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June 12, 2019

Commissioner Carla Peterman, Chair
Commissioner Dave Jones
Commissioner Michael Kahn
Commissioner Pedro Nava
Commissioner Michael Wara
Evan Johnson, Executive Officer

Subject: The Public Advocates Office Comments on Portions of the Commission on Catastrophic Wildfire Cost and Recovery Report

Dear Chair Peterman and Commissioners:

The Public Advocates Office is the independent consumer advocate at the California Public Utilities Commission. Our mission is to advocate for the lowest possible rates for customers of California's regulated utilities consistent with safe, reliable service levels, and the state's environmental goals. Given this mission, the Public Advocates Office applauds and supports the Commission on Catastrophic Wildfire Cost and Recovery (Wildfire Commission) efforts to provide recommendations on how to manage the long-term costs and liabilities associated with utility-caused wildfires. Indeed, we are an early and steadfast proponent of the idea that wildfire risk reduction must be an integral and guiding component of any statewide strategy for managing catastrophic wildfires, and wholly endorse Finding 5 of the Wildfire Commission's Report, that "Wildfire risk is created by multiple parties who should all be incentivized to reduce risk and share in paying for wildfire damages." However, the Public Advocates Office believes the Wildfire Commission's recommendation that a standard of review that is more lenient than the prudent manager standard be adopted is unfounded and contraindicated.

The "prudent manager" is simply the manager that "exercises reasonable judgment in light of the facts known or which should have been known at the time the decision was made."¹ It is not a standard of perfection but rather, of reasonableness. Because it takes into account both the actual conditions and what the manager can reasonably be expected to know, this standard incents managers to act to address unforeseen conditions, to take

¹ *Appl. of SCE, D.87-06-021 (1987) Cal. PUC LEXIS 588, *28-29; 24 CPUC 2d 476, 486.*

proactive steps, and in general to timely act to decrease the likelihood and severity of wildfires. By definition, a more permissive standard would allow unreasonable and imprudent behavior.

The Wildfire Fund Workgroup Report Draft recommends that “the legislature undertake modifications to the prudent manager standard to provide greater certainty regarding when utilities are able to recover costs related to wildfire damages.” This recommendation is based on a discussion in the Wildfire Commission’s Utility Liability Workgroup Draft Report.² The latter discussion:

- Relates the view that “the reasonably prudent manager standard is out of line with reasonableness standards used by the Federal Energy Regulatory Commission (FERC) and civil law, which place the burden on the party objecting to cost recovery (FERC) or asserting negligence (civil law) to show that the imprudence or negligence has occurred;”³
- Broadly asserts that the CPUC’s determination that the utility prudently managed its system, which is necessary before IOUs can recover liability costs from their electric customers, can take years;⁴ and
- Correctly notes that “SB 901 directs the CPUC’s prudence evaluation to consider twelve factors that more directly relate to wildfire causes and assessment, including the role of climate change in exacerbating wildfires.”⁵

² Appendix II: Fund Workgroup Report Draft, p.8.

³ This view which is attributed to two Investor Owned Utilities and a plaintiff side lawyer concern, presents a misleading oversimplification about the civil courts. Rather than parties alleging negligence bearing the burden, the rule in civil courts is that the moving party bears the preliminary (prima facie) burden of proof. Consistent with this approach, in CPUC proceedings to recover wildfire costs, as the applicant and moving party the utility bears the preliminary burden of proof.

⁴ The Liability Workgroup Draft Report acknowledges that “[t]o date, there has been only one significant instance where an investor owned utility requested cost recovery for third-party wildfire damage in excess of general liability insurance” and that this case was heard prior to the passage of legislation related to the timing issue such as SB 901.

⁵ The Utility Liability Workgroup Draft Report fails to acknowledge that SB 901’s list of factors to consider is neither exhaustive nor exclusive. See PU Code section 451.1.

Each of the claims above is intended to address the desire to “provide greater certainty regarding when utilities are able to recover costs related to wildfire damages.”⁶ However, these claims are flawed. (See footnotes 2-4.)

The Wildfire Commission’s Utility Liability Workgroup Draft Report’s suggestion that a more “permissive standard of review for wildfire claims may be warranted” is contrary to Finding 5 above. The Wildfire Commission errs by conflating providing for more timely recovery with increasing the certainty of recovery. While the report speculates that a more permissive standard may be appropriate “given the nature of the risk, size of potential liabilities, and assumptions of cost socialization assumed in ‘no-fault’ liability,”⁷ given the acknowledged need to incentivize risk reduction,⁸ these very considerations argue against diluting the prudent manager standard.

The Wildfire Commission has acknowledged that “California’s utilities have played a pivotal role in causing the state’s most destructive recent wildfires, and must take a leadership position in mitigating the risks created by this new reality,”⁹ and that “we must not incentivize risky behavior.”¹⁰ Therefore, why would the Wildfire Commission advocate adoption of a more permissive or unreasonable manager standard? While the objective to “significantly reduce the risk to ratepayers from overwhelming wildfire liability”¹¹ is laudable, we must not conflate reducing wildfire liability (for some) with reducing the likelihood, severity, and cost of wildfires. As the Wildfire Commission wisely notes, “all stakeholders suffer if wildfires persist at the current scale.”

Respectfully submitted,

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⁶ See Appendix II: Fund Workgroup Report Draft, p.8 (Emphasis added).

⁷ Appendix I: Utility Liability Workgroup Draft Report, p. 6.

⁸ Appendix II: Fund Workgroup Report Draft, p 5.

⁹ Appendix II: Fund Workgroup Report Draft, p. 2.

¹⁰ Appendix II: Fund Workgroup Report Draft, p 5.

¹¹ Appendix II: Fund Workgroup Report Draft, p. 8.