No. _____

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT

PACIFIC GAS AND ELECTRIC COMPANY,
Petitioner,

v.

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE COUNTY OF SAN FRANCISCO,
Respondent,

BARBARA ABBOTT *et al.*,
Real Parties in Interest.

From the Superior Court for the County of San Francisco,
No. JCCP 4955
The Honorable Curtis E.A. Karnow (415) 551-3729

PETITION FOR WRIT OF MANDATE, PROHIBITION, OR OTHER APPROPRIATE RELIEF; MEMORANDUM OF POINTS AND AUTHORITIES

[Appendix of Exhibits Filed Concurrently]

Keith E. Eggleton
(S.B. No. 159842)
Rodney G. Strickland
(SBN 161934)
WILSON SONSINI GOODRICH & ROSATI, P.C.
650 Page Mill Road
Palo Alto, California 94304
Telephone: (650) 493-9300
Facsimile: (650) 493-6811

Kathleen M. Sullivan
(S.B. No. 242261)
QUINN, EMMANUEL, URQUHART & SULLIVAN, LLP
51 Madison Avenue, 22nd Floor
New York, New York 10010
Telephone: (212) 849-7000
Facsimile: (212) 849-7100

Evan R. Chesler
(admitted *pro hac vice*)
Timothy G. Cameron
(admitted *pro hac vice*)
Kevin J. Orsini*
(admitted *pro hac vice*)
Damaris Hernández
(admitted *pro hac vice*)
CRAVATH, SWAINE & MOORE LLP
825 8th Avenue
New York, NY 10019
Telephone: (212) 474-1000
Facsimile: (212) 474-3700

Counsel for Petitioners Pacific Gas and Electric Company and PG&E Corporation

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS
(Cal. Rules of Court, rule 8.208)

Pursuant to California Rules of Court, rule 8.208, petitioners Pacific Gas and Electric Company and PG&E Corporation (collectively, "PG&E") hereby submit the following certificate of interested entities or persons:

1. The only entity or person that has a direct ownership interest of 10% or more in Pacific Gas and Electric Company is PG&E Corporation, which, together with a subsidiary, holds 100% of the issued and outstanding shares of Pacific Gas and Electric Company common stock and 95% of the total outstanding voting stock. No entity or person has a direct ownership interest of 10% or more in PG&E Corporation.

2. Pacific Gas and Electric Company and PG&E Corporation know of no other entity or person that has a financial or other interest in the outcome of the proceeding that they reasonably believe the Justices should consider in determining whether to disqualify themselves under California Rule of Court, rule 8.208.

Dated: July 20, 2018

By: 

Kevin J. Orsini
Counsel for Petitioners Pacific Gas and Electric Company and PG&E Corporation

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INTRODUCTION

Under the doctrine of inverse condemnation, a private party is entitled to compensation from a public entity if its property is "damaged" for public use. California courts—including the Supreme Court—have consistently explained that the "underlying purpose of [inverse condemnation] is to distribute throughout the community the loss inflicted upon the individual by the making of the public improvements: to socialize the burden . . . that should be assumed by society." (*Holtz v. Superior Court* (1970) 3 Cal.3d 296, 303, internal citations and quotation marks omitted.) Inverse condemnation thus serves as a form of social insurance, financed by the general public, based on the premise that the costs of damage from a public good "can better be absorbed, and with infinitely less hardship, by the taxpayers as a whole." (*Albers v. County of Los Angeles* (1965) 62 Cal.2d 250, 263 (*Albers*).)

When inverse condemnation is applied to a true public entity, such as a municipality or government utility, that entity serves

merely as a conduit for the socialization of losses. The public entity pays an award of inverse condemnation damages to the impacted individual and then socializes those damages by recouping them from the public at large though taxes or utility rate increases. The public entity does not itself bear the loss. This loss distribution framework is the constitutional "underpinning [of] inverse condemnation." (*Gutierrez v. County of San Bernardino* (2011) 198 Cal.App.4th 831, 837.)

This petition raises a question of great public interest that goes to the very viability of California's privately owned utilities, which serve over 75 percent of California's residents and play a vital role in California and its economy: can inverse condemnation apply to a private utility such as Pacific Gas and Electric Company, which has no taxation power and can increase utility rates only with the express permission of the California Public Utilities Commission ("CPUC")? Two previous Court of Appeal decisions have addressed this question and extended inverse condemnation

liability to privately owned utilities. (*Pacific Bell Tel. Co. v. S. Cal. Edison Co.* (2012) 208 Cal.App.4th 1400 (*Pacific Bell*); *Barham v. S. Cal. Edison Co.* (1999) 74 Cal.App.4th 744 (*Barham*).) However, both decisions did so based on the express assumption that privately owned utilities, just like governments and public entities, would be able to spread the cost of inverse condemnation liability among the benefitted public. (See *Pacific Bell*, *supra*, 208 Cal.App.4th at 1407; *Barham*, *supra*, 74 Cal.App.4th at 753.)

The CPUC has now expressly disproven that assumption. (2 Appen. 344-418.) Calling the cost-spreading rationale "unsound" and insisting that inverse condemnation liability is "not relevant" to rate recovery, the CPUC denied an application by privately owned utility San Diego Gas & Electric ("SDG&E") to recover $379 million in uninsured costs resulting from the settlement of claims for inverse condemnation based on wildfires within SDG&E's service territory. (*Id.* at 410.) Thus, unlike a public entity, PG&E has no guarantee that it can engage in the very loss spreading that forms the

constitutional underpinning of inverse condemnation. Privately owned utilities like PG&E and SDG&E are now caught in a whipsaw between unlimited strict inverse condemnation liability as a result of the prior Court of Appeal decisions and the CPUC's refusal to take that liability into account in rate recovery.

The instant litigation arises from multiple wildfires that began on October 8 and 9, 2017 in over 100 different locations throughout Northern California (the "North Bay Fires"). Fanned by extreme winds, these fires spread at a catastrophic pace and ultimately impacted at least a dozen counties. These fires were the result of a confluence of unprecedented weather events, including years of record breaking drought and bark beetle infestations that have led to an extreme tree mortality crisis; exceedingly heavy rainfall during the winter of 2016-2017, causing new vegetation growth; the hottest summer on record in 2017 for the Northern California area, killing and drying that new growth to create additional fuel; extremely low humidity throughout the Northern California area; and a high wind

event on October 8 and 9, 2017, before the first rains had come through to soak the vegetation and ground. As an official with the California Department of Forestry and Fire Protection ("CAL Fire") explained in the months following the wildfires, "[no one] could be prepared for the conditions that surfaced in California on . . . Oct[ober] 8."[1]

In addition to alleging negligence by PG&E (in causes of action to which PG&E did not demur), Plaintiffs seek to hold PG&E strictly liable through the doctrine of inverse condemnation for billions of dollars in property damages even though the events of October 8 and 9 were beyond any foreseeable scope. PG&E demurred to the inverse condemnation causes of action based on the threshold legal issue that inverse condemnation is wholly inapplicable to a privately owned utility whose rates are set by a regulatory body and therefore has no guarantee that it can socialize inverse losses, such as PG&E. Respondent court overruled PG&E's

[1] 1 Appen. 158-62.

demurrer in a ruling that PG&E respectfully submits was in error for at least two reasons.

First, as noted, California law establishes that the entire basis for inverse condemnation is loss spreading. The fundamental logic of the doctrine depends upon the ability of the inverse defendant to spread the inverse condemnation judgment imposed by a court across the entire benefitted public. Inverse condemnation is not about allocating the loss from one private entity to another, and it has nothing to do with fault, negligence or imprudence. Indeed, even the most imprudent or negligent of public utilities can spread inverse losses through tax or rate increases. It is now clear, however, that PG&E cannot engage in the same automatic loss spreading as public utilities. Instead, the CPUC has demonstrated that it can leave PG&E to bear the inverse losses entirely by itself.

In overruling PG&E's demurrer, the trial court incorrectly concluded that the CPUC's newly announced decision would not have changed the ruling in *Pacific Bell*, and therefore found that it

was bound by that decision. But *Pacific Bell* was expressly premised on the court's assumption that the utility *would* be able to socialize its inverse losses by recouping the damages through rate increases. (*Pacific Bell*, *supra*, 208 Cal.App.4th at 1407.) According to *Pacific Bell*, the privately owned utility "ha[d] not pointed to any evidence to support its implication that the [CPUC] would not allow [the utility] adjustments to pass on damages liability during its periodic reviews." (*Ibid.*) The CPUC's newly articulated policy provides exactly that evidence. The continued application of inverse condemnation to a private utility such as PG&E in the face of this new evidence cannot be squared with the nearly 100 years of California jurisprudence explaining that loss-spreading is the sine qua non of inverse.

Second, respondent court erroneously rejected PG&E's argument that the application of inverse condemnation to PG&E is unconstitutional. Now that PG&E has "no guaranty" that it can spread any losses it is forced to pay as a result of inverse

condemnation claims, it is clear that the application of inverse condemnation to PG&E would effect nothing more than the transfer of private property from one private entity (PG&E) to another (the inverse plaintiff) without any compensation, regardless of whether PG&E had complied with all applicable laws and standards. (4 Appen. 1101.) This uncompensated taking of PG&E's property would violate the Fifth Amendment of the United States Constitution as incorporated against the states by the Fourteenth Amendment and Article I, section 19 of the California Constitution.

