Oct. 8, 2019

SDG&E hope to spread fire liability blocked

The U.S. Supreme Court has elected to not hear a writ filed by San Diego Gas & Electric Company's challenge to a state regulator's decision disallowing the utility to socialize $379M to ratepayers stemming from a trio of wildfires that struck San Diego County in 2007.

San Diego Gas & Electric Co. has sought for years to socialize to ratepayers $379 million in uninsured wildfire liabilities. On Monday, the U.S. Supreme Court handed the utility a potentially devastating defeat, refusing to entertain its appeal.

Now the utility, and other utilities in California facing massive liabilities from ravaging blazes, must decide whether to return to the Legislature for more taxpayer funds to bail them out, legal and industry experts say.

In July, lawmakers approved Assembly Bill 1054, which created a $21 billion fund to help utilities offset liabilities stemming from future wildfires caused by their equipment.

Michael J. Aguirre, a partner at Aguirre Severson LLP in San Diego has fought for years to block SDG&E from passing costs for wildfires on to ratepayers. He also has sued to block the implementation of AB 1054, claiming the Legislature unfairly bailed out the utilities.

"This isn't the end of the fight — it's the end of the start of a fight," Aguirre said of the U.S. Supreme Court's decision not to hear SDG&E's case.

"These utilities want customers to pay no matter what and want to turn the law on its head," Aguirre said. "There are a lot of far-reaching consequences because the utilities now have nowhere to go for fires that occurred before July 2019."

AB 1054 weakened the California Public Utilities Commission's "prudent manager" standard for deciding if utilities could spread to ratepayers liabilities from disasters, Aguirre has argued. Under that standard, the CPUC determines if utility managers in charge during disasters acted prudently before deciding on rate hikes.

SDG&E wanted the nation's highest court to reverse a 2015 decision by the CPUC disallowing the utility to spread wildfire liabilities to ratepayers because it imprudently managed its facilities that caused the Witch, Guejito and Rice fires in 2007.

SDG&E first went to a state appellate court, which struck down its request. San Diego Gas & Electric Co. v. California Public Utilities Commission, D074417 (Cal.App.4th Dist., filed Nov. 13, 2018).

The utility then went to the state Supreme Court, which refused to hear the case. In April SDG&E went to the U.S. Supreme Court in a petition for writ of certiorari, which the court on Monday refused to hear.

"Despite this legal outcome, SDG&E remains committed to help strengthen wildfire preparedness and prevention and will continue our collaboration with other regional leaders to protect our customers and help prevent wildfires from devastating the communities we serve," SDG&E spokesperson Denice M. Menard said in a statement.

Partners Jeffrey N. Boozell and Kathleen M. Sullivan of Quinn Emanuel Urquhart & Sullivan LLP represented the utility. San Diego Gas & Electric Co. v. Public Utilities Commission of the State of California, 18-1368 (U.S. Supreme Court, filed Apr. 29, 2019).

Matthew D. Zinn, partner at Shute, Mihaly & Weinberger LLP who represented the CPUC, called the result "utterly unsurprising," as "the case was about state public utility law and wildfire policy, not federal constitutional rights."

In its writ, SDG&E didn't seek to invalidate inverse condemnation. Rather, the utility sought to reverse the Commission's denial of socializing costs under inverse condemnation by raising a federal issue for the U.S. Supreme Court to consider: that the CPUC's denial was an "unconstitutional taking" under the Fifth and Fourteenth Amendments.

Other utilities facing wildfire liabilities up and down the state, including Pacific Gas & Electric Co., Southern California Edison Co. and Edison Electric Institute threw their support behind SDG&E's writ earlier this summer via amicus briefs, arguing that the CPUC's denial was an unlawful taking as private utilities already face harm from the current inverse condemnation scheme now that wildfire season became the new normal.

SDG&E Hope To Spread Fire Liability Blocked

By Gina Kim | Oct. 8, 2019

PG&E and Edison have challenged inverse condemnation liability in the last few years. Nearly every superior court judge who has heard the issue has rebuffed the utilities.

Sacramento County Superior Court Judge Allen H. Sumner last year rejected PG&E's request for legal determination on inverse condemnation in the 2015 Butte Fire litigation.

Mike S. Danko, a partner Danko Meredith APC in Redwood Shores, is fighting PG&E. He said the utility has been repeating in bankruptcy court that it should not be liable to wildfire victims because the doctrine of inverse condemnation is unconstitutional.

"That argument never made any sense," Danko said. "We'll see if it keeps pressing it."

Earlier this year, SoCal Edison, facing liabilities for the Thomas and Woolsey fires, which burned in Santa Barbara, Ventura and Los Angeles counties in 2017 and 2018, also tried challenging the issue by citing the SDG&E writ. Edison argued that because it doesn't have control over raising rates to recover costs to pay wildfire claimants it shouldn't be subject to inverse liability.

Plaintiffs however, argued it wasn't necessary for courts to wait until the U.S. Supreme Court made a decision on the SDG&E writ and that inverse condemnation was irrelevant to the rate recovery process.

Los Angeles County Judge Daniel J. Buckley, presiding over the Thomas litigation, overruled Edison's challenge in 2018.

Los Angeles County Judge William F. Highberger, presiding over the Woolsey litigation, delayed his ruling in August until the U.S. Supreme Court decided on cert.

Highberger previously said that the historic theory of inverse condemnation against utilities poses a purely legal question "that should be in front of people who actually make the final decision, because anything I do is subject to de novo review."

But, if cert were denied, then the unlawful takings issue raised by defendants would provide more context to Edison's challenge to the inverse condemnation theory, Highberger said.

Edison's demurrer will be revisited Nov. 5.

"We're disappointed that the U.S. Supreme Court didn't grant SDG&E's petition but its order doesn't obviate the need for Judge Highberger to consider SoCal Edison's demurrer in the Woolsey Fire case," Edison spokesperson Robert Villegas said in a statement.

Craig S. Simon, managing partner at Berger Kahn, who is co-lead for subrogation plaintiffs in both Thomas and Woolsey, said he believes the high court made the right decision on the specific facts.

"The publicly-owned utilities argue that this means they can't risk spread, but that is factually wrong. When deciding rates, the CPUC takes into consideration all facts," he said. "Just because the CPUC doesn't say 'you can bake this named fire costs into your next year's rates,' doesn't mean they aren't already considered, and in the monetary return allowed to the privately-owned utility."

Although not involved in the Thomas or Woolsey litigation, Aguirre said SDG&E's writ had nothing to do with challenging inverse condemnation liability but rather, challenged the prudent manager standard that kept it from passing off wildfire costs via rate hikes.

"That issue has already been decided by the Legislature, and should have no effect on how state courts — presiding over wildfire cases — should look at something that's already a matter of settled California law," Aguirre said.