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SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF SAN FRANCISCO

Coordination Proceeding Special Title (Rule 3.550) *CALIFORNIA NORTH BAY FIRE CASES*	CASE NO. JCCP 4955 **PUBLIC ENTITY PLAINTIFFS' OPPOSITION TO PG&E'S DEMURRER** DATE: May 18, 2018 TIME: 9:00 am DEPT: 304 JUDGE: Hon. Curtis E. A. Karnow

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

This case is about a utility company with a long history of safety failures. Defendants PG&E CORPORATION's and PACIFIC GAS & ELECTRIC COMPANY's (collectively, "PG&E") inadequate risk management practices and systemic failures, including the lack of adequate safety regulations and inspections and maintenance, caused and contributed to the ignition of the most destructive wildfires in California's recorded history. As detailed in the Master Complaints on file, the wildfires, now termed the "North Bay Fires" began on the night of October 8, 2017, spread rapidly and ultimately claimed the lives of at least 44 individuals, burned over 245,000 acres and destroyed over 14,700 homes through numerous counties.

In its Demurrer, PG&E blames the historic event on a confluence of allegedly unprecedented weather events and asks this court to ignore almost twenty years of settled law concerning the applicability of inverse condemnation to a privately-owned utility company. The centerpiece of PG&E's argument is that a 2017 "Decision Denying Application" (the "CPUC Decision") issued by the California Public Utilities Commission (CPUC) upends the policy behind inverse condemnation's applicability to privately-held utility companies. For the reasons set forth herein, PG&E's arguments are unpersuasive.

First, the policy behind application of inverse condemnation to a privately-owned utility company lies in its monopoly on the delivery of electrical power in California. The economic benefit of a state-sanctioned monopoly is derived directly from an exclusive franchise provided by the CPUC, which thereby justifies the imposition of inverse condemnation liability. *Pacific Bell Telephone Company v. Southern California Edison* (2012) 208 Cal.App.4th 1400, 1406.

Second, the CPUC Decision arising out of the 2007 San Diego Wildfires does not alter the cost-spreading rationale behind the applicability of inverse condemnation. PG&E would have this court believe that because the CPUC did not automatically allow San Diego Gas & Electric Company to pass on the costs of settling cases to ratepayers, inverse condemnation should no longer apply. PG&E omits that the trial court in the 2007 San Diego Wildfire cases never made a finding concerning inverse condemnation. Accordingly, the CPUC did not consider inverse condemnation in its decision denying a pass through of costs to ratepayers.

Moreover, the Court of Appeal in *Pacific Bell* noted that the inability to pass through such costs would not immunize utilities from inverse condemnation liability. *Id.* at 1407, fn. 6. Regardless of whether PG&E must first obtain CPUC approval before passing inverse-condemnation damages to its ratepayers, PG&E remains in the best position to spread the costs arising from its ownership and maintenance of a public utility—especially costs incurred as a result of PG&E's own actions and omissions.

Third, the CPUC Decision that forms the basis of PG&E's argument is not a final decision. Thus, even if this court is inclined to entertain PG&E's arguments, the ripeness doctrine would foreclose any such review. In the same vein, resolution of this issue on demurrer is inappropriate, as doing so would require this Court to weigh evidence submitted by PG&E in analyzing just *one* of the policies underlying application of inverse-condemnation liability (namely, the cost-spreading policy).

Finally, PG&E makes several questionable arguments, at best, concerning the constitutionality of the application of inverse condemnation. PG&E usurps the victim's position, asserting that payments for *its liability* under inverse condemnation to plaintiffs whose property *it* destroyed constitutes a "taking" or a violation of substantive due process. Putting aside the insensitive nature of such an argument, this line of reasoning could easily be argued to apply in any case where one party seeks damages from another. The applicability of inverse condemnation to PG&E has not been altered, and thus, its liability to landowners would not be an unconstitutional "taking." The policy and laws underpinning inverse condemnation as applied to privately-owned utility companies like PG&E have not changed. The facts set forth in the Public Entity Plaintiffs' Master Complaint more than adequately state a cause of action for inverse condemnation. Accordingly, the Public Entity Plaintiffs respectfully request that this court overrule PG&E's demurrer.