In addressing this argument, the respondent court concluded that whether PG&E would suffer a taking was a fact-intensive inquiry not appropriate for resolution on demurrer and that PG&E should raise its constitutional challenge if and when the CPUC denies PG&E's request to recover any inverse condemnation costs. This conclusion is incorrect for numerous reasons, including because it is in direct contravention of *Eastern Enterprises v. Apfel*, in which the United States Supreme Court determined that a taking had

occurred even where the affected party may eventually have been able to seek recovery of certain costs, as there was no guaranteed right of reimbursement at the time of the taking. (*E. Enters. v. Apfel* (1998) 524 U.S. 498, 531.) The respondent court also erroneously rejected PG&E's argument in the alternative that the application of inverse condemnation to PG&E would be arbitrary and irrational and a violation of PG&E's substantive due process rights under the Fourteenth Amendment of the United States Constitution and the California Constitution.

As one CPUC Commissioner noted in approving the SDG&E decision, the courts that have extended inverse condemnation from public entities to private utilities such as PG&E have "done so without really grappling with the salient difference between public and private utilities, which is that there's no guaranty that private utilities can recover the cost from their ratepayers." (4 Appen. 1101.) Although the trial court believed it was constrained by the Second and Fourth Appellate Districts' decisions in *Barham* and *Pacific Bell*,

this Court is not and, in any event, should recognize that the CPUC's recent decision has disproved the core assumption underlying judicial extension of inverse condemnation liability to privately owned utilities. Any contrary result will have grave consequences for the state of California, as privately owned utilities such as PG&E may potentially face increased insurance costs, decreased rates of return and diminished interest from investors in the capital markets. These consequences can be expected to have ripple effects throughout the state economy.

WHY WRIT RELIEF SHOULD BE GRANTED

The petition raises an extremely important question of law that warrants this Court's review: whether private utilities may be subject to strict liability under the doctrine of inverse condemnation. For almost 100 years, California courts—including the Supreme Court—have clearly articulated that the fundamental rationale for inverse condemnation claims is that any loss inflicted on individuals by a public improvement should be distributed throughout the

community as a whole. That rationale was the basis for the Court of Appeal's decisions in *Barham* and *Pacific Bell*. Unlike public entities, however, private utilities have no inherent ability to spread their inverse costs across the community, and the recent CPUC decision disallowing another privately owned utility's recovery of inverse condemnation costs through its rates starkly declares inverse condemnation "not relevant" to rate recovery as a matter of law. That decision fundamentally undermines the core premise of *Barham* and *Pacific Bell*, namely, that private utilities have the same capacity as public entities to unilaterally recover inverse condemnation costs. It thus leaves private utilities to shoulder the burden of costs that *Barham* and *Pacific Bell* assumed would be shared by the benefitted public. Accordingly, inverse condemnation liability should not be applied against private utilities.

Review of this issue is urgently required and should not await final judgment in this case. PG&E is currently faced with the potential of tens of thousands of claims arising from dozens of

wildfires and amounting to billions of dollars in potential damages. If the parties do not receive further guidance from the Court of Appeal as to whether inverse condemnation applies to privately owned utilities, PG&E may be irreparably harmed. Should the trial court ultimately determine that PG&E is liable for inverse condemnation, and PG&E satisfies a judgment, PG&E may have no recourse against the plaintiffs who received proceeds that were later determined to be improperly and unconstitutionally owed, and as the CPUC has recently made clear, there is no guarantee that PG&E will be able to spread those damages across the benefitted community.

Further, resolution of the coordinated litigation will be highly complex given the number of different wildfires with distinct causes and origin points. The litigation is still in its infancy, and all parties would be greatly benefitted by further guidance from the Court of Appeal. Such guidance will be invaluable as the parties attempt to identify a path to resolution.

For all of these reasons, this Court should grant review now to clarify the extent to which inverse condemnation applies to privately owned utilities such as PG&E following the CPUC's recent decision that it will not automatically allow such utilities to spread inverse condemnation losses to the benefitted public through rate increases to customers.

PETITION

Beneficial Interest Of The Petitioner; Capacities Of Respondent; And The Real Parties In Interest

1. Pacific Gas and Electric Company and PG&E Corporation (collectively, "PG&E") are defendants in 177 complaints currently pending in the respondent court in a Judicial Council Coordination Proceeding entitled *California North Bay Fire Cases*, JCCP No. 4955. As of May 18, 2018, the complaints filed included approximately 2,489 individual plaintiffs, 108 subrogation insurer plaintiffs and 7 public entity plaintiffs. Plaintiffs are listed above as the real parties in interest.

Authenticity Of Exhibits

2. All exhibits accompanying this petition are true and correct copies of documents on file with respondent court. The exhibits are incorporated by reference as though fully set forth in this petition. The exhibits are paginated consecutively, and exhibit page references are to this consecutive pagination.

Timeliness Of Petition

3. Although there is no strict deadline, "[a]s a general rule a writ petition should be filed within the 60-day period that applies to appeals." (*Cal. W. Nurseries, Inc. v. Superior Court*, (2005) 129 Cal.App.4th 1170, 1173.)

4. Here the respondent court, Judge Curtis E. A. Karnow presiding, issued a ruling overruling Pacific Gas and Electric Company and PG&E Corporation's Demurrer on May 21, 2018, and PG&E filed this writ petition on July 20, 2018, within sixty days of that ruling. PG&E's petition is timely.

Pending And Prior Appeals

5. There have been no other appeals related to this coordinated proceeding before the Court.

BACKGROUND

A. PG&E And The CPUC

6. PG&E is a privately owned utility, and PG&E Corporation is its corporate parent. (5 Appen. 1235.)

7. At the state level, privately owned utilities such as PG&E are regulated by the California Public Utilities Commission ("CPUC"). (Cal. Const., art. XII, § 3; Pub. Util. Code, §§ 701-853, 1001, 1002, 2101.) In contrast to publicly owned utilities, which can set their own customer rates, the CPUC sets customer rates of privately owned utilities such as PG&E. (Cal. Const., art. XII, § 6.)

8. The United States Supreme Court has long recognized that a public utility's rates must "enable the company to operate successfully, to maintain its financial integrity, to attract capital, and to compensate its investors for the risks assumed." (See *Fed. Power Comm'n v. Hope Nat. Gas Co.* (1944) 320 U.S. 591, 605; see also *L.A. Gas & Elec. Corp. v. R.R. Comm'n* (1933) 289 U.S. 287, 319 ["[A] 'public utility is entitled to such rates as will permit it to earn a return on the

value of the property which it employs for the convenience of the public equal to that generally being made at [t]he same time and in the same general part of the country on investments in other business undertakings which are attended by corresponding risks and uncertainties . . . .'"], quoting *Bluefield Water Works Co. v. Pub. Serv. Comm'n* (1923) 262 U.S. 692, 693.)

9. The CPUC rate-setting process is intended to serve those same purposes by allowing privately owned utilities to recover operating expenses, capital costs and a reasonable rate of return on invested capital. Thus, a utility is entitled to recover its expenses on a dollar-for-dollar basis as part of its rates, along with a reasonable rate of return on the value of its property devoted to public use. (*S. Cal. Edison Co. v. Pub. Utils. Comm'n* (1978) 20 Cal.3d 813, 818-19; *Pac. Tel. & Tel. Co. v. Pub. Utils. Comm'n* (1965) 62 Cal.2d 634, 644-45.)

B. The North Bay Fires And Plaintiffs' Claims

10. On October 8 and 9, 2017, multiple wildfires ignited at different locations throughout Northern California. (See 1 Appen. 229-30, ¶¶ 2-3.)

11. Plaintiffs allege that their damages were "legally and substantially caused by the actions of [PG&E] . . . in [its] installation, ownership, operation, use, control, management, and/or maintenance of the power lines and other electrical equipment for a public use." (1 Appen. 285, ¶ 224.) Among other claims, Plaintiffs have asserted claims for inverse condemnation. (See, e.g., *id.* at 284-286, ¶¶ 220-227.)

12. The individual actions brought on behalf of individual plaintiffs, subrogation insurers and public entities were coordinated as the *California North Bay Fire Cases*, No. JCCP 4955, and assigned to the Honorable Curtis E. A. Karnow, Superior Court for the County of San Francisco. (1 Appen. 148-52.)

C. The CPUC's November 2017 Decision Denying Recovery Of Inverse Condemnation Costs To SDG&E

13. A decade before the North Bay Fires at issue in this litigation, several wildfires spread throughout portions of Southern California. (2 Appen. 347.) After the fires, Cal Fire and the CPUC's Consumer Protection and Safety Division attributed the ignition of three of these fires (the "2007 wildfires") to electrical facilities owned and operated by San Diego Gas & Electric ("SDG&E"). (*Ibid.*) SDG&E established a Wildfire Expense Memorandum Account ("WEMA") to track costs associated with the three fires.[2] (*Id.* at 347-48.) The WEMA account grew to $2.4 billion in costs and legal fees incurred by SDG&E to resolve third-party damage claims arising from the 2007 wildfires. (*Ibid.*) These costs arose primarily from settlements SDG&E entered into after the Superior Court held that

[2] A WEMA is a tracking mechanism used by a regulated utility to segregate costs that it may later seek to recover through rates in an application to the CPUC.

SDG&E could be liable for inverse condemnation damages. (*Id.* at 417.)

14. In September 2015, SDG&E applied to the CPUC to recover, through rates, $379 million of the WEMA account for unreimbursed costs that SDG&E paid due to inverse condemnation. (2 Appen. 247-48.)

15. On November 30, 2017, the CPUC adopted a final decision denying SDG&E's application for the recovery of costs related to the 2007 wildfires. (See generally 1 Appen. 344-418.) The CPUC applied its administratively created "prudent manager" standard, under which it examines whether costs incurred are "reasonable," to deny cost recovery to SDG&E. *Id.* at 355.)

