No. S078712

IN THE SUPREME COURT

OF THE STATE OF CALIFORNIA

THE PEOPLE OF THE STATE OF CALIFORNIA, acting by and through the DEPARTMENT OF TRANSPORTATION,

Plaintiff and Respondent,

vs.

SOUTHERN CALIFORNIA EDISON COMPANY,

Defendant and Appellant.

Appeal from Los Angeles County Superior Court
Honorable George P. Schiavelli, Judge

LASC Case No. BC136201

THE PEOPLE OF THE STATE OF CALIFORNIA'S BRIEF ON THE MERITS

WILLIAM M. McMILLAN, Chief Counsel
DAVID R. SIMMES, Deputy Chief Counsel
ANTHONY J. RUFFOLO, Bar No. 29335
ALEXANDER D. DeVORKIN, Bar No. 89351
865 South Figueroa Street, Suite 400
Los Angeles, California 90017-5472
(213) 955-5000

KENNETH B. BLEY, Bar No. 60600
COX, CASTLE & NICHOLSON LLP
2049 Century Park East, Suite 2800
Los Angeles, California 90067-3284
(310) 284-2231

MARC J. POSTER, Bar No. 48493
GREINES, MARTIN, STEIN & RICHLAND LLP
9601 Wilshire Boulevard, Suite 544
Beverly Hills, California 90210-5207
(310) 859-7811

Attorneys for Plaintiff and Respondent, The People of the State of California, acting by and through the Department of Transportation

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SUMMARY OF ARGUMENT

In 1969, Southern California Edison permitted the People of the State of California to take possession of Edison property, then worth about one-half million dollars, for the construction of a portion of the 605 Freeway. Edison was ultimately awarded $49.5 million for the taking and damages based on the property's 1995 value. The trial court recognized that Edison was entitled to be justly compensated for the State's use of the property since 1969 and awarded Edison an additional $5.6 million in the form of prejudgment interest from the date of value.

Edison, unsatisfied with having been awarded over $55 million – all of which has already been paid – contends that the State should pay interest of $400 million – four tenths of a **billion** dollars. Neither the law nor common sense supports such a result.

- The State did not deprive Edison of $49.5 million, or its equivalent in property, in 1969. Edison's property was worth only a tiny fraction of that amount in 1969. Moreover, the $49.5 million award was itself inflated many times over by what the trial court called "an extreme measure of value" (Joint Appendix ["JA"] 3108), Edison's unorthodox "replacement-cost" approach based on the combined cost of purchasing a hypothetical alternative transmission corridor that would run through densely-developed commercial and residential property, and of destroying all development on that property. Edison never purchased such an alternative corridor and suffered no loss of use of the purchase money that would justify an award of interest.

- Code of Civil Procedure section 1268.310 does not apply here. That statute specifies how interest is to be awarded when the plaintiff in an eminent domain action takes possession of the defendant's property

during the action. The statute does not address how interest is to be awarded when, as in this case, one party takes possession of another party's property by mutual agreement, decades before the filing of any eminent domain action. When this happens, it is for the courts to fashion an appropriate method for determining just compensation.

- In any event, in the circumstances of this case, Section 1268.310 cannot be interpreted to require that the State pay interest from 1969 based on a 1995 property valuation. This would be an enormous windfall to Edison. The Legislature could not possibly have intended such a result, and the statute should not, and constitutionally cannot, be interpreted to effect such an absurd give-away, a gift of public funds.

- The trial court awarded Edison $5.6 million in interest. This justly compensated Edison for the State's use of Edison's property from 1969 to the date of judgment. Edison never proved the value of any actual loss of use of its property, and the State's taking for compatible use of portions of Edison's corridor never actually interfered with Edison's existing use of the corridor for power transmission. If Edison spent money to expand other parts of its transmission system because of this taking, it has recovered that cost from its 11 million California customers through higher utility rates. Edison is not entitled to be compensated a second time – this time from California's taxpayers – and certainly not with a payment calculated as if Edison had bet the money in the stock market over the past 25 years.

Edison is so unsure of its position that it stoops to arguing that it is the victim of the State's "subterfuge," "duplicity," "prevarication," "dishonesty," and "chicanery" (Edison Br. on Merits 7, 16, 31, 33) and that the State never "lift[ed] a governmental finger to provide the compensation required by the constitutions" (Edison Br. on Merits 7). That simply is not the case. True, the State caused unwarranted delay in completing the

acquisition of Edison's property. But the State did not do so on purpose, and, as the trial court found, Edison sat on its corporate hands for 25 years. Moreover, the State has already paid dearly for the delay. Because of the delay, the trial court nullified Edison's agreement to value the property as of 1969, resulting in the inflated 1995 valuation date. The State should not have to pay again for the delay by accumulating interest on the 1995 valuation from 1969.

The trial court did what was right and fair in the unique circumstances of this case, fully consistent with the Constitution and the Eminent Domain Law. The judgment should be affirmed.

STATEMENT OF THE CASE

Edison forgets that on the interest issue the trial court found in the State's favor not only on the law but also on the facts. We therefore re-examine the facts that support the trial court's findings. In particular, we debunk Edison's assertions that the State intentionally misled Edison and that Edison reasonably relied on the State's assurances.

A. Factual Summary.

1. The Freeway Project.

In 1968, the State was prepared to extend the San Gabriel River Freeway from the San Bernardino Freeway in Baldwin Park northward to the Foothill Freeway in Duarte. (RT 266-267.) The project would not, as Edison luridly describes it, "slash" or "carve up" Edison's corridor. (Edison Br. on Merits 6, 7.) Rather, it required only the shared use of

portions of a segment of one of Edison's power transmission corridors. (RT 359-360.)[1]

As it was, Edison owned only portions of the corridor in fee simple. Some of the property consisted of an easement from the United States Army Corps of Engineers that expires in 2001. Other portions were held under license or were themselves subject to easement. (Exh. 1071[2]; RT 4048-4051, 5353.)

Figure 1, on the following page, is a copy of Edison's Exhibit 85, which illustrates Edison's transmission corridor between the 210 Freeway on the north and the 10 Freeway on the south in blue, the 605 Freeway project in yellow, the portions taken for compatible use in red, and Edison's hypothetical alternative corridor in orange.

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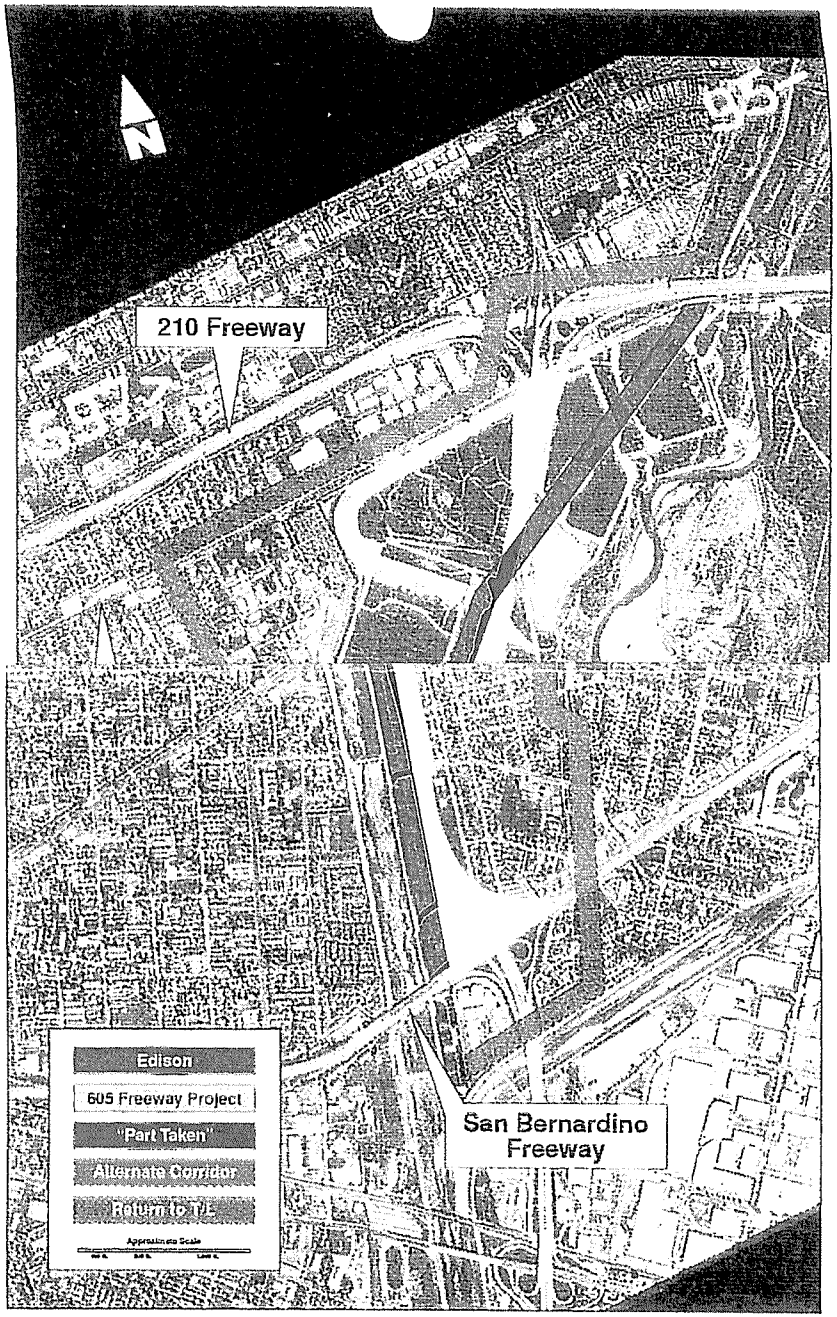
[1] Contrary to Edison's suggestion (Edison Br. on Merits 6), it was not at the State's mercy regarding the location and extent of the taking. As a public utility, Edison could have challenged the necessity of the State's taking. (Code Civ. Proc., § 1240.530; former Code Civ. Proc., §§ 1240, subd. (3), 1247, subd. (1), and 1247a.) Edison and its large staff of legal counsel chose not to do so.

