

146 FERC ¶ 63,017
UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

San Diego Gas & Electric Company

Docket No. ER12-2454-003

INITIAL DECISION AND ORDER GRANTING SDG&E MOTION FOR
SUMMARY DISPOSITION, BUT DENYING SDG&E MOTION TO
TERMINATE

(Issued February 25, 2014)

APPEARANCES

Rebecca Sterzinar, Esq., Margaret E. McNaul, Esq., and Bonnie Blair, Esq., on behalf of the Cities of Anaheim, Azusa, Banning, Colton, Pasadena, and Riverside, California.

Peter C. Kissel, Esq., on behalf of California Department of Water Resources State Water Project.

Deborah L. Barnes, Esq., on behalf of California Attorney General's Office.

Nicholas Sher, Esq., on behalf of California Public Utilities Commission.

Georgetta J. Baker, Esq., James F. Walsh, Esq., and James R. Dean, Jr., Esq. on behalf of San Diego Gas & Electric Company.

Natalie M. Karas, Esq. on behalf of Modesto Irrigation District and Transmission Agency of Northern California.

Andrew O. Schulte, Esq., Katherine Claflin, Esq., and Linda Lee, Esq., on behalf of the Federal Energy Regulatory Commission staff.

Michael J. Haubner, Presiding Administrative Law Judge

I. Factual Background

1. On August 15, 2012, San Diego Gas & Electric Company (SDG&E) filed its annual Transmission Owner (TO) formula rate informational filing as required by a previously approved settlement.¹

¹ *San Diego Gas & Electric Company*, 119 FERC ¶ 61,169 (2007) (TO3 Settlement).

2. Pursuant to the terms of SDG&E's TO3 Settlement, which was in effect from July 1, 2007 through August 31, 2013, SDG&E was required to file annually an informational filing that reflects adjustments to its transmission formula rate mechanism based on certain recorded and estimated costs.² The rates established under these annual filings take effect beginning September 1 of the current year and run through August 31 of the following year.

3. Under Article I, section 1.4 of the TO3 Settlement, SDG&E must demonstrate that the costs contained in its annual Informational Filing were prudently incurred, accurate, and are recovered consistent with the TO3 formula rate mechanism.³

4. On December 31, 2012, the Commission established Hearing and settlement judge procedures in Docket Nos. ER12-2454-000 and ER12-2454-001.⁴ On January 9, 2013, the Chief Judge appointed Judge H. Peter Young as the Settlement Judge in this proceeding. Judge Young conducted settlement negotiations that culminated in an Offer of Settlement and Settlement Agreement (Settlement Agreement) filed on May 10, 2013. The Settlement Agreement resolved all but one issue set for hearing. The unresolved issue pertains to whether SDG&E may recover approximately \$23 million in third-party wildfire-related costs from ratepayers. On June 7, 2013, Settlement Judge Young certified the Settlement Agreement to the Commission. On August 5, 2013, the Commission issued a letter order approving the Settlement Agreement. This Initial Decision addresses the unresolved issue of third-party wildfire-related costs.

II. Procedural History

5. On June 11, 2013, the Chief Administrative Law Judge (Chief Judge) appointed me as Presiding Judge.

6. On June 19, 2013, I issued an Order scheduling a prehearing conference. The prehearing conference occurred July 9, 2013. On July 9, 2013, counsel requested a brief delay to file a joint motion. Consequently, I issued an Order scheduling an additional prehearing conference for August 20, 2013.

² SDG&E Explanatory Statement in Support of Offer of Settlement, Docket No. ER07-284-000, Article I, section 1.1 at 5 (March 28, 2007) (2007 Offer of Settlement).

³ *Id.* at 6.

⁴ *San Diego Gas & Electric Company*, 141 FERC ¶ 61,273 (2012) (Suspension Order).

