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15

16 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
17 **COUNTY OF SACRAMENTO**

18 *Coordination Proceeding Special Title*
19 *(CRC 3.550)*
20
21 BUTTE FIRE CASES
22
23

Case No. JCCP 4853
**PACIFIC GAS & ELECTRIC
COMPANY'S NOTICE OF MOTION
AND RENEWED MOTION FOR A
LEGAL DETERMINATION
OF INVERSE CONDEMNATION
LIABILITY PURSUANT TO C.C.P.
§ 1260.040; MEMORANDUM OF
POINTS AND AUTHORITIES**
*[Declaration of Jeffrey N. Boozell filed
concurrently herewith]*
DATE: TBD
TIME: TBD
DEPT.: 42
JUDGE: Hon. Allen H. Sumner

28


1 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD

2 PLEASE TAKE NOTICE that on _____, at _____ a.m., or as soon thereafter
3 as the matter may be heard in Department 42 of the above-entitled court, located at 720 9th Street,
4 Sacramento, California, Defendant Pacific Gas and Electric Company (“PG&E”) will renew its
5 motion for an order dismissing Plaintiffs’ claims for inverse condemnation pursuant to California
6 Civil Procedure Code Section 1260.040.

7 This Motion is based on this Notice of Motion and Motion; the attached Memorandum of
8 Points and Authorities; the concurrently filed Declaration of Jeffrey N. Boozell; all other pleadings
9 and papers on file in this action; such matters of which the Court may properly take judicial notice;
10 and such other evidence as may be presented in accordance with the briefing schedule set by the
11 Court.

12
13 DATED: January 4, 2018

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14
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Daniel R. Mandelker, *Inverse Condemnation: The Constitutional Limits of Public Responsibility*, 1966 Wis. L. Rev. 3 8

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **PRELIMINARY STATEMENT**

3 Pursuant to California Civil Procedure Code Section 1008(b), Defendant Pacific Gas and
4 Electric Company (“PG&E”) respectfully submits this renewed motion for a legal determination of
5 inverse condemnation liability pursuant to California Civil Procedure Code Section 1260.040 on the
6 ground that new facts have materialized since the Court’s ruling on the previous motion.¹ PG&E
7 also respectfully asks that the Court also reconsider and deny Plaintiffs’ cross-motion for a legal
8 determination that PG&E is liable for inverse condemnation.

9 The California Supreme Court has stated that “the underlying purpose of [the California]
10 constitutional provision in inverse . . . is to distribute throughout the community the loss inflicted
11 upon the individual.” *Belair v. Riverside Cnty. Flood Control Dist.*, 47 Cal. 3d 550, 558 (1988)
12 (internal quotation marks omitted). Thus, the intent of the doctrine of inverse condemnation is “that
13 the costs of a public improvement benefitting the community should be spread among those
14 benefitted rather than allocated to a single member of the community.” *Pac. Bell v. City of San*
15 *Diego*, 81 Cal. App. 4th 596, 602 (2000). On June 22, 2017, the Court concluded that the doctrine
16 of inverse condemnation applies to PG&E with respect to the Butte Fire. The Court rejected
17 PG&E’s argument that inverse condemnation is not properly applied to a private utility such as
18 PG&E because, unlike a public utility, PG&E lacks the power unilaterally to spread the costs of
19 inverse condemnation across the benefitted public. The Court relied on two intermediate court
20 decisions that found that private utilities could be held liable for inverse condemnation because, in
21 the view of those courts, there is no salient difference between a public utility (which can
22 automatically pass on inverse damages to the public) and a private utility (which cannot). Critically,
23 this Court held that PG&E had failed to put forth any evidence to support its contention that the
24 California Public Utilities Commission (“CPUC”)—the regulatory agency charged with reviewing

25
26
27 ¹ The Court correctly found that Defendant PG&E Corporation is not liable for inverse
28 condemnation. Defendant PG&E is filing this renewed motion only with respect to the Court’s
ruling that PG&E is liable for inverse condemnation.

