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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN FRANCISCO

Coordination Proceeding Special Title (Rule 3.550)

IN RE: CALIFORNIA NORTH BAY FIRE CASES

This pleading relates to:

Underlying Cases Nos. CGC-17-562791, CGC-17-562990, CGC-17-563273, CGC-17-563363, CGC-17-563389, CGC-18-563582, and CGC-18-563700

JCCP No. 4955

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' DEMURRER

Date: May 18, 2018
Time: 9:00 a.m.
Dept.: 304

Assigned for All Purposes to:
Hon. Curtis E.A. Karnow, Dept. 304

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Rule 6.1, Cal. Public Utilities Comm. Rules of Practice and Procedure 11

I. INTRODUCTION

On or around the night of Sunday, October 8, 2017, power lines and electric equipment owned, operated and maintained by PG&E Corporation and Pacific Gas & Electric Company (hereinafter "PG&E") sparked and/or exploded, igniting nearby vegetation and causing wildfires that ravaged approximately 250,000 acres in multiple Northern California counties. Known collectively as the "North Bay Fires", the conflagrations damaged and destroyed thousands of homes, businesses, vineyards, farms, and lives. Plaintiffs are owners of real and personal property harmed as a result. They commenced this inverse condemnation claim pursuant to the California Constitution. Plaintiffs bring this cause of action to recover compensation for the damage to their properties caused by PG&E's equipment that is used to deliver electricity to the public.

In its Demurrer, PG&E seeks to overturn settled law that privately-owned public utilities may be liable for inverse condemnation. PG&E claims that there is a significant difference between it and, say, a municipal-owned utility, because PG&E cannot "automatically" pass on costs to its customers. This argument is not new. No California court has accepted it, and for good reason: the fundamental public policy principle underlying inverse condemnation is that owners of property damaged by a public work should be compensated, so they do not contribute more than their proper share to the public undertaking. Any concern regarding the extent to which PG&E, a state-guaranteed monopoly, may ultimately pass on the cost to rate payers does not override that policy of ensuring that individual property owners are not left to bear that expense alone.

The recent California Public Utilities Commission ("CPUC") decision cited by PG&E is a nothing burger. Its reach extends only as far as the facts underlying San Diego Gas & Electric's ("SDG&E") pending application before the CPUC, and does not establish Commission policy. At most, the decision reiterates that utilities must show that any proposed rate increase is just and reasonable. Nowhere in the hundreds of pages and hours of CPUC proceedings is any evidence that PG&E would not be able to pass along costs related to the North Bay Fires. Moreover, PG&E's position that it acted reasonably here in the face of unprecedented conditions (unlike SDG&E) confirms the decision's irrelevance.

1 Finally, PG&E gets the risk of constitutional harm here exactly wrong. Accepting PG&E's
2 invitation to immunize it from inverse condemnation would violate the constitutional rights of
3 property owners who, by no choice of their own, happen to be within PG&E's exclusive service
4 area. If inverse condemnation was unavailable to these Plaintiffs, and it turns out that PG&E did
5 act reasonably, then owners of damaged property would have no remedy at all. Property owners
6 such as Plaintiffs would accordingly bear more than their share of the risks of electric services
7 provided to the public. On the other hand, should PG&E be found liable for inverse
8 condemnation, but not under traditional tort principles, it has layers of administrative due process
9 through CPUC to recover its costs. The Demurrer should be overruled.

10 **II. STATEMENT OF FACTS**

11 **A. PG&E's Power Lines and Equipment Designed to Transmit Electricity to the Public Sparked and/or Exploded, Causing the North Bay Fires that Damaged**
12 **Plaintiffs' Properties.**

