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Office of Administrative Law File Number 2021-0903-01E

RE: San Diego Gas & Electric Company's Comments on the Office of Energy Infrastructure Safety's Adoption of Emergency Rulemaking Process and Procedure Regulations

Dear Director Thomas Jacobs and the Office of Administrative Law:

Pursuant to California Government Code Section 11349.6(b) and 1 California Code of Regulations Section 55, San Diego Gas & Electric Company (SDG&E) submits its comments addressing the California Office of Energy Infrastructure Safety's (Energy Safety or OEIS) Adoption of Emergency Rulemaking Action Process and Procedure Regulations and the Proposed Emergency Regulations (Proposed Regulations) submitted to the Office of Administrative Law (OAL) on September 3, 2021.¹ SDG&E previously submitted comments on Energy Safety's initially proposed regulations, submitted to OAL on July 26, 2021 and ultimately withdrawn prior to becoming effective. As the newly Proposed Regulations are, with some modifications, substantially similar to the July 26 version, SDG&E addresses the Proposed Regulations in their entirety, including restating comments that continue to apply.

¹ OAL File Number 2021-0903-01E. All statutory references hereafter to the California Code of Regulations refer to the Proposed Regulations unless indicated otherwise.

I. Background

On July 12, 2019, Governor Newsom signed Assembly Bill 111, which established the Wildfire Safety Division (WSD) as a division of the California Public Utilities Commission (Commission). Pursuant to AB 111, on July 1, 2021, Energy Safety was transferred to the California Natural Resources Agency as the successor to WSD, vested with all of the duties, powers, and responsibilities of WSD.² Prior to July 1, 2021, the WSD was charged with various responsibilities aimed at reducing the risk of wildfire ignition from utility infrastructure, including reviewing, approving, or denying the wildfire mitigation plans (“WMPs”) submitted by electrical corporations.³ To accommodate WSD’s transition to Energy Safety, the California Legislature authorized Energy Safety to use existing duly adopted rules or guidelines in effect and utilized by the WSD until the new agency adopted its own set of rules.⁴

On July 6, 2021, Energy Safety provided notice that it intended to submit proposed emergency regulations in accordance with Government Code Section 11346.1. The original proposed regulations were eventually submitted to OAL on July 26, 2021, and SDG&E, along with other stakeholders, provided comments. Energy Safety withdrew the original proposed regulations on August 4, 2021.

On August 26, 2021, Energy Safety again provided notice that it intended to submit a second set of proposed emergency regulations to OAL on September 3, 2021. Energy Safety submitted the proposed regulations to OAL on the proposed date. The new Proposed Regulations are substantially similar to those submitted to OAL on July 26, 2021, but do contain some notable changes discussed herein.

II. Summary and General Recommendations

SDG&E appreciates the need for appropriate processes and procedures as Energy Safety continues its transition from the Commission. The processes and procedures that are ultimately adopted should support the safe and reliable operation of electric corporation assets and focus on Energy Safety’s primary objective of reducing the risk of catastrophic wildfires. But given the Legislature’s directive allowing Energy Safety to continue operating using the processes and procedures previously in effect at WSD, SDG&E submits that the use of the emergency rulemaking process may no longer be necessary. Refinements to the processes in place, especially for issues such as confidentiality, will be better achieved through stakeholder input to allow for a consistent and effective process that facilitates the needs of all parties.

At a minimum, SDG&E recommends that Energy Safety convene a stakeholder workshop to allow interested parties to participate in a dialogue prior to filing an emergency rulemaking. Pursuant to Government Code Section 15475(a), Energy Safety has discretion and authority to adopt emergency regulations under the California Administrative Procedure Act. But the Legislature also specifically instructed Energy Safety to adopt initial guidelines and procedures

² Pub. Util. Code § 326.

³ See Pub. Util. Code §326; see also Govt. Code § 8386.1.

