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BY OEIS E-Filing

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SUBJECT: Office of Administrative Law File Number 2022-0228-02EE
Joint IOU Comments Regarding Energy Safety's Proposed
Readoption of Emergency Regulations

Dear Director Thomas Jacobs and Office of Administrative Law Reference Attorney:

Pursuant to the February 17, 2022 Notice of Readoption of Emergency Rulemaking Action¹ & California Government Code Section 11349.6(b) and 1 California Code of Regulations Section 55, Southern California Edison Company (SCE) hereby submits these comments on the proposed emergency action of the Office of Energy Infrastructure Safety (Energy Safety) on behalf of the investor-owned utilities: SCE, San Diego Gas & Electric Company (SDG&E), and Pacific Gas and Electric Company (PG&E) (collectively, Joint IOUs).

INTRODUCTION

The Joint IOUs appreciate the opportunity to comment on Energy Safety's Proposed Readoption of Emergency Regulations, submitted to the Office of Administrative Law (OAL) on February 28, 2022. Energy Safety seeks Readoption of all the Emergency Regulations currently in effect except for Cal. Code Regs. tit. 14, Sections 29000, 29001,

29103, and 29201.¹ SCE, SDG&E and PG&E previously provided comments on the Emergency Regulations—though SCE, SDG&E and PG&E continue to support those comments they will not be reiterated here. Rather, these comments from Joint IOUs are based on their experience implementing the emergency regulations since they were adopted by OAL. This experience has revealed opportunities to clarify and improve the regulations, particularly for Sections 29200, 29201 and 29300.

I. Section 29200, “Confidential Information”

Joint IOUs have the following comments, organized by subsection, regarding Section 29200 based on “lessons learned” implementing this Emergency Regulation.

Section 29200(a)(6)(C) requires that applicants for confidentiality designations based on critical energy infrastructure information (CEII) state “whether the information has been voluntarily submitted to the Office of Emergency Services as set forth in Government Code section 6254(ab).”² Government Code Section 6254 establishes that such information may be protected from disclosure, so Joint IOUs are not clear why this is useful for the application. Further, it may not be readily apparent to Joint IOUs in some cases whether information was voluntarily submitted to the Office of Emergency Services. Therefore, this requirement creates an unnecessary burden, particularly given the 3-day data request response requirement and Joint IOUs request that it be removed.

Section 29200(a)(6)(D) requires that CEII applicants state “whether the information or substantially similar information was classified as protected critical infrastructure information by the Department of Homeland Security or Department of Energy.”³ Joint

¹ Office of Energy Infrastructure Safety, (February 17, 2022). Notice of Readoption of Emergency Rulemaking Action. Retrieved from <https://efiling.energysafety.ca.gov/Lists/DocketLog.aspx?docketnumber=2022-RM>

² 14 CCR § 29200(a), (6) & (C): “Any private third party giving custody or ownership of a record to the Office shall specify whether the record should be designated a confidential record and not publicly disclosed. An application for confidential designation shall...if the applicant believes that the record should not be disclosed because it contains critical energy infrastructure information, state...whether (C) whether the information has been voluntarily submitted to the Office of Emergency Services as set forth in Government Code section 6254(ab)”; Cal. Gov. Code § 6254(ab): “Critical infrastructure information, as defined in Section 131(3) of Title 6 of the United States Code, that is voluntarily submitted to the Office of Emergency Services for use by that office, including the identity of the person who or entity that voluntarily submitted the information. As used in this subdivision, “voluntarily submitted” means submitted in the absence of the office exercising any legal authority to compel access to or submission of critical infrastructure information. This subdivision shall not affect the status of information in the possession of any other state or local governmental agency.”

³ 14 CCR § 29200(a), (6) & (D): “Any private third party giving custody or ownership of a record to the Office shall specify whether the record should be designated a confidential record and not publicly disclosed. An application for confidential designation shall...if the applicant believes that the record should not be disclosed because it contains critical energy infrastructure information, state...whether the information or substantially similar information was classified as protected critical infrastructure information by the Department of Homeland Security or Department of Energy.”

IOUs have found it difficult to determine this, and are unaware of any practical means of implementation. Further, while it may be of interest, it is not necessary to demonstrate information is CEII and creates an unnecessary burden, particularly given the 3-day data request response requirement.

II. Section 29201, “Disclosure of Confidential Information”

Joint IOUs appreciate Energy Safety’s decision not to seek readoption of Section 29201, “Disclosure of Confidential Information”. Joint IOUs previously commented that this regulation was problematic in that it permitted circulation of confidential material to other agencies beyond Energy Safety without notice to the party designating the material as confidential, and at a minimum, requested notice when confidential information was shared with other parties.⁴ Joint IOUs appreciate Energy Safety’s decision to not seek readoption of this emergency regulation.

III. Section 29300, “Notification”

Section 29300 provides as follows: “Notification. (a) A regulated entity shall notify the Office 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. (b) A regulated entity shall notify the Office within four hours of receiving notice that infrastructure that it owns or operates is being investigated by a governmental agency for involvement in potentially causing an ignition.”⁵

Joint IOUs appreciate the clarification provided by Energy Safety that this provision requires notification of only that information known to regulated entities within the prescribed 12-hour period.⁶ In implementing this requirement, however, Joint IOUs have on occasion experienced challenges determining within 12 hours whether there has been a fire suppression agency response. In addition, providing the level of detail required by Energy Safety within the 12-hour notification period has required a significant amount of employee time consistent with previous comments regarding burdensomeness of implementation. For these reasons, Joint IOUs request that the 12-hour Notification

⁴ See PG&E Comments on 9-3-21- OEIS Rules and Regulations, pp. 4-5 (docketed September 8, 2021); SCE Comments on OEIS Proposed Emergency Process and Procedure Regulations, pp. 8-9 (docketed September 8, 2021); and SDG&E Second Comments OEIS Proposed Regulations, pp. 3-5 (docketed September 8, 2021). All available at: <https://efiling.energysafety.ca.gov/EFiling/DocketInformation.aspx?docketnumber=2021-RM>.

⁵ 14 CCR § 29300.

⁶ Energy Safety Notification & Reporting Guidance (docketed November 4, 2021). Available at <https://efiling.energysafety.ca.gov/Lists/DocketLog.aspx?docketnumber=2021-RM>.

period be extended to a single business day to allow for more practical implementation by the IOUs and to improve the quality of information that will be received by Energy Safety.

CONCLUSION

The Joint IOUs appreciate the opportunity to provide these comments.

If you have any questions, or require additional information, please contact me at Shinjini.Menon@sce.com.

Sincerely,

//s//

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BY OEIS E-FILING

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Re: **Office of Energy Infrastructure Safety Adoption of Emergency Rulemaking Action Process and Procedure Regulations: Notice of Proposed Emergency Action 2021 Emergency Rulemaking Docket 2021-RM**

Dear Office of Administrative Law:

Pacific Gas and Electric Company (“PG&E”) submits the following comments in response to the Notice of Proposed Emergency Regulations provided by the Office of Energy Infrastructure Safety (“OEIS”). These comments are being submitted to both the OEIS and the Office of Administrative Law (“OAL”) pursuant to Government Code Section 11349.6 and 1 California Code of Regulation (“CCR”) § 55. Pursuant to 1 CCR § 55(b)(4), PG&E is electronically submitting these comments to the OEIS in the manner instructed by the OEIS in its Notice of Proposed Emergency Action.

INTRODUCTION

On July 12, 2019, Governor Gavin Newsom signed Assembly Bill 111 and established the OEIS within the Natural Resources Agency. The bill provided that, on July 1, 2021, the OEIS would become the successor to, and vested with, all of the duties, powers, and responsibilities of the Wildfire Safety Division (“WSD”), a division of the California Public Utilities Commission (“CPUC”).¹ Prior to July 1, 2021, the WSD has been charged with reviewing, approving, or denying the wildfire mitigation plans (“WMPs”) submitted by electrical corporations as part of a coordinated effort to reduce the risk of ignition of wildfires from utility infrastructure.²

¹ See also Govt. Code § 15475.

² See Pub. Util. Code §326; see also Govt. Code § 8386.1.

On July 13, 2021, the OEIS submitted a set of proposed emergency regulations to the OAL to “provide a framework for the OEIS to interact with regulated entities and the public so that all stakeholders understand how the OEIS obtains information, what information is required to be provided, how the public can participate, and how the OEIS ensures compliance with requirements imposed on regulated entities meeting its statutory mandates.”³ The emergency regulations cover the following topics: Construction of Provisions, General Provisions, Data Access and Confidentiality, and Investigation and Compliance. OEIS proposes including the regulations in a new Division 17 within Title 14 of the Code of Regulations. All statutory references hereafter to the Code of Regulations refer to these proposed regulations unless indicated otherwise.

PG&E commends the OEIS on its effort to advance rules and regulations to ensure clear processes when collaborating with utilities on WMP work. However, PG&E has concerns, and provides comments, regarding the following proposed regulations:

Section Number	Comments
§ 29102 – Filing of Documents	PG&E requests that the proposed regulations include a statement that documents served on stakeholders by the OEIS after 5:00 p.m. be deemed served the following business day.
§ 29200 – Confidential Information	The proposed confidentiality process is overly burdensome. There will be significant overlap between documents submitted to the OEIS and the CPUC. PG&E recommends that the OEIS follow the confidentiality process used by the CPUC set forth in CPUC General Order No. 66-D to maximize efficiency and minimize confusion.
§ 29201 – Disclosure of Confidential Information	The proposed regulation may not adequately protect confidential information submitted to the OEIS. Subsection (a)(4) must clarify that the California Department of Forestry and Fire Protection (“CAL FIRE”), the California Energy Commission (“CEC”), and the CPUC be required to keep records from the OEIS confidential.
§ 29300 – Notifications	The proposed regulations are vague, overbroad, and overly burdensome. PG&E recommends that the OEIS follow the Electric Incident Reporting process used by CPUC for ignitions to promote efficiency and consistency in reporting.
§ 29301 – Incident Report	The proposed regulation is vague, overbroad, and overly burdensome. PG&E recommends that the OEIS follow the 20-day reporting process used by the CPUC and that utilities be expressly

³ OEIS, *Notice of Proposed Emergency Action*, p. 3.

Section Number	Comments
	permitted to object to investigation information requests based on privilege.
§ 29302 - Investigations, Notices of Defects and Violations and Referral to the Commission	The proposed regulation is overbroad and potentially expands the authority of the OEIS. PG&E recommends that the proposed regulation be amended to reiterate that OEIS investigations must be related to wildfire mitigation work and WMPs.

SECTION 29102 – FILING OF DOCUMENTS

OEIS proposes that all documents will be accepted as of the day of their receipt except that documents filed after 5:00 p.m., on a business day, will be deemed filed the next business day.⁴ PG&E does not oppose this process. For clarity, PG&E suggests that the regulations also include a statement indicating that documents served by the OEIS on stakeholders after 5:00 p.m. be deemed served the next business day. This will help stakeholders have clarity regarding deadlines for serving discovery responses and/or filing responsive comments.

SECTION 29200 – CONFIDENTIAL INFORMATION

The proposed regulations require that all parties providing confidential information to the OEIS submit an application with a confidentiality declaration for review by the Deputy Director. In the declaration, the parties must: identify the specific confidential information; state how long the information should be kept confidential; discuss how the Public Records Act or other laws allow the OEIS to keep the information confidential; identify any specific trade secrets or competitive advantages that would be lost by production of the confidential information; describe why any critical infrastructure information is confidential; state whether the information could be disclosed in the aggregate or with certain portions masked; and explain how the information is currently kept confidential and if it has been produced previously.⁵ Following the submission, the Deputy Director would have thirty days to determine if the application for confidential declaration should be granted, followed by a review process.⁶

This proposed confidentiality application process is overly burdensome and not well suited for the WMP-related proceedings. The OEIS based the proposed confidentiality application process on the process used to submit confidential information to the CEC.⁷ That process is not ideal for the wildfire mitigation proceeding because utilities submit a limited amount of confidential

⁴ 14 CCR § 29102(b)(2).

⁵ 14 CCR § 29200(a).

⁶ 14 CCR § 29200(c).

⁷ See 20 CCR § 2505.

information to the CEC. On the other hand, the utilities are generally required to submit a significant number of documents and tables containing confidential information materials to the OEIS as part of quarterly reporting obligations and in response to other compliance investigations. In addition, for the past two years, the utilities have been asked to respond to thousands of written discovery requests following the submission of their WMPs. The responses to these requests have been due in three business days. The CEC confidentiality process proposed by the OEIS is too cumbersome and time consuming to facilitate this level of information exchange.

PG&E recommends that the OEIS use the process established by the CPUC—and previously used by the WSD—for submission of confidential materials. In General Order 66-D, the CPUC adopted an effective process that still requires parties to designate the confidential portions of each document provided, specify the basis for confidentiality, and sign a declaration in support of the legal authority cited. However, the level of detail needed for each confidentiality declaration is less. The stakeholders to the wildfire mitigation proceeding have used this process effectively in connection with submission of the 2020 and 2021 WMPs. The additional benefit of using General Order 66-D is that it will allow the utilities to use the same standard for submitting documents to the OEIS and the CPUC. Previously, it has been very common for the utilities to have to submit similar materials to the CPUC and the WSD, given the role of each agency. If the OEIS uses a different standard for submission of confidential materials from the CPUC, the utilities will have to prepare separate confidentiality declarations to submit the same materials to the CPUC and the OEIS. This will increase the likelihood of potential errors for similar submissions and will be overly burdensome.

SECTION 29201 - DISCLOSURE OF CONFIDENTIAL INFORMATION

In the proposed regulations, the OEIS states that it may disclose confidential information it receives to “other governmental bodies that need the records to perform their official functions and that agree to keep the records confidential and to disclose the records only to those employees or contractors whose agency work requires inspection of the records.”⁸ At the same time, the OEIS states that it may share confidential information “with the California Department of Forestry and Fire Protection, California Energy Commission, and California Public Utilities Commission.... without the need for an interagency agreement.”⁹

PG&E recognizes that the OEIS may need to share documents with confidential information with other agencies like CAL FIRE, the CEC, and the CPUC to fulfill its duties. However, the proposed regulations are ambiguous as to whether the three identified agencies will be required to keep the records confidential, especially if no interagency agreements are executed. PG&E is regularly asked to produce documents with confidential customer, employee, critical infrastructure, or trade secret information in connection with the wildfire mitigation proceeding.

⁸ 14 CCR § 29201(a)(3).

⁹ 14 CCR § 29201(a)(4).

Therefore, it is crucial that the OEIS confirm that all agencies receiving confidential information from it agree to keep the information confidential prior to transmission.

PG&E recommends that the proposed regulations be amended to clarify that CAL FIRE, the CEC, and the CPUC will be required to confirm they will keep all confidential information received from the OEIS confidential. The OEIS should provide electrical corporations notice when submitting confidential information to other agencies. We also recommend that the OEIS finalize a memorandum of understanding with the CPUC to clarify the issue of sharing confidential information between agencies.¹⁰

SECTION 29300 – NOTIFICATION

The OEIS suggests that each electrical corporation be required to notify the OEIS Director within 24 hours “from the time an electrical corporation becomes aware of a wildfire threat to electrical infrastructure it owns or operates.”¹¹ In addition, the Director must be notified within 24 hours from the time a regulated entity “becomes aware of infrastructure that it owns or operates being investigated for involvement in potentially causing an ignition.”¹² PG&E addresses these two proposals separately below.