13 In October 2017, a series of wildfires devastated nearly 250,000 acres across nine Northern
14 California counties, damaging and destroying homes, businesses, vineyards, farms, and lives.
15 (Compl. ¶¶ 2, 3). Though the North Bay Fires had different points of origin, they share a common
16 underlying cause: they were sparked by power lines and equipment owned, operated and
17 maintained by PG&E for transmitting electricity to the public. (*Id.* at ¶ 2.)
18 The spark of PG&E's equipment created one of the most catastrophic and deadly fires in
19 history. (*Id.* at ¶¶ 1, 60.) Over 100,000 residents were forced to evacuate, more than 8,000
20 structures were destroyed, and forty-four lives were lost. (*Id.* at ¶60.)
21 Contemporaneous calls and PG&E Electric Safety Incident Reports identified trees hitting
22 PG&E power lines and/or problems with other electrical equipment at or around the time and
23 place where the North Bay Fires started. (*Id.* at ¶¶ 80-129.) Witnesses also reported trees hitting
24 PG&E electrical lines and/or problems with other electrical equipment throughout the region
25 where the Fires broke out. (*Id.*) The Fires damaged Plaintiffs' real and personal property, and
26 they have not received adequate compensation. (*Id.* at ¶ 223, 225.)
27 ////
28 ////

B. PG&E Is a Public Utility that Enjoys a Guaranteed Monopoly with an Exclusive Right to Provide Electric Service in the North Bay.

PG&E is a privately-owned public utility with the exclusive right to deliver electricity in northern and central California. Cal. Const., art. XII, § 3. As a public utility, PG&E's monopoly is guaranteed and safeguarded by the CPUC, which possesses the power to refuse to issue certificates of public convenience and necessity to permit potential competition to enter the market. (Compl. at ¶ 224.) Pursuant to CPUC regulations, amounts that PG&E must pay in inverse condemnation can be included in their rates and spread among the entire group of rate payers, so long as they otherwise act as a reasonable and prudent manager of their electric distribution systems. (*Id.*)

C. In a Non-Final Decision, the CPUC Denied SDG&E's Application to Recover Costs After It Voluntarily Settled Claims in Three 2007 Southern California Wildfires Because SDG&E Did Not Reasonably Manage and Operate Its Facilities Prior to the Wildfires.

Beginning on October 21, 2007, more than a dozen fires spread across Southern California, causing extensive damage to properties in the region, widespread evacuations, and seventeen deaths. (See CPUC Decision Denying SDG&E Application 15-09-010, attached to the Baghdadi Dec. as Exhibit A, at 2.) Investigative reports issued after the 2007 wildfires attributed the ignition of three of these fires – the Witch Creek, Guejito and Rice – to San Diego SDG&E. (*Id.* at 11.) Injured property owners brought tort and inverse condemnation claims against SDG&E. (*Id.* at 3, 65.) After a superior court overruled SDG&E's demurrer to the plaintiffs' inverse condemnation claims, the utility settled with victims without admitting liability. (Baghdadi Dec. Ex. A at 65.) After all claims from the wildfires were settled, SDG&E submitted an application to CPUC to recover its costs. (Concurrence in Decision Denying SDG&E Application 15-09-010, attached to the Baghdadi Dec. as Exhibit B at 6.)

SDG&E filed Application 15-09-010 ("SDG&E's Application") on September 25, 2015, seeking recovery of $379 million of the $2.4 billion in costs and legal fees incurred to resolve third-party damage claims arising from the Witch, Guejito, and Rice fires. (Baghdadi Dec. Ex. A at 2-3.) SDG&E recovered $1.1 billion from liability insurance coverage and $824 million from

settlement payments with third parties. (Baghdadi Dec. Ex. A at 3 n.2.) Consumer groups and others filed protests and urged the Commission to deny SDG&E's Application. (*Id.* at 4.)

The Commission determined that the proceeding would address whether "SDG&E's operation, engineering and management of the facilities alleged to have been involved in the ignition of the fires was reasonable and prudent." (Scoping Memorandum and Ruling of Assigned Commissioner in Application 15-09-010, September 25, 2015, attached to the Baghdadi Dec. as Exhibit C.) The Commission refers to this type of inquiry as a "reasonableness" review.

Pursuant to Public Utilities Code section 451, which requires that rates be just and reasonable, the utility was required to prove that costs associated with the third-party damage claims were "prudently incurred by competent management exercising the best practices of the era, and using well-trained, well-informed and conscientious employees who are performing their jobs properly…" (*Id.* at 4-5.) When this is not the case, however, the "Commission can and must disallow those costs: that is, unjust and unreasonable costs must not be recovered in rates from ratepayers." (*Id.* at 5.) The Commission refers to this as the "prudent manager" standard.