7. On July 12, 2013, SDG&E filed a Joint Motion for Procedural Relief. On July 15, 2013, the Chief Judge denied that Joint Motion. In light of that denial, I issued a new Order on July 16, 2013 advancing the August 20, 2013 prehearing conference to July 30, 2013. That prehearing conference occurred on July 30, 2013.
8. On July 31, 2013, I issued an Order Establishing Procedural Schedule. On that same day, I issued an Order Establishing Rules for the Conduct of the Hearing.
9. On August 14, 2013, the California Public Utilities Commission (CPUC) filed a motion requesting that the proceeding be held in abeyance. On August 21, 2013, the Chief Judge granted CPUC's motion, based on information that it was unopposed. Accordingly, he shortened the time to file answers and agreed to consider modification of his Order. On August 28, 2013, however, SDG&E filed an Answer in opposition. Staff filed its Answer on the same day. On August 30, 2013, the Chief Judge issued an Order Vacating [the] Prior Order, Denying Motion to Hold [the] Proceeding in Abeyance, and Reinstating [the] Track II Procedural Schedule. On September 16, 2013, CPUC filed a Motion for Interlocutory Appeal of the Chief Judge's August 30th Order. On September 18, 2013, SDG&E filed its Answer. On September 19, 2013, the Chief Judge denied CPUC's Motion for Interlocutory Appeal. On September 26, 2013, CPUC filed a Motion for Leave to File Interlocutory Appeal, and Interlocutory Appeal of the Chief Judge's Denial of Motion to Hold in Abeyance. On October 2, 2013, (former) Chairman Wellinghoff denied CPUC's Motion. On January 8, 2014, CPUC filed a letter stating that it believed it could not participate in this proceeding. CPUC further stated that it had filed with the Ninth Circuit a petition for review of its motion requesting that the proceeding to be held in abeyance.⁵
10. On September 12, 2013, SDG&E filed a Motion for the Adoption of a Protective Order. On September 30, 2013, I issued an Order granting the Adoption of the Protective Order.
11. On November 4, 2013, I issued a Notice of Amended Rules.
12. On November 26, 2013, San Diego Gas and Electric filed its Motion to Terminate the Pending Hearing on the Severed Issue for Failure by the California Public Utilities Commission to Litigate (212 Motion).⁶ This motion was filed under Rule 212 of the

⁵ In sub-Docket No. ER12-2454-003, CPUC filed a Request for Rehearing of October 2, 2013 Order and Request to Stay the Proceeding Pending Petition for Review on November 1, 2013. On November 5, 2013, CPUC refiled this request in sub-Docket No. ER12-2454-004. On November 13, 2013, SDG&E filed its answer. On November 18, 2013, the Commission rejected the Request.

⁶ As mentioned briefly above, the severed issue pertains to whether SDG&E may recover approximately \$23 million in third-party wildfire-related costs from ratepayers

Rules of Practice and Procedure.⁷ Answers were initially due on December 11, 2013 under Rule 213.⁸ On December 10, 2013 Commission Trial Staff (Staff) filed a request to extend the time to Answer the 212 Motion through December 18, 2013. I granted that request on December 11, 2013. Also on December 11, 2013, CPUC filed its Answer in Opposition to the 212 Motion (CPUC 212 Answer). On December 18, 2013, Staff filed its Answer in Opposition to the 212 Motion (Staff 212 Answer); however, Staff suggested that a Motion for Summary Disposition could be appropriate.

13. On December 19, 2013, I set SDG&E's Motion to Terminate for oral argument. I also indicated that if a participant wished to file any additional motions, it must do so by January 3, 2014, with answers thereto due by January 10, 2014. I further indicated that oral arguments on all motions would be heard on January 15, 2014.

14. SDG&E filed a Motion for Summary Disposition under Rule 217 on January 3, 2014 (217 Motion). On January 8, 2014, CPUC filed a letter indicating it would not appear for oral argument. Staff filed its Answer in Support of the 217 Motion on January 10, 2014 (Staff 217 Answer).

15. On January 15, 2014, oral arguments occurred. Staff Witness Daniel Poffenberger was sworn and his pre-filed testimony was authenticated; SDG&E waived cross examination. Additionally at the oral-argument hearing, Staff waived cross examination of SDG&E witnesses.

16. Also on January 15, 2014, I issued an Order modifying the procedural schedule. On January 16, 2014, I issued an Order further modifying the procedural schedule.

17. On January 22, 2014, SDG&E filed authentication certificates regarding the pre-filed testimony of its witnesses. There were no objections to my admitting all such testimony into evidence, which I have done.

18. On February 10, 2014, SDG&E filed a Joint Motion for Limited Suspension of Hearing Date to Allow the Administrative Law Judge to Rule on Pending Dispositive

(*see* Joint Motion for Procedural Relief filed in this case on July 12, 2013). That recovery had been requested by SDG&E in its annual Transmission Owner Formula Rate Informational Filing (Suspension Order, 141 FERC ¶ 61,273 at P 1). The amount was approved by the Commission, subject to refund.

⁷ Rule 212 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.212 (2013).

⁸ Rule 213 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213.

Motions. SDG&E also requested a shortened comment period. On the same day, the Chief Administrative Law Judge granted SDG&E's request for a shortened comment period. On February 14, 2014, the Chief Administrative Law Judge Granted the Joint Motion, suspending the Hearing until March 24, 2014.

