

1 QUINN EMANUEL URQUHART & SULLIVAN, LLP

Kenneth R. Chiate (Bar No. 039554)

2 kenchiate@quinnemanuel.com

Kristen Bird (Bar No. 192863)

3 kristenbird@quinnemanuel.com

Jeffrey N. Boozell (Bar No. 199507)

4 jeffboozell@quinnemanuel.com

Sarah Cole (Bar No. 222719)

5 sarahcole@quinnemanuel.com

865 South Figueroa Street, 10th Floor

6 Los Angeles, California 90017-2543

Telephone: (213) 443-3000

7 Facsimile: (213) 443-3100

8 Kathleen M. Sullivan (Bar No. 242261)

kathleensullivan@quinnemanuel.com

9 555 Twin Dolphin Drive, 5th Floor

Redwood Shores, California 94065

10 Telephone: (650) 801-5000

Facsimile: (650) 801-5100

11 Attorneys for Defendants

12 PACIFIC GAS AND ELECTRIC COMPANY and

13 PG&E CORPORATION

14 **SUPERIOR COURT OF THE STATE OF CALIFORNIA**
15 **COUNTY OF SACRAMENTO**

16 *Coordination Proceeding Special Title*
17 *(CRC 3.550)*

19 BUTTE FIRE CASES

Case No. JCCP 4853

**PACIFIC GAS AND ELECTRIC
COMPANY'S SUPPLEMENTAL
BRIEF IN SUPPORT OF ITS
RENEWED MOTION REGARDING
THE COURT'S AUTHORITY TO
MAKE A LEGAL DETERMINATION
OF INVERSE CONDEMNATION
LIABILITY PURSUANT TO C.C.P.
§ 1260.040**

DATE: April 26, 2018

TIME: 10:00 a.m.

DEPT.: 42

JUDGE: Hon. Allen H. Sumner

1 **PRELIMINARY STATEMENT**

2 Defendant Pacific Gas and Electric Company (“PG&E”) respectfully files this
3 supplemental brief in response to the Court’s April 4, 2018 Order requesting the parties to address
4 a new split in authority regarding whether California Civil Procedure Code Section 1260.040
5 (“Section 1260.040”) permits a court to decide the issue of inverse condemnation liability before
6 trial. *See* Dkt. 7317.

7 As the court is aware, the issue of whether inverse condemnation should continue to apply
8 to privately owned utilities like PG&E is a major policy issue for the State that urgently demands
9 appellate resolution. Two influential decisions of the California Courts of Appeal have held that
10 privately owned utilities are subject to strict inverse condemnation liability, based on the
11 assumption that they (like government entities sued in inverse condemnation) supposedly may
12 spread the costs of their actions among their customers. *See Pac. Bell Tel. Co. v. S. Cal. Edison*,
13 208 Cal. App. 4th 1400, 1404-08 (2012); *Barham v. S. Cal. Edison Co.*, 74 Cal. App. 4th 744,
14 751-54 (1999). But the California Public Utilities Commission (“CPUC”) issued a decision on
15 November 30, 2017, that fundamentally undermines the basis for prior judicial rulings extending
16 inverse condemnation to privately owned utilities. That decision denied cost recovery to San
17 Diego Gas & Electric (“SDG&E”) for inverse condemnation costs, deeming inverse condemnation
18 “not relevant” to the CPUC’s cost recovery and allocation process for privately owned utilities.¹

19 The significant impact of the CPUC’s ruling is underscored by the reaction of industry,
20 investors, and members of the Legislature, who view the ruling as creating a potential “crisis” for
21 investor-owned utilities and the State if privately owned utilities face unlimited inverse
22 condemnation liability but cannot recover those costs through their rates under the CPUC’s new
23 ruling. This has real potential to put in motion economic consequences with ripple effects
24 throughout the California economy. The risk of these consequences may well escalate as
25 California wildfires become increasingly prevalent and destructive.

26
27 ¹ *See* Decision Denying Application No. 15-09-010, Decision No. 17-11-033, at 65 (Cal. Pub.
28 Utils. Comm’n Nov. 30, 2017), *available at* <http://docs.cpuc.ca.gov/PublishedDocs/Published/G000/M200/K045/200045020.pdf>.