II. A DEMURRER ONLY TESTS THE LEGAL SUFFICIENCY OF PLEADINGS

PG&E demurs to the Second Cause of Action for Inverse Condemnation of the Public Entity Plaintiffs' Master Complaint on the grounds that this cause of action fails to state facts sufficient to constitute a cause of action (Code of Civil Procedure §430.10(e)).

It is fundamental that the purpose of a demurrer is to test the sufficiency of the Complaint as a matter of law. As such, a demurrer only raises questions of law as opposed to questions of fact. *Code Civ. Proc.* §§422.10; 589. A demurrer solely serves to test the sufficiency of a pleading and not other extrinsic matters and may only be granted where defects appear on the face of the pleading, itself. *Blank v. Kirwan* (1985) 39 Cal.3d 311, 318. Thus, an attack on the pleadings through a demurrer only challenges the sufficiency of the causes of actions pled and must be overruled if any valid cause of action is pled. *Grieves v. Superior Court* (1984) 157 Cal.App.3d 159.

California courts have adopted more liberal pleading standards which put the emphasis on notice to the defendant, rather than technical pleading requirements. For purposes of a demurrer, the allegations in plaintiff's complaint must be accepted as true. *Aubry v. Tri-City Hosp. Dist.* (1992) 2 Cal.4th 962, 966-967. The sole issue raised by a general demurrer is whether the facts pled state a valid cause of action, not whether they are true. *Del E. Webb Corp. v. Structural Materials Co.* (1981) 123 Cal.App.3d 593, 604.

A general demurrer for failure to state a cause of action under *Code Civ. Proc.* §430.10(e) must be overruled if a plaintiff meets the minimal burden; i.e., "if the essential facts of *some* valid cause of action are alleged, the complaint is good against a general demurrer." *Cal. Practice Guide: Civil Procedure Before Trial* (The Rutter Group 2011) ¶7:41, p. 7(I)-20 (Rev. #1 2011); *Sheehan v. San Francisco 49ers, Ltd.* (2009) 45 Cal.4th 992, 992 – [general demurrer may be upheld "only if the complaint fails to state a cause of action under any possible legal theory"]. For the reasons set forth herein, the Court should overrule Defendant's demurrer.

III. INVERSE CONDEMNATION APPLIES TO PRIVATELY-OWNED UTILITIES

Barham v. Southern California Edison (1999) 74 Cal.App.4th 744 is the seminal case applying inverse condemnation to privately-owned utility companies. The *Barham* case, like the North Bay Fire Cases, involved damages sustained by plaintiffs as a result of a wildfire alleged to have resulted from a failure in Southern California Edison's ("Edison") overhead power line equipment. *Id.* at 747. After the trial court found in favor of Edison on the plaintiffs' cause of

action for inverse condemnation based on a finding that there had been no taking for a public use, the Court of Appeal reversed, concluding that although Edison was a privately-owned utility, its function as a provider of electricity is a "public use" that subjects it to inverse condemnation:

> "An inverse condemnation action is an eminent domain action initiated by one whose property was taken for public use, as opposed to by the condemning public agency. As such, the principles of eminent domain law apply to inverse condemnation proceedings. Public Utilities Code §612 provides, "An electrical corporation may condemn any property necessary for the construction and maintenance of its electric plant." "Electric plant" includes electrical transmission facilities such as those at issue in this case. (Pub. Util. Code §217). 'Electrical corporation' includes every corporation or person owning, controlling, operating, or managing any electric plant for compensation within this state, except where electricity is generated on or distributed by the producer through private property solely for its own use or the use of its tenants and not for sale or transmission to others.' (Pub. Util. Code §218, subd. (a)). **Therefore, generally, condemning private property for the transmission of electrical power is a public use and inverse condemnation will apply**."

