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

SAN DIEGO GAS & ELECTRIC COMPANY, Petitioner, v. PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, Respondent.	Case No. D074417 Commission Decisions D.17-11-033 & D.18-07-025

ANSWER OF RESPONDENT TO PETITION FOR WRIT OF REVIEW

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TO THE HONORABLE PRESIDING JUSTICE JUDITH McCONNELL AND ASSOCIATE JUSTICES OF THE CALIFORNIA COURT OF APPEAL, FOURTH APPELLATE DISTRICT, DIVISION ONE:

Respondent, the California Public Utilities Commission ("Commission"), respectfully submits its answer ("Answer") in opposition to petition for writ of review ("Petition"), filed by San Diego Gas & Electric Company ("SDG&E" or "Petitioner"), and denies that said writ should be issued.[1]

[1] Answers filed by the Commission are submitted pursuant to California Rules of Court Rule 8.496.

I. STATEMENT OF FACTS AND PROCEDURAL HISTORY

This case presents the question of what costs Commission-regulated utility ratepayers should be required to shoulder when wildfires are linked to, and caused by, a utility's electric transmission and/or distribution facilities.

Petitioner proposes that the cost-spreading policy underlying the doctrine of inverse condemnation dictates that ratepayers must absorb all costs. The Commission respectfully requests that this Court affirm the Commission's determination that even if Petitioner had been found strictly liable for wildfire-related damages under a theory of inverse condemnation, which was never in fact determined, utility shareholders, not ratepayers, must absorb the costs if the Commission determines that the utility did not reasonably and prudently operate and maintain its facilities leading up to and in direct response to the wildfire event.

As explained in this Answer, that was the lawful determination reached by the Commission in D.17-11-033 and D.18-07-025 (together "Decisions" or "determination"), which denied Petitioner's request to recover $379 million in costs associated with third party damage claims arising from three 2007 wildfires.[2] Given the facts of this case, Public Utilities Code Section 451 barred the

[2] A copy of D.17-11-033 is located at Petitioner's Appendix of Exhibits ("Pet. App."), Volume ("Vol.") 31, p. 11774. D.18-07-025 is located at Pet. App., Vol. 31, p. 12292. The Commission notes that Petitioner's exhibits contain a substantial number of ex parte notices and related material. Ex parte materials are not part of the Commission's formal administrative record and do not establish the veracity of any representations made therein. Thus, they should not be considered by the Court in determining whether the Commission's Decisions were lawful.

Commission from allowing Petitioner to pass the subject costs on to its ratepayers.[3] A brief background may be helpful.

The Commission is a state agency of constitutional origin with broad duties, functions and powers. (Cal. Const., art. XII, §§ 1-6.) It is within the Commission's exclusive jurisdiction to regulate public utilities, and to among other things, set rates, establish rules, hold hearings, award reparations, and establish its own procedures. (Cal. Const., art. XII, §§ 2, 4 & 6; see also *Consumers' Lobby Against Monopolies v. Public Utilities Commission* ("*CLAM*") (1979) 25 Cal.3d 891, 905-906.)

Petitioner is an investor-owned public utility that provides electric and gas service to customers in San Diego County and southern Orange County subject to the Commission's exclusive jurisdiction under Sections 216 and 218.

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")), determined that three of the fires were ignited by Petitioner's electric transmission facilities: the Witch Fire, the Guejito Fire; and the Rice Fire (together "2007 Wildfires").

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

After the fires, Petitioner, Pacific Gas and Electric Company ("PG&E"), Southern California Gas Company ("SCG"), and Southern California Edison Company ("SCE") all sought Commission approval to establish Wildfire Expense Memorandum Accounts ("WEMA") 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 Petitioner'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.[4]

In 2012, the Commission issued D.12-12-029 which, among other things, kept open Petitioner's WEMA account subject to reasonableness review should Petitioner later seek to recover those costs from its ratepayers.[5] In 2015, Petitioner did file an Application (A.) 15-09-010 with the Commission requesting cost recovery for $379 million in WEMA costs recorded for the 2007 Wildfires.[6] The

[4] Resolution E-4311, dated July 29, 2010, at pp. 2-3, 10 [Findings and Conclusions Number 2]. (Commission resolutions can be found on the Commission's website at: http://docs.cpuc.ca.gov/ResolutionSearchForm.aspx.)

[5] 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.)

[6] 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* ("SDG&E Application") (A.15-09-010), dated September 25, 2015, located at Pet. App., Vol. 1, p. 54.

matter now before this Court involves the Commission's reasonableness review.

Commission reasonableness reviews are governed by Section 451. Pursuant to Section 451, for Petitioner to recover costs from customers, it was required to show that all requested charges were "just and reasonable."

In discharging its obligation to ensure that charges requested by a utility are just and reasonable, and ensure a utility has operated and maintained its system in a safe and reasonable manner, the Commission applies a longstanding Prudent Manager Standard. In such a review, it is a utility's burden to establish by affirmative showing that it reasonably and prudently operated and maintained its system.[7]

As discussed in Part IV.C. below, that means a utility must demonstrate that its actions, practices, methods, and decisions showed reasonable judgment in light of what it knew or should have known at the time, and in the interest of achieving safety and reliability at a reasonable cost to ratepayers.[8]

On December 6, 2017, the Commission issued D.17-11-033, finding that on balance, Petitioner failed to meet its burden to show that its operation and maintenance 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,

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[7] See, e.g., *Re Southern California Edison Company* ("*Re SCE*") [D.87-06-021] (1987) 24 Cal.P.U.C.2d 476, 486. [The Commission may draw inferences from the utility's showing which conflict with the utility's position or interpretation.].

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

cost recovery was unjust, unreasonable, and unlawful under Section 451. For that reason, the Commission denied Petitioner's request to pass the $379 million in WEMA costs on to its ratepayers in electric rates.[9]

On January 2, 2018, applications for rehearing of D.17-11-033 were filed by Petitioner as well as PG&E and SCE jointly.[10] On July 13, 2018, after considering the above challenges, the Commission issued D.18-07-025, which affirmed D.17-11-033 and denied the challenges.

On August 3, 2018, Petitioner filed its Petition with this Court challenging the determinations reached in D.17-11-033 and D.18-07-025.

II. ISSUES PRESENTED

The Petition raises three primary issues:

1. **Did the Commission properly and lawfully determine that inverse condemnation did not govern evaluation of Petitioner's request for cost recovery?**

2. **Did the Commission properly and lawfully find that evaluation of Petitioner's request for cost recovery was governed by Section 451 and the associated Prudent Manager Standard?**

3. **Did the Commission properly and lawfully apply Section 451 and the Prudent Manager Standard to find that Petitioner was prohibited from recovering the requested $379 million from its ratepayers?**

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[9] D.17-11-033, at Pet. App., Vol. 31, pp. 11777, 11781, 11784-11786, 11845 [Conclusion of Law Number 9], p. 11846 [Conclusion of Law Number 13] & p. 11847 [Conclusion of Law Number 21] & [Ordering Paragraph Number 1].

[10] Petitioner's rehearing application ("SDG&E Rhg. App.") is located at Pet. App., Vol. 31, p. 11857. PG&E and SCE's rehearing application is located at Pet. App., Vol. 31, p. 11923.

The Commission respectfully submits that the answer to each of these questions is in the affirmative. Because the Decisions were reasonable and lawful, the Commission's findings were not arbitrary, capricious, or an abuse of discretion.

III. STANDARD OF REVIEW

The Court of Appeal has jurisdiction to review the Commission decisions at issue pursuant to section 1756. Subdivision (a) of this statutory provision provides that "any aggrieved party may petition for a writ of review in the court of appeal . . . ." However, granting a writ of review of Commission decisions under section 1756 is discretionary rather than mandatory. (*Pacific Bell Wireless, LLC v. Public Utilities Commission* (2006) 140 Cal.App.4th 718, 729; *Pacific Bell v. Public Utilities Commission* (2000) 79 Cal.App.4th 269, 272.) The plain language of the statute provides that: "*If* the writ issues, it shall be made returnable at a time and place specified by court order . . . ." (Pub. Util. Code, § 1756, subd. (a) (emphasis added).) Thus, the Court is "not compelled to issue the writ if the [Commission] did not err . . . ." (*Pacific Bell v. Public Utilities Commission*, *supra*, 79 Cal.App.4th at p. 279; see also, *Southern California Edison Company v. Public Utilities Commission* ("*Edison v. PUC*") (2005) 128 Cal.App.4th 1, 13-14, rehg. den. 2005 Cal.App. Lexis 745 ("[T]he court need not grant a writ if the petitioning party fails to present a convincing argument that the decision should be annulled"].)

The Court's review of the challenged Commission decisions is governed by section 1757. The statute provides that the Court's review 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.

(Pub. Util. Code, § 1757, subd. (a).)

