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BEFORE THE PUBLIC UTILITIES COMMISSION

OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking to Consider Authorization of a Non-Bypassable Charge to Support California's Wildfire Fund.	Rulemaking 19-07-017 (Filed July 26, 2019)

WILD TREE FOUNDATION

COMMENTS ON PROPOSED DECISION

April Rose Maurath Sommer
Executive and Legal Director

Wild Tree Foundation
1547 Palos Verdes Mall #196
Walnut Creek, CA 94597
April@WildTree.org
(925) 310-6070

Dated: October 11, 2019

SUMMARY OF RECOMMENDED CHANGES

1. Wild Tree Foundation recommends that the proposed decision should not be approved and an alternative decision should be issued denying an increase in rates to fund the Wildfire Fund as unjust, unreasonable, unsafe, and unconstitutional.

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WILD TREE FOUNDATION
COMMENTS ON PROPOSED DECISIONS

Pursuant to the Rule 13.4 of the Commission Rules of Practice and Procedure, Wild Tree Foundation ("Wild Tree") submits the following comments on the Proposed Decision Approving Imposition Of A Non-Bypassable Charge To Support California's Wildfire Fund And Adopting Rate Agreement Between The California Department Of Water Resources And The California Public Utilities Commission ("Proposed Decisions" or "PD").

The Commission should approve an alternate decision that denies any ratepayer increase to fund the Wildfire Fund. It would be unjust and unreasonable for the Commission to increase rates for the Wildfire Fund because 1.) without meaningful opportunity to be heard, imposition of the rate increase will be a taking in violation of constitutionally guaranteed due process, 2.) the operation of the Fund will increase risk to public safety from utility-caused fires 3.) the Fund will wrongly socialize risk and privatize gain, unduly enriching the private, for-profit investor owned utilities while making utility bills increasingly unaffordable.

While the Code mandates that the Commission reach a decision based upon a mandated schedule, it does not mandate what that decision must be. The Commission should, therefore, decline to adopt any rate increase. The PD lacks any findings of fact that can support a conclusion of law that the imposition of the rate increase is just and reasonable. There are no findings of fact that can support conclusions of law because there were no hearings to establish the facts of this case. Approval of a $15 billion increase in rates would be an abuse of discretion in these circumstances. Critically, there are no findings of fact regarding safety despite the Commission's duty, above all else, to protect public safety, and despite the fact that the Wildfire Fund scheme puts the public at greatly increased risk from fires by disincentivizing the investor owned utilities from prioritizing safety over profits.

The PD lacks needed analysis of the legality and safety implications of allowing the IOU's to be enriched with ratepayer funds based upon a ministerial, staff-level decision, likely immune from judicial review. Unfortunately, the Wild Tree's recommendation that safety be addressed in this proceeding was not heeded. The Commission will be remiss in its duty to protect the public safety should it approve a decision that lacks evaluation of the safety implications of its actions. The scheme whereby the Commission Executive Director will preemptively declare an IOU worthy of a get-out-of-jail free card in the form of a safety certificate is unconstitutional and unsafe. The taking and holding of ratepayers' property to be used in such a fashion, whereby judicial review of the ministerial decision is difficult if not impossible to attain, where the burden has been shifted to intervenors to prove imprudent IOU behavior, and where ratepayers will pay for damages from fires caused by IOU imprudent behavior should the cost exceed the cap, would be an unjust and unreasonable unconstitutional taking.

COMMENTS

A. Approval of the PD Would Be an Abuse of Discretion and Imposition of the Rate Increase Would Be an Unconstitutional Taking Without Due Process

The Commission should issue a decision that denies any rate increase based upon AB 1054. If the Commissions acts otherwise, it would do so in violation of the United States Constitution, the California Constitution, the Public Utilities Code, and Commission rules that require a decision be supported by the findings and that findings are supported by substantial evidence in light of a record developed with notice and meaningful opportunity to be heard. Here, there has been no hearing, no evidence accepted, no record developed, and no meaningful opportunity for ratepayers to be heard. There is no evidence to supports findings of facts and thus no facts to support conclusions of law. The Commissions cannot, under these circumstances, issue a legally defensible decision.

