BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

Application of San Diego Gas & Electric Company (U 902 E) for Authorization to Recover Costs Related to the 2007 Southern California Wildfires Recorded in the Wildfire Expense Memorandum Account (WEMA)	Application 15-09-010 (Filed September 25, 2015)

SAN DIEGO GAS & ELECTRIC COMPANY'S (U 902 E) APPLICATION FOR REHEARING OF DECISION 17-11-033 AND REQUEST FOR EXPEDITED ACTION

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EXECUTIVE SUMMARY

In D.17-11-033, the Commission wrongly denies SDG&E's Application for Authorization to Recover Costs Related to the 2007 Southern California Wildfires Recorded in the Wildfire Expense Memorandum Account ("Application").

The common denominator underlying the ignitions of the Witch, Guejito and Rice Fires was the extreme and unprecedented environmental conditions that created what Cal Fire called a "Fire Siege" across Southern California. With respect to the 2007 Wildfires, SDG&E operated and managed its facilities prudently, carried reasonable levels of liability insurance, effectively managed all claims and aggressively pursued third-party recoveries. The Decision imposes and an unreasonable and unattainable standard of perfection even when damages are caused by extreme factors beyond SDG&E's control.

SDG&E takes pride in the safety and reliability of its system, and the record in this proceeding demonstrates the company acted prudently with respect to the 2007 wildfires. The Decision based its findings of unreasonableness regarding the Guejito and Rice Fires, in large part, on violations of Commission General Orders or other requirements. But there is no evidence that those alleged violations caused the ignitions, or that SDG&E could have prevented the ignitions. In fact, it is undisputed that a broken lashing wire (Guejito) and a broken tree limb with a hidden structural defect (Rice) caused those ignitions.

The Decision's finding of imprudence related to the Witch Fire is of particularly grave concern. Unlike the findings regarding the Guejito and Rice Fires, there are no findings in the Decision of any General Order or Commission related violations associated with the Witch Fire. Instead, the Decision wrongly attempts to substitute hindsight judgment for that of highly-trained experts who followed industry standards and operated the grid in real time based on the information that was available to them. Moreover, the Decision's suggested actions would have in no way prevented an ignition. Indeed, the Decision concedes that SDG&E's recloser policy was consistent with industry standards. Also of note, the tie-line (637) associated with the Witch Fire was not linked to any fire ignitions during the nearly 50-year period between construction in 1959 and 2007.

After thorough review, FERC appropriately found SDG&E to be reasonable and prudent with respect to the 2007 wildfires and authorized 100% recovery of wildfire related costs. Considering the record in this proceeding, for this Commission to find otherwise, imposes an unreasonable and unattainable standard of perfection.

SDG&E hopes the Commission will act expeditiously to correct the legal errors in D.17-11-033, as described below. But if the Commission is unwilling to do so, it should nevertheless move quickly on rehearing given the urgency of these issues so that SDG&E may pursue legal remedies through other means. The legal errors in the Decision include the following:

Inverse Condemnation

- The Decision concluded that the California Constitutional claim of inverse condemnation – which applies strict liability based on the rationale that a utility can spread such costs –

is "not relevant" to its reasonableness review. That conclusion, coupled with the denial of any cost spreading (*i.e.,* cost recovery) ignores California law as applied to SDG&E, subjects SDG&E to an unjust and unreasonable whipsaw of incompatible legal standards in violation of SDG&E's due process rights, and results in an unconstitutional taking.

Reasonableness and Prudence of SDG&E's Pre-Fire Conduct

- Although SDG&E should not be required to prove the reasonableness of its pre-fire conduct in light of the application of inverse condemnation, SDG&E nonetheless proved by a preponderance of the evidence that it operated and managed its facilities reasonably and prudently prior to the ignitions of the Witch, Guejito and Rice Fires. In concluding that SDG&E did not meet its burden of proof, the Decision committed several types of legal error, including making findings unsupported by the substantial record evidence, and violating its own prudent manager standard.

- The Decision's findings of unreasonableness erroneously disregard causation and therefore violate SDG&E's due process rights and the requirement that a Commission decision must contain findings of fact and conclusions of law on all issues material to the decision.

Witch Fire

- The Decision's findings that SDG&E failed to undertake certain actions prior to the ignition of the Witch Fire – most notably its second-guessing with respect to de-energization of the line – violate the prudent manager standard because they are not based on what SDG&E knew or reasonably should have known at the time.

- The evidence clearly demonstrates that SDG&E actively monitored the faults on TL 637.

- The evidence shows that sending a protective engineer to determine the fault location would not have prevented the Witch Fire.

- The Decision amounts to the inappropriate application of a hindsight and perfection standard, in violation of the Commission's own precedent.

Guejito Fire

- By completely ignoring the findings by Cal Fire and CPSD that the broken Cox lashing wire caused the Guejito Fire ignition (and SDG&E's related arguments), the Decision denies SDG&E due process of law and violates the requirement that a decision must contain separately stated findings of fact and conclusions of law on all issues material to the decision.

- In finding SDG&E unreasonable for failure to maintain an adequate clearance between its facilities and Cox's facilities, the Decision erroneously disregards causation and imposes a perfection standard because the clearance did not cause the ignition.

Rice Fire

- The Decision departed from the Proposed Decision and announced a new theory of SDG&E's allegedly imprudent conduct related to the limb that broke and fell onto SDG&E's powerlines. In doing so, the Decision violates Public Utilities Code § 311 and due process requirements.

- The Decision's new theory that SDG&E should have discovered the broken limb prior to the fire is not supported by substantial evidence, which shows that the structural defect was "hidden." In deeming SDG&E unreasonable for failure to discover this "hidden defect," the Decision establishes a clairvoyance standard.

- The Decision's finding that SDG&E violated General Order 95, Rule 35 because it did not identify Tree FF1090 as a "Reliability Tree" conflicts with the language of Rule 35 requiring "actual knowledge," which SDG&E did not possess.

- The evidence demonstrates that the limb was growing away from the powerlines.

- The evidence demonstrates that trimming Tree FF1090 within 0 to 3 months would not have prevented the Rice Fire ignition.

- The evidence demonstrates that the Decision misinterprets the plain meaning of SDG&E's records related to Tree FF1090 and its growth rate.

Wind and Weather

- The evidence demonstrates that the wind and weather conditions in October 2007 were extreme and contributed to the fire storm that ensued.

TABLE OF AUTHORITIES

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SAN DIEGO GAS & ELECTRIC COMPANY'S (U 902 E) APPLICATION FOR REHEARING OF DECISION 17-11-033 AND REQUEST FOR EXPEDITED ACTION

I. INTRODUCTION

Decision ("D.") 17-11-033 ("D.17-11-033" or "Decision") wrongly denies the Application of San Diego Gas & Electric Company's ("SDG&E") (U 902 E) for Authorization to Recover Costs Related to the 2007 Southern California Wildfires Recorded in the Wildfire Expense Memorandum Account ("Application"). The Decision erroneously concludes that inverse condemnation is "not relevant" to its reasonableness review under Public Utilities Code § 451. Given that the $379 million in costs at issue ("WEMA Costs") were incurred as a result of the application of inverse condemnation to SDG&E, no legal principle could be more relevant to a review of those costs. The Decision's finding frustrates the purpose of inverse condemnation – a California state Constitutional claim – that costs of property damage should be spread through rates. Denying all cost recovery also unjustly subjects SDG&E to a whipsaw of inconsistent legal standards, violating SDG&E's due process rights and taking its property. The Commission should interpret its gatekeeping function under Section 451 to allow SDG&E to recover, and spread through rates, reasonable inverse condemnation costs, thus avoiding a conflict with the California and U.S. Constitutions.

The Decision also errs as a matter of law in concluding that SDG&E did not meet its burden to prove that it reasonably and prudently operated and managed its facilities prior to the

Witch, Guejito and Rice Fires. While the Decision claims to properly apply the prudent manager standard, it violates that standard through findings infused with hindsight bias and a total disregard for what SDG&E knew or reasonably should have known at the time based on the information available to it. For instance, the Decision denies that it applies a perfection standard, but it nevertheless finds SDG&E imprudent on the basis of mere speculation that sending a protective engineer to either end of Tie Line ("TL") 637 "may have prevented" the Witch Fire, even though the evidence shows the contrary. SDG&E had no basis to know (or ability to discover in time to prevent the ignition) that conductor-to-conductor contact was occurring on TL 637. The Decision also finds that SDG&E unreasonably maintained its facilities prior the Guejito Fire based solely on the existence of a clearance issue identified only after the fire, which did not cause the ignition. SDG&E also had no basis to know that a limb with a hidden (*i.e.*, invisible) structural defect would fail in the Santa Ana wind event, fall onto its powerlines, and ignite the Rice Fire.

Many of the Decision's other findings are not supported by substantial evidence and cannot be sustained as a matter of law. The evidence shows that SDG&E actively monitored the faults on TL 637 and took appropriate steps to investigate them. The Decision never even mentions, let alone addresses, what Cal Fire and the Consumer Protection and Safety Division ("CPSD") determined to be the cause of the Guejito Fire – a broken Cox lashing wire blowing into SDG&E's overhead powerlines. The Decision backed away from the theory of alleged imprudence advanced in the Proposed Decision with respect to the Rice Fire and developed an entirely new theory of SDG&E's allegedly imprudent conduct related to the broken limb – a theory that no party ever advanced in this proceeding – and that the Commission did not submit for public comment in violation of Public Utilities Code § 311 and SDG&E's due process rights.

As discussed in greater detail below, SDG&E respectfully requests that the Commission grant rehearing to remedy these legal errors, in accordance with Rule 16.1 and Public Utilities Code §§ 1731 and 1732. To avoid the Constitutional problems created by its Decision, the Commission should recognize that, in light of the application of inverse condemnation to SDG&E, it must allow cost recovery and spreading, subject to a review of the Phase 2 issues. Alternatively, the Commission should find that SDG&E reasonably and prudently operated and managed its facilities prior to the ignition of the Witch, Guejito and Rice Fires and should proceed to the Phase 2 reasonableness review of costs incurred.

II. REQUEST FOR EXPEDITED ACTION

The Commission should act expeditiously on this application for rehearing. The interplay of inverse condemnation – applied by courts to investor-owned utilities to further the policy rationale of cost spreading – and rate recovery at the Commission has become an even more urgent issue in California than it was at the time the Application was filed. SDG&E hopes the Commission will expeditiously correct the legal errors in D.17-11-033, as described below. But if the Commission is unwilling to do so, it should nevertheless move quickly on rehearing given the urgency of these issues so that SDG&E may promptly pursue legal remedies through other means.

III. BACKGROUND

Beginning October 21-22, 2007, "Southern California experienced an unusually severe fire weather event characterized by intense, dry, gusty Santa Ana winds."[1] As the Commission has noted, the "strong Santa Ana winds swept across Southern California and caused dozens of

[1] *See* California Fire Siege 2007: An Overview, p. 6. The Commission has previously taken notice of this report by the California Department of Forestry and Fire Protection ("Cal Fire"), the U.S. Forest Service, and the Office of Emergency Services. *See* D.12-01-032, pp. 5-6, n.1.

wildfires."[2] Among those fires, Cal Fire linked the ignitions of the Witch, Guejito and Rice Fires to SDG&E facilities.[3] According to the Cal Fire post-fire investigation reports, the Witch Fire ignited when two conductors on TL 637 came into contact with one another, causing arcing that produced sparks and ignited the grassy fuels below. Cal Fire determined that the Guejito Fire ignited when a broken Cox lashing wire blew upwards into SDG&E's powerlines in the Santa Ana wind event, producing sparks and starting a fire. Cal Fire and CPSD[4] found that the Rice Fire began when a limb from Sycamore Tree FF1090 fell onto SDG&E's powerlines, knocking them to the ground.

In the aftermath of the Witch, Guejito and Rice Fires, property owners and governmental entities who claimed damages filed more than 2,500 lawsuits against SDG&E ("2007 Wildfire Litigation"). The Superior Court in San Diego permitted plaintiffs to plead claims of inverse condemnation over SDG&E's objections, and SDG&E unsuccessfully petitioned both the Court of Appeal and the California Supreme Court to rule that the Superior Court erred in allowing inverse condemnation claims to proceed.[5] As a result, SDG&E was subjected to inverse condemnation liability as a matter of law, and with no other possible sources of ignition,

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[2] D.14-02-015, p. 3.

[3] *See* "California Department of Forestry and Fire Protection, Investigation Report, Witch Fire (CA-CDF-010432)" ("Cal Fire Witch Investigation Report"); "California Department of Forestry and Fire Protection, Investigation Report, Guejito Fire (CA-CDF-010484) ("Cal Fire Guejito Investigation Report"); and "California Department of Forestry and Fire Protection, Investigation Report, Rice Fire (CA-CDF-010502) ("Cal Fire Rice Investigation Report"). These Cal Fire Reports are included within Exhibit ORA-06 and are publicly available on Cal Fire's website.

