BEFORE THE PUBLIC UTILITIES COMMISSION

OF THE STATE OF CALIFORNIA

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Application of Southern California Gas Company (U904G) and San Diego Gas & Electric Company (U902G) for authority to revise their natural gas rates and implement storage proposals effective January 1, 2024 in this Cost Allocation Proceeding.	Application 22-09-015 (Filed September 30, 2022)

COMMENTS OF THE UTILITY REFORM NETWORK AND SOUTHERN CALIFORNIA GENERATION COALITION OPPOSING THE SETTLEMENT AGREEMENT BETWEEN SOUTHERN CALIFORNIA GAS COMPANY, SAN DIEGO GAS & ELECTRIC COMPANY, AND CLEAN ENERGY REGARDING A HYDROGEN FUELING RATE

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I. INTRODUCTION

Pursuant to Rule 12.2 of the Commission's Rules of Practice and Procedure, The Utility Reform Network (TURN) and Southern California Generation Coalition (SCGC) submit these joint comments opposing the "Settlement Agreement Amongst Southern California Gas Company (SoCalGas), San Diego Gas & Electric Company (SDG&E), and Clean Energy to Resolve Certain Issues in Applicants' Cost Allocation Proceeding (A.22-09-015)" (Settlement Agreement).[1] The Settlement Agreement purports to resolve the contested issue of SoCalGas's proposal to establish in this proceeding a pilot hydrogen fueling rate, G-FCEV, which would be available to the public in the event that the Commission grants the utilities' pending request in the Test Year 2024 General Rate Case (GRC) to construct, own, and operate hydrogen fuel cell electric vehicle fueling stations at utility operating bases that would serve both the utility fleet and the general public.[2]

SoCalGas proposed to establish a new rate for customers who use the public access capabilities at the new hydrogen fueling stations, should the Commission approve the utilities' request in the GRC.[3] Under SoCalGas's proposed rate schedule, SoCalGas would charge

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[1] Joint Motion for Approval of Settlement Agreement of Southern California Gas Company, San Diego Gas & Electric Company, and the Public Advocates Office (Joint Motion), filed December 1, 2023, p. 1.

[2] Joint Motion for Approval of Settlement Agreement of SoCalGas, SDG&E, and Clean Energy (Joint Motion), pp, 1-2.

[3] Ex. APP-12, p. 8.

customers at the point of sale a single volumetric rate per kilogram of dispensed hydrogen.[4] SoCalGas originally proposed to set the hydrogen rate "at the level required to collect the total estimated incremental operating costs (less LCFS [Low Carbon Fuel Standard] credit revenue) as well as 50% of the illustrative capital costs developed in the" benchmarking study SoCalGas commissioned and included in its showing in this proceeding.[5] SoCalGas further explained how it would recover its hydrogen station costs:

> While the capital-related costs for these stations would be embedded in SoCalGas's base margin revenue requirement, all operating costs as well as incremental revenue from the public-access operation of the retail station will be recorded in a balancing account, the Hydrogen Refueling Station Balancing Account (HRSBA), with any surplus or shortfall balanced each year and shared with all ratepayers. Any Low Carbon Fuel Standard (LCFS) or other green credit value generated by the hydrogen FCEV stations would also be credited to the HRSBA.[6]

The Settlement Agreement differs from SoCalGas's litigation position in three regards. First, the hydrogen rate would be designed to recover all O&M and all capital costs (less LCFS credit revenue) developed in the benchmarking cost study instead of 50% of the capital costs.[7] As with SoCalGas's original proposal, SoCalGas would balance hydrogen station O&M costs and revenues in the HRSBA and true-up any imbalance annually. The true-up of O&M costs

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[4] Ex. APP-12, p. 8.

[5] Ex. APP-12, p. 8. SoCalGas noted the absence of historical costs and volumes to use in designing a hydrogen rate and instead commissioned this benchmarking cost study. *Id.*, p. 7.

[6] Ex. APP-12, pp. 7-8. SoCalGas also indicated that "revenue received from public access utilization will be credited to the HRSBA and returned to ratepayers, partially offsetting the capital costs embedded in SoCalGas's base margin revenue requirement." *Id.*, pp. 8-9.