[2] Exhibits marked at the court trial on legal issues are cited as "Exh.-L." Exhibits marked at the jury trial on compensation are cited as "Exh."


N
210 Freeway
San Bernardino Freeway
Edison
605 Freeway Project
'Part Taken'
Alternate Corridor
Return to TE

2. The 1969 Permission To Enter And Agreement To Negotiate Compensation.

On October 3, 1968, the State filed a complaint to condemn portions of Edison's corridor where freeway construction was about to begin. (RT 283; Exh.-L 1017; JA 831.)

Edison now claims it was doing the State a favor (Edison Br. on Merits 33), but the evidence shows it was at Edison's request that the State did not prosecute the condemnation action. (Exh.-L 1001, p. 24; JA 822.) Instead, Edison drafted an agreement by which the State could build the freeway while the two entities negotiated the terms of compensation. This agreement, titled Permission to Enter (the "Entry Agreement"; Exh.-L 1003; JA 148; RT 261), was signed in June 1969 and was to continue in effect pending negotiations "or until a reasonable time after you [the State] have been requested by the undersigned [Edison] to commence eminent domain proceedings." (Exh.-L 1003, p. 2; JA 149.)[3]

In the agreement, the State assumed responsibility to maintain Edison's access to transmission facilities, to keep equipment away from conductors, to compact any soil it disturbed, to shore up towers, to mark and reinforce any underground facilities, assume liability for drainage or erosion damage resulting from fill, and to provide access across drainage facilities capable of supporting specified vehicles. (Exh.-L 1003, pp. 1-2; JA 148-149.)

The agreement was to continue in effect pending negotiations "or until a reasonable time after you [the State] have been requested by the

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[3] Actually, there were two Permissions to Enter, the second one (Exh.-L 1002) covering a single additional parcel of property. For simplicity, we refer to these agreements collectively as the Entry Agreement.

undersigned [Edison] to commence eminent domain proceedings." (Exh.-L 1003, p. 2; JA 149.) The agreement provided:

> "It is understood that the valuation date in any eminent domain proceedings filed in connection herewith shall be the date upon which entry shall have been made upon said land hereunder, and that settlement for compensation, or award made in any such eminent domain proceedings, shall bear interest at the rate of 7 per cent per annum from the date of acceptance by the State hereunder, until paid." (*Ibid.*)

In other words, the parties agreed on a 1969 date of value and 7% interest from 1969 to the date of payment.

3. Protracted Negotiations.

The State appraised Edison's property at $25,000 per acre (about $.57 per square foot). (Exh.-L 1001, p. 19; RT 240, 243, 266-267.) The total area was about 20 acres. Even assuming the State had taken the fee from Edison, which it did not, the total value would have been on the order of one-half million dollars.

The State and Edison negotiated, sporadically, for the next 25 years. During those decades, Edison sometimes sought an exchange of properties, sometimes monetary compensation. (RT 315-317, 3229; Exh. 1004; Exhs.-L 1001, 1009.) At first, Edison convinced the State that it needed additional land from the adjacent river banks to replace the land to be taken by the State for the freeway so that Edison could add 500kV lines in the future. Edison contended it needed at least a 250-foot wide corridor to provide for 500kV lines. The State planned to acquire adjacent Flood Control District land for Edison in lieu of compensation for the part taken.

(Exh. 76.) That land is still available today. (RT 5280.) However, Edison flip-flopped concerning its need for adjacent land, most recently in 1985. (RT 315, 395.)[4]

The State appraised the property a second time (RT 280, 549-550) and proposed to compensate Edison either based on the agreed-upon 1969 valuation date plus interest, or on current appraised value without interest (RT 418-419).

As the trial court found, during these years the State did not live up to its contractual obligation to negotiate in good faith and did not provide Edison with legal access to certain transmission towers over adjacent County Flood Control District land. (RT 232-383; Exh.-L 1009.). By the time of this litigation, some of the documents that would have been necessary to the negotiations (e.g., title reports, appraisals, maps, legal descriptions), could not be found in the State's file. (Exh.-L 1001; RT 352-353.)

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[4] Edison claims it would have "upgraded" the transmission corridor in anticipation of deregulation of the power industry. (Edison Br. on Merits 23.) What the evidence really shows is that, in the 1970's, the Public Utilities Commission approved Edison's application to upgrade the line in the forest north of the 210 freeway to 500kV, but to energize it to only 220kV. (RT 5067; Exh. 1023, p. 6.) Edison never applied to upgrade the corridor between the 10 and 210 Freeways. Edison could not justify the expenditure in light of diminished power usage expectations. (Exh. 1082; RT 2755.) Back in 1968, Edison predicted consumer demand for power would grow 9-10% per year (RT 3253) and reach 52,000 megawatts by 1990 (RT 3334), but actual power consumption in 1990 was only 17,650 megawatts. (RT 3339.) Deregulation would not have changed this at all.

4. Edison's Procrastination.

For 25 years, Edison never invoked its contractual right to have the State initiate condemnation proceedings, never denied the viability of the Entry Agreement, and continued to negotiate as if the agreement were valid and applicable. (RT 401, 412, 454; Exh.-L 1012.) All this time, Edison continued to use, without objection, portions of the adjacent Flood Control District river bank for one of its towers and to access its facilities impeded by freeway drainage systems. (RT 410-413, Exh.-L 1009.) Edison never complained that the State failed to keep equipment clear of the towers, failed to compact soil, failed to shore up towers, failed to mark and reinforce underground facilities, or failed to prevent interference with Edison's power transmission in any way. (RT 250.)

Although Edison would have this Court believe otherwise (Edison Br. on Merits 31, 33), the trial court specifically found that the agreement was *not* tainted by fraud. (JA 3107:1-2.) There was no evidence that the State intended to mislead Edison, that it willfully destroyed any documents,[5] or that its foot-dragging was anything other than institutional inertia.

