SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

Coordination Proceeding Special Title (Rule 3.550)

SOUTHERN CALIFORNIA FIRE CASES

CASE NO.: JCCP4965

Final

~~[TENTATIVE]~~ RULING RE: DEFENDANTS SOUTHERN CALIFORNIA EDISON COMPANY'S AND EDISON INTERNATIONAL'S DEMURRER

Date: October 4, 2018
Time: 1:45 P.M.
Dept.: Stanley Mosk, Room 2221

This coordinated proceeding arises from damages allegedly sustained during the Thomas and Rye Fires in late 2017. On July 12, 2018, three Master Complaints were filed by, respectively, the Individual Plaintiffs, the Public Entity Plaintiffs, and the Subrogation Plaintiffs, against Defendants Southern California Edison Company and Edison International. Although the causes of action in the complaints are not identical, each contains a first cause of action for inverse condemnation.

Defendants now demur to the inverse condemnation cause of action. Plaintiffs filed three oppositions on August 31, 2018, and Defendants filed a reply on September 21, 2018.

I. Request for Judicial Notice

The Public Entity Plaintiffs, Individual Plaintiffs, and Subrogation Plaintiffs each filed separate requests for judicial notice. Defendants also filed two requests for judicial notice, one in support of the demurrer and one in support of the reply. The Court addresses each in turn.

The Public Entity Plaintiffs request judicial notice of: (1) Decision 17-11-033 (November 30, 2017) of the California Public Utilities Commission (the "Commission"); (2) The Commission's order denying rehearing of Decision 17-11-033; (3) Petition for writ of review of Decision 17-11-033; (4) May 21, 2018, trial court order in Case No. JCCP4955; (5) June 22, 2017, trial court order in Case No. JCCP4853; (6) May 11, 2018, trial court order in Case No. JCCP4853; (7) Denial of writ by the Court of Appeal for Case No. JCCP4853; and (8) Denial of writ by the California Supreme Court for Case No. JCCP4853.

The Court granted this request for judicial notice on September 12, 2018.

The Individual Plaintiffs request judicial notice of: (1) Case Summary indicating denial of writ in Case No. D054841; (2) Case Summary indicating the case has been closed in Case No. D054841; (3) May 21, 2018, trial court order in Case No. JCCP4955; (4) June 22, 2017, trial court order in Case No. JCCP4853; (5) May 11, 2018, trial court order in Case No. JCCP4853; (6) Court of Appeal denial of writ for Case No. JCCP4853; (7) Supreme Court denial of writ for Case No. JCCP4853; (8) Defendants' April 3, 2018, application to the Commission to establish Wildfire Expense Memorandum Account; (9) The Commission's Resolution E-4311, July 29, 2010; (10) Decision 12-12-029 (December 28, 2012) of the Commission; (11) Ruling of Administrative Law Judge S. Pat Tsen; (12) The Commission's order denying rehearing of Decision 17-11-033; (13) Defendants' Advice Letter, dated March 18, 2017, and publicly available on Defendants' website.

As stated above, the Court has already taken judicial notice of Request Nos. 3-7, and 11. The Individual Plaintiffs' unopposed request is also GRANTED as to all other documents.

The Subrogation Plaintiffs request judicial notice of their own complaint. This request is DENIED as superfluous. Any party that wishes to draw the Court's attention to a matter filed in this action may simply cite directly to the document by execution and filing date. (See California Rules of Court, Rule 3.1110(d).)

In support of its demurrer, Defendants request judicial notice of: (1) California Department of Forestry and Fire Protection ("Cal Fire") 2017 Report; (2) Cal Fire Table Summarizing California Wildfires; (3) Decision 17-11-033 (November 30, 2017) of the Commission; (4) Transcript of the Commission's meeting relating to Decision 17-11-033; (5) Joint Concurrence of Commission President and Commissioner relating to Decision 17-11-033; and (6) The Commission's order denying rehearing of Decision 17-11-033.

