No. 18-____

IN THE

Supreme Court of the United States

SAN DIEGO GAS & ELECTRIC COMPANY,

Petitioner,

v.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA,

Respondent.

On Petition for a Writ Of Certiorari to the California Court of Appeal, Fourth Appellate District

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether it is an uncompensated taking for public use in violation of the Fifth and Fourteenth Amendments for a State to impose strict liability for inverse condemnation on a privately owned utility without ensuring that the cost of that liability is spread to the benefitted ratepayers.

PARTIES TO THE PROCEEDING

The following were parties to the proceeding before the California court of appeal:

1. San Diego Gas & Electric Co. ("SDG&E"), Petitioner in this Court, was Petitioner below.

2. The Public Utilities Commission of the State of California, Respondent in this Court, was Respondent below.

3. Protect Our Communities Foundation was a Real Party in Interest below.

4. The Utility Reform Network was a Real Party in Interest below.

5. Utility Consumers Action Network was a Real Party in Interest below.

6. Ruth Hendricks was a Real Party in Interest below.

7. San Diego Consumers' Action Network was a Real Party in Interest below.

8. Mussey Grade Road Alliance was a Real Party in Interest below.

9. Pacific Gas and Electric Company was an Interested Entity/Party below.

10. Southern California Edison Gas Company was an Interested Entity/Party below.

RULE 29.6 DISCLOSURE STATEMENT

SDG&E is a private, investor-owned utility. Enova Corporation owns 100% of SDG&E. Sempra Energy in turn owns 100% of Enova Corporation. Sempra Energy has no parent corporation, and no publicly held company owns 10% or more of its stock.

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INTRODUCTION

California's privately owned utilities face crippling liability for damage to private property from wildfires that have become the "new normal" in California. The prospect of such liability has increased insurance costs, weakened credit ratings, and discouraged investment in California's privately owned utilities, who supply power to the overwhelming bulk of the State's businesses and residents and provide a vital aspect of California's infrastructure. The catastrophic consequences of such liability are not hypothetical; they have already driven one privately owned utility (Pacific Gas & Electric Co. ("PG&E")) into a recent highly publicized bankruptcy.

This situation is almost entirely the creature of law. In a series of California intermediate appellate court decisions, California has imposed "inverse condemnation" liability on privately owned utilities for damaging private property, just as if they were government actors. Because inverse condemnation is a form of strict liability in California, it is far more attractive to plaintiffs and the plaintiffs' bar than the hard work of proving that the utilities' negligence in the operation of their powerlines proximately caused any wildfires or other damage. But unlike government actors, privately owned utilities lack the coercive power of taxation and cannot unilaterally set their own rates. To recover the costs of inverse condemnation liability, they must ask their regulator, the California Public Utilities Commission ("CPUC") to allow them to pass the costs of that liability on to their ratepayers.

The CPUC, affirmed by the California courts, has now said no. In denying the application of petitioner San Diego Gas & Electric Company ("SDG&E") to recover through rates the $379 million SDG&E was forced to pay in unreimbursed inverse condemnation costs from wildfires, the CPUC said that inverse condemnation was "not relevant" to its decision. Instead, the CPUC applied its own administrative "prudent manager" standard and deemed SDG&E entitled to nothing.

This is an uncompensated taking of SDG&E's private property for public use in violation of the Fifth and Fourteenth Amendments to the federal Constitution. The well-settled purpose of compensation for takings in eminent domain is to ensure that the costs of public improvements are borne by the benefitted public. The same is true for inverse condemnation, which ensures that damage from public improvements is not visited disproportionately on particular private parties but rather is borne by the benefitted public as a whole.

California law, in violation of these principles, has now created a takings whipsaw in which the State transfers the cost of damage from public improvements from one private party (the damaged homeowners and businesses) to another private party (SDG&E and other privately owned utilities). It thus does exactly what inverse condemnation is supposed to avoid: visits all the costs of damage from public improvements on a single private party—here, SDG&E. And in equal measure, California creates an unconstitutional windfall for ratepayers, who are the relevant public benefitted by the privately owned

utilities' investment in electric power generation, transmission and distribution facilities.

All three of California's privately owned utilities have tried in vain through repeated proceedings to persuade the California court of appeal and California Supreme Court to grant discretionary review to consider these issues. They have asked those courts repeatedly without success to revisit the imposition of inverse condemnation liability on privately owned utilities. And from the other direction, SDG&E asked those courts to review the CPUC decision denying recovery, arguing that, assuming inverse condemnation applies, denial of recovery is both an unreasonable application of state law and an unconstitutional taking without just compensation. Again without success.

In light of the California court of appeal's and California Supreme Court's steadfast refusal to consider these important questions, this Court should grant review. The decision of the California appellate court below takes privately owned utilities' property for public use without just compensation, in conflict with the Takings Clause as applied to the States through the Due Process Clause, and in conflict with this Court's settled takings jurisprudence. And the question presented indisputably has grave public importance: the legal whipsaw now created by California's appellate decisions threatens enormous and exponentially increasing financial and infrastructure harm to the largest economy in the Nation and the fifth largest economy in the world.

Certiorari should be granted.

OPINIONS BELOW

The California court of appeal's opinion is reproduced at App. 1a. The decision of the California Public Utilities Commission is reproduced at App. 6a and its denial of rehearing is reproduced at App. 94a. The California Supreme Court's denial of the petition for review is reproduced at App. 5a.

JURISDICTION

The California court of appeal issued its opinion on November 13, 2018. App. 1a. On January 31, 2019, the California Supreme Court denied SDG&E's timely filed petition for review. App. 5a. This Court has jurisdiction under 28 U.S.C. § 1257(2).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment, U.S. Const. amend. V, provides in pertinent part:

> No person shall * * * be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Due Process Clause of the Fourteenth Amendment, U.S. Const. amend. XIV, § 1, provides:

> No State shall * * * deprive any person of life, liberty or property, without due process of law.

STATEMENT

A. Factual Background

SDG&E is a private, investor-owned utility that supplies gas and electricity to over 3.4 million customers in San Diego County and southern Orange

County, California. *See* Petitioner's Appendix of Exhibits in Support of Writ of Review in the California Court of Appeal ("Cal. Ptn's App.") 1 Cal. Ptn's App. 497, 500. SDG&E owns and operates nearly 19,000 miles of electrical distribution and transmission lines, including many in rural backcountry areas that it is legally obligated to serve and where the risk of wildfires is significant. 1 Cal. Ptn's App. 500-501. In keeping with CPUC regulations and utility industry best practices, SDG&E has multiple programs to mitigate and reduce wildfire risk, and has been lauded as a "potential example of excellence." 2 Cal. Ptn's App. 822-824.

In October 2007, Southern California experienced severe Santa Ana winds with reported wind speeds of 40 to 60 miles per hour and gusts up to 100 miles per hour. 1 Cal. Ptn's App. 382, 31 Cal. Ptn's App. 11787, fn. 30. As these winds swept across Southern California, they caused hundreds of fires, only some of which the thinly stretched firefighting resources were able to contain and which burned over 500,000 acres. 1 Cal. Ptn's App. 149-150, 31 Cal. Ptn's App. 11777. The Witch Fire combined with the Guejito Fire burned nearly 200,000 acres, damaging over 1,140 homes. 31 Cal. Ptn's App. 11786, 11789, 11804. The Rice Fire burned nearly 9,500 acres and damaged over 200 homes. 13 Cal. Ptn's App. 6142.

Property owners, insurers, and government entities alleging damage from the fires filed more than 2,500 lawsuits against SDG&E, bringing, among others, claims for inverse condemnation.

B. California Law Of Inverse Condemnation

Under California law, inverse condemnation is a form of strict liability that can be enforced whether or not the damage from a public improvement was foreseeable, and even if there was no fault or negligence. *See, e.g.*, *Marshall v. Department of Water and Power of the City of Los Angeles*, 219 Cal. App. 3d 1124, 1138-39 (1990); *see also San Diego Gas & Elec. Co. v. Sup. Ct.*, 13 Cal. 4th 893, 939-40 (1996). All a plaintiff need establish is a causal relationship between the government's (or in this case, a privately owned utility's) activity and the alleged property loss. *Marshall*, 219 Cal. App. 3d at 1138-39. And a defendant can be held strictly liable for damages if its public improvement was a substantial cause of the damage, even if it is only one of several concurrent causes. *See id.*

The decisions of two intermediate California appellate courts have imposed inverse condemnation liability on privately owned utilities to the same extent as such liability applies to government actors. *See Pacific Bell Tel. Co. v. S. Cal. Edison Co.*, 208 Cal. App. 4th 1400 (2012); *Barham v. S. Cal. Edison Co.*, 74 Cal. App. 4th 744 (1999). These decisions and other decisions implementing them have never been reviewed by the California Supreme Court.

Each decision imposed inverse condemnation liability on privately owned utilities on the express assumption that the resulting costs would be recovered from ratepayers as the relevant benefitted public. *Pacific Bell* expressly noted that there was no "evidence" that the CPUC would not allow a privately owned utility to pass on inverse condemnation damages liability through adjustments "during its period-

ic reviews." 208 Cal. App. 4th at 1407-08. Similarly, *Barham* allowed a privately owned utility to be held "liable in inverse condemnation" just the same "as a public utility," but in doing so recognized that the key purpose of inverse condemnation is to "spread among the benefiting community any burden disproportionately borne by a member of that community." 74 Cal. App. 4th at 752-53.

C. Proceedings Below

Overruling a demurrer filed by SDG&E, the California superior court held that plaintiffs could bring their inverse condemnation claims against SDG&E even though it is a privately owned utility, not a government entity. *See* Minute Order, *In re 2007 Wildfire Insurer Litig.*, p.2 (Super. Ct. San Diego County, Jan. 29, 2009, No. 37-2008-0093083, CU-NP-CTL).

In light of the strict liability imposed by inverse condemnation under California law, SDG&E decided to settle the inverse condemnation claims against it in order to reduce its exposure and avoid unnecessary litigation. 1 Cal. Ptn's App. 141-42. As a result, although plaintiffs asserted $5.6 billion in damages, SDG&E resolved those claims with payments totaling $2.4 billion. 1 Cal. Ptn's App. 57. SDG&E recovered $1.1 billion from its liability insurers and another $824 million from settlements with third parties based on cross-claims it had filed, leaving SDG&E with $476 million in unrecovered settlement payments and legal expenses. 31 Cal. Ptn's App. 11778, fn. 2.

In 2012, SDG&E applied to the Federal Energy Regulatory Commission ("FERC"), which regulates the interstate transmission rates charged by utilities

like SDG&E, to include a portion of its unrecovered payments in those rates. In 2014, FERC granted SDG&E's application, allowing immediate recovery of $23 million and subsequent recovery of another $67 million in settlement payments. *See In re San Diego Gas & Elec. Co.*, 146 FERC ¶ 63,017, 2014 WL 713556 (2014).

In so doing, FERC held that recovery was warranted without regard to the prudence of SDG&E's maintenance operations. *Id.* at ¶ 66,112-13. FERC reasoned that SDG&E would have been held liable under California inverse condemnation law without regard to fault, and that, "[b]y settling, SDG&E avoided facing considerable litigation risk and disposed of claims for significantly less than the amount demanded by the claimants." *Id.*

In 2015, SDG&E applied to the CPUC to include in the rates under the CPUC's jurisdiction $379 million—most but not all of the unrecovered settlement payments. App. 9a-10a. The CPUC denied SDG&E's request, ruling that SDG&E had failed to prove that its operation and management of the facilities connected with the fires satisfied the CPUC's own administratively developed "prudent manager" standard. App. 81a-83a. Under the CPUC's "prudent manager" standard, privately owned utilities are allowed to recover costs only if they prove that those costs were "prudently incurred by competent management exercising the best practices of the era, and using well-trained, well-informed, and conscientious employees who are performing their jobs properly." App. 13a.

The CPUC deemed the fact that SDG&E had been subjected to strict liability for inverse condem-

nation "not relevant to a Commission reasonableness review under the prudent manager standard." App. 75a. According to the CPUC, "nothing" in prior judicial decisions extending inverse condemnation to private utilities "would supersede this Commission's exclusive jurisdiction over cost recovery/cost allocation issues involving CPUC regulated utilities," which the CPUC ruled required it to assess the prudence of SDG&E's conduct before the fires ignited. App. 76a.

The CPUC's president and another commissioner issued a joint concurrence expressing concern about the application of inverse condemnation to privately owned utilities, and deeming "unsound" the premise that utilities would be able to "socialize[]" the cost of such liability across ratepayers, as the prior California intermediate appellate court decisions in *Barham* and *Pacific Bell* had expressly assumed. App. 91a. In addition, the concurrence noted that applying inverse condemnation to privately owned utilities that are not guaranteed to recover their costs would increase those utilities' capital costs and insurance expenses, ultimately leading to higher rates for ratepayers. App. 92a. The concurrence urged the California legislature and courts to reconsider whether inverse condemnation applies to privately owned utilities. App. 92a-93a. Neither has since done so.

SDG&E applied for rehearing, which the CPUC denied. App. 94a-137a. The CPUC rejected SDG&E's argument that the "prudent manager" standard should not apply under state law to inverse condemnation costs, 127a-134a, and also rejected SDG&E's constitutional challenges to its application

of the "prudent manager" standard to bar recovery, App. 134a-137a.

The CPUC declined to harmonize its ruling with the judicial decisions in *Barham* and *Pacific Bell*, even though those decisions had subjected private utilities to inverse condemnation claims on the express assumption that the CPUC would spread inverse condemnation costs among the ratepayers. App. 125a-131a. Deeming itself bound to apply its "prudent manager" standard, the CPUC did not consider whether applying the standard to inverse condemnation costs created an unjust and unreasonable whipsaw between contradictory legal standards. App. 131a-134a. Finally, the CPUC denied that applying the "prudent manager" standard to inverse condemnation costs creates an unconstitutional taking. App. 134a-137a.

D. The California Courts' Denial Of Review

SDG&E filed a petition for a writ of review with the California court of appeal, which denied review in a summary three-page order. App. 1a-4a. The court of appeal did not address the California judicial decisions that had subjected privately owned utilities to inverse condemnation or the cost-spreading rationale underlying those decisions. Nor did it address the unconstitutional taking created by the CPUC decision or seek to avoid that serious constitutional issue by interpreting section 451 of the California public utilities code (which provides for rate recovery for "just and reasonable" charges) to afford rate recovery for inverse condemnation costs. Instead the court of appeal rejected SDG&E's arguments without explanation:

> The Commission's determination that the princip[les] of inverse condemnation did not bar its prudent manager analysis under section 451 was not in excess of its powers, nor a violation of the law, including the Constitutions of the United States and California. Contrary to SDG&E's assertion, the Commission's review was statutorily mandated, and no legal authority authorized it to forgo it obligations under section 451. Of note, SDG&E settled the inverse condemnation claims in the wildfire litigation rather than continue to advance its position that it could not be held strictly liable as a non-governmental entity. Further, had the Commission determined that SDG&E acted as a prudent manager, the costs could have been passed onto the ratepayers regardless of any potential strict liability in a civil litigation setting.

App. 3a-4a.

SDG&E then filed a petition for review in the California Supreme Court, which the Court summarily denied. App. 5a.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CONFLICTS WITH THE TAKINGS CLAUSE AND THIS COURT'S TAKINGS PRECEDENTS

This Court should grant certiorari because the decision below conflicts with the fundamental right to just compensation for takings of private property for public use, as enshrined in the Fifth Amendment

as applied to the States through the Fourteenth Amendment and embodied in this Court's Takings Clause jurisprudence. The CPUC's denial of recovery, affirmed by the California court of appeal, is a regulatory taking warranting just compensation. The California courts' decision to impose liability without such compensation upends settled law in this area, warranting this Court's review.

A. The Decision Below Conflicts With The Core Cost-Spreading Premise Of The Takings Clause

California law now imposes an unconstitutional whipsaw on privately owned utilities. *Barham* and *Pacific Bell*, decisions whose holdings the California Supreme Court has consistently declined to review or reconsider, impose inverse condemnation liability on privately owned utilities just as if they were government actors with the unfettered ability to spread the costs of such liability to the benefitted public. They are not. As the CPUC's refusal to allow SDG&E to recover those costs starkly illustrates, privately owned utilities, unlike government actors, may not spread inverse condemnation costs across the benefitted public—here the ratepayers who benefit from electric power generation and transmission. The decision below thus conflicts with this Court's precedent under the Takings Clause.

Inverse condemnation is a judicially developed doctrine rooted in federal and state constitutional provisions that "private property [shall not be] be taken for public use, without just compensation." U.S. Const. amend. V, XIV; *see* Cal. Const. Art. I, sec. 19 ("Private property may be taken or damaged for public use only when just compensation…has first

been paid…."). As this Court has consistently explained, the purpose of the Takings Clause is "to bar 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." *Armstrong v. United States*, 364 U.S. 40, 49 (1960). In particular, "the just compensation requirement spreads the cost of condemnations and thus 'prevents the public from loading upon one individual more than his just share of the burdens of government.'" *Kelo v. City of New London*, 545 U.S. 469, 497 (2005) (O'Connor, J., dissenting) (quoting *Monongahela Nav. Co. v. United States*, 148 U.S. 312, 325 (1960)). This rationale applies equally to suits for inverse condemnation. *See, e.g.,* Arvo Van Alstyne, *Statutory Modification of Inverse Condemnation: The Scope of Legislative Power*, 19 Stan. L. Rev. 727, 738 (1967) (explaining that the purpose of the California law of inverse condemnation is to ensure that losses are "distributed over taxpayers at large rather than be borne by the injured individual").

This rationale makes sense where the taking is made *by the government*, which is then free to spread that cost among the benefitted public through the coercive power of taxation. A government entity sued in inverse condemnation by an injured property owner may draw from general funds or raise taxes in the community, and a publicly owned utility may unilaterally raise the rates that consumers pay for the services the utility provides. *See, e.g.*, *Sultum v. Tahoe Regional Planning Agency*, 520 U.S. 725 (1997) (taking by regional government planning agency); *Babbitt v. Youpee*, 519 U.S. 234 (1997) (taking by federal government); *Dolan v. City of Tigard*, 512 U.S. 374 (1994) (taking by city).

Unlike the government or a public utility, however, a privately owned utility may not raise the rates that it charges customers or pass the costs of inverse condemnation liability on to ratepayers without the approval of its regulator, the CPUC. And the CPUC below treated SDG&E quite unlike a public entity by barring its request to spread those costs across the ratepayers who benefit from electricity generation and transmission. In denying SDG&E the ability to spread its inverse condemnation costs, the CPUC applied a "prudent manager" standard that does not apply when *the government* seeks to spread liability for such costs.

Such a ruling conflicts with the foundational premise of the Takings Clause. Inverse condemnation assumes that it is an unconstitutional taking to require the property owner who lost his home or business in a wildfire to "bear public burdens which, in all fairness and justice, should be borne by the public as a whole." *Armstrong*, 364 U.S. at 49. But by the same logic it is an unconstitutional taking to shift that public loss to another private entity—here, SDG&E—rather than to the ratepaying electricity customers who benefit from the public improvement of power generation and transmission in the State. Either the destruction of property in a wildfire is a taking or it is not; but it cannot be a taking for some purposes (when compensating property owners) but not others (allowing SDG&E the right to recover from the rate-paying public). This Court should grant review to clarify these basic principles in this context.

B. The Decision Below Conflicts With This Court's Regulatory Takings Precedent

The imposition of inverse condemnation liability on privately owned utilities without ensuring that those costs are spread across the benefitted ratepaying public further conflicts with this Court's precedent on regulatory takings. Such takings result from government action that (as here) diminishes or destroys economic value without the formal exercise of the power of eminent domain. In evaluating regulatory takings, this Court has instructed courts to examine three factors: (1) "[t]he economic impact of the regulation on the claimant"; (2) "the extent to which the regulation has interfered with distinct investment-backed expectations"; and (3) whether the government action balances the "benefits and burdens of economic life to promote the common good." *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 538-39 (2005) (quoting *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978)).

As the decision below fails to recognize, those factors are all satisfied here. *First*, the economic impact of imposing $379 million in inverse condemnation costs on SDG&E without just compensation is self-evidently substantial. And notably, SDG&E's total liability from inverse condemnation from the Witch, Guejito and Rice fires alone might have been much greater, indeed in the billions, had it not exercised foresight in settling cases and managing its insurance coverage so as to recover from third parties.

Second, requiring a privately owned utility to satisfy a "prudent manager" standard before it can recover the costs of inverse condemnation liability clearly upsets its reasonable investment-backed ex-

pectations. As noted, the judicial precedents under which California imposed inverse condemnation liability on privately owned utilities in the first place *expressly assumed* that the resulting costs would be spread across the benefitted rate-paying public. *See Pacific Bell*, 208 Cal. App. 4th at 1407-08; *Barham*, 74 Cal. App. 4th at 752-53; *see supra* at pp. 6-7. Thus, prior to the decision in this case, SDG&E's investors reasonably believed that SDG&E would be permitted to pass on the costs of inverse condemnation claims to ratepayers via adjustments in the rate-setting process. The CPUC decision negated these reasonable, investment-backed expectations, triggering the just compensation requirement.

Moreover, privately owned utilities are compelled by their regulatory obligations to sink significant investments into infrastructure and facilities, and are compelled to continue providing services regardless of profitability, without the option of exiting the market. As one notable set of commentators has thus suggested, "doctrinal confusion is nowhere more apparent or more important than in the treatment of takings principles applicable to public utilities." *See* William P. Barr, Henry Weissmann, & John P. Fratz*, The Gild that Is Killing the Lily: How Confusion over Regulatory Takings Doctrine Is Undermining the Core Protections of the Takings Clause*, 73 Geo. Wash. L. Rev. 429, 431 (2005).

Third, far from balancing the benefits and burdens of economic life, the whipsaw created by uncompensated inverse condemnation liability here would concentrate the entire burden of damage from the electricity infrastructure on privately owned utilities like SDG&E. Indeed, it would simply shift the

disproportionate burden of property damage from public improvements from one private member of the community (the damaged property owner) to another private member of the community (here, SDG&E) without ever allowing it to spread those costs among the relevant public that benefits from power generation and transmission. *Cf. Eastern Enterprises v. Apfel*, 524 U.S. 498, 529-30 (1998) (finding unconstitutional regulatory taking where law requiring payments into health fund for coal workers, even though the payor was no longer in the coal mining business).

While the CPUC did not dispute the enormous economic impact of its denial of any recovery, it erred in arguing that there was no regulatory taking because SDG&E had no "guaranteed expectation of rate recovery under Section 451." App. 136a. That argument ignores the decisions of this Court and the California court of appeal imposing inverse condemnation liability on private utilities *only* on the assumption that such liability would be recovered through rate-making and thus spread among ratepayers. The CPUC also argued that its actions were in keeping with the CPUC's statutory obligations and established rate-making practice and its interest in protecting ratepayers from unjust and unreasonable rates. *Id.* The Takings Clause, however, is a constitutional restriction that supersedes statutes and agency practice. Moreover, there is nothing "unjust or unreasonable" about allowing a private utility to pass onto ratepayers the cost of satisfying a burden that should be "borne by the public as a whole," *Armstrong*, 364 U.S. at 49, and spread among those benefitted, *Monongahela Nav. Co.*, 148 U.S. at 325. Therefore, the CPUC

failed to dispel the constitutional taking effected by applying the "prudent manager" standard to inverse condemnation costs.

In light of the CPUC's and court of appeal's failure to reconcile their decision with the Takings Clause, the decision below will sow further confusion in both state and federal courts regarding this Court's regulatory takings jurisprudence, and call into question the important lines this Court has drawn in explaining when a State's imposition of a new and expensive burden on a single private individual has gone too far.

The principles set forth in *Duquesne Light Co. v. Barasch*, 488 U.S. 299 (1989), do not suggest otherwise. There, the Court found there was no "confiscatory" taking from a public utility in the rate-setting process because the rate permitted by the public utilities commission still allowed for a reasonable rate of return on investment. *Id.* at 315. But that case did not determine whether a particular state action would constitute a regulatory taking. Nor did the Court state, or even suggest, that an overall reasonable rate of return would insulate a State from any and all takings challenges in the utilities context. Surely, the State could not have police seize a parcel of property or a building at SDG&E's corporate headquarters without compensation, and then argue that its actions were constitutional because, even without that property, SDG&E is still able to attract capital and earn a reasonable rate of return on its investments.

The same is true here: California has created a judicial regime whereby SDG&E and other privately owned utilities will be forced to absorb all of the costs

of inverse condemnation claims for wildfire-related losses across the State, but will receive none of the benefits that a government actor would receive in being able to spread the inverse condemnation costs to the benefitted public by creating a new tax, drawing from the public coffers, or increasing electricity rates. Such a regime threatens core principles of the Fifth and Fourteenth Amendments without regard to whether the rate set by the CPUC would also be considered unconstitutionally confiscatory or not. This Court's guidance is therefore needed to resolve this issue and provide much needed clarification in this area of the law.

II. THIS CASE IS AN IDEAL VEHICLE TO ADDRESS THE QUESTION PRESENTED

There is no reason why the question presented here may not be fully and finally resolved by this Court. *First*, unlike in many cases in which federal unconstitutional takings questions arise from state court proceedings, there is no question that SDG&E has exhausted its state-law remedies. Specifically, SDG&E has attempted to obtain "just compensation" from the State by asking the CPUC for permission to spread inverse condemnation liability across ratepayers via the rate-setting process before seeking this Court's review. App. 6a. Thus, this case does not present any of the procedural pitfalls of cases like *Williamson County v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985), or *Knick v. Township of Scott*, 862 F.3d 310 (3d Cir. 2017), *certiorari granted* 138 S. Ct. 1262 (2018), where the plaintiff elected to bring his Takings Clause claim in federal district court without availing himself of potential state court remedies first. *See Williamson Cnty.*, 473 U.S.

at 194-96 (holding that Takings Claim action brought under 42 U.S.C. § 1983 was not yet ripe because plaintiff did not first seek compensation through the procedures the state provided); *Knick*, 862 F.3d at 324-26 (same).

Second, the California court of appeal and Supreme Court have repeatedly declined to grant review of the issues raised here, suggesting that no judicial resolution of the issues under state law will be forthcoming so as to moot SDG&E's federal Takings Clause claim. The California appellate courts have declined review of these issues despite the CPUC's members' own repeated petitions for judicial review, *see supra*, at p. 9, and in the face of the privately owned utilities' exponentially increasing inverse condemnation liability from wildfires.

Specifically, the California court of appeal and Supreme Court have not only denied SDG&E's petitions for review in this case, but have also summarily denied six related petitions for review. In those petitions, PG&E and Southern California Edison ("SCE") questioned the California state-law decisions imposing inverse condemnation on privately owned utilities in light of the CPUC's decision denying recovery here. *See*, *e.g.*, *Pacific Gas & Electric Co. v. Superior Court (Abu-Shumays)* No. C087071 (Cal. App. May 9, 2018), No. S249429 (Cal. June 8, 2018) (2015 Butte Fire); *Pacific Gas & Electric Co. v. Superior Court (Abbott)* No. A154847 (Cal. App. July 20, 2018), No. S251585 (Cal. Oct. 1, 2018) (2017 North Bay Fires); *Edison International, Southern California Edison Company v. Superior Court (Abate)* No. B294164 (Cal. App. Dec. 3, 2018),

No. S253094 (Cal. Dec. 17, 2018) (2017 Thomas Fires). The denial of those petitions strongly suggests that no state judicial relief is forthcoming.