Nor was Edison actually misled by any misguided promises and assurances regarding appraisals in progress and offers to be made. The trial court specifically found that Edison did not reasonably rely on any such assurances. (JA 3139.) Edison knew perfectly well that it should not take 25 years to complete an appraisal, and, with its own staff of condemnation lawyers and right-of-way agents, Edison knew how to make its own

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[5] Copies of some of the "missing" appraisals turned up in Edison's files. (RT 267.)

appraisals and offers if it wanted to.[6] At trial, Edison asserted that the agreement "terminated as early as the 1970s" (RT 651-652) and conceded that "maybe it was foolish" to wait two decades for the State to take further action (RT 625, 647). Yet Edison did just that.[7]

Furthermore, as the trial court also found, "Edison did not act diligently to enforce its rights." (JA 3107.)[8] As late as 1992, Edison had made no claim for severance damages (RT 502) and continued to negotiate on the basis of the 1969 agreement (RT 479, 482). Though Edison had its own appraisal (RT 530-532), nevertheless the State's two appraisals of 1968 and 1978 (an update which covered all the parcels involved) were the basis for continuing negotiations for both parties (RT 280, 549-550).

In October 1993, Edison finally dropped its request for adjacent property, proposed a cash settlement that for the first time included severance damages, and advised the State: "We would like to meet with you to discuss these figures in detail and bring this long outstanding transaction to a close in a timely manner." (Exh.-L 1012.)

Edison – the world's second largest investor-owned utility – was hardly at the State's mercy during 25 years of negotiations over the terms of

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[6] Indeed, Edison completed its own appraisal in 1979, including a claim for severance damages, based on the 1969 valuation date. The State was not informed of this appraisal until 1993. (RT 530-532.)

[7] The record also does not support Edison's assertion that public utility acquisitions often take more than 20 years. (Edison Br. on Merits 12, fn. 16.) The testimony Edison cites (RT 4823:6-14) concerned the State's negotiation of common-use agreements with public utilities. (RT 4821:8-10.) That is an entirely different issue than negotiation of compensation for a taking.

[8] The court considered this issue long and hard, and gave Edison ample opportunity to address it. (RT 456-457, 460, 464, 466, 678, 826-828, 830, 6281; JA 3393.)

compensation for the taking. Under the 1969 Entry Agreement that it drafted, Edison had the right at any time to request that the State initiate eminent domain proceedings. Edison apparently felt no incentive to move things along because, despite the freeway's presence, Edison had uninterrupted operation of its transmission corridor and was assured, by express agreement with the State, of full compensation for the taking valued at the time of the taking plus interest from the time of the taking.

B. The Litigation.

In 1994, Edison requested that the State either come to terms or commence eminent domain proceedings. (RT 401, 412; Exh. 49.) But, before the State could complete all the procedural steps required to file a condemnation action, which included obtaining a Resolution of Necessity from the California Transportation Commission (RT 562; Code Civ. Proc., § 1245.220), Edison filed its own inverse condemnation action (JA 1). The State then filed its condemnation action (JA 36, 374), and the two actions were eventually consolidated for all purposes (JA 108).

Contrary to Edison's suggestion (Edison Br. on Merits 40), the State should not be penalized in the determination of just compensation because it filed a direct action, as Edison requested and as required by the Entry Agreement. While the State demurred to Edison's inverse condemnation on the ground that it was premature under the terms of the Entry Agreement, the State's direct action never "trumped" Edison's inverse action. The two actions were consolidated for all purposes, and Edison did not dismiss its inverse action until judgment was entered in the direct action, and even then Edison's dismissal was "without prejudice." (JA 3129.) The inverse action

was thus still pending when the trial court determined the proper amount of interest for just compensation.[9]

1. The Trial Court's Imposition Of A 1995 Valuation Date.

As a consequence of the State's breach of duty under the Entry Agreement, the trial court refused to honor the agreed-on 1969 valuation date and interest provision. Instead, very much to Edison's benefit in light of the manifold increase in property values, the trial court fixed a November 16, 1995 valuation date, the date the State made its deposit of probable compensation in the direct condemnation action. (JA 107, 3120-3123, 3131.)

2. The Valuation Trial And Edison's "Hypothetical Alternative Corridor" Theory.

At the jury trial on valuation, over the State's repeated objections (JA 901; RT 3859-3860), Edison's expert, George Hamilton Jones (RT 3775-3776, 3804, 3819), valued the taking and severance damages to the remainder by what he called a "replacement cost" approach. (RT 3832.)[10]

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[9] If Edison really believes the State unfairly preempted its inverse condemnation action, the State will abandon its direct action (as authorized by Code of Civil procedure section 1268.510), and Edison can proceed with its inverse action, where the taking could be valued as of 1969 and interest or loss of use determined accordingly.

[10] The State repeatedly objected that Edison's "replacement cost" approach was a thinly-disguised version of the discredited "substitute facilities" approach. (JA 901; RT 3859-3860.) We discuss this point in (continued...)

Jones relied on Edison engineers to designate a hypothetical alternative corridor that would bypass the affected portions of Edison's existing corridor and connect existing transmission facilities at either end of the affected portions. (RT 3847.) Unlike Edison's existing corridor, that runs through river beds and strawberry fields, this hypothetical alternative corridor would carve through residential, business and heavy industrial development. (RT 3867-3870.)

Jones testified that assembling this hypothetical corridor would cost $139.5 million ($15 per square foot), including $104.5 million for acquisition of properties and $32 million for relocation of existing businesses and residents out of the corridor, demolition and removal, appraisals, right-of-way planning, surveying, engineering, environmental impact reports, legal fees, and interest on acquisition funding. (RT 3861-3863, 3879, 3885.)

Starting with the hypothetical alternative corridor value ($139.5 million, or $15 per square foot) as the "before" value of the entire existing corridor, Jones apportioned $13.5 million to the parts of the corridor taken for compatible use by the State and $126 million to the remainder. (RT 3947.) He then appraised the value of Edison's remainder in the "after" condition at $85.2 million. He figured the severance damage to the remainder was the difference between the value of the remainder in the before and after conditions, $40.8 million. (RT 3938-3949.)

Jones further testified that the remaining corridor was worth less in the after condition than in the before condition because he considered about one-fourth of the remainder no longer part of the "effective" corridor. He

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[10](...continued)
detail here – not to argue a point on which this Court chose not to grant review – but because Edison's valuation method was one of the critical factors influencing the trial court's interest award.

devalued this property from $15 per square foot to $4 per square foot. He devalued all the remaining property by an additional $1.67 per square foot (down to as little as $2.33 per square foot) because access was now impaired by the freeway. (RT 3906-3907, 3922-3923, 3929-3930.)

Finally, adding the value of the taking to the damage to the remainder, and $5 million to relocate certain transmission towers in the existing corridor, Jones arrived at a total of $54.5 million. (RT 3939, 3955-3956.)[11]

3. The Jury's $49.5 Million Verdict.

The jury adopted Edison's "replacement cost" valuation theory in its entirety, awarding $49.5 million as compensation: $13.5 million for the part taken and $36 million for severance damages. (JA 1570.) The only item the jury apparently refused Edison was the $5 million it sought to relocate towers that had been operating undisturbed for 28 years.

4. The Trial Court's $5.6 Million Interest Award And Findings Regarding Edison's Delay.

The trial court awarded interest on the jury's condemnation award, not from the 1969 date of possession, as Edison urges is dictated by a literal reading of Code of Civil Procedure section 1268.310, but from the 1995 valuation date, for a total of $5.6 million. In so doing, the trial court relied on its "historic responsibility . . . to act as the arbiter of the breadth and

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[11] The State's expert, Robert H. Flavell, based his valuation of the taking on the value of similarly-undeveloped industrial land, and estimated severance damages based on the cost of purchasing adjacent undeveloped county land. His total was $4.7 million. (RT 5525.)

impact of constitutional requirements and to determine when the legislature's enactments exceed constitutional bounds." (JA 3105.) The trial court explained that "overarching the statutory condemnation scheme, is the constitutional requirement, conceded by both parties, that compensation must be 'just.'" (JA 3105.) The court found that awarding interest from the date of valuation is just compensation in light of a unique combination of unusual circumstances:

- "The original possession was consensual pursuant to a contract negotiated by the parties." (JA 3106.)
- "The contract between Edison and CalTrans was not one of adhesion or the result of a significant disparity in bargaining position. Also, the contract was not tainted by fraud." (JA 3107.)
- "Edison did not act diligently to enforce its rights." (*Ibid.*)
- "Edison is sophisticated. It knows how long property appraisals take. It knew CalTrans was not providing it with legal access to all of its facilities. While, as the Court has concluded, CalTrans' information to Edison was incorrect and misleading, this does not even come close to justifying Edison's failure to invoke the remedy it contracted to retain, inverse condemnation, for some twenty-five years. This is not reasonable reliance. Given the length of time involved, Edison's actions, consisting principally of the periodic exchange of letters with CalTrans, were appallingly meager, especially in light of the fact that Edison contracted to have the matter resolved as soon as reasonable [sic] possible, i.e., without unnecessary delay, and knew throughout this time it could obtain access to certain of its towers only by illegally trespassing on the property of others." (JA 3139.)
- "Edison cannot have believed the matter was proceeding without unnecessary delay. Nevertheless, Edison chose to take no decisive

action for twenty-five years. Rather, it chose to sit back while the damages mounted." (*Ibid.*)

- "Edison . . . has received what may conservatively be described as an extreme measure of value. Edison has received the value, as of November 1995, of the homes and businesses which exist along the substitute corridor outlined by its appraiser. Clearly that award must be deemed the outer limit of the appreciated value of the property." (JA 3108.)

