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April 22, 2019

To: Members, Commission on Catastrophic Wildfire Cost and Recovery
Fr: Lea-Ann Tratten
Nancy Peverini
Re: Consumer Attorneys of California Responses to Request for Comment from the Commission on Catastrophic Wildfire Cost and Recovery- April 22, 2019

1. **Wildfire Liability Regime**

Inverse condemnation is the constitutional, no fault cause of action that helps facilitate efficient resolution in the aftermath of utility-caused wildfires. Homeowners have limited ALE "alternative living expenses" that may last only one or two years, and it is vitally important that homeowners achieve efficient resolution of claims for underinsured losses in order to rebuild and recover. Without reimbursement from responsible IOUs, the overwhelming majority of homeowners simply cannot rebuild.

Ranchers and farmers depend upon efficient resolution to help regrow lost avocado orchards or vineyard crops—which were destroyed in the 2017 and 2018 fires.

Public entities receive initial help from federal or state funds. However, even after all state and federal funds are paid, local public entities are still out tens if not hundreds of millions of dollars because federal and state funds categorically do not include certain loses, and the local cost share in federal and state programs is itself millions of dollars. Parks, roads, sidewalks, tree removal, overtime, watershed restoration, and water contamination are just some examples of uncovered taxpayer losses.

Inverse condemnation is a property owner's ability to enforce its constitutional eminent domain rights.

The standard on inverse condemnation is whether "the injury resulted from the intended use and design of the electrical system." If the injury did not result from the intended use and design of the electrical system, then inverse condemnation does not apply. For example, if a drunk driver swerves 100 yards off the road and crashes into a utility pole, there is no liability under inverse condemnation because the injury did not result from the intended use and design of the electrical system.

We have heard a lot about the significant steps SDG&E has made in the last 10 years—investing in $1 billion towards prevention. It is under this current liability structure that has pressured SDG&E to do so, and to ask the very question that inverse demands: Is my electrical system designed and used in way that does not cause wildfires. Inverse condemnation exists when PG&E creates that risk through its intended use and design.

Secondly, inverse condemnation requires a showing that the intended use and design was a substantial factor in causing the injury. It is simply not true that "if PG&E is 1% at fault, they are responsible for 100% of the damages under inverse condemnation"—that example is simply false. That concept of apportionment of fault applies to negligence. Inverse condemnation requires that (1) the intended use and design was (2) a substantial factor in causing the injury.

It is a no-fault system of liability that arises while an IOU exercises its eminent domain power, granted by the state. Further, IOUs already spread their risk during and after the claims process by cross-claiming against responsible contractors, including arborists and tree trimming crews. In 2007, Cox Communications contributed over $400 million for its responsibility in the San Diego Fire.

Last year, certain investor-owned utilities launched an aggressive campaign to eliminate the constitutional property rights of wildfire victims. The IOUs sought to eliminate inverse condemnation as late as August 2018. However, a coalition of public entities, wildfire victims, and insurance companies fought back to maintain the rights of Article I, Section 19 of the California Constitution. SB901 passed in August 2018, decidedly without affecting inverse condemnation. Less than three months later, in November 2018, PG&E's equipment ignited the largest, most destructive, and deadliest wildfire in California history—killing 86 people and rendering 14,000 families homeless. On the same day, SCE started the Woolsey fire, causing additional billions of dollars in damage. If the IOUs had been successful just three months earlier, where would the Town of Paradise and Malibu victims be today?

It is incredibly important that the members of this commission understand that Article I, Section 19 protects families and property owners already under threat of multi-billion dollar for-profit corporations that have the power and ability to prevent utility-caused wildfires. Eliminating inverse condemnation means further hobbling communities struggling to get back on their feet. We urge this commission to recognize this important constitutional property right, and support victims and communities throughout California, now and into the future.

2. **Insurance/ 3. Financing Mechanisms**

    a. IOU Contribution to a Wildfire Fund; Balancing Shareholder and Ratepayer Interests

IOUs should contribute to a comprehensive fund in four ways.

First, IOUs should increase self-retention deductibles—for example, the first $100 million of a wildfire liability. Increased deductibles incentivize prudent management of electrical assets and reduce burdens on ratepayers, who ultimately pay insurance premiums.

Second, IOUs should increase primary liability coverage—each IOU should carry a minimum of $3 billion of wildfire coverage. Premiums on mandatory minimums should be supplemented by the state or shareholders to protect low-income ratepayers.

Third, IOUs should contribute initial capital borne by shareholders, not ratepayers. Initial capital would be in addition to state catastrophic bonds, tower insurance, and other funding mechanisms.

