



August 24, 2009

Julie Fitch  
Director, Energy Division  
California Public Utilities Commission  
505 Van Ness Avenue  
San Francisco, CA 94102

Dear Ms. Fitch:

**Re: Protest of the California Cable & Telecommunications Association and Pacific Bell Telephone Company d/b/a AT&T California (U-1001-C) to SDG&E Advice Letter 2101-E, Establishment of the Pole Attachment Communication Maintenance Memorandum Account (PACMMA).**

The California Cable & Telecommunications Association (CCTA) and Pacific Bell Telephone Company d/b/a AT&T California (U-1001-C)<sup>1</sup> hereby protest the revision to its electric tariffs submitted by SDG&E in Advice Letter 2101-E, whereby SDG&E seeks to establish a Pole Attachment Communications Maintenance Memorandum Account. (PACMMA). According to SDG&E, it intends to have its contractors make corrections to Communications Infrastructure Providers' (CIP) facilities to ensure compliance with General Order (GO) 95, and will invoice the CIPs for the cost of the work necessary to correct alleged infractions. In its Advice Letter, SDG&E claims that the amounts invoiced to the CIPs, and reimbursements, "if any," will be recorded in the PACMMA, "until such time as they are reviewed by the Commission and authorized for recovery by the Commission through base rates in the next general rate case or other appropriate proceeding as authorized by the Commission."<sup>2</sup>

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<sup>1</sup> Joining AT&T California in this protest are AT&T Communications of California, Inc. (U-5002-C); TCG San Francisco (U-5454-C); TCG Los Angeles, Inc. (U-5462-C); TCG San Diego (U-5389-C); AT&T Mobility LLC; New Cingular Wireless PCS, LLC (U-3060-C); Cagal Cellular Communications Corporation (U-3021-C); Santa Barbara Cellular Systems, Ltd. (U-3015-C); and Visalia Cellular Telephone Company (U-3014-C) d/b/a AT&T Mobility LLC.

<sup>2</sup> SDG&E AL 2101-E at 2.

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SDG&E's proposal and the stated purpose of the account are flawed both on the basis of fact, and as a matter of law, and must be denied. As discussed below, SDG&E's implied allegation that CIPs are ignoring their GO 95 obligations and responsibilities, and that verified infractions involving or constituting safety hazards are or will be unresolved by the CIPs is baseless, and there is nothing to support the notion that SDG&E must assume the right to correct CIP infractions or to recover the cost from its ratepayers or CIPs. SDG&E's proposal unlawfully conflicts with the pole attachment agreements between it and the CIPs, which provide for the CIPs to maintain their plant in conformance with GO 95 at their own expense. SDG&E also seeks to inappropriately transfer unilaterally to itself the Commission's authority to enforce GO 95, and abrogate the CIPs' obligation under GO 95 generally, as well as pursuant to the newly adopted Rule 18, to resolve their own infractions, none of which can be accomplished through the Advice Letter process. AL-2101-E is a thinly-veiled attempt to alter substantive CIP pole attachment rights, Commission jurisdiction and GO 95 obligations in the guise of establishing a memorandum account, and must be denied.

**I. There Is No Basis To SDG&E's Claims That CIP Verified Infractions Will Be Unresolved By the CIPs.**

As noted by SDG&E in its Advice Letter, SDG&E performs detailed inspections of its electric distribution and transmission systems under General Order 165.<sup>3</sup> During these inspections, it is true that SDG&E may discover and document potential GO 95 infractions by CIPs using SDG&E facilities, and that when these potential infractions are discovered, SDG&E sends to the CIP a notification of the infraction requesting their cooperation in inspecting and resolving the infractions. SDG&E also reports third party infractions to the Commission in its GO 165 Annual Report.