The Commission held public and evidentiary hearings in January of 2017. Briefing followed, and the Commission issued a Proposed Decision on August 22, 2017, denying SDG&E's application. On September 11, 2017, PG&E filed a motion for party status, to be able to file comments on the application, on the specific issue of inverse condemnation. On September 26, 2017, the Administrative Law Judge (ALJ) granted PG&E limited party status to address that issue but denied the ability to comment on any remaining matters given the advanced stage of the evidentiary proceedings. (Email Ruling from ALJ Pat S. Tsen Granting Limited Party Status in Application 15-09-010, attached to the Baghdadi Dec. as Exhibit D.)

Noting that PG&E had recently filed for authorization to create a tracking account and potentially pass along its own fire-related costs, ALJ Tsen made clear in her ruling that "[t]he evaluation of the prudent manager standard in this proceeding has been thoroughly litigated and is intensely fact specific. *Its resolution in this proceeding will not negatively impact PG&E in other proceedings with different facts*." (Baghdadi Dec. Ex. D at 2-3. (emphasis added).)

Following comments from the parties, the Commission issued a Decision on December 6,

2017, denying SDG&E's request. The CPUC Decision was based on an analysis of the "the Witch, Guejito, and Rice fires separately, taking into account extensive records submitted by the parties, industry practice in 2007, and contemporaneous information available to SDG&E at the time of the separate ignitions. Each analysis is fact specific and has been reached after careful consideration of the record." (Baghdadi Dec. Ex. A at 10.)

The Commission denied SDG&E's request as to each fire, but for different reasons. (*Id.* at 61-62.) Notably, the Commission did not rely upon inverse condemnation to arrive at its decision, because it found that legal principles are not relevant to a reasonableness review under the prudent manager standard. (*Id.* at 65.) The Commission did, however, discuss the long history of proceedings that apply the prudent manager standard, and remarked that when recovery was denied under such proceedings, the facts in each case showed that the costs were directly attributable to clear and identifiable utility failures or errors. (*Id.* at 49-54.) On January 2, 2018, SDG&E filed a timely application for rehearing of the Decision. On January 2, 2018, PG&E and Southern California Edison (another limited party) jointly filed an application of rehearing as well. The application is now pending before the CPUC.

III. ARGUMENT

A. As a Public Utility that Enjoys a Guaranteed Monopoly, PG&E May Be Liable for Inverse Condemnation

1. The California Constitution Provides that When Property Is Damaged by a Public Improvement, the Owners May Bring an Inverse Condemnation Claim Against the Responsible Public Entity for Compensation.

The California Constitution, article I, section 19, "requires just compensation be paid when private property is taken or damaged for public use." *Marshall v. Department of Water & Power* (1990) 219 Cal.App.3d 1124, 1138 (citations omitted). Inverse condemnation is the cause of action through which a property owner may obtain the just compensation that the California Constitution requires when their property was damaged for public use. *Sheffet v. County of Los Angeles* (1970) 3 Cal.App.3d 720, 732 (citations omitted). A "public entity may be liable in an inverse condemnation action for any physical injury to real property proximately caused by a public improvement as deliberately designed and constructed, whether or not that injury was

foreseeable, and in the absence of fault by the public entity." *Marshall*; *supra*, 219 Cal.App.3d at 1138 (citations omitted). Transmission of electricity is a public use. *Barham v. Southern Cal. Edison Co.* (1999) 74 Cal.App.4th 744, 751.

Here, PG&E does not challenge the sufficiency of Plaintiffs' allegations that their properties were physically injured, nor that these injuries were proximately caused by public improvements as deliberately designed and constructed. Plaintiffs have accordingly stated a claim for inverse condemnation, so long as PG&E is considered a "public entity."

2. California Courts Of Appeal Have Already Determined That a Public Utility May Be Liable For Inverse Condemnation, Even if it Is Privately Owned.

