2d Civil No. B118802

IN THE COURT OF APPEAL

OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

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

RESPONDENT'S BRIEF OF THE PEOPLE OF THE STATE OF CALIFORNIA

DANIEL W. McGOVERN, General Counsel
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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INTRODUCTION

Is a public utility entitled to $367 million in back interest from *1969* on a $49.5 million condemnation award against the People of the State of California where that award is based on the utility's cost of purchasing substitute property at inflated *1995* prices and where the utility has never purchased substitute property and never will?

This Court need not reach this question raised by appellant Southern California Edison Company because, as respondent State has demonstrated in its own appeal from the judgment, the $49.5 million condemnation award must be reversed and the interest question may be moot. However, if the Court were to decide the question of whether to award back interest, the answer would have to be "No." Exactly as the trial court ruled, interest should run from the 1995 date of valuation. To interpret the law to allow three decades' back interest as Edison contends would, on the facts of this case, lead to an immense and unjustified windfall for Edison and an absurd, unintended and unconstitutional result for the People of the State of California.

The pertinent facts are that in 1969, Edison granted the State permission to build the 605 Freeway across portions of one of Edison's power transmission corridors in the San Gabriel Valley. Edison's existing transmission lines would remain in operation. In their written contract, entitled "Permission to Enter" [Exhibit-L ("Exh.-L") 1002; Joint Appendix ("JA") 148),[1] the State and Edison agreed to negotiate the terms of

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[1] 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."

compensation for the taking or, if agreement could not be reached, to pursue an eminent domain action. If eminent domain proceedings were necessary, the Permission to Enter fixed the date of valuation of the property at the date of entry — 1969 — and provided for interest running from that date. Significantly, the Permission to Enter also provided that it "shall continue in effect pending such negotiations, or until a reasonable time after you [the State] have been requested by the undersigned [Edison] to commence eminent domain proceedings." (JA 149.)

For decades, Edison continued to transmit electricity through its corridor as it had in the past, but did not obtain the State's agreement on the terms of compensation. In 1994, Edison exercised its right under the Permission to Enter and requested that the State commence eminent domain proceedings. The State did so.

After a bench trial on legal issues, the court found that "Edison has been dilatory in asserting its rights to just compensation for the taking." (JA 3123.) Furthermore, although its agreement with the State permitted it to do so, "Edison chose to take no decisive action for twenty-five years." (JA 3124.)

The trial court also found that the State had breached the Permission to Enter and failed to negotiate in good faith. As a consequence, the court refused to honor the agreed-on 1969 valuation date. Instead, very much to Edison's benefit in light of a manifold increase in property values, the court fixed a 1995 valuation date. (JA 3120-3123.) The State challenges this ruling, and others, in its own appeal.

At the jury trial on compensation for the taking, Edison's expert adopted an unorthodox valuation method, relying on the 1995 cost of buying a hypothetical replacement power transmission corridor. This hypothetical corridor — unlike Edison's existing corridor on vacant land adjacent to a river and through public flood control facilities — would run through a densely-populated stretch of businesses and homes. (RT 3861-3863.) Although Edison has never purchased such a replacement corridor, has no plans or need to do so, and continues uninterrupted use of its existing corridor, the jury adopted this valuation theory and awarded Edison $49.5 million. With another $5.6 million in interest from the 1995 valuation date, the total judgment was $55.1 million, which the State has paid.

On this appeal, Edison claims interest from 1969 on the jury's $49.5 million 1995 valuation — an additional $367 million or so — based on Code of Civil Procedure section 1268.310.[2]

However, the trial court correctly concluded that the interest statute should not be interpreted to produce the absurd result of awarding 25-years' back interest on a present-value award, far beyond any fair measure of just compensation. The terms of the statute, plain or not, simply do not fit here and were never intended to fit the unique circumstances of this case. Rather, for several good reasons, interest should run from the 1995 valuation date:

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[2] "The compensation awarded in the proceeding shall draw interest . . . from the earliest of the following dates: . . . (b) The date the plaintiff takes possession."

- Unlike most condemnation cases, the State entered Edison's property under an express agreement negotiated and drafted by Edison. The agreement specified a 1969 valuation date and the interest rate. If and when Edison no longer felt bound by those terms and wanted statutory condemnation procedures to apply, both the agreement and the law required Edison to say so. Yet, as late as 1993, twenty-four years after it signed the Permission to Enter, Edison had not made that demand and was still corresponding with 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.)