⁴ Gov. Code §15475.6.

through a collaborative stakeholder process. Specifically, Government Code Section 15475.6 provides as follows:

The office shall adopt guidelines setting forth the requirements, format, timing, and any other matters required to exercise its powers, perform its duties, and meet its responsibilities described in Sections 326, 326.1, and 326.2 and Chapter 6 (commencing with Section 8385) of Division 4.1 of the Public Utilities Code at a publicly noticed meeting during which the office presents proposed guidelines or guideline amendments and allows all interested stakeholders and members of the public an opportunity to comment. *Not less than 10 days' public notice shall be given of any meetings required by this section, before the office initially adopts guidelines.* Substantive changes to the guidelines shall not be adopted without at least 30 days' written notice to the public and opportunity to comment. Any guidelines adopted pursuant to this section are exempt from the requirements of Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2.⁵

Development of initial guidelines and procedures through a stakeholder workshop—even if ultimately submitted and approved by OAL through an emergency rulemaking process—would better meet the legislative intent of the California Energy Infrastructure Safety Act and could address many of the concerns addressed herein.

Additionally, the Proposed Regulations as amended continue to develop a new agency process that is inconsistent with and at times duplicative of existing rules and regulations.⁶ While SDG&E understands Energy Safety's need for information and data to support wildfire safety, the creation of overly broad and administratively burdensome reporting – with insufficient time to prepare such reports – will have the perverse result of potentially diminishing wildfire mitigation efforts when the focus should be on the safe operation of infrastructure. Energy Safety should permit state, local, and utility personnel to focus on safety first, with reporting after a reasonable investigative period that allows for preservation of applicable legal and constitutional rights. SDG&E's general recommendations are summarized as follows:

- The process for treatment and disclosure of confidential information described in Sections 29200 and 29201 continues to be overly burdensome and conflicts with existing CPUC practice established in General Order No. 66-D and other relevant decisions. Given the often overlapping oversight and involvement of the Commission and Energy Safety, the processes for confidentiality should be the same to avoid inconsistency.
- The proposed notification and incident reporting processes described in Sections 29300 and 29301 remain overly vague and will likely result in overly broad and burdensome reporting, and given the timeframes at issue may lead to inaccuracies.

⁵ Gov. Code §15475.6 (emphasis added).

⁶ Gov. Code § 11349.1 provides that OAL must review all regulations submitted to it using six standards: (1) necessity, (2) authority, (3) clarity, (4) consistency, (5) reference, and (6) nonduplication.

- Consistent with General Order 95 Rule 19, the Proposed Regulations should clearly state that they remain subject to all legal rights and privileges, including the attorney client privilege and the attorney work product doctrine.
- The electrical corporations should be allowed a reasonable time to implement any new regulations.

III. Confidential Information Processes Should Follow Existing CPUC Practices and Procedures

A. Proposed Section 29200 Creates an Overly Burdensome Process for Asserting and Determining Confidentiality That is Inconsistent with Existing Regulations

Despite some changes, the newly Proposed Regulations continue to establish a process for confidentiality that is inconsistent with the long-established CPUC confidentiality procedures and will create a duplicative and confusing process for all parties. The CPUC has long-established practices and procedures for submitting and handling confidential information. The Commission addressed the process for addressing claims of confidentiality in General Order (G.O.) 66-D and CPUC Decision (D.) 06-06-066. To maintain consistency in the process of providing nearly identical information to its regulatory bodies and so that all parties remain on the same page regarding the confidentiality of records, SDG&E recommends that Energy Safety amend the proposed confidentiality processes to mirror the process that occurs at the CPUC.

As currently drafted, the proposed process in Section 29200 of the Proposed Regulations regarding applications for confidentiality is overly burdensome. The second set of proposed rules again require that all parties providing confidential information to Energy Safety submit an application with a confidentiality declaration for review by the Deputy Director, who then has 30 days to determine if an application should be granted.⁷ While Energy Safety has oversight over the electrical corporations' wildfire safety efforts, many of the materials requested by Energy Safety will continue to have significant overlap with information provided to the CPUC in other oversight activities. If adopted, the Proposed Regulations on confidentiality will result in parties being required to submit two different confidentiality declarations to meet the differing requirements of both Energy Safety and the CPUC.