Under this standard, the Court is to determine whether the Commission acted contrary to a statute, contrary to the state or federal constitution, in excess of its jurisdiction, as a result of fraud, or in abuse of its discretion. In addition, the Court is to determine whether the Commission's decision is supported by findings, and whether those findings are in turn supported by "substantial evidence in light

of the whole record."[11]

Court review is subject to the "substantial evidence in light of the whole record" standard: " '[T]he power of an appellate court begins and ends with the determination as to whether, on the entire record, there is substantial evidence . . . . If such substantial evidence be found, it is of no consequence that the [the decision-maker] believing other evidence, or drawing other reasonable inferences, might have reached a contrary conclusion.' " (9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 362, p. 412, citing *Bowers v. Bernards* (1984) 150 Cal.App.3d 870.)[12] It is the Commission and not the Court that weighs the evidence. (*Eden Hospital District v. Belshe* ("*Eden Hosp. Dist.*") (1998) 65 Cal.App.4th 908, 915.) Thus, this Court's function is not to hold a trial *de novo*, but to review the entire record to determine whether the Decision's conclusions are reasonable and supported by evidence. (See Pub. Util. Code, § 1757, subd. (b).)

Where constitutional issues are raised, section 1760 specifies the standard of review. This statutory provision provides: "Notwithstanding sections 1757 and 1757.1, in any proceeding wherein the validity of any order or decision is challenged on the ground that it violates any right of petitioner under the United States Constitution or the California Constitution, the Supreme Court or Court of

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[11] Factual findings by the Commission "are not open to attack for insufficiency if they are supported by any reasonable construction of the evidence." (*Toward Utility Rate Normalization v. Public Utilities Commission* ("*TURN v. PUC*") (1978) 22 Cal.3d 529, 537-538 (citation omitted).)

[12] See also Pierce Administrative Law Treatise (5th ed. 2010) Judicial Review of Adjudications, § 11.4, pp. 1020-1021.

Appeal shall exercise independent judgment on the law and the facts, and the findings or conclusions of the commission material to the determination of the constitutional question shall not be final." (Pub. Util. Code, § 1760.)

However, as the California Supreme Court has explained, section 1760 does not greatly alter the Court's review of this Commission's decisions: "The provisions of [S]ection 1760 . . . authorizing an independent judgment on the law and the facts in cases in which an order or decision is challenged on constitutional grounds, do not authorize this court to substitute its own judgment as to the weight to be accorded evidence before the Commission." (*Goldin v. Public Utilities Commission* ("*Goldin v. PUC*") (1979) 23 Cal.3d 638, 653; see also, *Pacific Telephone & Telegraph Company v. Public Utilities Commission* ("*Pac. Tel. & Tel.*") (1965) 62 Cal.2d 634, 646.)

In *Greyhound Lines, Inc. v. Public Utilities Commission* ("*Greyhound Lines*") (1968) 68 Cal.2d 406, the California Supreme Court noted that there is a "strong presumption of validity of the [C]ommission's decisions." (*Id.* at pp. 410-411 (citations omitted); see also *Pacific Bell v. Public Utilities Commission, supra,* 79 Cal.App.4th at p. 283 [Courts will not disturb Commission decisions absent a "manifest abuse of discretion or an unreasonable interpretation of the statutes" at issue]; *Southern California Edison Company v. Public Utilities Commission* (2000) 85 Cal.App.4th 1086, 1096.) Further, in *Wise v. Pacific Gas & Electric Company* (1999) 77 Cal.App.4th 287, the Court noted that the Commission "is not an ordinary administrative agency, but a constitutional body

with broad legislative and judicial powers." (*Id*. at p. 300; see also *Southern California Edison Company v. Public Utilities Commission*, *supra*, 85 Cal.App.4th at p. 1096.)

In the present case, the Commission proceeded entirely in the manner required by law. Therefore, the Commission respectfully requests that the Petition be denied.

IV. ARGUMENT

A. Inverse Condemnation Is A Doctrine Applied By The Courts In The Context Of Civil Claims For Damages.

Inverse condemnation is a judicially developed doctrine that operates as a reverse eminent domain proceeding.[13] Both derive from the constitutional principle that private property may not be "taken" or damaged for public use without just compensation. (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.)[14] 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).

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[13] See, e.g., *Belair v. Riverside County Flood Control District* ("*Belair*") (1988) 47 Cal.3d 550, 558, citing *Albers v. County of Los Angeles* ("*Albers*") (1965) 62 Cal.2d 250, 263-264.

[14] See also *San Diego Gas & Electric Company v. The Superior Court of Orange County* ("*Covalt*") (1996) 13 Cal.4th 893, 939-940, citing Cal. Const., art. I, § 19; U.S. Const., 5th Amend.

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 to real property. But it can also compensate for the loss of personal property. (*Marshall, supra,* 219 Cal.App.3d at pp. 1138-1139, citing *Aetna Life and Casualty Company v. City of Los Angeles* ("*Aetna*") (1985) 170 Cal.App.3d 865, 877-878.)[15]

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. (*Marshall, supra,* 219 Cal.App.3d 1124, 1138-1139, citing *Souza v. Silver Development Company* ("*Souza*") (1985) 164 Cal.App.3d 165, 170.) All a plaintiff need establish is a causal relationship between the governmental activity and the property loss complained of, i.e., proximate cause. It appears to be a fairly minimal standard. 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. (*Marshall, supra,* 219 Cal.App.3d at p. 1139.)[16]

The policy underlying inverse condemnation is one of cost sharing or cost-spreading. It is intended to relieve individual property owners from the economic

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[15] Inverse condemnation cases generally involve damage not normally covered by insurance. (*Aetna, supra,* 170 Cal.App.3d at p. 873.)

[16] The Courts have allowed certain exceptions from strict liability. (See, e.g., *Belair, supra,* 47 Cal.3d at pp. 553-554; *Locklin v. City of Lafayette* ("*Locklin*") (1994) 7 Cal.4th 327, 337.)

burden of damages by spreading the costs among the larger community of individuals that benefit from the public improvement. (See, e.g., *Barham v. Southern California Edison Company* ("*Barham*") (1999) 74 Cal.App.4th 744, 752.)

In the past, the Courts only applied inverse condemnation to local public or governmental entities such as a City Department of Water and Power. More recently, suits invoking this doctrine have been allowed against Commission-regulated, investor-owned public utilities.[17]

Case law suggests that in extending inverse condemnation liability to investor-owned utilities, the Courts have reasoned there are functional similarities between local public or government entities and regulated investor-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), Commission-regulated utilities have no taxing authority. Regulated utilities can only increase rates with Commission approval. (*Pacific Bell Telephone Company v. Southern California Edison Company* ("*Pac Bell*") (2012) 208 Cal.App.4th 1400, 1407-1408.) But the Court said only that SCE failed to prove the Commission would not allow it to pass along costs to its customers. (*Pac Bell, supra,* 208 Cal.App.4th at pp. 1407-1408.)

[17] For purposes of this Answer, the term utility is used to mean Commission-regulated privately-owned public utilities. The term does not include publicly-owned utilities.

To date, nothing in the relevant case law suggests that the Courts have directly grappled with whether inverse condemnation should apply to regulated utilities in light of the fact that they are subject to the exclusive jurisdiction of this Commission, including the Commission's exclusive authority to set utility rates and allocate costs.[18]

B. The Commission Lawfully Found That Evaluation of Petitioner's Request For Cost Recovery Was Governed By Section 451 And The Associated Prudent Manager Standard.

After the 2007 Wildfires, more than 2,500 civil lawsuits were filed against Petitioner by property owners and governmental entities seeking recovery for damages caused by the fires. The San Diego Superior Court ruled that the civil plaintiffs could bring a cause of action against Petitioner under the doctrine of inverse condemnation.[19]

Because Cal Fire determined that the Witch, Guejito, and Rice fires were caused by Petitioner's electric facilities, Petitioner stated that fully litigating the damage claims was too great a financial risk given the potential inverse condemnation liability. Petitioner therefore settled the claims, in lieu of litigating the actions to conclusion. In its 2015 application to the Commission, Petitioner stated that the $379 million represented claim amounts not otherwise covered by

[18] Cal. Const., art. XII, §§ 1-6.

[19] Petition ("Pet."), p. 29. (See also SDG&E Application, at Pet. App., Vol. 1, p. 59, citing *In re 2007 Wildfire Insurer Litigation* (Super. Ct. San Diego Cty., January 29, 2009) Minute Orders Overruling SDG&E's Demurrers to the Master Complaints, No. 37-2008-00093083-CU-NP-CTL.

its liability insurance, settlements with third parties, or cost recovery from the Federal Energy Regulatory Commission ("FERC").[20]

Because Petitioner settled the claims, the Superior Court never formally determined that Petitioner was strictly liable under inverse condemnation. Nevertheless, Petitioner contends liability was inevitable. As a result, Petitioner argues the Commission was bound to effectuate the cost-spreading principle of inverse condemnation and require its ratepayers to absorb the $379 million in outstanding damages costs.

1. Petitioner is wrong that the Commission should have allowed cost recovery under inverse condemnation's cost-spreading policy irrespective of the law governing Commission regulation of investor-owned public utilities.

The Commission's application of Section 451 and the Prudent Manager Standard was both lawful and proper in this case. That conclusion is based on the nature of the Commission's authority, and the limitations thereon. Specifically, Commission regulation of investor-owned public 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:

[20] SDG&E Application, at Pet. App. Vol. 1, p. 63. [Total WEMA costs of $2.4 billion.].

> All charges demanded or received by any public utility…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, § 451 (emphasis added.).)[21]

Pursuant to this requirement, utility cost recovery is permissible only if requested rates, costs, and charges are deemed "just and reasonable." The converse is also true. Costs or charges deemed unjust or unreasonable are unlawful and must be denied.[22]

The Commission 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:

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[21] The reasonable and prudent principle is reflected throughout the Public Utilities Code. (See, e.g., Pub. Util. Code §§ 463, subd. (a), 463.5 & 464.)