- For nearly three decades, Edison sat on its corporate hands, continued to transmit power through its corridor, and watched property values appreciate in the area. And, as the trial court found after giving Edison ample opportunity to address the issue, Edison did not reasonably rely on any misrepresentations that the State may have made about its efforts to agree on compensation. (JA 3108.) Edison is the nation's second largest investor-owned utility, with more than 12,000 employees, 11 million customers, $764 million in annual profits, and $25 billion in assets. It has its own power of eminent domain and a legal and property-acquisition staff well-versed in condemnation law and procedures. Edison had relatively equal bargaining power with the State in negotiating the Permission to Enter (and it certainly was not, as Edison suggests, at the mercy of the State or the Public Utilities Commission in this matter). Edison knew it did not take 25 years to appraise property or obtain replacement property rights. In inverse condemnation cases, California courts deny prejudgment interest where the landowner sits on its rights. The same legal principle should apply here.

- The constitutional requirement of "just compensation" means compensation must be just for the condemnor as well as for the condemnee. It would be unjust for Edison to receive both the appreciated value of the property from 1969 to 1995 and interest on the appreciated value from 1969 to 1995. It would be even more unjust because Edison's appraisal of the property as of 1995, adopted virtually in total by the jury, was based on what the trial court described as an "extreme measure" at the "outer limit of the appreciated value of the property." (JA 3124.) Edison's valuation theory depended on the purchase of a hypothetical replacement corridor at 1995 prices, a purchase Edison has never made and has no plans or need to make.

Code of Civil Procedure section 1268.310 authorizes the award of interest on condemnation awards to ensure the owner is made whole. The statute should not be applied, as Edison would apply it in this case, to provide a windfall to Edison at taxpayer expense. Edison has already been made whole, and then some. By a seven-fold appreciation of the property, Edison obtained the time value of the delay between the taking and payment. 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 trial court's ruling on interest should be affirmed.

STATEMENT OF THE CASE

A. 1963: The State's Planned San Gabriel River Freeway Extension.

In 1963, the State formulated plans to extend the San Gabriel River Freeway (605) from the San Bernardino Freeway (10) in Baldwin Park northward to the Foothill Freeway (210) in Duarte. (RT 257.)

The project required the shared use of portions of a segment of one of Southern California Edison Company's power transmission corridors in the San Gabriel Valley. The segment of Edison's corridor begins at the 10 Freeway in Baldwin Park and runs along the east side of the San Gabriel River, which belongs to the Los Angeles County Flood Control District. (RT 359-360.) Edison's corridor crosses the river in Irwindale and continues along the west side of the river to the Santa Fe Dam area, which is owned by the United States Corps of Engineers. It continues through the dam area, north across the 210 Freeway, through residential areas, and into the Angeles National Forest.

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 north and the 10 Freeway on the south in blue, the 605 Freeway project in yellow, the portions taken in red, and the hypothetical alternative corridor in orange.

Edison owns its power transmission corridor in various legal forms: fee, underlying fee, license, easement, and an easement for a 50-year term from the Corps that expires in 2001. (Exh. 1071; RT 4048-4051, 5353.)

B. 1963-1969: The State's Preliminary Negotiations With Edison.

The State intended its freeway to be compatible with Edison's continued use of the corridor for power transmission purposes. To this end the State and Edison entered into a Utilities Relocation Agreement (Exh. 1078) by which the State would relocate certain towers and lines to sites selected by Edison's engineers. (RT 3014, 3418, 3442, 3470.)

The towers supported various 220kV and 66kV lines. However, 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.)[3]

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[3] In the 1970's, the PUC approved an application by Edison 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 to 500kV. Edison could not justify the expenditure in light of diminished power usage expectations. (Exh. 1082; RT 2755.) 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). Actual power consumption in 1990 was only 17,650 megawatts. (RT 3339.)

C. 1969: The Negotiated "Permission To Enter."

By 1968, the State was ready to begin construction on the first segment of the 605 Freeway north of the 10 Freeway to Ramona Boulevard. The State appraised the property and made Edison an offer of $25,000 per acre. (Exh.-L 1001, p. 19; RT 240, 243, 266-267.)

On October 3, 1968, the State filed a complaint to condemn that portion of Edison's corridor. (RT 283; Exh.-L 1017; JA 831.) At Edison's request, this action was not prosecuted. (Exh.-L 1001, p. 24; JA 822.) Because the State needed to start construction, Edison agreed that the State could enter the property and build the freeway while they negotiated the terms of compensation. Edison drafted a "Permission to Enter" which the parties signed on June 20, 1969. (Exh.-L 1003; JA 148; RT 261.)[3] In this 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 undersigned [Edison] to commence eminent domain proceedings." (Exh.-L 1003, p. 2; JA 149.)

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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 Permission to Enter.

The agreement concluded:

"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.*)

D. 1968-1993: Twenty-Five Years Of Negotiations Over The Terms of Compensation.

Edison did not request that the State initiate eminent domain proceedings until 1994. (RT 401, 412; Exh. 49.) In the intervening 25 years, Edison never denied the viability of the Permission to Enter and continued to negotiate into 1993 as if it were valid and applicable to the negotiations. (RT 401, 412, 454; Exh.-L 1012.)

