

May 11, 2018

Presiding Judge and Associate Justices
California Court of Appeal
Third Appellate District
914 Capitol Mall, 4th Floor
Sacramento, CA 95814

Re: *Pacific Gas & Electric Co. v. Superior Court (Abu-Shumays)* (Case No. C087071)

Application to File Letter Brief of *Amici Curiae* Southern California Edison Company and San Diego Gas & Electric Company in Support of Pacific Gas & Electric Company

The Southern California Edison Company (“SCE”) and San Diego Gas & Electric Company (“SDG&E”) respectfully request permission to file the accompanying *amici curiae* letter brief in support of Pacific Gas & Electric Company’s (“PG&E’s”) petition for writ of mandate, prohibition, or other appropriate relief. SCE and SDG&E are familiar with the content of PG&E’s petition.

SCE and SDG&E are two of California’s oldest and largest electricity providers. Together, they deliver power to more than 18 million people and businesses across nearly 55,000 square miles in central, coastal and southern California. Like PG&E, SCE and SDG&E are privately owned utilities whose businesses have been significantly impacted by the application of inverse condemnation—a cause of action traditionally applied only to government entities—to private companies. *Amici* request permission to file this brief because the potential significant impacts of this issue on their businesses and customers are not fully addressed by PG&E’s petition.

Amici believe that their views will assist the Court in resolving this case by illustrating the widespread impact that the respondent court’s ruling would have on privately owned utilities’ ability to address the challenges of climate change, invest in safety and wildfire prevention, and provide Californians with safe and reliable electricity at affordable rates.

Letter Brief

Dear Justices,

The trial court in these coordinated cases went further than any court to date in expanding the judicially created remedy of “inverse condemnation.” Its decision threatens the economic viability of privately owned utilities such as *amici curiae* Southern California Edison Company (“SCE”) and San Diego Gas & Electric Company (“SDG&E”) and petitioner Pacific Gas & Electric Company (“PG&E”). Privately owned utilities are vital to California’s economy and residents. These companies deliver electricity to 75 percent of Californians, are collectively among the state’s largest employers, and are on the front lines of implementing California’s environmental policies and mitigating the risks of climate change.

At issue is the respondent court’s ruling that private companies can be strictly liable under the Takings Clause for all accidents traceable to their equipment even if they are unable to shift property owners’ losses to the broader community. This unprecedented expansion of inverse liability makes privately owned corporations the absolute insurers of all property within miles of their equipment—even when the utilities, unlike the government entities to whom inverse condemnation traditionally applies, cannot recover the costs of providing such insurance and are not afforded sovereign immunity.

Further, the respondent court’s ruling threatens privately owned utilities’ ability to address the challenges of climate change, invest in safety and wildfire prevention, and provide Californians with safe and reliable electricity at affordable rates. Correcting this mistake is especially urgent in light of changing environmental conditions that have contributed to increasingly destructive wildfires.

The proper bounds of inverse condemnation liability has significant consequences for privately owned utilities and for all Californians, and it has implications for thousands of pending claims arising out of California’s increasingly devastating and deadly wildfires. This issue is too important to both the public and the courts to wait for eventual resolution on appeal. We respectfully ask this Court to grant PG&E’s petition and reverse the respondent court’s decision now.

Statement of Interest of *Amici Curiae* Southern California Edison Company and San Diego Gas & Electric Company

SCE and SDG&E are two of California’s oldest and largest electricity providers. SCE delivers power to 15 million people and businesses across 50,000 square miles in central, coastal and southern California. SDG&E provides electricity to more than 3.1 million people and businesses across 4,100 square miles in San Diego and Orange Counties. Both SCE and SDG&E are privately owned utilities. Although they provide a public good, privately owned utilities are not government agencies or other state actors.