The Subrogation Plaintiffs oppose each of these requests.

Request Nos. 3, 4, 5, and 6, are either transcripts or decisions of a California agency, two of which have already been judicially noticed by this Court pursuant to the request of the Public Entity Plaintiffs. These documents are clearly judicially noticeable. (See, e.g., *Davis v. Southern California Edison Co.* (2015) 236 Cal.App.4th 619, 632 fn. 11 ("*Davis*").) The Subrogation Plaintiffs acknowledge that judicial notice of these documents is proper, but cite *People v. Castillo* (2010) 49 Cal.4th 145, 157 ("*Castillo*") for the proposition that the Court may take judicial notice of no more than the "procedural posture" of the case at issue in the Commission's decisions.[1] In other words, the Subrogation Plaintiffs argue the Court may only take judicial notice of the fact that the San Diego Gas & Electric Company ("SDG&E") filed a case with the Commission relating to certain 2007 wildfires, and nothing more. This is an over-reading of *Castillo* and *Davis*. Judicial notice extends beyond merely the fact that SDG&E filed a case with the Commission. Rather, the Court also takes judicial notice of the fact "that the [Commission] did in fact make . . . particular finding[s]," though it does not take judicial notice of the correctness or truthfulness of those findings. (See *Sosinsky v. Grant* (1992) 6 Cal.App.4th 1548, 1564-65.) Consistent with the foregoing, Defendants' request for judicial notice is GRANTED as to Request Nos. 3-6.

Request Nos. 1 and 2 are documents pulled from the Cal Fire website. The Court agrees with the Subrogation Plaintiffs that these are not appropriate documents for judicial notice, because

[1] The Court notes that notwithstanding the Subrogation Plaintiffs' citation thereto, the phrase "procedural posture" does not appear in *People v. Castillo*. Rather, the language appears in *Davis*.

Defendants have simply pulled information from a third party's website, without authentication or evidence of personal knowledge. This is insufficient to support judicial notice.[2] (See, e.g., *Jolley v. Chase Home Finance, LLC* (2013) 213 Cal.App.4th 872, 889.) Defendants' request for judicial notice is therefore DENIED as to Request Nos. 1-2.[3]

Finally, on September 21, 2018, Defendants filed an additional request for judicial notice in support of their reply, seeking judicial notice of the Commission's response to the still-pending petition for writ of review of Decision 17-11-033. This request is DENIED as untimely. (See, e.g., *Carbajal v. CWPSC, Inc.* (2016) 245 Cal.App.4th 227, 241 ["The general rule of motion practice, which applies here, is that new evidence is not permitted with reply papers . . . . [quoting *Jay v. Mahaffey* (2013) 218 Cal.App.4th 1522, 1537-38].)

II. Evidentiary Objections

The Subrogation Plaintiffs filed six evidentiary objections to the documents filed by Defendants in support of their demurrer. These objections are largely identical to the arguments made by the Subrogation Plaintiffs in their opposition to Defendants' request for judicial notice, which was discussed above. Accordingly, Objection Nos. 1 and 2 are SUSTAINED and Objection Nos. 3-6 are OVERRULED. As to the argument that the documents are inadmissible under Public Utilities Code § 315 (the sole argument made in the objections but not the opposition), the Court disagrees; the documents relate to an entirely separate action, pursued by an entirely different entity (SDG&E), relating to an entirely different harm (the 2007 wildfires). These documents are therefore not being submitted as evidence of causation or damages in this action.

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[2] This is in contrast to the Individual Plaintiff's Request No. 11, which was pulled from Defendants' own website, and is therefore appropriate for judicial notice. (See *Ampex Corp. v. Cargle* (2005) 128 Cal.App.4th 1569, 1573 fn. 2.)

[3] The Court notes that this decision has no practical effect on the Court's analysis: The sole purpose of these documents was to establish that both the 2017 fire season generally, and the Thomas Fire in particular, were devastating. (See Demurrer 4:4-13.) This fact was explicitly alleged in the Subrogation Plaintiffs' own complaint (see Compl. ¶¶ 1-12, 26-50), and thus remains before the Court.

