BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

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Application of Southern California Edison Company (U338-E) for Authority to Establish Its Authorized Cost of Capital for Utility Operations for 2022 and Reset the Annual Cost of Capital Adjustment Mechanism.	Application 21-08-013 (Filed August 23, 2021)
And Related Matters.	Application 21-08-014 Application 21-08-015 [Consolidated]

COMMENTS OF THE UTILITY REFORM NETWORK, WILD TREE FOUNDATION, ENERGY PRODUCERS AND USERS COALITION, INDICATED SHIPPERS, ENVIRONMENTAL DEFENSE FUND, FEDERAL EXECUTIVE AGENCIES, PROTECT OUR COMMUNITIES FOUNDATION, UTILITY CONSUMERS' ACTION NETWORK, AND WALMART ON PROPOSED DECISION

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Pursuant to Rule 14.3 of the California Public Utilities Commission (Commission) Rules of Practice and Procedure, Energy Producers and Users Coalition (EPUC), Environmental Defense Fund (EDF), Federal Executive Agencies (FEA), Indicated Shippers (IS), The Protect Our Communities Foundation (PCF), The Utility Reform Network (TURN), Utility Consumers Action Network (UCAN), Walmart, Inc., and Wild Tree Foundation (Wild Tree) (collectively, the Joint Parties) submit the following comments on the November 10, 2021 Proposed Decision (PD) Granting Motions to Establish Memorandum Accounts Effective on January 1, 2022. As discussed further below, the Joint Parties are gravely concerned that PD grants the electric utilities request for memorandum accounts in such a way that commits legal error by, perhaps inadvertently, circumventing the already approved cost of capital adjustment mechanism. The Joint Parties recommend that the Commission correct the PD's significant legal errors by withdrawing the PD, ordering the utilities to filed required Advice Letters to initiate the 2022 CCM adjustment, and consider assessing fines and penalties for the IOUs' violations of Commission orders.

I. INTRODUCTION

The PD would approve the electric utilities' request to establish memorandum accounts at the current Rate of Return (RoR) without the CCM adjustment required to go into effect January 1, 2022. Its approval would be in violation of both substantive and procedural due process and would undermine ratepayer confidence in the utilities and the Commission.

The Commission has repeatedly affirmed the Cost of Capital Mechanism (CCM) adjustment as a just and reasonable means, consistent with *Hope* and *Bluefield*,[1] of maintaining rates consistent with market conditions. The Commission has already found in Decision (D.) 08-05-035, D.13-03-015, and D.19-12-056 that the CCM adjustment should be implemented effective January 1, 2022. As drafted, the PD would commit legal error by disrupting this status

[1] *Fed. Power Comm'n v. Hope Natural Gas Co.*, 320 U.S. 591 (1944) ("Hope") and *Bluefield Water Works & Improvement Co. v. Pub. Serv. Comm'n of W. Va.*, 262 U.S. 679 (1923) ("Bluefield").

quo, unfairly burdening ratepayers with more than $400 million of unjust and unreasonable rate increases. If the CCM adjustment is suspended for 2022, as currently drafted in the PD, the Commission would, contrary to its own rules and precedent, abrogate its duty to provide just and reasonable rates with absolutely no record evidence upon which to base such a decision.

The PD would also alter multiple past decisions without providing parties statutorily mandated notice and opportunity to be heard and the PD has no Findings of Facts or Conclusions of Law supporting the suspension of the 2022 CCM. Indeed, this aspect of the PD is so rife with legal error that perhaps its inclusion in the PD was inadvertent. Given these foundational errors, the Joint Parties recommend that the PD be withdrawn. To the extent that the Commission believes that memorandum accounts are proper in the instant case, many intervenors suggest that the Commission should issue a ruling directing the utilities to establish such accounts[2] and collect rates at a rate of return reflecting the required and automatic CCM adjustment.

Were the Commission to approve the PD as drafted, it would determine that the CCM should be suspended based upon one sentence: "As a matter of policy, it is reasonable to preserve the current authorized rate of return, which is the status quo as experienced by the customers today, as the Commission decides the final authorized rates in the above-captioned applications."[3] It is true that as a matter of law, as well as policy, the current authorized rate of return and the status quo must be preserved. Status quo, however, is not the current authorized rate of return as of November 10, 2021; it is the rate of return as of January 1, 2022, as automatically adjusted by the CCM. Ratepayers are entitled to the just and reasonable rates assured by this adjustment. The PD, however, does not reflect the required adjustment.

