



April 22, 2019

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Ms. Carla Peterman
Chair, Commission on Catastrophic Wildfire Cost and Recovery
Governor's Office of Planning and Research
1400 Tenth Street
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Submitted via email: wildfirecommission@opr.ca.gov

RE: Request for Comment – Commission on Catastrophic Wildfire Cost and Recovery

Dear Chair Peterman,

The California State Association of Counties (CSAC) is pleased to offer the following comments as requested by the Commission on Catastrophic Wildfire Cost and Recovery. CSAC supported the passage of SB 901 (Dodd, 2018) and the efforts to address the multitude of issues surrounding catastrophic wildfire, including utility-caused wildfires and liability. Unfortunately, since that time California has experienced another series of tragic wildfires – the 2018 Camp Fire being the most deadly and destructive yet. We've also seen a major utility file for Chapter 11 Bankruptcy as a result of liabilities and other credit ratings reduced. We are committed to working with the Administration, the Legislature and this Commission on policies that will address this mounting crisis in our state.

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 losses, 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 incentivized 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.

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 false. That concept of apportionment of fault applies to negligence. Inverse condemnation requires that the intended use and design was 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.

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. 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.

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.

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.

We remain committed to being an active participant in these discussions and responding to the Governor's challenge to develop the framework for a solution in the very near future. Should you have any questions regarding our position or our coalition, please me at 916-327-7500, ext. 509, or dkernan@counties.org.

Sincerely,

A handwritten signature in cursive script that reads "Darby Kernan".

Darby Kernan
Deputy Executive Director