BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

Application of San Diego Gas & Electric Company (U902G) for Authorization to Recover Costs Related to the 2007 Southern California Wildfires Recorded in the Wildfire Expense memorandum Account (WEMA).	Application 15-09-010

RESPONSE OF THE OFFICE OF RATEPAYER ADVOCATES TO APPLICATIONS FOR REHEARING OF DECISION (D.) 17-11-033

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RESPONSE OF THE OFFICE OF RATEPAYER ADVOCATES TO APPLICATIONS FOR REHEARING OF DECISION (D.) 17-11-033

Pursuant to Rule 16.1(d) of the California Public Utilities Commission's ("Commission") Rules of Practice and Procedure ("Rules") the Office of Ratepayer Advocates ("ORA") hereby submits its response to the applications for rehearing of Decision (D.) 17-11-033 ("Decision") filed by San Diego Gas & Electric Company ("SDG&E") and jointly by Pacific Gas and Electric Company and Southern California Edison Company ("PG&E/SCE") on January 2, 2018.

I. BACKGROUND

On December 6, 2017, the Commission issued D.17-11-033, which denied the application of SDG&E to recover $379 million recorded in its Wildfire Expense Memorandum Account ("WEMA") associated with costs arising from the Witch, Guejito and Rice Wildfires in 2007.[1] In denying its request, the Commission found that SDG&E had not reasonably managed and operated its facilities prior to October 21, 2007.

On January 2, 2018, SDG&E filed an application for rehearing ("AFR") of the Decision, raising the following grounds for alleged legal error:

[1] These three wildfires are also referred to jointly in this Response as the "2007 Wildfires."

1. Under the theory of inverse condemnation, the Commission was required to allow SDG&E to spread its costs associated with the Witch, Guejito and Rice fires among its ratepayers. The Commission's failure to consider inverse condemnation in this proceeding is contrary to federal and state statutes and the denial of SDG&E's application constitutes a taking;
2. The Decision is not supported by substantial evidence in light of the record and fails to properly apply the prudent manager standard;
3. By failing to recirculate the revised proposed decision for comment, the Commission violated Public Utilities Code § 311(g) and denied SDG&E its due process rights;
4. The Commission's application of the prudent manager standard is not supported by the Mojave, Helms and SONGS I decisions; and
5. The Decision's findings regarding the weather conditions in October 2007 are not supported by the record.

PG&E and SCE also jointly filed an application for rehearing regarding inverse condemnation.

As discussed below, the arguments raised in the rehearing applications are without merit. Indeed, many of the arguments raised have already been considered and rejected by the Commission. Since, SDG&E, PG&E and SCE (jointly, the "utilities") have failed to demonstrate legal error, there is no basis for granting rehearing.

II. STANDARD OF REVIEW

In its Application for Rehearing, SDG&E points to Rule 16.1 of the Commission's Rules of Practice and Procedure, and Public Utilities Code § 1757(a), §1760 and §1705 for the standard of review for applications for rehearing of Commission decisions.[2] PG&E and SCE also point to Public Utilities Code §1731.[3]

All three utilities argue that D.17-11-030 should be set aside pursuant to Public Utilities Code §1757 (a) and §1760. Although the utilities accurately recite the standard of review for Commission decisions, their conclusion that D.17-11-033 "wrongly

[2] SDG&E AFR at pp. 8-10.

[3] PG&E/ SCE AFR at p. 2

denies"[4] SDG&E recovery of costs in the WEMA account is in error. This Commission's constitutional authority to regulate public utilities has long been recognized as entitled to great deference by the California courts: In fact, in a case involving PG&E, the Court of Appeal held that:

> … when no constitutional issue is presented, a PUC decision has the same standing as a judgment of the superior court: it is presumed correct, and any party challenging the decision has the burden of proving that it suffers from prejudicial error. Indeed, our Supreme Court has repeatedly called the presumption in favor of the Commission's decision a "strong" one.
>
> But even the presence of a constitutional dispute does not require the reviewing court to adopt de novo or independent review. Even there, "the question of the weight of the evidence in determining issues of fact lies with the commission acting within its statutory authority; the 'judicial duty to exercise an independent judgment does not require or justify disregard of the weight which may properly attach to findings upon hearing and evidence. In other words, judicial reweighing of evidence and testimony is ordinarily not permitted.[5]

Applying the standards of review set forth in Public Utilities Code §1757, there is no legal error in Decision 17-11-033. Moreover, contrary to SDG&E's claims, ORA has presented evidence to demonstrate that SDG&E had not acted in a reasonable and prudent manner prior to the 2007 Wildfires. The fact that SDG&E does not agree with the Commission's weighing of the evidence does not constitute legal error.

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[4] See SDG&E AFR at p. 1.

[5] *PG&E v. Public Utilities Commission* (2015) 237 Cal. App. 4th 812, 838.

III. THE COMMISSION PROPERLY DETERMINED THAT IT DID NOT NEED TO CONSIDER INVERSE CONDEMNATION

A. The Commission Correctly Determined that Inverse Condemnation is Not Relevant to Its Application of Public Utilities Code § 451

According to PG&E and SCE, "[i]n Decision 17-11-033, the Commission … erred as a matter of law in concluding that 'Inverse Condemnation principles [were] not relevant' to its application of Public Utilities Code § 451 in this case." SDG&E says that, "[u]nder 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."[6] The utilities had previously raised this argument in their comments on the Proposed Decision. The Commission has already considered and rejected the utilities' contentions. The utilities have not raised any new arguments demonstrating legal error. Thus, rehearing should be denied.

First, Inverse Condemnation principles are not relevant to a Commission reasonableness review under the prudent manager standard. The Scoping Memo limited Phase I to examining the reasonableness of SDG&E's operation and management of its facilities involved in the 2007 Wildfires. The Decision notes that SDG&E withdrew its testimony concerning Inverse Condemnation after the Scoping Memo was issued, thus acknowledging that this was not a material issue for Phase I.[7] Thus, the Commission does not have a basis in the record to make factual findings regarding the alleged impact of inverse condemnation.

Second, as D.17-11-033 notes:

> … the Superior Court only went so far as to rule that the plaintiff homeowners could plead inverse condemnation claims in their civil actions against SDG&E. We are not

[6] SDG&E AFR at p. 11.

[7] D. 17-11-033 at p. 65.

> aware of any Superior Court Determination that SDG&E was in fact strictly liable for the costs requested in its application.[8]

Moreover, as D. 17-11-033 states:

> Even if SDG&E were strictly liable, we see nothing in the cited case law that would supersede this Commission's exclusive jurisdiction over cost recovery/ cost allocation issues involving Commission regulated utilities.[9]

None of the utilities acknowledge that the Commission *did* consider their Inverse Condemnation arguments and explained the reasons for the Commission's rejection of them. None of the utilities provide any legal authority that changes the fact that, in asking to recover $379 million from ratepayers, SDG&E submits to this Commission's authority to conduct a reasonableness review.

