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12  
13 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
14 COUNTY OF LOS ANGELES, CENTRAL DISTRICT  
15

16 RALPH HABER, et al.,

17  
18 Plaintiffs,

19 vs.  
20

21 SOUTHERN CALIFORNIA EDISON  
22 COMPANY et al.,

23 Defendants.  
24

25 AND CONSOLIDATED AND CROSS-  
26 ACTIONS.  
27

Case No. BC 585858 [LEAD CASE]  
Consol/w BC 595757, BC 608001, BC 608363, BC 608411,  
BC 609549, BC 610560, BC 611086, BC 615033, BC 648862

**NOTICE OF MOTION AND MOTION  
FOR LEGAL DETERMINATION;  
MEMORANDUM OF POINTS AND  
AUTHORITIES**

[DECLARATION OF GINA E. OCH, REQUEST FOR  
JUDICIAL NOTICE AND NOTICE OF LODGMENT  
FILED CONCURRENTLY]

**Reservation ID 180201286345**

Date: April 2, 2018  
Time: 8:45 a.m.  
Dept: 14

Assigned to: **Hon. Terry Green**  
Trial Date: **April 2, 2018**  
Action Filed: June 22, 2015

1 PLEASE TAKE NOTICE that on April 2, 2018, at 8:45 a.m., or as soon thereafter as the  
2 matter may be heard in Department 14 of the above-entitled Court located at 111 North Hill Street,  
3 Los Angeles, California 90012, defendant SOUTHERN CALIFORNIA EDISON COMPANY  
4 (“SCE”) will and hereby does move the Court, under Code of Civil Procedure § 1260.040, for a  
5 legal determination that SCE is not liable for inverse condemnation damages.

6 The motion will be based on this Notice, the attached Memorandum of Points and  
7 Authorities, the concurrently filed Declaration of Gina E. Och in Support of SCE’s Motion for  
8 Legal Determination and Request for Judicial Notice with Exhibits, the concurrently filed Request  
9 for Judicial Notice, the Separate Statement of Undisputed Material Facts and Reference to  
10 Supporting Evidence filed on June 15, 2017 in support of SCE’s Motion for Summary  
11 Adjudication, the records and files in this matter, and any further evidence or argument that the  
12 Court may properly receive at or before the hearing.

13  
14 DATED: February 1, 2018.

**MURCHISON & CUMMING, LLP**

15  
16 By:   
17 \_\_\_\_\_  
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19 GINA E. OCH  
20 Attorneys for Defendant, Cross-Complainant  
21 and Cross-Defendant, SOUTHERN  
22 CALIFORNIA EDISON COMPANY  
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2  
3 **I. INTRODUCTION**

4 SOUTHERN CALIFORNIA EDISON COMPANY (“SCE”) brings this motion for a legal  
5 determination that SCE is not liable for inverse condemnation damages. Inverse condemnation is  
6 a judicially-created doctrine rooted in the Takings Clause of the California Constitution. The  
7 doctrine is designed to provide citizens a remedy against state and public entities that have taken  
8 or damaged a citizen’s property for a public use. Inverse condemnation is a strict liability cause of  
9 action, meaning that plaintiffs could recover even if SCE was not at fault and not negligent at all  
10 in this case. The fundamental premise of inverse condemnation is that a state entity can socialize  
11 across taxpayers any payments it must make to property owners who have suffered a loss caused  
12 by the entity.

13 Plaintiffs ask this Court to extend liability for inverse condemnation to SCE. Specifically,  
14 Plaintiffs argue that privately owned utilities like SCE are strictly liable under inverse  
15 condemnation even though privately owned utilities are different from state entities traditionally  
16 subject to inverse condemnation in two critical ways. First, privately owned utilities are not  
17 statutorily immune from traditional tort (*e.g.*, negligence) liability, as evidenced by Plaintiffs’ own  
18 complaint, which alleges numerous causes of action sounding in tort. Second, unlike state entities,  
19 privately owned utilities cannot, as a matter of right, spread the losses resulting from a public use  
20 to the community of ratepayers.

