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BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

Application of Pacific Gas and Electric Company for Recovery of Recorded Expenditures Related to Wildfire Mitigation, Catastrophic Events, and Other Recorded Costs. (U39M)	Application 23-12-001 (Filed December 1, 2023)

APPLICATION OF PACIFIC GAS AND ELECTRIC COMPANY FOR REHEARING OF DECISION 26-02-004

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Pursuant to California Public Utilities Code Sections 1731(b) and 1732 and Rule 16.1 of the California Public Utilities Commission's Rules of Practice and Procedure ("Rules"), Pacific Gas and Electric Company ("PG&E") submits this Application for Rehearing of Decision 26-02-004 ("the Decision"). This Application for Rehearing is timely because it is filed and served on March 16, 2026, within the timeframe prescribed by law.[1]

I. INTRODUCTION

Following a series of deadly and destructive wildfires in Northern California, some of which were caused by utility equipment, in 2019 the California Legislature passed a series of reforms to ensure safety received the appropriate level of attention from both state regulators and electric utilities. A critical component of those comprehensive reforms was the establishment of a new entity, the Office of Energy Infrastructure Safety ("OEIS"), to oversee investor-owned electric utility "wildfire mitigation plans," or WMPs.[2] This structural change reflected the Legislature's judgment that it was no longer appropriate to have the California Public Utilities Commission ("the Commission") oversee both wildfire safety planning and cost containment.

In a decision denying PG&E cost recovery for Enhanced Vegetation Management

[1] See Public Utilities Code ("Pub. Util. Code"), § 1731(b) and Rules 16.1 and 1.15. The Decision was issued on February 13, 2026. Sunday, March 15, 2026, is thirty days later. When the due date for a filing falls on a day Commission offices are closed, "the time limit is extended to include the first day thereafter" that the Commission's offices are open. Rule 1.15.

[2] See generally Government Code ("Govt. Code"), §§ 15470–15476.

("EVM") work mandated by OEIS, the Commission asserted, contrary to all evidence of statutory language and intent, that it does, in fact, have statutory authority to override OEIS's safety judgment. The Commission is incorrect. Although the Commission may scrutinize a utility's *implementation* of work mandated by OEIS to ensure just and reasonable rates, the Commission may not deem work mandated by OEIS to be unreasonable simply because it disagrees with OEIS's decision to approve that work in the first place. The Commission's interpretation disregards the careful regulatory balance struck by the Legislature and threatens progress that utilities have made on wildfire mitigation by disincentivizing utilities from prioritizing work that OEIS believes is necessary. Rehearing is warranted to correct the Commission's legal errors and authorize PG&E to fully recover its 2022 EVM expenditures.

II. BACKGROUND

A. Legal Background

1. Wildfire Mitigation Plans ("WMPs")

Since 2016, the Legislature has required investor-owned utilities like PG&E to annually develop and maintain a Wildfire Mitigation Plan ("WMP") outlining the steps the utility will take to reduce wildfire risk as well as the actions it will take in the event of a wildfire.[3] Section 8386 requires utilities to annually prepare a WMP (or update an existing WMP) and prescribes the types of information that a utility must include in its annual WMP.[4]

The statutory requirements governing the contents of WMPs have evolved over time. As relevant here, the statute requires each WMP to contain, among other things, protocols related to deenergization of lines, plans for line inspections, descriptions of where the utility has considered undergrounding, plans for vegetation management, a methodology for identifying

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[3] See Pub. Util. Code, §§ 8385–8389. Unless otherwise noted, all citations in this AFR to Public Utilities Code Sections 8385–8389 are to the provisions in effect in 2022. For § 8386, § 8386.3, and § 8386.5, the cited provisions are those in effect from Jan. 1, 2022 to September 18, 2025. For § 8386.4, the cited provision is that in effect from July 12, 2019 to September 18, 2025. For § 8389, the cited provision is that in effect from July 22, 2021 to September 18, 2025.

[4] Id., § 8386(a), (b).

enterprise wildfire risk, and a statement of processes and procedures the utility will use to monitor and implement the WMP.[5]

Until mid-2021, the WMP development and approval process was overseen by the Commission. As of July 1, 2021, the Legislature gave OEIS, an agency within the California Department of Natural Resources, responsibility for WMP oversight.

At all times relevant here, the Legislature required OEIS to review and ultimately approve or deny each utility's WMP within three months of submission,[6] but OEIS's approval or denial follows a lengthy and interactive multi-party development and review process.

As an initial matter, OEIS periodically issues guidelines to utilities outlining what it expects to see within draft WMPs and the submission schedule.[7] Based on those guidelines, each utility develops a draft WMP, and submits that draft to OEIS for review and comment.[8] OEIS must post the draft on its website, review the draft, and accept and consider comment from "the public, other local and state agencies, and interested parties."[9]

OEIS may then direct the utility to modify its WMP by sending the utility a "revision notice" for covering issues that OEIS believes require modification.[10] A utility must respond to such a notice within the time period specified by OEIS (typically 30-60 days) and then update the WMP accordingly.

OEIS next must take several additional steps in preparation for making its final decision on whether to approve or deny the utility's updated draft WMP. First, in rendering its decision to approve or deny a WMP, OEIS must consider public comments.[11] Second, OEIS must also

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[5] Id., § 8386(c).

[6] Id., § 8386.3(a). OEIS was permitted to extend the statutory deadline for good cause. Beginning in 2025, OEIS has nine months to approve or deny a WMP.

[7] These guidelines are developed under OEIS's authority pursuant to Govt. Code, § 15475.6.

[8] Pub. Util. Code, § 8386.3(a)(1)(A).

[9] Id., § 8386(e).

[10] Id., § 8386.3(a).

[11] Id., § 8386.3(a).

consult with the Office of the State Fire Marshal, known colloquially as CalFire, on the updated draft WMP.[12] Third, OEIS issues a draft approval and accepts public comments on that draft. After all of these steps are complete, OEIS issues a final decision approving or denying a utility's WMP. Upon approval, the WMP is considered final and approved. The final, approved WMP is then sent to the Commission, which is statutorily required to "ratify" the WMP.[13]

The commitments a utility makes in its WMPs are compulsory. A utility that fails to comply with its WMP is subject to penalties.[14] Additionally, a utility that is out of compliance with its WMP jeopardizes its ability to secure a safety certificate and access the California Wildfire Fund to cover the cost of claims in the event of wildfire.[15]

A utility that seeks to make changes to an approved WMP must use the OEIS-governed WMP "change order" process outlined in that agency's change order guidelines.[16] The change order process permits an electric utility to seek to change approved mitigations, but requires utilities to continue to follow a risk-based approach to mitigation of wildfire. The change order process cannot be used to make substantial revisions amounting to a "fundamental change in strategy"; such changes must await the following year's WMP.[17] Further, change order submissions must occur within a specified timeline.[18]

2. Cost Recovery for WMP Expenditures

WMP requirements are adopted and overseen by OEIS, but recovery for the reasonable costs of the work embodied in a WMP is overseen by the Commission.

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[12] Id., § 8386.3(a).

[13] Id., § 8386.3(a).

[14] Id., § 8386.1.

[15] Id., § 8389(e)(7); Id., § 451.1(c).

[16] See OEIS, 2022 Change Order Guidelines for Electric Corporations (Aug. 16, 2022), Draft Revised 2022 Change Order Guidelines (Oct. 7, 2022) and Revised 2022 Change Order Guidelines for Electric Corporations (Nov. 8, 2022), available at: <https://energysafety.ca.gov/what-we-do/electrical-infrastructure-safety/wildfire-mitigation-and-safety/wildfire-mitigation-plans/2022-wmp/> (accessed Mar. 9, 2026).

