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

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| Petition of the City and County of San Francisco for a Valuation of Certain Pacific Gas & Electric Company Property Pursuant to Public Utilities Code Sections 1401-1421. | P.21-07-012<br>(Filed July 27, 2021) |

# SECTION 851 OPENING BRIEF OF THE CITY AND COUNTY OF SAN FRANCISCO


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| Petition of the City and County of San Francisco for a Valuation of Certain Pacific Gas & Electric Company Property Pursuant to Public Utilities Code Sections 1401-1421. | P.21-07-012<br>(Filed July 27, 2021) |

# SECTION 851 OPENING BRIEF OF THE CITY AND COUNTY OF SAN FRANCISCO

Pursuant to the Assigned Commissioner's Scoping Memo and Ruling (Scoping Memo),[1] the City and County of San Francisco (San Francisco or CCSF) submits this brief addressing the scope of review required by the California Public Utilities Commission (Commission) for the transfer of utility property under Public Utilities Code § 851 in the event of an eminent domain proceeding to condemn certain electric service assets of Pacific Gas & Electric Company (PG&E) within and adjoining the boundaries of San Francisco. *See* Petition of the City and County of San Francisco for a Valuation of Certain PG&E Property Pursuant to Public Utilities Code Sections 1401–1421 (Petition).

## I. INTRODUCTION AND BACKGROUND

The Scoping Memo correctly found that San Francisco's Petition may proceed prior to and independent of the Commission's Section 851 review and directed parties to file briefs addressing "the scope of Commission review required by Pub. Util. Code Section 851 in relation to a condemnation of PG&E's electric service assets in San Francisco."[2] As further discussed below, the Legislature's recent amendments to Section 851, *et seq.*, limit the scope of the Commission's Section 851 review to *one* issue: determining whether the public entity's acquisition of public utility assets is "fair and reasonable to affected public utility employees, including both union and nonunion employees."[3]

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[1] *Assigned Commissioner's Scoping Memo and Ruling*, June 24, 2022, Ordering ¶ 6 (directing parties to file opening briefs within 60 days from the date of the Scoping Memo's issuance).

[2] Scoping Memo at 5.

[3] Pub. Util. Code § 851(b)(2).

PG&E has argued that the Commission's Section 851 review requires the Commission to find that the CCSF's acquisition of PG&E's assets "will serve the public interest,"[4] and offers a laundry list of criteria that it believes Commission should evaluate as part of that determination, including "wildfire mitigation costs."[5] Basic rules of statutory interpretation and the recent legislative history make clear that PG&E is wrong. In enacting Senate Bill (SB) 550, the Legislature eliminated any perceived requirement that the Commission must determine whether public entity acquisition of utility assets is in the "public interest" by removing from the Public Utilities Code language that may have briefly suggested that the Commission must make a "public interest" determination. The legislative history further supports this construction. As discussed below, that inquiry can and should follow the valuation and eminent domain proceedings as contemplated by the Scoping Memo.

* * *

As the Commission has recognized, "it is well established that the Commission's jurisdiction does not extend to overseeing political subdivisions of the state absent specific legislation permitting it to do so."[6] This is for good reason. Should the Commission exceed the scope of its statutory authority, it may create conflict with areas of law for which the Legislature has created a separate legal process. Here, issues such as whether CCSF's condemnation of PG&E's assets would serve the "public interest" are considerations that must be evaluated under the Eminent Domain Law.[7] If the Commission's Section 851 review delves into such considerations, it would not only exceed the Commission's statutory authority, but would potentially conflict with the findings CCSF must make pursuant to its sovereign right to condemn utility assets under the Eminent Domain Law.

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[4] *See* PG&E's Motion for the Commission to Exercise Discretion to Decline to Entertain the Petition, Sept. 14, 2021, p. 9.

[5] *See* PG&E's Prehearing Conference Statement, Dec. 7. 2021, pp. 2-3.

[6] *City of Encinitas v. North San Diego Transit District*, D.02-10-041 (CPUC Oct. 24, 2002), *available at* 2002 WL 31557244 (citing *Los Angeles Met. Transit Authority v. Public Utilities Comm.* (1959) 52 Cal. 2d 655).