Moreover, these two confidentiality processes may result in inconsistent conclusions regarding confidentiality, differing processes of review, and administratively burdensome delays. As Energy Safety assumes oversight over the electrical corporations' WMPs and many other matters related to wildfire mitigation, the need for stakeholder input will not change. And undoubtedly the WMP process will continue to involve large numbers of comprehensive data requests to facilitate input from interested stakeholders – the responses to which are currently due within three days. Because of the condensed timeframe for consideration of the electrical corporations' WMPs and the data request process, the proposed overly burdensome and time-consuming confidentiality process will likely complicate and delay consideration of and discourse regarding the WMPs and other wildfire mitigation efforts. Parties will remain in limbo with respect to the

⁷ Proposed 14 CCR §29200(c).

status of their confidential information, and may ultimately have to wait until receiving direction from the Deputy Director prior to responding to data requests and other disclosures.

To eliminate this inconsistent, burdensome, and time-consuming process, SDG&E recommends that Energy Safety adopt confidentiality regulations and guidelines that mirror the existing processes at the CPUC created by General Order (GO) 66D and Decision (D.)06-06-066. Namely, these processes create an initial presumption of confidentiality for information properly submitted by the party seeking confidential treatment. And upon a California Public Records Act request for information or in other relevant contexts the Commission's Legal Division reviews the applicant's confidentiality request to determine if it is lawfully based, with a process for appeal or reconsideration of that determination.⁸ The process established in GO-66D balances the public's interest in disclosure of records and information with the need for a streamlined process to protect confidential and sensitive information while maintaining efficiency and timeliness for all parties. Moreover, this tried-and-true process has been used effectively to share and disseminate information and facilitate review of WMPs by all stakeholders.

Energy Safety should revise the confidentiality process as proposed to better reflect a process consistent with the CPUC. If at some point Energy Safety wishes to refine the confidentiality process to better reflect the agency's needs, it should do so through a non-emergency process that facilitates stakeholder input.

B. Section 29201 of the Proposed Regulations Should Be Clarified to Include Notification to the Party Who Provided the Information

SDG&E understands the need for Energy Safety to share and disclose confidential information with its employees, representatives, contractors, or consultants, in addition to other government agency partners who require access to the records. This process will promote collaboration and hopefully reduce duplicative data requests. In order for parties to better understand who is in possession of confidential information, however, SDG&E requests that the Proposed Regulations include a requirement in Section 29201 that Energy Safety notify the party who provided the confidential information that its records have been disclosed and identify the party or parties who have received the information. SDG&E also recommends that any partner agencies to whom confidential information is disclosed be required to confirm that they will respect the confidentiality designation and the private nature of the information contained in confidential submissions.

⁸

GO-66D at Section 5.5.

IV. Investigation and Compliance Regulations Should Be Clear and Subject to Constitutional and Legal Rights and Privileges

A. *Energy Safety Should Clarify the Notification Requirements of Section 29300 to Avoid Burdensome and Unnecessary Reporting and Conform to the Agency's Mission*

Energy Safety revised Proposed Section 29300, ostensibly to provide “a level of clarity to the utility that notification under this provision is for fires that require deployment of firefighters.”⁹ The newly proposed rules require a regulated entity to notify OEIS within 12 hours of observing: (1) a fault, outage, or other anomaly on infrastructure it owns or operates occurring within the vicinity of a fire requiring a response from a fire suppression agency; or (2) a wildfire threat that poses a danger to infrastructure it owns or operates requiring a response from a fire suppression agency.¹⁰ But the newly-added metric regarding firefighter deployment neither achieves the clarity sought, nor does it conform to Energy Safety’s mission to address wildfire safety. Again, to streamline notification processes and promote consistency within agencies, SDG&E recommends that Energy Safety use existing processes in place at the CPUC to conform the notification process.