1 find that Defendants cannot be liable for inverse condemnation for damages to real and personal
2 property arising from the Butte Fire, including because PG&E is owned privately, not by the
3 government. Dkt. 3798. On May 16, 2017, Plaintiffs filed a cross-motion for a determination that
4 Defendants are liable for inverse condemnation. Dkt. 3838. On June 22, 2017, the Court resolved
5 those motions by ruling that PG&E, but not PG&E Corporation, is liable for inverse condemnation.
6 Dkt. 3987 at 22.

7 **STATEMENT OF FACTS**

8 Beginning on October 21, 2007, several wildfires spread throughout portions of Southern
9 California. Declaration of Jeffrey N. Boozell (“Boozell Decl.”) Ex. G at 2. After the fires, the
10 California Department of Forestry and Fire Protection and the CPUC’s Consumer Protection and
11 Safety Division attributed the ignition of three of these fires (the “2007 Wildfires”) to SDG&E
12 facilities. *Id.* SDG&E established a Wildfire Expense Memorandum Account (“WEMA”) to track
13 costs associated with the three fires.³ *Id.* at 3. The WEMA account grew to \$2.4 billion in costs
14 and legal fees incurred by SDG&E to resolve third-party damage claims arising from the 2007
15 Wildfires. These costs arose primarily from the application of inverse condemnation against
16 SDG&E, for which the Superior Court held SDG&E could be liable. *Id.* at 65.

17 In September 2015, SDG&E applied to the CPUC to recover, through rates, \$379 million in
18 unreimbursed WEMA costs that SDG&E paid due to inverse condemnation.⁴ Boozell Decl. Ex. A.
19 On August 22, 2017, after this Court issued its ruling on inverse condemnation liability against
20 PG&E concerning the Butte Fire, CPUC Administrative Law Judges (“ALJs”) issued a proposed
21 decision (the “PD”) denying SDG&E’s application to recover these costs. Boozell Decl. Ex. B.⁵

22
23
24 _____
25 ³ A WEMA is a tracking mechanism used by a regulated utility to segregate costs that it may
later seek to recover through rates in an application to the CPUC.

26 ⁴ SDG&E did not seek recovery of the full \$2.4 billion in the WEMA because portions were
27 recovered from insurance, third parties and FERC rates, and SDG&E agreed to a voluntary
contribution of 10% of the unreimbursed balance. (*Id.* at 3 n.2.)

28 ⁵ The Court may take judicial notice of official acts and statements of state agencies. Cal. Evid.
Code § 452(c); *Pratt v. Coast Trucking*, 228 Cal. App. 2d 139, 143 (1964).

1 The ALJs concluded that SDG&E did not reasonably manage and operate its facilities, and therefore
2 was not authorized to recover costs from the 2007 Wildfires through its rates. *Id.* at 55-57.

3 SDG&E filed comments on the PD on September 11, 2017 and September 18, 2017. Boozell
4 Decl. Ex. G at 8-9. On September 11, 2017, PG&E and Southern California Edison (“SCE”) moved
5 for party status in the SDG&E proceeding to provide comments on the PD to the CPUC. Boozell
6 Decl. Exs. C & D. The CPUC granted PG&E’s and SCE’s motions, giving them limited party status
7 to provide comments on the issue of inverse condemnation. Boozell Decl. Exs. E & F. PG&E and
8 SCE filed joint comments on inverse condemnation on October 4, 2017, and SDG&E and other
9 parties filed replies to the joint comments on October 11, 2017. Boozell Decl. Ex. G at 9. SDG&E,
10 PG&E, and SCE argued that the PD committed legal error by failing to address inverse
11 condemnation, and that under inverse condemnation principles, SDG&E had been deemed strictly
12 liable for the costs sought in its application. *Id.* at 64. Because inverse losses are imposed by the
13 courts based on the assumption that such losses can be spread among all rate-payers that benefit
14 from the electrical system, the parties argued that the CPUC had to permit SDG&E to spread those
15 losses across its customer base in the form of increased rates, subject only to a potential review of
16 the reasonableness of SDG&E settlements. *Id.* The ALJs subsequently revised the PD to, among
17 other things, address inverse condemnation. *Id.* at 64-65.