19. On February 24, 2014, I issued an Order Adopting Transcript Corrections.

III. Summarized Testimony

A. SDG&E Testimony

i. Mr. Lee Schavrien

20. Mr. Lee Schavrien is Senior Vice President for Finance, Regulatory, and Legislative Affairs at SDG&E. He noted that under the FERC-approved TO3 Formula at issue here, SDG&E may recover costs incurred in providing transmission service that are prudent, accurately calculated, and consistent with TO3 Formula rate mechanism.⁹

21. In late October 2007, drought conditions and hot, dry Santa Ana winds spawned 19 wildfires across Southern California. Mr. Schavrien testified that he believes it is sound policy for SDG&E to recover the \$23,242,389 (\$23.2 million) that it paid to settle third-party damage claims associated with three wildfires that occurred in SDG&E's service territory in 2007: the Witch, the Rice, and the Guejito fires. These costs were included in the Rate Effective Period September 1, 2012 through August 31, 2013 under SDG&E's Third Transmission Owner Formula ("TO3 Formula" for the "Sixth and last Informal Filing").¹⁰

22. The California Department of Forestry and Fire Protection (Cal Fire) issued reports concluding that two of the fires in San Diego County (the Witch and Rice fires) were SDG&E "power line caused" and that a third fire (the Guejito fire) occurred when a wire securing a Cox Communications fiber optic cable came into contact with an SDG&E power line.¹¹

23. Mr. Schavrien testified that wildfire costs may be unavoidable costs for utilities in Southern California. Thus, he believes it is prudent for SDG&E management to settle the claims at issue here since the benefits of early settlement outweighed the risk and cost of continuing to litigate each of these claims. This is especially true given that in California

⁹ Ex. SDG-1 at 1.

¹⁰ *Id.*

¹¹ *Id.* at 4-5.

utilities can be held strictly liable for damages caused by their facilities. California's inverse condemnation doctrine can require a utility to pay damages whenever its facilities, operating as deliberately designed and constructed for the public use, are involved in an event that damages third-party property, regardless of fault.¹²

24. Nonetheless, Mr. Schavrien explains that SDG&E expends significant efforts to avoid the possibility of power line-caused fires. SDG&E employs a full-time fire coordinator. Furthermore, its Vegetation Management Program has been recognized as an example of excellence.¹³

25. SDG&E also maintained insurance coverage to protect against the cost of large, infrequent, and unpredictable losses. At the time of the 2007 wildfires, SDG&E's liability coverage was more than \$1 billion. However, even this amount turned out to be less than the total claims resulting from the 2007 wildfires.¹⁴

ii. Ms. Karen Sedgwick

26. Ms. Karen Sedgwick is employed by Sempra Energy as Settlement Officer and Senior Director Enterprise Risk Management. She testified on behalf of SDG&E, which is seeking to recover \$23.2 million in third-party claims paid as a result of three wildfires in 2007. These costs were included in transmission rates for the Rate Effective Period September 1, 2012 through August 31, 2013.¹⁵

27. Ms. Sedgwick testified that SDG&E's settlement process is rigorous. The process thoroughly investigates and validates the reasonableness of each claimant's demands. She noted the process typically includes review of discovery responses including depositions where necessary, claimant's experts' valuations of claimed damage, third-party invoices and/or estimates for repairing/replacing damaged items, pre- and post-fire photographs of damaged real property, personal property, and vegetation, and other information.¹⁶

28. A claim is also validated independently against information such as ownership records, zoning, building permits, market research, employment records, tax returns,

¹² *Id.* at 2, 5-6, 8-9.

¹³ *Id.* at 7-8.

¹⁴ *Id.* at 9.

¹⁵ Ex. SDG-2 at 1.

¹⁶ *Id.* at 2-3.

satellite imagery, personal property records, and other available data. SDG&E compares the claimant's asserted damages against internal metrics which are targeted and specific to neighborhood, property, and loss types.¹⁷

29. Furthermore, SDG&E has hired a wide variety of experts to help evaluate claims. If the claim is not settled on an informal basis, it is referred to a retired judge or seasoned mediator. Fewer than 15 of the over 2,000 cases that have gone through the process remain unresolved and potential trial candidates.¹⁸

iii. Mr. R. Craig Gentes

30. Mr. R. Craig Gentes testified he is employed by SDG&E as Director of Utility Accounting. The purpose of his testimony is to explain the accounting treatment for the wildfire third-party damage claims and associated legal fees that SDG&E paid to resolve third-party claims related to three wildfires that occurred in SDG&E's service territory in 2007. The Witch Fire, the Rice Fire, and the Guejito Fire "Wildfire Costs" were included in the Rate Effective Period September 1, 2012 through August 31, 2013 under SDG&E's TO3 Formula.¹⁹

31. He represented that SDG&E accurately calculated and accounted for the \$23.2 million of Wildfire Costs at issue in this proceeding, consistent with the Commission's Uniform System of Accounts and SDG&E's TO3 Formula rate mechanism.²⁰

32. The \$23.2 million of Wildfire Costs was included in transmission rates. That figure is approximately 14.60 percent of the \$159,194,000 (\$159.2 million) total electric division wildfire damage claims and legal costs that SDG&E paid from December 2011 through March 2012 to settle claims by third-parties for damage to their property arising from the three wildfires. The months December 2011 through March 2012 constitute the True-Up Period in TO3 Cycle 6. The percentage was obtained by application of the labor statistics results in an allocation of 14.60 percent of total Wildfire Costs being allocated to the transmission function (*i.e.*, the FERC jurisdictional amount). Mr. Gentes believes that SDG&E complied with the requirements of the TO3 Formula because it recorded the

¹⁷ *Id.*

¹⁸ *Id.* at 4.