The Joint Parties urge the Commission to order the IOUs to submit Advice Letters to initiate the CCM adjustment mechanism for 2022. The Joint Parties note that the utilities were required to submit advice letters to make this adjustment on October 15, 2021, and such a

[2] Wild Tree has opposed the IOUs motions for memorandum accounts as premature and presumptive. (See A.21-08-013, *Wild Tree Foundation Opposition To Motion*s (September 30, 2021.) PCF submits that establishing a memorandum account under the present circumstances would not comport with applicable legal principles. *See e.g. Pacific Tel. & Tel. Co. v. Public Utilities Commission* (1965) 62 Cal.2d 634, 652 ("The commission's suggestion that its order in the proceedings now under review was not unlawfully retrospective because it purported to relate back only to the date the commission initiated its investigation, rather than to affect any earlier period, is negated by the holdings of the cases hereinabove cited and discussed, as well as by the language of the California statute."); Pub. Util. Code §§ 728, 728, 747, 761, 770, 1708.

[3] PD at p. 7.

submittal has not yet occurred. The Commission should consider assessing and assess penalties for the IOUs' flagrant and knowing ***ongoing*** violations of the requirement to submit Advice Letters by October 15, 2021. Unless the electric utilities are required to file Advice Letters implementing the CCM, the PD would permit PG&E, SDG&E, and SCE (collectively IOUs) shareholders to benefit from the IOUs' blatant and illegal defiance of Commission requirements while burdening ratepayers with over $400 million of undue burden.

II. BACKGROUND

A. The Cost of Capital Mechanism Helps Ensure Utility Rates Are Just and Reasonable.

The bedrock of Commission rate setting, as expressed in Public Utilities Code section 451[4], is that the rates charged by public utilities must be both just and reasonable. The CCM was adopted "to maintain fair and reasonable capital structures and [Return on Equities (ROEs)] for the major energy utilities while reducing ROE proceedings and simplifying workload requirements and regulatory costs."[5] To balance the desire to reduce utility work load and ensure consistency with just and reasonable rates, in D.08-05-035, the Commission adopted a "multi-year [CCM.]"[6] Under the CCM, "in any year where the difference between the current 12-month October through September average Moody's utility bond rates and the benchmark exceeds a trigger of 100 basis points, *an automatic adjustment* to the utilities' ROE shall be made."[7] Without the automatic adjustment provided by the CCM, however, just and reasonable capital structures and ROEs that balance IOU shareholder and ratepayer interests cannot be maintained.

D.08-05-035 highlights that "the utilities have a right to file a cost of capital mechanism outside of the CCM process upon an extraordinary or catastrophic event that materially impacts their respective cost of capital and/or capital structure and affects them differently than the overall financial markets."[8] This right does <u>not</u> include a waiver for filing an Advice Letter when an <u>automatic adjustment</u> is required as laid out in the Decision's Ordering Paragraph 2.

D.09-10-016 suspended the operation of the CCM adjustment during the 2009 financial crisis. Before doing so, the decision explains:

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[4] Hereinafter, all Code section references are to the Public Utilities Code unless otherwise specified.
[5] D.08-05-035 at p. 3.
[6] D.08-05-035 at p. 1.
[7] D.08-05-035 at Ordering Paragraph 2, p. 21 (emphasis added).
[8] D.08-05-035 at p. 16.

> The utilities' cost of capital is governed in the intervening years by a trigger adjustment. . . . During those intervening years, the utilities are *required* to file a Tier 2 advice letter on October 15 of any year when the difference between the current 12-month October through September average utility bond rate and their respective interest rate benchmark exceeds a trigger of 100 basis points. *If triggered*, the utilities' return on equity for the following calendar year would *automatically* be adjusted by one-half the difference between the current average utility bond rates and their benchmarks.[9]

Because of the market instability in 2009, SCE, PG&E and Cal Advocates petitioned to modify the previous year's decision establishing the CCM.[10] The modifications made were specific in nature and limited in time to address the mechanism for a single, identified year, 2010.[11] Importantly, and distinct from the instant proceeding, the CCM was suspended to protect ratepayers from rate increases.[12]