Privately owned utilities differ in important ways from government entities. Government entities are largely shielded from unpredictable litigation costs by sovereign immunity, while privately owned utilities enjoy no such immunity. Government entities can recover cost increases as a matter of course through taxes, fees, unilateral rate increases, and the power to issue tax-exempt debt, while privately owned utilities cannot unilaterally raise rates to socialize costs. Instead, privately owned utilities must ask permission from the California Public Utilities Commission (“PUC”). The PUC has the discretion to permit or deny rate increases as it sees fit. This important distinction was brought into sharp relief when the PUC denied SDG&E’s request for a rate increase to recover uninsured losses arising out of 2007 wildfires.

SCE and SDG&E have a particular interest in this case because application of the judicially created doctrine of inverse condemnation to privately owned utilities has a substantial impact on both utilities. As described more fully below, the fundamental premise underlying inverse condemnation liability is the ability to socialize costs—i.e., to shift the costs of a public good from an unfairly burdened private party to the public at large.¹ Currently, certain appellate courts have applied inverse condemnation to privately owned utilities, but the state (acting through the PUC) is not allowing those utilities to socialize the costs of such liability, which undermines the fundamental premise of the inverse condemnation theory. This doctrine was created specifically for governmental entities who not only have the power of condemnation but the power of taxation to pay for such condemnation. The courts’ application of this doctrine to private companies that lack the power of taxation is unconstitutional and inappropriate.

Most significantly, the respondent court rejected the long-standing principle that loss-spreading is integral to the application of inverse condemnation. The respondent court’s position—that inverse condemnation is applicable to privately owned utilities *even if* they cannot socialize costs—has significant impacts on *amici curia* as well as their employees, investors, and customers.

This Court should grant writ review to restore this central principle to the law of inverse condemnation. The respondent court’s decision puts SCE, SDG&E, and other privately owned utilities in the untenable position of being the uncompensated insurers of California’s wildfires regardless of the utility’s fault or lack thereof. Consequently, *amici curiae* respectfully urge this Court to reverse the respondent court’s decision, and find that inverse condemnation does not apply.

Why Review Should Be Granted

SCE and SDG&E recognize that writ relief is the exception rather than the rule. Nevertheless, writ relief is appropriate in either of two circumstances. First, writ relief is

¹ Indeed, inverse condemnation, which has been justified only insofar as it compensates citizens where the *government* has damaged their property for the public good, should not apply to privately owned utilities at all.

appropriate when the issue presented is of great public or jurisprudential significance,² meaning that the issue is of widespread interest; conflicting trial court interpretations need resolution; or a novel or constitutional question is presented.³ Second, writ relief is appropriate when the lower court's determination imposes unusually harsh and unfair results for which ordinary appellate review is inadequate.⁴

Both circumstances are met here. The Court of Appeal should issue an alternative writ or order to show cause because: (1) the respondent court erred by rejecting the well-settled constitutional principle that socialization of costs is the *sine qua non* of inverse condemnation liability; (2) the application of inverse condemnation to privately owned utilities without regard to the ability to socialize costs is having a significant, widespread, and damaging effect on utilities, on their ability to serve their customers effectively, and on their ability to assist the state in meeting its challenging environmental goals; (3) the issue in the Butte Fire case is currently presented in other wildfire-related cases throughout California; and (4) the issue presented in this writ should be resolved with haste because climate change and the devastating wildfires it contributes to have become the “new normal” in California.⁵

I. The Respondent Court Expanded Inverse Condemnation in an Unprecedented Way

Inverse condemnation is a judicially created constitutional remedy for landowners to seek compensation when the government deliberately takes or damages property to further a public use. The court below held that a privately owned utility can be held liable in an inverse condemnation liability action even if the utility cannot socialize costs from private owners to the community at large. No California appellate court has authorized such an extension. Importantly, the California Supreme Court has yet to rule whether inverse condemnation can apply to privately owned utilities at all, and counsel has been unable to locate any other state Supreme Court applying inverse condemnation to privately owned utilities in similar circumstances.

The Superior Court cited two Court of Appeal decisions—*Barham v. Southern California Edison Company*⁶ and *Pacific Bell Telephone Company v. Southern California Edison Company*⁷—in support of its ruling. While SCE and SDG&E believe *Barham* and *Pacific Bell* were wrongly decided, the respondent court's decision on inverse condemnation—although purporting to merely reflect a matter of *stare decisis*—actually extended rather than applied those cases.⁸ This new precedent conflicts with settled constitutional law that inverse condemnation

² *Cty. of Santa Clara v. Superior Court*, 171 Cal. App. 4th 119, 126 (2009).