[7] *See* Code Civ. Proc., § 1230.010 *et seq.*

## II. APPLICABLE LAW

The Commission's jurisdiction over and review of transactions involving municipal corporations must be viewed in light of a municipality's constitutional and statutory authority to establish and acquire property for purposes of furnishing power to their citizens. The extent of the Commission's jurisdiction over municipal affairs is limited to those areas where the Legislature has granted regulatory power to the Commission. The statutory scheme under Section 851 *et seq*. makes clear that the Commission's review and approval of a public entity's condemnation of utility assets extends only to determining whether it is "fair and reasonable to affected public utility employees, including both union and nonunion employees."[8]

### a. Public entities are vested with constitutional and statutory authority to establish and acquire property to furnish power to their citizens.

The California Constitution authorizes municipalities to "establish, purchase, and operate public works to furnish its inhabitants with light, water, power, heat, transportation, or means of communication."[9] Cal. Const., art. XI, § 9. In exercising this constitutional right, public entities may condemn existing public utility property pursuant to California's Eminent Domain Law. *See* Code Civ. Proc. § 1230.010, *et seq*; *see also People By Public Utilities Commission v. City of Fresno* (1967) 254 Cal.App.2d 76, 81 (*City of Fresno*) ("[T]he power of eminent domain which is inherent in government is regulated solely by the Legislature"). The Eminent Domain Law prescribes detailed and comprehensive statutory requirements for the condemnation of property, including the requirement that a public entity's governing body adopt a resolution of necessity that finds, "[t]he public interest and necessity require the proposed project." Code Civ. Proc. § 1245.230. The Eminent Domain Law further prescribes detailed valuation and compensation requirements to fairly compensate the owner of the condemned property. Code Civ. Proc. § 1263.010, *et. seq*.

Before recent amendments to Section 851 *et. seq.*, public entities could condemn public utility property pursuant to the Eminent Domain Law without seeking the permission or approval of the Commission. As an alternative to the valuation and compensation process available under

[8] Pub. Util. Code § 851(b)(2).

[9] Cal. Const., art. XI, § 9.

the Eminent Domain law, a public entity—at its sole discretion—could petition the Commission to set the value for the property it sought to condemn through an eminent domain action in civil court. Where a public entity invoked the Commission's limited jurisdiction in a condemnation matter, the Commission's authority extended only to fixing just compensation for the utility's property. *City of Fresno*, 254 Cal.App.2d at 85 ("[T]he Legislature intended to involve the commission in a condemnation proceeding only with the consent of the condemnor, and then only on the limited question of 'just compensation.'").

**b. The Commission has no jurisdiction over public entities unless expressly authorized by the Legislature.**

As a regulatory agency of constitutional origin, the Commission is vested with broad powers over public utilities. *Southern California Edison Co. v. Public Utilities Com.* (2014) 227 Cal.App.4th 172, 186; Cal. Const., art. XII, § 6 (Commission authority over public utilities); Cal. Const., art. XII, § 5 (vesting Legislature with plenary authority to confer additional authority on the Commission). However, in the absence of legislation providing otherwise, "the Commission's jurisdiction to regulate public utilities extends only to the regulation of privately-owned utilities." *City of Fresno*, 254 Cal.App.2d at 81 (citing, *Los Angeles Metropolitan Transit Authority v. Public Utilities Com'n of State* (1959) 52 Cal.2d 655, 661). Indeed, the Commission has no jurisdiction over municipalities or municipal utilities unless expressly provided by statute. *Santa Clara Valley Transportation Authority v. Public Utilities Com.* (2004) 124 Cal.App.4th 346, 356, 365 (holding the Commission's jurisdiction over a transit district must be clearly provided by statute); *Orange County Air Pollution Control Dist. v. Public Util. Com.* (1971) 4 Cal.3d 945, 953, n. 7 (noting the Commission has no jurisdiction over municipally owned utilities without express statutory authority).[10]

The Commission, too, has recognized the limits of its authority over municipalities and municipal utilities. *City of Encinitas,* D.02-10-041 (CPUC Oct. 24, 2002), *available at* 2002 WL 31557244, at *4 (finding that "it is well established that the Commission's jurisdiction does not extend to overseeing political subdivisions of the state absent specific legislation permitting it to do so."); *City of Jurupa Valley v. City of Riverside and Riverside Public Utilities,* D.13-09-

[10] See also, Cal. Const., art. XII, § 8 ("A city, county, or other public body may not regulate matters over which the Legislature grants regulatory power to the Commission….")