In D.13-03-015, the Commission adopted a joint stipulation to leave in place the "CCM process established by D.08-05-035" finding that the "CCM has also maintained a fair and reasonable COC while reducing the time and costs to the Commission and all parties associated with annual COC proceedings."[13] Specifically, the Commission found that the design of the CCM "provides a level of stability. . . that strikes a balance between triggering too often and triggering too infrequently."[14] Further, under the CCM "shareholders and ratepayers alike share in the burden and benefit of market changes."[15] In that proceeding, SDG&E proposed that the Commission grant utilities the ability to suspend the CCM in "times of great financial or economic upheaval,"[16] but in the adopted joint stipulation the utility expressly "agree[d] to retaining the CCM with no off-ramp."[17]

In 2015, the IOUs and interested intervenors, including Cal Advocates and TURN filed petition for modification that "preclude[d] the Utilities from using the existing [CCM] before the next cost of capital applications are due on April 20, 2017."[18] Highlighting the relative stability of interest rates, D.16-02-019 adopted the modifications but specified that the suspension of the

[9] D.09-10-016 at p. 2 (emphasis added).
[10] D.09-10-016 at p. 3.
[11] D.09-10-016 at Appendix A, p. 2.
[12] D.09-10-016 at p. 4.
[13] D.13-03-015 at p. 6
[14] D.13-03-015 at p. 6.
[15] D.13-03-015 at p. 7.
[16] D.13-03-015 at p. 5.
[17] D.13-03-015 at App. A, Page 6, Item No. SDG&E-1.
[18] D.16-02-019 at p. 1, 3.

CCM was limited to 2016.[19] In the most recent Cost of Capital decision, D.19-12-056, the Commission stated that "the record strongly supports continuing the existing structure of the CCM."[20]

While D.08-05-035 gives the utilities the ability to file an application for a new Cost of Capital in specific, extraordinary circumstances, the Commission has never suggested that filing such an application obviates the required,[21] automatic[22] CCM adjustment. Instead, the Commission has repeatedly affirmed in 13 years of precedent that the CCM is a just and reasonable method to set costs of capital in between full cost of capital cases. Additionally, the Commission has repeatedly indicated that the proper means for suspending the CCM is a petition for modification. The Joint Parties note that no such petition for modification has been submitted, and the Commission has not yet changed or suspended the adjustment mechanism. The submission of the Applications is not the equivalent of a petition for modification and the Joint Parties have been given no opportunity to comment on whether or not the adjustment mechanism should be modified or suspended.

B. The Commission Has Already Rejected The Arguments That An Off-Cycle Cost Of Capital Application Suspends The CCM

Under the long-established schedule for Cost of Capital cases, the next Cost of Capital applications are due to be filed on April 20, 2022 with the CCM continuing in the interim.[23] On August 23, 2021, the large electric IOUs all filed application for increases to their authorized costs of capital, claiming the COVID-19 pandemic was an extraordinary event with a unique market impact on the utilities and warranted off-cycle applications.[24] The utilities made the conscious, unilateral choice that their unsolicited and untimely applications "relieved [the utilities] of [their] obligation to update [their] costs of capital and to make related rate

[19] D.16-02-019 at Ordering Paragraph 1a, p. 4.
[20] D.19-12-056 at p. 45. The Commission actually considered *narrowing* the potential trigger of the CCM to only 50 basis points as suggested by SDG&E and SoCalGas.
[21] D.09-10-016 at p. 2.
[22] D.08-05-035 at Ordering Paragraph 2, p. 21.
[23] D.19-12-056 at p. 2.
[24] A.21-08-013, PG&E Application at pp. 12-19; SDG&E Application at pp. 9-18; SCE Application at p. 14.

adjustments" as required by the CCM.[25] Concurrent to the Applications for new 2022 Cost of Capital, each of the utilities filed a request to establish a new or modify an existing memorandum account to "record the difference between the rates in effect beginning January 1, 2022 and the rates to be adopted in [this COC proceeding]".[26]

Intervenors, including a subset of the Joint Parties - TURN, EPUC, EDF, IS, UCAN, Walmart, Inc., and Wild Tree - filed timely protests of the utility application. TURN and EPUC filed a joint response to the proposed memorandum accounts and Wild Tree filed a response in opposition to the memorandum accounts. In both its Protest and in Oppositions to Motions for Memorandum Accounts, Wild Tree provided substantial legal argument that the CCM adjustment mechanism must not be suspended and that the IOUs were required to file Advice Letters on October 15, 2021.[27] Perhaps recognizing that filing an off cycle Cost of Capital application did not, in fact, obviate the Advice Letter requirement leaving the utilities noncompliant with Commission Orders, SCE sent an October 1 email to the ALJ requesting that the ALJ "reject[] Wild Tree Foundation's contention that SCE is required to file an advice letter adjusting its cost of capital while this proceeding is pending."[28] SCE's email demonstrates that the utility was on notice that parties contended that the October 15 Advice Letter would be required.

