S252748

No. S_____
(Court of Appeal No. D074417)

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

SAN DIEGO GAS & ELECTRIC COMPANY,
Petitioner,

v.

PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA,
Respondent,

PROTECT OUR COMMUNITIES FOUNDATION et al.,
Real Parties in Interest.

After Order Summarily Denying Petition for Review
by the Court of Appeal, Third Appellate District, Division One
Case No. D074417

Public Utility Commission Dec. No. 17-11-033

PETITION FOR REVIEW

JEFFREY N. BOOZELL (S.B. No. 199507)
QUINN EMANUEL URQUHART & SULLIVAN LLP
865 South Figueroa Street, 10th Floor
Los Angeles, California 90017
Telephone: (213) 443-3000
Facsimile: (213) 443-3100
jeffboozell@quinnemanuel.com

*KATHLEEN M. SULLIVAN (S.B. No. 242261)
DANIEL H. BROMBERG (S.B. No. 242659)
QUINN EMANUEL URQUHART & SULLIVAN LLP
555 Twin Dolphin Drive, 5th Floor
Redwood Shores, CA 94065
Telephone: (650) 801-5000
Facsimile: (650) 801-5100
kathleensullivan@quinnemanuel.com
danbromberg@quinnemanuel.com

Attorneys for Petitioner San Diego Gas & Electric Company

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PETITION FOR REVIEW

San Diego Gas & Electric Company ("SDG&E") respectfully petitions this Court to review the decision of the Fourth District Court of Appeal, Division One, in *San Diego Gas & Electric Company v. Public Utilities Commission* (Nov. 13, 2018, D074417), attached as Exhibit A ("Order"). Because the decision was made in a summary order and became final immediately, SDG&E filed no petition for rehearing in the Court of Appeal. Pursuant to Rule 8.500, subd. (b)(1), this Court's review is necessary to secure uniformity of decision and to settle an important question of law.

ISSUES PRESENTED

1. If inverse condemnation applies to privately owned utilities, should such utilities, which have no taxation power and can increase rates only with the express permission of the California Public Utilities Commission ("CPUC"), be entitled to recover the costs of inverse condemnation as "just and reasonable" under section 451 of the Public Utilities Code?

2. Must a justice who sued a privately owned utility for damages recuse herself from a petition for review related to the subject matter of her suit?

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. This Court has 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 (*Holtz*), internal citations and quotation marks omitted.) When inverse condemnation is applied to a government agency or public utility, that entity can unilaterally recoup the costs from the benefited public though taxation or rate increases.

When inverse condemnation is applied to a privately owned utility, by contrast, the benefited public shares in the cost only if the CPUC approves recovery of those costs through ratemaking. For this reason, Court of Appeal decisions have extended inverse condemnation liability to privately owned utilities over the past two decades only on the express assumption that the CPUC will spread the costs of that liability among ratepayers. (*Barham v. S. Cal. Edison*

Co. (1999) 74 Cal.App.4th 744, 752–753 ("*Barham*"); *Pac. Bell Tel. Co. v. S. Cal. Edison Co.* (2012) 208 Cal.App.4th 1400, 1407 ("*Pacific Bell*".) Indeed, Pacific Bell expressly noted that it could find no "evidence … that the commission would not allow [a privately owned utility] adjustments to pass on [inverse condemnation] damages liability during its periodic reviews." (*Ibid.*)

In the orders below, the CPUC and the Fourth District Court of Appeal have now provided exactly that evidence, creating a square conflict with *Barham* and *Pacific Bell*. Calling the cost-spreading assumption in those decisions "unsound" and insisting that inverse condemnation liability is "not relevant" to its jurisdiction over rate recovery, the CPUC applied its "prudent manager" standard to deny SDG&E's application to recover $379 million in inverse condemnation costs based on wildfires within SDG&E's service territory. The Fourth District summarily denied SDG&E's petition for review, stating (per Benke, J.) that "[t]he Commission's determination that the principals [*sic*] of inverse condemnation did not bar its prudent manager analysis under section 451 was not in excess of its powers, nor a violation of the law." (Order, p. 2.)

Privately owned utilities like SDG&E are now caught in a legal whipsaw between two conflicting lines of decision. On the one hand, they are subject to strict liability for inverse condemnation as a result of the Court of Appeal decisions in *Barham* and *Pacific Bell*, which assumed that the costs of that liability would be recovered in ratemaking proceedings before the CPUC. On the other hand, the Court of Appeal has now approved the CPUC's decision that it need not take a privately owned utility's strict liability for inverse condemnation into account in rate recovery, and may instead deny such recovery under its "prudent manager" standard—a standard not applied to bar recoupment of inverse condemnation costs by government entities or public utilities. The Fourth District's summary affirmance of the CPUC's decision made no attempt to reconcile its ruling with *Barham* and *Pacific Bell*. This Court's review is necessary to resolve this conflict and secure uniformity of decision.

This Court's review is also warranted because whether privately owned utilities may recover inverse condemnation costs through ratemaking is a pressing and important question of law. Privately owned utilities serve over 75 percent of the State's residents across 75 percent of the State's territory, and play

a vital role in the State and its economy. And inverse condemnation claims against privately owned utilities are escalating exponentially as wildfires in California become more endemic and severe. Thousands of plaintiffs have filed dozens of actions asserting inverse condemnation claims against privately owned utilities in *Butte Fire Cases* (Super. Ct. Sacramento County, No. JCCP 4853), *Southern California Fire Cases* (Super. Ct. Ventura County, No. JCCP 4965) and *California North Bay Fire Cases* (Super. Ct. S.F. City and County, No. JCCP 4995), and thousands more inverse condemnation claims may well be filed in the aftermath of the recent Camp and Woolsey Fires.

If privately owned utilities cannot recover the costs of inverse condemnation liability through ratemaking, their financial solvency and ability to serve all ratepayers in their service territory will be gravely undermined. California's privately owned utilities have already seen their market

capitalization eroded and their credit downgraded in the aftermath of the CPUC's decision. This looming crisis has captured national media attention.[1]

Nor has there been any legislative resolution of the issue. In summer 2018, Governor Brown—who has recognized that wildfires are the "new normal" in California given the effects of climate change—proposed legislation that would have replaced strict liability for inverse condemnation with a reasonableness test in situations involving wildfires related to electrical utility operations. But the legislature failed to adopt the Governor's proposal, instead enacting a law that largely preserved the existing approach to rate recovery. (*See* Pub. Util. Code, §§ 451.1, 451.2, as amended by Stats. 2018, ch. 626 §§ 26, 27.) Only this Court, therefore, can resolve the conflict and address the pressing statewide problem that has been created by the Court of Appeal in extending the application of strict liability for inverse condemnation to privately owned utilities while precluding them from recovering the costs of that liability.