B. The Commission Correctly Followed the Scoping Memo in Applying the Prudent Manager Standard to the WEMA

SDG&E argues that the Commission must follow the Superior Court's interpretation of the "cost spreading rationale of inverse condemnation" and suggests that the Commission do so 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."[10] As SDG&E puts it, "the appropriate scope of the Commission's reasonableness review is: whether SDG&E reasonably decided to settle 2007 Wildfire Litigation 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."[11] If this were true, the Commission's only inquiry would be to assess whether SDG&E made a reasonable business decision in assessing the legal and litigation risks from the 2007 Wildfire Claims; the Commission could simply skip its

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[8] D. 17-11-033 at p. 65.

[9] D.17-11-033 at p. 65.

[10] SDG&E AFR at pp. 13-14.

[11] SDG&E AFR at pp. 14-15, 18.

prudency review of the WEMA costs. SDG&E's attempt at re-framing the issue is incorrect, for several reasons.

As SDG&E admits, this argument was previously considered and rejected by the Commission in the Scoping Memo, in favor of a two-phased approach, with Phase I to determine (*inter alia*) whether SDG&E's operation and management of the facilities involved in the ignition of the subject wildfires was reasonable and prudent, and Phase II to consider whether SDG&E reasonably settled the claims.[12]

The Scoping Memo further provided that the Commission's reasonableness review of the costs booked into the WEMA would be subject to the "prudent manager" standard. The Commission's standard for reasonableness reviews, reaffirmed in a series of decisions, is as follows:

> The term reasonable and prudent means that at a particular time any of the practices, methods and acts engaged in by a utility follows the exercise of reasonable judgment in light of the facts known or which should have been known at the time the decision was made. The act or decision is expected by the 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.[13]

Decision 17-11-033 undertook a detailed analysis of SDG&E's management and operation of its facilities prior to the ignition of the Witch, Guejito and Rice Wildfires within the rubric of the Commission's prudent manager standard.[14] Decision 17-11-033 finds that SDG&E did not reasonably manage and operate its facilities prior to the 2007 Wildfires and therefore denies SDG&E's request to recover $379 million in costs recorded in the WEMA.

Since the costs incurred in SDG&E's WEMA were linked to the utility's imprudent management practices in the first place, they cannot be passed on to

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[12] D.17-11-033 at pp. 8-9.

[13] *Appl. of SCE, D.87-06-021 (1987) Cal. PUC LEXIS 588, *28-29;* 24 CPUC 2d 476, 486.

[14] D.17-11-033 at p. 2.

ratepayers. Any damages claims paid by the utility, whether the result of a judgment rendered by the court or the result of the utility's decision to settle the claim, are not recoverable in rates. Therefore, the Commission properly defined and analyzed the issue of whether SDG&E could recover the 2007 Wildfire costs booked in its WEMA. SDG&E has failed to demonstrate legal error, and rehearing of this issue should be denied.

C. The Decision Does Not "Run Afoul" of Any Legal Authority

SDG&E, PG&E and SCE state that the California courts have applied the doctrine of inverse condemnation to plaintiff's claims for damages under the assumption that the utility may pass along these costs to ratepayers in rates.[15] While the utilities do not agree with the courts' orders, they assert that these orders mean the Commission is bound to follow this application and allow the utility to recover these costs.[16] For example, SDG&E argues that it "had" to pay property damages claims under inverse condemnation principles as applied by the Superior Court and therefore asks that the Commission "recognize and uphold the courts' determination in that regard."[17] PG&E and SCE similarly argue that because the Superior Court followed the appellate court's holding that an investor-owned utility is subject to the "constitutional policy" principles of inverse condemnation, the Commission must "implement this policy" in applying the just and reasonable standard.[18]

For example, PG&E and SCE note that they "strongly disagree" with the *Barham* and *Pac. Bell* decisions that have extended inverse condemnation liability to investor-owned utilities, and that they have argued and "continue to argue, that private utilities are

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[15] SDG&E AFR at 12 (citing *Pac. Bell v. So. Cal Edison Co.* (2012) 208 Cal. App. 4th 1400, 1407); PG&E/SCE AFR at 1 (citing *Barham v So. Cal. Edison Co.* (1999) 74 Cal.App. 4th 744, 752; *Pac. Bell v. So. Cal Edison Co.*, supra).

[16] SDG&E AFR at p. 13; PG&E/SCE AFR at pp. 5-6.

[17] SDG&E AFR at pp. 11-13. This authority appears to be a reference to the January 29, 2009 Superior Court *Minute Order* Overruling SDG&E's Demurrers to the Master Complaints in the Superior Court 2007 Wildfire Litigation.

[18] PG&E/SCE AFR at pp. 5-6.

so different from governmental public utilities that the loss-spreading rationale does not apply."[19] SCE and PG&E cite to President Picker and Commissioners Rechtschaffen and Guzman Aceves' statements made at the November 30, 2017 Commission voting meeting to support their critique of the underlying rationale for inverse condemnation in the public utility wildfire liability context. While these statements provide some insight into the Commissioners' views, they have no evidentiary value, and the Decision speaks for itself.[20] The utilities thus argue both that the application of inverse condemnation principles is wrong, and that the Commission must apply it. The utilities cannot have it both ways.

Moreover, the utilities' arguments that the Commission must follow the Superior Court's interpretation of inverse condemnation misrepresent the law. The Commission has independent Constitutional authority to set rates.[21] In contrast, the Superior Courts have no ratemaking authority, and their determination that the 2007 Wild Fire Plaintiffs could plead a cause of action in inverse condemnation does not bind the Commission's evaluation of the reasonableness of SDG&E's request.[22]

D. The Requirement to Prudently Review Costs Under Public Utilities Code § 451 Does Not Conflict With Inverse Condemnation Principles

SDG&E argues that in finding that inverse condemnation principles are "not relevant" to a Commission reasonableness review under the prudent manager standard, the Commission's decision frustrates the "cost spreading rationale" of inverse condemnation.[23] PG&E and SCE support SDG&E on this point, arguing that by not allowing SDG&E to pass on its damages liability to its customers via a rate adjustment,

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[19] *Id.*, citing to *Barham v. SCE*, (1999) 74 Cal.App.4th 744, 753 and *Pac. Bell v. SCE* (2012) 208 Cal.App.4th
1400, 1404.

[20] See, e.g., D.14-11-027 at p. 10 ("Commissioner comments are important for understanding the perspectives of the Commissioners and their rationales for their votes. However, the decision speaks for itself.")

[21] Cal. Const. Art. 12.

[22] Public Utilities Code § 1759.

