July 12, 2018

The Honorable Tani G. Cantil-Sakauye, Chief Justice
And Honorable Associate Justices
Supreme Court of California
350 McAllister Street, Room 1295
San Francisco, CA 94902

Re: Pacific Gas and Electric Co. v. Superior Court (Abu-Shumays)
(Supreme Court No. S249429; Court of Appeal No. C087071)

Amicus Curiae Letter of Amicus Curiae Edison Electric Institute in Support of Pacific Gas & Electric Company’s Petition for Review

Dear Chief Justice Cantil-Sakauye and Associate Justices,

Pursuant to Rule 8.500(g) of the California Rules of Court, the Edison Electric Institute (“EEI”) respectfully submits this amicus curiae letter brief in support of Pacific Gas and Electric Company’s (“PG&E’s”) Petition for Review. EEI is familiar with the content of PG&E’s petition, as well as the letter brief filed by amici curiae Southern California Edison Company (“SCE”) and San Diego Gas & Electric Company (“SDG&E”).

The purpose of this letter brief is not to retreat the well-argued points made by PG&E in its writ and echoed in the amici curiae letter brief filed by SCE and SDG&E. Rather, this letter aims to provide a national perspective on the significant consequences that will result if the Court does not address the trial court’s continued application of inverse condemnation—an anomalous and legally flawed doctrine—to require that private electric companies bear all costs for fire damages despite clear evidence that private electric companies are not assured recovery of these costs from customers.

Statement of Interest of Amicus Curiae Edison Electric Institute

EEI is the trade association that represents all U.S. private, investor-owned electric companies, including PG&E and the other investor-owned electric companies that operate in California, SCE and SDG&E.¹ Our members provide electricity for about 220 million Americans and operate in all 50 states and the District of Columbia. As a whole, the electric power industry supports more than seven million jobs in communities across the United States and contributes $880 billion to the U.S. economy through direct employment, contracts and supply chains, investments, and the jobs and investments

¹ About the Edison Electric Institute, EEI <http://www.eei.org/about/Pages/default.aspx> (as of May 23, 2018).
that are induced by these activities. Collectively, these activities and investments represent five percent of the nation’s gross domestic product.

EEI believes that its perspective will assist the Court in resolving this case by providing a national view on the mechanisms adopted by other states to address risks posed by wildfire and other disasters, as well as the effects of the application of inverse condemnation to PG&E (and other private electric companies in the state). Not only is it unsound and contrary to law, it is anomalous: no other state compels privately owned electric companies to act as the state-wide insurers for damages related to wildfires without any assured right to spread the associated risk. Further, the threat of massive wildfire liability is damaging the creditworthiness and financial health of PG&E and the other California private electric companies. This harms California customers, employees, shareholders and other power producers who do business with private electric companies. It also threatens the contributions that these companies make to California’s economy and the state’s efforts to achieve its climate and environmental goals. California is a bellwether state on many fronts and the harm to the economic health of the State’s private electric companies could affect companies outside the State. To reverse these harms, the Court should grant PG&E’s Petition for Review and find that inverse condemnation is not applicable to private electric companies.

Because California’s approach to inverse condemnation negatively affects the financial health of PG&E and the other EEI member companies in the State, EEI has a direct and substantial interest in the outcome of this case.

Why Review Should Be Granted

EEI respectfully submits that the Supreme Court should grant review because the issue presented is an important question of law with significant implications for California’s economy and because the trial court’s holding imposes an unusually harsh outcome that cannot be timely addressed through ordinary appellate review. Specifically, the inverse condemnation regime that is at issue in the trial court’s determination has already harmed the financial health of California’s private electric companies, which in turn threatens to harm California’s broader economy. Indeed, the ability of PG&E to attract capital that is critical to its financial viability is already in question.

Moreover, the trial court’s determination that privately-owned electric companies should be strictly liable for wildfire damages is unfair and unnecessary. As explained further below, the driving rationale behind inverse condemnation—i.e., to spread the costs of public goods across the entire community—breaks down in the context of private electric companies. Instead of spreading costs, inverse condemnation in this context leads to the costs being borne solely by the electric companies. There are much better, more fair mechanisms available to California for spreading the risk of wildfire damages.

I. Inverse Condemnation Has Immediate Consequences for Private Electric Companies, and Threatens to Harm Their Customers, Employees, Shareholders and Other Producers of Electricity.