18 On November 30, 2017, the CPUC adopted the revised PD and issued a final decision
19 denying in full SDG&E’s application for the recovery of costs related to the 2007 Wildfires. *See*
20 *generally id.*⁶ The CPUC purported to apply its administratively created “prudent manager”
21 standard, under which it examines whether costs incurred are “reasonable,” to deny cost recovery
22 to SDG&E. *Id.* at 9-11. In doing so, the CPUC announced for the first time that the inverse
23 condemnation principles of cost-spreading are irrelevant to rate setting because the CPUC has
24 exclusive jurisdiction over cost recovery:

25 Inverse Condemnation principles are not relevant to a Commission reasonableness
26 review under the prudent manager standard. . . . Even if SDG&E were strictly

27 ⁶ On January 2, 2018, SDG&E applied for rehearing of the CPUC decision. PG&E and SCE
28 jointly filed a separate application for rehearing. If the CPUC does not act within 60 days, the
applications will be deemed denied. Cal. Pub. Util. Code § 1733(a).

1 liable, we see nothing in the cited case law that would supersede this Commission’s
2 exclusive jurisdiction over cost recovery/cost allocation issues involving
Commission regulated utilities.

3 *Id.* at 65. Concurrently with issuing the SDG&E decision, the CPUC Commissioners held a hearing
4 in which they clearly affirmed the CPUC’s policy stance but recognized that courts should revisit
5 the application of inverse condemnation to private utilities that, unlike public utilities, cannot
6 automatically spread those costs. Indeed, Commissioner Rechtschaffen stated:

7 [I]t is worth noting that the doctrine of inverse condemnation, as its been developed
8 by the courts and applied to public utilities, may be worth re-examining in a sense
9 that the courts applying the cases to public utilities have done so *without really*
10 *grappling with the salient difference between public and private utilities, which*
11 *is that there’s no guaranty that private utilities can recover the cost from their*
12 *ratepayers*, so this is an issue that the legislature and the courts may wish to
13 examine and may be called on to examine in the future.

14 But having said that, it doesn’t change *our* obligation to rule that the utility can’t
15 recover unless they acted prudently, so, I’ll be supporting the decision, and thank
16 you again for your work on this.

17 Boozell Decl. Ex. I at 08:41-09:29 (first emphasis added); *see also* Boozell Decl. Ex. J at 4. Other
18 Commissioners agreed. For example, Commissioner Peterman remarked: “I also appreciate the
19 revisions to the proposed decision, clarifying that the legal doctrine of inverse condemnation does
20 not displace the Commission’s reasonableness review of whether SDG&E was a prudent manager
21 in this case.” Boozell Decl. Ex. I at 06:23-06:39; *see also* Boozell Decl. Ex. J at 3.

22 On December 26, 2017, President and Commissioner Picker and Commissioner Guzman
23 Aceves filed a joint concurrence. Boozell Decl. Ex. H. These Commissioners directly urged the
24 courts to reconsider the rationale for applying inverse condemnation to privately owned utilities,
25 specifically because “the logic for applying inverse condemnation to utilities—costs will necessarily
26 be socialized across a large group rather than borne by a single injured property owner, regardless
27 of prudence on the part of the utility—is unsound.” *Id.* at 1, 5.⁷

28 ⁷ The Commissioners also stated that “the application of inverse condemnation to utilities in all
events of private property loss [fails] to recognize important distinctions between public and private
utilities and that the financial pressure on utilities from the application of inverse condemnation may
lead to higher rates” resulting from “increase[s] in the cost of capital and the expense associated
with insurance.” *Id.* at 6.