[23] SDG&E AFR at p. 13.

the Commission has thwarted the fundamental policy concepts of inverse condemnation.[24] The utilities argue that the Commission decision unnecessarily creates a conflict between the Commission's responsibilities to prudently review costs under Public Utilities Code § 451, and the "cost spreading principles of inverse condemnation," and argue that the two should be "harmonized."[25] The utilities fail to acknowledge the Commission's distinct and separate jurisdiction to review utility costs for reasonableness before allowing any pass through in rates.

The Commission has broad and exclusive jurisdiction over the utilities it regulates to set rates and allocate costs.[26] Further, the Commission has a statutory and non-delegable duty to ensure that such rates are just and reasonable.[27]

In D.12-12-029, the Commission determined that WEMA costs would be subject to a reasonableness review.[28] SDG&E did not seek review of, nor did its application in this proceeding question, the Commission's jurisdiction to determine the reasonableness of SDG&E's proposed rates. The Commission properly applied the prudent manager test to the recovery of SDG&E's WEMA when it determined that SDG&E's shareholders should bear the financial consequences of SDG&E's imprudence, a matter squarely within the Commission's exclusive jurisdiction. The record of this proceeding amply supports the Commission's decision, as shown in Section IV, below.

However, the Commission does not have jurisdiction to award monetary damages for tortious conduct. Thus, a complaint for damages must be brought in the Superior Court.[29] Here, the Superior Court determined that the 2007 Wildfire Plaintiffs could

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[24] SDG&E/SCE AFR at p. 7.

[25] PG&E/SCE AFR at 7; SDG&E AFR at p. 15.

[26] Public Utilities Code §§ 451, 701.

[27] Public Utilities Code § 451.

[28] D.12-12-029 at p. 19, Ordering Para. 2-3.

[29] Public Utilities Code § 2106.

plead a cause of action in inverse condemnation,[30] which arises from an interference with a property right, in addition to other causes of action for tortious harm to persons or property such as negligence, nuisance or trespass. As ORA has previously argued, SDG&E has never demonstrated that the settled claims and other costs booked into its WEMA were due to inverse condemnation. SDG&E faced litigation risk from other causes of action as well as inverse condemnation, which was allowed after the original complaints were filed.[31]

Thus, the utilities' request that the Commission "harmonize" the inverse condemnation cost spreading rationale is based on a flawed understanding of Commission ratemaking jurisdiction and responsibilities, would result in an abrogation of the Commission's responsibility to ensure just and reasonable rates, and should be rejected.

E. The Decision's Denial of WEMA Cost Recovery does not constitute a taking

SDG&E further argues that for purposes of inverse condemnation, its "funds are being taken for the public purpose of making whole the persons injured by the 2007 Wildfires without just compensation."[32] As such, SDG&E asserts that the Decision results in an unconstitutional taking by denying recovery of the WEMA costs, and argues that the Commission "should have interpreted Public Utilities Code § 451 to permit recovery of damages paid in connection with inverse condemnation claims."[33]

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[30] An inverse condemnation action is an eminent domain action brought by the owner whose property was taken or damaged for public use, as opposed to being condemned by a public agency. Electric utilities have the power to condemn property for public use, known as eminent domain under Public Utilities Code § 612. Article I, § 19 of the California Constitution, requires that "Private property may be taken or damaged for public use only when just compensation … has first been paid … to the owner." Courts have extended the doctrine of inverse condemnation to public utilities under the rationale that a public utility is akin to a state actor. (*Barham v. SCE*, *supra,* 74 Cal.App.4th at 753.) Because just compensation must be paid when "property [is] proximately caused by a public improvement as deliberately designed and constructed … whether foreseeable or not." (Id. at 751.) Under takings law, the utility is said to be "strictly liable," and negligence need not be demonstrated.

[31] SDG&E AFR at 4 (citing *Minute Order* Overruling SDG&E's Demurrers to the Master Complaints in the San Diego Superior Court 2007 Wildfire Litigation, (January 29, 2009)).

[32] SDG&E AFR at p. 21.

[33] SDG&E AFR at p. 22.

Whether an unconstitutional taking has occurred must be determined based upon the "total effect" of the order.[34] Under the Commission's regulatory scheme, SDG&E may recover just and reasonable rates from its ratepayers to "furnish and maintain such adequate, efficient, just, and reasonable service, instrumentalities, equipment, and facilities … as are necessary to promote the safety, health, comfort, and convenience of its patrons, employees, and the public."[35] Further, the Commission sets SDG&E's cost of capital to include risks faced by the utility. However, SDG&E is now essentially arguing that it is entitled to receive full and complete recovery of the 2007 Wildfire costs requested in its Application, regardless of whether it acted reasonably and prudently. SDG&E is mistaken. It has no constitutional right to recover its 2007 Wildfire costs. Rather, consistent with the regulatory scheme in effect, it must demonstrate that it acted prudently and reasonably in order to recover these costs. The fact that it failed to do so does not constitute a taking.

Moreover, if SDG&E's argument were accepted, which it should not be, this would mean that no utility would have any incentive to maintain its facilities or equipment, since it would be allowed full recovery for any associated damages. Indeed, allowing a utility recovery, even when it has acted imprudently or unreasonably, not only conflicts with Public Utilities Code § 463, which requires the Commission to disallow expenses resulting from any unreasonable error or omission relating to, among other things, the operation of any portion of the utility's plant, but also would eliminate any risks faced by the utility, thus necessitating an adjustment in its rate of return.

For the reasons stated above, SDG&E's takings claim is without merit. Accordingly, rehearing on this issue should be denied.

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[34] *Duquense Light Cos. V. Barasch* (1989) 488 U.S. 299, 201 (quoting *FPC v. Hope Natural Gas Co.* (1944)
320 U.S. 591, 602).

[35] Public Utilities Code § 451.

IV. THE DECISION IS SUPPORTED BY THE RECORD

SDG&E argues that the Decision's findings with respect to the operation and management of its facilities prior to the Witch, Guejito and Rice fires are not supported by substantial evidence in light of the record and that it improperly applied the prudent manager standard.[36] This argument is without merit.

As discussed in more detail below, the Commission considered and weighed all evidence presented by parties concerning SDG&E's conduct to reach its determinations. This is exactly what the Court of Appeal requires:

> [T]he 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.[37]

SDG&E's arguments reflect its disagreement with how the Commission weighed the evidence in the record. The fact that SDG&E would have given more weight to its evidence than ORA's (and other intervenors') does not constitute legal error.

A. The Denial of Recovery as to the Witch Fire is Supported by the Record

SDG&E's assertion that "[l]egal errors abound in the Decision's findings that SDG&E unreasonably operated and managed its facilities prior to the Witch Fire ignition"[38] is meritless. SDG&E had raised similar arguments in its comments on the Proposed Decision. These arguments were considered and rejected by the Commission. ORA's Opening Brief at pages 8-34, and ORA's Reply Brief at pages 11-18, includes discussion of the record evidence that refutes SDG&E's re-litigation of the facts. SDG&E did not prove, by a preponderance of the evidence, that it prudently operated and

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[36] SDG&E AFR at pp. 22-26.