21 The Court should decline Plaintiffs’ invitation to extend inverse condemnation and should  
22 hold that inverse condemnation damages are not recoverable in situations where, as here, a  
23 fundamental premise of the doctrine is missing – namely, defendant’s ability to “socialize”  
24 Plaintiffs’ claimed losses throughout the community as a whole. (See *Gutierrez v. County of San*  
25 *Bernardino* (2011) 198 Cal.App.4th 831, 485 [“*Gutierrez*”].)

26 As California law makes clear, Plaintiffs may theoretically recover inverse condemnation  
27 damages only if SCE can raise its rates to recover the damages and thus spread the losses among  
28 the customers who benefit from access to the utility’s facilities. (See *Pac. Bell v. Southern*

1 *California* (2012) 208 Cal.App.4th 1400, 1407 [*Pac. Bell*].) Because SCE cannot do so, inverse  
2 condemnation is improper as a theory of liability.

3 Unlike government-owned utilities and other governmental entities, privately owned  
4 utilities like SCE cannot automatically spread inverse condemnation damages across the  
5 community. SCE can only “socialize” inverse condemnation damages by increasing the rates it  
6 charges to its customers, but SCE is not free to increase its rates unilaterally – it can do so only  
7 with the approval of the California Public Utilities Commission (“PUC”). The PUC has recently  
8 made clear, however, that it will not guarantee privately owned utilities the right to socialize losses  
9 resulting from inverse condemnation liability. In its recent decision, the PUC emphasized that it is  
10 not bound by the loss-spreading rationale of inverse condemnation to grant rate increase requests  
11 to privately owned utilities. On that basis, the PUC denied another utility’s requested rate  
12 adjustment meant to recover such costs. (See Declaration of Gina E. Och In Support of SCE’s  
13 Motion for Legal Determination [*Och Declaration*], ¶ 2 & Ex. A [PUC Decision Denying  
14 Application of SDG&E] at 65 [PUC finding that “inverse condemnation principles ... [were] not  
15 relevant” to whether it would approve SDG&E’s requested rate adjustment].) Indeed, as one of  
16 the PUC commissioners explained, the courts must revisit application of inverse condemnation to  
17 privately owned utilities because “there’s no guaranty that private utilities can recover the cost  
18 from their rate payers.” (*Och Declaration*, ¶ 3 & Ex. B [Nov. 30, 2017 PUC Hearing] at 21:30-  
19 22:00.)

20 Because “the underlying purpose of our constitutional provision in inverse—as well as  
21 ordinary—condemnation is to distribute throughout the community the loss inflicted upon the  
22 individual ... to socialize the burden ... that should be assumed by society,” (*Holtz v. Superior*  
23 *Court* (1970) 3 Cal.3d 296, 303 [*Holtz*]), the California Constitution does not permit claimants  
24 to recover inverse condemnation damages from a privately owned utility that lacks the ability to  
25 spread such losses. Indeed, imposing inverse condemnation damages on such a utility would itself  
26 be an unconstitutional taking: the use of the utility’s “private property” (*i.e.*, its money) to pay for  
27 a public benefit without just compensation. Further, applying inverse condemnation would be so  
28 patently contrary to the purpose and justification of the doctrine as to violate due process.

1           Accordingly, this Court should hold that SCE cannot be liable for inverse condemnation  
2 damages. Importantly, even if the Court grants SCE’s motion regarding inverse condemnation  
3 damages, Plaintiffs still have alternative theories of liability available to them, including by  
4 attempting to prove that SCE is liable under the traditional tort theory of negligence.

5 **II.    FACTS AND PROCEDURAL HISTORY**

6           On or around February 6, 2015, a wildland fire—commonly called the “Round Fire”—was  
7 ignited when a tree fell onto an SCE tap line. Plaintiffs sued, alleging that the Round Fire  
8 damaged their property. In their complaints, Plaintiffs asserted, among other claims, inverse  
9 condemnation causes of action against SCE. Importantly, inverse condemnation is only one of  
10 eight causes of action Plaintiffs plead. Among other causes of action, Plaintiffs plead traditional  
11 tort negligence and nuisance claims. Unlike the other claims, inverse condemnation, as applied to  
12 privately owned utilities and true governmental entities alike, is a strict liability tort, meaning that  
13 Plaintiffs do not need to prove SCE was at fault in order to recover from SCE.

