

No. 18-1368

In the Supreme Court of the United States

SAN DIEGO GAS & ELECTRIC COMPANY,

Petitioner,

v.

**PUBLIC UTILITIES COMMISSION OF THE STATE
OF CALIFORNIA,**

Respondent.

**ON PETITION FOR A WRIT OF CERTIORARI
TO THE CALIFORNIA COURT OF APPEAL, FOURTH
APPELLATE DISTRICT**

**BRIEF OF *AMICUS CURIAE* SOUTHERN
CALIFORNIA EDISON COMPANY IN
SUPPORT OF PETITIONER**

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MOTION FOR LEAVE

Southern California Edison Company (“*amicus*”) hereby moves, pursuant to S. Ct. R. 37.2, for leave to file a brief *amicus curiae* in support of the petition for a writ of *certiorari* to the California Court of Appeal, Fourth Appellate District. *Amicus* gave timely notice to Petitioner San Diego Gas & Electric Company and Respondent Public Utilities Commission of the State of California, both of whom consented to *amicus* filing this brief. We also gave notice to the other parties to the proceedings below who are not before this Court. One did not consent and the rest did not respond. A copy of the proposed brief is attached.

As more fully explained in the attached brief under “Interest of *Amicus Curiae*,” *amicus* is a private electrical utility and one of the largest providers of electricity in California. *Amicus* has been subjected to liability under California’s inverse condemnation law, ordinarily applied to public entities. But unlike public entities that can spread losses by raising taxes, SCE cannot raise its rates to recover its inverse condemnation losses.

The brief will assist the Court in determining whether to grant *certiorari* because *amicus* is well positioned to describe to the Court the importance of this case. Respondent’s decision to not allow privately owned utilities to recover inverse condemnation losses through rates could cost utilities billions of dollars as a warming climate subjects California to increasingly severe wildfires. As explained in the brief, the outcome of this case will have severe financial impacts on *amicus*, other private utilities,

and the millions of California residents that they serve.

Accordingly, *amicus* respectfully request that the Court grant leave to file the attached brief as *amicus curiae*.

Respectfully submitted,

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QUESTION PRESENTED

Whether it is an uncompensated taking for public use in violation of the Fifth and Fourteenth Amendments for a State to impose strict liability for inverse condemnation on a private utility without ensuring that the cost of that liability is spread to the benefitted ratepayers.

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INTEREST OF AMICUS CURIAE

Southern California Edison Company (“SCE”) is one of the largest providers of electrical power to California residents. It has been serving Californians for over 125 years and currently delivers power to 15 million people and businesses in 50,000 square miles across central, coastal and southern California. Like Petitioner San Diego Gas and Electric (“SDG&E”), SCE is a private utility. Unlike utilities like the Sacramento Municipal Utility District, SCE is not owned by a government entity, but instead is a subsidiary of Edison International (“Edison”), a publicly traded company. Although it provides a public good, SCE does not enjoy many of the benefits of a government entity. For example, unlike a government entity that can elect to increase taxes or fees to cover increased costs, SCE cannot unilaterally raise its rates in order to make up for losses it suffers. This important distinction between a government entity and a private utility was brought into sharp focus when the California Public Utilities Commission (“CPUC”) denied SDG&E’s request to recover in rates uninsured losses arising out of 2007 wildfires.¹

¹ No counsel for a party authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amicus curiae*, or its counsel made a monetary contribution to its preparation or submission. Petitioner and Respondent have been given at least 10 days notice of amicus’ intention to file, and the other parties below have been given notice as well. Petitioner and Respondent have

consented to the filing of this brief. One party, the San Diego Consumers' Action Network, did not consent. The other parties did not respond.

INTRODUCTION AND SUMMARY OF ARGUMENT

Inverse condemnation cannot apply to private utilities unless they may, as a matter of right, recover in rates the costs of the “strict liability” that inverse condemnation imposes. Absent such a right, inverse condemnation acts as a Government-sanctioned transfer of property from one party (a private utility) to another (inverse-condemnation plaintiffs) without just compensation in violation of the Fifth and Fourteenth Amendments of the U.S. Constitution. SCE has a particular interest in SDG&E’s petition because extension of inverse condemnation — a claim that has been justified only insofar as it compensates individuals where a *public entity* has damaged their property for the public good — to private utilities has a substantial impact on SCE, its investors, and ultimately its customers.