Finally, there is no near-term prospect of any legislative relief or clarification of the California law of inverse condemnation as applied to privately owned utilities. Last summer, Governor Jerry Brown, recognizing that wildfires are the "new normal" in California, proposed legislation that would have reformed inverse condemnation law as applied to privately owned utilities by removing the strict liability standard and replacing it with a standard reflecting a utility's proportionate fault. But the Legislature declined to adopt the Governor's proposal, instead enacting a statute concerning wildfire cost recovery, Cal. Stats. 2018, ch. 626, §§ 26–27, 32, that disclaimed any change in civil liability standards, Cal. Pub. Util. Code, §451.1, subd. (c), and effectively reaffirmed the CPUC's "prudent manager" standard, *id.*, § 451.1, subd. (a)(1)–(12). The Legislature thus left the legal whipsaw squarely in place, underscoring the ripeness of the Takings Clause question presented here.

III. THIS CASE PRESENTS A QUESTION OF EXCEPTIONAL NATIONAL IMPORTANCE

The national importance of the takings question presented here can hardly be overstated, and further warrants the grant of certiorari. The California courts' imposition of uncompensated inverse condemnation liability on privately owned utilities threatens grave economic and infrastructure harm not only to privately owned utilities in California, but also to the California economy as a whole. And

because California is the largest economy among the States and now the fifth largest economy in the world, such risks inherently threaten the United States' economy as well.

California's three largest privately owned utilities—PG&E, SCE, and SDG&E—together deliver power to 34.6 million of California's nearly 40 million residents over 124,100 of California's 163,696 square miles. These privately owned utilities not only supply three-quarters of the State's electricity, but also employ nearly 40,000 California residents and play a critical role in advancing environmental goals. The threat of expansive inverse condemnation liability against privately owned utilities has greatly increased financial pressures on those utilities.

First, the threat of uncompensated inverse condemnation liability in an era of escalating wildfires has increased the cost of insurance and eventually may render all California utilities uninsurable. According to one report, utilities' insurance costs in California have "skyrocketed" and sometimes insurance has become simply "unavailable."[1]

Second, the threat of uncompensated inverse condemnation liability increases the costs of capital for privately owned utilities. When the CPUC issued the order below denying SDG&E recovery, market analysts commented that California privately owned utilities presented a "uniquely unpalatable proposition of socialized no-fault liability" with "no

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[1] Ethan Howland, *Utilities to fight climate risk via insurance upgrades*, 2018 CQ Roll Call Was. Energy Briefing 1673 (Nov. 14, 2018).

assurance of presumed recoverability,"[2] and warned that the utilities would experience a "material increase in their cost of capital."[3] Indeed, Moody's changed SDG&E's rating outlook from "stable" to "negative," noting that the CPUC's decision denying SDG&E rate recovery would cause "higher regulatory risk for investor-owned utilities in California due to inverse condemnation exposure and the uncertainty that they will be able to recover related costs from ratepayers."[4] Following the CPUC's decision in this case, another analyst wrote that California utilities were "uninvestable right now" because there were "too many unknowns and significant risk."[5]

Third, privately owned utilities have suffered plunges in their stock prices in the aftermath of every new wildfire, reflecting the exponentially increasing costs and risks of inverse condemnation

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[2] Jonathan Arnold, *CPUC Denies SDG&E Wildfire Recovery; Notes "Incorrect Premise" of IC Doctrine,* Deutsche Bank Power Flash, at 3 (Nov. 30, 2017).

[3] Greg Gordon & Kevin Prior, *PCG Has Suspended Dividends, Citing Uncertainty Regarding Wildfire-Related Liabilities,* Evercore ISI, at 2 (Dec. 21, 2017).

[4] Moody's Investors Service, *Rating Action: Moody's Changes San Diego Gas & Electric's Rating Outlook to Negative From Stable* (Apr. 11, 2018), http://www.moodys.com/research/Moodys-changes-San-Diego-Gas-Electric-rating-outlook-to-negative-PR_380749.

[5] Mike Yamamoto, *Market Notes: Tuesday, December 12, 2017* (Dec. 12, 2017), https://investitute.com/activity-news/market-notes-tuesday-december-12-2017/.

claims.[6] In January 2019, PG&E filed for bankruptcy in the face of an likely unrecoverable estimated $30 billion in inverse condemnation liability resulting from a series of wildfires.[7] And this may just be the tip of the iceberg. SCE recently took a charge of $4.7 billion tied to wildfire events in its service territory[8] and both Edison International's CEO and analysts have opined that SCE could be just one or two more fires away from bankruptcy.[9]

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[6] *See* Ivan Penn & Peter Eavis, *Liability Claims From Wildfires Threaten Utility*, N.Y. Times, Nov. 14, 2018, at A1, *available at* https://www.nytimes.com/2018/11/14/business/energy-environment/california-fire-utilities.html.

[7] Mark Chediak & Kiel Porter, *PG&E Bankruptcy Looms, CEO to Exit as Fire Costs Dwarf Cash*, Bloomberg (Jan 14, 2019), https://www.bloomberg.com/news/articles/2019-01-14/pg-e-plans-bankruptcy-filing-as-california-wildfires-costs-mount.

[8] Anne C. Mulkern, *No silver bullet. Can Calif. Save its utilities?*, E&E News (Apr. 1, 2019), https://www.eenews.net/stories/1060137633.

[9] *Id.*; Sammy Roth, *Edison CEO talks wildfires, climate change and the utilities vanishing monopoly*, L.A. Times (Mar. 13, 2019), https://www.latimes.com/business/la-fi-southern-california-edison-sce-wildfires-climate-change-20190313-story.html; *see* J.D. Morris, *California considers wildfire insurance fund to avoid repeat of PG&E's woes*, S.F. Chronical (Feb. 25, 2019), https://www.sfchronicle.com/business/article/California-mulls-wildfire-insurance-fund-to-avoid-13641330.php?psid=oFzg.

The financial impact of inverse condemnation liability on privately owned utilities has other ripple effects on the national economy by harming consumers and environmental goals. As the CPUC's own President warned legislators, "the financial pressure on utilities from inverse condemnation may lead to higher rates for ratepayers."[10] And as one analysis recognized following the 2017 Wine Country wildfires, "unless the law is changed regarding application of inverse condemnation to investor-owned utilities or the CPUC changes its position on recovery under that law," California utilities will experience material increases in capital costs, "stressing their ability to invest in CA infrastructure and help the state meet its aggressive clean energy agenda."[11] Most recently, Governor Newsom's Strike Force report explained that California's "regime—strict liability for wildfire damage coupled with uncertain ability to recover those damages in rates—increases the risk of bankrupt utilities, which in turn drives up costs for consumers, threatens fair recoveries for fire victims, undermines the state's ability to mitigate and adopt to climate change, and creates uncertainty for utilities employees and contractors."[12]

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[10] Cal. Assembly Comm. on Utils. & Energy (Feb. 26, 2018), http://assembly.ca.gov/media/assembly-utilities-energy-committee-20180226/video, at 1:04:2-1:04:58 (testimony of CPUC President and Commissioner Michael Picker).

[11] Gordon & Prior, *supra*.

[12] Governor Newsom's Strike Force, *Wildfires and Climate Change: California's Energy Future* (Apr. 12, 2019), https://www.gov.ca.gov/wp-

These problems will only get worse as wildfires (and wildfire litigation) increase exponentially with climate change. Officials from the California Department of Forestry and Fire Protection ("Cal Fire") have warned that recent trends "'reflect a major shift in wildfires, one … seen over the past 10 years" showing that "'[w]ildfires are becoming more damaging and destructive.'"[13] They also have cautioned that fire season could now persist year-round.[14] By the end of this century, temperatures in the United States are expected to rise another 3.5 degrees Celsius,[15] or over 6 degrees Fahrenheit. The increase in the risk of wildfires caused by increased temperatures is exponential, not linear, meaning that each degree increase in temperature may herald a much greater proportional increase in the number and severity of wildfires.[16] Indeed, of the twenty

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content/uploads/2019/04/Wildfires-and-Climate-Change-California%E2%80%99s-Energy-Future.pdf.

[13] Melissa Pamer & Elizabeth Espinosa, *'We Don't Even Call It Fire Season Anymore ... It's Year Round': Cal Fire*, KTLA5 News (Dec. 11, 2017), http://ktla.com/2017/12/11/we-dont-even-call-it-fire-season-anymore-its-year-round-cal-fire/.

[14] *Id.*

[15] Robinson Meyer, *Has Climate Change Intensified 2017's Western Wildfires?*, The Atlantic (Sept. 7, 2017), https://www.theatlantic.com/science/archive/2017/09/why-is-2017-so-bad-for-wildfires-climate-change/539130/.

[16] Chelsea Harvey, *Here's What We Know About Wildfires and Climate Change*, Scientific American (Oct. 13, 2017), https://www.scientificamerican.com/article/heres-what-we-know-about-wildfires-and-climate-change/.

most destructive wildfires in California since 1932, five occurred in 2017, and thirteen after 2000, including the five largest.[17]

These profound economic and infrastructure consequences of wildfire-related inverse condemnation claims against privately owned utilities underscore the need for the Court's intervention, especially in the face of inaction by the California judicial and legislative branches. This Court should grant review.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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April 30, 2019

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[17] Cal. Dep't of Forestry & Fire Prot., *Top 20 Most Destructive California Wildfires* (Nov. 19, 2018), http://www.fire.ca.gov/communications/downloads/fact_sheets/Top20_Destruction.pdf.

APPENDIX

APPENDIX A

COURT OF APPEAL,
FOURTH APPELLATE DISTRICT
DIVISION ONE
STATE OF CALIFORNIA

D074417

(Public Utilities Commission No. 17-11-033)

SAN DIEGO GAS & ELECTRIC,

Petitioner,

v.

PUBLIC UTILITIES COMMISSION,

Respondent;

PROTECT OUR COMMUNITIES FOUNDATION *et al.*,

Real Parties in Interest.

THE COURT:

The petition for writ of review filed by San Diego Gas & Electric Company (SDG&E) and the accompanying exhibits, the answers filed by real parties in interest Protect Our Communities Foundation (POCF) and Ruth Henricks, the answer filed by the California Public Utilities Commission, and the reply to answers filed by SDG&E have been read and considered by Justices Benke, O'Rourke, and Dato.

SDG&E challenges the Commission's decision denying its application to include $379 million in settlement payments stemming from litigation involving wildfires caused by its facilities in 2007. SDG&E asserts the

Commission's decision should be annulled because it interpreted Public Utilities Code section 451 (further statutory references are to the Public Utilities Code) in a manner that unconstitutionally conflicts with the strict liability the utility faced in the wildfire litigation as a result of the plaintiffs' inverse condemnation claims. SDG&E also argues the Commission's decision must be annulled because insufficient evidence supported its determination that (1) SDG&E was an imprudent manager and (2) SDG&E's conduct caused the Witch Fire.

"'"[A]ny aggrieved party [to a decision of the Commission] may petition for a writ of review in the court of appeal . . . ."'" (*SFPP, L.P. v. Public Utilities Commission* (2013) 217 Cal.App.4th 784, 793 (*SFPP*).) "[W]hen 'writ review is the exclusive means of appellate review of a final order or judgment, an appellate court may not deny an apparently meritorious writ petition, timely presented in a formally and procedurally sufficient manner, merely because, for example, the petition presents no important issue of law or because the court considers the case less worthy of its attention than other matters.' [Citation.] We are not, however, 'compelled to issue the writ if the [Commission] did not err . . . .'" (*Ibid*.)

"The limited grounds and standards for our review are set forth in section 1757, subdivision (a). 'No new or additional evidence shall be introduced upon review by the court. In a complaint or enforcement proceeding, or in a ratemaking or licensing decision of specific application that is addressed to particular parties, the review by the court shall not extend further than to determine . . . whether any of the following occurred: (1) The commission acted without, or in excess of, its powers or jurisdiction. (2) The commission has not

proceeded in the manner required by law. (3) The decision of the commission is not supported by the findings. (4) The findings in the decision of the commission are not supported by substantial evidence in light of the whole record. (5) The order or decision of the commission was procured by fraud or was an abuse of discretion. (6) The order or decision of the commission violates any right of the petitioner under the Constitution of the United States or the California Constitution.'" (*SFPP, supra*, 217 Cal.App.4th at pp. 793-794.)

"'There is a strong presumption favoring the validity of a Commission decision.'" (*SFPP, supra,* 217 Cal.App.4th at p. 794.) "'Generally, we give presumptive value to a public agency's interpretation of a statute within its administrative jurisdiction because the agency may have "special familiarity with satellite legal and regulatory issues," leading to expertise expressed in its interpretation of the statute. [Citation.] Therefore, "the PUC's 'interpretation of the Public Utilities Code should not be disturbed unless it fails to bear a reasonable relation to statutory purposes and language . . . .'"'" (*Ibid*.)

The Commission's determination that the principals of inverse condemnation did not bar its prudent manager analysis under section 451 was not in excess of its powers, nor a violation of the law, including the Constitutions of the United States and California. Contrary to SDG&E's assertion, the Commission's review was statutorily mandated, and no legal authority authorized it to forego its obligation under section 451. Of note, SDG&E settled the inverse condemnation claims in the wildfire litigation rather than continue to advance its position that it could not be held strictly liable as a non-governmental entity.

Further, had the Commission determined that SDG&E acted as a prudent manager, the costs could have been passed onto the ratepayers regardless of any potential strict liability in a civil litigation setting.

In addition, the exhibits submitted by SDG&E do not support its assertion that the Commission's findings under section 451 were not supported by sufficient evidence. Specifically, the record contains substantial evidence showing both that SDG&E's facilities caused all three of the wildfires at issue, and that SDG&E did not meet its burden to show that it reasonably and prudently operated and maintained those facilities. (See *Toward Utility Rate Normalization v. Public Utilities Com.* (1978) 22 Cal.3d 529, 537 ["The findings of fact by the Commission are to be accorded the same weight that is given to jury verdicts and the findings are not open to attack for insufficiency if they are supported by any reasonable construction of the evidence."].)

In sum, SDG&E has failed to demonstrate that the Commission erred on the claims it asserts. Under these circumstances, we decline to issue the writ of review. (*Pacific Bell v. PUC* (2006) 140 Cal.App.4th 718, 729.) The petition is denied. The application of Southern California Edison Company and Pacific Gas and Electric Company for leave to file an amicus curiae brief is denied as moot.

BENKE, Acting P. J.

Copies to: All parties

APPENDIX B

IN THE SUPREME COURT OF CALIFORNIA

En Banc

S252748

SAN DIEGO GAS & ELECTRIC,

Petitioner,

v.

PUBLIC UTILITIES COMMISSION,

Respondent;

PROTECT OUR COMMUNITIES FOUNDATION *et al.*,

Real Parties in Interest.

Court of Appeal, Fourth Appellate District,
Division One - No. D074417

The request for judicial notice is granted.

The petition for review is denied.

CANTIL-SAKAUYE
Chief Justice

APPENDIX C

ALJ/SPT/SL5/ek4 Date of Issuance 12/6/2017

Decision 17-11-033 November 30, 2017

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

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Application 15-09-010

———

Application of San Diego Gas & Electric Company (U902E) for Authorization to Recover Costs Related to the 2007 Southern California Wildfires Recorded in the Wildfire Expense Memorandum Account (WEMA).

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DECISION DENYING APPLICATION

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Table of Contents

DECISION DENYING APPLICATION

Summary

This decision finds that San Diego Gas & Electric Company did not reasonably manage and operate its facilities prior to the 2007 Southern California Wildfires and therefore denies the utility's request to recover costs recorded in its Wildfire Expense Memorandum Account. Because we deny this application on its merits, the issue preliminarily scoped for phase two of this proceeding is moot.

This proceeding is closed.

1. Factual Background

Beginning on October 21, 2007, a fire storm ripped through portions of Southern California. This fire storm, which was comprised of more than a dozen fires, spread over portions of Orange, San Diego, Los Angeles, San Bernardino, Ventura, Santa Barbara, and Riverside counties. These wildfires caused extensive damage to properties in the region, widespread evacuations, and fatalities.[1] Investigative reports issued in the aftermath of the 2007 wildfires by the California Department of Forestry and Fire Protection (Cal Fire) and the Commission's Consumer Protection and Safety Division (CPSD) (now the Safety and Enforcement Division), attributed the ignition of three of these wildfires to San Diego Gas & Electric Company (SDG&E) facilities. These three fires, the Witch, Guejito and Rice wildfires (2007 Wildfires), are the subject of the instant proceeding.

On September 25, 2015, SDG&E filed Application (A.) 15-09-010 seeking Commission approval to recover

[1] Application (A.) 15-09-010 at 2.

$379 million recorded in its Wildfire Expense Memorandum Account (WEMA). The WEMA is an account established per Resolution E-4311, to track costs associated with the Witch, Guejito, and Rice wildfires. The $379 million represents a portion of the total $2.4 billion in costs and legal fees incurred by SDG&E to resolve third-party damage claims arising from the Witch, Guejito and Rice Wildfires.[2] When translated into typical residential rates, the WEMA costs would lead to an increase of $1.67 per month when amortized over six years.

2. Procedural Background

The 2007 Wildfires were the subject of two prior proceedings before the Commission. Investigation (I.) 08-11-007[3] concluded with Decision (D.) 10-04-047, which approved a settlement agreement between the Commission's CPSD and SDG&E. Pursuant to the settlement agreement, SDG&E paid penalties ($14.75 million) but did not admit to any safety violation or role in the cause of the 2007 wildfires.[4] Subsequently, SDG&E, alongside Southern California Gas Company and Pacific Gas and Electric Company, filed A.09-08-020 to seek authority to establish a Wildfire Expense Balancing Account (WEBA) to record future recovery

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[2] A.15-09-010 at 1. Portions of the $2.4 billion were recovered from liability insurance coverage ($1.1 billion) and settlement payments from third parties (Cox Communications and three contractors totaling $824 million). Other portions of the costs were allocated to Federal Energy Regulatory Commission jurisdictional rates. In addition, SDG&E proposes to voluntarily contribute $42 million. (*Id*. at 7.)

[3] Investigation on the Commission's own Motion into the Operations and Practices of SDG&E Regarding the Utility Facilities linked to the Witch and Rice Fires in 2007.

[4] D.10-04-047 at 5.

costs associated with the 2007 Wildfires. D.12-12-029 ultimately denied the utilities' request to open the WEBA.[5] D.12-12-029 additionally ordered the memorandum accounts (WEMA), authorized by Commission Resolution E-4311, to remain open pending a reasonableness review[6] in an appropriate proceeding.[7] Following this order, SDG&E filed A.15-09-010 on September 25, 2015.

Between October 23 and October 30, 2015, protests were timely filed and served by San Diego Consumers' Action Network (SDCAN), the Utility Consumers' Action Network (UCAN), The Utility Reform Network, Center for Accessible Technology (TURN/CforAT), Protect Our Communities Foundation (POC), Office of Ratepayer Advocates (ORA), and Mussey Grade Road Alliance (MGRA). TURN/CforAT argued that the proceeding should be phased, with the first phase addressing whether SDG&E had prudently managed its facilities and operations and the second phase addressing the reasonableness of the and timing of the

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[5] Ordering Paragraph 1 of D.12-12-029.

[6] There is usually a significant distinction between a balancing account and a memorandum account as used by the Commission. Both accounts are typically employed to ensure the accurate recovery of the actual cost of a regulatory program. The goal is to avoid the risk of over- or under-recovery in retail rates of reasonably incurred program costs. Balancing accounts have an associated expectation of recovery. They have been pre-authorized by the Commission, and it is the amounts -- and not the creation of the accounts themselves -- that the Commission reviews for reasonableness. Memorandum accounts, in contrast, are accounts in which the utilities record amounts for tracking purposes. While the utilities may later ask for recovery of the amounts in those accounts, recovery is not guaranteed. *See* D.03-06-013 at 4-5.

[7] Ordering Paragraph 2 of D.12-12-029.

amounts requested.[8] Under this proposal, Phase 2 would only be reached if it was determined that SDG&E had prudently managed its facilities. Ruth Henricks (Henricks) filed and served a Motion for Party Status on October 2, 2015 that was subsequently granted.

In its November 9, 2015 reply, SDG&E opposed phasing A.15-09-010 and the protestors' request to incorporate the record from the prior proceedings as part of the record for the instant proceeding. Additionally, SDG&E stated that the reasonableness standard should only be applied to: (1) its decision to pursue the settlement of the claims stemming from the 2007 Wildfires litigation; (2) the process SDG&E employed in settling the claims; and (3) its efforts in reducing the costs.[9]

On February 19, 2016, a Joint Proposed Schedule was served by MGRA, ORA, POC, Henricks, SDCAN, TURN, and UCAN (collectively, the Joint Intervenors). The Joint Proposed Schedule requested that A.15-09-010 be litigated in phases as proposed by TURN/CforAT, and that parties be provided with the opportunity to brief certain threshold legal and policy issues in relation to the appropriateness of the rate recovery.

The assigned Administrative Law Judge (ALJ) convened a prehearing conference on February 22, 2016. Subsequently the assigned Commissioner issued a Scoping Memorandum and Ruling (Scoping Ruling) on April 11, 2016.

The Scoping Ruling implemented a two-phase approach for this proceeding with a separate reason-

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[8] TURN/CforAT Protest at 4.

[9] SDG&E Reply at 3; Scoping Ruling at 3.

ableness review for each phase. Phase 1 was to address whether any threshold legal issues raised by the Joint Intervenors should be a bar to the application and prudent operation of the facilities. Specifically, Phase 1 was scoped as:

> (1) Whether any of the Threshold Issues[10] serves as a bar to recovery; and
>
> (2) Whether SDG&E's operation, engineering and management the facilities alleged to have been involved in the ignition of the fires was reasonable and prudent. Each of the three fires should be addressed separately.[11]

The Scoping Ruling stated that prior Commission decisions indicate that a reasonableness standard should entail a review of the prudency of SDG&E's actions leading up to the fire. The Scoping Ruling specifically referenced D.14-06-007 in which the Commission held that for costs to be found reasonable, the utility must prove that they were:

> prudently incurred by competent management exercising the best practices of the era, and using well-trained, well-informed and conscientious employees who are performing their jobs properly . . . [T]he Commission can

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[10] The Threshold Issues are: Whether rate recovery would create a moral hazards . . . the fairness of imposing rate increases on San Diego customers, particularly those who were already victims of the fires . . . , and whether SDG&E has already been compensated for such risks in its rates and whether it warrants special recovery outside of the normal general rate case process . . . : (Scoping Ruling at 6 citing the Joint Intervenors Joint Proposed Schedule).

[11] Scoping Ruling at 6.

> and must disallow those costs: that is unjust and unreasonable costs must not be recovered in rates from ratepayers.[12]

The Scoping Ruling further stated that this standard is consistent with the Commission's obligation under Pub. Util. Code § 451 to ensure that resulting rates will be just and reasonable and that service is provided in a safe manner.

Opening briefs on Threshold Issues were filed by SDG&E, ORA and UCAN on May 11, 2016. On May 26, 2016, Reply briefs were filed by SDG&E and UCAN. The assigned ALJ reviewed the arguments posed by the intervening parties to dismiss the application on the basis of the Threshold Issues as a motion for summary judgment. On August 11, 2016, the assigned ALJ issued a ruling against the intervening parties and confirming the procedural schedule set forth in the Scoping Ruling. The August 11, 2016 ruling allowed for the re-consideration of the arguments in the briefs after the development of an evidentiary record.[13]

If the proceeding was not dismissed during the first phase, the second of A.15-0-010 would have the Commission consider whether SDG&E's actions and decision making in connection with settling of legal claims and costs in relation to the wildfires were reasonable.[14]

In October 2016, this proceeding was reassigned to ALJ S. Pat Tsen and ALJ Pro Tem Sasha Goldberg.

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[12] Scoping Ruling at 6 citing D.14-06-007 at 31.

[13] Ruling Confirming Procedural Schedule Following Briefs on the Threshold Issues, August 11, 2016 at 4.

[14] *Id.* at 5.

Following this reassignment, ORA filed a motion for change of venue, which was ultimately denied.[15] In accordance with the procedural schedule set by the Scoping Ruling, the newly assigned ALJs and Commissioner scheduled and held two Public Participation Hearings (PPHs) in Escondido, California, on January 9, 2017.[16] Over 200 residents of San Diego County attended the PPHs, as well as several local news outlets.

Evidentiary Hearings for Phase 1 of this proceeding were held at the Commission's San Francisco hearing rooms the week of January 23, 2017. In response to requests from SDG&E and ORA, the assigned ALJs issued a ruling on February 10, 2017 modifying the post-hearing briefing schedule for Phase 1. In addition to modifying due date(s) for briefs, this ruling directed parties to obtain confirmation that the Cal Fire investigative reports on the 2007 Wildfires were in fact final and/or closed.[17]

On March 17, 2017, ORA served an affidavit from the Unit Chief for Cal Fire's MVU Unit affirming that Cal Fire considers the investigative reports into the 2007 Wildfires final, with no plans to re-open or supplement any of these investigations.[18] Opening briefs for Phase 1 were filed and served on March 24,

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[15] Administrative Law Judges' Ruling Denying the Office of Ratepayer Advocates' Motion to Change Venue (December 21, 2016).

[16] Administrative Law Judges' Ruling Setting Public Participation Hearings (November 11, 2016).

[17] Ruling Administrative Law Judges' Ruling Modifying Procedural Schedule and Requiring Supplemental Information at 4.

[18] ORA Response regarding Cal Fire Affidavit (March 17, 2017).

2017 by SDG&E, ORA, SDCAN, UCAN, POC, and Henricks. Reply briefs were filed and served on April 14, 2017 by SDG&E, ORA, MRGA, UCAN, and SDCAN. The record for Phase 1 of this proceeding was submitted[19] for Commission consideration on July 6, 2017 after Henricks filed a motion to accept the late filing of Henricks' Opening Brief.

On August 22, 2017 a proposed decision (PD) denying SDG&E's recovery in this proceeding was served on the service list to A.15-09-010. Opening comments on the PD were filed on September 11, 2017, along with motions by Pacific Gas and Electric Company (PG&E) and Southern California Edison Company (SCE) for party status. The filing of motions by PG&E and SCE at this late juncture triggered responses from the intervenors and ORA in this proceeding. After evaluating the motions and responses, the assigned ALJs granted PG&E and SCE limited party status[20] on September 26, 2017. This limited party status gave PG&E and SCE the opportunity to comment on the legal issue of inverse condemnation. PG&E and SCE filed joint comments on the issue of inverse condemnation on October 4, 2017. SDG&E, ORA, POC, UCAN and MGRA filed replies to the joint comments on October 11, 2017.

In addition to the comment period for inverse condemnation, on September 18, 2017, the assigned ALJs noticed an All Party Meeting. The All Party Meeting, held by Commissioner Liane Randolph, took place in Chula Vista, California, immediately after the

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[19] Rules of Practice and Procedure, Rule 13.14(a).

[20] *See* A.15-09-010 E-mail Ruling Granting Limited Party Status to Southern California Edison Company; A.15-09-010 E-mail Ruling Granting Limited Party Status to PG&E.

conclusion of the September 28, 2017 Commission Meeting. The All Party meeting provided parties with the opportunity to address the Commission. Participants in the All Party Meeting included SDG&E, PG&E, SCE, ORA, MGRA, POC, SDCAN, Henricks, and UCAN.

Due to the scheduling of the All Party Meeting, and building in time for replies to PG&E and SCE's comments on inverse condemnation, the statutory deadline for this proceeding was extended by D.17-09-038 to April 11, 2018.

