



April 22, 2019

Commissioner Dave Jones  
Commissioner Michael Kahn  
Commissioner Pedro Nava  
Commissioner Carla Peterman  
Commissioner Michael Wara  
Commission on Catastrophic Wildfire Cost and Recovery  
Governor's Office of Planning and Research, 1400 10<sup>th</sup> St  
Sacramento, CA 95814

**SUBJECT: Comments of the California Municipal Utilities Association (CMUA), the Southern California Public Power Authority (SCPPA), the Northern California Power Agency (NCPA), and Golden State Power Cooperative on behalf of Publicly Owned Electric Utilities and Electrical Cooperatives**

Dear Commissioners,

On behalf of our publicly owned utility (POU) and electrical cooperative (cooperative) members, we submit these comments in response to the discussions during the Commission on Catastrophic Wildfire Cost and Recovery's (commission) past meetings and questions posed in the April 8<sup>th</sup> request for public input. Our agencies and the members we represent take a strong interest in developing comprehensive approaches to addressing the devastating impacts of wildfires. While we acknowledge the work of this commission is principally focused on developing recommendations for the equitable distribution of costs associated with utility liability for damages caused by wildfires, below we offer comments for your consideration on a number of policy discussions that will influence the underlying risks, and thereby the associated costs, imposed by wildfires.

There are 46 POUs and 4 cooperatives across the state that collectively provide electricity to more than 25% of California. These utilities vary in size, geographic location, ownership of facilities and equipment, customer base, and governance structure—all factors that affect their relative wildfire risk exposure. While our members' expertise is delivering safe, affordable, reliable and sustainable power, as public agencies we have a broader interest in enhancing the safety of our communities. It is in this spirit that we support a comprehensive approach to reducing the threat of wildfires.

POUs and cooperatives have been working for years to proactively prevent and mitigate the impacts of wildfires. Such actions include implementing wildfire mitigation measures in their communities and aggressively implementing numerous state standards related to electric distribution system design, inspection, construction, maintenance and vegetation management. Our members have taken a variety of actions specific to their local geography to minimize wildfire risk. Furthermore, POUs and Cooperatives are uniquely situated within communities and, in many cases, as part of local governments, have strong working relationships with local planning, emergency preparedness and fire departments. We continue to work with our members on exploring opportunities for increased coordination with both public and private sector counterparts at the local, state, and federal levels.

Our comments on several of the specific topics identified in the commission's request for comment are below.

## I. Wildfire Liability Regime

### a) Issues with the Current Application of Strict Liability Under Inverse Condemnation and Recommendations for Addressing Concerns

The California Constitution (Article I, Section 19) establishes the doctrine of "inverse condemnation," which essentially states that state and local governments, including publicly-owned utilities, may be required to pay just compensation when property is taken or damaged by facilities providing a public service (such as utility infrastructure). A utility's fault or negligence is not considered. According to California courts, this is because "the cost of such damage [associated with providing public services] can be better absorbed, and with infinitely less hardship, by the taxpayers as a whole than by the owners of the individual parcels damaged" (*Pacific Bell Telephone Co. v. Southern California Edison Co.*, 208 Cal.App.4th 1400, 1407 (2012)). The framework is based on a shared "socialization" among all taxpayers of the costs that flow from operation of infrastructure that benefits the public generally.

Inverse condemnation claims have been handled differently by the courts in different situations. In the fire context, utilities are being held financially responsible for all property damage if their facilities are one cause of a wildfire, even when the utility acted reasonably and followed all applicable safety rules. For example, a utility would be held responsible under inverse condemnation if a limb from a healthy tree falls into an electrical line and causes a fire, even if the tree was outside the utility right-of-way and the utility maintained proper clearances between the tree and its power lines.

However, in the context of flood control projects, the courts have required proof that the government acted unreasonably in order to support an inverse condemnation claim. Utilities urge liability standards to be reformed to apply the same fault-based standard used in the flood case to the wildfire context. This change is not an argument for the utility to be absolved of liability if the utility is at fault. In fact, the fault-based standard would still hold the utility liable if the utility was determined to be at fault.

We believe the application of strict liability in inverse condemnation cases involving electric utility facilities can be reformed through legislation. Testimony by a Deputy State Attorney General at the March 13 commission hearing confirmed that the Legislature has the authority to establish a different interpretation of the parameters for applying strict liability because the standard has been applied by two Appellate Courts, but has not been ruled on by the State Supreme Court. In the absence of the Supreme Court interpreting the constitution, the State Legislature has full authority to do so.

