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APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SOUTHERN CALIFORNIA EDISON COMPANY, a California public utility corporation; SOUTHERN CALIFORNIA GAS COMPANY, a California public utility corporation, *Plaintiffs-counter-defendants-Appellants*, v. ORANGE COUNTY TRANSPORTATION AUTHORITY, a public corporation, *Defendant-counter-claimant-Appellee*.	No. 22-55498 D.C. Nos. 8:20-cv-02186-DOC-KES 8:20-cv-02187-DOC-KES OPINION

Appeal from the United States District Court
for the Central District of California
David O. Carter, District Judge, Presiding

Argued and Submitted April 13, 2023
Pasadena, California

Filed March 13, 2024

Before: Eric D. Miller and Salvador Mendoza, Jr., Circuit Judges, and Barry Ted Moskowitz,* District Judge.

Opinion by Judge Miller

SUMMARY**

Civil Rights/Takings

The panel affirmed the district court's summary judgment for the Orange County Transportation Authority (OTCA) in a 42 U.S.C. § 1983 action brought by two investor-owned utilities, Southern California Edison Company and Southern California Gas Company (collectively, the Utilities), alleging that they are entitled to compensation either under the Takings Clause or under state law for having to relocate their equipment from public streets to allow for the construction of a streetcar line.

The panel held that the Utilities were not entitled to compensation under the Takings Clause because they did not have a property interest under California law in maintaining their facilities at their specific locations in the face of OCTA's efforts to construct a streetcar line. The California Supreme Court recognized in *Southern California Gas Co. v. City of Los Angeles*, 329 P.2d 289 (Cal. 1958), that a public utility accepts franchise rights in public streets subject to an implied obligation to relocate its facilities therein at

* The Honorable Barry Ted Moskowitz, United States District Judge for the Southern District of California, sitting by designation.

** This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

its own expense when necessary to make way for a proper governmental use of the streets.

The panel rejected the Utilities' argument that constructing rail lines is *per se* a proprietary activity, not a governmental one. California common law has traditionally required utilities to bear relocation costs when governments construct subways, and there is no reason why above-ground rail lines should be treated differently. California law is consistent with traditional principles of property law, historical practice, and Supreme Court precedent.

The panel rejected the Utilities' supplemental state-law claim that California Public Utilities Code section 40162 places the costs of relocation on OCTA. That provision says nothing about imposing the costs of relocation on OCTA. Thus, section 40162 does not apply to OCTA's project.

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OPINION

MILLER, Circuit Judge:

When a government grants a utility permission to place pipes, transmission lines, or other equipment in a public right-of-way, it sometimes becomes necessary to move that equipment to allow the construction of roads, sewer systems, or other infrastructure. As the Supreme Court has explained, "the traditional common law rule" is that utilities are "required to bear the entire cost of relocating from a public right-of-way whenever requested to do so by state or local authorities." *Norfolk Redevelopment & Hous. Auth. v. Chesapeake & Potomac Tel. Co.*, 464 U.S. 30, 35 (1983).

In this case, the Orange County Transportation Authority (OCTA) asked two investor-owned utilities, Southern California Edison Company and Southern California Gas Company (collectively, the Utilities), to move their equipment from public streets to allow the construction of a streetcar line. The Utilities argue that the common-law rule applies only when the relocation is carried out for "governmental" purposes and that a streetcar line is a "proprietary" function for which compensation is required. We disagree, and we conclude that the Utilities are not entitled to compensation either under the Takings Clause or under state law. We affirm the judgment of the district court.

I

OCTA is a public agency established by the California Legislature to address "[p]ublic demand for an efficient public transportation system in the southern California region." Cal. Pub. Util. Code § 130001(a); *see* 1991 Cal. Stat. 3356–57. In 2016, OCTA began construction of a 4.15-mile streetcar line connecting downtown Santa Ana with the Santa Ana Regional

Transportation Center and another transportation hub in the nearby city of Garden Grove.

