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Rachel Peterson, Executive Director
California Public Utilities Commission
505 Van Ness Avenue
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Re: TURN and Cal Advocates Comments in Opposition to Draft Resolution SED-5 Adopting the Administrative Consent Order and Agreement Between SED and SCE Relating to 2017 and 2018 Wildfires

Dear Executive Director Peterson:

On November 2, 2021, the California Public Utilities Commission (Commission) issued Draft Resolution SED-5 that would approve an "Administrative Consent Order" proposed by the Commission's Safety and Enforcement Division (SED) and Southern California Edison Company (SCE) regarding the 2017/2018 Southern California wildfires associated with SCE's operations. The Administrative Consent Order represents a proposed settlement between SED and SCE that purports to resolve all issues related to SED's investigation of the 2017/2018 wildfires ignited by SCE equipment. Pursuant to Rule 14.5 of the Commission's Rules of Practice and Procedure and the instructions that accompanied the draft resolution, The Utility Return Network (TURN) and the Public Advocates Office at the California Public Utilities Commission (Cal Advocates) submit these comments on Draft Resolution SED-5.

TURN and Cal Advocates urge the Commission to reject the proposed Administrative Consent Order. Instead, it should open an OII or other appropriate investigative proceeding that would enable meaningful opportunities for other interested parties to fully participate in the record development and decision-making process, and position the Commission to engage in a fuller consideration of the underlying events and the reasonableness of any proposed settlement regarding penalties or other sanctions associated with the 2017/2018 wildfires.

I. The Determination of Fines and Penalties for a Catastrophic Wildfire Is Not Appropriate For The New Administrative Informal Consent Order Process.

A. Resolution M-4846 Recognized Some Circumstances Still Warrant an OII Rather Than Informal Resolution; The Utility-Ignited Catastrophic Wildfires At Issue Here Represent Such Circumstances.

The proposed settlement purports to resolve violations related to the 2017/2018 wildfires using the new processes outlined in the Commission Enforcement and Penalty Policy (Enforcement Policy) adopted in Resolution M-4846 issued November 6, 2020.[1] The new resolution adopted a more streamlined and structured approach to addressing utility violations for certain matters **not requiring** a more formal Order Instituting Investigation (OII) proceeding.[2] An important element of Resolution M-4846 is its express recognition that there will still be incidents that warrant issuing an OII and, therefore, would be inappropriate for the less formal review processes of the new Enforcement Policy.[3]

In the Enforcement Policy itself (attached to Resolution M-4846), the Commission identified a number of factors that should be considered in determining whether to recommend an OII rather than one of the new less formal alternatives. The factors for an OII include (but are not limited to) the alleged violations having "caused fatalities, substantial injuries, and/or involved significant property damage in a widespread area."[4] Unfortunately, there can be no dispute that the 2017/2018 Wildfires in SCE's service territory met those criteria.

- The proposed settlement would include the Thomas Fire of 2017, an event that caused two fatalities tied to the fire itself and an additional twenty-three fatalities from the related mudslides that occurred in the Montecito area, in addition to damaging or destroying over 1,200 structures, and burning 281,000 acres.[5]
- It would also cover the Woolsey Fire of 2018, which resulted in three fatalities, damage to or destruction of approximately 2,000 structures, and nearly 100,000 acres burned.[6]

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[1] *See*, https://docs.cpuc.ca.gov/PublishedDocs/Published/G000/M350/K405/350405017.PDF

[2] Resolution M-4846, p. 3.

[3] *Id.*, p. 3 and Attachment, pp 10-11 and 13-14.

[4] *Id.*, Attachment, p. 13.

[5] https://www.latimes.com/local/lanow/la-me-ln-thomas-fire-edison-cause-20190313-story.html

[6] https://www.fire.ca.gov/incidents/2018/11/8/woolsey-fire

Remarkably, the Administrative Consent Order that SCE and SED ask the Commission to adopt here (including the listed "Stipulated Facts Relevant to the 2017-2018 Southern California Wildfires" in Appendix A of the order) makes no mention of the fatalities, no mention of the mudslides that occurred after the Thomas Fire, no mention of the damaged and destroyed home and businesses, no mention of the acres burned, or any of the other serious damage and harm caused by these two wildfire events.[7] Rather than explain how the new process is appropriate in light of the severity of the losses and damages caused by these wildfires, SCE and SED completely ignore the question.