[17] See OEIS, Revised 2022 Change Order Guidelines for Electric Corporations (Nov. 8, 2022), p. 3.

[18] Id., p. 4.

The Commission has authority under Public Utilities Code Section 451 to ensure that rates collected from customers by investor-owned utilities are just and reasonable. Historically, the Commission has scrutinized utility costs to determine whether they are reasonable using the prudent manager standard. Under that standard, the Commission evaluates the reasonableness of the utility's costs based on what the utility knew or should have known at the time it made its decision to incur the costs, not based on hindsight.[19] As the Commission has explained, "the term 'reasonable and prudent' means that at a particular time any of the practices, methods, and acts engaged in by a utility follows the exercise of reasonable judgment in light of the facts known or which should have been known at the time the decision was made. The act or decision is expected by the utility to accomplish the desired result at the lowest reasonable cost consistent with good utility practices."[20]

In substantially amending the WMP requirements in 2019, the Legislature confirmed that the "cost of implementing" a utility WMP should be folded into a utility's General Rate Case ("GRC"), a quadrennial proceeding in which a utility forecasts all of its expected costs and expenditures and seeks pre-approval of those costs and expenditures.[21]

In its 2019 amendments, the Legislature also recognized that, as wildfire mitigation work was rapidly evolving in the late 2010s and early 2020s, a four-year advance projection of anticipated WMP implementation costs was likely to be inaccurate. Accordingly, in 2019 the Legislature also confirmed the Commission must allow utilities to establish accounts whereby the utilities could track the utilities' costs of implementing WMPs that were unforeseen and incremental to the programs and activities authorized in the general revenue requirement.[22]

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[19] See, e.g., D.24-07-008, p. 9 (citing D.22-06-032 at 18).

[20] D.87-06-021, 24 CPUC.2d 476, 1987 Cal. PUC LEXIS 588 *28-29.

[21] Pub. Util. Code, § 8386.4(b)(1).

[22] Id., § 8386.4(a)(2). A memorandum account is an account where a utility records costs it incurs. The utility cannot collect the revenue associated with the expended funds until the Commission has conducted an ex-post reasonableness review of the costs recorded.

Thus, the Legislature intended for the utility to be able to recover the costs of "implementing" its WMPs through the GRC, or, in the early years of aggressive utility wildfire mitigation, where there was a need for considerable experimentation and improvisation, via a separate accounting mechanism.

B. Factual Background

1. Anticipated WMP spending in PG&E's 2020 GRC

PG&E projected its WMP-related expenditures for 2020 through 2022 as part of its 2020 GRC application ("Application"), filed in December 2018. The Application sought recovery based on forecasts largely devised in 2018, before the November 2018 Camp Fire in Butte County destroyed nearly 19,000 structures and resulted in 85 deaths. PG&E's Application was also devised before the significant legislative amendments affecting WMPs adopted in 2019 in response to that fire took effect.

The Camp Fire, which was not contemplated in PG&E's 2018 forecasts, significantly affected the company's wildfire mitigation workplan.[23] PG&E's Application explained that, based on a comprehensive risk assessment, the company would need to take a diverse array of additional precautionary measures to further reduce wildfire risks, including by increasing vegetation management activities.[24] One such measure was an "Enhanced Vegetation Management" ("EVM") program, pursuant to which PG&E would remove or trim certain tree species to certain specifications. PG&E's Application accordingly projected that the company's overall wildfire mitigation costs would expand significantly between 2018 and 2022. Given that the EVM program was new and there remained uncertainty about how best to carry it out, PG&E

[23] Application 18-12-009, p. 1. As PG&E explained in its 2018 Application, the GRC "arrives at a time of significant change and uncertainty. The most destructive wildfires in state history occurred in 2017 and 2018, resulting in unparalleled loss of life and property."

[24] Id., p. 2.

also requested that it be permitted to recover spending for EVM (and for certain other wildfire mitigation costs) via a two-way balancing account.[25]

In its 2020 decision on PG&E's 2018 GRC Application, issued in December 2020, the Commission recognized that "[w]ildfire remains one of PG&E's top risks"[26] and that funding requests for wildfire mitigation "represent a significant portion of PG&E's GRC funding request."[27] The Commission ultimately authorized PG&E to collect $318.8 million for EVM for 2020, and slightly larger amounts for 2021 and 2022. But the Commission also recognized that the authorized amounts were only a conservative estimate of PG&E's actual spending: ultimate EVM costs were highly uncertain because the EVM program was so new, and there was a high likelihood that the estimate would need to be revised upwards.[28] Accordingly, the Commission decided that PG&E should be permitted to record costs above that amount in a two-way balancing account for potential later recovery.[29] EVM costs within 120 percent of the authorized amount for each year were presumed to be reasonable, and PG&E was authorized to collect that amount in rates.[30] If PG&E wished to recover any EVM costs above this amount, it was required to file an application for reasonableness review by the Commission of the amount exceeding the 120 percent threshold.[31]

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[25] A one-way balancing account records costs that have been pre-approved for inclusion in the utility's revenue requirement, and the utility is authorized to immediately collect the associated revenue requirement. An after-the-fact reasonableness review is later performed to compare actual recorded costs to forecasted costs, and the utility must refund to customers any overcollections. A two-way balancing account follows the same process, including the requirement to fund any overcollections, but it also permits the utility to recover for any undercollections.

[26] D.20-12-005, p. 4.

[27] Id., p. 56.

[28] Id., p. 77; id. at 78 ("[T]he enhanced VM program is new and so a proper forecast that balances both affordability and necessary work that needs to be performed is difficult to determine. In addition, the scope of activities continues to be refined[….] [B]ecause of enhanced wildfire risk, we find that it may be necessary for PG&E to conduct additional VM activities that are difficult to predict at this time."); accord p. 395, Conclusions of Law ¶¶ 14-17.

[29] Id., p. 67.

[30] Id., p. 412, Ordering Paragraph 8; see also Advice Letter 6661-E.

[31] D.20-12-005 p. 78; see also p. 395, COL 17.

2. PG&E's 2022 WMP

In mid-December 2021, OEIS adopted final guidelines outlining what utilities should include in their 2022 WMPs.32 Top of mind for regulators and for PG&E was the omnipresent threat that utility equipment would ignite another deadly fire resulting in catastrophic loss of life and property. That was not an idle concern, as at that time, the wildfire situation appeared significantly worse than it had even in the wake of the Camp Fire. In 2020, over 4 million acres burned in California, up from 280,000 acres the year before and more than double the number of acres burned in 2018. Then, in July 2021, the Dixie Fire ignited when a tree came into contact with powerlines owned by PG&E; that fire burned nearly a million acres and destroyed 1,311 structures.

Against this backdrop, and consistent with OEIS's WMP Guidelines (including the submission and evaluation schedule), PG&E prepared its 2022 WMP. In late February 2022, PG&E submitted its draft WMP to OEIS.[33] Consistent with what the company had discussed with OEIS, PG&E's draft WMP incorporated a plan to carry out EVM across 1,800 miles of PG&E's service territory.[34]

As required by statute, OEIS published PG&E's draft WMP on its website and solicited comments from other state and local agencies and from the broader public. In April 2022, multiple parties submitted comments on PG&E's draft WMP, including the California Department of Fish and Game, Green Power Institute, Mussey Grade Road Alliance, Rural County Representatives of California, The Utility Reform Network (TURN), the California Public Utilities Commission's Public Advocates Office (Cal Advocates), and an individual California citizen.