³ *Sci. Applications Int'l Corp. v. Superior Court*, 39 Cal. App. 4th 1095, 1100 (1995).

⁴ *Id.*

⁵ Vives et al., *Southern California's Fire Devastation Is “the New Normal,” Gov. Brown Says*, L.A. Times (Dec. 10, 2017), <http://www.latimes.com/local/lanow/la-me-social-fires-20171210-story.html>.

⁶ 74 Cal. App. 4th 744, 751 (1999).

⁷ 208 Cal. App. 4th 1400, 1408 (2012).

⁸ The respondent court based its ruling—extending inverse condemnation liability even when there is no

claims are impermissible where defendants cannot spread losses.⁹

The decision warrants immediate review and correction. It illustrates why trial courts need guidance on when (and whether) to treat damage as a taking triggering a constitutional inverse condemnation claim as opposed to a tort triggering a negligence, trespass, or nuisance claim.

The more removed a case is from a paradigmatic “taking”—in which the government deliberately exercises its eminent domain power by initiating a condemnation proceeding¹⁰—the more important appellate guidance is. Cases like this one are particularly remote from the traditional takings context: plaintiffs assert claims against *private* rather than government defendants, and their claims ultimately allege ordinary negligence rather than deliberate property damage or seizure in furtherance of a public purpose. This case is therefore an ideal vehicle for this Court to clarify the bounds of inverse condemnation for the many Superior Court judges handling wildfire cases throughout California, and provide guidance that takes into account the changed factual and legal circumstances surrounding privately owned utilities’ ability to socialize costs.

socialization of losses—in part on a single footnote in *Pacific Bell*. See 10 App. 3416 (citing *Pac. Bell*, 208 Cal. App. 4th at 1407 n.6). That footnote, however, was *dicta*, and it could not overrule the Supreme Court’s repeated insistence that the fundamental purpose of inverse condemnation is to spread losses from the individual to society. The footnote hypothesized that the legislature could subject municipal utilities to the jurisdiction of the PUC and that such PUC oversight would not immunize municipal utilities from inverse condemnation liability. That jurisdictional point is not relevant here. Privately owned utilities *are* subject to the PUC’s rate regulation, and the PUC has made clear that privately owned utilities are not entitled to socialize losses arising out of inverse condemnation liability. This information regarding the PUC’s views was not available to the *Barham* or *Pacific Bell* courts, and it merits this Court’s intervention.

⁹ See, e.g., *Holtz v. Superior Court*, 3 Cal. 3d 296, 303 (1970) (“the underlying purpose” of inverse condemnation is to “distribute throughout the community the loss inflicted upon the individual by the context of public improvements: to socialize the burden . . . that should be assumed by society”); *Albers v. County of Los Angeles*, 62 Cal. 2d 250, 263 (1965) (“[T]he policy underlying the eminent domain provision in the Constitution is to distribute throughout the community the loss inflicted upon the individual by the making of public improvements.”); *Belair v. Riverside County Flood Control Dist.*, 47 Cal. 3d 550, 558–59 (1988) (“[T]he underlying purpose of our constitutional provision in inverse—as well as ordinary—condemnation is to distribute throughout the community the loss inflicted upon the individual Balanced against this cost-spreading objective is the reality that boundless liability will thwart the development of beneficial public improvements.”).

¹⁰ See, e.g., *United States v. Clarke*, 445 U.S. 253 (1980) (“The phrase ‘inverse condemnation,’ as a common understanding of that phrase would suggest, simply describes an action that is the “inverse” or “reverse” of a condemnation proceeding.”); *Breidert v. S. Pac. Co.*, 61 Cal. 2d 659, 663 (1964) (“An inverse condemnation action is an eminent domain proceeding initiated by the property owner rather than the condemner. The principles which affect the parties’ rights in an inverse condemnation suit are the same as those in an eminent domain action.”); *Customer Co. v. City of Sacramento*, 10 Cal. 4th 368 (1995) (“The ‘just compensation’ clause is concerned, most directly, with the state’s exercise of its traditional eminent domain power, guaranteeing that when the state proposes to take private property for public use, the owner of the property promptly will receive just compensation.”).

