

May 25, 2018

Presiding Judge and Associate Justices
California Court of Appeal
Third Appellate District
914 Capitol Mall, 4th Floor
Sacramento, CA 95814

Re: *Pacific Gas and Electric Co. v. Superior Court (Abu-Shumays)* (Case No. C087071)

**Application to File Letter Brief of Amicus Curiae Edison Electric Institute
in Support of Pacific Gas & Electric Company**

The Edison Electric Institute (“EEI”) respectfully requests permission to file the accompanying *amicus curiae* letter brief in support of the writ for mandate, prohibition, or other appropriate relief filed by Pacific Gas and Electric Company (“PG&E”). EEI is familiar with the content of PG&E’s petition, as well as the letter brief in support filed by *amici curiae* Southern California Edison Company (“SCE”) and San Diego Gas & Electric Company (“SDG&E”).

EEI is the trade association that represents all U.S. private, investor-owned electric companies, including PG&E and the other investor-owned electric companies that operate in California, SCE and SDG&E. Our members provide electricity for about 220 million Americans and operate in all 50 states and the District of Columbia. As a whole, the electric power industry supports more than seven million jobs in communities across the United States and contributes \$880 billion to the U.S. economy through direct employment, contracts and supply chains, investments, and the jobs and investments that are induced by these activities. Collectively, these activities and investments represent five percent of the nation’s gross domestic product.

EEI believes that its perspectives will assist this Court in resolving this case and requests permission to file this letter brief to provide a national view of the effects of the application of inverse condemnation to PG&E (and other private electric companies in the state). Not only is it unsound and contrary to law, it is anomalous: no other state compels electric companies to act as the state-wide insurers for damages related to wildfires without any assured right to spread the associated risk. Further, the threat of massive wildfire liability is damaging the creditworthiness and financial health of PG&E and the other California private electric companies. This harms California customers, employees, shareholders and other power producers who do business with private electric companies. It also threatens the contributions that these companies make to California’s economy and the state’s efforts to achieve its climate and environmental goals. California is a bellwether state on many fronts and the harm to the economic health of the State’s private electric companies could affect companies outside the State. To reverse these harms, the Court should grant PG&E’s requested relief and find that inverse condemnation is not applicable to private electric companies.

Letter Brief

Dear Justices,

EEI writes today to respectfully request that this Court grant PG&E's petition and reverse the lower court's holding that private electric companies may be held strictly liable for wildfire damages under the theory of inverse condemnation.

The purpose of this letter brief is not to retread the well-argued points made by PG&E in its writ and echoed in the *amici curiae* letter brief filed by SCE and SDG&E. Rather, this letter aims to provide a national perspective on the significant consequences that will result if this court does not address the lower court's continued application of inverse condemnation – an anomalous and legally flawed doctrine – to require that private electric companies bear all costs for fire damages despite clear evidence that private electric companies are not assured recovery of these costs from customers.

Statement of Interest of Amicus Curiae Edison Electric Institute

As noted, EEI represents all U.S. private, investor-owned electric companies, including PG&E and the other investor-owned electric companies that operate in California, SCE and SDG&E.¹ EEI therefore has a unique national perspective on the mechanisms adopted by other states to address risks posed by wildfire and other disasters. EEI's perspective is further enhanced by its long-standing familiarity with the various states' regulation of private electric companies, as well as the economic benefits that private electric companies provide to customers, employees, shareholders and the economy in general.

Because California's approach to inverse condemnation negatively affects the financial health of PG&E and the other EEI member companies in the State, EEI has a direct and substantial interest in the outcome of this case.

This Court Should Grant Review

This Court should accept writ review because the issue presented is “of widespread interest” and because “the lower court's determination imposes unusually harsh and unfair results” that cannot be timely addressed through ordinary appellate review.² Specifically, the inverse condemnation regime that is at issue in the lower court's holding has already had consequences for the financial health of California's private electric companies, which in turn threaten to harm California's broader economy. Indeed, the ability of PG&E to attract capital that is critical to its financial viability is already in question. These consequences are therefore “of widespread interest” and cannot wait for

¹ *About the Edison Electric Institute*, EEI, <http://www.eei.org/about/Pages/default.aspx> (last visited May 23, 2018).