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[32] See OEIS, Final 2022 Wildfire Mitigation Plan Update Guidelines (Dec. 15, 2021), available at: <https://energysafety.ca.gov/what-we-do/electrical-infrastructure-safety/wildfire-mitigation-and-safety/wildfire-mitigation-plans/2022-wmp/> (accessed Mar. 9, 2026).

[33] PG&E's draft 2022 WMP (Feb. 25, 2022) is available at: <https://energysafety.ca.gov/what-we-do/electrical-infrastructure-safety/wildfire-mitigation-and-safety/wildfire-mitigation-plans/2022-wmp/> (accessed Mar. 9, 2026).

[34] Ibid.

Cal Advocates commented that, given the recent history of damaging and deadly wildfires, "identifying and removing hazardous trees is essential" and PG&E's proposed "one-third reduction in vegetation management expenditures in 2023, therefore, is concerning."[35] TURN, by contrast, opposed much of PG&E's vegetation management work and particularly objected to PG&E's inclusion in the WMP of 1,800 miles of EVM work. TURN's comments explained to OEIS that the EVM program made up "more than half … of PG&E's proposed spending for Vegetation Management activities in 2022"[36] and maintained that the EVM work proposed by PG&E "is no longer cost-effective."[37] TURN contended that EVM work was not cost-effective and expressly encouraged OEIS to "sharply limit the amount of EVM work that is approved for 2022" by 99 percent, to only 18 miles.[38]

In May 2022, OEIS presented PG&E with a revision notice containing 13 discrete items of concern and requested that PG&E submit a revised 2022 WMP in late July 2022 addressing those notices. Although three of OEIS's revision notice items concerned vegetation management, OEIS did not request that PG&E alter its EVM plans.

On July 26, 2022, PG&E submitted its revised WMP, addressing OEIS's revision notice and providing other updates as necessary.[39] The July version of PG&E's WMP did not alter the inclusion of 1,800 miles of EVM work.

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[35] Public Advocates Office, Comments on the 2022 Wildfire Mitigation Plan Updates of the Large Investor-Owned Utilities (Apr. 11, 022), OEIS Docket #2022-WMPs, p. 31, available at: <https://efiling.energysafety.ca.gov/eFiling/Getfile.aspx?fileid=52267&shareable=true> (accessed Mar. 9, 2026).

[36] A.23-12-001, Exhibit PG&E-29, p. 18.

[37] Id., p. 21.

[38] Id., p. 22.

[39] PG&E's July 2022 draft WMP is available at: <https://energysafety.ca.gov/what-we-do/electrical-infrastructure-safety/wildfire-mitigation-and-safety/wildfire-mitigation-plans/2022-wmp/> (accessed Mar. 9, 2026).

On October 6, 2022, OEIS issued a draft of a final decision approving PG&E's 2022 WMP and solicited public comments on its approval decision.[40] The draft decision acknowledged that stakeholders had provided comments on PG&E's draft WMP, and explained that OEIS had "evaluated these comments and concurred with and in some instances incorporated" select comments.[41] The draft decision listed 14 distinct stakeholder comments that OEIS had incorporated, including one comment from TURN. The draft decision did not, however, list TURN's comment regarding EVM as a comment with which OEIS concurred.[42]

On November 10, 2022, OEIS issued its final decision approving PG&E's 2022 WMP.[43] OEIS indicated that it had considered the comments it had received about the draft decision "and made revisions to the Decision where appropriate."[44]

On December 15, 2022, as required by statute, the Commission ratified OEIS's approval decision.[45]

In March 2023, consistent with Public Utilities Code § 8386.3(c)(1), PG&E submitted its annual compliance report to OEIS on its implementation of, and compliance with, its 2022 WMP. That report confirmed that PG&E had complied with its EVM commitments, and further noted that nearly 99 percent of the EVM work was performed on the highest-risk miles.[46]

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40 OEIS, Draft Decision on 2022 Wildfire Mitigation Plan Update (Oct. 6, 2022), available at: https://efiling.energysafety.ca.gov/Lists/DocketLog.aspx?docketnumber=2022-WMPs (accessed Mar. 9, 2026), Ref. # 11553.

41 Id., p. 23.

42 Parties were permitted to comment on OEIS's draft decision in late October and early November 2022. No party expressed concerns about PG&E's EVM work.

43 OEIS, Final Decision on 2022 Wildfire Mitigation Plan Update (Nov. 10, 2022), available at: <https://efiling.energysafety.ca.gov/eFiling/Getfile.aspx?fileid=53226&shareable=true&_gl=1*1lzeezt*_ga*MzA1NzUzNTIyLjE3NjI1MjgwNTg.*_ga_340RFMFNWY*czE3NzMwODg5OTEkbzEwJGcxJHQxNzczMDkyMTI4JGo2MCRsMCRoMA..*_ga_69TD0KNT0F*czE3NzMwODg5OTEkbzEwJGcxJHQxNzczMDkyMTI4JGo2MCRsMCRoMA..*_ga_DCP197HRSL*czE3NzMwODg5OTIkbzEwJGcxJHQxNzczMDkyMTI4JGo2MCRsMCRoMA..> (accessed Mar. 9, 2026).

44 Id, cover page.

45 Res. SPD-9.

46 PG&E Annual Report on Compliance for 2022 Wildfire Mitigation Plan (Mar. 31, 2023), available at: <https://www.pge.com/assets/pge/docs/outages-and-safety/outage-preparedness-and-support/2022-arc-03-31-2023.pdf> (accessed Mar. 9, 2026).

C. Procedural Background

On December 1, 2023, PG&E submitted Application 23-12-001, which sought recovery for approximately $353 million in 2022 EVM expenditures. Those expenditures were made to carry out the 1,800 miles of EVM work that was required under the 2022 WMP, but exceeded the authorized 120 percent cost threshold.[47] PG&E exceeded its EVM cost forecast because a greater number of trees needed work in 2022 than PG&E had anticipated in 2018, and because PG&E's assumptions about the kind of work needed had proven overly optimistic. Although PG&E's forecast was not accurate with respect to the amount of work that was ultimately necessary, PG&E's per-unit costs were lower than projected.[48]

PG&E's Application sought solely to recover its expenses to comply with OEIS requirements in rates. PG&E's Application acknowledged "the significance of the cost recovery request in this Application and its impact on customer rates if approved" and explained the importance of "measur[ing] these costs against the substantial customer benefits provided, including, among other things, reduced wildfire risks, increased public safety, and the continued safe and reliable operation of the electric system."[49] PG&E also attested that an outside auditor had reviewed its EVM costs to confirm that they were sufficiently supported, reasonable, and actually recorded in PG&E's financial systems.

Intervenors TURN and the Small Business Utility Advocates opposed PG&E's request to recover the $353 million in EVM costs attributable to the 2022 WMP.[50] TURN urged the Commission to disallow the full amount, arguing that PG&E failed to act reasonably and prudently in pursuing the EVM program in 2022. TURN's opposition in 2025 largely rehashed the arguments that it had presented to OEIS (and that OEIS had rejected) in 2022. According to

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47 The Application also sought to recover other costs, but those costs are not relevant here.

48 A.23-12-001, Exhibit PGE-4, p. 3-4, Table 3-2, available at: <https://docs.cpuc.ca.gov/PublishedDocs/SupDoc/A2312001/7975/556602951.pdf > (accessed Mar. 9, 2026).