5. The $55.1 Million Judgment.

On October 22, 1997, the trial court entered judgment on the jury's verdict, which, with $5.6 million in interest from the 1995 valuation date, came to total of $55.1 million (JA 3141), and which the State paid on October 24, 1997, under an agreement preserving both parties' right of appeal. The trial court has not yet determined how much more the State must pay for Edison's litigation expenses and costs.

6. The Court Of Appeal's Decision Affirming The Judgment.

Both Edison and the State appealed. (JA 3427, 3429.) The Court of Appeal affirmed the judgment in an unpublished opinion. (Appendix A to Edison's Petition for Review.) The Court rejected Edison's plea for interest running from 1969:

> "In the present case, the trial court could properly exercise its inherent power to avoid an oppressive and unjust result in awarding Edison interest from the date the state deposited probable compensation. To allow Edison interest from the

1969 date of possession would, as the trial court found, violate the Constitutional mandate that *just* compensation be awarded. Under the circumstances, the trial court could reasonably conclude an award of interest from the date of possession in 1969 would be unjust." (Typed opn., p. 18, original emphasis.)

LEGAL DISCUSSION

I.

THE JUDGMENT, INCLUDING $49.5 MILLION FOR THE TAKING AND SEVERANCE DAMAGES AND $5.6 MILLION FOR INTEREST, AMPLY AND JUSTLY COMPENSATES EDISON.

A. The Court Is The Ultimate Arbiter Of Just Compensation.

The courts have the final say in determining just compensation, including the accrual of interest if interest is a form of compensation for loss. "No one can gainsay that the amount to be paid for property taken by the government is, under the Constitution, a matter for the courts rather than the Legislature, and this applies also to the measure of damages awarded for the taking of the subject property." (*County of Los Angeles* v. *Ortiz* (1971) 6 Cal.3d 141, 145; *Marin M. W. Dist.* v. *Marin W. etc. Co.* (1918) 178 Cal. 308, 315 ["The fixing of the amount payable as compensation for property taken for public use presents a judicial question"]; *Monogahela Navigation Co.* v. *United States* (1893) 148 U.S. 312, 327 [13 S.Ct. 622, 626, 37 L.Ed. 463] ["[T]he measure of compensation . . . is a judicial, and not a

legislative, question"].) This is because "the legislature cannot change a rule established by constitutional provisions." (*Estate of Potter* (1922) 188 Cal. 55, 60.)

In assessing just compensation, the courts must assure that the compensation is just for the condemnor as well as the condemnee. (*Los Angeles County Metropolitan Transportation Authority* v. *Continental Development Corp.* (1997) 16 Cal.4th 694, 716.) As the court held in *City of Fresno* v. *Cloud* (1972) 26 Cal.App.3d 113, 123:

> "[T]he constitutional requirement for the payment of 'just compensation' is not only for the benefit of the landowner, but also for the benefit of the public. [Citation.] A landowner is not entitled to be placed in a better position financially than he was before the condemnation; neither is the state required to pay more than land is worth merely because of some theoretical, intangible concept."

This has always been California law. In *Cal. P. R. R. Co.* v. *Armstrong* (1873) 46 Cal. 85, the condemning agency, a railroad, built tracks across the defendant's property in 1868 but did not institute the condemnation action until 1870. Under applicable statute, the taking was valued as of 1870, when the action was commenced. The defendant argued that the value of the land in 1870 should include the value of the railroad tracks the railroad placed on the land as a trespasser in 1868. This Court disagreed:

> "Neither the Constitution nor the statute contemplates that a person, whose land is taken in the exercise of the right of eminent domain, shall be entitled to anything beyond 'just compensation.' *He is to be paid the damage he actually suffers, and nothing more.* But, to hold that, in addition to the

> fair value of the land taken, and such other damages as he may suffer by severing it from the remainder of his tract, he shall also recover the value of the railroad track, in the construction of which he never expended a dollar, and which was built by the plaintiffs at their own expense, would be to defeat the obvious intent of the statute by an over-technical construction of it." (*Id.* at p. 91, emphasis added.)

The Legislature, of course, can provide for compensation of real losses arising from a taking even if such compensation might not be constitutionally required. (*Redevelopment Agency* v. *Gilmore (1985)* 38 Cal.3d 790, 801 ["The Legislature may choose to recompense the owner of property or a business for a variety of losses caused by exercise of the eminent domain power. Its choices, however, are not necessarily the measure of the 'just' compensation constitutionally due"].) But the Legislature may not provide for compensation of a loss that has not actually occurred or for double compensation of the same loss. That would not be just compensation for the public; it would be a gift of public funds. (*Id.* at p. 809, conc. opn. of Mosk, J. ["Indeed, to assess more than just compensation runs the risk of violating the prohibition against making a gift of public funds. (Art. XVI, § 6.)"].)

B. <u>The Trial Court Fulfilled Its Duty To Ensure Just Compensation.</u>

The trial court awarded interest on the 1997 condemnation award back to the 1995 valuation date, for a total of $5.6 million in addition to the $49.5 million condemnation award itself. For several good reasons, this award amply and justly compensated Edison.

1. The Award Is Already Inflated By An Unorthodox Valuation Method Based On The Cost Of Purchasing Substitute Facilities.

Edison's condemnation award is premised on the cost of purchasing a hypothetical replacement corridor. While Edison's actual corridor consists mostly of river bed and strawberry fields, Edison's hypothetical replacement corridor consists of more valuable, densely-developed commercial, industrial and residential properties. The cost of this hypothetical replacement corridor also includes the cost of destroying the existing development in order to run hypothetical power lines. (RT 3833, 3938-3949.)

Edison's valuation method is but a variation on the "substitute facilities" method. Valuation is ordinarily premised on the cost of purchasing comparable property, not different and necessarily more expensive property. The substitute facilities method was contrived for the rare case where the property taken has a unique use, cannot be valued in the marketplace, and the only option is to give the condemnee enough money to purchase non-equivalent, substitute property to provide an equivalent use.[12]

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[12] Here, there was a market for Edison's land (RT 3730-3734, 3981-3987, 4004-4011, 5238-5242), and, as the State has previously argued, there was no need to resort to substitute property to determine value. *People ex rel. Dept. of Transportation* v. *Southern Pac. Transportation Co.* (1978) 84 Cal.App.3d 315, 325, is the sole California case where a substitute facilities approach was recognized as a "cost of reproduction" approach to just compensation. The court equated the condemnee's cost-of-reproduction-of-facilities approach to a fair-market valuation approach, authorized by Evidence Code section 820, involving the depreciated replacement cost of improvements. (84 Cal.App.3d at p.326.) The court thus treated land as if it were a depreciable improvement and mixed non-fair-market and fair-market valuation approaches. Since

(continued...)

Assuming this is one of those rare cases in which a replacement-corridor valuation method could apply, awarding interest before the valuation date is inappropriate in such a case. In theory, as noted above, such a compensatory award allows the condemnee to purchase replacement property on the date of valuation. Interest, therefore, should only run from the date of valuation. If interest ran from any earlier date, the condemnee would reap a windfall. A similar prohibition against the award of back interest was recognized in *Orme* v. *State of California ex rel. Dept. of Water Resources* (1978) 83 Cal.App.3d 178, 186, where the court stated:

> "If plaintiffs were to be awarded interest on the lump sum, as plaintiffs contend they should, they would be unjustly enriched by an award of interest on an award for damages incurred after the date interest is ordered to run."