3. Legal Standards Applied

The appropriate standard in a ratesetting matter is preponderance of the evidence.[21] As the Applicant, SDG&E bears the burden of proof. Preponderance of the evidence usually is defined "in terms of probability of truth, e.g., 'such evidence, when weighed with that opposed to it, has more convincing force and the greater probability of truth'."[22] In short, SDG&E must present more evidence that supports the requested result than would support an alternative outcome.

The Commission's standard for reasonableness reviews, reaffirmed in a series of decisions, is as follows:

> 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

[21] D.16-12-063 at 9, citing D.12-12-030 at 44.

[22] D.12-12-030 at 42, *aff'd* D.15-07-044 at 28-30.

> utility to accomplish the desired result at the lowest reasonable cost consistent with good utility practices. Good utility practices are based upon cost effectiveness, safety and expedition.[23]

We have analyzed SDG&E's management and operation of its facilities prior to the ignition of the Witch, Guejito and Rice Wildfires within the rubric of the Commission's prudent manager standard. In comments to the proposed decision, SDG&E contends that the Commission is imposing a perfection standard. That is not the case. Our decision today analyzes the Witch, Guejito, and Rice fires separately, taking into account extensive records submitted by the parties, industry practice in 2007, and contemporaneous information available to SDG&E at the time of the separate ignitions. Each analysis is fact specific and has been reached after careful consideration of the record. Contrary to SDG&E's assertion, holding utilities accountable under the reasonable and prudent manager standard in no way imposes a standard of perfection. The Commission was prepared in this case, as it will in the future, to find SDG&E's conduct is reasonable and prudent, if the facts warrant such a conclusion.

4. Discussion and Analysis

In this section, the Commission analyzes the Witch, Guejito, and Rice fires separately and determines SDG&E's prudency in managing its facilities. As the Applicant seeking recovery, SDG&E must affirmatively satisfy the Commission that it acted prudently. We weigh evidence presented by SDG&E that it acted prudently, against evidence presented by the interve-

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[23] 24 CPUC 2d 476, 486.

nors that SDG&E did not act prudently. In each analysis, we find SDG&E to have failed its burden of proof to show by a preponderance of the evidence, that it complied with the Commission's prudent manager standard.

4.1. Witch Fire

4.1.1. Witch Fire Background

The Witch Fire, which later merged with the Guejito Fire, was the second largest fire to occur in San Diego County in 2007.[24] The SDG&E facility involved in the ignition of the Witch Fire was Tie Line (TL) 637.[25] TL 637 is a 69 kilovolt (kV) transmission line that connects the Santa Ysabel and Creelman substations.[26] TL 637 is approximately 14 miles long and runs along a remote backcountry section of San Diego County.[27]

Although there were no eyewitnesses to the ignition of the fire, the Cal Fire investigator determined that a fault on TL 637 between poles Z416675 and Z416676 on October 21, 2007 led to arcing of the lines, which dispersed hot particles to land in the grassy field below the powerlines.[28] These particles were determined to have ignited the Witch Fire which was then spread by wind.[29] There was a Red Flag Warning[30] in place at

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[24] ORA-01 at 6.

[25] SDGE-11-A at 2.

[26] *Id*.

[27] *Id*. at 3

[28] *Id*. at 3; ORA-01 at 6 to 7.

[29] SGDE-11-A at 3-4, citing Cal Fire Report (Witch) at 2, 14, and 19.

[30] ORA-01 at 45: The National Weather Service issues a Red Flag Warning "to call attention to limited weather conditions of particular importance that may result in extreme burning

4:45 a.m., prior to the Witch Fire's ignition on October 21, 2007.[31]

The following chart depicts a timeline of the events occurring the day of the Witch Fire ignition:

Timeline of Events on October 21, 2007 on TL 637[32]

Time	Description of Event
8:53 a.m.	**Fault 1 occurred on TL 637**
9:05 a.m. and 9:08 a.m.	The Transmission System Operator dispatched Electric Troubleshooters to either end of TL 637(Santa Ysabel and Creelman substations) to gather additional information about the 8:53 a.m. fault
9:30 a.m.	SDG&E's Grid Operations were responding to the Harris Fire which burned in southern San Diego County near the vicinity of SDG&E's 500 kV transmission line, the Southwest Powerlink
10:00 a.m.	Electric Troubleshooters reported back to the Transmission System Operator at Grid Operations
The Troubleshooters found that the protection devices at each end of the line operated and opened the circuit breakers, which remained opened for ten seconds, and then	

conditions. It is issued when it is an on-going event or the fire weather forecaster has a high degree of confidence that Red Flag criteria will occur within 24 hours of issuance." (Citing the National Weather Service Glossary, Red Flag Warnings.)

[31] ORA-02-A.

[32] SDGE-11-A at 6-7, referencing Appendices 3 and 4 (Appendix 3 is the Operations Shift Supervisor Daily Log from October 21, 2007), (Appendix 4 is the Electric Switching Order for TL 637 on October 21, 2007).

reclosed the line, because the faults had cleared within the ten seconds The Troubleshooters learned that the faults were temporary because they had cleared within 10 seconds, and so the flow of electricity was restored.[33]	
11:22 a.m.	**Fault 2 occurred on TL 637**
11:42 a.m.	Cal Fire requests Grid Operations to de-energize the Southwest Powerlink to allow air drops of fire retardant in the area.
12:01 p.m.	Electric Troubleshooters dispatched to the Santa Ysabel and Creelman substations
12:15 p.m.	SDG&E's Grid Operations opened the Southwest Powerlink as a Forced Outage
12:19 p.m.	Electric Troubleshooter reported back to Grid Operations from the Santa Ysabel substation that the circuit breakers had again operated and had reclosed.
12:23 p.m.	**Fault 3 occurred on TL 637**, while the Troubleshooters were at the Santa Ysabel and Creelman substations.
Under SDG&E's Transmission Monitoring & Control Procedure 1100, when a line faults and immediately recloses and the cause for the trip is unknown, the line should be patrolled by either a vehicle or aerially, via a helicopter.	
12:29 p.m.	Witch Fire observed by Air Tanker Pilot (according to the Cal Fire Report)
12:33 p.m.	Patrolman was sent to patrol TL 637
12:39 p.m.	Patrolman informed the Grid Operations Transmission System Operator that he

[33] SDGE-11-A at 7.

	would go out to patrol TL 637 in person rather than by air.
12:56 p.m.	Electric Troubleshooter reported back to Grid Operations from the Creelman substation that the circuit breakers had again operated and had reclosed.
1:10 p.m.	**Grid Operations became aware of the Witch Fire**
1:14 p.m.	SDG&E's Transmission Construction and Maintenance Manager rerouted a Construction Supervisor to Santa Ysabel
1:59 p.m.	SDG&E's Transmission Construction and Maintenance Manager requested that Grid Operations disable automatic reclosing on TL 637
2:01 p.m.	Grid Operations Transmission System Operator turned-off automatic reclosing at the Santa Ysabel substation
2:05 p.m.	Grid Operations Transmission System Operator requested a Troubleshooter be dispatched to the Creelman substation to turn-off automatic reclosing.
3:00 p.m.	An SDG&E Construction Supervisor with SDG&E's Transmission Construction and Maintenance Manager met a Cal Fire crew at the Santa Ysabel substation
3:25 p.m.	**Fault 4 occurred on TL 637**, automatically reclosed at the Creelman substation
3:27 p.m.	TL 637 became de-energized by the Grid Operations Transmission System Operator

A series of four faults occurred on TL 637 on October 21, 2007: the first fault at 8:53 a.m.; the second fault at 11:22 a.m.; the third fault at 12:23 p.m.; and the fourth fault at 3:25 p.m.[34] Cal Fire concluded that the Witch Fire ignited after the third fault occurred on TL 637 at 12:23 p.m. on October 21, 2007 because an Air Tanker Pilot first observed the fire at 12:29 p.m.[35] SDG&E Grid Operations became aware of the Witch Fire at 1:10 p.m., and de-energized TL 637 after the fourth fault at 3:27 p.m.[36]

Ultimately, the Witch Fire led to the destruction of 1,141 homes, 509 outbuildings, and 239 vehicles.[37] Once combined with the Guejito Fire, the Witch Fire burned a total of 197,990 acres.[38] The combination of the Witch and Guejito Fires led to two fatalities and injured 40 firefighters.[39]

4.1.2. SDG&E's Position on its Operation and Management of its Facilities Prior to the Witch Fire

SDG&E maintains that its operation and management of its facilities linked to the Witch Fire prior to October 21, 2007 were reasonable.[40] SDG&E supports its position by claiming: (1) SDG&E's response to the faults along TL 637 was reasonable given the information available at the time of the faults; (2) SDG&E's

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[34] SDGE-11-A at 6 to7.

[35] SDGE-11-A at 6 to 7.

[36] SDGE-11-A at 6 to 7.

[37] ORA-01 at 7, citing Cal Fire Report (Witch) at 2.

[38] *Id*.

[39] *Id*.

[40] SDG&E Phase 1 Opening Brief at 30.

recloser policy was reasonable and prudent; and (3) the Witch Fire was not foreseeable.[41]

SDG&E's Response to Faults along TL 637

SDG&E maintains that the facts surrounding the Witch Fire do not show that SDG&E acted unreasonably or imprudently in its response to the four faults occurring along TL 637 on October 21, 2007.[42] SDG&E does not dispute the fact that its facilities were directly involved in the ignition of the Witch Fire, SDG&E put forth Mr. Ali Yari (Mr. Yari), SDG&E's Director of Electric Grid Operations, to testify as to SDG&E's reasonable and prudent monitoring of the faults along TL 637.[43]

First, SDG&E contends that its actions and response to the faults occurring along TL 637 were reasonable given the information it had available in real time on October 21, 2007.[44] Mr. Yari testified that in 2007, SDG&E did not have the capability to determine in real-time the exact location of the faults occurring along the 14-mile stretch of TL 637.[45] SDG&E maintains that the relay equipment at the substation stores voltage and current information, and not specific fault locations.[46] Mr. Yari testified that it would have taken at least one hour to get the protection engineer in a position to dial into the relay, plus about 30 additional minutes to download and

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[41] SDG&E Phase 1 Reply Brief at 30 to 31.

[42] SDG&E Phase 1 Reply Brief at 37.

[43] SDGE-11-A at 1.

[44] SDG&E Phase 1 Reply Brief at 37.

[45] *Id*.

[46] *Id*. at 41.

process the information.[47] SDG&E asserts that this need for engineering intervention to analyze the data stored in the relay showed that SDG&E acted prudently in responding to the faults on TL 637.[48] SDG&E contends its response to the faults along TL 637 was reasonable because its interpretation of the data stored in the relay along TL 637 was both analytical and appropriate, given the standards in 2007.[49]

Second, SDG&E maintains its Grid Operations' response time to inspect TL 637 was reasonable given the threat to the Southwest Powerlink on October 21, 2007.[50] In his direct testimony, Mr. Yari explains how the threat of the Harris Fire to the Southwest Powerlink impacted SDG&E's monitoring of TL 637. Mr. Yari notes, the threat to the Southwest Powerlink "was a major event consuming SDG&E resources – including the attention of Grid Operations personnel and the resources available to conduct patrols. . . . SDG&E was particularly concerned about the outage of this major transmission line since it was essential to grid stability across Southern California. . . . SDG&E was also taking seriously the faults on TL 637 but there was no indication of any kind of emergency . . . since faults are not particularly unusual on a windy day . . ."[51] SDG&E maintains that even though its Grid Operations de-energized the Southwest Powerlink at 12:15 p.m., Grid Operations was appropriately monitoring the faults along TL 637.[52] SDG&E argues

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[47] SDG&E Phase 1 Reply Brief at 43.

[48] *Id*. at 42.

[49] *Id*.

[50] *Id.* at 37, SDGE-11-A at 1-13.

[51] SDGE-11-A at 9.

[52] *Id.*

that its dispatch of troubleshooters to investigate the faults on TL 637 was all that was required to be reasonable.[53]

Third, SDG&E argues that, because it had not previously experienced fires related to transmission lines coming into contact with one another, SDG&E's level of concern about the faults along TL 637 was appropriate.[54] Through Mr. Yari, SDG&E stressed that conductor-to-conductor activity is "relatively rare" and on windy days a fault is not unusual given the potential for debris to come into contact with a conductor.[55] Because of this "relatively rare" activity, SDG&E asserts it was reasonable not to suspect that hot particles were being emitted from the activity along TL 637.[56]

As such, SDG&E maintains that its monitoring of the faults on TL 637 was reasonable and prudent.

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[53] SDG&E Phase 1 Reply Brief at 37 to 38.

[54] SDG&E Phase 1 Reply Brief at 38, citing SDGE-11-A at 15-16.

[55] *Id.* and SDGE-11-A at 8.

[56] SDGE-11-A 8 to 9.

SDG&E's Recloser Policy

SDG&E asserts its recloser policy[57] in effect on October 21, 2007 as both reasonable and prudent.[58] SDG&E maintains ORA fails to show how SDG&E's awareness of the 2001 Power Line Fire Prevention Field Guide (2001 Field Guide) put SDG&E on notice of the risks of its recloser policy prior to October 2007. SDG&E notes the 2001 Field Guides' excerpt, "automatic reclosers re-energizing the line into the fault may cause repeated arcing and increase the probability of igniting vegetation," does not show SDG&E's imprudence in utilizing its recloser policy in response to the faults along TL 637.[59] SDG&E asserts that even if it were possible to turn off TL 637's automatic reclosers after the second fault, such an action would

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[57] SDG&E Recloser Policy: Similar to all electric utilities across the country, SDG&E uses protection devices on all of its transmission lines to ensure that the electric system detects and responds to fault activity and isolates the faulted line. Those protection devices measure currents and voltages and detect any abnormal system conditions or faults, on the associated lines. If a transmission system line faults, the protective relays operate to open the circuit breakers (de-energizing the line), and the circuit breakers remain open for ten seconds before the reclosers attempt to reclose them. If the circuit breakers do not reclose successfully, which would indicate that the fault has not cleared after 10 seconds, the recloser "locks out" and prevents further automatic reclose attempts. If the circuit breakers reclose successfully, the circuit is restored. As an additional protection, even if the circuit breakers reclose successfully after 10 seconds, the recloser will lockout if the lines faults again within 120 second of the initial fault. If no additional faults occur within that 120-second period, the recloser resets. ORA-18 at 2, citing Geier Testimony Excerpts (I.08-11-006).

[58] SDG&E Phase 1 Reply Brief at 49.

[59] SDG&E Phase 1 Reply Brief at 49 to 50.

not have avoided the Witch Fire's ignition.[60] Moreover, Mr. Yari testified that disabling automatic reclosers after the second fault would have been imprudent "given the important of keeping [TL 637] in service to serve the backcountry during a very windy day" and that the recloser policy was industry practice.[61]

Foreseeability of Witch Fire

SDG&E maintains that the facts surrounding the Witch Fire do not show that SDG&E acted unreasonably or imprudently based on what SDG&E knew at the time.[62] More specifically, SDG&E argues that Henricks, MGRA, UCAN and POC fail to show how the Witch Fire was foreseeable.[63]

First, SDG&E put forth Mr. David Geier (Mr. Geier) to testify as to SDG&E's fire preparedness in 2007.[64] Mr. Geier, SDG&E's Vice President of Electric Transmission and System Engineering, discussed the 2003 Wildfires[65] in his direct testimony and the steps SDG&E took in the aftermath of the 2003 Wildfires to reduce the risk of wildfires in its service territory.[66] Mr. Geier explained how post-2003 SDG&E focused on improving the integrity and reliability of the utility's

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[60] SDG&E Phase 1 Reply Brief at 50.

[61] SDG&E Phase 1 Reply Brief at 51, citing Reporter's Transcript Volume 3 at 384.

[62] SDG&E Phase 1 Reply Brief at 30 to 31.

[63] SDG&E Phase 1 Reply Brief at 30.

[64] SDG&E Phase 1 Reply Brief at 31.

[65] SDGE-05 at 15, 2003 Wildfires: In San Diego County alone, the 2003 Wildfires burned over 400,000 acres, destroyed more than 2,400 homes, and caused extensive damage to SDG&E facilities.

[66] SDG&E Phase 1 Reply Brief at 31.

transmission and distribution systems, especially in the areas subject to the extreme Santa Ana winds.[67] Through Mr. Geier, SDG&E showed that it created a full-time fire coordinator position to provide training to its employees on fire risk, in addition to creating a database to track fire causes and patterns.[68] Despite the newly created fire coordinator position and database, SDG&E maintains that there was no information available that could have been used to predict the Witch Fire ignition.[69]

Second, SDG&E maintains that there has not been a credible showing that there has ever been a comparable event to the 2007 Wildfires.[70] SDG&E contends that while the 2003 Wildfires were significant, the 2007 Wildfires happened under different circumstances.[71] Specifically, SDG&E contends that the 2007 Wildfires involved over a dozen major fires igniting over a short period of time, including ignitions to powerlines, which was not the case in 2003.[72] Accordingly, SDG&E maintains there was no way to have foreseen what occurred in October 2007 based on historical data.[73]

Third, SDG&E contends that the Witch Fire was not foreseeable because SDG&E designed, engineered, maintained and inspected TL 637 in compliance with

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[67] SDGE-05 at 16.

[68] SDGE-05 at 16.

[69] SDG&E Phase 1 Reply Brief at 32 citing SDGE-12 at 25.

[70] SDG&E Phase 1 Reply Brief at 32.

[71] SDG&E Phase 1 Reply Brief at 32.

[72] SDG&E Phase 1 Reply Brief at 32.

[73] SDG&E Phase 1 Reply Brief at 33.

the Commission's industry standards.[74] General Order (GO) 95 requires that all infrastructure be designed, constructed, rebuilt and maintained to account for known local conditions.[75] And while MGRA and other intervenors have raised SDG&E's compliance with GO 95 in regards to the foreseeability of the Witch Fire, SDG&E maintains those arguments fail to discredit SDG&E's showings of compliance and prudence.[76] Specifically, SDG&E asserts MGRA fails to show how rebuilding TL 637 to a higher wind loading standard would have prevented the Witch Fire.[77]

As such, SDG&E maintains that its operation and management of TL 637 was reasonable.

4.1.3 ORA's Position on SDG&E's Operation and Management of its Facilities Prior to the Witch Fire

ORA maintains that SDG&E has not shown by a preponderance of the evidence that SDG&E's operation and management of its facilities prior to the ignition of the Witch Fire were reasonable.[78] ORA argues that SDG&E's response to the faults occurring on TL 637 was unreasonable.[79] Within this argument, ORA contends: (1) the timing of SDG&E's response to the faults along TL 637 was not appropriate; and (2) SDG&E did not effectively use fault location information available at the relays in response to the

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[74] SDG&E Phase 1 Reply Brief at 33.

[75] MGRA Phase 1 Reply Brief at 8.

[76] SDG&E Phase 1 Reply Brief at 33.

[77] SDG&E Phase 1 Reply Brief at 33.

[78] ORA Phase 1 Reply Brief at 13.

[79] *Id*.

faults.[80] ORA additionally argues that SDG&E's recloser policy in effect on October 21, 2007 imprudently increased fire risk.[81]

SDG&E's Response to Faults along TL 637

ORA contends that SDG&E has not shown it acted prudently in connection to the ignition of the Witch Fire.[82] ORA maintains SDG&E's failure to use fault location information effectively demonstrates that the utility failed to act reasonably regarding the faults along TL 637.[83]

First, ORA maintains that SDG&E should have responded sooner to investigate the faults occurring on TL 637 on the morning of October 21, 2007.[84] ORA points to SDG&E's dispatch of troubleshooters in support of this argument: "the dispatch time for the second trip was almost four times as long as for the first trip that occurred less than three hours before. Multiple line trips of TL 637 in a single day should have been a concern to the utility, especially since this was a rare event that had occurred only 9 times in the previous 24 years."[85] ORA argues that SDG&E's response time was slow, noting that over 6 hours passed from the time of the initial fault on TL 637 to its de-energization.[86] ORA argues that SDG&E should have had the resources in place to communicate the need for patrol; and that SDG&E's failure to have

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[80] *Id*.

[81] ORA Phase 1 Reply Brief at 28.

[82] ORA Phase 1 Reply Brief at 13.

[83] ORA Phase 1 Reply Brief at 13.

[84] ORA Phase 1 Opening Brief at 10.

[85] *Id*. citing ORA-03 at 1-3 (TL 637 Fault History).

[86] ORA Phase 1 Opening Brief at 11.

resources available constituted imprudent management.[87] ORA maintains that this imprudent management lead to the ignition and spread of the Witch Fire.[88]

Second, ORA maintains that SDG&E did not effectively use the fault location information it had available to respond to the faults along TL 637.[89] ORA contends that SDG&E could have obtained the location of faults in time to be in a better position to respond to the faults on TL 637.[90] Specifically, ORA refers to the following fault time and location information obtained through discovery to rebut SDG&E's argument that it could not analyze the data stored in the relay without engineering intervention.[91]

Fault Time	Fault Location
8:53 a.m.	2.73 miles / 2.74 miles
11:22 a.m.	2.73 miles / 2.75 miles
12:23 p.m.	2.79 miles /2.76 miles
3:25 p.m.	2.82 miles / 2.84 miles

ORA notes that SDG&E did not retrieve the above mileage data until October 22, 2007, a day after the ignition of the Witch Fire.[92] Additionally, ORA highlights the testimony of Mr. Yari, that had SDG&E looked at the mileage data, it would have been in a

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[87] ORA Phase 1 Opening Brief at 12.

[88] ORA Phase 1 Opening Brief at 34.

[89] ORA Phase 1 Reply Brief at 13.

[90] *Id*. at 17.

[91] ORA Phase 1 Opening Brief at 13.

[92] ORA Phase 1 Opening Brief at 13 to 16, referencing ORA-19.

better position to respond to the faults.[93] In sum, ORA asserts it was imprudent of SDG&E to not effectively use data that was available at the relays in responding to the faults. Moreover, ORA contends that had SDG&E used the fault location data on October 21, 2007, rather than the day after ignition, it would have assisted SDG&E in having a quicker response time.[94]

SDG&E's Recloser Policy

ORA maintains SDG&E's recloser policy in effect during the faults along TL 637 imprudently increased fire risk.[95] Under cross-examination by ORA, Mr. Geier acknowledged and essentially agreed with the 2001 Field Guide's assertion, "Automatic reclosers reenergizing the line into the fault may cause repeated arcing and increase the probability of igniting vegetation."[96] ORA contends this assertion put SDG&E on notice of the risks posed by automatic reclosers to ignite vegetation, as early as 2001.[97] ORA asserts that these risks and the fact that there was a Red Flag Warning in place on October 21, 2007, and that there were an unusual number of trips shows that SDG&E was imprudent when it did not anticipate that its facilities posed a fire risk on October 21, 2007.[98]

As such, ORA maintains the record established SDG&E did not act prudently on October 21, 2007.

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[93] ORA Phase 1 Reply Brief at 17, citing Reporter's Transcript Volume 3 at 349.

[94] ORA Phase 1 Opening Brief at 17.

[95] ORA Phase 1 Opening Brief at 28.

[96] Hearing Reporter's Transcript Volume 2 at 197; ORA Phase 1 Opening Brief at 29, citing ORA-20.

[97] ORA Phase 1 Opening Brief at 32.

[98] ORA Phase 1 Reply Brief at 15.

4.1.4. Intervenors' Position on SDG&E's Operation and Management of its Facilities Prior to the Witch Fire

Many of the intervenors to this proceeding contend that SDG&E fails to prove by a preponderance of the evidence that SDG&E's operation and management of its facilities prior to the ignition of the Witch Fire were reasonable.[99] Henricks, MGRA, UCAN and POC assert that the fact that SDG&E had prior experience with catastrophic fires, renders SDG&E imprudent when SDG&E failed to adequately address the faults on TL 637.[100]

Foreseeability of Witch Fire

Henricks, MGRA, UCAN and POC maintain that the facts show SDG&E did not operate its facilities reasonably prior to the ignition of the Witch Fire.[101]

Henricks asserts that SDG&E was familiar with the 2003 Wildfires, and thus was on notice that a fire could spread to the extent to which the Witch Fire spread.[102] Henricks highlights the testimony of SDG&E's witness Lee Schavrien (Mr. Schavrien) to show that SDG&E had knowledge of the catastrophic events linked to 2003 Wildfires.[103] Henricks maintains that SDG&E's knowledge of the 400,000 acres burned, 16 lives lost, and 2400 homes destroyed by the 2003 Wildfires put SDG&E on notice that such an event

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[99] Henricks Phase 1 Opening Brief at 5.

[100] Henricks Phase 1 Opening Brief at 4; MGRA Phase 1 Reply Brief at 13 to 15.

[101] *See generally* Henricks Phase 1 Opening Brief.

[102] Henricks Phase 1 Opening Brief at 4.

[103] Henricks Phase 1 Opening Brief at 4, referencing Reporter's Transcript Volume 2 at 264 to 271.

could occur again.[104] As such, Henricks maintains SDG&E did not act reasonably because the 2007 Wildfires were foreseeable.[105]

MRGA argues that SDG&E fails to show it acted reasonably in its operation and management of TL 637.[106] MGRA contends that SDG&E fails to establish it had no reason to suspect the faults occurring along TL 637 were the result of unusual conductor to conductor contact.[107] More specifically, MGRA contends that had SDG&E applied SDG&E's prior knowledge of load standards and the Santa Ana wind conditions differently, the Witch Fire could have been prevented, or at the very least foreseen.[108]

UCAN and POC maintain that SDG&E failed to act reasonably prior to the Witch Fire's ignition because fires were foreseeable given the history in SDG&E's service territory.[109] Although UCAN's arguments as to wind and weather conditions are addressed in more detail in Section 4.4 of this decision (Wind and Weather Conditions in October 2007), UCAN's assertions touch on how SDG&E failed to act reasonably in regards to the Witch Fire.[110] UCAN contends that the Santa Ana wind conditions were a foreseeable, known local condition and SDG&E should have been prepared for the

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[104] Henricks Phase 1 Opening Brief at 5, referencing Reporter's Transcript Volume 2 at 264 to 271.

[105] Henricks Phase 1 Opening Brief at 5.

[106] MGRA Phase 1 Reply Brief at 13.

[107] MGRA Phase 1 Reply Brief at 15 to 16.

[108] MGRA Phase 1 Reply Brief at 16.

[109] UCAN Phase 1 Opening Brief at 3; POC Phase 1 Opening Brief at 3.

[110] UCAN Phase 1 Opening Brief at 3.

possibility that its electrical equipment might spark wildfires during a Santa Ana windstorm.[111] And although UCAN does not dispute the fact that SDG&E's facilities were not linked to the 2003 Wildfires, UCAN does contend that the events surrounding the 2003 Wildfires put SDG&E on notice of the fire potential years prior to the ignition of the 2007 Wildfires.[112] As such, UCAN maintains that SDG&E cannot prove by a preponderance of the evidence that its management and operation of its facilities prior to the ignition of the Witch Fire were reasonable.[113]

4.1.5. Reasonableness Review: SDG&E's Operation and Management of its Facilities Prior to the Witch Fire

In evaluating SDG&E's operation and management of its facilities in connection with the Witch Fire, the Commission must determine whether SDG&E employed reasonable judgement in its operation and management of its facilities in the period leading up to the ignition of the Witch Fire.

SDG&E's response to the faults along TL 637 was unreasonable when viewed in light of the record of this proceeding. The threat of the Harris Fire to the Southwest Powerlink, does not excuse SDG&E's failure to monitor the faults on TL 637. The fact that there are other wind related wildfires in the area should put a prudent manager on notice to anticipate wind related events to its facilities. Also, in the 24 year history of FL 637, there were only nine days with multiple faults. While compliance with industry

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[111] UCAN Phase 1 Opening Brief at 3.