Id. at 752 (citations omitted, emphasis added).

In rejecting Edison's emphasis on the term "public," the *Barham* court relied heavily on the California Supreme Court decision in *Gay Law Students Association v. Pacific Tel. & Tel. Co.* (1979) 24 Cal.3d 458. "[T]he Supreme Court held that a public utility is in many respects more akin to a governmental entity than to a purely private employer. The court held, '[m]oreover, 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.'" *Barham*, 74 Cal.App.4th at 753 (citations omitted).

Similarly, in *Pacific Bell Telephone Company v. Southern California Edison* (2012) 208 Cal.App.4th 1400, Edison appealed a judgment finding it liable to the plaintiff under inverse condemnation. There, the Court of Appeal discussed the *Barham* court's reliance on the California Supreme Court's finding in *Gay Law Students Association*; i.e., that a utility was more akin to a governmental entity 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.'" *Pacific Bell*, 208 Cal.App.4th at 1406 (citations omitted).

The court in *Pacific Bell* also noted that investor-owned utilities that are regulated by the CPUC enjoy a monopoly or quasi-monopoly on the delivery of electrical power in California. The economic benefit of a state-sanctioned monopoly is derived directly from an exclusive franchise provided by the CPUC which guarantees and safeguards a privately-owned utility and thereby justifies the imposition of inverse condemnation liability. *Pacific Bell*, 208 Cal.App.4th at 1406. That the government chose to grant a franchise and delegate the furnishing of electricity to a privately-owned company "does 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." *Id.* at 1407. "In the instant appeal, we find that Edison's monopolistic or quasi-monopolistic authority, deriving directly from its exclusive franchise provided by the state, distinguishes Edison's action from the cases it cites rejecting inverse condemnation cases against private parties who do not have such monopolistic authority from the state." *Id.* at 1406.

Accordingly, it is well-settled that a privately-owned utility company like PG&E can be held liable for inverse condemnation, and PG&E cites no legal authority to the contrary.

A. THE CPUC'S DECISION CONCERNING THE 2007 SAN DIEGO WILDFIRES HAS NO EFFECT ON PG&E'S LIABILITY IN THIS CASE

The centerpiece and common thread throughout PG&E's demurrer is its reliance on the California Public Utilities Commission's non-final, 2017 "Decision Denying Application" (the "CPUC Decision"). The CPUC Decision concerned San Diego Gas & Electric Company's ("SDG&E") application to pass through some of the costs of settling claims arising from three wildfires in 2007 to ratepayers. Because the CPUC denied SDG&E's application, PG&E contends that inverse condemnation is no longer applicable to privately-owned utility companies, despite longstanding case law to the contrary. This argument fails for several, critical reasons.

First, PG&E's demurrer omits several important statements contained in the CPUC Decision.

> "First, Inverse Condemnation principles are not relevant to a Commission reasonableness review under the prudent manager standard. *Thus, Inverse Condemnation was not a material issue in Phase 1 and did not merit a dedicated discussion. Notably, even SDG&E withdrew its testimony concerning*

Inverse Condemnation for purposes of Phase 1.

> ***"Second, according to SDG&E's application, the Superior Court only went so*** *far as to rule that the plaintiff homeowners could plead Inverse Condemnation claims in their civil actions against SDG&E. We are not aware of any Superior Court determination that SDG&E was in fact strictly liable for the costs requested in its application.* 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." (Emphasis added).

(Dec. of John Fiske, Ex. 4, p. 65.)