1 **STANDARD OF DECISION**

2 “A party who originally made an application for an order which was refused in whole or part
3 . . . may make a subsequent application for the same order upon new or different facts,
4 circumstances, or law.” Cal. Civ. Proc. Code § 1008(b). “[S]ubdivision (b) [of Section 1008]
5 applies to renewals based upon ‘new’ facts and imposes no time limitations on such motions.”
6 *Graham v. Hansen*, 128 Cal. App. 3d 965, 971 (1982). “Whether . . . ‘new’ facts alleged on a motion
7 for renewal are sufficient to satisfy the requirements of section 1008, subdivision (b), is a question
8 confided to the sound discretion of the trial court.” *Id.*

9 **ARGUMENT**

10 **I. RENEWAL OF PG&E’S MOTION IS PROPER**

11 Renewal of PG&E’s motion for a legal determination of inverse condemnation liability is
12 appropriate given the new fact now available for the Court’s consideration—the CPUC’s
13 determination that the cost-spreading rationale for inverse condemnation liability has no bearing on
14 whether a utility can pass on such costs. This new fact is material to the Court’s previous ruling and
15 warrants renewal of PG&E’s motion.⁸ See *Chen v. L.A. Truck Ctrs., LLC*, 7 Cal. App. 5th 757, 768-
16 69 (2017) (requiring reconsideration of choice of law ruling after out-of-state defendant settled);
17 *Hollister v. Benzl*, 71 Cal. App. 4th 582, 585 (1999) (production of new documents required
18 reconsideration of order compelling arbitration).

19 In its previous motion, PG&E argued, among other things, that “the cost-spreading rationales
20 upon which inverse liability are premised do not apply to PG&E, which—unlike the governmental
21 public utilities—has no unilateral ability to spread costs.” Dkt. 3798 at 11-12. In denying that
22 motion, the Court found that PG&E was lacking “evidence supporting its implication the PUC
23 would not allow it adjustments to pass on damage liability during its periodic reviews.” Dkt. 3987
24 at 20. But, as made clear by the recent CPUC decision, the CPUC has declared it is not bound by
25 the doctrine of inverse condemnation and will not automatically allow regulated investor-owned
26

27 ⁸ The PD denying SDG&E’s application was issued on August 22, 2017, two months after this
28 Court ruled on the parties’ competing inverse motions, and the final decision was not issued until
November 30, 2017.

1 utilities to spread the costs of inverse condemnation claims. The CPUC’s newly declared policy is
2 exactly the evidence that did not exist at the time and that the Court found lacking in its previous
3 decision.

4 PG&E also submits that if this Court grants PG&E’s renewed motion and finds PG&E not
5 liable for inverse condemnation, the Court should also reconsider and reverse its ruling on Plaintiffs’
6 cross-motion pursuant to California Civil Procedure Code Section 1008(c) to avoid conflicting
7 rulings on the same issue.⁹

8 **II. IN LIGHT OF THE CPUC’S POLICY, APPLICATION OF INVERSE**
9 **CONDEMNATION TO PG&E IS INCONSISTENT WITH STATE LAW**

10 Under California law, a defendant must be a “public entity” to be subject to inverse
11 condemnation. *See, e.g., Barham v. S. Cal. Edison Co.*, 74 Cal. App. 4th 744, 752-53 (1999). As
12 PG&E previously submitted, the California Supreme Court has never held that a private utility such
13 as PG&E is a public entity for the purposes of inverse condemnation. Dkt. 3798 at 11. As it is now
14 apparent that the CPUC’s policy restricts the ability of private utilities to spread inverse
15 condemnation costs among its rate payers, PG&E should not be treated as a public entity for
16 purposes of inverse condemnation. This new fact was not present in the prior Court of Appeal
17 decisions previously relied upon by this Court, thereby rendering those decisions both non-binding
18 and incorrect. Moreover, because applying inverse in light of this new fact would violate both the
19 California and United States Constitutions, doctrines of constitutional avoidance now compel the
20 conclusion that inverse is inapplicable to private utilities such as PG&E.

