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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SACRAMENTO

Coordination Proceeding Special Title (CRC 3.550) BUTTE FIRE CASES	Case No. JCCP 4853 **PACIFIC GAS AND ELECTRIC COMPANY'S REPLY IN SUPPORT OF ITS RENEWED MOTION FOR A LEGAL DETERMINATION OF INVERSE CONDEMNATION LIABILITY PURSUANT TO C.C.P. § 1260.040** [*Reply Declaration of Jeffrey N. Boozell filed concurrently herewith*] DATE: April 26, 2018 TIME: 10:00 a.m. DEPT.: 42 JUDGE: Hon. Allen H. Sumner

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PRELIMINARY STATEMENT

Plaintiffs' opposition fails to address the central question posed by PG&E's Renewed Motion: Should the Court revisit its June 22, 2017 ruling that PG&E is liable for inverse condemnation given that the CPUC's November 30, 2017 decision has now held, contrary to the Court of Appeal decisions on which this Court's ruling rests, that inverse condemnation liability is *not relevant* to cost recovery? For all the reasons set forth in PG&E's motion, the answer to that question is "yes."

Plaintiffs devote pages to arguing that the CPUC's policy statement was not "new fact" or "new law" warranting renewal, but that is incorrect. No prior CPUC statement ever held inverse condemnation liability irrelevant to cost recovery. The CPUC's decision now for the first time disproves the assumption in *Barham v. Southern California Edison Co.*, 74 Cal. App. 4th 744 (1999), and *Pacific Bell Telephone Co. v. Southern California Edison Co.*, 208 Cal. App. 4th 1400 (2012), that privately owned utilities, like publicly owned utilities, may spread the costs of inverse condemnation among their customers, a change in circumstance that renders those decisions non-binding on this Court. The novelty of the CPUC's ruling is underscored by the reaction of industry, investors, and members of the Legislature, who view the ruling as creating a potential "crisis" for investor-owned utilities and for the State.

Plaintiffs' remaining arguments attack this Court's jurisdiction and the ripeness of the CPUC's decision for "review." These arguments, however, are straw men: PG&E is *not* asking the Court to review the CPUC's decision. Rather, PG&E respectfully requests that the Court revisit its own June 22, 2017 Ruling in light of the CPUC's recent decision and find that PG&E is not liable under inverse condemnation.

ARGUMENT

I. THE CPUC'S DECISION IS "NEW FACT" AND "NEW LAW" RENDERING BARHAM AND PACIFIC BELL NON-BINDING AND MERITING RENEWAL OF PG&E'S MOTION

Plaintiffs fail in their efforts to argue that the CPUC decision is not "new fact" or "new law" allowing PG&E to renew its prior motion that PG&E is not liable in inverse condemnation. Plaintiffs argue that the "agency practice" of reviewing costs for reasonableness is well

established. Opposition (Dkt. 7301) at 9-13. But that misses the point: While there is nothing new about courts imposing strict liability for inverse condemnation or the CPUC conducting a reasonableness review, the CPUC has now announced *for the first time* that inverse condemnation is *not relevant* to the CPUC's cost recovery process:

> Inverse Condemnation principles are not relevant to a Commission reasonableness review under the prudent manager standard. . . . Even if SDG&E were strictly liable, we see nothing in the cited case law that would supersede this Commission's exclusive jurisdiction over cost recovery/cost allocation issues involving Commission regulated utilities.

See Boozell Decl. (Dkt. 6649) Ex. G at 65. This brand-new CPUC policy disproves the very cost-spreading rationale underlying the imposition of inverse condemnation liability in the first place. Until the CPUC officially adopted this decision on November 30, 2017, PG&E and other investor-owned utilities reasonably expected that inverse condemnation's cost-spreading rationale would be a critical part of the CPUC's review of costs incurred due to inverse condemnation liability. Instead, the CPUC simply dismissed inverse condemnation as "not relevant." *Id.* This is undeniably new fact and new law.[1]

Contemporaneous and subsequent comments by the CPUC underscore that this newly articulated CPUC policy changes the judicial landscape and that the CPUC expects the courts to address the consequences of its decision. At the November 30, 2017 meeting, Commissioner Rechtschaffen stated:

> [I]t is worth noting that the doctrine of inverse condemnation, as its been developed by the courts and applied to public utilities, may be worth re-examining in a sense that 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 from their ratepayers, so this is an issue that the legislature and the courts may wish to examine and may be called on to examine in the future.