This omission is critical because the trial court in the 2007 San Diego Wildfire cases *never* found SDG&E liable for inverse condemnation. Rather, it only overruled a demurrer to the plaintiffs' cause of action for inverse condemnation. Because there was never a finding of liability by the trial court, the CPUC did not, and could not, measure the relationship between a court's finding of liability for inverse condemnation contrasted with its own prudent manager standard. Put differently, its decision to deny SDG&E's request to pass through the costs it paid in settling cases had nothing to do with the utility's liability for inverse condemnation because that finding was never made. Accordingly, PG&E's repeated characterization of the CPUC Decision throughout its demurrer as a "refusal to allow automatic pass-through of inverse condemnation costs" is both inaccurate and misleading. *Cf.*, PG&E Demurrer, p. 17, lns. 13-14.

Second, the rationale behind the applicability of inverse condemnation to a privately-owned utility company lies in its exclusive, state-sanctioned monopoly to deliver electricity. *Pacific Bell*, 208 Cal.App.4th at 1406. That the government chose to grant a franchise and delegate the furnishing of electricity to a privately-owned company "does 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." *Id.* at 1407. In *Pacific Bell*, Edison argued that this loss-spreading rationale does not apply because it does not have taxing authority and cannot raise rates absent the approval of the CPUC. *Id.* The court "note[d] that in this case…Edison has not pointed to any evidence to support its implication that the commission would not allow Edison adjustments to pass on damages liability…"

In a footnote immediately following, the *Pacific Bell* court stated: "We also note that the Supreme Court has stated that, although the Legislature has not chosen 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. **We do not believe such regulation would immunize municipal utilities from inverse condemnation liability under the theory that they were no longer able to spread the cost of public improvements.**" (Emphasis added). *Id.* at 1407, fn. 6. PG&E would have this court dismiss this footnote as "dicta"; however, the footnote represents the clearest insight into the Court of Appeal's interpretation of the policy behind inverse condemnation. When distilled, the policy and rationale behind the applicability of inverse condemnation to a privately-owned utility company lies not in "loss-spreading" in the sense of taxing authority, but rather, the fact that a utility company, and not a homeowner, is in the best position to absorb the risks from an improvement made for public use. In other words, PG&E remains in the best position to spread losses—even if it must first obtain approval from the CPUC to spread losses through a rate increase.

Third, and in the same vein, the Court of Appeal in *Pacific Bell* agreed with *Barham* and had no interest in being "required to differentiate between damage resulting from the operation of a utility based solely upon whether the utility is operated by a governmental entity or by a privately owned public utility" and was "not convinced that any significant differences exist." *Id.* at 1408. The court reasoned that, at the end of the day, a homeowner that sustained damages "suffers a disproportionate share of the cost of the public improvement regardless of whether the utility is governmentally or privately owned." *Id.* Accordingly, the court "[did] 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." *Id.*

Based on the foregoing, the CPUC Decision should not be afforded the import PG&E ascribes to it nor does it support PG&E's argument that inverse condemnation no longer applies to privately-owned utility companies. Accordingly, *Barham* and *Pacific Bell* soundly remain as binding decisions upon this court, and a CPUC decision arising out of a different utility

company's conduct, in a different wildfire, where inverse condemnation was expressly not a consideration, and a different standard of review was utilized, should not be persuasive.

B. THE CPUC DECISION IS NOT FINAL

Even if the court is inclined to consider PG&E's argument concerning the impact of the CPUC Decision, it should note that it is not a final decision. PG&E, SDG&E and Edison have all filed applications for rehearing of the CPUC Decision. To date, the CPUC has not ruled on those applications and all three utilities have threatened they would appeal any adverse ruling by the CPUC to the proper court.

Whether the utility companies ultimately seek appellate review, the CPUC Decision is not final because the CPUC has not issued a ruling on the application for rehearing. See, *City of Los Angeles v. Public Utility Commission* (1975) 15 Cal.3d 680, 707; *Communications Telesystems Int'l v. California Public Utilities Commission*, 193 F.3d 1011, 1016 (9th Cir. 1999) ["According to California law, the 'final' administrative decision is the one made on an application for rehearing, not the original decision."].