The project required the Utilities to relocate pipes, transmission lines, and other equipment from the streetcar's route. The Utilities have maintained that equipment in the streets of Santa Ana since 1937 and 1938, when they signed franchise agreements with the city permitting them to lay "poles, wires, conduits and appurtenances . . . in the public streets," and, in exchange, promised to pay the city 2 percent of their annual receipts "arising from the . . . franchise."

Southern California Edison forecast that complying with OCTA's relocation requests would cost about $8.8 million; Southern California Gas projected costs of $6.35 million. OCTA agreed to advance the Utilities their relocation costs while reserving the right to demand that the costs should ultimately fall on the Utilities.

The Utilities then brought suit under 42 U.S.C. § 1983, alleging that the relocation constituted a taking of private property requiring just compensation under the Fifth and Fourteenth Amendments. Separately from their constitutional argument, the Utilities argued that California Public Utilities Code section 40162 places the costs of relocation on OCTA. OCTA counterclaimed for the funds it had advanced the Utilities, plus interest. The parties filed a joint stipulation of undisputed facts and cross-moved for summary judgment.

The district court granted summary judgment for OCTA, ordering the Utilities to repay all costs that OCTA had advanced and determining that OCTA has no further liabilities. The district court did not award interest.

The district court began its analysis of the Utilities' takings claim by explaining that even a physical invasion of property by the government will not constitute a taking if it is "consistent with longstanding background restrictions on property rights." *Cedar Point Nursery v. Hassid*, 594 U.S. 139, 160 (2021). The district court observed that "[u]nder the traditional common law rule, utilities have been required to bear the entire cost of relocating from a public right-of-way whenever requested to do so by state or local authorities." *Norfolk Redevelopment & Hous. Auth.*, 464 U.S. at 35. But that common-law rule does not apply, the district court explained, when the government demands relocation "not in its governmental capacity—an exertion of the police power—but in its 'proprietary or quasi private capacity.'" *City of Los Angeles v. Los Angeles Gas & Elec. Corp.*, 251 U.S. 32, 38–39 (1919).

The district court noted that "the caselaw is not particularly clear on where to draw the line between 'proprietary' and 'governmental' purposes," and it applied three tests for distinguishing governmental and proprietary functions. It concluded that under each test, OCTA's streetcar project was governmental. First, a project might be governmental if it is "required in the interest of the public health and welfare." *New Orleans Gaslight Co. v. Drainage Comm'n of New Orleans*, 197 U.S. 453, 474 (1905). And "the California legislature has made numerous findings that construction of mass transit systems is necessary to address" environmental harms and mobility needs.

Second, governmental projects might be those that are "(1) essential or necessary for the government to perform, or (2) traditional for the government to perform." *Riverside Cnty. Transp. Comm'n v.*

Southern Cal. Gas Co., 268 Cal. Rptr. 3d 196, 230 (Ct. App. 2020). The district court agreed with OCTA that "mass transit projects are exclusively a government function, and operate at a loss using heavy government subsidies."

Third, the district court considered "whether there is statutory authority for the government entity to use the streets in the contested manner." The district court noted that the California Legislature has granted OCTA the authority to administer light rail systems. *See* Cal. Pub. Util. Code § 130001.

After concluding that the Takings Clause did not require OCTA to pay the Utilities' relocation costs, the district court determined that California Public Utilities Code section 40162 did not shift the costs to OCTA. Section 40162, enacted as part of the Orange County Transit District Act of 1965, provides that the Orange County Transit District "may exercise the right of eminent domain" and that "[t]he district in exercising such power shall . . . pay the cost of removal, reconstruction or relocation of any structure," including "pipes, conduits, cables, or poles." 1965 Cal. Stat. 4384.