If the respondent court correctly interpreted *Barham* and *Pacific Bell* as standing for the proposition that inverse condemnation is permissible even where an entity has no right or ability to socialize losses, then those cases were plainly wrongly decided. The Takings Clause clearly was not intended to be used as a shortcut to recovery from private entities without the bother of having to establish fault under long-established standards that apply to tort claims against all other private entities.

II. Judicial Expansion of Inverse Condemnation to Privately Owned Utilities Regardless of Their Ability to Socialize Costs Harms the Utilities and Many Other Interests

Urgent appellate review is necessary because judicial action unbinding inverse condemnation from its traditional moorings—*i.e.*, to permit inverse condemnation claims even where entities lack the right to socialize losses—has had significant consequences for California’s privately owned utilities. Further, given the critical role that utilities play as citizens, employers, and engines of economic growth in California, the state’s economy, environment, and communities have also suffered reverberating repercussions.

A. Privately Owned Utilities Make Substantial Contributions to California

The public services provided by privately owned utilities are of fundamental importance to California residents. SCE and SDG&E deliver power to millions of Californians.¹¹ In order to deliver power safely, reliably, and affordably, SCE maintains a vast electrical system containing more than 13,000 miles of transmission lines, 106,000 miles of distribution lines, 1.4 million electric poles, and 720,000 distribution transformers.¹² SDG&E maintains more than 1,800 miles of transmission lines, more than 16,000 miles of distribution lines, and over 200,000 poles.

The state’s three investor-owned electric utilities—SCE, PG&E, and SDG&E—together employ more than 40,000 Californians. In 2017, SCE spent approximately \$3.8 billion on contracts with more than 3,200 suppliers, including \$1.8 billion spent on diverse suppliers. Last year, SCE paid almost \$480 million in taxes and franchise fees, making it Los Angeles County’s largest taxpayer. Similarly, in 2017 SDG&E spent more than \$1.5 billion with suppliers, with more than \$703 million spent on diverse suppliers. Further, SDG&E paid, in 2017, over \$275 million in local taxes and franchise fees.

Privately owned utilities make other substantial investments in California, ranging from developing infrastructure to investing in improvements for the public good. Privately owned utilities are leading implementers of statewide environmental policies. As was recently explained in a letter from renewable energy industry leaders to the Governor and Legislative leaders, the “continued viability” of the state’s utilities “is fundamental to achieving many of California’s

¹¹ So. Cal. Edison, *Overview: Who We Are*, <https://sce.com/wps/portal/home/about-us/who-we-are>

¹² *Id.*

future objectives, including both clean energy advancements and reduced wildfire danger.”¹³ Indeed, SCE delivers more solar power nationally than any other utility, and more than 28 percent of its energy comes from renewable sources. Approximately 45 percent of SDG&E’s energy delivered to customers is renewable.

Moreover, SCE, SDG&E, and other privately owned utilities invest heavily in their systems to protect against a variety of natural threats, including wildfires. Approximately 30 percent of SCE’s service territory, covering 9 million acres, consists of high-fire risk areas. For SDG&E, approximately 2,600 square miles (1.6 million acres), or 57% of the SDG&E service area, are in high-fire risk areas.

B. Privately Owned Utilities Serve the Public Good, But Lack Protections and Powers Necessary to Shoulder Inverse Condemnation Liability

Privately owned utilities occupy a space somewhere between an entirely private company and a municipal utility, shouldering many of the burdens of each type of entity but lacking concomitant privileges and powers. Unlike municipal utilities, privately owned utilities cannot rely on public funding or tax-free bonds to raise capital, and must rely instead on private markets.¹⁴ Privately owned utilities also have fiduciary duties to their shareholders, many of whom are individual California residents and retirement and pension funds. Unlike an unregulated private company, however, utilities cannot just raise their prices to cover increased costs or risks. Similarly, unlike an unregulated private company, utilities cannot choose to avoid high risk or fire-prone areas, or choose which customers they will serve, as the PUC mandates the utilities to provide service to all customers, including those in high-risk areas.