On October 8, 2021, Walmart, Inc., EDF, TURN, IS, EPUC, UCAN and Wild Tree filed a joint Prehearing Conference (PHC) statement (Joint Intervenor PHC Statement) requesting that "[t]he utilities [] be required to comply with the advice letter requirement as soon as

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[25] A.21-08-013, SCE Application at p. 4. *See also* SDG&E Application at p. 6, fn 17; PG&E Application at p. 19.

[26] PD at p. 1.

[27] *See, for example* A.21-08-015, Wild Tree Foundation Protest (September 24, 2021) at pp. 8-13 ("There is no authority in support of the IOUs' argument that CCM should be suspended in this proceeding for the sole purpose of protecting shareholders. The CCM has been suspended in the past as a way of protecting ratepayers and decreasing administrative burden on the Commission. In this case, ratepayers would be harmed and administrative burden increased."); A.21-08-014, Wild Tree Foundation Opposition To Motion Of Southern California Edison Company To Establish A Cost Of Capital Memorandum Account (September 30, 2021) at pp. 14-15 ("The IOUs do not have a decision that permits them to act as if the CCM adjustment for 2022 is suspended; the IOUs are required to submit the required advice letters to update their ROEs and collect rates as determined by the CCM. . . The Commission should hold any IOU that fails to timely file its advice letter to update its ROE in contempt and order compliance with the law.")

[28] Attachment A, Email from SCE to ALJ Zheng (October 1, 2021)

practicable."[29] At the October 15 PHC, multiple parties argued that the October 15 ALs and the associated January 1, 2022 rate changes are required under Commission precedent.[30]

> On October 28, 2021, ALJ Zhang issued a ruling stating, in part:
>
> The Utilities are out of compliance with the CCM requirements ordered in D.08-05-035. As correctly surmised by the Utilities in the past, the Utilities must request permission from the Commission to deviate from the CCM requirements. Nothing in D.08-05-035 or the subsequent cost of capital decisions indicate that applications based on extraordinary circumstances can be filed in lieu of the advice letters due on October 15. (See D.09-10-016, D.13-03-015, D.16-02-019, D.19-12-056). The applications based on extraordinary circumstances are outside of the CCM process.[31]

The same ALJ Ruling directs the utilities to "file in this proceeding all materials that would have been included in the October 15, 2021 Advice Letters."[32]

The PD similarly states that October 15, 2021 Advice Letters could not be "be replaced with their August 23, 2021 applications."[33] The Joint Parties concur. Unfortunately, the PD as drafted would have the Commission do just that – replace the October 15, 2021 Advice Letter CCM process with the IOUs August 23, 2021 applications and memorandum accounts motions as well as replace a Petition for Modification of D.13-03-015 with the IOUs' memorandum accounts motions.

III. COMMENTS

The varied Joint Parties to this pleading reflect a diverse coalition: ratepayers both large and small as well as environmental interests. These parties all recommend that the Commission correct the PD's significant legal errors by withdrawing the PD, ordering the IOUs to filed required Advice Letters to initiate the 2022 CCM adjustment, and consider assessing fines and penalties for the IOUs' violations of Commission orders. Most parties also recommend that the Commission should address memorandum account motions in a ruling. Constitutional due process protections, the Public Utilities Code, Commission Rules of Practice and Procedure, and Commission precedent require that the Commission ensure that the CCM adjustment is

[29] A.21-08-013, *Joint PHC Statement* at p. 11.
[30] A.21-08-013, 1 TR 72:18-73:12 (Cal Advocates/Hodel); 1 TR 67:13-19 (EPUC/IS/Sheriff); 1 TR 70:7-10 (UCAN/Lopez); 1 TR 78:23-28 (Severson/PCF).
[31] A.21-08-013, *Email Ruling of the Assigned Commission and the Administrative Law Judges Ordering Compliance with Decision 08-05-035* (Oct. 28, 2021.)
[32] *Ibid.*
[33] PD at p. 8.

implemented so that rates are just and reasonable and that the IOUs are held accountable for their violations of Commission decisions to implement the CCM.