[112] UCAN Phase 1 Opening Brief at 3.

[113] UCAN Phase 1 Reply Brief at 5.

practice is relevant to our reasonableness review, SDG&E must also show it acted reasonably in light of the circumstances at the time. The Red Flag Warning indicating high wind conditions, other fires in the vicinity, the request by Cal Fire to de-energize another transmission line, and three faults over a period of 3.5 hours, all alerted SDG&E to the potential for fires and should have caused SDG&E to act more proactively on October 21, 2007.[114] Mr. Yari testified it would take 1.5 hours for a protective engineer and computer to calculate the exact location of the fault(s) on TL 637. Had SDG&E de-energized TL 637 or sent a protective engineer out to either end of TL 637 before the third fault occurred, it may have prevented the third fault from igniting the Witch Fire at 12:23 p.m. Moreover, it would have been more reasonable for SDG&E to send a protective engineer to calculate the fault mileage information on the date the faults occurred and the fire ignited.

While SDG&E's recloser policy was industry practice, it knew as early as 2001 that automatic reclosers energizing into the fault may cause arcing and increase fire risk. SDG&E fails to show how it was reasonable for its Grid Operations to take 6.5 hours to de-energize TL 637 after the initial 8:53 a.m. fault. This 6.5 hour lapse does not show that SDG&E was engaged in reasonable utility practice. It would have been more reasonable to force an outage before the Witch Fire ignited at 12:23 p.m. However, the fact that SDG&E did not de-energize TL 637 until 3:27 p.m., does not show how SDG&E acted reasonably in its decision to not de-energize the line immediately at 1:10 p.m. Even though SDG&E management was

[114] ORA-01 at 10:13-15; ORA-03 at 1-3.

aware of the 2001 Field Guide's assertion that automatic reclosers increase the risk to ignite vegetation, SDG&E still failed to take more proactive steps to prevent the Witch Fire's ignition.

There were multiple events happening on October 21, 2007 which show SDG&E was unreasonable not to foresee the Witch Fire or to assert now that that it was not foreseeable. The Red Flag Warning in effect on October 21 2007 coupled with the 9:30 a.m. ignition of the Harris Fire put SDG&E on notice that wind and weather could cause the ignition of another fire in its territory on October 21, 2007. The four faults on a line that did not have a history of faults combined with SDG&E's knowledge of the destruction caused by the 2003 Wildfires, including the Cedar Fire, contradicts the argument that the Witch Fire was unforeseeable.

As such, SDG&E fails to prove by a preponderance of the evidence that it acted prudently in its operation and management of its facilities linked to the ignition of the Witch Fire.

4.2. Guejito Fire

4.2.1. Guejito Fire Background

The Guejito Fire was first reported by Cal Fire at 01:00 on October 22, 2007 near the City of Escondido, in San Diego County.[115] The SDG&E facility involved in the ignition of the Guejito Fire was a 12 kV overhead conductor. CPSD and Cal Fire attributed the ignition of the Guejito Fire to a Cox Communications (Cox) lashing wire coming into contact with an SDG&E 12 kV overhead conductor, between SDG&E

[115] ORA-01 at 17.

poles P196387 and P196394.[116] The SDG&E conductors were located above the Cox lines.[117]

GO 95, within the California State Rules for Overhead Electric Line Construction, sets the basic minimum allowable clearance of wires from other wires at crossings.[118] Rule 38 of GO 95 specifies a minimum clearance of 6 feet with a maximum reduction of ten percent under wind conditions.[119] On November 2, 2007 an SDG&E engineering contractor, Nolte Associates, Inc. performed an engineering survey on the facilities linked to the Guejito Fire's ignition.[120] The Nolte Survey documented a 3.3-foot clearance between the SDG&E conductors and Cox lines prior to any repair work being completed after the ignition of the Guejito Fire.[121]

The Cox facilities involved in the Guejito Fire were installed in August of 2001.[122] SDG&E purports that it is not known when the 3.3-foot clearance violation occurred, as there were no pre-fire surveys completed on the facilities in question.[123] At hearings however, SDG&E presented Mr. Greg Walters, a former manager of SDG&E's Compliance Management Group and Joint Facilities Department, to testify that it was his belief that the Cox facilities involved in the Guejito

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[116] ORA Phase 1 Opening Brief at 34, citing ORA-05 at 926.

[117] ORA Phase 1 Opening Brief at 34, citing ORA-50.

[118] General Order 95 at Table 2.

[119] *Id*.

[120] *Id*.

[121] *Id*. at 18-19.

[122] ORA Phase 1 Reply Brief at 18.

[123] SDG&E Phase 1 Reply Brief at 59.

Fire were not in compliance with GO 95, Rule 38, Table 2 at the time of installation.[124]

In its opening brief, ORA notes that CPSD found SDG&E to be in violation of the following statutory provisions at the time it conducted its post-fire survey of the SDG&E facilities involved in the Guejito Fire:

- Public Utilities Code Section 451 ("Failing to detect/repair a broken lashing wire and/or failing to maintain required clearances.");
- GO 95, Rule 31.1 ("Failing to detect/repair a broken lashing wire and/or failing to maintain required clearances, in consideration of the given local conditions such as the well-known Santa Ana winds."); and
- GO 95, Rule 38 ("As supported by the Nolte Survey, the clearances between Cox's and SDG&E's facilities were noncompliant before/ during and after the Guejito [F]ire ignition, which occurred during conditions that did not justify the noncompliance.")[125]

SDG&E's expert, Mr. Darren Weim (Mr. Weim), testified that detailed inspections prior to the Guejito Fire were conducted on June 22, 2007 (for Pole P196394) and April 8, 2005 (for Pole P196394).[126] Mr. Weim noted, "[o]ther than missing or damaged high voltage or warning signs (which were repaired), no [other] conditions were noted in these inspections."[127]

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[124] A.15-09-010 at 15; Reporter's Transcript Volume 5 at 793.

[125] ORA Phase 1 Opening Brief at 25; citing ORA-05 at 1238:3-4.

[126] SDGE-06 at 11.

[127] SDGE-06 at 11.

As referenced above, the Guejito Fire, which later combined with the Witch Fire, burned a total of 197,990 acres before being contained.[128] Once combined, the Guejito and Witch Fires led to two fatalities and 40 injured firefighters.[129]

4.2.2. SDG&E's Position on its Operation and Management of its Facilities Prior to the Guejito Fire

SDG&E does not dispute that GO 95 required a 6-foot clearance; however, SDG&E maintains that its operation and management of its facilities involved in the Guejito Fire prior to October 22, 2007 were reasonable.[130] SDG&E argues that it appropriately inspected the facilities linked to the ignition Guejito Fire.[131] Furthermore, SDG&E contends ORA fails to show how a compliant clearance between the Cox line and the SDG&E overhead conductors could have prevented the ignition of the Guejito Fire.[132]

GO 95 Clearance Requirements and SDG&E's Inspections

At hearings, SDG&E presented Mr. Darren Weim (Mr. Weim), SDG&E's Manager of Northeast Construction & Operations, to discuss the utility's design, construction, and maintenance standards that were in place prior to 2007.[133] While SDG&E does not dispute GO 95's 6-foot clearance requirement, Mr. Weim's

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[128] ORA-01 at 7.

[129] ORA-01 at 18.

[130] SDG&E Phase 1 Reply Brief at 59-60.

[131] *Id*.

[132] SDG&E Phase 1 Reply Brief at 3.

[133] A.15-09-010 at 15.

testimony was used to show the programmatic approach SDG&E takes in its inspection and maintenance of its facilities.[134] Mr. Weim testified regarding SDG&E's Corrective Maintenance Program. He elaborated on two of the inspections carried-out under SDG&E's Corrective Maintenance Program.[135] A "patrol inspection" involves visual inspections, designed to identify obvious structural problems and hazards.[136] A "detailed inspection" requires trained employees to perform thorough checks on distribution poles and all attachment facilities to identify GO 95 clearance violations.[137] Mr. Weim noted that the most recent patrol inspection was completed on August 30, 2007, with no hazards identified.[138] The most recent detailed overhead inspections were conducted on June 22, 2007 and April 8, 2005, but did not uncover design or construction issues with respect to poles P196387 and P196394.[139]

SDG&E maintains that "if the 3.3 foot clearance pre-dated SDG&E's inspections, and those inspections did not uncover the problem, those facts merely show that SDG&E was not perfect."[140] SDG&E maintains that the Commission's prudence standard "is not a 'perfection' standard: it is a standard of care that demonstrates all actions were well planned, properly

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[134] SDG&E Phase 1 Reply Brief at 60.

[135] SDGE-06 at 4.

[136] SDGE-06 at 4 to 5.

[137] SDGE-06 at 5.

[138] SDGE-06 at 10.

[139] SDGE-06 at 11.

[140] SDG&E Phase 1 Reply Brief at 60.

supervised and all necessary records retained."[141] Furthermore, SDG&E maintains that ORA failed to show that the 3.3-foot clearance contributed to the Guejito Fire's ignition.[142]

As such, SDG&E maintains that its management and control of its facilities prior to the ignition of the Guejito Fire were reasonable.

4.2.3. ORA's Position on SDG&E's Operation and Management of its Facilities Prior to the Guejito Fire

ORA maintains that SDG&E has failed to prove by a preponderance of the evidence that SDG&E's operation and management of its facilities linked to the Guejito Fire were reasonable.[143] ORA cites to the facts surrounding the ignition of the Guejito Fire as well as the applicable clearance requirements per GO 95.

GO 95 Clearance Requirements and SDG&E's Inspections

ORA argues that SDG&E's failure to comply with GO 95 renders the utility's operation and management of its facilities imprudent.[144] ORA contends that the lack of records documenting when the 3.3-foot clearance violation occurred does not mean that SDG&E met the prudent manager standard.[145] ORA maintains that the fact that Mr. Walters testified, under oath, that the clearance violation occurred at the time of the 2001 Cox line installation is evidence of imprudent

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[141] *Id*. citing D.14-06-007 at 36.

[142] SDG&E Phase 1 Reply Brief at 63.

[143] ORA Phase 1 Reply Brief at 18.

[144] *Id*.

[145] *Id*.

utility management.[146] Additionally, ORA contends that the longstanding clearance violation was a safety risk, rendering SDG&E imprudent.[147] Bolstering this argument, ORA highlights the specific statutory violations CPSD found during its post-fire investigation of the facilities linked to the Guejito Fire.[148] ORA contends that CPSD's finding that SDG&E failed to maintain its facilities in compliance with Public Utilities Code § 451, GO 95 Rule 31.1, and GO 95 Rule 38 , shows SDG&E was imprudent in managing its facilities linked to the Guejito Fire.[149]

As such, ORA maintains that SDG&E's operation and management of its facilities prior to the ignition of the Guejito Fire were not reasonable.[150]

4.2.4. Reasonableness Review: SDG&E's Operation and Management of its Facilities Prior to the Guejito Fire

In evaluating SDG&E's operation and management of its facilities in connection to the Guejito Fire, the Commission must determine whether SDG&E employed reasonable judgment in its operation and management of its facilities in the period leading up to the ignition of the Guejito Fire.

The record shows that SDG&E utilized its Corrective Maintenance Program to perform patrol and detailed (overhead) inspections of P196387 and P196394 prior to the Guejito Fire ignition. SDG&E asserts its failure to identify the 3.3-foot clearance violation merely

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[146] *Id*. citing Reporter's Transcript Volume 5 at 792.

[147] *Id*. at 24.

[148] ORA Phase 1 Opening Brief at 24.

[149] ORA Phase 1 Opening Brief at 24.

[150] ORA Phase 1 Reply Brief at 30.

shows the utility was not perfect; we disagree. SDG&E's use of patrol and overhead inspection protocols may be reasonable. The repeated failure of these patrols to identify the clearance violation is not reasonable. While SDG&E's testimony highlights its Corrective Maintenance Program, the existence of the Corrective Maintenance Program is not sufficient to establish that SDG&E fulfilled its duty to be a reasonable and prudent manager. At the same time, the lack of inspection records indicates a failure to act prudently. The fact that the Cox line was installed in 2001, six years before the fire, and that no inspection records affirmatively reference compliance with GO 95 clearance requirements is problematic. Moreover, we find the six-year gap in inspection records (from 2001 to 2007) to be indicative of imprudent management. SDG&E asserts that to find its failure imprudent would be to interpret the prudence standard as a perfection standard. We disagree. Documentation of compliance with objective clearance standards at some point during the many years the Cox line was installed is not equivalent to perfection.

As such, SDG&E fails to prove by a preponderance of the evidence that it acted prudently in its operation and management of its facilities prior to the ignition of the Guejito Fire.

4.3. Rice Fire

4.3.1. Rice Fire Background

The Rice Fire ignited on October 22, 2007 in Fallbrook, California.[151] The Cal Fire Investigation Report into the Rice Fire concluded that the cause of

[151] SDGE-08 at 2.

the fire was a downed powerline.[152] CPSD determined that a limb from sycamore Tree FF1090 (FF1090) broke and fell onto SDG&E 12 kV overhead conductors on October 22, 2007, which in turn caused the conductors to break and fall to the ground.[153]

In comments to the proposed decision, SDG&E alleges that the weight of the evidence shows it could not have prevented the Rice Fire, because it had no way to know of a defect in the broken tree branch that fell onto the conductors. SDG&E reiterates its claim that the broken branch was not marked for trimming and would not have been removed.[154] We revise our discussion below to address these comments with further support from the evidentiary record of this proceeding. The Commission finds that SDG&E failed to trim FF1090 on a timely basis and failed to keep adequate records for FF1090. SDG&E failed to show that it was prudent in its management of FF1090, or that it could not have identified the defective branch with proper management. We find the evidence inconclusive as to the growth direction and the growth pattern of the broken branch.

4.3.2. Legal Requirements

The Commission's GO 95, Rule 35 sets the general clearance requirements for vegetation around powerlines.[155] Rule 35 requires that where dead, rotten or diseased trees or dead, rotten, or diseased portions of otherwise healthy trees overhang or lean toward power conductors, those trees or portions are to be

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[152] ORA-01 at 22.

[153] SDGE-08 at 2.

[154] *See* SDG&E's Comment

[155] SDGE-08 at 2.

removed. In 2007, GO 95 required a radial clearance of 18 inches, and Public Resources Code Section 4293[156] required a radial clearance of 4 feet, between vegetation and 12 kV conductors.[157] To comply with both Commission rules and State law, SDG&E designed and implemented its Vegetation and Management Program (VMP) and Tree Pre-inspection procedures.[158] In this decision, we review the VMP that was in place on October 22, 2007. SDG&E's VMP manual describes SDG&E's Tree Pre-inspection procedures in

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[156] Public Resources Code § 4293: Except as otherwise provided in Sections 4294 to 4296, inclusive, any person that owns, controls, operates, or maintains any electrical transmission or distribution line upon any mountainous land, or in forest-covered land, brush-covered land, or grass-covered land shall, during such times and in such areas as are determined to be necessary by the director or the agency which has primary responsibility for the fire protection of such areas, maintain a clearance of the respective distances which are specified in this section in all directions between all vegetation and all conductors which are carrying electric current: (a) For any line which is operating at 2,400 or more volts, but less than 72,000 volts, four feet; (b) For any line which is operating at 72,000 or more volts, but less than 110,000 volts, six feet; (c) For any line which is operating at 110,000 or more volts, 10 feet. In every case, such distance shall be sufficiently great to furnish the required clearance at any position of the wire, or conductor when the adjacent air temperature is 120 degrees Fahrenheit, or less. Dead trees, old decadent or rotten trees, trees weakened by decay or disease and trees or portions thereof that are leaning toward the line which may contact the line from the side or may fall on the line shall be felled, cut, or trimmed so as to remove such hazard. The director or the agency which has primary responsibility for the fire protection of such areas may permit exceptions from the requirements of this section which are based upon the specific circumstances involved. (Amended by Stats. 1976, Ch. 1300.)

[157] SDGE-08 at 16.

[158] SDG&E-08, Appendix 3.

detail. The document provides an overview of the VMP, inventory criteria for vegetation, instructions to the Vegetation Management System, factors affecting reliability, procedure to escalate issues, updating inventory of vegetation, tree growth rates and the Vegetation Management Areas (VMAs). The manual is comprehensive and indicates that SDG&E had a robust VMP in 2007.

4.3.3. Issues and Party Positions

Although no party disputes that the Rice Fire started when a broken limb from FF0190 fell onto SDG&E's conductors, parties dispute whether SDG&E prudently marked, inspected and trimmed FF1090 pursuant to its VMP. Parties focused their litigation efforts on the tree inspections, trimming schedule and activities related to the clearance requirements. ORA and SDG&E also introduced testimony and evidence regarding Reliability Trees and FF1090's latent defect.

4.3.3.1. FF1090's Inspection and Trimming Schedule

FF1090 is a fast growing sycamore tree inventoried by the VMP in its Vegetation Management System (VMS) in 1999. The VMS is a software application designed by SDG&E to record tree data within a dynamic inventory of vegetation having the potential to grow into or fall into SDG&E electric power lines and facilities.[159] SDG&E pre-inspectors update information contained within certain fields in the database based on their evaluation of the tree. One of the fields in the VMS database is called "Months to next trim", and the inspector can choose 0-3, 3-6, 6-9 months, etc. from the drop down menu. SDG&E's VMS considers

[159] *Ibid* at 8.

the tab "0-3 months" as setting a timeline that begins during the subsequent trim cycle, which in this case meant between September to November 2007.

The record shows that FF1090 was inspected on July 18, 2007 and the SDG&E inspector chose the 0-3 months tab to remove direct overhang. On October 22, 2007, three months later, when the Rice Fire ignited, FF1090 had not been trimmed. ORA and SDG&E heavily litigated the issues of when FF1090 should have been trimmed, whether FF1090 exhibited a clearance violation, and whether the trim would have prevented the branch from falling onto the conductors.

ORA argues that FF1090 should have been trimmed before October 18, 2007, three months from the July 18, 2007 pre-inspection. ORA believes that failure to trim FF1090 led directly to the branch breaking off and falling on the conductors. SDG&E states that the "Months to next trim" tab should be used to estimate how many months will elapse before the tree grows out of compliance. According to SDG&E, a selection of 0-3 months would mean that the tree should be trimmed in the upcoming trim cycle, which in this case, would have been between September and November of 2007.[160] SDG&E further alleges that the broken off branch was growing away from the power lines, and as such would not necessarily have been subject to trimming.

4.3.3.2. FF1090's latent defect and the issue of Reliability Trees

The parties did not focus on some other aspects of the VMP manual that are nevertheless important in

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[160] *See* SDG&E-13 Prepared Rebuttal Testimony of Don Akau at 10-11.

determining whether SDG&E acted prudently prior to the fire. Don Akau, SDG&E's Vegetation Management Program Manager, testified about the hidden defect he observed in the broken branch after the fire. Mr. Akau referred to "staining" at the point where the fallen branch broke from the main trunk[161] and proposed that the staining could be an indicator of "included bark", or "internal structural stressing and cracking in the branch union" which in his opinion contributed to the failure of the limb in the winds.[162]

Throughout this proceeding, SDG&E claimed that the included bark was hidden, and could not have been discovered by its personnel during their inspections. According to SDG&E's VMP manual, a Reliability Tree is "Any Tree, located inside or outside the utility right-of-way, that has a reasonably good potential for interrupting service to an overhead circuit (excluding secondary) with the current routine cycle."[163] When a pre-inspector identifies a Reliability Tree, it is mandatorily marked in the VMS as a Reliability Tree and for trimming.[164] A Reliability Tree exhibits one or more factors listed in the VMP manual, and per SDG&E's inspection procedures, must be marked, pruned and inspected to ensure grid reliability. FF1090 was not marked as a Reliability Tree before the Rice Fire.

4.3.4. Discussion

In evaluating SDG&E's operation and management of its facilities in connection with the Rice Fire, the

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[161] SDG&E-08 at 19 and SDG&E-13 at 8.

[162] *Ibid*.

[163] SDG&E-08, Appendix 3 at 7.

[164] *Ibid.* at 30.

Commission must determine whether SDG&E employed reasonable judgment in its operation and management of its facilities in the period leading up to the ignition of the Rice Fire. The general purpose of routine pre-inspections is to identify vegetation for pruning and removal that will not maintain required clearance for a full cycle (fourteen months). As part of the inspection process, the pre-inspector is also tasked to identify and mark Reliability Trees. A Reliability Tree is "Any Tree, located inside or outside the utility right of way, that has a reasonably good potential for interrupting service to an overhead circuit within the current routine cycle." According to the VMP manual, "a majority of tree related outages that occur in the utility right-of-way are the result of tree or limb failure, not tree growth."[165] When a Reliability Tree is identified the pre-inspector *shall* [emphasis added] check both the reliability and trimming required box in the tree tab.[166]

As part of its VMP, SDG&E relies on its inspectors to select the appropriate fields in the VMS and to identify potential Reliability Trees. It is essential for SDG&E personnel and contractors to be well trained in the procedures of the VMP so that they accurately select the drop down menus in the VMS.[167]

Based on an exhaustive review of the record and informed primarily by SDG&E's own VMP manual,

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[165] *Ibid.*

[166] *Ibid.*

[167] The Vegetation Management System (VMS) is a database which tracks all of the inventoried vegetation within SDG&E's territory. The VMS has various drop down menus which allow an inspector to identify issues with a tree and recommend the proper course of action.

the Commission finds SDG&E acted imprudently in its management of FF1090. First, we find SDG&E to have deviated from its usual timeline in trimming FF1090. Secondly, SDG&E's pre-inspector mistook the 'months to next trim' menu to mean that a selection of 0-3 months means that an actual trimming would take place within 0-3 months of the pre-inspection. The contractor's misunderstanding of the VMS led him to incorrectly select a menu item that delayed the trimming beyond three months from the inspection date. Thirdly, SDG&E did not identify FF1090 as a "Reliability Tree" even though FF1090 seems to have exhibited at least two characteristics on the "Tree Hazard Checklist."[168] Each of these elements of the record is discussed below. In each of these instances, SDG&E failed to demonstrate that it employed reasonable judgment in its operation and management of its facilities in the period leading up to the ignition of the Rice Fire.

4.3.4.1. SDG&E's Tree Inspection and Trimming Schedule

The record shows that at the time of the Rice Fire's ignition, SDG&E had a VMP in place whereby FF1090 was inspected and trimmed. A summary of all available pre-inspections and subsequent trim dates recorded in the VMS Tree Information Sheet up to the Rice Fire are shown in the table below:

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[168] *Ibid.*

Tree FF1090 Inspection and Prune dates

Tree FF1090	Inspection Date	Prune date
	05/07/1999	05/01/2000
	01/25/2001	No trim record
	01/02/2002	04/29/2002
	01/13/2003	05/07/2003
	11/11/2003	02/17/2004
	11/17/2004	02/11/2005
	07/12/2005	No trim record
	07/19/2006	No trim record
	07/18/2007	
	(10/15/2007)*	
	(10/19/2007)*	10/22/2007

* SDG&E states that Davey Tree Surgery Company and SDG&E personnel performed follow up inspections on October 15, 2007 and October 19, 2007 respectively, and that FF1090 was in compliance with clearance requirements on those two visits. However, these additional inspection dates are not shown in the tree information sheet submitted by SDG&E. SDG&E asserts the October 15, 2007 inspection by a data request response submitted by Davey.[169]

The Tree Information Sheet identifies FF1090 as a fast growing sycamore tree with a growth rate of between four to six feet every year. FF1090 was inventoried on May 7, 1999 and pruned on May 1,

[169] *See* SDGE-08, Appendix 7.

2000. It was inspected again on January 25, 2001 and January 2, 2002. Having not been trimmed for 20 months, the January 2, 2002 inspection documents FF1090 as having between 1.5 to 4 foot clearance to the conductors and SDG&E pruned FF1090 on April 29, 2002.[170] In 2002, SDG&E had notice that, because of FF 1090's growth rate, not trimming the tree annually resulted in FF1090 being out of clearance compliance. Subsequent to the 2002 violation, FF1090 was inspected and pruned annually until the inspection on July 12, 2005. FF1090 was not trimmed after July 12, 2005, nor was it trimmed after the inspection on July 19, 2006. By the July 18, 2007 inspection, FF1090 had not been trimmed for over 29 months.[171]

There were only two instances in FF1090's inventoried history in which it was not trimmed on an annual basis. The first instance in which SDG&E failed to trim FF1090 annually was in 2002, when the tree was recorded as being within 4 feet of conductors. The Rice Fire marks the end of the second time period during which SDG&E fell out of the annual trimming schedule. At the time of the Rice Fire ignition, SDG&E had not trimmed FF1090 for 29 months. The fact that SDG&E deviated from its own standard time table, and allowed more than two years to elapse without pruning this fast-growing tree, shows that SDG&E was not reasonable or prudent in its management of FF1090.

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[170] SDGE-08 at Appendix 6. SDG&E argues that ORA failed to prove FF1090 was out of compliance, we note that it is SDG&E who carries the burden of proof to show it was acting prudently and reasonably, not the other way around.

[171] *Ibid.*

ORA and SDG&E focus their arguments on the definition of 0-3 months and whether it meant that FF1090 should have been trimmed by October 18, 2007. The Commission reviews all available data as a whole. SDG&E's inspector described his reasoning in selecting 0-3 months: "And I listed from zero months to three months as when it should be trimmed. I chose that option on the drop-down menu." "[I]t had strong growth towards the lines, and I felt it would encroach in the 4 foot distance from the primary line in the facilities within three months."[172]

In light of this testimony, SDG&E's claim that "0-3 months" did not set a deadline for trimming is unpersuasive. SDG&E's contract requires Davey to train its pre-inspectors on many topics in the VMP manual and to use the VMS. But, in this instance, the pre-inspector did not have a clear understanding of the drop down menu functions in the VMS. The inspector's misunderstanding of SDG&E's tree trimming program underscores the need for proper training. If the contractor made a mistake due to insufficient or improper training, SDG&E is still responsible for acts, omissions, or failures of its agents under PUC Section 2109.[173]

In comments on the proposed decision, SDG&E further asserted that the broken off branch grew away from the powerline, and was not marked for trimming.

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[172] ORA-44, Transcript excerpts of the March 25, 2008 Examination Under Oath of Mark Clemens.

[173] California Public Utilities Code section 2109: "In construing and enforcing the provisions of this part relating to penalties, the act, omission, or failure of any officer, agent, or employee of any public utility, acting within the scope of his official duties or employment, shall in every case be the act, omission, or failure of such public utility."

SDG&E did not carry its burden to show that the broken branch grew away from the powerline. Rather, the growth direction of the broken branch is inconclusive from the record. Testimony from Mr. Akau states that the branch was positioned toward the northeast, growing away from the powerline;[174] testimony from Mr. Ronald Hay states that the broken branch grew to the south, toward the utility lines;[175] and testimony from Mr. David Kracha states that broken limb grew completely vertically and did not grow toward or away from the powerlines.[176]

Next, assuming that the broken branch grew away from the powerline, a second evidentiary issue emerges. SDG&E presented multiple witnesses stating that the broken branch was part of co-dominant leader growth-with two similar-sized branches growing from the same union point. SDG&E has argued throughout this proceeding that due to the co-dominant nature of these branches, the breaking of one necessitated the removal of the other. After observing the broken branch on October 22, 2007, before Cal Fire could inspect the ignition site, SDG&E's Chris Thompson ordered the removal of the remaining leader branch, and reduction of FF1090's entire canopy to prevent additional failures.[177] SDG&E justifies the reduction of the entire canopy of FF1090 by stating it was necessary to prevent further failures. Applying the same rationale, the evidence indicates that that

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[174] *See* SDG&E-08 at 18.