¹⁹ Ex. SDG-3 at 1-2.

²⁰ *Id.* at 1, 4-5.

costs in the administrative and general Account 925 of the Uniform System of Accounts, as required by the Commission during SDG&E's TO3 Cycle 5 Informational Filing.²¹

33. Mr. Gentes states that SDG&E used funds received in its settlement with Cox Communications to pay for claims and legal costs, but that those amounts were insufficient to cover all claims and legal costs.²²

B. Staff Answering Testimony

i. Mr. Daniel L. Poffenberger

34. Mr. Daniel L. Poffenberger is a Supervisory Energy Industry Analyst in the Office of Administrative Litigation at FERC.²³

35. Mr. Poffenberger believes that CPUC established the relevant safety rules and compliance standards in General Order 95 (GO-95). At the time of the wildfires, there were no FERC regulations specifically targeting vegetation management.²⁴

36. Mr. Poffenberger states that SDG&E provided documents in response to discovery requests that indicate SDG&E had excellent vegetation management.²⁵

37. Cal Fire concluded that the Guejito fire was caused because Cox failed to maintain and inspect its facilities. Cox and CPUC settled this matter without an admission as to the cause of the fire.²⁶

38. He summarizes the Cal Fire reports related to the three fires, and states that SDG&E and CPUC reached a settlement with regard to the Witch and Rice fires whereby SDG&E did not admit to any violations of the General Order safety provisions.²⁷

²¹ *Id.* at 4-5.

²² *Id.* at 3-4.

²³ Ex. S-1 at 1.

²⁴ *Id.* at 9.

²⁵ *Id.* at 10.

²⁶ *Id.* at 11.

²⁷ *Id.* at 11-15.

39. In Mr. Poffenberger's view, the evidence in this proceeding does not cast "serious doubt" on whether SDG&E prudently maintained its electrical lines.²⁸

40. Mr. Poffenberger states that \$1.1 billion of costs were covered by SDG&E's liability insurance. An additional \$824 million was recovered through indemnification from Cox and other third-party contractors. Approximately \$159 million in total electric division wildfire damage claims and legal costs remain. Of this (approximately) \$23.2 million, or 14.6 percent, is attributable to transmission rates. Mr. Poffenberger reviewed SDG&E's supporting documentation and agrees with these amounts.²⁹

41. Mr. Poffenberger represents that the total amount of claims originally sought by non-insurer plaintiffs was approximately \$3.4 billion. He describes SDG&E's process for settling these claims. He believes that SDG&E was prudent in settling these claims in light of its settlement process and the fact that it paid out much less than was initially claimed.³⁰

42. He adds that SDG&E's data was accurately recorded. Finally, he believes that SDG&E's recovery of these costs is consistent with its TO3 formula because SDG&E proposed recording the expenses in Account No. 925.

C. SDG&E Supplemental Testimony

i. Mr. R. Craig Gentes

43. Mr. Gentes clarified that of the \$23.2 million, approximately \$8.0 million is attributable to the Guejito fire, \$12.0 million to the Witch fire, and \$3.2 million to the Rice fire.³¹

IV. Issues and Discussion

A. Order Granting SDG&E's 217 Motion for Summary Disposition

44. The record demonstrates that no disputed material fact exists. Therefore, summary disposition of the severed litigation issue is appropriate.³² As previously noted,

²⁸ *Id.* at 17.

²⁹ *Id.* at 17-18.

³⁰ *Id.* at 18-19.

³¹ Ex. SDG-4 at 2.

³² Rule 217 of the Commission's Rules of Practice and Procedure, 18 C.F.R. §385.217(b), provides in relevant part that "[i]f a decisional authority

SDG&E³³ and Trial Staff³⁴ filed the only testimony in this proceeding. CPUC failed to file any testimony,³⁵ nor did they file an Answer to the 217 Motion.³⁶

45. The Commission has stated that for summary disposition to be granted, the following two conditions must be met:

(1) the proponent must have been afforded a reasonable opportunity to present arguments and factual support (written and oral) and that evidence must be viewed in its most favorable light [to the non-moving party], and (2) the Commission must find that a hearing is unnecessary or would not affect the ultimate disposition of an issue because there are no material facts in dispute or because the facts presented by the proponent have been accepted in reaching the decision.