[22] Petitioner cites *Holtz v. Superior Court of San Francisco* ("*Holtz*") (1970) 3 Cal.3d 296, 303, and *Mercury Casualty Co. v. City of Pasadena* ("*Mercury Casualty*") (2017) 14 Cal.App.5th 917, 925, to argue it is just and reasonable for ratepayers to absorb any and all costs that a Court may find a utility to be liable for under inverse condemnation. (Pet., pp. 46-47.) That is incorrect. These cases go only so far as to discuss the general cost-spreading policy behind inverse condemnation. They are silent regarding Section 451 and its statutory reasonableness mandate.

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

Petitioner's challenge raises the following question: could or must the Commission have foregone Section 451 and the associated Prudent Manager review in lieu of applying inverse condemnation cost-spreading principles? For at least two reasons, the answer to that question is no.

First, inverse condemnation is a doctrine to be applied by the Courts, not the Commission. The doctrine is relevant to the litigation of civil damages claims. It is well settled that the Commission has no jurisdiction to litigate such cases or award damages. (Pub. Util. Code, § 2106.)[23]

By extension the Commission also has no jurisdiction to render determinations as to whether inverse condemnation or other legal tort doctrines should be applied in the context of assessing damages claims.[24] Those issues are

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[23] See also, e.g., *Bereczky v. Southern California Edison Company* [D.96-03-009] (1996) 65 Cal.P.U.C.2d 145, 147; *Balding v. Southern California Edison Company* [D.96-11-055] (1996) 69 Cal.P.U.C.2d 313, 315; *Vila v. Tahoe Southside Water Utility* (1965) 223 Cal.App.2d 469, 479-480.

[24] The Commission does not typically address civil liability issues. (See, e.g., *Re Southern California Edison Company* [D.84-09-120] (1984) 16 Cal.P.U.C.2d 249, 283.)

for the Courts, not the Commission.

Second, even if the Superior Court had found Petitioner to be strictly liable for the costs at issue here, the Commission was bound to apply Section 451 and related cost recovery principles. Article III, Section 3.5 of the California Constitution expressly prohibits the Commission from foregoing its own statutory obligations, stating:

> Sec. 3.5 An administrative agency, including an administrative agency created by the Constitution or an initiative statute, has no power:
>
> (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. III, § 3.5.)[25]

To date, no Appellate Court has determined that Section 451 is unconstitutional, unenforceable, or prohibited by federal law.

Petitioner proposes that because inverse condemnation holds public and government entities strictly liable regardless of whether their actions were

[25] See also *The Burlington Northern and Santa Fe Railway Company et al. v. Public Utilities Commission* (2003) 112 Cal.App.4th 881, 887.

reasonable and prudent, the same must be true for investor-owned utilities. (Pet., pp. 47-48, citing *Barham, supra*, and *Pacific Bell v. City of San Diego* ("*Pacific Bell*") (2000) 81 Cal.App.4th 596.)

However, as noted above, no case law reflects that an Appellate Court has ever directly considered the interplay between inverse condemnation and the exclusive constitutional authority of the Commission and its statutory obligations under Section 451 in extending the doctrine to Commission-regulated utilities. For example, the Courts have not considered whether the application of inverse condemnation to Commission-regulated utilities interferes with the Commission's established regulatory policies and its exclusive authority to set rates and determine issues of cost recovery and cost allocation. (See, e.g., *Koponen v. Pacific Gas & Electric Company* (2008) 165 Cal.App.4th 345, 351 ["Under the *Waters* rule…an action for damages against a public utility pursuant to section 2106 is barred by section 1759 not only when an award of damages would directly contravene a specific order or decision, but also when an award of damages would simply have the effect of undermining a general supervisory or regulatory policy of the commission, i.e., when it would 'hinder' or 'frustrate' or 'interfere with' or 'obstruct' that policy." (citation omitted.).].)[26]

Similarly, nothing indicates the Courts have considered that applying inverse condemnation, i.e., deeming ratepayers responsible for all damages costs

[26] See also *Waters v. Pacific Telephone Co.* (1974) 12 Cal.3d 1, 4; *Covalt, supra*, 13 Cal.4th at pp. 916-918.

regardless of the reasonableness of a utility's conduct, creates a number of perverse incentives. Among them are:

- Limitless potential for ratepayers to fund third-party claims, including fire suppression and environmental damage, which all but invites governmental entities and others to submit claims to utilities;
- No incentive for utilities to defend against third-party claims, leaving ratepayers without any practical means to protect their interests; and
- The presumption of recovery of third-party claims undermines financial incentives for prudent risk management and compliance with safety regulations.

(See, e.g., D.12-12-029, *supra*, at pp. 1-2 (slip op.).)

Petitioner does not address any of these issues, admitting only that the Courts have assumed the cost-spreading policy of inverse condemnation would be satisfied via cost recovery. (Pet., pp. 45-46; SDG&E Rhg. App., at Pet. App., Vol. 31, p. 11876.)

Assumptions do not constitute legal mandates. Accordingly, unless or until the Appellate Courts or the Legislature provide otherwise, the Commission's treatment of utility cost recovery is bound by the legislative mandate of Section 451.

Petitioner also claims the Commission failed to properly harmonize Section 451 with inverse condemnation. (Pet., p. 49.) In its rehearing application, Petitioner argued *PG&E Corporation v. Public Utilities Commission* ("*PG&E Corp.*") (2004) 118 Cal.App.4th 1174, 1199 required the Commission to harmonize Section 451 in a manner that would allow cost recovery without regard

to the Prudent Manager Standard. (SDG&E Rhg. App., at Pet. App., Vol. 31, pp. 11877-11880.).

PG&E Corp. states only 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.) That might have been relevant if a statute directed the Commission to allow cost recovery when a Court finds a utility to be strictly liable under inverse condemnation. It might also have been relevant if a statute prohibited the Commission from applying its own Section 451 standards in that instance. But there were no such legislative directives or prohibitions. And Petitioner can point to none.

Finally, Petitioner cites *Re San Diego Gas & Electric Company* 146 FERC P63,017 to argue that even FERC authorized rate recovery for certain damages costs arising from the 2007 Wildfires. (Pet., pp. 48-49.)

In that case, Petitioner requested WEMA cost recovery as part of its federal Transmission Owner rate case. (*Id.* at ¶¶ 1-4.) A FERC rate case is a very different type of review than a Commission Prudent Manager review. Further, while FERC looks generally to the reasonableness of a utility's conduct, it applies a far different standard of review. FERC presumes that any requested costs are reasonable unless there is a specific challenge that casts "serious doubt" on the prudency of a utility's request. (*Id.* at ¶¶ 37-38.)

This Commission applies no similar presumption, and FERC's findings were not binding on the Commission. The law governing Commission regulation

requires utilities to prove that all costs sought to be recovered from customers are just and reasonable. (See, e.g., *Re Southern California Edison Company* [D.84-09-120] (1984) 16 Cal.P.U.C.2d 249, 283 [Stating: "It would be unconscionable from a regulatory perspective to reward such imprudent activity by passing the resultant costs through to ratepayers."]; *Re Pacific Gas and Electric Company* [D.85-08-102] (1985) 18 Cal.P.U.C.2d 700, 709 ["This Commission has always placed the burden of proving the reasonableness of rate increases upon utility applicants."].)[27] Petitioner failed to meet that burden here.

2. The Commission's determination did not produce an unjust or unreasonable result.

Petitioner contends nothing in Section 451 requires application of the Prudent Manager Standard to "inverse condemnation rate recovery claims," and nothing requires application of the standard in all cases.[28] (Pet., pp. 49-52, citing *Re Southern California Gas Company* [D.92-11-030] (1992) 46 Cal.P.U.C.2d 242; *Re Southern California Gas Company* [D.94-05-020] (1994) 54 Cal.P.U.C.2d 391;

[27] See also, e.g., *Application of Pacific Gas and Electric Company for Authority, Among Other Things, to Increase Rates and Charges for Electric Service Effective January 1, 1999, and Related Matters* [D.00-02-046] (2000) 4 Cal.P.U.C.3d 315, 339-341; *In the Matter of the Application of Pacific Bell, a Corporation, for Authority to Increase Certain Intrastate Rates and Charges Applicable to Telephone Services Furnished Within This State of California* [D.87-12-067] (1987) 27 Cal.P.U.C.2d 1, 21-23, 34-38.

[28] The Commission made clear in 2012 that Petitioner's cost recovery would be subject to traditional reasonableness review. (See, *ante*, fn. 5.) That determination was never challenged. And Petitioner's attempts to circumvent and/or limit the scope of the Commission's review should be rejected. (Pub. Util. Code, §§ 1709, 1731, subd. (b); *Coast Truck Line v. Asbury Truck Co.* (1933) 218 Cal. 337.)

and *Re San Diego Gas & Electric Company* [D.98-12-049] (1998) 83 Cal.P.U.C.2d 436.) This argument should be rejected.

It is incorrect to characterize this as an "inverse condemnation" cost recovery claim. Even if Petitioner had been deemed strictly liable under inverse condemnation, which it was not, this was nothing but a straight up request for cost recovery. Section 451 applies to *all* such requests, thus they are all subject to reasonableness review with very few exceptions.