[175] *See* ORA-40, Transcript excerpts of May 28, 2008 examination under oath of Ronald Hay.

[176] *See* ORA-41, Transcript excerpts of May, 28, 2008 Examination under oath of David Kracha.

[177] *See* SDG&E-13, Appendix 4 at 4.

trimming of FF1090's overhang would have required balanced trimming throughout the canopy. Thus, even if the broken branch did not have clearance problems, a prudent manager trimming on a regular schedule likely would have trimmed FF1090 to balance the other branches that did have clearance issues.

According to SDG&E, two additional inspections of FF1090 took place on October 15, 2007 and October 19, 2007, and those inspections found FF1090 to be in compliance with clearance requirements.[178] The October 19, 2007 inspection was conducted by SDG&E personnel, but also is not shown in the Tree Information sheet.

4.3.4.2. FF1090's Latent Defect and the Issue of Reliability Trees

In addition to FF1090's inspection and trim history, the Commission also considers whether SDG&E has met the burden of showing that it could not have identified the defect in FF1090. The Commission's analysis of the record and the VMP concludes that SDG&E has not met its burden: There is insufficient evidence to show that acting responsibly SDG&E could not have identified the defect in FF1090. The broken branch with included bark exhibited at least two factors which could warrant FF1090 being marked as a Reliability Tree.

To begin, Section 5 of SDG&E's VMP manual discusses Reliability Trees. The five-page section defines Reliability Trees and provides a Hazard Tree Checklist for evaluating trees for reliability and six

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[178] We note the October 15, 2007 inspection is not recorded on SDG&E's own Tree Information Sheet, but reported by Davey as part of a data response in SDG&E-08, appendix 7.

sample photos.[179] Two checklist items are relevant to FF1090: 1) "are there multiple vertical branches originating from one point that may indicate weak attachment?" and 2) "are there narrow-angled branch crotches that may indicate included bark?[180]"

Section 5 of SDG&E's VMP manual is consistent with General Order 95, Rule 35, which requires that diseased and rotten portions of otherwise healthy trees growing toward or hanging over powerlines be removed.

SDG&E presents evidence of the included bark and the limb's growth direction through Mr. Akau's testimony, a hand drawn diagram by Mr. Akau, and testimony from Ronald Matranga and Chris Thompson, SDG&E arborists who visited the Rice Fire site after the fire. According to SDG&E, the broken limb which caused the ignition contained hidden 'included bark', which could not be observed during routine inspections. In his direct and rebuttal testimony, Mr. Akau referred to the presence of "staining" at the point where the fallen branch broke from the main trunk.[181] Mr. Akau proposes that the staining could be an indicator of "included bark", or "internal structural stressing and cracking in the branch union" which in his opinion contributed to the failure of the limb in the winds.[182]

The record, however, does not clearly support that SDG&E did not have advance notice of the structural defect.

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[179] *Ibid.*

[180] SDG&E-08, Appendix 3 at 30.

[181] SDG&E-08 at 19 and SDG&E-13at 8.

[182] *Ibid*.

Mr. Akau testified regarding SDG&E's Vegetation Management Program and presented inspection protocol for "Reliability Trees," and stated that no structural defects were noted by SDG&E's contractors during the July 18, 2017 inspection [183] SDG&E's Chris Thompson testified in I.08-11-006 that the cause of the included bark was co-dominant leader branches in FF1090.[184] Mr. Thompson states in his testimony that FF1090's included bark occurred "when two separate leaders start growing together and pushing against each other as they grow in diameter."[185] Further corroboration of FF1090's growth pattern can be found in the transcribed testimony of Ronald Hay, which described the broken branch as part of "a healthy clutter[spelling per transcript] of branches that grew straight up."[186]

While as discussed above, SDG&E personnel provided conflicting testimony on the growth direction of the broken branch, in contrast SDG&E personnel have been consistent in their recollection of the growth pattern of the broken limb.

The testimony indicates that the broken branch was part of at least two vertical branches, possibly more, growing closely together. This testimony indicates that the tree appeared to have some physical characteristics that would have warranted further attention. Based on the testimony of SDG&E's personnel, SDG&E

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[183] SDGE-13 at 9, citing "Direct Testimony of Ronald Matranga" in I.08-11-006, June 6, 2009 at 3-5.

[184] SDG&E-13, Appendix 4 at 4.

[185] *Ibid*.

[186] *See* ORA-40, Transcript excerpts of May 28, 2008 Examination under oath of Ronald Hay at 23.

has not met its burden of showing that it could not have identified the defect in FF1090.

4.4. Commission Precedent

The Commission has a long history of cases that apply the reasonable and prudent manager standard to after-the-fact reviews of costs incurred by utilities. In each case, the facts showed that the costs the Commission denied were directly attributable to clear and identifiable utility failures or errors.

Mohave

The facts of I.86-04-002 have similarities to the facts of the instant proceeding. On June 9, 1985, a weld in a high-pressure steam pipe at the Mohave Coal Plant (Mohave) ruptured, blasting steam hotter than 1,000 degrees Fahrenheit through an employee breakroom and Mohave's control room.[187] As a result, six people were killed and ten others were severely injured.[188] The steam caused extensive damage to the control room, as well as other portions of the plant.[189] The Commission ultimately concluded that Southern California Edison Company (SCE) acted unreasonably in failing to implement an inspection program to ensure that the portion of the piping system that ultimately failed was maintained in a safe condition.[190] In reaching its decision, the Commission offered, "[e]vidence of accepted industry practices will often be relevant to a reasonableness inquiry, but compliance with such practices will not relieve the utility of [its]

[187] D.94-03-048 at 2.

[188] D.94-03-048 at 2.

[189] D.94-03-048 at 2.

[190] D.94-03-048 at 2.

burden of showing that its conduct was reasonable."[191] Furthermore, the Commission noted "guidelines are only advisory in nature and do not relieve the utility of its burden to show that its actions were reasonable." I.86-04-002 concluded with D.94-03-048, which held it was not reasonable to pass costs resulting from the accident to SCE's ratepayers.

Similar to Mohave, where SCE's facilities were directly involved killing six people and injuring ten others, SDG&E's facilities were directly involved in the ignition and subsequent destruction caused by the 2007 Wildfires. Although SDG&E had industry recognized policies and programs in place (recloser policy, Corrective Maintenance Program, and Vegetation Management Program) prior to October 2007, such practices do not relieve SDG&E of its burden to show that its actions were reasonable. As discussed above, SDG&E fails to show its actions were reasonable when SDG&E allowed 4 faults to occur on TL 637 over a period of 6.5 hours; SDG&E failed to uncover the 3.3 feet clearance violation for 6 years after utilizing its Corrective Maintenance Program's patrol and detailed inspections; and SDG&E did not show by a preponderance of the evidence that it properly monitored and trimmed FF1090 before the ignition of the Rice Fire. SDG&E did not train its contractors to properly mark the VMS and has not shown it could not have identified a defective limb. SDG&E is responsible for its contractor's failure to appropriately mark the VMS and ensure that Tree FF1090 was trimmed on a timely basis. The Commission is also concerned with records suggesting that FF1090 may have been a Reliability Tree warranting immediate attention.

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[191] D.94-03-048 at 37, citing D.88-03-036 at 527.

Helms

In A.82-04-12 and I.82-01-01 (Helms), the Commission reviewed whether the costs incurred by Pacific Gas & Electric Company (PG&E) in building the Helms Project[192] prior to the Lost Canyon pipe failure constituted reasonable and prudent utility expenditures.[193] On September 29, 1982, the Lost Canyon pipe crossing failed during testing of the Helms Project.[194] In April 1983, PG&E filed an amendment to A.82-04-12 asking the Commission: (1) to place $738.5 million cost for the Helms Project incurred before the Lost Canyon pipe failure into rate base; and (2) to defer any review of the additional reconstruction cost until PG&E resolved all litigation arising from the Lost Canyon pipe failure.[195] In reaching its conclusion, the Commission found PG&E failed to appreciate the risks associated with the construction of the Helms Project,

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[192] D.85910 defines the Helms Project as: The Helms Pumped Storage Project is a combination pumped storage and conventional hydroelectric project. The project allowed for the utilization of the water power resources of the North Fork Kings River and Helms Creek. The project completes development of the available head between Courtright Lake, maximum water surface elevation 8,184 feet, and the U.S. Army Corps of Engineers' Pine Flat Reservoir, maximum water surface elevation 952 feet. The maximum head developed by the project between Courtright Lake and Lake Wishon is 1,744 feet. The power potential will be developed by constructing a conduit consisting of two tunnels, a short pipe section and a penstock between Courtright Lake and an underground powerhouse. Total length of the conduit, which is entirely underground except for the 140-foot pipe section, is 20,408 feet. The trailrace tunnel connects the underground powerhouse with Lake Wishon.

[193] D.85-08-102 at 6 to 7.

[194] D.85-08-102 at 5.

[195] D.85-08-102 at 5 to 6.

and that PG&E also failed "to take seriously the repeated safety citations and work shutdowns issued and ordered by the State Department of Occupational Safety and Health."[196] Ultimately, the Commission found PG&E failed to perform at the appropriate standard of performance, rendering PG&E imprudent.[197] D.85-08-102 specified that ratepayers would not be required to indemnify PG&E for losses arising from the Lost Canyon pipe failure.[198]

Similar to Helms, where the Commission found PG&E failed to take into account the risks associated with building the Helms Project, SDG&E failed to take into account the risks associated with its automatic recloser policy. As ORA showed, SDG&E had knowledge of the 2001 Field Guide's caution that automatic reclosers increase the risk of igniting vegetation. As such, it was imprudent of SDG&E to not take into account the risk factors associated with re-energizing TL 637 after three faults occurred within a span of 3.5 hours.

SONGS

D.84-09-120 addressed the reasonableness of SCE's cost of power purchased to replace power lost because of the diesel generator fire at San Onofre Nuclear Generating Station (SONGS) Unit 1.[199] On July 14, 1981, a fire caused by a small oil leak in a section of piping attached to a diesel engine caused two emergency diesel generators at SONGS 1 to be out

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[196] D.85-08-102 at Findings of Fact 6 and 10.

[197] D.85-08-102 at Conclusions of Law 5 and 6.

[198] D.85-08-102 at Conclusion of Law 9.

[199] D.84-09-120 at 2.

from July 17, 1981 to August 16, 1981.[200] Although a small oil leak had been reported near the piping in question, maintenance personnel could not find the source of the leak, even with the diesel shutdown.[201] Unfortunately, during the next monthly scheduled load-test, the unidentifiable leak caused oil to spray out and ignite a fire.[202] The coordinated effort between SONGS 1 control room operators and the fire personnel limited the fire to only 7 minutes, thereby reducing damage to the diesel generator.[203] In reviewing SCE's conduct, the Commission applied its reasonableness standard, and found that the replacement energy costs associated with the SONGS I diesel generator fire were incurred on account of SCE's unreasonableness and were therefore unrecoverable.[204]

Similar to SONGS, where the Commission found costs incurred for replacement energy costs were unrecoverable due to the unreasonableness of SCE's actions, the costs of the 2007 Wildfires were incurred due to unreasonable management by SDG&E. Even though SCE limited the diesel fire to 7 minutes, thereby substantially reducing the fire's damage, the Commission still found SCE's actions leading up to the diesel fire to be unreasonable. Similarly, it was imprudent of SDG&E to allow a fourth fault to occur on TL 637 more than two hours after SDG&E's Grid Operations became aware of the Witch Fire. Similar to SONGS, where maintenance personnel could not locate the oil leak, SDG&E's Corrective Maintenance

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[200] D.84-09-120 at 72.

[201] D.84-09-120 at 73 to 74.

[202] D.84-09-120 at 74 to 75.

[203] D.84-09-120 at 74 to 75.

[204] D.84-09-120 at Conclusion of Law 2.

Program failed to identify the almost 3-feet clearance violation between SDG&E's overhead conductors and the below-installed Cox Communication Line. While SONGS involved the prompt deployment of maintenance personnel to address its oil leak, SDG&E was unable to locate and address the clearance issue for almost six years, even after personnel completed inspections on April 8, 2005, June 22, 2007 and August 30, 2007.

Applying the above case analysis to the facts of the instant proceeding, it is reasonable for the Commission to find SDG&E's actions leading up to the 2007 Wildfires imprudent. Moreover, it is reasonable for the Commission to deny those costs which were incurred by SDG&E to resolve third-party damage claims arising from the Witch, Guejito and Rice Wildfires.

4.5. Wind and Weather Conditions in October 2007

Per the Scoping Ruling, the Commission has analyzed SDG&E's operation and management of its facilities prior to the ignition of the 2007 Wildfires by each fire. Regardless of the varying facts surrounding the Witch, Guejito and Rice wildfire ignitions, a common issue amongst the three fires exists. While no party disputes the fact that the Santa Ana winds are a known local condition in San Diego County, dispute remains as to whether the winds credited with the ignition and spread of the 2007 Wildfires were unprecedented.[205] If the wind and weather patterns present in October of 2007 were not unprecedented, then a prudent manager would have used the weather information to reasonably manage and operate its facilities.

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[205] ORA-01 at 36; SDGE-05 at 3.

The parties to this proceeding have put forth extensive arguments and expert witness testimony on the issue of the wind and weather conditions in October 2007. While both SDG&E and UCAN presented highly recognized wind and weather experts, the opinions encompass a variety of the methodologies to estimate the peak wind speeds during the ignition of each of the 2007 Wildfires. While reviewing the experts' showings, we have applied the following principle:

> [I]n administrative proceedings before an agency composed of trained specialists and before expert examiners or hearing officers, the burden of evaluating the weight and probity of testimony and evidence covering technical subject matter is primarily that of sifting and evaluating the evidence based upon the agency's expertise. Expert opinion does not bind the Commission. The Commission may form its own conclusions without the aid of expert opinions.[206]

SDG&E's Experts' Showings

SDG&E put forth Mr. Steve Vanderburg (Mr. Vanderburg) and Dr. Jon Peterka (Dr. Peterka) to show that the October 2007 weather conditions were unprecedented.

Mr. Vanderburg, a Senior Meteorologist with SDG&E, testified that the 2007 Wildfires occurred during the most severe weather event in San Diego

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[206] D.90642, 2 CPUC2d 89, 102 (1979), citing Market Street Railway v. Railroad Commission, 324 U.S. 548, 560-561 (1945). *See* City of Los Angeles v. Public Utilities Commission, 7 Cal. 3d 331, 351 [*34] (1972).

County since 1984.[207] Mr. Vanderburg presented a statistical analysis comparing wind gusts from the Julian Remote Automated Weather Station (RAWS) and the West Santa Ysabel weather station to show that the wind gust speeds would have been 92 miles per hour (mph) during the peak of October 2007 weather season.[208] Mr. Vanderburg utilized data from the West Santa Ysabel weather station because it was the closest source to the Witch Fire ignition point.[209] In briefs, SDG&E stressed that even though the West Santa Ysabel weather station did not exist in 2007, "Mr. Vanderburg was still able to determine what the wind gust speeds would have been at the West Santa Ysabel weather station during the peak of the late October 2007 wind event."[210]

Dr. Peterka, a Professional Engineer and Professor Emeritus in Fluid Mechanics and Wind Engineering at the Department of Civil Engineering at Colorado State University, testified as to the mean wind speeds at the time and location of the ignition of each of the 2007 Wildfires.[211] Dr. Peterka used a two-pronged approach, WRF (Weather Researching and Forecasting) Modeling and a model of the local terrain, to compute peak wind gusts speeds of: 78 to 87 miles per hour (mph) for the Witch fire ignition; 59 to 68 mph for the Guejito fire ignition; and 70 to 75 mph for the Rice fire ignition.[212] In his direct testimony, Dr. Peterka elabo-

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[207] SDGE-09 at 2.

[208] SDG&E Phase 1 Opening Brief at 91 to 92.

[209] SDG&E Phase 1 Opening Brief at 91.

[210] SDG&E Phase 1 Opening Brief at 91 to 92.

[211] SDG&E Phase 1 Opening Brief at 98.

[212] SDG&E Phase 1 Opening Brief at 98, citing SDGE-10 at 1 and Appendix 1.

rated on his methodology. Essentially, Dr. Peterka explained that he validated his WRF results with 2007 observed data from the Automated Surface Observing System (ASOS) located at the Ramona Airport.[213] Dr. Peterka stated, "the largest 3-second gust measured at the Ramona Airport during [October 2007] was 55 mph. Based on the ESDU procedure used to estimate the 3-second gust from the WRF simulations, the gusts are predicted to be between 60 and 76 mph, or 9 to 38 percent higher than the actual measurements. The validation exercise is dependent on the overall match between ASOS and WRF wind speeds and directions . . . . as well as the comparison of peak gusts. This validation supports my methodologies."[214] Dr. Peterka explained that he believed the RAWS and ASOS data were obtained from stations that were improperly sited. Dr. Peterka asserts that the improper siting resulted in recorded wind speeds that are too low.[215] For this reason, Dr. Peterka discarded the 2007 RAWS and ASOS and came up with a result that is 9 to 38 percent higher.[216]

In addition to providing analyses of the wind and weather events surrounding the ignition of the 2007 Wildfires, SDG&E's experts highlighted the utility's involvement in developing the Santa Ana Wildfire Threat Index (SAWTI).[217] SDG&E notes, "to develop the SAWTI, SDG&E and UCLA worked to configure the WRF model by calibrating it against actual observations of temperatures, winds, and dew points

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[213] Reporter's Transcript Volume 5 at 735 to 740.

[214] SDGE-10 at 12.

[215] UCAN Phase 1 Opening Brief at 9.

[216] Reporter's Transcript Volume 5 at 739.

[217] SDG&E Phase 1 Opening Brief at 94.

collected from SDG&E weather stations during Santa Ana wind events."[218] SDG&E highlights that the SAWTI allows an individual to understand the fire potential by comparing it to past and present conditions.[219] As such, SDG&E's experts utilized the SAWTI in testifying that the wind and weather conditions in San Diego County in 2007 had the largest fire potential since 1984.[220] Because of this, SDG&E maintains that it had no way to know how the strong winds in October 2007 would affect SDG&E's service territory and fire danger.[221]

UCAN's Experts' Showings

UCAN put forth Dr. Janice Coen (Dr. Coen) and Dr. Alexander Gershunov (Dr. Gershunov) to rebut the claims made by SDG&E's weather experts. Dr. Coen, a Project Scientist with the National Center for Atmospheric Research in Colorado, and Dr. Gershunov, from University of San Diego in the Climate, Atmospheric Science and Physical Oceanography Division at the Scripps Institute of Oceanography, assert that SDG&E's experts' analysis is flawed.[222]

Dr. Gershunov testified regarding his methodologies in calculating the wind gust speeds for each of the 2007 Wildfires, and how his findings show that the 2007 Wildfires cannot be attributed to an unprecedented weather event.[223] Dr. Gershunov's estimates

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[218] SDG&E Phase 1 Opening Brief at 94.

[219] SDG&E Phase 1 Opening Brief at 95.

[220] SDG&E Phase 1 Opening Brief at 95.

[221] SDG&E Phase 1 Opening Brief at 95.

[222] UCAN Phase 1 Opening Brief at 8, 18; UCAN Phase 1 Reply Brief at 8.

[223] UCAN Phase 1 Reply Brief at 9.

for the Witch fire ignition were 43.1 mph, 56.7 mph at the time of the Guejito Fire's ignition, and 34.4 mph at the time of the Rice Fire's ignition.[224] UCAN argues that "when looking at these numbers from both SDG&E's wind expert and UCAN's wind expert, the differences seem huge. However, as Dr. Gershunov testified, the difference is that [Dr. Gershunov] used the recorded data from 2007 to validate and bias correct his model results and that SDG&E did not."[225] Dr. Gershunov utilized data recorded by the RAWS and ASOS stations in calculating his wind speed estimates.[226] As noted by Dr. Gershunov, "not only was there a stronger wind event on record [in San Diego County], but there were 3 other wind events that were within 10-percent of the wind speeds of the 2007 Santa Ana event that occurred in the last 30 years."[227] Furthermore, UCAN notes that SDG&E's use of the SAWTI to advance its theory that the 2007 Wildfires' ignition and spread were beyond the utility's control is not supported by SDG&E's experts' theories.[228]

Analysis of Parties' Experts

The presentation of UCAN's and SDG&E's expert witnesses added tremendous value to the record of this proceeding. SDG&E's attempt to explain why the contemporaneous data collected from San Diego County's RAWS and ASOS should be discarded were not persuasive. We find the wind estimates of Dr. Gershunov to be more reflective of the actual wind and

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[224] UCAN Phase 1 Reply Brief at 9.

[225] UCAN Phase 1 Reply Brief at 9.

[226] UCAN Phase 1 Reply Brief at 9.

[227] UCAN Phase 1 Opening Brief at 19, citing Reporter's Transcript at 1004 to 1005.

[228] UCAN Phase 1 Opening Brief at 19.

weather conditions during the ignitions of the Witch, Guejito and Rice Wildfires in October 2007. We find Dr. Gershunov's utilization of the actual recorded weather data from 2007 to validate his wind speed estimates to be more reliable than Dr. Peterka's methodologies. Furthermore, the Commission is not persuaded by SDG&E's use of the SAWTI to try to establish that the wind and weather conditions in San Diego County in October 2007 created the largest wildfire threat since 1984 because of more refined testimony provided by the other parties.

Because we find the methodologies that UCAN's experts utilized in developing its testimony to be more consistent with the actual weather and wind conditions in San Diego County in October 2007, the Commission does not find that the 2007 Wildfires were spread under unprecedented wind and weather conditions. SDG&E fails to show how the wind and weather conditions impacted its operation and management of its facilities involved in the 2007 Wildfires.

4.6. Reconsideration of Threshold Issues

While the August 11, 2016 ruling rejected the Joint Intervenors' briefs requesting the dismissal of this application based on the aforementioned Threshold Issues, the ruling did allow for the re-consideration of the Threshold Issues after the development of the evidentiary record. Since the August 11, 2016 ruling, there have been no additional testimonies or briefs submitted referencing the Threshold Issues. With this decision, the Commission denies A.15-09-010 based on SDG&E's imprudent management of its facilities. As such, the Threshold Issues should be denied as moot.

5. Conclusion

Almost 10 years have passed since the Witch, Guejito, and Rice Wildfires ripped through San Diego County in October 2007. The parties to this proceeding have produced a voluminous record on which the Commission must base its decision. And although ORA and UCAN were not present at Grid Operations on October 21, 2007, or at the August 30, 2007 patrol inspection of P196394 and P196387, or privy to the implementation of SDG&E's Vegetation Management Program, ORA, UCAN, MGRA and Henricks have presented evidence which paints a clearer picture of SDG&E's utility management prior to the ignition of the 2007 Wildfires.

As to the Witch Fire, the Commission is not persuaded that SDG&E utilized good utility practice when it allowed three faults to occur within a span of 3.5 hours, on a line with a history of 9 multiple fault days in a 24-year period. Multiple faults on TL 637 on a single day during a Red Flag Warning should have been of more concern to SDG&E than the threat of the Harris Fire to the Southwest Powerlink. Additionally, while SDG&E's recloser policy was industry practice, it was unreasonable for SDG&E to allow 6.5 hours to elapse between the initial fault at 8:53 a.m. on TL 637 and the de-energizing of TL 637 at 3:27 p.m.

As to the Guejito Fire, SDG&E cannot just point to its Corrective Maintenance Program to show it fulfilled its duty to be a reasonable and prudent manager. SDG&E did not utilize good utility practice when it failed to discover the 3.3-foot clearance violation after conducting what it purported to be thorough patrol and visual inspections prior to October 22, 2007. And although the record shows SDG&E completed inspections prior to the Guejito Fire ignition, it is

unreasonable for six years to have elapsed without finding or addressing the clearance violation between the SDG&E overhead conductor and the Cox line.

As for the Rice Fire, SDG&E fails to explain why it ignored its own contractor's recommendation to trim FF1090 within 0 to 3 months of Davey's July 2007 inspection. Furthermore, SDG&E's utilization of its Vegetation Management Program does not absolve SDG&E of its responsibility to act reasonably in light of specific information. Because SDG&E had labeled FF1090 as a fast grower, SDG&E should have trimmed FF1090 before October 22, 2007.

Finally, even if we were to find SDG&E's operations reasonable under the circumstances, SDG&E cannot use the wind and weather conditions of October 2007 to mitigate SDG&E's failure to operate as reasonable and prudent manager. SDG&E's witnesses fail to accurately present the wind and weather conditions in October 2007. Moreover, SDG&E does not prove that the Witch, Guejito and Rice Wildfire were due to unforeseeable circumstances beyond SDG&E's control.

Because SDG&E has failed to prove by a preponderance of the evidence that its management and operation of its facilities prior to the ignition of the Witch, Guejito and Rice wildfires were reasonable, we find SDG&E's management and control of its facilities prior to the 2007 Wildfires imprudent.

California law, Commission practice and precedent all essentially require that before ratepayers bear any costs incurred by the utility, those costs must be just and reasonable. Because we find SDG&E's management and control of its facilities prior to the ignition of the Witch, Guejito and Rice Wildfires unreasonable,

such costs incurred by the utility in settling third-party damage claims are unjust and unreasonable. As such, those costs must not be recovered through ratepayers. SDG&E's request to recover $379 million recorded in its WEMA must be denied.

With the denial of SDG&E's application, there is no reason for SDG&E's Wildfire Expense Memorandum Account to remain open to recover: (a) wildfire claims, including any deductibles, co-insurance and other incremental insurance expense paid by SDG&E that are not authorized as part of SDG&E's General Rate Case or any other proceeding; and (b) incremental outside legal costs incurred by SDG&E in the defense of wildfire claims.[229] After the adoption of this decision, it is appropriate for SDG&E to file a Tier 1 Advice Letter with the Commission's Energy Division to implement the denial of $379 million from its WEMA and to close the account.

Since SDG&E's application is denied based on its unreasonable management and control of its facilities, there is no need to re-consider the Threshold Issues identified in the Scoping Ruling. The Threshold Issues should be denied as moot.

6. Intervenor Compensation

Per Public Utilities Code Section 1804(c), following the issuance of a final order or decision by the Commission in the hearing or proceeding, a customer who, or eligible local government entity that, has been found, pursuant to § 1804 (b), to be eligible for an award of compensation may file within 60 days a request for an award.

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[229] A.15-09-010 at Attachment B.

7. Comments on Proposed Decision

The PD of the ALJs in the matter was mailed to the parties in accordance with Pub. Util. Code § 311 and comments were allowed under Rule 14.3 of the Commission's Rules of Practice and Procedure. Opening Comments to the PD were filed on September 11, 2017 by SDG&E, ORA, POC, MGRA, and Henricks. Reply Comments were filed by SDG&E, Henricks, MGRA, POC, and UCAN on September 15, 2017. This Decision has been revised where appropriate to address relevant comments.

A second round of comments pertaining to the issue of Inverse Condemnation was filed according to the procedural schedule set via e-mail ruling on September 29, 2017.

SDG&E, PG&E and SCE all argue that the PD commits legal error by failing to address Inverse Condemnation. Further, they argue that under Inverse Condemnation principles, SDG&E would be strictly liable for the costs sought in its application. Thus, they argue that the Commission must approve rate recovery of the costs SDG&E requests here regardless of prudency. SDG&E argue that reasonableness review of the WEMA application should be based exclusively on whether the settlement amounts paid by SDG&E were reasonable. We disagree.