A. Notifications for Wildfire Threats

The proposed 24-hour notification requirement for wildfire threats to electrical infrastructure is unclear. The term “wildfire threat” is not defined. Therefore, it is unclear if the notification requirements apply to situations involving minor electrical arcing, active fires of any size, or simply weather conditions that increase the threat of a wildfire in a service territory. In addition, there is no standard for how a utility “becomes aware” of any such “wildfire threat.” If a troubleman were to observe—and extinguish—a spark during electrical repair work in the HFTD, would that be sufficient “awareness” of a “wildfire threat” to require notification to the OEIS within 24 hours?

The proposed notification requirement is also overly burdensome. As indicated in the 2021 WMP, over half of PG&E’s service territory lies in the High Fire Threat Districts (“HFTD”) Tiers 2 and 3, and changes in weather patterns have increased the threat over the past decade.¹³ Reporting all undefined “wildfire threats” to any electrical facility within 24 hours would be incredibly time consuming, and difficult to accomplish, especially during the fire season. The

¹⁰ Govt. Code § 15476 states that the CPUC and the OEIS “shall enter into a memorandum of understanding to cooperatively develop consistent approaches and share data related to electric infrastructure safety....”

¹¹ 14 CCR § 29300.

¹² *Id.*

¹³ 2021 Revised WMP, p. 3.

proposed notification requirement may also distract from an electrical corporation's need to quickly respond in the field to simultaneous wildfire threats.

The OEIS arguably does not have the statutory authority to issue this broad notification requirement. As indicated above, the OEIS is the successor to, and vested with, all the duties, powers, and responsibilities of the WSD. The primary responsibility of the WSD has been to review and oversee compliance of the utilities' WMPs.¹⁴ The proposed notification requirement goes beyond wildfire mitigation efforts set forth in the electrical corporation WMPs. As shown in 2020, many wildfires and wildfire "threats" are caused by circumstances unrelated to electrical infrastructure (e.g. lightning and other weather conditions).

B. Notifications for Ignition Investigations

The proposed 24-hour notification requirement for ignition investigations is too broad and overly burdensome. The proposal suggests that the Director must be notified whenever an electrical corporation becomes aware of infrastructure that it owns or operates being investigated for "potentially causing an ignition." This proposal potentially relates to an investigation into an ignition of any size, in any location, performed by any entity or individual. This goes well beyond the confines of the HFTD and the reporting requirements for utility wildfire ignitions pursuant to Decision ("D.") 14-02-015, Appendix C and Table 2 of the WMP templates. Information about an ignition outside of the HFTD that may be investigated by an individual or entity unaffiliated with a responsible agency (e.g. CAL FIRE, U.S. Forest Service, or local fire department) has no bearing on an electrical corporation's wildfire mitigation work and should not be required for reporting purposes.

In lieu of the proposed 24-hour notification requirement relating to incident investigations, PG&E recommends that the OEIS look to the thresholds set by the CPUC for reporting electric incidents described in D.98-07-097 for guidance. 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. PG&E suggests that the OEIS use the same thresholds for determining when an electrical corporation is required to report investigations into HFTD ignitions that are attributable, or allegedly attributable to electric utility facilities. This will promote efficiency and reduce possible duplication of work.

SECTION 29301 – INCIDENT REPORT

The OEIS proposes that utilities be required to submit an incident report within 30 days "in the event that an ignition may have been started by the infrastructure owned or operated by a

¹⁴ See e.g. Pub. Util. Code, § 326(a)(1)-(3).

regulated entity.”¹⁵ The incident report would include: any factual or physical evidence related to the incident including photographs; witness information; a preliminary root cause analysis; actions taken to prevent recurrence of the incident; the identification of all incident documents; and any other information the OEIS may require.¹⁶ Electrical corporations would be required to preserve all incident evidence and documents for at least five years.¹⁷

The incident report proposal should be modified because it is overbroad and burdensome. Under the drafted regulation, electrical corporations may be required to file an incident report for every ignition, of any size, in any part of their service territory that “may have been started” by their infrastructure. It is unclear what standard should be used to determine if an ignition “may have been” started by electric facilities. Also, ignition investigations often take a significant amount of time to complete. It is common for agencies like CAL FIRE to collect physical evidence during their investigations for testing and evaluation. Thus, electrical corporations may not have access to the materials they need to complete a root cause analysis for months or longer. For this reason, it can be difficult to create a detailed corrective action plan to prevent recurrence within 30 days. The OEIS has also provided no explanation for what types of “other information” it may require in the proposed incident reports.

The proposed regulations should also be modified because they do not recognize the right to object to the production of certain documents and information in the incident reports. The OEIS proposes that electrical corporations produce all documents relating to each incident, preliminary root cause analyses, and extensive witness information. However, some of that information may be privileged from discovery under the attorney-client privilege and work product doctrine. The proposed regulations should recognize that electrical corporations do not waive these important rights by filing an incident report.¹⁸

Finally, the proposed regulation should be modified because it overlaps, and potentially interferes with, the CPUC’s reporting requirements for ignitions. As indicated in the Section 29300 – Notification analysis above, electrical corporations are required to report electric incidents to the CPUC that are attributable, or allegedly attributable, to electric utility facilities that are found to meet certain criteria, as described in D.98-07-097. Within twenty business days of the incident, the utility must provide:

A written account of the incident which includes a detailed description of the nature of the incident, its cause and estimated damage. The report shall identify the time and date of the incident, the time and date of the notice to the

¹⁵ 14 CCR § 29301(a).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ The language of CPUC General Order 95, Rule 17 is instructive. In that General Order relating to accident investigations, the CPUC has stated the following: “Nothing in this rule is intended to extend, waive, or limit any claim of attorney client privilege and/or attorney work product privilege.”

Commission, the location of the incident, casualties which resulted from the incident, identification of casualties and property damage. The report shall include a description of the utility's response to the incident and the measures the utility took to repair facilities and/or remedy any related problems on the system which may have contributed to the incident.¹⁹

To prevent duplicative work for agencies with slightly different reporting requirements, PG&E suggests that the OEIS follow the reporting requirements of the CPUC set forth above and collect 20-day reports from the utilities for all reportable ignitions as described in D. 98-07-097. This is preferred because the CPUC is the primary agency responsible for investigating electrical incidents, including ignitions, in California. The 20-day report should provide enough information to the OEIS to allow it to determine if there is a connection between a fire and any of the initiatives described in the utilities' WMPs or if additional discovery is needed.

SECTION 29302 - INVESTIGATIONS, NOTICES OF DEFECTS AND VIOLATIONS AND REFERRAL TO THE COMMISSION

In the proposed regulations, the OEIS states that the Director may designate investigators to investigate: whether an approved WMP was followed; whether failure to follow a WMP contributed to the cause of a wildfire; whether the regulated entity is noncompliant with its duties and responsibilities or has otherwise committed violations of any laws, regulations, or guidelines within the authority of the Office; and other related investigations requested by the Director.²⁰

California law does not give the OEIS the broad authority to investigate whether an electrical corporation was “noncompliant with its duties and responsibilities or has otherwise committed violations of any laws, [or] regulations” or to perform “other investigations requested by the Director.” As indicated above, under Public Utilities Code Section 326, the WSD has been responsible for reviewing, and overseeing compliance with, the WMPs. This same authority has been extended to the OEIS. However, the authority does not encompass investigations into utility compliance with all other laws or regulations implemented by other agencies that do not relate to wildfire mitigation work. The CPUC has already empowered its Safety and Enforcement Division (“SED”) to perform electric safety audits and conduct incident investigations, including wildfires. If the proposed regulations are implemented, it is likely that the SED and the OEIS will be performing simultaneous investigations into the same incidents. This creates the potential for inconsistent rulings and findings, and it duplicates the efforts of governmental agencies and utilities.

PG&E suggests that the proposed investigation regulations be amended to reiterate that OEIS investigations are to be related to wildfire mitigation work and the WMPs submitted by electrical

¹⁹ D.98-07-097, Appendix B.

²⁰ 14 CCR § 29302(a).

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corporations. This will help avoid duplicative investigations by State agencies and allow parties more time to investigate reportable incidents.

CONCLUSION

PG&E commends the OEIS for its effort to advance rules and regulations to ensure clear processes when collaborating with utilities on wildfire mitigation work. PG&E respectfully submits these comments and looks forward to working with the OEIS to promote wildfire safety going forward.

If you have any questions, please do not hesitate to contact me.

Very truly yours,

/s/ Meredith Allen

Meredith Allen

MA/haj

Enclosures

cc: R 18-10-007 Service List



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RE: 2021 Emergency Rulemaking Docket 2021-RM; Comments of San Diego Gas & Electric Company (U 902 M) In Response to Office of Energy Infrastructure Safety Adoption of Emergency Rulemaking

Dear Office of Administrative Law:

INTRODUCTION

San Diego Gas & Electric Company (SDG&E) submits these comments addressing the California Office of Energy Infrastructure Safety's (OEIS) Adoption of Emergency Rulemaking Action Process and Procedure Regulations and the Proposed Emergency Regulations (Proposed Regulations).¹ These comments are being submitted to both OEIS and the Office of Administrative Law ("OAL") pursuant to Government Code Section 11349.6 and 1 California Code of Regulation ("CCR") Section 55.²

I. Introduction and Summary

SDG&E appreciates the need for common sense processes and procedures as OEIS transitions from the Wildfire Safety Division at the California Public Utilities Commission (CPUC). Any processes and procedures that are ultimately adopted should support the safe and reliable operation of electric corporation assets and focus on OEIS's primary objective of reducing the

¹ Notice of Proposed Emergency Action; (July 6, 2021). All statutory references hereafter to the Code of Regulations refer to the Proposed Regulations unless indicated otherwise.

² SDG&E is electronically submitting these comments to the OEIS in the manner instructed by OEIS in its Notice of Proposed Emergency Action.

risk of catastrophic wildfires. While SDG&E understands OEIS'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. SDG&E respectfully recommends that the Proposed Regulations be amended to provide greater clarity regarding reporting requirements and reflect the varying nature of fire investigations. SDG&E recommends that the OEIS's processes and procedures focus on accurate reporting and acknowledge the roles of the many state and local fire and utility personnel that are involved in ignition and wildfire investigations. OEIS 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.

II. 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 May Delay Stakeholder Input

The CPUC has long-established practices and procedures for submitting and handling confidential information. The Commission addressed the process for claims of confidentiality in General Order (G.O.) No. 66-D and CPUC Decision (D) 06-06-066. To maintain consistency in the process of providing information to its regulatory bodies, SDG&E recommends that OEIS amend the proposed confidentiality processes to reflect the process that occurs at the CPUC. As currently drafted, the proposed process in Chapter 3 of the Proposed Regulations regarding applications for confidentiality is overly burdensome. While OEIS has oversight over the electrical corporations' wildfire safety efforts, many of the materials requested by OEIS will have significant overlap with information provided to the CPUC which may also correspond with materials provided in CPUC proceedings. If adopted, Chapter 3 of the Proposed Regulations will result in parties being required to submit two different confidentiality declarations to meet the differing requirements of both OEIS and the CPUC.

Moreover, these two confidentiality processes may result in inconsistent conclusions regarding confidentiality, differing processes of review, and administratively burdensome delays. As successor to the WSD, OEIS will assume oversight over the electrical corporations' WMPs and many other matters related to wildfire mitigation. And undoubtedly the WMP process will continue to involve significant data requests to facilitate input from interested stakeholders. Because of the condensed timeframe for consideration of the electrical corporations' WMPs and the expedited data request process, an overly burdensome and time-consuming confidentiality process will likely complicate and delay consideration of and discourse regarding the WMPs and other wildfire mitigation efforts. For instance, the requirement that the Deputy Director issue a

written decision within 30 days of an application for confidentiality,³ with additional time for reconsideration of decisions by the Director,⁴ leaves private parties in limbo with respect to the disclosure of their confidential information in response to data requests and other disclosures. To eliminate this inconsistent, burdensome, and time-consuming process, SDG&E recommends that OEIS adopt confidentiality regulations and guidelines that mirror the existing processes at the CPUC created by G.O. 66-D 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.⁵ The process established in G.O. 66-D balances the public’s interest in disclosure of records and information with the need for a streamlined process to protect confidential and sensitive information—including critical infrastructure information— while maintaining efficiency and timeliness for all parties. OEIS should revise the confidentiality process as proposed to better reflect a process consistent with the CPUC.

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

SDG&E understands the need for OEIS 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 add a requirement in Section 29201 that OEIS 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.

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

A. OEIS Should Clarify Notification Requirements to Avoid Burdensome and Unnecessary Reporting

SDG&E respectfully recommends that the procedures regarding notification in Section 29300 of the Proposed Regulations be updated to clearly define the type of “wildfire threat to electrical infrastructure” that requires notification to OEIS. To avoid the potential for unnecessary over-

³ Proposed 14 CCR §29200(c).

⁴ Proposed 14 CCR §29200(c)(2).

⁵ G.O. 66-D at Section 5.5.

reporting, notifications should be limited to threats from a large or catastrophic wildfire. Depending on the circumstances, nearly every ignition—and even certain weather events—pose a potential “wildfire threat” to electrical infrastructure. So far in 2021, CAL FIRE has 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. 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 OEIS’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.⁶ These groups and SDG&E generally define the term “wildfire” to mean a fire burning more than 300 acres.

Additionally, in order to provide OEIS the most accurate and relevant information regarding investigations of ignitions potentially caused by electrical equipment or infrastructure, the timeframe for such notifications should be extended from 24 hours to 72 hours.⁷ A 72-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. Moreover, allowing 72 hours for an initial investigation to occur will eliminate excessive reporting of ignitions where electrical equipment is quickly ruled out as the cause of an ignition.

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

Section 29301 of the Proposed Regulations establish incident reporting requirements in the “event that an ignition may have been started by the infrastructure owned and operated by a

⁶ 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.nwccg.gov/term/glossary/large-fire>.

⁷ Proposed 14 CCR §23000.

regulated entity.” While incident reporting on ignitions potentially caused by electrical infrastructure is reasonable, the Proposed Regulations are overly broad in scope and 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 it is unlikely that a fire has been caused by electrical equipment, fire investigators and relevant agencies may not have ruled out electrical infrastructure as a potential cause of an ignition. As discussed below, the proposed 30-day timeframe may not allow for a thorough investigation by fire agencies to determine the cause of an ignition. To that end, SDG&E recommends that the Proposed Regulations be changed to reflect that an incident report is required if electrical infrastructure has been identified as or is the significantly suspected cause of an ignition. This modification would eliminate the need for incident reports for ignitions where electrical equipment is not suspected as the cause of an ignition but has not yet been ruled out.

