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California Water Association

October 16, 2017

Honorable Vance W. Raye, Presiding Justice,
and Associate Justices of the Third District Court of Appeal
914 Capitol Mall, 4th Floor
Sacramento, CA 95814

RE: Amicus Curiae Letter in Support of Petitioner
Pacific Gas and Electric Company v. Superior Court
Case No. C085669

Honorable Presiding Justice and Associate Justices:

The California Water Association (CWA), on behalf of its member water utilities, respectfully submits this *amicus curiae* letter in support of Petitioner's request for the issuance of an appropriate writ directing the San Joaquin County Superior Court to vacate its September 6, 2017 ruling on the burden of proof and evidentiary issues in its Case No. STK-CV-UED-2016-0006638 and grant Petitioner's motion on the same issues, thereby correcting a clear error of law. CWA's interest in this matter and the basis for its support of the relief requested in the Petition for Writ of Mandate or Other Appropriate Writ (Petition) are explained below.

CWA's Statement of Interest

CWA represents the interests of more than one hundred investor-owned water companies, all of which are regulated by the California Public Utilities Commission (CPUC). Like Petitioner, CWA-member companies are regulated public utilities that face eminent domain threats and actions by local public entities under the same body of law at issue in this proceeding.

For example, on December 9, 2016, the Los Angeles County Superior Court issued a Statement of Final Decision and Order of Dismissal in an eminent domain action brought by the City of Claremont against Golden State Water Company, a CWA-member company. A copy of that Statement of Final Decision is appended hereto as Attachment 1 and shall be referred to herein as the "Golden State Decision."

By way of further example, in January of 2016, the Town of Apple Valley brought eminent domain proceedings against Apple Valley Ranchos Water Company, another CPUC-regulated, CWA-member water utility. This action remains pending and shall be referred to herein as the "Apple Valley Case."[1]

Until the September 6, 2017, ruling by the San Joaquin County Superior Court - the subject of Petitioner's request for relief - the burden of proof for a regulated electric, gas, or water utility's challenge to a public entity's findings of public necessity in eminent domain proceedings had been clear and distinct from the burden of proof for a challenge to the same public entity's resolution of necessity. But the Superior Court's ruling has now replaced that clarity and distinction with potentially catastrophic confusion to the detriment of all concerned.

[1] San Bernardino County Superior Court, Case No. CIVDS1600180.

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Unless the Superior Court's Ruling is corrected, CPUC-regulated utilities, like Petitioner and CWA-member companies, will face great uncertainty and even greater expense to both owners and customers when public entities employ the law of eminent domain against them. So, it is of great interest to CWA that this Court restore the preponderance of evidence burden of proof for regulated electric, gas, and water utility challenges to public entity findings of necessity in eminent domain proceedings, as requested in the Petition.

Reasons Why the Merits of the Petition Should Be Considered

As a necessary prelude to its eminent domain action against Petitioner, South San Joaquin Irrigation District (SSJID) took two actions:

> (1) the SSJID Board of Directors adopted a Resolution of Necessity under the authority of Code of Civil Procedure (CCP) section 1245.250; and
>
> (2) the SSJID Board of Directors made findings of public necessity as required under CCP section 1240.030, together with a further finding that SSJID's intended use of Petitioner's property constituted a more necessary public use under CCP section 1240.610.

SSJID then brought its eminent domain action against Petitioner, and Petitioner sought to challenge SSJID's findings of public necessity and "more necessary public use" under the rights afforded for "electric, gas, or water public utility property" under CCP section 1245.250, subd. (b) and CCP section 1240.650, subd. (c). In other words, Petitioner's challenge is to the truth of the findings made in the second of the two actions listed above.

Notably, Petitioner did not challenge SSJID's first action – the adoption of the Resolution of Necessity. Under eminent domain law, adoption of a Resolution of Necessity can be invalidated only upon a showing of "gross abuse of discretion" by the public entity. However, in this case, the trial court mistakenly and erroneously ruled that the "gross abuse of discretion" burden of proof for a challenge to the Resolution of Necessity must also be applied to challenges to findings of public necessity and "more necessary public use."

The decision by the trial court is directly at odds with the manner in which the trial court addressed the burden of proof issue in the Golden State Decision. There, on precisely the same issue, the trial court stated:

> Golden State, therefore, may offer evidence to rebut, and may prevail against, the City's assertion that its use of eminent domain to take the Claremont Water Assets is "a more public use" for those Assets. Golden State may also offer evidence to rebut the presumption that the findings required by CCP section 1240.030 have been established. CCP section 1245.230(b).
>
> Nonetheless, the statutory presumptions favoring the City's exercise of eminent domain affect the parties' proof burdens. Evidence Code section 606 provides: "The effect of a presumption affecting the burden of proof is to impose upon the party against whom it operates the burden of proof as to the nonexistence of the presumed fact." The burden of proof thus imposes on Golden State the duty to

> introduce competent evidence to show – by a preponderance of the evidence – the nonexistence of the presumed fact. Evid. Code sections 115 and 500. Golden State's burden to overcome the presumptions favoring the City, therefore, includes showing that it is more likely true than not true that the City's acquisition of the Claremont Water Assets is not "require[d]" by "public interest and necessity" and is not "a more public use."[2]

CWA does not present this excerpt from the Golden State Decision as authority for granting Petitioner's request for relief, but instead offers it to demonstrate that in less than one year, two trial courts have construed the same statutes in two entirely different and irreconcilable ways.

Petitioner, as well as all other regulated, investor-owned public electric, gas, and water utilities, including all CWA-member companies[3], need the same (and correct) standards applied in eminent domain proceedings. Public entities need this, too. Without a consistent and correct application of the burden of proof requirements in eminent domain proceedings, there will be a massive waste of money (public and private) and judicial resources.

Fortunately, the trial court below recognized the potential for an extreme waste of money and time due to the possibility its decision on the burden of proof issue was incorrect (noting that its ruling "concerns a controlling question of law as to which there are substantial grounds for difference of opinion'), and it ordered a stay in the proceedings below. In light of this rather candid and intellectually honest acknowledgement by the trial court, it is fair to say that the table is well set for consideration of the issue by this Court.

CWA requests that this Court accept and decide to hear the Petition on its merits.

Respectfully submitted,

John K. Hawks
Executive Director

Attachment: *City of Claremont v. Golden State Water Company*, Statement of Final Decision, Case No. BC566124 (Los Angeles County Superior Court, December 9. 2016)

[2] See Attachment 1, at pages 4 – 5.
[3] Including CWA-member utility Apple Valley Ranchos Water Company in the Apple Valley Case.