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[1] See, e.g., Penn & Eavis, *California Utility Customers May Be on Hook for Billions in Wildfire Damage*, N.Y. Times (Nov. 18, 2018) at <https://www.nytimes.com/2018/11/14/business/energy-environment/california-fire-utilities.html> [as of Nov. 24, 2018].).

STATEMENT OF THE CASE

A. Background

SDG&E is a private, investor-owned utility that supplies gas and electricity to over 3.4 million customers in San Diego County and southern Orange County. (1App497, 500.) SDG&E owns and operates nearly 19,000 miles of electrical distribution and transmission lines, including many in rural backcountry areas that it is legally obligated to serve where the risk of wildfires is significant. (1App500–501.) In keeping with CPUC regulations and utility industry best practices, SDG&E has multiple programs to mitigate and reduce wildfire risk, including a Corrective Maintenance Program, which has been recognized as an industry model (1App506–510, 516–520, 577–580), and a Vegetation Management Program, which the CPUC described as "robust" (31App11813) and has been lauded as a "potential example of excellence" (2App822–824).

In October 2007, Southern California experienced a severe Santa Ana wind with reported wind speeds of 40 to 60 miles per hour and gusts up to 100 miles per hour. (1App382; 31App11787, fn. 30.) As these winds swept across Southern California, they caused hundreds of fires, only some of which the thinly

stretched firefighting resources were able to contain and which burned over 500,000 acres. (1App149–150; 31App11777.) The Witch Fire, which ignited on October 21, 2007 in a remote backcountry area of San Diego County, combined with the Guejito Fire, which ignited the following day, to burn nearly 200,000 acres and damage over 1,140 homes. (31App11786, 11789, 11804.) The Rice Fire also ignited on October 22, 2007 and burned nearly 9,500 acres and damaged over 200 homes. (13App6142.)

Property owners, insurers, and government entities alleging damage from the Witch, Guejito, and Rice Fires filed more than 2,500 lawsuits against SDG&E, bringing, among others, claims for inverse condemnation. Denying a demurrer filed by SDG&E, the Superior Court held that the inverse condemnation claims could be brought against privately owned utilities such as SDG&E. (See Minute Order, *In re 2007 Wildfire Insurer Litig*. (Super. Ct. San Diego County, Jan. 29, 2009, No. 37-2008-0093083-CU-NP-CTL) p. 2.) In light of the strict liability imposed by inverse condemnation, SDG&E decided to minimize its exposure and avoid unnecessary litigation by settling the inverse condemnation claims against it. (1App141–142.) As a result, although plaintiffs asserted $5.6 billion in

damages, SDG&E was able to resolve those claims with payments totally only $2.4 billion. (1App57.) SDG&E recovered $1.1 billion from its liability insurers and another $824 million from settlements with third parties based on cross-claims it had filed, leaving SDG&E with $476 million in unrecovered settlement payments and legal expenses. (31App11778, fn.2.)

In 2012, SDG&E applied to the Federal Energy Regulatory Commission (FERC), which regulates the interstate transmission rates charged by SDG&E, to include a portion of its unrecovered payments in those rates. In 2014, FERC granted SDG&E's application, allowing immediate recovery of $23 million and subsequent recovery of another $67 million in settlement payments. (See *In re San Diego Gas & Elec. Co*. (2014) 146 FERC ¶ 63017 [2014 WL 713556].) In so doing, FERC held that recovery was warranted without regard to the prudence of SDG&E's maintenance operations. (*Id*. at pp. 66112–66113.) FERC reasoned that SDG&E would have been held liable under California inverse condemnation law without regard to fault, and that, "[b]y settling, SDG&E avoided facing considerable litigation risk and disposed of the claims for significantly less than the amount demanded by the claimants." (*Ibid*.)

B. The CPUC's Decision Denying Recovery

In 2015, SDG&E applied to the CPUC to include $379 million—most but not all of the unrecovered settlement payments—in the rates under the CPUC's jurisdiction. (31App11778–11779.) The CPUC denied SDG&E's request on the ground that SDG&E had failed to prove that its operation and management of the facilities connected with the Witch, Guejito, and Rice Fires satisfied the CPUC's "prudent manager" standard. (31App11845–11847.) In applying this standard, the CPUC deemed the fact that SDG&E had been subjected to strict liability for inverse condemnation "not relevant to a Commission reasonableness review under the prudent manager standard." (31App11840.) According to the CPUC, "nothing" in prior judicial decisions extending inverse condemnation to privately owned utilities "would supersede this Commission's exclusive jurisdiction over cost recovery/cost allocation issues involving CPUC regulated utilities," which the CPUC claimed required it to assess the prudence of SDG&E's conduct before the fires ignited. (*Ibid*.)

The CPUC's President and another Commissioner subsequently issued a joint concurrence expressing concern about the application of inverse

condemnation to private utilities, and deeming "unsound" the premise that utilities will be able, as prior judicial decisions had assumed, to "socialize[]" the cost of such liability across ratepayers. (31App11854.) In addition, the concurrence noted, applying inverse condemnation to a privately owned utility that is not guaranteed to recover its costs increases those utilities' capital and insurance expenses, leading to higher rates for ratepayers. (31App11845–11847.) The concurrence therefore urged the courts and the Legislature to reconsider whether inverse condemnation applies to privately owned utilities. (31App11850.)

SDG&E applied for rehearing, which the CPUC denied on July 13, 2018. (31App12292–12324.) The CPUC rejected SDG&E's challenges to its application of the "prudent manager" standard (31App12297–12312) as well as the arguments of SDG&E and the intervenors that the standard does not apply to inverse condemnation costs (31App12315–12324).

The CPUC declined to harmonize section 451 with the judicial precedents that had subjected private utilities to inverse condemnation claims on the express assumption that the CPUC would spread inverse condemnation costs among the

ratepayers. (31App12316–12319.) Deeming itself bound to apply its "prudent manager" standard, the CPUC did not consider whether applying the standard to inverse condemnation costs created an unjust and unreasonable whipsaw between contradictory legal standards. (31App12319, 123121.) Finally, the CPUC denied that applying the "prudent manager" standard to inverse condemnation costs creates an unconstitutional taking. (31App12322–12324.)