There were many problems to be solved before negotiations could be concluded, property issues being even more complicated than the appraisal of the property itself. (RT 256, 396-397.) The most vexatious problem arose from Edison's desire to use adjacent river-bank land controlled by the Flood Control District and the Corps of Engineers. The original solution was for the State to acquire a 50-foot-wide strip of adjacent land for Edison to replace the strip occupied by the freeway and thereby maintain the full width and potential of the corridor. Even though this land was not in the riverbed, the Corps objected to the conveyance of the fee to Edison, and offered only an easement with limiting conditions to preserve the County's control of the channel for flood control purposes. (RT 2883.) Eventually,

Edison went along with this proposal because the adjacent land was essentially needed only as an "overhang" easement for power lines. (Exh. 1004.) However, Edison changed its mind "a couple times" concerning its need for the Flood Control District land. (RT 315.)

Meanwhile, in 1979, the adjacent-property acquisition was put on hold pending the outcome of a trial involving similar issues between Edison and the State regarding an Edison corridor on Katella Avenue in Orange County. (RT 317; Exh. 16; Exh.-L 1001, p. 60.)

In 1985, Edison decided it did not want the adjacent parcels as replacement right of way. (RT 395.) This was later confirmed by a letter to the State in 1993 (Exh.-L 1009) wherein Edison requested only minor property acquisitions from the Flood Control District for an encroaching tower which was constructed under permit (RT 3229) and access around the drainage facilities. These acquisitions would have "legalized" Edison's use of the river bank for its tower and to access its facilities. That use had been continuous for approximately 25 years without objection by the Flood Control District. (RT 410-413, Exh.-L 1009.)

Edison contends that under the Permission to Enter, the State "met none of its obligations — not a single one." (Edison AOB 11.) Not so. Edison never complained that the State failed to keep equipment clear of the towers, to compact soil, to shore up towers, to mark and reinforce underground facilities, or to hinder Edison's power transmission in any way. (RT 250.) True, as the trial court found, there is evidence that the State failed 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.) But Edison had actual,

uninterrupted access to its towers over Flood Control land, without objection from Flood Control, for 25 years. Moreover, Edison was assured of compensation at 1969 values plus interest.

The State's "parcel diary" (Exh.-L 1001) was the primary source of proof regarding negotiations from 1963 to 1994. Many of the documents that would normally be in the file were missing (e.g. title reports, appraisals, maps, legal descriptions), and the absence of such documents contributed to the State's delay in negotiating terms of compensation. (RT 352.) As it turned out, however, Edison's own files contained parts of missing State appraisals. (RT 267.)

There were other reasons for delay too. Edison was supposed to supply certain property descriptions to the State but failed to do so. (RT 482.) In addition, some of Edison's ownership claims conflicted with preliminary title reports. (RT 397, 482.)

In 1984, Edison advised the State that it was considering inverse condemnation regarding the State's delay in appraising the replacement parcel. (Exh.-L 1001, p. 61.) Edison did not follow through and file an action.

As of 1987, Edison still had not provided the State with its "swing area" requirements over adjacent land, nor the type of estate needed, fee or easement. (Exh.-L 1001, pp. 68-71.)

By 1989, it appeared that most of the property issues had been settled, including changes in right of way requirements for each agency. (RT 386.) This led the State to propose alternative offers to Edison: Either

accept the 1969 values, plus interest from 1969, or appraise the property at current values without interest. (RT 418-420.)

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).

As noted, in October 1993, Edison dropped its request for exchange of Flood Control District 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.)

E. 1994: Edison Exercises Its Right Under The 1969 Agreement And Requests That The State File A Condemnation Action.

In 1994, for the first time, Edison requested that the State either come to terms or commence eminent domain proceedings. (Exh. 49.) However, before the State could file suit, it had to obtain a Resolution of Necessity from the California Transportation Commission. (Code Civ. Proc., § 1245.220.) This required the State to obtain an appraisal and make Edison a formal offer (Gov. Code, § 7267.2), and the Commission to give notice, hold a hearing, and vote (Code Civ. Proc., § 1245.235). Ironically, Edison appeared before the Commission and unsuccessfully opposed the State's effort to obtain the Resolution. (RT 562.) And while the State was

doing all this, Edison filed its own inverse condemnation action. (No. BC 113181; JA 1.) The State then filed its condemnation action (No. BC 136201; JA 36, 374), and the two actions were eventually consolidated for all purposes (JA 108).

F. The Trial Court's Findings On Legal Issues.

The trial court found that because the State had breached some terms of the Permission to Enter, the date of valuation specified in the Permission did not apply. Instead, by statute, the date of valuation would be November 16, 1995, the date the State made its deposit of probable compensation in this condemnation action. (JA 107, 3131.)