A. The PD's Suspension Of The CCM Would Alter And Amend Commission Precedent Without Due Process and in Violation of Applicable Statutes and the Commission's Own Rules

Unless the PD is withdrawn in its entirety or, at a minimum, all reference to the CCM adjustment and Advice Letters are removed, the decision would not withstand legal challenge. If the PD is not withdrawn as the Joint Parties recommend, at the very least, it should be clarified to order that *if* memorandum accounts were to be adopted, they would be adopted with the adjustment mechanism *in effect*. Adoption of the PD as drafted, with the unlawful CCM adjustment suspension and no action on Advice Letters would be egregious legal error on multiple grounds:

- The PD would fail due process protections and Public Utility Code section 1757 requirements by not including any required findings, much less findings supported by substantial evidence in light of the whole record; any required conclusions of law; any citation to record evidence; or an accurate description of the background of this proceeding and applicable Commission precedent;

- The PD would violate Constitutional due process protections, Public Utility Code section 1757, and Commission rules requiring that decisions follow the taking of evidence, filing of briefs, and presentation of oral argument;

- The PD would rescind, alter, and amend multiple Commission decisions without providing parties notice and an opportunity to be heard as required by due process protections and Public Utility Code section 1708;

- The PD would approve unjust and unreasonable rate increases, contrary to the just and reasonable rate decreases that have already been approved and would occur via operation of the CCM;

- The Commission would fail its duty mandated by due process, the Public Utility Code, and its own precedent that the law and Commission orders and decisions are enforced and obeyed and that violations are promptly prosecuted.

Suspension of the CCM adjustment as proposed in the PD would upend the precedent first established under D.08-05-035 in violation of the Public Utility Code sections 1701, 1705, and 1708 and Commission Rules intended to provide due process. Not only have the utilities failed to file a Petition for Modification, the PD contains no Findings of Fact or Conclusions of Law

that support the PD's suspension of the CCM. As drafted, the PD denies ratepayers just and reasonable rates during the pendency of the proceeding. The parties were never provided notice and opportunity to be heard prior to the Commission attempting to alter and amend previous decisions.

Pursuant to Public Utilities Code section 1757, a decision is unlawful and is subject to judicial review when: (1) the Commission has acted without, or in excess of, its powers of jurisdiction; (2) the Commission has not proceeded in the manner required by law; (3) the Commission's decision is not supported by the findings; (4) the Commission's findings are not supported by substantial evidence in light of the whole record; (5) the Commission's decision was procured by fraud or was an abuse of discretion; or (6) the decision violates any right of the petitioner under the United States or California Constitution.[34] Due process under the US and California Constitutions and the Public Utilities Code require the Commission to comply with the law and its own rules.[35] As the court recognized in *Southern California Edison Co. v. Public Utilities Commission*, the Commission's failure to follow its own rules in adopting a particular decision constitutes a failure to proceed as required by law, and, if prejudicial, invalidates that decision.[36]

Due process and the Commission's Rules call for decisions to be based on a record. In *California Trucking Association v. Public Utilities Commiss*ion, the Supreme Court of California explains that: "…section 1708 provides that when the commission alters or rescinds a prior order the opportunity to be heard must be afforded 'as provided in the case of complaints."[37] Commission decisions "shall contain, separately stated, findings of fact and conclusions of law by the commission on all issues material to the order or decision."[38] "Every issue that must be

[34] Pub. Util. Code, § 1757(a).
[35] *Southern California Edison Co. v. Public Utilities Commission (*2006)140 Cal.App.4th 1085, 1106 ("*Edison*").
[36] *Id.* at p. 1104, 1106; Pub. Util. Code § 1757, subd. (a)(2).
[37] *California Trucking Association v. Public Utilities Com.* (1977) 19 Cal.3d 240, 244-245 ("…section 1708 provides that when the commission alters or rescinds a prior order the opportunity to be heard must be afforded 'as provided in the case of complaints.' The procedure applicable to hearings on complaints filed by the commission on its own motion, as occurred here, is prescribed in section 1701—1706. Section 1705 requires a hearing at which parties are entitled to be heard and to introduce evidence, and the commission must issue process to enforce the attendance of witnesses."). *See also* Cal. Pub. Util. Code, § 1708.
[38] Pub. Util. Code, § 1705; See also *Clean Energy Fuels Corp. v. Public Utilities Com.* (2014) 227 Cal. App. 4th 641.