14           On June 15, 2017, SCE moved for summary adjudication of these claims pursuant to Code  
15 of Civil Procedure Section 473c and *Cantu v. Pacific Gas & Electric Co.* (1987) 189 Cal.App.3d  
16 160. SCE argued that the Round Fire was not caused by any “public use” because the line  
17 extension at issue was constructed pursuant to a private agreement and served only an individual  
18 need. On September 1, 2017, this Court heard and orally denied SCE’s motion without prejudice,  
19 explaining that “if something happens in this case that is momentous and you want me to[] look at  
20 something and reconsider I will.” (9/1/17 RT 72.) The Court explained that it would be “liberal  
21 when it comes to entertaining motions to reconsider if there is some legitimately new fact or law  
22 that comes down.” (*Id.* 71.) On October 13, 2017, the Court issued a written order denying the  
23 motion for the reasons stated during the hearing.

24           As explained more thoroughly below, in November and December 2017, the PUC issued a  
25 decision and supporting statements that warrant this Court’s analysis of whether an inverse  
26 condemnation claim can be brought against SCE. While the motion for summary adjudication  
27 challenged whether there was a “public use,” this motion presents a distinct issue brought into  
28 focus by the PUC: whether a privately owned utility such as SCE can be liable for inverse

1 condemnation damages when it is unable to socialize the losses, if any, that Plaintiffs recover  
2 under that theory.

3 **III. LEGAL STANDARD**

4 Code of Civil Procedure Section 1260.040 allows this Court to resolve, as a matter of law,  
5 whether inverse condemnation can be asserted against SCE. (Code Civ. P. § 1260.040(a); see  
6 *Dina v. People ex rel. Dept. of Transp.* (2007) 151 Cal.App.4th 1029, 1040-41, 1047 [holding that  
7 a motion under § 1260.040 is the proper vehicle for resolving whether an inverse condemnation  
8 claim can be asserted against the defendant].) The issue presented in this motion, whether SCE  
9 may be subject to an inverse condemnation claim as a privately owned utility, “is a question of  
10 law.” (See *Barham v. So. Cal. Edison Co.* (1999) 74 Cal.App.4th 744, 751-52 [“*Barham*”].) The  
11 only operative fact—that SCE is a privately owned utility subject to PUC rate-review and not a  
12 government-owned utility that can set rates unilaterally—is undisputed.<sup>1</sup>

13 Section 1260.040’s procedure for seeking a legal determination “supplements” and does  
14 not duplicate or “replace” Code of Civil Procedure Section 473c’s procedure for seeking summary  
15 adjudication. (See Code Civ. P. § 1260.040(c).) For that reason, this motion is not a motion to  
16 renew or reconsider SCE’s prior motion for summary adjudication subject to Code of Civil  
17 Procedure Section 1008. That is particularly so given that this motion presents a distinct legal  
18 issue. Nevertheless, this motion would satisfy Section 1008’s broad standard because the PUC’s  
19 recent statements regarding privately owned utilities’ ability to spread inverse losses constitute  
20 “new or different facts, circumstances, or law.” (Code Civ. P. § 1008(b); see *Graham v. Hansen*  
21 (1982) 128 Cal.App.3d 965, 972 [no time limitation for motions for renewal based on new facts,  
22 circumstances, or law; trial court has broad discretion to grant such motions].)

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28 <sup>1</sup> This was the nineteenth of the undisputed material facts filed on June 15, 2017, in connection with  
SCE’s Motion for Summary Adjudication of Cause of Action for Inverse Condemnation.

1 **IV. ARGUMENT**

2 **A. Extending Inverse Condemnation Liability to Privately Owned Utilities**  
3 **Violates California Law Because the “Loss Spreading Rationale” Has Proven**  
4 **False**

5 1. Inverse Condemnation Claims Are Permitted Against Governmental  
6 Entities to “Socialize” Individual Losses Caused by Public Improvements

7 The California Constitution requires the government to pay just compensation when it  
8 takes or damages private property for a public purpose. (Cal. Const., art. I, § 19 [“Private property  
9 may be taken or damaged for a public use and only when just compensation ... has first been paid  
10 to ... the owner.”].) Based on the California Constitution’s requirement that compensation be paid  
11 where property is “taken *or damaged* for public use” (*ibid*, italics added), California courts have  
12 developed a body of decisions applying this rule not merely to traditional takings, but also to  
13 instances in which the government, in furtherance of some public purpose, damages private  
14 property: a so-called “inverse condemnation.” (E.g., *Albers v. County of Los Angeles* (1965) 62  
15 Cal.2d 250 [*Albers*].) Such a claim can be brought only against a “public entity,” which has  
16 loss-shifting powers. (*Barham, supra*, 74 Cal.App.4th at 751.)