[4] As discussed in the Decision, CPSD conducted investigations into the fires, which were ultimately settled. D.17-11-033, p. 3.

[5] *See* Application, p. 3; *In re 2007 Wildfire Litigation*, January 29, 2009 Minute Orders Overruling SDG&E's Demurrers to the Master Complaints. SDG&E petitioned the Court of Appeal and the California Supreme Court to overturn the trial court's order, but those petitions were dismissed. SDG&E reserves the right in future cases to oppose the application of inverse condemnation to it.

SDG&E would have been found strictly liable. SDG&E then embarked on a course of settlement to resolve the claims. The WEMA Costs represent the outstanding portion of the total Wildfire Costs ($2.4 billion) that SDG&E has incurred through that settlement process.[6] SDG&E reduced that amount through liability insurance ($1.1 billion), settlement payments received from third parties ($824 million), Federal Energy Regulatory Commission ("FERC") recoveries, and a voluntary shareholder contribution ($42 million or 10%).[7] Among these deductions, the FERC recoveries are especially notable. The FERC reviewed its jurisdictional portion of the 2007 Wildfire costs and concluded that SDG&E acted reasonably and prudently, granting full recovery.[8]

SDG&E filed its Application for recovery of the WEMA Costs with this Commission on September 25, 2015. Since the Commission had previously indicated that any recovery would be subject to a reasonableness review,[9] SDG&E submitted extensive testimony and evidence to support its Application. In the Application, SDG&E noted that reasonableness reviews typically involve costs a utility voluntarily incurs through procurement or other activities, but in this instance, the only decisions SDG&E made with respect to the costs at issue were its decisions surrounding the settlement of claims asserted in the 2007 Wildfire Litigation, as well as its decisions related to the pursuit of amounts to offset the 2007 Wildfire Costs.[10] As was the case in rate proceedings before the FERC, SDG&E contended that those decisions and issues should be the subject of the Commission's reasonableness review.

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6 *See* Application, pp. 1-7.

7 *Id*.

8 *San Diego Gas & Electric Co.*, 146 FERC ¶ 63,017 (2014).

9 D.12-12-029.

10 Application, p. 10.

Nevertheless, SDG&E also submitted testimony and evidence regarding its pre-fire conduct, recognizing that the proceedings could focus on those issues in light of Cal Fire's findings that SDG&E facilities were involved in the ignitions.[11] SDG&E demonstrated that, while its facilities were involved, the fires resulted from circumstances beyond SDG&E's control in each instance.[12] Hence, SDG&E acted reasonably and prudently prior to the Witch, Guejito and Rice Fires.

On April 11, 2016, the Assigned Commissioner and Administrative Law Judge ("ALJ") issued the Scoping Memo. The Scoping Memo rejected SDG&E's arguments about the appropriate scope of this reasonableness review (*i.e.*, that it should focus on what became known as the Phase 2 issues) and adopted the position of the Office of Ratepayer Advocates ("ORA") and intervenors. The Scoping Memo ignored the impact of inverse condemnation on the proceeding and defined Phase 1 to include "whether SDG&E's operation and management of its facilities prior to the 2007 wildfires were reasonable," with each fire to be addressed separately.[13] The Scoping Memo also agreed to the request by ORA and intervenors to conduct "Threshold Briefing" on legal issues that those parties contended would warrant dismissal of the Application without further proceedings.

If SDG&E survived both the Threshold Briefing and Phase 1, only then would the Commission address in Phase 2 "whether SDG&E's actions and decision making in connection

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[11] *Id*.

[12] *See, e.g.*, [SDG&E's] Phase 1 Opening Brief (March 24, 2017) ("SDG&E Phase 1 Opening Br."), pp. 2-4.

[13] "Scoping Memo and Ruling of Assigned Commissioner and Assigned Administrative Law Judge" (April 11, 2016) ("Scoping Memo"), pp. 4, 6.

with settling their legal claims and costs in relation to the wildfire were reasonable."[14] The Scoping Memo afforded ORA and intervenors more than a year from the date SDG&E filed its Application to conduct discovery and prepare testimony, while granting SDG&E approximately two months to respond to their showing.[15]

Following the submission of testimony and an evidentiary hearing, the ALJs issued their Proposed Decision on August 22, 2017. The Proposed Decision rejected SDG&E's positions in every respect, and it denied the Application on the grounds that SDG&E was unreasonable and imprudent. The Proposed Decision did not mention or address in any way the impact of inverse condemnation on this proceeding. In its Comments on the Proposed Decision, SDG&E and other utilities again urged the Commission to address inverse condemnation. Just prior to the November 30 Commission Meeting at which the Commissioners voted to approve the Proposed Decision, the Proposed Decision underwent numerous substantive revisions that were not served on the parties or made available for comment, and these revisions were ultimately incorporated in D.17-11-033.

At the November 30 Commission Meeting, President Picker voiced concerns about certain aspects of the Decision, including the "legal framework" related to inverse condemnation and whether the Commission should be second-guessing the fact that SDG&E did not de-energize TL 637 prior to the Witch Fire ignition.[16] President Picker indicated he would be filing a joint concurrence with Commissioner Guzman-Aceves, who also expressed concern about the

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[14] Scoping Memo, p. 5.

[15] *Id*., p. 7.

[16] A video recording of this meeting may be found on the California Public Utility Commission's website.

legal framework. That joint concurrence was issued on December 26, 2017. In addition to concerns related to the application of inverse condemnation, the Joint Concurrence also noted the challenges of applying the preponderance of the evidence standard to the facts of this case.[17]

IV. STANDARD OF REVIEW

The standard of review for applications for rehearing is set forth in Rule 16.1(c), as follows:

> Applications for rehearing shall set forth specifically the grounds on which the applicant considers the order or decision of the Commission to be unlawful or erroneous, and must make specific references to the record or law. The purpose of an application for rehearing is to alert the Commission to a legal error, so that the Commission may correct it expeditiously.[18]

Under Public Utilities Code § 1757(a), a decision by the Commission may be set aside when (1) the Commission has 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 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 decision was procured by fraud or an abuse of discretion, or (6) the decision violates any right of the petitioner under the Constitution of the United States or the California Constitution.

Under Public Utilities Code § 1760, as to concerns arising under the United States and California Constitutions, the reviewing court "shall exercise independent judgment on the law and facts, and the findings or conclusions of the commission" that are material to the determination of the constitutional questions.

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[17] Joint Concurrence of President Picker and Commissioner Guzman Aceves, A.15-09-010, p. 2 (Dec. 26, 2017).

[18] Rule 16.1(c); *see also* Public Utilities Code § 1732.

Under Public Utilities Code § 1705, the Commission's decision "must contain, separately stated, findings of fact and conclusions of law by the commission on all issues material to the decision."

In this Application for Rehearing, SDG&E alerts the Commission to the following legal errors in the Decision that, if not corrected, render it subject to reversal upon judicial review under the standards of the Public Utilities Code referenced above.

Inverse Condemnation

- The Decision concluded that the California Constitutional claim of inverse condemnation – which applies strict liability based on the rationale that a utility can spread such costs – is "not relevant" to its reasonableness review. That conclusion, coupled with the denial of any cost spreading (*i.e.,* cost recovery) ignores California law as applied to SDG&E, subjects SDG&E to an unjust and unreasonable whipsaw of incompatible legal standards in violation of SDG&E's due process rights, and results in an unconstitutional taking.

Reasonableness and Prudence of SDG&E's Pre-Fire Conduct

- Although SDG&E should not be required to prove the reasonableness of its pre-fire conduct in light of the application of inverse condemnation, SDG&E nonetheless proved by a preponderance of the evidence that it operated and managed its facilities reasonably and prudently prior to the ignitions of the Witch, Guejito and Rice Fires. In concluding that SDG&E did not meet its burden of proof, the Decision committed several types of legal error, including making findings unsupported by the substantial record evidence, and violating its own prudent manager standard.

- The Decision's findings of unreasonableness erroneously disregard causation and therefore violate SDG&E's due process rights and the requirement that a Commission decision must contain findings of fact and conclusions of law on all issues material to the decision.

Witch Fire

- The Decision's findings that SDG&E failed to undertake certain actions prior to the ignition of the Witch Fire – most notably its second-guessing with respect to de-energization of the line – violate the prudent manager standard because they are not based on what SDG&E knew or reasonably should have known at the time.

- The evidence clearly demonstrates that SDG&E actively monitored the faults on TL 637.

- The evidence shows that sending a protective engineer to determine the fault location would not have prevented the Witch Fire.

- The Decision amounts to the inappropriate application of a hindsight and perfection standard, in violation of the Commission's own precedent.

Guejito Fire

- By completely ignoring the findings by Cal Fire and CPSD that the broken Cox lashing wire caused the Guejito Fire ignition (and SDG&E's related arguments), the Decision denies SDG&E due process of law and violates the requirement that a decision must contain separately stated findings of fact and conclusions of law on all issues material to the decision.

- In finding SDG&E unreasonable for failure to maintain an adequate clearance between its facilities and Cox's facilities, the Decision erroneously disregards causation and imposes a perfection standard because the clearance did not cause the ignition.

Rice Fire

- The Decision departed from the Proposed Decision and announced a new theory of SDG&E's allegedly imprudent conduct related to the limb that broke and fell onto SDG&E's powerlines. In doing so, the Decision violates Public Utilities Code § 311 and due process requirements.

- The Decision's new theory that SDG&E should have discovered the broken limb prior to the fire is not supported by substantial evidence, which shows that the structural defect was "hidden." In deeming SDG&E unreasonable for failure to discover this "hidden defect," the Decision establishes a clairvoyance standard.

- The Decision's finding that SDG&E violated General Order 95, Rule 35 because it did not identify Tree FF1090 as a "Reliability Tree" conflicts with the language of Rule 35 requiring "actual knowledge," which SDG&E did not possess.

- The evidence demonstrates that the limb was growing away from the powerlines.

- The evidence demonstrates that trimming Tree FF1090 within 0 to 3 months would not have prevented the Rice Fire ignition.

- The evidence demonstrates that the Decision misinterprets the plain meaning of SDG&E's records related to Tree FF1090 and its growth rate.

Wind and Weather

- The evidence demonstrates that the wind and weather conditions in October 2007 were extreme and contributed to the fire storm that ensued.

SDG&E requests that the Commission rectify these legal errors in a Decision Granting Rehearing.

V. ARGUMENT

A. The Decision Commits Legal Error in Concluding that Inverse Condemnation Is "Not Relevant" to its Reasonableness Review

1. Inverse Condemnation Is a California Constitutional Claim That Applies Strict Liability to Spread Costs Associated with Property Damage

Under California legal principles of inverse condemnation as applied by the Superior Court, SDG&E had to pay property damage claims related to the Witch, Guejito and Rice Fires *regardless* of the reasonableness of its conduct so that those costs could be spread across the public. As noted above, plaintiffs in the 2007 Wildfire Litigation pled inverse condemnation claims against SDG&E, and California courts rejected SDG&E's arguments that inverse condemnation should not apply to it.

As the California Supreme Court has indicated, inverse condemnation is a California Constitutional claim that "derives from article 1, section 19 of the California Constitution, which provides in pertinent part: 'Private property may be taken or damaged for public use only when just compensation … has first been paid … to the owner.'"[19]

Under inverse condemnation, a public entity "may be held strictly liable, *irrespective of fault*, where a public improvement constitutes a substantial cause of the plaintiff's damages *even if only one of several concurrent causes*."[20] In other words, issues of negligence or wrong-doing are explicitly *not* taken into account in inverse condemnation cases.[21] Thus, "[u]nlike negligence

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[19] *Holtz v. San Francisco Bay Area Rapid Transit Dist*. 17 Cal. 3d 648, 652 (1976).

[20] *Marshall v. Dept. of Water and Power*, 219 Cal. App. 3d 1124, 1138-39 (1990) (*citing Souza v. Silver Development Co.,* 164 Cal. App. 3d 165, 170 (1985)) (emphases added).

[21] *Pac. Bell v. So. Cal. Edison Co.*, 208 Cal. App. 4th 1400, 1408 (2012); *see also Marshall v. Dept. of Water and Power*, 219 Cal. App. 3d 1124 (1990).

… inverse condemnation does not require any breach of a standard of care, nor foreseeability of the harm."[22]

In applying inverse condemnation, California courts have stated that the "fundamental policy underlying the concept of inverse condemnation is that the costs of a public improvement benefiting the community should be spread among those who benefited rather than allocated to a single member of the community."[23] Public entities can spread costs through taxation or, as a court observed with respect to the Los Angeles Department of Water and Power, through electric rates. [24]

Until relatively recently, California courts applied inverse condemnation only to governmental entities. But the courts have extended inverse condemnation to privately-owned public utilities, and in doing so, have assumed that the cost spreading purpose could be accomplished through rates:

> Edison argues that this loss-spreading rationale does not apply because as a public utility it does not have taxing authority and may raise rates only with the approval of California's Public Utilities Commission. We note that in this case the judgment was for $123,841.95 and that Edison has not pointed to any evidence to support its implication that the commission would not allow Edison adjustments to pass on damages liability during its periodic reviews.[25]

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22 *Aetna Life & Casualty Co. v. City of Los Angeles*, 170 Cal. App. 3d 865 (1985).