The trial court found that "Edison has been dilatory in asserting its rights to just compensation for the taking." (JA 3138.) The Court explained:

> "With respect to the court's conclusion Edison failed to act with diligence, the court does not see how, on the facts here, any other conclusion can be reached. Edison is not an unsophisticated landowner suddenly displaced by government action. To the contrary, Edison is an entity very familiar with condemnation proceedings. At arm's length and with relatively equal bargaining power to that of the State, Edison negotiated a Permission to Enter which, to protect Edison's property interests, required, *inter alia*, that the amount of compensation for the property be determined without unnecessary delay and that CalTrans protect Edison's legal access to its facilities. Neither of these terms was satisfied.

The agreement also made clear that Edison retained its right to initiate proceedings in inverse condemnation." (JA 3139.)

"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." (*Ibid.*)

"Given the state of the evidence, 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.*)[4]

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[4] In its original "Order re: Judgment, Statement of Decision and Prejudgment Interest," the court also found: "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.)

Finally, the court rejected Edison's argument that it had no opportunity to litigate the issue of its delay in asserting its rights:

> "Edison has had ample opportunity to brief the issue. Moreover, Edison has been aware for many months that this was an issue in the Court's mind and has made no request to make any additional evidentiary showing on the matter. Finally, the Court recalls that when it vacated the original ruling in the legal issues trial to consider whether Edison's delay suggested CalTrans' breach was immaterial, the Court offered the parties an opportunity to add evidence on the issue and the offer was declined." (JA 3138-3139.)

The trial court set the date of accrual of interest as of the date of valuation, November 16, 1995. (JA 3138.)

G. The Appraisal Evidence.

Edison's expert witness on the value of the taking was George Hamilton Jones. (RT 3775-3776, 3804, 3819.) He testified that the highest and best use of the strip of land taken by the State from Edison's power transmission corridor was continued use as a transmission corridor. (RT 3806.) Mr. Jones acknowledged that Edison purchased the corridor for this specific use, much like people would buy land for a church, to use it, not to sell or rent it. (RT 3813-3814.)

According to Mr. Jones, there were no comparable corridor sales that would shed light on the value of this operating corridor. (RT 3830.) In addition, he could not use an income capitalization approach because there

is no way to attribute specific income to this corridor portion of the total system. (RT 3832.)

Instead, Mr. Jones used what he called a "replacement cost" valuation method. (RT 3832.) He relied on Edison engineers to designate a hypothetical alternative corridor that would bypass the affected portions of the existing corridor and connect existing Edison transmission facilities at either end of the segment affected by the freeway. (RT 3847.) Unlike the existing corridor, the hypothetical alternative corridor, approximately one-quarter mile away, would carve through residential, business and heavy industrial development. (RT 3867-3870.)

Mr. Jones testified that this hypothetical alternative corridor would cost $139,500,000 (an average of $15 per square foot), including $104,525,000 for acquisition of properties and $32,052,000 for indirect costs of administration, relocation of existing businesses and residents out of the corridor, demolition, title and escrow, hazardous materials removal, appraisal costs, right-of-way planning, surveying, engineering, environmental impact reports, legal fees, and interest on acquisition funding. (RT 3861-3863, 3879, 3885.)

Mr. Jones then made the following calculations. Starting with the hypothetical alternative corridor value ($139,500,000) as the "before" value of the entire existing corridor, he apportioned $13,500,000 to the parts of the corridor taken by the State and $126,000,000 to the remainder of the actual corridor still owned by Edison. (RT 3947.) Jones then appraised

the value of Edison's remainder in the "after" condition at $85,184,000.[5] He figured the severance damage to the remainder was the difference between the value of the remainder in the before condition ($126,000,000) less the value of the remainder in the after condition ($85,184,000), or $40,816,000. (RT 3938-3949.)

Mr. Jones testified that the remaining corridor was worth less in the after condition than in the before condition because he considered about 25 percent of the remainder no longer part of the "effective" corridor. In his view, the effective corridor was only as wide as its narrowest point, and since at certain points the corridor was 160/170 feet wide, land outside that width was reduced in value from $15 per square foot to $4 per square foot. In addition, Mr. Jones knocked off $1.67 per square foot for all the remainder property (down to as little as $2.33 per square foot) because access to the corridor, which used to abut a frontage road, was now impaired by the freeway. (RT 3906-3907, 3922-3923, 3929-3930.)

Finally, adding the value of the taking ($13,500,000) to the damage to the remainder ($40,816,000), and with minor additions for temporary construction easements ($11,587) and the taking of one separate small parcel ($212,000), Mr. Jones arrived at a total of $54,539,587 for just compensation. (RT 3939, 3955-3956.)