16. In its November 30, 2017 decision, the CPUC announced for the first time that the principles of inverse condemnation are irrelevant to rate setting because the CPUC has exclusive jurisdiction over cost recovery:

> Inverse Condemnation principles are not relevant to a Commission reasonableness

> review under the prudent manager standard. . . . Even if SDG&E were strictly liable, we see nothing in the cited case law that would supersede this Commission's exclusive jurisdiction over cost recovery/cost allocation issues involving Commission regulated utilities.

(2 Appen. 410.)

17. After the Superior Court overruled SDG&E's demurrer on inverse condemnation, the CPUC Commissioners held a hearing in which they affirmed the CPUC's policy but several commissioners recognized that courts should revisit the continued application of inverse condemnation to private utilities that, unlike public utilities, cannot automatically spread inverse condemnation costs.

18. Commissioner Rechtschaffen stated:

> [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 private**

> **utilities, which is that there's no guaranty that . . . private utilities can recover the cost from their ratepayers**. 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.
>
> But having said that, it doesn't change our obligation to rule that the utility can't recover unless they acted prudently.

(4 Appen. 1101 (emphasis added).)

19. Other Commissioners agreed. For example, Commissioner Peterman remarked: "I also appreciate the revisions to the proposed decision, clarifying that the legal doctrine of inverse condemnation does not displace the Commission's reasonableness review of whether SDG&E was a prudent manager in this case." (4 Appen. 1101.)

20. On December 26, 2017, President Picker and Commissioner Guzman-Aceves filed a joint concurrence. (2 Appen. 490-96.) In their concurrence, the President and Commissioner directly urged the courts to reconsider the rationale for applying inverse condemnation to privately owned utilities, specifically

because "the logic for applying inverse condemnation to utilities—costs will necessarily be socialized across a large group rather than borne by a single injured property owner, regardless of prudence on the part of the utility—is unsound." (*Id.* at 494.)

21. The Commissioners also stated in their concurrence that "the application of inverse condemnation to utilities in all events of private property loss [fails] to recognize important distinctions between public and private utilities and that the financial pressure on utilities from the application of inverse condemnation may lead to higher rates" resulting from "increase[s] in the cost of capital and the expense associated with insurance." (2 Appen. 495.)

22. On Friday, July 13, 2018, the CPUC issued a decision denying applications for rehearing of the WEMA Decision that had been filed by SDG&E, PG&E and the Southern California Edison Company ("SCE"). (6 Appen. 1401-33.) The CPUC reiterated that the "policy underlying inverse condemnation is one of cost sharing or cost spreading. It is intended to relieve individual property

owners from the economic burden of damages by *spreading the costs among the larger community of individuals that benefit from the public improvement*." (*Id.* at 1423 (italics added).) The CPUC further confirmed its previously stated views that even if SDG&E had been found "strictly liable under inverse condemnation," the CPUC nonetheless would have conducted a reasonableness review. (*Id.* at 1426.) The CPUC also refused to find that the denial of rate recovery for inverse condemnation losses constituted an unconstitutional taking. (*Id.* at 1431-33.)

D. PG&E's Demurrer To The Inverse Condemnation Causes Of Action And The Trial Court's Ruling

23. On March 16, 2018, PG&E filed its demurrer as to the inverse condemnation causes of action in the Individual Plaintiffs' Master Complaint, the Subrogation Plaintiffs' Master Complaint and the Public Entity Plaintiffs' Master Complaint. (2 Appen. 300-20.)

24. The basis for PG&E's demurrer was that the CPUC's November 30, 2017 decision newly announcing that inverse condemnation liability was "not relevant" to cost recovery vitiated

the cost-spreading rationale underlying the judicial extension of inverse condemnation liability to private utilities. (2 Appen. 309-10, 313-16.)

25. PG&E argued that the November 2017 decision announcing the CPUC's new policy regarding recovery of inverse condemnation costs rendered prior appellate decisions that had held privately owned utilities strictly liable for inverse condemnation fairly distinguishable and non-binding. (2 Appen. 313-15.)

26. PG&E also argued that in light of the CPUC's policy, the application of inverse condemnation to PG&E would violate PG&E's constitutional rights. (2 Appen. 316-20.) Specifically, PG&E contended that "the combination of inverse condemnation and the CPUC's refusal to allow automatic pass-through of inverse condemnation costs exacts an uncompensated taking of PG&E's property in violation of the Takings Clause of the Fifth Amendment of the United States Constitution . . . and Article I, Section 19 of the California Constitution." (*Id*. at 316; see also *id.* at 317-18.) Further,

PG&E claimed that "the application of inverse condemnation to PG&E is arbitrary and irrational and violates PG&E's substantive due process rights under the Fourteenth Amendment and the California Constitution." (*Id.* at 316; see also *id.* at 319-20.)

27. The Superior Court heard oral argument on the demurrer on May 18, 2018. (See generally 5 Appen. 1192-1234.) At the hearing, PG&E argued that the prior Court of Appeal decisions, *Barham* and *Pacific Bell*, are now fairly distinguishable in light of the CPUC's November 30, 2017 decision. (*Id.* at 1202-12.) PG&E also argued that if inverse condemnation is applied to PG&E, it would be an unconstitutional taking of PG&E's property in violation of the United States and California Constitutions, or, in the alternative, it would be a violation of PG&E's substantive due process rights under the United States and California Constitutions. (*Id.* at 1212-19.)

28. In a ruling dated May 21, 2018, the trial court overruled PG&E's demurrer, concluding that it was bound by *Pacific Bell*, and

that PG&E's argument that because "there is never a guarantee that the regulatory agency will permit cost spreading via e.g. increased rates, . . . it is never possible for privately owned utilities to be subject to inverse condemnation" was "flatly contradicted by *Pacific Bell*." (5 Appen. 1240.)

29. The court did not address *Barham*'s explicit holding that "[t]he fundamental policy underlying the concept of inverse condemnation is to spread among the benefiting community any burden disproportionately borne by a member of that community, to establish a public undertaking for the benefit of all." (*Barham, supra*, 74 Cal.App.4th at 752.) Although the court recognized that *Pacific Bell* agreed with *Barham*, it noted that *Pacific Bell* "couched the [loss-spreading] rationale in terms that emphasized the policy against overburdening individual property owners rather than the policy of socializing the cost," and that the *Pacific Bell* court "would have reached the same result even if there had been evidence that

the [C]PUC would bar [Edison] from passing along its damages liability to its ratepayers." (5 Appen. 1240.)

30. The respondent court also rejected PG&E's argument that the application of inverse condemnation to PG&E would be an uncompensated taking in violation of the United States and California constitutions. (5 Appen. 1240-42.) In addressing this argument, the respondent court concluded that whether PG&E would suffer a taking was a fact-intensive inquiry not appropriate for resolution on demurrer and that PG&E should raise its constitutional challenge if and when the CPUC denies PG&E's request to recover any inverse condemnation costs, in direct contravention of *Eastern Enterprises v. Apfel* (1988) 524 U.S. 498, 531. The respondent court also rejected PG&E's argument in the alternative that the application of inverse condemnation to PG&E would be arbitrary and irrational and a violation of PG&E's substantive due process rights under the United States and California Constitutions.

31. Finally, the trial court denied PG&E's request for certification under section 166.1. (5 Appen. 1243-44.) Although the court acknowledged "the issue is of great interest" and there is "a controlling issue of law" as to whether privately owned utilities may be liable under the doctrine of inverse condemnation, the court stated that "there is little [it] can add that the appellate court cannot discern from a petition for a writ." (*Id.* at 1243.) Further, because the court concluded that it was bound by *Barham* and *Pacific Bell*, any contrary decision "will be that of an appellate opinion yet to come, and [the court's] views are not material." (*Id.* at 1244.)

E. The Current Status Of The Coordination Proceeding

32. As of the May 18, 2018 hearing, 2489 individual plaintiffs, 108 subrogation plaintiffs and 7 public entity plaintiffs had filed 177 complaints. PG&E expects that additional parties will file claims in the coming months. The parties have had one case management conference, and they have had an informal discovery conference and a second case management conference in June and

July, respectively. (5 Appen. 1233.) Discovery has just begun and is ongoing. Immediate appellate review of this critical issue will assist the parties in determining whether resolution may be reached.

Basis For Relief

33. The Superior Court erred in denying PG&E's demurrer. Although the CPUC recently announced that strict inverse condemnation liability is "not relevant" to recovery of associated costs by privately owned utilities, (2 Appen. 410), the Superior Court concluded that *Pacific Bell* would not have been decided differently in light of the CPUC's decision, and it was therefore bound by that decision. (5 Appen. 1240.)

34. However, *Pacific Bell* and *Barham*, on which it relied, have now been shown to have been incorrectly decided in light of the CPUC's policy. In concluding that privately owned utilities such as PG&E may be subject to inverse condemnation liability because no "significant differences exist regarding the operation of publicly versus privately owned electric utilities" (*Barham, supra*, 74

Cal.App.4th at 753), the Second and Fourth Appellate Districts in those cases failed, in one CPUC Commissioner's words, to "grappl[e] with the salient difference between public and private utilities, which is that there's no guaranty that . . . private utilities can recover the cost from their ratepayers." (4 Appen. 1101.)