C. The Court Of Appeal's Summary Denial Of Review

SDG&E filed a petition for review with Division One of the Fourth Appellate District on August 3, 2018. On November 13, 2018, in a summary three-page order entered by Acting Presiding Justice Benke, the Fourth District denied the petition and declined to issue a writ of review. In so doing, the Court of Appeal did not address the judicial decisions that had for two decades subjected privately owned utilities to inverse condemnation on the assumption that resulting costs would be recovered through the ratemaking process. Nor did it address whether constitutional takings problems might be avoided by harmonizing section 451 of the Public Utilities Code with those decisions. Instead, the Fourth District rejected SDG&E's arguments without explanation:

> The Commission's determination that the princip[les] of inverse condemnation did not bar its prudent manager analysis under section 451 was not in excess of its powers, nor a violation of the law, including the Constitutions of the United States and California. Contrary to SDG&E's assertion, the Commission's review was statutorily mandated, and no legal authority authorized it to forgo it obligations under section 451. Of note, SDG&E settled the inverse condemnation claims in the wildfire litigation rather than continue to advance its position that it could not be held strictly liable as a non-governmental entity. Further, had the Commission determined that SDG&E acted as a prudent manager, the costs could have been passed onto the ratepayers regardless of any potential strict liability in a civil litigation setting.

(Order, p. 2.) The court rejected SDG&E's challenges to the CPUC's causation and prudence rulings in similarly conclusory fashion. (Order, p. 3.)

REASONS WHY REVIEW SHOULD BE GRANTED

I. THE COURT'S REVIEW IS NECESSARY TO SECURE UNIFORMITY OF DECISION

Inverse condemnation is a judicially developed doctrine rooted in the California Constitution, which provides that "[p]rivate property may be taken or damaged for a public use … only when just compensation, ascertained by a jury unless waived, has first been paid to, or into court for, the owner." (Cal. Const.,

art. I, § 19, subd. (a).) An inverse condemnation action allows private property owners to seek compensation for damage to property by "public use."

Inverse condemnation is based on the fundamental premise that costs of public improvements, including damages caused by them, should be spread across the members of the public benefited by the improvement, as this Court's longstanding precedents confirm. (*Holtz, supra,* 3 Cal.3d at p. 303 ["[T]he underlying purpose of our constitutional provision in inverse … condemnation is to distribute throughout the community the loss inflicted upon the individual by the making of public improvements: to socialize the burden … that should be assumed by society."]; *Mercury Cas. Co. v. City of Pasadena* (2017) 14 Cal.App.5th 917, 925–926 (*Mercury*) ["The fundamental policy 'underlying the concept of inverse condemnation is that the costs of a public improvement benefiting the community should be spread among those benefited rather than allocated to a single member of the community,'" quoting *Pac. Bell v. City of San Diego* (2000) 81 Cal.App.4th 596, 602]; *Belair v. Riverside Cnty. Flood Control Dist.* (1988) 47 Cal.3d 550, 558 (*Belair*) ["the underlying purpose of [the California] constitutional provision in inverse … condemnation is to distribute throughout the community

the loss inflicted upon the individual," internal citation and quotation omitted]; Van Alstyne, *Statutory Modification of Inverse Condemnation: The Scope of Legislative Power* (1967) 19 Stan. L. Rev. 727, 738 [the purpose of inverse condemnation is to ensure that losses are "distributed over the taxpayers at large rather than … borne by the injured individual"].)

The Court of Appeal decision below, however, defies that fundamental premise by holding that a privately owned utility that is subject to inverse condemnation may not be able recover those costs from the ratepaying public. That holding creates a conflict with prior Court of Appeal precedents that warrants this Court's review and resolution.

A. Court Of Appeal Decisions Are Divided On Recovery Of Inverse Condemnation Costs By Privately Owned Utilities

Prior Court of Appeal precedents have extended inverse condemnation to privately owned utilities even though, unlike government entities and public utilities (see, e.g., *Albers v. Los Angeles Cnty.* (1965) 62 Cal.2d 250, 263 (*Albers*); *Belair*, *supra*, 47 Cal.3d at p. 567), privately owned utilities are not backstopped by the coercive power of taxation or the unilateral power to set their own rates, and can increase rates only with permission of the CPUC. The Court of Appeal

decisions so extending inverse condemnation (*Barham, supra,* 74 Cal.App.4th at p. 753; *Pacific Bell*, *supra*, 208 Cal.App.4th at pp. 1404–1408) were expressly premised on the assumption that the CPUC would allow privately owned utilities to spread the cost of inverse condemnation liability through ratemaking to the ratepayers who benefit from the provision of electrical power transmission and distribution.

For example, in *Barham,* the Fourth District Court of Appeal held that a privately owned utility (Southern California Edison ("SCE")) "may be liable in inverse condemnation" just the same "as a public entity." (*Barham, supra,* 74 Cal.App.4th at p. 753.) *Barham* expressly noted that inverse condemnation is based on a policy of "spread[ing] among the benefiting community any burden disproportionately borne by a member of that community" and that the electrical power transmission allegedly damaging the property of the plaintiff in that case was "for the benefit of the public." (*Id*. at pp. 752, 754.) But *Barham* ruled that there were no "significant differences … regarding the operation of public versus privately owned electrical utilities" that affect the application of inverse condemnation. (*Id*. at p. 753, citing *Marshall v. Dep't of Water & Power* (1990) 219

Cal.App.3d 1124; *Aetna Life & Cas. Co. v. City of Los Angeles* (1985) 170 Cal.App.3d 865.)

In *Pacific Bell*, the Second District Court of Appeal likewise extended inverse condemnation liability against SCE based on the express assumption that privately owned utilities are able to spread the cost of inverse condemnation liability to the ratepaying public. (208 Cal.App.4th at pp. 1404–1408.) SCE there argued that the cost-spreading rationale underlying inverse condemnation does not apply to privately owned utilities because such utilities "do[] not have taxing authority and may raise rates only with approval of California's Public Utilities Commission." (*Id*. at p. 1407.) But the Second District rejected this argument, relying on *Barham* and finding that SCE had "not pointed to any evidence to support its implication that the [CPUC] would not allow [SCE] adjustments to pass on damages liability during its periodic reviews." (*Id.* at p. 1407.)