23 *Pac. Bell v. City of San Diego*, 81 Cal. App. 4th 596, 602 (2000) (*citing Belair v. Riverside County Flood Control Dist.* (47 Cal. 3d. 550, 558 (1988)).

24 *Aetna Life & Casualty Co. v. City of Los Angeles*, 170 Cal. App. 3d 865, 875 (1985).

25 *Pac. Bell v. So. Cal. Edison Co.*, 208 Cal. App. 4th 1400, 1407 (2012).

California courts have determined as a matter of public policy that strict liability under inverse condemnation coincides with the ability of the utility to pass along the costs through rates. The Commission should recognize and uphold the courts' determination in that regard in this case.

2. The Decision Frustrates the Cost Spreading Rationale of Inverse Condemnation and Runs Afoul of Applicable Law and the U.S. and California Constitutions

In finding that "Inverse Condemnation principles are not relevant to a Commission reasonableness review under the prudent manager standard,"[26] the Commission frustrates the cost spreading purpose of inverse condemnation as it was applied in the 2007 Wildfire Litigation. In reaching its conclusion of irrelevance, and by denying *any* recovery (and spreading) of the WEMA Costs, the Decision commits legal error within the meaning of both Sections 1757(a)(2) and 1757(a)(6) of the Public Utilities Code and the U.S. and California Constitutions.

The Commission does not elaborate on why it believes it has the authority to disregard the cost-spreading rationale of inverse condemnation, which violates the requirement that its decision contain separately stated findings of fact and conclusions of law on all issues material to the decision.[27] But the Commission appears to assume either that it is not bound by California court decisions regarding inverse condemnation and cost spreading, or that Public Utilities Code § 451 somehow trumps the law of inverse condemnation. Neither assumption has merit.

First, inverse condemnation is a Constitutional claim that applied to SDG&E as a result of the Superior Court's interpretations of the state Constitution in the 2007 Wildfire Litigation.

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[26] D.17-11-033, p. 65.

[27] *See* Public Utilities Code § 1705. While the Decision cursorily dismisses issues of inverse condemnation in a matter of a few sentences on p. 65, this falls short of the requirements of Section 1705 since there are no stated Findings of Fact or Conclusions of Law that reference inverse condemnation.

The Commission must adhere to both the federal and state Constitutions, and the Public Utilities Code specifically identifies as reversible legal error any Decision that violates either Constitution.[28] While the California Constitution permits the Commission to "establish its own procedures," that grant of authority is "subject to statute and due process."[29] In other words, the Commission must follow and give effect to the law in its proceedings.

Further, while the meaning and requirements of inverse condemnation, as applied to SDG&E, derives from judicial interpretations of Article I, § 19 of California Constitution, those interpretations are nevertheless binding on the Commission.[30] In finding inverse condemnation "not relevant," however, the Commission has ignored the cost spreading rationale for inverse condemnation.

Second, the Commission wrongly assumes there is a conflict between inverse condemnation principles and its obligation to conduct a reasonableness review of the WEMA Costs under Public Utilities Code § 451.[31] But no such conflict need exist, as SDG&E has explained since it filed its Application.[32] In light of the applicability of inverse condemnation, the Commission can and should ensure the justness and reasonableness of the WEMA Costs by examining the actions and decisions that SDG&E undertook in light of the applicability of inverse condemnation to the claims asserted in the 2007 Wildfire Litigation – *i.e.*, the issues erroneously deferred to Phase 2 of this proceeding. To the extent that settlements, or other

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[28] Public Utilities Code §§ 1757(a)(6) and 1760.

[29] Cal. Const. Art. XII, § 2.

[30] *See, e.g., PG&E Corp. v. Public Utilities Com.*, 118 Cal. App. 4th 1174, 1199 (2004) (*citing Pacific Tel. & Tel. Co. v. Public Util. Com.*, 62 Cal. 2d 634, 653 (1965)).

[31] D.17-11-033, p. 65.

[32] *See, e.g.*, Application, pp. 4-7; 9-12.

decisions SDG&E made that led to the $379 million in WEMA Costs are unreasonable, a percentage of the costs can be disallowed. In the past, the Commission has implemented percentage disallowances in reasonableness reviews.[33] But if the Decision stands, the Commission will never examine the actions and decisions that actually gave rise to the costs that are at issue.

The conflict the Commission has unnecessarily created between inverse condemnation principles and Public Utilities Code § 451 also violates principles of statutory construction. The Supreme Court has repeatedly articulated two principles of statutory construction that the Commission should recognize and apply here:

> First, '[a] court must, where reasonably possible, harmonize statutes, reconcile seeming inconsistences in them, and construe them to give force and effect to all of their provisions. …' Second, all 'presumptions are against a repeal by implication,' including partial repeals that occur when one statute implicitly limits another statute's scope of operation. Thus, 'we will find an implied repeal 'only when there is no rational basis for harmonizing … two potentially conflicting statutes, and the statutes are 'irreconcilable, clearly repugnant, and so inconsistent that the two cannot have concurrent operation.'[34]

Here, the Commission has *not* harmonized applicable laws but has instead found that Public Utilities Code § 451 implicitly limits the scope of operation of the California Constitution, as applied to SDG&E. That the Commission has undertaken such an implicit limitation of inverse condemnation is demonstrated by its outright refusal to enforce the cost-spreading rationale of inverse condemnation. The Commission should have sought to harmonize inverse condemnation

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[33] D.87-06-021, 1987 Cal. PUC LEXIS 588, *1-2 and *47 (*citing* D.84-12-033; D.94-05-020).

[34] *Even Zohar Construction & Remodeling, Inc. v. Bellaire Townhouses, LLC* 61 Cal. 4th 830, 838 (internal citations omitted) (2015).

and Section 451 by focusing its reasonableness review on the Phase 2 issues in recognition of the fact that the costs were imposed by application of inverse condemnation.[35]

The Commission's failure to harmonize Section 451 with the court's application of inverse condemnation is especially troubling because, as demonstrated below, it creates an unconstitutional taking and due process violations. It is well-settled, however, that statutes should not be interpreted in a way that renders their application unconstitutional or, indeed, that raises doubts about their constitutionality. To the contrary, under the doctrine of constitutional avoidance, statutes should be interpreted to avoid constitutional problems "if any other possible construction remains."[36] Here, such an interpretation is not only possible; it is compelled by other principles of statutory construction.

3. The Decision's Complete Denial of WEMA Cost Recovery Leads to Unjust and Unreasonable Results

Furthermore, the legal conflict created by the Commission's finding that inverse condemnation is "not relevant" to its reasonableness review creates a fundamentally unjust and unreasonable whipsaw of inconsistent and incompatible legal standards. That result is both arbitrary and inconsistent with SDG&E's right to due process of law. Specifically, despite the fact that the incurrence of costs resulted from inverse condemnation, a – a strict liability regime premised upon the utility's ability to spread costs, irrespective of fault and where the utility is only one of several concurrent causes – the Commission has found that the recovery of costs depends on a reasonableness review where the standard of reasonableness depends on (alleged)

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[35] *See also Rose v. State*, 19 Cal. 2d 713, 723 (1942) (Observing the "rule that statutes must be given a reasonable interpretation, one which will carry out the intent of the legislators and render them valid and operative, rather than defeat them. In so doing, sections of the Constitution, as well as of the codes, will be harmonized where reasonably possible, in order that all may stand.")

[36] *People v. Garcia*, 2 Cal. 5th 792, 804 (2017).

fault and where concurrent causes – such as extreme winds, a broken lashing wire, and a tree limb – are ignored.

Put differently, since the reasonableness of SDG&E's conduct in operating and managing its system prior to the Witch, Guejito and Rice Fires was specifically excluded from the analysis of whether it must pay property damage claims under California law – in order to further the goal of cost spreading – it defies logic and the law to deny such cost spreading on the very basis the courts did *not* consider. As noted above, the Commission should have avoided this outcome by assessing the reasonableness of the actions and decisions SDG&E voluntarily made – *i.e.*, the Phase 2 issues.

The Decision misguidedly attempts to bolster its determination that inverse condemnation is "not relevant" to its reasonableness review through several specious arguments. In response to comments on the Proposed Decision that challenged its failure to address, let alone mention, inverse condemnation, the Decision defensively contends that it was not "a material issue in Phase 1" because "even SDG&E withdrew its testimony concerning inverse condemnation for purposes of Phase 1."[37] That contention mischaracterizes the arguments SDG&E has made during the course of this proceeding, and the way the Assigned Commissioner and Administrative Law Judge decided to conduct this proceeding.

SDG&E has consistently maintained that the Commission must take the legal issue of the applicability of inverse condemnation into account in its reasonableness review. Beginning with its Application, SDG&E has argued that it is entitled to recover the WEMA Costs because of the applicability of inverse condemnation, and that the appropriate scope of the Commission's reasonableness review is: whether SDG&E reasonably decided to settle 2007 Wildfire Litigation

[37] D.17-11-033, p. 65.

claims in light of the applicability of inverse condemnation; the process SDG&E employed to settle those claims at the lowest reasonable cost; and SDG&E's efforts to substantially reduce the costs it seeks to recover.[38] Prior to the Prehearing Conference and the issuance of the Scoping Memo, SDG&E similarly argued "[t]he impact of inverse condemnation on the WEMA Costs therefore cannot be ignored. Rather, that impact should drive both the Commission's assessment of the WEMA Costs and, in turn, the schedule for this proceeding."[39]

The Scoping Memo, however, rejected SDG&E's arguments about the appropriate scope and schedule and instead phased this proceeding *over SDG&E's objection*, with Phase 1 to address SDG&E's pre-fire operation and management of its facilities, and Phase 2 to address the issues SDG&E argued should be at the heart of this reasonableness review.[40]

In the pre-Phase 1 Threshold Briefing ordered by the Scoping Memo, SDG&E continued to press its position regarding the relevance of inverse condemnation:

> This case presents a legal issue of first impression for the Commission: the relevance of the doctrine of inverse condemnation in the context of the Commission's review of cost recovery. In addition to explaining how inverse condemnation led to SDG&E's incurrence of the WEMA Costs regardless of "fault," SDG&E has demonstrated through testimony that the actions and decisions that led to the incurrence of the WEMA Costs were reasonable and prudent.[41]

Similarly, in its Opening Brief following the evidentiary hearing, SDG&E again asserted that the Commission must address the legal issue of inverse condemnation.[42] None of the decisions that were issued following SDG&E's briefs (*i.e.*, the Scoping Memo, the "Ruling Confirming

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38 Application, pp. 3-7, 9-12.

39 "Prehearing Conference Statement of [SDG&E] (Feb. 19, 2016)," pp. 2-5, 7-9.

40 Scoping Memo, pp. 4-6.

41 "[SDG&E]'s Opening Brief on Threshold Issues (May 11, 2016)," p. 2 (internal citation omitted).

42 SDG&E Phase 1 Opening Brief, pp. 10-12, 17-20.

Procedural Schedule Following Briefs on Threshold Issues," or the Proposed Decision) mentioned or addressed in any way SDG&E's arguments regarding inverse condemnation. The Decision is the first time that any ruling in this case has included a single mention of inverse condemnation.

By claiming that "even SDG&E withdrew its testimony concerning Inverse Condemnation for purposes of Phase 1," the Decision seems to be taking the position that SDG&E somehow failed to preserve its arguments regarding inverse condemnation, which as described above, is false. SDG&E withdrew certain testimony on the first day of the evidentiary hearing at the insistence of an intervenor who claimed that only Phase 1 testimony should be addressed at the Phase 1 evidentiary hearing.[43] To imply that SDG&E should not have withdrawn that testimony if it wanted inverse condemnation to be considered penalizes SDG&E for following the rules of the proceeding established by the Scoping Memo. In any event, inverse condemnation is a legal issue and its applicability to this case does not depend on testimony or evidence.

The Decision also defends its position on inverse condemnation by stating that the "the Superior Court only went so far as to rule that the plaintiff homeowners could plead Inverse Condemnation claims in their civil actions against SDG&E" and did not determine "that SDG&E was in fact strictly liable."[44] In other words, the Decision suggests that SDG&E's arguments regarding the applicability of inverse condemnation are weakened by the fact that it settled the 2007 Wildfires plaintiffs' claims following the Court's ruling, instead of litigating those claims to a final judgment.

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[43] Tr. 232:10-236:23.

[44] D.17-11-033, p. 65.