*Why is the Current Liability Standard Problematic?* Inverse condemnation with a strict liability standard imposes no-fault liability on investor-owned and publicly-owned utilities, as well as electrical cooperatives. As increasingly devastating wildfires have begun to arise, a utility's financial exposure under a strict liability standard can go far beyond the ability of its customers to shoulder the financial burden. If a utility's insurance does not cover its liabilities, then the utility itself must pay those costs out of pocket. Because publicly-owned utilities do not have shareholders, these costs get passed directly on to customers. This is particularly problematic for smaller utilities that may suffer from catastrophic wildfires, as those utilities do not have a large customer base across which to socialize the cost of damages. Furthermore, for publicly-

owned utilities that are structured as city departments, any liabilities that the utility is not able to cover (either through wildfire insurance or rate increases) could be passed to the city's balance sheet.

The financial impacts at an individual customer level become impractical and are, in fact, a significant hardship to the ratepayers of all utilities. A substantial liability could impact the utility's (and in the cases noted above, the city's) credit rating. Depending on the magnitude of the downgrade, this can present challenges for borrowing capital to finance infrastructure investments.

We believe that the application of strict liability is unsustainable, especially in light of the widely recognized fact that wildfire risk will continue to grow in California largely due to factors outside of a POU or Cooperative's control, such as less predictable precipitation that leads to more combustible fuel growth. In addition, factors outside of a utility's control can cause utility equipment to spark or fail resulting in a fire for which a utility can be deemed liable. Two examples illustrating this paradigm are: a motorist hitting a utility pole or a tree branch – from outside a maintained utility right of way – blowing into a powerline sparking a fire. Strict liability means that if the facilities of the POU or cooperative are the ignition source of a wildfire, even if the utility or cooperative has met or exceeded applicable regulations and industry standards and has acted as a prudent electric system operator, the POU or cooperative will be held liable for all the property damages.

Credit rating agencies, such as Moody's and S&P, have, across the board, cited strict liability as a risk to the financial health of POU's. As an example, in placing the Los Angeles Department of Water and Power on negative credit watch, Moody's said one factor that could lead to a credit downgrade is the "failure to pass legislation or enact regulatory measures to largely mitigate the impact of inverse condemnation." In addition, an S&P survey of POU wildfire related liability exposures, called the current application of inverse condemnation "financially onerous" and is "an integral component of our analysis of public power utilities." A Moody's Investor Service review of POU wildfire risks in California noted that because "utilities face inverse condemnation related claims irrespective of whether the utility acted negligently or violated regulations, utilities have effectively become the default insurance provider for wildfire liabilities, a risk that is outside the scope of operations and one that substantially increases the risk spectrum for utilities."

Impacts to credit ratings are important because they form the basis for costs of borrowing for POU's. Those with large Capital Improvement Programs may need to raise rates to meet higher borrowing costs in the event structural solutions are not implemented. Even with interest rates at historically low levels, a downgrade from AA to A would result in \$3-4 million of additional interest costs annually for every \$1 billion of borrowing, or \$100 million over the life of the bonds. A return to higher interest rates could increase these costs dramatically. Utilities may also need additional liquidity to meet more frequent and higher collateral requirements through its power procurement function, stranding financial resources that could be used for other mitigation efforts and also have fewer counterparties willing to provide commodity sales if ratings continue to deteriorate.

Ultimately, POU's and cooperatives must remain financially viable to continue to deliver their essential services to all Californians. Additionally, California's utilities are the foundation of the state's clean energy goals – from installation of renewable generation, to investments in transportation electrification. It is for these reasons we believe the application of strict liability is inappropriately applied and undermines the ability of POU's and Cooperatives to meet our obligation to serve all communities, both urban and rural.

## b) Recommended Changes to Reform the Strict Liability Standard

We believe it would be appropriate to apply a fault-based standard that holds an electric utility liable if the utility's conduct posed an unreasonable risk of damage to property and if the conduct posing the risk was a substantial cause of the damage. **The following criteria is a starting point for a conversation about how a court can determine if a utility's conduct posed an unreasonable risk:**

- The overall purpose served by the utility facilities.
- The availability to utility of feasible alternatives with lower risks.
- The severity of the damage in relation to risk-bearing capabilities.
- The extent to which the damage is generally considered as a normal risk of land ownership.
- The degree to which similar damage is distributed at-large over other land owners.
- The practical ability of the utility to recover costs from its customers without imposing undue hardship or impair the utility's financial condition.

Such a standard would still hold utilities accountable for their actions but would provide relief in circumstances where wildfires are started by factors outside of their control. A "fault-based" approach will provide positive incentive for utilities to aggressively implement wildfire mitigation measures.

