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**BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA**

Application of San Diego Gas & Electric
Company (U 902 E) for Authorization to
Recover Costs Related to the 2007 Southern
California Wildfires Recorded in the Wildfire
Expense Memorandum Account (WEMA)

Application 15-09-010

U 39 E

**PACIFIC GAS AND ELECTRIC COMPANY (U 39 E) AND
SOUTHERN CALIFORNIA EDISON COMPANY (U338-E)
JOINT COMMENTS ON THE PROPOSED DECISION OF
ADMINISTRATIVE LAW JUDGES TSEN AND
GOLDBERG**

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SUBJECT INDEX OF RECOMMENDED CHANGES

- The Proposed Decision (PD) commits legal error by failing to address inverse condemnation and its state policy basis that utilities can socialize inverse costs in rates.

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I. INTRODUCTION

Pursuant to California Public Utilities Commission (CPUC or Commission) Rules of Practice and Procedure 14.3 and recent email rulings, Pacific Gas and Electric Company (PG&E) and Southern California Edison Company (SCE) submit these joint comments on the Proposed Decision of Administrative Law Judges (ALJ) Tsen and Goldberg dated August 22, 2017 (PD).^{1/}

The PD's failure to discuss inverse condemnation, a state policy that presumes utilities will socialize costs through rates, including the kinds of costs at issue in this application, is legal error. Recovery of the full costs of settlements and legal defense incurred by San Diego Gas & Electric Company (SDG&E) resulting from inverse condemnation claims that are not covered by its insurance meets the just and reasonable standard of Public Utilities Code Section 451 provided that the settlements and legal costs are reasonable.

The Commission should not impose the additional requirement of a prudence review of SDG&E's operations as a condition to recovery of uninsured costs incurred by the utility. The

^{1/} Pursuant to Rule 1.8(d), counsel for SCE has authorized PG&E to file these joint comments on its behalf. In email rulings dated September 26, 2017 by Interim Chief Administrative Law Judge S. Pat Tsen, PG&E and SCE were granted party status "for the limited purpose of filing comments on the legal issue of inverse condemnation from the existing record." In an email ruling dated September 29, 2017, PG&E and SCE were directed to submit comments on the proposed decision by October 4, 2017.

Commission should instead address any compliance issues arising from the event under the mechanism provided in Public Utilities Code Section 2107. The Commission has conducted such a review of SDG&E’s conduct here and resolved alleged violations through a Commission-approved settlement.^{2/} The PD commits legal error by imposing a “prudence” condition on the recovery of reasonably incurred settlement and defense costs arising from inverse condemnation claims, which arbitrarily and disproportionately shifts the entire risk of any uninsured costs arising from a wildfire to the utility.

These legal errors lead the PD to erroneously find: “SDG&E has not justified recovering from ratepayers costs incurred to resolve third-party damage claims arising from the Witch, Guejito and Rice Wildfires.”^{3/} Because the Commission has already approved an appropriate financial remedy for the wildfires at issue pursuant to Section 2017, it should revise the PD to allow SDG&E to recover the costs sought in this application.

II. COMMENTS

A. **The PD Commits Legal Error By Failing To Address Inverse Condemnation And Its State Policy Basis That Utilities Can Socialize Inverse Costs In Rates**

Climate change and its adverse impacts, including the effects of the California drought and tree mortality conditions, continue to be far reaching, particularly regarding wildfire risk.^{4/} This wildfire risk directly affects utilities due to California’s legal doctrine of inverse condemnation. Inverse condemnation is a strict liability legal theory. That is, utilities are liable for all resulting property damages when their facilities cause a wildfire, whether or not the utility was negligent or engaged in any wrongful conduct, and regardless of whether actions or omissions of other persons were a contributing cause. In addition, utilities are liable for plaintiffs’ attorneys’ fees under inverse condemnation claims.

^{2/} D.10-04-047.

^{3/} PD, Conclusion of Law 21.

^{4/} *See, e.g.*, October 30, 2015 Tree Mortality Proclamation of a State of Emergency (available at, https://www.gov.ca.gov/docs/10.30.15_Tree_Mortality_State_of_Emergency.pdf) and September 1, 2017 Executive Order B-42-17 of Governor Edmund Brown (available at <https://www.gov.ca.gov/news.php?id=19936>).

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.”^{5/} The California Court of Appeal has applied inverse condemnation liability to private utilities, likening them to state actors. The courts have noted that a privately owned utility is a “monopolistic or quasi-monopolistic authority, deriving directly from its exclusive franchise provided by the state,” to whom the state delegated the obligation to provide vital public services.^{6/} Notwithstanding their lack of taxing authority, the court found this policy justification to be appropriately applied to privately owned utilities because they could socialize such costs through rates.