030 (CPUC Sept. 19, 2013)*, available at* 2013 WL 5488499, at *2–3 (accord); *see also County of Inyo v. Public Utilities Com.* (1980) 26 Cal.3d 154, 158 (California Supreme Court affirming Commission's unanimous opinion that it lacked jurisdiction over municipally owned utility in the absence of express statutory authority).[11]

*City of Fresno* is instructive of the limitations on the Commission's jurisdiction over a city's municipal affairs. There, the City of Fresno (Fresno) and a water company filed a joint application with the Commission pursuant to Public Utilities Code section 851, seeking the Commission's permission for the sale of the water company's assets to Fresno upon a fixed purchase price. *City of Fresno*, 254 Cal.App.2d at 79. The Commission found that the proposed agreement did not "protect the water company's consumers," but approved the transaction subject to certain conditions, including a promise by Fresno "that it would not discriminate against consumers of the water system who lived outside of the City of Fresno." *Id*. However, instead of accepting the conditions imposed by the Commission, Fresno instituted an action in the Superior Court of Fresno County to condemn the water company's system. *Id*. Upon the trial court's judgement in favor of Fresno, the Commission challenged the outcome, arguing that the superior court could not enter a "final unconditional judgement transferring title" to Fresno "until and unless the commission has granted its approval under section 851." *Id*. at 80.

The court rejected the Commission's argument, finding that the Commission's authority under Section 851 could not restrict the city's power to condemn public utility property under the Eminent Domain Law. *Id*. at 82. The court held that Section 851 contained no express language which purported to control or affect a public entity's power to acquire property through the exercise of eminent domain and that the city's power of eminent domain could not be restricted "in the absence of clear legislative intent to so restrict." *Id*. at 82–83. Comparing the more specific provisions of the Eminent Domain Law against Section 851, the court concluded that "the Legislature did not and could not have intended to include a public entity's power of eminent domain within the mandatory requirement of Public Utilities Code section 851." *Id*. at 84.

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[11] *See also City of Los Angeles v. Tesoro Refining & Marketing Co.* (2010) 188 Cal.App.4th 840, 848 ("The PUC has limited or no jurisdiction over municipal utilities.").

### c. Recent amendments to Section 851 authorize the Commission to evaluate only whether a public entity's acquisition of public utility assets would be fair and reasonable to affected public utility employees.

Between July 2019 and January 2020, the Legislature twice amended the change of control statutes codified under the Public Utilities Code. These amendments authorized the Commission to review utility change of ownership transactions involving public entities under Section 851 but limited the Commission's review of municipal acquisition of utility assets to evaluating whether the transaction is "fair and reasonable to affected public utility employees, including both union and nonunion employees." Section 851(b)(2). With this legislation, the Legislature took *two* steps to make clear the limited scope of the Commission's review: first, as part of Assembly Bill (AB) 1054, the sweeping legislation establishing the Wildfire Fund; and, second, with the passage of Senate Bill (SB) 550 just six months later, which was specifically meant to clarify the Legislature's intent to prevent PG&E from making the arguments it has advanced in this proceeding. We discuss both enactments in turn.

#### i. AB 1054—Public Utilities: wildfires and employee protection.

On February 21, 2019, the Legislature introduced AB 1054, a bill that originally sought to amend only Public Utilities Code Section 307.6 relating to the Commission's chief internal auditor.[12] The first Senate amendment entirely refocused AB 1054 on expanding the Commission's role with respect to utility-caused wildfires.[13] While principally a wildfire bill, the second and final amendment to AB 1054 added—for the first time—the requirement that the Commission review utility change of control applications involving public entities.[14]

AB 1054 amended the definition of "change of control" codified in Section 854.2(b)(1) to add a new subsection (F): "a voluntary or involuntary change in ownership of assets from an electrical or gas corporation to ownership by a public entity."[15] AB 1054 further amended

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[12] Declaration of William D. Kissinger in Support of The Section 851 Brief of The City and County of San Francisco (Decl. of W. Kissinger) ¶ 2, Exh. A (Assembly Bill (AB) 1054, introduced Feb. 21, 2019).