That suggestion makes no sense. Indeed, inverse condemnation was the driving force behind SDG&E's settlement strategy. Whether SDG&E had litigated the plaintiffs' claims to a final judgment or not, the Superior Court determination that inverse condemnation applied meant that SDG&E was strictly liable because there are no defenses to strict liability. Indeed, the FERC appropriately reached that very conclusion:

> Under the present circumstances, therefore, it is highly probable that California's inverse condemnation policy would result in SDG&E's strict liability for the damages arising from the 2007 wildfires. In fact, a 2009 Minute Order issued by the Superior Court of California, County of San Diego found that plaintiffs seeking damages for the 2007 wildfires had 'adequately alleged a cause of action for inverse condemnation against SDG&E.' Under these circumstances, it is clear that SDG&E's proactive steps in settling the related third-party claims were justified since they would have been exposed to strict liability for third party claims in any event. By settling, SDG&E avoided facing considerable litigation risk and disposed of the claims for significantly less than the amount demanded by plaintiffs. Therefore, I find SDG&E's conduct was rational and prudent.[45]

The Commission cannot intend to suggest that a utility should litigate a case to judgment as a prerequisite to preserving arguments regarding the applicability of inverse condemnation in a subsequent rate recovery proceeding. Such a suggestion is particularly perverse given that the Decision finds that inverse condemnation is "not relevant" to a Commission reasonableness review. Moreover, if SDG&E had litigated with 2007 Wildfire plaintiffs, it could have faced far greater damages, as FERC appropriately recognized, leading to a higher level of WEMA Costs. Then, the Commission would undoubtedly have concluded that SDG&E was imprudent for failing to settle the cases for less.

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[45] *San Diego Gas & Elec. Co.*, 146 FERC ¶ 63,017, PP 61-62 (2014) (internal citations omitted).

4. The Decision Violates Constitutional Takings Principles

The Decision's outcome – denial of *any* recovery of the WEMA Costs – also results in an unconstitutional taking, mandating reversal under Section 1757(a)(6). The state and federal Constitutions prohibit the government from taking private property for public use without just compensation.[46] As discussed above, for purposes of inverse condemnation, SDG&E is treated as the government and must provide just compensation to property owners who suffer damage. But since SDG&E cannot unilaterally impose rate increases or taxation to pay for the property damage, it must seek Commission approval to effectuate the California Constitutional cost-spreading.

By denying that approval, the Commission has in effect taken SDG&E's property for public use without just compensation in violation of both the state and federal Constitutions.[47] The "takings clause is 'designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.'"[48] Here, SDG&E has been forced to compensate the 2007 Wildfire plaintiffs for property damage without regard to the fault or foreseeability of SDG&E's conduct based on inverse condemnation, but SDG&E is not being permitted to recover and therefore spread those costs. Thus, SDG&E's funds are being taken for the public purpose of making whole the persons injured by the 2007 Wildfires without just compensation. Accordingly, the Decision results in an unconstitutional taking. To avoid this unconstitutional taking, the Commission should have

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[46] Cal. Const. Art. I § 19; U.S. Const. 5th Amend.

[47] As the Supreme Court has explained, "The guiding principle has been that the Constitution protects utilities from being limited to a charge for their property serving the public which is so 'unjust' as to be confiscatory." *Duquesne Light Co. v. Barasch*, 488 U.S. 299, 308 (1989).

[48] *Kavanau v. Santa Monica Rent Control Bd.*, 16 Cal. 4th 761, 774 (1997) (internal citations omitted).

interpreted Public Utilities Code § 451 to permit recovery of damages paid in connection with inverse condemnation claims.

As discussed below, SDG&E has demonstrated the reasonableness of its pre-fire conduct in this proceeding. But setting that issue aside, the Commission has not proceeded in a manner required by law in concluding that inverse condemnation is "not relevant" to its reasonableness review. To cure this error, the Commission must examine and predicate cost recovery upon the reasonableness of SDG&E's Phase 2 conduct.

B. The Decision Commits Reversible Legal Error in Its Phase 1 Reasonableness Reviews

In finding SDG&E imprudent with respect to the operation and management of its facilities prior the Witch, Guejito and Rice Fires, the Commission committed a series of legal errors that, under Public Utilities Code § 1757(a), render the Decision subject to reversal on appeal. The Decision's most egregious legal errors are that its findings are not supported by substantial evidence in light of the whole record, it did not proceed in the manner required by law (particularly with respect to application of the prudent manager standard), and it conflicts with due process standards.

1. The Decisions Findings Are Not Supported by Substantial Evidence in Light of the Whole Record

To satisfy Public Utilities Code § 1757(a)(4), the Commission's decisions must be supported by substantial evidence in light of the whole record.[49] The Commission's decision here is not. California Court of Appeal decisions provide clear guidance on what constitutes "substantial evidence": "We keep in mind that substantial evidence has been defined as

[49] *See* Public Utilities Code § 1757(a)(4).

'ponderable legal significance … reasonable in nature, credible, and of solid value."[50] Likewise, the Court of Appeal has explained the meaning of "in light of the whole record":

> The 'in light of the whole record' language means that the court reviewing the agency's decision cannot just isolate the evidence supporting the findings and call it a day, thereby disregarding other relevant evidence in the record. Rather, the court must consider all relevant evidence, including evidence detracting from the decision, a task which involves some weighing to fairly estimate the worth of the evidence. We may reverse the decision only if, based on the evidence before the Commission, no reasonable person could reach the decision it did.[51]

As discussed below, the Decision is *not supported* by substantial evidence in light of the whole record in several respects. The Decision very clearly did "just isolate the evidence supporting the findings and call it a day, thereby disregarding other relevant evidence in the record."

2. The Decision Did Not Proceed in the Manner Required by Law

To satisfy Public Utilities Code § 1757(a)(2), the Commission must proceed in the manner required by law. Under the law regarding just and reasonable rates, Public Utilities Code § 451, the Commission requires a utility to demonstrate "that the costs it seeks to include in revenue requirement are reasonable and prudent."[52] The utility bears the burden to prove reasonableness and prudence by the preponderance of the evidence, defined as "in terms of probability of truth, e.g., such evidence as, when weighed with that opposed to it, has more convincing force and the greater probability of truth."[53] The Decision does not proceed in a

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[50] *Lucas Valley Homeowners Ass'n v. County of Marin*, 233 Cal. App. 3d 130, 142 (1991) (internal citations omitted).

[51] *The Utility Reform Network v. Public Utilities Com*., 223 Cal. App. 4th 945, 959 (2014) (internal citations omitted).

[52] D.14-06-007, p. 12.

[53] *Id*., p. 13 (internal citations omitted).

manner required by law and abuses its discretion because it did not in fact follow its own prudent manager standard in reaching its findings and conclusions.

As the Decision indicates, the Commission's standard for reasonableness reviews is as follows:

> The term reasonable and prudent means that at a particular time any of the practices, methods and acts engaged in by a utility follows the exercise of reasonable judgment in light of the facts known or which should have been known at the time the decision was made. The act or decision is expected by the utility to accomplish the desired result at the lowest reasonable cost consistent with good utility practices. Good utility practices are based upon cost effectiveness, safety and expedition.[54]

The Decision, however, fails to acknowledge that the Commission has recently pointed out in D.16-12-063 that "D.02-08-064 provides additional factors for applying the reasonable manager standard," including that:

- the reasonableness of a particular management action depends on what the utility *knew or should have known at the time* that the managerial decision was made, not how the decision holds up in light of future developments; and

- a reasonable and prudent act includes a *spectrum of possible acts* consistent with the utility system need, the interest of the ratepayers, and the requirements of governmental agencies of competent jurisdiction.[55]

Consistent with these additional factors – which make clear that the utility's knowledge at the time of the decision is crucial, and that a spectrum of acts (rather than a single, optimal act) may be reasonable – the Commission has also made clear that a reasonableness review *does not* include hindsight analyses.[56] In other words, whether an action "may or may not prove to be the

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[54] D.17-11-033, p. 10 (citing 24 CPUC 2d 476, 486).

[55] D.16-12-063, pp. 9-10 (citing D.02-08-064) (emphasis added).

[56] D.09-05-025, p. 8. *See also* D.90-09-088, p. 15 (noting that the reasonableness review standard "is used to avoid the application of hindsight in reviewing the reasonableness of a utility decision.")

best possible [action] in hindsight" is not an appropriate inquiry in a reasonableness review, nor is the way in which the action or decision "holds up in light of future developments."[57]

Likewise, the Commission does not impose "a 'perfection' standard" in a reasonableness review.[58] These additional factors draw support from the U.S. Supreme Court, which has indicated that in cost review proceedings, a state commission is not entitled to "substitute its judgment" for the judgment of the utility's management, unless the management acted in "bad faith" or there is "an abuse of discretion."[59]

The Commission's prudent manager standard also requires a causal connection between the reasonableness of the conduct at issue and the costs under review. As the Decision sets forth in Conclusion of Law 1, "For costs to be found reasonable, the utility must prove that they were prudently incurred by competent management exercising the best practices of the era, and using well-trained, well-informed, and conscientious employees who perform their jobs properly." In other words, the costs are to be evaluated based on the actions that led to them (or by which they were "incurred"). Thus, actions that did not lead to or cause the specific costs under review are not properly within the scope of a review pursuant to the prudent manager standard.

The Decision purports to heed its prudent manager standard but in fact violates that standard in several ways. As the U.S. Supreme Court stated in the context of judicial review of administrative agency adjudication, "[i]t his hard to imagine a more violent breach of [the reasoned decision] requirement than applying a rule of primary conduct or standard of proof

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57 D.09-05-025, p. 8.

58 D.14-06-007, p. 36.

59 *Missouri ex rel. Southwestern Bell Tel. Co. v. Public Service Com*. 262 U.S. 276, 288-289 (1923).

which is in fact different from the rule or standard formally announced."[60] The Decision commits such a breach with respect to its application of the prudent manager standard, and the Commission must remedy this legal error on rehearing.

3. The Decision Conflicts With Due Process Requirements

For a Commission order to be legally valid, it must comport with the state and federal constitutional requirements of due process of law.[61] Among those requirements is that "the Commission must act upon evidence and not arbitrarily."[62] This means that the Commission cannot simply ignore evidence, particularly when that evidence directly relates to the causation of a fire at issue. Due Process also requires "the opportunity to be heard 'at a meaningful time and in a meaningful manner.'"[63] In that regard, the Commission cannot invent new theories of the evidence in an effort to support findings of unreasonable conduct and deprive the affected party (SDG&E) of any opportunity for comment.

The ways in which these categories of legal error manifest themselves in the Decision's specific findings and conclusions regarding the Witch, Guejito and Rice Fires are discussed below.

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60 *Allentown Mack Sales & Serv. v. NLRB,* 522 U.S. 359, 374 (1998) (overturning a National Labor Relations Board adjudicatory decision for imposing a more stringent standard than the articulated standard suggested).

61 *Railroad Com. of California v. Pacific Gas & Electric Co.*, 302 U.S. 388, 393 (1938).

62 *Id*. (*citing Interstate Commerce Comm'n v. Louisville & Nashville R. Co.*, 227 U.S. 88, 91; *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 51, 73; *Morgan v. United States*, 298 U.S. 468, 480-481; *Ohio Bell Telephone Co. v. Public Utilities Comm'n*, 301 U.S. 292, 304, 305.).

63 *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)).

4. The Decision Errs as a Matter of Law in Finding SDG&E's Operation and Management of the Facilities Linked to the Witch Fire Were Unreasonable and Imprudent

Legal errors abound in the Decision's findings that SDG&E unreasonably operated and managed its facilities prior to the Witch Fire ignition. In particular, the Commission's findings that SDG&E unreasonably failed to undertake certain actions prior to the ignition violate the Commission's prudent manager standard because they ignore what SDG&E knew or reasonably should have known on October 21, 2007, prior to the ignition on TL 637. Instead, the Decision relies on hindsight bias and speculation, while ignoring "good utility practice" and disregarding evidence of industry standards and the requirement that the conduct at issue have a causal connection to the incurrence of the WEMA Costs. By imposing a standard that clearly violates the prudent manager standard, the Decision did not proceed in a manner required by law. The Decision also runs afoul of the requirement that its findings draw support from substantial evidence in light of the whole record, which shows that SDG&E reasonably operated TL 637 on October 21, 2007 and took the appropriate steps to investigate the three faults that preceded the ignition, all in accordance with prudent procedures consistent with industry practice.

According to the Decision, SDG&E unreasonably failed to perform three actions on October 21, 2007:

> (1) SDG&E failed to monitor the faults along TL 637;
>
> (2) SDG&E failed to send a protective engineer to determine the location of the faults; and
>
> (3) SDG&E failed to de-energize TL 637 and appreciate the risk of its automatic recloser policy.[64]

[64] D.17-11-033, pp. 27-29, Findings of Fact 15-19 and Conclusion of Law 11.