California courts initially applied inverse condemnation to private utilities on the express assumption that they could recover inverse losses through rate increases. *See, e.g., Barham v. S. Cal. Edison Co.*, 74 Cal. App. 4th 744, 752 (1999) (extending inverse condemnation to SCE on the assumption it could raise rates the same way the government uses taxes or government-owned utilities use their rates to “spread among the benefiting community any burden disproportionately borne by a member of that community”). But the State of California (acting through the CPUC) has now made clear that such an assumption was incorrect — private utilities cannot socialize the costs of inverse

liability as a matter of right. Since that decision, the California appellate courts have refused to address the fundamental flaw in their prior inverse jurisprudence.

Review by this Court is not only necessary, it is urgent. Permitting inverse condemnation claims to proceed against entities that lack the right to socialize losses threatens dire consequences for California's private utilities, including SCE. SCE presently faces numerous inverse condemnation claims seeking billions of dollars in strict liability damages for wildfires that ignited in 2017 and 2018. Under the current inverse condemnation scheme in California, SCE faces such liability regardless of fault, yet lacks the ability to recover the costs of that liability as a matter of right. Although causation has not yet been established, SCE is already facing economic harm, such as lower credit ratings and higher cost of capital, as a result of this asymmetric risk.

Moreover, SCE (and other private utilities) could face billions more in liability in California's "new normal" where the fire season is year-round and the fires are more frequent and intense. And, as development creeps into high-risk fire zones, more homes and businesses are at risk. Warmer temperatures dry out vegetation, which increases the fuel load for future fires, increasing their severity.

Private utilities are already facing significant harm from California's current inverse condemnation scheme. Insurance costs for utilities have begun to skyrocket and utilities are facing difficulty raising money in the capital markets. And the threat of

inverse liability without a linked mechanism to secure cost recovery through a rate increase has already forced one private utility in California (Pacific Gas & Electric Company (“PG&E”)) to declare bankruptcy. Others could face a similar fate absent a clarification of the law.

Certiorari should be granted.

ARGUMENT**I. The CPUC's Decision to Deny Recovery of Inverse-Condensation Liability Is an Uncompensated Taking because It Imposes All the Costs of Damage from Public Improvements on SDG&E**

Both the federal and California Constitutions require the government to pay just compensation when it takes or damages private property for a public purpose.² Based on that requirement, California courts have developed a body of decisions applying this rule not merely to traditional takings, but also to instances in which the government, in furtherance of some public purpose, damages private property: a so-called “inverse condemnation.”³ Such a claim is to be brought only against a “public entity,” which has loss-shifting powers.⁴

“[T]he 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

² U.S. Const. amend. V (“nor shall private property be taken for public use, without just compensation”); Cal. Const., art. I, § 19 (“Private property may be taken or damaged for a public use and only when just compensation . . . has first been paid to . . . the owner.”).

³ See e.g., *Albers v. Cty. of Los Angeles*, 62 Cal. 2d 250, 263–72 (1965).

⁴ *Barham v. S. Cal. Edison Co.*, 74 Cal. App. 4th 744, 751 (1999).

the burden ... that should be assumed by society.”⁵ Because “the cost of such damage can be better absorbed, and with infinitely less hardship, by the taxpayers as a whole than by the owners of the individual parcels damaged,” inverse liability serves as a buffer against the risks created by public works.⁶ In the same way that a governmental agency can socialize costs through taxes, a government-owned utility can socialize costs through rate increases.⁷ This “loss distribution premise” is the constitutional “underpinning [of] inverse condemnation damages.”⁸ Without it, the doctrine is inapplicable: It would impose “strict liability” on an entity that does not have the requisite right to spread inverse condemnation losses to the community. Countless decisions have reaffirmed that spreading and socializing losses throughout the community is the policy behind, intended effect of, and, most importantly, the constitutional justification for, permitting strict liability inverse condemnation claims.⁹

⁵ *Holtz*, 3 Cal. 3d 295, 303 (1970) (internal citations and quotation marks omitted).