Utilities have repeatedly challenged the application of this cost sharing policy in courts, arguing that utilities do not have the power to socialize those costs in rates as state actors do. In *Pac. Bell v. So. Cal. Ed.*, SCE argued that the loss-spreading rationale underlying the application of inverse condemnation liability does not apply because as a public utility, it does not have taxing authority and may raise rates only with the approval of the California Public Utilities Commission.^{7/}

The court rejected that argument saying, “Edison has not pointed to any evidence to support its implication that the commission would not allow Edison adjustments to pass on damages liability during its periodic reviews.”^{8/} PG&E recently made the same argument before the Superior Court for the County of Sacramento in the Butte Fire civil litigation. Referring to *Pac. Bell*, the Superior Court rejected PG&E’s argument on the same basis and ruled that the doctrine of inverse condemnation applied to PG&E.^{9/} SDG&E timely and appropriately raised

^{5/} *Barham v. Southern Cal. Edison Co.*, (1999) 74 Cal. App. 4th 744, 752; citing *Belmont County Water Dist. v. State of California* (1976) 65 Cal. App. 3d 13, 19, fn. 3 [135 Cal. Rptr. 163].)

^{6/} *Pac. Bell Tel. Co. v. So. Cal. Ed.*, (2012) 208 Cal. App. 4th 1400, 1406.

^{7/} *Ibid.*

^{8/} *Ibid.* The opinion’s statements regarding the socialization of inverse costs are clearly not dicta. They are the foundation relied upon by the court for upholding application of the inverse doctrine.

^{9/} June 22, 2017 Ruling on Submitted Matter: Inverse Condemnation Motions, Butte Fire Cases, Case No: JCCP 4853, Superior Court of California for the County of Sacramento (available at,

this issue in its Application as a basis for cost recovery.^{10/} The PD’s failure to address this issue is legal error.

B. Public Utilities Code Section 451 Does Not Require an Independent Review of Reasonable Amounts Paid in Settlement or Defense of Inverse Condemnation Claims

Public Utilities Code Section 451 requires that costs be just and reasonable. Where courts apply inverse condemnation to utilities based on the presumption that the utilities will be permitted to socialize costs in rates, permitting recovery of those costs is just and reasonable.

In *Monterey Peninsula Water Management District v. Public Utilities Commission*, (2016) 62 Cal.4th 693, a water management district imposed an agency fee on a public utility’s customers pursuant to state law for environmental mitigation work. The Commission determined it could independently review the fee under Section 451 of the Public Utilities Code. The California Supreme court disagreed, holding Section 451 did not empower the Commission to independently review charges appropriately assessed upon utility customers by the district over which it did not have jurisdiction.¹¹

The utilities face a similar problem as that described in *Monterey Peninsula*. Under inverse condemnation, California courts can and do impose strict liability on utilities based on the presumption that utilities will be able to collect those costs from their customers. Unlike the fees in *Monterey Peninsula*, the precise amount incurred by SDG&E was not the result of an agency action. Thus, as SDG&E acknowledges, whether the settlement amounts paid and the amount of

<https://bloximages.chicago2.vip.townnews.com/calaverasenterprise.com/content/tncms/assets/v3/editorial/e/cd/e78c9c-57bd-11e7-b75e-3bdfd51bbf85/594c80b29f9cc.pdf.pdf>.

^{10/} Application, pp. 4-7; see also SDG&E’s “Opening Brief on Threshold Issues” (May 11, 2006), p. 2 (noting that this case “presents a legal issue of first impression for the Commission: the relevance of the doctrine of inverse condemnation in the context of the Commission’s review of cost recovery”).

^{11/} *Id.*, 62 Cal.4th at 699 (“To read [Section 451]’s prescription of a ‘just and reasonable’ standard for reviewing the rates of public utilities as a general grant of authority to review the amounts of any and all municipal and other governmental fees and taxes that appear on a utility’s customer bills would dramatically expand the Commission’s powers in a manner the Legislature could not have intended [citations omitted].”)

defense costs incurred were reasonable is an appropriate subject for Commission review.^{12/} But once such amounts are determined to be reasonable, the utility should be permitted to recover them in rates. Any other outcome would place utilities in an untenable situation by unreasonably shifting to the utility all uninsured costs associated with the risk of wildfire inherent in the operation of an electric utility, in contradiction of the law of inverse condemnation, which presupposes that a utility can socialize the costs through its rates. The PD commits legal error by categorically denying approval of all costs without addressing this legal issue.