1. A Rate Increase Must Be Just, Reasonable, and Based Upon a Record Developed in a Proceeding That Provides Due Process

The California Constitution grants the Commission authority to "fix rates" and "establish rules" for public utilities[1] but its ratemaking authority is not absolute – it must provide due process in compliance with the Public Utilities Codes and its own Rules. Although permitted to establish its own procedures, the Commission is "subject, of course, to the constitutional obligation to satisfy due process. . ."[2] The Public Utilities Code explicitly provides for due process: "The assigned commissioner shall schedule a prehearing conference and shall prepare and issue by order or ruling a scoping memo that describes the issues to be considered and the

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[1] Cal. Const., art. XII, § 6.
[2] *Pac. Gas & Elec. Co. v. Pub. Utilities Comm'n* (2015) 188 Cal. Rptr. 3d 374, 410.

applicable timetable for resolution and that, *consistent with due process*, public policy, and statutory requirements, determines whether the proceeding requires a hearing.[3]

Due process requires a fair proceeding whenever an individual is to be deprived of property for a public purpose. Ratepayers have a property interest in utility service: "Utility service is a necessity of modern life; indeed, the discontinuance of water or heating for even short periods of time may threaten health and safety."[4] Pursuant to the 14th Amendment, "No state shall … deprive any person of life, liberty, or property, without due process of law."[5] Likewise, under the California Constitution, "A person may not be deprived of life, liberty, or property without due process of law."[6] A fundamental requirement of due process is "the opportunity to be heard."[7] "It is an opportunity which must be granted at a meaningful time and in a meaningful manner."[8]

The United State Supreme Court has long held that due process in ratemaking proceedings by the Commission requires a fair hearing. In *Railroad Com. of California v. Pacific Gas & Electric Co.*, the Court explained that the requirements of procedural due process are met only where "the rate-making agency of the State gives a fair hearing, receives and considers the competent evidence that is offered, affords opportunity through evidence and argument to challenge the result, and makes its determination upon evidence and not arbitrarily."[9]

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[3] Pub. Util. Code, § 1701.1.
[4] *Memphis Light, Gas Water Div. v. Craft* (1978) 436 U.S. 1, 18.
[5] U.S. Const., 14th Amend.
[6] Cal. Const., art. I, § 7, subd. (a).
[7] *Grannis v. Ordean* (1914) 234 U.S. 385, 394.
[8] *Armstrong v. Manzo* (1965) 380 U.S. 545, 552.
[9] *Railroad Com. of California v. Pacific Gas & Electric Co.* (1938) 302 U.S. 388, 393-394.

Due process also calls for a decision to be based on a record. "[T]he decisionmaker's conclusion . . . must rest solely on the legal rules and evidence adduced at the hearing. To demonstrate compliance with this elementary requirement, the decisionmaker should state the reasons for his determination and indicate the evidence he relied on, though his statement need not amount to a full opinion or even formal findings of fact and conclusions of law."[10] Commission decisions must go further: Commission decisions "shall contain, separately stated, findings of fact and conclusions of law by the commission on all issues material to the order or decision."[11] "Every issue that must be resolved to reach that ultimate finding is 'material to the order or decision,' and findings are required of the basic facts upon which the ultimate finding is based. . .[S]uch findings afford a rational basis for judicial review and assist the reviewing court to ascertain the principles relied upon by the [PUC] and to determine whether it acted arbitrarily, as well as assist parties to know why the case was lost and to prepare for rehearing or review, assist others planning activities involving similar questions, and serve to help the [PUC] avoid careless or arbitrary action."[12]

Commission decisions are subject to being overturned upon judicial review where the Commission has demonstrated an abuse of discretion whereby: (1) the commission has not proceeded in the manner required by law, (2) the decision of the commission is not supported by the findings, (3) the findings in the decision of the commission are not supported by substantial

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[10] *Goldberg v. Kelly* (1970) 397 U.S. 254.
[11] Pub. Util. Code, § 1705; See also *Clean Energy Fuels Corp. v. Public Utilities Com.* (2014) 227 Cal. App. 4th 641.
[12] *Clean Energy Fuels Corp. v. Public Utilities Com.* (2014) 227 Cal. App. 4th 641 quoting *Greyhound Lines, Inc. v. Public Utilities Com.* (1967) 65 Cal.2d 811 (citation omitted.)

evidence in light of the whole record, or (4) the order or decision of the commission violates any right of the petitioner under the Constitution of the United States or the California Constitution.[13]

The review is broader where constitutional issues are presented. "Notwithstanding Sections 1757 and 1757.1, in any proceeding wherein the validity of any order or decision is challenged on the ground that it violates any right of petitioner under the United States Constitution or the California Constitution, the Supreme Court or court of appeal shall exercise independent judgment on the law and the facts, and the findings or conclusions of the commission material to the determination of the constitutional question shall not be final."