III. Demurrer

A. Legal Standard

"The function of a demurrer is to test the sufficiency of a plaintiff's pleading by raising questions of law." (*Wilhelm v. Pray, Price, Williams & Russell* (1986) 186 Cal.App.3d 1324, 1330.) When assessing the allegations in a complaint, a demurrer admits the truth of all material facts pleaded. (*Serrano v. Priest* (1972) 5 Cal. 3d 584, 617.) While facts in the complaint are treated as true, deductions and conclusions of law are not. (*Gutkin v. University of Southern California* (2002) 101 Cal. App. 4th 967, 975.) Additionally, "[i]n the construction of a pleading, for the purpose of determining its effect, its allegations must be liberally construed, with a view to substantial justice between the parties." (Code Civ. Proc., § 452.)

B. Inverse Condemnation

> An action for inverse condemnation "is an eminent domain proceeding initiated by the property owner rather than the condemner. The principles which affect the parties' rights in an inverse condemnation suit are the same as those in an eminent domain action. [Citations.]" [Citation.] The doctrine has been summarized as follows: "Article I, section 19 (formerly art. I, § 14) of the California Constitution requires that just compensation be paid when private property is taken or damaged for public use. Therefore, a public entity may be liable in an inverse condemnation action for any physical injury to real property proximately caused by a public improvement as deliberately designed and constructed, whether or not that injury was foreseeable, and in the absence of fault by the public entity. [Citations.]" [Citation.]

(*Marshall v. Department of Water & Power* (1990) 219 Cal.App.3d 1124, 1138.)

Accordingly, to state a claim for inverse condemnation, Plaintiffs must show that "[1] a public entity [2] has taken or damaged their property [3] for a public use." (*Barham v. Southern Cal. Edison Co.* (1999) 74 Cal.App.4th 744, 751.)

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1. Public Entity

Defendants argue Plaintiffs' claim must fail because Defendants are not a public entity for purposes of the doctrine of inverse condemnation. All parties primarily focus on the applicability of two Court of Appeal decisions. In both cases, the Court of Appeal concluded that privately owned utilities are public entities for purposes of inverse condemnation. Defendants argue these cases are not applicable, however, because both were based on the incorrect premise that Defendants could raise their rates to cover any inverse condemnation liability imposed upon them.

In *Barham v. Southern Cal. Edison Co.* ("*Barham*"), numerous plaintiffs sued defendant Southern California Edison Company for damages they suffered due to wildfires. The Court of Appeal held that the defendant was a public entity for inverse condemnation purposes. The *Barham* court was primarily concerned with the inconsistency that would arise if inverse condemnation decisions were based on whether the utility was operated directly by the government or through a privately company. (See *Barham v. Southern Cal. Edison Co., supra,* 74 Cal.App.4th at 753 ["We are not convinced that any significant differences exist regarding the operation of publicly versus privately owned electric utilities as applied to the facts in this case and find there is no rational basis upon which to found such a distinction."].)

In *Pacific Bell Telephone Co. v. Southern California Edison Co.* ("*Pacific Bell*"), an electric shock in defendant Southern California Edison Co.'s underground power lines damaged adjacent lines owned by plaintiff Pacific Bell Telephone Co., and plaintiff sued for inverse condemnation. The *Pacific Bell* court reviewed *Barham* in depth, and reaffirmed its conclusions, finding that despite being a private utility, defendant could still be liable for inverse condemnation. The defendant argued inverse condemnation should not apply because, unlike public utilities, defendant could not unilaterally raise rates to pay any liabilities incurred. The *Pacific Bell* court specifically rejected this argument. (*Pacific Bell Telephone Co. v. Southern California Edison Co. supra,* 208 Cal.App.4th at 1408.)