[13] Decl. of W. Kissinger ¶ 3, Exh. B (AB 1054, amended by Senate June 27, 2019).

[14] Decl. of W. Kissinger ¶ 4, Exh. C (AB 1054, amended by Senate July 5, 2019).

[15] *Id*., Exh. C at 41, 43.

Section 854 to make the requirements of that section applicable to change of control transactions involving public entities:

> 854. (a) No person or corporation, whether or not organized under the laws of this state, shall merge, acquire, or ~~control~~ *control, including pursuant to a change in control as described in subparagraphs (D) to* ***(F), inclusive, of paragraph (1) of subdivision (b) of Section 854.2***, either directly or ~~indirectly~~ *indirectly*, any public utility organized and doing business in this state without first securing authorization to do so from the commission. …[16]

In addition to requiring the Commission's approval, AB 1054's amendments to Sections 854 and 854.2 could be interpreted to require the Commission to make several findings before authorizing a change of control involving a public entity. These requirements included, for example, that the Commission find that the acquisition does all the following:

> (1) Provide short-term and long-term economic benefits to ratepayers.
>
> (2) Equitably allocate, where the commission has ratemaking authority, the total short-term and long-term forecasted economic benefits, as determined by the commission, of the proposed merger, acquisition, or control, between shareholders and ratepayers. Ratepayers shall receive not less than 50 percent of those benefits.
>
> (3) Not adversely affect competition. In making this finding, the commission shall request an advisory opinion from the Attorney General regarding whether competition will be adversely affected and what mitigation measures could be adopted to avoid this result.
>
> (4) For an electrical or gas corporation, ensure the corporation will have an adequate workforce to maintain the safe and reliable operation of the utility assets.[17]
>
> (5) On balance, that the merger, acquisition, or control proposal is in the public interest.[18]

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[16] Italics and strike-through in original; bold added. See *id*., Exh. C at 39.

[17] Decl. of W. Kissinger ¶ 4, Exh. C at 39-40.

[18] Decl. of W. Kissinger ¶ 4, Exh. C at 40. Subsection (c) required the Commission to make a finding of "public interest" after considering the following eight criteria: (1) Maintain or improve the financial condition of the resulting public utility doing business in the state; (2) Maintain or improve the quality of service to public utility ratepayers in the state; (3) Maintain or improve the quality of management of the resulting public utility doing business in the state; (4) Be fair and reasonable to affected public utility employees, including both union and nonunion employees; (5)

While the plain text of the AB 1054 amendments could have been interpreted as conflicting with a municipality's right under the Eminent Domain Law to condemn property, AB 1054's legislative history made apparent that the amendment to Section 854 was intended to allow the Commission to evaluate only the impact of a change of control on a public utility's workforce. To that end, upon AB 1054's enactment, the coauthors of the bill issued a letter to the Secretary of the Senate memorializing their intent regarding the Commission's review of public entity's acquisition of public utility assets:

> [I]t is our intention that, as to CPUC review of a public entity's acquisition of electrical or gas assets, the amendments in Public Utilities Code Section 854(a) modify existing law only to the extent necessary to assure that the CPUC review the impact of change of ownership on public utility employees, including union and non-union employees.[19]

Any remaining doubts regarding the scope of the Commission's review were resolved with the enactment of SB 550 just six months later.

**ii. SB 550—Public utilities: merger, acquisition, or control of electrical or gas corporations.**

SB 550 amended Sections 851 and 854 to rectify any mistaken impression that AB 1054 might have been intended to extend the Commission's review beyond the evaluation of public utility workforce impacts. SB 550 removed from Section 854(a) the requirement, added by AB 1054 just six months earlier, that the Commission review transactions involving public entities:

> 854. (a) No person or corporation, whether or not organized under the laws of this state, shall merge, acquire, or control, including pursuant to a change in control as described in subparagraphs (D) to ~~(F)~~, ***(E),*** inclusive, of paragraph (1) of subdivision (b) of Section 854.2, either directly or indirectly, any public utility

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Be fair and reasonable to the majority of all affected public utility shareholders (6) Be beneficial on an overall basis to state and local economies, and to the communities in the area served by the resulting public utility; (7) Preserve the jurisdiction of the commission and the capacity of the commission to effectively regulate and audit public utility operations in the state; (8) Provide mitigation measures to prevent significant adverse consequences which may result.