[7] Joint Motion, p. 6; Settlement Agreement § II.B(1).

and revenues would occur through gas transportation rates in the Annual Regulatory Account Balance Update.[8]

Second, the Settlement Agreement would obligate SoCalGas to provide a study for a cost-based hydrogen fueling rate in its next cost allocation proceeding application (but not necessarily endorse this rate), based on the actual hydrogen station capital and O&M costs and LCFS revenues associated with the operation of SoCalGas's approved hydrogen refueling stations.[9]

Finally, SoCalGas has agreed to open its LCFS Fuel Card Program to include third-party NGV fueling stations in addition to SoCalGas NGV fueling stations and to work with Clean Energy on implementation of the LCFS Fuel Card Program in 2024.[10]

As explained below, the Commission should find that the Settlement Agreement fails to satisfy the requirements of Rule 12.1 because it would permit SoCalGas to use a Tier 2 Advice Letter process to recover a shortfall in operational O&M costs without the Commission or stakeholders having a meaningful opportunity to review those costs for reasonableness. Further, by requiring ratepayers to make up any "shortfall" in SoCalGas's recovery of operational costs, the Settlement Agreement would provide SoCalGas an anti-competitive cost recovery assurance not enjoyed by independent hydrogen fueling stations. The Commission should accordingly reject the Settlement Agreement.

Alternatively, the Commission should modify the Settlement Agreement to prohibit SoCalGas from recovering any operational cost shortfall from ratepayers.

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[8] Joint Motion, p. 6; Settlement Agreement § II.B(1).

[9] Joint Motion, p. 6.; Settlement Agreement § II.B(2).

[10] Joint Motion, p. 6; Settlement Agreement § II.B(3)-(4).

II. STANDARD OF REVIEW

Rule 12.1(d) provides that, before approving a settlement, the Commission must determine that the settlement is reasonable in light of the whole record, consistent with law, and in the public interest. When the Commission finds that a settlement is unreasonable, the Commission "will not be persuaded to approve unreasonable settlements simply because of a general policy favoring the approval of settlements."[11]

When a settlement is contested, as here, the Commission engages in a closer review of the settlement compared to an all-party settlement:

> … [W]e are within our authority to consider whether it would serve the public interest. Our standard of review, however, is somewhat more stringent. Here we consider whether the settlement taken as a whole is in the public interest. In so doing we consider individual elements of the settlement in order to determine whether the settlement generally balances the various interests at stake as well as to assure that each element is consistent with our policy objectives and the law.[12]

A "contested settlement is not entitled to any greater weight or deference merely by virtue of its label as a settlement; it is merely the joint position of the sponsoring parties, and its reasonableness must be thoroughly demonstrated by the record."[13]

III. THE SETTLEMENT AGREEMENT IS NOT CONSISTENT WITH LAW.

Under the Settlement Agreement, SoCalGas would have the opportunity to pass on to ratepayers any shortfall in the HRSBA that results from balancing revenues from the new rate plus LCFS credits with SoCalGas's actual O&M operating costs. This true-up would occur through SoCalGas' Annual Regulatory Account Balance Update, which is a Tier 2 Advice Letter

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[11] D.19-05-030, p. 22.

[12] *Re Natura1 Gas Procurement and System Reliability Issues* 54 Cal.P.U.C.2d 337, 343 (CPUC 1994).

[13] D.07-03-044 (PG&E TY 2007 GRC), p. 13 (quoting from D.02-01-041 at 13).

process.[14] However, SoCalGas has not presented a forecast of hydrogen refueling station operating costs in this proceeding (or in the GRC). As such, the Commission will not be able to determine a reasonable level of operational costs before SoCalGas seeks cost recovery through a Tier 2 Advice Letter. Under these circumstances, a Tier 2 Advice Letter is not an appropriate vehicle for reviewing the reasonableness of incurred costs that have never been subject to Commission scrutiny because the Commission cannot satisfy its responsibilities under Public Utilities Code § 451 to determine that any costs to be collected from ratepayers were reasonably incurred by SoCalGas.

Pursuant to Public Utilities Code § 451, the Commission must ensure that all charges demanded or received by any public utility are just and reasonable.[15] Consistent with § 451, the Commission "can grant rate recovery only if requested rates and charges are deemed 'just and reasonable.'"[16] This inalterable obligation to determine the reasonableness of costs the utility seeks to include in its authorized rates is not a task that the Commission can delegate to staff; the Commission must reach appropriate findings of fact and conclusions of law as set forth in a formal decision or resolution.

Tier 2 Advice Letters are resolved by Commission staff, rather than by the Commission itself.[17] General Rule 7.6.1 (Industry Division Disposition of Advice Letter) of General Order 96-B explains what is and is not an appropriate subject for staff approval:

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[14] *See* SoCalGas Advice Letter 6210-G, Annual Regulatory Account Balance Update for Rates Effective January 1, 2024, p. 9.

[15] Cal. Pub. Util. Code § 451.

[16] D.18-07-025, *Denying Rehearing of D.17-11-033* (A.15-09-010), p. 4.