² *Sci. Applications Int'l Corp. v. Superior Court* (1995) 39 Cal.App.4th 1095, 1100-01.

resolution through ordinary appellate review, which “is unduly delayed, and cannot be compared to writ review in terms of time effectiveness.”³

Moreover, the lower court’s determination that privately-owned electric companies should be strictly liable for wildfire damages is unfair and unnecessary. As explained further below, the driving rationale behind inverse condemnation—i.e., to spread the costs of public goods across the entire community—breaks down in the context of private electric companies. Instead of spreading costs, inverse condemnation in this context leads to the costs being borne solely by the electric companies. There much better, more fair mechanisms available to California for spreading the risk of wildfire damages.

I. Inverse Condemnation Has Immediate Consequences for Private Electric Companies, and Threatens to Harm Their Customers, Employees, Shareholders and Other Producers of Electricity.

The lower court’s determination that private electric companies may be held strictly liable for wildfire damages under the theory of inverse condemnation has severe financial consequences for private electric companies in California. In fact, as a result of the 2017 Northern California fires alone, PG&E may be liable for approximately \$10 billion in damages under the inverse condemnation doctrine,⁴ with no guarantee of recovering those costs.⁵ To put this in perspective, \$10 billion is 12.5 times PG&E’s \$800 million liability insurance policy, 4.76 times its 2017 pretax income (\$2.1 billion), and 51.54 percent of its total equity (\$19.4 billion).⁶ And the scope of such liability may increase in the coming years given the increasing prevalence of wildfires in California.⁷

Exposure to this potential liability has immediate consequences on the ability of private electric companies in California to attract outside investment, an essential element to providing continued reliable electric service. As background, the investor-owned electric company model provides that private electric companies will serve all customers in exchange for regulated rates that permit the recovery of prudently incurred costs, plus a rate of return. These are known as “cost-of-service” rates and are set by state economic regulators, such as the California Public Utilities Commission (“CPUC”). Importantly, the inclusion of a rate of return in cost-of-service rates is explicitly intended

³ *Id.* at 1101.

⁴ See PG&E Corp., Annual Report (Form 10-K) 28 (Feb. 9, 2018) [hereinafter PG&E 10-K] (noting that California’s Department of Insurance announced that insurers had received claims totaling approximately \$10 billion in losses as a result of the October 2017 wildfires).

⁵ See PG&E’s Petn. for Writ of Mandate, Prohibition, or Other Appropriate Relief; Mem. of P. & A. 95-98 (May 9, 2018) [hereinafter PG&E Petition for Writ] (explaining that CPUC does not guarantee recovery of costs incurred as a result of inverse condemnation liability).

⁶ PG&E 10-K, *supra* note 4, at 28, 87, 89.

⁷ Appl. to File Letter Br. of *Amici Curiae* Southern California Edison Co. and San Diego Gas & Electric Co. in Support of Pacific Gas & Electric Co. 10-11 (May 11, 2018).

to attract outside investment in the electric company.⁸ Private electric companies use this capital to invest in the expensive, long-lived assets needed to provide all customers with affordable, reliable electricity. On average, EEI's member electric companies invest more than \$100 billion annually in generation, transmission and distribution infrastructure to serve customers.⁹ Accordingly, outside investment is critical to a private electric company's ability to provide electricity to all customers.

Inverse condemnation liability has already had significant adverse impacts on the ability of private electric companies to attract that investment. At the time of this filing, PG&E's stock is selling at \$44.51 a share, a significant drop from October 11, 2017—the day before the Northern California wildfires began—when PG&E was trading near \$70.¹⁰ This represents nearly \$12.13 billion of lost market capitalization.¹¹

The problem was compounded in December 2017 when PG&E was forced to suspend dividends to shareholders in order to conserve financial resources to pay potential inverse condemnation claims.¹² While dividend suspensions do occur in some industries, it is highly unusual among private electric companies, a characteristic that often drives investors to choose these companies in the first place. In fact, privately-owned utilities, such as electric companies, are generally among the most popular stocks for dividend investors because their earnings are comparatively stable and they offer higher than average dividend yields.¹³ This is so because they provide non-discretionary services and because they are mature businesses with less room for growth and expansion, which allows them to pay out higher portions of their earnings.¹⁴ PG&E's dividend suspension is therefore highly unusual, as demonstrated by the fact that every single EEI Index company paid a dividend from the years 2011 to 2016.¹⁵

⁸ See *Fed. Power Comm'n v. Hope Nat. Gas Co.* (1944) 320 U.S. 591, 603; see also *Bluefield Water Works & Improvement Co. v. Public Service Comm'n* (1923) 262 U.S. 679.