49 Application, p. 5.

50 See TURN Opening Brief (June 2, 2025), pp. 23-40; SBUA Opening Brief (June 2, 2025), pp. 13-15.

TURN, the EVM program achieved too little risk reduction at too high a price. TURN alleged that PG&E was blindly adhering to the "1,800 mile [EVM] target," which TURN conceded was part of the WMP, but believed PG&E could disregard for cost reasons.[51]

On December 26, 2025, the Commission issued its proposed decision ("PD"), which proposed to deny PG&E all of the approximately $350 million in EVM costs PG&E had sought by Application to recover.[52] In comments filed with the Commission, PG&E objected to the PD's treatment of PG&E's recovery for EVM.[53] The Commission then released a revised PD reducing the disallowance by approximately $160 million. Echoing TURN's comments, the Commission's revised proposed decision reasoned that the EVM program achieved too little risk reduction, "at too high a price."[54] According to the revised proposed decision, PG&E should have abandoned the EVM program in October 2022, and PG&E should have sought relief from the Commission from these obligations.[55] PG&E's failure to do so was allegedly "unreasonabl[e] and imprudent[]."[56] The revised proposed decision also dismissed PG&E's argument that the WMP prevented the utility from ending the EVM program in October 2022, asserting, without elaboration, that PG&E's contention "that WMP work should continue with no consideration of work effectiveness is not an adequate showing of reasonableness in this context."[57]

On February 5, 2026, the Commission adopted the revised PD without further changes.

III. STANDARD OF REVIEW

An application for rehearing of a Commission order or decision "shall set forth

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[51] See TURN Opening Brief (June 2, 2025), p. 36.

[52] See Proposed Decision Granting, in part, request by Pacific Gas and Electric Company for recovery of wildfire mitigation, vegetation management, catastrophic events, and other costs (December 26, 2025).

[53] PG&E Opening Comments, pp. 1-12 (Jan. 15, 2026).

[54] D.26-02-004, p. 65.

[55] Id., p. 65.

[56] Ibid.

[57] Id. p. 66.

specifically the grounds on which the applicant considers the order or decision of the Commission to be unlawful or erroneous, and must make specific references to the record or law."[58] "The purpose of an application for rehearing is to alert the Commission to a legal error, so that the Commission may correct it expeditiously."[59]

The Commission commits reversible legal error when it acts without, or in excess of, its powers or jurisdiction; does not proceed in the manner required by law; issues a decision that is not supported by the factual findings; makes factual findings in the decision that are not supported by substantial evidence in light of the whole record; abuses its discretion; or violates any right of the applicant under the Constitution of the United States or the California Constitution.[60]

IV. REHEARING SHOULD BE GRANTED TO CORRECT THE DECISION'S LEGAL ERRORS

A. The Commission acted in excess of its powers or jurisdiction when it denied cost recovery for PG&E's Enhanced Vegetation Management Program.

Under Public Utilities Code § 1757(a)(1), a Commission decision is invalid where the Commission acts "in excess of [] its powers or jurisdiction."61 The Commission acts in "excess of its jurisdiction" when it disregards express legislative restrictions upon its powers and acts in a way that "exceed[s]" its "defined power…in any instance,"[62] including when it "grants relief which it has no power to grant."[63]

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[58] Rule 16.1(c); see also Pub. Util. Code, § 1732.

[59] Rule 16.1(c).

[60] Pub. Util. Code, § 1757(a)(1)-(6).

[61] Pub. Util. Code, § 1757(a)(1). The "excess of jurisdiction" language in § 1757(a)(1) is similar to language found in other authorities governing agency powers. See, e.g., Code Civ. Proc. § 1102 ("The writ of prohibition arrests the proceedings of any tribunal, corporation, board, or person exercising judicial functions, when such proceedings are without or in excess of the jurisdiction of such tribunal, corporation, board, or person.").

[62] *Schrage v. Schrage*, 69 Cal.App.5th 126, 139-40 (Cal. Ct. App. 2021); see also *Calveras Telelphone Co. v. Public Utilities Comm'n*, 87 Cal.App.5th 793 (Cal. Ct. App. 2022).

[63] *In re Andres G.*, 64 Cal.App.4th 476, 482 (Cal. Ct. App. 1998) (citation omitted); accord *Brock v. Superior Court of Stanislaus Cty*., 29 Cal. 2d 629, 631 (Cal. 1947).

Here, the Commission acted in excess of its powers or jurisdiction by denying cost recovery on the grounds that PG&E should not have performed certain work required by its WMP. That amounts to an effort to regulate the contents of a utility's WMP—a power that the Legislature removed from the Commission and delegated instead to OEIS.

1. In 2019, the Legislature Revoked the Commission's Authority to Regulate the Content of WMPs.

Beginning in the 2010s, wildfires in California increased in both severity and frequency, driven by a combination of climate change, accumulating fuels, and the continued expansion of housing in the wildland-urban interface. Since that time, California has seen a number of deadly, destructive fires. In October 2017, the Tubbs fire in Sonoma County destroyed 5,600 structures and resulted in 22 deaths. About one year later, in November 2018, the Camp fire in Butte County destroyed nearly 19,000 structures and resulted in 85 deaths.

Motivated by the growing threat that catastrophic wildfire posed to California's residents, property, and environment, the California Legislature passed a series of bills designed to improve the safety of utility wildfire operations. In 2016, the Legislature passed S.B. 1028, which requires investor-owned utilities to annually create and submit "wildfire mitigation plans" (WMPs) to the Commission for review and approval.[64] In 2018, the Legislature passed S.B. 901, which updated requirements governing a WMP's contents and required an independent evaluator to review and assess utility's compliance with its WMP.[65]

In 2019, following the deadly Camp fire, the Legislature again revisited the issue of wildfire safety—this time, passing an additional 22 bills to address wildfire risk. Two of these bills, Assembly Bills 111 and 1054, imposed new requirements for contents of a WMP. These bills also fundamentally restructured how WMPs would be reviewed, adopted, and enforced.

One of those fundamental changes was divesting the CPUC of its jurisdiction to oversee and approve the contents of a WMP. The Legislature did this via a structured and stepwise

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[64] See Pub. Util. Code, § 8386 (2017).

[65] See Pub. Util. Code, § 8386 (Jan. 1, 2019).

process. It directed the Commission to first create a new unit within the CPUC, the Wildfire Safety Division, that would have responsibility for WMP oversight and enforcement.[66] But the Legislature simultaneously created a new office in the California Natural Resources Agency: the Office of Energy Infrastructure Safety (OEIS).[67] And the Legislature mandated that, effective July 1, 2021, all of the Wildfire Safety Division's functions were to be transferred to OEIS.[68] Beginning on that date, it was OEIS that was required to "[o]versee electrical corporations' performance with wildfire safety pursuant to" the provision in Public Utilities Code Sections 8385 et seq.[69]

Thus, beginning on July 1, 2021, it was OEIS, not the Commission, that was tasked with overseeing and ultimately approving the contents of a utility's WMP and had primary responsibility for monitoring compliance with that WMP.[70] To be sure, in 2021 the CPUC retained jurisdiction to approve all costs for wildfire work incurred in implementing a WMP and to penalize a utility's noncompliance with its WMP. But, beginning in 2021, the Commission was no longer able to itself approve or disapprove the contents of a WMP.[71]

In short, effective July 2021, the Legislature stripped from the Commission the authority to oversee WMP development and contents and instead vested those functions in a separate agency. There is an inherent tension between the role of cost regulator (where the regulator has an incentive to minimize utility costs), and the role of safety regulator (where the regulator has an incentive to maximize investment in reducing risk). The Legislature could have reasonably believed that, allowing those functions to both remain in the hands of a single agency would

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66 Pub. Util. Code, § 8386.3 (July 12, 2019).