1 condemnation issue pursuant to Section 1260.040 in this case. It is legally permissible, fair, and
2 expedient for it to do so. PG&E thus respectfully requests that the Court rule on PG&E’s pending
3 Renewed Motion for a Legal Determination of Inverse Condemnation Liability (“Renewed
4 Motion”) on its merits (Dkts. 6648-6651, 6702-6704), rather than vacating all of its pre-trial
5 rulings regarding inverse condemnation (see *infra* Part II).

6 Where, as here, “there is more than one appellate court decision, and such appellate
7 decisions are in conflict . . . , the court . . . can and must make a choice between the conflicting
8 decisions.” *Auto Equity Sales, Inc. v. Super. Ct.*, 57 Cal. 2d 450, 456 (1962). In light of the
9 circumstances of this case, this Court should exercise its discretion to continue to follow *Dina* in
10 this Coordinated Proceeding. *Dina* has allowed both litigants and courts to rely on Section
11 1260.040 as a procedural vehicle for pre-trial determinations of inverse condemnation liability for
12 more than ten years. As the Court has noted (Dkt. 7317 at 1), the parties and the Court have relied
13 on *Dina* here as the basis for the Court’s authority to determine inverse condemnation liability
14 under Section 1260.040, and it thus constitutes the “law of the case.”

15 First, *Dina* was the only controlling appellate authority as of May 2017, when the parties
16 first moved under Section 1260.040, and also was the only controlling appellate authority as of
17 January 2018, when PG&E filed its Renewed Motion. While *Weiss* and *Dina* reach conflicting
18 conclusions, *Dina* has not been overturned or ordered unpublished and continues to provide a
19 basis for this Court’s legal and factual determinations of inverse condemnation. Although the
20 California Supreme Court last year granted review of an unpublished Third Appellate District
21 decision involving cross-motions under Section 1260.040,² the propriety of *Dina*’s ruling in favor
22 of the propriety of the use of Section 1260.040 procedure for inverse condemnation is not among

23 ² See *City of Oroville v. Super. Ct.*, Case No. S243247 (Cal. filed July 19, 2017), *docket*
24 *available at* [http://appellatecases.courtinfo.ca.gov/search/case/dockets.cfm?dist=0&doc_](http://appellatecases.courtinfo.ca.gov/search/case/dockets.cfm?dist=0&doc_id=2214280&doc_no=S243247&request_token=NiIwLSIkXkw7WyBNSCM9VENIUDw0UDxTJyIuTz5SQCAGcg%3D%3D)
25 [id=2214280&doc_no=S243247&request_token=NiIwLSIkXkw7WyBNSCM9VENIUDw0UDxTJ](http://appellatecases.courtinfo.ca.gov/search/case/dockets.cfm?dist=0&doc_id=2214280&doc_no=S243247&request_token=NiIwLSIkXkw7WyBNSCM9VENIUDw0UDxTJyIuTz5SQCAGcg%3D%3D)
26 [yIuTz5SQCAGcg%3D%3D](http://appellatecases.courtinfo.ca.gov/search/case/dockets.cfm?dist=0&doc_id=2214280&doc_no=S243247&request_token=NiIwLSIkXkw7WyBNSCM9VENIUDw0UDxTJyIuTz5SQCAGcg%3D%3D). Pursuant to California Evidence Code Sections 452(c) and (d)(1),
27 the Court may take judicial notice of “[o]fficial acts of the . . . judicial departments . . . of any state
28 of the United States” and the “[r]ecords of . . . any court of this state.” These provisions
encompass online court dockets. See *People v. Mendoza*, 241 Cal. App. 4th 764, 773 n.1 (2015).
PG&E is prepared to provide the Court with copies of the opening and answering briefs on the
merits before the Supreme Court in *City of Oroville* for the Court’s convenience if the Court so
requests.

1 the issues presented for review. Thus, it is permissible and appropriate for the Court to continue to
2 rely on *Dina* in this case.

