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Docket No. 2022-RM
OAL File No. 2022-0307-02E

**RE: Joint IOU Comments Regarding the Office of Energy Infrastructure Safety's
(Energy Safety) Proposed Emergency Rulemaking Action To Institute a Written
Hearing Process**

Dear Director Thomas Jacobs and the Office of Administrative Law:

Pursuant to the February 22, 2022 Notice of Proposed Emergency Action to Institute a Written Hearing Process (Notice of Proposed Rulemaking) and Government Code Section 11349.6(b), San Diego Gas & Electric Company (SDG&E) hereby submits these joint comments on the Proposed Emergency Action on behalf of SDG&E, Southern California Edison Company (SCE), and Pacific Gas and Electric Company (PG&E) (collectively, the Joint IOUs).

I. Introduction

The Joint IOUs appreciate Energy Safety's initiative to implement a hearing system by which electrical corporations who receive a Notice of Defect or a Notice of Violation related to compliance with their Wildfire Mitigation Plans (WMP) may provide additional information to address the allegations contained therein.¹ The Joint IOUs direct their comments to seek clarification of certain issues and request additions or changes to the Proposed Regulations to preserve due process.

¹ See Notice of Proposed Rulemaking, "Informative Digest" (February 22, 2022).

II. Energy Safety Should Provide Additional Clarity Regarding Referrals to the Public Utilities Commission to Ensure Due Process

As the Notice of Proposed Rulemaking describes, Government Code Section 15475 requires that Energy Safety conduct a hearing regarding Notices of Violation or Defect if requested by the electrical corporation. Under Public Utilities Code Section 8389(g), Energy Safety may recommend the CPUC pursue an enforcement action where an electrical corporation “is not in compliance with its approved wildfire mitigation plan.” Public Utilities Code Section 8386.1 further provides that the CPUC shall assess penalties where the electrical corporation “fails to *substantially* comply with its plan” (emphasis added). This new process is unique in that it involves investigation and factfinding efforts by one agency, including the hearing process outlined in the Proposed Regulation, but a distinct process after such findings by a separate agency. In preparation for future hearings, the Joint IOUs believe it would be beneficial to have additional clarity from both Energy Safety and the Public Utilities Commission regarding the interplay between the two processes. Specifically, at what point in the process can electrical corporations challenge a referral from OEIS to the CPUC for an enforcement action? The Joint IOUs recommend that, as Energy Safety develops a permanent hearing process, it would be helpful to engage with stakeholders through a workshop or other means to promote clarity and preparedness for all parties.

III. A Written Hearing Process May Implicate Due Process Concerns in Certain Instances

The Joint IOUs generally believe that a written hearing process will be an expeditious and efficient means to address Notices of Violation or Defect, particularly those deemed “moderate,” or “minor.” But limiting the hearing process to only a written procedure may implicate due process concerns if it restricts the Joint IOUs or other stakeholders from conducting additional factfinding, presenting testimony, or cross-examining witnesses. The Joint IOUs have two primary concerns regarding a process that excludes the potential for in-person hearings.

First, Energy Safety may issue a Notice of Violation or Defect with no initial input from the electrical corporation in question. To understand or contest the findings within the Notice, the electrical corporation may require additional information from Energy Safety regarding the defect or seek to question the inspectors or other relevant witnesses regarding the findings. The current process provides no such opportunity, which limits the due process rights of the electrical corporations, particularly for any violations or defects categorized as “severe” or that may give rise to a finding of substantial noncompliance with the WMP.

Government Code Section 15475.4 anticipated a “hearing” process, which traditionally implies an in-person hearing affording parties to present evidence and examine witnesses. The statute establishes that Energy Safety is the successor to the Wildfire Safety Division at the Public Utilities Commission, which, notably, does not have a written hearing process. Rather, parties may request an in-person hearing to address contested issues of fact. In this instance, it seems logical to assume that the statutory intent of Government Code Section 15475.4 was to establish an in-person hearing process, similar to Energy Safety’s predecessor agency. While Energy Safety characterizes the process as an “appeal” in the Notice of Proposed Rulemaking, the statute affords electrical corporations a hearing. The Proposed Regulations should be expanded to allow the electrical corporations to request oral hearings when warranted.

Second, there is little clarity in the Proposed Regulation regarding the definition of a “neutral employee” or who oversees the selection of such an employee. The potential absence of a neutral arbiter in such instances poses significant due process concerns. Moreover, many of the issues that may arise regarding WMP compliance require technical expertise and knowledge of both utility and regulatory operations. This is particularly true given the timeframe by which Energy Safety proposes to resolve the hearing process. The Joint IOUs request that Energy Safety propose a list of qualifications by which it intends to consider and select a neutral employee to oversee hearings.

IV. The Joint IOUs Recommend that Energy Safety Consider a Rehearing Process in the Permanent Rules

The Joint IOUs do not anticipate instances of significant non-compliance with their WMPs and believe that many moderate or minor infractions may be expeditiously addressed through the written hearing process proposed. In the meantime, Energy Safety’s findings are directly appealable to Superior Court. To provide a more thorough administrative review and to mitigate the potential for dual track proceedings, the Joint IOUs recommend that Energy Safety consider a rehearing process by which the Director may solicit additional information or receive additional briefing regarding the final decision. As at the Public Utilities Commission, a rehearing process allows for reconsideration of decisions based on factual or legal issues and could greatly reduce the need for unnecessary litigation for all the parties.

V. Conclusion

The Joint IOUs are pleased to continue working with Energy Safety throughout the rulemaking process and encourage Energy Safety to consider the recommendations contained herein. Adoption of these recommendations would clarify the proposed processes, avoid duplicative or contradictory regulatory procedures, and prioritize safety and wildfire prevention in a streamlined process.

Respectfully submitted,

 /s/ Laura M. Fulton

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