The district court concluded that section 40162 circumscribed only the Orange County Transit *District*'s powers and not those of OCTA. California Public Utilities Code section 130241 states that "[a]ll the provisions of the Orange County Transit District Act of 1965 . . . shall be equally applicable to the Orange County Transportation Authority." But the same section later provides that "[t]he authority shall determine which provisions are applicable to the authority." For that reason, the district court determined that "the provisions of the Orange County Transit District Act apply to OCTA only when OCTA determines

that they apply," and here, it concluded, "OCTA has made no such determination."

II

The Takings Clause of the Fifth Amendment, made applicable to the States by the Fourteenth Amendment, provides that "private property [shall not] be taken for public use, without just compensation." U.S. Const. amend. V; *see Chicago, B. & Q.R. Co. v. City of Chicago*, 166 U.S. 226, 247 (1897). Ordinarily, government action that "physically appropriates" property is treated as "a *per se* taking" requiring just compensation. *Cedar Point Nursery*, 594 U.S. at 149.

But before deciding whether the government has taken a property interest, we first must determine whether any property interest exists. *See Wells Fargo Bank, N.A. v. Mahogany Meadows Ave. Tr.*, 979 F.3d 1209, 1214 (9th Cir. 2020) ("The State cannot take what the owner never had."); *see also Vandevere v. Lloyd*, 644 F.3d 957, 963–64 (9th Cir. 2011). "Because the Constitution protects rather than creates property interests, the existence of a property interest is determined by reference to 'existing rules or understandings that stem from an independent source such as state law.'" *Phillips v. Washington Legal Found.*, 524 U.S. 156, 164 (1998) (quoting *Board of Regents of State Colls. v. Roth*, 408 U.S. 564, 577 (1972)); *accord Stop the Beach Renourishment, Inc. v. Florida Dep't of Env't Prot.*, 560 U.S. 702, 707 (2010) ("Generally speaking, state law defines property interests."). Our inquiry is not limited to state law, however, or else "a State could 'sidestep the Takings Clause by disavowing traditional property interests' in assets it wishes to appropriate." *Tyler v. Hennepin County*, 598 U.S. 631, 638 (2023) (quoting *Phillips*, 524 U.S. at 167). So,

we must look as well to "'traditional property law principles,' plus historical practice and [the Supreme] Court's precedents." *Id.* (quoting *Phillips*, 524 U.S. at 167).

With that understanding in mind, we consider whether the Utilities have a property interest in maintaining their facilities at their specific locations in the face of OCTA's efforts to construct a streetcar line. We first examine that question under California property law and then consider traditional property-law principles, historical practice, and precedent.

A

California law does not give the Utilities the property interest that they assert. More than fifty years ago, the California Supreme Court recognized in *Southern California Gas Co. v. City of Los Angeles* that "it has generally been held that a public utility accepts franchise rights in public streets subject to an implied obligation to relocate its facilities therein at its own expense when necessary to make way for a proper governmental use of the streets." 329 P.2d 289, 290 (Cal. 1958). The Utilities acknowledge that rule but insist that OCTA's streetcar line is not a "governmental" project. As *Southern California Gas* demonstrates, however, that proposition is not consistent with California law.

In *Southern California Gas*, the California Supreme Court considered whether Los Angeles owed Southern California Gas Company compensation for the costs of relocating to make way for a city sewage project. 329 P.2d at 290. The court held that no reimbursement was owed. In reaching that conclusion, the court did not expressly define the term "governmental." But it explained that the power to make utilities

bear the costs of relocation for governmental projects originates in the "paramount right of the people as a whole to use the public streets wherever located." *Id.* at 291. The court also relied on the State's general police power, *id.* at 291–92, which authorizes the State to pursue "the preservation of the public peace, safety, morals, and health" and, more generally, "the promotion of the public welfare," *Miller v. Board of Pub. Works of City of L.A.*, 234 P. 381, 383 (Cal. 1925). Based on those principles, the court deemed it sufficient that the project "invoke[d] the public right for the public benefit." *Southern Cal. Gas*, 329 P.2d at 291.

