



December 22, 2021

Laura M. Fulton, Senior Counsel
San Diego Gas & Electric
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San Diego, CA 92123-1548

RE: Response Letter to SDGE’s December 1, 2021 Letter re: Energy Safety’s Guidance on Compliance with Energy Safety Notification Regulations

Dear Ms. Fulton,

The Office of Energy Infrastructure Safety (Energy Safety) provides this letter in response to your December 1, 2021 letter regarding “Energy Safety’s Guidance on Compliance with Energy Safety Notification Regulations.” Your letter contains three primary contentions: (1) Energy Safety did not provide San Diego Gas & Electric (SDG&E) with sufficient due process, (2) the narrative requirement and fields listed in the data spreadsheet template (data fields) are legally problematic, and (3) the narrative requirement and data fields are overly burdensome. Energy Safety rejects each of these contentions. First, Energy Safety provided ample due process in adopting Title 14, California Code of Regulations section 29300 (§ 29300) and the guidance and data spreadsheet template (Guidance) is a proper implementation of that regulation. Second, the narrative requirement and data fields are legal. Third, the narrative requirement and data fields are not overly burdensome.

1. SDG&E Received Proper Due Process.

SDG&E received and utilized the due process Energy Safety put in place regarding the adoption of § 29300. Energy Safety first issued a notice of proposed emergency action with the Office of Administrative Law (OAL) on July 6, 2021. SDG&E took advantage of the public comment period associated with this notice and submitted comments to Energy Safety and OAL on July 30, 2021. Considering feedback, including SDG&E’s, Energy Safety revised the emergency regulations, including § 29300. Energy Safety then issued a revised notice of proposed emergency action with OAL on August 26, 2021. SDG&E again took advantage of the associated comment period and submitted further comments to Energy Safety and OAL on September 8, 2021. After considering the public comments, Energy Safety’s emergency regulations were approved by OAL on September 13, 2021.

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After a request from the electrical corporations to discuss implementation of § 29300, Energy Safety held a meeting with them on September 28, 2021. SDG&E participated in that meeting. In light of the discussion during the meeting, Energy Safety agreed to issue further guidance regarding implementation of § 29300. Energy Safety issued such Guidance on November 4, 2021.

2. Energy Safety's Guidance is Legal.

Energy Safety's written narrative requirement and data fields related to "suspected cause" are legal. Most of SDG&E's objections to this portion of the Guidance are essentially arguments that the "suspected cause" fields are difficult and sometimes impossible to fill out. Those arguments are discussed below. SDG&E also argues that Energy Safety cannot ask about the electrical corporation's investigations of causation because such investigations are likely to be privileged under the attorney client privilege and the attorney work-product doctrine. However, nothing in the Guidance requires the electrical corporations to submit confidential or privileged information to Energy Safety.

Energy Safety's Guidance asks electrical corporations to provide "a summary of facts regarding the incident known at the time of reporting, including but not limited to, suspected cause... ." The data fields require the electrical corporations to list a general suspected initiating cause out of a variety of possible values. The possible values are rather vague ("object contact," "normal operation," etc.), one options is "unknown," and one option allows the electrical corporation to explain why none of the values listed are appropriate ("other – see comment"). These general values do not require the disclosure of privileged material. If for some reason SDG&E believes selecting a specific value would disclose privileged material in a particular instance, Energy Safety recommends SDG&E select "other-see comment" and explain the privilege concern.

3. Energy Safety's Guidance is not Overly Burdensome.

Energy Safety's guidance related to "suspected" cause and the 12-hour reporting requirement, is not overly burdensome. First, as described above, electrical corporations are only required to provide information on "suspected cause" that is "known at the time of reporting" and electrical corporations are allowed to select "unknown" as the value for the data field regarding "suspected cause." This negates SDG&E's concerns about the difficulty of ascertaining cause in 12 hours, the complexity of the causation determination, and the possibility of conjecture. Second, the 12-hour notification requirement was adopted through the emergency rulemaking process. During the comment period, SDG&E expressed a preference for a 24-hour notice requirement instead of a 12-hour requirement. Energy Safety considered this request and ultimately decided, in its regulatory capacity, that a 12-hour notice requirement best ensured timely notification while allowing electrical corporations adequate time to compile data.