In stark conflict with *Barham* and *Pacific Bell*, the CPUC held below that "[i]nverse [c]ondemnation principles" simply "are not relevant" to its rate recovery processes, and denied recovery to SDG&E on the ground that SDG&E supposedly had not satisfied the CPUC's "prudent manager" standard.

(31App11840, 11844–11847.) The CPUC's own members acknowledged the conflict, "urg[ing] the California Courts of Appeal to carefully consider the rationale for applying inverse condemnation in these types of cases." (31App11850 [concurrence of President and Commissioner Picker and Commissioner Guzman Aceves].)

In denying review of the CPUC's order, the Fourth District's summary order solidifies the conflict with *Barham* and *Pacific Bell*. The order does not deny that *Barham* and *Pacific Bell* extended inverse condemnation liability to privately owned utilities on the assumption that the resulting costs would be recoverable through ratemaking. But it does not mention or resolve the conflict with those decisions, ruling only that "[t]he Commission's determination that the princip[les] of inverse condemnation did not bar its prudent manager analysis under section 451" did not exceed its powers or violate the law. (Order, p. 2.) This Court's review is required to address this conflict, which the CPUC's members acknowledged and the Court of Appeal failed to resolve.

B. The Decision Below Errs In Its Construction Of Public Utilities Code Section 451

This Court's review is also needed to harmonize *Barham* and *Pacific Bell* with section 451 of the Public Utilities Code, which authorizes utilities to recover "just and reasonable" costs. (Pub. Util. Code, § 451; see also *Pacific Tel. & Tel. Co. v. P.U.C.* (1965) 62 Cal.2d 634, 647 [CPUC has power to "disallow[] expenditures that [it] finds unreasonable"].) Under any proper construction of that provision, it is "just and reasonable" for ratepayers to bear the costs of a privately owned utility's inverse condemnation liability, without any threshold inquiry into prudence or fault.

Conversely, it is *un*just and *un*reasonable to deny SDG&E any recovery for inverse condemnation costs when *Barham* and *Pacific Bell* imposed those costs upon privately owned utilities on the express premise that they would be able to spread those costs across the benefited ratepayers. In paying inverse condemnation damages for wildfires, SDG&E shoulders "a burden that should be assumed by society" (*Holtz*, *supra*, 3 Cal.3d at p. 303, citation and quotation marks omitted), and "should be spread among those benefited" by SDG&E's electrical transmission and distribution facilities. (*Mercury*, *supra*, 14 Cal.App.5th

at p. 925, citation and quotation marks omitted.) Requiring SDG&E alone to bear the burden of those public improvements turns inverse condemnation on its head: Rather than *spreading* the costs incurred by a small group to a large group benefiting from a public improvement, the CPUC's decision *concentrates* costs onto a single company.

In contrast to the decision below, FERC properly concluded that privately owned utilities subject to California law should be permitted to recover reasonable payments made to resolve inverse condemnation claims. FERC thus allowed SDG&E to recover a portion of the payments at issue here in rates under FERC's jurisdiction. (See *In re San Diego Gas & Elec. Co.* (2014) 146 FERC ¶ 63017 [2014 WL 713556].) Like the CPUC, FERC is statutorily required to permit only charges that are "just and reasonable." (16 U.S.C. § 824d(a).) FERC found SDG&E's inverse condemnation payments just and reasonable. FERC ruled that the settlement payments were "rational and prudent" and therefore recoverable because "SDG&E would likely have been held responsible for such costs irrespective of fault" under inverse condemnation and "[b]y settling, SDG&E avoided facing considerable litigation risk and disposed of the claims for

significantly less than the amount demanded by the claimants." (*In re San Diego Gas & Elec. Co.*, *supra*, 146 FERC ¶ 63017, pp. 66112–66113.) Moreover, FERC expressly stated that it would have reached this conclusion even if SDG&E's conduct of its operations had not been found prudent. (*Id*. at p. 66112.)

Ignoring FERC's decision, the Fourth District asserted that the CPUC was required to apply the prudent manager standard because "no legal authority authorized it to forgo its obligation under section 451." (Order, p. 2.) Section 451, however, requires that costs be "just and reasonable," not that they satisfy the "prudent manager" standard, and while the CPUC uses that standard to determine whether costs are just and reasonable, it has recognized that section 451 does not always require application of the "prudent manager" standard. In considering hazardous waste cleanup expenses, for example, the CPUC found that a utility had not shown the reasonableness of its expenses under the "prudent manager" standard. (See *In re S. Cal. Gas Co.* (1992) 46 CPUC.2d 242, 244.) But, rather than denying all recovery, the CPUC requested comments on "alternative methods" of review, noting that "the reasonableness review procedure may not be the best vehicle for determining rate recovery of Hazwaste

cleanup expenses" because it is difficult to prove the reasonableness of hazardous waste expenses. (*Id*. at p. 247.) Moreover, when utilities and the Division of Ratepayer Advocates proposed a method deeming a fixed percentage (90%-95%) of hazardous waste expenses reasonable and recoverable *without* any prudence review, the CPUC adopted it. (*In re S. Cal. Gas Co*. (1994) 54 CPUC.2d 391, 397 [ruling the procedure "fair to both shareholders as well as ratepayers"].)

Thus, section 451 should be construed to permit the CPUC to determine whether a charge is "just and reasonable" without applying the "prudent manager" standard, which would resolve the conflict between the decision below and the decisions in *Barham* and *Pacific Bell*.

C. The Decision Below Creates Serious Constitutional Questions Under The Takings Clause

If the decision below is permitted to stand, forcing SDG&E to bear inverse condemnation costs alone without compensation from the ratepaying public, it would raise serious constitutional questions under the Takings Clauses of the California Constitution (Cal. Const., art. I, § 19, subd. (a)), and the United States Constitution (U.S. Const., 5th and 14th Amends.). Construing section 451 as the Court of Appeal did thus would violate the classic canon that statutes should be

construed to avoid, not create, constitutional problems. (See, e.g., *People v. Gutierrez* (2014) 58 Cal.4th 1354, 1373.)