[19] Decl. of W. Kissinger ¶ 5, Exh. D at 2 (Letter from R. Hertzberg, B. Dodd, to Secretary of Senate, E. Contreras, Re: Implementation of AB 1054 of the 2019-2020 Regular Session).

> organized and doing business in this state without first securing authorization to do so from the commission. …[20]

By removing Subsection 854.2(b)(1)(***F***) from Section 854, the Legislature exempted public entities from the findings the Commission is otherwise required to make under Section 854 in evaluating change of control transactions, including the public interest finding in Section 854(c) regarding public utility employees. Settled principles of statutory interpretation underscore that the deletion of this reference removed any obligation on the Commission to make a public interest finding. *See Nick v. Department of Alcoholic Beverage Control* (2014) 233 Cal.App.4th 194, 205–206 (holding that a statutory amendment to delete the Department of Alcohol Beverage Control's obligation to make a "public convenience or necessity determination" established the Legislature's intent to *eliminate* the Department's obligation to make such a finding); *City of Irvine v. Southern California Assn. of Governments* (2009) 175 Cal.App.4th 506, 522 ("[u]nder the rules governing statutory construction, when the Legislature enacts an amendment, we presume it indicates that it thereby intended to change the original act by creating a new right or withdrawing an existing one."[21]); *Suman v. BMW of North America, Inc.* (1994) 23 Cal.App.4th 1, 10–11 ("[i]t is a well recognized principle of statutory construction that when the Legislature has carefully employed a term in one place and has excluded it in another, it should not be implied where excluded."[22]).

While the Legislature exempted transactions involving public entities from the Commission's review under Section 854, the Legislature preserved AB 1054's intended requirement that the Commission review the workforce impacts of public entity acquisitions. Thus, concurrent with the Legislature's removal of Subsection 854.2(b)(1)(F) from Section 854, the Legislature added to Section 851 the requirement that the "commission shall determine whether the transaction is fair and reasonable to affected public utility employees, including both union and nonunion employees." *See* §851(b)(2). Aside from adding this narrow requirement,

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[20] Italics and strike-through in original; bold added. See, Decl. of W. Kissinger ¶ 6, Exh. E at 5 (SB 550, amended September 6, 2019).

[21] Internal quotations and citations omitted.

[22] Internal quotations and citations omitted.

however, the substantive provisions of Section 851 remained largely unchanged from its original enactment.

The SB 550 amendments to Sections 851 and 854 removed any doubt that the Legislature intended to limit the Commission's review of public entity acquisitions of utility assets to evaluating only workforce impacts. And while the statutory text is clear, the legislative history bolsters this construction of these amendments. The Office of Senate Floor Analyses on the bill spelled out the Legislature's intent to "***[e]liminate the requirement the CPUC review any merger, acquisition, or change of control of a public utility by a public entity … to determine whether that transaction is in the public interest, thus clarifying provisions of AB 1054 (Holden, Chapter 95, Statutes of 2019)***" as a "major provision" of SB 550.[23]

Analysis prepared by the Senate Committee on Energy, Utilities and Communications further details that SB 550 sought to exempt public entity change of control transactions from the Commission's review, except with respect to the Commission's evaluation of public utility workforce issues:

> This bill further clarifies the considerations required of the CPUC in any asset sale or change of control between a public utility and a public entity, which is intended to include any transfer that may be entailed in a transaction to municipalize a portion of an IOU's service territory. The growing interest of municipalities to purchase the distribution infrastructure of electrical corporations was the primary transaction of concern which prompted the additional changes in this bill. Those changes largely preserve the additional protections added by AB 1054, *while exempting voluntary or involuntary transfer of assets of an IOU to ownership by a public entity from the change of control while more broadly requiring the CPUC's review of these transactions determines whether the transaction is fair and reasonable to affected IOU employees*.[24]

The statutory language and legislative history make clear that the Commission's review of transactions involving public entities under Section 851 is limited to evaluating impacts of the transaction on the public utility workforce and that public entity acquisitions are expressly exempt from the several factors the Commission must evaluate under Section 854.