21 *First*, as described above, the core purpose of inverse condemnation is “that the costs of a
22 public improvement benefitting the community should be spread among those benefitted rather than
23 allocated to a single member of the community.” *San Diego*, 81 Cal. App. 4th at 602 (citing *Belair*,
24 47 Cal. 3d at 558); *see Holtz v. Superior Court*, 3 Cal. 3d 296, 303 (1970) (noting fundamental

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26 ⁹ The time limit imposed pursuant to C.C.P. § 1008(a) does not limit the court’s authority to act
27 on its own motion under § 1008(c). *See Le Francois v. Goel*, 35 Cal. 4th 1094, 1104-05, 1108
28 (2005) (“If a court believes one of its prior interim orders was erroneous, it should be able to correct
that error no matter how it came to acquire that belief.”); *Magallanes v. Superior Court*, 167 Cal.
App. 3d 878, 881-82 (1985).

1 policy is to distribute losses throughout the community and to “socialize the burden”) (internal
2 quotations omitted); *see also* Dkt. 3987 at 13.¹⁰ That is why inverse condemnation liability is
3 imposed without fault: Losses caused by a public improvement are “capable of more equitable
4 absorption by the beneficiaries of the project (ordinarily either taxpayers or consumers of service
5 paid for by fees or charges) than by the injured owner.” *McMahan’s of Santa Monica v. City of*
6 *Santa Monica*, 146 Cal. App. 3d 683, 697 (1983) (internal quotation marks omitted). The policy
7 underlying inverse condemnation does not permit merely shifting losses from one private party to
8 another under strict liability.

9 True public utilities are generally immune from tort liability and have the taxing authority
10 to spread costs. As a result, the doctrine of inverse condemnation has been developed to ensure that
11 citizens who suffer loss as a result of a public improvement constructed by a public entity have a
12 means of redress that results in the spreading of all such losses. Private utilities, on the other hand,
13 do not have tort immunity, do not have taxing authority, and cannot automatically spread costs as
14 their rates are subject to CPUC approval. *See Moreland Inv. Co. v. Superior Court*, 106 Cal. App.
15 3d 1017, 1022 (1980) (holding private utility is not governmental agency under California Civil
16 Procedure Code Section 397 in part because it cannot directly pass on eminent domain costs to rate
17 payers).

18 Prior to this Court’s decision, only two Court of Appeal decisions (and no Supreme Court
19 decision) had extended inverse condemnation to a private utility such as PG&E where there was not
20 joint action with a public entity: *Barham*, 74 Cal. App. 4th 744, and *Pacific Bell Telephone Co. v.*
21 *Southern California Edison Co.*, 208 Cal. App. 4th 1400 (2012). This Court relied on these cases
22

23 ¹⁰ *See also Mercury Cas. Co. v. City of Pasadena*, 14 Cal. App. 5th 917, 925-26 (2017) (“The
24 fundamental policy underlying the concept of inverse condemnation is that the costs of a public
25 improvement benefitting the community should be spread among those benefited rather than
26 allocated to a single member of the community.”) (internal quotation marks omitted); *Barham*, 74
27 Cal. App. 4th at 752 (same); *Magnuson-Hoyt v. Cnty. of Contra Costa*, 228 Cal. App. 3d 139, 144
28 (1991) (same); Arlo Van Alstyne, *Statutory Modification of Inverse Condemnation: The Scope of*
Legislative Power, 19 Stan. L. Rev. 727, 738 (1967) (explaining that the purpose of inverse is to
ensure that losses are “distributed over the taxpayers at large rather than be borne by the injured
individual.”); Daniel R. Mandelker, *Inverse Condemnation: The Constitutional Limits of Public*
Responsibility, 1966 Wis. L. Rev. 3, 8 (same).

1 as precedent. But the CPUC policy set forth in the SDG&E decision is a new fact that undermines
2 the validity of those decisions and dictates departure from those rulings in the instant case. *See, e.g.,*
3 *People v. Linkenauger*, 32 Cal. App. 4th 1603, 1613 (1995); *cf. Montandon v. Triangle Publ'ns,*
4 *Inc.*, 45 Cal. App. 3d 938, 950-52 (1975) (declining to follow Supreme Court precedent because
5 Supreme Court had not considered facts present in pending case). Indeed, as the CPUC
6 acknowledged, those prior rulings extended inverse condemnation to private utilities “*without really*
7 *grappling with the salient difference between public and private utilities, which is that there’s no*
8 *guaranty that private utilities can recover the cost from their ratepayers.*” Boozell Decl. Ex. I at
9 08:41-09:29 (emphasis added); *see also* Boozell Decl. Ex. J at 4.