Fourth, IOUs can reimburse funds when drawn for negligent liabilities.

    b. IOU Access to a Wildfire Fund

IOUs and wildfire victims should jointly petition the state to access funds. Victims can proffer threshold evidence, such as Cal Fire reports or findings, or other evidence, to qualify and justify fund access. The state should not require IOUs to admit fault or liability, as such would interfere with the usual and customary civil, criminal, and regulatory processes, and therefore make fund access impractical and inefficient.

IOUs should have access to funds no later than two years from the date of the fire. Most personal insurance policies offer coverage called "alternative living expenses," or "ALE." ALE provides wildfire victims money for alternative housing. Most ALE coverage expires within two years after the date of the fire, after which families are left without financial support.
Public entities need funds for urgent public works and infrastructure projects, such as water systems, roads, parks, bridges, stormwater culverts, soils, and land rehabilitation.
Thus, an IOU should have access to such funds well in advance of the two-year anniversary of the fire to help communities rebuild.

c. IOU Reimbursement to a Wildfire Fund

Shareholders should reimburse funds if IOUs are found negligent. To the extent the fund includes state, taxpayer, or ratepayer resources, such funds should not subsidize negligent liabilities in a manner inconsistent with current CPUC socialization policy.
However, the standard for CPUC socialization should be clear and congruent with current civil law. Lack of clarity in CPUC's standard creates uncertainty for IOUs and investors. One suggestion is to match CPUC standards with current civil law to provide such congruence.
Should the CPUC find that an IOU did not act negligently, socialization would be appropriate under California law, and thus shareholders would not bear the burden of reimbursement.

d. Detail- How a Fund Might Work, and Why

One concept for a proposed fund can be found in the attached document entitled "Legislative Doc #3," which outlines layers of funding sources at suggested amounts. The first layer requires IOUs to bear the first burden, which is an increased self-retention/deductible. As described by one SCE representative, the low $10 million deductible allows SCE to pass on higher insurance premiums to ratepayers. SCE's description of primary insurance coverage as the "self-retention/deductible" for a "fund" is a misnomer, as ratepayers bear the burden of those premiums—thus ratepayers are the ones paying that self-retention/deductible.
Increasing the deductible lowers relative premiums and puts IOU shareholder money on the line first, which promotes shareholder pressure on management to implement mitigation measures. This shareholder self-retention/deductible could be $100 million or $250 million—but it must be an amount commensurate with actual wildfire liability, unlike $10 million.
The next layer of primary insurance coverage should be at least $3 billion, and here's why: A review of utility-caused wildfires since the 2007 San Diego fire may reveal that most individual wildfire liabilities can be managed at or near $3 to $4 billion, including the following fires: 2007 SDG&E San Diego fire, 2015 Butte Fire, any one of the individual 2017 North Bay Fires, 2017 Thomas Fire, and 2018 Woolsey Fire. Recently, the Camp Fire and aggregate set of 18 fires in North Bay have skewed public and market perception regarding the statistical prevalence of extremely costly fires above $3 to $4 billion. In other words, historical data may reveal that the overwhelming majority of any one utility caused wildfire can be appropriately managed using a $3 billion policy, rarely requiring fund access. IOUs should have no basis for objection to mandatory insurance minimums since ratepayers pay premiums. The impact to ratepayers can be offset by two factors: (1) increased self-retention/deductibles, and (2) state-supported premiums to protect low-incomes ratepayers.
Why should the state taxpayers subsidize insurance premiums for low income ratepayers on robust insurance policies? The provision of electricity is a public service/function. The state of

California has effectively outsourced that provision largely to IOUs and relieved itself of the burden of providing that public service/function. In doing so, the state has arbitrarily divided its geographic service regions into three large areas serviced by three large for-profit corporations. The division of service areas were not originally designed/divided to spread wildfire risk evenly, which should not unfairly burden low income communities in some parts of the state versus others, especially in a modern, well-traversed statewide economy. Electricity is public service/function; the state has arbitrarily divided itself into three large IOU territories; and, California operates as one statewide "global" economy—thus, the state has an interest in supporting low income ratepayers in all three regions. Said another way, low income ratepayers should not be regressively burdened due to sophisticated, modern energy markets. The next layer of funding begins "the fund," a combination of state catastrophic bond funds, pooled risk capital from shareholders, and pooled/shared tower insurance. As occurs with any "layer cake," each layer must be exhausted before reaching the next layer. This is important because shareholder capital must be exhausted before returning to tower insurance, reserved for those truly extreme catastrophic circumstances such as Camp. Insurance at the highest towers should be relatively cheaper than primary coverage. These premiums would be borne by ratepayers, but on a statewide, pooled basis among all three IOUs, more adequately spreading the risk. Low income ratepayers should continue to receive state-backed protection. The total fund amount in the attached example, which can range from $15 billion to $21 billion, is based on the estimate of the most devastating fire in state history, the Camp Fire.