While PG&E admits it is a "public utility", it nevertheless claims that it is not a "public entity" for purposes of inverse condemnation. No court has agreed, and two Courts of Appeal have held otherwise. It is settled that a privately-owned public utility, such as PG&E, may be held liable for inverse condemnation. *Barham*, 74 Cal.App.4th at 753; *Pac. Bell Tel. Co. v. Southern California Edison* (2012) 208 Cal. App.4th 1400 ["*Pacific Bell*"].

In *Barham*, Santa Ana winds caused a section of Southern California Edison's ("SCE") power line to break, igniting a brush fire that quickly spread. (*Barham*, 74 Cal.App.4th at 748-749.) SCE argued on appeal that because SCE is a privately owned public utility and not a public entity, inverse condemnation principles should not apply. *Id.*, at 752-53. The Fourth District Court of Appeal disagreed, citing the California Supreme Court's holding in *Gay Law Students Assn. v. Pac Tel. & Tel. Co.* (1979) 24 Cal.3d 458, 469-70, that the defendant, "a privately owned public utility, which enjoys a state-protected monopoly or quasi-monopoly," is subject to the equal protection guarantee when hiring its employees. (*Barham* at 753.) In *Gay Law Students*, the Supreme Court found that the privately-owned public utility was "in many respects more akin to a governmental entity than to a purely private employer" and "the breadth and depth of governmental regulation of a public utility's business practices inextricably ties the state to a public utility's conduct, both in the public's perception and in the utility's day-to-day activities." (*Gay Law Students Assn.,* 24 Cal.3d at 469). The Supreme Court further stressed that "the nature of the California regulatory scheme demonstrates that the state generally expects a public utility to

conduct its affairs more like a governmental entity than like a private corporation." (*Id.* at 469.) The Court concluded that "a public utility may not properly claim prerogatives of 'private autonomy' that may possibly attach to a purely private business enterprise." (*Id.* at 470.)

In *Pacific Bell*, the Second District Court of Appeal also held that SCE's quasi-monopoly rendered it a public entity liable for inverse condemnation. (*Pac. Bell*, *supra*, 208 Cal.App.4th at 1405.) There, SCE's installed guards failed to prevent a large bird from coming into contact with an energized power line and grounded equipment on a utility pole, causing a ground fault that burned Pacific Bell's underground telephone cables. *Id.* The Second District rejected SCE's argument, adopted *Barham's* reasoning, and found "of particular significance" that "a public utility's monopolistic or quasi-monopolistic authority…derives directly from its exclusive franchise provided by the state," and "is guaranteed and safeguarded by the state Public Utilities Commission, which possesses the power to refuse to issue certificates of public convenience and necessity to permit potential competition to enter the market." *Pacific Bell* 208 Cal.App.4th at 1406 (citations omitted).

Publicly owned electric utilities have been held liable in inverse condemnation in situations virtually identical to this case. *See Marshall v. Department of Water & Power* (1990) 219 Cal.App.3d 1124; *Aetna Life & Casualty Co. v. City of Los Angeles* (1985) 170 Cal.App.3d 865. The Court in *Barham* found no "significant differences" between a privately-owned public utility and a publicly-owned utility for the purpose of inverse condemnation liability, and "no rational basis upon which to found such a distinction." (*Barham*, *supra*, 74 Cal.App.4th at 753.) Indeed, "Article I, section 19 of the California Constitution and the cases which interpret and apply it have as their principal focus the concept of public use, as opposed to the nature of the entity appropriating the property." *Barham,* 74 Cal.App.4th at 753.

The decisions of the Second and Fourth Districts are binding. The facts in *Barham* and *Pacific Bell* are materially the same as here, with inverse condemnation actions brought by plaintiffs whose properties were burned and damaged by power lines and equipment. Like SCE, PG&E is a public utility that enjoys a monopoly or quasi-monopoly, guaranteed by the exclusive franchise provided by the state. Both PG&E and SCE are subject to numerous regulations from

the CPUC, entwining their operations with the state. Like SCE, PG&E is more akin to a governmental actor in delivering electricity for public use, than to a private entity, and is thus a "public entity" for purposes of inverse condemnation.