PG&E's argument is that the mere *possibility* of not being able to automatically and unilaterally pass through damages paid in connection with lawsuits somehow turns the applicability of inverse condemnation against it upside down. As expressed by the Court of Appeal in *Pacific Bell*, this version of "loss-spreading" is simply not what is contemplated behind applying inverse condemnation to private utilities. Even so, the CPUC Decision is not final, and the matter is simply not "ripe" for review by any court. Where there are concurrent judicial and administrative proceedings, the ripeness doctrine "prevent[s] the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Pacific Legal Foundation v. California Coastal Commission, et al.* (1982) 33 Cal.3d 158, 171.

For these reasons, and if this court is inclined to entertain PG&E's arguments concerning the impact of the CPUC Decision, the ripeness doctrine forecloses this review.

IV. THE CPUC DECISION DOES NOT IMPACT THE CONSTITUTIONALITY OF INVERSE CONDEMNATION'S APPLICABILITY TO PG&E

PG&E expands its tenuous arguments concerning the CPUC Decision's impact on the state of inverse condemnation and argues that lawsuits by homeowners seeking compensation for damages to their property would constitute an unconstitutional taking. It presents two primary arguments in this regard: (1) because the CPUC did not allow SDG&E to pass through some of the liabilities for damages paid to resolve lawsuits, application of inverse condemnation would be tantamount to a "taking" of private property from one private party (PG&E) to another (the inverse plaintiff) without just compensation; and (2) application of inverse condemnation to PG&E violates PG&E's substantive due process rights because it would be required to pay money damages to plaintiffs. For the following reasons, these arguments should be rejected by this court and PG&E's demurrer should be overruled.

A. CASES CITED BY PG&E IN SUPPORT OF ITS "TAKINGS" ARGUMENTS ARE DISTINGUISHABLE

PG&E primarily cites two cases for the proposition that limiting a utility's rate-setting ability constitutes a "taking" because it cannot automatically pass on costs to ratepayers for its own liability. It argues that payments from PG&E to landowners for losses caused by PG&E's equipment constitutes a transfer of private property from one party to another. This flawed reasoning, if taken to its logical conclusion, would mean than any lawsuit seeking damages by one party from another would constitute a "taking." PG&E shrouds this dubious position with claims of unconstitutionality that are unsupported by the cases it cites – both of which are easily distinguished as set forth below.

1. Duquesne Light Co. v. Barasch, **488 U.S. 299 (1989)**

In the *Duquesne Light Co.* case, two power companies formed a joint venture to build more generating capacity in response to predictions of increased demand for electricity. *Id.* at 302. The plan consisted of the construction of several, large nuclear generating units and the total investments by the two companies exceeded $40 million. *Id.* However, due to unforeseen global events and a decrease in popularity for nuclear energy as a way to meet increased demands for electricity, the companies decided to abandon their efforts. *Id.* Following this

decision, the two companies sought permission from the Pennsylvania Public Utilities Commission to recoup their expenditures for the unbuilt plants. *Id.*

The United States Supreme Court noted that, as privately-owned public utilities, the power companies are under a state statutory duty to serve the public. *Id.* at 307. The Court further recognized that this "partly public, partly private status of utility property creates its own set of questions under the Takings Clause of the Fifth Amendment." *Id.* However, "[t]he guiding principle has been that the Constitution protects utilities from being limited to a charge for their property serving the public which is so 'unjust' as to be confiscatory." *Id.* (citations omitted). Thus, the Court narrowly found that, as it relates to the provision of power and investment in infrastructure to serve the public's needs for electricity, the rates must afford sufficient compensation so as to not create a taking. *Id.* Citing to *FPC v. Texaco Inc.*, 417 U.S. 380, 391-392, the Court utilized the rationale that, "[a]ll that is protected against, in a constitutional sense, is that the rates fixed by the Commission be higher than a confiscatory level." *Id.*

Here, the alleged "takings" that PG&E references are payments for its liability under the law. In no way does the CPUC Decision or the applicability of inverse condemnation have any bearing on PG&E's ability to request rate increases as it relates to providing further infrastructure to deliver power. Accordingly, PG&E's reliance on the *Duquesne Light Co.* case is misplaced.