2. Ratepayers Will Be Denied Due Process Under the Proposed Decision

The PD implies that the Commission has no choice but to approve the rate increase: "In a more general sense, when the Legislature crafts a law, such as AB 1054, it speaks for the people of California on matter of public policy. This determination cannot be supplanted by the Commission."[14] This ignores the fact the Legislature did not speak in AB 1054 on whether or not imposition of a rate increase to fund the Fund would be just and reasonable, and specifically calls upon the Commission to make a just and reasonableness determination. Section 3289 states that the Commission "shall initiate a rulemaking proceeding to consider using its authority. . . to collect a nonbypassable charge from ratepayers. . ."[15] and, if, only and if, "the commission determines that the imposition of the charge described in paragraph (1) is just and reasonable,

[13] Pub. Util. Code, § 1757, subd. (a); see *Save Our Peninsula Comm. v. Monterey Cnty. Bd. of Supervisors* (2001) 87 Cal.App.4th 99, 116–117.
[14] PD at p. 34.
[15] Pub. Util. Code, § 3289.

and that it is appropriate to exercise its authority pursuant to Section 701 to do so" should the Commission approve the rate increase.[16]

Unfortunately, the Legislature did mandate that the Commission make their determination in in an unreasonably expedited fashion – section 3289 commands that "notwithstanding any other law, no later than 90 days after the initiation of the rulemaking proceeding, the commission shall adopt a decision regarding the imposition of the charge."[17] But, the Legislature does not have the ability to legislative away due process rights. The fact that the Legislature set an unreasonably expedited schedule and wrongly limited the ability for any changes to the decision in this proceeding does not mean that the Commission is absolved of its duty to provide due process. If the Commission cannot guarantee due process rights in the mandated schedule, then it must not act to engage in a taking of ratepayer property and must deny any increase in rates.

The PD claims that due process was provided because party comments were extensive, substantially similar, and "few restrictions were placed on the parties' ability to provide comments in a form of their choosing."[18] These factors are not determinative as to whether or not due process was afforded. Furthermore, party comments were not substantially similar and many issues raised are not addressed in the PD. While parties did their best to provide meaningful comment, the level of analysis due a massive rate increase was frustrated by the limitation of party participation to one set of comments due under unreasonably short deadlines: the Scoping Memo was issued August 14 and party comments were due just two weeks later on

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[16] *Id.* at subd. (a)(2).
[17] *Id.* at subd. (b).
[18] R.19-07-017, Proposed Decision (September 23, 2019) ("PD") at p. 43.

August 29 and reply comments were due one week later on Sept 6. Comments were not informed by evidence because there was no testimony accepted and hearings were not held.

The PD states, "Based on these legislative determinations, and the record of this proceeding, the Commission determines that the creation and imposition of the Wildfire Fund NBC is just and reasonable as discussed in more detail below."[19] But, there is no record in this proceeding upon which a decision can be based; should the PD be approved, the resultant decision would be issued absent any testimony, evidentiary hearings, public participation hearings, or legal briefing.

The PD summarily dismisses the need for evidentiary hearings, stating "parties concerned with the expedited process in this proceeding fail to demonstrate that there are <u>any</u> material issues of disputed fact that require evidentiary hearing, despite their claims to the contrary."[20] In fact, in its Reply brief, Wild Tree documented the many materials issues of disputed fact that were raised by parties[21], including the following:

1. Which ratepayers will pay increased rates?
    a. Will all IOUs ratepayers pay regardless of individual IOU participation?
    b. Will CARE and medical needs ratepayers pay? How much?
    c. Will NEM participants pay? How much?
    d. Will Direct Access customer pay? How much?
    e. Do ratepayers of all IOUs continue to pay if an IOU becomes ineligible in the future?
2. How much will ratepayers pay?
    a. Will the charge be based on usage or a set fee?
    b. How should the revenue requirement equivalent amount be calculated?
    c. What will interest rate of bonds be and how does this impact the rate increase?
    d. Will the ratepayer fund amount be equivalent to the revenue requirement as adopted or collected?
    e. Is there a conflict in the law regarding the amount of bonds to be issued? If so, how it is to be settled and how does this impact rate increase?