Defendants argue *Barham* and *Pacific Bell* have become inapplicable by recent actions by the Commission. Specifically, Defendants argue that, unlike in *Pacific Bell*, they now have "evidence to support [the] implication that the commission would not allow" rate increases to pay for their liability. Following wildfires in 2007, another privately owned utility, SDG&E, was sued for inverse condemnation. The total cost in legal fees and settlement payments amounted to approximately $2.4 billion, of which about $379 million was not covered by SDG&E's insurance. SDG&E applied to the Commission for permission to raise its rates in order to cover these costs, but on November 30, 2018, the Commission denied its request. (See Kaba Decl. ¶ 4, Exh. C, p. 2-3.) The standard used by the Commission in determining whether a rate increase is permissible is the "prudent manager" standard. (Id. at p. 10.) SDG&E (as well as Pacific Gas and Electric and Defendants, who filed supporting briefs) argued to the Commission that, because the courts intended to subject SDG&E to strict liability under the inverse condemnation doctrine, SDG&E should be entitled to raise its rates to address this risk. The Commission disagreed, explicitly finding that "Inverse Condemnation principles are not relevant to a Commission reasonableness review under the prudent manager standard." (Id. at 64-65.)

Following a request for rehearing, the Commission again denied the request, noting, in relevant part, that "[i]t is not in our purview to render determinations regarding whether inverse condemnation or other legal tort doctrines should be applied in assessing damages claims. Those issues are for the Courts, not this Commission." (See Kaba Decl. ¶ 7, Exh. F, p. 27.)

Based on the foregoing, Defendants argue it has now presented judicially noticeable evidence that it would not be able to raise its rates if it were held liable under an inverse condemnation theory; *Barham* and *Pacific Bell*, both of which noted that inverse condemnation was based on the concept that losses should be spread throughout the community, rather than borne solely by the individual harmed, are therefore distinguishable.

Defendants' argument fails both in the characterization of their evidence and in their reading of the cases, particularly *Pacific Bell*. More critical to a ruling on a demurrer, Defendants introduce a factual dispute for the Court to weigh. That alone dictates a decision to overrule the demurrer.

The Court disagrees that the Commission's decision relating to SDG&E and the 2007 wildfires is necessarily indicative of some future Commission decision on Defendants and the 2017 wildfires. Nothing in the Commission's decision suggests that an entity found liable in an inverse condemnation proceeding would be *barred* from obtaining a rate increase. Further, the relevance of any one earlier decision is unclear, because each Commission decision turns upon a "fact specific" analysis as to whether a utility has acted reasonably and prudently. (Id. at 10.) In short, any future decision by the Commission relating to rate increases by Defendants would necessarily be based on a separate, fact-specific analysis of that situation. It would turn on whether Defendants were able to satisfy the Commission's reasonable and prudent manager standard, whether they have been found liable for inverse condemnation. In *Pacific Bell*, the Court of Appeal faulted the defendant for failing to provide evidence "that the commission would not allow Edison adjustments to pass on damages liability." (*Pacific Bell Telephone Co. v. Southern California Edison Co., supra,* 208 Cal.App.4th at 1408.) Here, Defendants' judicially noticeable evidence is likewise insufficient. Defendants' evidence does not demonstrate that the Commission would deny a rate increase in the future based on the specific facts of this case.

In any event, even assuming Defendants' evidence sufficiently demonstrated that they would not be able to raise rates (a factual dispute not appropriate for a demurrer), *Pacific Bell* makes clear that this issue, alone, would not have changed its analysis. Immediately after noting that the defendant had failed to submit evidence that the Commission would not allow a rate increase, the *Pacific Bell* court included a footnote indicating that the issue was, in any event, not dispositive: "We also note that the Supreme Court has stated that, although the Legislature has

chosen not to do so, nothing in the Constitution prevents the Legislature from placing municipally owned utilities under the regulations of the Public Utilities Commission, including regulation of rates. [Citation.] We do not believe such regulation would immunize municipal utilities from inverse condemnation liability under the theory that they were no longer able to spread the cost of public improvements." (*Id.* at fn. 6.)