KN Interstate Gas Transmission Co., 86 FERC ¶ 61,229, at 61,824 (1999).³⁷ Both of these conditions have been met. The procedural schedule has allowed any party contesting SDG&E's recovery of the Wildfire Costs to file testimony adducing evidence contesting the recovery of such costs. No such evidence has been presented. Rather, the only evidence presented, apart from SDG&E's evidence, has been that of the Trial Staff. As summarized herein, both SDG&E's evidence and the Trial Staff's evidence confirm

determines that there is no genuine issue of fact material to the decision . . . the decisional authority may summarily dispose of all or part of the proceeding.”

³³ On October 17, 2013, SDG&E filed: Prepared Direct Testimony and related Exhibits of Lee Schavrien (Exhibit No. SDG-1), Prepared Direct Testimony of Karen Sedgwick (Exhibit No. SDG-2), and Prepared Direct Testimony of R. Craig Gentes (Exhibit Nos. SDG-3 and SDG-3-1).

³⁴ On December 18, 2013 Trial Staff filed Prepared Answering Testimony of Daniel L. Poffenberger (Exhibit Nos. S-1 through S-13).

³⁵ My Order Establishing Procedural Schedule of July 31, 2013 required that Intervenor answering testimony be filed by November 14, 2013, and cross-answering testimony be filed by January 13, 2014.

³⁶ Albeit protestations that CPUC could not prejudice its position as an objective adjudicator by participating in any way, it did file an Answer to the 212 Motion. Therefore, it is unclear why CPUC failed to respond to the 217 Motion.

³⁷ See also *Coastal States Marketing Inc. and Coastal States Trading, Inc. v. Texas-New Mexico Pipeline Co.*, 25 FERC ¶ 61,164, at 61,452 (1983).

that SDG&E is entitled to recover the Wildfire Costs in transmission rates. Thus, a Hearing is unnecessary because there are no facts in dispute material to the decision.

46. At the oral-argument Hearing on January 15, 2014, SDG&E acknowledged that in proving its *prima facie* case it bears the burden of: “demonstrating (a) that such costs and expenditures were prudently incurred, (b) the accuracy of the data and (c) consistency with the TO3 Formula.”³⁸ SDG&E has a standing obligation to demonstrate “the justness and reasonableness of the implementation of its formula rate *in the context of a formal challenge*.”³⁹ However, absent a formal challenge or complaint, its annual update “will go into effect without being addressed by Commission Order.”⁴⁰

47. Whether a challenge is sufficient depends on the type of challenge. A challenge to the accuracy of the data or consistency with the formula rate requires less than a challenge to the prudence of the costs incurred, because a prudence challenge requires the challenger to raise “serious doubt” before the burden shifts to the transmission owner.⁴¹ Here, no party has raised any challenge, on any grounds, as to the Wildfire Costs at issue.

48. The Commission presumes that a utility’s expenditures are prudent in the absence of a challenge casting “serious doubt” on such prudence.⁴² Therefore, in light of the absence of any challenge in the record, the rebuttable presumption of prudence in cost incursion has not been refuted. As noted, the *MISO Protocols Order* further clarifies that “absent a formal challenge or complaint, [the annual update] will go into effect without being addressed by Commission Order.”⁴³

³⁸ See Tr. 49:12-15. See also Section 1.4 of the 2007 Offer of Settlement; the Commission’s Suspension Order, 141 FERC ¶ 61,273 at P 2 (enumerating the elements of the *prima facie* case).

³⁹ *Midwest Indep. Transmission Sys. Operator, Inc.*, 143 FERC ¶ 61,149, at P 120 (2013) (*MISO Protocols Order*) (emphasis added).

⁴⁰ *Id.* P 120 n.200.

⁴¹ *Id.* PP 120-121.

⁴² *Id.* (citing *Potomac-Appalachian Transmission Highline, LLC*, 140 FERC ¶ 61,229, at P 81 (2012)). See also *Entergy Services, Inc.*, Opinion 505, 130 FERC ¶ 61,023, at P 52 (2010).

⁴³ *Miso Protocols Order*, 143 FERC ¶ 61,149 at P 120 n.200.

49. By way of background, on August 15, 2012, SDG&E submitted its TO3 Cycle 6 Informational Filing. The Informational Filing is the sixth update to the TO3 formula.⁴⁴ The Informational Filing is an “annual update” to a formula rate, as that term was used in the *MISO Protocols Order* and related precedent. As such, the Informational Filing does not amount to a section 205 Filing because the data contained in it is not the rate – “it is merely an input into the formula, which is the rate.”⁴⁵ Therefore, the Commission does not need to make a separate just and reasonable finding for the inputs contained in the Informational Filing unless there is a specific challenge to one of the inputs. This approach is consistent with the language in SDG&E’s TO3 Tariff that requires interested parties to mount a challenge in order to trigger SDG&E’s burden.⁴⁶