1. Notifications for Faults, Outages, or Other Anomalies

Energy Safety notes that it is tasked with “ensuring that electrical utilities are taking actions to reduce utility related wildfire risk.”¹¹ But the metric of requiring notice every time “a fault, outage or other anomaly on” electrical infrastructure is “within the vicinity of a fire requiring a response from a fire suppression agency” results in vague and overbroad reporting requirement that exceeds Energy Safety’s jurisdiction.¹² To avoid the potential for unnecessary over-reporting, notifications should be limited to threats from a large or catastrophic wildfire. The proposed notification requirement of Section 29300(a)(1) is not limited to wildfire safety, as it encompasses a fire of nearly any size or scope in any location, as long as it involves a fire agency response. Nearly every fire results in some response from a fire suppression agency. Additionally, a requirement to notify Energy Safety of “anomalies” “within the vicinity” of a fire, regardless of size, scope, or location is vague and could result in overly broad reporting related to fires—such as common housefires—that pose no wildfire threat. A notification requirement that is not aimed at wildfire safety—or even the safety of electrical infrastructure—exceeds Energy Safety’s task and will distract both the electrical corporations and Energy Safety personnel from the true mission of wildfire safety.

SDG&E does not object to the creation of reasonable notification requirements aimed at promoting the safety of California’s electrical infrastructure. To that end, SDG&E proposes revising the notification requirement to known faults or outages that occur within a one-mile vicinity of a fire that is 50 acres or greater in size. This revision to the notification requirements would tailor the regulation to better suit Energy Safety’s goal of reducing wildfire risk and

⁹ Notice of Proposed Emergency Action at 10-11.

¹⁰ Proposed 14 CCR § 29300(a)(1)-(2).

¹¹ Notice of Proposed Emergency Action at 10.

¹² Proposed 14 CCR § 29300(a)(1).

reduce unnecessary and overly burdensome reporting. Additionally, the notification requirement should be restored to the 24-hour timeframe originally proposed to promote accurate and timely notifications.

2. Notifications for Wildfire Threats

The revised notification requirements for “wildfire threats that pose a danger to infrastructure [that an electrical corporation] owns or operates” remains vague and overly broad. Many wildfire “threats” may evolve to pose a danger to electrical infrastructure. While Energy Safety has added the metric of firefighter response to limit this provision, as noted above, nearly every known fire will include some response from fire suppression agencies. As of July 2021, CALFIRE had responded to 4,599 incidents identified as wildfires statewide; and in SDG&E’s service territory there have been an average of 70 vegetation/wildland fire dispatches per week. All these dispatches have the potential to impact utility equipment and pose a wildfire threat, depending on conditions. To the extent that OEIS intends for electrical corporations to report on each of these events, it would create an overly burdensome process of reporting that would ultimately distract from the joint focus of mitigating the threat of catastrophic wildfires caused by or related to electrical infrastructure and equipment. Moreover, this level of notification is simply not necessary to meet the Energy Safety’s key objectives.

To reduce the risk of over-notification, SDG&E recommends that the Proposed Regulations be clarified to define “wildfire threat” consistent with the definition of a large fire applied by the National Wildfire Coordination Group and the United States Forest Service.¹³ These groups and SDG&E generally define the term “wildfire” to mean a fire burning more than 300 acres. Like the notification requirement addressed above, SDG&E also recommends returning to the 24-hour notice requirement. A 24-hour notification window allows the dual purpose of ensuring timely and accurate notification to OEIS while allowing electrical corporation personnel to support the incident objectives of the first responder agencies in the initial stages of a wildfire incident. SDG&E personnel need to be able to focus their attention on the safe operation and potential restoration of infrastructure and the pressure of immediate short-term reporting may inhibit SDG&E’s ability to ensure the safety of its electrical equipment and cooperate with first responders.

3. Notifications Regarding Government Agency Investigations of Electrical Infrastructure

Proposed Section 29300(b) requires a regulated entity to notify Energy Safety within four hours of “receiving notice that infrastructure it owns or operates is being investigated by a governmental agency for involvement in potentially causing an ignition.” Energy Safety justifies reducing the originally proposed 24-hour timeframe for reporting such incidents to four hours as being “critical to ensure that the OEIS is aware of the investigation so that appropriate

¹³ These agencies define “Large Fire” as “1) For statistical purposes, a fire burning more than a specified area of land e.g., 300 acres. 2) A fire burning with a size and intensity such that its behavior is determined by interaction between its own convection column and weather conditions above the surface.” See, <https://www.fs.fed.us/nwacfire/home/terminology.html#W> and <https://www.nwcg.gov/term/glossary/large-fire>.

coordination with the investigating agency can commence.”¹⁴ But the four-hour timeframe for notification is unjustified and overly burdensome without reasonable limitation. And again, the notification requirement conflicts with existing requirements promulgated by the CPUC.