First, Inverse Condemnation principles are not relevant to a Commission reasonableness review under the prudent manager standard. Thus, Inverse Condemnation was not a material issue in Phase 1 and did not merit a dedicated discussion. Notably, even SDG&E withdrew its testimony concerning Inverse Condemnation for purposes of Phase 1.

Second, according to SDG&E's application, the Superior Court only went so far as to rule that the plaintiff homeowners could plead Inverse Condemnation claims in their civil actions against SDG&E. We are not aware of any Superior Court determination that SDG&E was in fact strictly liable for the costs requested in its application. Even if SDG&E were strictly liable, we see nothing in the cited case law that would supersede this Commission's exclusive jurisdiction over cost recovery/cost allocation issues involving Commission regulated utilities.

In response to comments, the section of the decision describing the Rice Fire has been modified to provide more of the details of the facts and legal analysis on which the decision is based. Corresponding findings of fact and conclusions of law have been revised to reflect this.

8. Assignment of Proceeding

Liane M. Randolph is the assigned Commissioner and ALJ S. Pat Tsen and ALJ Pro Tem Sasha Goldberg are the presiding officers to this proceeding.

Findings of Fact

1. Intervening parties argued that Threshold Issues on fairness and moral hazard should bar SDG&E from recovering its costs recorded in the WEMA before a reasonableness review.

2. The assigned ALJ rejected early dismissal of the application based on the Threshold Issues but allowed re-consideration of the Threshold issues after the development of an evidentiary record.

3. Parties have served no additional testimony or briefs on the Threshold Issues.

4. The Witch Fire, which later merged with the Guejito Fire, was the second largest fire to occur in San Diego County in 2007.

5. The SDG&E facility involved in the ignition of the Witch Fire was TL 637.

6. TL 637 is a 69 kV line that connects the Santa Ysabel and Creelman substations.

7. Cal Fire determined that a fault on TL 637 between poles Z416675 and Z416676 on October 21, 2007 led to arcing of the lines, which dispersed hot particles to land in the grassy filed below the powerlines.

8. A Red Flag Warning was in place at 4:45 a.m. on October 21, 2007.

9. The first fault on TL 637 occurred at 8:53 a.m. on October 21, 2007.

10. The second fault on TL 637 occurred at 11: 22 a.m. on October 21, 2007.

11. The third fault on TL 637 occurred at 12:23 p.m. on October 21, 2007.

12. The Witch Fire ignited at 12:23 p.m., after the third fault on TL 637.

13. SDG&E's Grid Operations became aware of the Witch Fire at 1:10 p.m. on October 21, 2007.

14. The fourth fault on TL 637 occurred at 3:25 p.m. on October 21, 2007.

15. SDG&E's recloser policy was industry practice.

16. On October 21, 2007, it took 6.5 hours for Grid Operations to de-energize TL 637.

17. SDG&E did not calculate the fault location information data stored in the relay until October 22, 2007.

18. It would take a protective engineer 1.5 hours to calculate the exact location of the faults on TL 637.

19. SDG&E was aware of the 2001 Power Line Fire Prevention Field Guide, which put SDG&E on notice that automatic reclosers re-energizing the line increases the probability of igniting vegetation.

20. The Guejito Fire ignited on October 22, 2007 near Escondido, California.

21. The SDG&E facility involved in the ignition of the Guejito Fire was a 12 kV overhead conductor.

22. CPSD and Cal Fire attributed the ignition of the Guejito Fire to a Cox Communications lashing wire coming into contact with an SDG&E 12 kV overhead conductor, between poles P196387 and P196394.

23. Rule 38 of GO 95 sets a minimum clearance of 6 feet for wires from other wires at crossings.

24. The November 2, 2007 survey completed by the SDG&E contractor, Nolte Associates, Inc. documented a 3.3-foot clearance between the SDG&E conductors and the Cox Communications line prior to any repair being completed after the ignition of the Guejito Fire.

25. At the time of the Guejito Fire ignition, SDG&E had in place its Corrective Maintenance Program to conduct patrol and detailed inspections on its facilities.

26. SDG&E completed a patrol inspection on P196387 and P196394 on August 30, 2007 and a detailed inspection on June 22, 2007 and April 8, 2005, but did not uncover the 3.3-foot clearance violation.

27. The Cox Communications Facilities were installed in August 2001.

28. SDG&E presented evidence that it is not known when the clearance violation between the Cox Communications line and the SDG&E overhead conductors first occurred.

29. The Rice Fire ignited on October 22, 2007 in Fallbrook, California.

30. CPSD determined that a limb from sycamore Tree FF1090 broke and fell onto SDG&E 12 kV overhead conductors causing a powerline to fall to ignite the ground below.

31. To track and monitor vegetation around powerline facilities and comply with General Order 95 and Public Resources Code Section 4293, SDG&E designed and implemented a Vegetation Management Program and Tree-Pre-inspection procedures that were in place at the time of the ignition of the Rice Fire.

32. The Tree Information Sheet for Tree FF1090 listed it as a "fast grower" prior to and at the time of the ignition of the Rice Fire, with between 4 and 6 feet of growth per year.

33. The Tree Information Sheet for Tree FF1090 shows that it was trimmed approximately every 12 months except for two occasions: 1) After being trimmed on May 1, 2000, it was next trimmed on April 29, 2002 and 2) after being trimmed on February 11, 2005, it was not trimmed again until the day of the Rice Fire on October 22, 2007.

34. A January 2, 2002 inspection recorded Tree FF1090 with a 1.5 to 4 foot clearance from the conductors and subsequently trimmed on April 29, 2002.

35. A July 18, 2007 inspection of Tree FF1090 advised SDG&E of a direct overhang and marked it for trimming within zero to three months.

36. SDG&E's Vegetation Management System considers the tab 'zero to three months' to begin during the subsequent trim cycle, which in this case meant between September to November, 2007.

37. SDG&E's inspector marked the zero to three months tab in the Vegetation Management System to indicate that the tree needed to be trimmed before the end of three months due to strong growth toward the powerline, which ends on October 18, 2007.

38. SDG&E's inspector mistook the meaning of the zero to three months tab, and did not follow the instructions for SDG&E's Vegetation Management Program.

39. SDG&E's Vegetation Management Program had an inspection protocol for "Reliability Trees."

40. Reliability Trees are trees which pose a threat to the safe and reliable delivery of electricity that have the potential to fail completely or drop limbs onto powerlines.

41. Trees marked as Reliability Trees are mandatorily marked for trimming and heightened inspections.

42. The broken branch of FF1090 was part of at least two vertical branches, possibly more, growing closely together.

43. SDG&E's testimony indicates that FF1090's broken branch matched the description of two checklist items in the Hazard Tree Checklist.

44. FF1090 was not marked as a Reliability Tree before the Rice Fire.

45. SDG&E failed to trim Tree FF1090 for a 29-month period prior to the ignition of the Rice Fire.

46. Dr. Gershunov's estimates of the peak wind gusts speeds for the 2007 Wildfires are more compelling than Dr. Peterka's because he relied on contemporaneous wind and weather data recorded during October 2007 to validate his estimates.

Conclusions of Law

1. For costs to be found reasonable, the utility must prove that they were prudently incurred by competent management exercising the best practices of the era, and using well-trained, well-informed and conscientious employees who perform their jobs properly.

2. As required by Public Utilities Code Section 451 all rates and charges collected by a public utility must be "just and reasonable."

3. The burden of proof is on SDG&E to demonstrate that it is entitled to the relief sought in this proceeding, including affirmatively establishing the reasonableness of all aspects of the application.

4. The standard of proof that SDG&E must meet is that of a preponderance of evidence, which means the evidence presented by SDG&E must be more convincing and have a greater probability of truth when weighed against opposing evidence.

5. SDG&E's operation and management of its facilities prior to the ignition of the 2007 Wildfires is subject to a reasonableness review.

6. The reasonableness review entails a review on the prudency of SDG&E's actions leading up to the ignition of the 2007 Wildfires.

7. Evidence of accepted industry practices is relevant to a reasonableness inquiry, but compliance with such practices is not dispositive.

8. Evidence of following accepted industry practices does not relieve SDG&E of the burden of showing that its conduct was reasonable.

9. SDG&E fails to prove by a preponderance of the evidence that its operation and management of its facilities prior the ignition of the Witch Fire were reasonable.

10. The combination of the Red Flag Warning in place on October 21, 2007, three faults on a line over a period of 3.5 hours after having only 9 multiple fault days in that same line's 24-year history, should have caused SDG&E to act more aggressively.

11. The threat of the Harris Fire to the Southwest Powerlink does not excuse SDG&E's failure to monitor the faults on TL 637.

12. The 2003 Wildfires put SDG&E on notice of the potential for wildfires in its service territory.

13. SDG&E fails to prove by a preponderance of the evidence that its operation and management of its facilities prior to the ignition of the Guejito Fire were reasonable.

14. It was imprudent of SDG&E to not discover the clearance violation between its overhead conductor and the Cox Communication line for 6 years.

15. SDG&E failed to maintain its facilities in compliance with GO 95 Rule 38 clearance requirements prior to the ignition of the Guejito Fire.

16. SDG&E failed to prudently inspect its facilities prior to the ignition Guejito Fire.

17. General Order 95, Rule 35 requires that where dead, rotten or diseased trees or dead, rotten or diseased portions of otherwise healthy trees overhang or lean toward power conductors, those trees or portions are to be removed.

18. Public Resources Code Section 4293 requires radial clearance of 4 feet between vegetation and 12 kV conductors.

19. SDG&E failed to properly train its tree pre-inspectors, causing the inspector to incorrectly mark fields in its Vegetation Management System.

20. SDG&E failed to prove by a preponderance of the evidence that it could not identify the defective limb in Tree FF1090.

21. SDG&E fails to prove by a preponderance of the evidence that its operation and management of its facilities prior to the ignition of the Rice Fire were reasonable.

22. SDG&E failed to prudently manage the facilities connected with the 2007 Wildfires.

23. Because we find Dr. Gershunov's analysis of the wind gust speeds at the time of the ignition of each of the 2007 Wildfires more compelling, the 2007 Wildfires were not spread under extraordinary circumstances.

24. SDG&E has not justified recovering from rate-payers costs incurred to resolve third-party damage claims arising from the Witch, Guejito and Rice Wildfires.

25. SDG&E's requested relief should be denied.

26. SDG&E should file a Tier 1 Advice Letter with the Commission's Energy Division to implement the provisions of this decision.

27. The Threshold Issues identified in the Scoping Memorandum should be denied as moot.

28. This decision should be effective today.

29. Application 15-09-010 should be denied.

ORDER

IT IS ORDERED that:

1. The application by San Diego Gas and Electric Company for Authorization to Recover Costs Related to the 2007 Southern California Wildfires Recorded in the Wildfire Expense Memorandum Account is denied.

2. The Threshold Issues as identified in the Scoping Memorandum are denied as moot.

3. Within 30 days of the effective date of this decision, San Diego Gas and Electric Company shall file a Tier 1 Advice Letter to implement the denial of (a) wildfire claims, including any deductibles, co-insurance and other incremental insurance expense paid by SDG&E that are not authorized as part of SDG&E's General Rate Case or any other proceeding; and (b) incremental outside legal costs incurred by SDG&E in the defense of wildfire claims from its Wildfire Expense Memorandum Account as ordered in this decision, and to close the account.

4. All pending motions in Application 15-09-010 are hereby denied.

5. Application 15-09-010 is closed. This order is effective today.

Dated November 30, 2017, at San Francisco California.

MICHAEL PICKER
President
CARLA J. PETERMAN
LIANE M. RANDOLPH
MARTHA GUZMAN ACEVES
CLIFFORD RECHTSCHAFFEN
Commissioners

APPENDIX D

STATE OF CALIFORNIA
EDMUND G. BROWN JR., *Governor*

PUBLIC UTILITIES COMMISSION
505 VAN NESS AVENUE
SAN FRANCISCO, CA 94102-3298

December 26, 2017

TO PARTIES OF RECORD IN APPLICATION 15-09-010:

At the Commission Meeting of November 30, 2017, President Michael Picker and Commissioner Martha Guzman Aceves stated that they would file a Joint Concurrence in Decision 17-11-033. The decision was mailed on December 6, 2017.

The joint concurrence of President Picker and Commissioner Guzman Aceves is now available and is attached herewith.

/s/ ERIC WILDGRUBE for
Anna E. Simon
Acting Administrative Law Judge

AES:lil

Attachment

Concurrence of President and Commissioner Michael Picker and Commissioner Martha Guzman Aceves on Item 40, Decision Regarding Application of San Diego Gas & Electric Company for Authorization to Recover Costs Related to the 2007 Southern California Wildfires Recorded in the Wildfire Expense Memorandum Account

This decision denies the Application of San Diego Gas & Electric Company (SDG&E) for Authorization to Recover Costs Related to the 2007 Southern California Wildfires Recorded in the Wildfire Expense Memorandum Account. We support this decision, but join in this concurrence to note concerns this decision revealed. We respectfully urge the California Legislature to affirmatively address the issues of liability calculation and cost allocation in instances when utility infrastructure is implicated in private property loss. We also respectfully urge the California Courts of Appeal to carefully consider the rationale for applying inverse condemnation in these types of cases. Despite our concerns, after a thorough review of the record and legal arguments, we join our colleagues in support of this decision, which is supported by the record.

This decision denies cost recovery of $379 million in costs related to the 2007 Southern California Wildfires recorded in the Wildfire Expense Memorandum Account (WEMA). Specifically it concludes SDG&E did not meet the preponderance of evidence standard that it acted as a prudent manager in response to the three wildfires at issue: Witch, Guejito, and Rice.

Preponderance of the evidence usually is defined "in terms of probability of truth, e.g., 'such evidence as, when weighed with that opposed to it, has more

convincing force and the greater probability of truth'"[1] In short, SDG&E must present more evidence that supports the requested result than would support an alternative outcome.

The decision reviews and discusses in detail whether SDG&E's actions met the preponderance of evidence standard. Although the analysis of these actions is thorough and the record supports the outcome of this case, we note the challenges of applying this standard in such a case.

Witch Fire

We believe the question of whether SDG&E's response to the Witch Fire was reasonable, which later merged with the Guejito Fire, is a close call, but the record supports the outcome of this case. The SDG&E facility involved in the ignition of the Witch Fire was Tie Line (TL) 637.[2] TL 637 is a 69 kilovolt (kV) transmission line that connects the Santa Ysabel and Creelman substations.[3] TL 637 is approximately 14 miles long and runs along a remote backcountry section of San Diego County.[4] Although there were no eyewitnesses to the ignition of the fire, the Cal Fire investigator determined that a fault on TL 637 between poles Z416675 and Z416676 on October 21, 2007, led to arcing of the lines, which dispersed hot particles to land in the grassy field below the powerlines.[5] These

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[1] D.12-12-030 at 42, *aff'd* D.15-07-044 at 28-30.

[2] SDGE-11-A at 2.

[3] *Id*.

[4] *Id*. at 3.

[5] *Id*. at 3; ORA-01 at 6 to 7.

particles were determined to have ignited the Witch Fire which was then spread by wind.[6]

A series of four faults occurred on TL 637 on October 21, 2007: the first fault at 8:53 a.m.; the second fault at 11:22 a.m.; the third fault at 12:23 p.m.; and the fourth fault at 3:25 p.m.[7] Cal Fire concluded that the Witch Fire ignited after the third fault occurred on TL 637 at 12:23 p.m. on October 21, 2007 because an Air Tanker Pilot first observed the fire at 12:29 p.m.[8] SDG&E Grid Operations became aware of the Witch Fire at 1:10 p.m., and de-energized TL 637 after the fourth fault at 3:27 p.m.[9] SDG&E maintains that its operation and management of its facilities linked to the Witch Fire prior to October 21, 2007 were reasonable.[10] SDG&E supports its position by showing: (1) SDG&E's response to the faults along TL 637 was reasonable given the information available at the time of the faults; (2) SDG&E's recloser policy was reasonable and prudent; and (3) the Witch Fire was not foreseeable.[11]

The decision of whether to de-energize power lines in a region in response to a catastrophic event such as a wildfire is significant, because it implicates public safety broadly. Street lights, telephones, and other infrastructure critical to a response to an emergency are dependent on electricity. When a wildfire threat-

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[6] SGDE-11-A at 3-4, citing Cal Fire Report (Witch) at 2, 14, and 19.

[7] SDGE-11-A at 6 to7.

[8] *Id.*

[9] *Id.*

[10] SDG&E Phase 1 Opening Brief at 30.

[11] SDG&E Phase 1 Reply Brief at 30 to 31.

ens the electricity grid for a specific region, the utility must consider not only the immediate danger of the wildfire, but also the public safety considerations of de-energizing a particular circuit. Utilities are understandably reluctant to de-energize circuits without a compelling rationale. Here, SDG&E faced this choice with the Witch fire. The record reflects the wildfire threatened TL 637 and SDG&E did not de-energize the line until 3:27 p.m. This decision finds that SDG&E acted imprudently. Under the preponderance of the evidence standard, the Commission must consider all of these facts. We found the determination of when was the appropriate time to de-energize TL 637 to be a close call, but the record supports the outcome of this decision.

We also note developing an evidentiary record regarding wind is a challenge, but is essential to a case such as this where wind played a key role. SDG&E contends that the wind conditions were severe and unprecedented. If that is the case, SDG&E's decision to not de-energize TL 637 before the start of the fire is complex. The complexity of that decision reflected in the record in this case demonstrates the challenge of applying a prudency standard, which requires us to consider in the aggregate whether SDG&E acted reasonably and make what we consider to be a binary choice whether SDG&E should be able to recover all or none of the costs. The ability to do a more nuanced assessment of fault could be a helpful regulatory tool and we respectfully ask the legislature to consider this issue.

Despite the concerns regarding the Witch fire identified in this concurrence, we defer to the conclusion of the Administrative Law Judges (ALJs), because as the finders of fact in this proceeding, they are situated best

to make factual determinations. Indeed the record in this case supports the outcome of this decision.

Legal Liability of a Utility Related to Wildfires

In this case SDG&E assumed the legal principle of inverse condemnation applied to torts claims in this matter and settled claims by the public before submitting an application to the Commission. In its application, the SDG&E cites California Courts of Appeal cases addressing utility legal liability in the context of other types of private property loss.[12] SDG&E contends a court noted it could be appropriate to apply the legal principle of inverse condemnation to utilities in some instances.[13]

The California Public Utilities Code requires the Commission to subject applications for recovery of cost by investor owned utilities to a reasonableness review,[14] which is not true for publicly owned utilities. If the preponderance of the evidence shows that the utility acted prudently, the Commission will allow the utility to recover costs from the ratepayers. However in this instance, the Commission determined the actions of SDG&E were imprudent based on the specific facts in the case and will not allow recovery of costs. Thus the logic for applying inverse condemnation to utilities - costs will necessarily be socialized across a large group rather than borne by a single injured property owner, regardless of prudence on the part of the utility - is unsound.

Returning to the case at hand, SDG&E settled tort claims by the public before submitting an application

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[12] SDG&E Application at 4 to 7.

[13] SDG&E Application at 6.

[14] Cal. Pub. Util. Code Section 451.

to the Commission to recover those costs. The Commission then fulfilled its statutorily prescribed role to perform a reasonableness review. This process demonstrates two concerns to us, which we believe merit further review. First, the SDG&E accrued liability by settling tort claims before the Commission could determine the prudency of its actions in a reasonableness review. Second, as noted above the application of a prudency standard, which provides the Commission with what we consider to be a binary choice of determining prudency in the aggregate, could be improved upon to explicitly allow a more nuanced assessment of fault.

We are also concerned that the application of inverse condemnation to utilities in all events of private property loss would fail to recognize important distinctions between public and private utilities and that the financial pressure on utilities from the application of inverse condemnation may lead to higher rates for ratepayers. Investor owned utilities are partially dependent on the capital markets to raise money and the insurance market to mitigate financial risk. If strict liability is imposed for damage associated with wildfires caused in whole or in part by utility infrastructure, the risk profile of the investor-owned utility may be questioned by investors and insurance providers alike. The increase in the cost of capital and the expense associated with insurance could lead to higher rates for ratepayers, even in instances where the investor-owned utility complied with the Commission's safety standards.

We respectfully urge the California Legislature to affirmatively address the issues of liability calculation and cost allocation in instances when utility infrastructure is implicated in private property loss. We

also respectfully urge the California Courts of Appeal to carefully consider the rationale for applying inverse condemnation in these types of cases. Despite our concerns, after a thorough review of the record and legal arguments, we join our colleagues in support of this decision, which is supported by the record.

Dated December 21, 2017, at San Francisco, California.

/s/ MICHAEL PICKER
Michael Picker
President

/s/ MARTHA GUZMAN ACEVES
Martha Guzman Aceves
Commissioner

APPENDIX E

Date of Issuance July 13, 2018

Decision 18-07-025 July 12, 2018

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

Application 15-09-010
(Filed September 25, 2015)

Application of San Diego Gas & Electric Company (U902E) for Authorization to Recover Costs Related to the 2007 Southern California Wildfires Recorded in the Wildfire Expense Memorandum Account (WEMA).

ORDER DENYING REHEARING OF DECISION (D.) 17-11-033

I. INTRODUCTION

In this Order, we dispose of the Applications for Rehearing of Decision (D.) 17-11-033 (or "Decision"), filed by San Diego Gas & Electric Company ("SDG&E"), and by Pacific Gas and Electric Company ("PG&E") and Southern California Edison Company ("SCE") jointly.

In October 2007, over a dozen wildfires burned portions of southern California causing extensive property damage and a number of deaths. Investigation reports issued by the California Department of Forestry and Fire Protection ("Cal Fire") as well as the Commission's Consumer Protection and Safety Division (now the Safety and Enforcement Division ("SED"), deter-

mined that three of the fires were ignited by SDG&E electric transmission facilities: the Witch Fire; the Guejito Fire; and the Rice Fire (together "2007 Wildfires").

After the fires, SDG&E, PG&E, and SCE all sought Commission approval to establish Wildfire Expense Memorandum Accounts ("WEMAs") to record costs such as: a) payments to satisfy wildfire claims including co-insurance and deductibles expenses; b) outside legal expenses incurred defending wildfire claims; c) increases or decreases in wildfire insurance premiums from amounts authorized in SDG&E's general rate case; and d) the cost of financing Wildfire Expense Balancing Account ("WEBA") balances. The Commission authorized the WEMA accounts in Resolution E-4311.[1]

In 2012 the Commission issued D.12-12-029 which, among other things, kept open SDG&E's WEMA account subject to reasonableness review consistent with Public Utilities Code Section 451 should SDG&E later seek to recover those costs from its ratepayers.[2]

In 2015, SDG&E in fact filed Application (A.) 15-09-010 requesting rate recovery for $379 million in

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[1] Resolution E-4311, dated July 29, 2010, at pp. 2-3, 10 [Findings and Conclusions Number 2].

[2] See *Application of San Diego Gas & Electric Company, Southern California Edison Company, Southern California Gas Company and Pacific Gas and Electric Company for Authority to Establish a Wildfire Expense Balancing Account to Record for Future Recovery Wildfire-Related Costs* [D.12-12-029] (2012) at pp. 13-14, 19 [Ordering Paragraph Number 2] (slip op.). (All citations to Commission decisions are to the official pdf versions which can be found on the Commission's website at: http://docs.cpuc.ca.gov/DecisionsSearch Form.aspx.)

WEMA costs recorded for the 2007 Wildfires.[3] In this proceeding we conducted the reasonableness review required by D.12-12-029. Such reviews are governed by Public Utilities Code Section 451.[4]

Section 451 requires utilities to show that all requested charges are "just and reasonable" in order to be recovered in rates.[5] To ensure that charges requested by a utility are just and reasonable, and ensure that a utility has operated and maintained its

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[3] See *Application of San Diego Gas & Electric Company for Authorization to Recover Costs Related to the 2007 Southern California Wildfires Recorded in the Wildfire Expense Memorandum Account* (A.15-09-010), dated September 25, 2015, at p. 7.

[4] All subsequent section references are to the Public Utilities Code unless otherwise stated.

[5] D.17-11-033 at p. 10, citing e.g., *Re Southern California Edison Company* ("*Re SCE*") [D.87-06-021] (1987) 24 Cal.P.U.C.2d 476, 486. Pub. Util. Code Section 451 states in pertinent part:

> All charges demanded or received by any public utility . . . for any product or commodity furnished or to be furnished or any service rendered or to be rendered shall be just and reasonable. Every unjust or unreasonable charge demanded or received for such product or commodity or service is unlawful.
>
> Every public utility shall furnish and maintain such adequate, efficient, just, and reasonable service, instrumentalities, equipment, and facilities . . . as are necessary to promote the safety, health, comfort, and convenience of its patrons, employees, and the public.

Pub. Util. Code Section 454 states in pertinent part:

> (a) Except as provided in Section 455, a public utility shall not change any rate or so alter any classification, contract, practice, or rule as to result in any new rate, except upon a showing before the commission and a finding by the commission that the new rate is justified . . . .

system in a safe and reasonable manner, we have adopted the longstanding Prudent Manager Standard.

Under that standard, a utility has the burden to affirmatively prove that it reasonably and prudently operated and managed its system.[6] As discussed at more length in Part II.A. below, that means a utility must show that its actions, practices, methods, and decisions show reasonable judgment in light of what it knew or should have known at the time, and in the interest of achieving safety, reliability and reasonable cost.[7]

Our Decision found that, on balance, SDG&E failed to meet its burden to show that its operation and management of its system leading up to the 2007 Wildfires, and its immediate response at the time of the fires, was reasonable and prudent. By definition then, rate recovery would be unjust, unreasonable, and unlawful under Section 451. For that reason, we denied SDG&E's request to pass the $379 million in WEMA costs on to its ratepayers.[8]

Applications for Rehearing were filed by SDG&E as well as PG&E and SCE jointly. SDG&E alleges: (1) it was unlawful to find SDG&E failed to meet the Prudent Manager Standard; (2) Commission precedent did not support the Commission's determination; (3) the Decision erred regarding the severity of wind and weather conditions in October 2007; and (4) the Decision erred by failing to allow rate recovery

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[6] See, e.g., *Re SCE* [D.87-06-021], *supra*, 24 Cal.P.U.C.2d at p. 486.

[7] *Id.* at p. 486.

[8] D.17-11-033, at pp. 2, 6, 9-11, 70 [Conclusion of Law Number 9], p. 71 [Conclusion of Law Number 13] & p. 72 [Conclusion of Law Number 21] & [Ordering Paragraph Number 1].

consistent with the cost spreading principle under the doctrine of inverse condemnation.

PG&E and SCE challenge the Decision alleging that cost recovery should have been driven by the cost spreading policy of inverse condemnation rather than traditional Commission reasonableness review standards.[9] Responses were filed by the Office of Ratepayer Advocates ("ORA"), Ruth Hendricks, and Protect Our Communities ("POC") and the Utility Consumers' Action Network ("UCAN") jointly.

We have reviewed each and every issue raised by SDG&E, PG&E and SCE and are of the opinion that good cause has not been established to grant rehearing. Accordingly, the Applications for Rehearing of D.15-11-042 are denied because no legal error was shown.

II. DISCUSSION

A. Reasonableness Reviews and the Prudent Manager Standard

Commission regulation of privately owned utilities is governed by the principle of reasonableness, as to both a utility's ability to spread costs and charges among its ratepayers, as well as its provision of a safe and reliable utility system. The principle derives from Section 451, which provides:

> All charges demanded or received by any public utility . . . shall be just and reasonable. Every unjust or unreasonable charge demanded

[9] PG&E and SCE's arguments are almost entirely subsumed in the issues and arguments raised by SDG&E. Thus unless specifically noted, their arguments are not addressed separately.