2. ***Ponderosa Tel. Co. v. Pub. Utils. Comm'n* (2011) 197 Cal.App.4th 48**

PG&E's reliance on *Ponderosa* is equally inapposite. In this case, 11 rural telephone companies challenged the California Public Utilities Commission (CPUC)'s decision to allocate proceeds from the redemption of Rural Telephone Bank (RTB) stock to the telephone companies' ratepayers. The RTB was a creation of Congress in 1971, the purpose of which was to make capital available to rural telephone providers at reasonable costs for investment in infrastructure. *Id.* at 52. One form of financing for the RTB was stock available for purchase.

The plaintiff-utility, an owner of RTB shares, contended that the CPUC's action in allocating the share proceeds to ratepayers constituted an unlawful taking of its property which

amounted to improper, retroactive ratemaking. *Id.* at 50. The CPUC issued a decision finding that the 11 rural telephone companies received approximately $31 million from an RTB stock redemption and that this amount should be credited to ratepayers. *Id.* at 55. An underlying basis for the CPUC's decision to do so was that because the payments for the stock were supplied by the ratepayers through the regulated revenue requirement, that the ratepayers actually furnished the funds and should be the beneficiaries of the redemption. *Id.* Ultimately, the Court of Appeal determined that the CPUC has mischaracterized the actual owner of the stock to be the ratepayers, and not the utility and its shareholders. *Id.* at 57. Because the utility was allowed to purchase the stock despite doing so through the incursion of debt, the court found that the utility and its shareholders were the rightful owner of the stock. Accordingly, the utility/shareholders, and not the ratepayers, were entitled to the benefits. *Id.* The court therefore found that the improper allocation of the benefits would be tantamount to retroactive ratemaking. *Id.* at 64.

Again, liability for damages that may ultimately be paid by PG&E under inverse condemnation does not align with the discussion set forth in *Ponderosa*, nor would it be considered retroactive ratemaking under the circumstances. PG&E, in fact, offers no arguments in that regard because it is simply inapplicable in this scenario, and the *Ponderosa* case offers no support for PG&E's "unconstitutional taking" arguments.

B. INVERSE CONDEMNATION DOES NOT INTERFERE WITH PG&E'S INVESTMENT-BACKED EXPECTATIONS

PG&E also offers the argument that the applicability of inverse condemnation interferes with PG&E's reasonable investment-backed expectations. In so doing, it relies upon *Eastern Enterprises v. Apfel*, 524 U.S. 498 (1998) for this proposition.

In *Eastern Enterprises*, at issue was the responsibility of a company to fund premiums under the 1992 Coal Industry Retiree Health Benefit Act of 1992 (Coal Act) for over 1,000 retired miners who had worked for the company before 1966. *Id.* at 499. In finding that the Coal Act's applicability to the company interfered with its reasonable investment-backed expectations, the United States Supreme Court reasoned that the "Act's beneficiary allocation scheme reaches back 30 to 50 years to impose liability against [the company] based on the

company's activities between 1946 and 1965. Thus, even though the Act mandates only the payment of future health benefits, it nonetheless 'attaches new legal consequences to an employment relationship completed before its enactment.'" *Id.* at 532 (citations omitted). "Retroactivity is generally disfavored in the law, *Bowen v. Georgetown Univ. Hospital*, 488 U.S. 204, 208, in accordance with 'fundamental notions of justice' that have been recognized throughout history, *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827, 855." *Id.*

Here, PG&E cannot reasonably assert that the application of longstanding case law applying inverse condemnation against it interferes with its investment-backed expectations. In other words, and unlike the *Eastern Enterprises* case, nothing about inverse condemnation as applied to PG&E is retroactive in nature, and it has no reasonable basis for claiming that it could not have prepared for this type of event.