The CPUC requires that electric utilities report electric incidents that are attributable, or allegedly attributable, to electric utility facilities that are found to meet the following criteria within two hours during business hours (or four hours outside of business hours): a fatality or injury requiring overnight hospitalization; damage to property of the utility or others in excess of \$50,000; or significant public attention or media coverage.¹⁵ Energy Safety can achieve its goal of coordinating with relevant agencies simply by receiving a copy of the same notification provided to the CPUC. This will promote efficiency and reduce both duplication of work and inconsistent messages between regulatory agencies.

B. The Proposed Incident Reporting Requirements of Section 29301 Should be Limited to Matters Within OEIS’ Statutory Authority and are Duplicative of the CPUC’s Incident Reporting Regulations

SDG&E generally restates its previous comments on this slightly revised Proposed Regulation. Section 29301 now establishes incident reporting requirements in the “event that a regulated entity or fire investigation agency suspects an ignition to have been started by infrastructure owned or operated by a regulated entity.” While incident reporting on ignitions potentially caused by electrical infrastructure is reasonable, the language of Section 29301 remains overly broad in scope and could potentially infringe on the legal and constitutional rights of those involved.

First, the language of the Proposed Regulations is unclear regarding the level of certainty required to rise to an incident report. In some instances, while its unlikely that a fire has been caused by electrical equipment, fire investigators and relevant agencies may not have ruled out electrical infrastructure as potential cause of an ignition. Thus, the fire investigation agency may still “suspect” that utility equipment could have caused an ignition and simply need more time (potentially months or even years) to rule it out as a cause. Thus, the proposed 30-day timeframe may not allow for a thorough investigation by fire agencies to determine the cause of an ignition.

Additionally, requiring an incident report for *all* such ignitions is overly broad and will result in unnecessary and cumbersome reporting. SDG&E recommends that Energy Safety adopt reporting requirements for incidents deemed “reportable” by the CPUC in Decision (D.)06-04-055. Notably, the CPUC elected to allow the electrical corporations to stop reporting all vegetation-related incidents, including small incident fires with no associated property damage.¹⁶ SDG&E requests that the Proposed Regulations be changed to allow electrical corporations to send a copy of incident reports submitted to the CPUC consistent with D.06-04-055 and Resolution E-4184. This eliminates the creation of duplicative and inconsistent process and ensures all stakeholders are privy to the same information. Like the CPUC, Energy Safety will

¹⁴ Notice of Proposed Agency Action at 11.

¹⁵ See Resolution E-4184, *Adoption of Web-Based Emergency Reporting for Utilities and Generation Asset Owners*, California Public Utilities Commission, August 21, 2008.

¹⁶ D.06-04-055 at 6-7.

retain the authority to investigate any ignition, while eliminating the potentially “wasteful” use of Energy Safety’s and utility resources necessary to report each and every minor ignition.¹⁷

With respect to the content of ignition reports, SDG&E recommends that Energy Safety amend the Proposed Regulations to clarify that they remain consistent with all applicable law, including the electrical corporations’ and individuals’ rights and privileges under the United States and California Constitutions as well as available privileges such as the attorney-client privilege and the attorney work product doctrine. SDG&E appreciates Energy Safety’s clarification that electrical corporations are required to report the information only to the extent known to it. SDG&E continues to have significant privacy concerns regarding sharing the personal information of private citizens in incident reports, given that they are likely to be shared with the public. The Proposed Regulations should be modified to reflect the limitations imposed on electrical corporations and include reference to all applicable privacy laws.