OCTA's streetcar line easily satisfies that standard. In building the streetcar line—that is, in making use of the public streets of Orange County—OCTA exercised its state-delegated authority to meet the "demand for an efficient public transportation system in the southern California region," "reduce the levels of automobile-related air pollution," and "offer adequate public transportation to all citizens, including those immobilized by poverty, age, physical handicaps, or other reasons." Cal. Pub. Util. Code § 130001(a), (b), (e). In other words, OCTA invoked the public right to use the streets for the public benefit.

The Utilities do not meaningfully argue that OCTA's streetcar line fails to serve a public interest. Instead, they maintain that it is "settled" that constructing rail lines is *per se* a proprietary activity, not a governmental one. That is incorrect. When the court in *Southern California Gas* described "the established rule that a utility's rights in the public streets are taken subject to the paramount right of public travel," it said nothing to suggest that such travel must be by car rather than by rail. 329 P.2d at 291.

To the contrary, in a long list of cases exemplifying governmental functions, the court cited two cases from other States in which utilities were required to pay relocation costs to make way for rail lines. *See id.* at 290 (citing *In re Delaware River Joint Comm'n*, 19 A.2d 278, 280 (Pa. 1941); *Natick Gaslight Co. v. Inhabitants of Natick*, 56 N.E. 292, 293 (Mass. 1900)).

Significantly, in 1937—the same year that the Utilities signed their first franchise agreement with the City of Santa Ana—the California Legislature passed the Franchise Act, which required utilities to "remove or relocate without expense to the municipality any facilities . . . when made necessary by any lawful change of grade, alignment, or width of any public street . . . including the construction of any *subway* or viaduct, by the municipality." Cal. Pub. Util. Code § 6297 (emphasis added); *see* 1937 Cal. Stat. 1781, 1785. That statute does not directly resolve this case because OCTA is not a "municipality." But the California Supreme Court has explained that "most of the provisions" of the statute should be understood as declaratory of the common law. *Los Angeles Cnty. Flood Control Dist. v. Southern Cal. Edison Co.*, 333 P.2d 1, 5 (Cal. 1958). The statute thus supports the conclusion that California common law has traditionally required utilities to bear relocation costs when governments construct subways. The Utilities do not offer, and we do not see, any reason why above-ground rail lines should be treated differently.

The Utilities' narrow characterization of governmental functions is even more clearly inconsistent with more recent California cases. As one California court has observed, "[a] review of the cases interpreting . . . the common law indicate an almost unanimous refusal to allow utility company franchisees to recover

reimbursement for equipment relocation expenses." *Pacific Gas & Elec. Co. v. City of San Jose*, 218 Cal. Rptr. 400, 401–02 (Ct. App. 1985). Indeed, the California Court of Appeal recently held that "[w]hatever local government is authorized to do constitutes a function of government," not a proprietary function, so that *any* valid exercise of governmental power places relocation costs on utilities. *Riverside Cnty. Transp. Comm'n*, 268 Cal. Rptr. 3d at 232 (alteration in original). We need not decide whether the California Supreme Court would embrace that broad proposition or whether, if it did, it would "contraven[e] established property law" that existed at the time the Utilities were granted their franchises. *Stop the Beach Renourishment*, 560 U.S. at 733. For present purposes, it suffices to observe that neither current nor historical California law has embraced the proposition that the construction of rail lines is *per se* non-governmental.

In contending that constructing rail lines is a proprietary function under California law—or, at least, that it was a proprietary function at the time the Utilities signed their franchise agreements in the late 1930s—the Utilities rely heavily on two California Court of Appeal cases. Neither supports their argument.

In *Postal Telegraph-Cable Co. v. City & County of San Francisco*, the California Court of Appeal held that San Francisco owed an electric utility compensation for the cost of relocating to make way for a "municipal street railway system" because, the court noted, "it is conceded . . . that the city and county of San Francisco, while engaged in the operation of its municipal street railway system, is acting in a proprietary and not in a governmental capacity." 199 P.