Certain parties have argued that adding a “prudence” test to the review of inverse condemnation costs is necessary for the Commission to regulate the prudence of a utility’s operations and management. This is incorrect. The Commission has many vehicles to evaluate the prudence of a utility’s conduct that are more appropriate than a cost recovery proceeding. The Legislature has established the appropriate remedy for imprudent conduct is through Section 2017 of the Public Utilities Code. That section authorizes the Commission to initiate enforcement proceedings and issue penalties of up to \$50,000 per day and other relief if a utility is found to have violated the Commission’s orders and other applicable law. The Commission has frequently initiated enforcement proceedings under this statute.^{13/}

As noted above, the Commission initiated an enforcement proceeding raising virtually the identical arguments about SDG&E’s alleged imprudence being raised here. That proceeding was resolved by a settlement involving a substantial payment, acknowledgements of violations and other substantial commitments by SDG&E. That settlement “resolv[ed] all pending issues”

^{12/} SDG&E appropriately argued this proceeding should have been limited to reviewing the reasonableness of such costs. A.15-09-010, pp. 9-12. SCE and PG&E agree. Under well-established Commission precedent, settlement amounts are deemed reasonable if they fall within a range of reasonable outcomes. *See, e.g., Re Southern California Edison Company*, D.96-12-082, 70 CPUC 2d. 427, 430.

^{13/} *See, e.g.* D.13-09-028 (approving settlement of an enforcement proceeding involving allegations of SCE violations relating to a 2007 Malibu wildfire).

raised by the Commission related to these fires.^{14/} In addition, the Commission recently approved an Electric Safety Citation program, pursuant to which the Safety and Enforcement Division can impose penalties without a formal hearing subject to the utility's right to appeal.^{15/} The Commission can also consider issues regarding the reasonableness of the amount and costs of liability insurance in the utilities' General Rate Cases. It is not necessary for the Commission to conduct another review here simply because the costs incurred exceeded the amount of SDG&E's insurance coverage.

Finally, some parties commented that passing on the costs of inverse condemnation to customers would create a "moral hazard." That argument directly conflicts with the state policy basis for applying inverse condemnation liability to the utilities in the first instance—that utilities can socialize those costs through rates. If parties feel the state policy represents a moral hazard, that concern should be raised either with the Legislature or with the courts that have extended the application of the inverse condemnation to utilities. As noted above, the courts, by applying the inverse condemnation doctrine, have already decided the costs are to be socialized.

The review imposed by the PD here improperly seeks to impose additional shareholder costs on top of those agreed to by SDG&E in the settlement. Such a review inappropriately conflates the prudence review regime with a review of the reasonableness of SDG&E's settlements and unlawfully undermines well-established cost of service ratemaking principles pursuant to which utilities are entitled to recover reasonably incurred costs, including costs of defense.^{16/}

^{14/} D.10-04-047, Finding of Fact No. 1. In the agreement, the settling parties expressly reserved their right notwithstanding the settlement to take positions in the Catastrophic Memorandum Account proceeding and other Commission proceedings related to the fires. Thus, intervenors may not be legally foreclosed from arguing the Commission may impose a prudence test on reasonable inverse condemnation settlement and defense costs. But the reservation of a right to make an argument does not make the argument correct. As noted above, adding a prudence condition to the recovery of reasonable inverse condemnation costs is both unwise and unlawful.

^{15/} D.16-09-055.

^{16/} D.03-02-035, p. 6.

III. CONCLUSION

PG&E and SCE respectfully submit that the PD has erred in its conclusions and should not be adopted. The Commission should revise the PD to correct these errors.

Respectfully Submitted on behalf of Joint Parties,

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APPENDIX A

PROPOSED CONCLUSIONS OF LAW

The Conclusions of Law should be deleted in their entirety. SCE and PG&E propose the following Conclusions of Law:

[#]. Under inverse condemnation, privately owned public utilities such as SDG&E are strictly liable for property damage related to their facilities, irrespective of fault, and even where their facilities are one of several concurrent causes. Under inverse condemnation, utilities are also liable for plaintiff's attorneys' fees.

[#]. California courts apply inverse condemnation to privately owned public utilities on the grounds that they can spread costs through rates, just as a public entity can spread costs through taxation.

[#]. Utilities may recover just and reasonable costs. Because the WEMA Costs at issue here resulted from the applicability of the inverse condemnation doctrine, SDG&E must be permitted to demonstrate the amounts paid in settlement and for defense were reasonable. If it is determined that such amounts were reasonable, SDG&E must be permitted to spread the WEMA Costs through rates.