17 “[T]he underlying purpose of ... inverse ... condemnation is to distribute throughout the  
18 community the loss inflicted upon the individual by the making of the public improvements: to  
19 socialize the burden ... that should be assumed by society.” (*Holtz, supra*, 3 Cal.3d at 303,  
20 internal citations and quotations omitted.) Because “the cost of such damage can be better  
21 absorbed, and with infinitely less hardship, by the taxpayers as a whole than by the owners of the  
22 individual parcels damaged,” inverse liability serves as a buffer against the risks created by public  
23 works. (*Albers, supra*, 62 Cal.2d at 263.) In the same way that a governmental agency can  
24 socialize costs through taxes, a *government-owned* utility can socialize costs through rate  
25 increases. (*Aetna Life & Casualty Co. v. City of Los Angeles* (1985) 170 Cal.App.3d 865, 875.)  
26 This “‘loss distribution’ premise” is the constitutional “underpinning [of] inverse condemnation  
27 damages.” (*Gutierrez, supra*, 198 Cal.App.4th at 485, quoting *Holtz*.) Without it, the doctrine is  
28 inapplicable: It would impose strict liability damages on an entity that does not have the requisite  
ability to spread inverse condemnation losses to the community. Countless decisions have

1 reaffirmed that spreading and socializing losses throughout the community is the policy behind,  
2 intended effect of, and, most importantly, the constitutional justification for, permitting claims of  
3 inverse condemnation.<sup>2</sup>

4           2.       Some Courts Have Permitted Inverse Condemnation Claims Against  
5                    Privately Owned Utilities On the Assumption That They Can Socialize  
6                    Losses Like True Government Entities

7           In *Barham v. Southern California Edison*, the Court of Appeal permitted an inverse  
8 condemnation claim to proceed against SCE, even though it is a privately owned utility.  
9 Critically, the Court expressly based its extension of inverse condemnation to SCE on the theory  
10 that the “‘loss distribution’ premise” would apply to privately owned utilities just as it did to  
11 public utilities. *Barham* assumed that a privately owned utility could raise rates the same way the  
12 government uses taxes (or government-owned utilities use their rates) to “spread among the  
13 benefiting community any burden disproportionately borne by a member of that community.”  
(*Barham, supra*, 74 Cal.App.4th at 752.)

14           In 2012, SCE challenged that assumption in *Pacific Bell v. Southern California*. The  
15 challenge was unsuccessful, however, because the *Pacific Bell* court concluded that there was no  
16 evidence that the PUC would ever prevent privately owned utilities from socializing losses by  
17 “pass[ing] on damages liability” to the publicly benefited community through a rate adjustment.  
18 (208 Cal.App.4th at 1407.) This critical assumption—the assumption “underpinning” the  
19 extension of inverse condemnation liability to privately owned utilities—has now been  
20 proven false.

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24           <sup>2</sup> (See, e.g., *Mercury Casualty Co. v. Pasadena*, 14 Cal.App.5th 917, 925-26 (2017) [“The  
25 fundamental policy underlying the concept of inverse condemnation is that the costs of a public  
26 improvement benefitting the community should be spread among those benefited rather than allocated to a  
27 single member of the community.”]; *Magnuson-Hoyt v. Cnty. of Contra Costa*, 228 Cal.App.3d 139, 144  
28 (1991) (same); see generally Arlo Van Alstyne, *Statutory Modification of Inverse Condemnation: The  
Scope of Legislative Power*, 19 Stan. L. Rev. 727, 738 (1967) [“The law of inverse condemnation ... seeks  
to identify the extent to which otherwise uncompensated private losses attributable to government activity  
should be socialized and distributed over the taxpayers at large ....”]; Daniel R. Mandelker, *Inverse  
Condemnation: The Constitutional Limits of Public Responsibility*, 1966 Wis. L. Rev. 3, 8 [same].)