Moreover, the assertion that the CPUC Decision fundamentally changed PG&E's investor-backed expectations is disingenuous. PG&E has been involved in rate cases prior to the 2017 CPUC Decision it so heavily relies upon in which the CPUC articulated the procedure it follows and the burden it imposes in rate cases. For example, in a 2011 decision arising out of the 2010 San Bruno Gas Explosion, the CPUC imposed obligations on PG&E intended to move PG&E "towards becoming a safe natural gas transmission system operator." (PRJN, Ex. ___, p. 2.) The decision allocated the additional costs PG&E would incur between ratepayers and shareholder. (PRJN, Ex. ___, pp. 2-4.) The decision also articulated the procedure followed by the CPUC and the burden it imposes on utilities in rate cases:

> "Pursuant to Pub. Util. Code § 451 all rates and charges collected by a public utility must be 'just and reasonable," and a public utility may not change any rate 'except upon a showing before the commission and a finding by the commission that the new rate is justified.' (§ 454.) The Commission requires that the public utility demonstrate with admissible evidence that the costs which it seeks to include in revenue requirement are reasonable and prudent. The Commission is charged with the responsibility of ensuring that all rates demanded or received by a public utility are just and reasonable.
>
> "PG&E must meet the burden of proving that it is entitled to the relief sought in this proceeding, and PG&E has the burden of affirmatively establishing the reasonableness of all aspects of the application.
>
> "With the burden of proof placed on PG&E, the Commission has held that the standard of proof PG&E must meet is that of a preponderance of evidence.

> Preponderance of the evidence usually is defined 'in terms of probability of truth, e.g., "such evidence as, when weighed with that opposed to it, has more convincing force and the greater probability of truth."' In short, PG&E must present more evidence that supports the requested result than would support an alternative outcome." (PRJN, Ex. ___, pp. 41-42).

In a precursor to the 2017 CPUC Decision, SDG&E, PG&E, Edison, and Southern California Gas Company (SoCal Gas) filed an application in 2009 requesting CPUC authorization to establish a balancing account to allow each utility to recover from ratepayers "all amounts paid by the utility arising from wildfires."[1] (PRJN, Ex. ___, p. 2.) SDG&E and SoCal Gas "ask[ed] the Commission to allow them to recover wildfire costs in rates on the grounds that wildfire risk come with their obligation to serve, recovery of such costs is consistent with Commission treatment of the costs created by natural disasters, and the doctrine of inverse condemnation presupposes that costs allocated to the public entity will be shared by all users served by that entity. The applicants also argue[d] that certainty of rate recovery for wildfire costs is necessary for utilities to maintain their financial strength." (PRJN, Ex. _, p. 7). That application was denied in the CPUC's 2012 "Decision Denying Application." (PRJN, Ex. ___, p. 7).

In other words, the key issues raised by PG&E, SDG&E, and Edison in their applications leading to the 2017 CPUC Decision and in their present requests for rehearing were raised, discussed, and determined in the 2012 "Decision Denying Application." (PRJN, Ex. __). Issues of inverse condemnation, fire safety, and the potential exposure of ratepayers to unlimited costs were all part of the evidentiary record. (PRJN, Ex. ___, pp. 7, 11-12, and 16).