The trial court’s determination that private electric companies may be held strictly liable for wildfire damages under the theory of inverse condemnation has severe financial consequences for private electric companies in California. In fact, as a result of the 2017 Northern California fires alone, PG&E may be liable for approximately $10 billion in damages under the inverse condemnation
doctrine, with no guarantee of recovering those costs. To put this in perspective, $10 billion is 12.5 times PG&E’s $800 million liability insurance policy, 4.76 times its 2017 pretax income ($2.1 billion), and 1.54 percent of its total equity ($19.4 billion). And the scope of such liability may increase in the coming years given the increasing prevalence of wildfires in California.

Exposure to this potential liability has immediate consequences on the ability of private electric companies in California to attract outside investment, an essential element to providing continued reliable electric service. As background, the investor-owned electric company model provides that private electric companies will serve all customers in exchange for regulated rates that permit the recovery of prudently incurred costs, plus a rate of return. These are known as “cost-of-service” rates and are set by state economic regulators, such as the California Public Utilities Commission (“CPUC”). Importantly, the inclusion of a rate of return in cost-of-service rates is explicitly intended to attract outside investment in the electric company. Private electric companies use this capital to invest in the expensive, long-lived assets needed to provide all customers with affordable, reliable electricity. On average, EEI’s member electric companies invest more than $100 billion annually in generation, transmission and distribution infrastructure to serve customers. Accordingly, outside investment is critical to a private electric company’s ability to provide electricity to all customers.

Inverse condemnation liability has already had significant adverse impacts on the ability of private electric companies to attract that investment. At the time of this filing, PG&E’s stock is selling at $43.58 a share, a significant drop from October 11, 2017—the day before the Northern California wildfires began—when PG&E was trading near $70. This represents approximately $13.11 billion of lost market capitalization.

The problem was compounded in December 2017 when PG&E was forced to suspend dividends to shareholders in order to conserve financial resources to pay potential inverse condemnation claims. While dividend suspensions do occur in some industries, it is highly unusual

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2 See PG&E Corp., Annual Report (Form 10-K) 28 (Feb. 9, 2018) [hereinafter PG&E 10-K] (noting that California’s Department of Insurance announced that insurers had received claims totaling approximately $10 billion in losses as a result of the October 2017 wildfires).

3 See PG&E’s Petition for Review at 21-23 (June 18, 2018) [hereinafter PG&E Petition] (explaining that the CPUC does not guarantee recovery of costs incurred as a result of inverse condemnation liability).

4 PG&E 10-K, supra note 4, at 28, 87, 89.


9 This number is based on PG&E’s weighted averages of outstanding common shares for 2017 and 2018, which are 508 million and 515 million shares respectively. PG&E Corp., Quarterly Report for the Period Ended Mar. 31, 2018 at 6 (May 3, 2018).

among private electric companies, a characteristic that often drives investors to choose these companies in the first place. In fact, privately-owned utilities, such as electric companies, are generally among the most popular stocks for dividend investors because their earnings are comparatively stable and they offer higher than average dividend yields.\footnote{The Best Stock Sectors for Dividend Income, Simply Safe Dividends (Mar. 5, 2016) <https://www.simplysafedividends.com/the-best-stock-sectors-for-dividend-income/> (as of July 11, 2018).} This is so because they provide non-discretionary services and because they are mature businesses with less room for growth and expansion, which allows them to pay out higher portions of their earnings.\footnote{Id.} PG&E’s dividend suspension is therefore highly unusual, as demonstrated by the fact that every single EEI Index company\footnote{The EEI Index “measures total shareholder return for 43 U.S. investor-owned electric utilities.” EEI Stock Index, EEI <http://www.eei.org/resourcesandmedia/industrydataanalysis/industryfinancialanalysis/Pages/eeistockindex.aspx> (as of July 11, 2018).} paid a dividend from the years 2011 to 2016.\footnote{Kuhn, EEI, President’s Letter - 2016 Financial Review (2016), http://www.eei.org/resourcesandmedia/industrydataanalysis/industryfinancialanalysis/finreview/Documents/FinancialReview_2016_01_President.pdf.}