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[19] PD at p. 33.
[20] PD at p. 42.
[21] R.19-07-017, Wild Tree Foundation Reply Comments on Scoped Issues (September 6, 2019) at pp. 6-10.

    f. Will the revenue requirement change if an IOU is or become ineligible?
3. When does payment into the fund begin? When does the water bond charge expire?
4. Will rate increase make utility bills unaffordable?
    a. Will the fund increase bill volatility?
    b. What is the cumulative impact on ratepayers of all rate increases to cover all fire-related costs?
    c. What is the cumulative impact on ratepayers of all rate increases currently proposed i.e requested increased rates of return?
5. Will ratepayers be reimbursed for overpayment? How and when?
6. Will ratepayers be required to pay more if the fund is entirely depleted?
7. How will the fund impact safety?

Issues of disputed fact that remain unaddressed in the PD get at the very heart of whether a rate increase is just or reasonable – *will the rate increase make utilities bills unaffordable* and *how will the Fund impact safety*. The PD dismissed the issue of impact on ratepayer bills stating, "Wild Tree Foundation grants that there is no dispute as to the nature of the non-bypassable charge that can be approved (or not approved). Therefore, there is no material dispute about the approximate magnitude of the bill impact of such a charge. The Commission is aware of these potential bill impacts and considers them, as detailed below, in its approval of the Wildfire Fund NBC."[22] Wild Tree does not, of course, grant that there is no dispute as to the impact on customer bills. There has been no analysis, whatsoever, in this proceeding or in any other, on the cumulative impact of all rate increases to cover fire related costs or all rate increases currently proposed. The rate increase contemplated in this proceeding will not occur in a vacuum and the Commission has a duty to consider whether the rate increase is reasonable in terms of affordability taking into account all known bill pressures.

[22] PD at p. 42.

B. Increasing Rates to Fund the Fund Will Harm Ratepayers and Increase Risk to Public Safety

The PD overstates the value of shareholder contributions and wrongly dismisses the harm to ratepayers that a ratepayer-funded Fund will cause. The PD states, "This decision finds that the shareholder contributions to the insurance structure of the Wildfire Fund provides benefits to ratepayers."[23] This conclusion, which is not supported by any facts on the record, ignores the business structure of the IOUs and other pending proceeding before the Commission. Any compensation IOU shareholders receive is derived from rates. The IOUs are all currently seeking to increase their rates of return to benefit their shareholders. Despite the rosy pictures the PD paints of the beneficent IOUs decreasing their requests for return on equity increases as a result of the passage of AB 1054,[24] they are still all requesting increases. Further, the increases would be on top of the already highest rates of return in the country the California IOUs have enjoyed for almost two decades.[25] Increased rates of return on equity results in an increase in rates. With the increases in return on equity, the IOUs will have additional funds from the increased rates to pay the "shareholder" contributions to the Fund thereby insulating their shareholders from any financial impact of the Fund. The shareholder contributions do not, then, provide any ratepayer benefits as the ratepayers will be paying for the shareholder contributions one way or another.

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[23] PD at p. 35.

[24] PD at p. 38 ("These reduced risks of credit downgrades attributable to AB 1054 have the potential to result in reduced ratepayer costs in open Commission proceedings. SCE claims to have reduced their requested revenue requirement in their return on equity proceeding . . . PG&E similarly claims to have reduced their requested return on equity. . . SDG&E states that it decreased its requested return on equity . . .")

[25] See CPUC, *An Introduction to Utility Cost of Capital* (April 18, 2017), available at: https://www.cpuc.ca.gov/cpucblog.aspx?id=6442453134&blogid=1551.

The PD claims that "AB 1054's scheme essentially provides an insurance fund that can insulate ratepayers from future recovery in rates for prudently incurred utility wildfire costs for which ratepayers would otherwise be responsible to pay in full."[26] The PD cites to no circumstance where ratepayers suffered an increase in rates as a result of a fire caused by IOU where the utility acted prudently. It is a fiction that there is a problem with fires caused by the IOUs that were somehow not the IOUs fault. The problem is fires caused by IOU negligence, recklessness, imprudent management, and violations of the law.

The claim that the Fund will insulate ratepayers also completely ignores the fact that, even where an IOU is found to have acted imprudently, its reimbursement of the Fund following withdrawal to pay claims for a fire it started is capped. As explained in the PD, "costs not deemed just and reasonable would be capped up to an amount equivalent to a cap on 20 percent of the [electrical corporation's] transmission and distribution equity rate base."[27] The cost cap is actually even lower than 20 percent, because it is spread out over a three year "measurement period."[28] Under the Fund scheme, ratepayers will thus be paying for the most destructive fires caused by imprudent IOU action, a change that certainly does not benefit ratepayers and is morally wrong.