[37] *The Utility Reform Network v. Public Utilities Com.* (2014) 223 Cal. App. 4th 945, 959. See also, *PG&E v. Public Utilities Commission*, *supra*, 237 Cal. App. 4th 812, 839 (a reviewing court will only exercise independent judgement if "findings or conclusions 'drawn from undisputed evidence…from which conflicting inferences may not be reasonably be drawn [and therefore] present questions of law.'") (internal citations omitted).

[38] SDG&E AFR at p. 27.

managed the facilities associated with the Witch Fire. The Commission's weighing of the exhaustive evidentiary record must be given deference. Commission decisions have a strong presumption of validity,[39] and SDG&E's disagreement on how the Commission weighed the evidence does not demonstrate legal error.

1. The Record Supports the Decision's Determination that SDG&E's Response to the Faults Along TL 637 was Unreasonable

SDG&E's contests language in the Decision that it failed to "monitor the faults on TL 637."[40] The language appears in the body of the Decision, and in Conclusion of Law 11: "[t]he threat of the Harris Fire to the Southwest Powerlink, does not excuse SDG&E's failure to monitor the faults on TL 637."[41] The preceding sentence in the body of the Decision states: "SDG&E's response to the faults along TL 637 was unreasonable when viewed in light of the record of this proceeding."[42]

SDG&E's complaint appears semantic. SDG&E does not dispute the accuracy of the Decision's timeline regarding the faults and other material events.[43] It should be clear that the Decision's analysis focuses on SDG&E's failure to timely respond to the faults leading up to the Witch Fire ignition. Also, the Decision notes that: "[i]n his direct testimony, Mr. Yari explains how the threat of the Harris Fire to the Southwest Powerlink impacted SDG&E's monitoring of TL 637."[44] Thus, the Decision's discussion of "monitoring" considered SDG&E's showing.

Moreover, the Decision properly weighed numerous associated circumstances:

> The fact that there are other wind related wildfires in the area should put a prudent manager on notice to anticipate wind related events to its facilities. Also, in the 24 year history of

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[39] See *Utility Consumers' Action Network v. Public Utilities Commission* (2010) 187 Cal.App.4th 688, 697.

[40] SDG&E AFR at p. 28.

[41] D.17-11-033 at pp. 27, 71 (Conclusion of Law 11).

[42] D.17-11-033 at p. 27.

[43] D.17-11-033 at pp. 12-14.

[44] D.17-11-033 at p. 16.

> FL 637, there were only nine days with multiple faults. While compliance with industry practice is relevant to our reasonableness review, SDG&E must also show it acted reasonably in light of the circumstances at the time. The Red Flag Warning indicating high wind conditions, other fires in the vicinity, the request by Cal Fire to de-energize another transmission line, and three faults over a period of 3.5 hours, all alerted SDG&E to the potential for fires and should have caused SDG&E to act more proactively on October 21, 2007.[45]

The Commission weighed the evidence and determined that SDG&E did not meet its burden on this issue. SDG&E's re-litigation is meritless.

2. The Record Supports the Decision's Discussion Regarding a Protective Engineer

SDG&E critiques the Decision's discussion regarding whether dispatching a protective engineer would have prevented the Witch Fire.[46] Citing the Decision, SDG&E maintains that the Decision speculates that sending a protective engineer would have prevented the fire. SDG&E further argues that dispatch of a patrolman would not have been completed prior to the ignition. However, SDG&E only cites a portion of the Commission's analysis; the Decision's language actually states:

> Had SDG&E de-energized TL 637 or sent a protective engineer out to either end of TL 637 before the third fault occurred, it may have prevented the third fault from igniting the Witch Fire at 12:23 p.m. Moreover, it would have been more reasonable for SDG&E to send a protective engineer to calculate the fault mileage information on the date the faults occurred and the fire ignited.[47]

SDG&E's argument does not actually refute either point. While SDG&E calls the discussion "speculation", it merely re-litigates its argument that a protective engineer would have had no impact. Yet, as discussed in ORA's Opening Brief at pages 13-17, the fault location data was available at the relay. The Decision aptly notes that SDG&E

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[45] D.17-11-033 at pp. 27-28 (citing ORA-01 at 10:13-15; ORA-03 at 1-3.).

[46] SDG&E AFR at pp. 30-32.

[47] D.17-11-033 at p. 28.

SDG&E now has forced outages when any red flag warning is issued, regardless of the reported wind speeds. Their lines are supposed to be built to sustain 56MPH winds. They cut off power to the back country when on 35 MPS winds are reported.

did not gather that data on the date of the incident, as part of its analysis of whether SDG&E acted prudently. No legal error has been shown by SDG&E.

3. The Record Supports the Decision's Discussion Regarding the Timing of when SDG&E Forced an Outage on TL 637 and Automatic Reclosers

SDG&E argues that the Commission engaged in hindsight analysis by concluding that SDG&E should have forced an outage before the Witch Fire ignited.[48] The Commission, however, did not do so. SDG&E's stated reliability concerns were disputed. As ORA explained, "SDG&E's failure to present any meaningful analysis on what its specific reliability concerns were for TL 637, on October 21, 2007, weighs against its assertion of prudence."[49] The Decision appropriately weighed the evidence on this point and determined that SDG&E did not meet its burden.

SDG&E also appears to dispute the connection between faults and fire ignition.[50] ORA discussed this issue in its Opening Brief at pages 20-21. SDG&E's other arguments regarding why it took so long to de-energize TL 637 are mere re-litigation of issues weighed and resolved in the Decision.

Regarding automatic reclosers, SDG&E tries to distinguish the modality of ignition between the 2001 Field Guide excerpt[51] and the Witch Fire ignition. SDG&E is re-litigating a distinction without a difference. In practice SDG&E seems to have acknowledged the fire risks posed by automatic reclosers. After the 2007 fires, SDG&E updated its recloser policy accordingly.[52]

SDG&E fails to demonstrate legal error. It has failed to meet its burden, and its disagreements with how the evidence was weighed are of no moment.[53] The Decision correctly denied recovery to SDG&E regarding the Witch Fire.

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[48] SDG&E AFR at p. 32-38.

[49] ORA Reply Brief at p. 16; *see also*, ORA-01 at p. 14:7-14. .

[50] SDG&E AFR at pp. 33-34.

[51] Exhibit ORA-20 (Power Line Fire Prevention Field Guide – 2001 Edition) at pp. 1-5.

[52] See ORA-06 at 271-272 (*SDG&E Fire Conditions* – TMC 1320, dated 09/03/08).

[53] See Rule 16.1(c).

B. The Denial of Recovery as to the Guejito Fire is Supported by the Record

1. The Commission Reasonably Weighed the Longstanding Clearance Violation In Determining SDG&E's Imprudence Associated with the Guejito Fire

SDG&E maintains that the Decision deprived SDG&E of due process for not elaborating on "causation" and its lashing wire theory and that failure to mention or weigh the evidence regarding the broken lashing wire violated Public Utilities Code § 1705.[54] These arguments are without merit.