Indeed, it has been held that if the replacement-value compensation is not used to purchase replacement property, as it was not in this case, interest should not run at all. As the court explained in *United States* v. *14.83 Acres of Land* (D.N.H. 1962) 204 F. Supp. 613, 615:

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[12](...continued)
Southern Pacific was decided, its basic premises have been questioned both by the United States Supreme Court (*United States* v. *564.54 Acres of Land* (1979) 441 U.S. 506, 516 [99 S.Ct. 1854, 1859, 60 L.Ed.2d 435] [substitute facilities method "would thus provide a windfall if substitute facilities were never acquired, or if acquired, were later sold or converted to another use"]; *United States* v. *50 Acres of Land* (1984) 469 U.S. 24, 30-31 [105 S.Ct. 451, 455, 83 L.Ed.2d 376] ["the possibility that the cost of a substitute facility exceeds the market value of the condemned parcel would not justify a departure from the market value measure"] and by other courts that have considered the issue. (*Religious of the Sacred Heart of Texas* v. *City of Houston* (Tex. 1992) 836 S.W.2d 606.)

"If the cost of providing any necessary substitute is not expended at the time demand is made for interest, the allowance of such upon future expenditures would result in something more than just compensation."[13]

So, too, in this case. Edison has been compensated as if it were going to purchase a replacement corridor of far more expensive property at 1995 value. Edison just kept the money. Allowance of interest before the 1995 valuation date "would result in something more than just compensation." (*Ibid.*)

2. The Award Is Based On A Valuation Date 26 Years After The Taking.

That the condemnation award is based on a 1995 valuation of the 1969 taking is triply significant.

First, property values increased significantly between 1969 and 1995. In effect, loss of use was compensated by inflation in property values.[14] The Legislature has never contemplated such double dipping.

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[13] Accord *United States* v. *1,433 Acres of Land* (D.Kan. 1947) 71 F.Supp. 854, 856-857: "In view of the fact that $10,434 was expended by the commission on July 1, 1942, interest upon that amount at six percent per annum is allowed. *Interest upon the remainder of the judgment will not be allowed at this time; but the court retains jurisdiction for the purpose of allowing interest upon so much of the balance as remains unpaid after being expended by the commission for the purpose allowed by the appraisers.*" (Emphasis added.)

[14] There are no formal appraisals of the 1969 value in the record, because the trial court established a 1995 date of value. However, the State had valued the property at $25,000 per acre in 1968 and made its

(continued...)

(Code Civ. Proc., § 1263.010, subd. (b) ["In any case where two or more statutes provide compensation for the same loss, the person entitled to compensation may be paid only once for that loss"].)

Second, whatever logical connection there might be between loss of use and interest on the condemnation award, that connection vanishes when the loss of use of property begins in 1969, the taking is valued as of 1995, and the judgment is entered in 1997. Back interest on a condemnation award for a few years might, in a particular case, afford a reasonable approximation of loss of use. (See *Metropolitan Water Dist.* v. *Adams* (1940) 16 Cal.2d 676, 682.) Back interest for 28 years, in a rising real estate market, is utterly incompatible with just compensation.

Third, Edison sat on its corporate hands. The parties operated for 26 years under the terms of the Entry Agreement. The Agreement specified how the property would be valued and how interest would be calculated. This assured a fair method of determining just compensation, on terms that a court could apply in an inverse condemnation case, no matter how long the negotiations took. The parties then negotiated, albeit not always diligently, as if the Agreement controlled. Nevertheless, based on the State's delay, the trial court rejected the agreed-upon valuation date. The

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[14](...continued)
1969 offer based on that appraisal. Through the years, the parties continued to negotiate on the assumption that the property was worth $25,000 per acre in 1969. (RT 246-247; Exh.-L 1019.) The fact that Southern California property values generally increased over that 25-year period, sometimes quite dramatically, is beyond dispute. (*Holmes* v. *Southern Cal. Edison Co.* (1947) 78 Cal.App.2d 43, 50-51 [judicially noticing marked rise in property values during World War II]; *Estate of Heltcel* (1962) 200 Cal.App.2d 398, 403 [judicially noticing general rise in property values between 1940 and 1958].) Moreover, Edison itself has indicated there was an eight- or nine-fold increase in value during that time. (RT 6264.)

court was entitled to consider Edison's delay in determining the interest accrual date.

3. The Award Compensates For Edison's Actual Loss Of Use, If Any.

A condemnee is entitled to be compensated for the loss of use of the property between the time of the taking and the time the condemnee receives compensation for the taking. Interest on the condemnation award from the date of the taking generally is a reasonable means of effecting that compensation. (*City of Hollister* v. *McCullough* (1994) 26 Cal.App.4th 289, 302 [interest is awarded in lieu of the actual value of the condemnor's prejudgment use of the property]; *Orme* v. *State of California ex rel. Dept. of Water Resources*, *supra*, 83 Cal.App.3d at p. 186 ["The purpose of an award of interest is to provide just compensation for a person deprived of property by the state"].) But an interest award that gives the condemnee more than that would simply be an unwarranted windfall to the condemnee and penalty against the condemnor.[15]

Edison contends $400 million really is no windfall, since it could have taken its damages in 1969, bet it all on the stock market, let it ride for 30 years, and have $375 million today. (Edison Br. on Merits 41-44.) This is nonsense. Just compensation is not determined by stock market speculation. This Court so held in *Redevelopment Agency* v. *Gilmore*,

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[15] Edison argues that interest also functions as an incentive to condemnors to expedite the condemnation process and to condemnees to cooperate. (Edison Br. on Merits 31.) Interest may or may not have such incidental effects, but that is not what motivates an award of interest. It is to compensate for loss of use. (3 Cal. Law Revision Com. Rep. (1961) pp. B56-57; JA 2180.)

supra, 38 Cal.3d at p. 806, fn. 17: "No case has suggested that the Constitution contemplates a 'prudent investor' in stocks or other equity securities." A prudent investment of the 1969 value of the taking would have yielded certainly no more than what Edison has already obtained, $5.6 million in interest on top of the $49.5 million. That is more than $200,000 per year return on property that was and is used mostly, if at all, for crops and storage.[16]

Edison complains that it seems to be getting the same amount of interest whether the State took its property in 1969 or in 1995. (Edison Br. on Merits 23.) But, as we have shown, the 1969 taking was by the parties' agreement, independent of any court proceedings, and neither party was diligent in effecting a compensation award. In a run-of-the-mill case, where the time between entry and the compensation award is no more than a few years, statutory interest is a convenient and reasonable approximation of loss of use. This isn't such a run-of-the-mill case. The trial court's determination of loss of use cannot be compared to statutory interest that might have been awarded in other circumstances.

4. The Award Is Consistent With California Case Law On Just Compensation.

The trial court's approach is the same approach courts apply in inverse condemnation cases to ensure just compensation for both the condemnee and the condemnor. (*Leaf* v. *City of San Mateo* (1984) 150

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[16] Assuming the property was worth $25,000 per acre in 1969 and Edison could earn 10 percent on the value of the land either as interest or rent, the total loss from 1969 to the present, principal, interest or rent *and* back interest on that interest or rent, would still be less than $12 million. (RT 6261.)