Additionally, as noted above, requiring an incident report for all ignitions is overly broad and will result in unnecessary and cumbersome reporting. SDG&E recommends that OEIS 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.⁸ 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 a duplicative and repetitive process and ensures all stakeholders are privy to the same information. Like the CPUC, OEIS will retain the authority to investigate any ignition, while eliminating the potentially “wasteful” use of OEIS and utility resources necessary to report each and every minor ignition.⁹

With respect to the content of ignition reports, SDG&E recommends that OEIS 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. Further, some of the proposed requirements may inadvertently infringe on other investigations being performed by CAL FIRE and other fire agencies. For instance, SDG&E is willing to provide factual or physical evidence

⁸ D.06-04-055 at 6-7.

⁹ 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.”)

related to the incidents,¹⁰ but can only provide the evidence known to SDG&E or in its possession. While electrical corporations may be actively involved in fire investigations, much of the information sought in the incident reports is the purview of CAL FIRE and other applicable investigative agencies. Because of the nature of fire investigations, SDG&E can attempt to, but may not be able to accurately identify whether a person or entity has taken possession of any physical evidence removed from the site of the incident.¹¹ To the extent that information is known to SDG&E, SDG&E can provide it, subject to any privacy limitations for private individuals. Similarly, SDG&E is limited in its ability to provide the names and contact information of known witnesses.¹² SDG&E can provide the names of SDG&E employees and personnel and a method of contacting those individuals, but to the extent witnesses are private individuals, they may not be known to SDGE. Moreover, SDG&E has 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 the aforementioned privacy concerns.

The incident report requirements, including the proposed “preliminary root cause analysis, including detailed discussion of all findings”¹³ and the obligation to identify “all documents related to the incident,”¹⁴ are also in conflict with OEIS’s proposed 30-day timeframe for reports. It may be possible 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.¹⁵ 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. The requirement to identify documents should be removed, as OEIS can request and obtain documents related to the incident after submission of the initial incident report, pursuant to its existing authority.

Moreover, the 30-day incident notification required by OEIS would be duplicative with 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

¹⁰ Proposed 14 CCR §29301(b)(1).

¹¹ Proposed 14 CCR §29301(b)(5).

¹² Proposed 14 CCR §29301(b)(2).

¹³ Proposed 14 CCR §29301(b)(3).

¹⁴ Proposed 14 CCR §29301(b)(6).

¹⁵ Proposed 14 CCR §29301(b)(4).

reported in a way that ensures thoroughness and accuracy, and a rushed turnaround does not benefit anyone and could lead to false initial conclusions. To that end, SDG&E recommends that OEIS require incident reports that parallel those already required by the CPUC. Specifically, the CPUC's reports are required within 20 business days and are required to include "a detailed description of the nature of the incident, its cause and estimated damage."¹⁶ The CPUC incident reports require much of the same information included in the Proposed Regulations, but on a more preliminary basis.¹⁷ As SDG&E and other relevant stakeholders continue their investigations, SDG&E can then continue to update OEIS through ongoing reports as requested.

Finally, OEIS 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.

The incident reporting requirements also obligate electrical corporations to preserve documents or evidence related to incident investigations for at least five years. Given the breadth of the incident reporting requirements as currently drafted, this potentially obligates electrical corporations to maintain significant amounts of documents and evidence—many of which will likely be related to incidental ignitions. SDG&E requests that OEIS allow the Director, upon written request from the entity filing the incident report, to authorize the electrical corporation to dispose of the evidence within the five-year period.

IV. OEIS's Investigative and Enforcement Authority Remains Limited to its Jurisdiction

SDG&E generally does not take issue with the Proposed Regulations regarding "Investigations, Notices of Defects and Violations, and Referral to the Commission." But the proposed authority to conduct "other related investigations requested by the Director"¹⁸ should, like other sections of the Proposed Regulations, be clearly limited to matters within the jurisdiction and authority of the Office.¹⁹ As successor to the Wildfire Safety Division, OEIS is tasked with oversight and enforcement of "electrical corporations' compliance with wildfire safety pursuant to Chapter 6 [of the Public Utilities Code]," and other efforts to mitigate the risk of utility-caused catastrophic wildfires.²⁰ As OEIS solidifies its separation from the CPUC and status as a new agency under

¹⁶ D.06-04-055 at Appendix B.

¹⁷ *Id.*

¹⁸ Proposed 14 CCR §29302(a)(4).

¹⁹ *See* Proposed 14 CCR §29302(a)(3), stating that compliance investigations are limited to matters "within the authority of the Office."

²⁰ Pub. Util. Code §326.

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the Department of Natural Resources, it remains important to distinguish its jurisdiction over wildfire safety efforts from other matters under the jurisdiction of the CPUC. This will avoid duplicative efforts and investigations. To that end, SDG&E recommends adding that the Director’s authority to request authorizations is also “subject to the authority and jurisdiction of the Office.”

V. Conclusion

SDG&E appreciates the Office of Energy Infrastructure 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 OEIS to consider the recommendations contained herein to clarify the proposed processes, avoid confusion, and prioritize safety and wildfire prevention in a streamlined regulatory process.

Respectfully submitted,

/s/ Laura M. Fulton

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SUBJECT: Office of Administrative Law File Number 2021-0726-01E

Southern California Edison Company's Comments on Proposed Emergency Process and Procedure Regulations Submitted with Proposed Emergency Rulemaking Action by the Office of Energy Infrastructure Safety to the Office of Administrative Law on July 13, 2021.

Dear Director Thomas Jacobs and Office of Administrative Law Reference Attorney:

Pursuant to California Government Code Section 11349.6(b) and 1 California Code of Regulations Section 55, Southern California Edison Company (SCE) hereby submits its comments on the Proposed Emergency Process and Procedure Regulations Noticed with the Proposed Emergency Rulemaking Action by the Office of Energy Infrastructure Safety (Energy Safety) to the Office of Administrative Law (OAL) on July 26, 2021. SCE appreciates the opportunity to provide these comments, which generally support the proposed regulations, with particular exceptions discussed below.

INTRODUCTION

SCE agrees that “[i]n order for the Energy Safety to be ready to perform its vital work as a new office within CNRA shortly after July 1, 2021, Energy Safety will need regulations that establish a process and procedures, effective immediately, that will form the

structure of its operations in meeting its statutory mandates.”¹ Energy Safety is a newly formed agency established under Government Code Sections 15470, *et seq.* As Energy Safety points out, “[t]he Energy Safety is the successor to, and, effective July 1, 2021, is vested with, all of the duties, powers, and responsibilities of the Wildfire Safety Division established pursuant to Public Utilities Code section 326, including, but not limited to, the power to compel information and conduct investigations.”² For the most part, SCE supports the regulations Energy Safety proposes as the successor to WSD. That said, several proposed regulations create issues that would largely be resolved by continuing with existing California Public Utilities Commission (CPUC or Commission) requirements that have generally functioned well and are familiar to stakeholders rather than shifting to other regulatory models, e.g., State Energy Resources Conservation and Development Commission’s (California Energy Commission) model regarding confidentiality designation, or developing new regulations that could cause confusion, unnecessary burden, duplication of effort, and potential jurisdictional issues.

Where indicated, the CPUC has in place reasonable, equally effective alternatives to the more burdensome regulations proposed by Energy Safety, but Energy Safety has not described these alternatives or explained why it has rejected them.³ In such cases, the CPUC alternatives are established means of achieving substantially the same apparent objectives⁴ as the proposed regulations, and the CPUC alternatives are relatively clear and familiar to stakeholders.

In particular, SCE recommends modifications and/or clarifications to the Proposed Regulations below. Where noted, the Proposed Regulations as written appear to be in conflict with one or more of the California Administrative Procedure Act (APA)⁵ standards, e.g., inconsistent with statute (Government Code Section 11342.2); unclear (Government Code Section 11349(c)); duplicative; and/or unnecessary.

- Section 29200: Confidential Information
- Section 29201: Disclosure of Confidential Information
- Section 29300: Notification

¹ Energy Safety Adoption of Emergency Rulemaking Action Process and Procedure Regulations, Notice of Proposed Emergency Action (Notice), p. 3.

² OEIS Adoption of Emergency Rulemaking Action Process and Procedure Regulations, Notice of Proposed Emergency Action (Notice), p. 3.

³ “Every agency subject to this chapter shall prepare, submit to the [Office of Administrative Law] with the notice of the proposed action as described in Section 11346.5, and make available to the public upon request, all of the following:...An initial statement of reasons for proposing the adoption, amendment, or repeal of a regulation. This statement shall include, but not be limited to, all of the following: *A description of reasonable alternatives to the regulation and the agency’s reasons for rejecting those alternatives. Reasonable alternatives to be considered include, but are not limited to, alternatives that are proposed as less burdensome and equally effective in achieving the purposes of the regulation in a manner that ensures full compliance with the authorizing statute or other law being implemented or made specific by the proposed regulation.*” Government Code Section 11346.2(b)(4)(A).

⁴ As noted below, however, the objective is not always clear based on the proposed regulations as written.

⁵ Government Code Section 11340, *et seq.*

- Section 29301: Incident Report
- Section 29302: Investigations, Notices of Defects and Violations and Referral to the Commission

COMMENTS ON NOTICE AND PROPOSED REGULATIONS

1. Section 29200 Should Be Modified to Adopt CPUC Requirements Currently Used for Confidentiality Designations

Energy Safety notes that the language of Section 29200 “is modeled from other agency regulatory language previously approved by OAL,” and cites California Code of Regulations, Title 20, section 2505.⁶ With some omissions, additions and modifications, Section 29200 generally follows 20 CCR Section 2505, “Designation of Confidential Records,” the regulation used by the California Energy Commission.

As a general matter, SCE proposes that the Energy Safety continue to use the confidentiality designation requirements developed by the CPUC in CPUC Decisions 06-06-066 (energy procurement); 16-08-024; 17-09-023; and General Order 66-D. These confidentiality designation requirements were developed over a series of rulemakings and reflect a considerable amount of stakeholder input and public process. Further, the CPUC’s confidentiality declaration/matrix process is familiar to stakeholders in the context of the WMP and appears to have functioned well thus far through successive WMP processes. Given the potentially devastating consequences associated with inadvertent disclosure of sensitive information such as critical energy infrastructure information (CEII), it would be prudent to continue with a proven confidentiality designation process familiar to WMP stakeholders, especially in the context of a high volume of data requests with a relatively short response period. The requirement for Deputy Director (and possibly Director) review for every confidentiality request exacerbates these issues. Finally, it is unnecessarily burdensome to require two distinct processes for providing confidential material to the CPUC and Energy Safety.

In addition to this general concern, SCE raises the following specific issues with respect to Proposed Regulation Section 29200.

Section 29200(a)(6), a provision not included either in 20 CCR Section 2505 or the CPUC’s confidentiality designation requirements, requires specific information in support of a confidentiality designation for CEII, including “whether the information would allow a bad actor to attack, compromise or incapacitate physically or electronically a facility providing critical utility service” and “whether the information discusses vulnerabilities of a facility providing critical utility service.”⁷ This level of detail

⁶ Notice, p. 10.

⁷ “If the applicant believes that the record should not be disclosed because it contains critical energy infrastructure information, the application shall also state: (A) whether the information is customarily in the

is not required in the confidentiality designation and matrix/declaration processes under CPUC Decisions 06-06-066 (energy procurement); 16-08-024; 17-09-023; and General Order 66-D. The information in this proposed regulation highlights how a bad actor could abuse the CEII, undermining the very purpose of a confidentiality process. SCE recommends this provision be removed from the regulation. Instead, SCE recommends that Energy Safety follow up with the information provider in a confidential communication if there are questions regarding the basis for particular confidentiality designation requests.⁸

Section 29200(a)(6),⁹ which concerns aggregated information, is another provision not contained either in 20 CCR Section 2505 or the CPUC's confidentiality requirements. It requires that the application "state whether the information may be disclosed if it is aggregated with other information or masked to conceal certain portions, and if so the degree of aggregation or masking required. If the information cannot be disclosed even if aggregated or masked, the application shall justify why it cannot." SCE is not certain what this draft regulation is intended to accomplish. It could be intended to require that applicants explain why aggregation or masking of data is not an option because there is no way to aggregate or mask the data to make it non-confidential. Or it could be intended to provide confidentiality protection for information that, while in itself may not be confidential, in aggregate with other information raises confidentiality issues, e.g., separate documents with asset data that when read together show the criticality of the asset and potential impacts to the system if that asset were to be disabled. Both are sound objectives but as written the intent is unclear. SCE recommends that this provision be clarified accordingly.

Section 29200(b) provides "A deficient or incomplete application shall be returned to the applicant with a statement of its defects and a request for additional information. If the missing information, or a request for an extension of time to respond, is not submitted within fourteen days of receipt of the request, the Deputy Director may deny the

public domain such as the location of visible equipment; (B) whether the information would allow a bad actor to attack, compromise or incapacitate physically or electronically a facility providing critical utility service; (C) whether the information discusses vulnerabilities of a facility providing critical utility service; (D) whether the information has been voluntarily submitted to the Office of Emergency services as set forth in Government Code section 6254(ab); (E) whether the information or substantially similar information was classified as protected critical infrastructure information by the Department of Homeland Security or Department of Energy." Section 29200(a)(6), Proposed Regulations, p. 5.

⁸ Section 29200(a)(5) (emphasis added), apparently modeled after 20 CCR Section 2505(a)(1)(D), raises similar concerns: "If the applicant believes that the record should not be disclosed because it contains trade secrets or its disclosure would otherwise cause loss of a competitive advantage, *the application shall also state the specific nature of that advantage and how it would be lost, including the value of the information to the applicant, and the ease or difficulty with which the information could be legitimately acquired or duplicated by others.*" Here, too, it is not prudent to require this level of explicit detail, at least in the initial application.

⁹ "[S]tate whether the information may be disclosed if it is aggregated with other information or masked to conceal certain portions, and if so the degree of aggregation or masking required. If the information cannot be disclosed even if aggregated or masked, the application shall justify why it cannot;" Section 29200(a)(7), Proposed Regulations, p. 6.

application.”¹⁰ This proposed regulation is a modification of 20 CCR Section 2505(a)(2),¹¹ which does not specifically state an application shall be denied if conditions are not met within the fourteen day period. The CPUC does not include such a provision. To avoid disclosure of confidential information in the event that the applicant does not receive timely notice from the Energy Safety or due to some other miscommunication, SCE requests that this proposed regulation be modified to require that the Deputy Director confirm receipt by the applicant of the returned application.

The Proposed Regulations do not include 20 CCR Section 2505(a)(6), which provides as follows: “Failure to request confidentiality at the time a record is submitted to the Commission does not waive the right to request confidentiality later; however, once a record has been released to the public, the record can no longer be deemed confidential. Although a record designated as confidential shall remain confidential during the application and appeal process, subject to the provisions of Section 2507(b) of this Article, the application itself is a public document and can be released.”¹² Notwithstanding whether the OEIS adopts the CPUC confidentiality designation approach, SCE proposes that this provision be adopted so that an applicant may preserve the right to designate material confidential prior to public disclosure.

a. The Regulations Should Provide for a “Closed Room” Approach to Temporarily Share “Security Sensitive” Confidential Information

In most instances, SCE anticipates providing sensitive utility information directly to Energy Safety, as envisioned in the preceding proposed regulations. For example, in the vast majority of instances that CPUC has sought SCE data, including sensitive data, SCE has provided it directly to CPUC. SCE anticipates doing the same with Energy Safety.