Unlike municipal utilities, privately owned utilities lack protections such as immunity from general tort liability and unilateral rate-setting authority to spread their costs or losses.¹⁵ Rather, privately owned utilities must obtain approval from the PUC before raising rates to recover their costs. But the PUC has made clear that it does not consider inverse condemnation losses a cognizable factor in ratemaking considerations.¹⁶

¹³ May 7, 2018 Letter to Governor Brown, Senator Atkins, Speaker Rendon, and others from Bradford, Cavanagh, et al. available at <https://www.nrdc.org/experts/ralph-cavanagh/avoiding-another-type-electricity-crisis>.

¹⁴ See Cal. Energy Comm’n, *Differences Between Publicly and Investor-Owned Utilities*, CA.gov, http://www.energy.ca.gov/pou_reporting/background/difference_pou_iou.html.

¹⁵ See *Moreland Inv. Co. v. Superior Court*, 106 Cal. App. 3d 1017, 1022 (1980) (holding privately owned utility is not a governmental agency in part because it cannot directly pass on eminent domain costs to rate payers).

¹⁶ Decision, Application of San Diego Gas & Electric Company (U902E) for Authorization to Recover Costs Related to the 2007 Southern California Wildfires Recorded in the Wildfire Expense Memorandum Account (WEMA) (Cal. P.U.C. Dec. 6, 2017); see also Concurrence of President and Commissioner Michael Picker and Commissioner Martha Guzman Aceves, Decision, Application of San Diego Gas & Electric Company (U902E) for Authorization to Recover Costs Related to the 2007 Southern California Wildfires Recorded in the Wildfire Expense Memorandum Account (WEMA) (Cal. P.U.C. Dec. 26, 2017) (“We also respectfully urge the California Courts of

This situation is untenable: on the one hand, several California courts, including the respondent court, have dramatically expanded privately owned utilities' exposure to claims of property loss and damage. On the other hand, privately owned utilities have no independent ability to socialize inverse condemnation losses through rate increases. And, most troubling, the respondent court has now concluded that inverse condemnation losses need not be socialized at all. This framework is unconstitutional and poses a serious danger to privately owned utilities' economic viability.

C. Inverse Condemnation Liability Threatens to Make Privately Owned Utilities Economically Unsustainable

Even before the respondent court held that privately owned utilities need not be able to spread the costs incurred by inverse condemnation in order to be subject to inverse liability, participants in capital markets had become keenly aware that California's unique inverse condemnation doctrine exposes privately owned utilities to billions of dollars in unrecoverable losses regardless of whether they act negligently.¹⁷ For example, until October 6, 2017, the Friday before the Wine Country wildfires began, PG&E's stock was trading at approximately \$70 per share. But from October 9, 2017 through December 29, 2017, PG&E's stock price tumbled to approximately \$45. This 35 percent drop represented billions of dollars in contraction in PG&E's market capitalization. The stock price for SCE's parent company, Edison International, followed suit once the Southern California wildfires broke out in December of last year. Whereas Edison's stock had previously been trading at about \$80 on December 4, 2017, the day the Thomas Fire broke out, news of the fires caused its stock price to fall by more than 14% two days later, representing billions in reduction in its market capitalization.

These dramatic reductions in PG&E's and Edison's stock prices—which impact their ability to raise capital in the equity markets needed to fund necessary electrical infrastructure—occurred before any fault has been determined. Likewise, citing the uncertainty and risk created

Appeal to carefully consider the rationale for applying inverse condemnation in these types of cases.”); 8 App. 2793 at 21:29–22:15 (“[I]t is worth noting that the doctrine of inverse condemnation as it’s been developed by the courts and applied to public utilities may be worth re-examining in a sense that the courts applying the cases to public utilities have done so without really grappling with the salient difference between public and privately owned utilities, which is that there’s no guaranty that . . . privately owned utilities can recover the cost from their rate payers. So this is an issue that the legislature and the courts may wish to examine and may be called on to examine in the future.”) (Commissioner Rechtschaffen).

