BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

Application of San Diego Gas & Electric Company (U902E) for Authorization to Recover Costs Related to the 2007 Southern California Wildfires Recorded in the Wildfire Expense Memorandum Account (WEMA)	Application 15-09-010 (Filed September 25, 2015)

PACIFIC GAS AND ELECTRIC COMPANY'S (U39E) AND SOUTHERN CALIFORNIA EDISON COMPANY'S (U338E) APPLICATION FOR REHEARING OF DECISION 17-11-033 AND REQUEST FOR EXPEDITED ACTION

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I. INTRODUCTION

When a California court rules, as a matter of constitutional law, that an investor-owned utility is subject to inverse condemnation liability, it does so in order to "spread among the benefiting community any burden disproportionately borne by a member of that community, to establish a public undertaking for the benefit of all."[1] Specifically, the court shifts liability from the affected individual to the utility expecting the utility to "raise rates" and thereby "pass on damages liability" to ratepayers.[2] Pacific Gas and Electric Company ("PG&E") and Southern California Edison ("SCE") have strongly objected to, and continue strongly to object to, expanding this "loss-spreading rationale" to non-governmental entities.[3] But where, as in the case of the San Diego Gas & Electric Company ("SDG&E") 2007 Wildfire Litigation, a court has interpreted the California constitution to impose inverse condemnation liability on an

[1] *Barham v. So. Cal. Edison Co.* (1999) 74 Cal.App.4th 744, 752.

[2] *Pac. Bell v. So. Cal. Edison Co.* (2012) 208 Cal.App.4th 1400, 1407 ("*Pac. Bell*").

[3] PG&E and SCE reserve all rights to oppose the application of inverse condemnation, and nothing in this Application can or should be construed to limit such rights. PG&E intends to renew its challenge to the application of inverse condemnation in the Butte Fire case, based on the Commission's decision in this proceeding. SCE intends to do the same in other wildfire cases.

investor-owned utility, the court's ruling amounts to a constitutional determination that the just and reasonable way to handle the costs resulting from an event such as a wildfire is to "socialize" those costs among ratepayers. In such a case, this Commission must carry out that constitutional directive by allowing the utility to "pass on damages liability" and spread these costs via a rate adjustment.

In Decision 17-11-033 ("Decision"), the Commission thus erred as a matter of law in concluding that "Inverse Condemnation principles [were] not relevant" to its application of Public Utilities Code § 451 in this case.[4] Such principles *should not* be relevant because courts should not permit inverse condemnation claims against investor-owned utilities.[5] But, as in this case, once a court has permitted such a claim, "Inverse Condemnation principles" are not only relevant but dispositive because the Commission must "harmonize" its ratemaking jurisdiction with the constitutional ruling that the damages should be spread across the community as a whole.[6] In this Application for rehearing under Public Utilities Code § 1731 and Rule 16.1, PG&E and SCE respectfully urge the Commission to reconsider the Decision as an expedited action and permit SDG&E to socialize the costs of inverse liability.

II. STANDARD OF REVIEW

Under Public Utilities Code § 1757(a), the Commission commits legal error where: (1) it acts without, or in excess of, its powers or jurisdiction; (2) it has not proceeded in the manner

[4] Decision at 65.

[5] PG&E and SCE agree with Commission President Picker and Commissioner Guzman Aceves who, in a concurring opinion, "respectfully urge[d] the California Courts of Appeal to carefully consider the rationale for applying inverse condemnation to these types of cases." Concurrence of President and Commissioner Michael Picker and Commissioner Martha Guzman Aceves ("Concurrence") 1, 6-7.

[6] See *California Housing Finance Agency v. Elliott* (1976) 17 Cal.3d 575, 594 ("[W]herever possible, we will interpret a statute as consistent with applicable constitutional provisions, seeking to harmonize Constitution and statute.").

required by law; (3) the decision is not supported by the findings; (4) the findings are not supported by substantial evidence; (5) the decision was an abuse of discretion; or (6) the decision violates any right of the petitioner under the Constitution of the United States or the California Constitution.

III. ARGUMENT

A. Background of Inverse Condemnation

The California Constitution, like the U.S. Constitution, requires the government to pay fair compensation when it takes private property for a public purpose.[7] In addition, based on the California Constitution's requirement that compensation be paid where property is "taken *or damaged* for public use,"[8] California courts developed a body of decisions applying this rule not merely to traditional takings, but also instances in which the government, in furtherance of some public purpose, damages private property: a so-called "inverse condemnation."[9] "[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 the burden … that should be assumed by society."[10] 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 kind of social security against the risks created by public works.[11] In the same way that a governmental agency can socialize costs

[7] 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.").

[8] *Ibid* (italics added).