[17] A Tier 2 advice letter becomes effective after staff approval. *Id.*, Energy Rule 5.2 (Matters Appropriate to Tier 2 (Effective After Staff Approval)).

> An advice letter is subject to disposition by the reviewing Industry Division whenever such disposition would be a "ministerial" act, as that term is used regarding advice letter review and disposition. (See Decision 02-02-049.) Industry Division disposition is appropriate where statutes or Commission orders have required the action proposed in the advice letter, or have authorized the action with sufficient specificity, that the Industry Division need only determine as a technical matter whether the proposed action is within the scope of what has already been authorized by statutes or Commission orders.…
>
> An advice letter will be subject to Industry Division disposition even though its subject matter is technically complex, so long as a technically qualified person could determine objectively whether the proposed action has been authorized by the statutes or Commission orders cited in the advice letter. Whenever such determination requires more than ministerial action, the disposition of the advice letter on the merits will be by Commission resolution, as provided in General Rule 7.6.2.

The Commission addressed the distinction between "ministerial" and "discretionary" duties in D.02-02-049, cited in G.O. 96-B:

> [W]hile agencies cannot delegate the power to make fundamental policy decisions or "final" discretionary decisions, they may act in a practical manner and delegate authority to investigate, determine facts, make recommendations, and draft proposed decisions to be adopted and ratified by the agency's highest decision makers, even though such activities in fact require staff to exercise judgment and discretion.[18]

Later in the decision the Commission provided a useful example:

> Staff's role in reviewing advice letters is analogous to the role of an Assigned Commissioner or Administrative Law Judge in conducting a formal proceeding… [with] the power to make rulings, preside over hearings, and take procedural actions that would affect the timing of the Commission's ultimate disposition.[19]

Determining whether hydrogen station operational costs recorded to the HRSBA are reasonable and therefore eligible for rate recovery, and whether such costs should be added to the

[18] D.02-02-049, 2002 Cal. PUC LEXIS 162, *10.

[19] *Id.*, at *20.

authorized revenue requirement, is a final discretionary decision involving one of the Commission's core functions. This is not a case where the Commission will have already determined a reasonable level of operational costs but deferred the recovery of those costs to a Tier 2 Advice Letter process that takes place after revenues and green credits can be accounted for. Rather, this will be a reasonableness review of completely new costs for SoCalGas.[20]

If the reasonableness review were performed in an application proceeding, there would be no doubt that the ultimate disposition would require Commission action, in the form of an adopted decision. A proposed decision might be drafted by an ALJ or other Commission staff, but the ultimate action would require a Commission vote adopting a final outcome. The nature of the reasonableness review for costs never authorized that are recorded in a balancing account should be treated no differently – it is still a determination of reasonableness pursuant to Section 451 and therefore must be recognized as a non-delegable discretionary act.

Given that a Tier 2 Advice Letter does not lead to a Commission vote adopting a final outcome, the Commission should find that the Settlement Agreement impermissibly permits SoCalGas to rely on such advice letters to collect any "shortfall" in the HRSBA, which represents a delegation to staff of a non-delegable discretionary task. As such, the Commission should conclude that the Settlement Agreement is inconsistent with the law.

IV. THE SETTLEMENT AGREEMENT IS UNREASONABLE IN LIGHT OF THE RECORD.

TURN, SCGC, the Public Advocates Office, and Clean Energy variously opposed SoCalGas's hydrogen rate proposal as premature, given the pending and objectionable proposal

[20] Ex. APP-12, p. 7 ("As these would be the first hydrogen retail fueling stations constructed and operated by SoCalGas, historical costs and volumes are unavailable for use in forecasting rates.").

in the GRC, and because of its anti-competitive effects.[21] The Settlement Agreement would partially address anti-competitive concerns raised by parties in two regards: (1) by requiring SoCalGas to design the hydrogen rate to recover 100% of capital and operational O&M costs estimated in SoCalGas's benchmarking study rather than 50% of capital costs and all O&M costs; and (2) requiring SoCalGas to implement an updated LCFS Fuel Card Program in 2024 that addresses the concerns raised by Clean Energy. However, the Settlement Agreement does not address the anti-competitive concerns raised by SCGC. As such, the Commission should find that the Settlement Agreement is unreasonable in light of the whole record.