However, as security risks to electric infrastructure grow and evolve, so should methods of sharing highly sensitive information between regulatory agencies and those being regulated. Based on new and emerging threats, SCE respectfully urges Energy Safety to recognize a new class of data – “Security Sensitive Information” – information about a regulated utility’s infrastructure, operations or security defenses, that is so sensitive that it merits use of special handling and sharing processes, even for Energy Safety regulatory review. Such information may include, *but is not limited to*, information (i) relating to SCE’s critical infrastructure, (ii) physical security, and (iii) cybersecurity.

Specifically, instead of requiring regulated entities to turn over Security Sensitive information directly to Energy Safety, SCE urges Energy Safety to view “Security Sensitive Information” on a temporary basis using a “closed room” approach – whether

¹⁰ Section 29200(b), Proposed Regulations, p. 6.

¹¹ “A deficient or incomplete application shall be returned to the applicant with a statement of its defects. The record or records for which confidentiality was requested shall not be disclosed for fourteen days after return of the application to allow a new application to be submitted except as provided in Section 2507 of this Article.” 20 CCR Section 2505(a)(2).

¹² 20 CCR Section 2505(a)(6).

physical or virtual. For example, should Energy Safety request viewing hard-copy versions of Security Sensitive information, SCE and Energy Safety would meet at a mutually convenient location. SCE would provide the data to Energy Safety for review during a closed-room session. Upon completing that review, the information is returned to SCE. Alternatively, should Energy Safety wish to view this information electronically, then SCE would make this information available to Energy Safety for remote viewing. Although accessible from Energy Safety computers, the information would not leave SCE's systems and repositories. The same process would apply for other regulated utilities providing "Security Sensitive Information" to Energy Safety.

The security risks triggering SCE's proposal are real, raising issues of not only informational security but also of US national security. As regulatory agencies accumulate greater information about regulated entities, they become more attractive targets to adversarial, sophisticated threat actors with the resources of entire countries behind them. For example, malicious foreign nationals associated with the Republican Guard of the Nation of Iran have successfully penetrated the Federal Energy Regulatory Commission (FERC) – an attack that then-United States Attorney Geoffrey Berman considered especially concerning because FERC holds details of some of the country's most sensitive infrastructure.¹³ And the recent, highly publicized "SolarWinds" attack, shows that government agencies remain squarely within the crosshairs of malicious adversaries seeking to steal their secrets.¹⁴ This represents but the tip of the iceberg in terms of national security threats facing government and regulatory agencies.¹⁵

In order to proactively mitigate against this regulatory targeting, electric utility regulators have already started authorizing use of temporary, closed door, regulatory review of a utility's most sensitive data. For example, at the federal level, the North American Electric Reliability Corporation (NERC) faced this same issue in promulgating Critical Infrastructure Protection ("CIP") Standard No. CIP-014-1 (Physical Security).¹⁶ NERC promulgated this regulatory standard in response to the highly publicized "Metcalf Substation" shooting, where unknown assailants used high-powered rifles to incapacitate a California electric substation.¹⁷ CIP-014-1 requires utilities to create highly sensitive information, such as locations of priority facilities; vulnerability

¹³ Dustin Voltz, U.S. charges, sanctions Iranians for global cyber attacks on behalf of Tehran, Reuters (March 23, 2018), at <https://www.reuters.com/article/us-usa-cyber-iran/u-s-charges-sanctions-iranians-for-global-cyber-attacks-on-behalf-of-tehran-idUSKBN1GZ22K>

¹⁴ Bill Whittaker, SolarWinds: How Russian Spies Hacked the Justice, State, Treasury, Energy and Commerce Departments (July 4, 2021), at <https://www.cbsnews.com/news/solarwinds-hack-russia-cyberattack-60-minutes-2021-07-04/>.

¹⁵ For more information about this issue, see Resubmission of Petition for Modification of Decision 19-01-018, CPUC Rulemaking No. R.15-06-009 (Jan. 16, 2020), at <https://docs.cpuc.ca.gov/PublishedDocs/Efile/G000/M324/K944/324944685.PDF>

¹⁶ NERC CIP Standard CIP-014-01, at C.1.4, available at <https://www.nerc.com/pa/Stand/Reliability%20Standards/CIP-014-1.pdf>.

¹⁷ Phase I Decision on Order Instituting Rulemaking Regarding the Physical Security of Electrical Corporations, Decision D.19-01-018 (Jan. 22, 2019), at pp.3-4, at <https://docs.cpuc.ca.gov/PublishedDocs/Published/G000/M260/K335/260335905.docx>

assessment; and mitigation plans.¹⁸ The standard also requires utilities to share that information with NERC for regulatory audit.¹⁹

However, CIP-014-1 does NOT require utilities to send security-sensitive information directly to NERC for regulatory review. Instead, this standard specifically mandates that that such data should not leave the utility's environment.²⁰ Instead, regulated utilities provide this information temporarily to NERC for regulatory review. Since then, NERC expanded use of closed room sharing methods by permitting utilities to create virtual "Secure Evidence Lockers" to be located within each utility's online systems.²¹ Once implemented, NERC may use these secure evidence lockers to remotely view a regulated utility's highly sensitive cybersecurity information, without that information leaving that utility's systems.

In California, the Commission's Safety and Enforcement Division (SED) authorized utilities regulated by the Commission to share highly sensitive physical security-related information with SED analysts in 2020 and 2021 using virtual sharing methods such as the ones proposed in these comments.²²

For the above reasons, SCE respectfully urges Energy Safety to adopt regulations permitting use of closed room procedures – whether virtual or physical – to view a utility's most "Security Sensitive" data without that data leaving the utility's custody.

2. Section 29201 Should Be Clarified to Require Formal Agreements to Keep Material Confidential and Notice to Designating Entities in All Cases of Interagency Disclosure

Section 29201, "Disclosure of Confidential Information", includes provisions allowing conditions under which Energy Safety "may disclose confidential information received by the Office from outside entities or persons."²³ Energy Safety notes that the language of Section 29201 "is modeled from other agency regulatory language previously approved by OAL," and cites California Code of Regulations, Title 20, section 2507.²⁴ Under Section 2901, Energy Safety can disclose confidential material to certain of those

¹⁸ *Id.*, *supra* n.14, at Section B (identifying risk assessment and mitigation process).

¹⁹ *Id.* at Section C.1.4 (identifying information security requirements).

²⁰ *Id.*

²¹ NERC, Registered Entity Maintained Secure Evidence Lockers – Functional Specification v.9, at p.1 (Jan. 298, 2021), available at <https://www.nerc.com/ResourceCenter/Align%20Documents/1-Align%20Registered%20Entity%20SEL%20Functional%20Requirements%20February%202021.pdf>

²² Letter from Dan Bout, Director of Safety Policy Division, to Parties to Physical Security Proceeding, CPUC Proceeding No. R.15-06-009, dated Dec. 4, 2020 (authorizing regulated utilities to share physical security data with CPUC using virtual sharing platforms). This letter, and earlier versions, at <https://www.cpuc.ca.gov/about-cpuc/divisions/safety-policy-division/risk-assessment-and-safety-analytics/physical-security-of-electric-infrastructure>

²³ Section 29201(a), Proposed Regulations, p. 7.

²⁴ Notice, p. 10.

persons that work for Energy Safety (Section 29201(a)(1) and (2)), as well as other governmental agencies (Section 29201(a)(3) and (4)). However, while 29201(a)(3) specifically requires “government bodies” “agree to keep the records confidential”, subpart (4) does not explicitly require the same of the specific agencies named, i.e., the California Department of Forestry and Fire Protection, California Energy Commission, and the California Public Utilities Commission.²⁵ SCE requests that the Regulations specify that those named agencies be required to agree to keep the material confidential, as is required in the previous subsection. SCE also requests that the regulation be modified to require that confidential information providers be given notice of any interagency sharing of that provider’s confidential information. Finally, SCE requests that as a policy matter such interagency sharing of confidential information be limited as much as reasonably possible because as a practical matter, the more widely information is distributed the more likely the confidential material will be inadvertently disclosed, at great potential risk to the public.

3. The Scope of Issues Requiring Notification Under Section 29300 Should Be Clarified

Section 29300, “Notification”, in its entirety, reads “The Director, or designee, shall be notified within 24 hours from the time an electrical corporation becomes aware of a wildfire threat to electrical infrastructure it owns or operates. The Director, or designee, shall be notified within 24 hours from the time a regulated entity becomes aware of infrastructure that it owns or operates being investigated for involvement in potentially causing an ignition.”²⁶ As written, this draft regulation is vague and potentially overbroad and unduly burdensome. For example, “wildfire threat” could mean any number of minor issues for which a 24-hour notification requirement would be overbroad and unreasonably burdensome. Under this language, “wildfire threat” could be construed to include a relatively small ignition next to a pole creating a reliability issue, but no significant wildfire threat. Reporting every such “wildfire threat” to any electrical asset within 24 hours would require an enormous amount of time and effort and unnecessarily divert resources.

²⁵ “(a) The Director may disclose confidential information received by the Office from outside entities or persons to: (1) Office employees or representatives whose work requires inspection of the information; (2) Contractors and consultants to the Office whose work for the Office requires inspection of the information and who agree in a contract or separate non-disclosure agreement to keep the records confidential; and (3) Other governmental bodies that need the records to perform their official functions and that agree to keep the records confidential and to disclose the records only to those employees or contractors whose agency work requires inspection of the records. (4) Under Public Utilities Code section 8386.5, Public Resources Code sections 25216.5 and 25224, and Title 20, California Code of Regulations section 2505(b), confidential information in the custody or control of the Office may be shared with the California Department of Forestry and Fire Protection, California Energy Commission, and California Public Utilities Commission. Upon receipt of a request for data from those agencies, confidential information may be shared without the need for an interagency agreement.” Section 29201(a), Proposed Regulations, p. 7.

²⁶ Section 29300, Proposed Regulations, p. 8.

Further, this provision does not clarify what type of “investigation” or by what agency or agencies would qualify. Thus, this Proposed Regulation is unclear under the APA.²⁷ Rather than reinvent the proverbial wheel, to avoid confusion and inefficiency associated with duplication of effort, SCE recommends that the regulation be revised to state that SCE shall provide the same information, and under the same circumstances, as in the established Electric Safety Incident Report (ESIR) used at the CPUC. The ESIR is a report required by the CPUC if SCE’s facilities are involved in certain types of events: (1) a fatality or serious injury involving electric facilities; (2) damage to property of the utility or others in excess of \$50,000; (3) significant media coverage, and is submitted within 2 hours during business hours or within 4 hours outside of business hours.²⁸ The ESIR provides more specificity regarding content, triggers, and timing than this Proposed Regulation and would appear to cover the same content sought by Energy Safety through this proposed regulation. Alternatively, SCE recommends stakeholder discussions or workshops to clarify what Energy Safety attempts to cover by this provision.

4. The Scope of Reporting Under Section 29301 Should Be Clarified

Section 29301, “Incident Report”, directs regulated entities to submit an incident report within 30 days containing, among other information, factual or physical evidence related to the incident, contact information of any known witnesses, preliminary root cause analysis, and description of all actions taken to minimize recurrence.²⁹ This provision raises several concerns. First, in subpart (b)(3), “*preliminary* root cause” analysis is a vague term that requires clarification—“root cause” investigations have a particular meaning, completion of which often requires more than 30 days in the experience of SCE. The reference to “detailed discussion of *all* findings” in that subpart (emphasis added) raises issues concerning information protected by the attorney-client privilege and attorney work product doctrine. Second, the requirement in subpart (b)(4) to describe “all actions taken, if any, to minimize the recurrence of such incidents” within 30 days is an insufficient amount of time because in SCE’s experience it typically takes more time to identify appropriate mitigation measures. Third, subpart (b)(7) is vague and could be burdensome to provide within 30 days depending on what “any other information” is intended to include. Thus, this Proposed Regulation is unclear and unnecessary under the APA.³⁰ Similar to SCE’s comments regarding Proposed Regulation 29300, above, SCE recommends that Proposed Regulation 29301 be revised to require the same information SCE currently provides to the CPUC under its

²⁷ Government Code Section 11340, *et seq.*

²⁸ Example of ESIR @ <https://www.edison.com/content/dam/eix/documents/investors/wildfires-document-library/esir-20201207-201207-13722.pdf>

²⁹ Section 29301, Proposed Regulations, p. 8.

³⁰ Government Code Section 11340, *et seq.*

well-established process pursuant to Public Utilities Code Section 315.³¹ Such information includes the underlying facts of the fire as known by SCE at the time of reporting. Additionally, any proposed regulation requiring submission of incident reports should include a provision to the same effect as PUC Section 315, which provides: “Neither the order or recommendation of the commission nor any accident report filed with the commission shall be admitted as evidence in any action for damages based on or arising out of such loss of life, or injury to person or property.”

5. The Scope of Inspections Under Section 29302 Should Be Clarified

Section 29302, “Investigations, Notices of Defects and Violations and Referral to the Commission”, would allow Energy Safety to designate investigators to, for example, investigate whether an approved WMP was followed or if failure to do so contributed to the cause of a wildfire (or conduct other investigations). This provision also would allow Energy Safety to designate a compliance officer to consider the findings of any investigation and specifies how notices of violation will be served. Finally, the provision would allow Energy Safety to recommend to the Commission that it pursue enforcement action in the event of noncompliance with an approved WMP plan.³²

Similar to SCE’s comments regarding Proposed Regulations 29300 and 29301, above, SCE recommends that Proposed Regulation 29302 be revised to require the same information SCE currently provides to the CPUC under its well-established process pursuant to Public Utilities Code Section 315. Such information includes the underlying facts of the fire as known by SCE at the time of reporting. Creating a different set of requirements through this Proposed Regulation will likely result in duplicative processes—simultaneous investigations into the same incidents by OEIS and the CPUC—and the potential for inconsistent rulings and findings. As with Section 315, SCE asks that the following safeguards also be implemented, “Neither the order or recommendation of the commission nor any accident report filed with the commission shall be admitted as evidence in any action for damages based on or arising out of such loss of life, or injury to person or property.”

Further, it is not clear that Energy Safety has the jurisdictional authority to conduct the investigations described as drafted, particularly in a(3) and a(4). These provisions state that “The Director may designate investigators to investigate the following: (3) *Whether the regulated entity is noncompliant with its duties and responsibilities* or has otherwise committed violations of any laws, regulations, or guidelines within the authority of the Office; and (4) *Other related investigations* by the Director.” The italicized language (added here for emphasis) as written potentially exceeds the Energy Safety’s jurisdictional authority as codified in Public Utilities Code Section 326 and Government

³¹ Public Utilities Code Section 315; Example of Section 315 letter @<https://www.edison.com/content/dam/eix/documents/investors/wildfires-document-library/section-315-20210104-202014197.pdf>

³² Section 29302, Proposed Regulations, p. 9.