3. Whether a Utility Is Publicly or Privately Owned Is Irrelevant to the Fundamental Public Policy Principle Underlying Inverse Condemnation: that Owners of the Damaged Property Should Not Have to Contribute More than Their Proper Share of the Risks from Public Improvements Made to Benefit the Community as a Whole.

Notwithstanding its monopoly and the regulatory regime, PG&E claims it is not a public entity for purposes of inverse condemnation, because it cannot "automatically and unilaterally" raise rates to recover costs paid to injured property owners. This argument too has been rejected, as it contorts the public policy underlying inverse condemnation. (*Pacific Bell, supra*, 208 Cal. App.4th at 1407.) Immunizing a public utility from inverse condemnation would allocate the costs of PG&E's power lines to those owners whose properties were burned, precisely the opposite of what the California Constitution mandates:

> The construction of the public improvement is a deliberate action of the state or its agency in furtherance of public purposes. In erecting a structure that is inherently dangerous to private property, the state or its agency undertakes by virtue of the constitutional provision to compensate property owners for injury to their property arising from the inherent dangers of public improvement….

House v. Los Angeles Co. Flood Control Dist. (1944) 25 Cal.2d 384, 396-397 [conc. opn. of Traynor, J.] (citations omitted).

PG&E is correct that inverse condemnation is fundamentally about cost-sharing, that is, the doctrine exists to compensate property owners who, if left uncompensated, would bear more than their share of the cost of the public work. Indeed, the "decisive consideration" underlying inverse condemnation is "the effect of the public improvement on the property and whether the owner of the damaged property if uncompensated would contribute more than his proper share to the public undertaking." (*Id.* (citations omitted)). Accordingly, the corresponding benefits to the public from the improvement cited by PG&E, such as jobs and uninterrupted electricity delivery, are irrelevant. *See id.* ("It is irrelevant whether or not the injury to the property is accompanied by a corresponding benefit to the public purpose to which the improvement is dedicated, since the

measure of liability is not the benefit derived from the property, but the loss to the owner.").

In *Pacific Bell*, SCE similarly argued that the loss-spreading rationale underpinning inverse condemnation liability did not apply to it, because as a public utility it did not have taxing authority and could only raise rates with the approval of California's Public Utilities Commission. But the Court noted that the government's delegation to SCE of the right and obligation to provide a vital public interest (electricity) did "not remove the policy justifications underlying inverse condemnation liability: that individual property owners should not have to contribute disproportionately to the risks from public improvements made to benefit the community as a whole." (*Pacific Bell*, 208 Cal.App.4th at 1407.)

Plaintiffs have not received adequate compensation for the damage to their properties, which thus constitutes a taking of those properties by PG&E, without just compensation. If the individual property owners damaged here were to absorb all those losses, they would be contributing more than their "proper share" to the cost of delivering electricity to their communities. As the Pacific Bell court stressed, "For an owner whose property is damaged by the operation of a utility, he or she suffers a disproportionate share of the cost of the public improvement regardless of whether the utility is governmentally or privately owned. We do not believe the happenstance of which type of utility operates in an area should foreclose a property owner's right to just compensation under inverse condemnation for the damage, interest and attorney fees and should limit the property owner to traditional tort remedies." *Pacific Bell*, 208 Cal.App.4th at 1408.

The Court in *Pacific Bell* further illustrated why rate-regulation is not determinative of whether a utility is liable for inverse condemnation: "the Supreme Court has stated that, although the Legislature has chosen not to do so, nothing in the Constitution prevents the Legislature from placing municipally owned utilities under the regulations of the Public Utilities Commission, including regulation of rates." *Id.* at 1407 n.6. Following PG&E's approach, if the Legislature so acted, municipalities would also be immunized from inverse condemnation liability—an outcome even PG&E agrees would not square with California law. (PG&E's Demurrer ("Dem.") at 16 n.8).

None of the cases cited by PG&E support immunizing it from inverse condemnation at the

expense of injured property owners. In *McMahan's of Santa Monica v. City of Santa Monica* (1983) 146 Cal.App.3d 683, 697, the Second District affirmed an inverse condemnation judgment entered against the City of Santa Monica for damages caused by a ruptured water main. *McMahan's* did not involve a privately-owned public utility. Notably, when the same court decided *Pacific Bell* nearly thirty years later, it did not even cite *McMahan's*, which merely reiterates that the principle underlying inverse condemnation is to compensate innocent owners when a public project causes physical property damage. *McMahan's*, 146 Cal.App.3d at 697.