Specifically, interpreting section 451 to bar recovery of inverse condemnation costs would violate the state and federal Takings Clauses by forcing SDG&E "alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole." (*E. Enters. v. Apfel* (1998) 524 U.S. 498, 522 (plur. opn.), citation and quotation marks omitted; see *Holtz*, *supra*, 3 Cal.3d at p. 303). As noted, the judicial imposition of inverse condemnation liability on privately owned utilities presumes the ability to spread "the costs of a public improvement benefiting the community" among "those benefited." (*Mercury*, *supra*, 14 Cal.App.5th at pp. 925–926, citation and quotation marks omitted.)

Indeed, the imposition of uncompensated inverse condemnation payments on SDG&E would be a per se taking because it takes monies "linked to a specific, identifiable property interest," the utilities' transmission facilities. (*Koontz v. St. Johns River Water Mgmt. Dist.* (2013) 570 U.S. 595, 614 [fee connected with permit for use of specific property]; see also *Brown v. Legal Found. of Wash.* (2003) 538 U.S. 216, 232 [interest on specific fund]; *Webb's Fabulous Pharmacies, Inc. v.*

Beckwith (1980) 449 U.S. 155, 163–164 [same]; *Ponderosa Tel. Co. v. P.U.C.* (2011) 197 Cal.App.4th 48, 59 [forced allocation of proceeds from specific shares to ratepayers].)

Imposing inverse condemnation liability without compensation also would constitute a regulatory taking. In evaluating regulatory takings, courts examine three factors: (1) "'[t]he economic impact of the regulation on the claimant'"; (2) "'the extent to which the regulation has interfered with distinct investment-backed expectations'"; and (3) whether the government action balances the "'benefits and burdens of economic life to promote the common good.'" (*Lingle v. Chevron U.S.A. Inc.* (2005) 544 U.S. 528, 538–539, quoting *Penn Central Transp. Co. v. New York City* (1978) 438 U.S. 104, 124.) Those factors are satisfied here. The economic impact of imposing $379 million in inverse condemnation liability without compensation is obviously substantial. Applying the CPUC's "prudent manager" standard to deny recovery of inverse condemnation costs upsets the reasonable investment-backed expectations of privately owned utilities because *Barham* and *Pacific Bell* imposed inverse condemnation liability on them only on the express assumption that the resulting

costs would be recovered from ratepayers. (*Pacific Bell*, *supra*, 208 Cal.App.4th at pp. 1407–1408; *Barham*, *supra*, 74 Cal.App.4th at pp. 752–753.) And, far from balancing the benefits and burdens of economic life, uncompensated inverse condemnation liability would concentrate the entire burden on SDG&E.

In the order below, the Court of Appeal improperly disregarded this constitutional infirmity, compounding the error in its construction of section 451. Although the Public Utilities Code expressly requires courts to "exercise independent judgment on the law and the facts" where a CPUC order is challenged on constitutional grounds (Pub. Util. Code, § 1760), the order simply asserts without explanation that the CPUC's determination was not unconstitutional. (Order, p. 2.)

For all these reasons, this Court's review is necessary to secure uniformity of decision.

II. THE COURT'S REVIEW IS NECESSARY TO RESOLVE AN IMPORTANT QUESTION OF LAW

Review should also be granted for the additional reason that the conflict between the decision below and the decisions in *Barham* and *Pacific Bell* creates an untenable legal whipsaw with grave practical consequences. *Barham* and

Pacific Bell subject privately owned utilities to inverse condemnation's expansive strict liability on the assumption that resulting costs will be recovered through ratemaking. But at the same time, the CPUC and Fourth District orders below hold that recovery for inverse condemnation costs will be denied to privately owned utilities unless they can satisfy the restrictive requirements of the CPUC's "prudent manager" standard. This legal whipsaw has grave practical consequences, impairing the ability of privately owned utilities to operate in California and thereby threatening important public services, consumers and a significant portion of the State's economy.

A. Privately Owned Utilities Now Face A Legal Whipsaw Over Inverse Condemnation Costs

Inverse condemnation claims subject privately owned utilities to a particularly expansive form of liability. Inverse condemnation is a "strict liability" rule under which damages are imposed without regard to fault. (*Bunch v. Coachella Valley Water Dist.* (1997) 15 Cal.4th 432, 440.) Moreover, this liability covers any property damage proximately caused by public improvements whether "foreseeable or not." (*Albers*, *supra*, 62 Cal.2d at pp. 263–264.) Thus, under inverse condemnation, a defendant may be held liable 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*." (*Marshall v. Dept. of Water & Power*, *supra*, 219 Cal.App.3d at p. 1138, citation and quotation marks omitted; italics added.)

Under the CPUC's "prudent manager" standard, however, recovery of costs is severely restricted. Privately owned utilities are not allowed to recover all costs that they incur, but only those costs "prudently incurred by competent management exercising the best practices of the era, and using well-trained, well-informed, and conscientious employees who are performing their jobs properly." (31App11781, quotation omitted.) Moreover, the utility must prove to the CPUC's satisfaction that it has met this requirement (31App11784), a burden that "rests heavily upon a utility" (*In re Southern California Edison* (1990) 37 CPUC.2d 488, 499).

Subjecting privately owned utilities to strict liability for inverse condemnation while barring recovery of the costs of that liability under the CPUC's "prudent manager" standard creates a legal whipsaw for privately owned utilities. No government entity or public utility subject to inverse

condemnation liability ever faces a similar dilemma—to the contrary, they may recover such costs unilaterally through the power of coercive taxation or their own ratemaking authority.

B. Privately Owned Utilities' Inability To Recover Inverse Condemnation Costs Will Have Grave Practical Consequences

This legal whipsaw places privately owned utilities in serious financial peril that threatens grave harm to the California economy and underscores the urgency of this Court's review. *First*, the threat of uncompensated inverse condemnation liability will increase the cost of insurance and eventually may render California utilities uninsurable. In light of increased liability against privately owned utilities from inverse condemnation claims, insurance companies are increasing premiums, reducing coverage, or refusing to insure such utilities altogether—making insurance harder to secure and more expensive.[2] As the CPUC's President warned the Legislature, insurance costs

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[2] Sempra Energy, Annual Report (Form 10-K), Feb. 27, 2018, at p. 51, at <https://investor.sempra.com/static-files/c53628aa-4b86-47d7-b91a-14e4e8bbc2bd> [as of Nov. 24, 2018]; CPUC Webinar on Impacts of Climate Change and Resulting Resiliency Challenges (C.P.U.C. Feb. 7. 2018), at 48:26-48:42, at <http://adminmonitor.com/ca/cpuc/other/20180207/> [as of Nov. 24, 2018] [noting difficulty in obtaining insurance].)