⁶ *Albers*, 62 Cal. 2d at 263.

⁷ See, e.g., *Aetna Life & Casualty Co. v. City of Los Angeles*, 170 Cal. App. 3d 865, 875 (1985) (applying inverse liability to the City of Los Angeles and its Department of Water and Power).

⁸ *Gutierrez v. Cty. of San Bernardino*, 198 Cal. App. 4th 831, 837 (2011) (internal quotations omitted).

⁹ See, e.g., *Mercury Cas. Co. v. Pasadena*, 14 Cal. App. 5th 917, 925–26 (2017) (“The fundamental policy underlying the concept of inverse condemnation is that the costs of a public improvement benefitting the community should be spread

In *Barham v. Southern California Edison Company*,¹⁰ the California Court of Appeal permitted an inverse condemnation claim to proceed against SCE, even though it is a private utility. The Court expressly based its extension of inverse condemnation to SCE on the theory that the loss distribution premise would apply to private utilities just as it did to municipal utilities. *Barham* assumed that a private utility could raise rates the same way the government uses taxes — or government-owned utilities use their rates — to “spread among the benefiting community any burden disproportionately borne by a member of that community.”¹¹

In 2012, SCE challenged that assumption in *Pacific Bell v. Southern California Edison Company*. The challenge was unsuccessful, however, because the *Pacific Bell* court concluded that there was no evidence that the CPUC — the entity that decides what rates a private utility can charge — would ever prevent private utilities from socializing inverse condemnation losses by “pass[ing] on damages liability” to the public through a rate adjustment.¹²

among those benefited rather than allocated to a single member of the community.”); *Magnuson-Hoyt v. Cty. of Contra Costa*, 228 Cal. App. 3d 139, 144 (1991) (same).

¹⁰ 74 Cal. App. 4th 744 (1999).

¹¹ *Barham*, 74 Cal. App. 4th at 752.

¹² 208 Cal. App. 4th at 1407.

In 2015, SDG&E put *Pacific Bell's* assumption to the test: it applied to the CPUC for a rate recovery of costs arising out of the settlement of inverse condemnation losses claims associated with the 2007 Wildfires.¹³ But the CPUC rejected SDG&E's application. The CPUC stated that inverse condemnation was "not relevant" to its decision and instead applied its own administrative "prudent manager" standard. Under that standard, private utilities may only recover costs that were "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."¹⁴ And the CPUC found that SDG&E's inverse-condemnation losses "not relevant to [the CPUC's] review under the prudent manager standard."¹⁵ This requirement stands in stark contrast to municipal utilities, whose negligence or imprudence would not prevent them from socializing inverse losses through rate increases or tax increases (as municipal taxes and utility rates are not subject to review by the CPUC).¹⁶

As explained in SDG&E's petition, the CPUC's decision has now proven the critical assumption "underpinning" the judicially imposed extension of

¹³ *Application of San Diego Gas & Electric Company for Authorization to Recover Costs Related to the 2007 Southern California Wildfires Recorded in the Wildfire Expense Memorandum Account* (A.15-09-010), dated September 25, 2015, at p. 7.

¹⁴ App. 13a.

¹⁵ App. 75a.

¹⁶ *See Pac. Bell*, 208 Cal. App. 4th at 1407 n.6.

inverse condemnation liability to private utilities incorrect. The CPUC denied SDG&E the ability to spread its inverse losses through rate increases, thereby undercutting the foundational assumption that justified applying inverse condemnation to private utilities in *Barham* and *Pacific Bell*.

The present state of play is untenable: on the one hand, California courts have, through the application of a strict liability theory like inverse condemnation, dramatically expanded private utilities' exposure to claims of property loss and damage; on the other hand, the CPUC refuses to permit private utilities to socialize inverse condemnation losses through rate increases. Private utilities have thus been dragooned into the role of general insurers (and, in many cases, reinsurers) for California's natural disasters. This taking poses a serious danger to private utilities, particularly now that they are facing a landscape that portends ever more frequent and intense wildfires, for which they may be found liable even if they are completely without fault — i.e., even if the utility acted reasonably and with caution.