Code Section 15475, et seq. Any “investigation” under this Proposed Regulation must be explicitly limited to wildfire safety, or it is potentially invalid under Government Code Section 11342.2.³³

CONCLUSION

SCE appreciates the opportunity to submit its comments on Energy Safety’s Notice and Proposed Regulations.

Sincerely,

//s//

Michael A. Backstrom
VP Regulatory Policy
Southern California Edison

cc: Service List for R.18-10-007
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³³ “Whenever by the express or implied terms of any statute a state agency has authority to adopt regulations to implement, interpret, make specific or otherwise carry out the provisions of the statute, no regulation adopted is valid or effective unless consistent and not in conflict with the statute and reasonably necessary to effectuate the purpose of the statute.” Government Code Section 11342.2.

September 8, 2021

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BY OEIS E-FILING

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

Southern California Edison Company's Comments on Proposed Emergency Process and Procedure Regulations Submitted with Proposed Emergency Rulemaking Action by the Office of Energy Infrastructure Safety to the Office of Administrative Law on September 3, 2021.

Dear Director Thomas Jacobs and Office of Administrative Law Reference Attorney:

Pursuant to California Government Code Section 11349.6(b) and 1 California Code of Regulations Section 55, Southern California Edison Company (SCE) hereby submits its comments on the Proposed Emergency Process and Procedure Regulations Noticed with the Proposed Emergency Rulemaking Action by the Office of Energy Infrastructure Safety (Energy Safety) to the Office of Administrative Law (OAL) on September 3, 2021. With the exception of proposed regulation Section 29300 "Notification" and a few other changes, the instant proposed regulations essentially mirror the July 26, 2021 version, which Energy Safety subsequently withdrew after SCE and others submitted comments but before the OAL issued a decision. SCE addresses the modifications to Energy Safety's initial proposed regulations in these comments and restates those comments that continue to apply.

INTRODUCTION

Energy Safety is a newly formed agency established under Government Code Section 15470, et seq. As Energy Safety points out, "[t]he Energy Safety is the successor to, and, effective July 1, 2021, is vested with, all of the duties, powers, and responsibilities

of the Wildfire Safety Division established pursuant to Public Utilities Code section 326, including, but not limited to, the power to compel information and conduct investigations.”¹

On July 26, 2021, Energy Safety provided notice with OAL of a Proposed Emergency Rulemaking Action with Proposed Process and Procedure Regulations. Subsequently, SCE, San Diego Gas & Electric Company (SDG&E), Pacific Gas and Electric Company (PG&E), and the Public Advocates Office timely filed comments within the 5-calendar-day public comment period for emergency rulemakings. On August 4, 2021, the day before OAL was due to issue a decision, Energy Safety withdrew its proposed regulations.

On September 3, 2021, Energy Safety noticed the instant Proposed Emergency Rulemaking Action with Proposed Emergency Process and Procedure Regulations with OAL. Most of Energy Safety’s proposed regulations remain the same as the previous, noticed and withdrawn versions. However, Energy Safety made some modifications, particularly to the Section 29300 Notification provision. SCE addresses these modifications below. To the extent Energy Safety has not changed its proposed regulations, SCE restates its previous comments.

For the most part, SCE continues to support the regulations Energy Safety proposes as the successor to WSD. That said, as with the previous versions, several of Energy Safety’s instant proposed regulations create issues regarding confidentiality designation, or developing new regulations that could cause confusion, unnecessary burden, duplication of effort, and potential jurisdictional issues. These issues would largely be resolved by continuing with existing CPUC or Commission requirements that have generally functioned well and are familiar to stakeholders rather than shifting to other regulatory models, e.g., State Energy Resources Conservation and Development Commission’s (California Energy Commission) model. Where indicated, the CPUC has in place reasonable, equally effective alternatives to the more burdensome regulations proposed by Energy Safety, but Energy Safety has not described these alternatives or explained why it has rejected them.² In such cases, the CPUC alternatives are

¹ Energy Safety Adoption of Emergency Rulemaking Action Process and Procedure Regulations, Notice of Proposed Emergency Action (Notice), p. 3. The Wildfire Safety Division (WSD), Energy Safety’s predecessor, was formed within the California Public Utilities Commission (CPUC or Commission) to “Oversee and enforce electrical corporations’ compliance with wildfire safety”, among other statutory roles. Cal. Pub. Util. Code Section 326.

² “Every agency subject to this chapter shall prepare, submit to the [Office of Administrative Law] with the notice of the proposed action as described in Section 11346.5, and make available to the public upon request, all of the following:…An initial statement of reasons for proposing the adoption, amendment, or repeal of a regulation. This statement shall include, but not be limited to, all of the following: A description of reasonable alternatives to the regulation and the agency’s reasons for rejecting those alternatives. Reasonable alternatives to be considered include, but are not limited to, alternatives that are proposed as less burdensome and equally effective in achieving the purposes of the regulation in a manner that ensures full compliance with the authorizing statute or other law being implemented or made specific by the proposed regulation.” Government Code Section 11346.2(b)(4)(A).

established means of achieving substantially the same apparent objectives³ as the proposed regulations, and the CPUC alternatives are relatively clear and familiar to stakeholders. Although Energy Safety has authority to adopt emergency regulations under Government Code Section 15475,⁴ in the interim the rules or guidelines used by the WSD/CPUC (and familiar to stakeholders) remain in effect under Government Code Section 15474.6.⁵

In particular, SCE recommends modifications and/or clarifications to the Proposed Regulations below. Where noted, the Proposed Regulations as written appear to be in conflict with one or more of the California Administrative Procedure Act (APA)⁶ standards, e.g., inconsistent with statute (Government Code Section 11342.2); unclear (Government Code Section 11349(c)); duplicative; and/or unnecessary.

- Section 29200: Confidential Information
- Section 29201: Disclosure of Confidential Information
- Section 29300: Notification
- Section 29301: Incident Report

³ As noted below, however, the objective is not always clear based on the proposed regulations as written.

⁴ “The office shall adopt, amend, or repeal emergency regulations to implement this part in accordance with the Administrative Procedure Act (Chapter 3.5 (commencing with Section 11340) of Part 1). The adoption, amendment, or repeal of these regulations shall be deemed to be an emergency for the purpose of Section 11342.545 and shall be considered by the Office of Administrative Law as necessary for the immediate preservation of the public peace, health and safety, or general welfare.” Government Code Section 15475(a).

⁵ “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. Any duly adopted rules or guidelines in effect and utilized by the Wildfire Safety Division at the time of transition to the office shall remain valid and in effect as to the office pending the adoption of new or amended guidelines by the office pursuant to this section.” Government Code Section 15475.6.

⁶ Government Code Section 11340, et seq.

- Section 29302: Investigations, Notices of Defects and Violations and Referral to the Commission

In addition to providing comments on Energy Safety's proposed regulations, SCE requests that Energy Safety/OAL (1) hold a stakeholder workshop in advance of finalizing the regulations, and (2) provide an implementation period once the regulations are finalized to give the utilities sufficient time to develop protocols in compliance with the new regulations.

COMMENTS ON NOTICE AND PROPOSED REGULATIONS

1. Section 29200 Should Be Modified to Adopt CPUC Requirements Currently Used for Confidentiality Designations

Because Section 29200 contains nearly all of the same language as the previous version Energy Safety proposed, most of SCE's previous comments still apply. That said, SCE appreciates one modification that Energy Safety made, consistent with SCE's previous comments: Energy Safety removed the requirement that the applicant citing critical energy infrastructure information (CEII) as a basis for confidentiality state "whether the information would allow a bad actor to attack, compromise or incapacitate physically or electronically a facility providing critical utility service."⁷ SCE supports this modification because, as stated in SCE's previous comments, such a requirement would highlight how a bad actor could abuse the CEII, undermining the very purpose of a confidentiality process.

As a general matter, SCE stands by its proposal that Energy Safety continue to use the confidentiality designation requirements developed by the CPUC in CPUC Decisions 06-06-066 (energy procurement); 16-08-024; 17-09-023; and General Order 66-D, rather than modeling its regulatory language after 20 CCR Section 2505, "Designation of Confidential Records", the regulation used by the California Energy Commission. The CPUC's confidentiality designation requirements were developed over a series of rulemakings and reflect a considerable amount of stakeholder input and public process. Further, the CPUC's confidentiality declaration/matrix process is familiar to stakeholders in the context of the WMP and appears to have functioned well thus far through successive WMP processes. Given the potentially devastating consequences associated with inadvertent disclosure of sensitive information such as critical energy infrastructure information (CEII), it would be prudent to continue with a proven confidentiality designation process familiar to WMP stakeholders, especially in the context of a high volume of data requests with a relatively short response period.⁸

⁷ Section 29200(a)(6), Proposed Regulations, p. 4.

⁸ The Notice of Proposed Emergency Action posted on OAL's website on September 3, 2021 contains new language on pages 8-9 stating that "The information being requested related to CEII is derived

The requirement for Deputy Director (and possibly Director) review for every confidentiality request exacerbates these issues. Finally, it is unnecessarily burdensome to require two distinct processes for providing confidential material to the CPUC and Energy Safety.

In addition to this general concern, SCE restates the following specific issues with respect to Proposed Regulation Section 29200.

Section 29200(a)(7), which concerns aggregated information, is not contained either in 20 CCR Section 2505 or the CPUC's confidentiality requirements. It requires that the application "state whether the information [requested to be confidential] may be disclosed if it is aggregated with other information or masked to conceal certain portions, and if so the degree of aggregation or masking required. If the information cannot be disclosed even if aggregated or masked, the application shall justify why it cannot."⁹ SCE is not certain what this draft regulation is intended to accomplish. Energy Safety added the bracketed language to the previous version of this proposed regulation. Unfortunately, it does not clarify the issue regarding the intent of this provision that SCE restates here from SCE's previous comments. The proposed regulation could be intended to require that applicants explain why aggregation or masking of data is not an option because there is no way to aggregate or mask the data to make it non-confidential. Or it could be intended to provide confidentiality protection for information that, while in itself may not be confidential, in aggregate with other information raises confidentiality issues, e.g., separate documents with asset data that when read together show the criticality of the asset and potential impacts to the system if that asset were to be disabled. Both are sound objectives but as written the intent is unclear. SCE recommends that this provision be clarified accordingly.

Section 29200(b) provides "A deficient or incomplete application shall be returned to the applicant with a statement of its defects and a request for additional information. If the missing information, or a request for an extension of time to respond, is not submitted within fourteen days of receipt of the request, the Deputy Director may deny the application."¹⁰ This proposed regulation is a modification of 20 CCR Section

from Decision 20-08-031 of the California Public Utilities Commission in the rulemaking proceeding 14-11-001 titled, PHASE 2B DECISION ADOPTING BASELINE SHOWINGS NECESSARY TO QUALIFY FOR CONSIDERATION OF CONFIDENTIAL TREATMENT. Thus, it is expected that utilities subject to the CPUC will already be aware of and familiar with these categories." While this confirms that Energy Safety intends to recognize the substantive CEII categories approved by the CPUC, it does not resolve the process issues discussed herein.

⁹ Section 29200(a)(7), Proposed Regulations, p. 4.

¹⁰ Section 29200(b), Proposed Regulations, p. 5.

2505(a)(2),¹¹ which does not specifically state an application shall be denied if conditions are not met within the fourteen day period. The CPUC does not include such a provision. To avoid disclosure of confidential information in the event that the applicant does not receive timely notice from the Energy Safety or due to some other miscommunication, SCE requests that this proposed regulation be modified to require that the Deputy Director confirm receipt by the applicant of the returned application.

The Proposed Regulations do not include 20 CCR Section 2505(a)(6), which provides as follows: “Failure to request confidentiality at the time a record is submitted to the Commission does not waive the right to request confidentiality later; however, once a record has been released to the public, the record can no longer be deemed confidential. Although a record designated as confidential shall remain confidential during the application and appeal process, subject to the provisions of Section 2507(b) of this Article, the application itself is a public document and can be released.”¹² Notwithstanding whether the Energy Safety adopts the CPUC confidentiality designation approach, SCE proposes that this provision be adopted so that an applicant may preserve the right to designate material confidential prior to public disclosure.

a. The Regulations Should Provide for a “Closed Room” Approach to Temporarily Share “Security Sensitive” Confidential Information

In most instances, SCE anticipates providing sensitive utility information directly to Energy Safety, as envisioned in the preceding proposed regulations. For example, in the vast majority of instances that CPUC has sought SCE data, including sensitive data, SCE has provided it directly to CPUC. SCE anticipates doing the same with Energy Safety. However, as security risks to electric infrastructure grow and evolve, so should methods of sharing highly sensitive information between regulatory agencies and those being regulated. Based on new and emerging threats, SCE respectfully restates its request that Energy Safety to recognize a new class of data – “Security Sensitive Information” – information about a regulated utility’s infrastructure, operations or security defenses, that is so sensitive that it merits use of special handling and sharing processes, even for Energy Safety regulatory review. Such information may include, but is not limited to, information (i) relating to SCE’s critical infrastructure, (ii) physical security, and (iii) cybersecurity. Specifically, instead of requiring regulated entities to turn over Security Sensitive information directly to Energy Safety, SCE urges Energy Safety to view “Security Sensitive Information” on a temporary basis using a “closed room” approach – whether physical or virtual. For example, should Energy Safety request viewing hard-copy versions of Security Sensitive information, SCE and Energy Safety would meet at a mutually convenient location. SCE would provide the data to

¹¹ “A deficient or incomplete application shall be returned to the applicant with a statement of its defects. The record or records for which confidentiality was requested shall not be disclosed for fourteen days after return of the application to allow a new application to be submitted except as provided in Section 2507 of this Article.” 20 CCR Section 2505(a)(2).

¹² 20 CCR Section 2505(a)(6).

Energy Safety for review during a closed-room session. Upon completing that review, the information is returned to SCE. Alternatively, should Energy Safety wish to view this information electronically, then SCE would make this information available to Energy Safety for remote viewing. Although accessible from Energy Safety computers, the information would not leave SCE's systems and repositories. The same process would apply for other regulated utilities providing "Security Sensitive Information" to Energy Safety.

The security risks triggering SCE's proposal are real, raising issues of not only informational security but also of US national security. As regulatory agencies accumulate greater information about regulated entities, they become more attractive targets to adversarial, sophisticated threat actors with the resources of entire countries behind them. For example, malicious foreign nationals associated with the Republican Guard of the Nation of Iran have successfully penetrated the Federal Energy Regulatory Commission (FERC) – an attack that then-United States Attorney Geoffrey Berman considered especially concerning because FERC holds details of some of the country's most sensitive infrastructure."¹³ And the recent, highly publicized "SolarWinds" attack, shows that government agencies remain squarely within the crosshairs of malicious adversaries seeking to steal their secrets.¹⁴ This represents but the tip of the iceberg in terms of national security threats facing government and regulatory agencies.¹⁵

In order to proactively mitigate against this regulatory targeting, electric utility regulators have already started authorizing use of temporary, closed door, regulatory review of a utility's most sensitive data. For example, at the federal level, the North American Electric Reliability Corporation (NERC) faced this same issue in promulgating Critical Infrastructure Protection ("CIP") Standard No. CIP-014-1 (Physical Security).¹⁶ NERC promulgated this regulatory standard in response to the highly publicized "Metcalf Substation" shooting, where unknown assailants used high-powered rifles to incapacitate a California electric substation.¹⁷ CIP-014-1 requires utilities to create

¹³ Dustin Voltz, U.S. charges, sanctions Iranians for global cyber attacks on behalf of Tehran, Reuters (March 23, 2018), at <https://www.reuters.com/article/us-usa-cyber-iran/u-s-charges-sanctions-iranians-for-global-cyber-attacks-on-behalf-of-tehran-idUSKBN1GZ22K>.

