Comments of Michael Aguirre and Maria Severson to the Commission on Catastrophic Wildfire Cost and Recovery

June 5, 2019

We are attorneys who have been representing investor-owned utility (IOU) ratepayers in litigation against the IOUs since 2009. We have learned through our decade-long advocacy on behalf of ratepayers the primary cause of catastrophic wildfires: The IOUs' noncompliance with wildfire safety rules, along with the California Public Utilities Commission's (CPUC) failure to enforce those rules.

On April 30 of this year, San Diego Gas & Electric (SDG&E) petitioned the U.S Supreme Court to hear its appeal to force the CPUC to allow a $379 million rate increase for uninsured liabilities from the 2007 San Diego wildfires. A week ago, on May 30, we filed a brief with the U.S. Supreme Court on behalf of a party to that case, an interested SDG&E ratepayer, to demonstrate why SDG&E's attack on the prudent manager standard – one of the key issues here – lacked merit.[1] SDG&E and its fellow IOUs now repeat the same misleading arguments before the Commission on Catastrophic Wildfire Cost and Recovery ("Commission").

We therefore write to provide an underrepresented perspective to the Commission on the cost recovery mechanism the IOUs seek to dismantle. Ratepayers should not be stripped of protection from unjust and unreasonable rate increases, especially when ratepayers were not responsible for the IOUs' continued failure to abide by California's wildfire safety laws time and again.

A. The Prudent Manager Standard's Inquiry into The Justness and Reasonableness of Cost Recovery Should Not be Diluted nor the Burden of Proof Therein Unchanged

As stated in Finding 3 of Appendix II, the Commission stated it received testimony "that the current standard for cost-recovery is unclear," with some parties favoring a system which places the burden of proof on ratepayers to prove IOU imprudence or negligence. The Commission should not recommend any such change because of the tried-and-true effectiveness of the prudent manager standard in preventing the passing on of and unjust and unreasonable costs onto ratepayers.

---

[1] *See San Diego Gas & Elec. v. CPUC*, docket No. 18-1368 at the U.S. Supreme Court: https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/18-1368.html

The standard for cost recovery is not unclear. The standard is well-known: IOUs bear the burden of showing its costs to be imposed upon ratepayers are "just and reasonable," and the prudent manager standard exists to determine whether such costs are in fact just and reasonable.[2] The Legislature's use of the prudent manager standard to ensure ratepayers pay just and reasonable rates is well in keeping with long-established principles of Fifth Amendment Takings Clause jurisprudence from the Supreme Court.[3]

Moreover, the prudent manager standard as articulated in SB 901 is already in line with reasonableness standards in civil law. In a negligence action, the party seeking compensation has the burden of proof, and likewise, the party seeking cost recovery under the prudent manager standard – the IOUs – must demonstrate their sought-after rate increases are just and reasonable.

The CPUC has in fact previously considered, and rejected, the very proposals advanced by the IOUs to the Commission to apply negligence principles into the ratemaking process: "Indeed it is probably unwise to inject the concept of negligence… into the ratemaking process, where standards for allowance or disallowance are already adequately defined to resolve reasonableness issues."[4]

The prudent manager standard is effective at ensuring ratepayers in fact pay just and reasonable costs *because* the burden of proof is on IOUs. The CPUC has emphasized the prudent manager standard's role in protecting ratepayers: "It would be *unconscionable* from a regulatory perspective to reward… imprudent activity by passing the resultant costs through to ratepayers."[5]

Without the burden of proof being put onto the party seeking rate recovery – the IOUs – to show their costs are in fact just and reasonable, ratepayers will be in a deeply disadvantageous position relative to the IOUs. Ratepayers lack immediate

---

[2] *See* 2002 Cal. PUC LEXIS 534 (2002) *6-7 (describing the utility's "burden to show that its actions were reasonable in light of circumstances existent at the time… through clear and convincing evidence.").

[3] *See e.g. Duquesne Light Co. v. Barasach*, 488 U.S. 299, 307–08 (1989) (rejecting suggestion that a "prudent investment rule should be… the constitutional standard" and holding "no single method need be followed… in considering the justness and reasonableness of rates."); *Fed. Power Comm'n v. Hope Nat. Gas Co.*, 320 U.S. 591, 603 (1943) (fixing of just and reasonable rates "does not insure that the business shall produce net revenues.").

[4] *See* 1984 Cal. PUC LEXIS 1044 (1984) *106.

[5] *See id.* at *107 (emphasis added) (analyzing the reasonableness of IOU conduct relating to a diesel fire at the San Onofre Nuclear Generating Station and determining the IOU was not a prudent manager).

access to an IOU's internal data showing what conditions an IOU was aware of around the time a wildfire began, what actions were or were not taken in response to such conditions, and what tools were available to the IOU in the first place.