Once SDG&E notifies a CIP that a potential infraction has been discovered, the CIP is immediately obligated, pursuant to its pole attachment contract and GO 95, to inspect the site and, if the infraction is indeed caused by the CIP, resolve the infraction. Importantly, SDG&E's Advice Letter never states that CIPs are not resolving their infractions, only that infractions are discovered by SDG&E and that the CIP is notified by SDG&E to correct the infraction. As discussed in detail below, SDG&E's notification to the CIP is just the start of the process. Upon receipt of the notification, the CIP initiates its own inspection to verify that its facilities are indeed involved, and if so, what work needs to be undertaken. Historically, that inspection

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<sup>3</sup> *SDG&E Al 2101-E at 1.*

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and verification process has revealed errors in SDG&E's identification of the alleged infractions – sometimes the alleged violations are not GO 95 violations at all; in other instances the alleged violations involve SDG&E's own facilities.

Moreover, there is nothing to suggest that CIPs are not resolving their verified infractions. Indeed, SDG&E's statement that in the electric safety OIR (R.08-11-005), it provided "documentation on several thousand CIP infractions"<sup>4</sup> is disingenuous at best. In reviewing every filing submitted by SDG&E in that proceeding, no such documentation is contained in the record. SDG&E did present a power point presentation at the first workshop in an attempt to claim that CIP GO 95 infractions were an issue, and that they reported these infractions to the CIPs. The power point presentation, however, neither alleges nor proves that the unspecified infractions were caused by the CIPs. In fact, the power point presentation demonstrated a steep decline in CIP infractions over a five-year period: alleged clearance infractions declined by 78%, and alleged climbing space infractions declined by 68.4%.<sup>5</sup> Thus there is nothing to suggest that CIP infractions are at significant numbers. In fact, at least one CIP attached to SDG&E poles, Time Warner Communications, has recently received a notification from SDG&E that it has no infractions in high fire risk areas<sup>6</sup>.

Nor is there any support or basis in any Commission decision or individual contracts with the CIPs that SDG&E must undertake the responsibility to resolve CIP infractions under any circumstance. While SDG&E's Advice Letter states that it will have qualified contractors make the necessary corrections to the CIP facilities to ensure compliance "if the CIPs are unable to make the necessary corrections" it provides no basis whatsoever for this assumption of responsibility. Ultimately, one is left to guess at the need for SDG&E to assume any responsibility for resolving communication facilities compliance with GO 95, but certainly the implication in the Advice Letter is that SDG&E seeks to unilaterally determine a CIP's safety infraction, unilaterally resolve such alleged CIP facility infraction and bill the CIP, or the ratepayer, for the associated cost. Because there is no authority or a basis for SDG&E to assume such an unorthodox intervention in the businesses of CIPs, SDG&E's proposal is impermissible and unimplementable and thus the Advice Letter which is based on this proposition must be denied.

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<sup>4</sup> *SDG&E Advice Letter 2101-E at 2.*

<sup>5</sup> *Significantly, the ALJ in the proceeding expected all assertions of fact to be verified, and SDG&E never verified the contents of the power point presentation.*

<sup>6</sup> *Letter of David Geier, Vice President, SDG&E, to Bob Jones, Vice President, Time Warner Communications, August 12, 2009.*

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## **II. SDG&E's Proposal To Assume Responsibility For CIP Facilities And Compliance With GO 95 Is Inappropriate, And Raises More Questions And Concerns Than It Answers.**

SDG&E's proposal to assume the responsibility for maintaining CIP facility compliance with GO 95 is inappropriate both legally and as a matter of public policy, since, as discussed herein, it unlawfully transfers enforcement responsibility of GO 95 from the Commission to SDG&E, and because it conflicts with CIP pole attachment agreements. But it is also bad from a public policy perspective because it creates the opportunity for SDG&E to perform work at CIP expense that should be borne by SDG&E.