Likewise, *Gutierrez v. County of San Bernardino* (2011) 198 Cal.App.4th 831, 485, also involved a publicly-owned utility, not a private one. PG&E mistakenly claims that *Gutierrez* stands for the principle that loss distribution – meaning the ability of the governmental agency to automatically spread the loss to taxpayers – is the underpinning of inverse condemnation damages. Rather, as the Fourth District further explains, the "underlying purpose" of inverse condemnation is "to afford relief to the landowner in cases in which it is unfair to ask him to bear a burden that should be assumed by society." *Gutierrez*, 198 Cal.App.4th at 485. Finally, the fact that PG&E cannot directly pass eminent domain costs on to its customers does not mean that the burden would not be shared. Indeed, as the Fourth District recognized in *Moreland Investment Co. v. Superior Court* (1980) 106 Cal.App.3d 1017, 1021–1022, a utility's shareholders are expected to bear some of the eminent domain costs, while ratepayers make a partial contribution. *Id.* (citations omitted).

B. CPUC's Decision Denying a Different Public Utility's Application to Raise Rates Because It Did Not Reasonably Manage and Operate Its Facilities Before Three 2007 Southern California Wildfires Does Not Immunize PG&E from Inverse Condemnation Liability Here.

PG&E seeks to overturn settled law based on the CPUC's pending decision denying SDG&E's application to recover costs after it voluntarily settled claims arising from three 2007 wildfires in Southern California. PG&E argues this decision provides "new" evidence that the CPUC would not allow it to automatically pass on damage liability during its periodic reviews, and therefore, *Barham* and *Pacific Bell* are no longer binding. There is nothing new here. The pending CPUC decision merely applies longstanding rules to the facts presented in SDG&E's

application as to those three fires in Southern California – period.

1. The CPUC's Decision Addresses Only SDG&E's 2015 Application and Does Not and Cannot Establish a Policy on Inverse Condemnation.

The CPUC has issued a ruling on SDG&E's Application concerning the fires in Southern California, and nothing more. "Each analysis is fact specific and has been reached after careful consideration of the record." (Baghdadi Dec. Exhibit B at 10.) Cost recovery is determined based on the facts and circumstances of *each fire*, rather than any predetermined policy.

A future application by PG&E, for example, would entail an inquiry to the specific facts presented in that application. ALJ Tsen made that clear in granting PG&E limited party status. (Baghdadi Dec. Ex. D at 3). Furthermore, there is no language in the CPUC Decision or the Commission's other rulings that suggest its decision is binding on PG&E.

Finally, if the Commission had intended to create policy on fire recovery, it would have opened a rulemaking proceeding, rather than issue a decision in an application proceeding. The Commission's Rules of Practice and Procedure distinguish between the two types of proceedings. Rule 6.1 addresses rulemaking:

> The Commission may at any time institute rulemaking proceedings on its own motion (a) to adopt, repeal, or amend rules, regulations, and guidelines for a class of public utilities or of other regulated entities; (b) to amend the Commission's Rules of Practice and Procedure; or (c) to modify prior Commission decisions which were adopted by rulemaking.

No similar language exists in the rules governing applications. Instead, an application "shall cite by appropriate reference the statutory provision or other authority under which Commission authorization or relief is sought ..." (Rule 2.1, Cal. Public Utilities Comm. Rules of Practice and Procedure.) As such, a rulemaking proceeding is designed to create policy, while an application must reference and conform to policy. An application, like SDG&Es application here to recover for fire-related costs, is designed for discrete regulatory approvals rather than policy. For these reasons, the denial of SDG&E's request for cost recovery is limited to the facts presented in that proceeding, and does not create policy applicable to other utilities, other fires, or other cases such as this one.

2. CPUC's Decision Merely Reinforces the Longstanding Rule that Public Utilities Must Demonstrate that Any Rate Increase Is Just and Reasonable.

