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VIA ELECTRONIC MAIL

Commission on Catastrophic Wildfire Cost and Recovery

RE: Reform of Inverse Condemnation

Dear Commissioners:

As a native Californian and resident of Northern California, I thank the Commission for its dedicated and thoughtful attention to the wildfire challenges all Californians face. I am not only a concerned citizen and taxpayer but also an attorney who has spent the better part of three decades handling catastrophic property damage cases. At the beginning of my career, I represented 1,400 people who lost their homes in the devastating 1986 floods. I have tried inverse condemnation cases and argued them on appeal. I have represented both plaintiffs and defendants in flood and fire cases. For the past 15 years, I have represented defendants in some of the largest civil wildfire cases in California history. I have also handled wildfire cases in Washington, Oregon and Texas.

I write in hopes the Commission will derive some value from my experience with wildfires and inverse condemnation. I do not represent electrical utilities; my clients are more likely to be companies that contract with electrical utilities to help prevent wildfires. Indeed, my clients' interests are often adverse to those of the electrical utilities. But the last 30 years taught me a great deal about the toll these fires place on victims, firefighters, employers, insurers, the environment, the economy and the judicial system. It is from that perspective that I offer my view of how the legal system can strike a better balance between the need to compensate victims and the need to assure the equitable dispensation of justice.

I. The Current Wildfire Liability Regime

The current wildfire liability regime is certainly equitable when it comes to holding electrical utilities and others responsible for their negligence. Inequity results when people and companies are expected to bear the costs of wildfires that were not caused by their negligence – in other words, no-fault liability.

One can only do so much to control the risks and costs of wildfires. Those risks and costs have increased due to conditions the entire community faces but no single industry can control or plan for, such as the following:

- The impacts of climate change;
- Massive tree mortality due to bark beetle and other natural threats;
- The tremendous growth of communities within the Wildland Urban Interface;
- Lack of funding for, or inadequate enforcement of, ordinances and regulations requiring fire-safe measures to protect homes; and
- Inadequate funding for forest management at the Federal, State and local level.

A wildfire liability regime that places no-fault liability on electrical utilities thus burdens the utilities with more than their fair share of the costs of social, political and environmental circumstances they cannot control. Often, their only solution is to try to pass that cost on to their contractors or the insurance industry. That is not a workable solution. It does nothing but move an inequitable burden from one industry to another. Insurance companies are refusing to insure the risk of wildfire in California. Companies that once contracted with utilities to help prevent wildfires can no longer get the insurance they need so they are leaving the State and taking valuable jobs away from Californians. The inequitable ripple effect of the current no-fault liability regime is expansive, wide-ranging and financially intolerable.

II. A Possible Solution

There still needs to be a wildfire liability regime that holds electrical utilities and others responsible for fires they negligently cause. Victims of negligence deserve compensation for the wrongs done to them. The law in that area is well-developed and serves important policies of deterrence and accountability.

Laws that wholly ignore culpability need to be changed. The most prominent of those is the law of inverse condemnation, a concept with which the Commission has already become very familiar. I do not propose doing away with inverse condemnation against electrical utilities. I propose that the law of inverse condemnation be changed so electrical utilities are only liable for fires caused by unreasonable plans of design, construction, maintenance or operation.

This is not an unprecedented approach. Over 30 years ago, the California Supreme Court largely abolished no-fault inverse condemnation liability for failures of flood control

projects like dams and levees. And the Court did so for reasons that apply just as much in the context of wildfires caused by electrical utilities as for floods caused by flood control projects. The case was *Belair v. Riverside County Flood Control District* (1988) 47 Cal. 3d 550. The Court in *Belair* grappled with the problem that, if the owner of a dam is held liable for inverse condemnation without fault, the dam owner is turned into "the absolute insurer" of every piece of land protected by the project. Meanwhile, the very same people who were damaged had benefitted from the protection the project provided them; indeed, some would never have been able to live where they did but for the flood protection the project provided. On the other hand, the Court recognized that the potential damage caused by a flood control project could be enormous. The Court balanced those concerns by changing the law of inverse condemnation so that the owner of a flood control project will be liable only if the damage was caused by an unreasonable plan of design, construction, maintenance or operation.

The current regime of no-fault inverse condemnation puts electrical utilities in the exact same unfair position as were owners of flood control projects before the *Belair* decision. Electrical utilities have effectively become the insurers for all of the lands and homes to which they provide electrical service. Yet the very same people who are at risk of wildfire would probably not live in the Wildland Urban Interface without electricity. Placing the entire risk of loss on the company that provides electricity – like placing it on the entity that provides flood control – ignores the benefits that company provides to the community it serves.

The *Belair* solution worked for flood control projects and it will work for electrical utilities facing massive wildfire claims. Indeed, the law that has developed since *Belair* now clearly defines what it means for a plan to be unreasonable – and that definition is perfectly adaptable to the wildfire context. Thanks to cases like *Locklin v. City of Lafayette* (1994) 7 Cal.4th 327, the law already includes a list of specific factors that courts have used for decades to decide whether a plan is unreasonable. With some modification, we can readily adapt those factors to wildfires to create a liability regime that equitably distributes the risks and costs of wildfires in much the same way we now distribute the risks and costs of floods.

I propose a statutory remedy that would require a showing of an unreasonable plan before an electrical utility will be found liable for inverse condemnation for wildfires. Under this proposal, courts would take into account the following factors when deciding whether a utility's plan was unreasonable:

(1) Whether the plan complies with regulations, laws, Public Utilities Commission Orders, fire mitigation plans prepared pursuant to Section 8386 of the Public Utilities Code or other statutes requiring the development of fire mitigation or prevention plans;

(2) Whether the plan complies with reasonable industry standards and practices;

(3) The extent to which extreme weather, wind, drought or other factors contributed to the cause of the fire; and

(4) The feasibility, availability and cost of taking measures that would have prevented the fire.

The solution I propose is one that has worked in the flood context and would work just as well in the wildfire context. It should require no Constitutional amendment, since it incorporates principles that are already part the law of inverse condemnation. It leaves fully intact the law of negligence, so victims would still have a right to be compensated when the utility negligently causes a fire by unsafe work practices, careless repair, defective equipment and other conduct in the operation of the electrical facilities.

This solution is not only good for the electrical utilities. It is good for other businesses to whom electrical utilities often attempt to pass their no-fault liability. It is good for companies that might otherwise have no choice but to take jobs out of California or, worse, go into bankruptcy. It is good for the liability insurance market because it encourages more insurers to continue to write coverage in California. And it creates these benefits without depriving wildfire victims of their rights to sue for negligence or to seek the Constitutional remedy of inverse condemnation.

As a fellow Californian who has first-hand experience with the tremendous challenges of wildfire liability, I thank the Commission for its fine service to the People of this State and remain pleased and prepared to help in any way I can.

Sincerely,

Randy W. Gimple