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."[39]

Pursuant to Commission Rules of Practice and Procedure, Rule 14.2, proposed decisions are to be filed *following* submission and, pursuant to Rule 13.5, "a proceeding shall stand submitted for decision by the Commission after the taking of evidence, the filing of briefs, and the presentation of oral argument as may have been prescribed."[40] However, at the time the PD was issued and as of the date of this pleading, no scoping memo has been issued much less evidence taken or legal argument made as required for a record sufficient to support a reversal of precedent with a significant price tag for ratepayers. Under such circumstances, the PD cannot meet the due process requirements that decisions "shall contain, separately stated, findings of fact and conclusions of law by the commission on all issues material to the order or decision."[41]

The Commission should reject any suggestion that the failure to implement the required adjustment is supported by previous suspensions of the CCM. The current circumstances are distinct from the past Commission suspensions of the CCM. First, in all previous instances as described herein in Section II, the utilities filed Petitions for Modification that were unopposed or ultimately supported by ratepayers. Second, those suspensions of the CCM served to benefit both the utility and its ratepayers.[42] Here the IOUs' requests and the PD's actions would harm ratepayers by significantly increasing rates, infringing on statutory directives and due process rights, and requiring participation in an untimely, extraneous, fact intensive and high stakes proceeding.

The PD would alter and amend D.08-05-035, D.13-03-015, and D.19-12-056 without any underlying petitions for modifications and, critically, without having provided the parties in this proceeding or the previous proceedings notice or opportunity to be heard. Pursuant to Public Utilities Code section 1708, the Commission must provide notice to the parties and opportunity to be heard before it acts to "rescind, alter, or amend any order or decision made by it." As the Court has explained:

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[39] *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.)
[40] Commission Rules of Practice and Procedure, Rule 13.5.
[41] Pub. Util. Code, § 1705; See also *Clean Energy Fuels Corp. v. Public Utilities Com.* (2014) 227 Cal. App. 4th 641.
[42] *See, for example,* D.09-10-016 at p. 4.

> Critically, the language in section 1708 requiring that parties be provided "opportunity to be heard as provided in the case of complaints" means the parties must be provided an opportunity to present evidence. As the Supreme Court explained in concluding a company had been denied its rights under section 1708, "[t]he procedure applicable to hearings on complaints filed by the [C]ommission on its own motion, as occurred here, is prescribed in sections 1701– 1706. Section 1705 requires a hearing at which parties are entitled to be heard and to introduce evidence, and the [C]ommission must issue process to enforce the attendance of witnesses."[43]

Notice to the parties, taking of evidence, legal briefings and arguments, and the submission of the proceeding must all occur before a PD can be issued that would serve to alter and amend previous Commission decisions. In this case, the Commission has failed to observe all necessary due process requirements and issued a PD without notice, hearings, briefings and prior to submission of the record. The PD will not, therefore, withstand judicial scrutiny.

Given the above, it is unclear to the Joint Parties why a Proposed Decision needs to be adopted at all.[44] The IOUs specifically requested an ALJ ruling permitting the opening of memorandum accounts and a PD is procedurally unnecessary to rule on motions to establish memorandum accounts. PG&E included a section in its motion whereby it argued that "Pursuant to Rule 9.1 of the Commission's Rules of Practice and Procedure, ALJs possess the authority to rule upon a memorandum account motion, which does not involve a final determination of proceedings."[45] ALJs have issued rulings in many past cases permitting the use of memorandum accounts based upon the authority granted ALJ's in Rule 9.1 to "rule upon all objections or motions which do not involve final determination of proceedings."[46]

Because suspension of the CCM would unfairly enrich shareholders by unjustly and unreasonably reversing an approved decrease in rates, the Joint Parties recommend that the PD be dismissed in its entirety as a matter of fairness to ratepayers. By dismissing the PD and allowing the CCM to adjust as scheduled, the Commission fulfills its duty to ratepayers to establish just and reasonable rates.

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[43] *Bullseye Telecom, Inc. v. Cal. Public Utills Comm'n* (2021) 281 Cal. Rptr. 3d 127, 138 (citations omitted) quoting *California Trucking Assn. v. Public Utilities Com.* (1977) 19 Cal.3d 240, 244–245, 137 Cal.Rptr. 190, 561 P.2d 280.)

