the reports”³⁹ but “while courts may notice official acts and public records, ‘we do not take judicial notice of the truth of all matters stated therein.’”⁴⁰ Additionally, the submission of evidence in this manner, with no opportunity for parties to object violates Rule 13.6 that provides, “Although technical rules of evidence ordinarily need not be applied in hearings before the Commission, substantial rights of the parties shall be preserved.”⁴¹

Even if the reports were properly submitted into evidence through sua sponte official notice by the Commission, “mere admissibility of evidence does not necessarily confer the status of ‘sufficiency’ to support a finding *absent other competent evidence*.”⁴² Pursuant to the Public Utilities Code,⁴³ Commission rules, and the California Supreme Court, “There must be substantial evidence to support ... a board's ruling, and hearsay, unless specially permitted by statute, is not competent evidence to that end.”⁴⁴

The Commission's proceedings are governed by its rules of practice and procedure, and “the Commission's own rulings preclude reliance on uncorroborated hearsay to support a finding of fact.”⁴⁵ The Commission's decisions follow the general rule stated in Government Code section 11513 that “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”⁴⁶ and articulated by the California Supreme Court in cases such as *Walker*.⁴⁷ For example, in D.05-06-033, the

³⁹ Scoping Memo at p. 2.

⁴⁰ *Mangini v. R.J. Reynolds Tobacco Co.*, *supra*, 7 Cal. 4th at p. 1063 citing *Love v. Wolf* (1964) 226 Cal.App.2d 378.

⁴¹ Rule 13.6, subd. (a).

⁴² *Util. Reform Network v. Pub. Utilities Comm'n*, *supra*, 167 Cal. Rptr. 3d at p. 760 quoting *Daniels v. Department of Motor Vehicles* (1983) 33 Cal.3d 532, 538fn. 3 (italics added.)

⁴³ Pub. Util. Code, § 1757, subd. (a).

⁴⁴ *Walker v. City of San Gabriel* (1942) 20 Cal.2d 879, 881 (*Walker*), overruled on another ground in *Strumsky v. San Diego County Employees Retirement Assn.* (1974) 11 Cal.3d 28, 37, 44, 112 Cal.Rptr. 805.)

⁴⁵ *Util. Reform Network v. Pub. Utilities Comm'n*, *supra*, 167 Cal. Rptr. 3d at p. 762 n10.

⁴⁶ Govt. Code, § 11513, subd. (d).

⁴⁷ *Util. Reform Network v. Pub. Utilities Comm'n*, *supra*, 167 Cal. Rptr. 3d at pp. 760-61.

Commission noted that “while hearsay is admissible in our administrative hearings, it cannot be the basis for an evidentiary finding without corroboration where the truth of the out-of-court statements is at issue. (Gov.Code § 11513(d).)”⁴⁸

The reports should not be noticed as they are irrelevant, not official government actions and provide no value to this proceeding as uncorroborated hearsay evidence.

CONCLUSION

The process by which an IOU would be able to use ratepayer funds to pay for damages from a fire it caused based upon a ministerial, pre-emptive staff decision that will not take into account IOU negligence or even recklessness, would be an unconstitutional taking and would provide the IOUs an undeserved windfall. It would also threaten public safety by disincentivizing IOUs to prioritize safety as the financial incentive to do so will be erased. The Commission should deny rate increase as unjust, unreasonable, unconstitutional, and unsafe.

Respectfully submitted,

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⁴⁸ D.05-06-033 at p. 53; *see also Util. Reform Network v. Pub. Utilities Comm'n*, *supra*, 167 Cal. Rptr. 3d at p. 761 quoting *Re Communication TeleSystems International* (1996) 66 C.P.U.C.2d 286, 292, fn. 8.) (“Consequently, hearsay is admissible in Commission proceedings, but it “may not be solely relied upon to support a finding.”)