50. Eleven interventions and four protests were filed in response to SDG&E’s TO3 Cycle 6 Informational Filing. Protests were filed by CPUC; M-S-R Public Power Agency and the City of Santa Clara, California, doing business as Silicon Valley Power (M-S-R/SVP); the Cities of Anaheim, Azusa, Banning, Colton, Pasadena and Riverside, California (Six Cities); and the California Department of Water Resources State Water Project (SWP). M-S-R/SVP, Six Cities, and SWP raised concerns with the inputs containing insurance premiums and pension expenses, as well as whether or not to capitalize or expense wildfire mitigation costs and post-construction environmental costs. Despite the numerous sophisticated parties involved, CPUC was the only party to suggest that the input containing uninsured wildfire expenses was not adequately supported.⁴⁷

51. However, *CPUC never formally raised a challenge*, as required by the SDG&E TO3 Tariff and formula rate jurisprudence. Indeed, CPUC’s Protest simply requested that “the CPUC and/or its staff (and other parties) should be given *the opportunity to*

⁴⁴ TO3 Settlement, 119 FERC ¶ 61,169 (2007).

⁴⁵ *Virginia Elec. & Power Co.*, 123 FERC ¶ 61,098, at P 31 (2008); *see also MISO Protocols Order*, 143 FERC ¶ 61,149 at P 85.

⁴⁶ SDG&E’s TO3 Tariff reads in part, “[i]n the event of a challenge to any cost reflected in charges derived under this Appendix VIII, SDG&E shall bear the burden of demonstrating that such costs and expenditures included for recovery were prudently incurred, as well as the accuracy and consistency with the formula of the information contained therein.” SDG&E Tariff, Vol. No. 11, Original Sheet No. 138A (approved in Docket No. ER07-284-000) (emphasis added)

⁴⁷ Uninsured wildfire expenses are distinct from wildfire mitigation costs. *See Suspension Order*, 141 FERC at PP 7, 17, 18.

challenge the costs in question.”⁴⁸ Thus, on its face, the CPUC’s Protest was not a challenge.⁴⁹ The full text of Article I, section 1.4 of the TO3 Settlement makes it clear that the burden is triggered only “in the event of a challenge.”⁵⁰ That provision states:

When SDG&E makes its annual Informational Filings, in the event of a challenge to any cost reflected in charges derived under Appendix VIII, SDG&E shall bear the burden of demonstrating:

- (a) that such costs and expenditures were prudently incurred,
- (b) the accuracy of the data and
- (c) consistency with the TO3 Formula.

52. Pursuant to Article I, Section 1.4 of the TO3 Settlement, a showing of prudence is only required if a challenge to any cost is made. There has been no formal challenge to the costs, *much less one raising “serious doubt” as to the prudence of those expenditures.*

53. Furthermore, SDG&E’s proposal to recover approximately \$23.2 million in Commission-jurisdictional transmission rates is supported with accurate data.⁵¹ The accuracy of SDG&E’s data has been verified through information provided in response to Trial Staff’s discovery requests, submitted into the record as Exhibit No. S-9.⁵² Trial Staff Witness Daniel L. Poffenberger thoroughly analyzed SDG&E’s accounting and the testimony of SDG&E witness R. Craig Gentes and concluded that the information SDG&E provided was accurate and supported.⁵³

⁴⁸ California Public Utilities Commission Sept. 4, 2012 Notice of Intervention, Protest, and Request for Hearing at 8 (emphasis added). CPUC never availed itself of that opportunity. *See* discussion *supra* regarding CPUC’s failure to file testimony or to respond to the 217 Motion.

⁴⁹ In addition to being deficient as a challenge under the TO3 Tariff itself and under formula rate jurisprudence, the CPUC’s Protest fails to satisfy the protestor’s burden “to do more than make mere unsubstantiated allegations.” *Midwest Indep. Transmission Sys. Operator, Inc.*, 117 FERC ¶ 61,108, at P 14 (2006) (*MISO Vegetation Management Order*).

⁵⁰ 2007 Offer of Settlement at 6.

⁵¹ Ex. SDG-3 at 3:7 – 4:12; Ex. SDG-3-1.

⁵² Ex. S-1 at 16:18 – 17:19; Ex. S-9.

⁵³ Ex. S-1 at 19:11-15.

54. Additionally, SDG&E's inclusion for recovery of approximately \$23.2 million in Wildfire Costs through transmission rates is consistent with the allocation methodology set forth in SDG&E's TO3 formula rate. The TO3 formula rate uses a labor ratio to allocate a portion of expenses recorded in Account No. 925, Damages and Injuries, as part of the transmission revenue requirement.⁵⁴ The Commission has previously determined that Wildfire Costs are properly recorded in Account No. 925.⁵⁵ Thus, the total amount of wildfire claims paid between December 2011 and March 2012 (amounting to approximately \$159 million) was properly booked to Account No. 925 and a portion of that amount (the \$23.2 million) was properly allocated to transmission rates based on labor ratios. Therefore, the accuracy of the data has been clearly demonstrated, as well as consistency with the TO3 formula.