¹⁴ Bill Whittaker, SolarWinds: How Russian Spies Hacked the Justice, State, Treasury, Energy and Commerce Departments (July 4, 2021), at <https://www.cbsnews.com/news/solarwinds-hack-russia-cyberattack-60-minutes-2021-07-04/>.

¹⁵ For more information about this issue, see Resubmission of Petition for Modification of Decision 19-01-018, CPUC Rulemaking No. R.15-06-009 (Jan. 16, 2020), at <https://docs.cpuc.ca.gov/PublishedDocs/Efile/G000/M324/K944/324944685.PDF>

¹⁶ NERC CIP Standard CIP-014-01, at C.1.4, available at <https://www.nerc.com/pa/Stand/Reliability%20Standards/CIP-014-1.pdf>.

¹⁷ Phase I Decision on Order Instituting Rulemaking Regarding the Physical Security of Electrical Corporations, Decision D.19-01-018 (Jan. 22, 2019), at pp.3-4, at <https://docs.cpuc.ca.gov/PublishedDocs/Published/G000/M260/K335/260335905.docx>

highly sensitive information, such as locations of priority facilities; vulnerability assessment; and mitigation plans.¹⁸ The standard also requires utilities to share that information with NERC for regulatory audit.¹⁹

However, CIP-014-1 does NOT require utilities to send security-sensitive information directly to NERC for regulatory review. Instead, this standard specifically mandates that that such data should not leave the utility's environment.²⁰ Instead, regulated utilities provide this information temporarily to NERC for regulatory review. Since then, NERC expanded use of closed room sharing methods by permitting utilities to create virtual "Secure Evidence Lockers" to be located within each utility's online systems.²¹ Once implemented, NERC may use these secure evidence lockers to remotely view a regulated utility's highly sensitive cybersecurity information, without that information leaving that utility's systems.

In California, the Commission's Safety and Enforcement Division (SED) authorized utilities regulated by the Commission to share highly sensitive physical security-related information with SED analysts in 2020 and 2021 using virtual sharing methods such as the ones proposed in these comments.²²

For the above reasons, SCE respectfully urges Energy Safety to adopt regulations permitting use of closed room procedures – whether virtual or physical – to view a utility's most "Security Sensitive" data without that data leaving the utility's custody.

2. Section 29201 Should Be Clarified to Require Formal Agreements to Keep Material Confidential and Notice to Designating Entities in All Cases of Interagency Disclosure

SCE restates its concerns with proposed regulation Section 29201; additional authority cited by Energy Safety does not resolve these concerns. Section 29201, "Disclosure of Confidential Information", includes provisions allowing conditions under which Energy Safety "may disclose confidential information received by the Office from outside entities

¹⁸ *Id.*, supra n.14, at Section B (identifying risk assessment and mitigation process).

¹⁹ *Id.* at Section C.1.4 (identifying information security requirements).

²⁰ *Id.*

²¹ NERC, Registered Entity Maintained Secure Evidence Lockers – Functional Specification v.9, at p.1 (Jan. 298, 2021), available at <https://www.nerc.com/ResourceCenter/Align%20Documents/1-Align%20Registered%20Entity%20SEL%20Functional%20Requirements%20February%202021.pdf>.

²² Letter from Dan Bout, Director of Safety Policy Division, to Parties to Physical Security Proceeding, CPUC Proceeding No. R.15-06-009, dated Dec. 4, 2020 (authorizing regulated utilities to share physical security data with CPUC using virtual sharing platforms). This letter, and earlier versions, at <https://www.cpuc.ca.gov/about-cpuc/divisions/safety-policy-division/risk-assessment-and-safety-analytics/physical-security-of-electric-infrastructure>.

or persons.”²³ Energy Safety notes that the language of Section 29201 “is modeled from other agency regulatory language previously approved by OAL,” and cites California Code of Regulations, Title 20, section 2507.²⁴ Energy Safety cites additional authority not cited in the previous Notice, for the premise that the California Energy Commission is a central repository for the collection of data and information sharing among state government agencies “helps the relevant agencies meet the statutory directives, and support the need to prepare for wildfire events and immediate summary reliability issues.”²⁵

Under Section 2901, Energy Safety can disclose confidential material to certain of those persons that work for Energy Safety (Section 29201(a)(1) and (2)), as well as other governmental agencies (Section 29201(a)(3). However, while 29201(a)(3) specifically requires “government bodies” “agree to keep the records confidential”, subpart (b) does not explicitly require the same of the specific agencies named, i.e., the California Department of Forestry and Fire Protection, California Energy Commission, and the California Public Utilities Commission.²⁶

SCE requests that the Regulations specify that those named agencies be required to agree to keep the material confidential, as is required in the previous subsection. SCE also requests that the regulation be modified to require that confidential information providers be given notice of any interagency sharing of that provider’s confidential information. Finally, SCE requests that as a policy matter such interagency sharing of confidential information be limited as much as reasonably possible because as a practical matter, the more widely information is distributed the more likely the confidential material will be inadvertently disclosed, at great potential risk to the public. These requests are not inconsistent with the authority newly cited by Energy Safety in its Notice for the instant action—SCE is not requesting a bar on sharing of information among these agencies, only that the sensitivities and potential harm to the public related to the distribution of *confidential* information be recognized via the precautionary measures SCE has proposed.

²³ Section 29201(a), Proposed Regulations, p. 6.

²⁴ Notice, p. 10.

²⁵ “In addition, the Public Resources Code section 25216.5 designates the California Energy Commission as the central repository within state government for the collection of data and information on energy supply, public safety and other related subject. Public Resources Code section 25224 directs the California Energy Commission and other state agencies to the fullest extent possible exchange records, reports, materials and other information related to energy resources and power facilities and other areas of mutual concern. Including language regarding information sharing helps the relevant agencies meet the statutory directives, and support the need to prepare for wildfire events and immediate summary reliability issues.” Notice, p. 10.

²⁶ Proposed Regulations, p. 6.

3. The Scope of Issues Requiring Notification Under Section 29300 Should Be Clarified

Energy Safety modified proposed regulation Section 29300 most substantially from the regulations it previously noticed and withdrew:

§ 29300. Notification. [PREVIOUS VERSION]

The Director, or designee, shall be notified within *24 hours* from the time an electrical corporation becomes aware of a wildfire threat to electrical infrastructure it owns or operates. The Director, or designee, shall be notified within *24 hours* from the time a regulated entity becomes aware of infrastructure that it owns or operates being investigated for involvement in potentially causing an ignition.

§ 29300. Notification. [UPDATED VERSION]

- (a) A regulated entity shall notify the Office 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*.
- (b) A regulated entity shall notify the Office within *four hours of receiving notice* that infrastructure that it owns or operates is being investigated by a governmental agency for involvement in potentially causing an ignition.²⁷

The modifications include a shortening of the notice period and the addition of the “requiring a response from a fire suppression agency” provision, for which Energy Safety provides some context in new language in the Notice: “Subsection (a) covers the notification within 12 hours of a wildfire that threatens equipment and is also subject to fire fighting efforts. This second metric provides a level of clarity to the utility that notification under this provision is for fires that require deployment of firefighters.”²⁸

Unfortunately, several critical terms as modified by this proposed regulation are vague and open to interpretation, e.g., “other anomaly” could include virtually any issue, “danger” is open to many interpretations and “wildfire threat” remains too vague a term. The additional criterion of “requiring a response from a suppression agency” does not resolve these issues. The shorter notice interval, reduced from 24 hours to 12 hours in subpart (a) and 4 hours in subpart (b), only serves to further exacerbate the issues.

²⁷ Proposed Regulations, p. 7 (emphasis added).

²⁸ Notice, pp. 10-11.

To resolve these issues and those raised in SCE's comments to the previous iteration of this proposed regulation, SCE proposes the following modifications to Section 29300:

- (a) A regulated entity shall notify the Office within 12 24 hours of observing:
 - (1) A fault, ~~or outage, or other anomaly~~ on infrastructure it owns or operates occurring within the a one-mile vicinity of a 50 acre or greater wildfire requiring a response from a governmental fire suppression agency; or
 - (2) A wildfire threat that poses a danger to infrastructure it owns or operates requiring a response from a governmental fire suppression agency.
 - (i) For a wildfire to be considered a threat under this provision it must be at least 50 acres in size.
 - (ii) For a wildfire to be deemed to pose a danger to infrastructure under this provision it must encroach within one mile of that infrastructure.
- (b) A regulated entity shall notify the Office within two hours of receiving notice during business hours, or four hours of receiving notice outside business hours, that an electric incident occurred in a high fire threat district that is attributable, or allegedly attributable, to electric utility facilities, and in which any of the following occurred: ~~infrastructure that it owns or operates is being investigated by a governmental agency for involvement in potentially causing an ignition.~~
 - (1) A fatality or injury requiring overnight hospitalization;
 - (2) Damage to property of the utility or others in excess of \$50,000;
 - (3) Significant public attention or media coverage.

4. The Scope of Reporting Under Section 29301 Should Be Clarified

SCE restates its comments regarding Section 29301, which Energy Safety has slightly modified from the previous version.²⁹ Section 29301, "Incident Report", directs regulated entities to submit an incident report within 30 days containing, among other information, factual or physical evidence related to the incident, contact information of

²⁹ Proposed Regulations, p. 7. Subpart (a) previously read "In the event that an ignition may have been started by the infrastructure owned or operated by a regulated entity, the entity shall submit an incident report within 30 days of the incident." Subpart (a) now reads "In the event that a regulated entity or fire investigation agency suspects an ignition to have been started by the infrastructure owned or operated by a regulated entity..."

any known witnesses, preliminary root cause analysis, and description of all actions taken to minimize recurrence. This provision continues to raise several concerns. First, in subpart (b)(3), “preliminary root cause” analysis is a vague term that requires clarification—“root cause” investigations have a particular meaning, completion of which often requires more than 30 days in the experience of SCE. The reference to “detailed discussion of all findings” in that subpart (emphasis added) raises issues concerning information protected by the attorney-client privilege and attorney work product doctrine. Second, the requirement in subpart (b)(4) to describe “all actions taken, if any, to minimize the recurrence of such incidents” within 30 days is an insufficient amount of time because in SCE’s experience it typically takes more time to identify appropriate mitigation measures. Third, subpart (b)(7) is vague and could be burdensome to provide within 30 days depending on what “any other information” is intended to include. Thus, this Proposed Regulation is unclear and unnecessary under the APA.³⁰ SCE recommends that Proposed Regulation 29301 be revised to require the same information SCE currently provides to the CPUC under its well-established process pursuant to Public Utilities Code Section 315.³¹ Such information includes the underlying facts of the fire as known by SCE at the time of reporting. Additionally, any proposed regulation requiring submission of incident reports should include a provision to the same effect as PUC Section 315, which provides: “Neither the order or recommendation of the commission nor any accident report filed with the commission shall be admitted as evidence in any action for damages based on or arising out of such loss of life, or injury to person or property.”

5. The Scope of Investigations Under Section 29302 Should Be Clarified

Section 29302, “Investigations, Notices of Defects and Violations and Referral to the Commission”, would allow Energy Safety to designate investigators to, for example, investigate whether an approved WMP was followed or if failure to do so contributed to the cause of a wildfire (or conduct other investigations). This provision also would allow Energy Safety to designate a compliance officer to consider the findings of any investigation and specifies how notices of violation will be served. Finally, the provision would allow Energy Safety to recommend to the Commission that it pursue enforcement action in the event of noncompliance with an approved WMP plan.³²

Energy Safety has made some modifications to Section 29302, one of which resolves a jurisdictional issue SCE raised in the previous version of the proposed regulation: Energy Safety now specifies in subpart (a) (4) that “the Director may designate investigators to investigate the following:…Other related investigations *within the*

³⁰ Government Code Section 11340, et seq.

³¹ Public Utilities Code Section 315; Example of Section 315 letter
@<https://www.edison.com/content/dam/eix/documents/investors/wildfires-document-library/section-315-20210104-202014197.pdf>

³² Section 29302(a)(4), Proposed Regulations, p. 8.

authority of the Office, as required by the Director.”³³ SCE restates its other comments, which remain applicable.

SCE recommends that Proposed Regulation 29302 be revised to require the same information SCE currently provides to the CPUC under its well-established process pursuant to Public Utilities Code Section 315. Such information includes the underlying facts of the fire as known by SCE at the time of reporting. Creating a different set of requirements through this Proposed Regulation will likely result in duplicative processes—simultaneous investigations into the same incidents by OEIS and the CPUC—and the potential for inconsistent rulings and findings. As with Section 315, SCE asks that the following safeguards also be implemented, “Neither the order or recommendation of the commission nor any accident report filed with the commission shall be admitted as evidence in any action for damages based on or arising out of such loss of life, or injury to person or property.”

REQUEST FOR STAKEHOLDER WORKSHOP AND IMPLEMENTATION PERIOD

Energy Safety’s proposed regulations require new reporting protocols that differ significantly in some respects from SCE’s current requirements under the CPUC that are familiar to SCE and other stakeholders (and which remain in effect under Government Code Section 15475.6 unless and until alternative regulations are approved). Consistent with that statute, SCE requests that a workshop be held prior to finalization of the proposed regulation language, to clarify the regulations and address issues raised by SCE and other stakeholders.

For the same reasons, SCE requests that Energy Safety provide a reasonable implementation period once the final regulations are approved to allow the electrical corporations to adapt their internal processes to comply with the new rules. SCE requests that stakeholder meetings among Energy Safety and the electrical corporations be held during this implementation period, so that requirements can be clarified and compliance issues avoided.

³³ Section 29302(a)(4), Proposed Regulations, p. 8 (emphasis added).

CONCLUSION

SCE appreciates the opportunity to submit its comments on Energy Safety's Notice and Proposed Regulations.

Sincerely,

//s//

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VP Regulatory Policy
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September 8, 2021

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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,

/s/ Laura M. Fulton

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Re: **Office of Energy Infrastructure Safety Adoption of Emergency Rulemaking Action Process and Procedure Regulations: Notice of Proposed Emergency Action 2021 Emergency Rulemaking Docket 2021-RM**

Dear Office of Administrative Law:

Pacific Gas and Electric Company (“PG&E”) submits the following comments in response to the second set of proposed Rules of Practice and Procedure from the Office of Energy Infrastructure Safety (“OEIS”), which were submitted to the Office of Administrative Law (“OAL”) on September 3, 2021 under the emergency rulemaking protocol. These comments are being submitted to both the OEIS and the OAL in accordance with Government Code Section 11349.6 and 1 California Code of Regulation (“CCR”) § 55. Pursuant to 1 CCR § 55(b)(4), PG&E is electronically submitting these comments to the OEIS in the manner instructed by the OEIS in its Notice of Proposed Emergency Action.