and the rates charged consumers will rise as a result.[3] Indeed, according to a recent report, insurance costs in California have "skyrocketed" and sometimes insurance has become simply "unavailable."[4]

Second, the threat of uncompensated inverse condemnation liability increases the costs of capital for privately owned utilities. When the CPUC issued the order below denying SDG&E recovery, market analysts commented that California private utilities presented a "uniquely unpalatable proposition of socialized no-fault liability" with "no assurance of presumed recoverability,"[5] and warned that the utilities would experience a "material increase in their cost of capital."[6] Indeed, Moody's changed SDG&E's rating outlook from "stable" to "negative," noting that the CPUC's decision denying SDG&E rate recovery

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[3] Cal. Assembly Comm. on Utils. & Energy (Feb. 26, 2018), at 1:04:2-1:04:58 (testimony of CPUC President and Commissioner Michael Picker) at <http://assembly.ca.gov/media/assembly-utilities-energy-committee-20180226/video> [as of Nov. 24, 2018].

[4] Howard, *Utilities to fight climate risk via insurance upgrades* (Nov. 14, 2018) 2018 CQFENRPT 1672.)

[5] Arnold, *CPUC Denies SDG&E Wildfire Recovery; Notes "Incorrect Premise"of IC Doctrine* (Nov. 30, 2017) Deutsche Bank, at p. 3.

[6] Gordon and Prior, *PCG Has Suspended Dividends, Citing Uncertainty Regarding Wildfire-Related Liabilities* (Dec. 21, 2017) Evercore ISI, at p. 2.

would cause "higher regulatory risk for investor-owned utilities in California due to inverse condemnation exposure and the uncertainty that they will be able to recover related costs from ratepayers."[7] Credit rating agencies also downgraded privately owned utility PG&E and its parent PG&E Corporation because the CPUC decision in this case "exposes a utility to a significant risk of not recovering wildfire costs."[8] Following the CPUC's decision, another analyst wrote that California utilities were "uninvestable right now" because there were "too many unknowns and significant risk."[9] More recently, SDG&E's credit

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[7] *Rating Action: Moody's Changes San Diego Gas & Electric's Rating Outlook to Negative From Stable* (Apr. 11, 2018) Moody's Investors Service, at p. 1, at <http://www.moodys.com/research/Moddys-changes-San-Diego-Gas-Electric-rating-outlook-to-negative-PR_38074> [as of Nov. 24, 2018].

[8] Shipman and Grosberg, *Research Update: PG&E Corp. and Subsidiary Downgraded to "BBB+' on Contingent Liabilities; Still CreditWatch Negative*, RatingsDirect (Feb. 22, 2018) S&P Global Ratings, at p. 3; see also Smyth et al., *Fitch Downgrades PG&E Corp v. and Sub. To 'BBB+'; Places on Ratings Watch Negative* (Feb. 26, 2018) Fitch Ratings, at <https://www.fitchratings.com/site/pr/10021816> [as of Nov. 24 2018]; Rivas, *PG&E: It's Like Sticking a Fork in a Socket* (Jan 2, 2018) Barron's, at <https://www.barrons.com/articles/pg-e-its-like-sticking-a-fork-in-a-socket-1514920990> [as of Nov. 24, 2018].

[9] Yamamoto, *Market Notes: Tuesday, December 12, 2017* (Dec. 12, 2017), at <https://investitute.com/activity-news/market-notes-tuesday-december-12-2017/> [as of Nov. 24, 2018].

rating was downgraded on the ground that "the application of strict liability under inverse condemnation tempers SDG&E's credit quality."[10] And privately owned utilities have suffered plunges in their stock prices in the aftermath of every new wildfire, reflecting the potential costs of exponentially increasing inverse condemnation claims.[11]

These harms to privately owned utilities portend ripple effects throughout California's economy. Such utilities are vital to the lifeblood of the State. They employ more than 40,000 California workers and provide electric power to over three-quarters of California's residents through service areas that cover more

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[10] *San Diego Gas & Electric Company: Update following downgrade to A2 stable* (Sept. 10, 2018) Moody's Investor Services, at p. 1, at <https://www.moodys.com/research/Moodys-downgrades-San-Diego-Gas-Electric-to-A2-from-A1--PR_388482> [as of Nov. 24, 2018].

[11] See Penn & Eavis, *California Utilities May Be on the Hook for Billions in Wildfire Damages*, N.Y. Times, *supra* [noting the sharp decline in PG&E's stock price in light of the Camp Fire, and noting further that "[s]hares of the parent companies of the state's other investor-owned utilities—Edison International, which operates Southern California Edison, and Sempra Energy, which owns San Diego Gas and Electric—also dropped earlier this week as wildfires spread in both Northern and Southern California"].

than three-quarters of the territory of the State.[12] They also play an important role in developing California's infrastructure and its commitment to clean, renewable energy, meaning that the financial health of privately owned utilities has far-reaching implications for California's environmental goals as well as its economy.[13] If California courts continue to hold privately owned utilities liable for inverse condemnation while the CPUC is permitted to deny recovery of the unreimbursed costs of that liability, their increased costs of capital and insurance will threaten their financial sustainability.

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[12] PG&E employed approximately 22,980 full-time employees in 2017, SCE 12,234, and SDG&E 4,116. PG&E Corp., Annual Report (Form 10-K) at p. 8 (Feb. 9, 2018), at <https://investor.PGECorp.com/financials/sec-filings-details/default.aspx?filingId+12532998> [as of Nov. 24, 2018]; Edison International, Annual Report (Form 10-K) at p. 114 (Feb. 22, 2018), at <https://www.edison.com/home/investors/sec-filings-financials/sec-filings.html?company=§formtype=§pageNum=4> [as of Nov. 24, 2018; Sempra Energy, Annual Report (Form 10-K), *supra*, at p. 36.

[13] Cal. Energy Comm'n, Tracking Progress (Dec. 2017) at p. 1, at <http://www.energy.ca.gov/renewables/tracking_progress/documents/renewable.pdf> [as of Nov. 24, 2018]; see also Gordon & Prior, *supra*, at p. 2 ["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"].