1108, 1109 (Cal. Ct. App. 1921). In support of that proposition, the court relied on an earlier decision holding that "under the charter provisions concerning public utilities, the city and county of San Francisco, through its board of public works, is acting in a proprietary and not in a governmental capacity" when purchasing and operating buses. *Vale v. Boyle*, 175 P. 787, 790 (Cal. 1918); *see Postal Tel.-Cable*, 199 P. at 1109.

The Utilities read *Postal Telegraph-Cable* as holding that "the construction and operation of a municipal railway system is a 'purely proprietary activity.'" (quoting *Postal Tel.-Cable*, 199 P. at 1110). But that case, like *Vale*, on which it relied, held only that "*the city and county of San Francisco*" acted in a proprietary capacity when administering trains and buses. *Postal Tel.-Cable*, 199 P. at 1109 (emphasis added). The courts in those cases so held not on the basis of any general, cross-jurisdictional rule that trains are always proprietary, but rather based on a construction of San Francisco's "charter provisions concerning public utilities." *Vale*, 175 P. at 790.

In consulting the city charter to determine whether the transit project was governmental or proprietary, the courts were simply applying the rule that whether a municipal activity is governmental or proprietary turns partly on whether a municipality is authorized to exercise the State's police powers—that is, on whether a municipality has pursued a project in its capacity as an "instrumentality intrusted by the state with the subordinate control of some public affair." *Davoust v. City of Alameda*, 84 P. 760, 761 (Cal. 1906); *see also id.* (explaining that a city acts in a governmental character when it has been "made, by the state, one of its instruments, or the local depositary of

certain limited and prescribed political powers, to be exercised for the public good on behalf of the state" (quoting John F. Dillon, 1 *Commentaries on the Law of Municipal Corporations* § 66, at 88 (3d ed. 1881))).

Those cases do not reflect "a view that operating a railway *could not* be a governmental action, only that it was not authorized by the municipal charter at issue in the case." *Riverside Cnty. Transp. Comm'n*, 268 Cal. Rptr. 3d at 240 (Raphael, J., concurring in part and dissenting in part). Here, by contrast, it is undisputed that the California legislature established OCTA, and it expressly did so for the broad benefit of the region. *See* Cal. Pub. Util. Code. § 130001. *Postal Telegraph-Cable* is therefore inapposite.

The Utilities also rely on *Coleman v. City of Oakland*, in which the California Court of Appeal stated that Oakland's operation of its airport was a proprietary function because "[a]n air port falls naturally into the same classification as such public utilities as electric light, gas, water, and transportation systems, which are universally classed as proprietary." 295 P. 59, 61 (Cal. Ct. App. 1930). But that case concerned the city's tort liability, not an effort by the city to invoke the right at the core of a utility's obligation to bear relocation expenses: the "paramount right of the people as a whole to use the public streets wherever located." *Southern Cal. Gas*, 50 Cal. 2d at 717. The decision therefore sheds little light on OCTA's right to use the streets of Santa Ana for the public benefit.

B

In denying the Utilities a property interest that would implicate the Takings Clause in these circumstances, California law is consistent with traditional principles of property law, historical practice, and

Supreme Court precedent. As the Supreme Court has explained, "the traditional common law rule" is that "utilities have been required to bear the entire cost of relocating from a public right-of-way whenever requested to do so by state or local authorities." *Norfolk Redevelopment & Hous. Auth.*, 464 U.S. at 35.