35. Strict inverse condemnation liability is a judicial creation premised upon the ability to spread costs of a "public use" of property over the benefitted public. (*Belair v. Riverside Cty. Flood Control Dist.* (1988) 47 Cal.3d 550, 558 (*Belair*).) The recently announced CPUC policy has rejected that justification as to privately owned utilities, calling "the logic . . . unsound." (2 Appen. 494.)

36. Consequently, CPUC members have called on California's courts to re-examine the judicial doctrine of inverse condemnation as it is applied to privately owned utilities. (4 Appen. 495.) This Court—which is not bound by the Second and Fourth Appellate Districts' decisions in *Barham* and *Pacific Bell*—should "grappl[e] with" this vital issue, an issue that has the potential to

create an immediate crisis for privately owned utilities and the state.[3]

37. The respondent court also erred in rejecting PG&E's argument that the application of inverse condemnation to PG&E would be a constitutional violation. (5 Appen. 1240-42.) Given the CPUC's policy of denying automatic rate recovery by a private utility, the application of strict liability under inverse condemnation would be an unconstitutional taking of PG&E's property, forcing PG&E alone to bear the public burdens of inverse condemnation losses that were meant to be borne by all who benefit from a public

[3] PG&E is also a defendant in a series of lawsuits arising from the 2015 Butte Fire. Those actions have been coordinated as the *Butte Fire Cases*, No. JCCP 4853, and assigned to the Superior Court for the County of Sacramento (Sumner, J.). The court in those proceedings has held that "PG&E may be liable for inverse condemnation under California law even though it is a privately owned public utility." (1 Appen. 78.) Following the WEMA Decision, PG&E sought rehearing of that prior determination, which the court denied. (5 Appen. 1129-74.) PG&E subsequently filled a petition for a writ of mandate in the Court of Appeal for the Third Appellate District, which was denied without opinion on June 7, 2018. PG&E filed a petition for review with the Supreme Court on June 18, 2018. (5 Appen. 1249-1383.) That petition remains pending.

improvement. (See 2 Appen. 317-18.) Alternatively, the application of inverse condemnation absent a guarantee of loss-spreading would be arbitrary and irrational in violation of PG&E's due process rights, as privately owned utilities are treated as public entities for purposes of inverse condemnation, but as private entities for purposes of rate recovery. (See *id*. at 318-22.)

38. Continued application of inverse condemnation liability to privately owned utilities such as PG&E not only threatens the continued viability of the utilities themselves, but it also has the potential to cause serious harm to California consumers and the California economy.

Absence Of Other Remedies

39. Absent writ review, PG&E will suffer irreparable injury. PG&E has no right of appeal from the trial court's ruling denying its demurrer, nor does it have a plain, speedy or adequate remedy available aside from this petition. The coordinated

proceeding is in its infancy, and there are more claims that will be filed in the coming months.

40. An appeal following a lengthy trial is an inadequate remedy given the nature of this large and complex coordination proceeding. It would not serve the judicial system or any of the parties to force the parties to wait years to determine whether the Superior Court was correct on this legal issue, which will have a central and singularly significant impact on the entire progression of this litigation.

41. Although most of plaintiffs' claims sound in negligence, inverse condemnation is a strict liability cause of action. Discovery, the goals and strategies of the parties and certainly trial are all directly and greatly influenced by the presence or absence of this central claim. Waiting until the conclusion of this litigation to address this key issue would result in a great deal of wasted time and effort for both plaintiffs and PG&E.

42. Further, it is quite possible that, given the nature of litigation generally and the enormity of this litigation in particular, PG&E will be compelled to settle inverse condemnation claims that would be dismissed under the ultimately correct rule of law. In that event, no appeal would be filed and this Court would never have an opportunity to correct the legal error of respondent court or to clarify this important area of law. This case presents an important opportunity for this Court, and this writ petition may very well be this Court's best chance to act. (*Starbucks Corp. v. Superior Court* (2008) 168 Cal.App.4th 1436, 1453 [noting in another context that settlement due to the pressure from potentially large exposure is a "valid concern" that justifies early appellate review because it may be "too late" if the court waits].)

43. In the meantime, the nature of potential liability and exposure under California law will remain uncertain for all privately owned utilities operating in this state. Continued uncertainty about the issue—which will persist until an eventual judgment and appeal

in the absence of writ review—could be very costly and could herald an immediate crisis for privately owned utilities and the state. The prospect of unlimited and unrecoverable inverse condemnation liability for privately owned utilities "could well inhibit further construction of public works." (See *Bunch v. Coachella Valley Water Dist.* (1997) 15 Cal.4th 432, 451 (*Bunch*).)

44. For example, on November 30, 2017, following the WEMA Decision, an analyst noted that, "to the average investor[, inverse condemnation liability] seems a uniquely unpalatable proposition of socialized no-fault liability despite no assurance of presumed recoverability in the CPUC-rate setting process."[4] On December 12, 2017, following ignition of the Thomas Fire in SCE's service territory, another analyst wrote that there were "too many unknowns and significant risk," rendering California utilities "uninvestable right now."[5] Finally, on December 21, 2017, following

[4] 1 Appen. 107.

[5] 1 Appen. 115-26.

PG&E Corporation's announcement that it was suspending the quarterly common dividend due to financial uncertainties following the October 2017 Wine Country wildfires, a third analyst opined that, "unless the law is changed regarding application of inverse condemnation to investor-owned utilities or the CPUC changes its position on recovery under that law, the CA utilities will see this material increase in their cost of capital persist and amplify, stressing their ability to invest in CA infrastructure and help the state meet its aggressive clean energy agenda."[6]

45. The uncertainty facing privately owned utilities has also negatively affected their creditworthiness, potentially affecting their ability to obtain financing through debt instruments. In February 2018, for example, two of the three largest credit rating agencies downgraded PG&E Corporation's and PG&E's credit ratings from A- to BBB+ and placed them on a negative rating watch to reflect the possibility of further, future downgrades because of potentially

[6] 1 Appen. 136-46.

large—and unrecoverable—liabilities due to inverse condemnation.[7] In June 2018, PG&E Corporation and PG&E were further downgraded to BBB, with a continuing negative rating watch, because of "the company's exposure to the California wildfires and its ability to recover associated costs from ratepayers" under the doctrine of inverse condemnation.[8] Further credit downgrades may follow "[a]bsent a near-term resolution" of the "disconnect" between the judicial strict liability and regulatory prudence standards for inverse condemnation."[9]

[7] 1 App. 163-68; *Id.* at 170-77.

[8] 5 App. 2284.

[9] *Ibid*.

PRAYER

Petitioners Pacific Gas and Electric Company and PG&E Corporation (collectively, "PG&E") pray that this Court:

1. Either (a) issue a peremptory writ of mandate, prohibition or other appropriate writ in the first instance directing respondent Superior Court to set aside and vacate its May 21, 2018 Order overruling PG&E's demurrer, and to enter a new order sustaining PG&E's demurrer; or (b) issue an alternative writ directing the respondent court to set aside and vacate its May 21, 2018 Order, and to sustain PG&E's demurrer, or to show cause why it should not be ordered to do so, and upon return of the alternative writ issue a peremptory writ of mandate, prohibition or other appropriate writ directing the court to vacate its order and to enter a new order sustaining PG&E's demurrer.

2. Grant such other relief as this Court may deem just and proper.

Dated: July 20, 2018

By: _____

Kevin J. Orsini

Counsel for Petitioners Pacific Gas and Electric Company and PG&E Corporation

VERIFICATION

I, Kevin J. Orsini, declare as follows:

I am one of the attorneys for petitioners Pacific Gas and Electric Company and PG&E Corporation (collectively, "PG&E"). I have read the foregoing petition and know its contents. The facts alleged in the petition are within my own knowledge, and I know these facts to be true. Because of my familiarity with the relevant facts pertaining to the trial court proceedings, I, rather than an officer or principal of PG&E, verify this petition.

I declare under penalty of perjury that the foregoing is true and correct and that this verification was executed on July 20, 2018 in New York, New York.

Dated: July 20, 2018

By: _____

Kevin J. Orsini
Counsel for Petitioners Pacific Gas and Electric Company and PG&E Corporation

MEMORANDUM OF POINTS AND AUTHORITIES

I. INVERSE CONDEMNATION LIABILITY CANNOT EXTEND TO PRIVATELY OWNED UTILITIES UNLESS THEY CAN SPREAD THE COSTS OF THAT LIABILITY ACROSS THE BENEFITTED PUBLIC

Under California law, only a "public entity" is subject to inverse condemnation. (See *Barham, supra,* 74 Cal.App.4th at 752 [holding that a plaintiff seeking to prevail on inverse condemnation "must prove that a public entity has taken or damaged their property for a public use"].) The California Supreme Court has never held that a privately owned utility such as PG&E is a public entity for purposes of an inverse condemnation claim. Because the CPUC's newly articulated policy restricts the ability of privately owned utilities to spread inverse condemnation costs among their customers, PG&E should not be treated as a public entity for purposes of inverse condemnation. Although two prior Court of Appeal decisions have held privately owned public utilities liable in inverse condemnation, (see, e.g., *id.* at 752-53), those courts did not have the benefit of the CPUC's recent announcement that it will not

allow automatic recovery of the costs associated with inverse claims. This Court should decline to follow those decisions, as they were wrongly decided and their holdings rested on mistaken assumptions about privately owned utilities' abilities to spread inverse condemnation losses.