Finally, in Resolution M-4846 the Commission made clear it did not intend for the new process to restrict use of OIIs or other enforcement tools currently used for enforcement purposes, stating "[t]hese tools remain unaltered by this resolution."[8] Instead, the Commission specifically referenced the "staff-level actions to correct behavior before more serious action is needed," and described the new Enforcement Policy as seeking "to provide more structure around those tools by consolidating and identifying a uniform set of staff level enforcement actions."[9] The Commission's attempt to provide further structure to such staff level actions should not be implemented as if the agency intended to extend staff level actions to utility-ignited catastrophic wildfires, nearly all of which have been the subject of a formal OII proceeding.[10]

In sum, the Commission should recognize that the new Enforcement Policy is intended to provide mechanisms that might permit less formal resolution of enforcement actions "in situations not currently covered by an existing citation program or warranting an OII."[11] The 2017-2018 Southern California wildfires, and particularly the Thomas and Woolsey Fires,

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[7] Proposed Administrative Consent Order and Agreement, between SCE and SED for the 2017/2018 Wildfires, Appendix A, pp. A-2 to A-4.

[8] Resolution M-4846, p. 2.

[9] *Id.*, pp. 2-3.

[10] The San Diego Gas & Electric Company was subject to I.08-11-007 after the 2007 Witch/Rice and Guejito Wildfires. PG&E was subject to I.19-06-015 for the 2017 and 2018 wildfires as well as three OIIs for the San Bruno natural gas disaster (I.12-01-007; I.11-02-016; and I. 11-11-009). The only recent catastrophic event, identified as caused by utility infrastructure, that TURN and Cal Advocates are aware of that has not been the subject of an OII is Pacific Gas and Electric Company's (PG&E) 2015 Butte Fire.

[11] Resolution M-4846, p. 3.

warrant an OII. Therefore, the Commission should reject the proposed draft resolution and the associated SED-SCE settlement, and instead initiate an OII in these matters.

B. The Recent Experience With The OII Process In Reviewing PG&E's 2017-2018 Wildfires Demonstrates The Value Of Providing Parties Other Than SED and SCE With Meaningful Opportunities to Participate and Challenge the Settlement.

The Commission's process for considering and adopting penalties or sanctions associated with the 2017-2018 wildfires attributed to SCE's operations should, at a minimum, follow the general pattern of the review conducted of the 2017-2018 wildfires associated with PG&E. In I.19-06-015, the Commission considered PG&E's role in 2017 and 2018 wildfires that occurred in its service territory. There, the OII was accompanied by SED's reports on the 2017 wildfires;[12] the staff's report on the 2018 Camp Fire was issued while the OII proceeding was underway, and the scope of the proceeding was expanded to include consideration of issues concerning that fire.[13]

The OII proceeding provided an opportunity for all active parties to meaningfully participate in the review of PG&E's actions, and to weigh in on the appropriate fines, penalties, disallowances or other measures that should be imposed on PG&E. Even with a procedural schedule truncated in order to accommodate PG&E's simultaneous bankruptcy review, active parties had substantial opportunities to obtain information needed to fully consider and analyze the underlying events and any proposed outcome. As the decision describes, those opportunities were largely in the form of participating in the extensive settlement discussions among the active parties.[14] The settlement meetings were often half-day or all-day events and took place over the course of several months. TURN and Cal Advocates know through their experience that the process that took place, while somewhat abbreviated due to the bankruptcy overlay, was essential to the development of the Commission's understanding of the underlying events and the elements of the proposed settlement. The deeper understanding of the facts of the investigations provided by participating in settlement discussions enabled TURN and Cal Advocates to provide

[12] D.20-05-019, p. 4.

[13] *Id.*, pp. 6-7.

[14] D.20-05-019, p. 7 ["Since the PHC, the parties have met bilaterally or multilaterally over thirty times … regarding settlement efforts."]

comments and other materials that the Commission found useful in their reviews of the proposed settlement, as evidenced by the modifications made to bring the proposed settlement in line with achieving a reasonable outcome that promoted the public interest.