[1] Plaintiffs' extended discussion of the CPUC's San Bruno decision and prior WEBA decision attempts to prove that PG&E (and other investor-owned utilities) knew the "procedure [the CPUC] follows and the burden it imposes in rate cases." Dkt. 7301 at 11. That the CPUC has to date required a utility to demonstrate that its costs are reasonable and prudent, however, does not mean that the CPUC has directly disavowed the underpinnings of the judicial doctrine of inverse condemnation, as it did for the first time in its November 30, 2017 decision.

Boozell Decl. Ex. K at 21:29-22:08. President and Commissioner Picker, in recent remarks before the California State Assembly Standing Committee on Utilities and Energy, similarly noted that the CPUC is "concerned that the application of inverse condemnation to utilities [by the courts] in all events of private property loss would fail to recognize important distinctions between public and private utilities." Declaration of Jeffrey N. Boozell in Support of PG&E's Reply Ex. L at 1:04:02-1:04:14.[2] There can thus be no serious question that the CPUC's November 30, 2017 decision represents a fundamental departure from California appellate courts' previous assumption that a privately owned utility may freely spread any costs imposed by inverse condemnation law, destroying the factual foundations of those decisions.

Plaintiffs nonetheless assert that *Barham* and *Pacific Bell* remain controlling absent a "change in the law" recognized by a Court of Appeal or the Supreme Court. But Plaintiffs simply ignore PG&E's authorities (*see* Dkt. 6648 at 9) showing that those decisions are now "fairly distinguishable" and therefore no longer binding on this Court. *See People v. Linkenauger*, 32 Cal. App. 4th 1603, 1613 (1995); *Montandon v. Triangle Publ'ns, Inc.*, 45 Cal. App. 3d 938, 950-52 (1975) (declining to follow Supreme Court precedent because Supreme Court had not considered facts present in pending case). As explained in PG&E's motion (Dkt. 6648 at 7-10), both *Barham* and *Pacific Bell* relied upon the judicial assumption that private utilities would be able to spread the costs of inverse condemnation among their ratepayers. That assumption remained untested until the CPUC unequivocally rejected it in the CPUC's November 30, 2017 decision. This case, unlike *Barham* and *Pacific Bell*, arises under the CPUC's new regulatory policy. This Court thus must now "grappl[e] with the salient difference between public and private utilities, which is that there's

[2] The Court may properly take judicial notice of Exhibit L pursuant to California Evidence Code Section 452(c) as an administrative record of the California State Assembly and of the comments made by President and Commissioner Picker at this legislative hearing as an official act of the CPUC. *See* Cal. Evid. Code § 452(c) (authorizing California courts to take judicial notice of "[o]fficial acts of the legislative, executive, and judicial departments of the United States and of any state of the United States"); *see also Marocco v. Ford Motor Co.*, 7 Cal. App. 3d 84, 88 (1970) ("Defendant's objection that the court could not take judicial notice of any part of the records of a Congressional hearing was properly overruled.").

no guaranty that private utilities can recover the cost from their ratepayers." Dkt. 6648 at 9 (quoting Boozell Decl. Ex. I).[3]

Further, unlike the court in *Barham*, this Court can no longer assume as a factual matter that no "significant differences exist regarding the operation of publicly versus privately owned utilities." Dkt. 6648 at 9 (quoting *Barham*, 74 Cal. App. 4th at 752-53). While the court noted in *Pacific Bell*, 208 Cal. App. 4th at 1407, that the privately owned utility there had failed to "point[] to any evidence to support its implication that the [CPUC] would not allow [the utility] adjustments to pass on damages liability during its periodic reviews," the CPUC decision provides just such evidence. The CPUC has now made clear that the strict liability standard for inverse condemnation and its underlying cost-spreading rationale have no bearing on whether privately owned utilities may pass on inverse condemnation damages to their customers. That ruling directly conflicts with the rationale underlying the courts' imposition of inverse condemnation liability, which had long simply assumed the utilities' ability to pass through such costs. Accordingly, neither *Barham* nor *Pacific Bell* is binding, and the Court should reconsider and reverse its own prior decision in this litigation.

II. PLAINTIFFS' MISCELLANEOUS JURISDICTIONAL AND PROCEDURAL ARGUMENTS AGAINST RENEWAL ARE UNAVAILING

Plaintiffs mischaracterize the nature of PG&E's Renewed Motion to manufacture several attacks to this Court's jurisdiction, arguing (*see* Dkt. 7301 at 1-5) that "this Court simply has no