The reform of strict liability, coupled with improved statewide risk reduction, could lead to improved utility wildfire insurance offerings and will undoubtedly boost the confidence of credit rating agencies, all of which have cited strict liability as a credit risk. We also believe that any system must treat wildfire victims fairly and believe that a fault-based standard is fair to all parties as it would not hinder the ability of harmed individuals to seek damages for bodily harm or wrongful death, as those issues are dealt with under another legal standard, as pointed out in the Governor's Wildfire Task Force Report, and still allows for a fair property damages recovery process.

We also recognize that other public entities, such as water agencies, are subject to a strict liability interpretation of inverse condemnation. For water agencies, the problem of applying strict liability has been brought highlighted by a case involving the Yorba Linda Water District. To the extent other public agencies also face wildfire costs arising from such a strict liability interpretation, we believe it would be appropriate to explore the issue.<sup>1</sup>

## II. Insurance

Over the past years, many POU's and cooperatives have seen the price of their wildfire insurance premiums increase dramatically, while at the same time the amount of coverage decreases. As an example, SMUD doubled its wildfire insurance coverage in 2018 but absorbed a four-fold increase to premiums for that additional coverage. The higher costs resulted in .50% rate increase and SMUD expects an additional .25% rate impact when insurance renewal is sought in 2019. This year, Plumas-Sierra Rural Electric Cooperative was unable to obtain the extra umbrella insurance policy they typically carry. Their insurer, Federated Rural Electric Insurance Exchange, is unable to provide a commercial umbrella coverage because of California's inverse condemnation laws, regardless of the robust, proactive efforts Plumas-Sierra has undertaken to invest in vegetation management.

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<sup>1</sup> CMUA represents 43 public water agencies that provide water to more than 70% of the state.

A twofold approach is the more certain way to increase the availability and effectiveness of utility insurance coverage is twofold: implement a fault-based liability standard under inverse condemnation and continue to implement statewide measures to reduce the risk of wildfires overall. Both of these measures could result in insurance companies being more willing to offer affordable utility insurance coverage. Availability of more, affordable insurance coverage for POU's and cooperatives will ensure their consumers are able to be made whole in the event of a claim.

### III. Financing Mechanisms

Our preference is to reform the strict liability standard. However, the concept of an electric utility catastrophic wildfire fund has been explored in multiple venues as an alternative. The establishment of a utility wildfire fund on its own is not likely to fully resolve the challenges imposed by the current application of the strict liability standard and may not provide adequate access to utility insurance options. Acknowledging that there is significant interest in the establishment of an electric utility wildfire fund, POU's and cooperatives raise the following key principles for the Commission's considerations:

- **Participation in the fund should be on an opt-in basis for all POU's.** In no event should only select utilities, be it based on size or otherwise, be mandated to participate.
- **The fund should be prospective and only available on a forward-looking basis.** That is, utilities should not be able to draw from the funds to support claims associated with past wildfires.
- **The fund must be held in trust, such that the funds could not be repurposed for other uses at a later date.**
- **The fund should cover costs arising from a utility-ignited wildfire that are not the result of negligence.**
- **The fund should carefully consider a utility's individual insurance coverage.** The availability of the fund should not be a substitute for utilities procuring their own, separate insurance policies.
- **A statewide fund must include protections that ensure one utility with significant claims cannot "drain" the fund or make it in any other way insolvent for use by other electric utilities.** The State should consider how the statewide fund would be appropriately capitalized according to risk and how the fund would be replenished once drawn.
- **Contributions would need to take into account the utilities' relative wildfire risk profiles, geographies, sizes, and operating budgets, among other factors.** A one-size-fits-all approach will not work.
- **The fund must be appropriately structured to be sustainable over multiple years.** Given the changing climate and its impacts on wildfires, the fund must be durable enough to withstand multiple years of high-cost catastrophic wildfires.
- **If the fund relies on utility ratepayer contributions, the contributions must be structured in a way that protects against cost shifts from one customer group to another.** Any charge

should be applied fairly across utility customers. Any POU funding must be recognized as tax exempt funds and may not be used or co-mingled with taxable funds. Any funding approach must be constructed to prevent risking any POU's tax exempt status or risking a gift of public funds liability.

- ***If the fund is limited to recovery from “catastrophic” wildfires, the determination of whether a wildfire is “catastrophic” for a utility must be made relative to that utility’s specific conditions.*** Any fund would have to be carefully crafted to ensure utilities of all sizes can realize value.
- ***To the extent a utility would need to demonstrate it meets certain standards to participate in the fund, the utility’s mitigation planning efforts required by SB 901 should be taken into consideration.*** Utilities should be required to demonstrate compliance with the provisions of SB 901 as a pre-requisite for drawing from the fund.