Far from new facts or evidence warranting a change in settled law, the CPUC decision applies the established rule that utilities may raise rates only upon a finding by the Commission that the increase is just and reasonable. Public Utilities Code Section 451. This was the rule long before *Barham* and *Pacific Bell* were decided and remains so today.

The CPUC decision does nothing to upend that law. To the contrary: the CPUC determined inverse condemnation principles were "not relevant to a Commission reasonableness review under the prudent manager standard" and thus did not "merit a dedicated discussion." (Baghdadi Dec. Ex. A at 65). No court had found SDG&E strictly liable for the costs requested in its application, and SDG&E had disclaimed all liability when it voluntarily settled claims with wildfire victims. (*Id.*)[1] SDG&E even withdrew its testimony concerning Inverse Condemnation for purposes of Phase 1 in the Application proceedings. *Id.*

The only question before the Commission was whether SDG&E's management and operation of its facilities leading up to the 2007 wildfires was reasonable, and the CPUC found it was not. At no point did the CPUC address whether a rate hike would be permitted if SDG&E found liable under inverse condemnation, but still acted as a prudent manager. At most, PG&E points to musings from CPUC commissioners who express some concern about the inverse condemnation law. (Dem. at 13.) These statements, respectfully, are not new facts that distinguish *Barham* or *Pacific Bell* and do not provide any basis for this Court to attempt to overturn settled law.

3. Nothing in the CPUC's Non-Final Decision Regarding SDG&E's Application Would Prevent PG&E from Seeking a Rate Increase Here if It Were Held Liable for Inverse Condemnation.

The CPUC Decision is not yet final, nor is it binding on SDG&E, let alone PG&E.

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[1] PG&E mistakenly claims that SDG&E paid costs "due to inverse condemnation" and "the application of inverse condemnation against them." (Demurrer at 12.) As the CPUC decision explains, no court applied inverse condemnation against SDG&E, and in fact, SDG&E expressly denied all liability when it voluntarily settled claims. (Baghdadi Dec. Ex. A at 65.)

SDG&E, PG&E, and SCE have all filed applications for rehearing.[2] (*See* Baghdadi Dec. Ex. A at 72-73; *see also* Public Utilities Code § 1731(a)). "According to California law, the 'final' administrative decision is the one made on an application for rehearing, not the original decision." *City of Los Angeles v. Public Utilities Commission* (1975)15 Cal.3d 680, 707. Thus, the decision of the CPUC is not "final" because the Commission has not issued a ruling on the applications for rehearing, and the matter is simply not "ripe" for review by any court. *See Pacific Legal Foundation v. California Coastal Commission, et al.* (1982) 33 Cal.3d 158, 171.

Even if the decision were final, it is nevertheless irrelevant for all the other reasons discussed above. And one more: PG&E apparently contends here that it acted reasonably to prevent wildfires (Dem. at 8). *If* that is true, there is no reason to believe that it could not recover costs through the CPUC process. *See* Baghdadi Dec. Ex. A at 49 (noting that "in each case, the facts showed that the costs the Commission denied were directly attributable to clear and identifiable utility failures or error.").

C. Failure to Allow Inverse Condemnation Is Unconstitutional, Not the Other Way Around.

PG&E claims potential liability for inverse condemnation would violate its rights under the Fifth and Fourteenth Amendments, because that liability would somehow dictate the outcome of future rate proceedings before the CPUC, foreclose any chance for PG&E to pass wildfire costs to ratepayers, and thereby constituting a taking. The sole basis proffered by PG&E for the plausibility of this scenario is the CPUC's pending decision on SDG&E's application to recover costs from the 2007 wildfires in Southern California. This is a red herring. The CPUC expressly found that inverse condemnation had no relevance to its decision on the Application. (*See* Baghdadi Dec. Ex. A at 65.) PG&E's constitutional arguments are built entirely on this speculative foundation and must collapse without it. In contrast, Plaintiffs' inverse condemnation claims are anchored in Article I of the California Constitution, and reiterated by California

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[2] On January 2, 2018, SDG&E filed a timely application for rehearing of the CPUC's November 30, 2017, "Decision Denying Application." On January 2, 2018, PG&E and Southern California Edison jointly filed an application of rehearing of the "Decision Denying Application."

appellate courts.