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[3] Plaintiffs also focus on *Barham*'s reliance on the California Supreme Court's opinion in *Gay Law Students Association v. Pacific Telephone and Telegraph Co.*, 24 Cal. 3d 458 (1979), asserting that the "[t]he economic benefit of a state sanctioned monopoly . . . . justifies the imposition of inverse condemnation on an Investor Owned Utility such as PG&E." Dkt. 7301 at 13-14. As explained at length in PG&E's moving papers and in PG&E's reply in support of its original motion, *see* Dkt. 3928 at 7-8; Dkt. 6648 at 9 n.11, *Gay Law Students* held that a privately owned utility was equivalent to a public entity only in the narrow context of an equal protection challenge based on employment discrimination. 24 Cal. 3d at 469, 472, 474. In that context, the grant of a monopoly or quasi-monopoly by the state is a relevant consideration, as it excludes competitors from whom parties discriminated against might otherwise seek employment and means that the public cannot avoid indirectly supporting the discriminatory practices of a monopolistic utility. *Id.* at 470-71. To the extent that reasoning ever translated to privately owned utilities in inverse condemnation cases, the CPUC's decision now distinguishes between privately and publicly owned utilities for purposes of imposing inverse condemnation liability.

subject matter jurisdiction to inquire into the lawfulness of the CPUC's 'Order Denying Application.'" *Id.* at 4. PG&E agrees, but asks for no such review here. As is clear from PG&E's moving papers, PG&E is *not* asking the Court to review the CPUC's decision or to find it legally infirm. *See generally* Dkt. 6648. Rather, PG&E is asking the Court to reverse *its own* prior Ruling finding PG&E liable for inverse condemnation on the grounds that continued imposition of such liability on privately owned utilities such as PG&E is no longer justified or constitutional in light of the CPUC's recent decision. *See id.* at 6-12. Accordingly, Plaintiffs' challenges to the Court's jurisdiction, *see* Dkt. 7301 at 1-4, and PG&E's failure to petition the Court of Appeal pursuant to California Public Utilities Code Section 1756, *see id.* at 4-5, are specious.

A. The Court's Prior Ruling Is Ripe for Review

Plaintiffs again misconstrue PG&E's Renewed Motion by insisting that the CPUC's decision is not "final." *See* Dkt. 7301 at 7-9. Plaintiffs note that the parties to the CPUC decision have requested rehearing and, until the CPUC decides that request, "the ripeness doctrine forecloses this Court's review of the" CPUC's decision. *See id.*

Again, PG&E does not seek review of the *CPUC*'s decision, but rather of *this Court*'s prior ruling. And there is no need for the Court to await a "more final" decision from the CPUC before renewing consideration of its own ruling. This Court held that PG&E had failed to introduce any evidence to show that the CPUC would not allow it to pass through inverse condemnation liability to its customers:

> The court also rejects PG&E's argument the cost-sharing policy underlying inverse condemnation does not apply because it lacks the power to spread the cost of condemnation across the benefitted public.
>
> . . .
>
> The court [in *Pacific Bell*, 208 Cal. App. 1400,] . . . noted [the utility] had not pointed to any evidence supporting its implication the [C]PUC would not allow it adjustments to pass on damage liability during its periodic reviews. . . .
>
> Such evidence is similarly lacking here.

See Ruling (Dkt. 3987) at 17. The CPUC decision now supplies just such evidence.

In any event, by its own terms, the CPUC's decision was final and went into effect November 30, 2017. Boozell Decl. Ex. G at 73 ("This order is effective today."). The CPUC's decision announced the CPUC's new policy that "Inverse Condemnation principles are not relevant to a Commission reasonableness review," *id.* at 65, a policy reaffirmed by the CPUC unanimously adopting the decision. *See supra* Part I.

In light of that policy announcement, the Court should not impose any inverse condemnation liability on PG&E unless and until the CPUC's decision on SDG&E's cost recovery is overturned on rehearing, writ review, or appeal.[4] These are issues of utmost importance to the instant litigation given that the specter of inverse condemnation liability has concrete effects on all aspects of these cases, including the parties' leverage at mediations and the size of the settlements reached. Given the importance of these issues, and the CPUC's disproof of the assumption underlying the extension of inverse condemnation liability to privately owned utilities, the Court should act without delay.

Plaintiffs' cases are inapposite. *Pacific Legal Foundation v. California Coastal Commission*, 33 Cal. 3d 158 (1982), involved "an attempt to obtain review of the propriety of administrative regulations prior to their application to the party challenging them." *Id.* at 171. Again, PG&E is not challenging the CPUC's decision, but rather asking the Court to reconsider its own ruling. With respect to Plaintiffs' remaining cases, contrary to Plaintiffs' assertion (*see* Dkt. 7301 at 8), this is not a situation involving "concurrent judicial and administrative proceedings" in which the Court risks intruding upon issues within the CPUC's sole jurisdiction or the Court and the CPUC risk reaching inconsistent decisions. The Court thus need not delay in resolving the motion to renew.