The PD further claims that the Wildfire Fund will not incent unsafe utility operation because "the Wildfire Fund makes shareholders pay for claims even if they were prudently incurred costs" but ignores the fact that the converse is true. That is, the Wildfire Fund makes ratepayers pay for claims even if they were imprudently incurred costs. Under the new scheme, even if an intervenor is able to overcome the prudency presumption for a fire where costs exceed

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[26] PD at p. 35.
[27] PD at p. 47.
[28] Pub. Util. Code, § 3292, subd. (h).

the cap, ratepayers will be subsidizing shareholder profits despite IOU negligence and/or recklessness. This is hardly a ratepayer benefit but is, instead, an unjust enrichment of shareholders on the backs of ratepayers, including fire victims. Given the anticipated cost of the 2017 and 2018 fires of $10s of billions, there is a high likelihood that a future fire will easily exceed the cap, providing a culpable IOU with an undeserved windfall.

Citing only to an opinion expressed by SCE, the PD further concludes that "the risk of shareholder reimbursement of the Wildfire Fund, even if capped, incents safe behavior."[29] This assertion is incorrect for a number of reasons. First, the risk of shareholder reimbursement is very low due to the shifting of burden of proof onto the shoulders of intervenors to prove imprudence rather than on the culpable party, an IOU that caused a fire. The ease in which the Executive Director granted the safety certificate to SCE and SDG&E demonstrates how the process is no more than a thoughtless rubber stamp.[30] SCE and SDG&E are now effectively immune from any shareholder reimbursement should they cause any fires over the next year. Secondly, the extremely truncated catastrophic wildfire proceeding process makes it even more unlikely that intervenors, generally individuals and non-profit organizations with magnitude of orders less resources than the IOUs, will be able to make a showing of imprudence. The force majeure excuses built into AB 1054[31] make it even less likely that there will be any shareholder reimbursement. Even if reimbursement is ordered, it will be capped and, as explained above, any shareholder reimbursement will likely be funded through increase in rates as a result of excessive rates of return on equity.

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[29] PD at p. 51.
[30] *See* R.19-07-017, Comments Of Ruth Henricks (August 29, 2019) at p. 8.
[31] Pub. Util. Code, § 451.1, subd. (b) ("Costs and expenses in the application may be allocated for cost recovery in full or in part taking into account factors both within and beyond the utility's control that may have exacerbated the costs and expenses, including humidity, temperature, and winds.")

The PD claims, "There are numerous elements of AB 1054 beyond the Wildfire Fund that will keep utility shareholders motivated to ensure safe operation."[32] This list of elements includes "detailed wildfire mitigation plans." In fact, AB 1054 actually made the wildfire mitigation planning process far less robust than that used in the past. The consideration of mitigation plans has been converted into a staff process instead of a Commission proceeding process, thereby removing the public from participating and making the plans basically immune from judicial review as approval will be a ministerial, staff decision.[33]

The rate increase to fund the Wildfire Fund will increase public safety risks and the Commission has a duty to fully develop a factual record in regards to safety upon which conclusions can be reached. Instead, the PD includes no findings of fact or conclusions of law in regards to safety. It includes only a truncated analysis based entirely upon the opinion of SCE. This is insufficient and the Commission should not approve the PD on the grounds that it lacks necessary analysis of the safety implications of the rate increase.

CONCLUSION

The Commission was directed by the Legislature to make a determination if an increase in rates to fund the Wildfire Fund is just and reasonable. There has been insufficient process in this proceeding to make such a determination and to protect the due process rights of ratepayers. The Commission should not approve the PD but should issue a decision denying any rate increase to fund the Fund as unjust, unreasonable, unconstitutional, and unsafe.

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[32] PD at p. 51.
[33] Pub. Util. Code, § 8386.

Respectfully submitted,

/s/ April Maurath Sommer

April Rose Maurath Sommer
Executive and Legal Director

Wild Tree Foundation
1547 Palos Verdes Mall #196
Walnut Creek, CA 94597
April@WildTree.org
(925) 310-6070

Dated: October 11, 2019

APPENDIX: PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Pursuant to the Public Utilities Code section 3289, the Commission finds that a rate increase to fund the Wildfire Fund would not be just and reasonable.