The Decision's discussion of SDG&E's longstanding clearance violation implies the connection between SDG&E's imprudence and the ignition of the Guejito Fire, which was explained by ORA.[55] Indeed, SDG&E has failed to provide persuasive evidence to disprove the basic inference that "facilities that are closer together are more likely to make contact during wind conditions."[56] At hearings, SDG&E's witness Mr. Weim conceded that, even assuming a pre-existing broken lashing wire, contact would be more likely to occur between facilities that were closer together, compared with those that had a compliant clearance.[57] He also conceded that the same would be true absent a pre-existing broken lashing wire.[58]

The record supports the conclusion that the clearance violation also increased the likelihood of igniting a fire. As explained in ORA's Opening Brief:

> In the event that the lashing wire was broken prior to the ignition, having a clearance violation not only increased the risk of contact, but also the risk that a ***larger segment*** of the lashing wire or multiple points on the lashing wire would contact the SDG&E conductor. A larger area of contact or

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[54] SDG&E AFR at pp. 38-41.

[55] D.17-11-033 at pp. 35-36.

[56] ORA Opening Brief at p. 41.

[57] RT at 612:27 – 614:2 (Vol. 4) (Weim – SDG&E). See, ORA Opening Brief at 39-45; ORA Reply Brief
at pp. 21-24.

[58] RT at 606:18 – 607:4 (Vol. 4) (Weim – SDG&E). See, ORA Opening Brief at p. 41.

> greater number of contacts would likely increase the amount of arcing, and thus sparks, that would land on nearby vegetation. It only takes one spark to start a fire, but having more sparks would ***increase the risk*** of starting a fire.[59]

The Commission properly weighed the evidence regarding the clearance violation associated with the Guejito Fire. The fact that the Commission did not find SDG&E's evidence persuasive does not constitute legal error.

2. The Commission Properly Weighed the Evidence Regarding the Cause of the Guejito Fire

SDG&E argues that "[t]he preponderance of the evidence unambiguously demonstrates that [a] broken Cox lashing wire caused the ignition."[60] SDG&E errs in its argument.

First, SDG&E contests the possibility of contact between an intact Cox telco wire and the SDG&E conductor as "impossible"[61] but does not support this assertion with record evidence.[62] In contrast, ORA observed the possibility that the lashing wire affixed to the communications line actually broke "as a result of the contact with the SDG&E conductor."[63]

SDG&E's AFR also points to "a series of motions filed involving Cox and SDG&E on this topic."[64] However, SDG&E fails to explain that in those pleadings, Cox, the operator of the subject telco line, disputed SDG&E's lashing wire theory.[65]

SDG&E's reliance on CalFire's and CPSD's assertions regarding the Cox lashing wire is also misplaced.[66] As explained in ORA's Opening Brief, CPSD was "***was***

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[59] ORA Opening Brief at 44 (emphasis in original); see also, ORA Opening Brief at 41-42 (discussing SDG&E's failure to prudently comply with GO 95).

[60] SDG&E AFR at p. 39.

[61] RT at p. 603:16-19 (Vol. 4) (Weim – SDG&E).

[62] See ORA Opening Brief at p. 40.

[63] ORA Opening Brief at p. 44.

[64] SDG&E AFR at p. 40.

[65] SDG&E Response to Cox Motion for Limited Party Status and Motion to Strike, at pp. 4-5 (July 10, 2017).

[66] SDG&E AFR at p. 39-40.

unaware of the clearance violation discovered on November 2, 2007, prior to repair work on the subject facilities."[67] Given that SDG&E had failed to disclose the Nolte Survey, which identified the clearance violation, for over 14 months, the Commission properly concluded that this violation was relevant for purposes of this proceeding.[68]

Finally, SDG&E relies on the live testimony of its witness, Mr. Weim, to support its proposition that contact would have occurred between an assumed "dangling" lashing wire and the SDG&E conductor had the clearance been the required 6 feet.[69] However, under cross-examination, Mr. Weim, testified that contact would be more likely with a clearance violation.[70] As noted in ORA's Opening Brief, "[t]he fact that that Cox cable and the SDG&E conductor had inadequate clearance ***increased the risk*** that contact, and the resultant ignition, would occur."[71]

Moreover, Mr. Weim initially avoided a direct answer of ORA's question regarding the impact of a clearance violation. As noted in ORA's Opening Brief:

> A lengthy discussion ensued, including Mr. Weim inserting an assumption that there was "no wind" in the hypothetical. (citation) After the intervention of the ALJ, Mr. Weim acknowledged that the scenario with a clearance violation of GO 95 was the more likely scenario to have contact[.][72]

Other areas of resistance were also noted in ORA's Opening Brief.[73] Courts have acknowledged the importance of demeanor in assessing the oral testimony of a witness:

> Oral testimony of witnesses given in the presence of the trier of fact is valued for its probative worth on the issue of credibility, because such testimony affords the trier of fact an opportunity to observe the demeanor of witnesses. A witness's demeanor is part of the evidence and is of

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[67] ORA Opening Brief at p. 46 (emphasis in original).

[68] *See*, ORA Opening Brief at p. 48.

[69] SDG&E AFR at p. 42 (citing RT 612:15-17; 614:10-13).

[70] RT at pp. 613:15–614:2 (Vol. 4) (Weim – SDG&E).

[71] ORA Opening Brief at p. 43.

[72] ORA Opening Brief at p. 43 (citing RT at 611:21-22 (Vol. 4) (Weim – SDG&E).)

[73] See ORA Opening Brief at pp. 39-43.

> considerable legal consequence. … A prepared, concise statement read by counsel may speed up a hearing, but it is no substitute for the real thing. Lost is the opportunity for the trier of fact and counsel to assess the witness's strengths and weaknesses, recollection, and attempts at evasion or spinning the facts.[74]

Repeatedly failing to answer questions about the potential impacts of the longstanding clearance violation could have caused the trier of fact to allocate less weight to Mr. Weim's position that contact would have occurred no matter what, particularly considering the demeanor of the witness during that questioning. The Administrative Law Judges were in the best position to observe and weigh the demeanor evidence, and evaluate whether Mr. Weim was simply confused, or was actively resisting answering the clearance hypotheticals, due to the unrefuted impact of the clearance violation on the risk of igniting a fire. SDG&E's dispute with how the evidence was weighed does not establish legal error.

3. The Record Supports a Finding That SDG&E's Clearance Violation Began in August of 2001, Years Prior to the Ignition of the Guejito Fire

SDG&E asserts that: "[i]t 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."[75] This flies in the face of the record evidence.

SDG&E's witness, Mr. Greg Walters, opined that the clearance violation began at the time of installation in 2001:

> Q. So Cox did not install their cable at an appropriate clearance from SDG&E's facilities, right?
>
> A. That is correct.[76]
>
> . . .