The incident report requirements, including the proposed “preliminary root cause analysis, including detailed discussion of all findings”¹⁸ and the obligation to identify “all documents related to the incident,”¹⁹ are also in conflict with Energy Safety’s proposed 30-day timeframe for reports. It is likely impossible – given the complexity of facts and circumstances – to prepare a preliminary root cause analysis within 30 days of an event, however for many if not most events such an analysis would be incomplete due to the short turnaround. And if a preliminary root cause analysis cannot be completed, it is correspondingly impossible to describe the actions taken to minimize the recurrence of such events.²⁰ Additionally, depending on the nature of the incident, there may be thousands of related documents, if not more. Imposing these short-term incident reporting requirements on the electrical corporations will distract from the near-term goal of investigating the incident and ensuring safe operations.

Moreover, the 30-day incident notification required by Energy Safety would be duplicative of many of the requirements for incident notification at the CPUC, resulting in a focus on overreporting rather than adequate investigation and ensuring safe service. Ignitions should be investigated and reported in a way that ensures thoroughness and accuracy; a rushed turnaround does not benefit anyone and could lead to false initial conclusions. SDG&E notes that such reports, once public, can have significant financial consequences for utilities and, by extension, their ratepayers, such as loss of market capitalization and ratings agency declines.

Accordingly, SDG&E recommends that Energy Safety require incident reports that parallel those already required by the CPUC. Specifically, the CPUC’s incident reports are required within 20 business days and are required to include “a detailed description of the nature of the incident, its

¹⁷ *Id.* at 7 (“Moreover, we agree that reporting relatively minor vegetation-related incidents are unnecessarily wasteful of utility and Commission staff and resources. Since the Commission will continue to receive reports of significant vegetation incidents under the remaining criteria and since the Commission retains authority to investigate any utility accident, the requested relief is sensible and is supported by our Energy Division staff.”)

¹⁸ Proposed 14 CCR §29301(b)(3).

¹⁹ Proposed 14 CCR §29301(b)(6).

²⁰ Proposed 14 CCR §29301(b)(4).

cause and estimated damage.”²¹ The CPUC incident reports require much of the same information included in the Proposed Regulations, but on a more preliminary basis.²² As SDG&E and other relevant stakeholders continue their investigations, SDG&E can then continue to update Energy Safety through ongoing reports as requested.

Finally, Energy Safety has broad authority to request documents and inspections of electrical corporations’ infrastructure and equipment. That authority, however, is not unchecked by applicable law and privileges. SDG&E requests that the Proposed Regulations clarify that the requirements of Section 29301 are subject to all applicable law and privilege, including the attorney-client privilege and the attorney work product doctrine, both of which are appropriately referenced in the CPUC’s rule regarding cooperating with Commission investigations and preserving evidence related to incidents.²³

V. OEIS’s Investigative and Enforcement Authority Remains Limited to its Jurisdiction

SDG&E generally does not take issue with the Proposed Section 29302 regarding “Investigations, Notices of Defects and Violations and Referral to the Commission.” SDG&E appreciates Energy Safety’s inclusion in the Proposed Regulations of additional language limiting “other related investigations” to those “within the authority of the Office.”²⁴ Energy Safety’s mission is established in Public Utilities Code Section 326 and is primarily aimed at ensuring the electrical corporation’s compliance with wildfire safety,” namely the Wildfire Mitigation Plans.

As Energy Safety solidifies its separation from the CPUC and status as a new agency under the Department of Natural Resources, SDG&E reiterates the need to distinguish Energy Safety’s jurisdiction over wildfire safety efforts from other matters that remain under the jurisdiction of the CPUC. This will avoid duplicative efforts and investigations.

VI. Conclusion

SDG&E appreciates Energy Safety’s efforts to provide a clear regulatory process with procedures generally consistent with the existing practices and procedures at the California Public Utilities Commission. SDG&E respectfully encourages Energy Safety to consider the

²¹ D.06-04-055 at Appendix B.

²² *Id.*

²³ General Order 95, Rule 19.

²⁴ Proposed 14 CCR §29302(a)(4).

recommendations contained herein to clarify the proposed processes, avoid duplicative or contradictory regulatory procedures, and prioritize safety and wildfire prevention in a streamlined process.

Respectfully submitted,

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