67 See Govt. Code, § 15470(a); Id., § 15473.

68 Pub. Util. Code, § 326(b); see also D.21-12-025.

69 Govt. Code, § 15475(b)(1).

70 See D.26-01-021 at p. 18 (describing legislative history and acknowledging that each utility submits its WMP to OEIS for review and approval).

71 The Legislature subsequently made additional modifications to this regime in 2025. As relevant here, A.B. 254 clarified that the Commission must approve costs for expenditures required by an approved WMP. See Pub. Util. Code, § 8386.4(b)(2) (effective Sept. 18, 2025).

have tended, over time, to lead that agency to underinvest in risk mitigation or else to swing between prioritizing risk mitigation and cost reduction depending on the prevailing concerns of the day. The Legislature chose to address this structural concern by vesting those functions in separate agencies.

2. The Decision usurps OEIS's authority to regulate the contents of a WMP.

The plain language of the 2019 statutes, reflected in Public Utilities Code Section 326 and 8386 and Government Code 15470, manifests the Legislature's unambiguous intent to change the Commission's oversight role with respect to wildfire safety. Specifically, the Legislature granted OEIS (not the Commission) with authority to "approve or deny" the contents of an investor-owned utility WMP.[72] After OEIS approves a WMP, the Commission does not have authority to object or issue a directive that conflicts with to OEIS's decision. To the contrary, the Legislature was quite clear that the Commission has no choice *other than* to ratify OEIS's approval.[73] To be sure, the Legislature left within the Commission's scope of authority the ability to deny cost recovery for unreasonable costs incurred in conducting work required by a WMP. Public Utilities Code § 8386.4 directs the Commission to "consider whether the cost of *implementing* each electrical corporation's plan is just and reasonable."[74] In this context, "implementing"—used consistently throughout § 8386.4—means reviewing the way the work was conducted, not whether the work was to be conducted at all.

The statutory language admits of no other reading, and "the words of a statute [are] the most reliable indicator of legislative intent."[75] Further, "[t]he very fact that [a] prior act is

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[72] Pub. Util. Code, § 8386.3(a).

[73] Id., § 8386.3(a).

[74] Pub. Util. Code, § 8386.4(b)(1) (emphasis added).

[75] *Union of Med. Marijuana Patients, Inc. v. City of San Diego* 7 Cal.5th 1171, 1184 (2019) (citation omitted).

amended demonstrates the intent to change the pre-existing law"—and here, the Legislature made an express choice to shift the relevant authority from this Commission to OEIS.[76]

The Decision usurps OEIS's role in WMP development and approval. Nowhere does the Decision acknowledge that PG&E's 2022 EVM requirements were subject to a detailed approval process overseen by another regulator, and that *the other regulator* concluded that the work was both reasonable and necessary. Nor does the Decision explain how PG&E can or should have ignored that other regulator, or persuaded it to change its mind about what it deemed necessary as a matter of public safety. Indeed, the Decision can only be understood as based on the conclusion that OEIS should not have approved PG&E's 2022 WMP as written, with the EVM requirement.

That is not a valid basis to deny cost recovery because the Legislature vested WMP approval functions in OEIS, not the Commission. The Commission may not evade the Legislature's choices by using cost recovery to regulate the contents of PG&E's 2022 WMP.

Yet the Commission has consistently—and incorrectly—asserted its entitlement not only to review whether work was "implemented" in a reasonable and prudent manner, but to second-guess OEIS's judgment about whether performing certain work was reasonable and required. For instance, in a recent decision denying San Diego Gas & Electric cost recovery for certain costs incurred in the course of implementing its WMP, the Commission asserted that "[t]he WMP process is not a substitute for the Commission's statutory objective of determining the reasonableness of costs."[77] This is so because, according to the Commission, OEIS "do[es] not address a utility's optimal portfolio of wildfire mitigations considering the affordability and reasonableness of rates."[78] Accordingly, the Commission opined that "Section 8386.4 requires the Commission to disallow unreasonable costs even when OEIS and the Commission have

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[76] *People v. Perkins* 37 Cal.2d 62, 63-64 (1951) (citation omitted); see also *Daily v. City of Pomona* 207 Cal.App.2d 637, 641 (1962) ("It is presumed that any statutory amendment works a change in the law.").

[77] D.26-01-021, p. 172.

[78] Ibid.

determined the program promotes public safety."[79] In fact, the Commission has gone so far as to explain that, in its view, it "is perfectly within its right to deny all costs [in a WMP] not found to be reasonable[.]"[80] Put differently, the Commission views OEIS's approval of a WMP as provisional—a step along the way to ultimate Commission approval. In the Commission's view, *it* retains the ultimate, final approval over safety by the mechanism of cost recovery.[81]

The Public Utilities Code confers no such authority on the Commission. The statutory language means what it says: the Commission may evaluate cost reasonableness not by looking to *whether* a utility should perform the mandated work, but only by looking to *how* the required work is proposed to be (or actually was) "implemented." The language of § 8386.4 requires the Commission to disallow costs where there is evidence that the utility's projected cost of implementation is not reasonable (in the context of a utility seeking pre-approval of recover via the GRC) or the utility did not, in fact, perform work in an efficient manner (in context of a utility seeking after-the-fact recovery of costs in a memorandum or balancing account). It does not give the Commission authority to disallow any cost where the work is proposed to be performed in a satisfactory manner—or actually *was* performed in a satisfactory manner—but the Commission is unhappy with another regulator's decision to mandate the work in the first instance.

The statute does give the Commission a role in determining what work the utility should perform in its WMP—but that role is *prospective*, and it is also limited and advisory. The statute requires OEIS to "accept comments on each [WMP] from the public, other local and state agencies, and interested parties"[82] and to "consider" those comments prior to approving a

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[79] Ibid.; see also id. pp. 24-25 (citing Pub. Util. Code, Section 8386.4(b)(1)); see also pp. 105-109.

[80] D.26-01-021, p. 109.

[81] If reviewed by a court, the Commission's interpretation would not be entitled to any deference. See, e.g., *Kaiser Found. Health Plan, Inc. v. Zingale* 99 Cal. App. 4th 1018, 1028 (2002) ("[T]he general rule of deference to interpretations of statutes subject to the regulatory jurisdiction of agencies does not apply when the issue is the scope of the agency's jurisdiction.").

[82] Pub. Util. Code, § 8386(e).

WMP.[83] "State agencies" includes the Commission. The Commission may influence (though not control) the contents of a WMP through that prescribed statutory process. Similarly, the Legislature required the Commission to "ratify" an OEIS decision approving a WMP.[84] This *required* ratification does not suggest that the Commission may, at the back end, disapprove the decisions of OEIS.

The Commission's interpretation would render superfluous various aspects of the statutory process set forth by the Legislature governing WMPs. If the Commission could simply disapprove utility recovery for certain types of work mandated by a WMP, there would be no need for the Commission to participate in the WMP comment process, since it would always have recourse to "fix" whatever problems it found via its cost recovery authority. There would also be no need for stakeholders like TURN to participate in the OEIS process, since they could instead forum-shop by asking the Commission to block what OEIS had decided (as ultimately happened here). The legislative requirement that the Commission "ratify" an OEIS decision approving a WMP would also be rendered meaningless.[85] The ratification process exists to ensure that the Commission has reviewed and understands the contents of a WMP, and is prepared for future applications concerning cost recovery. If the Commission could, through the mechanism of cost recovery, disapprove a WMP, that disapproval would effectively "undo" its (mandatory) ratification.