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[74] *Elkins v. Superior Court* (2007) 41 Cal. 4th 1337, 1358 (Citations omitted).

[75] SDG&E AFR at p. 42.

[76] RT at p. 792:20-23 (Vol. 5) (Walters – SDG&E).

> Q. When Cox installed their facilities in 2001, you believed that the facilities, the distance between the SDG&E lines and the Cox lines was out of compliance, right?
>
> A. From the information that was given to me at a later time, yes, I have believe their facilities were not in compliance with GO 95, Rule 38, Table 2.
>
> Q. That would be at the date of installation, correct?
>
> A. Yes.[77]

This admission under cross-examination is credible and was appropriately accorded weight. Indeed, "cross-examination . . . is beyond any doubt the greatest legal engine ever invented for the discovery of truth."[78]

The Decision correctly denied recovery to SDG&E regarding the Guejito Fire.

C. The Denial of Recovery as to the Rice Fire is supported by the record

1. The Decision's Analysis Regarding the Defect in Sycamore Tree FF1090 Is Supported by the Record

SDG&E once again argues that it could not have detected the "latent" defect in the subject tree FF1090. To that end, SDG&E wrongly asserts that: "there is no evidence that the defect was reasonably or even possibly detectable."[79] Based on its thorough review of the evidence, however, the Decision discussed its review of corroborated testimony and observed that:

> The testimony indicates that the broken branch was part of at least two vertical branches, possibly more, growing closely together. This testimony indicates that the tree appeared to have some physical characteristics that would have warranted further attention.[80]

Further, ORA's Reply Brief at pages 35-37 discusses SDG&E's problematic showing on this topic. As to the Reliability Tree designation, the Decision correctly

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[77] RT at p. 793:9-19 (Vol. 5) (Walters – SDG&E).

[78] *Ford v. Wainwright* (1986) 477 U.S. 399, 415 (internal citations omitted).

[79] SDG&E AFR at p. 46.

[80] D.17-11-033 at p. 49.

notes that Tree FF1090 could have warranted being marked as a Reliability Tree since it "seems have exhibited at least two characteristics on the 'Tree Hazard Checklist'.[81]

ORA also disagrees with SDG&E's statement that Mr. Akau was the only witness to provide evidence regarding its theory of a "hidden limb with the structural defect."[82] The Decision weighed the testimony of multiple witnesses in assessing this theory.[83] SDG&E's AFR itself includes quoted material referencing Ronald Metranga.[84] His prepared direct testimony in Investigation (I.) 08-11-006 was included in SDG&E's showing in this proceeding.[85]

SDG&E does not agree with how the Commission's weighed the evidence on this point. However, its failure to meet its burden of proof, by a preponderance of the evidence, does not establish any legal error in the Decision.

2. The Decision's Analysis Regarding Rule 35 is Supported by the Record

SDG&E asserts that the Decision "seems to suggest" that SDG&E violated GO 95, Rule 35.[86] SDG&E contests that it violated the Rule. Yet, regardless of SDG&E's violation status, no concrete error is alleged: suggestions are not findings or conclusions. Moreover, SDG&E neglects to cite the Decision's recognition that GO 95, Rule 35 also "sets the general clearance requirements for vegetation around powerlines."[87] In any event, this argument is inapposite.

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[81] See D.17-11-033 at pp. 42, 47.

[82] SDG&E AFR at p. 46.

[83] See D.17-11-033 at pp. 47-49.

[84] SDG&E AFR at p. 46.

[85] See SDG&E-13 (Akau Rebuttal), Appx. 2.

[86] SDG&E AFR at p. 47.

[87] D.17-11-033 at p. 37.

3. The Decision's Findings Regarding the Growth and Structure of Tree FF1090 Are Supported by the Record

SDG&E disagrees with the Commission's outcome in its analysis of the direction that the subject limb had been pointing prior to the ignition.[88] ORA's Opening Brief at pages 64-75, and ORA's Reply Brief at 31-35, present both testimonial and documentary evidence as to the direction of the subject branch. While the matter was disputed between ORA and SDG&E, the Commission weighed the evidence and determined that it was inconclusive.[89]

SDG&E's complaint that the Commission-sanctioned Examination Under Oath ("EUO") transcripts, of percipient witnesses from the scene of the incident, were "unsubstantiated hearsay"[90] does not present a legal error. SDG&E did not object to the introduction of the EUO Transcripts into the evidentiary record, but merely complained about them in briefs and its AFR. There is no question that the EUO evidence is admissible[91] and credible. Furthermore, the EUO evidence served to demonstrate that there were different recollections regarding the directionality of the tree limb. The Commission made no finding that the branch was pointing towards the power lines, or away from the power lines. Rather it weighed the evidence and found the evidence inconclusive.

Indeed, the Commission could determine that SDG&E did not meet its burden of proof, by a preponderance of the evidence, even in the absence of the EUO evidence. The ALJs, not SDG&E, were in the best position to judge the amount of weight that should be given to Mr. Akau's testimony. An ALJ's assessment of witness demeanor may be relied on in Commission decisions, just as an appellate court relies upon the original trier of fact, to determine the credibility of witnesses.

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[88] SDG&E AFR at p. 48.

[89] D.17-11-033 at p. 37.

[90] SDG&E AFR at p. 49 (citing *The Utility Reform Network v. Public Utilities Commission (2014)* 223 Cal. App. 4th 945).

[91] Rule 13.6(a).

> The presiding ALJ who observed the demeanor of the witnesses and reviewed the documentary evidence, found the testimony of witnesses Barcus, Davis, and Bjork to be credible. Bjork was custodian of the property for the previous owner. His testimony corroborated that of complainants on the existence of telephone service at the time Barcus purchased the property. The following findings are based upon the determination of credibility by the ALJ. (Evidence Code § 780; *Wilson v. State Personnel Board* (1976) 58 Cal. App. 3d 865, 877; *Kilstron v. Bronnenberg* (1952) 110 Cal. App. 2d 62, 64-65.[92]

Also, SDG&E's disagreement with the Commission's analysis on the prudent actions that SDG&E could have taken, under the assumption that the broken branch had been growing away from the powerlines[93], does not show a legal error. SDG&E had the burden to prove its prudence, by a preponderance of the evidence, but failed to do so. SDG&E's speculates about what it would have done pre-failure, if it had actually trimmed the tree between the pre-trim inspection and the failure. Yet, SDG&E did not address the sycamore tree FF1090's problems during that critical timeframe. SDG&E's critiques are of no moment.

4. The Decision's Analysis of the 0-3 Months Evidence Is Supported by the Record

SDG&E disputes the Decision's assessment of the 0-3 months evidence because it believes that it had nothing to do with the ignition of the Rice Fire.[94] Yet, SDG&E's attack is solely premised on the assumption that pre-failure trimming could not have prevented the Rice Fire. SDG&E's flawed assumption does not indicate a legal error on the Commission's part.