¹⁷ See J.P. Morgan, *North America Equity Research: Edison International*, dated January 11, 2018 at 1 (noting that California's inverse condemnation law significantly increases the risk of operating a utility in the state); Evercore ISI, *CPUC Rejects Recovery of SDG&E Wildfire Costs; PCG's Financial Risk Related to Inverse Condemnation Remains*, dated December 1, 2017 at 2 (identifying California's inverse condemnation law as a factor in PG&E's stock price fluctuations); Deutsche Bank, *Market Research: Earnings No Match for Wildfire Talk*, dated November 13, 2017, at 1 (“The call included plenty of discussion of the question of California's inverse condemnation doctrine for utilities which has been a subject of intense scrutiny of late among utility investors.”).

by inverse condemnation liability as applied to investor-owned utilities, the ratings agencies have downgraded Edison, SCE, and SDG&E.¹⁸ Such downgrades have a serious impact on access to capital. The market's response reflects concern that, even if privately owned utilities followed all applicable regulations and were not at fault for causing the fires, they could still be liable for unrecoverable losses under inverse condemnation principles and without the certainty of spreading those losses to all customers on whose behalf the electric system is operated.

As the PUC has noted, “[r]easonable financial health is necessary so that each utility may serve reliable, safe and adequate electricity at just and reasonable rates.”¹⁹ After all, adequate capital is essential for utilities to operate, modernize, and expand their electrical transmission and distribution facilities. Such efforts benefit the public in real and immeasurable ways.²⁰

D. Expansion of Inverse Condemnation to Privately Owned Utilities Threatens Numerous California Interests and Public Policies

Judicial expansion of inverse condemnation also harms the public. Subjecting California's privately owned utilities to no-fault liability makes insurance more difficult and expensive to obtain, weakens the economy, and jeopardizes California's environmental agenda.

Increased scarcity and cost of insurance coverage: As the PUC recently explained, privately owned utilities in California are beginning to have difficulty “obtain[ing] insurance to . . . cover the risk of fire both to their infrastructure and from their infrastructure.”²¹ This is because carriers are increasingly reluctant to underwrite wildfire risk given climate change, expansion of developments in the urban-wildland interface, and the increased destructiveness of California wildfires. These issues are compounded by judicial action exposing privately owned utilities to potentially enormous, unrecoverable losses under inverse condemnation principles. In this environment, wildfire liability insurance coverage has begun to contract, become prohibitively

¹⁸ Moody's Investors Service, *Rating Action: Moody's Changes Edison International and Southern California Edison's Rating Outlooks to Negative* (Apr. 11, 2018), https://m.moody.com/Research.html?docid=PR_380780 (“SCE's credit profile is weighed down by the potentially large contingent exposure created by the application of [a] strict liability standard in California in the case of wildfires where utility equipment was determined to be the source of the fire.”); see also Moody's Investors Service, *Rating Action: Moody's Changes San Diego Gas & Electric's Rating Outlook to Negative from Stable* (Apr. 11, 2018), https://www.moody.com/research/Moodys-Changes-San-Diego-Gas-Electrics-Rating-Outlook-to-Negative--PR_380749 (“The increasing inverse condemnation risk exposure has caused us to reassess our view of the credit supportiveness of the regulatory environment in California.”).

¹⁹ Interim Opinion Modifying Decision 01-03-082 to Change Restriction on Use of Surcharge Revenues, D.02-11-026 at § 3.

²⁰ The PUC has also acknowledged that a key factor in the financial health of public utilities is creditworthiness, since a lack of access to credit significantly impedes the utilities' ability to procure and supply electricity at reasonable cost. *Id.* at § 3.1.1.