[44] PCF maintains that a memorandum account would not be appropriate under the facts here. *See e.g. Southern California Edison v. Pub. Util. Com.* (1978) 20 Cal.3d 813, 830-831 (distinguishing between a commission decision to "mitigate a 'windfall' accruing to the utilities" and inappropriate retroactive ratemaking).

[45] A.21-08-013, PG&E Motion for Memorandum Accounts at p. 3.

[46] Commission Rules of Practice and Procedure, Rule 9.1.

B. The Status Quo Rates of Return Are The Rates As Adjusted By The CCM

The PD finds "it is reasonable to preserve the current authorized rate of return, which is the status quo as experienced by the customers today."[47] As the discussion of Commission precedent in Section II above demonstrates, status quo on January 1, 2022 is not maintaining the current rate of return, but rather adjusting it pursuant to lawful operation of the CCM. With this Ordering Paragraph, the PD would, perhaps inadvertently, suspends the CCM, absent the required procedure, reversing a long line of Commission decisions and depriving ratepayers of much needed rate relief.

Over the opposition of the Joint Parties,[48] the PD would deny ratepayers just and reasonable rates approved by the Commission, relying instead on the sole argument discussed in the PD that adopting the rate change would "lead to a 'yo-yo effect' in customer rates."[49] This argument ignores the fact that the "the combination of a 12-month measurement period and 100-basis point deadband provides a level of stability...that strikes a balance between triggering too often and triggering too infrequently"[50] and that the Commission has repeatedly found that the "CCM has provided certainty for its customers and investors, and avoided the use of scarce Commission resources to litigate the utilities' COC."[51] It is the IOUs' off-cycle applications and failure to file the required Advice Letters that have introduced disruption to the Cost of Capital, not the CCM.

Furthermore, any supposed yo-yo in rates is subsumed by the ongoing steady increase in California rates over the past decade resulting in Californians paying far more than the US average. SCE recently implemented a steep rate increase and SCE, PG&E and SDG&E all forecast rate increases on January 1, 2022:

- SCE recently filed AL 4590-E effective October 1, 2021 reflects an 8.8% rate increase for residential customers and a 7.6% total rate increase.[52]

[47] PD at p. 7.
[48] PD at p. 6.
[49] PD at p. 7.
[50] D.13-03-015 at p. 6.
[51] *Ibid.*
[52] Implementation of Southern California Edison Company's Consolidated Revenue Requirement and Rate Change on October 1, 2021, SCE AL 4590-E (Sept. 17, 2021) at p. 9.

- SDG&E's AL 3881-E, effective January 1, 2022 includes 1.67% rate increase for residential customers and a 1.62% system total increase.[53]

- Also effective on January 1, 2022, PG&E's AL 6408-E shows a 17.6% increase for residential ratepayers and a 19.4% increase systemwide.[54]

- SCE also filed AL 4651-E on November 23, 2021 for an additional 2.8% for residential customers and 2.7% increase systemwide.[55]

The PD's prohibition of the required, automatic CCM denies ratepayers the just and reasonable rates already approved by the Commission. Even if this were later reversed, reimbursement after the fact is not sufficient to rectify the harm of denying ratepayers this relief, especially given the present suffering of Californians due to the pandemic.

If the Commission were to adopt the PD as drafted, the Commission would, without the required process deprive utility customers of significant rate reductions that it already determined to be just and reasonable. In order to avoid this legal error, the PD should thus be withdrawn.

C. The IOUs Should Be Ordered To File Required Advice Letters To Implement The CCM And Should Be Subject To Enforcement Action For Their Ongoing Failure To Do So

The Joint Parties request that the Commission penalize the utilities for failing to submit the required Advice Letter filing, or, at a minimum, preserve this issue for further consideration. The Joint Parties agree with the PD that "the Utilities were out of compliance with D.08-05-035 when they failed to file the October 15, 2021 Advice Letters."[56] The Commission, however, has not yet held the IOUs accountable for their blatant flouting of the Commission decisions requiring the Advice Letters filings to implement the CCM. As drafted, the PD may serve to foreclose on opportunities to remedy this error. The PD takes no action to enforce compliance with its own findings or to effectuate the purpose of the Advice Letters which is to implement the required, automatic CCM adjustment. Making matters even worse, if the PD is approved, the IOUs' scheme to evade $100s of millions of rate decreases would succeed.