In denying the application, the CPUC found that the applicants' proposed use of balancing accounts to pass through all costs associated with wildfires unfairly "continues to

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[1] Balancing accounts are approved by the CPUC and are established by utilities to serve various ratemaking purposes. The primary purpose of balancing accounts is to ensure that a utility recovers its CPUC authorized revenue requirement from ratepayers for a given program or function, but no more or less. Since rates are always forward-looking and based on forecasted sales, actual collections by the utility from ratepayers can be more or less than what the Commission had authorized it to collect. The net balance in a balancing account is typically recovered from or refunded to ratepayers on an annual basis, but in some cases, the amortization of the balance may be more frequent.

provide for unlimited potential for uninsured wildfire costs [being passed on] to ratepayers" and that it "does not create incentives to reduce the risk of wildfires." (PRJN Ex. ___, p. 18). Accordingly, and given the foregoing history, nothing about the 2017 CPUC Decision should have altered PG&E's investment-backed decisions.

C. INVERSE CONDEMNATION PROPERLY ALLOCATES BENEFITS AND BURDENS

PG&E asserts that the application of inverse condemnation to it does not adjust the benefits and burdens of economic life to promote the common good. Despite the plaintiffs' allegations concerning the historic damage caused by PG&E, the utility cries foul that it should be required to pay landowners for damage to their property caused by its power lines and dismisses clear, longstanding law to the contrary. As discussed herein, the policy underlying PG&E's liability under inverse condemnation arises out of its quasi-governmental role it plays in the distribution of electricity and gas – a profitable role it enjoys through the monopolistic franchise it is afforded by the state. The constitutional underpinnings of inverse condemnation rest on the fundamental principle that a homeowner that sustained damages "suffers a disproportionate share of the cost of the public improvement..." *Pacific Bell*, 208 Cal.App.4th at 1408. Again, this is why the *Pacific Bell* court expressed that a property owner that sustained damages involving a utility's equipment, whether publicly or privately-owned, should not be foreclosed in seeking just compensation under inverse condemnation and be limited to traditional tort remedies, only. *Id.*

D. PG&E'S SUBSTANTIVE DUE PROCESS RIGHTS ARE NOT VIOLATED

PG&E asserts two arguments concerning its alleged deprivation of its substantive due process rights: (1) taking PG&E's "property" without a showing of fault and without automatic rate recovery is not substantially related to the alleged cost-spreading justification for inverse condemnation; and (2) that inverse condemnation is "irrational" as applied to PG&E. Both arguments fail.

First, and as set forth in great detail herein, PG&E offers a flawed underlying assumption and interpretation of what "cost-spreading" means in the context of inverse condemnation.

Again, the Court of Appeal in *Pacific Bell* expressly rejected this line of reasoning. It noted that the fact a utility is regulated by the CPUC and cannot automatically "cost-spread" in the sense of raising taxes or rates does not result in immunity from inverse condemnation liability. *Pacific Bell*, 208 Cal.App.4th at 1407, fn. 6.

Second, PG&E summarily offers that the application of inverse condemnation liability to it is irrational because government entities are protected by sovereign immunity or California's Tort Claims Act. PG&E reasons, without any legal basis, that private individuals do not need inverse condemnation to recover from harm caused by it because it is subject to general tort liability. This is unpersuasive for the simple reason that no case law, statute or other binding decision upon this court has ever offered support to this argument as being an "irrational" application of inverse condemnation. As articulated by the Court of Appeal in *Pacific Bell*, the court had no interest in being "required to differentiate between damage resulting from the operation of a utility based solely upon whether the utility is operated by a governmental entity or by a privately owned public utility" and was "not convinced that any significant differences exist." *Id.* at 1408. To that end, the court "[did] 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." *Id.*

V. CONCLUSION

For the foregoing reasons, the Public Entity Plaintiffs respectfully request that this court overrule Defendant PG&E's demurrer to the inverse condemnation cause of action of the Public Entity Master Complaint. The Master Complaint properly pled the requisite elements of the cause of action. Alternatively, if this court is inclined to sustain PG&E's demurrer in any way, the Public Entity Plaintiffs respectfully request leave to amend the complaint.

Dated: April 16, 2018

By: 

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