[9] E.g., *Albers v. County of Los Angeles* (1965) 62 Cal.2d 250.

[10] *Holtz v. Superior Court* (1970) 3 Cal.3d 296, 303 (internal citations and quotations omitted).

[11] *Albers*, *supra*, 62 Cal.2d at p. 263.

through taxes, a government-owned utility can socialize costs through rates.[12] This "'loss distribution' premise" is the constitutional "underpinning [of] inverse condemnation damages."[13]

Because of this premise, inverse condemnation does not *punish* a culpable *wrongdoer*, but rather makes whole an individual whose losses flowed from the operation of a public improvement.[14] An inverse condemnation claim is thus unusual in that rather than requiring the defendant to have done some private wrong, it requires the defendant to have undertaken a public good: "the presence or absence of fault by the public entity ordinarily is irrelevant."[15] The inverse condemnation framework is thus built around no-fault, compensatory mechanisms that operate quite differently from an ordinary negligence claim. For example, the governmental entity may be held strictly liable, irrespective of whether it behaved reasonably.[16] Moreover, the plaintiff whose property was injured may be made whole regardless of "whether such damage is foreseeable or not,"[17] and regardless of the plaintiff's own negligence.[18] And the plaintiff may recover prejudgment interest, attorney's fees, and other costs.[19] All this can extend well beyond negligence liability, and a plaintiff can pursue an inverse condemnation claim even where the claim ordinarily would sound in negligence instead.[20]

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[12] *Aetna Life & Casualty Co. v. City of Los Angeles* (1985) 170 Cal.App.3d 865, 875.

[13] *Gutierrez v. County of San Bernardino* (2011) 198 Cal.App.4th 831, 485 (quoting *Holtz*).

[14] *Pac. Bell v. City of San Diego* (2000) 81 Cal.App.4th 596, 602.

[15] *Ibid*.

[16] *Pac. Bell, supra*, 208 Cal.App.4th at pp. 1408-1411 (explaining that an exception to this rule exists only in the flood-control context).

[17] *Albers*, *supra*, 62 Cal.2d at p. 262.

[18] *Ibid*.

[19] *Customer Co. v. City of Sacramento* (1995) 10 Cal.4th 368, 390.

[20] *Barham, supra*, 74 Cal.App.4th at pp. 751, 755.

In a handful of cases, the first being *Barham* in 1999, some California courts have permitted inverse condemnation claims to proceed not just against publicly owned (*i.e.*, governmental) utilities but also against investor-owned utilities such as SCE, PG&E, and SDG&E. As they must—since it is the constitutional "underpinning" of the doctrine—these courts have expressly based their expansion of inverse condemnation on the theory that the "'loss distribution' premise" applies even to private utilities. *Barham* reasoned that these utilities could use rates the same way the government uses taxes (or publicly owned utilities use their rates) to "spread among the benefiting community any burden disproportionately borne by a member of that community."[21] PG&E and SCE have argued, and continue to argue, that private utilities are so different from governmental public utilities that the loss-spreading rationale does not apply. But some courts have, as in *Barham*, rejected those arguments.

In rejecting the distinction between governmental entities and investor-owned utilities, two courts have based their decision on the belief that the PUC would not prevent private utilities from socializing the private third-party harm by "pass[ing] on damages liability" to the publicly benefited community via a rate adjustment.[22] Put otherwise, these courts have said that imposition of inverse condemnation liability rests upon the premise that the utilities will be able to spread (and recover) these costs via rates.[23]

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[21] *Id.* at p. 752.

[22] *Pac. Bell, supra*, 208 Cal.App.4th at p. 1407; accord June 22, 2017 Ruling on Submitted Matter: Inverse Condemnation Motions, Butte Fire Cases, Case No: JCCP 4853, Superior Court of California for the County of Sacramento, *available at* https://bloximages.chicago2.vip.townnews.com/calaverasenterprise.com/content/tncms/assets/v3/editorial/e/cd/ecd78c9c-57bd-11e7-b75e-3bdfd51bbf85/594c80b29f9cc.pdf.pdf.

[23] *Ibid.*

B. Because the Court Applied Inverse Condemnation to SDG&E, the Commission Legally Erred by Applying the Prudent Manager Standard and Deeming Inverse Condemnation Principles "Not Relevant"

Over SDG&E's demurrer and unsuccessful petitions to the Court of Appeal and California Supreme Court, the Superior Court permitted the plaintiffs in the 2007 Wildfire Litigation to proceed with inverse condemnation claims against SDG&E.[24] By placing SDG&E within the no-fault framework ordinarily applicable to governmental entities, the Superior Court followed *Barham*'s holding that an investor-owned utility (1) has the power to "spread [the plaintiff's losses] among the … community" via a rate adjustment and (2) is therefore subject to the constitutionally based principle of inverse condemnation.[25] The Commission must implement that constitutional policy in applying the "just and reasonable" standard of § 451. Thus, the Commission legally erred in concluding that "Inverse Condemnations principles" were "not relevant to a Commission reasonableness review" in this case.[26]