In other words, *Pacific Bell* made it explicitly clear that the distinction upon which Defendants so heavily rely, between private utilities (which are required to obtain approval for rate increases and thus arguably cannot 'spread the cost' of inverse condemnation liability) and public utilities (which are not subject to that limitation), was not the definitive basis for their decision, because it would reach the same conclusion against a public utility that was also required to obtain permission before raising rates. Rather, *Pacific Bell* was predicated on the principle that, where the government has created a "monopolistic or quasi-monopolistic" entity, "individual property owners should not have to contribute disproportionately to the risks from public improvements made" by that entity. (*Id.* at 1406-07.) This policy concern would remain applicable to Defendants here, even if the Court were to assume that Defendants would be barred from raising their rates following the imposition of inverse condemnation liability.

Accordingly, the Court concludes Plaintiffs' have sufficiently alleged that, under *Barham* and *Pacific Bell*, Defendants are public entities for purposes of their inverse condemnation cause of action.

2. Taking

The second element of inverse condemnation is that Defendants "ha[ve] taken or damaged" Plaintiffs' property. (*Barham v. Southern Cal. Edison Co., supra,* 74 Cal.App.4th at 751.) Plaintiffs allege Defendants' power lines and/or electrical distribution systems caused the fires, due to Defendants' poor maintenance of the system. (See, e.g., Individuals Compl. ¶¶ 143, 147-157, 193;

Subrogation Compl. ¶¶ 143, 147-157, 193; Public Compl. ¶¶ 141, 145-155.) Defendants argue this is insufficient, because the taking must be a deliberate or necessary consequence, as opposed to merely an incidental consequence, of Defendants' conduct.

Defendants' argument is identical to the one raised and rejected in *Barham*. As noted, *Barham* was also based on damages arising from a "fire [that] was alleged to have resulted from a failure in SCE's overhead power line equipment." (*Id.* at 747.) The Court of Appeal held that these allegations were sufficient to conclude that "the damage arose out of the functioning of the public improvement as deliberately conceived, altered and maintained." (*Id.* at 755.)

Defendants claim that *Barham* is distinguishable, but Defendants do not actually attempt to distinguish *Barham*; rather, they merely argue it was wrongly decided. (See Demurrer at 19:9-15 [arguing the *Barham* court "misapplied [the] rule," and "misunderstood the deliberate action requirement."].) Even assuming Defendants' critiques of *Barham* have merit, this Court is bound by the *Barham* decision, and cannot refuse to follow it. (See, e.g., *Sarti v. Salt Creek Ltd.* (2008) 167 Cal.App.4th 1187, 1193.)

Other cases cited by Defendants, which Defendants urge this Court to follow instead of *Barham*, are likewise unpersuasive. In fact, the case Defendants rely upon the most, *Customer Co. v. City of Sacramento* (1995) 10 Cal.4th 368 ("*Customer Co.*"), was explicitly found to be inapplicable in *Barham*. (*Barham v. Southern Cal. Edison Co., supra,* 74 Cal.App.4th at 755 ["*Customer Co. v. City of Sacramento*, *supra*, 10 Cal.4th 368, cited by SCE, is distinguishable . . . . A clear distinction has been recognized between inverse condemnation which arises out of damage to property caused by the construction or maintenance of public works and that which arises out of an exercise of police powers."].) The Court therefore does not view *Customer Co.* as applicable to this action.