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[92] D.91-12-030 (1991) 42 CPUC2d 348, 349.

[93] See D.17-11-033 at p. 46.

[94] SDG&E AFR at p. 51.

5. The Decision's Analysis Regarding Sycamore Tree FF1090 Records and Growth Rate Are Supported by the Record

SDG&E asserts that "the Decision's assertions regarding the growth rate of Tree FF1090 and the related tree records draw no support from the record evidence."[95] SDG&E errs in its analysis and presents no legal error.

First, as to growth rate, the Decision identifies Sycamore Tree FF1090 as a fast grower.[96] That is SDG&E's own designation in the tree information form, and the record evidence confirms that designation.[97]

Second, as to the tree records, SDG&E points to no actual errors in the Decision's description of the tree FF1090's pre-inspection and trimming timeline over several years:

> There were only two instances in FF1090's inventoried history in which it was not trimmed on an annual basis. The first instance in which SDG&E failed to trim FF1090 annually was in 2002, when the tree was recorded as being within 4 feet of conductors. The Rice Fire marks the end of the second time period during which SDG&E fell out of the annual trimming schedule. At the time of the Rice Fire ignition, SDG&E had not trimmed FF1090 for 29 months.[98]

Consistent with ORA's analysis, the Decision confirmed that: "[i]n 2002, SDG&E had notice that, because of FF1090's growth rate, not trimming the tree annually resulted in FF1090 being out of clearance compliance."[99] SDG&E did not learn from its 2002 failure, and allowed the tree to remain untrimmed for over two years, until the subject tree was linked to the ignition of the Rice Fire. This failure supports the Decision's determination of SDG&E's imprudence.

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[95] SDG&E AFR at p. 51.

[96] D.17-11-033 at pp. 62, 68 (Finding of Fact 32).

[97] See ORA Opening Brief at pp. 56-57; Exhibit ORA-32 (SDG&E Data Request Response to CPSD, January 25, 2008) at 3; Exhibit SDGE-08 (Akau), Appx. 6.

[98] D.17-11-033 at p. 44.

[99] D.17-11-033 at 44; See also ORA Opening Brief at pp. 57-59.

SDG&E's complaint is just a re-hashing of the discredited "medium grower" theory put forward by Mr. Akau.[100] During cross-examination by ORA, Mr. Akau was pointed to an SDG&E data request response conceding that the subject tree was a fast grower, and he did not disagree with that data request response.[101]

The Decision is far from "arbitrary." The Decision correctly applied the Prudent Manager Standard in its analysis, and weighed the evidence appropriately. While SDG&E failed to meet its burden, its disagreements with how the evidence was weighed do not indicate legal error.[102]

The Decision correctly denied recovery to SDG&E regarding the Rice Fire.

V. THE COMMISSION WAS NOT REQUIRED TO RECIRCULATE THE REVISED PROPOSED DECISION FOR COMMENT UNDER PUBLIC UTIITIES CODE SECTION 311

SDG&E states that in response to its opening comments on the Proposed Decision, the Commission "invented an entirely new theory about SDG&E's management of Tree FF1090" that had not been presented by parties in testimony or during hearings.[103] SDG&E asserts that this alleged "new theory" is a substantive revision, thus making the revised Proposed Decision an "alternate" and subject to a 30 day comment period under Public Utilities Code § 311(g).[104] By failing to provide such a comment period, SDG&E maintains that it has been deprived of its due process rights and that the Commission has violated Public Utilities Code §§ 311(g) and 1757(a)(6).

SDG&E's argument is without merit. Public Utilities Code § 311(e) defines an "alternate" as "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." Rule 14.1(d) of the Commission's Rules of Practice and Procedure defines an "alternate proposed decision" as a

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[100] SDG&E AFR at p. 52.

[101] RT at p. 490:25-491:2 (Akau)(Vol. 4).

[102] See Rule 16.1(c).

[103] SDG&E AFR at p. 44.

[104] SDG&E AFR at p. 45.

"substantive revision by a Commissioner to a proposed decision…not proposed by that Commissioner which either: (1) materially changes the resolution of a contested issue, or (2) makes any substantive addition to the findings of fact, conclusions of law, or ordering paragraphs." Rule 14.1(d) further elaborates that a substantive revision to a proposed decision is not an alternate proposed decision "if the revision does no more than make changes suggested in prior comments on the proposed decision or draft resolution, or in a prior alternate to the proposed decision or draft resolution."[105]

The revised Proposed Decision does not meet the definition of an "alternate" under the Public Utilities Code nor the Commission's Rules. It was not a substantive revision by a Commissioner to the Proposed Decision, but a revision by the ALJs in response to SDG&E's comments on the Proposed Decision. It did not materially change the resolution of a contested issue and did not make substantive additions to the findings of fact, conclusions of law or ordering paragraphs. Rather, the revisions were made in response to SDG&E's comments. As explained by the Decision "the section of the decision describing the Rice Fire has been modified to provide more of the details of the facts and legal analysis on which the decision is based. Corresponding findings of fact and conclusions of law have been revised to reflect this."[106]

Moreover, contrary to SDG&E's assertions, the Decision does not present a new "theory" regarding SDG&E's unreasonable actions regarding the Rice Fire. In its comments on the Proposed Decision, SDG&E specifically argued that it had "no way to know that this defect [in the limb of Tree FF1090] existed"[107] and criticized the Commission for disagreeing with SDG&E's arguments "without identifying any

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[105] See also, D.15-07-044 at p. 9 (*slip op.*) (stating that the legislative history of Public Utilities Code § 311(e) "shows that the Legislature intended 'alternates' to be substantive changes made by an Commissioner, not revisions made by an ALJ.")

[106] D.17-11-033 at p. 65.

[107] SDG&E Opening Comments on Proposed Decision at p. 12.

substantial evidence supporting that disagreement."[108] The Decision was appropriately revised to address this criticism. Furthermore, a review of the Proposed Decision mailed on August 22, 2017 demonstrates that each of the points raised by SDG&E as the basis for the Commission's "new theory" had been part of the Proposed Decision.[109] In reaching its conclusions concerning the Rice Fire, the Commission evaluated evidence presented by parties, including SDG&E's Vegetation Management Program's inspection protocol for "Reliability Trees",[110] the "latent defect" in Tree FF1090,[111] the actions of SDG&E's contractor Davey Tree Company,[112] and SDG&E's failure to properly monitor the growth rate of Tree FF1090.[113]

The revised Proposed Decision explained the Commission's analysis in greater detail and identified the evidence supporting the Commission's determination that SDG&E had not acted prudently with respect to the Rice Fire. Additionally, as required by Public Utilities Code § 1705, the Commission added findings of fact and conclusions of law to further clarify its determination. These revisions, made in response to SDG&E's criticism in Opening Comments that the Commission had not identified the substantial evidence to support its determinations, do not make the revised Proposed Decision an "alternate" and there was no need for a new 30-day review and public comment period. SDG&E had an opportunity to comment on the Commission's determinations and was not deprived of its due process rights. Accordingly, the Commission did not violate Public Utilities Code §§ 311(e) and 1757(a)(6). SDG&E's arguments fail to demonstrate legal error and rehearing of this issue should be denied.