The Court recognized that rule more than a hundred years ago in *New Orleans Gaslight Co.*, in which New Orleans required a gas utility to relocate its facilities to permit the construction of a drainage project. 197 U.S. at 459. The Court observed that nothing in the franchise agreement between the city and the utility indicated any "intention of the State to give up its control of the public streets." *Id.* Relocation costs therefore fell on the utility, as the city had the right to enact "proper regulations in the interest of the public health, morals, and safety." *Id.*

A few years later, in *Cincinnati, Indianapolis & Western Railway Co. v. City of Connersville*, a city laid a new road across the tracks of a privately owned railroad, and the Supreme Court held that the railroad could be required to pay the costs of building a bridge over the new road. 218 U.S. 336, 343–44 (1910). The Court explained that "[t]he railway company accepted its franchise from the State . . . subject necessarily to the condition that it would conform at its own expense to any regulations, not arbitrary in their character, as to the opening or use of streets, which had for their object the safety of the public, or the promotion of the public convenience." *Id.*

Those early precedents demonstrate that the Utilities are wrong to suggest that their franchises are subject only to what they call a "limited relocation obligation" that does not extend to relocating to permit the construction of a streetcar line. Instead, for more

than a hundred years, utilities have been required to relocate to make way for a government that seeks to vindicate its right to use the streets and enact "proper regulations in the interest of the public health, morals, and safety." *New Orleans Gaslight*, 197 U.S. at 473. Indeed, about ten years before the Utilities accepted the franchises at issue here, a leading treatise on municipal powers explained that "[t]he grantee of a franchise to use the streets takes it subject to the right of the municipality to make public improvements whenever and wherever the public interest demands" because "the grant of a franchise is subject to *any* proper exercise of the police power." 4 Eugene McQuillin, *The Law of Municipal Corporations* § 1806, at 793–94 (2d ed. 1928) (emphasis added). The construction of a streetcar line is just such an exercise. *See Northern States Power Co. v. Federal Transit Admin.*, 358 F.3d 1050, 1057 (8th Cir. 2004) (holding that a State did not need to reimburse a utility for the costs of relocating to avoid light-rail construction because the utility "merely had to move its facilities from one portion of the street to another, and such regulation is well within the state's police powers" (citation omitted)).

When it comes to a federal-law basis for their asserted property interest, the best the Utilities can offer is *City of Los Angeles v. Los Angeles Gas & Electric Corp.*, 251 U.S. 32, 39 (1919). In that case, a Los Angeles ordinance authorized the city to remove or relocate utility poles "when necessary" to allow it to construct a lighting system. *Id.* at 34. The Supreme Court held that the city committed a taking when it forced an electric street-lighting utility to remove its equipment so that the city could install its own utility serving the same function. According to the Court, the city's project was non-governmental because it was

not a valid use of the State's police powers. In forcing the electric utility to relocate to make way for another electric utility, Los Angeles had identified "no real 'public necessity' arising from consideration of public health, peace or safety" because it had not pointed to any "disorder or overcharge of rates or peril, or defect of any kind" in the existing electric system that would make a new utility appropriate. *Id.* at 38. In fact, there was reason to suspect a self-serving motive because the city wanted to replace "what belongs to one lighting system in order to make way for another." *Id.* at 40.

The Utilities seize on the Court's use of the word "necessity," arguing that OCTA has failed to show that its streetcar satisfies any public necessity. On the strictest possible understanding of "necessity," it seems that few, if any, public projects would qualify—not even the sewer in *New Orleans Gaslight* or the road in *Cincinnati, Indianapolis & Western Railway*. *Cf. M'Culloch v. Maryland*, 4 Wheat. (17 U.S.) 316, 325 (1819) ("[I]f congress could use no means but such as were absolutely indispensable to the existence of a granted power, the government would hardly exist."). But we do not read *Los Angeles Gas & Electric* to invite us to make our own assessment of whether a streetcar line is or is not necessary for Orange County—the California Legislature, after all, believes that the project serves valuable public purposes, and the Utilities offer no reason for us to second-guess that judgment. *See* Cal. Pub. Util. Code § 130001. Instead, *Los Angeles Gas & Electric* stands for the same rule as the rest of the Supreme Court's cases in this line, and it is consistent with other cases evaluating whether a state or local entity is acting in a governmental or a proprietary capacity. *See, e.g.*, *Vale*, 175 P. at 790 (examining the City and County of San

Francisco's charter to determine whether San Francisco was acting in a governmental capacity when it constructed a streetcar line).