Robert H. Flavell appraised the property for the State using a conventional "across-the-fence" method. He concluded the value of the

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[5] Mr. Jones' actual value of the remainder in the after condition was $91,720,000 (RT 3931), but he subtracted the alleged cost of relocating towers and lines that were infringing on Flood Control property to reach a net value in the after condition of $85,184,000 (RT 3947, 3962).

taking, plus severance damages, was $4,697,400. (RT 5525.) His opinion for the value of the part taken was $4,285,000, plus $412,400 severance damage, and as much as $153,000 for the cost of adjacent property to restore Edison's facilities. (RT 5524-5525.)

H. The Jury's Valuation Verdict.

The jury adopted Edison's substitute corridor valuation theory in its entirety, awarding $13,500,000 for the part taken and $36,000,000 for severance damages. (JA 1570.) The only item that the jury apparently refused was the cost of moving the towers after they had been in place for 28 years.

On October 22, 1997, the court entered judgment on the jury's verdict which, with $5,649,836.54 in interest from the 1995 valuation date, came to total of $55,149,836.54. (JA 3141.) The judgment has been paid.

Also on October 22, 1997, Edison filed a request to dismiss without prejudice its inverse condemnation action (No. BC 113181). (JA 3129.) On December 23, 1997, the court denied both Edison's and the State's motions for new trial and the State's motion for judgment notwithstanding the verdict. (JA 3425.)

I. Edison's Appeal.

On January 6, 1998, Edison filed its notice of appeal from the judgment "to the extent that it denies, or fails to award, Edison recovery of any pre-judgment interest from June 20, 1969 through November 15,

1995." (JA 3427.) The appeal is timely under California Rule of Court 2(d).[6]

LEGAL DISCUSSION

I

THE JURY'S $49 MILLION AWARD, BASED ON THE 1995 COST OF REPLACING THE CONDEMNED PROPERTY, PLUS THE TRIAL COURT'S AWARD OF INTEREST FROM 1995, FULLY COMPENSATES EDISON FOR THE TAKING.

Edison concedes that an award of interest from the date of possession is intended to compensate the owner for the loss of use of the property (or of the money paid for the taking) between the time of the taking and the time the owner receives compensation for the taking. (Edison AOB 24, fn. 39; *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* (1978) 83 Cal.App.3d 178, 186 ["The purpose of an award of interest is to provide just compensation for a person deprived of property by the state"].)

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[6] On January 15, 1998, the State filed its own notice of appeal from the judgment and from the order denying its motion for judgment notwithstanding the verdict. (JA 3429.) The State has filed its own opening brief on that appeal.

To meet this intent, Edison should be entitled to interest on the value of the property at the time of the taking until that value is paid. But Edison is asking for much more than that, and therefore for much more than just compensation. Indeed, the condemnation award is already bloated with redundant damages:

- The State took possession of the property pursuant to the Permission to Enter in 1969. The judgment, however, is based on 1995 property values, not 1969 values. The jury's $49,500,000 award implicitly includes the appreciation of the property from the 1960's to the 1990's,[7] and explicitly includes the cost of purchasing a hypothetical replacement corridor at 1995 value. Edison never has purchased such a replacement corridor and never will.

- Even severance damage to the remainder that Edison still owns and uses was premised on the basis of purchasing an entirely-new 250-foot wide replacement corridor at 1995 prices.

- If Edison ever were to replace the part taken using the compensation that it has received and that is based on alternative-corridor valuation, the remainder portion would no longer be restricted. Yet the

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[7] There are no formal appraisals of the 1969 value in the record, because the trial court established a 1995 date of value. However, 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 6364.)

judgment includes recovery for the cost of *replacing* the part taken, and also recovery for loss due to restricted width of the remainder because the part taken was *not replaced.*

Edison has thus been well compensated, indeed overcompensated, for loss of property and use. In these circumstances, the Eminent Domain Law cannot be interpreted to provide for an award of back interest, too. "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." (Code Civ. Proc., § 1263.010, subd. (b).)

Furthermore, Edison has never lost effective use of the corridor at all. The freeway is compatible with Edison's use. Edison can and does transmit the same electrical power through the corridor now as it did in 1969. Where necessary, towers were relocated and power lines extended over the freeway.

The fact that Edison has not replaced (and has no intention of replacing) the condemned portion of the property is particularly significant. Edison receives compensation for what is in effect only a paper loss, and it should not be entitled to interest on an expense it has not actually incurred.

A few courts were once of the view that when one public entity took another public entity's property that was already dedicated to a public use (and therefore may have had no ascertainable market value), the condemnee nevertheless could be reimbursed for the cost of purchasing equivalent replacement facilities. Even in such a rare case, however, the condemnee was not entitled to interest unless and until it actually spent money on replacement facilities. If the rule had been otherwise, the condemnee

would reap a windfall: Interest on money it had not spent and on which it was already earning interest. As the court held in *United States* v. *14.83 Acres of Land* (D.N.H. 1962) 204 F. Supp. 613, 615:

> "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."[8]

A similar prohibition against the award of back interest was recognized in *Orme* v. *State of California ex rel. Dept. of Water Resources, supra,* 83 Cal.App.3d 178, 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."

