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Amendments to CA Proposed Legislation Would Change Municipalization / Eminent Domain Takeovers of Electric, Gas and Water Utilities: Nossaman

We've previously reported on [Senate Bill 917](#), which was introduced on February 3, 2020, by Senator Wiener (D-San Francisco) to establish a process for a potential government takeover of investor-owned electrical, gas and water corporations. While the stated intention of the bill was to facilitate an eminent domain acquisition of PG&E by the state government, its wording goes much further. Additionally, on April 3, a series of amendments were introduced that would potentially significantly change the burden of proof on a municipalization takeover effort.

Specifically, the amendments to SB 917 would make changes to Sections 1240.650, 1245.210, 1245.250, and 1268.610 of the Code of Civil Procedure, which govern the standard of proof and different evidentiary presumptions relevant for eminent domain actions. Under existing law, when the government takes private property for private use, if that property is used for the same purpose (e.g., continuing to use a water supply system to provide water), then there is a **rebuttable** presumption that it is a "more necessary use," thus fulfilling one of the requirements to allow the government to condemn it. The proposed new language changes that and states:

(c) Where property that has been appropriated to a public use is electrical, gas, or water public utility property which the public entity intends to put to the same use, the presumption of a more necessary use established by subdivision (a) is **conclusive, and not rebuttable**, including in the circumstances when (1) the acquiring public entity is a sanitary district exercising the powers of a county water district pursuant to Section 6512.7 of the Health and Safety Code, and (2) the public utility that owns the public utility property has been convicted of one or more felony criminal violations of laws enacted to protect the public safety within 10 years of the date the condemnation action is commenced.

This proposed language would result in a significant change for investor-owned utilities, as it negates the utility's ability to introduce evidence and contradict the public agency's findings regarding whether the agency really needs to undertake the takeover of the utility to provide the same service. The existing "rebuttable" presumption has been used by utilities to defeat a public agency's right to take, primarily by introducing evidence that the public agency would not be able to provide better or more cost-effective services. By eliminating this rebuttable presumption, and making it "conclusive," the utility would arguably lose the ability to contest the public agency's determinations.

While the intention of this proposed new language appears to be aimed at making the conclusive presumption regarding "a more necessary use" applicable to public utilities that have been convicted of a felony, the language is ambiguous in that it uses the word "including" those situations — not "limited to" those situations. Therefore, a government entity may attempt to interpret this

proposed statute to make all municipal takeover eminent domain actions involving “electrical, gas, or water public utility property” subject to the same “conclusive” presumption. This would, in effect, make contesting any municipalization takeover effort incredibly difficult and would effectively eliminate a significant potential defense that was previously available.

There are also several other amendments to the initial SB 917 language, including:

- **Community Choice Aggregation Providers (CCAs)** - The amendments would authorize CCAs to own and operate electrical distribution and transmission equipment that they acquire from public utilities. The new amendment would also allow CCAs to take part in the eminent domain acquisitions of electric corporation assets under the process previously contemplated in SB 917.
- **Acquired Employee Protections** - The amendments add several significant provisions regarding employee protections for employees of acquired utility systems, including requiring identical salaries and benefits as they had when they were still employed by the public utility until a collective bargaining agreement can be reached.
- **NCLEUD Participation in Wildfire Fund** - The amendments would authorize the Northern California Local Energy Utility District (NCLEUD) (an entity that would be formed under SB 917 to own and operate the assets) to participate under the wildfire fund created in Assembly Bill 1054 (2019).
- **NCLEUD Low-Income Customer Assistance Program** - Authorizes the Northern California Local Energy Utility District to implement a low-income customer assistance program for any acquired service.
- **Prohibition on Sale of Hydro-Electric Assets by PG&E** - The amendments include language that would effectively prohibit PG&E from selling hydro-electric assets until 2030 except to the Northern California Local Energy Utility District that would be formed under SB 917.

You can view the April 3, 2020 amendments to the initial SB 917 language introduced in February [here](#) or view how the amended language would change existing statutory codes [here](#).

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