It has also been suggested that a statewide electric utility catastrophic wildfire fund would only be feasible in conjunction with a more centralized approach to regulating utility wildfire safety practices. We do not believe centralized regulation is a prerequisite to fund participation. First, we note that statewide electric utility standards already exist, which even POUs and cooperatives that are not under the jurisdiction of the CPUC recognize as reflecting industry standard. These standards include, federal North American Electric Reliability Corporation (NERC) standards, vegetation management standards pursuant to CPUC’s GO 95, powerline inspection standards pursuant to GO 165, and the statutory directive pursuant to SB 901 to develop wildfire mitigation plans.

In light of these existing standards, we are not convinced that additional, centralized state regulation will improve safety. To the contrary, a POU’s or Cooperative’s intimate knowledge of their local service territory informs their specific safety standards that exceed existing industry standards. A new centralized approach to regulations would, by its very nature, be more formulaic and less responsive to local conditions. It could actually be detrimental to utility wildfire safety mitigation efforts that reflect local conditions.

Finally, other stakeholders have suggested broader catastrophic wildfire fund concepts that could be used to reimburse Californians for all wildfire damages, regardless of ignition source. We believe the commission should explore these concepts as, based on the most recent CalFire data, electric utility infrastructure is responsible for igniting only 10% of wildfires.

#### **IV. Community and Wildfire Victim Impacts**

A primary concern from recent wildfires is the devastating impacts of wildfires on communities and residents. The members of our organizations have experienced this devastation first hand and we are working diligently with our local government partners to address community needs. We strongly support investments to improve communication and coordination between fire officials and utilities, especially to facilitate sharing of critical fire weather data. Additionally, we urge the state to lead an effort to streamline access to disaster relief to ensure communities are supported and electric service can be promptly restored.

## V. Other Policy Considerations to Reduce the Risk and/or Impact of Wildfires

Publicly owned electric utilities and cooperatives are committed to implementing robust safety and wildfire mitigation practices to ensure the delivery of safe, reliable and affordable electricity. The following policy considerations we believe, supplement and enhance POU and Cooperative commitment to a safer California.

### a) Improving Statewide Coordination

We have observed that there is room to improve statewide coordination on wildfire efforts. It would be prudent to investigate the creation of a Wildfire Safety Council or some similar body, or high-level government official, to oversee all wildfire prevention efforts undertaken by CalFire, the Office of Emergency Services and the California Public Utilities Commission (CPUC). There does not appear to be one agency that coordinates all statewide wildfire mitigation efforts, ranging from utility safety standards, to forest management, to local planning practices. Putting a council, or person, in charge of these efforts may prove beneficial to overall risk reduction efforts. We envision that such a council would be empowered to establish regular meetings of agencies with wildfire related activities, to identify cost-effective and feasible measures to improve public safety, and to work with stakeholders to identify goals and the measures needed to accomplish them.

### b) Strengthening Coordination Between Transmission-Owning and Transmission-Dependent Utilities, and Water Agencies

Both water utilities and impacted electric utilities face unique challenges associated with IOU de-energization events. For example, the de-energization of water pumping stations can limit a water utility's ability to provide adequate supply and maintain water pressure. A lack of supply can reduce firefighting capabilities and a lack of adequate water pressure increases the risk of drinking water contamination. Advance notice is one option that can help a water utility at least partially mitigate these problems.

Similarly, some POUs are interconnected with the surrounding or neighboring IOU in such a configuration that it is likely that a preemptive de-energization decision of the IOU would also result in power outages to all or a portion of the POU's customers. The IOU making the decision to de-energize is unlikely to have contact information for the POU's medical baseline or other vulnerable customers, or knowledge of the critical infrastructure located in the POU's territory. Additionally, the affected POU may need to preposition its own employees to help provide an orderly and safe restoration of power within its service territory.

Because of these unique challenges, the IOUs will need to have a high degree of coordination with the POUs and water utilities in or neighboring their service territory. There should be assurances that the channels of communication are open and that each IOU is responsive to requests by a POU or water agency to discuss coordination *prior* to this upcoming wildfire season.