10 For example, the court in *Barham* simply asserted that no “significant differences exist
11 regarding the operation of publicly versus privately owned utilities,” and did not discuss the key
12 fact present here, that—unlike public entities—private utilities cannot spread inverse losses across
13 the community. 74 Cal. App. 4th at 752-53.¹¹ Likewise, the court in *Pacific Bell* found that inverse
14 condemnation applied to Southern California Edison (“SCE”), a private utility, in light of SCE’s
15 “quasi-monopolistic” authority. 208 Cal. App. 4th at 1404-08. But in doing so, the court did not
16 consider whether SCE could in fact spread losses to the community because “[SCE] ha[d] not
17 pointed to any evidence to support its implication that the [CPUC] would not allow [SCE]
18 adjustments to pass on damages liability during its periodic reviews.” *Id.* at 1407.

19 Such evidence now exists. The CPUC has explained that even if a utility is held strictly
20 liable in inverse condemnation on the rationale that it can spread those costs throughout the
21 community, the CPUC will not automatically permit the utility to spread those costs. This
22 incompatibility between inverse condemnation and CPUC policy now compels the conclusion

23
24 ¹¹ The *Barham* court relied on a completely unrelated decision about whether private utilities
25 were bound by the equal protection clause when making employment decisions. *See* 74 Cal. App.
26 4th at 753 (citing *Gay Law Students Ass’n v. Pac. Tel. & Tel. Co.*, 24 Cal. 3d 458, 469-70 (1979)).
27 But quasi-public entities can be deemed public entities in certain contexts and not others, and
28 whether a court has held that a utility is bound by the equal protection clause has no bearing on
whether a private utility is subject to inverse condemnation. For example, in contrast with *Barham*,
the Court of Appeal stated in *Pasillas v. Agricultural Labor Relations Board*, 156 Cal. App. 3d 312
(1984), that private entities can take state action sufficient to trigger equal protection guarantees but
not sufficient to trigger free speech and associational guarantees. *Id.* at 348.

1 that the prior Court of Appeal decisions applying inverse condemnation to private utilities are
2 inconsistent with the fundamental purpose of inverse condemnation, as recognized by the
3 Commissioners. *See* Boozell Decl. Ex. I at 08:41-09:29 (“[T]his is an issue that the legislature and
4 the courts may wish to examine and may be called on to examine in the future.”); Boozell Decl. Ex.
5 J at 4; *see also* Boozell Decl. Ex. H at 6-7 (same).)

6 *Second*, as explained in Part III below, the CPUC’s declaration that inverse condemnation is
7 irrelevant to its rate-making process establishes that the application of inverse to private utilities
8 violates the California and U.S. Constitutions. It is well-established that state law, including the
9 state constitution, should be construed so as not to violate the federal constitution wherever possible.
10 *See, e.g., People v. Castro*, 38 Cal. 3d 301, 330-31 (1985) (Bird, C.J., concurring and dissenting)
11 (court must interpret section of California constitution “to avoid conflict with the due process clause
12 of the Fourteenth Amendment”); *Olson v. Cory*, 134 Cal. App. 3d 85, 99-100 (1982) (invalidating
13 state constitutional amendment that violated federal constitution).

14 For these reasons, PG&E respectfully requests that this Court address the “salient
15 difference” between privately owned utilities such as PG&E and public entities—namely, privately
16 owned utilities’ inability to unilaterally and automatically recover inverse condemnation costs—and
17 reconsider its ruling.