INTRODUCTION

Governor Gavin Newsom signed Assembly Bill 111 and established the OEIS within the Natural Resources Agency on July 12, 2019. AB 111 provided that, on July 1, 2021, the OEIS would become the successor to, and be vested with, all of the duties, powers, and responsibilities of the Wildfire Safety Division (“WSD”), a division of the California Public Utilities Commission (“CPUC”).¹ Prior to July 1, 2021, the WSD has been charged with reviewing, approving, or denying the wildfire mitigation plans (“WMPs”) submitted by electrical corporations as part of a coordinated effort to reduce the risk of ignition of wildfires from utility infrastructure.² Pursuant

¹ See also Govt. Code § 15475.

² See Pub. Util. Code §326; see also Govt. Code § 8386.1.

to Energy and Infrastructure Safety Act Section 15475.6, the OEIS was instructed to use the CPUC’s Rules of Practice and Procedure until the new agency adopted its own set of rules, so as to provide the OEIS with a smooth transition and functioning rules in this interim period.

On July 6, 2021, the OEIS provided notice that it intended to submit proposed emergency regulations on July 13, 2021, in accordance with Government Code Section 11346.1. These proposed regulations were eventually submitted to the OAL on July 26, 2021 and PG&E, Southern California Edison Company, and San Diego Gas & Electric Company each provided comments on this first set of emergency regulations. However, the OEIS withdrew these proposed regulations on August 4, 2021, the day before the OAL was statutorily required to approve or deny the proposed regulations.

On August 26, 2021, the OEIS provided notice that it intended to submit a second set of proposed emergency regulations to the OAL on September 3, 2021 and proceeded to submit the proposed regulations to the OAL on that date.

PG&E commends the OEIS on its effort to advance rules and regulations to ensure clear processes when collaborating with utilities on wildfire mitigation work. We share OEIS’s goal of eliminating the threat of catastrophic wildfires and welcome OEIS’s engagement. However, PG&E offers the following comments to help improve certain specific aspects of the proposed regulations.

Additionally, PG&E suggests that OEIS provide a reasonable amount of implementation time to allow the utilities to adapt to the proposed emergency rules and to allow them to create internal processes to comply with the new rules.

Section Number	Comments
§ 29200 – Confidential Information	The proposed confidentiality process remains overly burdensome. There will be significant overlap between documents submitted to the OEIS and the CPUC. PG&E recommends that the OEIS follow the confidentiality process used by the CPUC set forth in CPUC General Order No. 66-D to maximize efficiency and minimize confusion.
§ 29201 – Disclosure of Confidential Information	The proposed rule still does not adequately protect confidential information submitted to the OEIS. Subsection (a)(4) must clarify that the California Department of Forestry and Fire Protection (“CAL FIRE”), the California Energy Commission (“CEC”), and the CPUC will be required to keep confidential records from the OEIS confidential.
§ 29300 – Notifications	The newly proposed rules are vague, overbroad, and overly burdensome. The notification requirements should be limited to

Section Number	Comments
	faults or outages occurring within a one-mile vicinity of a wildfire that is 50 acres or greater in size. PG&E also recommends that the OEIS follow the Electric Incident Reporting process used by CPUC to promote efficiency and consistency in reporting.
§ 29301 – Incident Report	The proposed rule is still vague, overbroad, and overly burdensome. PG&E recommends that the OEIS follow the 20-day reporting process used by the CPUC and that utilities be expressly permitted to object to investigation information requests based on privilege.
§ 29302 - Investigations, Notices of Defects and Violations and Referral to the Commission	The proposed rule remains overbroad and potentially expands the authority of the OEIS. PG&E recommends that the proposed rule be amended to reiterate that OEIS investigations must be related to wildfire mitigation work and WMPs.
None	If adopted on an emergency basis, the newly proposed rules will become immediately effective without providing any time to allow the electrical corporations to implement the new rules, which, if not modified, will differ significantly from those of the CPUC and which are currently being used by the OEIS in an interim capacity. PG&E therefore recommends the OEIS allow a minimum of 60 days for the implementation of the new rules, which will require the creation of new internal protocols and procedures at the electrical corporations. Additionally, this implementation time would allow for joint sessions to be held between the utilities and OEIS to ensure there are no misunderstandings about the new rules.

SECTION 29200 – CONFIDENTIAL INFORMATION

PG&E again notes that the proposed confidentiality process—which was only minimally altered in this second set of comments—is unnecessarily burdensome given the vast amount of information and exceedingly short time frames in which to respond to data requests.

The second set of proposed rules again require that all parties providing confidential information to the OEIS submit an application with a confidentiality declaration for review by the Deputy Director. In the declaration, the parties must: identify the specific confidential information; state how long the information should be kept confidential; discuss how the Public Records Act or other laws allow the OEIS to keep the information confidential; identify any specific trade secrets or competitive advantages that would be lost by production of the confidential information; describe why any critical infrastructure information is confidential; state whether

the information could be disclosed in the aggregate or with certain portions masked; and explain how the information is currently kept confidential and if it has been produced previously.³ Following the submission, the Deputy Director would have thirty days to determine if the application for confidential declaration should be granted, followed by a review process.⁴

This process remains overly burdensome and not well suited for the WMP-related proceedings. The OEIS based the proposed confidentiality application process on the process used to submit confidential information to the CEC.⁵ That process is not ideal for the wildfire mitigation proceeding because utilities submit a limited amount of confidential information to the CEC. On the other hand, the utilities are generally required to submit a significant number of documents and tables containing confidential information to the OEIS as part of quarterly reporting obligations and in response to other compliance investigations. In addition, for the past two years, the utilities have been asked to respond to thousands of written discovery requests following the submission of their WMPs. The responses to these requests have been due in three business days. The CEC confidentiality process proposed by the OEIS is too cumbersome and time consuming to facilitate this level of information exchange efficiently.

PG&E recommends that the OEIS use the process established by the CPUC—and previously used by the WSD—for submission of confidential materials. In General Order 66-D, the CPUC adopted an effective process that still requires parties to designate the confidential portions of each document provided, specify the basis for confidentiality, and sign a declaration in support of the legal authority cited. However, the level of detail needed for each confidentiality declaration is less. The stakeholders to the wildfire mitigation proceeding have used this process effectively in connection with submission of the 2020 and 2021 WMPs. The additional benefit of using General Order 66-D is that it will allow the utilities to use the same standard for submitting documents to the OEIS and the CPUC. Previously, it has been very common for the utilities to have to submit similar materials to the CPUC and the WSD, given the role of each agency. If the OEIS uses a different standard for submission of confidential materials from the CPUC, the utilities will have to prepare separate confidentiality declarations to submit the same materials to the CPUC and the OEIS. This will increase the likelihood of potential errors for similar submissions and will be overly burdensome.

SECTION 29201 - DISCLOSURE OF CONFIDENTIAL INFORMATION

In the second proposed regulations, the OEIS again states that it may disclose confidential information it receives to “other governmental bodies that need the records to perform their official functions and that agree to keep the records confidential and to disclose the records only to those employees or contractors whose agency work requires inspection of the records.”⁶ At

³ 14 CCR § 29200(a).

⁴ 14 CCR § 29200(c).

⁵ See 20 CCR § 2505.

⁶ 14 CCR § 29201(a)(3).

the same time, the OEIS states that it may share confidential information “with the California Department of Forestry and Fire Protection, California Energy Commission, and California Public Utilities Commission...without the need for an interagency agreement.”⁷

PG&E recognizes that the OEIS may need to share documents with confidential information with other agencies like CAL FIRE, the CEC, and the CPUC to fulfill its duties. However, the proposed regulations are ambiguous as to whether the three identified agencies will be required to keep the records confidential, especially if no interagency agreements are executed. PG&E is regularly asked to produce documents with confidential customer, employee, critical infrastructure, or trade secret information in connection with the wildfire mitigation proceeding. Therefore, it is crucial that the OEIS confirm that all agencies receiving confidential information from it agree to keep the information confidential prior to transmission.

PG&E recommends that the proposed regulations be amended to clarify that CAL FIRE, the CEC, and the CPUC will be required to confirm they will keep all confidential information received from the OEIS confidential. The OEIS should provide electrical corporations notice when submitting confidential information to other agencies. We also recommend that the OEIS finalize a memorandum of understanding with the CPUC to clarify the issue of sharing confidential information between agencies.⁸

SECTION 29300 – NOTIFICATION

The “notification” section of the second set of proposed rules is substantially different from the first set but again suffers from being vague, overbroad, and overly burdensome. 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.⁹ Additionally, a utility must notify OEIS within four hours of receiving notice that infrastructure that it owns or operates is being investigated by a governmental agency for involvement in potentially causing an ignition.¹⁰

A. Notifications for Faults, Outages, or Other Anomalies

The requirement that a utility notify OEIS within 12 hours of observing “a fault, outage, or other anomaly” on its infrastructure within the vicinity of a fire is ambiguous, overbroad, and overly

⁷ 14 CCR § 29201(a)(4).

⁸ Govt. Code § 15476 states that the CPUC and the OEIS “shall enter into a memorandum of understanding to cooperatively develop consistent approaches and share data related to electric infrastructure safety....”

⁹ 14 CCR § 29300(a)(1)-(2).

¹⁰ 14 CCR § 29300(b).

burdensome, even with the limitation that the fire must require a response from a fire suppression agency. First, the term “anomaly” is largely subjective and should be defined, or at least have some limiting parameters set. Second, this requirement is not limited to wildfires, nor is it limited to fires of any particular size or scope, meaning that it will be repeatedly and frequently triggered by incidents which have no relation to the OEIS’s mission to drive “utility-related wildfire risk reduction for the State of California.”¹¹ For example, urban and suburban kitchen or garage fires regularly occur in PG&E’s service territory and regularly require the deenergization of PG&E infrastructure. A notification requirement that encompasses these types of residential fires would not be beneficial for either the electrical corporations or the OEIS. Therefore, PG&E proposes limiting this notification requirement to faults or outages that occur within a one-mile vicinity of a wildfire that is 50 acres or greater in size. Additionally, this requirement should be restored to the 24-hour timeline set out in the previous proposed rules, rather than the abbreviated 12-hour timeline of the newly proposed rules. There is no benefit to requiring utilities to report this information to the OEIS in the middle of the night to meet this 12-hour notification requirement.

Furthermore, the OEIS arguably does not have the statutory authority to issue this broad notification requirement. The OEIS is the successor to, and vested with, all the duties, powers, and responsibilities of the WSD. The primary responsibility of the WSD has been to review and oversee compliance of the utilities’ WMPs.¹² This newly proposed notification requirement goes well beyond the wildfire mitigation efforts set forth in the electrical corporation WMPs to include any fault, outage or “anomaly” occurring in the vicinity of any type of fire, including non-wildfires, and whether caused by the utility or not.

B. Notifications for Wildfire Threats

The proposed 12-hour notification requirement for wildfire threats, like the previously proposed 24-hour notification requirement before it, is unclear. Most importantly, the term “wildfire threat” remains undefined and can cause confusion, despite the addition of language that the threat must be one “requiring a response from a fire suppression agency.”¹³ It remains unclear what constitutes a “threat” and when exactly infrastructure would be in “danger.” Therefore, as with the previous notification requirement, PG&E recommends adding language restricting this notification requirement to wildfires that are 50 acres or greater in size, and that encroach within one mile of PG&E’s infrastructure. Additionally, this notification requirement should also be returned to the previous 24-hour requirement, as there is no benefit to the OEIS to require reporting deadlines in the middle of the night.

The newly proposed notification requirement also remains overly burdensome. As indicated in the 2021 WMP, over half of PG&E’s service territory lies in Tier 2 and 3 High Fire Threat

¹¹ See <https://energysafety.ca.gov/>.

¹² See e.g. Pub. Util. Code, § 326(a)(1)-(3).

¹³ 14 CCR § 29300(a)(2).

Districts (“HFTDs”), and changes in weather patterns have increased the threat of fire over the past decade.¹⁴ Reporting all undefined “wildfire threats” to any electrical facility—even limiting it to those investigated by a fire suppression agency—within 12 hours would be incredibly time consuming, and difficult to accomplish, especially during the fire season. The proposed notification requirement may also distract from an electrical corporation’s need to quickly respond in the field to simultaneous wildfire threats.

Lastly, as discussed in the section above, the OEIS may be exceeding its statutory authority if it enacts this overly broad notification requirement. This notification requirement would extend beyond reviewing and overseeing the utilities’ wildfire mitigation work and include wildfire threats caused by circumstances unrelated to electrical infrastructure (e.g. lightning, human interactions, or other weather conditions).

C. Notification for Governmental Agency Investigations

The newly proposed rules requiring a utility to notify the OEIS within four hours of receiving notice that it is being investigated by a governmental agency for potentially causing a fire are overly burdensome and unnecessarily differ from the requirements imposed by the CPUC.

In lieu of the proposed 4-hour notification requirement relating to governmental agency investigations, PG&E recommends that the OEIS look to the thresholds set by the CPUC for reporting electric incidents described in D.98-07-097 for guidance. 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. PG&E suggests that the OEIS use the same thresholds for determining when an electrical corporation is required to report investigations into HFTD ignitions that are attributable, or allegedly attributable to electric utility facilities. This will promote efficiency and reduce possible duplication of work.

D. Proposed Language for Section 29300 – Notification

Based upon the above recommendations, PG&E proposes, at a minimum, adding the following language to Section 29300:

- (a) A regulated entity shall notify the Office within ~~12~~ 24 hours of observing:
 - (1) A fault, ~~or outage, or other anomaly~~ on infrastructure it owns or operates occurring within ~~the a one-mile~~ vicinity of a 50 acre or greater wildfire requiring a response from a governmental fire suppression agency; or

¹⁴ 2021 Revised WMP, p. 3.

- (2) A wildfire threat that poses a danger to infrastructure it owns or operates requiring a response from a governmental fire suppression agency.
 - (i) For a fire to be considered a wildfire threat under this provision it must be at least 50 acres in size.
 - (ii) For a fire to be deemed to pose a danger to infrastructure under this provision it must encroach within one mile of that infrastructure.
- (b) A regulated entity shall notify the Office within two hours of receiving notice during business hours, or four hours of receiving notice outside business hours, that an electric incident occurred in a high fire threat district that is attributable, or allegedly attributable, to electric utility facilities, and in which any of the following occurred: infrastructure that it owns or operates is being investigated by a governmental agency for involvement in potentially causing an ignition.
 - (1) A fatality or injury requiring overnight hospitalization;
 - (2) Damage to property of the utility or others in excess of \$50,000;
 - (3) Significant public attention or media coverage.