⁹ See Edison Elec. Inst., *Delivering America's Energy Future: Electric Power Industry Outlook* 9 (Feb. 7, 2018), http://www.eei.org/issuesandpolicy/finance/wsb/Documents/EEI_WSB_Remarks.pdf.

¹⁰ See *PG&E Corp.*, Market Watch, <https://www.marketwatch.com/investing/stock/pcg> (last visited May 25, 2018) (providing current and historical share prices).

¹¹ This number is based on PG&E's weighted averages of outstanding common shares for 2017 and 2018, which are 508 million and 515 million shares respectively. PG&E Corp., Quarterly Report for the Period Ended Mar. 31, 2018 at 6 (May 3, 2018).

¹² Press Release, PG&E Corp., PG&E Announces Suspension of Dividend, Citing Uncertainty Related to Causes and Potential Liabilities Associated with Northern California Wildfires (Dec. 20, 2017), <http://investor.pgecorp.com/news-events/press-releases/press-release-details/2017/PGE-Announces-Suspension-of-Dividend-Citing-Uncertainty-Related-to-Causes-and-Potential-Liabilities-Associated-with-Northern-California-Wildfires/default.aspx>.

¹³ *The Best Stock Sectors for Dividend Income*, Simply Safe Dividends (Mar. 5, 2016), <https://www.simplysafedividends.com/the-best-stock-sectors-for-dividend-income/>.

¹⁴ *Id.*

¹⁵ Thomas R. Kuhn, EEI, *President's Letter - 2016 Financial Review* (2016), http://www.eei.org/resourcesandmedia/industrydataanalysis/industryfinancialanalysis/finreview/Documents/FinancialReview_2016_01_President.pdf.

In response to the sheer magnitude of liability, as well as the dividend suspension, PG&E's stock was downgraded in January and February of 2018. Credit rating agencies explained that inverse condemnation liability was a central cause of the downgrade—especially given the amount of time investors predict it will take the courts to ‘revisit’ the inverse condemnation doctrine.¹⁶ According to one analyst, the downgrade was driven in part by “volatility stemming from a ‘guilty before proven innocent’ sentiment,” as well as the fact that “any hope from legislative /judicial efforts [to revisit] the interpretation of inverse condemnation in [California] will likely take a considerable amount of time to play out.”¹⁷ Similarly, Fitch Ratings explained that the downgrades “reflect PG&E’s potential exposure to large third party liabilities associated with unprecedented 2017 wildfires . . . and seemingly absent legislative support for recovery of such costs.”¹⁸ Fitch also warned that further “multi-notch downgrades [are] inevitable if the status quo prevails in the face of such large potential liabilities and application of inverse condemnation liability.”¹⁹ In short, the general perception among investors is that California utilities are simply “uninvestable right now,”²⁰ and it will remain so until the uncertainty surrounding inverse condemnation liability is resolved.

These immediate developments could have serious long-term consequences for customers, employees, and shareholders, as well as the broader economy. First, and perhaps most significantly, the ability of privately owned electric companies to provide customers reliable electricity service is threatened to the extent that capital cannot be raised to make continued investments in the operation, maintenance and expansion of needed energy infrastructure. Assuming capital can still be raised, customers may also have to pay higher rates as the increased costs of capital that will result from the downgrade in credit ratings are appropriately recovered in rates.

Second, failure to address inverse condemnation damages also threatens thousands of high quality, well-paying jobs in California and potentially across the nation.²¹ The electric power industry is responsible for 2.7 million jobs—and supports another 4.4 million induced jobs—across the United States. In total, the industry supports more than seven million jobs, which constitutes approximately five percent of all jobs in the United States.²² Further, employment in the industry is well-paying and stable; the median annual wages for direct electric power industry employees were \$73,000 in 2015, the latest year for which data are available. This is twice the national average. With benefits, including health care and retirement contributions, median annual compensation exceeds \$100,000. Nearly

¹⁶ Press Release, Fitch Ratings, Fitch Downgrades PG&E Corp. and Sub to ‘BBB+’; Places on Rating Watch Negative (Feb. 26, 2018), <https://www.fitchratings.com/site/dodd-frank-disclosure/10021816>; Teresa Rivas, *PG&E: It’s like Sticking a Fork in a Socket*, Barron’s (Jan. 2, 2018), <https://www.barrons.com/articles/pg-e-its-like-sticking-a-fork-in-a-socket-1514920990>.

¹⁷ Rivas, *supra* note 16.

¹⁸ Press Release, Fitch Ratings, *supra* note 16.