Cal.App.3d 1184, 1191-1192, disapproved on another point in *Trope* v. *Katz* (1995) 11 Cal.4th 274, 287; *Pierpont Inn, Inc.* v. *State of California* (1969) 70 Cal.2d 282, 298-299; see also *Mehl* v. *People ex rel. Dept. Pub. Wks.* (1975) 13 Cal.3d 710, 720.)[17]

Leaf was an action to recover subsidence damage caused by a City sewer project. The jury determined damages as of the date of trial in 1981. The trial court awarded interest on the award from the date the landowners filed their complaint, 1977. The City appealed, contending the award of prejudgment interest from the filing of the complaint was excessive in that it unfairly allowed interest on an appreciated value used in determining just compensation. The appellate court agreed the interest award was excessive and reversed:

> "Plaintiffs' damages were properly measured from the date of commencement of trial resulting in the benefit of appreciated value since the date of injury. Such measure of damages adequately provides for just compensation for the taking based upon the inflated value. The evidence of damages sustained related largely, if not exclusively, to costs of repair necessary to correct the injury or taking. *To permit an award of interest on a judgment reflecting that cost component would not only result in unjust enrichment but also sanction interest on a monetary loss accrued but not yet paid or incurred. Under the special circumstances shown, prejudgment interest should be fixed on the net judgment from*

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[17] In *Klopping* v. *City of Whittier* (1972) 8 Cal.3d 39, 58, this Court indicated that in a direct condemnation action the defendant may claim, and the trial court may award, damages for the condemnor's pre-litigation conduct based on inverse condemnation principles.

the valuation or trial date." (*Id.* at p. 1191, emphasis added.)[18]

In *Pierpont*, the property owner's predecessor in interest had donated the property west of San Jon Road in Ventura to the State on condition that the property be used as a park. The State never developed a park but in 1960 began work on a freeway over that property and other property owned by the plaintiff east of San Jon Road. On July 24, 1961, the owner declared a forfeiture for breach of the condition upon which the property west of San Jon Road had been granted to the State. The owner's title was judicially reinstated as of that date, except for the portion burdened by the freeway which remained with the State. In the owner's inverse condemnation action, the trial court awarded interest on the taking from that date. This Court found no error in this regard:

> "[T]he interest dates established by the court . . . appear to reflect the trial court's accurate recognition of the true factual picture presented and in every real sense are fair to appellant. Although it allowed interest on the fair market value of the property taken east of San Jon Road from February 1, 1960, as urged by appellant, it quite understandably decided that interest should not be allowed on the property taken west of San Jon Road until July 24, 1961, when respondent had exercised its right to declare a forfeiture of the state's title

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[18] *Leaf* notes that the Eminent Domain Law was designed to cover eminent domain actions, not inverse condemnation actions. (*Id.* at p. 1190.) But *Leaf* does not hold, as Edison asserts, that the computation of interest would not be the same where possession was taken by parties' agreement before the filing of a direct condemnation case. (Edison Br. on Merits 11, fn. 15.) That issue was not presented in *Leaf.*

thereto for breach of the condition subsequent. Since respondent might have waived its rights in the premises entirely, *it was certainly not unreasonable for the court to decline to grant it interest on the property owned and occupied by the state prior to the time it declared the forfeiture and revested the fee interest in itself.*" (*Id.* at pp. 298-299, emphasis added.)[19]

In the present case, Edison did not declare a breach of the Entry Agreement until 1994, when it filed its inverse condemnation action. Under *Pierpont*, Edison would not be entitled to interest before that date.

The propriety of any interest award ultimately depends on the circumstances of each case and whether an award of interest would duplicate other forms of compensation. In *City of San Rafael* v. *Wood* (1956) 144 Cal.App.2d 604, for instance, the appellate court emphasized: "[T]he condemnee is entitled to compensation for the loss of use of the property from the date of possession to the date of trial, even though the value of the property . . . is fixed at the time of trial. *Where the value of such use is not included in the judgment, the condemnee is entitled to interest from the date of taking in lieu of the value of such use.*" (*Id.* at p. 607, emphasis added.) "*Interest may be used as a measure of such loss, but it is only awarded when the actual loss has not been fixed.*" (*Id.* at p. 608, emphasis added.) The court found that since the judgment already

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[19] In *Mehl* v. *People ex rel. Dept. Pub. Wks.*, *supra*, 13 Cal.3d 710, 720, this Court relied on *Pierpont* in holding that in an inverse condemnation case for damages caused by increased drainage onto the plaintiff's property from the construction of a freeway, interest should run not from the date the freeway was constructed and when the taking actually occurred, but from the later date that the taking became appreciable.

compensated the condemnee for loss of use, an award of interest from the date of possession was inappropriate.

The trial court in this case applied the same equitable principles as in *Leaf*, *Pierpont*, and *Wood*. To paraphrase *Leaf*, "To permit an award of interest on a judgment reflecting [a public utility's hypothetical cost of purchasing substitute facilities] would not only result in unjust enrichment but also sanction interest on a monetary loss accrued but not yet paid or incurred."

II.

EDISON IS NOT ENTITLED TO ADDITIONAL INTEREST UNDER CODE OF CIVIL PROCEDURE SECTION 1268.310.

A. The Statute Does Not Apply.

Edison claims additional interest based on what it believes is a literal reading of Code of Civil Procedure section 1268.310. (Edison Br. on Merits 13-16, 21-22.) That approach gets Edison nowhere.

The literal-reading rule itself cannot be taken literally. As this Court has repeatedly held, a statute is interpreted literally only if that interpretation promotes the statutory purpose, renders the statute reasonable, and avoids absurd consequences. (*Calatayud* v. *State of California* (1998) 18 Cal.4th 1057, 1064 ["any person" not to be read literally where Legislative intent establishes certain persons not included]; *People* v. *Aguilar* (1997) 16 Cal.4th 1023, 1030; *Quintano* v. *Mercury Casualty Co.* (1995) 11 Cal.4th 1049, 1055; *California School Employees Assn.* v. *Governing Board* (1994) 8 Cal.4th 333, 340 ["We need not follow the plain meaning of a statute when to do so would 'frustrate[] the manifest

purposes of the legislation as a whole or [lead] to absurd results'"]; *Ford* v. *Gouin* (1992) 3 Cal.4th 339, 348; *Dempsey* v. *Market Street Ry. Co.* (1943) 23 Cal.2d 110, 113 ["a literal construction that will lead to absurd results should not be given if it can be avoided"]; see also *Gifford* v. *J & A Holdings* (1997) 54 Cal.App.4th 996, 1004 ["'The courts resist blind obedience to the putative "plain meaning" of a statutory phrase where literal interpretation would defeat the Legislature's central objective.'"].)

A reading of Section 1268.310 in the context of this case does not support Edison's interest claim. That statute is part of California's Eminent Domain Law, Code of Civil Procedure section 1230.010 et seq. The Eminent Domain Law prescribes procedures for filing condemnation proceedings, deposit of probable compensation, right to possession, trial, entry of judgment, and payment of compensation. The Eminent Domain Law does not address the issue of interest on a condemnation award where, as here, without a lawsuit, the condemnor takes possession of the property by agreement with the condemnee.

Indeed, California's condemnation interest statutes have never addressed what happens when, as in this case, there is an extra-judicial taking. They have always addressed how interest should be awarded when, unlike the present case, the condemnor takes possession of the property by court order following the filing of a condemnation lawsuit. The 1872 precursor to Section 1268.310, former Code of Civil Procedure section 1249, provided in pertinent part:

> "If an order be made letting the plaintiff into possession, as provided in [former] Section 1254, the compensation and damages awarded shall draw lawful interest from the date of such order." (JA 1947.)

The 1959 version, former Code of Civil Procedure section 1255b, also tied the running of interest to the date the court granted possession to the condemnor, but recognized:

> "If the plaintiff in a condemnation proceeding obtains an order from the court for possession of the property sought to be condemned prior to the trial of the action, then the compensation and damages awarded shall draw lawful interest from the effective date of said order." (JA 1967.)[20]

In 1961, the Legislature revised former Section 1255b. The 1960 Law Revision Commission Recommendation and Study Report, on which the 1961 revision was based, said this about existing law:

> "Interest upon the award in eminent domain cases runs from the date of entry of judgment unless possession is taken prior to entry of judgment, *in which case interest is computed from the effective date of the order for possession.* After judgment, interest ceases upon payment of the judgment to the condemnee or into court for his benefit. Of course, if any portion of a deposit is withdrawn, interest ceases to accrue on the portion withdrawn on the date of its withdrawal. These rules have been established both by cases and statutes but

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[20] The Legislature had no reason to consider the issue of interest where possession is taken by agreement prior to commencement of eminent domain proceedings. California Constitution, Article I, section 19, states in pertinent part: "The Legislature may provide for possession by the condemnor *following commencement of eminent domain proceedings* upon deposit in court and prompt release to the owner of money determined by the court to be the probable amount of just compensation." (Emphasis added.)

some of them are difficult to find and others have been questioned by some writers.