As previously noted, SCE and PG&E strongly disagree with decisions such as *Barham* and *Pac. Bell*, as well as the trial court orders against SDG&E in this case and PG&E in the Butte Fire case, that impose inverse condemnation liability on investor-owned utilities. SCE and PG&E agree with Commissioner Rechtschaffen's view that "the doctrine of inverse condemnation as it's been developed by the courts and applied to public utilities may be worth re-examining" in the context of investor-owned utilities because "the courts applying the cases to public utilities have done so without really grappling with the salient difference between public and private utilities, which is that there's no guaranty that private utilities can recover the cost

[24] See Application at 3; *In re 2007 Wildfire Litigation*, January 29, 2009 Minute Orders Overruling SDG&E's Demurrers to the Master Complaints.

[25] *Barham, supra*, 74 Cal.App.4th at p. 752.

[26] See Decision at 65.

from their rate payers."[27] Commission President Picker and Commissioner Guzman Aceves, for the same reason, have "respectfully urge[d] the California Courts of Appeal to carefully consider the rationale for applying inverse condemnation to these types of cases."[28] But in this case—as in *Barham* and *Pac. Bell*—the Superior Court rejected that distinction and concluded that SDG&E would as a matter of course "recover the cost from [its] rate payers."

In order to "harmonize" its authority under § 451 with the Superior Court's application of Article I, § 19 of the California Constitution,[29] the Commission was required to implement the Constitution's "loss-spreading rationale" and allow the SDG&E to "pass on damages liability" via a rate adjustment.[30] By not allowing SDG&E "to distribute throughout the community the loss" and "socialize the burden,"[31] the Commission thwarted the "[t]he fundamental policy underlying the concept of inverse condemnation"[32] and contravened the reasoning "underpinning" the Superior Court's decision to allow "inverse condemnation damages" to be sought against SDG&E.[33] The Decision thus creates a direct, and unnecessary, conflict between § 451 and Article I, § 19.

Under § 451, the Commission must approve rate increases that are "just and reasonable." In discharging that obligation, the Commission has developed the "prudent manger" standard. But that standard is inappropriate when assessing whether costs arising from inverse

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[27] CPUC Hearing, *available at* http://adminmonitor.com/ca/cpuc/voting_meeting/ (Nov. 30, 2017) at 21:34-22:00.

[28] Concurrence at 6-7.

[29] *California Housing Finance Agency*, 17 Cal.3d at p. 594.

[30] *Pac. Bell, supra*, 208 Cal.App.4th at p. 1407.

[31] *Holtz, supra*, 3 Cal.3d at p. 303.

[32] *Pac. Bell v. San Diego*, 81 Cal.App.4th at p. 602.

[33] *Gutierrez, supra*, 198 Cal.App.4th at p. 485.

condemnation damages are "just and reasonable." As explained above, the legal standard for inverse condemnation severs any connection between culpability and damages: "the presence or absence of fault … is irrelevant,"[34] as is "whether such damage is foreseeable or not,"[35] as is whether the "defendant's acts, conduct and omissions resulting in an alleged dangerous condition of public property [were] reasonable."[36] "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."[37] Put otherwise, the whole point of the inverse condemnation framework is to replace concepts of individual responsibility and negligence with a shared "socialization" of the costs that flow from the operation of a facility that benefits the public.

Thus, when a court permits inverse condemnation liability against an investor-owned utility, that court has made the determination based on the California Constitution's public policies that the losses should be spread among the benefited community as a whole. That determination is sufficient to establish that any rate increase designed to spread such costs is "just and reasonable" as a matter of law. When this Commission concluded otherwise in the Decision, it created a direct conflict between § 451 (as interpreted by the Commission) and Article I, § 19 (as interpreted by the Superior Court). Rather than allowing the "loss-spreading"

[34] *Pac. Bell v. San Diego, supra*, 81 Cal.App.4th at p. 602.

[35] *Albers*, *supra*, 62 Cal.2d at p. 262.

[36] *Ingram v. City of Redondo Beach* (1975) 45 Cal.App.3d 628, 633 fn. 4 (internal citation and quotes omitted).