This proposed fund does not contemplate direct payment to victims—nor is this fund intended to insure first party losses, such as occurs in the Florida model or the CEA. Hurricanes and earthquakes are natural disasters. Utility-caused wildfires are man-made disasters, not naturally-caused. This proposed fund is not meant to replace or supplement first party insurance, but rather third-party liability. While victims would be involved in providing prima facie/threshold justification for access to the fund, the monies would be available to the potentially-liable IOU to manage and pay claims. Multi-billion-dollar corporations are good at hiring defense lawyers who evaluate legal liability, including causation, violations of law, damages, and defenses, to properly manage victims' claims. Most CalFire reports issue within about a year or less, and certainly all that I am aware of issue within two years. These official investigative reports provide guidance to IOUs and victims regarding evidence of causation and ultimate legal liability. In the attached proposal, the fund is not intended to supplant the healthy adversarial process. Rather, the funds are intended to stabilize markets and provide liquidity solutions for IOUs and victims alike.
Homeowners and renters remain incentivized to purchase property insurance for three reasons: (1) Homeowners must still insure against single-event house fires and other property damage, (2) Homeowners must still insure against non-IOU caused wildfires, such as the Carr fire in Redding, and (3) Even when used for IOU-caused fires, the adversarial process still applies; legal and factual causation, and ultimate legal liability must be proven; and, there is no guarantee of receiving certain funds for certain amounts since they will be distributed through the IOU in the healthy adversarial process, and the funds are intended to cover only those uninsured losses. This proposed fund is not intended to replace first party insurance, but rather support third party liability to support liquidity and stabilize markets.

4. Community and Wildfire Victim Impacts

Wildfire victims are ratepayers and taxpayers too. When a community suffers a devastating wildfire, victims are impacted in four ways:

1. Loss of real property, personal property, life, or injury
2. Loss of community resource benefits, including natural and public resources; and an increase in homelessness, crime, cost of living, etc.
3. Increased/wasted taxes due to loss/expenditure of local and statewide governmental resources
4. Potential for increase in rates, as IOU ratepayers from all income strata

Any wildfire fund must take into consideration timing, including swift and just payment within two years of the date of the fire. Most homeowner policies include ALE “alternative living expense” terms that expire after two years of benefits—some policies expire sooner. As construction costs increase, as housing costs increase, and as governments strain to rebuild communities in the aftermath of fires, it is vital to provide individuals and public entities money as soon as possible after a wildfire.

In 2019, as PG&E drags victims and communities through bankruptcy, and as ALE expires for North Bay and Thomas victims, bridge financing to IOUs becomes increasingly attractive to allow IOUs to meet certain obligations now so that victims become fully compensated as soon as possible and so that markets are stabilized until more permanent solutions can be reached.

5. Miscellaneous

The only way to reduce wildfire costs and stabilize markets is prevent wildfires with responsible and appropriate corporate policies that employ the vast and sophisticated resources available to IOUs.

A state-wide wildfire enforcement division should be created and empowered with inspection, notice, and violation/fine responsibilities. Under the federal Clean Water Act, daily fines are imposed for daily pollutant discharges in violation of an NPDES permit. Currently, some IOUs are in gross violation of current state standards, including vegetation management and clearance standards, but those violations are not enforced and do not carry daily fines. The CPUC is not equipped to enforce such laws, and a new enforcement unit under the state fire marshal office should be created, funded, employed, and deployed.

Additionally, other best management practices must be codified and enforced, including but not limited to clear de-energizing policies and procedures, and clear recloser policies and procedures. IOUs and governmental agencies should work together to educate the public regarding the importance of de-energizing and provide low-income assistance for necessary generators and general preparedness.

Lastly, the standard for IOU liability socialization/ratepayer pass through at the CPUC must be clear to the IOUs. No IOU should be left guessing what the standard is or how it is applied. One suggestion is to mirror current civil standards, identifying negligent and non-negligent management. IOUs are better served when the question is whether their management fell below the standard of care, providing clarity to management and investors alike.

The bottom line: Discussing inverse condemnation while IOUs are in violation of current state law is like discussing which dessert the fox should get while he's raiding the hen house—only prevention, and strong prevention policies and laws, will reduce IOU and investor risk.