II. Frequent and Intense Year-Round Wildfires Are the “New Normal” in California, Compounding the Unconstitutional Impact of Inverse Liability without the Right to Recover Inverse Losses

Wildfires have caused billions of dollars of damage in recent years and, as California’s climate warms, the devastating wildfires that have plagued the state will only get bigger, more frequent, and more expensive. Under California’s inverse condemnation scheme, SCE and the other private utilities can never fully protect themselves from the billions of dollars of potential liability they may face through California’s new year-round fire season. Private utilities, even if they comply with every applicable statute, regulation, and standard of care, will be treated as the ultimate insurers of these potentially enormous losses. Inverse condemnation liability has already forced another private utility, PG&E, into bankruptcy in January 2019.¹⁷ It could force others to do the same.¹⁸

Wildfires have always burned in California. They are not inherently problematic — low-intensity

¹⁷ Mark Chediak & Kiel Porter, *PG&E Bankruptcy Looms, CEO to Exit as Fire Costs Dwarf Cash*, Bloomberg (Jan. 14, 2019), <https://www.bloomberg.com/news/articles/2019-01-14/pge-plans-bankruptcy-filing-as-california-wildfires-costsmount>.

¹⁸ Sammy Roth, *Edison CEO talks wildfires, climate change and the utilities vanishing monopoly*, L.A. Times (Mar. 13, 2019), <https://www.latimes.com/business/la-fi-southern-california-edison-sce-wildfires-climate-change-20190313-story.html> (“The reality is that with the potential scale we’ve all now learned

fires are essential to the well-being of California's forests and chaparral.¹⁹ Because of climate change and human land use management practices, however, California's wildfires are getting bigger, more frequent, and more intense.²⁰ California is getting hotter: by mid-century, average temperatures in the Los Angeles region could rise by 4.3°F,²¹ and in the San Diego region they could rise by 4.9°F.²² Rising

these fires can have — and with the current policy in the state that pins the liability on utilities — that has led to significant uncertainty about our ability to recover our costs from customers, even if we think we've been prudent. And therefore, if we have one or two or three other major events like this, yes, that could at some point exceed our balance sheet capacity.”).

¹⁹ CAL FIRE, *Benefits of Fire*, https://www.fire.ca.gov/communications/downloads/fact_sheets/TheBenefitsofFire.pdf

²⁰ See, e.g., John T. Abatzoglou & A. Park Williams, *Impact of Anthropogenic Climate Change on Wildfire Across Western US Forests*, 113-42 Proc. Nat'l Acad. Sci. (Oct. 2016) at 11770–75; Chelsea Harvey, *Here's What We Know About Wildfires and Climate Change*, Sci. Am. (Oct. 13, 2017), <https://www.scientificamerican.com/article/heres-what-we-know-about-wildfires-and-climate-change/>.

²¹ Inst. of the Env't & Sustainability, Univ. of Cal., Los Angeles, *Research Project: Climate Change in the Los Angeles Region*, <https://www.ioes.ucla.edu/project/climate-change-in-the-los-angeles-region>

²² County of San Diego, *Climate Action Plan*, Ch. 4-3 (2018), available at https://www.sandiegocounty.gov/content/sdc/pds/ceqa/Climate_Action_Plan_Public_Review.html.

temperatures suck the moisture out of plants, turning vegetation into a state-wide tinderbox.²³

Climbing temperatures have an exponential relationship with wildfires — every degree of warming increases the risk of wildfires more than the previous degree of warming did.²⁴ In 2017, for example, the western United States experienced record-breaking heat waves.²⁵ Despite drought-ending La Niña rains the prior winter, the exceptional summer heat scorched the vegetation to kindling in 2017, fueling some of the largest fires in state history.²⁶

Efforts to contain fires have been ineffective or even counterproductive.²⁷ Historically, California's wildfire management philosophy has prioritized emergency response over long-term forest health,

²³ Jeff Goodell, *California Is Burning Before Our Eyes*, Rolling Stone (July 31, 2018), <https://www.rollingstone.com/politics/politics-news/california-wildfires-705225>.