### c) Improving Forest and Vegetation Management

In addition to climate change, historical forest management practices have contributed to thick stands of forests that act as explosive tinder. Proper fuel treatment and vegetation management support forest health and help mitigate the risk of larger fires that would result in serious public health and safety concerns as well as significantly higher air pollution and greenhouse gas emissions in the future. The state has begun to

address this problem, as outlined in a presentation by CalFire staff to the commission on February 25. However, additional resources are needed at the state and federal levels to support enhanced forest management efforts. For this reason, we support Governor Newsom's efforts to partner with the governors of Washington and Oregon to call on the federal government to double its investment in managing federal forestlands. Continued improvements can be made by doing more prescribed burning and more mechanical thinning where applicable and we support the state's continued efforts to increase investments in forest management.

We also support efforts to bring to light the critical role of landowners in maintaining defensible space and reducing the potential impacts of wildfires; we suggest that the State should engage in public education campaigns to urge landowners to ensure their property is in compliance with applicable defensible space requirements. Recent policies at the federal and state levels take important steps to address challenges that utilities face in managing vegetation around their infrastructure. The State must provide a framework to assist POUs to expedite the vegetation management around power line rights-of-way with CEQA exemptions similar to the recent federal exemptions that are being implemented for federal lands. POUs in many cases have been waiting up to two years for vegetation management permits.

Furthermore, we support efforts to increase workforce training and development opportunities in the context of fire prevention and suppression. As proposed in CalFire's *Community Wildfire Prevention & Mitigation Report*, released in February 2019, we are supportive of having the Natural Resources Agency identify specific opportunities for developing workforce training programs that could increase the number of properly trained individuals available to assist with fuels reduction and forest management efforts, among other areas.

#### **d) Improving Fire Suppression and Emergency Response**

Protecting communities is the top priority and, towards that end, we agree with many policymakers that California must have a 21<sup>st</sup> century public safety system able to readily alert residents of impending disasters, including wildfires, and to put forward sufficient resources to respond accordingly. Legislation in 2018 was enacted to improve public alert systems and to increase the effectiveness of the state's mutual aid response system. It is vital that we continue to build on these improvements. This should include ensuring CalFire and local fire departments are adequately staffed and have sufficient resources to suppress fire. We understand that firefighting resources are inadequate in some areas. As an example, the City of Redding has historically only been able to staff their fire engines with two firefighters, as opposed to the standard three. To improve fire response in the community, the City of Redding Electric Utility will be funding an additional 12 firefighting positions to improve the city's capabilities. These deficiencies must continue to be remedied statewide.

#### **e) Creating a Culture of Preparedness**

Many have said we live in a new normal where wildfires strike unexpectedly and quickly, forcing the evacuation of thousands. The state must undertake robust public education efforts to ensure residents, particularly those in areas of high wildfire threat, have a plan in place to respond quickly to wildfires. This will help reduce issues during evacuations and will hopefully save lives. We support customer education campaigns to support emergency preparedness in their communities. These efforts include providing information on how community members can be prepared in the event of a power outage. We welcome the



opportunity to partner with the Governor, State Legislature, and our local government colleagues on a broader effort that would reach all Californians.

**f) Addressing Local Planning**

Millions of people live in areas of high wildfire threat. We support efforts to re-evaluate local planning and development policies for business and residences in these areas, including those in the wildland-urban interface. We also agree with the recommendation of the Rural County Representatives of California to work with local governments to establish best practices on development in high wildfire threat areas to protect public safety.

In closing, thank you for your consideration of our comments and for your service and commitment to addressing this important issue. Please do not hesitate to contact any of us or our staff with questions.

Sincerely,



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Randy S. Howard  
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Michael S. Webster  
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Jessica Nelson  
General Manager  
Golden State Power Cooperative

Cc: The Honorable Gavin Newsom, Governor of California  
The Honorable Toni Atkins, President Pro Tempore of the California State Senate  
The Honorable Anthony Rendon, Speaker of the California State Assembly  
The Honorable Ben Hueso, Chair of the Senate Committee on Energy, Utilities and Communications  
The Honorable Chris Holden, Chair of the Assembly Committee on Utilities and Energy  
Members, Senate Committee on Energy, Utilities and Communications  
Members, Assembly Committee on Utilities and Energy

Attachments:

- a. *Rating Action: Moody's revises LADWP's outlook to negative; affirms the Aa2 rating on LADWP's \$9.32 billion power system revenue bonds*, Moody's Investors Service, March 18, 2019
- b. *California Public Power Utilities Are Better Able To Temper Wildfire Related Liability Exposures Than IOU Counterparts*, S&P Global Ratings, February 28, 2019
- c. *FAQ: California public power utilities are not immune to wildfire risks*, Moody's Investor Service, April 9, 2019