The Commission's interpretation of its authority under Section 8386.4 is thus contradicted by the plain text of the Public Utilities Code and the Government Code, by statutory context, and by common sense. The Commission is incorrect that it may disapprove cost recovery for work required in a WMP on the basis that it does not agree the work was necessary or cost-effective. Because the Decision was premised on the Commission's misunderstanding that it may second-guess OEIS's judgment as to what work ought to be performed by a utility

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[83] Id., § 8386.3(a)(2).

[84] Id., § 8386.3(a).

[85] Id., § 8386.3(a).

pursuant to a WMP, the Commission acted without, or in excess of, its powers or jurisdiction. Rehearing is warranted to correct the error.

B. The denial of recovery for PG&E's Enhanced Vegetation Management Program constitutes an abuse of discretion.

The Decision should be reheard on the independent ground that the Commission abused its discretion in concluding that a reasonable and prudent operator would have taken steps to narrow its EVM program beginning in October 2022.[86] An agency abuses its discretion when it makes a decision that is "arbitrary, capricious, or entirely lacking in evidentiary support," or when it fails to consider all relevant factors and demonstrate a rational connection between those factors, the choices made, and the purposes of the enabling statute.[87] Here, the Commission's conclusion arbitrarily disregards the Commission's own prior conduct regarding OEIS's approval of the WMP, ignores the highly salient factor that OEIS could have reasonably wanted to conduct work without regard to its cost-effectiveness, and unreasonably ignores clear record evidence that OEIS would not have permitted a modification of the WMP that would have reduced PG&E's EVM obligations.

First, the Commission's sub silencio change in course from its prior acceptance of PG&E's 2022 WMP is arbitrary. The Decision faults PG&E for continuing a program that the Commission now considers to be cost ineffective. But the Commission did not raise these cost-effectiveness concerns in 2022. For instance, the Commission did not comment on PG&E's WMP as part of OEIS's public comment process, or express support for TURN's assertions of cost-ineffectiveness. Nor did the Commission elsewhere raise any concern about PG&E's 2022 EVM mileage—despite ample opportunity to do so, especially in light of the Commission's oversight of EVM in its Enhanced Oversight and Enforcement process. Additionally, the

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[86] Pub. Util. Code, § 1757(a)(5). In addition, even if the Commission were to conclude that its Decision does not violate the statute governing its authority (see Part A) or the Constitution (see Part C), the Commission should nevertheless conclude for the reasons set forth in Parts A and C that the Decision is an abuse of discretion because it tramples on the authority of another regulatory agency and deprives PG&E of compensation for work that another agency required PG&E to undertake.

[87] *Cal. Comm. Choice Ass'n v. CPUC*, 103 Cal.App.5th 845, 861 (Cal. Ct. App. 2024).

Commission ultimately ratified PG&E's WMP, as mandated by law. In short, PG&E (and OEIS) had every reason to believe that, in 2022 and with the Commission's ratification of PG&E's WMP, the Commission accepted PG&E's 2022 EVM target.

Yet, four years after the work has been completed, the Commission disavows its prior acceptance. It now maintains that PG&E should have "c[o]me to the Commission to seek a change in its EVM program" notwithstanding its own failure to raise these concerns earlier, and despite OEIS's approval of PG&E's WMP and the Commission's own prior ratification.[88] The Commission has not acknowledged its change in position, much less accounted for PG&E's reliance on the Commission's contemporaneous silence regarding this work. The Decision's failure to acknowledge its own prior conduct, and PG&E's reliance on that conduct, is arbitrary and capricious, and thus an abuse of discretion.[89]

Second, the Decision's conclusion that PG&E should have "c[o]me to the Commission to seek a change in its EVM program" is also arbitrary, because it overlooks an extremely relevant factor, namely, the role of other regulators in the WMP process and the fact that those regulators could have reasonably believed this work was necessary. The Decision fails to acknowledge that, to change its EVM program in October 2022 or later, PG&E would have had to obtain consent from OEIS, the safety regulator charging with overseeing the contents of PG&E's WMP. Indeed, in October 2022—the point at which the Commission alleges PG&E should have altered its WMP—OEIS had already issued a draft approval of PG&E's WMP, including its EVM targets.

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[88] D.26-02-004, p. 65.

[89] *FCC v. Fox*, 556 U.S. 502, 515 (2009) (an agency is arbitrary and capricious where it changes position without explanation, or else changes position without acknowledging a party's reasonable reliance interests).

The Commission's misunderstanding that it—rather than OEIS—could change PG&E's legal requirements is itself a prejudicial error.[90] But that error is compounded because it represents the Commission's failure to consider an extremely relevant factor, namely, that OEIS was required to exercise its own regulatory authority and make its own decisions, even if those are different from the ones the Commission would make if it were empowered to consider the issue afresh. As the Commission itself has explained, "the reasonableness of any cost may be influenced by other facts [beyond an official risk-spend efficiency score]."[91] OEIS was entitled to make safety of California residents and ratepayers its highest priority, and to conclude that EVM was necessary to achieve its safety objectives.[92] The Decision's failure to acknowledge or properly consider that fact renders the Decision an abuse of discretion.

Finally, there is clear evidence in the record, which the Decision impermissibly disregards, that it would have been both procedurally impracticable and substantively impossible for PG&E to ask OEIS to make a mid-year (or post-approval) change as the Commission asserts PG&E should have done. The Decision's disregard of this context is an abuse of discretion.

As to the process, the Commission asserts that PG&E should have changed course on its EVM program beginning in October 2022. At that point, however, PG&E's WMP was already being formally evaluated for approval by OEIS. It is unlikely that OEIS would have permitted PG&E to make so significant a change so late in the process. This is even more true after OEIS approved PG&E's WMP on November 10, 2022. At that point, PG&E would have had only ten

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[90] The Commission appears to suggest that PG&E would *only* have had to seek Commission approval. See D.26-02-004, p.65 ("PG&E also does not assert that in view of this knowledge it came to the Commission to seek a change in its EVM program, *despite what was in its WMP*[.]" (emphasis added).

[91] D.26-01-021, pp. 28-29; see also id., p. 29 ("[T]he analysis [of cost-reasonableness] cannot necessarily stop if one factor is not provided, particularly if other factors are more significant…some initiatives, such as patrol inspections, are mandated by regulation. Other initiatives are required based on functional or operational considerations, such as weather monitoring.").

[92] OEIS was not alone in foregrounding safety. As PG&E prepared its draft 2022 WMP, other authorities (such as federal district Judge William Alsup) also expressed the view that PG&E should continue to elevate safety about other considerations. See, e.g., *United States v. PG&E*, Case No. 3:14-cr-175 (N.D. Cal.), Doc. 1559.

days to make a change to its WMP, which PG&E would have had to submit via OEIS's change order process. Moreover, it is not even clear that halting EVM at that point was even subject to the change order process, as it was arguably a "fundamental change in strategy" that could be incorporated only into the next year's WMP. The Decision does not grapple with these procedural realities, much less support its conclusion that PG&E should have somehow overcome them.

But even assuming these process challenges were manageable, the record shows beyond any doubt that OEIS would have rejected PG&E's changes. After all, OEIS was presented with—and rejected—the very information that the Commission now relies on to contend that there should have been a change in PG&E's EVM obligations in its WMP. Specifically, in April 2022, TURN submitted public comments to OEIS, in which it raised *precisely* the same concern that the Commission has now used to justify its Decision—namely, that the EVM work PG&E planned to conduct was not cost-effective, and therefore should not be incorporated into PG&E's 2022 WMP. As required by law, OEIS considered these stakeholder comments. OEIS did not adopt or otherwise act on TURN's request to reject EVM, even while it ultimately concurred with, and acted on, at least one of TURN's other recommendations. Thus, it is clear that OEIS did not agree—not in May 2022, when it issued a "revision notice" to PG&E, and not in November 2022, when it approved PG&E's WMP—that PG&E's EVM work should be scaled back or ended. To the contrary, OEIS plainly believed that safety required the performance of this work. The Commission's conclusion that, in the face of OEIS's position, PG&E could have changed its WMP, is belied by the record and thus an abuse of discretion.