Ultimately, the Commission determined in the PG&E wildfire OII that the "penalties set forth in the proposed settlement agreement [were] inadequate [in part because] PG&E may not otherwise have received ratepayer recovery for a substantial amount of the costs…and…can be expected to receive significant tax savings associated with the financial obligations."[15] The Commission "increase[d] the financial obligations to be imposed on PG&E by another $462 million" and required that any tax savings "be returned for the benefit of ratepayers."[16] As is more fully discussed in a following section, the SCE-SED proposed settlement here includes elements similar to those the Commission modified in the PG&E case, such as relying on "disallowances" that represent the utility giving up the ability to recover costs that may not be eligible for rate recovery, and keeping any and all resulting tax savings for itself. The only material difference here is that SCE and SED have chosen a course that virtually eliminates any meaningful opportunity for interested parties to review the proposed outcome in any detail, or to develop alternatives for the Commission's consideration. In the case of the PG&E 2017 and 2018 wildfires, the Commission's decision-making process clearly benefited from the OII process, as evidenced by its determination that modifications were required in order to approve the PG&E-SED proposed settlement. The Commission should again rely on the OII process for purposes of resolving issues regarding SCE's role in the 2017-2018 wildfires in Southern California.

II. The Limited Information in the Proposed Administrative Consent Order Identifies a Number of Deficiencies Requiring Modifications.

In addition to the procedural and due process issues implicated by SCE's and SED's reliance on the new informal process rather than an OII, there are several substantive issues that appear on the face of the proposed Administrative Consent Order. TURN and Cal Advocates submit that each of these issues is a further reason for the Commission to reject the proposed

[15] D.20-05-019, p. 32; *see also* Findings of Fact 15-27.

[16] *Id.*, pp. 33-34; *see also* Ordering Paragraph 1.

draft Resolution and instead initiate an OII for the review of the circumstances associated with the 2017-2018 wildfires.

A. The Black Box Nature Of The Agreement Is Insufficient To Allow Commission Approval.

Under the heading "General Considerations for Settlement," the proposed Administrative Consent Order identifies four categories of general considerations identified in the new Enforcement Policy that must be evaluated as part of the Commission's review of the proposed settlement.[17] But SCE and SED failed to provide information that might enable the Commission or interested parties to evaluate how the identified general considerations influenced the development of the proposed settlement and resulted in terms the Commission might find reasonable. Instead, SCE and SED merely contend that they "explicitly considered these factors in their confidential settlement communications" and, based upon their own considerations, agreed that the amounts of penalties "are within the range of reasonable outcomes had the matters proceeded to formal litigation."[18]

There are at least two problems with the approach taken by SCE and SED in this regard. First, relying on the settling parties' declaration (absent sufficient supporting and detailed facts) that the proposed outcome is reasonable as a basis for the Commission's adoption or ratification of the proposed settlement would be an improper delegation of the Commission's authority. Such a determination of reasonableness is for the Commission to make, not the parties. TURN and Cal Advocates do not dispute that the Commission may delegate certain matters to staff for purposes of making an initial determination. However, the staff must provide the Commission with sufficient information to enable the Commission to reach its own conclusion regarding the reasonableness of the proposed outcome. Nor do any interested entities, such as TURN and Cal Advocates, who were not privy to the settlement discussions or any informal or formal discovery process, have a sufficiently meaningful ability to offer informed views as the reasonableness of the settlement. Mere assertions that the parties considered certain factors is inadequate – there

[17] Proposed Administrative Consent Order, p. 10, *citing* Resolution M-4846, Attachment, p. 15, Section III.B. of the new Enforcement Policy. The four factors include "1. Equitable factors; 2. Mitigating circumstances; 3. Evidentiary issues; and 4. Other weakness in the enforcement action that the division reasonably believes may adversely affect the ability to obtain the calculated penalty."

[18] *Id.*

needs to be a meaningful and well-supported demonstration of the basis for the proposed outcome.[19] And a failure to require more detailed information would lead to the conclusion that the Commission's delegation of authority here went beyond the degree that is permissible.