SECTION 29301 – INCIDENT REPORT

The OEIS proposes that utilities be required to submit an incident report within 30 days “in the event that an ignition may have been started by the infrastructure owned or operated by a regulated entity.”¹⁵ The incident report would include: any factual or physical evidence related to the incident including photographs; witness information; a preliminary root cause analysis; actions taken to prevent recurrence of the incident; the identification of all incident documents; and any other information the OEIS may require.¹⁶ Electrical corporations would be required to preserve all incident evidence and documents for at least five years.¹⁷

The incident report proposal should be modified because it is overbroad and burdensome. Under the drafted regulation, electrical corporations may be required to file an incident report for every ignition, of any size, in any part of their service territory when the electrical corporation “suspects an ignition to have been started” by their infrastructure. It is unclear what standard should be used to determine if an ignition is suspected “to have been” started by electric facilities. Also, ignition investigations often take a significant amount of time to complete. It is common for agencies like CAL FIRE to collect physical evidence during their investigations for testing and evaluation. Thus, electrical corporations may not have access to the materials they

¹⁵ 14 CCR § 29301(a).

¹⁶ *Id.*

¹⁷ *Id.*

need to complete a root cause analysis for months or longer. For this reason, it can be difficult to create a detailed corrective action plan to prevent recurrence within 30 days. The OEIS has also provided no explanation for what types of “other information” it may require in the proposed incident reports.

The proposed regulations should also be modified because they do not recognize the right to object to the production of certain documents and information in the incident reports. The OEIS proposes that electrical corporations produce all documents relating to each incident, preliminary root cause analyses, and extensive witness information. However, some of that information may be protected from discovery under the attorney-client privilege and work product doctrine. The proposed regulations should recognize that electrical corporations do not waive these important rights by filing an incident report.¹⁸

PG&E is also deeply concerned about the requirement that electrical corporations produce a root cause analysis within 30 days.¹⁹ Even if this root cause analysis is described as “preliminary,” it still requires the utility to include a “detailed discussion of all findings.”²⁰ Producing a root cause analysis, which includes a detailed determination of all findings, can take several months and requires extensive input and support from field personnel. It is not reasonable to require this type of detailed analysis within 30 days.

Finally, the proposed regulation should be modified because it overlaps, and potentially interferes with, the CPUC’s reporting requirements for ignitions. As indicated in the Section 29300 – Notification analysis above, electrical corporations are required to report electric incidents to the CPUC that are attributable, or allegedly attributable, to electric utility facilities that are found to meet certain criteria, as described in D.98-07-097. Within twenty business days of the incident, the utility must provide:

A written account of the incident which includes a detailed description of the nature of the incident, its cause and estimated damage. The report shall identify the time and date of the incident, the time and date of the notice to the Commission, the location of the incident, casualties which resulted from the incident, identification of casualties and property damage. The report shall include a description of the utility's response to the incident and the measures the utility took to repair facilities and/or remedy any related problems on the system which may have contributed to the incident.²¹

¹⁸ The language of CPUC General Order 95, Rule 17 is instructive. In that General Order relating to accident investigations, the CPUC has stated the following: “Nothing in this rule is intended to extend, waive, or limit any claim of attorney client privilege and/or attorney work product privilege.”

¹⁹ 14 CCR § 29301(b)(3).

²⁰ *Id.*

²¹ D.98-07-097, Appendix B.

To prevent duplicative work for agencies with slightly different reporting requirements, PG&E strongly suggests that the OEIS follow the reporting requirements of the CPUC set forth above and collect 20-day reports from the utilities for all reportable ignitions as described in D.98-07-097. This is preferred because the CPUC is the primary agency responsible for investigating electrical incidents, including ignitions, in California. The 20-day report should provide enough information to the OEIS to allow it to determine if there is a connection between a fire and any of the initiatives described in the utilities' WMPs or if additional discovery is needed.

However, if the OEIS is unwilling to standardize its reporting requirements with those of the CPUC, PG&E proposes, at a minimum, the following revisions to Section 29301:

- (a) In the event that a regulated entity or fire investigation agency suspects reasonably believes an ignition to have been started by the infrastructure owned or operated by a regulated entity, the entity shall submit an incident report within 30 days of the incident.
- (b) The incident report shall contain the following information, to the extent known:
 - (1) Any factual or physical evidence related to the incident including, but not limited to, photographs of the relevant area.
 - (2) The name and contact information of any known witnesses.
 - (3) A preliminary root cause analysis, including a preliminary detailed discussion of all findings to date. If the entity does not have sufficient information to produce a preliminary root cause analysis within 30 days, the entity will provide an explanation as why it is unable to comply with this requirement and what additional information needs to be obtained.
 - (4) A description of all actions taken to minimize the recurrence of such incidents.
 - (5) The name and contact information of any person or entity that has taken possession of any physical evidence removed from the site of the incident.
 - (6) Identification of all documents related to the incident.
 - (7) Any other information that the Office may require and that the entity can reasonably obtain within the 30-day time period.
 - (8) Incident reports shall not include information protected from discovery under any applicable privileges, including the attorney-client privilege or the attorney work product privilege.
- (c) Each entity shall preserve all documents or evidence it collects as part of its incident investigation for at least five years and shall make the document available upon request by the Director or a Director's designee.

SECTION 29302 - INVESTIGATIONS, NOTICES OF DEFECTS AND VIOLATIONS AND REFERRAL TO THE COMMISSION

In the second proposed regulations, the OEIS again states that the Director may designate investigators to investigate: whether an approved WMP was followed; whether failure to follow a WMP contributed to the cause of a wildfire; whether the regulated entity is noncompliant with

its duties and responsibilities or has otherwise committed violations of any laws, regulations, or guidelines within the authority of the Office; and other related investigations requested by the Director.²²

California law does not give the OEIS the broad authority to investigate whether an electrical corporation was “noncompliant with its duties and responsibilities or has otherwise committed violations of any laws, [or] regulations.” As indicated above, under Public Utilities Code Section 326, the WSD has been responsible for reviewing, and overseeing compliance with, the WMPs. This same authority has been extended to the OEIS. However, the authority does not encompass investigations into utility compliance with all other laws or regulations implemented by other agencies that do not relate to wildfire mitigation work. The CPUC has already empowered its Safety and Enforcement Division (“SED”) to perform electric safety audits and conduct incident investigations, including wildfires. If the proposed regulations are implemented, it is likely that the SED and the OEIS will be performing simultaneous investigations into the same incidents. This creates the potential for inconsistent rulings and findings, and it duplicates the efforts of governmental agencies and utilities.

PG&E suggests that the proposed investigation rules be amended to reiterate that OEIS investigations are to be related to wildfire mitigation work and the WMPs submitted by electrical corporations. This will help avoid duplicative investigations by State agencies and allow parties more time to investigate reportable incidents. Thus, at a minimum, PG&E suggests the Section 29302, subsection (a) of the proposed rules be amended as follows:

- (a) The Director may designate investigators to investigate the following:
 - (1) Whether an approved Wildfire Mitigation Plan was followed;
 - (2) Whether failure to follow the Wildfire Mitigation Plan contributed to an ignition;
 - (3) Whether the regulated entity is noncompliant with its duties and responsibilities related to wildfire mitigation work or has otherwise committed violations of any laws, regulations, or guidelines related to wildfire mitigation work and within the authority of the Office; and
 - (4) Other wildfire mitigation related investigations within the authority of the Office, as requested by the Director.

IMPLEMENTATION TIME TO ALLOW FOR COMPLIANCE

Given that these proposed rules of practice and procedure differ substantially from those of the CPUC, if adopted without modification, PG&E requests that the OEIS provide an implementation period of at least 60 days to allow the utilities to adapt their internal processes to comply with the new rules once they are adopted. PG&E is concerned that despite its best efforts, it will be unable to develop internal protocols to comply with the new rules in the limited amount of time provided by the emergency rulemaking process. PG&E proposes that as part of

²² 14 CCR § 29302(a).

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this implementation period, that joint sessions be held among the utilities and the OEIS to ensure that there were no misunderstandings about the specifics of what is required under the new rules.

CONCLUSION

PG&E commends the OEIS for its effort to advance rules and regulations to ensure clear processes when collaborating with utilities on wildfire mitigation work. PG&E respectfully submits these comments and looks forward to working with the OEIS to promote wildfire safety going forward.

If you have any questions, please do not hesitate to contact me.

Very truly yours,

/s/ Meredith Allen

Meredith Allen

MA/aps



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December 1, 2021

BY EMAIL

Caroline Thomas Jacobs
Director, Office of Energy Infrastructure Safety
California Natural Resources Agency
715 P Street, 20th Floor
Sacramento, CA 95814

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.



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03/07/2022

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SUBJECT: Office of Administrative Law File Number 2022-0228-02EE
Joint IOU Comments Regarding Energy Safety's Proposed
Readoption of Emergency Regulations

Dear Director Thomas Jacobs and Office of Administrative Law Reference Attorney:

Pursuant to the February 17, 2022 Notice of Readoption of Emergency Rulemaking Action¹ & California Government Code Section 11349.6(b) and 1 California Code of Regulations Section 55, Southern California Edison Company (SCE) hereby submits these comments on the proposed emergency action of the Office of Energy Infrastructure Safety (Energy Safety) on behalf of the investor-owned utilities: SCE, San Diego Gas & Electric Company (SDG&E), and Pacific Gas and Electric Company (PG&E) (collectively, Joint IOUs).

INTRODUCTION

The Joint IOUs appreciate the opportunity to comment on Energy Safety's Proposed Readoption of Emergency Regulations, submitted to the Office of Administrative Law (OAL) on February 28, 2022. Energy Safety seeks Readoption of all the Emergency Regulations currently in effect except for Cal. Code Regs. tit. 14, Sections 29000, 29001,

29103, and 29201.¹ SCE, SDG&E and PG&E previously provided comments on the Emergency Regulations—though SCE, SDG&E and PG&E continue to support those comments they will not be reiterated here. Rather, these comments from Joint IOUs are based on their experience implementing the emergency regulations since they were adopted by OAL. This experience has revealed opportunities to clarify and improve the regulations, particularly for Sections 29200, 29201 and 29300.

I. Section 29200, “Confidential Information”

Joint IOUs have the following comments, organized by subsection, regarding Section 29200 based on “lessons learned” implementing this Emergency Regulation.

Section 29200(a)(6)(C) requires that applicants for confidentiality designations based on critical energy infrastructure information (CEII) state “whether the information has been voluntarily submitted to the Office of Emergency Services as set forth in Government Code section 6254(ab).”² Government Code Section 6254 establishes that such information may be protected from disclosure, so Joint IOUs are not clear why this is useful for the application. Further, it may not be readily apparent to Joint IOUs in some cases whether information was voluntarily submitted to the Office of Emergency Services. Therefore, this requirement creates an unnecessary burden, particularly given the 3-day data request response requirement and Joint IOUs request that it be removed.

Section 29200(a)(6)(D) requires that CEII applicants state “whether the information or substantially similar information was classified as protected critical infrastructure information by the Department of Homeland Security or Department of Energy.”³ Joint

¹ Office of Energy Infrastructure Safety, (February 17, 2022). Notice of Readoption of Emergency Rulemaking Action. Retrieved from <https://efiling.energysafety.ca.gov/Lists/DocketLog.aspx?docketnumber=2022-RM>

² 14 CCR § 29200(a), (6) & (C): “Any private third party giving custody or ownership of a record to the Office shall specify whether the record should be designated a confidential record and not publicly disclosed. An application for confidential designation shall...if the applicant believes that the record should not be disclosed because it contains critical energy infrastructure information, state...whether (C) whether the information has been voluntarily submitted to the Office of Emergency Services as set forth in Government Code section 6254(ab)”; Cal. Gov. Code § 6254(ab): “Critical infrastructure information, as defined in Section 131(3) of Title 6 of the United States Code, that is voluntarily submitted to the Office of Emergency Services for use by that office, including the identity of the person who or entity that voluntarily submitted the information. As used in this subdivision, “voluntarily submitted” means submitted in the absence of the office exercising any legal authority to compel access to or submission of critical infrastructure information. This subdivision shall not affect the status of information in the possession of any other state or local governmental agency.”

³ 14 CCR § 29200(a), (6) & (D): “Any private third party giving custody or ownership of a record to the Office shall specify whether the record should be designated a confidential record and not publicly disclosed. An application for confidential designation shall...if the applicant believes that the record should not be disclosed because it contains critical energy infrastructure information, state...whether the information or substantially similar information was classified as protected critical infrastructure information by the Department of Homeland Security or Department of Energy.”

IOUs have found it difficult to determine this, and are unaware of any practical means of implementation. Further, while it may be of interest, it is not necessary to demonstrate information is CEII and creates an unnecessary burden, particularly given the 3-day data request response requirement.

II. Section 29201, “Disclosure of Confidential Information”

Joint IOUs appreciate Energy Safety’s decision not to seek readoption of Section 29201, “Disclosure of Confidential Information”. Joint IOUs previously commented that this regulation was problematic in that it permitted circulation of confidential material to other agencies beyond Energy Safety without notice to the party designating the material as confidential, and at a minimum, requested notice when confidential information was shared with other parties.⁴ Joint IOUs appreciate Energy Safety’s decision to not seek readoption of this emergency regulation.

III. Section 29300, “Notification”

Section 29300 provides as follows: “Notification. (a) A regulated entity shall notify the Office 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. (b) A regulated entity shall notify the Office within four hours of receiving notice that infrastructure that it owns or operates is being investigated by a governmental agency for involvement in potentially causing an ignition.”⁵

Joint IOUs appreciate the clarification provided by Energy Safety that this provision requires notification of only that information known to regulated entities within the prescribed 12-hour period.⁶ In implementing this requirement, however, Joint IOUs have on occasion experienced challenges determining within 12 hours whether there has been a fire suppression agency response. In addition, providing the level of detail required by Energy Safety within the 12-hour notification period has required a significant amount of employee time consistent with previous comments regarding burdensomeness of implementation. For these reasons, Joint IOUs request that the 12-hour Notification

⁴ See PG&E Comments on 9-3-21- OEIS Rules and Regulations, pp. 4-5 (docketed September 8, 2021); SCE Comments on OEIS Proposed Emergency Process and Procedure Regulations, pp. 8-9 (docketed September 8, 2021); and SDG&E Second Comments OEIS Proposed Regulations, pp. 3-5 (docketed September 8, 2021). All available at: <https://efiling.energysafety.ca.gov/EFiling/DocketInformation.aspx?docketnumber=2021-RM>.

⁵ 14 CCR § 29300.

⁶ Energy Safety Notification & Reporting Guidance (docketed November 4, 2021). Available at <https://efiling.energysafety.ca.gov/Lists/DocketLog.aspx?docketnumber=2021-RM>.

period be extended to a single business day to allow for more practical implementation by the IOUs and to improve the quality of information that will be received by Energy Safety.

CONCLUSION

The Joint IOUs appreciate the opportunity to provide these comments.

If you have any questions, or require additional information, please contact me at Shinjini.Menon@sce.com.

Sincerely,

//s//

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BY EMAIL AND OEIS E-FILING

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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.