In sum, the Decision is an abuse of discretion for any (and all) of the three reasons outlined above. Rehearing is warranted to correct these errors.

C. The denial of recovery for PG&E's Enhanced Vegetation Management Program is unconstitutional.

The Decision violates the Fifth and Fourteenth Amendments of the U.S. Constitution and Sections 7 and 19 of Article I of the California Constitution, because it constitutes either an

unlawful taking or a deprivation of due process of law. The Decision must therefore be invalidated.[93]

1. The Decision constitutes a taking without just compensation.

The Fifth and Fourteenth Amendments of the U.S. Constitution and Article I Section 19 of the California Constitution prohibit the taking of private property for public gain without just compensation. The purpose of those prohibitions is to "bar [the] Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole."[94]

The U.S. and California constitutions protect utilities from uncompensated takings as they do any other business. Although PG&E's assets are employed in the public interest to provide consumers with safe, reliable electric power, the company is owned and operated by private investors. As the U.S. Supreme Court has counseled, those investors' private interests are significant and worthy of protection: "[f]rom the investor or company point of view it is important that there be enough revenue not only for operating expenses but also for the capital costs of the business…the return to the equity owner should be commensurate with returns on investments in other enterprises having corresponding risks."[95] In addition, "[t]hat return…should be sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital."[96]

The Decision fails to protect those interests as the federal and state constitutions require.

a. Where a regulated utility is mandated to perform a particular service, denial of all recovery for the prudently incurred costs of providing that service is a taking.

The Decision denies PG&E cost recovery for a specific service for the public benefit that

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[93] Pub. Util. Code, § 1757(a)(6).

[94] *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 123 (1978) (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)).

[95] *Federal Power Comm'n v. Hope Natural Gas*, 320 U.S. 591, 603 (1944).

[96] Ibid.

PG&E was commanded to take, under threat of severe punishment, by a different regulatory body. "The utility is not a servant to the state; it is a for-profit enterprise which incurs legal obligations in exchange for state-conferred benefits."[97] In this context—a utility that is directly beholden to the government for its revenues—the state may not demand performance of work and deny all recovery (not only *profit*, but recovery at all) for the prudently incurred costs of providing that service. As the Supreme Court concluded in another takings case, "a State, by ipse dixit, may not transform private property into public property without compensation. … This is the very kind of thing that the Taking Clause of the Fifth Amendment was meant to prevent. That Clause stands as a shield against the arbitrary use of governmental power."[98] Although that case involved a physical taking, the logic applies equally here.

Nothing in *Duquesne Light Co. v. Barasch* ("*Duquesne*") suggests otherwise.[99] Under *Duquesne*, rates with a confiscatory impact—i.e., rates that deprive investors of a fair return, measured against the rate as a whole—are constitutionally suspect.[100] But neither *Duquesne* nor any other Supreme Court case involving a utility takings claim involved denial of cost recovery for an action *mandated* by the regulator. That fact alone distinguishes this case and necessitates a different rule.

To be sure, the utilities in *Duquesne* argued that they had a statutory duty to serve anticipated load growth, but that duty is not equivalent to an express order from a regulator to take a particular action. The *Duquesne* utilities had significant discretion concerning *how* to serve their anticipated load growth. There was no state order directing the utilities to build generation, much less to enter into a complex contractual arrangement to build multiple, capital-

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[97] *Jersey Cent. Power & Light Co. v. FERC*, 810 F.2d 1168, 1189 (D.C. Cir. 1987) (Starr, J., concurring); see also *Calder v. Bull,* 3 Dall. 386, 388 (1798) (opinion of Chase, J.) ("It is against all reason and justice" to presume that the legislature has been entrusted with the power to enact "a law that takes property from A. and gives it to B").

[98] *Webb's Fabulous Pharmacies v. Beckwith*, 449 U.S. 155, 164 (1980).

[99] *Duquesne*, supra, 488 U.S. at 310.

[100] Id. at 310-11.

intensive nuclear plants, as the Pennsylvania utilities had. The utilities could have, for instance, invested in energy efficiency, new transmission lines, or other, less capital-intensive types of generating facilities. Further, nothing in *Duquesne* suggests that failure to carry out the actions in which the utilities did choose to engage would have resulted in penalties. Put differently, although the *Duquesne* utilities' investments were ultimately deemed prudent by the state utilities commission, that does not mean that they were *mandated*, with potential liability for failure to comply.

That factual distinction between *Duquesne* and this case is dispositive. There is a constitutionally significant distinction between, on the one hand, permitting a state to deny recovery of costs that a utility has made in its discretion and, on the other, permitting such a denial as to decisions that the utility made because a regulator directed it to do so under threat of sanction. Nothing in *Duquesne*, nor any other Supreme Court case, permits a state to direct the deployment of utility assets as though they were their own and then turn around and deny cost recovery for those assets. The Decision constitutes a taking on this ground.

b. *Duquesne* does not apply to the ratesetting system in California.

There is a second, independent reason that the Decision constitutes a taking. Whether a rate fairly compensates a utility must be evaluated "given the risks under [the] particular ratesetting system."[101] The particular ratesetting system in California today is a piecemeal system, where each rate decision is set individually. Within that system, the Decision constitutes a taking.

To elaborate, *Duquesne*'s rule that a rate is only constitutionally prohibited if it is "confiscatory" rule was developed in, and is specific to, "the context of the system under which [it is] imposed," namely, generalized ratemaking.[102] Under a "ratesetting system" of generalized ratemaking, the utility regulator conducts a comprehensive, overarching rate-setting proceeding

[101] *Duquesne*, supra, 488 U.S. at 310.

[102] Id. at 314.

at some established cadence. The end product of that rate-setting process was a single "rate" that reflected the utility's *entire* revenue requirement. The singular rate ultimately adopted reflected an enormous number of discrete regulatory judgments, including methodological choices (e.g., whether to use a test year, whether to apply cost of service ratemaking), accounting judgments (e.g., how to treat investments), factual determinations (e.g., how much it costs to operate a particular facility), and policy judgments (e.g., what is a fair rate of return for an investor, given the risk of the business).

The Supreme Court recognized in *Duquesne* that, under this system of general ratemaking, imbuing each one of these individual decisions with constitutional significance would put courts in the uncomfortable position of having to adjudicate disputes more appropriately directed to state regulators. The Court thus rejected the notion, advocated by the *Duquesne* appellants, that "the Constitution requires that subsidiary aspects of Pennsylvania's ratemaking methodology be examined piecemeal."[103] As the Court reasoned, in ratemaking, "[e]rrors to the detriment of one party may well be canceled out by countervailing errors or allowances in another part of the rate proceeding."[104] It then "reaffirm[ed]" that the object of the Court's constitutional analysis is not the particular ratemaking methodology, "but the impact of the rate order" on the utility's financial health.[105] In other words, *Duquesne* (and its predecessor cases) must be understood as a rejection of the invitation to interfere with the general ratesetting process by flyspecking individual choices made as part of a broader compromise achieved in setting a singular, unitary utility rate.

But, as noted above, *Duquesne*'s analysis was particular to the "system of ratesetting" at play there. That system, however, is of limited applicability in California today, and is not implicated by the Decision. Indeed, California has gradually moved away from general ratemaking, and PG&E today ultimately recovers less than half of its revenue requirement from

[103] Id. at 313.