> or received by for such product or commodity or service is unlawful.
>
> Every public utility shall furnish and maintain such adequate, efficient, just, and reasonable service, instrumentalities, equipment, and facilities. . . as are necessary to promote the safety, health, comfort, and convenience of its patrons, employees, and the public.

(Pub. Util. Code, § 451.)[10]

Consistent with Section 451, we can grant rate recovery only if requested rates and charges are deemed "just and reasonable." Similarly, rates or charges deemed unjust or unreasonable are unlawful, and must be denied.

We have summarized this concept of reasonableness in *In the Matter of the Application of San Diego Gas & Electric Company and Southern California Gas Company for Authority to Revise Their Rates Effective January 1, 2013, in Their Triennial Cost Allocation Proceeding* [D.14-06-007] (2014) at p. 31 (slip op.), stating:

> California law, Commission practice and precedent, and common sense, all essentially require that before ratepayers bear any costs incurred by the utility, those costs must be just and reasonable . . . . When that occurs, the Commission can find the costs incurred by the utility to be just and reasonable and therefore, they can be recovered from ratepayers. When this is not the case however, the Commission can and must disallow those

[10] See also *ante,* fn. 5 [Pub. Util. Code, § 454, subd. (a).].

> costs: that is unjust or unreasonable costs must not be recovered in rates from ratepayers.

In implementing Section 451 for purposes of utility reasonableness reviews, the Commission utilizes an established Prudent Manager Standard as the test to evaluate whether requested costs are just and reasonable. We have summarized this test as follows:

> The standard for reviewing utility actions has been established as one of reasonableness and prudence . . . . 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 facts known 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. Good utility practices are based upon cost-effectiveness, reliability, safety, and expedition.

(See, e.g., *Re SCE* [D.87-06-021], *supra,* 24 Cal.P.U.C.2d at p. 486.)

Further guidance is embodied in other decisions, such as D.02-08-064, which states:

> A reasonable and prudent act is not limited to the optimum practice, method, or act to the exclusion of all others, but rather encompasses a spectrum of possible practices, methods, or acts consistent with the utility system needs, the interest of the ratepayers and the requirements of governmental agencies of competent jurisdiction . . . .

> The greater the level of money, risk and uncertainty involved in a decision, the greater the care the utility must take in reaching that decision . . . .
>
> The burden rests heavily upon a utility to prove . . . that it is entitled to the requested rate relief and not upon the Commission, its staff, or any interested party to prove the contrary.

(*Investigation into the Natural Gas Procurement Practices of Southwest Gas Company* [D.02-08-064] (2002) at pp. 5-8 (slip op.) (citations omitted).)

> We have also stated:
>
> When [utilities] file applications to demonstrate the reasonableness of Safety Enhancement they will bear the burden of proof that the companies used industry best practices and that their actions were prudent. This is not a "perfection" standard: it is a standard of care that demonstrates all actions were well planned, properly supervised and all necessary records are retained.

(D.14-06-007, *supra,* at pp. 31, 36 (slip op.).)

Although these concepts guide all Prudent Manager reviews, each case must be evaluated in light of own unique circumstances and the evidence presented. In this case we reviewed evidence presented by SDG&E, ORA, UCAN, POC, Ruth Hendricks, San Diego Consumers' Action Network ("SDCAN"), and the Mussey Grade Road Alliance ("MGRA").

SDG&E contests our findings for all three 2007 Wildfires. In its Application for Rehearing, SDG&E essentially attempts to re-litigate the issues and the

evidence. Such attempts are improper under Section 1732. However, to fully address SDG&E's claims we will discuss SDG&E's allegations below.

B. SDG&E's Reasonableness Challenges

1. The Witch Fire

Cal Fire determined that the Witch Fire was caused by SDG&E's 14-mile long 69 kilovolt ("kV") transmission line ("TL") 637 that runs between its Santa Ysabel and Creelman substations. TL 637 experienced four faults between 8:53 a.m. and 3:25 p.m. on October 21, 2007.[11] SDG&E's automatic reclosers re-energized the line after each of the faults. But the repeated re-energization caused arcing after the third fault that caused hot particles to ignite vegetation below the line.[12]

SDG&E does not contest these facts, but argues we ignored what it knew or reasonably could have known at the time. SDG&E argues we wrongly found that it: (a) failed to adequately monitor the faults; (b) failed to send a protective engineer to identify the fault locations; and (c) failed to adequately appreciate the arcing risk and more timely de-energize TL 637.

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[11] The first fault occurred at 8:53 a.m., the second at 11:22 a.m., the third at 12:23 p.m., and the fourth at 3:25 p.m. The Witch Fire was first observed by an air tanker at 12:29 p.m., shortly after the third fault. Ultimately, TL 637 was not de-energized until approximately 3 hours after the Witch Fire started and almost two hours after SDG&E's Grid Operations became aware of it. (D.17-11-033, at pp. 12-13; ORA Exhibit 2 (ORA-02); SDG&E Exhibits 11 & 11-A (SDG&E-11, at p. 4, SDG&E-11-A, at pp. 2-4.)

[12] Witch Fire Investigation Report. Case No. 07-CDF-570, Incident No. 07-CA-MVU-10432. October 21, 2007. California Department of Forestry and Fire Protection.

(SDG&E Rhg. App., at pp. 27-38, citing D.17-11-033, at pp. 27-29, 66-67 [Findings of Fact Numbers 15, 16, 17, 18 & 19] & p. 71 [Conclusions of Law Number 11].) We disagree.

a) Fault Monitoring

SDG&E contends the fact that it dispatched troubleshooters to the substations after the first two faults and dispatched a patrolman after the third fault, proved that it acted prudently.[13] (SDG&E Rhg. App., at pp. 28-30.)

We acknowledged these steps, but disagreed that they were adequate. We reasoned that under the conditions, a prudent manager should have sent a protective engineer to determine the exact location and cause of the faults, or, absent that, should have de-energized TL 637 sooner to prevent any potential fire from starting.[14]

SDG&E argues that such extraordinary measures were unnecessary. SDG&E said faults are common on windy days, and its reclosers successfully re-energized the line after each of the first two faults. Thus, SDG&E saw no cause for heightened concern.

This reasoning ignores a number of important considerations that a prudent manager should have taken into account. For example:

- SDG&E knew, or should have known that October 21, 2007 was not going to be just an ordinary windy day. For several days Predictive

[13] A patrol never actually occurred. High winds prevented a helicopter patrol, and rough terrain prevented a patrol by foot. A fire near the Santa Ysabel substation also made patrol too dangerous. (SDG&E-11-A, at pp. 7-8, 10-11.)

[14] D.17-11-033, at pp. 27-29.

Services at the Southern California Geographic Area Coordination Center, in coordination with the National Weather Service, had been predicting "High Risk" and "Red Flag" wind events for October 21, 2007.[15] SDG&E's own troubleshooters attested to the intensity of the winds on that day.[16]

- SDG&E knew or should have known there was a history of significant wind-related power line fires in San Diego County.[17]
- SDG&E knew that although its recloser policy was industry practice, faults that resulted in multiple re-energization attempts posed a risk of arcing that could ignite vegetation and cause fires.[18]
- SDG&E should have known that multiple faults on TL 637 were cause for concern given faults on TL 637 were uncommon.[19]
- SDG&E knew TL 637 was located in a remote backcountry location with an abundance of vegetation that would be prone to fire.[20]

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[15] SDG&E-01, Appendix 1, California Fire Siege 2007, at pp. 16-17.

[16] See, e.g., SDG&E-11-A, at pp. 6-7, 10-11, 13.

[17] MGRA Exh. 1 (MGRA-1, at pp. 5-8, 11-18, 23-28.); POC Exh. 1 (POC-1, at pp. 8-9, 11-13, 17-18.)

[18] See e.g., D.17-11-033, at p. 18; ORA-18; Reporters Transcript ("RT") Volume ("Vol.") 2, SDG&E/Geier, at p. 197; ORA-20.

[19] D.17-11-033, at p. 27; ORA-3, at pp. 1-3 (TL 637 Fault History).

[20] SDG&E-11, at pp 3-4.

- SDG&E knew on the day of the Witch Fire that several other fires had already been triggered by the winds.[21]

SDG&E argues there was no known or foreseeable risk because not all past fires were linked to utility facilities,[22] and its own facilities had never started a fire due to conductor (line-to-line) contact. SDG&E also argued that its resources were consumed with responding to the Harris Fire, which it deemed a priority because it threatened SDG&E's 500 kV Southwest Powerlink.[23]

These arguments were not persuasive given the above known safety risks. These factors indicated more than a routine response effort was needed. Evidence showed that other response and service entities had prudently prepared for heightened response efforts in light of the impending Santa Ana conditions.[24] Nothing suggested SDG&E had done the same.

SDG&E said only that it took the usual routine measures by sending troubleshooters to the substations. But troubleshooters do not necessarily locate faults and dispatching patrolmen do not help if a patrol is not possible. In addition, while we recognize SDG&E's concerns regarding the Harris Fire, it is not clear why problems on TL 637 or any other line did not merit equal effort.

SDG&E argues there was no evidence a prudent manager would have acted differently. But that was

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[21] SDG&E-11-A, at pp. 8-9.

[22] SDG&E-12, at pp. 23-25.

[23] SDG&E-11-A, at pp. 8-9.

[24] (SDG&E-01, Appendix 1, California Fire Siege 2007, at pp. 16-17.)

not the burden of any party to prove. Under a reasonably objective view, the conditions warranted more intervention.

b) Failure to Deploy a Protective Engineer

Because SDG&E could not patrol the line, it could only have determined the fault locations on TL 637 by deploying a protective engineer to run a computer model using mileage data from its event records.

SDG&E contends that even if it had done that, it could not have prevented the Witch Fire. SDG&E reasons there was only an hour between the second and third faults, and it would have taken longer for a protective engineer to calculate the fault locations. Thus, SDG&E argues sending a protective engineer would have changed nothing, and there was no proof its failure to do so caused the fire. (SDG&E Rhg. App., at pp. 30-32.)

SDG&E misses the fundamental point. Even if the fire would have started anyway, a reasonableness review looks at whether it acted reasonably and prudently given what it knew or should have known about the potential safety risk.

As explained above, SDG&E knew that Santa Ana wind conditions were predicted, it knew it had such conditions on that day, and it knew those conditions increased the potential for fire risk. SDG&E also knew there were other wind-related fire events already happening, it knew TL 637 had already faulted twice, it knew repeated reclosing attempts could cause a fire, and it knew relatively quickly that it could not physically patrol TL 637.

Together, these factors suggest that a prudent manager would use all available resources to ensure that TL 637 did not ignite a fire. Here, that would have meant utilizing a protective engineer and event records to determine the location and cause of the faults. Even SDG&E conceded that effective use of event records would have put SDG&E in a better position to respond to the faults.[25] But SDG&E did not do that. And had SDG&E taken that step, it may have been possible to find that its actions were prudent.

c) Delay in De-Energizing TL 637

SDG&E Grid Operations de-energized TL 637 approximately 6.5 hours after first fault occurred and almost 2.5 hours after it knew the Witch Fire had started. We did not consider this time lapse to be reasonable under the conditions (e.g., high winds, multiple faults, etc.), and the likelihood for fire under these conditions.

SDG&E argues there was no reason to de-energize TL 637 any sooner. It states that the Harris Fire and 2003 Cedar Fires did not involve powerlines, and it didn't know that conductor contact could cause a fire. SDG&E says all it knew was that it had temporary faults on a backcountry line on a windy day. Thus, to suggest it could have foreseen a fire or been more proactive was hindsight bias. (SDG&E Rhg. App., at pp. 33-35.)

That SDG&E can name two fires that did not involve powerlines was not persuasive. It knew or should have known that multiple fires, such as the 1970 Laguna Fire, the 2004 Wynola Fire, and the 2005 Fallbrook Fire, were wind and powerline related. That

[25] See, e.g., RT Vol. 3, at p. 349.

should have put SDG&E on notice that the situation was unsafe.

SDG&E's position regarding the weather conditions is also problematic. Here it says it was just another windy day. Elsewhere it says the winds were extreme and unprecedented.[26] (SDG&E Rhg. App., at pp. 34, 55-57.) It cannot have been both.

In addition, the fact that SGD&E had no direct experience with conductor contact causing a fire misses the larger point. It is reasonable to expect that a prudent manager, when faced with potential conductor contact, would know it presented a heightened safety risk.[27]

SDG&E contends that even if it had de-energized the line when Grid Operations learned of the fire (1:10 p.m.), it would not have prevented it because the fire had already started. But that is not the point. The issue was whether SDG&E could show that its actions and decisions were prudent given what it knew or should have known at the time. De-energizing the line, at least once SDG&E knew the Witch Fire had started, would have been a reasonable and prudent thing to do.

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[26] SDG&E states it had safety procedures for Red Flag conditions. (SDG&E Rhg. App., at p. 35.) However, procedures alone do not prove a utility's actions or decisions in any particular instance were reasonable. (*Re Southern California Edison Company* ("*Mohave*") [D.94-03-048] 53 Cal.P.U.C.2d 452, 465-466.)

[27] SDG&E minimizes the potential for fire ignition from repeated re-energization stating the conditions contemplated in its 2001 Field Guide were different. (SDG&E Rhg. App., at p. 35.) Whether the exact same conditions were in play was not the issue. SDG&E knew that an event causing repeated re-energization could cause arcing and potential fire ignitions. Disavowal of any such knowledge is simply not persuasive.

SDG&E's own testimony attested to the fact that energized power lines can create additional risks to firefighters and the public in fire conditions.[28]

SDG&E contends that de-energizing powerlines should not be taken lightly because electricity is needed to provide water supply, traffic signals, communications, and emergency services during fire events. (SDG&E Rhg. App., at pp. 32-33.)

These are important considerations. Yet, SDG&E has utilized de-energization strategies before to minimize fire risk.[29] And SDG&E made no showing here that de-energizing TL 637 sooner would have caused significant adverse impacts. Given the backcountry location of TL 637, it was not clear why SDG&E waited so long after the fire had begun to de-energize TL 637.[30]

Finally, SDG&E argues that the $379 disallowance amounted to a penalty, and one that was grossly excessive given its culpability. (SDG&E Rhg. App., at p. 37, citing *BMW of N. Am. v. Gore* ("*BMW*") (1996) 517 U.S. 599.)

BMW involved an award of $4,000 in actual damages and $2,000,000 in punitive damages. The Court deemed $2,000,000 to be excessive in that it was 500 times the amount of actual harm caused by the

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[28] SDG&E-11-A, at p. 11.

[29] ORA-60.

[30] SDG&E contends that its actions post-ignition, and in response to, the fire were outside the scope of this proceeding. (SDG&E Rhg. App., at p. 37, citing Scoping Memo, at p. 4; RT Vol. 3, at pp. 388-400, 404, 433 & 436.) Nothing in the Scoping Memo or elsewhere imposed such a limitation.

defendant's conduct. (*Id.* at pp. 562, 565, 574-576, 581-582.) That is not the case here.

This case did not involve punitive damages. And even if did, the $379 million disallowance would not have been excessive compared to the $2.4 billion in actual harm caused by the 2007 Wildfires.

2. The Guejito Fire

Cal Fire determined that the Guejito fire ignited when a Cox Communications ("Cox") lashing wire came into contact with an SDG&E 12 kV overhead conductor between poles 196394 and 196387. The SDG&E line was located above the Cox equipment, and the winds blew the lashing wire up into SDG&E's line, causing an arc and starting the fire.[31]

SDG&E does not contest these facts, but argues we failed to say *why* the lashing wire contacted SDG&E's line, i.e., because Cox's lashing wire was broken. SDG&E claims we ignored that evidence, thus failed to state a material finding of fact. (SDG&E Rhg. App., at pp. 38-41.)

We did not ignore the fact that Cox's lashing wire was broken prior to the contact. But there was no need to make a specific finding to that effect. It was an obvious point, and not material in and of itself.

SDG&E also contends it had no way to know that the lashing wire broke, and it was unreasonable to find that its actions were imprudent just because of a "technical" clearance violation. (SDG&E Rhg. App., at p. 42.)

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[31] Guejito Fire Investigation Report. Incident No. CA-MVU-010484. October 22, 2007. California Department of Forestry and Fire Protection; D.17-11-033, at p. 29; ORA-05, at pp. 1075-78.

SDG&E misses the point. It is not about whether SDG&E knew the lashing wire was broken or even when it broke. The issue is that SDG&E knew it had an obligation to maintain its facilities in compliance with established equipment clearance requirements under General Order ("GO") 95.[32]

SDG&E's own testimony readily acknowledged the mandates of GO 95, specifically noting Rule 31.1 (Design, Construction, and Maintenance), Rule 31.2 (Inspection of Lines), Rule 32.1 (Two or More Systems), and Rule 38 (Minimum Clearances of Wires From Other Wires). SDG&E also acknowledged the pole inspection requirements under GO 165.

These regulations required SDG&E to maintain a minimum 6 foot clearance between its line and Cox's equipment. SDG&E was also required to conduct regular patrol inspections to ensure compliance with all safety requirements at least every 2 years, with detailed inspections every 5 years.

SDG&E testified that it complied with all inspection requirements, and had last inspected Pole 196394 on June 22, 2007, and Pole 196378 on April 8, 2005.[33] Still, there was a significant clearance violation that SDG&E's inspections failed to identify.[34] SDG&E should have known about that violation and resolved it before the Guejito Fire.

SDG&E tries to shift the responsibility to Cox. But GO 95 applies to both SDG&E and Cox, and both were

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[32] A copy of GO 95 can be located at: http://www.cpuc.ca.gov/generalorders/.

[33] SDG&E-12, at p. 10-11.

[34] D.17-11-033, at pp. 30-31; SDG&E-07, at pp. 14-15.

responsible to ensure compliance with respect to their respective facilities.

SDG&E also suggests that the lashing wire would have contacted its line regardless of the clearance violation, thus there was no causal link between the violation and the fire. That is a theory SDG&E cannot prove, and the rules are designed to prevent such contact. SDG&E's speculation and conjecture do not establish error.

SDG&E's position also seems to ignore the point of reasonable and prudent management. Had SDG&E complied with the established clearance rules, absent any other imprudent conduct, there would have been some basis to find that it reasonably and prudently operated and maintained its facilities. Here, the GO violation and the failure of SDG&E's inspections to identify the violation demonstrated a failure to reasonably and prudently operate and maintain overhead electric lines in accordance with established rules and regulations. Compliance is not discretionary. Thus, we could not reasonably find that SDG&E met the Prudent Manager Standard.

3. The Rice Fire

Cal Fire determined that the Rice Fire ignited when a limb from sycamore tree FF1090 broke and knocked an SDG&E 12 kV line to the ground, starting the fire.[35] SDG&E does not contest these facts, but contends the Decision: (a) violated section 311; and (b) was unsupported by the evidence. We find these arguments are without merit.

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[35] Rice Fire Investigation Report. Case No. 07-CDF-572, Incident No. 07-CA-MVU-010502. October 23, 2007. California Department of Forestry and Fire Prevention. (See, also e.g., D.17-11-033 at p. 36; SDG&E-08 at p. 2.)

a) Section 311

SDG&E contends that after the Proposed Decision was issued, we invented an entirely new theory to support the proposed outcome.[36] SDG&E contends that the modifications made to the Decision were substantive revisions that constituted an "alternate." As such, SDG&E argues Section 311 required the Decision to be recirculated for a new 30-day review and comment period, and by not doing that SDG&E was denied adequate due process. (SDG&E Rhg. App., at pp. 43-45.)

Section 311(e) requires that "alternate" decisions be subject to a 30-day public notice and comment period. But the statute did not apply here because the modifications SDG&E complains of did not make the Decision an "alternate" within the meaning of section 311(e), or the Commission's implementing rules.

Section 311(e) defines an "alternate" as:

> [E]ither a substantive revision to a proposed decision that *materially changes the resolution of a contested issue,* or any substantive addition to the findings of fact, conclusions of law, or ordering paragraphs.

(Pub. Util. Code, § 311, subd. (e) (emphasis added.).)

Similarly, Rule 14.1 of the Rules or Practice and Procedure define an "alternate" as follows:

> (d) "Alternate proposed decision" . . . means a *substantive revision by a Commissioner* to a proposed decision or draft resolution . . . which either:

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[36] A copy of the Proposed Decision can be located at: http://docs.cpuc.ca.gov/SearchRes.aspx?DocFormat=ALL&DocID=193981771.

> (1) materially changes the resolution of a contested issue, or
>
> (2) makes any substantive addition to the findings of fact, conclusions of law, or ordering paragraphs.
>
> A substantive revision to a proposed decision or draft resolution *is not an "alternate proposed decision"* . . . if the revision does no more than make changes suggested in prior comments on the proposed decision . . . .

(See also Cal. Code of Regs., tit. 20, § 14.1, subd. (d) (emphasis added.).)[37]

The modifications at issue were not an "alternate" because they were not substantive revisions made by a Commissioner, nor did they materially change the outcome recommended by the Proposed Decision. The modifications were simply changes made by the Administrative Law Judge ("ALJ") in response to comments on the Proposed Decision.

Decisions routinely contain changes made by an ALJ following comments on a Proposed Decision. That practice is consistent with section 311(d), which allows the Commission to adopt, modify, or set aside all of a

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[37] Section 311(e) also requires the Commission to have rules for implementing Section 311(e), stating:

> The commission shall adopt rules that provide for the time and manner of review and comment and the rescheduling of the item on a subsequent public agenda, except that the item may not be rescheduled for consideration sooner than 30 days following service of the alternate item upon all parties.

Proposed Decision without any additional review or comment.[38]

The modifications also did not present an entirely new theory to support the proposed outcome. The Proposed Decision and Final Decision both show that the same basic issues were discussed in addressing the Rice Fire. For example, both documents discussed: vegetation clearance requirements; SDG&E's Vegetation Management Program ("VMP"); SDG&E's inspection records for Tree FF1090; the positions of the parties; recommendations by SDG&E's tree contractor; the 0-3 month trim designation under the SDG&E's VMP; evidence regarding the growth rate for Tree FF1090; the latent defect in the limb that fell; and Reliability Tree issues.[39]

The modifications did no more than provide additional detail, based on the evidence, with respect to the same issues. SDG&E had, and availed itself of, the opportunity to comment on those issues in its testimony, its briefs, and its comments on the Proposed Decision.[40] Accordingly, SDG&E received adequate due process.

b) Record Evidence

The Decision found that SDG&E failed to prove that its vegetation management of Tree FF1090 was prudent because it: deviated from its own past annual

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[38] See Pub. Util. Code, § 311(d).

[39] See Proposed Decision, at pp. 34-43 and Decision, at pp. 36-49.

[40] See, e.g., SDG&E's Comments on the Proposed Decision of ALJs Tsen and Goldberg, dated September 11, 2017 and SDG&E's Reply Comments on the Proposed Decision of ALJs Tsen and Goldberg, dated September 18, 2017.

trim cycle; failed to keep complete trim records;[41] failed to identify structural issues that may have led to more timely trimming of the limb that broke; and let more than two years lapse prior to the fire without having trimmed Tree FF1090.[42]

SDG&E states there was no need to trim Tree FF1090 in the two years before the fire because it did not find any clearance violations.[43] (SDG&E Rhg. App., at pp. 51-52.) Yet even if that was so, SDG&E knew Tree FF1090 was fast growing.[44] And records showed that the tree had been on an annual trim cycle prior to the two year lapse.[45]

That practice suggested that at least at some point, SDG&E believed it was prudent to trim Tree FF1090 annually. It was not clear why it was suddenly prudent *not* to follow that practice. It was also not persuasive that SDG&E's idea of prudent management was to trim a tree only when there is a recorded clearance violation.

SDG&E's handling of a trim recommendation that was made before the fire was also a cause for concern. In July 2007, SDG&E's tree contractor Davey Tree Surgery Company ("Davey") inspected Tree FF1090

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[41] D.17-11-033, at pp. 36-49.

[42] D.17-11-033, at pp. 42-44; SDG&E-08, Appendix 6.

[43] SDG&E contends the evidence proved that the limb that broke grew away from the line, and we relied on unsubstantiated hearsay to say SDG&E did not prove that fact. (SDG&E Rhg. App., at pp. 48-49.) Even if the evidence was hearsay, it is not impermissible to rely on hearsay evidence in administrative proceedings. (See, e.g., *Investigation re North Shuttle Service Inc.* [D.98-05-019] (1998) 80 Cal.P.U.C.2d 223, 230.)

[44] See, e.g., ORA-32, Data Request Response Number 7.

[45] SDG&E-08, Appendix 6.

and identified a limb directly overhanging SDG&E's electric line. The contractor testified that the tree showed strong growth toward SDG&E's electric line, thus the limb required immediate trimming.[46]

Using SDG&E's computerized Vegetation Management System ("VMS"), the contractor selected the menu item called "Months to Next Trim" and picked the option that appeared to require the most immediate trim (0-3 months).[47] He understood that to mean that the tree would be trimmed within three months of his inspection.[48]

In explaining why the tree had not been trimmed at the time of the fire, SDG&E said the contractor misunderstood the 0-3 designation. SDG&E argued it did not mean the tree should be trimmed within 3 months of inspection. It only meant the tree would grow out of compliance within 3 months.[49] SDG&E also argued that if a more immediate trim was required, the contractor should have flagged the tree as a hazard tree.[50]

This argument seemed to suggest the only way a tree would be trimmed is if it was identified as a hazard, or if it grew out of compliance with established clearance minimums. Such conditions do not make a strong case for prudent preventative maintenance. If nothing else, it appeared SDG&E had not adequately

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[46] ORA-44, RT Excerpt at pp. 10-13, 39-40, 56.

[47] Options under the 'Months to Next Trim' field were 0-3 months, 3-6 months, and 6-9 months, etc. (SDG&E-13, at p. 10.)

[48] ORA-44, RT Excerpt at pp. 10-11, 39-40, 56.

[49] See, e.g., ORA-34, RT Excerpt at pp. 6-7; SDG&E-13, at pp. 10-11.

[50] SDG&E-08, at pp. 12, 17.

trained its contractor to know the appropriate means by which to ensure a tree would be trimmed on a more immediate basis. Adequate contractor training is part of a utility's responsibility as prudent manager.

SDG&E's response at the time the trim recommendation was made also raised questions as to prudency. Prior to authorizing a time and equipment billing for the recommended trim, an SDG&E employee went to observe Tree FF1090. He said he recommended against any trimming because he considered the overhang to be too slight.[51] That is SDG&E's discretion. Yet if there is a direct overhang, prudent practice suggests that trimming or removing such a limb would be the obvious and safe course to take.

In testimony, SDG&E stated that the limb that broke on October 22, 2007, broke due to the failure of a codominant branch structure with included bark.[52] Throughout the proceeding that was referred to as a "hidden defect." SDG&E contends that because it was hidden, it could not have known the limb might break, and such defects would be difficult to detect from regular ground inspections.[53] SDG&E argues even Rule 35 only requires removal of such limbs when a utility has actual knowledge of the problem.[54] (SDG&E Rhg. App., at pp. 46-48.)

We recognize that Tree FF1090 was fairly tall and that could hinder SGD&E's ability to detect the defect

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[51] SDG&E-13, Appendix 4, at pp. 1-2.

[52] SDG&E-13, Appendix 2, at p. 4.

[53] SDG&E-13, Appendix 2, at p. 4.

[54] SDG&E contends it was, or would have been error to find SDG&E violated Rule 35. Nothing in the Decision made such a finding. We merely identified the standard required by that Rule. (D.17-11-033, at p. 37.)

during routine ground inspections. But the broken limb was also part of a growth structure called a codominant leader branch growth. And it is known that hidden defects are common in such growth structures. The tree also appeared to have certain indicia of a Reliability (or hazard) Tree.