IOUs also have access to significant resources – financial, legal, legislative, and so on – to make their affirmative case to raise rates. It would be unreasonable, if not disastrous, to require ratepayers to do the same against the raising of rates. As Judge William Alsup of the Northern District of California put it: "You [PG&E] spend so much money on lobbying, you could go to Sacramento today and get a law passed on cutting down those trees [near transmission lines]."[6]

Indeed, the Commission's draft report seems to recognize use of the prudent manager standard has not by itself caused IOUs financial difficulties. The draft report recognizes there is only "one significant instance" in which an IOU requested, and was denied, cost recovery beyond its liability insurance.[7]

The significance of this example cannot be understated. SDG&E was denied recovery for $379 million of liabilities from the 2007 San Diego wildfires, a mere *fifteen percent* of the $2.4 billion in total liabilities, because its insurance paid for the remaining *eighty-five percent*. Recovery was denied because SDG&E acted unreasonably in handling the 2007 San Diego wildfire – in one instance, SDG&E waited *six hours* to de-energize its downed power lines, despite SDG&E's arguments that contemporaneous weather conditions were unusually hot and dry.[8]

The lone example of the prudent manager standard being applied to deny cost recovery beyond insurance coverage should not be understood as evidence that a new standard of review is warranted or that it should be more permissive. If anything, the lone example shows the prudent manager standard working as intended: to prevent cost spreading of modest amounts of liabilities onto ratepayers where the catastrophic wildfire at issue was directly caused by the IOUs' actions.

---

[6] John Wildermuth, *PG&E lobbying spending in California soars after deadly wildfires, San Francisco Chronicle* (Jan. 30, 2019), https://www.sfchronicle.com/politics/article/PG-E-lobbying-spending-in-California-soars-after-13575166.php

[7] Appendix II, Finding 3 of the Draft Report, page 6.

[8] Jeff McDonald, *Judges: Reject SDG&E bid to charge customers for $379 million in wildfire costs*, San Diego Union Tribune (Aug. 23, 2017), https://www.sandiegouniontribune.com/news/watchdog/sd-me-wildfire-costs-20170823-story.html

In other words, the prudent manager standard already prevents unjust and unreasonable cost spreading, in furtherance of the ratepayers' Fifth Amendment rights against unlawful government takings. Weakening of the prudent manager standard does not constitute clarification of the same.

B. The Process by Which Investors Can Predict IOU Liability is Not Protracted, as Enough Facts Become Available to the Public to Reasonably Determine Liability Within Months, as Seen with The Camp Fire

The Commission's draft report reflects testimony that "the current standard for cost-recovery is… protracted," but in truth, investors are provided enough information to make reasonable determinations of IOU liability within a few months after a catastrophic wildfire has been contained.

Information linking PG&E to the Camp Fire was revealed quickly. Two months after the fire, reports were published of PG&E infrastructure damage in the area at the time the fire ignited.[9] Indeed, three months after the fire, a federal judge issued a proposed order to PG&E to reinspect its entire electric grid[10] and shortly thereafter, PG&E declared bankruptcy.[11] By February 2019 – four months after the Camp Fire – PG&E admitted to its investors that it had likely caused the conflagration.[12] Investors lost confidence in PG&E long before Cal Fire declared its investigation results in May 2019, where PG&E equipment was found to be the direct cause of the Camp Fire.

In other words, PG&E's poor financial health, and the market's unwillingness to extend credit to PG&E, is the result of PG&E's wildfire safety violations and not the purported length of time a prudent manager determination

---

[9] Roland Li, *Numerous PG&E employees saw flames soon after Camp Fire started, San Francisco Chronicle* (Dec. 31, 2018), https://www.sfchronicle.com/california-wildfires/article/Numerous-PG-E-employees-saw-flames-soon-after-13501188.php

[10] Dale Kasler & Tony Bizjak, *Judge could force PG&E to inspect all 106,000 miles of electric grid*, The Sacramento Bee (January 9, 2019), https://www.sacbee.com/latest-news/article224204400.html

[11] Iulia Gheorghiu, *A PG&E bankruptcy timeline: The road to Chapter 11 and beyond*, UtilityDive (Jan. 31, 2019), https://www.utilitydive.com/news/a-pge-bankruptcy-timeline-the-road-to-chapter-11-and-beyond/547154/

[12] Francesca Paris, *PG&E Says Its Equipment Likely Caused Camp Fire, As Investigation Continues*, National Public Radio (February 28, 2019), https://www.npr.org/2019/02/28/699026147/pg-e-says-its-equipment-likely-caused-camp-fire-as-investigation-continues

would take. The culprit behind lack of investor confidence in IOUs is not the prudent manager standard or an IOUs' ability to prove it deserves to spread costs onto ratepayers, but with the market's confidence in California's IOUs to avoid causing wildfires in the first place.

Conclusion

Cal Fire's investigations and ratepayer lawsuits have proven, time and again, the direct causes of catastrophic wildfires to be the IOUs' refusal to do what is necessary for safety, despite the many resources at their disposal. Judge William Alsup, who found PG&E to have violated its probation by causing the Camp Fire, memorialized that sentiment succinctly:

> In the last five years, $4.5 billion in dividends were paid out to shareholders. Some of that could've been paid out to cut trees. But all the money went to shareholders.[13]

The IOUs arguments against the prudent manager standard therefore lack merit. The Commission should direct its attention instead at the root cause of the IOUs' financial difficulties: their noncompliance, time and again, with wildfire safety standards.

---

[13] Matthias Gafni & John Woolfolk, *Federal judge asks PG&E: Should I 'let you keep killing people?' Rules utility violated its felony probation*, Redwood Times (January 30, 2019), https://www.redwoodtimes.com/2019/01/30/federal-judge-to-decide-whether-to-toughen-pges-probation-terms-today/