For example, CIPs' experience in other states has shown the electric utility pole owner inspecting the overhead plant, finding a significant number of violations, and billing the CIP for the cost of resolving the infraction, only to discover through its own investigation of the alleged violations that many of them were caused by the electric utility itself. See, e.g. *Kansas City Cable Partners d/b/a Time Warner Cable of Kansas City v. Kansas City Power & Light Co.* 14 F.C.C.R. 11.599, paras. 19-20 (Cable Serv. Bur. 1999) (holding that the electric utility was responsible for correcting violations it alleged were attributable to cable attachments because the poles "violated NESC requirements prior to attachment by Time Warner's facilities"); Letter to Steven D. Lasser, Chief of Staff, Public Utilities Commission of Ohio, from Gardner Gillespie (Dec. 9, 2008) (requesting mediation of pole attachment dispute between Time Warner Cable, Inc. and Duke Energy Ohio, Inc.). In other cases the electric utility conducted massive inspections in order to maintain its own plant, and billed the CIP for the cost, on the pretense that the inspection found CIP infractions as well as utility infractions. See, e.g. Reply Comments of Time Warner Cable, Inc. Federal Communications Commission, WC Docket No. 07-245; RM-11293; RM-11303 (filed Apr. 22, 2008) at Exhibits 3 & 4 (discussing system-wide pole inspection conducted by utility). These are but two examples of the potential for SDG&E to engage in activities that benefit itself at the expense of the CIP or even ratepayers, if it is allowed to engage in the "self-help" it proposes here, and it raises a number of other concerns that illustrate why the proposal is a bad idea.

For instance, as stated above, the current practice is that SDG&E sends notifications of discovered infractions to the CIP, requesting the CIP's cooperation in inspecting and resolving the infraction. It is not an unusual occurrence, however, that once the

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CIP receives the notification and completes its own inspection, the violation is found to be that of SDG&E. Under SDG&E's proposal, it is completely unanswered how parties determine whether the situation really reflects a GO 95 violation, or who created it, once the notification is sent. And it is equally unanswered as to who makes that determination, though the implication certainly is that SDG&E alone makes it.

Similarly, it is unanswered as to what kind of notice SDG&E intends to provide to the CIP, and how much time will be permitted for the parties to determine (i) whether the alleged infraction is a violation, (ii) who created it, and (iii) who is to cure it. As for the latter, even where the CIP created the violation, curing it may require the joint actions of other parties, such as the pole owner. It is essential that sufficient time be allowed to fully document and determine who is responsible before any corrective action is taken, so that the parties can determine who should bear the cost before the evidence is destroyed (i.e., the attachment condition is altered prematurely by SDG&E contractors). More importantly, it is essential that where joint corrective action is necessary, the CIP be provided the opportunity to perform its necessary part of the corrective action.

The Advice Letter is also silent as to the timeframe within which SDG&E plans to allow CIPs to cure violations they allegedly have caused, and whether those timeframes correspond to the timeframe in which SDG&E cures its own violations. It remains unstated as to what notice would be provided to CIPs regarding when the work would be performed and when the work had been done, so that it could be checked, and it certainly is left open as to what SDG&E's ability to discipline the expenses charged by the SDG&E (contractor) would be. These are critical issues, particularly in light of SDG&E statements in the OIR that it has no knowledge of communications facilities.

CIPs similarly have no guarantee that SDG&E would discipline the work of its contractors in working on CIP attachments, or that the contractors would have enough knowledge of communications plant, or cable plant, to ensure that CIP networks are not damaged. This is particularly troublesome, since fiber is easily damaged, and a break could impact essential communications throughout the service area or further. Equally significant is the unanswered question as to what redress exists for any damage to the CIP facilities, or worst case, for any damage to

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person or property caused by the negligence of the SDG&E contractors performing work on CIP facilities<sup>7</sup> For all of these reasons, SDG&E's proposal must be denied.