A. Cost-Spreading Is The Central Policy Underlying Inverse Condemnation Liability

California's Takings Clause is designed to ensure that the costs of the public use of private property are shared by all members of the public that benefit from that use. Thus, "the underlying purpose of [California's] constitutional provision in inverse—as well as ordinary—condemnation is 'to distribute throughout the community the loss inflicted upon the individual by the making of public improvements': 'to socialize the burden . . . to afford relief to the landowner in cases in which it is unfair to ask him to bear a burden that should be assumed by society.'" (*Holtz*, *supra*, 3 Cal.3d at 303, quoting *Bacich v. Bd. of Control* (1943) 23 Cal.2d 343, 350 (*Bacich*).)

The Supreme Court has reiterated this cost-spreading rationale for the imposition of inverse condemnation liability for over 75 years:

- See *Bacich*, *supra*, 23 Cal.2d at 350 ["[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"], italics added;
- *Customer Co. v. City of Sacramento* (1995) 10 Cal.4th 368, 409 (*Customer Co.*) ["the relevant 'policy' basis of article I, section [19] . . . is '*to distribute throughout the community the loss inflicted upon the individual* by [the public enterprise as deliberately conceived]'"], italics added;
- *Locklin v. City of Lafayette* (1994) 7 Cal.4th 327, 365 (*Locklin*) ["the 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* by the making of public improvements'"], in bank, italics added;

- *Belair*, *supra*, 47 Cal.3d at 558 ["the 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*'"], in bank, italics added;
- *Varjabedian v. City of Madera* (1977) 20 Cal.3d 285, 296 (*Varjabedian*) ["the 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 the public improvements"], italics added;
- *Albers, supra*, 62 Cal.2d at 263 ["the 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 the public improvements"], italics added.

The centrality of the cost-spreading rationale to the inverse condemnation doctrine is underscored by the fact that the Supreme Court has extended liability to apply without fault: "any actual physical injury to real property proximately caused by the improvement as deliberately designed and constructed is compensable under article I, section 14, of our Constitution whether foreseeable or not." (*Albers*, *supra*, 62 Cal.2d at 263-64; *see also Holtz*, *supra*, 3 Cal.3d at 303.) The Supreme Court has further explained that "a governmental entity may be held strictly liable, irrespective of fault, where a public improvement constitutes a substantial cause of the plaintiff's damages even if only one of several concurrent causes." (*Marshall v. Dept. of Water & Power* (1990) 219 Cal.App.3d 1124, 1139, citing *Belair*, *supra*, 47 Cal.3d at 558-59.)

B. Inverse Condemnation Has Historically Applied Only To Governmental And Other Public Entities

The Court has long held "the state" or "the government" liable for inverse condemnation claims. (See, e.g., *Regency Outdoor Advert., Inc. v. City of Los Angeles* (2006) 39 Cal.4th 507, 515-16, as modified (Oct. 11, 2006); *Customer Co.*, *supra*, 10 Cal.4th at 376-77; *Bauer v. County of Ventura* (1955) 45 Cal.2d 276, 282-83, abrogated on other grounds as recognized by *Belair*, *supra*, 47 Cal.3d at 550; *House v. Los Angeles Cty. Flood Control Dist.* (1944) 25 Cal.2d 384, 388-89.) This is because when the government is sued in inverse condemnation, it may use the coercive power of taxation to ensure that losses be "distributed over the taxpayers at large rather than be borne by the injured individual," and therefore the cost-spreading rationale of inverse condemnation is always achieved when a true public entity is the inverse defendant. (1 Appen. 19, 30.) The public entity on which inverse condemnation is imposed merely acts as a conduit, shifting the costs of inverse condemnation from the injured individual to the community at large.

Inverse condemnation has also been extended to other "public entities" that can also engage in automatic cost-spreading. (See, e.g., *Bunch*, *supra*, 15 Cal.4th at 435; *Customer Co.*, *supra*, 10 Cal.4th at 376-77.) For example, an airport became a "public entity" after it was acquired by three cities. (See *Baker v. Burbank-Glendale-Pasadena Airport Auth.* (1985) 39 Cal.3d 862, 865, citing Gov. Code, § 6500 [defining "public agency" as including "the federal government or any federal department or agency, this state, another state or any state department or agency, a county, county board of education, county superintendent of schools, city, public corporation, public district, regional transportation commission of this state or another state, a federally recognized Indian tribe, or any joint powers authority formed pursuant to this article by any of these agencies"].) The cities owning the airport were able to spread the costs for inverse condemnation liability against the airport using their taxing authority. (See generally Cal. Const. arts., XIIIA, XIIIC, XIIID.)

In fact, every inverse condemnation defendant in the seminal cases that have developed the State's inverse condemnation law (see *supra*, pp. 54-56) was a government or other public entity. (See, e.g., *Bacich*, *supra*, 23 Cal.2d [Board of Control, California Toll-Bridge Authority, and State Department of Public Works]; *Customer Co.*, *supra*, 10 Cal.4th [City of Sacramento and Sacramento County]; *Locklin*, *supra*, 7 Cal.4th [City of Lafayette, County of Contra Costa, Contra Costa County Flood Control District, California Department of Transportation, and Bay Area Rapid Transit District]; *Belair*, *supra*, 47 Cal.3d [Riverside County Flood Control District and State of California]; *Varjabedian*, *supra*, 20 Cal.3d [City of Madera]; *Holtz*, *supra*, 3 Cal.3d [San Francisco Bay Area Rapid Transit District and the City and County of San Francisco]; *Albers*, *supra*, 62 Cal.2d [County of Los Angeles]). Every one of these entities had the power unilaterally to fund inverse condemnation liability through compulsory taxation, rates or fees.[10] They each, therefore, were

[10] Likewise, the Supreme Court has held that a private actor

guaranteed the right to spread the costs of an inverse damages judgment among the public at large and would never be obligated to bear these costs themselves.

C. *Barham* And *Pacific Bell* Extended Inverse Condemnation Liability To Privately Owned Utilities Based On The Cost-Spreading Rationale

The Court of Appeal for the Fourth Appellate District made new law by extending inverse condemnation liability to a privately owned utility, the Southern California Edison Company ("Edison"), in *Barham v. S. Cal. Edison* (1999) 74 Cal.App.4th 744. Relying on *Barham*, in 2012, the Second District also upheld the imposition of inverse condemnation liability against Edison. (*Pac. Bell Tel. Co. v. S. Cal. Edison Co.* (2012) 208 Cal.App.4th 1400.

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acting jointly with a state actor may be liable for inverse condemnation. (See, e.g., *Breidert v. S. Pac. Co.* (1964) 61 Cal.2d 659, 662 [railroad was active joint participant with city], citing *Talbott v. Turlock Irr. Dist.* (1933) 217 Cal. 504, 506 [irrigation district acting jointly with improvement district]). But again, these cases turn on the cost-spreading rationale for inverse condemnation, as the private party may seek contribution from the state actor. (Civ. Code, § 1431.)

In extending inverse condemnation to a privately owned utility for the first time in California history, the *Barham* court, quoting the Supreme Court's decision in *Belair*, expressly acknowledged that "[t]he *fundamental* policy underlying the concept of inverse condemnation is to *spread among the benefiting community* any burden disproportionately borne by a member of that community, to establish a public undertaking for the benefit of all." (*Barham*, *supra*, 74 Cal.App.4th at 752, italics added, citing *Belair*, *supra*, 47 Cal.3d at 558.) The *Barham* court cited to cases holding *public* entities liable for inverse condemnation under similar circumstances and found that Edison was liable for inverse only after determining that no "significant differences exist regarding the operation of publicly versus privately owned electric utilities." (*Id.* at 752-53 ["We are not convinced that any significant differences exist regarding the operation of publicly versus privately owned electric utilities . . . and find there is no rational basis upon which to found such a distinction. We conclude, under the factual scenario

here present, [Edison] may be liable is inverse condemnation as a public entity."].) The Court did not address the circumstances under which the privately owned utility would be unable to act as a conduit for loss-spreading and appears simply to assume it *always* would be able to socialize losses in the same way a public utility is able to so do.

In *Pacific Bell*, the Second District Court of Appeal relied on *Barham* to again extend inverse condemnation to Edison. (*Pacific Bell*, *supra*, 208 Cal.App.4th at 1408 [citing *Barham* in support of determination that no "significant differences exist" between publicly and privately owned utilities].) As in *Barham*, the *Pacific Bell* court cited *Belair* for the proposition that the underlying rationale—which it referred to as the "loss-spreading rationale"—for inverse condemnation should apply to both publicly and privately owned utilities. (*Id.* at 1407.) Presuming that the cost-spreading rationale fully justified extending inverse condemnation to Edison, the court expressly rejected Edison's argument that it differed from a

public utility or other public entity because it had no power to unilaterally raise rates and depended entirely on the regulatory discretion of the CPUC as to whether inverse condemnation costs would be spread to the benefitted ratepayers. (*Id.* at 1407-08.) Indeed, *Pacific Bell* found that Edison "ha[d] not pointed to any evidence to support its implication that the [CPUC] would *not* allow [it] adjustments to pass on damages liability during its periodic reviews." (*Id.* at 1407, italics added.)

D. The CPUC Decision Makes Clear That *Barham*'s And *Pacific Bell*'s Assumptions Regarding Cost-Spreading Were Unfounded

The reasoning of *Barham* and *Pacific Bell* was originally flawed because privately owned utilities have no coercive taxation power or unilateral ratemaking authority and cannot automatically spread costs because their rates are subject to CPUC approval. But regardless of whether *Barham* and *Pacific Bell* were wrongly decided at the time, they are certainly wrong now. In the wake of the CPUC's decision denying SDG&E's application and newly declaring

inverse condemnation "not relevant" to cost recovery through the rate-setting process, the assumption that privately owned utilities will be able to spread the costs of strict inverse condemnation liability is demonstrably false. It is now clear that, even if a private utility is held strictly liable in inverse condemnation, the CPUC will not automatically permit the private utility to spread the costs associated with its public improvement throughout the benefiting community.