D.92-11-030, *supra,* and D.94-02-020, *supra*, reflect an exception allowed for certain hazardous waste cleanup costs. Nothing in these decisions suggests a utility could recover unreasonable costs. But the unique circumstances in such cases led the Commission and stakeholders to forego traditional reasonableness review in favor of a specified formula for allocating costs between ratepayers and shareholders. (D.92-11-030, *supra*, 46 Cal.P.U.C.2d at pp. 244, 246-247; D.94-05-020, *supra*, 54 Cal.P.U.C.2d at pp. 393-395.)

D.98-12-049, *supra,* reflects another exception in the case of settlements. (D.98-12-049, *supra,* 83 Cal.P.U.C.2d at pp. 436-440.) Again, nothing suggests unreasonable costs could be approved. (Settlements must be reasonable in light of the whole record, consistent with the law, and in the public interest (Commission Rule of Practice and Procedure 12.1(d); Cal. Code of Regs., tit. 20, § 12.1(d.).)[29]

[29] Settlements are neither binding nor precedential as to the principles or issues for purposes of any future proceeding. (Commission Rule of Practice and Procedure 12.5; Cal. Code of Regs., tit. 20, § 12.5.)

But settlements are also instances where parties often agree to forego a reasonableness review and simply agree to a cost allocation.

That Petitioner has found and cited such exceptions does not establish that any similar treatment was warranted here. Further, even in a typical reasonableness/Prudent Manager review, the Commission may apportion costs between ratepayers and shareholders where warranted.[30] The facts of this case just did not support that outcome.

Petitioner also contends that by not allowing it to pass WEMA costs on to ratepayers, the Commission subjected it to a "legal whipsaw." Petitioner goes on at some length discussing "grave practical consequences" of a Court imposing strict liability and the Commission denying cost recovery. For example, Petitioner alleges dire economic impacts to utility insurance costs, capital costs, and credit ratings, etc.. (Pet., pp. 52-57.)

Petitioner's argument should be rejected for four reasons. First, it is all new argument not previously part of its application for rehearing before the Commission. New argument and evidence at this juncture are prohibited by statute, and should not be considered by the Court. (Pub. Util. Code, § 1732 ["No corporation or person shall in any court urge or rely on any ground not so set forth

[30] Costs deemed to be reasonably and prudently incurred would be recoverable in rates to be paid by the utility's ratepayers, while costs unreasonably and imprudently incurred would be the responsibility of the utility's shareholders.

in the application."], & § 1757, subd. (a) ["No new or additional evidence shall be introduced upon review by the court."].)

Second, these are policy issues which have absolutely no bearing on the lawfulness of the Commission's determination and its statutory obligation to ensure that only just and reasonable costs be passed on to a utility's ratepayers.

Third, Petitioner wrongly suggests that its imprudence had no causal connection to the 2007 Wildfires that gave rise to the damages costs. As discussed in Part IV.C. below, there was sufficient causation to support the Commission's Decisions.

Finally, it is not a Commission reasonableness review that is the problem. The Commission has been carrying out this regulatory function for decades. And the utilities have remained economically viable. The problem, to the extent there is one, is the potential impact of subjecting Commission-regulated utilities to strict liability. But that is a question for the Courts, not the Commission. Under the law that applied to this case, the Commission properly and lawfully applied Section 451 and the Prudent Manager Standard. That inverse condemnation is indifferent regarding the reasonableness of a utility's conduct did not override, negate, or nullify the Commission's own statutory obligations.

3. The Commission's determination was lawful under the California and United States Constitutions.

The California and United States Constitutions prohibit the government from "taking" private property for public use without just compensation. (Cal.

Const., art. I, § 19; U.S. Const., 5th Amend.) As applied to utilities, Courts have stated the guiding principle is 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.)

Generally, there are two types of taking arguments: (1) economic taking; and (2) the physical taking of property. Petitioner alleges an economic taking. Specifically, that the denial of WEMA cost recovery, i.e., the ability collect the $379 million from its ratepayers, was an unlawful taking of money to which Petitioner claims it had a "specific and identifiable property interest." (Pet., pp. 57-61, citing *Koontz v. St. Johns River Water Mgmt. Dist.* ("*Koontz*") (2013) 570 U.S. 595; *Brown v. Legal Foundation of Washington* ("*Brown*") (2003) 538 U.S. 216; *Webb's Fabulous Pharmacies v. Beckwith* ("*Webb's*") (1980) 449 U.S. 155; and *Ponderosa Telephone Co. v. Public Utilities Commission* ("*Ponderosa*") (2011) 197 Cal.App.4th 48.)[31]

[31] Petitioner also cites *People v. Gutierrez* (2014) 58 Cal.4th 1354, to suggest there is an impermissible conflict between Section 451 and inverse condemnation. But the case in fact states that when faced with questions of statutory interpretation implicating constitutional issues, the Courts will generally construe a statute to avoid any conflict. (*Id.* at pp. 1372-1373.) The Court did so there in finding a criminal sentencing statute did not violate the constitutional right against cruel and unusual punishment because it carried no presumption of the harshest sentencing. (*Id*. at pp.1360-1361.) The same can be said with Section 451. It carries no presumption that cost recovery will be denied. Denial will occur only if the requested costs are deemed unjust and unreasonable.

Petitioner's reliance on the cited cases is flawed. The cases show where a taking has been found, individuals or entities had an existing and identifiable interest in real property or money. (See., e.g., *Koontz, supra,* 570 U.S. at pp. 595, 613-614 [existing ownership interest in real property]; *Brown, supra,* 538 U.S. at pp. 220-221, 234-235 [individual interest in amounts earned on principal in client trust funds]; *Webb's, supra,* 449 U.S. at pp. 155, 160-162 [individual interest in amounts accrued on principal in an interpleader account]; *Ponderosa, supra,* 197 Cal.App.4th at pp. 50-52 [ownership interest in stock proceeds].) The same is not true here.

Regulated utilities have no similar existing and identifiable interest because they are not entitled, as a matter of right, to realize any particular cost recovery. And nothing in the State or United States Constitutions establishes such an interest or guarantees recovery.[32] "That a particular rate may not cover the costs of a particular good or service does not work a confiscation in and of itself." (*20th Century Ins., supra,* 8 Cal.4th at p. 293.)

Further, a regulated utility has neither a constitutional right to profit nor constitutional right against a loss. (*Id.* at p. 294.) For example, "[T]he fixing of

[32] In the context of utility ratemaking or cost recovery, the Courts have found that an unlawful taking or confiscation does not occur unless a regulation or cost to be recovered is unjust and unreasonable. (*Duquesne, supra,* 488 U.S. at p. 307; *20th Century Insurance Co. v. Garamendi* ("*20th Century Ins.*") (1994) 8 Cal.4th 216, 292.) 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. (*Federal Power Commission v. Hope Natural Gas Company* ("*FPC v. Hope*") (1943) 320 U.S. 591, 603; *20th Century Ins., supra,* 8 Cal.4th at p. 293.)

prices, like other applications of the police power, may reduce the value of property which is being regulated. But the fact that the value is reduced does not mean that the regulation is invalid." (*FPC v. Hope, supra,* 320 U.S. at p. 601.)

In addition, although "regulation does not insure that the business shall produce net revenues…the investor interest [does have] a legitimate concern with the financial integrity of the company whose rates are being regulated …. [Thus any rate or] return should be sufficient to assure confidence in the financial integrity of the enterprise, so as to attract capital." (*Id.* at p. 603.) But 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.)" (*20th Century Ins., supra*, 8 Cal.4th at p. 293.)

For Petitioner to establish a taking here, it would have to show: (a) it had a protected interest in cost recovery; (b) there was an unlawful withholding of the requested money; and (c) the taking was for a public purpose. (See, e.g., *Bronco Wine Company v. Jolly* ("*Bronco Wine*") (2005) 129 Cal.App.4th 988, 1030.) Petitioner fails to make this case.[33]

Further, case law instructs that in determining whether a taking occurred, a Court will look to whether a regulation (e.g., Section 451 review) "goes too far."

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[33] The hallmark of a protected property interest is an individual entitlement grounded in State law. (See, e.g., *Logan v. Zimmerman Brush Company* (1982) 455 U.S. 422, 430-431.) Petitioner points to no State law establishing such an entitlement. To the contrary, State law requires all cost recovery to be just and reasonable.

The inquiry in any case is "ad hoc" and "a question of degree." And claims of unlawfulness cannot be disposed of by "general propositions." (See, e.g., *Kavanau v. Santa Monica Rent Control Board* ("*Kavanau*") (1997) 16 Cal.4th 761, 773-774.) That is exactly the approach Petitioner takes here. Petitioner simply recites the general cost-spreading policy of inverse condemnation. It is a correct restatement of the policy. But that is not enough to establish any unlawful taking occurred.

Even if the Court were to look at other relevant factors, there was no unlawful taking here. For example, where there is no clear taking it is reasonable to look at issues such as: (1) the economic impact of a regulation on the claimant; (2) the extent to which the regulation interfered with investment-backed expectations; (3) the character of the government action; and (4) the nature of the State's interest in the regulation. (*Id.* at pp. 773-775.)[34]

The Commission has never denied that a denial of cost recovery can have a negative economic impact on a utility. Yet, the mandate of Section 451 is clear. To be compensable, *all* costs and charges demanded or received by a public utility *must* be just and reasonable. As discussed below, they were not in this case.