1 condemnation principles ... [were] not relevant” to whether it would approve SDG&E’s requested  
2 rate adjustment. (Och Declaration, ¶ 2 & Ex. A at 65.)

3 Tellingly, in assessing the case, Commissioner Rechtschaffen urged that “the doctrine of  
4 inverse condemnation as it has been developed by the courts and applied to public utilities may be  
5 worth re-examining” in the context of privately owned utilities because “the courts applying the  
6 cases to public utilities have done so without really grappling with the salient difference between  
7 public and private utilities, which is that there’s no guaranty that private utilities can recover the  
8 cost from their rate payers.” (Och Declaration, ¶ 3 & Ex. B at 21:30-22:00.) On December 26,  
9 2017, Commission President Picker and Commissioner Guzman Aceves similarly issued a  
10 concurrence in which they expressed their “concern[] that the application of inverse condemnation  
11 to utilities in all events of private property loss would fail to recognize important distinctions  
12 between public [*i.e.*, government-owned] and private [*i.e.*, privately-owned] utilities” and “urge[d]”  
13 California courts “to carefully consider the rationale for applying inverse condemnation” to  
14 privately owned utilities. (Och Declaration, ¶ 4 & Ex. C [Concurrence of Pres. Picker and  
15 Commissioner Guzman Aceves] at 6.)

16 4. This Court Should Consider the PUC’s Suggestion to “Carefully Consider  
17 the Rationale for Applying Inverse Condemnation” to Privately Owned  
Utilities

18 In addition to the PUC’s bottom-line decision denying SDG&E’s loss-spreading rate  
19 adjustment, the statements above from three of the PUC’s members (*i.e.*, a *majority* of its  
20 members) make clear that *Barham* and *Pacific Bell* incorrectly assumed that privately owned  
21 utilities can “spread” or “socialize” losses like the government. As the majority of the PUC  
22 explained, this “important distinction” is a “salient difference between public and private utilities”  
23 that should lead this Court “to carefully consider the rationale for applying inverse condemnation”  
24 to privately owned utilities like SCE.

25 //  
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1           **B.     Allowing Inverse Condemnation Claims Against Privately Owned Utilities Is**  
2           **Improper and Unconstitutional Because the “Loss-Spreading” Rationale Does**  
3           **Not Apply to Such Utilities**

3           1.     Where the “Fundamental Premise” of Inverse Condemnation—Loss  
4           Spreading to the Public—Is Unavailable, Inverse Condemnation Does Not  
5           Apply

5           As the recent PUC decision makes clear, a privately owned utility like SCE lacks the  
6 salient characteristic “underpinning inverse condemnation damages” (*Gutierrez, supra*, 198  
7 Cal.App.4th at 485) – namely the ability to “spread among the benefitting community any burden  
8 disproportionality borne by a member of that community” (*Barham*, 74 Cal.App.4th at 751) by  
9 raising rates. On this basis alone, the Court should conclude that inverse condemnation damages  
10 are not available in this case.<sup>3</sup> California courts recognize that, where, as here, the underpinnings  
11 of a legal doctrine are eroded, the doctrine itself should no longer apply. For instance, the  
12 California Supreme Court overruled its longstanding rule of parental immunity in tort because the  
13 rule was grounded “on the policy that an action by a child against his parent would bring discord  
14 into the family and disrupt the peace and harmony of the household,” but that, due to recent  
15 developments, this rationale was no longer true. (*Gibson v. Gibson* (1971) 3 Cal.3d 914, 915, 923;  
16 see also *Cianci v. Super. Ct.* (1985) 40 Cal.3d 903 [overruling precedent where the “reasoning is  
17 unsound because its underlying premise is unsupported”].)