55. Also regarding expenditure prudence⁵⁶, as noted above there was some evidence of *alleged* violation of GO-95, initially raised by CPUC in its Intervention and Protest. However, such alleged violation (or indeed, even a violation) does not create a presumption of imprudence. GO-95 is a set of rules developed for the design, construction, and maintenance of overhead electrical supply and communication facilities that come within the jurisdiction of CPUC,⁵⁷ prescribed and enforced by the CPUC. As discussed below, even if SDG&E had been found to have violated GO-95, that alone is insufficient to cast serious doubt on the prudence of the Wildfire Costs.

56. In fact, one violation by a utility does not necessarily constitute imprudence, as utilities are not expected to be infallible. Instead, the Commission looks to things like standard utility practice to determine whether the utility's conduct was that of a reasonable, prudent utility, as set forth in *New England Power Company*: "[T]he appropriate test to be used is whether they are costs which a reasonable utility management (or that of another jurisdictional entity) would have made, in good faith, under the same circumstances, and at the relevant point in time."⁵⁸ The Commission's prudence standard "permits considerable latitude, in that the Commission, in reviewing a decision ... does not look for a single correct result or require that every possible

⁵⁴ Ex. S-1 at 19:18 – 20:2; Ex. SDG-3 at 4:13-19.

⁵⁵ *San Diego Gas & Electric Co.*, 137 FERC ¶ 61,041, at P 21 (2011).

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⁵⁷ General Order No. 95 at p. I-3 (2012), <http://docs.cpuc.ca.gov/PUBLISHED/Graphics/162158.PDF>.

⁵⁸ *New England Power Company*, 31 FERC ¶ 61,047, at 61,084 (1985); *see also MISO Vegetation Management Order*, 117 FERC ¶ 61,108 at P 15.

alternative be evaluated.”⁵⁹ Here, the record indicates that SDG&E behaved as a reasonable, prudent utility in the maintenance of its lines prior to the wildfires and in its settling of the claims of injured third-party homeowners.⁶⁰

57. The Commission’s presumption of prudence is not easily refuted. As noted previously, the Commission presumes an expense is prudent unless a challenging participant casts *serious doubt* on the prudence of that expense. Based on the foregoing, *even if* SDG&E had been found to have violated GO-95, such a violation standing alone would be insufficient to shift the presumption against SDG&E.

58. Significantly, as the facts stand, SDG&E has not been found to have violated GO-95. Indeed, the entity with jurisdiction over GO-95, the CPUC, ended its investigation without finding any violations of the safety General Order provisions or related statutory requirements.⁶¹ Given the Commission’s well-established presumption of prudence, it follows that an *inconclusive allegation* of a violation of GO-95, not even acted upon by the CPUC, certainly does not create a presumption of imprudence.

59. The Commission’s prudence standard “permits considerable latitude, in that the Commission, in reviewing a decision ... does not look for a single correct result or require that every possible alternative be evaluated.”⁶² Here, the record indicates that SDG&E behaved as a reasonable, prudent utility in the maintenance of its lines prior to the wildfires and in its settling of the claims of injured third-party homeowners.⁶³

60. Finally, at the January 15, 2014 oral-argument Hearing, I requested the participants brief whether California’s inverse condemnation precepts would affect the issue of SDG&E’s prudence in incurring the Wildfire Costs in the first instance. While the presumption of prudence and lack of challenge are dispositive, as demonstrated above, even if they were not, under California law SDG&E would likely have been held responsible for such costs irrespective of fault. Therefore, inclusion of those costs in its TO3 Cycle 6 Filing was valid.

⁵⁹ *Entergy Services, Inc.*, 130 FERC ¶ 61,023 at P 51.

⁶⁰ Ex. S-1 at 16:1-15, 19:3-10.

⁶¹ Ex. S-1 at 15:3-14; Ex. S-5 at 5.

⁶² *Entergy Services, Inc.*, 130 FERC ¶ 61,02 at P 51.

⁶³ Ex. S-1 at 16:1-15, 19:3-10.

61. As pointed out by the Staff, under California law an inverse condemnation action can be initiated by one whose property was “taken” for public use.⁶⁴ California Courts have interpreted this to mean that “any actual physical injury to real property proximately caused by a public improvement as deliberately designed and constructed is compensable . . . whether foreseeable or not.”⁶⁵ I find it telling that California jurisprudence holds the “presence or absence of fault by the public entity ordinarily is irrelevant.”⁶⁶ It applies to utilities whose facilities were involved in fires that damaged private property.⁶⁷ 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 resulting from the 2007 wildfires.⁶⁸ 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.”⁶⁹

62. 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 the claimants.⁷⁰ Therefore, I find SDG&E’s conduct was rational and prudent.