SDG&E's own Vegetation Management Plan indicated that both these factors, if properly identified, would result in immediate trimming or removal of the affected limbs.[55] The Plan also represented that SDG&E routinely inspected for structural defects, limbs that may break even if there are no clearance issues (such as codominant limb growth), and Reliability Tree issues.[56] Thus, it was not clear why SDG&E's inspections had failed to identify these issues prior to the fire. SDG&E never claimed that it could not have identified these problems during normal inspections. It only said that it had not found them.

Finally, SDG&E contends that even if it had marked Tree FF1090 as a Reliability Tree and/or trimmed that tree, there was no proof that the fire would have been avoided. (Rhg. App., at pp. 48, 51.)

There is no way to know that. At least the potential for fire would have been reduced. And again, the argument sidesteps the fact that if SDG&E had adhered to its annual trim cycle for this tree, adequately trained its contractors, or acted on what seemed to be reasonably identifiable structural problems, it may have been possible to agree that SDG&E's

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[55] D.17-11-033, at pp. 46-49; SDG&E-13, at p. 11; SDG&E-08, Appendix 3, at pp. 30-31.

[56] SDG&E-13, at p. 9.

actions were prudent. The evidence did not support that conclusion here.

C. Commission Precedent

In discussing the outcome in this case, the Decision found certain similarities between the facts of this case and three other notable prudency reviews where the Commission denied rate recovery due to various utility errors or failures. (D.17-11-033, at pp. 49-54, citing *Re Southern California Edison Company* ("*SONGS I*") [D.84-09-120] (1984) 16 Cal.P.U.C.2d 249 [Replacement power costs related to an oil leak and fire at San Onofre Nuclear Generating Station]; *Re Pacific Gas and Electric Company* ("*Helms*") [D.85-08-102] (1985) 18 Cal.P.U.C.2d 700 [Costs related to delays in construction of the Helms Pumped Storage Project]; *Mojave* [D.94-03-048], *supra,* 53 Cal.P.U.C.2d 452 [Costs associated with explosion at the Mojave Generating Station].)

SDG&E contends these decisions fail to support any finding of imprudence, because unlike *Mohave*, SDG&E implemented its inspection and maintenance program, unlike *Helms*, SDG&E was not issued safety citations or subject to work shut downs, and unlike *SONGS I,* SDG&E did not have improper equipment in place. (SDG&E Rhg. App., at pp. 54-55.)

It was not necessary that these specific facts be the same. As discussed above, each case presents its own unique facts and circumstances. But there were certain analogies, and SDG&E ignored those.[57] SDG&E

[57] SDG&E also argues we must find "clear and identifiable errors" in order to find imprudence. (SDG&E Rhg. App., at p. 53.) Certain prudency reviews have identified such errors. But that is not the established test. And even if it was, SDG&E fails to

may disagree with our findings in that regard. But that does not establish that we erred.[58]

D. Wind and Weather Conditions

SDG&E contends that the wind and weather conditions were unprecedented when the fires broke out, and it was error to find that those conditions did not impact SDG&E's operation and management of its facilities. (SDG&E Rhg. App., at pp. 55-57.)

We did not say the conditions had no impact at all. We recognize Santa Ana wind conditions can present certain challenges. Yet the evidence suggested the conditions were not as extreme and unprecedented as SDG&E claimed, and SDG&E failed to show that the conditions impacted its actions in a manner that should have negated any finding of imprudence.[59]

In evaluating the weather conditions, we considered evidence presented by SDG&E's own experts as well the experts of other parties.[60] These experts used very different methodologies to arrive at their conclusions.

SDG&E's main expert used wind tunnel simulations and calculations derived from a numerical computer program designed to approximate the physical process of the atmosphere (Mesoscale modeling).[61]

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explain how many of the issues discussed herein would not qualify as such.

[58] See *Southern California Edison Company v. Public Utilities Commission* (2005) 128 Cal.App.4th 1, 8.

[59] D.17-11-033, at pp. 55-60.

[60] See, e.g., SDG&E-01; SDG&E-10; SDG&E-15; MGRA-1; POC-1; UCAN-01; UCAN-02; UCAN-07.

[61] SDG&E-10, at pp. 3-11, 13-19; SDG&E-15. Based on this approach SDG&E calculated mean or sustained wind speeds of 56 mph for the Witch Fire, 34 mph for the Guejito Fire and 37

This approach was criticized as producing artificial results, and parties argued SDG&E had failed to account for the limitations and error estimates associated with its approach.[62]

By contrast, UCAN's experts relied on Remote Automatic Weather Station ("RAWS') data, i.e., actual wind observations recorded at various geographical locations at the time of the event. Based on that data, they concluded that the October 2007 weather conditions were neither unprecedented nor uniquely extreme.[63]

SDG&E rejected RAWS in arriving at its wind estimates. SDG&E said RAWS data was unreliable because on the ground obstructions could minimize what SDG&E believed to be the actual wind values.[64]

In response, UCAN's experts argued, among other things, that: (a) rejection of RAWS data led to a biased

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mph for the Rice Fire. Peak gust speeds were calculated to be 78-87, 59-68, and 70-75 mph, respectively. (SDG&E-10, at p. 3.) SDG&E also states that the California Fire Siege 2007 Report deemed the 2007 fires as among the most devastating in California history. (SDG&E Rhg. App., at p. 56, citing SDG&E-01, Appendix 2, at p. 6.) The Report does indicate the wind event was severe. But the fact that the fires were devastating does not necessarily mean that the wind and weather conditions were unprecedented.

[62] See, e.g., ORA-55, at pp. 4-3 to 4-9.

[63] UCAN-01; UCAN-02; UCAN-07. Based on RAWS observations UCAN determined mean or sustained wind speeds of 23-29 mph for the Witch Fire, 26-33 mph for the Guejito Fire, and 17-25 mph for the Rice Fire. Associated peak sustained winds were 30-38, 26-33, and 20-28 mph, respectively. Gust speeds at the time of ignition were determined to be 43.1, 56.7, and 34.4, respectively. (UCAN-02, at p. 3.)

[64] See, e.g., SDG&E-10, at pp. 13-19.

result; (b) the consistency of RAWs data at the various weather stations proved its accuracy and reliability; (c) SDG&E's calculations were overstated as based on a worst case scenario; (d) wind tunnel estimates were unnecessary and relied on flawed computer (Mesoscale) inputs; (e) theoretical calculations and modeling fail to accurately capture the physical terrain and actual atmospheric conditions; and (f) SDG&E's Santa Ana Wildfire Threat Index ("SAWTI") appeared to overstate the impact of the winds on fire spread.[65]

Perhaps no approach is perfect. The evidence was conflicting. But on balance, we found the evidence supported UCAN's approach as being more realistic, and reliable. Thus, we find no error.

E. Inverse Condemnation Generally

Inverse condemnation is a reverse eminent domain proceeding. Both derive from the constitutional principle that private property may not be "taken" or damaged for public use without just compensation.[66] In an eminent domain proceeding, a public or governmental entity seeks to condemn or "take" private property for a public use (such as the construction of an electric transmission line).

In an inverse condemnation proceeding, a property owner seeks to hold a public or government entity strictly liable for any physical injury/damages that may have been caused by that entity's public improvement. Traditionally, the doctrine has covered damages

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[65] UCAN-01, at pp. 4-5, 11-17; UCAN-07, at pp. 25-27.

[66] See, e.g., *Marshall v. Department of Water and Power of the City of Los Angeles* ("*Marshall*") (1990) 219 Cal.App.3d 1124, 1138-1139; *San Diego Gas & Electric Company v. The Superior Court of Orange County* ("*Covalt*") (1996) 13 Cal.4th 893, 939-940, citing Cal. Cost., art. I, § 19; U.S. Const., 5th Amend.

to real property. But it can also compensate for the loss of personal property.[67]

Under inverse condemnation, liability can be found whether or not the damage was foreseeable, and even if there was no fault or negligence by the public entity.[68] All a plaintiff need establish is a causal relationship between the governmental activity and the property loss complained of, i.e., proximate cause. And a public entity can be held strictly liable for damages if its public improvement was a substantial cause of the damages, even if it is only one of several concurrent causes.[69]

The policy underlying inverse condemnation is one of cost sharing or cost spreading. It is intended to relieve individual property owners from the economic burden of damages by spreading the costs among the larger community of individuals that benefit from the public improvement.[70]

Relevant case law reflects that the doctrine was initially applied to only local public or governmental entities such as a City Department of Water and Power. More recently, the Courts have allowed inverse condemnation claims against Commission-regulated, privately-owned utilities ("IOUs").[71]

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[67] *Marshall, supra,* 219 Cal.App.3d at pp. 1138-113.

[68] *Marshall, supra,* 219 Cal.App.3d at pp. 1138-1139.

[69] *Marshall, supra,* 219 Cal.App.3d at p. 1139.

[70] See, e.g., *Barham v. Southern California Edison Company* ("*Barham*") (1999) 74 Cal.App.4th 744, 752.

[71] For purposes of this order, the terms IOUs and utilities are used interchangeably to mean Commission-regulated, privately-owned utilities. The terms do not include publicly-owned utilities.

In extending inverse condemnation liability to IOUs, the Courts have reasoned there are functional similarities between local public or government entities and regulated IOUs. For example, in 1999 the Court stated:

> . . . the Supreme Court held that a public utility is in many respects more akin to a governmental entity than to a purely private employer . . . . [m]oreover, the nature of the California regulatory scheme demonstrates that the state generally expects a public utility to conduct its affairs more like a governmental entity than like a private corporation . . . . We are not convinced that any significant differences regarding the operation of publicly versus privately owned utilities . . .

(*Barham, supra,* 74 Cal.App.4th at p. 753.)

In a later case, SCE argued that a distinction could be drawn because unlike governmental entities (such as a city), IOUs have no taxing authority. IOUs can only raise rates with Commission approval.[72] But the Court said only that SCE failed to prove the Commission would *not* allow it to pass along costs in rates, stating:

> As the *Barham* court noted, if we were to adopt Edison's position, "we would be required to differentiate between damage resulting from the operation of a utility based solely upon whether it is operated by a gov-

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[72] *Pacific Bell Telephone Company v. Southern California Edison Company* ("*Pac Bell*") (2012) 208 Cal.App.4th 1400, 1407-1408.

> ernmental entity or by a privately owned public utility' but we are "not convinced that any significant differences exist."

Pacific Bell Telephone Company v. Southern California Edison Company ("*Pac Bell*") (2012) 208 Cal.App.4th 1400, 1407-1408.)

F. SDG&E's Inverse Condemnation Challenge

After the 2007 Wildfires, more than 2,500 civil lawsuits were filed against SDG&E by property owners and governmental entities seeking recovery for damages caused by the 2007 Wildfires. The San Diego Superior Court ruled that the civil plaintiffs could bring a cause of action against SDG&E under the doctrine of inverse condemnation.[73]

Because the investigation reports linked SDG&E's facilities to the Witch, Guejito, and Rice fires, SDG&E argued that fully litigating the damage claims was too great a financial risk in light of its potential liability. For that reason SDG&E settled the claims in lieu of litigating them to conclusion. In its Application before this Commission, SDG&E stated that the requested $379 million represents claim amounts not otherwise covered by its liability insurance, settlements with third parties, or cost recovery from the Federal Energy Regulatory Commission ("FERC").[74]

SDG&E's settlement of the claims meant the Superior Court never formally determined that SDG&E was strictly liable under inverse condemnation. But

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[73] See A.15-09-010, at p. 2, citing *In re Wildfire Litigation,* January 29, 2009 Minute Orders Overruling SDG&E's Demurrers to the Master Complaints.

[74] A.15-09-010, at p. 7. [Total WEMA costs identified as $2.4 billion.].

SDG&E argued liability was inevitable, thus our review should have been driven by the cost spreading principle of inverse condemnation, not by the traditional Section 451/Prudent Manager review.

SDG&E argues that if we had applied the cost spreading principle, rate recovery would have been allowed. But in denying that recovery, we: (1) created an unnecessary conflict of laws; (2) produced an unjust and unreasonable result; and (3) violated Constitutional takings principles. We discuss these allegations below.

1. Conflict of Laws

Inverse condemnation is a constitutional principle and this Commission must abide by the Constitution.[75] SDG&E therefore reasons we created a conflict of laws by failing to harmonize Section 451 and inverse condemnation in a manner that allowed it to pass its WEMA costs on to ratepayers.[76] (SDG&E Rhg. App., at pp. 13-16, citing *PG&E Corporation v. Public Utilities Commission* ("*PG&E Corp.*") (2004) 118 Cal.App.4th 1174, 1199.) We disagree.

As discussed above, Commission regulation of IOUs is governed by the principle of reasonableness pursuant to Section 451. SDG&E's challenge raises the

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[75] See Pub. Util. Code, §§ 1757, subd. (a)(6) & 1757.1, subd. (a)(6).

[76] SDG&E argues our Decision ignored inverse condemnation, thus failed to contain adequate findings and conclusions on all issues material to a decision. (SDG&E Rhg. App., at p. 13, citing Section 1705.) That is incorrect. Our Decision merely explained that the scope of this proceeding was limited to determining whether SDG&E met the Prudent Manager Standard. Inverse condemnation is not an element of, or material to, that analysis. Thus, no separate findings or conclusions were required.

following question: could or must the Commission have foregone Section 451 and the associated Prudent Manager review in lieu of applying inverse condemnation cost sharing principles? We find the answer to that question is no.

Inverse condemnation arises in the context of litigating civil damages claims. We have no jurisdiction to award damages or litigate such cases.[77] It is not in our purview to render determinations regarding whether inverse condemnation or other legal tort doctrines should be applied in assessing damages claims. Those issues are for the Courts, not this Commission.

More importantly, even if the Court had found SDG&E strictly liable under inverse condemnation, we could not have set aside Section 451 review. The California Constitution expressly prohibits agencies such as this Commission from foregoing such statutory mandates. Section 3.5 provides:

> Sec. 3.5 An administrative agency, including an administrative agency created by the Constitution or an initiative statute, has no power:

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[77] Pub. Util. Code Section 2106 provides in pertinent part:

> Any public utility which does, causes to be done, or permits any act, matter, or thing prohibited or declared unlawful, or which omits to do any act, matter, or thing required to be done, either by the Constitution, any law of this State, or any order or decision of the commission, shall be liable . . . for all loss, damages, or injury caused thereby or resulting therefrom. *If the court finds* that the act or omission was willful, it may in addition to the actual damages, award exemplary damages. An action to recover from such loss, damage, or injury may be brought *in any court of competent jurisdiction* by any corporation or person . . . .

> (a) To declare a statute unenforceable, or refuse to enforce a statute, on the basis of it being unconstitutional unless an appellate court has made a determination that such statute is unconstitutional;
>
> (b) To declare a statute unconstitutional;
>
> (c) To declare a statute unenforceable, or refuse to enforce a statute on the basis that federal law or federal regulations prohibit the enforcement of such statute unless an appellate court has made a determination the enforcement of such statute is prohibited by federal law or regulations.

(Cal. Const., art. 3, § 3.5.)

SDG&E ignores these issues, saying only that the Courts have assumed the cost spreading policy of inverse condemnation could be satisfied by IOU rate recovery. (SDG&E Rhg. App., at p. 12.) Assumptions, however, are not legal requirements. Thus, unless or until the Courts or the Legislature provide otherwise, our treatment of IOU cost recovery is bound by the statutory mandate of Section 451.

PG&E Corp. does not change our conclusion. *PG&E Corp.* states that the Commission cannot disregard express legislative directives or restrictions on its power. (*PG&E Corp., supra,* 118 Cal.App.4th at pp. 1198-1199.) This is not relevant here because there are no legislative directives or prohibitions regarding the application of Section 451 versus inverse condemnation.

SDG&E also cites *People v. Garcia* (2017) 2 Cal.5th 792 to suggest that we were required to forego Section 451 and allow rate recovery under the doctrine of

constitutional avoidance.[78] (SDG&E Rhg. App., at pp. 14-16.) Again, we disagree.

In *People v. Garcia*, the Court found that requiring sex offenders, as a condition of probation, to waive the psychotherapist-patient privilege did not violate the constitutional rights to privacy or right against self-incrimination. In reaching that conclusion, the Court reasoned the statute was narrowly tailored so that a defendant's rights were only limited in specific circumstances and consistent with the State's goal of managing sex offenders. (*Id.* at pp. 792, 800-801, 802-803, 806-807.)

Like the statute in *People Garcia,* Section 451 is narrowly tailored to deny cost recovery only if costs are deemed unjust and unreasonable. That is consistent with the State's goal of ensuring that utility customers receive safe and reliable service, and pay only just and reasonable rates.[79]

Finally, SDG&E contends that even if its actions and decisions were unreasonable, we should have allocated/apportioned costs between ratepayers and shareholders consistent with other reasonableness reviews. (SDG&E Rhg. App., at pp. 14-15, citing *Re Pacific Gas and Electric Company* [D.84-12-033] (1984) 16 Cal.2d 457; *Re Southern California Edison Company* [D.87-06-021] (1987) 24 Cal.P.U.C.2d 476;

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[78] PG&E and SCE cite to *California Housing Finance Agency v. Elliott* (1976) 17 Cal.3d 575 for the same notion. (PG&E/SCE Rhg. App., at p. 2.) We find nothing in that case to suggest an agency must abdicate its own governing statutes and standards in light of constitutional principles.

[79] Cal. Const., art XII, § 6; Pub. Util. Code, §§ 451, 454, subd. (a), 728.

and *Re Southern California Gas Company* [D.94-05-020] (1994) 54 Cal.P.U.C.2d n391.)

The cited cases are not controlling here. Those cases involved unique circumstances where we approved settlements in which the parties had agreed to allocate costs in varying degrees between ratepayers and shareholders. (*Re Pacific Gas and Electric Company* [D.84-12-033], *supra*, 16 Cal.2d at pp. 457, 460, 489 [Findings of Fact Numbers 1, 3, 6 & 11]; *Re Southern California Edison Company* [D.87-06-021], supra, 16 Cal.P.U.C.2d pp476, 478; and *Re Southern California Gas Company* [D.94-05-020], *supra,* 54 Cal.P.U.C.2d 392-393, 402.) Settlements, however, are not precedential. And they do not establish standards or principles that carry over to future proceedings.[80]

2. Alleged Unreasonable and Unjust Result

SDG&E contends we wrongly found inverse condemnation inapplicable to Prudent Manager reviews because doing so subjected SDG&E to an unreasonable whipsaw of incompatible legal standards. SDG&E argues that because inverse condemnation excludes any analysis of reasonableness, it defied logic that it was subjected it to that standard here. (SDG&E Rhg. App., at pp. 16-17.)

As discussed above, we were bound to apply the reasonableness standard of Section 451 under the law that exists today. That inverse condemnation is indifferent regarding reasonableness did not negate our own statutory obligation.

SDG&E also argues we wrongly used its own actions against it in finding that inverse condemnation was

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[80] Commission Rule of Practice and Procedure 12.5; Cal. Code of Regs., tit. 20, § 12.5.

irrelevant for purposes of this Phase 1 review. In particular, SDG&E objects to the fact we said it had withdrawn its inverse condemnation testimony in Phase 1.[81] SDG&E argues that did not mean it waived those arguments, it just meant SDG&E adhered to the scope of Phase 1. (SDG&E Rhg. App., at pp. 18-19.)

Our Decision did not say or find that SDG&E had waived all inverse condemnation arguments. The question was at what juncture that issue might be relevant. Phase I was about the Prudent Manager review. As discussed above, many considerations are relevant in that context, but inverse condemnation is not among them. Thus we correctly found that inverse condemnation was not material to Phase 1.

SDG&E also objects to our stating no Court determined SDG&E was strictly liable under inverse condemnation.[82] SDG&E argues we could not possibly intend to suggest that a utility must litigate a case to judgement, irrespective of cost, in order to preserve arguments such as inverse condemnation. (SDG&E Rhg. App., at pp. 19-20.)

Again, that is not what our Decision said. It is a utility's prerogative to settle civil lawsuits. It was simply a statement of fact. And this Commission was not free, in the place of a Court, to make that determination.

Finally, SDG&E contends we could have avoided any tension between Section 451 and inverse condemnation by looking only at whether it was reasonable for SDG&E to settle the damage claims. (SDG&E Rhg.

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[81] D.17-11-033, at pp. 64-65.

[82] D.17-11-033, at p. 65.

App., at pp. 16-20, citing *San Diego Gas & Electric Company,* 146 FERC P63,017, ¶¶ 61-62 (2014).)[83]

The purpose of this proceeding was determined by the Scoping Memo. Phase 1 was to address the prudent operation and management of SDG&E's facilities. Whether it was reasonable for SDG&E to have settled the legal claims was an issue for Phase 2.[84] We were not required to forego the Phase 1 evaluation just because SDG&E preferred a more limited review.

SDG&E's reliance on *San Diego Gas & Electric Company,* 146 FERC P63,017, ¶¶ 61-62 (2014) is also flawed. FERC did not conduct a dedicated reasonableness review. SDG&E had requested WEMA cost recovery as part of a Transmission Owner rate case. (*Id.* at ¶¶ 1-4.) That is very different than a Prudent Manager review.

In addition, even when FERC considers whether a utility's conduct was reasonable, it applies a very different standard of review. FERC presumes all costs

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[83] PG&E and SCE contend the rate recovery should not be used to deter imprudent actions. Rather, penalties should be used for that purpose. (PG&E/SCE Rhg. App., at pp. 9-10.) We did impose such a penalty in D.10-04-047. (*Investigation on the Commission's Own Motion into the Operations and Practices of San Diego Gas & Electric Company Regarding the Utility Facilities Linked to the With and Rice Fires of October 2007; Investigation on the Commission's Own Motion into the Operations and Practices of San Diego Gas & Electric Company Regarding the Utility Facilities Linked to the Guejito Fire of October 2007* [D.10-10-047] (2010) at p. 1, 16-17 [Ordering Paragraph Number 4] (slip op.).) The disallowance here was the lawful consequence of review under Section 451.

[84] Scoping Memo and Ruling of Assigned Commissioner and Assigned Administrative Law Judge ("Scoping Memo"), dated April 11, 2016, at pp. 4-6.

requested by an IOU are reasonable and prudent, and its analysis stops there unless there is a specific challenge to the utility's request. (*Id.* at ¶¶ 37-38.)

Our standard is more rigorous. Utilities bear the burden to prove that all costs sought to be recovered in rates are just and reasonable.[85] SDG&E did not meet that burden here. Thus, we find no legal error.

3. Constitutional Takings

The State and federal Constitutions prohibit the government from "taking" private property for public use without just compensation.[86] Generally, there are two types of taking arguments: (1) economic taking; and (2) the physical taking of property.

SDG&E argues there was an economic taking. Specifically, that our denial of WEMA rate recovery, i.e., SDG&E's ability collect the $379 million from its ratepayers, was an unlawful taking of money it has a right to receive. (SDG&E Rhg. App., at pp. 21-22.)

This argument assumes that a utility is guaranteed rate recovery for any costs that it incurs (particularly where inverse condemnation could apply). That is not the case. For purposes of utility ratemaking or rate recovery, the Courts have found that an unlawful taking or confiscation does not occur unless a

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[85] See, e.g., *SONGS 1* [D.84-09-120], *supra,* 16 Cal.P.U.C.2d at p. 283 [Stating also: "It would be unconscionable from a regulatory perspective to reward such imprudent activity by passing the resultant costs through to ratepayers."].

[86] Cal. Const., art. I, § 19; U.S. Const., 5th Amend. As applied to utilities, Courts have stated that the guiding principle has been that the Constitution protects utilities from being limited to a charge for their property serving the public which is so "unjust" as to be confiscatory. (See, e.g., *Duquesne Light Co. v. Barasch* ("*Duquesne*") (1989) 488 U.S. 299, 307-308.)

regulation or rate is unjust and unreasonable.[87] And whether a regulation or rate is just and reasonable depends on a balancing of the interests of the regulated entity and the interests of its ratepayers.[88]

Utilities are not entitled to any particular rate recovery. "That a particular rate may not cover the costs of a particular good or service does not work confiscation in and of itself."[89] Similarly, a regulated has does not have a constitutional right to a profit or any right against a loss.[90] As long as the regulation or rates "'as a whole afford [the regulated firm] just compensation for [its] over-all services to the public, they are not confiscatory. (Citation omitted.)"[91]

For SDG&E to establish a taking here, it would have to show that it had a protected interest in rate recovery, that we unlawfully withheld that money, and that the takings was for a public purpose.[92] SDG&E does not establish any of these things here.

Instead, SDG&E reiterates the constitutional policy that under the takings clause a government entity should not force some people alone to bear public burdens which, in all fairness, should be borne by the public as a whole.

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[87] *Duquesne, supra,* 488 U.S. at p. 307; *20th Century Insurance Co. v. Garamendi* ("*20th Cent. Ins.*") (1994) 8 Cal.4th 216, 292.

[88] *Federal Power Commission v. Hope Natural Gas Company* ("*FPC v. Hope*") (1943) 320 U.S. 591, 603; *20th Cent. Ins., supra,* 8 Cal.4th at p. 293.

[89] *20th Cent. Ins., supra,* 8 Cal.4th at p. 293.

[90] *Id.* at p. 294.

[91] *Id.* at p. 293.

[92] See, e.g., *Bronco Wine Company v. Jolly* ("*Bronco Wine*") (2005) 129 Cal.App.4th 988, 1030.

Here, SDG&E argues that had it not settled the damages claims, a finding of strict liability was a foregone conclusion. Thus, in SDG&E's view, its WEMA costs were a public burden that its ratepayers, not it alone, should have to bear. (SDG&E Rhg. App., at p. 21, citing *Kavanau v. Santa Monica Rent Control Board* ("*Kavanau*") (1997) 16 Cal.4th 761, 773-774.)

We do not see any violation under the standard in *Kavanau.* That case states that claims of unlawfulness cannot be disposed of by "general propositions." (*Id.* at pp. 773-744.) In addition, absent a clear takings the Court will look at other factors such as the economic impact of a regulation on the claimant, the extent to which the regulation interfered with investment-backed expectations, the character of the government action, and the nature of the State's interest in the regulation. (*Id.* at pp. 773-775.)

SDG&E's claim is based entirely on the general proposition of cost sharing. That alone does not prove any constitutional violation occurred. In addition, under other factors a Court may consider, our determination was lawful. For example, while the denial of rate recovery may have an economic impact on SDG&E, utilities have no guaranteed expectation of rate recovery under Section 451. The law is clear. To be compensable, costs, charges and rates must be just and reasonable.[93]

The character of our action was also in keeping with this Commission's statutory obligations and established ratemaking practice. And we have a substantial interest in protecting consumers (ratepayers) from

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[93] Pub. Util. Code, § 451. (See also e.g., *FPC v. Hope, supra,* 320 U.S. at p. 600.)

exorbitant, unjust, and unreasonable rates. Thus, we find no unlawful takings.

III. CONCLUSION

The Application for Rehearing of D.17-11-033 is denied because no legal error was established.

THEREFORE, IT IS ORDERED that:

1. The Applications for Rehearing of D.17-11-033 are denied.
2. This proceeding, Application (A.) 15-09-010 is closed. This order is effective today. Dated July 12, 2018, at San Francisco, California.

MICHAEL PICKER
President
CARLA J. PETERMAN
LIANE M. RANDOLPH
MARTHA GUZMAN ACEVES
CLIFFORD RECHTSCHAFFEN
Commissioners