

# INDEPENDENT ENERGY PRODUCERS

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July 13, 2018

The Honorable Tani G. Cantil-Sakauye, Chief Justice  
and Honorable Associate Justices  
Supreme Court of California  
350 McAllister Street, Room 1295  
San Francisco, California 94902-4797

Re: *Pac. Gas and Elec. Co. v. Superior Court (Abu-Shumays)* (Court of Appeal No. C087071)

**Letter Brief of Amicus Curiae Independent Energy Producers Association in Support of  
Pacific Gas and Electric Company**

Dear Chief Justice Cantil-Sakauye and Associate Justices:

The Independent Energy Producers Association (“IEPA”) respectfully submits, pursuant to Rule 8.500 (g) of California Rules of Court, to file the attached *amicus curiae* letter brief in support of Pacific Gas and Electric Company’s (“PG&E”) Petition for Review. IEPA believes that its perspective will assist the Court in reviewing this case by revealing the significant impacts the respondent court’s ruling will have on the electric generation sector’s ability to provide energy to meet reliability needs and the underlying California public policy objectives.

**Statement of Interest of Amicus Curiae Independent Energy Producers Association**

The Independent Energy Producers Association (IEPA), represents the interest of independent private electric generators that build and operate electric generation facilities. These generation facilities utilize wind, solar, geothermal, biomass, small hydro and clean natural gas to provide electricity, under contract to private electric utilities, such as PG&E, serving California ratepayers. PG&E currently has 430 counterparties with contracts of at least 10 years’ duration.

These contracts, the foundation of the electricity sector meeting California’s Greenhouse Gas goals, are at stake. The California Air Resource Board’s (CARB) recent report citing the improvement in electricity sector emissions stated: “Greenhouse Gas (GHG) emissions from this sector declined by 18% in 2016 compared to 2015. The overall carbon intensity of

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California's electricity generation is driven primarily by the large increase in renewable energy and Cap and Trade."<sup>1</sup>

The great progress made in the declining GHG emissions is attributable, in great part, to the investments made by IEPA members and other private sector investors in providing low carbon and renewable energy electricity generation. These investments with private electric utilities and future projects are threatened by financial uncertainty.

IEPA is concerned that the application of inverse condemnation to private electric utilities, without the ability to attain cost recovery, will undermine the financial integrity of these utilities, putting at risk billions of dollars invested in member company electric generation infrastructure. *Amicus* submits this letter brief to address these business and energy policy concerns not addressed in the PG&E Petition.

The PG&E Petition raises the issue that unlike publicly owned electric utilities, or other governmental entities, PG&E cannot raise its own rates or impose taxes to cover the inverse condemnation damages caused by a public improvement. PG&E, as a private utility, has its rate set by the California Public Utilities Commission (CPUC). This is not a new issue, but given a recent CPUC decision, the facts related to cost recovery have changed from previous inverse condemnation cases brought for appellate review.

IEPA believes the Petition for Review is the first inverse condemnation appeal filed with the Court, since the issuance of a California Public Utilities Commission Decision (D.17-11-033)<sup>2</sup> denying wildfire cost recovery by San Diego Gas & Electric (SDG&E) in a separate fire related proceeding. The Commission declared that the principle of inverse condemnation was "irrelevant" in determining cost recovery, by a private utility subject to its jurisdiction.<sup>3</sup> Instead, the Commission disallowed cost recovery for 379 million dollars of fire related damages citing a "prudent manager" standard of cost recovery. The imposition of strict liability, on a private electric utility, may lead to unrecoverable losses as evidenced by this recent California Public Utilities Commission decision requires the Supreme Court to clarify the application strict liability on private utilities.