Courts have frequently applied equitable principles in determining the date for accrual of interest in inverse condemnation cases. *Leaf* v. *City*

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[8] 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."

In its own appeal from the judgment, the State contends that if the "substitute facilities" valuation approach cited in *14.83 Acres* and *1,433 Acres* was ever good law, it is not good law now. (See *United States* v. *50 Acres of Land* (1984) 469 U.S. 24 [105 S.Ct. 451, 83 L.Ed.2d 376].) Even if the approach were valid, however, it should not have been used here, and certainly cannot be combined, as Edison would combine it, with an award of back interest.

of San Mateo (1984) 150 Cal.App.3d 1184, disapproved on another point in *Trope* v. *Katz* (1995) 11 Cal.4th 274, 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 the valuation or trial date." (*Id.* at pp. 1191-1192.)

In *Pierpont Inn, Inc.* v. *State of California* (1969) 70 Cal.2d 282, disapproved on another point in *Authority* v. *Continental Development Corp.* (1997) 16 Cal.4th 694, 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. The Supreme 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 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 p. 298-299.)[9]

There is no sound reason to ignore equitable principles in this case. To paraphrase *Leaf* v. *City of San Mateo*, *supra*, 150 Cal.App.3d 1184,

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[9] See also *Mehl* v. *People ex rel. Dept. of Pub. Wks.* (1975) 13 Cal.3d 710, 720.

1191-1192, "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

THE INTEREST STATUTE SHOULD NOT BE APPLIED, AS EDISON WOULD APPLY IT, TO REACH THE ABSURD, UNINTENDED AND UNCONSTITUTIONAL RESULT THAT CALTRANS WOULD PAY EDISON A $367 MILLION WINDFALL.

A. The Courts Do Not Interpret Statutory Language, Even Apparently Plain Language, To Reach Absurd And Unintended Results.

Edison has not cited and cannot cite a case for the proposition that the courts must give literal application to a statute no matter how absurd the result. Indeed, it is governing law that statutes may not be applied literally if the result is, as in this case, absurd. California courts have so held on numerous occasions: *Calatayud* v. *State of California* (August 6, 1998) Supreme Court No. S062627 ["any person" not to be read literally where Legislative intent establishes certain persons not included]; *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'"]; *In re Marriage of Perry* (1998) 61 Cal.App.4th 295, 303-304 ["[L]anguage of a statute will not be given literal meaning if it would

result in absurd consequences the Legislature did not intend. [Citation.] The intent of the statute 'prevails over the letter, and the letter will, if possible, be read so as to conform to the spirit of the act'"].

For example, in *Mendez* v. *Kurten* (1985) 170 Cal.App.3d 481, a personal injury action, the plaintiff claimed 20% interest on his judgment based on the language of two statutes: Civil Code section 3291, which provides for 10% interest until the judgment is satisfied where the defendant rejects a pretrial settlement offer less than the amount of the eventual judgment; and Code of Civil Procedure section 685.010, which provides for 10% interest on any unpaid judgment. By their literal terms, both statutes applied and neither excluded the other. Nevertheless, the appellate court held that plaintiff was entitled only to 10% interest on the unsatisfied judgment because the Legislature could not have intended the absurd result that interest accrue at double the usual rate.

The statutory interpretation urged by Edison is, in the circumstances of this case, equally as absurd as claiming double interest. This is so, not merely because the amount of money which Edison claims as interest is so huge ($367 million is an enormous sum, even by Edison's standards), but because Edison's interpretation would violate the constitutional mandate of just compensation and cannot be what the Legislature intended. Edison would reap an immense windfall, a judgment unrelated to its actual loss as a result of the condemnation.

Courts are not powerless to deal with such statutory inadequacies. In *Citizens Utilities Co.* v. *Superior Court* (1963) 59 Cal.2d 805, the Supreme 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 Supreme 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. The Supreme 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.)[10] 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,

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[10] The Legislature subsequently agreed with the Supreme Court's logic. In 1975 it enacted Code of Civil Procedure section 1263.240, subdivision (a), which specifies several circumstances, including public utility improvements, under which post-condemnation improvements may be considered in valuing condemned property.

> 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.)

The cases relied on by Edison do not require the courts to interpret the interest statute in absurd and unintended ways. 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. The Supreme 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 in this case, lead to absurd and unintended results.

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 to obtain many multiples of its loss.