1. PG&E's Speculation About What Might Occur in this Case and in Subsequent CPUC Proceedings Does Not Establish a Constitutional Violation.

There is no record upon which a court could determine a taking has or ever would occur here. First, no determination has been made that PG&E is liable for inverse condemnation. PG&E will have the opportunity to "raise several defenses to the application of inverse condemnation on the facts presented in these cases." (Dem. at 9.) Second, even if liability is found, damages remain to be established. PG&E cannot say that liability would exceed insurable amounts (Dem. at 10), nor whether PG&E's shareholders would have to bear any costs at all. Third, even if liability for inverse condemnation is found, and it exceeds insurable and other recoverable amounts, whether the remaining costs can be recovered will be determined upon application to the CPUC, which has already made clear that inverse condemnation is not relevant to such determinations. (*See* Baghdadi Dec. Ex. A at 65, *supra*). PG&E has layers of legal and administrative proceedings that protect its Fifth and Fourteenth Amendment rights.

2. PG&E Cannot Marshal Any Authority Supporting Its Claims of Constitutional Violations.

Nor can PG&E find purchase in the case law for the notion that its constitutional rights are violated by inverse condemnation. The scant authority it grasps is inapposite: the question before this Court bears no relation to whether a state utility commission decision limiting rate pass-throughs for the cost of inactive power plants constitutes a taking (*Duquesne Light Co. v. Barasch*, 488 U.S. 299 (1989), affirming decision that it did not); or whether legislation regarding retiree benefits imposes "severe retroactive liability" on parties who "could not have anticipated" it (*Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998)); or whether a CPUC decision regarding ownership and crediting of utility shares constitutes improper retroactive ratemaking (*Ponderosa Tel. Co. v. Pub. Utils. Comm'n* (2011) 197 Cal.App.4th 48). [3]

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[3] *Action Apartment Ass'n v. Santa Monica Rent Control Bd.*, 509 F.3d 1020 (9th Cir. 2007), cited by PG&E in support of its claim that inverse condemnation will violate its substantive due process rights, is equally unavailing. There, the Ninth Circuit held that a substantive due process challenge to a rent control

PG&E's argument that inverse condemnation may constitute a taking because it interferes with its reasonable investment-backed expectations also fails. The case it relies upon, *Eastern Enterprises*, found such interference where retroactive legislation "reached back 30 to 50 years to impose liability" on employers "unrelated to any commitment that [they] made or to any injury they caused." 524 U.S. at 501-2. Here, PG&E cannot claim its investors are unduly surprised by the prospect of inverse condemnation liability – or that it is retroactive – when state appellate decisions dating back to 1999 have held that the doctrine applies to privately owned public utilities. And to the extent that inverse condemnation may apply here, it will be precisely because PG&E caused the fires that damaged Plaintiffs' property. That is not a taking.

IV. CONCLUSION

For these reasons, the Demurrer should be overruled.

Dated: April 16, 2018

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ordinance was not ripe as to a plaintiff against whom its provisions had yet to be enforced. *Id.* at1027-28. PG&E has not been subject to enforcement of any holding that it is liable for inverse condemnation in this litigation.

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PROOF OF SERVICE
California North Bay Fire Cases
Case No. JCCP No. 4955

At the time of service, I was over 18 years of age and not a party to this action. I am employed in the county where the mailing took place. My business address is 650 California Street, 26th Floor, City and County of San Francisco, CA 94108-2615.

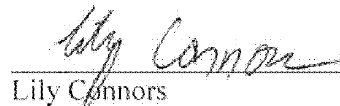
On the date set forth below, I caused to be served true copies of the following document(s) described as:

PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' DEMURRER

BY ELECTRONIC SERVICE:: I electronically served the document(s) described above on the interested parties in this action pursuant to the most recent Omnibus Service List by submitting an electronic version of the document(s) via file transfer protocol (FTP) to CaseHomePage through the upload feature at www.casehomepage.com.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on April 16, 2018, at San Francisco, California.



Lily Connors