Second, the approach taken in the proposed Administrative Consent Order is the equivalent of a "black box" settlement. There is insufficient basis in the proposed resolution to establish what "the range of reasonable outcomes" might be, much less whether the agreed-upon outcomes fall within that range. As a result, the Commission is left without sufficient information to evaluate the merits of the agreed-upon figures. There may be circumstances in utility regulation where reliance on a "black box" approach might be acceptable or appropriate. But where, as here, the underlying matters include catastrophic wildfires that resulted in a multiple fatalities and billions of dollars of property loss, a "black box" approach is inadequate.

B. The $375 Million of "Permanent Disallowances" Could Well Have A Ratepayer Value of $0.

The proposed Administrative Consent Order describes $550 million of "fines, safety measures and disallowances." The vast majority of this figure is the $375 million of "third-party uninsured claims payments" for which SCE agrees to "permanently waive its right to seek recovery."[20] This element of the proposed settlement is very similar to the Catastrophic Event Memorandum Account (CEMA) costs that PG&E had agreed to forgo as part of its proposed settlement in the 2017-2018 wildfire OII. As the Commission stated there:

> the Commission agrees with the Opposing Parties that argue that PG&E's ability to recover all of the CEMA costs identified in the settlement is questionable. TURN observes that PG&E has not yet sought recovery of these costs. Moreover, in the past, the Commission has disallowed ratepayer recovery for costs related to fires caused by utility equipment where the Commission found that the utility did not reasonably manage and operate its facilities prior to the fire. [footnote reference omitted] On the other hand, … PG&E contests many of the violations related to the 2017 and 2018 fires. [¶] Given the substantial

[19] For example, the settlement agreement for PG&E's 2017 and 2018 wildfires included 141 stipulated facts spanning 28 pages, and a further 55 pages of exhibits, to allow parties and the Commission to assess the reasonableness of the proposed settlement. *Joint Motion of Pacific Gas and Electric Company (U 39 E), the Safety and Enforcement Division of the California Public Utilities Commission, Coalition of California Utility Employees, and the Office of the Safety Advocate for Approval of Settlement Agreement*, Exhibit A; and Attachments 1 through 13.

[20] Proposed Administrative Consent Order, pp. 4-5.

> uncertainty regarding the recoverability of the settled CEMA costs, the effective value of these disallowances is likely much lower than the stated [amount]. It is unclear whether the Settling Parties took into account the likelihood of recoverability of these costs. [footnote reference omitted] However, the Commission finds that this uncertainty must be taken into account when assessing whether the penalty is adequate.[21]

In 2017, the Commission disallowed rate recovery for third party uninsured claims payments related to fires caused by utility equipment, based on its determination that SDG&E had failed to demonstrate that it reasonably managed and operated its facilities associated with the fires.[22] TURN and Cal Advocates are unaware of any prior decision that authorized rate recovery of such third-party uninsured claims payments that arose from a utility-ignited wildfire. Thus, the uncertainty regarding the prospects for SCE recovering in rates any portion of the uninsured claims costs is quite substantial. And as a result, the Commission should expect that it would need to substantially increase the amount of the proposed disallowance, as it did in the PG&E OII decision.

C. The Proposed Administrative Consent Order Would Unreasonably and Inappropriately Prevent SED from Having Any Role In a Future Review of SCE's Request for Rate Recovery of Uninsured Claims.

If SCE files a cost recovery application formally seeking a reasonableness review of the wildfire claims costs recorded in its Wildfire Expense Memorandum Account (WEMA), SED's analysis of the alleged violations associated with those fires could play an important role in the Commission's determination of reasonableness. If the proposed Administrative Consent Order were adopted as written, the Commission would be deferring to a future reasonableness review the resolution of all disputed issues regarding any "fault, negligence, imprudence or violation with respect to the 2017/2018 Southern California Fires."[23] SCE would expressly retain its full ability to defend the prudency of its conduct in connection with those fires in a future cost

[21] D.20-05-019, pp. 38-39.

[22] D.17-11-033 and D.18-07-025 (in A.15-09-010). The Commission's decision rejecting SDG&E's claims was unsuccessfully challenged by SDG&E.