²⁴ Robinson Meyer, *Has Climate Change Intensified 2017's Western Wildfires?*, The Atlantic (Sep. 7, 2017), <https://www.theatlantic.com/science/archive/2017/09/why-is-2017-so-bad-for-wildfires-climate-change/539130/>.

²⁵ *Id.*

²⁶ Eleanor Cummins, *How the End of the Drought Likely Exacerbated the Deadly California Wildfires*, Slate (Oct. 10, 2017), http://www.slate.com/articles/health_and_science/science/2017/10/how_the_drought_fueled_california_s_wildfires.html

²⁷ Little Hoover Comm'n, *Fire on the Mountain: Rethinking Forest Management in the Sierra Nevada* (Feb. 2018) at 12–14.

leading to forests overgrown with fire-intolerant trees and a carpet of fuel on forest floors.²⁸ Moreover, as California's population grows, homes and businesses encroach into high-risk areas, making it more likely that fire will damage property and injure people.²⁹

Wildfires are expected to increase, not only in number,³⁰ but also in duration and intensity. The past several years have seen six of the most destructive wildfires in California history.³¹ In 2017, wildfires burned more than 505,000 acres in California.³² The fires used to be concentrated in the fall months, but are increasingly likely to take place year-round.³³ As

²⁸ *Id.* at 6.

²⁹ Michael L. Mann et al., *Modeling Residential Development in California from 2000 to 2050: Integrating Wildfire Risk, Wildland and Agricultural Encroachment*, 41 *Land Use Pol'y* 438 (Nov. 2014) at 438–52.

³⁰ According to CAL FIRE, California agencies responded to 4,785 fires in 2016 and 7,117 fires in 2017. CAL FIRE, *Incident Information: Number of Fires and Acres*, CA.gov, (Jan. 24, 2018), http://cdfdata.fire.ca.gov/incidents/incidents_stats?year=2017 (including all wildfires responded to by CAL FIRE in both the State and Local Responsibility Areas as well as all large wildfires in the State Responsibility Area protected by CAL FIRE's contract counties).

³¹ Cal. Dep't of Forestry & Fire Prot., *Top 20 Most Destructive California Wildfires*, CA.gov (May 16, 2019), http://www.fire.ca.gov/communications/downloads/fact_sheets/Top20_Destruction.pdf

³² *Id.*

³³ Melissa Palmer & Elizabeth Espinosa, "We Don't Even Call It Fire Season Anymore . . . It's Year Round": *Cal Fire*, KTLA (Dec. 11, 2017), <http://ktla.com/2017/12/11/we-dont-even-call-it-fire-season-anymore-its-year-round-cal-fire/>.

former California Governor Jerry Brown declared, catastrophic wildfires have become the “new normal” in California.³⁴

Although the consequences for this “new normal” should be shared by all Californians, the CPUC has forced private utilities to bear outsized financial exposure that results from California’s changing climate. SCE faces massive liability from two recent wildfires: the Thomas Fire and the Woolsey Fire. The Thomas Fire, which ignited in December 2017, was the largest wildfire in California history when it occurred.³⁵ Emblematic of the increasing severity of California’s wildfires, the Mendocino Complex Fire in Northern California broke the record just six months later.³⁶ Estimates attribute nearly \$2 billion in damage to the Thomas Fire.³⁷ The Woolsey Fire ignited in November 2018.

³⁴ Vives et al., *Southern California’s Fire Devastation Is “the New Normal,” Gov. Brown Says*, L.A. Times (Dec. 10, 2017), <http://www.latimes.com/local/lanow/la-me-socal-fires-20171210-story.html>.

³⁵ Dakin Andone, *The largest wildfire in California’s modern history is finally out, more than 6 months after it started*, CNN (June 2, 2018), <https://www.cnn.com/2018/06/02/us/thomas-fire-officially-out/index.html>

³⁶ Joseph Serna, James Queally, and Alene Tchekmedyan, *Mendocino Complex Fire now largest in California history, capping destructive year*, L.A. Times (Aug. 06, 2018) <https://www.latimes.com/local/lanow/la-me-ln-california-wildfires-danger-level-20180806-story.html>.