Based on what SDG&E knew or reasonably should have known at the time, SDG&E has met its burden to show its response to the events on TL 637 was reasonable and prudent.

a. The Decision Ignores Substantial Evidence Showing that SDG&E Monitored the Faults Along TL 637

First, the Decision's finding that SDG&E unreasonably "fail[ed] to monitor the faults along TL 637" conflicts with the record evidence. That evidence overwhelmingly demonstrates that SDG&E actively monitored the faults on TL 637, and that its monitoring was appropriate based on what SDG&E knew or reasonably should have known at the time. After the first fault on TL 637 at 8:53 a.m., SDG&E "did not know the specific location of the fault (other than that it occurred somewhere along the approximately 14 miles of TL 637), the nature of the fault (whether it was, for example, phase-to-ground, phase-to-phase), or the cause of the faults (whether it was caused by debris in the wind, blowing branches, animals, *etc*.)."[65] Consistent with its procedures, SDG&E thus dispatched Troubleshooters (trained electrical workers) to the substations at either end of TL 637 to investigate and report to Grid Control.[66]

Troubleshooters were again dispatched to the substations at either end of TL 637 after the second fault at 11:22 a.m.[67] The troubleshooters each reported back to Grid Control that the circuit breakers had operated and reclosed.[68] Again, it was not known at this time where on TL 637 the fault had occurred.[69] SDG&E had no reason to take extraordinary measures at that time because, as Mr. Yari testified, based on his substantial experience, "[c]onductor-to-conductor

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65 Exhibit ("Exh.") SDGE-11-A (Yari Amended Rebuttal), p. 6.

66 *Id*., pp. 6-7.

67 *Id*., pp. 9-10.

68 *Id*.

69 Tr. 337:11-23.

contact is relatively rare, whereas on a windy day, a fault is not unusual given that there can be wind-blown vegetation or other debris that can come into contact with the conductors."[70] Further, SDG&E had no prior experience of fire ignitions from transmission lines contacting one another and faulting in high winds.[71] Grid Control personnel also had no reason to suspect that the faults were unusual or dangerous at this time and indicated "[t]here doesn't appear to be any kind of weird stuff going on" with respect to the faults.[72] While the troubleshooters were at the substations investigating the second fault, TL 637 tripped and reclosed again, at 12:23 p.m., which is the fault that is believed to have led to the ignition.[73]

Under SDG&E's procedures, when a line faulted and immediately reclosed, and the cause for the trip was unknown, the line would be physically patrolled within a single business day.[74] Consistent with its procedures, an SDG&E patrolman was sent to patrol TL 637 at 12:23 p.m., and a few minutes later, he informed Grid Control that he would conduct the patrol via land because he did not think a helicopter patrol was possible under the prevailing wind conditions.[75] Ultimately, the patrolman did not reach TL 637 because the fire ignited, presenting dangerous conditions, while he was en route.[76]

As this unrebutted evidence clearly demonstrates, SDG&E did actively "monitor the faults along TL 637." In its "Witch Fire Background" Section (4.1.1), the Decision even

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70 *Id*., p. 8.

71 *Id*., p. 15.

72 *See* 12:19 p.m. audio recording (SDGE0208961_STM_jcampbel_datarequest_10-21-2007_1B6) referenced in footnotes 58 and 59 of Exh. ORA-01 (Stannik Direct), p. 14.

73 Exh. SDGE-11-A (Yari Amended Rebuttal), pp. 9-10.

74 *Id*., pp. 10-11.

75 *Id*., pp. 10-11.

76 *Id*., p. 11.

provides its own timeline that reflects SDG&E's monitoring activities, but the Decision inexplicably ignores those activities in the "Reasonableness Review" Section (4.1.5) where it claims SDG&E failed to monitor the faults.[77] The Decision does not even attempt to explain how the evidence does *not* constitute monitoring, or what, in its view, would constitute monitoring of the faults.

Nor is there any evidence in the record that a reasonable manager would have monitored the situation differently than SDG&E did based on the available information. No party in this proceeding provided any showing of particular steps a reasonable manager would have taken under the circumstances, or what facts would have informed such steps. As noted, SDG&E had no prior experience of fire ignitions from transmission lines contacting one another and faulting in high winds, and so SDG&E's monitoring activities could not have been informed by that danger.

Accordingly, the Decision's finding regarding the supposed failure to monitor is unsupported by *any* evidence and must be overturned.

b. Dispatching a Protective Engineer Would Not Have Prevented the Witch Fire Ignition

Second, the Decision's finding that SDG&E should have "sent a protective engineer out to either end of TL 637 before the third fault occurred," which "may have prevented the third fault from igniting the Witch Fire at 12:23 p.m."[78] is not supported by substantial evidence and conflicts with the Commission's prudent manager standard. While the Decision recognizes that it would have taken 1.5 hours for a protective engineer to calculate the fault location, and merely

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77 *Compare* D.17-11-033, pp. 12-14 *with* pp. 27-29.

78 *Id*., p. 28.

speculates that such an action "*may* have prevented" the fire, it ignores SDG&E's evidence that such an exercise would *not* have revealed the cause of the faults prior to the ignition of the fire.[79]

Specifically, Mr. Yari explained that the first fault was routine and should have caused no major concern.[80] Since the second fault (11:22 a.m.) occurred just one hour before the third fault (12:23 p.m.), which is believed to have ignited the Witch Fire, the fault location would not have been determined in time since the calculations take 1.5 hours. Moreover, even if the location had been determined just prior to 12:23 p.m., a patrolman would have then had to drive to the remote backcountry location to observe that the faults were resulting from conductor to conductor contact, which would have taken additional time, and also could not have been completed prior to the ignition.[81] Since the record unequivocally shows that sending a protective engineer would not have prevented the fire ignition, it was unreasonable for the Decision to fault SDG&E for failing to do so.

As noted above, under the prudent manager standard, "[t]he act or decision is expected [to be] … consistent with good utility practices." The Decision also cannot square its finding with the with "good utility practices" element because there is no record evidence that any utility would have sent a protective engineer to calculate the fault location under the circumstances. Ultimately, by deeming SDG&E unreasonable for failing to take an action that it speculates "may have prevented" the fire – but where the evidence shows the action would *not* have prevented the fire – the Decision improperly establishes a perfection standard and applies hindsight bias, contrary to the prudent manager standard. The lack of any causal connection

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[79] *See, e.g.*, "[SDG&E's] Phase 1 Reply Brief" (April 14, 2017) ("SDG&E Phase 1 Reply Br."), pp. 41-43.

[80] Tr. 349:18-350:1.

[81] Exh. SDGE-11-A (Yari Amended Rebuttal), pp. 13-15.

between the failure to send a protective engineer to determine the fault location and the costs incurred reflects an additional violation of the prudent manager standard and deprivation of substantive due process.

c. SDG&E Did Not De-Energize TL 637 Prior to the Ignition Because It Had No Knowledge that the Witch Fire Would Ignite

Third, the Decision's finding that "[i]t would have been more reasonable to force an outage before the Witch Fire ignited at 12:23 p.m.,"[82] and the related criticisms of SDG&E's recloser policy, similarly lack support in substantial evidence and conflict with the prudent manager standard. With the knowledge that the Witch Fire ignited, it is easy for the Decision to second-guess the decisions SDG&E made in real-time without such knowledge. But that constitutes hindsight analysis, forbidden by the prudent manager standard, unless there is information SDG&E knew or should have known that would have supported a decision to de-energize TL 637 after the second fault. The record reflects no evidence of any such knowledge.

Mr. Yari comprehensively explained why SDG&E did not de-energize TL 637 or disable automatic reclosing prior to the Witch Fire ignition:

> There was no information available at that time that suggested there was a problem that would have required those measures. Faults are not uncommon on a windy day. If SDG&E had known, prior to the ignition of the Witch Fire, that its lines were contacting one another and that there was arcing that could ignite a wildfire, I have no doubt that TL 637 would have been de-energized. In my experience, SDG&E had not previously experienced fires related to transmission lines contacting one another and faulting in high winds. De-energizing lines is not taken lightly because they can cause power outages to customers.[83]

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82 D.17-11-033, p. 28.

83 Exh. SDGE-11-A (Yari Amended Rebuttal), pp. 14-15.

Consistent with Mr. Yari's testimony, Mr. Geier also explained the seriousness of any de-energization decision:

> In emergencies, reliability is extremely important since water supply, traffic signals, safe evacuations, communications, and emergency response all depend on electric power. Both before and after the 2007 Wildfires, I have personally seen the consequences that can result from outages of common facilities such as traffic signals, and my colleagues and I are always mindful of the importance of keeping the electricity flowing and minimizing transmission and distribution facility outage times, even if such outages cannot be eliminated entirely, such as in extreme weather conditions.[84]

Given that SDG&E did not learn that TL 637 was implicated in the Witch Fire ignition until well after the ignition, it was perfectly reasonable not to de-energize the line prior to obtaining that knowledge.[85] Nothing rebuts this testimony, and in their joint concurrence, President Picker and Commissioner Guzman acknowledged that "Utilities are understandably reluctant to de-energize circuits without a compelling rationale. Here, SDG&E faced this choice with the Witch fire."[86]

The Decision seeks to overcome the preponderance of the evidence regarding the state of SDG&E's knowledge on October 21, 2007 by asserting that SDG&E "was unreasonable not to foresee the Witch Fire."[87] According to the Decision, the following facts rendered the ignition foreseeable: the Red Flag warning in effect on October 21, 2007; the 9:30 a.m. ignition of the Harris Fire; the four faults on a line that had only experienced multiple faults on nine days in its 24 year history; and the 2003 Cedar Fire in San Diego County.[88]

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84 Exh. SDGE-05 (Geier Direct), p. 10.

85 Exh. SDGE-11-A (Yari Amended Rebuttal), pp. 11-13.

86 Joint Concurrence of President Picker and Commissioner Guzman Aceves, A.15-09-010, p. 4 (Dec. 26, 2017).

87 D.17-11-033, p. 28.

88 *Id*., pp. 28-29.

None of those "facts," however provided knowledge that would have supported a decision to de-energize TL 637 on October 21, 2007 because none of them provide a causal link between powerlines and fire ignitions, let alone conductor-to-conductor contact and such ignitions. First, SDG&E had fire safety procedures in place for operating in Red Flag conditions,[89] and the Decision does not identify any deficiency in those procedures. A Red Flag warning relates to the expected wind and weather conditions and provided no basis for SDG&E to suspect that the faults on TL 637 resulted from conductor-to-conductor contact, and the Decision does not even attempt to make such a link. Likewise, neither the Harris Fire nor the 2003 Cedar Fire provided any knowledge that the Witch Fire was likely to occur because neither of those fires involved powerlines. The fault history shows the opposite of what the Decision suggests: the fact that previous faults did not cause a fire ignition[90] shows that SDG&E had no reason to suspect that the faults on October 21, 2007 would do so. Again, as noted above, based on the information known in real-time, SDG&E merely knew that there had been temporary faults on a backcountry transmission line on a windy day. The Decision's inference that such faults indicated more than they did is the epitome of hindsight bias.

With respect to SDG&E's automatic reclosers, the Decision does not identify any specific action SDG&E should have taken. Instead, the Decision faults SDG&E for failing to "take more proactive steps to prevent the Witch Fire's ignition"[91] in light of the 2001 Field Guide's assertion that automatic reclosers increase the risk to ignite vegetation, but it does not explicitly say what those steps should have been. A finding of unreasonable conduct for failure

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89 Exh. ORA-06-C, p. 250 (TMC-1320).

90 Exh. SDGE-11-A (Yari Amended Rebuttal), p. 6.

91 D.17-11-033, p. 28.

to take an action that is not even identified in the Decision cannot be supported by substantial evidence. And the *only* evidence that explains what the 2001 Field Guide means with respect to reclosers shows that it does not reflect what happened in the Witch Fire ignition and thus cannot be used to assume the existence of knowledge that might have prevented the fire.

As Mr. Weim explained at the hearing, the portion of the 2001 Field Guide on which the Decision relies reflects what could happen in a situation, such as a phase-to-ground fault, where a conductor was lying on the ground.[92] In such a situation, in the absence of a lockout setting prohibiting the recloser from re-energizing the line, the fallen line would remain energized on the ground.[93] The recloser device could thereby continue to re-energize the line into the fault, causing repeated arcing and increasing the probability of igniting vegetation.[94] But as Mr. Geier explained, SDG&E had a lockout setting in place, so the scenario described in the 2001 Field Guide could not have occurred under SDG&E's operating procedures.[95] As Mr. Weim also explained, SDG&E transmission lines could not be re-energized into the fault; instead, the recloser device would trip to lock-out, de-energizing the line.[96] In sum, the 2001 Field Guide does not apply to the facts of the Witch Fire, which involved a phase-to-phase (conductor to conductor) fault, which created arcing; there was no downed powerline. Thus, there is no basis to conclude, as the Decision does, that SDG&E's knowledge of the 2001 Field Guide should have been used to take any particular (and unspecified) action SDG&E failed to take.