"*The Commission recommends the enactment of legislation which would gather the rules on interest in eminent domain cases into one section.*" (3 Cal. Law Revision Com. Rep. (1961) p. B-9; JA 2160; emphasis added.)[21]

In short, the Commission did not recommend substantive changes in the on when interest should accrue before any action is filed.

The Legislature thus revised former section 1255b to provide, in pertinent part:

"(a) The compensation and damages awarded in an eminent domain proceeding shall draw legal interest from the earliest of the following dates:

(1) The date of entry of judgment.

(2) The date that the possession of property sought to be condemned is taken or the damage thereto occurs.

(3) The date after which the plaintiff may take possession of the property as stated in an order authorizing the plaintiff to take possession."

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[21] The Commission identified four "[d]iffering situations in condemnation actions that may have differing effects upon the right to interest." These included "(a) [i]mmediate possession is taken by the condemnor under an order for immediate possession," and (b), (c) and (d), situations where "[i]mmediate possession is not taken." (3 Cal. Law Revision Com. Rep. (1961) p. B-57; JA 2180.) The Commission did not consider how interest should be awarded where possession is taken by agreement prior to any court proceeding.

In 1975, again acting on Law Revision Commission recommendations (12 Cal. Law Revision Com. Rep. (Dec. 1974) p. 1861), the Legislature adopted the Section 1268.310, upon which Edison now relies. The Commission recommended only a minor change in wording to eliminate potential confusion about the accrual of interest when "the damage thereto occurs." Thus, the statute now reads:

> "The compensation awarded in the proceeding shall draw interest, computed as prescribed by Section 1268.350, from the earliest of the following dates:
> (a) The date of entry of judgment.
> (b) The date the plaintiff takes possession of the property.
> (c) The date after which the plaintiff is authorized to take possession of the property as stated in an order for possession."[22]

The Law Revision Commission comment to the 1975 version of the interest statute explains in pertinent part:

> "Section 1268.310 is the same in substance as subdivision (a) of former Section 1255b except that the phrase 'or damage [to the property] occurs' has been deleted from subdivision (2). The deleted phrase was inadvertently included in the 1961 revision of Section 1255b. See Recommendation and Study Relating to Taking Possession and Passage of Title in Eminent Domain Proceedings, 3 Cal.L.Revision Comm'n Reports B-1, B-9, B-20 (1961). The 1961 revision was not

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[22] The 1975 version was virtually identical to the current version. In 1986, the Legislature deleted the term "legal" before "interest" and inserted "computed as prescribed by Section 1268.350" in the introductory clause.

intended to and has not been construed to require computation of interest on severance damages from a date prior to the earliest date stated in Section 1268.310. The deletion of this phrase is not intended to affect any rules relating to the time of accrual of interest on a cause of action based on inverse condemnation, whether raised in a separate action or by cross-complaint in the eminent domain proceeding."

And more generally, in its introductory comments to the 1975 revision of the entire Eminent Domain Law (Code of Civil Procedure section 1230.020), the Law Revision Commission stated:

"The provisions of the Eminent Domain Law are intended to supply rules only for eminent domain proceedings. The law of inverse condemnation is left for determination by judicial development."[23]

Edison did file an inverse condemnation action alleging loss of use and claiming pre-condemnation damages in the form of interest as suggested by the comment to Section 1230.020. (JA 1.) Such damages also could have been claimed by way of cross-complaint in the direct condemnation action. (1 Matteoni & Veit, Condemnation Practice in California (C.E.B. 1999) § 8.27, pp. 337-338.)

Edison's own interpretation of Section 1268.310 confirms that the statute simply does not address the issue of interest where the condemnor takes possession of the property by agreement prior to the commencement of condemnation proceedings. Edison describes the three situations

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[23] In particular, the Legislature assigned to the court the task of determining interest. (Code Civ. Proc., § 1268.340.)

contemplated by Section 1268.310: (a) possession after judgment, (b) possession with deposit of probable compensation, and (c) order of possession without taking possession. (Edison Br. on Merits 28-29.) The statute was never intended to apply to possession before litigation begins under the Eminent Domain Law. The Legislature left it to the courts to devise appropriate procedures for determining just compensation in pre-litigation situations.

Edison cites two cases in support of entitlement to interest under Section 1268.310. First, *People ex rel. Dept. of Pub. Wks.* v. *Williams* (1973) 30 Cal.App.3d 980, 982-983, involved an agreed-on possession prior to litigation under the Eminent Domain Act, but the parties "stipulated that the entry agreement should be the equivalent of an order for immediate possession." In other words, the parties submitted the case as if the Eminent Domain Law applied, and interest was awarded accordingly.

Second, in *City of Hollister* v. *McCollough, supra,* 26 Cal.App.4th 289, possession was taken prior to litigation (apparently by agreement of the parties [see 2 Matteoni & Veit, Condemnation Practice in Cal. (Cont. Ed. B. 1998) § 10.32, p. 509][24]), but no one contested the applicability of Section 1268.310. The appellate court never mentions its possible non-applicability. The parties stipulated to the valuation date. The court awarded a few thousand dollars in interest on a $22,000 condemnation award, not $400 million on a $49.5 million award.

In short, neither of Edison's cases even considered the issue presented in this case. Appellate decisions are not authority for propositions not considered. (*People* v. *Banks* (1993) 6 Cal.4th 926, 945.)

The State took possession of Edison's property by mutual agreement decades before this condemnation proceeding began, not by court process,

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[24] Mr. Matteoni was counsel on appeal in *McCullough.*

and not under the Eminent Domain Law. Thus, Section 1268.310 does not apply to this taking, and inverse condemnation rules apply to the determination of an appropriate interest accrual date.

B. Even If The Statute Purported To Apply, The Trial Court Was Still Empowered To Devise A Procedure To Ensure Just Compensation.

In *Citizens Utilities Co.* v. *Superior Court* (1963) 59 Cal.2d 805, this Court refused to apply the literal terms of former Code of Civil Procedure section 1249 in a case involving condemnation of a public utility's property. The statute required that property be valued as of the date of issuance and service of summons without regard to improvements the condemnee made to the property after the valuation date. The statute made no exception for public utility property. But in this case, the utility had improved the condemned property after service of summons in order to fulfill its obligations as a public utility. The Court held that, in fairness and to maintain the constitutional mandate of just compensation, the utility ought to be excluded from the statute's operation, and that the trial court properly devised a procedure to value the property as of the date of trial rather than the date of service of summons. This Court explained: "This interpretation of the section is in accord with the basic principle of statutory construction that laws should be sensibly interpreted, and that general terms in statutes will not be construed to lead to unjust or oppressive results." (*Id.* at p. 811.) Moreover, the Court approved the procedure devised by the trial court to correct the statutory inadequacy:

> "Thus, the trial court held, and held properly, that the problem could be solved by simply devising a procedure whereby the value of petitioner's water system would be assessed as of the

> date of trial rather than the date of summons. Petitioner challenges the power of the trial court to so improvise. The trial court had such power. The provision of the Constitution compelling the payment of just compensation for a public taking of property [citation] is self-executing. Since this is so it has consistently been held, in inverse condemnation cases, that inherent power is reposed in the trial court to provide for the assessment of just compensation in situations not within the purview of existing statutory provisions. [Citations.] *The trial court, in the instant case, was empowered to devise a procedure whereby the value of petitioner's water system could be justly and constitutionally assessed.*" (*Id.* at p. 812, emphasis added.)

Similarly here, the trial court was empowered to devise a procedure whereby the value of the taking, including loss of use, could be justly and constitutionally assessed.