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[23] Decl. of W. Kissinger ¶ 7, Exh. F at 1 (California Assembly prepared analysis of SB 550, September 6, 2019) (emphasis added).

[24] Decl. of W. Kissinger ¶ 8, Exh. G at 4-6 (Senate Committee on Energy, Utilities and Communications, analysis of SB 550, September 6, 2019) (emphasis added).

## III. DISCUSSION OF ISSUES RELATING TO SECTION 851 REVIEW

The Assigned Commissioner's Scoping Memo asked parties to brief the "scope of Commission review required by Pub. Util. Code § 851," including three specific sub-issues identified under Issue 6 of the Scoping Memo. CCSF responds to each of these issues below.

### a. Issue 6: The scope of Commission review required by Pub. Util. Code § 851.

The scope of the Commission's Section 851 review specific to change of control transactions involving public entities is limited to determining whether the "transaction is fair and reasonable to affected public utility employees." Pub. Util. Code §851(b)(2). As discussed above, the limits on the Commission's review of municipal acquisitions of utility assets is made clear by the Legislature's amendments to Section 851, *et seq*., as confirmed by the associated legislative history that memorializes its intent. By deleting Subsection 854.2(b)(1)(F) (public entity change of control) from Subsection 854(a), the Legislature clarified that the considerations enumerated under that section—*including a finding that the acquisition is in the public interest*—do not apply to a public entity's acquisition of public utility assets. *See*, *Nick* and *City of Irvine* (*supra* at 9). Against this backdrop, the Commission must reject PG&E's suggestion that the Commission's Section 851 review requires the Commission to evaluate "[w]hether CCSF's proposed acquisition of PG&E's assets would be in the public interest, considering impacts on both PG&E's customers outside San Francisco as well as the customers within San Francisco that CCSF proposes to serve." PG&E's Prehearing Conference Statement (PHC Statement) at 2. Nor should the Commission consider the lengthy "non-exhaustive" laundry list of issues PG&E urges the Commission must evaluate as part of the "public interest inquiry." *Id*. at 3.

To the degree the Commission's Section 851 review of San Francisco's acquisition exceeds the narrow scope expressly permitted by the Legislature, it would invite legal error. Determination of extraneous issues, such as whether San Francisco's condemnation of PG&E's assets is in the public interest, would infringe upon CCSF's right to condemn property pursuant to the Eminent Domain Law's well-established statutory framework.

The Eminent Domain Law mandates that CCSF find that the "public interest and necessity require the proposed project." Code Civ. Proc., §§ 1245.220 & 1245.230.[25] Thus, the Commission's consideration of issues related to "public interest" would not only conflict with the clear language of Section 851 as reflected in SB 550 but would also improperly elevate a general law over the more specific statutory framework embodied in the Eminent Domain Law. *Rose v. State* (1942) 19 Cal.2d 713, 724 ("[a] specific provision relating to a particular subject will govern in respect to that subject, as against a general provision."); *City of Fresno* (1967) 254 Cal.App.2d 76, 84 (finding that the more specific provisions of the Eminent Domain Law control over a general statute); *Beasley v. Municipal Court* (1973) 32 Cal.App.3d 1020, 1027 (specific statute dealing with motor vehicle misdemeanor violations necessarily controls general Penal Code statute).

The Commission must ensure that it regulates municipalities only to the extent expressly authorized by the Legislature. With respect to the Commission's review of change of control transactions involving public entities, the Legislature has provided express authority for the Commission to consider only the impact of the transaction on the workforce of the public utility. Thus, Section 851(b)(2) defines the narrow scope of the Commission's review.