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92 Tr. 647:10-649:8.

93 *Id*.

94 *Id*.

95 Exh. ORA-18, p. 2 (Geier Testimony Excerpts I.08-11-006).

96 Tr. 648:19-649:8.

While, as noted, the Decision does not specifically identify what action SDG&E should have taken to comply with the standard of prudent managerial conduct with respect to automatic reclosers, to the extent it implies those reclosers should have been disabled, that implication runs contrary to the overwhelming weight of the record evidence. Mr. Yari testified that disabling automatic reclosers on October 21, 2007, based on the knowledge at the time, would have been imprudent, "given the importance of keeping the line in service to serve the backcountry during a very windy day, and based on practices, not just SDG&E's, those were proven industry practices."[97] Again, this testimony was not rebutted.

Since the prudent manager standard explicitly looks to "good utility practices," Mr. Yari's testimony supports the prudence of SDG&E's conduct. So too does the other record evidence regarding industry standards for automatic reclosers. During the hearing, SDG&E cross-examined ORA's witness Mr. Stannik with deposition testimony from Southern California Edison Company's ("SCE") Grid Operations Manager, Mr. Smith. Mr. Smith stated he would have operated SCE's transmission system, including the automatic reclosers, just as SDG&E did on October 21, 2007.[98] Mr. Smith explained that the "lines tested good. It's three temporary faults."[99] He further explained that SCE would have "given it to the transmission patrolman to go out and patrol that," which is exactly what SDG&E did on October 21, 2007.[100] There is no record evidence that contradicts the evidence of "good utility practices" contained in the

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97 Tr. 384:16-23.

98 Exh. SDGE-29, pp. 165-66; Tr. 1247:18-1248:8.

99 Tr. 1248:24-25.

100 Tr. 1249:8-10; Exh. SDGE-29, p. 167; Exh. SDGE-11-A (Yari Amended Rebuttal), pp. 10-11.

testimony of Mr. Yari and Mr. Smith. Accordingly, SDG&E has met its burden of proof under any standard.

The Proposed Decision conceded that "SDG&E can show that its recloser policy was reasonable and prudent because of industry practice."[101] In the Decision, however, the phrase "reasonable and prudent" was deleted. The Decision gives no justification whatsoever for this troubling deletion, and none exists.

Similarly, although the Decision finds it unreasonable that SDG&E did not de-energize TL 637 immediately *after* it became aware of the Witch Fire at 1:10 pm, the Decision never explains why that was unreasonable. More importantly, the Decision is relying on post-ignition actions and decisions that are outside of the scope of Phase 1 of this proceeding.[102] Even if SDG&E had de-energized TL 637 at 1:10 pm, the Witch Fire would not have been prevented since it had started more than 30 minutes earlier. The Decision is thus again finding SDG&E unreasonable for conduct unrelated to the causation of the fire. Due Process does not permit the Commission to deny recovery of the WEMA Costs based on conduct that did *not* cause those Costs. Requiring SDG&E to forfeit costs with no causal nexus to its conduct is a penalty, and the size of the penalty here—the forfeiture of $379 million in costs—is out of all proportion to any culpability. Indeed, the Commission already has imposed direct penalties on SDG&E for alleged violations, which are a fraction of this amount.[103] Substantive Due Process prohibits the imposition of such "grossly excessive" penalties.[104]

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101 "Proposed Decision Denying Application" (Aug. 22, 2017), p. 26.

102 *See* Scoping Memo, p. 4; Tr. 388:28-400:8; 404:3-7; 433:17-27; 436:23-25.

103 D.10-04-047.

104 *BMW of N. Am. V. Gore,* 517 U.S. 599, 575-77 (1996).

Ultimately, the Decision fails to make any finding or conclusion regarding SDG&E's operational or managerial conduct that actually bears a causal relationship to the ignition of the Witch Fire. No issue could be more material to a finding of imprudence than causation. Accordingly, the Decision violates Public Utilities Code § 1705, which requires separately stated findings of fact and conclusions of law on all issues material to the decision.

5. The Decision Errs as a Matter of Law in Finding SDG&E's Operation and Management of the Facilities Linked to the Guejito Fire Was Unreasonable and Imprudent

The Decision erred as a matter of law in finding that SDG&E did not meet its burden of proof with respect to the reasonableness of its operations and maintenance of the powerlines linked to the Guejito Fire ignition.[105] The Decision completely ignores the evidence of what caused the ignition (the broken Cox lashing wire), violating its duty to weigh the evidence and depriving SDG&E of due process. Again, SDG&E has met its burden of proof with respect to the reasonableness of its actions. The Decision's finding of imprudence lacks support in the substantial record evidence and violates the prudent manager standard because that finding is based on actions that have no causal relationship to the ignition of the Guejito Fire.

a. The Decision Never Mentions or Addresses the Cause of the Guejito Fire

In its "Guejito Fire Background" Section (4.2.1), the Decision describes the cause of the fire as follows: "CPSD and Cal Fire attributed the ignition of the Guejito Fire to a Cox Communications (Cox) lashing wire coming into contact with an SDG&E 12 kV overhead conductor, between SDG&E poles P196387 and P196394. The SDG&E conductors were located above the Cox lines."[106] But this discussion of the cause omits the reason *why* that

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105 D.17-11-033, pp. 35-36.

106 D.17-11-033, p. 29 (internal citations omitted).

lashing wire came into contact with SDG&E's 12 kV conductor: the Cox lashing wire was broken and dangling from Cox's bundle of facilities. The preponderance of the evidence unambiguously demonstrates that this broken Cox lashing wire caused the ignition.

In his report, when answering the question "What caused the fire?," Cal Fire's investigator wrote: "According to witnesses and evidence at the origin area, the cause of the fire was [lashing] wire used to attach fiber optics cable to a support cable [that] unwound and made contact with a powerline conductor, causing an arc."[107] The Cal Fire investigator also explained that the lashing wire "had come undone in several locations;" "some of the lashing wire was dangling from the Cox cable line; the ends about 10-12 feet from the ground;" and he "also found some of the same type [of] lashing wire lying on the ground in the origin area."[108] The investigator further indicated that SDG&E's powerline was "damage[d]," and he "found three spots where the lashing wire from the fiber optics cable was fused to the power line."[109] As CPSD later noted in its investigation, the Cal Fire investigator concluded that the Cox lashing wire was broken prior to the Guejito Fire and that the broken lashing wire blew up into SDG&E's conductors, starting the fire.[110]

SDG&E witness Mr. Weim testified about the broken Cox lashing wire, recounting the Cal Fire and CPSD findings, and noting that CPSD rejected a theory advanced by Cox that the lashing wire broke after making contact with SDG&E's conductors.[111] As Mr. Weim noted,

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107 Exh. SDGE-30, Cal Fire Guejito Investigation Report, PDF p. 7.

108 *Id*., pp. 12-13.

109 *Id*., p. 13.

110 Supplemental Direct Testimony of the Consumer Protection and Safety Division Regarding the Formal Guejito Fire Investigation, I.08-11-007 (Mar. 6, 2009). This testimony is included in Exh. ORA-05, pp. 1075-78.

111 Exh. SDGE-12 (Weim Rebuttal), pp. 6-10.

CPSD referred to eyewitness testimony of the lashing wire blowing up into the SDG&E conductor in the wind, and the fact that the lashing wire was hanging 10-12 feet from the ground, which meant it was long enough to contact the SDG&E conductor.[112] At the hearing, ORA (the only party other than SDG&E that submitted evidence on the Guejito Fire) was asked about whether it disputed Cal Fire's conclusion about the role of the broken lashing wire in causing the Guejito Fire ignition, and its witness, Mr. Stannik, conceded "I don't dispute that."[113]

SDG&E has also discussed the Cal Fire and CPSD findings regarding the broken lashing wire in every brief it has submitted in this case.[114] There was even a series of motions filed involving Cox and SDG&E on this topic after the hearings had concluded. For the Decision to *never once mention the broken lashing wire* – particularly in its summary of "SDG&E's Position on its Operation and Maintenance of its Facilities Prior to the Guejito Fire" (Section 4.2.2) since that is the very heart of SDG&E's position – shows that it very clearly does "just isolate the evidence supporting the findings and call it a day, thereby disregarding other relevant evidence in the record," which is prohibited under *The Utility Reform Network v. Public Utilities Com*.

That disregard of relevant evidence in the record also deprives SDG&E of due process required by law. By omitting any mention of the evidence regarding the broken Cox lashing wire, evidence that is unrebutted, the Decision has utterly failed to "act upon evidence" and has engaged in arbitrary decision making. Indeed the Commission's own standard of proof in reasonableness reviews, the preponderance of the evidence standard, rightly assumes that the

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112 Tr. 612:12-17.

113 Tr. 1265:21.

114 *See, e.g.*, SDG&E Phase 1 Opening Br., pp. 3, 6, 59-63; "[SDG&E] Comments on The Proposed Decision of Administrative Law Judges Tsen And Goldberg" (Sept. 11, 2017) ("SDG&E Comments on the PD"), pp. 11-12.

fact-finder will weigh the evidence. "Preponderance of the evidence usually is defined 'in terms of probability of truth, e.g., such evidence as, when weighed with that opposed to it, has more convincing force and the greater probability of truth.'"[115] Since the Decision did not mention or weigh the evidence regarding the broken lashing wire, it cannot legally conclude that SDG&E did not satisfy the standard of proof. Lastly, the failure to mention or address causation of the Guejito Fire violates the requirement in Public Utilities Code § 1705 that the Decision contain separately stated findings of fact and conclusions of law on all issues material to the decision.

b. The Decision's Imprudence Finding Relies on Facts that Did Not Cause the Guejito Fire

The Decision's stated reasons for finding SDG&E unreasonable also suffer from legal errors. According to the Decision, SDG&E unreasonably failed to discover that a 3.3 foot clearance existed between its overhead conductors and the bundle of Cox's facilities below, even though SDG&E conducted inspections of the span under its Corrective Maintenance Program during the six years following Cox's installation of its facilities.[116] The Decision brushes aside SDG&E's arguments that perfection is not required by the reasonable manager standard, as though those arguments exclusively concerned the 3.3 foot clearance documented after the fire.[117]

In reality, in light of the evidence that the broken lashing wire caused the Guejito Fire ignition, and that the dangling lashing wire would have contacted SDG&E's conductors whether

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115 D.14-06-007, p. 13.

116 D.17-11-033, pp. 35-36.

117 D.17-11-033, p. 10; *see also id.*, p. 35.

the clearance had been 3.3 feet or 6 feet,[118] a finding that SDG&E acted unreasonably because of the clearance issue violates the prudent manager standard.[119] More specifically, in deeming SDG&E imprudent because of a technical violation that had no causal link to the fire ignition, the Decision ignores the requirements that the actions causally relate to the WEMA Costs and imposes a perfection standard. Once again, these errors deprive SDG&E of substantive due process.

Apart from the Decision's errors regarding causation, the Decision's finding of imprudence is not supported by substantial evidence in light of the whole record. SDG&E demonstrated that its inspections of its facilities under the Corrective Maintenance Program was proper and thorough.[120] Mr. Weim reasonably concluded that SDG&E "had no basis to know of the issues that Cal Fire alleged to have caused that fire" – *i.e.*, the broken lashing wire blowing into SDG&E's conductors.[121] It is, however, unknown whether the 3.3 foot clearance even existed prior to the late October 2007 Santa Ana wind event or resulted from that event or some other event. Thus, the evidence shows that SDG&E reasonably operated and managed its facilities prior to the ignition of the Guejito Fire.

6. The Decision Erred as a Matter of Law in Finding SDG&E's Operation and Management of the Facilities Linked to the Rice Fire Was Unreasonable and Imprudent

The Decision committed several legal errors in finding that SDG&E's vegetation management was imprudent prior to the Rice Fire ignition. In creating an entirely new theory of

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118 *See, e.g.*, Tr. 612:15-17; 614:10-13 (Mr. Weim testified "so regardless of what the clearance was, [the lashing wire is] going to contact the southerly conductor" and that the broken lasing wire "would have contacted the 12 kV no matter what.").

119 *See, e.g.*, SDG&E Comments on the PD, pp. 11-12.

120 Exh. SDGE-06 (Weim Direct), pp. 2-10.

121 *Id*., pp. 2, 11.