¹⁹ *Id.*

²⁰ Mike Yamamoto, *Market Notes: Tuesday, December 12, 2017*, Investitute (Dec. 12, 2017), <https://investitute.com/activity-news/market-notes-Tuesday-december-12-2017/>.

²¹ See *Company Profile*, PG&E Corp., https://www.pge.com/en_US/about-pge/company-information/profile/profile.page (last visited May 23, 2018) (PG&E employs approximately 20,000 employees).

²² See M.J. Bradley, *Powering America: The Economic and Workforce Contributions of the U.S. Electric Power Industry* 6 (2017), <https://mjbradley.com/sites/default/files/PoweringAmerica.pdf>.

every job category in the industry earns a median wage of \$30 or more per hour, plus health and retirement benefits. Many of these skilled, well-paying jobs do not require a four-year college degree, unlike many other jobs with similar pay and benefits.²³ And while employment opportunities in the industry are expected to grow for various types of workers over the next decade, these opportunities rely on the continued financial health and viability of electric companies

Third, shareholders will suffer direct economic losses if dividends are suspended or if the value of stock declines. Indeed, PG&E shareholders have already incurred such losses, and PG&E will not be able to reinstate dividends unless and until the threat of massive unrecoverable liability is lifted. Finally, there may be other ripple effects on companies that partner with private electric companies, such as other power producers in California. For example, CPUC President Picker noted in March that investment analysts had recently downgraded the credit rating of independent power producer Topaz Solar because it has a contract with PG&E.²⁴ As one credit rating agency recently explained, the downgrade “was triggered by the rating downgrade of . . . PG&E,” Topaz Solar’s key revenue counterparty.²⁵ This not only harms Topaz, but could hamper the efforts of other renewable developers, who rely on contracts with private electric companies to attract financing and to deploy the resources that California needs to meet its ambitious goals to reduce greenhouse gases.

In summary, the imposition of enormous liability under the inverse condemnation doctrine, without guarantee of cost recovery, is a serious threat to the immediate financial health of private electric companies in California. Further, given the significant role that such companies play in California’s economy, the long term consequences of these financial harms will likely be felt across the state. The uncertainty surrounding these issues must be addressed in a timely manner and cannot wait for resolution through the ordinary course of appellate review.

II. Inverse Condemnation Is an Inappropriate Mechanism for Addressing Wildfire Risk That Results in Unfair Outcomes.

Holding private electric companies liable under inverse condemnation liability also results in outcomes that are unfair and contrary to the policy rationale that underlies the inverse condemnation doctrine. As PG&E explains at length in its petition, the driving rationale behind inverse condemnation in California is to spread the costs of public services across the population so that individual property owners do not bear a disproportionate burden for services that benefit the entire community.²⁶ Inverse condemnation is therefore intended to be a loss-spreading mechanism that shifts costs that would otherwise fall on a single property owner to a governmental entity, which in turn spreads those costs across the population via taxes.²⁷

²³ See *id.* at 9.

²⁴ See Jason Fordney, *Picker Seeks Guidance on IOUs, Aliso Canyon*, RTO Insider (Mar. 6, 2018), <https://www.rtoinsider.com/cpuc-michael-picker-aliso-canyon-87985/>.

²⁵ Press Release, Fitch Ratings, *Fitch Downgrades Topaz Solar Farms, LLC’s Senior Notes to ‘BBB+’; Places on Rating Watch Negative* (Mar. 2, 2018), <https://www.fitchratings.com/site/pr/10022405>.

²⁶ PG&E Petition for Writ, *supra* note 5, at 85-88.

²⁷ *Id.* at 88-93; *Pac. Bell Tel. Co. v. S. Cal. Edison Co.* (2012) 208 Cal.App.4th 1400, 1404, 1407; *Barham v. S. Cal. Edison Co.* (1999) 74 Cal.App.4th 744, 752.

Relevant here, two California courts have applied the doctrine to require private electric companies to pay for damages caused by electric equipment.²⁸ These courts reasoned that because all customers share in the benefits of the electric system, they should also share in the risks posed by that system, including the increasing risk of wildfire.²⁹ Further, while inverse condemnation has traditionally been applied to public entities because of their ability to spread those risks, the courts held that private electric companies are sufficiently public for inverse condemnation purposes based on the assumption that electric companies could spread costs by raising electricity rates through future rate recovery proceedings.³⁰

This reasoning was fundamentally incorrect, however, as demonstrated by a CPUC decision last year that denied recovery of inverse condemnation costs. As a result, rather than *spreading* costs across the entire class of electric customers as the courts intended, inverse condemnation functions to *concentrate* wildfire costs experienced by thousands of property owners onto a single company. This, in effect, forces private electric companies to function as uncompensated insurers for wildfire damage, a result that is contrary to the purpose of the inverse condemnation doctrine and inherently unfair.