These problems will only get worse as wildfires (and wildfire litigation) increase exponentially with climate change. Officials from the California Department of Forestry and Fire Protection ("Cal Fire") have warned that recent trends "'reflect a major shift in wildfires, one … seen over the past 10 years" showing that "'[w]ildfires are becoming more damaging and destructive.'"[14] They also have cautioned that fire season could now persist year-round.[15] Thus, as the Chief Justice recognized earlier this year, the State is facing an "onslaught" of wildfire cases,[16] and the recent Camp and Woolsey Fires will likely generate thousands more claims.

Moreover, the number of such wildfire cases is only likely to increase in the future. By the end of this century, temperatures in the United States are

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[14] Pamer & Espinosa, KTLA5 News, *'We Don't Even Call It Fire Season Anymore ... It's Year Round': Cal Fire* (Dec. 11, 2017) at < http://ktla.com/2017/12/11/we-dont-even-call-it-fire-season-anymore-its-year-round-cal-fire/> [as of Nov. 24, 2018].

[15] *Ibid.*

[16] Tani Cantil-Sakauye, C.J., State of the Judiciary Address to a Joint Session of the California Legislature (Mar. 19, 2018) at <https://newsroom.courts.ca.gov/news/2018-state-of-the-judiciary-address> [as of Nov. 24, 2018].

expected to rise another 3.5 degrees Celsius,[17] or over 6 degrees Fahrenheit. The increase in the risk of wildfires caused by increased temperatures is exponential, not linear, meaning that each degree increase in temperature may herald a much greater proportional increase in the number and severity of wildfires.[18] Indeed, of the twenty most destructive wildfires in California since 1932, five occurred in 2017, and thirteen after 2000, including the five largest.[19] As Governor Brown observed, frequent, devastating wildfires is "the new normal."[20]

This Court's resolution of the problem is necessary because a legislative solution has not been forthcoming. Although the Legislature recently passed

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[17] Meyer, *Has Climate Change Intensified 2017's Western Wildfires?*, (Sept. 7, 2017) The Atlantic, at <https://www.theatlantic.com/science/archive/2017/09/why-is-2017-so-bad-for-wildfires-climate-change/539130/> [as of Nov. 24, 2018]

[18] Harvey, *Here's What We Know About Wildfires and Climate Change* (Oct. 13, 2017) Scientific American, at <https://www.scientificamerican.com/article/heres-what-we-know-about-wildfires-and-climate-change/> [as of Nov. 24, 2018].

[19] Cal. Dep't of Forestry & Fire Prot., *Top 20 Most Destructive California Wildfires* (Nov. 19, 2018) at <http://www.fire.ca.gov/communications/downloads/fact_sheets/Top20_Destruction.pdf> [as of Nov. 24, 2018].

[20] Vives, Etehad and Cosgrove, *Southern California's fire devastation is 'the new normal,' Gov. Brown says*, L.A. Times (Dec. 10, 2017) at <http://www.latimes.com/local/lanow/la-me-socal-fires-2017120-story-html> [as of Nov. 24, 2018].

legislation concerning wildfire cost recovery (Stats. 2018, ch. 626, §§ 26–27, 32), it declined to replace strict liability for inverse condemnation in electrical utility wildfire cases with a reasonableness test, as Governor Brown had expressly proposed. The Legislature thus left the legal whipsaw squarely in place.[21]

The new legislation instead expressly disclaims any change in civil liability standards. (See Pub. Util. Code, § 451.1, subd. (c), added by Stats. 2018, ch. 626, § 26 ["This section shall not affect any civil action, appeal, or other action or proceedings."].) In addition, the legislation effectively reaffirms the CPUC's "prudent manager" standard, specifying factors to be considered (*id*., § 451.1, subd (a)(1)–(12), which expressly "includ[e] "factors traditionally relied upon by the commission in its decisions" (*id*., § 451.1, subd (a)(12)), and even then only for wildfires "occurring on or after January 1, 2019" (*id*., § 451.1, subd (a)).

Accordingly, this Court should grant review because of the profound harm the decision below threatens to California businesses, consumers and the State's

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[21] See, e.g., Nikolewski *Governor Brown Backs Liability Changes for California Utilities in Wildfires* The San Diego Union-Tribune (July 25, 2018) at <http://www.sandiegouniontribune.com/business/energy-green/sd-fi-wildfire-hearing-20180724-story.html> [as of Nov. 24, 2018]

economy in the face of the mounting onslaught of wildfire-related inverse condemnation claims against privately owned utilities.

III. THE COURT'S REVIEW IS ALSO WARRANTED BECAUSE THE PRESIDING JUSTICE WHO ENTERED THE DECISION BELOW WAS REQUIRED TO RECUSE HERSELF

The decision below also warrants review because Justice Patricia Benke,the acting presiding justice who entered the order summarily denying SDG&E's petition for review, had previously sued SDG&E in one of the disputes leading to the request that the CPUC denied. SDG&E had no opportunity to request her recusal before the Court of Appeal because her participation in the case was not apparent until the order issued, and the order became final immediately upon filing. (See Cal. Rules of Court, rule 8.268, subd. (a)(1) [prohibiting petitions for rehearing from immediately final orders]; *see also Kaufman v. Court of Appeal* (1983) 31 Cal. 933, 940 [Supreme Court may review failure of appellate justices to recuse].)

On October 14, 2009, Justice Benke and her husband sued SDG&E alleging that they lost their house in the Guejito Fire as a result of SDG&E's negligence and claiming inverse condemnation as well as negligence and other causes of

action.[22] The Code of Judicial Ethics requires justices to recuse themselves when "the circumstances are such that a reasonable person would doubt the justice's ability to be impartial." (Code of Judicial Ethics, Canon 3E(4)(c).) A justice's prior suit against a party in matters relating to the suit before the justice is plainly one of those circumstances. (See *Johnson v. Mississippi* (1971) 403 U.S. 212, 215–216 [requiring recusal of judge sued by party in prior civil action]; see also *Lesko v. Valley Presbyterian Hosp*. (1986) 180 Cal.App.3d 519, 529 [requiring recusal of decisionmaker "enmeshed in other matters involving the person whose rights he is determining"].)