SDG&E's supposedly unreasonable conduct, the Decision denied SDG&E due process of law and violated Public Utilities Code § 311. The Decision's new theories are also undermined by the substantial evidence in the record and exceed the requirements of the prudent manager standard.

a. The Decision's New Theory Violates Public Utilities Code § 311 and Due Process of Law

In the Proposed Decision, the ALJs deemed SDG&E imprudent for failing to trim Tree FF1090 within 0 to 3 months from the date of the Pre-Inspection, per the recommendation of the Davey tree trim contractor.[122] In its Comments on the Proposed Decision, SDG&E referred to the Proposed Decision's acknowledgement that "no party disputes that the Rice Fire started when a broken limb from FF1090 fell onto SDG&E's conductors," and challenged the Proposed Decision's finding of imprudence, arguing that "the weight of the evidence demonstrates that SDG&E could not have prevented the Rice Fire because it had no way to know this defect existed or that the limb would break and contact SDG&E's conductors."[123] The Davey contractor recommended trimming to prevent a future clearance violation (*i.e.*, a situation where a branch grew into SDG&E powerlines) and to remove direct overhang.[124] As SDG&E argued in its Comments, however, the Rice Fire did not result from a failure to trim Tree FF1090 within 0-3 months; it resulted from a broken limb with a hidden structural defect, which had been growing away from the powerlines, falling onto those lines in the Santa Ana wind event on

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122 Proposed Decision, p. 43.

123 SDG&E Comments on the PD, p. 12.

124 Exh. SDGE-13 (Akau Rebuttal), pp. 7-18.

October 22, 2007.[125] Thus, trimming the tree per the Davey recommendations would not have prevented the Rice Fire ignition.[126]

The Decision appears to have recognized the fundamental errors in the Proposed Decision's reliance on alleged trimming violations, claiming that "[i]n response to comments, the section of the decision describing the Rice Fire has been modified to provide more of the details of the facts and legal analysis on which the decision is based."[127] But that statement grossly understates the nature and extent of the actual modifications; the Decision has not merely elaborated on its findings by providing "more of the details of the facts and legal analysis." Rather, it has invented an entirely new theory about SDG&E's management of Tree FF1090 – a theory that was not advanced by any party in the case in testimony or at the hearings, and that, as discussed below, is unsupportable.

According to the Decision's new theory, SDG&E was unreasonable (or failed to demonstrates its reasonableness) in the following respects:

> (1) SDG&E should have detected the hidden defect in the limb and identified Tree FF1090 as a "Reliability Tree";
>
> (2) SDG&E did not demonstrate that the limb was growing away from the conductors,;
>
> (3) SDG&E's contractor (Davey) mistook the meaning of 0-3 months; and
>
> (4) SDG&E did not adequately monitor the growth rate of Tree FF1090.

Apart from the lack of substantial evidence to support these contentions, the Decision's new theory unquestionably constitutes a "substantive revision" to the Proposed Decision. Not only is the theory of unreasonable conduct entirely new, as reflected in the substantial revisions to what

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125 *Id*.; SDG&E Comments on the PD, pp. 12-14.

126 *Id*.

127 D.17-11-033, p. 65.

is now Section 4.3 of the Decision, but there are also 12 new Findings of Fact (31-38, 41-44) and four new Conclusions of Law (17-20) to reflect the new theory. In addition, five Findings of Fact (34-38) and one Conclusion of Law from the Proposed Decision that reflected the old theory have been stricken.

Under Public Utilities Code § 311(g), decisions, including an "alternate" decision, must be "served on the parties and subject to at least 30 days public review and comment." Section 311(e) explains that an "'alternate' means either a substantive revision to a proposed decision that materially changes the resolution of a contested issue or any substantive addition to the findings of fact, conclusions of law, or ordering paragraphs."[128] The new theory and related Findings of Fact and Conclusions of law is an "alternate" in both senses contemplated by Section 311(e), but this "alternate" was not "subject to at least 30 days public review and comment" in violation of Section 311(g).

Since the new theory was first articulated in the Decision, SDG&E never had an opportunity to explore, test or respond to it. By depriving SDG&E an opportunity to test, let alone comment on, the Decision's new theory in violation of Public Utilities Code § 311(e) and (g), the Commission has not proceeded in a manner required by law, as required by Public Utilities Code § 1757(a)(2). The Decision's new theory also runs afoul of SDG&E's Constitutional rights to due process of law, and hence Section 1757(a)(6), because SDG&E has been deprived of "the opportunity to be heard 'at a meaningful time and in a meaningful manner.'"[129] Accordingly, the Commission should strike the Decision's new theory and related Findings of Fact and Conclusions of Law on Rehearing.

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128 *See also* Rule 14.1(d).

129 *Mathews v. Eldridge*, 424 U.S. 319, 333 (1976) (quoting *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965)).

b. The Decision's New Theory Is Unsupported by Substantial Evidence

In addition to these legal errors, the Decision's new theory is unsupported by the substantial record evidence. First, with respect to the Decision's conjectures that SDG&E should have detected the hidden structural defect in the limb that broke from Tree FF1090, and marked the tree as a Reliability Tree under its Vegetation Management Program procedures, there is no evidence that the defect was reasonably or even possibly detectable. The only witness who provided evidence about the hidden limb with the structural defect was Mr. Akau.

In his rebuttal testimony, Mr. Akau testified that he only learned about the hidden structural defect *after* the limb had been "cut down and placed on the ground."

> Once the tree had been trimmed on October 22, 2007, and the portion of the tree from which the limb had broken out was on the ground, I could see staining on the bark where the limb had been attached to the tree. Such staining indicates what is referred to as included bark. In some cases, included bark is visible because there is swelling in the branch bark ridge, which indicates pressure, but in this instance, it was not visible. That is why I have referred to the problem as a 'hidden' structural defect. Many defects aren't visible – particularly when they are high up in a tree canopy and obscured by foliage – and many trees have defects, which often cannot be seen until there is a branch or other structural failure. In the Witch/Rice OII proceedings, Ronald Matranga, another certified arborist, testified that it would have been very difficult to determine whether the limb had included bark from the ground, and that there was no evidence that Tree FF1090 was diseased. [130]

As this discussion makes clear, the staining that indicated the defect was hidden when the limb was attached and could only be seen once the limb had broken and was on the ground. There is no evidence to the contrary. Mr. Akau's testimony directly refutes the Decision's baseless speculation that the hidden structural defect should have been detected.

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130 Exh. SDGE-13 (Akau Rebuttal), p. 8.

The Decision, however, whitewashes this evidence. Although the Proposed Decision had quoted *the exact same testimony* by Mr. Akau quoted above, that testimony was stricken as part of the substantive revisions made to the Proposed Decision, and thus does not appear in the Decision.[131] The Decision offers no explanation for this deletion. While the Decision repeatedly reminds SDG&E that it carries the burden of proof, it unreasonably denies SDG&E the opportunity to meet that burden by excising the very evidence SDG&E offered for that purpose.

Relatedly, Mr. Akau also explained that SDG&E inspects for "Reliability Trees," which are trees that "pose a threat to the safe and reliable delivery of electricity," but that Tree FF1090 had not been so identified because the structural defect was hidden and was not visible until the limb was on the ground.[132] According to the Decision, SDG&E's definition of Reliability Trees "is consistent with General Order 95, Rule 35, which requires that diseased and rotten portions of otherwise healthy trees growing toward or hanging over powerlines be removed."[133] The Decision seems to suggest that by not identifying Tree FF1090 as a Reliability Tree and trimming it, SDG&E violated General Order 95, Rule 35.[134] That suggestion is incorrect and improperly relies on a perfection standard. The Decision's findings are also unsupportable based on the record evidence showing extensive inspections and maintenance of the tree at issue and the comprehensive nature of SDG&E's Vegetation Management Program.

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131 *Compare* Proposed Decision, p. 36 *with* D.17-11-033, p. 38.

132 Exh. SDGE-13 (Akau Rebuttal), p. 9.

133 D.17-11-033, p. 47.

134 *Id*., pp. 37, 47, 71 (Conclusion of Law 17).

Moreover, while the Decision repeatedly paraphrases Rule 35 as requiring "that diseased and rotten portions of otherwise healthy trees growing over powerlines be removed,"[135] the actual language of the rule reads as follows:

> When a supply or communication company has *actual knowledge*, obtained either through normal operating practices or notification to the company, that dead, rotten or diseased trees or dead, rotten or diseased portions of otherwise healthy trees overhang or lean toward and may fall into a span of supply or communication lines, said trees or portions thereof should be removed.[136]

There is no evidence whatsoever that SDG&E possessed such "actual knowledge," and to the contrary, Mr. Akau testified that SDG&E did not. Accordingly, SDG&E cannot be found to have violated Rule 35.

Lastly, there are no findings in the Decision that marking the tree as a Reliability Tree would have avoided the Rice Fire ignition. This violates the requirement in Public Utilities Code § 1705 that the decision must contain separately stated findings of fact and conclusions of law on all issues material to the decision. It also violates SDG&E's substantive due process rights.

c. The Decision's Findings Regarding the Growth and Structure of Tree FF1090 Are Unsupported by Substantial Evidence

In concluding that SDG&E failed to show that the limb that broke from Tree FF1090 was growing away from the powerlines, the Decision runs afoul of the substantial record evidence. In support of its conclusion, the Decision references the following:

> Testimony from Mr. Akau states that the branch was positioned towards the northeast, growing away from the powerline; testimony from Mr. Ronald Hay states that the broken branch grew to the south, towards the utility lines; and testimony from Mr.

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135 *See, e.g.*, *Id*., pp. 37, 47.

136 General Order 95, Rule 35 (emphasis added). At the time of the Rice Fire, the phrase "supply or communications line" read "utility line." When the Commission modified this language in 2012, it noted that "[we use] the terms 'power line' and 'supply line' interchangeably." D.12-01-032, p. 20, fn. 24.

> David Kracha states that (sic) broken limb grew completely vertically and did not grow toward or away from the powerlines.[137]

The Decision calls this "conflicting testimony," but in reality, there is no conflict. Mr. Hay and Mr. Akau had slightly different recollections of directional positioning.[138] But Mr. Hay's testimony that the branch was positioned to the south meant that the branch was positioned *parallel to* (and not towards) the powerlines since the powerlines extended in a north-south direction and the tree was positioned to the east of the powerlines.[139] Accordingly, the evidence shows that the limb was *not* growing towards the powerlines. Moreover, the only witness who testified in this case was Mr. Akau. The statements of Mr. Hay and Mr. Kracha were drawn from deposition transcripts from another proceeding, and neither witness testified in this proceeding. Accordingly, their statements are unsubstantiated hearsay. Applicable precedent makes clear that it is reversible error for the Commission to base a finding of fact solely upon hearsay evidence when the truth of the extra-record statements is disputed.[140] Based on that principle, the Commission cannot use these hearsay statements to overcome the weight of the testimony of a testifying witness in this case, Mr. Akau.

There is also no evidence to support the new theory that SDG&E should have identified a hazardous co-dominant structure in the tree. As noted by an SDG&E Forester who visited the scene on the day of the fire, the limb that broke from Tree FF1090 was one of two leader branches (*i.e.*, substantial limbs) that, together, formed what is known as a co-dominant

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137 D.17-11-033, pp. 45-46 (internal citations omitted).

138 *See* SDG&E Phase 1 Reply Br., pp. 75-82.

139 *See* Exh. SDGE-13 (Akau Rebuttal), pp. 4-6; *see also id.*, Appendix 4, Exhibit 1 (Direct Testimony of Chris Thompson, San Diego Gas & Electric Company (Rice Fire), I.08-11-006).

140 *The Utility Reform Network v. Public Utilities Com.* 223 Cal.App.4th 945, 959 (2014).

structure.[141] After the limb broke and fell, the other leader branch remained.[142] Following the fire, SDG&E removed the entire co-dominant structure because, as the forester explained, "co-dominant leaders often fail partially or entirely once another co-dominant leader fails."[143] In other words, the failure of the limb rendered the entire co-dominant structure susceptible to failure, presenting safety concerns to the fire personnel on the ground.[144]

The Decision wrongly infers from this information regarding the post-fire trimming that the same rationale that led SDG&E to remove the co-dominant structure post-fire should have guided SDG&E's trimming pre-fire, noting that "even if the broken branch did not have clearance problems, a prudent manager trimming on a regular schedule would likely have trimmed FF1090 to balance the other branches that did have clearance issues."[145] Such an inference shows exactly why expert testimony and hearings are important: they provide a means to test theories and evidence.

The Decision's new and untested theory lacks substantial evidence in several respects. There is no basis for assuming that the branch that presented a potential future clearance problem was a part of the co-dominant structure or would have been balanced by trimming the co-dominant structure, and the Decision cites to none. Moreover, the only reason the co-dominant structure was removed post-ignition was because the limb had failed, rendering the remaining structure unbalanced and unsafe, as the Forester explained. Logically (and contrary to the decision), that trimming rationale would not apply before the limb had broken.

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141 *See* Exh. SDGE-13 (Akau Rebuttal), pp. 18-19; *see also id.*, Appendix 4, p. 4 (Direct Testimony of Chris Thompson, San Diego Gas & Electric Company (Rice Fire), I.08-11-006).