Edison labors unsuccessfully to distinguish *Citizens Utilities*. This Court did not, as Edison contends, limit its holding to cases where a statute was unconstitutional on its face. This Court did hold that a statute that was "in the ordinary case . . . fair, equitable, and proper," should not be applied in that particular case to obtain a result that "would be unfair, unrealistic and unconstitutional." (59 Cal.2d at p. 811.) Indeed, this Court cited *Redevelopment Agency* v. *Maxwell* (1961) 193 Cal.App.2d 414, where the appellate court did not declare a valuation statute unconstitutional but

nevertheless refused to interpret the statute in a way that would permit a windfall to the condemnee. (59 Cal.2d at pp. 811-812.)[25]

Here too we have a statute that might be fair, equitable and proper when applied in the ordinary case, but would be "unfair, unrealistic and unconstitutional" if applied as Edison would have it in this unique case. In ordinary cases, an award of interest from the date of possession would fairly approximate the condemnee's loss of use and thus constitute just compensation. But literal application of the statute to the unusual circumstances of this case would require the State to pay far more than just compensation. The State did not take $49.5 million from Edison in 1969, and to award interest on that entire sum from 1969 would be nothing but a taxpayer giveaway to Edison.[26]

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[25] In *Redevelopment Agency v. Gilmore*, *supra*, 38 Cal.3d at p. 797, this Court made clear that the interest rate statute, while valid in other situations, could be held unconstitutional as applied in a particular situation. The courts do not have to void a statute for all cases, as Edison seems to think, in order to avoid its impermissible application in a particular case.

[26] Edison has suggested that it should have been awarded interest for some unspecified period of time until its delay became unreasonable. But the existing interest award already covers the entire period of delay, and Edison's delay was just one element in the trial court's overall interest equation. Moreover, Edison erroneously assumes that loss of use can be equated to interest in some mechanistic manner. It can't be, as it is only a rough approximation to start with. Finally, it is far too late for Edison to be raising such a fact-intensive claim. The trial court gave Edison the opportunity to further litigate the interest issue, and Edison turned it down. (RT 826-828, 830, 6281; JA 3393.)

III.

EDISON IS NOT ENTITLED TO ADDITIONAL INTEREST UNDER ANY OF THE CASES IT CITES.

The cases relied on by Edison do not require an award of interest from 1969. In *City of Vista* v. *Fielder* (1996) 13 Cal.4th 612, the lower courts purported to apply a common law rule that a taking of property terminates any leasehold on the property and the lessee is not entitled to compensation for the loss of its lease. This Court held that the common law does not apply where the Eminent Domain Law specifically provides that the lessee does have the right to compensation for its loss unless the lessee and lessor otherwise agree to adjust their rights between them. Applying the Eminent Domain Law in the *Fielder* case did not, as Edison would have it in this case, lead to absurd and unintended results. Moreover, the Eminent Domain Law does not specifically provide for the pre-condemnation interest Edison claims.

In *Community Redevelopment Agency* v. *Force Electronics* (1997) 55 Cal.App.4th 622, the condemning agency attempted to require the condemnee to accept a periodic payment of a portion of the condemnation award. The appellate court held this would violate not only the Eminent Domain Law, which gives the condemnee the choice of accepting periodic payments or reclaiming the property, but also the constitutional requirement of just compensation. This is because the receipt of an amount of money by payments over time is not the "full and perfect equivalent" of receipt of the same amount of money now. (*Id.* at p. 634.)

Edison would turn *Force Electronic*'s reasoning on its head. Rather than invoke the Eminent Domain Law to ensure the "full and perfect equivalent" of its loss, Edison would misuse that law, as the Legislature never intended, to obtain many multiples of its loss.

In *San Bernardino County Flood Control Dist.* v. *Grabowski* (1988) 205 Cal.App.3d 885, the court found the Legislature had a reasonable basis for placing a 10 percent floor under eminent domain interest calculations. According to the court, the Legislature "reasonably could have concluded that sound social policy requires that under no circumstances should condemnees receive *less* than the statutory judgment interest rate prevailing in this state for all other judgment creditors." (*Id.* at p. 903, original emphasis.) "[W]e conclude that that rate, notwithstanding lower extant market rates of interest, is not invalidated by the constitutional prohibition against gifts of public funds." (*Id.* at p. 904.)[27]

Unlike the situation in *Grabowski*, there is no reasonable basis for compelling the award of interest from the date of possession where, as here, possession was taken by mutual agreement nearly three decades before the date of valuation of the taking. In the unique circumstances of this case, the trial court correctly determined that interest should run from the date of valuation.

Edison cites *Estate of Getty* (1983) 143 Cal.App.3d 455, for the proposition that size does not matter. The statutory fees in *Getty* were large, but they amounted to approximately 2.7% of the value of the estate. Edison seeks interest equal to 800% of the amount of just compensation it was awarded.

Ironically, the case Edison believes most helpful to its cause, *Metropolitan Water Dist.* v. *Adams*, *supra*, 16 Cal.2d 676, 682, supports the trial court's approach in this case.

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[27] Despite the *Grabowski* decision, it is clear the Legislature did not intend that interest be paid without regard to actual loss. After *Grabowski*, the Legislature enacted Code of Civil Procedure section 1268.350 and removed the 10% interest-rate "floor." Interest payments are now based on real-world rates, not arbitrary percentages.

In *Adams*, the condemnor filed suit in March 1935. In August 1935, as authorized by the state constitution, the court granted the condemnor right of immediate possession. Judgment was entered in 1938. The trial court awarded interest on the judgment from the date of possession.

On appeal, the condemnee claimed the interest award was proper based on former Code of Civil Procedure section 1249, which provided that if an order of possession be made, as provided in former Code of Civil Procedure section 1254, interest shall run from the date of the order. This Court held that the statute did not apply. Immediate possession was granted pursuant to the Constitution, not section 1254, which only authorized the court to grant possession to the condemnor after judgment. Absent a controlling statute, this Court sought a "fair and just rule" that would ensure the condemnee would receive "'the full equivalent of [the value of the property at the time of the taking] paid contemporaneously with the taking.'" (*Id.* at p. 682.) The Court concluded that "interest was properly allowed under the facts of this case." (*Id.* at p. 683.)

Edison claims it is entitled to interest on the judgment from the date of possession, just as interest was awarded to the condemnee in *Adams*. But *Adams* did not lay down a hard and fast rule for awarding interest in all cases, no matter how long the time between the date of taking and the date of valuation. What was just and equitable in *Adams* (or in *Williams* or *McCullough* discussed in Point I.B.4, above) may not be just and equitable in every case, and it certainly is not just and equitable in this case.

In this case, the full "equivalent of the value of the property at the time of the taking" is not the value of the property in 1995, $49.5 million, plus eight times that amount, $400 million, for a total of $450 million. This is especially true since the 1995 valuation is based on a replacement-cost theory that inflated the valuation four-fold, even at 1995 dollars.

CONCLUSION

Code of Civil Procedure section 1268.310 does not apply in this case. In any event, it cannot apply as Edison contends. The Legislature authorized the award of interest on condemnation awards to ensure the owner is made whole, not to provide a windfall to condemnees at taxpayer expense. Edison has already been made whole, and then some. By manifold appreciation of property values from 1969 to 1995, Edison obtained the time value of the delay between the taking and payment. And by invoking a replacement corridor valuation theory, Edison obtained compensation for a loss it has never actually incurred and never will. Neither the law nor common sense requires that back interest be awarded on top of all that. More than $400 million for loss of use of these narrow strips of property is too much, not merely because it is an extraordinary burden for California's citizens to shoulder, but because it is far more than just compensation to Edison.

The ultimate authority and responsibility for interpreting the Constitution remains in the judiciary. (*Powers* v. *City of Richmond* (1995) 10 Cal.4th 85, 115, quoting *Marbury* v. *Madison* (1803) 5 U.S. (1 Cranch) 137, 177 [2 L.Ed. 60].) The trial court fulfilled its responsibility in this regard. The $49.5 million jury award, plus $5.6 million in interest, is just compensation in the unique circumstances of this case. The trial court's ruling on interest is correct in the circumstances of this case, and the judgment should be affirmed.

Respectfully submitted,

WILLIAM M. McMILLAN, Chief Counsel
DAVID R. SIMMES, Deputy Chief Counsel
ANTHONY J. RUFFOLO
ALEXANDER D. DeVORKIN

COX, CASTLE & NICHOLSON LLP
KENNETH B. BLEY

GREINES, MARTIN, STEIN & RICHLAND LLP
MARC J. POSTER

Attorneys for Plaintiff and Respondent, The People of the State of California, acting by and through the Department of Transportation