[23] Proposed Administrative Consent Order, p. 3.

recovery proceeding before the Commission.[24] SED, on the other hand, appears to be effectively prohibited from taking part or playing any meaningful role in any such future proceeding:

> SED shall not participate as a party in any future cost recovery proceeding about SCE's conduct related to the 2017/2018 Southern California Fires, nor shall it oppose any request by SCE to recover costs related to the 2017/2018 Southern California Fires in any future cost recovery proceeding.[25]

The Commission should find this term of the proposed agreement unreasonable. SED has special expertise in the investigation of such utility-ignited wildfire events, and could provide key information relevant to the Commission's determination of "fault, negligence, imprudence or violation" with respect to these fires. Absent the proposed agreement, there would be nothing to prevent SED from playing an appropriate role in such a future reasonableness review proceeding.[26] Under the terms of the proposed agreement, however, SED would be prohibited from participating in such a proceeding. The Commission must recognize this lopsided element of the settlement to be particularly inappropriate. Expressly preventing a division of the agency from using its knowledge and expertise for the benefit of the public interest is unlikely to ever be reasonable, and certainly is unreasonable under the circumstances here. The Commission should not allow its enforcement division to be subject to the equivalent of a gag order. Doing so would be an abdication of the Commission's responsibility under Public Utilities Code Section 451 to protect SCE's customers from unjust and unreasonable charges.

D. The Tax Treatment Under The Proposed Administrative Consent Order Is Unreasonable and Inconsistent With The Treatment Adopted for PG&E.

After listing three categories of fines, safety measures and disallowances that would constitute the penalty to SCE for the 2017-2018 Southern California Wildfires, the proposed

[24] *Id.*, p. 7.

[25] *Id.*

[26] The Commission should note that the proposed Administrative Consent Order submitted by PG&E and SED for the Kincade Fire (the subject of Draft Resolution SED-6) specifically acknowledges SED's ongoing ability to rely on violations alleged or identified in the staff's investigation of that fire for purposes of supporting future disallowances, violations or penalties should PG&E later seek rate recovery any third-party claims costs arising from the Kincade Fire. Proposed Administrative Consent Order from Draft Resolution SED-6, p. 6 of attached Settlement Agreement.

Administrative Consent Order claims that tax effects have been specifically considered and incorporated into the figures.

> The terms of the ACO reflect the Parties' integrated agreement inclusive of the anticipated tax treatment of the ACO Amounts. Having considered the potential tax treatment applicable to the ACO Amounts, the Parties expressly agree that the ACO Amounts are fair, just and reasonable without any adjustment to account for any tax benefits or liabilities that may be realized by SCE or its shareholders.[27]

SCE and SED contend that such treatment is consistent with D.21-09-026, and D.15-04-024. Notably omitted from their discussion is the contrary treatment adopted in D.20-05-019, the decision in the OII on the 2017-2018 wildfires in PG&E's service territory:

> In order for the penalties adopted in this decision to have the appropriate punitive and deterrent impact, ratepayers, rather than shareholders, should receive the benefit of any tax savings associated with these financial obligations, consistent with IRS rules.[28]

There is nothing in the proposed Administrative Consent Order that identifies the amount of estimated tax savings SCE would likely experience, even if those savings are limited to those associated with operating expenses and not capital expenditures.[29] And there is no explanation of why SCE and SED believe the outcomes adopted in the other proceedings should be controlling. Thus, there is not a sufficient basis for assessing the reasonableness of this element of the proposed Order.

III. Conclusion

For the for reasons set forth and supported in these comments, TURN and Cal Advocates urge the Commission to reject the draft resolution and instead issue an Order Instituting Investigation into the penalties and other remedies that should be imposed on SCE for the role its electrical and other facilities played in igniting wildfires in its service territory in 2017 and 2018.

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[27] Proposed Administrative Consent Order, p. 4.

[28] D.20-05-019, Finding of Fact 27; *see also* Section 8.4 of the decision.

[29] *Id.*, p. 45-46.

Respectfully submitted,

_____/s/_____
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Service List for R.18-10-007
Service List for R.21-10-001