Contrasting two other cases cited by Defendants, *McMahan's of Santa Monica v. City of Santa Monica* (1983) 146 Cal.App.3d 683 ("*McMahan*") and *Tilton v. Reclamation Dist. No. 800*

(2006) 142 Cal.App.4th 848 ("*Tilton*"), further supports Plaintiffs position in this case. In *McMahan*, Santa Monica built pipes with a life expectancy of 40 years. Some ten years after the 40-year mark had passed, Santa Monica was in the process of implementing a water main replacement program that would take another thirty years to complete. During this time, a 51-year-old pipe burst, and the Court of Appeal held that Santa Monica could be liable for inverse condemnation. (*McMahan's of Santa Monica v. City of Santa Monica, supra,* 146 Cal.App.3d at 697-98 ["[T]he City was taking a calculated risk by adopting a plan of pipe replacement and maintenance that it knew was inadequate. The City's plan of replacement of the water mains reflected the deferred risks of the project both foreseeable and unforeseeable, and it is proper to require the City to bear the loss when the damage occurs."].)[4] In *Tilton*, by contrast, the plaintiffs sought inverse condemnation damages from a reclamation district due to its alleged failure to properly maintain levees, and the Court of Appeal held that "[t]hese allegations do not meet the test we derive from the precedents just discussed, i.e., that garden variety inadequate maintenance, as distinguished from a faulty plan involving the design, construction and maintenance of a levee, is not an adequate basis for an inverse condemnation claim." (*Tilton v. Reclamation Dist. No. 800, supra,* 142 Cal.App.4th at 859.)

Here, Plaintiffs' allegations are more analogous to *McMahan* than to *Tilton*: They allege not only negligent maintenance, but also that Defendants have been engaged in a long-term (and largely ineffective) project of identifying electrical poles that are too old and replacing them. (See Public Entity Compl. ¶¶ 138, 141, 146, 151; Subrogation Compl. ¶¶ 140, 143, 148, 153; Individual Compl. ¶¶ 140, 143, 148, 153 [alleging that Defendants have been aware of problems with the age

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[4] *McMahan* was subsequently disapproved only insofar as its holding was applied to certain flood control cases. (See *Bunch v. Coachella Valley Water Dist.* (1997) 15 Cal.4th 432.) In *Pacific Bell*, however, the Court of Appeal held that the special issues relating to flood control cases were not applicable to other inverse condemnation cases, including damages caused by faulty electrical wires. (See *Pacific Bell Telephone Co. v. Southern California Edison Co., supra,* 208 Cal.App.4th at 1411 ["We . . . conclude that the 'concerns that animated the rejection of the strict liability rule in the context of public flood control projects has no counterpart here'"].) *McMahan* therefore remains applicable law for other inverse condemnation actions.

of their poles since at least 2012, and that it thereafter adopted a program to remedy the problem, which it expects to be completed in 2025].) In this respect, the allegations are almost identical to those of *McMahan*, where Santa Monica adopted a plan to repair pipes that would last for years beyond the known expiry date of the current pipes, and clearly distinguishable from *Tilton*, where no such plan was alleged.[5]

Most of the other cases involve conduct on public property that negligently damaged neighboring property, as opposed to some aspect of the public property itself causing the damages. (See, e.g., *Neff v. Imperial Irrigation Dist.* (1956) 142 Cal.App.2d 755 [no inverse condemnation where County sprayed chemicals on public land that drifted onto and damaged neighboring land]; *McNeil v. City of Montague* (1954) 124 Cal.App.2d 326 [no inverse condemnation where government employees burned weeds on city hall property, which spread to neighboring properties]; *Miller v. City of Palo Alto* (1929) 208 Cal. 74 [no inverse condemnation where government employees took garbage from incinerator and carelessly discarded it onto neighboring property]; *Western Assurance Co. of Toronto v. Sacramento & San Joaquin Drainage Dist.* (1925) 72 Cal.App. 68 [no inverse condemnation where state employees set fire to clear weeds around ditch, and fire spread to adjacent field].) These are clearly distinguishable from the situation here, where the poles and electrical wires—the actual property that had been taken and was faultily maintained—are alleged to have been a cause of the fires.[6]