[37] *Pac. Bell v. San Diego*, 81 Cal.App.4th at p. 602.

envisaged by the Superior Court, the Commission imposed the extraordinary losses on "a single member of the community": SDG&E. This was legal error, and it warrants rehearing.[38]

C. Denial of Inverse Loss-Spreading Is Not a Necessary Deterrent

When a court permits no-fault liability against an investor-owned utility on the theory that it is a public entity that "socializes" the costs of its operation, the court has made a constitutional judgment that such liability functions not as a deterrent for wrongful or unreasonable behavior, but simply as a "loss-spreading" mechanism.[39] As explained above, the Commission's § 451 review of the utilities resulting rate adjustment must implement that "fundamental policy." Doing so would not incentivize utilities to ignore safety risks.

Even where a court has ruled that losses should be spread among the community, a utility will remain liable for penalties to the extent it violates Commission rules.[40] Because "[t]he amount of a fine imposed pursuant to Pub. Util. Code § 2107 must be proportional to the severity

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[38] That SDG&E settled does not change the analysis. Once the Superior Court allowed the inverse condemnation claim to proceed, further litigation would have increased fees, costs, and interest. Waiting for a final "Superior Court determination that [the utility] was in fact strictly liable for the costs requested in its application" would have entailed enormous financial risk. (Decision at 65.)

Indeed, FERC determined that "SDG&E's conduct was rational and prudent" because, "[b]y settling, SDG&E avoided facing considerable litigation risk and disposed of the claims for significantly less than the amount demanded by plaintiffs." (*San Diego Gas & Elec. Co.* (2014) 146 FERC ¶ 63,017, PP 61-62.)

Moreover, because the Assigned Commissioner and Administrative Law Judge's Scoping Memo precluded SDG&E from demonstrating that its settlement was a prudent way of addressing inverse condemnation liability until Phase 2, the Commission must assume for purposes of the Decision that the settlement was reasonable based on the claim of inverse damages.

[39] See *ante* pp. 3-5.

[40] Pub. Util. Code, § 2107.

of the offense,"[41] such a fine will provide appropriate deterrence. In contrast and by design, inverse condemnation damages are disconnected from (potentially much greater than) the foreseeable damages resulting from a defendant's negligence. Thus, such damages may be disproportionate to any imprudent management by the utility. For the Commission to deny cost recovery (and loss spreading) through a rate adjustment would not merely conflict with the court's decision to permit an inverse condemnation claim, it would also result in the wrong level of deterrence.

IV. CONCLUSION AND REQUEST FOR EXPEDITED ACTION

Where, as against SDG&E, a court permits inverse liability against an investor-owned utility, the Commission must implement the "'loss-distribution' premise" underlying that liability and permit a rate-adjustment to recover the inverse costs. By treating that principle as "not relevant" to the Decision, the Commission committed legal error, and for that reason the Commission should grant rehearing.

PG&E and SCE respectfully request that the Commission act expeditiously in granting or denying this Application. Any determination by the Commission that inverse condemnation principles are "not relevant" to rate-setting—such that an investor-owned utility cannot necessarily socialize inverse losses—would be relevant not only to this case but to other pending and impending wildfire cases. Indeed, the current Decision directly contradicts the key assumption on which courts have been permitting inverse condemnation claims against investor-owned utilities, namely that such utilities can recover inverse costs as a matter of course. PG&E and SCE respectfully ask for expedited action so that they can promptly provide courts, such as

[41] D.14-08-033, at 18.

the court handling the Butte Fire case, with Commission's Decision regarding the applicability of inverse condemnation.

Respectfully submitted on behalf of Joint Parties,

/s/ William V. Manheim

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CERTIFICATE OF SERVICE

I, the undersigned, state that I am a citizen of the United States and am employed in the City and County of San Francisco; that I am over the age of eighteen (18) years and not a party to the within cause; and that my business address is Pacific Gas and Electric Company, Law Department B30A, 77 Beale Street, San Francisco, California 94105.

On January 2, 2018, I served a true copy of:

PACIFIC GAS AND ELECTRIC COMPANY'S (U39E) AND SOUTHERN CALIFORNIA EDISON COMPANY'S (U338E) APPLICATION FOR REHEARING OF DECISION 17-11-033 AND REQUEST FOR EXPEDITED ACTION

[XX] By Electronic Mail – serving the enclosed via e-mail transmission to each of the parties listed on the official service list for A.15-09-010 with an e-mail address.

[XX] By U.S. Mail – by placing the enclosed for collection and mailing, in the course of ordinary business practice, with other correspondence of Pacific Gas and Electric Company, enclosed in a sealed envelope, with postage fully prepaid, addressed to those parties listed on the official service list for A.15-09-010 and without an e-mail address.

[XX] By Courier – serving the above document, via courier, to the following:

Administrative Law Judge Sasha Goldberg
California Public Utilities Commission
505 Van Ness Avenue, 5th Floor
San Francisco, CA 94102

Administrative Law Judge S. Pat Tsen
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I certify and declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on January 2, 2018 at San Francisco, California.

/s/ Amy S. Yu
Amy S. Yu

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