Petitioner counters that the Takings Clause supersedes agency practice, thus there is nothing unjust or unreasonable about assigning the economic burden of the $379 million to society, i.e., to Petitioner's ratepayers. (Pet., p. 60.)

[34] See also *Keystone Bituminous Coal Assn. v. DeBenedictis* (1987) 480 U.S. 470, 488; *Pennsylvania Coal Co. v. Mahon* (1922) 260 U.S. 397, 413-414.

The Takings Clause has never been interpreted to provide an absolute guarantee of cost recovery to regulated utilities. The character of the Commission's determination was in keeping with the Commission's statutory obligations and established cost recovery practice. And the Commission has a substantial interest in protecting consumers (ratepayers) from exorbitant, unjust, and unreasonable rates. That is the very foundation of utility regulation. (Cal. Const., art. XII, § 6: Pub. Util. Code, §§ 451, 454, subd. (a), 728; *Washington Gas Light Co. v. Baker* (D.C. Cir. 1950) 188 F.2d 11, 15 [Consumers must rely upon the Commission to provide protection from excessive rates or cost recovery.].)

For these reasons, the Commission respectfully requests that the Court uphold the Commission's determination as reasonable and lawful.

C. The Commission Lawfully Applied Section 451 And The Prudent Manager Standard To Find That Petitioner Was Prohibited From Recovering $379 Million From Its Ratepayers.

As noted above, in effectuating the mandate of Section 451, the Commission conducts reasonableness reviews in which it applies its longstanding Prudent Manager Standard. This is not the same as a tort/negligence inquiry. Commission regulations do incorporate certain negligence-based concepts. But the Commission has repeatedly found that traditional tort/negligence determinations are appropriately left to the Courts. (See., e.g., D.84-09-120, *supra*, 16 Cal.P.U.C.2d at p. 283; *Order Instituting Investigation into Southern California Edison Company's Electric Line Construction, Operation, and*

Maintenance Practices [D.04-04-065] (2004) at pp. 15-17.) The Commission's Prudent Manager inquiry has been stated 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.)[35]

In D.02-08-064 the Commission provided further guidance, stating:

> 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.).)[36]

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[35] See also, e.g., *Re PG&E* [D.85-08-102], *supra,* 18 Cal.P.U.C.2d at pp. 709-710.

[36] See also, e.g., *Application of San Diego Gas & Electric Company and Southern California Gas Company to Recover Costs Recorded in Their Pipeline Safety and*

(footnote continued on next page)

The Commission has 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.

(*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 pp. 31, 36 (slip op.).)[37]

These broad concepts guide all Prudent Manager reviews. However, each case must be evaluated in light of its individual facts and circumstances, the strength of the utility's evidentiary showing, and the evidence presented by other interested parties. In this case, evidence was presented by Petitioner, the Office of Ratepayer Advocates ("ORA"), the Utility Consumers' Action Network ("UCAN"), Protect Our Communities ("POC"), Ruth Hendricks, San Diego Consumers' Action Network ("SDCAN"), and the Mussey Grade Road Alliance ("MGRA").

(footnote continued from previous page)

Reliability Memorandum Accounts [D.16-12-063] (2016) at pp. 8-10 (slip op.).

[37] See also, e.g., [D.84-09-120], *supra*, 16 Cal.P.U.C.2d at p. 283 ["…the burden of proof is on the utility applicant to establish the reasonableness of the energy expenses sought to be recovered….Unless PG&E meets the burden of proving…the reasonableness of all the expenses it seeks to have reflected in rate adjustments, those costs will be disallowed (citation omitted.)….It would be unconscionable from a regulatory perspective to reward such imprudent activity by passing the resulting costs through to ratepayers."].

Petitioner challenges the Commission's Prudent Manager determination alleging: (1) there was insufficient evidence to prove Petitioner failed to reasonably and prudently operate and maintain its system; and (2) there was no causal nexus between any imprudence and the wildfires. (See, e.g., Pet., pp. 61.)

Petitioner tries to cast doubt on the Commission's evidentiary findings by either shifting the burden of proof onto the Commission, or by citing to isolated portions of evidence and argument that support its own desired result. The Commission respectfully requests that the Court reject such an approach.

It was not the burden of this Commission or any other party to prove Petitioner's actions were unreasonable and imprudent. It was Petitioner's burden to prove the opposite, and it simply failed to meet that burden here. In addition, case law instructs that the Court's review should be guided by the following principles:

> The power of an appellate court begins and ends with the determination as to whether there is any substantial evidence contradicted or uncontradicted which will support the finding of fact….It will not reweigh the evidence….A reviewing court begins and ends with the ' "presumption that the record contains evidence to sustain every finding of fact." ' ….To overcome the trial court's factual findings, PG&E must "demonstrate that there is *no* substantial evidence to support the challenged findings.…A recitation of only defendants' evidence is not the 'demonstration' contemplated under the above rule….[defendants] are required to set forth in their brief *all* the material on the point and *not merely their own evidence.*"

(*Road Sprinkler Fitters Local Union No. 669 v. G&G Fire Sprinklers, Inc.* ("*Road Sprinkler Fitters*") (2002) 102 Cal.App.4th 765, 781-782 (emphasis added.).)

The Courts have also generally found that:

> "…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….when conflicting evidence is presented from which conflicting inferences can be drawn, the commission's findings are final."

(*TURN v. PUC, supra,* 22 Cal.3d at pp. 537-538.)[38]

Generally, it is for the agency, as trier of fact, to form its own conclusions as to the probative value of the evidence, determine the credibility of the witnesses and their testimony, and weigh any conflicting evidence. (See, e.g., *Market Street Railway v. Railroad Commission* ("*Market Street Railway*") (1945) 324 U.S. 548, 558-559; *Pacific Telephone & Telegraph Co. v. Public Utilities Commission* ("*Pac. Tel. & Tel.*") (1965) 62 Cal.2d 634, 645-648.)[39] An agency's determination should only be reversed if, based on the evidence before the agency, a reasonable person could not have reached the same conclusion. (See, e.g., *Eden Hosp. Dist., supra,* 65 Cal.App.4th at pp. 915-916.)

The evidence in this case was sufficient to support the Commission's determination. That Petitioner disagrees with the Commission's findings and

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[38] See also *Bowers v. Bernards* (1984) 150 Cal.App.3d 870, 873-874 [Adding: "if such substantial evidence can be found, it is of no consequence that the trial court believing other evidence, or drawing other reasonable inferences, might have reached a contrary conclusion."].

[39] See also *Leonard v. Watsonville Community Hospital* ("*Leonard*") (1956) 47 Cal.2d 509, 518. (Pub. Util. Code, § 1757, subd. (b) [The Court is "not permit[ted] to hold a trial de novo," to take new evidence, "or exercise independent judgment on the evidence."].)

conclusions is not a legitimate ground for reversal. (*Southern California Edison Company v. Public Utilities Commission* (2005) 128 Cal.App.4th 1, 8.)

Petitioner also claims the Commission stated that no causation was required under the Prudent Manager Standard. (See, e.g., Pet., pp. 37, 70, citing e.g., D.18-07-025, at Pet. App., Vol. 31, pp. 12301, 12311.) That is not what the Commission said.

The Commission merely recognized that it is theoretically possible for a fire caused by utility facilities to start even if a utility reasonably and prudently operated and maintained its facilities. And if that were the case, cost recovery may be permissible. In this case, the Commission said that by failing to take some actions at all, and/or imprudently conducting others, it was not possible to find that Petitioner met its burden under the Prudent Manager Standard. For that reason, cost recovery was lawfully denied.

In addition, there was never any dispute that Petitioner's facilities caused all three of the 2007 Wildfires. And based on the record, the Commission found multiple instances of imprudence in Petitioner's operation and maintenance of its system. Petitioner cannot escape those facts no matter how hard it tries, and they were sufficient to support the denial of cost recovery.

1. Petitioner did not meet its burden to prove that it reasonably and prudently operated and maintained its facilities in connection with the Witch Fire.

Cal Fire determined that the Witch Fire was caused by Petitioner's 14-mile long 69 kilovolt ("kV") electric 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.[40] Petitioner's automatic reclosers re-energized the line after each of the faults. But the repeated re-energization caused arcing after the third fault that in turn caused hot particles to ignite vegetation below the line. (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.)

Petitioner never disputed these facts, but alleges the Commission conducted an improper hindsight review that held it to an unreasonable standard of perfection. Petitioner contends the Commission unreasonably found Petitioner imprudent for: (a) failing to adequately monitor the faults; (b) failing to send a protective engineer to identify the fault locations; and (c) failing to more timely de-energize TL 637. (Pet., pp. 61-74.)

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[40] 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 3 hours after the fire started and 2.5 hours after Petitioner's Grid Operations became aware of it. (D.17-11-033, at Pet. App., Vol. 31, pp. 11787-11788; ORA-2, at Pet. App., Vol. 4, p. 1650; SDG&E-11, at Pet. App., Vol. 18, p. 7354; SDG&E-11-A, at Pet. App., Vol. 22, pp. 8671-8673.)