18           2.     An Inverse Condemnation Claim Against A Privately Owned Utility That  
19           Cannot Socialize Losses Is Itself A Taking Without Just Compensation That  
20           Violates the California and Federal Constitution

20           If losses are merely transferred from private plaintiffs to a private defendant in the form of  
21 inverse condemnation damages that cannot be “spread” or “socialized,” then the defendant is  
22 being forced to shoulder “a burden that should be assumed by society.” (*Holtz, supra*, 3 Cal.3d  
23 at 303 [quoting Mandelker, *Inverse Condemnation*]). That is a taking, plain and simple: the  
24 defendant’s money is “private property ... taken ... for a public use” without “just compensation.”  
25

26           <sup>3</sup> Privately owned utilities are different from government agencies and utilities in other important ways  
27 as well. For instance, an inverse condemnation claim is frequently the only way a private individual can  
28 recover damages from the government because government entities are protected by sovereign immunity  
and California’s Tort Claims Act. (See Cal. Gov’t Code §§ 810 *et seq.*) Privately owned utilities, by  
contrast, are subject to ordinary tort claims.

1 (Cal. Const., art. I, § 19.) Absent cost spreading via rate increases, there is no justification for  
2 transferring the loss from one private party (plaintiff) to another (defendant privately owned  
3 utility) in the form of an inverse condemnation claim, which applies without regard to fault: a  
4 plaintiff can recover even when he was negligent (*Albers, supra*, 62 Cal.2d at 262) and the  
5 defendant was not (*Pac. Bell v. City of San Diego* (2000) 81 Cal.App.4th 596, 602).

6 For the same reason, allowing an inverse condemnation claim against a privately owned  
7 utility that cannot spread losses would constitute a taking under the U.S. Constitution. The  
8 Takings Clause of the Fifth Amendment provides: “[N]or shall private property be taken for  
9 public use, without just compensation.” (U.S. Const. amend. V.) The Supreme Court of the  
10 United States has explained that, “[t]he aim of the [Takings] Clause is to prevent the government  
11 ‘from forcing some people alone to bear public burdens which, in all fairness and justice, should  
12 be borne by the public as a whole.’ [Citation.]” (*Eastern Enterprises v. Apfel* (1998) 524 U.S.  
13 498, 522 [plurality op.], quoting *Armstrong v. United States* (1960) 364 U.S. 40, 49.) In *Eastern*  
14 *Enterprises*, the U.S. Supreme Court addressed a requirement of the Coal Act under which coal  
15 companies were required to make premium payments on behalf of retired miners into a privately  
16 operated Combined Fund. (*Id.* at 517-19.) While the Coal Act provided a mechanism by which  
17 these companies could “seek indemnification [cite], it d[id] not confer any *right* of  
18 reimbursement.” (*Id.* at 532, italics added.) But “the mere possibility of indemnification” did not  
19 change the nature of the taking (*ibid*), and neither did the fact that the premiums were not paid to  
20 the government, but to a private third party (*id.* at 521). Ultimately, a plurality concluded that the  
21 law was an impermissible taking, while a concurrence found it to be a due process violation. (*Id.*  
22 at 539 [Kennedy, J., concurring in the judgment and dissenting in part].)

23 An inverse condemnation claim against a privately owned utility that cannot spread the  
24 damages is unsupportable, since it constitutes a taking of the privately owned utility’s property  
25 without just compensation.

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1                   3.     Allowing An Inverse Condemnation Claim Against A Privately Owned  
2                             Utility That Cannot Spread Losses Is So Irrational As to Violate the Due  
3                             Process Clause

4             Where, as here, myriad plaintiffs, including corporations, are seeking inverse  
5     condemnation damages from a single defendant that cannot “spread” those losses, permitting the  
6     claims to go forward would not merely fail to advance the purpose of inverse condemnation, but  
7     would actually confound it by *de-socializing* losses currently borne by many and focusing them on  
8     a single entity. This departure from the lawful operation of inverse condemnation would be so  
9     irrational as to violate due process.