18 **III. IN LIGHT OF THE CPUC’S POLICY, APPLICATION OF INVERSE**
19 **CONDEMNATION TO PG&E IS UNCONSTITUTIONAL**

20 The application of inverse condemnation to PG&E in light of the new CPUC policy
21 declaration would also violate PG&E’s constitutional rights. Assuming, *arguendo*, that inverse
22 condemnation serves a legitimate government purpose, the combination of inverse condemnation
23 and the CPUC’s refusal to allow automatic pass-through of inverse condemnation costs exacts an
24 uncompensated taking of PG&E’s property in violation of the Takings Clause of the Fifth
25 Amendment of the United States Constitution as incorporated against the States through the
26 Fourteenth Amendment and Article I, Section 19 of the California Constitution. Alternatively, the
27 application of inverse condemnation to PG&E is arbitrary and irrational and therefore also violates
28

1 PG&E’s substantive due process rights under the California Constitution and the Fourteenth
2 Amendment of the United States Constitution.

3 **A. Application of Inverse Condemnation to PG&E Violates the Takings Clause of**
4 **the Fifth Amendment**

5 The Takings Clause of the Fifth Amendment provides: “[N]or shall private property be
6 taken for public use, without just compensation.” U.S. Const. amend. V. The Supreme Court has
7 explained that this clause “prevent[s] the government ‘from forcing some people alone to bear the
8 public burdens which, in all fairness and justice, should be borne by the public as a whole.’” *E.*
9 *Enters. v. Apfel*, 524 U.S. 498, 522 (1998) (plurality opinion) (quoting *Armstrong v. United States*,
10 364 U.S. 40, 49 (1960)). Article I, Section 19 of the California Constitution provides: “Private
11 property may be taken or damaged for public use only when just compensation” had been paid.

12 Because the CPUC can deny and has denied private utilities the ability to spread inverse
13 losses, the application of inverse to a privately owned utility such as PG&E is nothing more than a
14 taking of private property from one private party (PG&E) to give it to another (the inverse plaintiff)
15 without any just compensation. As explained above, the purpose of inverse is to spread the losses
16 sustained by one class of people that have been harmed by a public improvement to all who benefit
17 from that improvement. That is the whole point behind the strict liability scheme. When applied to
18 a public utility, which can spread costs simply by increasing its rates with no requirement for
19 regulatory approval, there is no uncompensated taking: All rate payers bear the costs of the strict
20 liability regime that has been developed for their common good. By contrast, given the CPUC’s
21 policy of denying automatic rate recovery by a private utility, the application of strict liability under
22 inverse condemnation would “forc[e PG&E] alone to bear the public burdens” of inverse losses that
23 were meant to be “borne by the public as a whole.” *See E. Enters.*, 524 U.S. at 522. That
24 uncompensated taking for public use is unconstitutional.

25 *First*, inverse condemnation will force a considerable financial burden on PG&E. PG&E’s
26 liability under inverse, though yet to be determined, will be substantial, and PG&E is “clearly
27 deprived of the amounts it must pay” to the injured landowners. *See id.* at 529-32 (finding taking
28 occurred where Coal Act required plaintiff to make considerable payments and where, although

1 indemnification was possible, it was not guaranteed); *cf. Duquesne Light Co. v. Barasch*, 488 U.S.
2 299, 307-08 (1989) (“[T]he Constitution protects utilities from being limited to a charge for their
3 property serving the public which is so ‘unjust’ as to be confiscatory.”); *Ponderosa Tel. Co. v. Pub.*
4 *Utils. Comm’n*, 197 Cal. App. 4th 48, 59 (2011) (holding that CPUC had engaged in impermissible
5 appropriation by failing to permit rate increase).

6 *Second*, the CPUC’s recent policy statements indicate that the inverse condemnation
7 doctrine interferes with PG&E’s reasonable investment-backed expectations. *E. Enters.*, 524 U.S.
8 at 524-25, 532. As a privately owned entity, PG&E does not expect, on the one hand, to be held
9 strictly liable by courts for inverse condemnation costs, but unable, on the other hand, to recover the
10 very same costs through its rates. Further, as noted in the CPUC Concurrence, “[i]nvestor owned
11 utilities are partially dependent on the capital markets to raise money and the insurance market to
12 mitigate financial risk.” Boozell Decl. Ex. H at 6. Prior to the CPUC’s recent policy statements,
13 the investment-backed expectation of the capital markets was aligned with PG&E’s expectations
14 that it would not be subjected to strict liability but also precluded from cost spreading. Now, the
15 taking of PG&E’s property without just compensation through the application of inverse could
16 change “the risk profile of investor-owned utilities,” *id.*, and thereby increase PG&E’s cost of
17 obtaining the capital that it needs to continue to provide its customers with safe and reliable energy
18 service.