In response to the sheer magnitude of liability, as well as the dividend suspension, PG&E’s credit rating was downgraded in January and February of 2018. Credit rating agencies explained that inverse condemnation liability was a central cause of the downgrade—especially given the amount of time investors predict it will take the courts to ‘revisit’ the inverse condemnation doctrine.\footnote{Press Release, Fitch Ratings, Fitch Downgrades PG&E Corp. and Sub to ‘BBB+’; Places on Rating Watch Negative (Feb. 26, 2018) <https://www.fitchratings.com/site/dodd-frank-disclosure/10021816> (as of July 11, 2018); Teresa Rivas, PG&E: It’s like Sticking a Fork in a Socket, Barron’s (Jan. 2, 2018) <https://www.barrons.com/articles/pg-e-its-like-sticking-a-fork-in-a-socket-1514920990> (as of July 11, 2018).} According to one analyst, the downgrade was driven in part by “volatility stemming from a ‘guilty before proven innocent’ sentiment,” as well as the fact that “any hope from legislative/judicial efforts [to revisit] the interpretation of inverse condemnation in [California] will likely take a considerable amount of time to play out.”\footnote{Rivas, supra note 16.} Similarly, Fitch Ratings explained that the downgrades “reflect PG&E’s potential exposure to large third party liabilities associated with unprecedented 2017 wildfires . . . and seemingly absent legislative support for recovery of such costs.”\footnote{Press Release, Fitch Ratings, supra note 16.} Fitch also warned that further “multi-notch downgrades [are] inevitable if the status quo prevails in the face of such large potential liabilities and application of inverse condemnation liability.”\footnote{Id.} In short, the general perception among investors is that California utilities are simply “uninvestable right now,”\footnote{Yamamoto, Market Notes Tuesday, December 12, 2017, Investitute (Dec. 12, 2017) <https://investitute.com/activity-news/market-notes-tuesday-december-12-2017/> (as of July 11, 2018).} and it will remain so until the uncertainty surrounding inverse condemnation liability is resolved.
These immediate developments could have serious long-term consequences for customers, employees, and shareholders, as well as the broader economy. First, and perhaps most significantly, the ability of privately owned electric companies to provide customers reliable electricity service is threatened to the extent that capital cannot be raised to make continued investments in the operation, maintenance and expansion of needed energy infrastructure. Assuming capital can still be raised, customers may also have to pay higher rates as the increased costs of capital that will result from the downgrade in credit ratings are appropriately recovered in rates.

Second, failure to address inverse condemnation damages also threatens thousands of high quality, well-paying jobs in California and potentially across the nation. The electric power industry is responsible for 2.7 million jobs—and supports another 4.4 million induced jobs—across the United States. In total, the industry supports more than seven million jobs, which constitutes approximately five percent of all jobs in the United States. Further, employment in the industry is well-paying and stable; the median annual wages for direct electric power industry employees were $73,000 in 2015, the latest year for which data are available. This is twice the national average. With benefits, including health care and retirement contributions, median annual compensation exceeds $100,000. Nearly every job category in the industry earns a median wage of $30 or more per hour, plus health and retirement benefits. Many of these skilled, well-paying jobs do not require a four-year college degree, unlike many other jobs with similar pay and benefits. And while employment opportunities in the industry are expected to grow for various types of workers over the next decade, these opportunities rely on the continued financial health and viability of electric companies.

Third, shareholders will suffer direct economic losses if dividends are suspended or if the value of stock declines. Indeed, PG&E shareholders have already incurred such losses, and PG&E will not be able to reinstate dividends unless and until the threat of massive unrecoverable liability is lifted. Finally, there may be other ripple effects on companies that partner with private electric companies, such as other power producers in California. For example, CPUC President Picker noted in March that investment analysts had recently downgraded the credit rating of independent power producer Topaz Solar because it has a contract with PG&E. As one credit rating agency recently explained, the downgrade “was triggered by the rating downgrade of . . . PG&E,” Topaz Solar’s key revenue counterparty. This not only harms Topaz, but could hamper the efforts of other renewable developers, who rely on contracts with private electric companies to attract financing and to deploy the resources that California needs to meet its ambitious goals to reduce greenhouse gases.

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22 See id. at 9


In summary, the imposition of enormous liability under the inverse condemnation doctrine, without guarantee of cost recovery, is a serious threat to the immediate financial health of private electric companies in California. Further, given the significant role that such companies play in California’s economy, the long term consequences of these financial harms will likely be felt across the state. The uncertainty surrounding these issues must be addressed in a timely manner and cannot wait for resolution through the ordinary course of appellate review.

II. Inverse Condemnation Is an Inappropriate Mechanism for Addressing Wildfire Risk That Results in Unfair Outcomes.

Holding private electric companies liable under inverse condemnation liability also results in outcomes that are unfair and contrary to the policy rationale that underlies the inverse condemnation doctrine. As PG&E explains in its petition, the driving rationale behind inverse condemnation in California is to spread the costs of public services across the population so that individual property owners do not bear a disproportionate burden for services that benefit the entire community. Inverse condemnation is therefore intended to be a loss-spreading mechanism that shifts costs that would otherwise fall on a single property owner to a governmental entity, which in turn spreads those costs across the population via taxes.