Finally, 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.)[11]

Unlike the situation in *Grabowski*, the Legislature could have 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. There is no rational basis for using interest on a 1995 value as a means of determining loss of use of property beginning in 1969. And the Legislature could not have contemplated that back interest be awarded where there was such a significant delay between the time of possession and time of valuation, and

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[11] 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.

especially where the condemnor initially entered and remained on the property by written agreement.

Governing case law makes clear that 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.) "The proper rule is that the trial court must ascertain the actual loss caused by such loss of use from the date of possession to the date of judgment, and then such sum should be included in the severance damages. *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 compensated the condemnee for loss of use, an award of interest from the date of possession was inappropriate.[12]

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[12] Compare *Metropolitan Water Dist.* v. *Adams* (1940) 16 Cal.2d 676, where the court held that an interest award was appropriate because the judgment did not compensate the condemnee for loss of use. "The value of respondents' property at the date of trial, whether less or more, was the measure of respondents' damage for the taking of their property, but it did not cover respondents' damage for being deprived of the use of said property prior to judgment. In our view of the merits of this appeal, we are of the opinion that *interest was properly allowed under the facts of this case.*" (*Id.* at pp. 682-683, emphasis added.)

Here, too, the judgment based on 1995 values adequately compensated Edison for loss of use, if any, of the property taken for the State's compatible use. In the unique circumstances of this case, the trial court correctly determined that interest should run from the date of valuation.

B. The Constitution Requires That A Condemnation Award Be Just To The Condemnor As Well As To The Condemnee.

Even if Edison's reading of the interest statute was not absurd, the courts, not the Legislature, have the ultimate 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, 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.)

Thus, the courts must intervene when an unjust method is invoked to determine just compensation. This is true whether the result is unjust to the condemnee or, as in this case, unjust to the condemnor. "[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 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. We cannot ignore rules of evaluation which harmonize with the constitutional requirement of 'just compensation' and which prevent landowners from receiving windfalls at public expense." (*City of Fresno* v. *Cloud* (1972) 26 Cal.App.3d 113, 123.)

The Supreme Court emphasized this point in *Authority* v. *Continental Development Corp.* (1997) 16 Cal.4th 694, 716: "[C]ompensation for taking or damage to property must be just to the public as well as to the landowner." 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 law, 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. The Supreme 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. 90, emphasis added.)

The Legislature, of course, can provide for compensation of losses arising from a taking even if such compensation is not 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, Mosk, concurring ["Indeed, to assess more than just compensation runs the risk of violating the prohibition against making a gift of public funds. (Art. XVI, § 6.)"].) It would serve no public purpose for the State to compensate private landowners for more than their actual loss from the taking of their property.

An award of interest on the 1995 value of the property from 1969 would grossly overcompensate Edison for any actual loss of use of the property. Edison presented no evidence that it lost any rents or income from the strip of property now occupied by the 605 Freeway. Instead, Edison argues that its loss was to its "entire transmission system" due to the reduced width of the corridor and alleged expenditures made to upgrade other parts of the system. (JA 546; Edison AOB 48.) This makes clear that Edison really is seeking the same recovery twice — once for the cost of

replacing the corridor, and once again for the cost of not replacing the corridor.

Edison concedes no evidence was admitted as to the amount of its supposed loss to its "entire transmission system." Remarkably, Edison blames this on "the State's trial tactics." (Edison AOB 48, fn. 60.) Not so. Edison's own strategy caused this omission. In its case in chief, Edison sought to introduce evidence of the supposed $105 million cost of upgrading other portions of its system as "cost of cure." (RT 3145, 3169.) The State objected because the cost to cure would exceed even Edison's claim as to the value of the property taken, and Edison was entitled only to the lesser of the two amounts. (*People* v. *Hayward Bldg. Materials Co.* (1963) 213 Cal.App.2d 457, 465-467; *People ex rel. Dept. Pub. Wks.* v. *Flintkote Co.* (1968) 264 Cal.App.2d 97, 106; see *Olson* v. *County of Shasta* (1970) 5 Cal.App.3d 336, 342 ["cost of cure" not separate item of damage].) Edison withdrew its offer of proof, conceding that the evidence really only went to the issue of its purported need for a 500 kV facility. (RT 3292-3293.) The trial court excluded the evidence without prejudice to Edison raising it on rebuttal. (RT 3377.) Edison called only one witness on rebuttal, and he did not testify on this subject. (RT 5519.)

Thus, the necessity of upgrading the "entire transmission system" was not a separate item of damage for loss of use or delay at trial, and Edison cannot make it so on appeal. As it turned out, the upgrading evidence that was admitted, even without the $105-million price tag, simply lent a false aura of authenticity to Edison's $54-million compensation claim.