²¹ Wednesday, Feb., 7, 2018 Commissioner Informational Webinar on Impacts of Climate Change and Resulting Resiliency, at 48:25-40, <http://www.adminmonitor.com/ca/cpuc/other/20180207/>.

expensive, and may become unavailable at times for utilities.

Harm to the economy: Undermining the financial health of privately owned utilities is bad for California workers. The state’s three privately owned electric utilities collectively employ more than 40,000 Californians—including thousands of IBEW union employees and independent contractors—and provides them with good, well-paying jobs with benefits. Furthermore, electrical energy is the lifeblood of numerous other economic activities and industries in California. Hobbling California’s privately owned utilities undermines their ability to deliver electrical energy efficiently, reliably, and at competitive prices, which could have far-reaching consequences for California’s economy.

California will be unable to achieve its environmental objectives without support from privately owned utilities: Electric utilities are uniquely positioned to facilitate the transformation to a clean energy economy. They have the size, scope, and infrastructure needed to deliver clean energy to all customers. If California hopes to achieve its greenhouse gas and clean energy goals, privately owned utilities must modernize their grids to integrate carbon-free energy, enable customer choices around technology, and foster efficient, widespread electrification. California’s environmental agenda may suffer significant setbacks if the state’s privately owned utilities must redirect their resources to pay for inverse condemnation losses. Ironically, curtailing privately owned utilities’ ability to invest in cleaner energy will only exacerbate the environmental changes that have resulted in increasingly devastating wildfires.²²

III. Frequent and Intense Wildfires Are the “New Normal” in California, Compounding the Negative Effects of Unbounded Inverse Condemnation Liability

Wildfires have always been a part of California’s landscape due to the state’s geography, ecology, and weather patterns. Recent experience, however, suggests that intense, devastating wildfires are here to stay. The past year saw five of the most destructive wildfires in California history.²³ Climate change and human land use and management practices have combined to increase the environmental, physical, and economic threats posed by wildfires.²⁴ Hotter summers

²² See May 7, 2018 Letter to Governor Brown, Senator Atkins, Speaker Rendon, and others from Bradford, Cavanagh, et al. available at <https://www.nrdc.org/experts/ralph-cavanagh/avoiding-another-type-electricity-crisis> (“Today, the ongoing financial viability of all California utilities is in doubt at the same time that California is counting on their expertise and capital to help address the state’s clean energy needs and deal with the economic consequences of the 2017 wildfires. If utilities are held to an unworkable, strict liability standard of responsibility for damages caused by severe weather events—events that ironically are exacerbated by the same climate change forces that the state is relying on utilities to combat—they may fail.”).

²³ Cal. Dep’t of Forestry & Fire Prot., *Top 20 Most Destructive California Wildfires*, CA.gov (Jan. 12, 2018), http://www.fire.ca.gov/communications/downloads/fact_sheets/Top20_Destruction.pdf.

²⁴ See, e.g., John T. Abatzoglou & A. Park Williams, *Impact of Anthropogenic Climate Change on Wildfire Across Western US Forests*, 113-42 Proc. Nat’l Acad. Sci. (Oct. 2016) at 11770–75; Robinson Meyer, *Has Climate Change Intensified 2017’s Western Wildfires?*, The Atlantic (Sep. 7, 2017),

and persistent droughts are projected to continue: by mid-century, average temperatures in the Los Angeles region could rise by 4.3°F,²⁵ and 4.9°F in the San Diego region.²⁶ An abundance of dying trees and dry vegetation—born after winter rains but dried to kindling by scorching summer heat—provides fuel for these fires.²⁷ Efforts to contain these fires by managing forests and fires have been historically ineffective—or worse, counterproductive.²⁸ Moreover, new residences in high-risk areas increase the probability that fire will cause injury and property damage.²⁹

Environmental and human factors indicate that wildfires are expected to increase not only in number,³⁰ but also in duration and intensity. In 2017, wildfires burned more than 505,000 acres in California.³¹ Moreover, wildfires, which were traditionally concentrated in the fall months, are increasingly likely to take place year-round.³² As Governor Brown declared, catastrophic wildfires have become the “new normal” in California.³³

Although the consequences for this “new normal” should be shared by all Californians, inverse condemnation forces privately owned utilities to bear outsized financial exposure that results from California’s changing climate. Privately owned utilities should not and cannot be in a position where they alone bear financial risk for a complex societal problem.