19 *Third*, application of inverse condemnation to PG&E does not “adjust[] the benefits and
20 burdens of economic life to promote the common good.” *See Lingle v. Chevron U.S.A. Inc.*, 544
21 U.S. 528, 539 (2005). Under inverse condemnation, PG&E has to pay landowners for damage to
22 their property caused (without fault) by PG&E’s power lines. The CPUC policy now burdens PG&E
23 without promoting the common good. PG&E—and not the rate payers who benefit from power
24 lines—alone will bear the costs.

25 **B. Application of Inverse Condemnation Liability to PG&E Violates PG&E’s**
26 **Substantive Due Process Rights**

27 The Fourteenth Amendment protects against government deprivations of life, liberty, or
28 property that are arbitrary and irrational. *See State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S.

1 408, 416-18 (2003) (“The Due Process Clause of the Fourteenth Amendment prohibits the
2 imposition of grossly excessive or arbitrary punishments on a tortfeasor.”); *Action Apartment Ass’n*
3 *v. Santa Monica Rent Control Bd.*, 509 F.3d 1020, 1025 (9th Cir. 2007); *Sinaloa Lake Owners Ass’n*
4 *v. City of Simi Valley*, 864 F.2d 1475, 1484-87 (9th Cir. 1989) (government action violates
5 substantive due process if it is “clearly arbitrary and unreasonable, **having no substantial relation**
6 to the public health, safety, morals, or general welfare”) (emphasis added).¹²

7 As a threshold matter, inverse condemnation liability plainly deprives PG&E of its property,
8 as PG&E is required to pay money damages. *Cf. Bd. of Regents v. Roth*, 408 U.S. 564, 571-72
9 (1972) (property interests protected by due process extend beyond ownership of real estate, property
10 and chattels). Contrary to the typical eminent domain or inverse condemnation case, PG&E is not
11 actually entitled to retain the “condemned” property, and thus receives no benefit in exchange for
12 compensating the landowner. The only question, therefore, is whether this deprivation is arbitrary
13 and irrational. *Action Apartment*, 509 F.3d at 1025-26. It is for at least two reasons.

14 *First*, taking PG&E’s property without a showing of fault and without rate recovery is not
15 “substantially related” to the stated cost-spreading justification for inverse condemnation. *Cf.*
16 *Sinaloa Lake*, 864 F.2d at 1484-87. As explained above in Part II, under the CPUC’s policy, PG&E
17 cannot spread its costs without satisfying the CPUC’s “prudent manager” standard through an extra-
18 judicial administrative proceeding. It is arbitrary and irrational for a court, on one hand, to hold
19 PG&E strictly liable for inverse condemnation on the theory that it can recover such costs and for
20 the CPUC, on the other, to require PG&E to meet an administratively created standard to recover
21 the same.

22 *Second*, inverse condemnation is irrational as applied to PG&E. Government entities are
23 protected by sovereign immunity and California’s Tort Claims Act, California Government Code
24 Sections 810 *et seq.* Inverse condemnation therefore allows private property owners an opportunity
25 to recover damages from government entities in circumstances where otherwise no remedy may be
26 available. PG&E, however, is a private corporation and is subject to general tort liability. Therefore,

27 _____
28 ¹² The Superior Court’s ruling on inverse condemnation constitutes state action. *See Shelley v. Kraemer*, 334 U.S. 1, 14-18 (1948); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 265 (1964) (same).

1 private individuals do not need inverse condemnation to recover for harm allegedly caused by
2 PG&E. *See* Cal. Civ. Code § 3333.

3 **CONCLUSION**

4 For the foregoing reasons, PG&E respectfully requests that the Court find that PG&E is not
5 liable for inverse condemnation.

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