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[108] SDG&E Opening Comments on Proposed Decision at p. 13.

[109] The Proposed Decision may be found at http://docs.cpuc.ca.gov/PublishedDocs/Published/G000/M194/K209/194209380.PDF.

[110] Proposed Decision at p. 39.

[111] Proposed Decision at pp. 39, 42.

[112] Proposed Decision at pp. 40-42.

[113] Proposed Decision at pp. 38-39 and pp. 41-42.

VI. THE MOJAVE, HELMS AND SONGS I DECISIONS SUPPORT THE DECISION

In its Application for Rehearing, SDG&E argues that the discussion in D.17-11-033 of Commission decisions in prior reasonableness reviews "… do[es] not, however, support the Commission's Decision here because the conduct found to be imprudent in those cases differed significantly from SDG&E's conduct prior to the Witch, Guejito, and Rice Fires, where there were no such 'clear and identifiable utility errors or failures."[114] The three cases are *Mohave, Helms and SONGS 1.*[115] In *Mohave, Helms and SONGS 1*, the Commission denied costs that were directly attributable to clear and identifiable utility failures or errors.[116] The identifiable utility failures or errors in *Mohave, Helms and SONGS 1* were different from each other, but all similar to the utility failures and errors involved in this reasonableness review.

SDG&E argues that the *Mohave* decision is not applicable because, in that case, "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."[117] SDG&E claims that its case should be distinguished from *Mohave* because "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."[118] Decision 17-11-033 reviewed SDG&E's claims and rejected them, finding that "… such practices do not relieve SDG&E of its burden to shows actions were reasonable."[119] This, according to SDG&E, amounts to an "unjust and unreasonable perfection standard."[120] SDG&E's argument is baseless. The fact that SDG&E had industry recognized policies and programs in place at the time prior to October 2007 does

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[114] SDG&E AFR at p. 53.

[115] D.17-11-033 at pp. 49-55.

[116] D. 17-11-033 at p. 49.

[117] SDG&E AFR at p. 53; D.17-11-033 at p. 53.

[118] SDG&E AFR at p. 53.

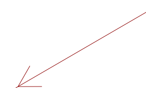
[119] D.17-11-033 at p. 51.

[120] SDG&E AFR at p. 54.

not mean it acted reasonably with respect to the 2007 Wildfires. Indeed, the Commission evaluated this argument and rejected it, finding:

> SDG&E fails to show its actions were reasonable when SDG&E allowed 4 faults to occur on TL 637 over a period of 6.5 hours; SDG&E failed to uncover the 3.3 feet clearance violation for 6 years after utilizing its Corrective Maintenance Program's patrol and detailed inspections; and SDG&E did not show by a preponderance of the evidence that it properly monitored and trimmed FF1090 before the ignition of the Rice Fire. SDG&E did not train its contractors to properly mark the VMS and has not shown it could not have identified a defective limb. SDG&E is responsible for its contractor's failure to appropriately mark the VMS and ensure that Tree FF1090 was trimmed on a timely basis. The Commission is also concerned with records suggesting that FF1090 may have been a Reliability Tree warranting immediate attention.[121]

With regard to the *Helms* case, SDG&E argues that it is distinguishable because, in *Helms*, PG&E was found unreasonable for failing "to take seriously the repeated safety citations and shutdowns issued and ordered by the State Department of Occupational Safety and Health."[122] Decision 17-11-033 found that:



> [s]imilar to Helms, where the Commission found PG&E failed to take into account the risks associated with building the Helms Project, SDG&E failed to take into account the risks associated with its automatic recloser policy. As ORA showed, SDG&E had knowledge of the 2001 Field Guide's caution that automatic reclosers increase the risk of igniting vegetation. As such, it was imprudent of SDG&E to not take into account the risk factors associated with re-energizing TL 637 after three faults occurred within a span of 3.5 hours.[123]

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121 D.17-11-033 at p. 51.

122 SDG&E AFR at p. 54.

123 D.17-11-033 at p. 51.

It is not, despite SDG&E's claim, an "unjust perfection standard" to require SDG&E to meet the prudent manager standard. Like PG&E in the *Helms* case, SDG&E failed to prove it met the prudent manager standard and cost recovery should be denied. Finally,

SDG&E argues that the *SONGS 1* decision, finding SCE's actions unreasonable and denying cost recovery, does not apply to SDG&E's conduct regarding the Witch fire.[124] SDG&E says that "[t]he Decision overlooks the critical distinction between *SONGS 1* 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 Guajito fire because the uncontroverted evidence shows the fire would have started whether the clearance had been 3 feet or 6 feet."[125]

As authority for this claim of "uncontroverted evidence" SDG&E does not cite to any evidence. It cites to its own brief. The Decision, on the other hand, provides a thorough review of the record evidence of SDG&E's operations and management of its facilities prior to the Guejito fire and concludes that, like SCE in the *SONGS 1* case, SDG&E failed to prove by a preponderance of the evidence that it acted prudently.[126]

VII. THE DECISION'S FINDINGS AS TO THE WEATHER CONDITIONS ARE SUPPORTED BY THE RECORD

SDG&E's argues that the Decision's findings regarding wind and weather are not supported by the record.[127] SDG&E has raised these same arguments in its Opening Brief and Opening Comments on the Proposed Decision. The Commission considered these arguments and concluded that it was "not persuaded by SDG&E's use of the [Santa Ana Wildfire Threat Index] to try to establish that the wind and weather conditions in San Diego County in October 2007 created the largest wildfire threat since 1984."[128] Further, the Decision concluded: "SDG&E cannot use the wind and weather conditions of

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[124] SDG&E AFR at p. 54.

[125] SDG&E AFR at p. 55.

[126] D.17-11-033 at pp. 35-36.

[127] SDG&E AFR at pp. 55-57

[128] D.17-11-033 at p. 60.

October 2007 to mitigate SDG&E's failure to operate as [a] reasonable and prudent manager."[129] SDG&E has raised no new arguments in its rehearing application and fails to identify any legal error. Rather, SDG&E simply reiterates that it disagrees with the outcome of the Decision's analysis. Because the record supports the Decision's determination that the conditions were not unprecedented, there is no basis for granting rehearing on this issue.

VIII. CONCLUSION

For all the foregoing reasons, ORA recommends the Commission deny SDG&E's and PG&E/SCE's applications for rehearing.

Respectfully submitted,

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[129] D.17-11-033 at p. 62.