³⁷ Annette Ding, *Charting the Financial Damage of the Thomas Fire*, The Bottom Line, University of California, Santa Barbara (Apr. 10, 2018) <https://thebottomline.as.ucsb.edu/2018/04/charting-the->

Though it burned fewer acres than the Thomas Fire, it caused more damage. One estimate puts losses from the Woolsey Fire at \$4 billion to \$6 billion.³⁸

SCE is committed to mitigating the impact of wildfires and is uniquely positioned to do so, particularly in respect to fires started by electrical equipment. However, under California's inverse condemnation scheme, SCE and other private utilities will be held to be the financial backstops for many of the devastating wildfires to come, preventing investment in efficient and clean energy, and causing significant setbacks to California's environmental objectives.

The magnitude of losses from the recent wildfires is unprecedented and will only be exacerbated as the climate changes. The factors contributing to this "new normal" are varied and many. But under California's inverse condemnation scheme, private utilities and their shareholders are expected to shoulder all the risk – even when the utilities acted with due care. This effectively transforms utilities into general insurers or reinsurers for all public harm stemming

financial-damage-of-the-thomas-fire; *see also* California Department of Insurance, *Insured Losses from the 2018 Mudslide and the 2017 & 2018 Wildfires* (Sep. 6, 2018) (estimating insurance claims related to the Thomas Fire at more than \$2 billion).

³⁸ *The Camp and Woolsey Wildfires in California Cause Devastating Losses Between \$15 Billion and \$19 Billion According to CoreLogic*, CoreLogic (Nov. 27, 2018) <https://www.corelogic.com/news/the-camp-and-woolsey-wildfires-in-california-cause-devastating-losses-between-15-billion-and-19-billion-according-to-corelogic.aspx>.

from wildfires. The arrangement is inefficient and inequitable. It is inefficient because, although private utilities can promote public policy, they cannot on their own stop temperatures from rising or compel changes in policy or practice to mitigate human factors that contribute to the “new normal” in California. It is inequitable because private utilities are saddled with all the damages even when wildfires are the product of multiple factors, only one of which may, in some cases, be the operation of utility equipment.

III. Judicial Expansion of Inverse Condemnation to Private Utilities Without the Right to Socialize Costs Harms Utilities

Even before the CPUC ruled that SDG&E could not recover inverse losses through a rate increase, participants in capital markets had become keenly aware that this inverse condemnation scheme exposes private utilities to billions of dollars in unrecoverable losses regardless of whether they acted

negligently.³⁹ For example, until October 6, 2017, the Friday before the North Bay wildfires began, PG&E's stock was trading at approximately \$70 per share. But from October 9, 2017 through December 29, 2017, PG&E's stock price tumbled to approximately \$45. This 35 percent drop represented billions of dollars in contraction in PG&E's market capitalization. The stock price for SCE's parent company, Edison, followed a similar path once the Thomas Fire broke out in December 2017. Whereas Edison's stock had previously been trading at about \$80 on December 4, 2017, the day the Thomas Fire broke out, news of the fire caused its stock price to fall by more than 14 percent two days later, representing billions in reduction in its market capitalization. Indeed, a major Wall Street firm declared that California's private utilities are "uninvestable," in part because they are exposed to inverse condemnation losses and face cost-recovery peril due to their inability to socialize

³⁹ See J.P. Morgan, *North America Equity Research: Edison International*, dated January 11, 2018 at 1 (noting that California's inverse condemnation law significantly increases the risk of operating a utility in the state); Evercore ISI, *CPUC Rejects Recovery of SDG&E Wildfire Costs; PCG's Financial Risk Related to Inverse Condemnation Remains*, dated December 1, 2017 at 2 (identifying California's inverse condemnation law as a factor in PG&E's stock price fluctuations); Deutsche Bank, *Market Research: Earnings No Match for Wildfire Talk*, dated November 13, 2017, at 1 ("The call included plenty of discussion of the question of California's inverse condemnation doctrine for utilities which has been a subject of intense scrutiny of late among utility investors.").

inverse losses through a rate increase.⁴⁰ Because private utility stocks (such as those of SCE’s parent company, Edison International) are listed on national exchanges, the effects of California’s inverse condemnation scheme are felt throughout the country by investors who participate in those markets.