There was nothing improper about the Commission's evaluation. Reasonableness reviews are, by their very nature, after the fact or "hindsight" evaluations of the events that gave rise to the costs being sought by a utility. It is inherent to the timing of the process. That does not mean the timing was improper or that a perfection standard was expected. Petitioner simply failed to show that its actions were reasonable and prudent in light of what it knew or should have known, and consistent with expected utility practice in the interest of maintaining system reliability and safety.

a) Petitioner failed to reasonably and prudently monitor the faults on transmission line 637.

Petitioner states that at the time of the fires it had industry-leading policies and procedures, including those for maintenance, inspections, and vegetation management. Petitioner also states that its recloser policy was industry standard and it had special procedures for Red-Flag wind conditions. Petitioner contends that it promptly responded to the faults on TL 637 by dispatching troubleshooters to its substations after the first two faults, and dispatching a patrolman after the third fault. (Pet., pp. 62-64.)

The Commission appreciates the merits of having industry standard policies and procedures. But policies alone are not proof that a utility's actions were reasonable and prudent in any given instance. (See, e.g., *Re Southern California Edison Company* [D.94-03-048] 53 Cal.P.U.C.2d, 452, 465-466.)

In addition, while it was good to dispatch troubleshooters and a patrolman, it was reasonable to expect more of a prudent manager given the Santa Ana wind conditions, the fact that multiple faults were occurring on TL 637, and the back country location of the line that made it particularly susceptible to fire. Under these conditions, Petitioner should have been prepared to call in a protective engineer to determine the actual cause and location(s) of the faults. Given Petitioner was not, it should have de-energized TL 637 sooner to minimize the danger to property and the public. (D.17-11-033, at Pet. App., Vol. 31, pp. 11802-11804; D.18-07-025, at Pet. App., Vol. 31, pp. 12298-12300.)

Petitioner counters that such measures were unnecessary because faults are common on windy days and its reclosers had successfully re-energized the line. Thus, it saw no cause for heightened concern.[41] (Pet., pp. 64-65.)

This reasoning ignores a number of critical considerations that a prudent manager should have taken into account. Specifically:

- Petitioner knew, or should have known that October 21, 2007 was not going to be just an ordinary windy day. For several days Predictive 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. (SDG&E-01, Appendix 1, California Fire Siege 2007, at Pet. App., Vol. 1, pp. 170-171.) Petitioner's own troubleshooters attested to the intensity of the winds on that day. (SDG&E-11-A, at Pet. App., Vol. 22, pp. 8675-8676, 8679-8680, 8682.)

[41] Petitioner states it did not know the cause, nature, or specific location of the faults. (Pet., p. 65.) It was not clear how this lack of knowledge argued against doing more to determine the answer to those questions.

- Petitioner knew or should have known there was a history of significant wind-related power line fires in San Diego County, suggesting the need for extra preparedness and caution. (MGRA-1, at Pet. App., Vol. 17, pp. 7070-7074, 7077-7084, 7089-7091; POC-1, at Pet. App., Vol. 17, pp. 7204-7205, 7207-7215.)

- Petitioner knew that although its recloser policy was industry practice, multiple recloser re-energization attempts could cause arcing that could ignite nearby vegetation. (D.17-11-033 at Pet. App., Vol. 31, p. 11793; D.18-07-025, at Pet. App., Vol. 31, p. 12299; ORA-18, at Pet. App., Vol. 20, p. 8331; Reporters Transcript ("RT") Volume ("Vol.") 2, at Pet. App., Vol. 20, p. 8149; ORA-2, at Pet. App., Vol. 4, p. 1650.)

- Petitioner should have known that multiple faults on TL 637 were unusual and a cause for concern. (D.17-11-033, at Pet. App., Vol. 31, p. 11802 [Noting only nine days with multiple faults in the line's 24-year history.]; ORA-3, at Pet. App., Vol. 4, pp. 1663-1664 [TL 637 Fault History].)

- Petitioner knew TL 637 was in a remote backcountry location with an abundance of vegetation that would be prone to catch fire if the reclosers caused arcing. (SDG&E-11, at Pet. App., Vol. 18, pp. 7353-7354 [Describing TL 637 as a 14-mile line in a remote backcountry section of San Diego County including lands owned by the County of San Diego, the U.S. Bureau of Land Management, and a small portion of Cleveland National Forest.].)

- Petitioner knew that on the day of the Witch Fire the high winds had already triggered several other fires. (SDG&E-11-A, at Pet. App., Vol. 22, pp. 8676-8677.)

Petitioner contends it had no reason to suspect a fire could start because its own facilities had never started a fire due to conductor (line-to-line) contact. In its testimony, Petitioner also said that it was busy that day responding to the Harris Fire, which was deemed a priority due to its proximity to Petitioner's 500 kV

Southwest Powerlink. (Pet., pp. 64-65; SDG&E-11-A, at Pet. App., Vol. 22, pp. 8676-8677.)

That Petitioner had no direct experience with line-to-line contact causing a fire was irrelevant. When faced with winds that might cause such contact, a prudent manager should know it is a high-risk situation.

Similarly, while the Harris Fire presented an understandably serious concern, the above enumerated risk factors and on-the-ground conditions suggested more than Petitioner's routine response effort was warranted. Other service and safety entities had anticipated the need for heightened response efforts due to the Santa Ana wind conditions, and prepared by increasing staffing or otherwise ensuring employees would be on standby if needed. (SDG&E-01, Appendix 1, California Fire Seige 2007, at Pet. App., Vol. 1, pp. 170-171.)

There was no evidence Petitioner took similar steps. Petitioner merely said that it responded as usual by dispatching troubleshooters. Yet troubleshooters merely check the conditions at the substations. (SDG&E-11, at Pet. App., Vol. 18, pp. 7357-7358.) They do not appear to locate a fault, determine its cause, or remedy the problem. And dispatching a patrolman does no good if, as here, winds and terrain prevent any actual inspection of the line. (SDG&E-11-A, at Pet. App., Vol. 22, pp. 8676-8677, 8679-8680.)

Petitioner counters there was no proof that a prudent manager would have responded any differently. To that end, it cites the testimony of SCE's grid

manager stating SCE would have done similarly. (Pet., p. 65, citing Pet. App., Vol. 27, pp. 10378-10379.)

Review shows, however, that SCE's witness went only so far as to say that temporary faults are not generally cause for concern. Still, SCE would want to patrol its line to determine the cause of any problems. It was not clear what SCE would do if, like Petitioner, it could not conduct that patrol, and the other risk factors were also in play.

b) Petitioner failed to reasonably and prudently deploy a protective engineer to determine the location of the faults.

Because the patrol of TL 637 could not take place, the only way Petitioner could have determined the cause and location of the faults was to dispatch a protective engineer who would run a computer model using relevant event records and mileage data. (See, e.g., RT Vol. 2, at Pet. App., Vol. 20, pp. 8158-8159.)

Petitioner contends that even if it had done that it may not have prevented the fire. Thus, Petitioner reasons sending a protective engineer would have changed nothing, and there was no proof that failing to take that step caused the fire. (Pet., pp. 69-70.)

Petitioner misses the point of a Prudent Manager review. Yes, it is possible the Witch Fire would have started even if Petitioner had dispatched a protective engineer. But that cannot be known with absolute certainty. The question is, was it reasonable and prudent *not* to take that step given what Petitioner knew or should have known. As stated above, given the facts and record of this case,

Petitioner should have used more of the resources at its disposal to ensure the safety of its customers and the line.[42] Even Petitioner conceded that effective use of its event records would have allowed it to better respond to the faults.[43]

Under normal weather conditions and in single fault instances, Petitioner's response effort may have been reasonable. Given the situation occurring on October 21, 2007, Petitioner failed to show that its actions and decisions were reasonable and prudent.

c) Petitioner failed to reasonably and prudently de-energize transmission line 637 in a more timely manner.

Petitioner contends that its response efforts were prudent because it de-energized TL 637 within two minutes of the fourth fault. (Pet., p. 64.) This depiction of the time frame is misleading.

Petitioner ignores that it was almost 6.5 hours after the first fault occurred before the line was de-energized. And it was 2.5 hours after Petitioner *knew* the Witch Fire had started before it shut down that line. The Commission found that delay unreasonable under the conditions. De-energization, at least once Petitioner knew the fire started, would by any reasonable measure, seem the safe and prudent

[42] Petitioner argues that it would have been imprudent to devote all its resources to this particular fire. (Pet., p. 67.) The Commission never suggested Petitioner was expected to do that. And it is difficult to conceive that dispatching one protective engineer would have depleted all Petitioner's resources.

[43] Petitioner did not look at the event records until the day after the fire. (D.17-11-033, at Pet. App., Vol. 31, p. 11798; ORA-19, at Pet. App., Vol. 21, p. 8337.)

thing to do. (D.18-07-025, at Pet. App., Vol. 31, p. 12301.) That conclusion was consistent with Petitioner's own testimony attesting to the fact that in fire situations, leaving power lines energized puts firefighters and the public at additional risk. (SDG&E-11, at Pet. App., Vol. 18, p. 7361.)

In its rehearing application, Petitioner cited the Harris Fire and the 2003 Cedar Fire to support not de-energizing TL 637 sooner. Petitioner argued neither of those fires involved utility powerlines, and all Petitioner knew was that it had temporary faults on a backcountry line on a windy day. (SDG&E Rhg. App., at Pet. App., Vol. 31, pp. 11897-11899.)