[4] To the extent Plaintiffs suggest that PG&E's Renewed Motion is not ripe until any appeals concerning the CPUC's decision have been exhausted, *see* Dkt. 7301 at 7 (noting that "SDG&E, PG&E, and SCE have threatened to appeal any adverse ruling by the CPUC to the proper court"), that position is untenable. Exhaustion of appeals to the Court of Appeal and the Supreme Court could take years, perhaps even longer than the parties anticipate it will take to resolve this litigation.

B. The CPUC's Decision Is Not "Advisory"

Plaintiffs similarly err in asserting (Dkt. 7301 at 5) that the CPUC's decision was "at best a kind of advisory opinion or *dictum*."[5] To the contrary, and as explained at length in PG&E's motion, *see* Dkt. 6648 at 4-7, the CPUC's decision changed the landscape regarding the application of inverse condemnation to privately owned utilities.

Despite Plaintiffs' best efforts to recharacterize the CPUC's decision as a "hypothetical determination" concerning a "hypothetical utility . . . in an unspecific and hypothetical factual situation" (Dkt. 7301 at 5 (emphasis omitted)), the CPUC's decision expressly announced that "[i]nverse Condemnation principles are *not relevant* to a Commission reasonableness review." Boozell Decl. Ex G at 65 (emphasis added). In adopting the decision, the CPUC rejected the underlying judicial assumption that cost recovery would operate identically for privately and publicly owned utilities:

> [T]he doctrine of inverse condemnation, as its been developed by the courts and applied to public utilities, may be worth re-examining in a sense that 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 from their ratepayers.

Boozell Decl. Ex. K at 21:32-22:00; *see also* Boozell Decl. Ex. H at 1, 5 ("[T]he logic for applying inverse condemnation to utilities—costs will necessarily be socialized across a large group rather than borne by a single injured property owner, regardless of prudence on the part of the utility—is unsound."). These statements are not mere "hypothetical[s]"; rather, they represent a clear articulation of CPUC policy. Accordingly, renewal of PG&E's motion is appropriate.

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[5] Far from amounting to mere *dicta*, the CPUC's remarks regarding inverse condemnation were essential to the CPUC's decision and, in any event, are clear evidence of the CPUC's policy not to consider the impact of inverse condemnation on cost recovery. Nor should Plaintiffs be heard to argue that the CPUC's decision was non-final because SDG&E was never adjudicated liable for inverse condemnation liability. *See* Dkt. 7301 at 5; *see also generally* Declaration of Craig S. Simon (Dkt. 7302). The court in the SDG&E case overruled SDG&E's demurrer and allowed the plaintiffs' inverse condemnation claims to proceed, subjecting SDG&E to strict liability, and the Court of Appeal and Supreme Court declined SDG&E's petitions for review. Thus legal decisions applying inverse condemnation were a decisive factor in SDG&E's decision to settle those claims. Boozell Decl. Ex. A at 3-4, 10-11.

C. Plaintiffs' Evidentiary Objections Are Without Merit

Plaintiffs argue that PG&E's Motion is not supported by competent evidence because judicial notice extends only so far. *See, e.g.*, Dkt. 7301 at 5. As explained more fully in PG&E's previously filed request for judicial notice (*see* Dkt. 6703) and its concurrently filed response to Plaintiffs' evidentiary objections, the official pronouncements and acts of the CPUC in its decision are properly subject to judicial notice. *See, e.g.*, *People ex rel. Orloff v. Pac. Bell*, 31 Cal. 4th 1132, 1143 n.4 (2003) (taking judicial notice of CPUC's final decision pursuant to Section 452(c)); *Panoche Energy Ctr., LLC v. Pac. Gas & Elec. Co.*, 1 Cal. App. 5th 68, 90-92 (taking judicial notice of "developments in the [CPUC] regulatory proceedings"), *review denied* (Oct. 12, 2016). The Court may therefore take judicial notice that the CPUC made the statements that form the basis of PG&E's Renewed Motion.

CONCLUSION

For the foregoing reasons, PG&E respectfully requests that the Court grant PG&E's Renewed Motion and find that PG&E is not liable for inverse condemnation.[6] Should the Court be inclined to deny PG&E's Renewed Motion, PG&E respectfully requests that the Court indicate its belief that this "is a controlling question of law as to which there are substantial grounds for difference of opinion, appellate resolution of which may materially advance the conclusion of the litigation." *See* Cal. Civ. Proc. Code § 166.1.

DATED: April 16, 2018

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[6] Should the Court grant PG&E's Renewed Motion, it may reconsider its decision granting Plaintiffs' motion *sua sponte*, *see* Cal. Civ. Proc. Code § 1008(c), and should do so to avoid inconsistent rulings concerning PG&E's liability for inverse condemnation. *See* Dkt. 6648 at 7.