<https://www.theatlantic.com/science/archive/2017/09/why-is-2017-so-bad-for-wildfires-climate-change/539130/>; Chelsea Harvey, *Here’s What We Know About Wildfires and Climate Change*, Sci. Am. (Oct. 13, 2017), <https://www.scientificamerican.com/article/heres-what-we-know-about-wildfires-and-climate-change/>.

²⁵ Inst. of the Env’t & Sustainability, Univ. of Cal., Los Angeles, *Research Project: Climate Change in the Los Angeles Region*, <https://www.ioes.ucla.edu/project/climate-change-in-the-los-angeles-region>

²⁶ County of San Diego, *Climate Action Plan*, Ch. 4-3 (2018), available at

https://www.sandiegocounty.gov/content/sdc/pds/ceqa/Climate_Action_Plan_Public_Review.html.

²⁷ Eleanor Cummins, *How the End of the Drought Likely Exacerbated the Deadly California Wildfires*, Slate (Oct. 10, 2017),

http://www.slate.com/articles/health_and_science/science/2017/10/how_the_drought_fueled_california_s_wildfires.html

²⁸ Little Hoover Comm’n, *Fire on the Mountain: Rethinking Forest Management in the Sierra Nevada* (Feb. 2018) at 12–14.

²⁹ Michael L. Mann et al., *Modeling Residential Development in California from 2000 to 2050: Integrating Wildfire Risk, Wildland and Agricultural Encroachment*, 41 Land Use Pol’y 438 (Nov. 2014) at 438–52.

³⁰ According to CAL FIRE, California agencies responded to 4,785 fires in 2016 and 7,117 fires in 2017. CAL FIRE, *Incident Information: Number of Fires and Acres*, CA.gov, (Jan. 24, 2018),

http://cdfdata.fire.ca.gov/incidents/incidents_stats?year=2017 (including all wildfires responded to by CAL FIRE in both the State and Local Responsibility Areas as well as all large wildfires in the State Responsibility Area protected by CAL FIRE’s contract counties).

³¹ *Id.*

³² Melissa Palmer & Elizabeth Espinosa, “*We Don’t Even Call It Fire Season Anymore . . . It’s Year Round*”: *Cal Fire*, KTLA (Dec. 11, 2017), <http://ktla.com/2017/12/11/we-dont-even-call-it-fire-season-anymore-its-year-round-cal-fire/>.

³³ Vives et al., *Southern California’s Fire Devastation Is “the New Normal,” Gov. Brown Says*, L.A. Times (Dec. 10, 2017), <http://www.latimes.com/local/lanow/la-me-socal-fires-20171210-story.html>.

Urgent attention is required by this Court to address the very real legal, economic and environmental problems created by the respondent court's decision. Wildfires worsen each year and privately owned utilities face an ever-increasing risk of liability, no matter what precautions they take. SCE and SDG&E respectfully urge this Court to decide now that inverse condemnation cannot extend to private entities if they have no right to spread losses.

Conclusion

SCE and SDG&E respectfully request that this Court issue an alternative writ or order to show cause on the ground that inverse condemnation is inapplicable to private companies, who lack the independent ability to implement the basic purpose of inverse condemnation by socializing losses incurred by individual parties across the broader community.

Sincerely,



John C. Hueston
Moez M. Kaba
HUESTON HENNIGAN LLP
523 W. 6th Street, Suite 400
Los Angeles, CA 90014
(213) 788-4340
(888) 775-0898 (fax)
Attorneys for Amicus Curiae
Southern California Edison Company



C. Larry Davis
Assistant General Counsel
San Diego Gas & Electric Company
8330 Century Park Court, Bldg 3
San Diego, CA 92123
(858) 654-1621
(619) 696-4838 (fax)

Attorneys for *Amicus Curiae*
San Diego Gas & Electric Company