Petitioner's reliance on the Harris and Cedar fires was not persuasive. While those particular fires may not have involved powerlines, evidence showed that many past fires have indeed been wind and powerline related. Among them the: 1970 Laguna Fire; 2004 Wynola Fire; 2005 Fallbrook Fire; 2006 Laguna Niguel Fire; and 2006 Camp Pendelton Fire. (See, e.g., MGRA-1, at Pet. App., Vol. 17, pp. 7071-7074.) Petitioner continues to ignore this. But that knowledge should have put Petitioner on notice that the situation on October 21 warranted more than its usual response.

The claim it was just another windy day also seemed somewhat disingenuous, since Petitioner had simultaneously argued the weather conditions were unprecedented. (SDG&E Rhg. App., at Pet. App., Vol. 31, pp. 11898, 11919-11921.) It could not have been both.

Petitioner points out that de-energization is an extraordinary step that should not be taken lightly. Electricity is needed to maintain basic services such as water supply, traffic signals, communications, and emergency services during fire events. (Pet., pp. 67-68.)

These are indeed valid considerations. Yet, de-energization is sometimes the most reasonable and prudent thing to do. For example, on the day of the fire, Cal-Fire had already asked Petitioner to de-energize the Southwest Powerlink. (SDG&E-11, at Pet. App., Vol. 18, pp. 7359-7360.) Petitioner had also de-energized lines in the past in anticipation of, and response to, hazardous wind conditions. (ORA-60, at Pet. App., Vol. 26, pp. 10289-10290 (SDG&E Advice Letter 1801-E re: the Bark Beetle Catastrophic Event Memorandum Account for the Period April 3, 2003 – December 31, 2003) [Protective outages in three communities due to high wind conditions in 2003.].) And here, Petitioner offered no evidence that acting sooner to de-energize the line would have caused any significant adverse impacts given its backcountry location.

Finally, Petitioner contends that the denial of cost recovery was a penalty, and one that was grossly excessive. In Petitioner's view, the Commission's punishment bore no reasonable relation to the harm that was caused. (Pet., p. 73, citing e.g., *State Farm Mut. Auto. Ins. Co. v. Campbell* ("*State Farm*") (2003) 538 U.S. 408, 416; *Cooper Indus. v. Leatherman Tool Group, Inc.* ("*Cooper*") (2001) 532 U.S. 424, 434.)

The Commission has authority to impose penalties pursuant to Section 2100 et seq., and it did already impose a 2007 Wildfire-related penalty in D.10-04-047. (*Investigation on the Commission's Own Motion into Operations and Practices of San Diego Gas & Electric Company Regarding the Utility Facilities Linked to the Witch and Rice Fires of October 2007; Investigation on the Commission's Own Motion into Operations and Practices of Cox Communications and San Diego Gas & Electric Company Regarding the Utility Facilities Linked to the Guejito Fire of October 2007* [D.10-04-047] (2010) at pp. 1, 7, 16-17 [Ordering Paragraph Number 4] (slip op.).)

The WEMA cost disallowance at issue here was not a penalty. It was merely a disallowance of cost recovery consistent with a Section 451 reasonableness review. The Commission explained the distinction in *Re Southern California Edison Company* [D.91-12-076] (1991) 42 Cal.P.U.C.2d 645, 738, stating:

> Disallowances are denials of rate recovery for unreasonable costs, whether those costs are ordinary expenses, capital costs, or costs induced by unreasonable forecasts. Disallowances can result from explicit findings that costs are unreasonable or from failure to meet the burden of proof of reasonableness. Penalties are punishments for offenses or actions contrary to statute, order, rule, instruction, or express policy. Adverse consequences to shareholders do not by themselves make penalties out of Commission decisions or disallowances.

State Farm and *Cooper* are also not instructive. Both cases involved punitive damages awards. As previously noted, the Commission has no authority to award damages and did not do so here.

Even if the Court were to consider these cases, they are useful only to support Petitioner's point that damages should not be excessive in light of the actual harm caused. (See, e.g., *State Farm, supra,* 538 U.S. at pp. 435-436.) By that standard, the cost recovery denied here was not excessive. The Commission denied only $379 million. That was minimal compared to the $2.4 billion harm caused by the 2007 Wildfires.

2. Petitioner did not meet its burden to prove that it reasonably and prudently operated and maintained its facilities in connection with the Guejito Fire.

Cal Fire determined that the Guejito fire ignited when a Cox Communications ("Cox") lashing wire came into contact with Petitioner's 12 kV overhead conductor between poles 196394 and 196387. Petitioner's electric line was located above the Cox equipment. Winds blew the Cox lashing wire up into Petitioner's line, which then arced and started the fire. (Guejito Fire Investigation Report. Incident No. CA-MVU-010484. October 22, 2007. California Department of Forestry and Fire Protection.)[44]

[44] See also D.17-11-033, at Pet. App., Vol. 31, p. 11804; ORA-05, at Pet. App., Vol. 9, pp. 4751-4754.

Petitioner does not dispute these facts, but argues it was Cox's broken lashing wire, not Petitioner's electric line, that caused the fire.[45] Petitioner further asserts that it was error to deny cost recovery because there was no imprudence on its part. (Pet., pp. 74-77.) That is wrong.

Petitioner was in direct violation of established Commission safety rules and equipment clearance requirements embodied in GO 95. In its rehearing application, Petitioner dismissed it as just a minor "technical violation." (SDG&E Rhg. App., at Pet. App., Vol. 31, p. 11906.). In the instant Petition, Petitioner barely even acknowledges the violation. But violation of Commission rules and regulations is inherently unreasonable and imprudent. And such violations justify denial of any associated cost recovery.

Petitioner knew it had an obligation to operate and maintain its facilities in compliance with GO 95. Petitioner's own testimony 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-07, at Pet. App., Vol. 2, pp. 717, 721-722.)

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[45] State and federal law support allowing communications infrastructure providers ("CIPs") such as Cox, and electric utilities such as Petitioner, to enter joint pole attachment agreements under which the CIPs attach their facilities to utility electric poles. Today, the relevant regulations are embodied in Commission General Order ("GO") 95, which specifies various safety and clearance requirements. Petitioner and Cox had such an agreement, and Cox attached the equipment in question to Petitioner's poles in 2001. (See, e.g., SDG&E-07, at Pet. App., Vol. 2, pp. 720-721.) GO 95 can be located at: http://www.cpuc.ca.gov/generalorders/.

Petitioner also knew or should have known that its own inspection obligations under GO 165 failed to discover and correct the violation.[46] Commission regulations required Petitioner to ensure there was a minimum 6 foot clearance between its electric line and Cox's communications equipment. (SDG&E-07, at Pet. App., Vol. 2, pp. 721-722; GO 95, Rule 38.) The rules also required Petitioner 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-07, at Pet. App., Vol. 2, pp. 715-716; GO 165, Table 1.)

Petitioner testified that it did conduct regular inspections, and last inspected Pole 196394 on June 22, 2007, and Pole 196378 on April 8, 2005. (SDG&E-12, at Pet. App., Vol. 19, pp. 7539-7540.) Yet, there was a 3 foot clearance violation that Petitioner repeatedly failed to identify. (D.17-11-033, at Pet. App., Vol. 31, pp. 11805-11806; SDG&E-07, at Pet. App., Vol. 2, pp. 725-726.) Petitioner should have known about that violation and rectified it long before the Guejito Fire.

Petitioner has repeatedly attempted to defend itself by shifting responsibility to Cox. But the rules apply to both Petitioner and Cox, and both are responsible for ensuring compliance with respect to their respective facilities.[47]

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[46] SDG&E-07, at Pet. App., Vol. 2, pp. 720-726. GO 165 can be located at: http://www.cpuc.ca.gov/generalorders/.

[47] Petitioner's own testimony spoke to its role in identifying and reporting any GO 95 infractions in connection with CIP joint pole agreements. (SDG&E-7, at Pet. App., Vol. 2, pp. 721-722.)

Petitioner maintains that that the lashing wire would have contacted its conductors even absent the clearance violation. At least that was the belief expressed by Petitioner's witness when asked to provide an opinion regarding which conductor the wire would have been more likely to hit. (Pet., p. 75, citing Pet. App., Vol. 23, p. 9035.)

But an opinion based on a hypothetical is not proof that contact would have occurred had the proper clearance been maintained. At the end of the day, it is just conjecture, and that does not negate the fact that proper clearance was not maintained. Nor does it establish error in the Commission's findings. (See, e.g., *Order Instituting Investigation on the Commission's Own Motion into the Operations and Practices of Pacific Gas and Electric Company Regarding Anti-Smart Meter Consumer Groups* [D.14-12-027] (2014) at pp. 2-3 (slip op.); *Application of The Utility Reform Network for Rehearing of Resolution E-3689, Approving Southern California Edison Company's Advice Letter 1465-E to Reopen and Expand the Interruptible Program* [D.00-12-066] (2000) at pp. 5-6 (slip op.).)

Petitioner also sidesteps the fact that regardless of whether contact would have occurred, had Petitioner complied with the applicable rules it would have been possible to find that it met the Prudent Manager Standard. But the clearance violation and failure of Petitioner's inspections to identify the violation demonstrated a failure to reasonably and prudently operate and maintain its facilities.