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[53] Annual Electric Regulatory Account Update Effective January 1, 2022, SDG&E AL 3881-E (Oct. 29, 2021) at Attachment B.
[54] Annual Electric True-Up Submittal-Change to PG&E's Electric Rates on January 1, 2022, PG&E AL 6408-E (Nov. 15, 2021) at Table 5, Bundled.
[55] Implementation of Southern California Edison Company's Consolidated Revenue Requirement and Rate Change on January 1, 2022, SCE Advice 4651-E (Nov. 23, 2021) at Table 5, p. 20.
[56] PD at p. 8.

If the PD is not withdrawn in its entirety, all content under the heading "Affirmation of Ruling of the Assigned Commissioner and the ALJs" must be stricken as it fails to provide for any enforcement action and may shut the door on the Commission appropriately holding the IOUs accountable in the future. As drafted, this section is no more than dicta that would not remedy the IOUs' conscious, unilateral choices not to file the advice letters required under Decision 08-05-035 that trigger the automatic CCM adjustments that are critical to maintaining just and reasonable capital structures and ROE under the multi-year cost of capital cycle.

Were the Commission to approve the PD and not take any action against the IOUs for their failure to abide by a Commission decision, it would abrogate its statutory mandate to ensure that "the provisions of the Constitution and statutes of this State affecting public utilities. . . are enforced and obeyed, and that violations thereof are promptly prosecuted"[57] and to ensure compliance with any "order, decision, rule, direction, or requirement of the commission."[58] As the Commission has explained, "It is fundamental to the Commission's exercise of its powers and jurisdiction that the agency take reasonable steps to ensure that the utilities comply with its orders and rules. As part of its enforcement efforts, the Commission has traditionally imposed fines when faced with persuasive evidence of non-compliance."[59]

The evidence of non-compliance here is obvious and persuasive: D.08-05-035 and its progeny require the October 15 Advice Letter filings. The IOUs explicitly stated in their applications and memorandum account motions that they intended *not* to file the Advice Letters; parties to this proceeding further put the IOUs on notice prior to October 15 that the filings were required. And yet, the IOUs intentionally and willfully failed to file the required advice letters. The conscious choice by the IOUs to collectively ignore D.08-05-035 was unreasonable, imprudent, in contempt of the Commission, and in violation of Commission decisions.

The purpose of the Advice Letters is not just to provide information, it is to act as the triggering mechanism for the implementation of the CCM adjustment. It bears noting that the Advice Letter ignored by the utilities would result in a significant decrease in rates for each utility yet, PG&E did not overlook the filing required by Resolution E-4693. Instead, PG&E filed its Annual Electric True Up, forecasting a 19.4% increase in PG&E's system bundled

[57] Pub. Util. Code, § 2101.
[58] Pub. Util. Code, § 2102.
[59] D.98-12-075 at p. 6.

average electric rates.[60] If the IOUs are allowed to flout the Commission's rate-setting decisions by picking and choosing when compliance benefits their ratepayers and when it does not, it undermines ratepayer confidence in both the utilities and in the Commission. This is particularly important in this instance because under a normal functioning of the CCM adjustment, ratepayers are entitled to the benefit of significant savings of over $400 million.

The Commission must order the IOUs to file the Advice Letter and implement the associated rate adjustment. The Commission should also either open a new proceeding to investigate the violations, including the manner in which the IOUs colluded to jointly violate Commission decisions, or issue an order to show cause in this proceeding why the IOUs should not be subject to fines and other penalties for their willful, knowing, and harmful actions. The Joint Parties note that the IOUs continue to violate D.08-05-035 and, pursuant to the Code, each day that such a violation occurs is considered a separate offense and fines for each offense are cumulative.[61]

IV. CONCLUSION

The Joint Parties urge the Commission to withdraw the PD to prevent more than $400 million of unjust and unreasonable rate increases in a decision that would not withstand judicial challenge. Instead, the ALJ should order the IOUs to submit Advice Letters to initiate the CCM adjustment mechanism for 2022. Further, the Commission should assess fines and penalties for the IOUs' ongoing intentional and willful violations of the Commission orders.
(Signature page follows)

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[60] Annual Electric True-Up Submittal-Change to PG&E's Electric Rates on January 1, 2022, PG&E AL 6408-E (Nov. 15, 2021) at Table 5, Bundled.
[61] Pub. Util. Code, § 2108.

Respectfully submitted,

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