### **III. The SDG&E Proposal Unlawfully Grants SDG&E, In Lieu Of The Commission, The Authority To Enforce GO 95.**

Aside from the practical and economic implications to the CIP resulting from having SDG&E assume the role of identifying *and* correcting alleged infractions, legally, SDG&E cannot assume the role of enforcing GO 95. It is the Commission that is the final arbiter of what constitutes an infraction, and the very practical limitations associated with SDG&E's proposal illustrate clearly how essential it is for an enforcement agency to be a neutral agency. Clearly, if a pole owner is capable of going beyond notifying a CIP of a potential infraction, and instead can by fiat of action *declare* a CIP infraction and "resolve" it at CIP expense, or ratepayer expense, the motivation of the pole owner will be to err on the side of declaring a CIP, rather than an SDG&E infraction. And the Commission's role in reviewing the decision will have been concurrently eliminated. The Commission, and not SDG&E, is the enforcement agency for GO 95 compliance and SDG&E, cannot unilaterally strip the Commission of this authority through an Advice Letter filing.

### **IV. The SDG&E Proposal Conflicts With Existing Pole Attachment Contracts Between SDG&E And The CIPs.**

In order to attach, and to obtain licenses to SDG&E and other utility pole owners' pole space, CIPs enter into pole attachment contracts that enumerate the rights and obligations of the pole owner and the licensee. SDG&E's pole attachment agreements generally require CIPs "at their own risk and expense" to place and maintain their equipment in conformity with General Order 95 of the Public Utilities Commission. Thus not only are CIPs obligated by the Public Utilities Commission to remedy their own infractions to GO 95, but they are contractually obligated to perform the work necessary to maintain their plant in conformance with GO 95, at their own risk and expense. SDG&E cannot now claim that it is entitled to determine

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<sup>7</sup> *Indeed, it is somewhat ironic that in 08-12-021, SDG&E has submitted a proposal for Commission approval that would grant SDG&E a blanket absolution from all liability and yet here seems to blindly seek authority to take action that will subject it to a multitude of liability claims.*


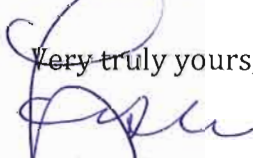

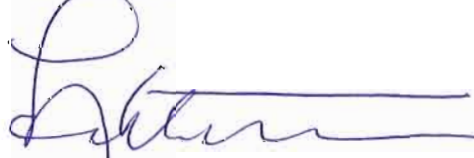
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the violation, perform the work and collect, if necessary, the costs from ratepayers through the establishment of a PACMMA account without contradicting the terms and conditions of its pole attachment contract. Contrary to Commission policy, such unilateral revision of existing contract rights would discourage parties from informally resolving issues with SDG&E through commercial agreements.

#### **IV. GO 95 Requires That CIPs Inspect and Resolve Their Own GO 95 Violations.**

CIPs' overhead facilities are governed by GO 95, and pursuant to GO 95, CIPs are required to inspect and maintain those overhead facilities (See, e.g. GO 95 Rules 1.2, 31.2), and there is no basis for SDG&E to assume CIPs' responsibilities for compliance with these obligations. Moreover, newly adopted Rule 18 A now specifically clarifies that a communications provider "is responsible for taking appropriate corrective action to remedy safety hazards and GO 95 violations posed by their facility."<sup>8</sup> There is no provision in GO 95, whether one looks to Rule 18A or elsewhere, that allows the electric utility to substitute itself for any necessary corrective action to the CIPs' facilities. To the contrary, GO 95 requires a utility, such as SDG&E, to notify the CIP in the event that it observes in an inspection an alleged safety or GO 95 violation. Thus, ab initio, the SDG&E advice letter must be dismissed because it proposes to violate the procedures adopted in GO 95.

For the reasons set forth above, CCTA urges this Commission to deny the request of SDG&E as set forth in Advice Letter 2101-E.

Very truly yours,   
Very truly yours,   
  


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<sup>8</sup> See: *Decision in Phase 1 –Measures To Reduce Fire Hazards In California Before The 2009 Fall Fire Season* dated August 20, 2009, R. 08-11-005, Memo at pp 18-19.