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[5] The Court briefly notes that *Tilton* is also a flood control case, and therefore arguably inapplicable here under *Pacific Bell*. The same is true of other cases cited by Defendants, including *Beckley v. Reclamation Bd. of State* (1962) 205 Cal.App.2d 734 and *Clement v. State Reclamation Bd.* (1950) 35 Cal.2d 628. The Court further notes that numerous other cases relied upon in *Tilton* and by Defendants are distinguishable for the same reason that *Tilton* is distinguishable. (See, e.g., *Sheffet v. City. of Los Angeles* (1970) 3 Cal.App.3d 720; *Kambish v. Santa Clara Valley Water Consercation District of San Jose* (1960) 185 Cal.App.2d 107; *Hayashi v. Alameda City. Flood Ctrl. and Water Dist.* (1959) 167 Cal.App.2d 584; *Bauer v. Ventura City* (1955) 45 Cal.2d 276.)

[6] In any event, these cases all predate *Barham* by a minimum of 40 years, and Defendants provide no compelling reason for the Court to follow those earlier cases rather than a much more recent case that is also much more clearly on point.

Every other case cited by Defendants comes from a foreign jurisdiction and is not binding on this Court.[7] In sum, none of Defendants' authorities persuade this Court to reach a different result than the result in *Barham*, given the nearly identical allegations and law at issue in that case and this case. Accordingly, the Court concludes Plaintiffs have sufficiently alleged that there was a deliberate taking of Plaintiffs' property, within the meaning of the inverse condemnation doctrine.

3. Public Use

The third element for inverse condemnation is that the property be taken "for a public use." (*Barham v. Southern Cal. Edison Co., supra,* 74 Cal.App.4th at 751.)

Defendants agree that they "provide[] electricity for public use," but argue that this provision of electricity alone "does not convert wildfire damage into 'damage *for public use*'" (Demurrer 3:14-15.) Again, *Barham* addresses this issue directly: "[T]he issue is whether the Barhams' property was taken for a public use, i.e., the transmission of electric power to the public . . . . [W]e must conclude that the transmission of electric power through the facilities that caused damage to the Barhams' property was for the benefit of the public." (*Barham v. Southern Cal. Edison Co., supra,* 74 Cal.App.4th at 754.) In other words, the damage itself need not have been part of the public use.

As with the previous element, Defendants purport to argue that *Barham* is distinguishable, when in fact Defendants simply want this Court to conclude *Barham* was wrongly decided, which this Court cannot do. (See Demurrer 23:4 [discussing *Barham*'s "errant finding"].) And as with the previous element, none of the other cases cited by Defendants warrant departing from *Barham*'s holding. As discussed, *McNeil*, *Miller*, *Neff*, and *Western Assurance* did not actually involve takings, and thus clearly could not be takings for public use. Even less applicable is

[7] See *City of Austin v. Liberty Mut. Ins.* (Tex. App. 2014) 431 S.W.3d 817; *Cary v. United States* (Fed. Cir. 2013) 552 F.3d 1373; *Thune v. United States* (1998) 41 Fed. Cl. 49.

Customer Co., upon which Defendants again rely heavily. There, police officers damaged private property during the arrest of a suspect. The Supreme Court held that such conduct did not constitute inverse condemnation because the inverse condemnation laws simply did not apply to the law enforcement situation. (*Customer Co. v. City of Sacramento, supra,* 10 Cal.4th at 385 ["This court never has sanctioned an action for inverse condemnation seeking recovery for incidental damage to private property caused by law enforcement officers in the course of efforts to enforce the criminal law. Permitting Customer to bring an action for inverse condemnation under the circumstances of the present case would constitute a significant, unprecedented, and unwarranted expansion of the scope of the just compensation requirement and might well deter law enforcement officers from acting swiftly and effectively to protect public safety in emergency situations."].) Nothing comparable is alleged here. The remaining cases were all deemed inapplicable by *Pacific Bell*. (See *Pacific Bell Telephone Co. v. Southern California Edison Co., supra,* 208 Cal.App.4th at 1411 ["We . . . conclude that the 'concerns that animated the rejection of the strict liability rule in the context of public flood control projects has no counterpart here' where the risk to Pacific Bell's facility of injury from ground faults was not a risk it was exposed to in the absence of Edison's electrical facility."] [quoting *Pacific Bell v. City of San Diego* (2000) 81 Cal.App.4th 596, 614].)