SCGC witness Yap explained, "The provision of fueling stations is not inherently a natural monopoly service, yet the Applicants propose to provide hydrogen fueling services on a subsidized basis."[22] That subsidy takes two forms. First, Applicants have requested in the 2024 GRC that ratepayers pay for the construction of hydrogen fueling stations, and if authorized by the Commission, "capital-related costs for these stations would be embedded in SoCalGas's base margin revenue requirement."[23] Second, the Applicants propose to collect any hydrogen fueling station operational costs that are not recouped through the hydrogen rate from ratepayers through a balancing account.[24] This "shortfall" could occur if actual operational costs are significantly higher than were estimated by SoCalGas's benchmarking study, if sales were zero or

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[21] Ex. TURN-02-E, pp. 24-25; Ex. SCGC-01, pp. 28-29; Ex. CalAdv-01, p. 1-5; Ex. CE-02, pp. 2-3, 10-12. In TURN's testimony, TURN opposed the proposed hydrogen fueling rate because TURN opposed SCG's proposal to build, own, and operation hydrogen refueling stations, as conveyed in the 2024 GRC. TURN also clarified that TURN was not taking a position on the details of SoCalGas's proposed rates "at this time" but "may address the details … later in this proceeding." Ex. TURN-02-E, p. 25.

[22] Ex. SCGC-01, p. 28.

[23] Ex. APP-12, p. 7.

[24] Ex. SCGC-01, pp. 28-29.

significantly lower than assumed in SoCalGas's rate design, or some combination of these factors.

SoCalGas envisions that revenues credited to the HRSBA will be returned to ratepayers if the revenues exceed O&M costs, in which case these revenues would offset the capital-related hydrogen refueling station costs embedded in SoCalGas's base margin revenue requirement approved in the Test Year 2024 GRC.[25] However, there is no guarantee that such surplus revenues will exist or that they will cover all capital-related costs included in the Test Year 2024 GRC base margin revenue requirement. As SCGC noted, using ratepayers as a backstop to protect SoCalGas shareholders "would undermine the competitive viability of independent hydrogen fueling stations," which already number over 30 in the SoCalGas service territory with more than 20 currently undergoing development.[26]

The Settlement Agreement does nothing to alleviate the anti-competitive effects of using ratepayers to guarantee full cost recovery for capital and operational costs. Although the Settlement Agreement would have SoCalGas design the hydrogen rate to recover a larger share of capital costs estimated in SoCalGas's benchmarking study – 100% versus 50% – the Settlement Agreement does not change the assignment of risk for a shortfall. In both SoCalGas's original proposal and the Settlement Agreement, ratepayers would bear 100% of that risk. The Commission should find this assignment of risk unreasonable in light of the whole record.

Moreover, SCGC called upon the Commission to carefully consider the extent to which ratepayers versus shareholders should fund hydrogen fueling stations as a matter of policy,

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[25] Joint Motion, p. 10; Ex. APP-12, pp. 8-9.

[26] Ex. SCGC-01, p. 29.

before adopting SoCalGas's proposed rate and associated ratemaking via the HRSBA.[27] The record in this proceeding does not demonstrate the reasonableness of having ratepayers subsidize the operational costs of public-access hydrogen fueling stations, as the Settlement Agreement would permit, even if the Commission concludes in the 2024 GRC that ratepayers should fund construction costs for stations to be used by the utility's fleet and the public.

V. THE SETTLEMENT AGREEMENT IS NOT IN THE PUBLIC INTEREST.

The Commission must closely scrutinize the Settlement Agreement without the deference afforded to an all-party settlement. As discussed above, the Settlement Agreement would authorize SoCalGas to use a Tier 2 Advice Letter process to pursue cost recovery from ratepayers for hydrogen fueling station costs not covered by the hydrogen rate and green credits, as reflected in a new balancing account, the HRSBA. This ratemaking mechanism would prevent the Commission from satisfying its legal obligation to ensure that all costs recovered from ratepayers were reasonably incurred. The Settlement Agreement would also assign to ratepayers 100% of the risk of any shortfall in SoCalGas's recovery of operational and capital costs through the new hydrogen rate, despite the anti-competitive effects of this approach demonstrated in the record. Finally, the Settlement Agreement would permit SoCalGas to rely on its ratepayers to subsidize the operational costs of public-access hydrogen fueling stations, which are not a natural monopoly service. For all of these reasons, the Commission should find that the Settlement Agreement is not in the public interest.

[27] Ex. SCGC-01, p. 29.

VI. CONCLUSION

For the foregoing reasons, the Commission should find that the proposed Settlement Agreement is unreasonable. TURN and SCGC accordingly recommend that the Commission reject the proposed Settlement Agreement. Alternatively, the Commission should modify the Settlement Agreement to prohibit SoCalGas from recovering from ratepayers any shortfall in the HRSBA for hydrogen fueling station operating costs.

Respectfully submitted,

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