The Commission's regulations are objective standards having the force and effect of law. (See, e.g., *Southern California Edison Company v. Public Utilities Commission* (2006) 140 Cal.App.4th 1085, 1092, fn. 3 ["A regulation adopted by an administrative agency under its rulemaking authority has the force and effect of law."].) Compliance is not discretionary, and it cannot be minimized. Accordingly, the Commission could not reasonably or even lawfully find that Petitioner satisfied the Prudent Manager Standard.

3. Petitioner did not meet its burden to prove that it reasonably and prudently operated and maintained its facilities in connection with the Rice Fire.

Cal Fire determined that the Rice Fire ignited when a limb from sycamore Tree FF1090 broke and knocked Petitioner's 12 kV electric line to the ground, igniting the fire. (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.)[48]

Petitioner claims it was error to deny its request for cost recovery, because there was no nexus between its imprudence and the fire. (Pet., pp. 77-79.) The Commission disagrees.

[48] See, also e.g., D.17-11-033, at Pet. App., Vol. 31, p. 11811; SDG&E-08, at Pet. App., Vol. 2, p. 810.

First, it is undisputed that Tree FF1090 was subject to Petitioner's Vegetation Management Plan ("VMP"), and that tree contacted Petitioner's electric line causing the fire.

Second, the evidence showed Petitioner's vegetation management in this instance was inadequate because Petitioner deviated from its annual trim cycle for Tree FF1090, let more than two years lapse without trimming the tree, failed to keep complete and adequate trim records, failed to reasonably respond to the trim recommendation of its contractor, and failed to identify structural issues that would have led to more timely trimming of the limb that broke and started the fire. (D.17-11-033, at Pet. App., Vol. 31, pp. 11811-11824; D.18-07-025, at Pet. App., Vol. 31, p. 12308; SDG&E-08, Appendix 6, at Pet. App., Vol. 2, p. 939-941.)

In its rehearing application, Petitioner argued there was no need to trim Tree FF1090 in the two years before the fire because no clearance violations had been recorded. (SDG&E Rhg. App., at Pet. App., Vol. 31, pp. 11915-11916.)

Even if Petitioner had not recorded any violations, it did know that this was a fast-growing tree. (See, e.g., ORA-32, Data Request Response Number 7, at Pet. App., Vol. 23, pp. 9411-9412.)[49] For exactly that reason, Tree FF1090 had been on an annual trim cycle prior to the two-year lapse preceding the fire. (SDG&E-08, Appendix 6, at Pet. App., Vol. 2, pp. 939-940; ORA-32, Attachment C, at Pet.

[49] In written testimony, Petitioner seemed to back away from that statement, claiming the tree only had a medium growth rate. (SDG&E-13, at Pet. App., Vol. 19, p. 7585.) Such inconsistencies raised credibility issues that diminished the reliability of Petitioner's showing.

App., Vol. 23, p. 9416.) That practice indicated Petitioner knew the tree typically needed trimming every year. It was not clear why it was suddenly prudent to deviate from that practice. And it was not persuasive that Petitioner reasoned prudent management requires trimming only when there is an actual clearance violation. The Commission has been clear that it is not reasonable to wait for violations to occur. In some instances it is not reasonable to just comply with minimum requirements. (D.04-04-065, *supra*, at p. 16 (slip op.).)

Petitioner also failed to show that it had responded reasonably to a trim recommendation made by its tree contractor before the fire occurred. In July 2007, Petitioner's contractor inspected Tree FF1090 and discovered a limb that was directly overhanging Petitioner's electric line. The contractor testified that the tree showed strong growth toward the line, thus the limb needed immediate trimming.[50] (ORA-44, at Pet. App., Vol. 23, pp. 9500-9503, 9512.)

Using Petitioner'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).[51]

[50] Petitioner states that ORA's witness said the broken branch did not look like it had been overhanging the line. (Pet., p. 78, citing Pet. App., Vol. 23, p. 9482.) The commission did not view ORA's opinion rendered after the limb was on the ground as more reliable than the evaluation of Petitioner's own tree contractor before the limb broke.

[51] Options under the 'Months to Next Trim' field were 0-3 months, 3-6 months, and 6-9 months, etc. (SDG&E-13, at Pet. App., Vol. 19, p. 7582.)

He understood that to mean that the tree would be trimmed within three months of his inspection. (ORA-44, at Pet. App., Vol. 23, p. 9512.)

In explaining why the tree had not been trimmed in the three months before the fire, Petitioner argued that its contractor misunderstood the 0-3 month designation. Petitioner said 0-3 months 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. (See, e.g., ORA-34, at Pet. App., Vol. 23, pp. 9446-9447; SDG&E-13, at Pet. App., Vol. 19, pp. 7582-7583.) Petitioner also argued that if a more immediate trim was needed, the contractor should have flagged the tree as a hazard tree. (SDG&E-08, at Pet. App., Vol. 2, pp. 820, 825.)

This argument again suggested a tree would be trimmed only if it was identified as out of compliance or a hazard. That was not a compelling case for prudent vegetation management. At the very least the situation demonstrated that Petitioner failed to adequately train its contractor to understand how to ensure Tree FF1090 would receive the immediate trim he recommended. Adequate contractor training is part of a utility's obligations as a reasonable and prudent system manager. (See, e.g., *Snyder v. Southern California Edison Company* (1955) 44 Cal.2d 793, 796 ["Every public utility shall obey and comply with every order, decision, direction, or rule made or prescribed by the commission…and shall do everything necessary or proper to secure compliance therewith by all of its officers, agents, and employees."] & pp. 800-801 [Non-delegable utility duties].)

Petitioner's handling of the trim recommendation was also concerning. Before authorizing the contractor's billing request, Petitioner inspected Tree FF1090. Petitioner said trimming was unnecessary because the overhang was "too slight."[52] (SDG&E-13, Appendix 4, at Pet. App., Vol. 19, pp. 7613-7614.) Still, an overhang is an overhang, and prudent practice suggests that trimming the limb would have been the far safer course to take.

Finally, Petitioner argued it could not have detected any problem with the limb that caused the fire because it was part of a codominant branch structure with included bark. Throughout the proceeding that condition was referred to as a hidden defect. (SDG&E-13, Appendix 2, at Pet. App., Vol. 19, p. 7601.) Petitioner argues the Commission never explained how it should have known about the codominant structure since the tree was 70-80 feet tall. (Pet., p. 79.)

It is true that Tree FF1090 was relatively tall. (ORA-32, Data Response Answer Number 9, at Pet. App., Vol. 23, p. 9412.) At the same time, Petitioner knew hidden defects are common in codominant growth structures. (SDG&E-08, Appendix 3, at Pet. App., Vol. 2, pp. 867-872; SDG&E-13, at Pet. App., Vol. 19,

[52] Petitioner also argued that evidence proved that the limb that broke grew away from the line. The Commission made no definitive finding regarding that issue. The Commission merely said the record was inconclusive. (D.17-11-033, at Pet. App., Vol. 31, p. 11820.) That finding was consistent with the differing evidence. For example, at least one witness testified the branch was growing toward the line. (ORA-40, at Pet. App., Vol. 23, p. 9481.) Another said the growth direction was west. (ORA-41, at Pet. App., Vol. 23, p. 9487.) Petitioner's own testimony seemed to offer two different answers as to which way the broken limb had been growing. (SDG&E-13, at Pet. App., Vol. 19, pp. 7575, 7578 (northeast and southwest, respectively.) And whatever direction the limb had been growing, it broke, downed the line, and started the fire. That much, at least, was clear.

p. 7591.) The tree also appeared to have certain indicia of a Reliability (or hazard) Tree.[53] Petitioner's own Vegetation Management Plan indicated that both these factors, if properly identified during tree inspections, would result in immediate trimming or removal of affected limbs. (D.17-11-033, at Pet. App., Vol. 31, 11821-11824; SDG&E-13, at Pet. App., Vol. 19, p. 7583; SDG&E-08, Appendix 3, at Pet. App., Vol. 2, pp. 869-870.)

The plan also showed Petitioner knew of, and routinely inspected for, such dangers even absent clearance issues. (SDG&E-13, at Pet. App., Vol. 19, p. 7581.) And Petitioner knew that the majority of tree-related outages are the result of tree or limb failure, not tree growth (i.e., clearance issues). (SDG&E-08, Appendix 3, at Pet. App., Vol. 2, p. 869.)

Petitioner never claimed or established that the structural problems *could* not have been identified during its inspections. It just said that it had not found them. Given what Petitioner knew, and the vegetation practices Petitioner claimed to have in place, it is not reasonable to suggest that all bets are off just because a tree is tall. That is particularly true in a case such as this where an overhang had already been reported.

For all these reasons, the Commission respectfully requests that the Court uphold its denial of cost recovery as lawful.

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[53] A Reliability Tree is any tree inside or outside of a utility right-of-way that has a reasonably good chance of disrupting service (SDG&E-08, Appendix 3, at Pet. App., Vol. 2, pp. 30-31 [Including codominant branch structures and included bark.].)

V. CONCLUSION

For the reasons stated above, the Commission submits that its Decisions were reasonable and lawful. Because the Petitioner fails to show any basis for the Court to grant its petition for writ of review, the Commission respectfully requests that the Petition be denied.

Dated: September 7, 2018

Respectfully submitted,

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CERTIFICATE OF WORD COUNT

I hereby certify that the foregoing Respondent's Answer is 13,782 words in length. In completing this word count, I relied on the "word count" function of the Microsoft Word program.

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Dated: September 7, 2018 PAMELA NATALONI

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