These dramatic reductions in PG&E’s and Edison’s stock prices — which impact their ability to raise capital in the equity markets needed to fund necessary electrical infrastructure — occurred before any fault has been determined. Likewise, citing the uncertainty and risk created by inverse condemnation liability as applied to private utilities, the ratings agencies have downgraded SDG&E and also Edison and SCE.⁴¹ Citing the “disconnect between the [CPUC]’s prudence standard . . . and the courts['] strict liability standard,” Standard and Poor’s

⁴⁰ Mike Yamato, *Market Notes Tuesday December 12, 2017*, Investitute (Dec. 12, 2017), <https://investitute.com/activity-news/market-notes-tuesday-december-12-2017/>.

⁴¹ Moody’s Investors Service, *Rating Action: Moody’s Changes Edison International and Southern California Edison’s Rating Outlooks to Negative* (Apr. 11, 2018), https://m.moody.com/Research.html?docid=PR_380780 (“SCE’s credit profile is weighed down by the potentially large contingent exposure created by the application of [a] strict liability standard in California in the case of wildfires where utility equipment was determined to be the source of the fire.”); *see also* Moody’s Investors Service, *Rating Action: Moody’s Changes San Diego Gas & Electric’s Rating Outlook to Negative from Stable* (Apr. 11, 2018), https://www.moody.com/research/Moodys-Changes-San-Diego-Gas-Electrics-Rating-Outlook-to-Negative--PR_380749 (“The increasing inverse condemnation risk exposure has caused us to reassess our view of the credit supportiveness of the regulatory environment in California.”).

indicated that continued exposure to wildfire losses, recoverable from private utilities via inverse condemnation damages, “could result in a deterioration of credit quality and lower credit ratings for all of the California regulated electric utilities.”⁴² Such credit downgrades have a serious impact on access to capital. The market’s response reflects concern that — even if private utilities were not at fault for causing the fires — they could still be liable for unrecoverable losses under inverse condemnation principles without the certainty of spreading those losses to all customers on whose behalf the electric system is operated.

As the CPUC has noted, “[r]easonable financial health is necessary so that each utility may serve reliable, safe and adequate electricity at just and reasonable rates.”⁴³ After all, adequate capital is essential for utilities to operate, modernize, and expand their electrical transmission and distribution facilities. Such efforts benefit the public in real and immeasurable ways.⁴⁴

Relatedly, California’s inverse condemnation scheme has impacted insurance costs for some

⁴² S&P Global Ratings, *Will Wildfires Scorch California’s Utilities?*, dated June 18, 2018 at 3, 4.

⁴³ Interim Opinion Modifying Decision 01-03-082 to Change Restriction on Use of Surcharge Revenues, D.02-11-026 at § 3.

⁴⁴ The CPUC has also acknowledged that a key factor in the financial health of public utilities is creditworthiness, since a lack of access to credit significantly impedes the utilities’ ability to procure and supply electricity at reasonable cost. *Id.* at § 3.1.1.

utilities. As the CPUC recently explained, private utilities in California are beginning to have difficulty “obtain[ing] insurance to . . . cover the risk of fire both to their infrastructure and from their infrastructure.”⁴⁵ This is because carriers are increasingly reluctant to underwrite wildfire risk given climate change, expansion of developments in the urban-wildland interface, and the increased destructiveness of California wildfires. These issues are compounded by the CPUC’s decision not to let private utilities recover potentially enormous inverse losses. In this environment, wildfire liability insurance coverage has begun to contract, become more expensive, and may in the future become unavailable at times for certain utilities.

⁴⁵ Wednesday, Feb. 7, 2018 Commissioner Informational Webinar on Impacts of Climate Change and Resulting Resiliency, at 48:25-40, <http://www.adminmonitor.com/ca/cpuc/other/20180207/>.

CONCLUSION

Amicus curiae respectfully requests that this Court grant SDG&E's Petition for a Writ of Certiorari.

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