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In light of the above, Energy Safety denies SDG&E's request to reconsider and amend the Guidance at this time. If changes are made to § 29300 during Energy Safety's permanent rulemaking process (which SDG&E will have the opportunity to comment during), Energy Safety may amend the Guidance as appropriate then.

Sincerely,

A handwritten signature in blue ink, appearing to read 'C. Thomas Jacobs', written in a cursive style.

Caroline Thomas Jacobs
Director
Office of Energy Infrastructure Safety



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December 1, 2021

BY EMAIL

Caroline Thomas Jacobs
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California Natural Resources Agency
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RE: Energy Safety's Guidance on Compliance with Energy Safety Notification Regulations

Dear Director Thomas Jacobs:

San Diego Gas & Electric (SDG&E) is providing this letter in response to the recent guidance published by the Office of Energy Infrastructure Safety regarding compliance with Title 14, California Code of Regulations (CCR) Sections 29300. This regulation, passed through the emergency rulemaking process, requires regulated electrical corporations to notify Energy Safety within 12 hours of observing 1) a fault, outage, or anomaly on its electrical infrastructure occurring within the vicinity of a fire requiring response from a fire suppression agency, or 2) a wildfire threat that poses a danger to infrastructure owned or operated by the electrical corporation. On November 4, 2021, Energy Safety published its *Guidance on Compliance with Energy Safety Notification Regulations* (Guidance), which provided additional direction regarding compliance with these new regulations.

SDG&E is generally concerned that the Guidance, which contains at a minimum 27 different reported values *and* a written narrative describing the incident, poses a significant burden on the electrical corporations, particularly due to the lack of any limitation on incident reporting provided in §29300. Given the volume of reporting and the very tight turnaround time in which such reporting must be made, the Guidance is likely to result in unreliable and inconsistent reporting. Moreover, SDG&E is concerned that Energy Safety imposed this additional Guidance without sufficient due process for the impacted entities, particularly as the Guidance may exceed the requirements of §29300.¹ The "additional direction and clarification" related to §29300 that Energy Safety has now provided imposes significant new requirements

¹ During the Emergency Rulemaking process, SDG&E previously noted that the breadth of §29300 was overly vague and likely to result in overly broad and burdensome reporting, leading to inaccuracies given the proposed reporting timeframe, and that it exceeded the scope of Energy Safety's jurisdiction. *See*, SDG&E's Comments on the Office of Energy Infrastructure Safety's Adoption of Emergency Rulemaking Process and Procedure Regulations, Office of Administrative Law File No. 2021-0903-01E (September 8, 2021).

without any process for comment or consideration by the regulated entities or other stakeholders.² Although Energy Safety has not provided a forum for concerns to be raised, SDG&E nevertheless provides the following response to your November 4 letter directing regulated entities to comply with the Guidance.

SDG&E's concerns with Energy Safety's Guidance fall into two categories. First, there are reporting requirements that are legally problematic. Most egregious in this regard is the requirement (number 9 for the written narrative and the last 8 fields of the reporting template) related to "suspected cause." At the outset, it is often impossible to ascertain the cause of an ignition with any certainty during the 12 hours allotted for reporting.³ But Energy Safety should also recognize that the electrical corporations are not the legal arbiters of "cause" in California. Rather, under California law, it is the state fire agencies and investigators that determine cause with respect to fires. For instance, pursuant to Public Utilities Code Section 1701.8, it falls to the appropriate government agency to determine if a wildfire has been caused by an electrical corporation.⁴ Moreover, the causation of a particular incident often cannot be determined for several weeks, months, or even years after the incident occurs (for instance, the Tubbs fire investigation lasted over a year). Causation is often an extremely complex determination that requires the input of fire investigative experts, and even when certain initial factors may point to one cause, other factors may not be known until a complete investigation is concluded – and almost never within 12 hours of an ignition. Given the timeframe at issue, any discussion of causation, even if provided as pure conjecture, would be inherently unreliable.