**b. <u>Issue 6(a)</u>: Whether the Commission has jurisdiction to require a Section 851 application in the event of CCSF's successful condemnation of PG&E's electric service assets in San Francisco.**

The Commission has broad constitutional and statutory authority over PG&E and may "do all things" which are "are necessary and convenient in the exercise of such power and jurisdiction." Pub. Util. Code § 701. The primary limiting factor on the Commission's jurisdiction is that the Commission's action must be "cognate and germane to utility regulation." *PG&E Corp. v. Public Utilities Com.* (2004) 118 Cal.App.4th 1174, 1201. Here, there is no doubt that it is within the Commission's jurisdiction to require PG&E to file a Section 851

[25] *See also* Code Civ. Proc., § 1240.650 (requiring public entities acquiring property that is already in public use to put the property to "a more necessary use").

application if CCSF successfully condemns PG&E's assets. Equally, should the Commission require PG&E to file a Section 851 application, PG&E would be statutorily bound to comply.[26]

While the Commission may issue a ruling requiring PG&E to file a Section 851 application, it is unclear whether the Commission may *require* a public entity to do the same. As discussed above, the Commission's jurisdiction over municipalities extends only so far as expressly authorized by the Legislature. Section 851, which has historically related to only a public utility's affairs, does not expressly authorize the Commission to direct a public entity to file a Section 851 application. That said, CCSF could file a Section 851 application if requested by the Commission.

**c. Issue 6(b): The appropriate timing and process to complete the Commission's Section 851(b) review if CCSF proceeds to seek condemnation of PG&E's electric service assets in San Francisco.**

The Scoping Memo correctly found that "the Section 851 review need not occur prior to resolution of the valuation issues" and currently contemplates the Commission will issue a final decision on CCSF's valuation petition by the fourth quarter of 2023. Scoping Memo at 3 & 6. CCSF believes there are several ways that the Commission's Section 851 review could be initiated, including the following:

- PG&E Application. As discussed above, the Commission has extensive authority over PG&E and could direct PG&E to file a Section 851 application promptly upon the condemnation of its assets, with CCSF's input and consent.
- CCSF Application. Also, as discussed above, CCSF could file an application to initiate the Section 851 review upon the Commission's request.
- Commission's Own Motion. The Commission could open an 851 proceeding on its own motion. Under this approach, CCSF and/or PG&E would notify the

[26] Pub. Util. Code § 702 provides: "Every public utility shall obey and comply with every order, decision, direction, or rule made or prescribed by the commission in the matters specified in this part, or any other matter in any way relating to or affecting its business as a public utility, and shall do everything necessary or proper to secure compliance therewith by all of its officers, agents, and employees."

Commission upon resolution of the condemnation action, prompting the Commission to initiate the Section 851(b) review.

**d. Issue 6(c): Whether such review includes review of wildfire mitigation costs, or other additional costs.**

As discussed above, the Legislature limited the Commission's Section 851 review to evaluating only workforce impacts resulting from public entity acquisitions of public utility property. Thus, the Commission is not authorized to consider wildfire mitigation costs in the context of its Section 851 review, nor would it serve as the best procedural vehicle to do so. The City recognizes that a process may be needed to address charges associated with the City taking over part of the PG&E distribution system, potentially including departing load charges and other nonbypassable charges. However, such costs are not the proper subject of a Section 851 proceeding for the reasons noted. Instead, the Commission should consider CCSF responsibility for such additional costs, if any, within a separate proceeding following the completion of a successful condemnation action. This might then be followed by a joint application by the parties or other proceeding to address such issues. *See, e.g.*, *Application of Pac. Gas & Elec. Co. (U39e), Modesto Irrigation Dist., & Merced Irrigation Dist. for Approval of Nonbypassable Charge Agreement*, D.10-11-011 (CPUC Nov. 19, 2010), *available at* 2010 WL 4912432 (approving nonbypassable charge agreement entered into between Modesto Irrigation District and Merced Irrigation District and PG&E related to new municipal departing load customers).

## IV. CONCLUSION

The Legislature has made clear that the scope of the Commission's Section 851 review is limited to determining whether a public entity's acquisition of utility assets is fair and reasonable to affected public utility employees. Despite that, PG&E may continue to argue otherwise in order to prevent this proceeding from advancing in the sensible and legally appropriate manner detailed in the Scoping Memo.

The Commission should decline PG&E's invitation for the Commission to exceed its statutory authority over municipalities like San Francisco and to improperly expand the scope of its review beyond the narrow determination identified by the Legislature. To do so would not only exceed the Commission's authority but would also infringe upon the inherent right of San Francisco to condemn property under the Eminent Domain Law.

Date: August 23, 2022

Respectfully submitted,

By: /s/ *Theresa Mueller*

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