142 *Id*.

143 *Id*.

144 *Id*.

145 D.17-11-033, p. 46.

d. The Decision's Findings Regarding 0 to 3 Months Violate the Prudent Manager Standard

The Decision resurrects part of the 0 to 3 months issue that drove the finding of imprudence in the Proposed Decision, but for a more limited purpose. According to the Decision, to the extent the Davey tree trim contractor wrongly thought that 0 to 3 months meant that trimming would occur within three months from the date of the Pre-Inspection, rather than in the upcoming trim cycle, SDG&E is responsible for its agent's act, omissions or failures.[146] While the meaning of 0 to 3 months does not appear to form the basis for the Decision's finding of imprudence – that issue has been supplanted by the new theory discussed above – it is nevertheless unsupported by the substantial evidence. Even if Tree FF1090 had been trimmed within 3 months from the date of the Pre-Inspection, the Rice Fire would not have been avoided because there is no evidence that the fire was caused by or related to any of the issues the Davey tree trim contractor marked for trimming.[147] Faulting SDG&E for conduct that does not relate to the fire causation, as the Decision does with respect to 0 to 3 months, violates the prudent manager standard and imposes a perfection standard, depriving SDG&E of substantive due process.

e. The Decision's Findings Regarding the Tree FF1090 Records and Growth Rate Are Unsupported by Substantial Evidence

Lastly, the Decision's assertions regarding the growth rate of Tree FF1090 and the related tree records draw no support from the record evidence and again illustrate the danger of advancing new theories that the parties did not address or test in the underlying record. The Decision posits that the tree records for Tree FF1090 show that SDG&E imprudently managed

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146 D.17-11-033, p. 45.

147 Exh. SDGE-13 (Akau Rebuttal), pp. 9-18; Tr. 550:20-22; 551:13-16.

the tree because it "deviated from its own standard time table, and allowed more than two years to elapse without pruning this fast growing tree."[148] In an attempt to prove this point, the Decision manufactures a table of inspection and prune dates that only partially reflects SDG&E's actual Information Sheet for Tree FF1090.[149] Under the column "prune date," the Decision's table indicates "no trim record" in certain years, including 2005 and 2006, which it takes to mean that SDG&E failed to trim the tree.[150] But the table omits the portion of the tree records showing annual inspections of the tree that explained why there was no pruning in certain years: the recorded clearance was *in excess of* the required 4 foot clearance. More specifically, in 2005 and 2006, the Pre-Inspector recorded clearances of "8 to 12 ft." and "8 to 9.9 ft.," respectively.[151] Accordingly, the Decision's finding of imprudence on this issue relies not on substantial evidence but rather upon an error of interpreting facts. As the U.S. Supreme Court has ruled in reviewing the "quasi-judicial" proceedings of a regulatory Commission, "[a] finding without evidence is arbitrary and baseless."[152] Further, the Decision again fails to draw any causal link between this supposedly imprudent conduct and the Rice Fire ignition, as there is no evidence that the fire was caused by a clearance violation.

7. The *Mojave*, *Helms* and *SONGS I* Decisions Do Not Support the Decision's Application of the Prudent Manager Standard

Following its "Reasonableness Reviews" of SDG&E's conduct prior to the ignitions of the three fires, the Decision discusses certain prior reasonableness reviews. According to the

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148 D.17-11-033, p. 44.

149 D.17-11-033, p. 43. The actual Tree Information Sheet appears at Appendix 6 to Exh. SDGE-08 (Akau Direct).

150 D.17-11-033, pp. 43-44.

151 Exh. SDGE-08 (Akau Direct), Appendix 6.

152 *Interstate Commerce Com. v. Louisville & N. R. Co.*, 227 U.S. 88, 91 (1913).

Decision, the Commission "has a long history of cases that apply the reasonable and prudent manager standard to after-the-fact reviews of costs incurred by utilities," and the Decision references three such cases in which the Commission denied recovery of costs that "were directly attributable to clear and identifiable utility failures or errors."[153] Those three cases – *Mojave*, *Helms*, and *SONGS I*[154] – do not, however, support the Commission's Decision here because the conduct found to be imprudent in those cases differed significantly in each instance from SDG&E's conduct prior to the Witch, Guejito, and Rice Fires, where there were no such "clear and identifiable utility failures or errors."

Mojave involved a rupture to a weld in a high-pressure steam pipe at a coal plant, which caused damage, injury and death. As the Decision notes, SCE was found unreasonable for "failing to implement an inspection program to ensure that the portion of the piping system that ultimately failed was maintained in a safe condition."[155] But with respect to the Witch, Guejito and Rice Fires, the record evidence conclusively demonstrates that SDG&E had extensive inspection and maintenance programs in place to ensure that its facilities would remain in a safe condition.[156] According to the Decision, however, such inspection programs are not enough: "Although SDG&E had industry recognized policies and programs in place (recloser policy, Corrective Maintenance Program, and Vegetation Management Program) prior to October 2007, such practices do not relieve SDG&E of its burden to show its actions were reasonable."[157] This conclusion is not only inconsistent with the requirement of "clear and identifiable errors," it

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153 D.17-11-033, p. 49.

154 *See* D.94-03-048 ("*Mojave*"); D.85-08-102 ("*Helms*"); and D.84-09-120 ("*SONGS I*").

155 D.17-11-033, p. 50.

156 *See, e.g.*, Exh. SDGE-05 (Geier Direct), pp. 4, 9-15.

157 D.17-11-033, p. 51.

amounts to an unjust and unreasonable perfection standard. The Commission should recognize that compliance with "industry recognized polies and programs" is evidence of prudent conduct, particularly since its own prudent manager standard directly references "good utility practices."

Helms involved a pipeline failure at a pumped storage project. As the Decision recognizes, PG&E was found unreasonable for failure "to take seriously the repeated safety citations and work shutdowns issued and ordered by the State Department of Occupational Safety and Health."[158] In attempting to apply *Helms* to this case, the Decision found that SDG&E "failed to take account the risks associated with its automatic recloser policy."[159] As noted above, however, the Decision has correctly recognized that this policy was "industry standard," and once again the Decision is thus applying a perfection standard. Moreover, there were no "repeated safety citations and work shutdowns" issued by a state agency to SDG&E with respect to any of the facilities involved in the Witch, Guejito or Rice Fires leading up to the 2007 Wildfires.

Lastly, *SONGS I* involved a fire caused by a small oil leak in a section of piping attached to a diesel engine. The piping that failed was intended to be temporary.[160] The fire caused an outage at two emergency diesel generators at SONGS I. As noted by D.14-11-021, the Commission found SCE unreasonable for installing inadequate equipment, causing the leak.[161]

The Decision likens SCE's conduct in *SONGS I* to SDG&E's conduct regarding the Witch Fire as follows: just as the Commission found SCE unreasonable even though it limited

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158 *Id*., p. 52.

159 *Id*., p. 52.

160 *See* D.84-09-120, p. 68 [mimeo].

161 D.14-11-021, p. 5.

the diesel fire to seven minutes, SDG&E unreasonably allowed the fourth fault to occur on TL 637 two hours after SDG&E became aware of the fire.[162] But the analogy the Decision attempts to draw does not hold. The Commission found SCE unreasonable based on its belief that SCE could have prevented the diesel fire by installing the appropriate equipment and discovering the source of the oil leak. With respect the Witch Fire, there is no evidence that SDG&E had the wrong equipment in place or could have discovered the cause of the ignition prior to the ignition.[163]

The Decision also likens SCE's conduct in *SONGS I* to SDG&E's conduct regarding the Guejito Fire as follows: just as the Commission found SCE unreasonable because its personnel could not locate the oil leak, SDG&E's Corrective Maintenance Program allowed a 3-foot clearance to exist for almost six years.[164] But the Decision overlooks the critical distinction between *SONGS I* and this case: SCE's failure to locate the leak directly led to the fire, whereas the clearance violation did not lead to or cause the Guejito Fire ignition because the uncontroverted evidence shows the fire would have started whether the clearance had been 3 feet or 6 feet.[165] Accordingly, none of these prior reasonableness review cases support the Decision's application of the prudent manager standard in this case.

8. The Decision's Findings Regarding the Winds and Weather in Late October 2007 Are Not Supported by the Substantial Evidence

The Decision wrongly concludes that "the 2007 Wildfires were [not] spread under unprecedented wind and weather conditions" and that the wind and weather did not impact

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162 D.17-11-033, p. 54.

163 SDG&E Phase 1 Opening Br., pp. 22-24.

164 D.17-11-033, p. 54.

165 SDG&E Phase 1 Opening Br., pp. 63-74.

SDG&E's operation and management of its facilities.[166] For that finding to be valid, there can be no explanation as to how more than a dozen major wildfires broke out across Southern California in late October 2007 –from Santa Barbara County to San Diego County with over 251 vegetation fire starts – leading to what the state's California Fire Siege 2007 report deemed "unquestionably one of the most devastating wildfire events in the history of California."[167] Numerous contemporaneous reports support the conclusion that the October 2007 wind event was extreme and unprecedented.[168]

The Decision ignores this reality and adopts the testimony of the Utility Consumers' Action Network's witness Dr. Gershunov, lauding his use of "actual recorded weather data from 2007 to validate his wind speed estimates."[169] But that is not what Dr. Gershunov did. The scientists who created the model that generated the wind speed data Dr. Gershunov used could *not* validate the wind speeds against actual measurements in San Diego County.[170] Dr. Gershunov sidestepped this problem by taking measurements from Remote Automated Weather Stations ("RAWS") and claiming that the obstructions that block the RAWS (and reduce their wind speed recordings) do not matter.[171] Dr. Peterka thoroughly demonstrated that an obstructed wind measurement device at a RAWS will not give an accurate wind speed estimate, fatally

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166 D.17-11-033, p. 60.

167 See SDG&E Phase 1 Opening Br., pp. 101-104; California Fire Siege 2007 report, p. 6 (this report is attached as Appendix 2 to Exh. SDGE-01 (Schavrien Direct)); see also Appendices 3-5 for additional fire reports.

168 *Id*.

169 D.17-11-033, p. 60.

170 SDG&E Phase 1 Opening Br., p. 107.

171 *Id*., pp. 107-109.

undermining Dr. Gershunov's supposed validation.[172] The University of California, Los Angeles's modeling, which is validated against actual observations, determined that the wind speeds at the time and place of the Witch Fire were an extreme 78-85 mph.[173] SDG&E's Santa Ana Wildfire Threat Index, which the Decision found less "refined" than Dr. Gershunov's analysis, is in fact a real-world predictive tool used by state and federal firefighting agencies, including the U.S. Forest Service.[174] The Decision unreasonably disregarded the evidence regarding the extreme wind and weather conditions in late October 2007.

172 *Id*., pp. 100-101; 107-109.

173 *Id*., pp. 96-98.

174 Exh. SDG&E-14 (Vanderburg Rebuttal), p. 15; 18-19; Exh. SDGE-09 (Vanderburg Direct), pp. 10-15.

VI. CONCLUSION

WHEREFORE, for the foregoing reasons, SDG&E respectfully requests the Commission grant rehearing to correct the legal errors in D.17-11-033. SDG&E respectfully requests that the Commission grant rehearing to remedy these legal errors, in accordance with Rule 16.1 and Public Utilities Code §§ 1731 and 1732. To avoid the Constitutional problems created by its Decision, the Commission should recognize that, in light of the application of inverse condemnation to SDG&E, it must allow cost recovery and spreading, subject to a review of the Phase 2 issues. Alternatively, the Commission should find that SDG&E reasonably and prudently operated and managed its facilities prior to the ignition of the Witch, Guejito and Rice Fires and should proceed to the Phase 2 reasonableness review of costs incurred. SDG&E also requests that the Commission expedite its proceedings on rehearing.

Respectfully submitted,

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January 2, 2018

BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

Application of San Diego Gas & Electric Company (U 902 E) for Authorization to Recover Costs Related to the 2007 Southern California Wildfires Recorded in the Wildfire Expense Memorandum Account (WEMA)	Application 15-09-010 (Filed September 25, 2015)

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing **SAN DIEGO GAS & ELECTRIC COMPANY (U 902 E) APPLICATION FOR REHEARING OF DECISION 17-11-033 AND REQUEST FOR EXPEDITED ACTION** parties of record in **A.15-09-010** by electronic mail and by U.S. mail to those parties who have not provided an electronic address to the commission.

A copy was also sent via Federal Express to Administrative Law Judge(s).

Executed this 2nd day of January, 2018 at San Diego, California.

/s/ Jenny Norin
Jenny Norin

CPUC Home

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Service Lists

PROCEEDING: A1509010 - SDG&E - TO RECOVER C
FILER: SAN DIEGO GAS & ELECTRIC COMPANY
LIST NAME: LIST
LAST CHANGED: DECEMBER 27, 2017

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