These new requirements are even more problematic as they also apply to §29300(a)(2), which requires reporting related to the already ambiguous and broadly defined "wildfire threat" to electrical infrastructure. It's likely the case that such wildfire threats will not be linked to electrical infrastructure at all—the electrical corporation will be in the position of observing the fire with an aim toward complying with fire agency direction to promote safety and preventing damage to its infrastructure to the extent possible. Despite SDG&E's requests, Energy Safety did not amend the regulations to include limitations on proximity to electrical infrastructure or fire size. Thus the electrical corporations have been placed in the position to assess whether a fire of

² While Energy Safety is authorized to enact regulations through the Emergency Rulemaking process, SDG&E notes that Government Code Section 15475.6 specifically instructed Energy Safety to adopt initial guidelines through a process that included stakeholder engagement. Gov. Code §15475.6 ("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").

³ As discussed below, to the extent discussion of causation is warranted at all, it is better placed in the 30-day report required by CCR §29301, which already requires a "root cause analysis."

⁴ Pub. Util. Code §1708(a)(1) ("Covered wildfire" means any wildfire ignited on or after July 12, 2019, caused by an electrical corporation *as determined by the governmental agency responsible for determining causation*) (emphasis added).

any size, speed, or distance from infrastructure a) constitutes a wildfire, and b) poses a threat to infrastructure. Now Energy Safety places SDG&E in the position of attempting to ascertain the cause of these fires and providing specific information that it may never ascertain. The electrical corporations are not fire investigation agencies, and they may never even be on the site of a fire reported pursuant to §29300(a)(2). It would be impossible for an electrical corporation to comment on the causation of such an event during nearly any timeframe, but certainly not within the 12 hours provided.

Energy Safety's requirement that the electrical corporation provide discussion of causation related to a fire also fails to recognize that aspects of the utility's own investigation of causation is almost certain to be protected under the attorney client privilege or the attorney work product doctrine, given that such investigations are undertaken in anticipation of litigation. Energy Safety lacks the legal authority to override the attorney client privilege and the attorney work-product doctrine.⁵

Second, from a logistical and operational standpoint, SDG&E is deeply concerned with the overbreadth and significant burden associated with the newly proposed compliance requirements—particularly considering the breadth of the regulations in place. Given the lack of a size, acreage, or distance threshold in the regulations, and the fact that they apply both inside and outside the High Fire Threat Districts, the electrical corporations are now poised to report dozens, or potentially hundreds of fires per year—many of which will be small, unrelated to electrical equipment, and result in minimal damage. Per the language of the regulation, SDG&E understands the requirement of §29300 to be a notification. By now imposing *27 required* fields of reporting, and *46 total fields*, Energy Safety has morphed the notification requirement permitted through the emergency rulemaking into a reporting requirement.

The relevance of many of these reporting requirements—such as the identity of the fire suppression agency—is questionable (particularly if the fire has no relationship to electrical infrastructure). But more importantly, Energy Safety's requirement that the electrical corporations provide this information within 12 hours is simply unreasonable. Assuming a reported fire started at 7:00 pm on a Saturday, the electrical corporation is responsible for assembling the 27 fields of information and a written narrative discussing the incident by 7:00 am on Sunday. This is of course in addition to monitoring the fire, ensuring safe and reliable service to the extent possible, and complying with direction from fire suppression agencies. And the same reporting requirements apply to a fire related to a downed wire in the HFTD or for a garage fire in an urban area that leads to a fault, such as an outage, but poses no wildfire threat. This expansive reporting goes beyond the notifications required by the emergency regulations as well as Energy Safety's jurisdiction to oversee the electrical corporations' wildfire mitigation efforts.⁶

⁵ See, e.g. Cal. Evid. Code §954. See e.g. *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981); *Brandt v. Smith*, 634 F.2d 796, 800 (5th Cir. 1981) (privilege is a product of state and federal common law).

⁶ See Pub. Util. Code §326; see also Govt. Code § 8386.1.