Accordingly, because *Barham* clearly governs this situation—explicitly holding that the provision of electricity constitutes a public use—and because Defendants have provided no persuasive authority supporting their request that the Court depart from *Barham*, their argument with respect to public use likewise fails.

For the foregoing reasons, the Court concludes Plaintiffs have sufficiently alleged a cause of action for inverse condemnation.

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C. Constitutional Violations

Defendants argue that if the Court concludes Plaintiffs have sufficiently pled a cause of action for inverse condemnation, such a cause of action would nevertheless violate Defendants' rights under the Takings Clause and Due Process Clause.

Defendants' first claim, for a violation of the Takings Clause, is unsupported by any analogous authority. Defendants suggest there is an unlawful taking if a court orders the "transferring [of] funds from one private party (SCE) to another (Plaintiffs), without proof of fault." In other words, "[i]f SCE is held strictly liable for inverse condemnation damages, SCE's money ('private property') will be taken without 'just compensation.'" (Demurrer 24:10-12.) Following this statement to its logical conclusion, however, would suggest that *any* strict liability cause of action would constitute a taking. Defendants cite no authority whatsoever for such a broad proposition. The sole authority cited by Defendants, *Eastern Enterprises v. Apfel* (1998) 524 U.S. 498, is completely inapplicable. It involved a coal miners' retirement fund that numerous companies entered into voluntarily in the 1950s and 1970s. In the 1990s, in light of the insolvency of the funds, Congress passed a coal miners' retirement act that, among other things, permitted a government entity to bill a coal company for the cost of covering a given coal miner's retirement, based on the fact that the coal miner had worked for the company forty years earlier. In this context, a plurality of the Supreme Court justices concluded the law constituted an unjustified taking from the coal companies. *Eastern Enterprises* was concerned with issues of retroactivity and reimbursement rights and indemnification rights; it was in no way concerned with anything resembling the strict liability or inverse condemnation principles at issue here.

Accordingly, the Court concludes Defendants have made no showing that their rights under the Takings Clause would be violated if they were ultimately found liable for inverse condemnation under Plaintiffs' allegations.

As to the Due Process Clause, Defendants argue that "[t]he Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor" (*State Farm Mutual Auto. Ins. Co.* (2003) 538 U.S. 408, 416-17), and that if Plaintiffs prevail on a strict liability inverse condemnation claim, the Court will be shifting the costs of the harm from one blameless group (Plaintiffs) to another blameless group (Defendants), without first requiring any proof of fault. Defendants argue this would be arbitrary, and would therefore violate the Due Process Clause. Such an allocation, however, is not arbitrary. Assuming Plaintiffs prevail in their inverse condemnation action, the Court would be shifting the costs of the harm from innocent Plaintiffs to Defendants that have been granted "monopolistic or quasi-monopolistic authority, deriv[ed] directly from [their] exclusive franchise provided by the state" to operate a utility. (See *Pacific Bell Telephone Co. v. Southern California Edison Co., supra,* 208 Cal.App.4th at 1406.) In other words, Defendants *chose* to take on a quasi-governmental role in the community. The Court therefore disagrees that it would be arbitrary to hold Defendants strictly liable for harms arising from its fulfillment of this role. Again, as noted above, accepting Defendants' argument here would appear to apply with equal force to essentially the entire concept of strict liability. Defendants provide no authority for such an expansive argument.

Accordingly, the Court concludes Defendants have made no showing that their Due Process rights would be violated assuming they were ultimately found liable for inverse condemnation under Plaintiffs' allegations.

IV. Conclusion

Defendants' demurrer is OVERRULED.