Relevant here, two California courts have applied the doctrine to require private electric companies to pay for damages caused by electric equipment. These courts reasoned that because all customers share in the benefits of the electric system, they should also share in the risks posed by that system, including the increasing risk of wildfire. Further, while inverse condemnation has traditionally been applied to public entities because of their ability to spread those risks, the courts held that private electric companies are sufficiently public for inverse condemnation purposes based on the assumption that electric companies could spread costs by raising electricity rates through future rate recovery proceedings.

This reasoning was fundamentally incorrect, however, as demonstrated by a CPUC decision last year that denied recovery of inverse condemnation costs. As a result, rather than spreading costs across the entire class of electric customers as the courts intended, inverse condemnation functions to concentrate wildfire costs experienced by thousands of property owners onto a single company. This, in effect, forces private electric companies to function as uncompensated insurers for wildfire damage, a result that is contrary to the purpose of the inverse condemnation doctrine and inherently unfair.

EEI is not aware of any other state that applies inverse condemnation to private electric companies to hold them strictly liable for property damages related to wildfires. Moreover, a review of other states’ policy mechanisms for addressing natural disasters indicates that there are other options,

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25 PG&E Petition, supra note 5, at 17-18.
27 PG&E Petition, supra note 5, at 19-21; Pacific Bell, supra, 208 Cal.App.4th at p. 1408; Barham, supra, 74 Cal.App.4th at p. 756.
28 Barham, supra, 74 Cal.App.4th at p. 754.
and courts are neither required nor best suited to develop a solution to this problem. While singularity is not a test of legality, the inability of electric companies to spread wildfire costs calls into question the fundamental policy rationale for imposing those costs upon electric companies and leads to untenable results that jeopardize the power market in California. In short, inverse condemnation is not an appropriate policy solution for wildfire risk.

Indeed, if this Court were to reverse the trial court’s holding, California’s legislature would be free to pursue other policies that are much better suited to addressing natural disaster risks. For example, Florida, which suffers from unpredictable hurricane risk, has developed better tools to spread the risk that some property owners might suffer losses in any given year. First, Florida participates in the primary insurance market through a legislatively-created entity, Citizens Property Insurance Corporation, which provides insurance to those property owners who cannot find coverage on the private market.\(^{30}\) Similar to private insurance, Citizens is financed by policyholder premiums, which aligns the benefits of the insurance (protection against risk of loss) with at least some of the burden (the cost of the premium). Policy premiums may also function as a signal to property owners that their property is located in an area subject to hurricane risk. Second, to ensure that private insurers continue to provide reasonably-priced coverage, Florida created its own reinsurance program, the Florida Hurricane Catastrophe Fund, which is funded by state-backed bonds, further aligning benefits and burdens.

In contrast, the forced electric company insurance program created by inverse condemnation does not align benefits with burdens. Rather, it discourages private citizens from obtaining appropriate amounts of fire insurance and private insurers from developing appropriate products to help manage risk.\(^{31}\) This in turn encourages development in fire prone areas. By any measure, this is a failed social insurance program. This failure is magnified by the fact that privately owned utilities cannot reliably spread damages to all electric customers, as evidenced by the CPUC’s declaration last year that it would not automatically allow private electric companies to socialize wildfire costs through electricity rates.\(^{32}\) As a result, all of the burdens will now be borne by private electric companies’ employees, shareholders, and other producers of electricity, which will, in turn, harm their customers. This outcome warrants review by the Court.

**Conclusion**

Inverse condemnation is harming the financial health of private electric companies. This, in turn, harms their customers, employees, shareholders and the other electricity providers that do business with these companies. Moreover, when applied to private electric companies, the inverse

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\(^{30}\) See Who We Are, Citizens Property Insurance Corp. <https://www.citizensfla.com/who-we-are> (as of May 23, 2018).

\(^{31}\) In fact, California insurance code currently requires California insurers to participate in a legislatively created insurer of last resort for fires, which provides fire insurance policies to homeowners who cannot buy such insurance on the voluntary market. General Information, California FAIR Plan Property Insurance <https://www.cfpnet.com/index.php/general-info/> (as of May 24, 2018). This means that fire insurance is available to anyone who wishes to purchase it. However, there is no corresponding provision that requires property owners to purchase such insurance, and they may have less incentive to do so if they assume wildfire damages will be covered by utilities through inverse condemnation liability.

condemnation doctrine leads to unfair outcomes that are contrary to the doctrine’s intended purpose. Accordingly, EEI respectfully urges the Court to grant PG&E’s Petition for Review and decide that inverse condemnation is inapplicable to privately owned electric companies. Alternatively, the Court should grant PG&E’s petition and transfer this case to the Court of Appeal with instructions to issue an alternative writ and consider PG&E’s writ petition on the merits.

Sincerely,

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