3 *Second*, principles of efficiency, fairness, expediency, and consistency all support the
4 Court's continued reliance on *Dina*'s conclusion that the use of Section 1260.040 procedure is
5 permissible here, as the parties have agreed. Dkt. 3987 at 2-3 (“[The parties] acknowledge the
6 court may reach the issue of liability through this special eminent domain law procedure based
7 upon their evidentiary record.”); *see also, generally*, Dkts. 3798, 3838, 6648. The Court and the
8 parties have relied on *Dina* for nearly a year now, spending significant time briefing, arguing, and
9 adjudicating Plaintiffs' inverse condemnation claim under the Section 1260.040 procedure, during
10 a period in which either side could easily have used other procedural mechanisms to present the
11 very same issues. As of this filing, the parties have fully briefed cross-motions on inverse
12 condemnation and PG&E's Renewed Motion, all in reliance on *Dina* providing a proper procedure
13 for pre-trial resolution of inverse condemnation issues. *See* Dkts. 6648-6651, 6702-6704, 7300-
14 7305, 7314-7316.

15 Should the Court determine at this juncture that another procedure should have been
16 followed (per *Weiss*), those considerable efforts will be wasted and the parties and the Court will
17 be forced to begin anew, seeking the same result under a new procedure that will involve great
18 duplication of effort and loss of judicial economy. This will serve no purpose and will result in
19 significant delay in the resolution of a fundamental issue in the case, as well as delay any effort to
20 obtain the urgently needed appellate review of an issue that is critical not only to the State's
21 privately owned utilities but also to the State itself. Accordingly, PG&E urges the Court to rule
22 on PG&E's Renewed Motion on its merits as authorized by *Dina*.

23 **II. ALTERNATIVELY, IF THE COURT DECIDES WEISS APPLIES, IT SHOULD**
24 **VACATE ALL OF ITS INVERSE CONDEMNATION ORDERS DECIDED**
25 **PURSUANT TO SECTION 1260.040 AND ALLOW THE INVERSE**
26 **CONDEMNATION ISSUE TO BE DECIDED BY AN ALTERNATIVE**
27 **PROCEDURE**

28 Should this Court decline to proceed under *Dina* and instead apply *Weiss* and not hear
PG&E's Renewed Motion, it should also reconsider and vacate the portions of its June 22, 2017
Order granting Plaintiffs' motion on the applicability of inverse condemnation to PG&E. Dkt.

1 3987. The Court is permitted to reconsider a prior order “at any time” if the Court “determines
2 that there has been a change of law that warrants” reconsideration. Cal. Civ. Proc. Code §
3 1008(c); *see, e.g., State v. Super. Ct.*, 4 Cal. App. 5th 94, 100 (2016) (“An appellate decision
4 published during an action’s pendency may be a change of law under section 1008, subdivision
5 (c), and requires a trial court to reconsider its earlier ruling if the decision materially changed the
6 law.”), *review denied* (Jan. 11, 2017). Accordingly, any decision to follow *Weiss* rather than *Dina*
7 would require the Court *both* to deny PG&E’s Motion to Renew *and* to vacate its earlier decision
8 that inverse condemnation applies here in the first place.

9 As noted, PG&E is not advocating that the Court determine at this juncture that its prior
10 Order was procedurally improper or that it does not have authority to grant the relief requested in
11 PG&E’s Renewed Motion. But should the Court decide to follow *Weiss*—and reject *Dina*—in the
12 context of PG&E’s Renewed Motion, that standard would need to be applied consistently, and the
13 Court should vacate all prior rulings on the parties’ motions under Section 1260.040. In that
14 event, PG&E intends to present the same legal issue on inverse condemnation liability that has
15 already been briefed in PG&E’s Renewed Motion through an alternative procedural mechanism
16 (such as a motion on the pleadings or motion for summary adjudication) and to request a hearing
17 on the first available date on the Court’s calendar. In this manner, the expenditure of effort by the
18 parties and the Court on this issue may be preserved and the issue presented in a form that can
19 ensure urgently needed appellate review.

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21 DATED: April 16, 2018

QUINN EMANUEL URQUHART &
SULLIVAN, LLP

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By 

Kathleen M. Sullivan
Kenneth R. Chiate
Kristen Bird
Jeffrey N. Boozell
QUINN EMANUEL URQUHART &
SULLIVAN, LLP

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