This incompatibility between judicially created inverse condemnation principles and CPUC policy compels the conclusion that the prior Court of Appeal decisions extending inverse condemnation to privately owned utilities were founded upon an "unsound" rationale requiring re-examination. (See 2 Appen. 494; see also *id.* at 495-96 [urging the courts "to carefully consider the rationale for applying inverse condemnation in these types of cases"].) The respondent court's contrary ruling is flawed for numerous reasons.

First, the respondent court incorrectly held that it is the quasi-monopolistic status of privately owned utilities that provides the basis for extending the doctrine and suggested that *Pacific Bell* "emphasized the policy against overburdening individual property owners rather than the policy of socializing the cost." (See 5 Appen. 1240.) That reading of *Pacific Bell* is incorrect; it is cost-spreading that is the sine qua non of inverse condemnation, not cost-shifting premised on quasi-monopoly status.

In discussing the policy justifications underlying inverse condemnation, *Pacific Bell* cited to *Belair* which, consistent with decades of Supreme Court case law, held that "the underlying purpose . . . of inverse condemnation is '*to distribute throughout the community the loss inflicted upon the individual*.'" (*Belair, supra*, 47 Cal.3d at 558, in bank, italics added.) To be sure, the courts that developed inverse condemnation recognized the importance of not having one individual member of the community bear a disproportionate share of the cost of a public improvement. But the

inverse condemnation doctrine was designed not to ensure that this cost is shifted from one private entity to another; it was developed explicitly for the purpose of spreading the losses suffered by one individual to the community at large. Indeed, just a few weeks before the hearing on this demurrer, the Fourth District embraced exactly this reading of California law, holding that it "has long been recognized that the purpose of section 19, as well as the purpose of the Takings Clause of the Fifth Amendment to the United States Constitution, is to ensure that individual property owners are not compelled to bear burdens or incur costs that, in fairness and justice, *should be borne by the public at large*." (*Williams v. Moulton Niguel Water Dist.* (2018) 22 Cal.App.5th 1198, 1210, italics added.)

This more recent holding by the very district that decided *Pacific Bell* dispels the notion that the "*Pacific Bell* Court would have reached the same result even if there had been evidence that the PUC would bar SCE from passing along its damages liability to its ratepayers" (5 Appen. 1240.) Moreover, the Fourth District

explicitly based its decision on the *assumption* that the loss-spreading rationale would apply to Edison, which failed to "point[] to any evidence to support its implication" that it could not spread costs. (*Pacific Bell*, *supra*, 208 Cal.App.4th at 1407.) While *Pacific Bell* stated in dicta in a footnote that regulation of a public utility by the CPUC would be insufficient to render that utility immune from inverse condemnation liability, (*Pacific Bell*, *supra*, 208 Cal.App.4th at 1407, fn. 6), that statement was made before the CPUC announced its regulatory decision that inverse condemnation is "not irrelevant" to its rate-making policy decision, (WEMA Decision at 65). That statement also has no bearing here, as even a regulated *public* entity would be supported by *public* tax funds and would not, in any circumstance, be required to rely on *private* funds and *private* property to satisfy an award of inverse condemnation damages. The opposite is true for a private utility such as PG&E.

In short, the Supreme Court has repeatedly held that the fundamental purpose of inverse condemnation is to socialize losses

among the community, not to shift them from one private entity to another. *Pacific Bell* did not change—and could not change—that well-established principle. While the respondent court was correct that *Barham* held there was "no rational basis" for a distinction between a public entity and a private entity like PG&E, (5 Appen. 1238), that holding was issued long before the CPUC's recent policy decision. In failing to reassess whether that holding should continue to apply, the respondent court failed to "grappl[e] with the salient difference between public and private utilities, which is that there's no guaranty that . . . private utilities can recover the cost from their ratepayers." (4 Appen. 1101.)

Second, even if the respondent court were correct that *Pacific Bell* turned on the quasi-monopolistic status of privately owned utilities, any such holding by *Pacific Bell* was the result of misplaced reliance on *Gay Law Students Assn. v. Pac. Tel & Tel. Co.* (1979) 24 Cal.3d 458 (*Gay Law Students*). *Gay Law Students* held that the California Constitution's Equal Protection Clause barred a privately

owned utility, like a state actor, from engaging in employment discrimination based on sexual orientation. (*Gay Law Students*, 24 Cal.3d at 485-86.) The Court reasoned that the grant of quasi-monopoly power to a private utility by the State limits competition that might otherwise discourage discriminatory practices and also enlists taxpayers in indirect support of the discriminatory practices. (*Id.* at 470-72.)[11]

In relying on *Gay Law Students*, *Pacific Bell* failed to read *Gay Law Students* "in context." (See *Pasillas v. Agric. Labor Relations Bd.* (1984) 156 Cal.App.3d 312, 348 (*Pasillas*) ["*Gay Law Students* . . . must be read in context, as addressing only the problem of *arbitrary discrimination* in employment (or membership) criteria affecting an individual's fundamental right to work."], italics in original; see also

[11] Federal constitutional law holds the contrary, as the United States Supreme Court has held that privately owned utilities are not state actors merely because they are heavily regulated and enjoy government-granted monopoly status. (See *Jackson v. Metro. Edison Co.* (1974) 419 U.S. 345, 351-52 [rejecting state action for purposes of a due process claim, holding that monopoly status was "not determinative" of whether a privately owned utility was a state actor].)

Auto. Sprinkler Corp. v. S. Cal. Edison Co. (1989) 216 Cal.App.3d 627, 633 [distinguishing *Gay Law Students* because it "considered [a] narrow issue" in the equal protection and employment discrimination context].)

Quasi-public entities can be deemed public entities in certain contexts and not others, and whether a court has held that a utility is bound by the equal protection clause has no bearing on whether it is subject to inverse condemnation. For example, in contrast with *Gay Law Students*, the Court of Appeal stated in *Pasillas* that private entities can take state action sufficient to trigger equal protection guarantees but not sufficient to trigger free speech and associational guarantees. (*Pasillas*, *supra,* 156 Cal.App.3d at 348.) Similarly, in relying on the context-specific holding in *Gay Law Students*, *Pacific Bell* did not even acknowledge that the Fourth District had in another context distinguished a private utility from a public utility on the grounds that the private utility "cannot directly pass on its eminent domain [and inverse condemnation] costs to the

ratepayers." (See *Moreland Inv. Co. v. Superior Court* (1980) 106 Cal.App.3d 1017, 1022 [holding that a private utility is not governmental agency under Code of Civil Procedure section 397, in part because it cannot directly pass on eminent domain costs to ratepayers].)

Any quasi-monopoly status PG&E may enjoy is irrelevant to the salient policy upon which the Supreme Court has fashioned inverse condemnation liability, namely, the ability to spread the cost of public improvements over the benefitted public. The policy concerns expressed in *Gay Law Students* are absent here. Obviously, there is no concern that taxpayers will be enlisted in supporting discriminatory policies. And unlike the concern that a quasi-monopolistic utility will be free to engage in employment discrimination without competitive checks, there are ample alternative mechanisms for discouraging privately owned utilities from engaging in conduct that damages private property. Most important, privately owned utilities, unlike governmental entities

traditionally subject to inverse condemnation liability, *may be sued in tort*.

Specifically, privately owned utilities are not public entities for purposes of sovereign immunity to tort liability pursuant to the Tort Claims Act, Government Code sections 810 *et seq.* (See Gov. Code, § 811.2.) Thus, private property owners may sue privately owned utilities *more freely* than they may sue governmental entities, not less. This is an important distinction for purposes of inverse condemnation. (See, e.g., *Albers*, *supra*, 62 Cal.2d at 256 ["The [constitutional] provision [from which inverse condemnation has been developed] permits an action against the state, which cannot be sued without its consent. It is designed not to create new causes of action, but to give a remedy for a cause of action that would otherwise exist"], quoting *Archer v. City of Los Angeles* (1941) 19 Cal.2d 19, 24.)

Third, the respondent court suggested that even if cost-spreading is critical to the inverse condemnation doctrine, the fact

that PG&E "may" be able to spread the losses is sufficient. (5 Appen. 1239-40.) Nothing in any of the Supreme Court inverse condemnation decisions supports this conclusion. A true public entity can *always* socialize inverse losses. For example, a public electric utility can set its own rates, and it also has the backstop of the municipality's taxation power in the event its rate increases are insufficient. The true public utility does not have to apply to any regulatory authority to increase its rates, and there is no threshold determination that it acted "prudently" that applies before the inverse losses are spread amongst the entire community.

The respondent court seemed to suggest that only a ruling by the CPUC that a public utility could *never* spread inverse losses through rate increases would be sufficient to establish that inverse condemnation is inapplicable. But that is backwards. The point is not whether it is possible, in some instances, that inverse losses *could* be spread among the public. The point is whether it is possible, in some instances, that inverse losses *will not* be spread among the

public. The public entities against which inverse condemnation has always been applied have never faced the risk of being left to absorb inverse losses themselves. They are guaranteed recovery from the public at large. That guarantee is not present for PG&E, and it is the absence of that guarantee that renders the "constitutional underpinning" of inverse inapplicable.