10            While “the imposition of strict liability ... does not *of itself* contravene the due process  
11     clauses of the Federal or State Constitutions” (*Sandstrom v. California Horse Racing Bd.* (1948)  
12     31 Cal.2d 401, 407 [italics added]), it does so when there is no “rational relationship between the  
13     State’s purposes” and the scope of liability (*Ketchum v. State* (1998) 62 Cal.App.4th 957, 963; see  
14     *Shaw v. Cty. of Santa Cruz* (2008) 170 Cal.App.4th 229, 266 [collecting cases]). Here, the  
15     “purpose” of inverse condemnation liability is explicitly set forth in the cases establishing and  
16     implementing the cause of action: “the underlying purpose of our constitutional provision in  
17     inverse—as well as ordinary—condemnation is to distribute throughout the community the loss  
18     inflicted upon the individual ... to socialize the burden ... that should be assumed by society.”  
19     (*Holtz, supra*, 3 Cal.3d at 303.) If privately owned utilities cannot spread losses, then imposing  
20     those losses on such utilities has no “rational relationship” with “the underlying purpose of [the  
21     relevant] constitutional provision.”<sup>4</sup> And where, as here, many plaintiffs—including subrogated  
22     insurance corporations that can themselves spread losses through premium increases—seek to  
23     shift all their losses onto the utility, inverse condemnation claims amount to a burden shifting from  
24     “the community” to “the individual” defendant. Thus, taking SCE’s property without a showing  
25     of fault and without rate recovery is not substantially related to the stated cost-spreading  
26     justification for inverse condemnation and violates SCE’s due process rights.

27            <sup>4</sup> On this score, it is significant that the authority entrusted by the California Constitution with  
28     overseeing utilities, the PUC, has expressed concerns with the application of inverse condemnation to  
   privately owned utilities for exactly this reason.

1 Further, there is no rational basis or societal interest advanced in applying inverse  
2 condemnation to SCE in these circumstances. Although plaintiffs need the availability of an  
3 inverse condemnation claim against government entities (as those entities are otherwise protected  
4 by sovereign immunity and California’s Tort Claims Act, (see Cal. Gov’t Code §§ 810, *et seq.*)),  
5 plaintiffs do not need such a claim to pursue damages against SCE. As a private entity, SCE is  
6 subject to general tort liability; indeed, Plaintiffs here have pleaded traditional negligence and  
7 nuisance claims against SCE in addition to inverse condemnation claims.

8 While due process serves as a separate, freestanding basis on which the Court should bar  
9 the inverse condemnation claims, these due process concerns also influence the application of the  
10 inverse condemnation doctrine. Due process principles underscore how extraordinary and  
11 irrational it would be to allow an inverse condemnation claim against a privately owned utility in  
12 light of the recent statements from the PUC. Interpreting the Constitution to create a cause of  
13 action that would itself violate the Constitution—to permit an inverse condemnation claim that  
14 would be both a taking without just compensation and a violation of due process—would violate  
15 the bedrock principle that courts “must so construe the various clauses of the constitution as to  
16 make them harmonize.” (*Marye v. Hart* (1888) 76 Cal. 291, 293.) There is a simple way to  
17 engender such harmony here, and that is to do as the PUC has suggested, and recognize the  
18 controlling difference between government-owned utilities and privately owned utilities. In this  
19 way, plaintiffs can pursue tort claims, but not inverse condemnation claims, against a privately  
20 owned utility.

21 **V. CONCLUSION**

22 The Court should hold that an inverse condemnation claim cannot be brought against SCE  
23 because it is incapable of spreading or socializing the plaintiffs’ losses to the community as a  
24 whole.

25 DATED: February 1, 2018.

**MURCHISON & CUMMING, LLP**

26 By: 

27 GINA E. OCH  
Attorneys for Attorneys for Defendant, Cross-  
28 Complainant and Cross-Defendant  
SOUTHERN CALIFORNIA EDISON COMPANY

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**PROOF OF SERVICE**

**STATE OF CALIFORNIA, COUNTY OF LOS ANGELES**

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the County of Los Angeles, State of California. My business address is 801 South Grand Avenue, Ninth Floor, Los Angeles, California 90017-4613.

On February 1, 2018, I served true copies of the following document described as **NOTICE OF MOTION AND MOTION FOR LEGAL DETERMINATION; MEMORANDUM OF POINTS AND AUTHORITIES** on the interested parties in this action as follows:

**BY ELECTRONIC SERVICE VIA CASE HOME PAGE:** I electronically served the document described above via Case Home Page, by submitting in PDF format a copy of such document via file transfer protocol to Case Home Page through the upload feature at [www.casehomepage.com](http://www.casehomepage.com).

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on February 1, 2018, at Los Angeles, California.

  
\_\_\_\_\_  
MARJORIE K. DEJOHNETTE