Especially as Justice Benke not only acted as the presiding justice and entered the decision below but did so in a conclusory summary order, her failure to recuse was prejudicially unfair and should be reviewed. (See *Aetna Life Ins. Co. v. Lavoie* (1986) 475 U.S. 813, 830–833 (conc. opn. of Brennan, J.) [Participation of a judge with a bias "of which he knows at the time he participates *necessarily*

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[22] See Second Amended Master Complaint for Individual Residents and Business Owners, *In re 2007 Wildfire Individual Litigation—Witch Creek/Guejito Fires* (Super. Ct. San Diego County, No. 37-2008-00093080-CPU-PO-CTL) Attachment One, at p. 2.)

imports a bias into the deliberative process."]; see also Ruvolo, *California's Amendment to Canon 3E of the Code of Judicial Conduct Requiring Self-Recusal of Disqualified Appellate Justices—Will It Be Reversible Error Not to Self Recuse?* (2003) 25 Thomas Jefferson L. Rev. 529, 558 [anticipating that California courts will rule that "reversal is appropriate whenever a disqualified justice participates"].) These grounds for recusal provide additional reason to grant review.

CONCLUSION

The petition for review should be granted and the questions presented reviewed by this Court.

Dated: November 26, 2018

Respectfully Submitted,

QUINN EMANUEL URQUHART & SULLIVAN, LLP

By: 

Kathleen M. Sullivan
Daniel H. Bromberg
Jeffrey N. Boozell
Counsel for Petitioner Pacific Gas and Electric Company

CERTIFICATE OF COMPLIANCE

Pursuant to California Rules of Court, rule 8.504, subd. (d)(1), I hereby certify that, according to the word count feature of the software used, this Petition for Review contains 7,144 words, exclusive of materials not required to be counted under Rule 8.504, subd. (d)(3).

DATED: November 26, 2018

Kathleen M. Sullivan

EXHIBIT A: COURT OF APPEAL ORDER

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

SAN DIEGO GAS & ELECTRIC, Petitioner, v. PUBLIC UTILITIES COMMISSION, Respondent; PROTECT OUR COMMUNITIES FOUNDATION et al., Real Parties in Interest.	D074417 (Public Utilities Commission No. 17-11-033)

THE COURT:

The petition for writ of review filed by San Diego Gas & Electric Company (SDG&E) and the accompanying exhibits, the answers filed by real parties in interest Protect Our Communities Foundation (POCF) and Ruth Henricks, the answer filed by the California Public Utilities Commission, and the reply to answers filed by SDG&E have been read and considered by Justices Benke, O'Rourke, and Dato.

SDG&E challenges the Commission's decision denying its application to include $379 million in settlement payments stemming from litigation involving wildfires caused by its facilities in 2007. SDG&E asserts the Commission's decision should be annulled because it interpreted Public Utilities Code section 451 (further statutory references are to the Public Utilities Code) in a manner that unconstitutionally conflicts with the strict liability the utility faced in the wildfire litigation as a result of the plaintiffs' inverse condemnation claims. SDG&E also argues the Commission's decision must be annulled because insufficient evidence supported its determination that (1) SDG&E was an imprudent manager and (2) SDG&E's conduct caused the Witch Fire.

" ' "[A]ny aggrieved party [to a decision of the Commission] may petition for a writ of review in the court of appeal . . . ." ' " (*SFPP, L.P. v. Public Utilities Commission* (2013) 217 Cal.App.4th 784, 793 (*SFPP*).) "[W]hen 'writ review is the exclusive means of appellate review of a final order or judgment, an appellate court may not deny an apparently meritorious writ petition, timely presented in a formally and procedurally sufficient manner, merely because, for example, the petition presents no important issue of law or because the court considers the case less worthy of its attention than other matters.' [Citation.] We are not, however, 'compelled to issue the writ if the [Commission] did not err . . . .' " (*Ibid*.)

"The limited grounds and standards for our review are set forth in section 1757, subdivision (a). 'No new or additional evidence shall be introduced upon review by the court. In a complaint or enforcement proceeding, or in a ratemaking or licensing decision of specific application that is addressed to particular parties, the review by the court shall not extend further than to determine . . . whether any of the following occurred: (1) The commission acted without, or in excess of, its powers or jurisdiction. (2) The commission has not proceeded in the manner required by law. (3) The decision of the commission is not supported by the findings. (4) The findings in the decision of the commission are not supported by substantial evidence in light of the whole record. (5) The order or decision of the commission was procured by fraud or was an abuse of discretion. (6) The order or decision of the commission violates any right of the petitioner under the Constitution of the United States or the California Constitution.' " (*SFPP, supra*, 217 Cal.App.4th at pp. 793-794.)

" 'There is a strong presumption favoring the validity of a Commission decision.' " (*SFPP, supra,* 217 Cal.App.4th at p. 794.) " 'Generally, we give presumptive value to a public agency's interpretation of a statute within its administrative jurisdiction because the agency may have "special familiarity with satellite legal and regulatory issues," leading to expertise expressed in its interpretation of the statute. [Citation.] Therefore, "the PUC's 'interpretation of the Public Utilities Code should not be disturbed unless it fails to bear a reasonable relation to statutory purposes and language . . . .' " ' " (*Ibid*.)

The Commission's determination that the principals of inverse condemnation did not bar its prudent manager analysis under section 451 was not in excess of its powers, nor a violation of the law, including the Constitutions of the United States and California. Contrary to SDG&E's assertion, the Commission's review was statutorily mandated, and no legal authority authorized it to forego its obligation under section 451. Of note, SDG&E settled the inverse condemnation claims in the wildfire litigation rather than continue to advance its position that it could not be held strictly liable as a non-governmental entity. Further, had the Commission determined that SDG&E acted as a prudent manager, the costs could have been passed onto the ratepayers regardless of any potential strict liability in a civil litigation setting.

In addition, the exhibits submitted by SDG&E do not support its assertion that the Commission's findings under section 451 were not supported by sufficient evidence. Specifically, the record contains substantial evidence showing both that SDG&E's facilities caused all three of the wildfires at issue, and that SDG&E did not meet its burden to show that it reasonably and prudently operated and maintained those facilities. (See *Toward Utility Rate Normalization v. Public Utilities Com.* (1978) 22 Cal.3d 529, 537 ["The findings of fact by the Commission are to be accorded the same weight that is given to jury verdicts and the findings are not open to attack for insufficiency if they are supported by any reasonable construction of the evidence."].)

In sum, SDG&E has failed to demonstrate that the Commission erred on the claims it asserts. Under these circumstances, we decline to issue the writ of review. (*Pacific Bell v. PUC* (2006) 140 Cal.App.4th 718, 729.) The petition is denied. The application of Southern California Edison Company and Pacific Gas and Electric Company for leave to file an amicus curiae brief is denied as moot.

BENKE, Acting P. J.

Copies to: All parties