* * * * *

At oral argument, the respondent court identified the precise problem that arises where privately owned utilities are deprived of the ability to automatically spread inverse damages across the benefitted community. As the court asked: "Let's say we go through trial, [plaintiffs] win on inverse condemnation, [plaintiffs] get a judgment, PG&E goes through some processes with the CPUC. The CPUC, for whatever reason, says, 'We're not gonna let you recoup.' Now, what does PG&E do? . . . Do they take the money back from [plaintiffs]? Probably not." (5 Appen. 1223-24.) That is precisely the whipsaw that PG&E now faces. Not a single one of the

Supreme Court cases developing the doctrine of inverse condemnation ever contemplated such a scenario; *Pacific Bell* and *Barham* assumed this problem away. The CPUC's recent decision no longer permits such an assumption to stand, and those cases are no longer good law. PG&E is not a public actor for the purposes of inverse condemnation and the doctrine is inapplicable.

II. APPLICATION OF INVERSE CONDEMNATION LIABILITY TO PRIVATELY OWNED UTILITIES IN THE ABSENCE OF COST-SPREADING WOULD BE UNCONSTITUTIONAL

The CPUC's decision set a new policy, disrupting long-standing beliefs that the CPUC would consider the cost-spreading rationale of inverse condemnation when setting rates. For the reasons described above, inverse condemnation should not apply to PG&E as matter of California law. If, however, this Court were to agree with the respondent court that inverse condemnation is about cost-shifting (that is, reallocating the wildfire losses from one set of private entities to another), rather than cost-spreading (that is, spreading the losses suffered by some members of the community

across the community at large), inverse condemnation would then be unconstitutional as applied to investor-owned utilities.

Without a guarantee that PG&E can recover inverse condemnation costs, the imposition of such liability effects a taking without just compensation. Moreover, because inverse condemnation rests on the premise that losses from public improvements should be spread throughout the community, application of inverse condemnation to PG&E when it cannot engage in such loss-spreading is arbitrary and irrational.[12]

A. Continued Application Of Inverse Condemnation To Privately Owned Utilities Would Violate The Takings Clause Of The Fifth Amendment

The Takings Clause of the Fifth Amendment provides: "[N]or shall private property be taken for public use, without just compensation." (U.S. Const., 5th Amend., cl. 5.) The United States

[12] A Superior Court's ruling on inverse condemnation constitutes state action that is subject to constitutional constraints. (See *N.Y. Times Co. v. Sullivan* (1964) 376 U.S. 254, 265 [freedom of speech and press]; *Shelley v. Kraemer* (1948) 334 U.S. 1, 14-18 [equal protection].)

Supreme Court has explained that this clause "prevent[s] the government 'from forcing some people alone to bear the public burdens which, in all fairness and justice, should be borne by the public as a whole.'" (*E. Enters. v. Apfel*, *supra*, 524 U.S. at 522.) Article I, Section 19 of the California Constitution similarly provides that "[p]rivate property may be taken or damaged for a public use . . . only when just compensation" has been paid. If PG&E were subject to strict liability for inverse condemnation, but could not recover its inverse condemnation costs, the application of inverse condemnation would be nothing more than a naked transfer of wealth from one private party (PG&E and its shareholders and investors) to another (the inverse plaintiff) without just compensation. This is an unconstitutional taking.

First, contrary to the court's statement that "[t]he economic impact of the regulation is unknown" (5 Appen. 1242), there can be no dispute that inverse condemnation liability would force a considerable financial burden on PG&E and its investor

shareholders. As of May 18, 2018, there were already 2,489 individual plaintiffs, 108 subrogation plaintiffs and 7 public entity plaintiffs who had filed suit, and the parties anticipate more plaintiffs will file suit in the coming months. Counsel for subrogation plaintiffs represented at the first case management conference that "there are 30,000 [subrogation] claims or more." (1 Appen. 205.) PG&E's potential liability under inverse condemnation is substantial, and it would be "clearly deprived of the amounts it must pay" to the injured landowners in the event of an inverse condemnation judgment. (See *E. Enters.* 524 U.S. at 529-32 [finding considerable financial burden was imposed where the Coal Act required plaintiff to make considerable payments and where the Act did not guarantee a right to reimbursement].)

Notably, Courts have recognized that limiting a utility's rate-setting ability can, in some circumstances, constitute a taking. (See *Duquesne Light Co. v. Barasch* (1989) 488 U.S. 299, 308 (*Duquesne*) ["If the rate does not afford sufficient compensation, the State has taken

the use of utility property without paying just compensation and so violated the Fifth and Fourteenth Amendments."]; *Ponderosa Tel. Co. v. Pub. Utils. Comm'n* (2011) 197 Cal.App.4th 48, 59 (*Ponderosa*) [holding that CPUC had engaged in impermissible appropriation by failing to permit rate increase].) This is one of those circumstances. The CPUC has said it will ignore inverse condemnation principles and place the burden on PG&E to prove that it operated prudently before permitting it to recover inverse damages through rate increases. Thus, PG&E will be in a position where it is at risk of being "forced alone to bear the public burdens" of inverse condemnation losses that were meant to be "borne by the public as a whole." (See *E. Enters.*, *supra*, 524 U.S. at 522.) By contrast, when inverse condemnation is applied to a public entity with the coercive power of taxation, or a public utility that can spread costs simply by increasing its rates with no requirement for regulatory approval, no such financial burden is created. In that circumstance, there is no uncompensated taking: All taxpayers or ratepayers bear the costs of

the strict liability regime that has been developed for their common good.

Second, the application of inverse condemnation after the CPUC has rejected the cost-spreading rationale on which such liability has always been predicated plainly interferes with PG&E's reasonable investment-backed expectations. (See *E. Enters.*, *supra*, 524 U.S. at 526-27, 532-33.) As a privately owned entity, PG&E has relied for nearly three decades on the premise in *Barham* and *Pacific Bell* that imposition of inverse condemnation liability would be offset by the ability to spread the costs through the rate recovery process. PG&E never expected on the one hand to be held strictly liable by courts for inverse condemnation costs, while on the other hand to be unable to recover those costs through its rates. PG&E assumed—as did the California courts—that privately owned entities would be able to automatically spread inverse costs the same way that publicly owned utilities can. No "evidence" about

"PG&E's investment backed expectations" was needed to resolve the demurrer. (5 Appen. 1242.)

Further, as noted in the CPUC Concurrence, "[i]nvestor owned utilities are partially dependent on the capital markets to raise money and the insurance market to mitigate financial risk." (2. Appen. 495.) Prior to the CPUC's policy statements, the investment-backed expectations of the capital markets were aligned with PG&E's expectations that it would not be subjected to strict liability but also precluded from cost spreading. Now, the CPUC's unexpected decision to deny privately owned utilities the ability to automatically recover their strict liability inverse condemnation costs could change "the risk profile of . . . investor-owned utilit[ies]" (*ibid.*) and thereby increase PG&E's cost of obtaining the capital that it needs to continue to provide its customers with safe and reliable energy service.

Third, application of inverse condemnation to PG&E does not "adjust[] the benefits and burdens of economic life to promote the

common good." (*Lingle v. Chevron U.S.A. Inc.* (2005) 544 U.S. 528, 539 (*Lingle*).) Under inverse condemnation, PG&E has to pay landowners for damage to their property caused (without fault) by PG&E's power lines. In this circumstance, PG&E—and not the customers who benefit from power lines—is left to bear the costs alone.

Fourth, the respondent court's conclusion that PG&E's takings argument was not ripe for resolution on demurrer was in error. The court erroneously relied on *Duquesne* in concluding that "the proper time for PG&E to raise a challenge is if, and when, the [C]PUC denies PG&E's request to recover any inverse condemnation costs." (2. Appen. 496.) Contrary to *Duquesne*, which was a scenario in which the regulatory taking occurred during the rate-making decision, (see *Duquesne*, *supra*, 488 U.S. at 303-05), here, the taking occurs when PG&E is found liable for inverse condemnation and has to perfect the judgment entered by the court. A holding that the doctrine of inverse condemnation could only be challenged by

PG&E after a CPUC decision undermines a key rationale of the doctrine.[13] Under the respondent court's approach, PG&E would have to lose an inverse condemnation action, perfect the judgment and then seek and be denied cost recovery by the CPUC before its takings claim would be ripe. But in that scenario, there is no reason to believe a court would reopen the inverse condemnation lawsuit, hold that inverse was now inapplicable and order disgorgement of the inverse damages after the judgment of inverse had already been satisfied.

Moreover, the possibility that PG&E may eventually be able to spread some of the costs does not negate the existence of a taking at the time of an inverse condemnation judgment. As the United States

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[13] In the WEMA Rehearing Denial, the CPUC held that its regulatory rate-making decision under its statutory obligations did not constitute an arbitrary and irrational result or an unconstitutional taking. (6 Appen. 1401-33.) This underscores the argument PG&E is making here; the unconstitutional taking occurs the moment a judgment for inverse condemnation damages is perfected absent a guarantee of subsequent rate recovery that would permit the socialization of losses that is the core premises behind the inverse condemnation doctrine.

Supreme Court articulated in *Eastern Enterprises*, the possibility of future recovery is insufficient to guarantee a taking will not occur. (*E. Enters.*, *supra*, 524 U.S. at 531-32 [finding a taking occurred even where "[the injured party] may be able to seek indemnification from [third parties]" because "the possibility of indemnification does not alter the fact that" the injured party's property had been taken].)[14] It is therefore not relevant for purposes of the takings analysis that PG&E *may* ultimately be able to spread some of the inverse condemnation losses, as the Constitution requires that just compensation be *guaranteed*.