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<sup>1</sup> 2018 Edition, California Greenhouse Gas Emissions Inventory, 2000-2016, CARB, pg.6

<sup>2</sup> CPUC D. 17-11-033

<sup>3</sup> (8 App. 2694)

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The PG&E Petition presents a strong case documenting the legal conflict caused by the imposition of “cost spreading” strict liability for inverse condemnation damages caused by public infrastructure owned by a private utility and the inability for it to recover these costs. The imposition of strict liability, without a corresponding ability to recover costs, creates adverse financial implications not only for PG&E, but will affect companies that have invested in California’s clean electric infrastructure. The financial duress of PG&E will create a market disruption undermining existing contractual investment and future procurements with adverse implications on IEPA member companies.

Specifically, in the extreme case, the risk of PG&E filing for bankruptcy would put billions of dollars of contracts, many held by IEPA member companies at severe risk, creating a market disruption undermining existing contractual investment and future procurements.

A significant number of these contracts are from renewable energy technologies including: wind, solar, geothermal, biomass and small hydroelectricity. These contracts were designed to meet one of the California’s chief policy goals the Renewable Portfolio Standard (RPS).<sup>4</sup> The RPS was adopted by the legislature in 2002 and expanded over the last several years. The current goal is thirty three percent (33%) of retail sales by 2020 and fifty percent (50%) by 2030. The RPS has attracted significant third-party investment in renewable technologies supplying private electric utilities with renewable generation. This renewable generation is under contract with these utilities. The California Energy Commission estimates that the RPS is currently meeting about thirty percent (30%) of California’s retail energy sales. IEPA understands that PG&E currently has 225 RPS contracts amounting to 7100 Megawatts of renewable energy generation. A number of these contracts are with IEPA individual member companies.

In addition to the RPS related contracts, additional contracts with clean natural gas generation and energy storage provide Resource Adequacy, localized reliability to the grid and provide generation after sundown or when wind resources are unavailable. These contracts have been added to meet specific California policies promoting grid reliability, renewable energy generation and Greenhouse gas reduction.<sup>5</sup> These facilities are essential for the reliable operation of the electricity grid. IEPA has been an active party in developing California’s procurement markets that are driven to meet these statutory requirements.

California’s procurement markets have been very successful attracting private investment in facilities needed to meet California’s Greenhouse Gas reduction goals. As stated recently in a

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<sup>4</sup> Pub. Util. Code 399.11

<sup>5</sup> Senate Bill 32 (Pavley, Chapter 249, Statutes of 2016)

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California Energy Commission Report: "Greenhouse gas emissions reductions from the electricity sector have helped advanced the state's climate goals. ... According to CARB's inventory, electricity sector emissions in 2015 were 29% below 1990 levels."<sup>6</sup> The goal is to be 50% below 1990 levels by 2030.

The substantial California investments that IEPA members have made and will make in the future are predicated upon financially stable electric utility counter parties. Absent credit worthy utility counterparties investment will either not be made or will be significantly costlier to California ratepayers. The CPUC Decision undermines this financial stability having adverse impacts on the investments needed to meet California's policies.

The market concern due to wildfire liability has led to the downgrade of California private utilities: Pacific Gas and Electric (PG&E), Southern California Edison (SCE) and San Diego Gas & Electric (SDG&E). Moody's downgraded Edison International and its subsidiary Southern California to negative stating:

SCE's credit profile is weighed down by potentially large contingent exposure created by the application of strict liability standard in California in the case of wildfires where utility equipment was determined to be the source of the fire. The increasing inverse condemnation risk exposure has caused us to reassess our view on the credit supportiveness of the regulatory environment in California.<sup>7</sup>

Moody's also changed SDG&E's rating to negative for the same reasons and on the same day.<sup>8</sup>

The erosion of the private utilities' credit ratings and financial uncertainty is also influencing independently owned generation facilities. The effect of this financial instability is already being demonstrated with the specific example of Topaz Solar Farms LLC (Topaz), a 550 megawatt project located in San Luis Obispo County. Topaz Solar Farms receives all its revenues from Pacific Gas and Electric through a thirty-year contract. Topaz was placed on CreditWatch Negative by S&P Global Ratings on February 23, 2018 and had its credit rating downgraded due to its contract with PG&E. The credit agency recently reiterated its concern, stating:

We expect to resolve the CreditWatch negative placement when the credit profile for Topaz's sole off-taker, PG&E, is resolved. If there are interim downgrades of

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<sup>6</sup> Tracking Progress: Greenhouse Gas Emissions Reductions, pg. 11, (12/2017) Calif. Energy Commission

<sup>7</sup> Toby Shea, Rating Action: Moody's Changes Edison International and southern California Edison's Rating Outlook Negative (11 Apr 2018).

<sup>8</sup> Natividad Martel, Rating Action: Moody's Changes San Diego Gas & Electric's rating outlook to Negative from Stable. (11Apr.2018).

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more than one notch on PG&E before the resolution of the CreditWatch, it would trigger a commensurate downgrade for Topaz Solar.<sup>9</sup>

The downgrade of Topaz Solar Farm, while unique to its financing, is indicative of the concern throughout the industry regarding the financial integrity of PG&E, a private electric company. The financial instability of private utility counterparties is caused by the strict liability aspect of inverse condemnation, should liability costs be uncollectable through CPUC ratemaking. A private electric utility such as PG&E under severe financial distress, including potential bankruptcy, would have profound negative implications on the independent energy industry. The cloud of uncertainty over inverse condemnation cost recovery and the potential for rapid deterioration of confidence in the long term financial stability of private electric utilities, warrant a review by the Court.

## Conclusion

Amicus, Independent Energy Producers Association respectfully requests that this Court grant the Petition for Review by PG&E and decide that inverse condemnation strict liability does not apply where a private utility cannot recover those costs by spreading them to the benefitted community. In the alternative, remand the PG&E Petition to the Appellate Court for consideration of PG&E's Petition on its merits.

Sincerely,



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<sup>9</sup> S&P Global Ratings, Rating Direct, Topaz Solar Farms LLC Ratings Remain on CreditWatch Negative, 25 April 2018.

**PROOF OF SERVICE**

I am employed in the County of Sacramento, State of California. I am over the age of 18 and not a party to the within action. My business address is P.O. Box 1287, Sloughhouse, CA 95683.

On July 13, 2018, I served the foregoing document(s) described as:

**LETTER BRIEF OF AMICUS CURIAE INDEPENDENT ENERGY PRODUCERS IN SUPPORT OF PACIFIC GAS AND ELECTRIC COMPANY**

on the interested parties in this action as stated on the attached mailing list.

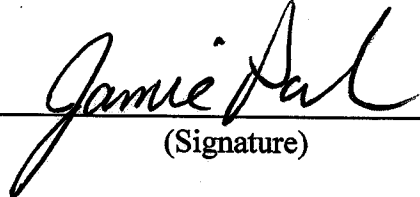
(BY MAIL) By placing a true copy of the foregoing document(s) in a sealed envelope addressed as set forth on the attached mailing list. I placed each such envelope for collection and mailing following ordinary business practices. I am readily familiar with this Firm's practice for collection and processing of correspondence for mailing. Under that practice, the correspondence would be deposited with the United State Postal Service on that same day, with postage thereon fully prepaid at Sloughhouse, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

(BY OVERNIGHT DELIVERY) I deposited in a box or other facility regularly maintained by Federal Express, an express service carrier, or delivered to a courier or driver authorized by said express service carrier to receive documents, a true copy of the foregoing document(s) in a sealed envelope or package designated by the express service carrier, addressed as set forth on the attached mailing list, with fees for overnight delivery paid or provided for.

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

Executed on July 13, 2018, at Sloughhouse, California.

\_\_\_\_\_  
Jamie Parker  
(Type of print name)

  
\_\_\_\_\_  
(Signature)

**SERVICE LIST**

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