Finally, even if Edison could have earned some return from the property it shared with the State in compatible use, that return would have been a tiny fraction of the $367 million in back interest Edison asks this Court to award. Assuming the property was worth $25,000 per acre in 1969[13] 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, *with* back interest on that interest or rent, would still be less than $12 million. (RT 6261.) The jury has already awarded Edison $49.5 million for the taking, and the trial court added interest to that amount from 1995. In these circumstances, neither common sense nor the Constitution requires an award of an additional $367 million.

The ultimate authority and responsibility for interpreting the Constitution remains in the judiciary. (*City of Boerne* v. *Flores* (1997) ___ U.S. ___ [117 S.Ct. 2157, 138 L.Ed.2d 624]; *Marbury* v. *Madison* (1803) 5 U.S. 137 [1 Cranch 137, 176, 2 L.Ed. 60].) The trial court fulfilled its responsibility in this regard. Its ruling on the accrual date for interest on the compensation award is fair and just to both parties. The Eminent Domain Law cannot and should not be read to require any other result.

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[13] As noted above, there is no formal 1969 appraisal in the record because the trial court required the parties to appraise the taking as of 1995. However, the State had valued the property at $25,000 per acre in 1968 and made its 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.)

III

THE EVIDENCE AMPLY SUPPORTS THE TRIAL COURT'S FINDING THAT EDISON WAS DILATORY IN ASSERTING ITS LEGAL AND CONTRACTUAL RIGHTS.

A. For Nearly Three Decades, Edison Negotiated Under The Terms Of Its Agreement With The State And Failed To Exercise Its Contractual And Legal Rights To Obtain Compensation.

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 compensation for the taking. Under the 1969 Permission to Enter that it drafted, Edison had the right at any time to request that the State initiate eminent domain proceedings. Edison, backed by an army of lawyers and eminent domain experts, chose not to make that request until 1994.

Moreover, if Edison believed there had been an uncompensated taking, it also had the right to file an inverse condemnation action. Edison chose not to do that, either, until 1994. Edison claims it was misled by the State's promises and assurances regarding appraisals in progress and offers to be made. But the trial court specifically found that Edison did not reasonably rely on any such assurances. (JA 3139.) Edison knew perfectly well that it would 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 appraisals and offers if it wanted to.[14] 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, waited and waited and waited.

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. Edison Had Ample Reason And Opportunity To Litigate The Issue Of Its Sloth.

The trial court gave Edison clear and unmistakable notice that Edison's own delay and inaction was a critical issue. The court raised the issue early and often during the legal issues trial:

> "I guess the focus is Southern California Edison doesn't seem to have done much in those 26 years to complain or say, you know, boy, this is unnecessary delay, what are you guys doing, we want to get this done, we want our money." (RT 456:27-457:3.)

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[14] Indeed, Edison completed its own appraisal in 1979, including a claim for severance damages, based on the 1969 valuation date. (RT 531-532.) The State was not informed of this appraisal until 1993. (RT 530-532.)

". . . and this is what I keep coming back to -- did Edison waive?" (RT 460:4-5.)

"And so the question is: Assuming there was a breach, did Edison, by continuing to negotiate, waive it?" (RT 464:5-6.)

"The question is just, is there a breach, and if so, did Edison -- it's not an action in equity -- but sits [sic] on its rights. And that's what I want to consider." (RT 466:4-6.)

Even after finding the State was in breach, the court continued to express concern that Edison could not "sit on its rights while the property appreciates." (RT 679.)

The court's concern over Edison's conduct was further demonstrated by its July 25, 1996 order in which it vacated its previous ruling on the date of value for the purpose of reconsidering the evidence relating to materiality of the breach. (JA 439.) At that time, the court offered the parties the opportunity to present additional evidence on the issue of materiality which necessarily involved Edison's conduct. Edison declined the invitation. (RT 826-828, 830, 6281.)

Yet again, at the status conference on November 13, 1996, the court offered the parties opportunity to present additional evidence or briefing on the issue of Edison's dilatory conduct. (JA 3393.) Yet again, Edison declined.

Edison takes the court's comment that "I don't want to be assessing fault on either side . . ." completely out of context. (Edison AOB 38.) The

court was referring to the jury's deliberations on value of the property, not to the court's own findings on the legal issues. The court was concerned that Edison was turning the jury trial on the value of the taking into an action to punish the State for its delay in resolving the compensation issue. (RT 998 [The Court: "I want the jury to value the property"].)

In short, Edison was not sand-bagged on the delay issue. Edison may have hoped that if it ignored the issue it would go away, but the issue did not and could not go away. In determining the appropriate date for accrual of interest, the trial court properly considered Edison's own unreasonable delay.

CONCLUSION

For the reasons presented in its own appeal, the State urges this Court to reverse the entire judgment. At the least, for the reasons presented in this respondent's brief, the State urges this Court to affirm the trial court's just and proper order awarding interest on the judgment from the date of valuation, November 16, 1995.

Respectfully submitted,

DANIEL W. McGOVERN, General Counsel
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