EEI is not aware of any other state that applies inverse condemnation to private electric companies to hold them strictly liable for property damages related to wildfires. Moreover, a review of other states' policy mechanisms for addressing natural disasters indicates that there are other options, and courts are neither required nor best suited to develop a solution to this problem. While singularity is not a test of legality, the inability of electric companies to spread wildfire costs calls into question the fundamental policy rationale for imposing those costs upon electric companies and leads to untenable results that jeopardize the power market in California. In short, inverse condemnation is not an appropriate policy solution for wildfire risk.

Indeed, if this Court were to reverse the lower court's holding, California's legislature would be free to pursue other policies that are much better suited to addressing natural disaster risks. For example, Florida, which suffers from unpredictable hurricane risk, has developed better tools to spread the risk that some property owners might suffer losses in any given year. First, Florida participates in the primary insurance market through a legislatively-created entity, Citizens Property Insurance Corporation, which provides insurance to those property owners who cannot find coverage on the private market.³¹ Similar to private insurance, Citizens is financed by policyholder premiums, which aligns the benefits of the insurance (protection against risk of loss) with at least some of the burden (the cost of the premium). Policy premiums may also function as a signal to property owners that their property is located in an area subject to hurricane risk. Second, to ensure that private insurers continue to provide reasonably-priced coverage, Florida created its own reinsurance program, the Florida

²⁸ PG&E Petition for Writ, *supra* note 5, at 93-95; *Pacific Bell*, *supra*, 208 Cal.App.4th at p. 1408; *Barham*, *supra*, 74 Cal.App.4th at p. 756.

²⁹ *Barham*, *supra*, 74 Cal.App.4th at p. 754.

³⁰ PG&E Petition for Writ, *supra* note 5, at pp. 94-95 (citing *Barham*, *supra*, 74 Cal.App.4th at p. 752; *Pacific Bell*, *supra*, 208 Cal.App.4th 1400).

³¹ See *Who We Are*, Citizens Property Insurance Corp., <https://www.citizensfla.com/who-we-are> (last visited May 23, 2018).

Hurricane Catastrophe Fund, which is funded by state-backed bonds, further aligning benefits and burdens.

In contrast, the forced electric company insurance program created by inverse condemnation does not align benefits with burdens. Rather, it discourages private citizens from obtaining appropriate amounts of fire insurance and private insurers from developing appropriate products to help manage risk.³² This in turn encourages development in fire prone areas. By any measure, this is a failed social insurance program. This failure is magnified by the fact that privately owned utilities cannot reliably spread damages to all electric customers, as evidenced by the CPUC's declaration last year that it would not automatically allow private electric companies to socialize wildfire costs through electricity rates.³³ As a result, all of the burdens will now be borne by private electric companies' employees, shareholders, and other producers of electricity, which will, in turn, harm their customers. This outcome warrants review by the Court.

Conclusion

Inverse condemnation is harming the financial health of private electric companies. This, in turn, harms their customers, employees, shareholders and the other electricity providers that do business with these companies. Moreover, when applied to private electric companies, the inverse condemnation doctrine leads to unfair outcomes that are contrary to the doctrine's intended purpose. Accordingly, EEI urges this Court to accept writ review and grant the relief requested by PG&E.

Sincerely,



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³² In fact, California insurance code does currently require California insurers to participate in a legislatively created insurer of last resort for fires, which provides fire insurance policies to homeowners who cannot buy them on the voluntary market. *General Information*, California FAIR Plan Property Insurance, <https://www.cfpnet.com/index.php/general-info/> (last visited May 24, 2018). This means that such insurance is available to anyone who wishes to purchase it. But there is no corresponding provision mandating that property owners purchase such insurance, and may have less incentive to do so if they assume wildfire damages will be covered by utilities through inverse condemnation liability.

³³ See Decision, Appl. of San Diego Gas & Electric Co. (U902E) for Authorization to Recovery Costs Related to the 2007 Southern California Wildfires Recorded in the Wildfire Expense Memorandum Account (WEMA) (2017) Cal.P.U.C. Dec. No. 17-11-033.