[14] As discussed above, the trial court acknowledged the problems that could arise without guaranteed cost-spreading. (5 Appen. 1223-24 ["Let's say we go through trial, [plaintiffs] win on inverse condemnation, [plaintiffs] get a judgment, PG&E goes through some processes with the CPUC. The CPUC, for whatever reason, says, 'We're not gonna let you recoup.' Now, what does PG&E do? . . . Do they take the money back from [plaintiffs]? Probably not."].)

B. Continued Application Of Inverse Condemnation To Privately Owned Utilities Would Violate Their Substantive Due Process Rights

In the alternative, the application of inverse condemnation to PG&E would violate PG&E's substantive due process rights under the Fourteenth Amendment and the California Constitution. The Fourteenth Amendment protects against government deprivations of life, liberty or property that are arbitrary and irrational. (See *State Farm Mut. Auto. Ins. Co. v. Campbell* (2003) 538 U.S. 408, 416-17 ["The Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor"]; *Action Apartment Assn. v. Santa Monica Rent Control Bd.* (9th Cir. 2007) 509 F.3d 1020, 1025-26 (*Action Apartment*) ["an arbitrary and irrational deprivation of real property . . . might be 'so arbitrary or irrational that it runs afoul of the Due Process Clause'"] citing *Lingle*, 544 U.S. at 542.)

As a threshold matter, inverse condemnation liability plainly deprives PG&E of its property, as PG&E is required to pay money

damages. (See *Bd. of Regents v. Roth* (1972) 408 U.S. 564, 571-72 ["property interests protected by . . . due process extend well beyond actual ownership of real estate, chattels, or money"].) Contrary to the typical eminent domain or inverse condemnation case, PG&E is not actually entitled to retain the "condemned" property, and thus receives no benefit in exchange for compensating the landowner. The only question, therefore, is whether this deprivation is arbitrary and irrational. (*Action Apartment*, *supra*, 509 F.3d at pp. 1025-26.) It is, for at least two reasons.

First, taking PG&E's property without a showing of fault and without automatic rate recovery is not substantially related to the stated cost-spreading justification for inverse condemnation. (See, e.g., *Sinaloa Lake Owners Assn. v. City of Simi Valley* (9th Cir. 1989) 864 F.2d 1475, 1484-87 ["To establish a violation of substantive due process, the plaintiffs must prove that the government's action was 'clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare.'"].) To the

contrary, under the CPUC's newly announced policy, PG&E cannot spread its costs without satisfying the CPUC's "prudent manager" standard through an extra-judicial administrative proceeding. Indeed, as the CPUC stated in the WEMA Rehearing Denial, the utility can be denied cost recovery even if it can prove that taking whatever steps the CPUC determines were necessary to be a "prudent operator" would have had no impact whatsoever on whether a fire actually started. According to the CPUC, the "fundamental point" is that "[e]ven if the fire would have started anyway, a reasonableness review looks at whether [the utility] acted reasonably and prudently." (6 Appen. 1410.)

The CPUC has thus placed a tort-law like burden upon PG&E to justify recovery of costs incurred by virtue of a strict liability claim that is meant to apply regardless of fault and based on the assumption that cost-spreading will be automatic. But in doing so, the CPUC has removed even a requirement of proximate cause. On the one hand, the respondent court has found that PG&E can be held

strictly liable for inverse condemnation on the theory that it can recover the inverse condemnation damages through rate recovery. On the other hand, the CPUC has stated that it can deny cost recovery unless PG&E can prove that its conduct—including conduct that everyone agrees had absolutely nothing to do with starting a fire—was "prudent." This is an arbitrary and irrational result.

Relying on *Pacific Bell*, the trial court erroneously found that it is not arbitrary and irrational to apply inverse condemnation to privately owned utilities and subject them to a "prudent manager" review because the state has granted privately owned utilities "a monopoly or quasi-monopoly status." (5 Appen. 1242.) But it was the fundamental assumption of cost-spreading that supported the *Pacific Bell* ruling, not the so-called "quasi-monopolistic" status of a private utility. And the court's further determination that "it is not arbitrary or irrational to deny PG&E the opportunity to spread its losses where it fails to satisfy a prudent manager standard" is

similarly in error. (5 Appen. 1242.) Even where a public utility acted imprudently or even recklessly, that utility would be able to spread its inverse condemnation losses across society. Given that inverse condemnation was developed as a form of social insurance for public utilities subjected to no-fault liability, it is arbitrary and irrational to hold privately owned utilities to a different standard for rate recovery while still subjecting them to the same strict liability regime. It is significant that the regulator entrusted by the California Constitution with overseeing utilities, the CPUC, has expressed concerns with the application of inverse condemnation to private utilities for exactly this reason. (See, e.g., 2 Appen. 494-95.)

Second, inverse condemnation is irrational as applied to PG&E. Government entities are protected against private claims by sovereign immunity or the Tort Claims Act, Government Code sections 810 *et seq.* Inverse condemnation therefore allows private property owners an opportunity to recover damages from government entities when otherwise no remedy may be available.

PG&E, however, is a private corporation and is subject to general tort liability. Private individuals do not need inverse condemnation to recover for harm allegedly caused by PG&E. (See Code of Civ. Proc., § 3333.)

III. CONTINUED APPLICATION OF INVERSE CONDEMNATION LIABILITY TO PRIVATELY OWNED UTILITIES WOULD HAVE NEGATIVE ECONOMIC CONSEQUENCES FOR THE STATE

In addition to the legal arguments discussed above for re-examining *Barham* and *Pacific Bell*, the dangerous practical consequences of the current regime compel re-examination by this Court. If left unresolved, applying inverse condemnation liability to privately owned entities in the wake of the CPUC's decision threatens to impose unrecoverable inverse condemnation liabilities that will impede reasonable rates of returns, discourage investment and potentially place California's economy in crisis.

The Supreme Court has long recognized that the imposition of inverse condemnation liability must strike a delicate balance between compensating those whose property was unfairly damaged

and not discouraging beneficial public improvements. (See, e.g., *Bunch*, *supra*, 15 Cal.4th at 442; *Locklin*, *supra*, 7 Cal.4th at 368; *Belair*, *supra*, 47 Cal.3d at 565 & fn. 6; *Varjabedian*, *supra*, 20 Cal.3d at 296; *Holtz*, *supra*, 3 Cal.3d at 304 ["competing considerations . . . caution against an open-ended, 'absolute liability' rule of inverse condemnation [because] . . . compensation, [if] allowed too liberally, will seriously impede, if not stop, beneficial public improvements because of the greatly increased cost]," citing *Bacich*, *supra*, 23 Cal.2d at 350.) Indeed, the Supreme Court has cautioned that "a public agency that undertakes to construct or operate a [public improvement] clearly must not be made the absolute insurer of" it. (*Belair*, *supra*, 47 Cal.3d at 565.) Until the inconsistency between *Pacific Bell* and *Barham* and the CPUC decision is resolved, however, privately owned utilities will indeed be made such absolute insurers, contravening the Supreme Court's admonition that inverse condemnation law should not be construed so as discourage entities from undertaking publicly beneficial improvements.

Failure to restore the proper balance urged by the Supreme Court but disrupted by the CPUC's decision will have negative economic consequences for the state. Investor-owned utilities such as PG&E are a vital source of electrical power for California's residents and businesses, accounting for approximately three-quarters of the electricity supply in California. Should California courts continue to hold privately owned utilities liable for inverse condemnation, while the CPUC refuses to allow automatic recovery of the unreimbursed costs of that liability, privately owned utilities will face increasing difficulty in obtaining capital from investors, threatening financial harm to the utilities and potentially rendering them economically unsustainable. It is clear the present uncertainty facing investor-owned utilities has been a cause for concern among their investors and the financial markets.[15]

Although continued application of inverse condemnation liability to privately owned utilities will undoubtedly harm the

[15] 5 Appen. 1246.

utilities themselves, the ripple effect on California consumers, the economy and the environment may prove even more profound. Privately owned utilities are vital to California's economy, employing more than 40,000 Californians and providing electrical service to over three-quarters of California's residents through a service area that covers more than three-quarters of the state.[16]

As California Assemblyman Jim Patterson, Vice Chair of the Utilities and Energy Committee, recently warned legislators at a State Assembly hearing, continued application of a strict liability standard to privately owned utilities through inverse condemnation will lead to "an immediate crisis that is literally going to affect 70 percent of the population of the state of California that receives its electricity from utilities."[17]

This Court should grant review in this case to determine whether California consumers and the state's economy should thus

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[16] PG&E employed approximately 22,980 full-time employees in 2017. (2 Appen. 506.)

[17] 4 Appen. 1070.

be jeopardized by the continued application of inverse condemnation to privately owned utilities in the wake of the CPUC's decision.

CONCLUSION

For the reasons stated above, petitioner respectfully requests that the Court grant the relief sought in the petition, vacate the ruling overruling PG&E's demurrer on the inverse condemnation causes of action issued below, require respondent Superior Court to issue an order sustaining PG&E's motion and provide such other and further relief as is just, proper and equitable.

Dated: July 20, 2018

Respectfully Submitted,

By: _____

Evan R. Chesler
Timothy G. Cameron
Kevin J. Orsini
Damaris Hernandez
Counsel for Petitioners Pacific Gas and Electric Company and PG&E Corporation

CERTIFICATE OF WORD COUNT

Pursuant to California Rules of Court, rule 8.204(c), I hereby certify that the attached Petition for Writ of Mandate, Prohibition, or Other Appropriate Relief has a typeface of 13 points or more and contains 13,210 words, as determined by the word processing software used to generate the document.

DATED: July 20, 2018

Kevin J. Orsini