63. For all of the foregoing reasons, I grant SDG&E’s Rule 217 Motion for Summary Disposition.

⁶⁴ *Barham v. S. Cal. Edison Co.*, 74 Cal. App. 4th 744, 752 (1999).

⁶⁵ *Pacific Bell v. City of San Diego*, 81 Cal. App. 4th 596, 602 (2000) (citation omitted).

⁶⁶ *Id.*

⁶⁷ *E.g., Marshall v. Department of Water & Power*, 219 Cal. App. 3d 1124, 1139 (1990).

⁶⁸ *Pacific Bell v. S. Cal. Edison Co.*, 208 Cal. App. 4th 1400, 1408 (2012) (finding that strict liability applies to inverse condemnation cases involving power lines).

⁶⁹ *In re 2007 Wildfire Insurer Litigation – Rice Canyon Fire*, Case No. 2008-00093083-CU-NP-CTL, January 29, 2009 Minute Order Overruling SDG&E’s Demurrer to the Master Complaint at 2.

⁷⁰ Ex. S-1 at 17:20 – 18:5; Ex. S-10.

B. Order Denying SDG&E's 212 Motion for Termination

64. SDG&E also moved to terminate the hearing⁷¹ and to enforce the Settlement Agreement.⁷² It alleged that “CPUC has made [clear] its intent not to litigate this matter” by (1) repeatedly asserting it cannot litigate without impermissibly prejudging issues,⁷³ and (2) by declining to file testimony, as required under the Procedural Schedule.⁷⁴

65. Regarding SDG&E's first assertion in its Motion to Terminate, as noted in the CPUC Answer to that 212 Motion, footnote 8 of Section D of the Settlement Agreement stated: “[the] filing of a motion to hold this issue in abeyance does not mean that the CPUC has declined to litigate this [i]ssue.”⁷⁵ CPUC has filed multiple motions to hold this proceeding in abeyance (and for reconsideration of its request for abeyance).⁷⁶ By the very terms of the Settlement Agreement, CPUC actions cannot therefore be construed as a failure to litigate.

66. SDG&E's second assertion in its 212 Motion is that this proceeding should be terminated for CPUC's failure to litigate by not filing any testimony. It is important to keep in mind, however, that it was SDG&E who requested the additional costs be included in its TO3 Cycle 6 Filing. CPUC has no duty to file testimony at this juncture. For example, CPUC could have attempted to make its case through cross-examination of opposing witnesses at the hearing.⁷⁷ Thus, the argument that CPUC has failed to litigate

⁷¹ 212 Motion at 4. While my ruling on the 217 Motion has effectively disposed of this case, I am also ruling on the 212 Motion since it was properly brought and is before me.

⁷² 212 Motion at 4.

⁷³ 212 Motion at 1-2. *See* CPUC 212 Answer at 2, where CPUC conceded it filed multiple requests to hold the litigation abeyance.

⁷⁴ 212 Motion at 1-2 (citing July 31, 2013 Order Establishing Procedural Schedule).

⁷⁵ CPUC 212 Answer at 2 (citing the Settlement Agreement).

⁷⁶ On December 12, 2013, CPUC filed a Petition for Review in the U.S. Court of Appeals for the Ninth Circuit, Case No. 13-7436, regarding its request to hold the FERC proceeding in abeyance. CPUC has not provided additional updates.

⁷⁷ *E.g.*, SDG-1 at 4 (filed by SDG&E) and S-1 at 10 (filed by Staff) acknowledged allegations that SDG&E violated CPUC GO-95, causing the Witch and Rice Fires.

merely by not pre-filing testimony is premature until a merits Hearing actually occurs, given CPUC's right to present rebuttal evidence at such a Hearing.⁷⁸

67. For all the foregoing reasons, I find SDG&E's argument that CPUC has failed to litigate untenable. Therefore, I deny SDG&E's 212 Motion to Terminate.

V. Order

68. This Initial Decision's failure to discuss any matter raised by the parties, or any portion of the record, does not indicate that it has not been considered. Rather, any such matter(s) or portion(s) of the record has/have been determined to be irrelevant, immaterial, or meritless. Arguments made on brief that were otherwise unsupported by record evidence or legal precedent have been accorded no weight.

69. IT IS ORDERED, subject to review by the Commission on exceptions or on its own motion, as provided by the Commission's Rules of Practice and Procedure, that within thirty (30) days of the issuance of the final Order of the Commission in this proceeding, all parties shall take appropriate action to implement all the rulings in this decision.

SO ORDERED.

Michael J. Haubner
Presiding Administrative Law Judge

⁷⁸ See Rule 505 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.505, which mandates that during a Hearing "a participant has the right to present such evidence, including rebuttal evidence, to make such objections and arguments, and to conduct such cross-examination, as may be necessary to assure true and full disclosure of the facts."