[104] Id. at 314.

[105] Id. at 310.

its general rate case. Instead, California regulators set rates by a series of individualized decisions governing recovery of utility programs, divorced from any broader, comprehensive consideration of the utility's overall revenue requirement. In some cases, "rates" set by particular Commission decisions reflect not the utility's revenue requirement at all, but the cost of programs the utility administers on behalf of the state itself. In California's "system" of ratemaking, then, the utility's revenue is obtained through a series of discrete, independent orders, and regulators have every incentive "to arbitrarily switch back and forth between methodologies in a way which require[s] investors to bear the risk of bad investments at some times while denying them the benefit of good investments at others…."[106]

In this context (or at least, regarding decisions that do not implicate general rate-setting, like the Decision here), the regulatory takings framework established in *Penn Central* is more appropriate. The Supreme Court recognized in *Penn Central* that the Takings Clause is concerned with whether "justice and fairness require that economic injuries caused by public action be compensated by the government, rather than disproportionately concentrated on a few persons."[107] To answer this question, courts undertake an ad hoc, factual inquiry, anchored by three factors: "[1] the economic impact of the regulation on the claimant; [2] the extent to which the regulation has interfered with distinct investment-backed expectations; and [3] the character of governmental action."[108]

Each of those three factors demonstrates that the Decision is a taking. First, the economic impact of the Commission's disallowance (more than $172 million) is significant, representing nearly 10 percent of the $2 billion PG&E sought to recover in this particular application.

Second, the regulation has interfered with PG&E's reasonable, investment-backed expectations. In particular, OEIS *mandated* that PG&E undertake certain wildfire mitigation

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[106] Id. at 315.

[107] *Penn Cent. Transp. Co. v. City of New York*, supra, 438 U.S. at 124 (1978).

[108] Ibid.

activities, and the Commission ratified that decision. Had PG&E declined to perform these activities, it could have been penalized by the Commission and lost its safety certification. PG&E and its investors expected, based on understandings at the time and existing law, that it would be able to recover these costs to the extent they implemented the wildfire mitigation activities prudently and as mandated. Although the Commission retained authority over cost recovery, PG&E had no reason to doubt that it would be able to recover its costs because, on a per-unit basis, it exceeded its prior estimated performance.

Finally, the character of the government action is akin to a physical expropriation by the government, not a public program adjusting the benefits and burdens of economic life. The action targets PG&E, which the Commission expects to bear the entire burden of these costs to promote the common good. The Commission has not incidentally affected the company's property value. Its Decision has forced the company to expend money to perform a wildfire-mitigation service that inured to the public benefit and has forced PG&E's investors—and PG&E's investors alone—to bear those costs. Considered cumulatively, justice and fairness require that the cost burden of this conduct be reimbursed by the government or recovered from customers as a cost of service, rather than disproportionately borne by PG&E's shareholders.[109]

2. The Decision violates the Due Process Clause.

Both the U.S. Supreme Court and California Supreme Court have recognized the fuzzy relationship between the Due Process Clause and the Takings Clause in the context of price regulation. To the extent the Commission disagrees that PG&E has a property interest in its cost recovery, or otherwise believes the Takings Clause is a poor fit in this context, that does not end the constitutional analysis. Instead, the Commission must consider the constitutionality of the Decision under the Takings Clause's "Fifth Amendment neighbor," the Due Process Clause.[110]

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[109] The Decision might also be construed as a tax or regulatory fee paid PG&E's shareholders. Such a tax or fee would be an unlawful assessment, as it was not voted on by the Legislature.

[110] *Eastern Enterprises v. Apfel*, 524 U.S. 498, 556 (1998) (Breyer, J., dissenting).

At least in certain contexts, whether Takings Clause analysis or Due Process Clause analysis is more appropriate is debatable. For instance, in *Eastern Enterprises v. Apfel*, the U.S. Supreme Court considered the constitutionality of a statute mandating that mining companies—including companies who exited the industry decades before—pay additional healthcare costs for their former workers. The plurality analyzed the case under the Takings Clause. Five justices, however, disagreed with the plurality that the Takings Clause—rather than the Due Process Clause—was the appropriate analytic framework.

Similarly, in *Kavanau v. Santa Monica Rent Control Board*, the California Supreme Court likewise acknowledged that the Due Process Clause and Takings Clause analysis "blurs somewhat in cases applying the due process and takings clauses to price regulations," including utility rate regulation.[111] The *Kavanau* majority explained that prior U.S. Supreme Court cases involving challenges to utility rate regulation—including *Hope* and *Bluefield*—had originally been discussed under the Due Process Clause before the Court ultimately shifted the analysis to the Takings Clause in *Duquesne*.[112]

Justice Mosk's instructive concurrence in *Kavanau* attempted to clarify the relationship between the Due Process and Takings Clauses in the context of rate regulation, including utility rate regulation.[113] As he explained, utility ratemaking may raise two different kinds of Due Process Clause problems, requiring two distinct analyses: a rate or similar regulatory action may violate due process principles because (1) it is arbitrary or discriminatory; or (2) it is confiscatory.[114] That latter concept of due process, Justice Mosk explained, overlaps considerably with the Takings Clause analysis. But the former analysis is distinct, and action that is arbitrary may still violate due process, even if it is not confiscatory. Where the

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[111] *Kavanau v. Santa Monica Rent Control Bd.,* 16 Cal.4th 761, 770-771 (1997).

[112] Id. at 776-777 (discussing the doctrinal evolution of how the Supreme Court has approached price control, including utilities regulation).

[113] Id. at 786 (Mosk, J., concurring) (attempting to clarify the relationship between due process and takings jurisprudence in the context of rate regulation).

[114] Accord *Eastern Enterprises*, supra, 524 U.S. at 554-56 (Breyer, J., dissenting).

government's regulatory conduct is arbitrary—in the sense that there is no reasonable relationship to a legitimate regulatory purpose—or "involve[s] the potential unfairness of retroactive liability"—it fails under the Due Process Clause.[115]

The Decision denying PG&E recovery is arbitrary in just that way: it is fundamentally unfair and bears no relationship to legitimate government purposes. That is because the Decision imposes a "basically arbitrary" retroactive liability based on the unreasonable (indeed, illogical) view that another regulator's judgment was improper—even though the Legislature entrusted that regulator with the responsibility to make the judgment in question.[116]

To be clear, PG&E is not asserting that a disallowance under § 8386.4 that actually examines the utility's judgment in how it goes about implementing a WMP's requirements, violates the Due Process Clause. But the combination of a mandate to perform EVM work and a denial of compensation on the grounds that the work was unnecessary, is so arbitrary as to constitute a violation of due process.[117]

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[115] Id. at 556.

[116] Id. at 557 (citing *Pension Benefit Guaranty Corp. v. R.A. Gray & Co.*,467 U.S. 717, 730 (1984)).

[117] Cf. *In re Marriage of Bouquet*, 16 Cal.3d 583, 592 (1976) (in considering whether a retroactive government action contravenes due process, the Court considers "the significance of the state interest serviced by the [government action], the importance of the retroactive application to the effectuation of that interest, the extent of reliance upon the former law, the legitimacy of that reliance, the extent of actions taken on the basis of that reliance, and the extent to which retroactive application of the [government action] would disrupt those actions.").

V. CONCLUSION

For the foregoing reasons, PG&E respectfully requests that the Commission grant this Application for Rehearing and authorize PG&E to fully recover its 2022 EVM expenditures.

Respectfully Submitted,

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