The project at issue in *Los Angeles Gas & Electric* apparently lacked any public-facing rationale, and it therefore lost the status of "governmental." OCTA's project has no comparable defect, or at least none the Utilities identify. It is a governmental project that fits comfortably within a long tradition of relocations for which franchisees must foot the bill.

III

Separate from any argument under the Takings Clause, the Utilities also contend that the California Public Utilities Code places the costs of relocation on OCTA. We disagree.

Unlike the takings claim, over which we have federal-question jurisdiction, *see* 28 U.S.C. § 1331, the state-law claim is not independently subject to federal jurisdiction. Rather, the district court exercised supplemental jurisdiction over that claim because it is part of the "same case or controversy" as the federal claim. *See id.* § 1367(a). Ordinarily, "if the federal claims are dismissed before trial . . . the state claims should be dismissed as well." *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 726 (1966); *see also* 28 U.S.C. § 1367(c). Here, we have affirmed the dismissal of the Utilities' federal claim. But whether to exercise supplemental jurisdiction over state-law claims after federal claims are dismissed is a matter of discretion, not subject-matter jurisdiction. *See Acri v. Varian Assocs., Inc.*, 114 F.3d 999, 1000 (9th Cir. 1997) (en banc). We must accordingly decide whether to retain state-law claims according to "our normal rules of appellate procedure." *Kohler v. Inter-Tel*

Techs., 244 F.3d 1167, 1171 (9th Cir. 2001) (quoting *Government Emps. Ins. Co. v. Dizol*, 133 F.3d 1220, 1225 (9th Cir. 1998) (en banc)).

The parties in this case might have argued that the district court should dismiss the supplemental state-law claim under 28 U.S.C. § 1367(c) in the event that it dismissed the federal claim. But neither party so argued, either in the district court or before us. We decline to excuse the parties' forfeiture by *sua sponte* disclaiming supplemental jurisdiction over the state-law claim. *See Kohler*, 244 F.3d at 1171; *Doe by Fein v. District of Columbia*, 93 F.3d 861, 871 (D.C. Cir. 1996) ("The discretionary aspect to supplemental jurisdiction is waivable."). We therefore proceed to consider the merits of the state-law claim.

The Utilities focus on California Public Utilities Code section 40162, which provides that "[t]he district may exercise the right of eminent domain . . . . [But] the district in exercising such power shall . . . pay the cost of . . . relocation of any structure . . . mains, pipes, conduits, cables or poles of any public utility which is required to be moved to a new location." As is apparent from that statute's reference to "the district," the provision applies not to OCTA but to the Orange County Transit *District*, a separate regional transit entity. It appears in a part of the Public Utilities Code titled the "Orange County Transit District Act of 1965" (Transit Act). Cal. Pub. Util Code. §§ 40020–40617; 1965 Cal. Stat. 4384.

The Utilities argue that section 40162 nonetheless creates duties for OCTA because of a separate part of the Public Utilities Code, section 130241, which provides:

> All the provisions of the Orange County Transit District Act of 1965 . . . regarding the powers and functions of the Orange County Transit District shall be equally applicable to the Orange County Transportation Authority as if set forth herein, and shall be in addition to the powers and functions set forth in this division. The authority shall determine which provisions are applicable to the authority.

The Utilities' argument founders on the last sentence of that section: OCTA has not "determine[d]" that section 40162 shall "[be] applicable to" it. OCTA invoked a different provision of the Transit Act, section 40180, as authority to build the streetcar line and force the Utilities to relocate. That provision says nothing about imposing the costs of relocation on OCTA. Thus, as the district court concluded, section 40162 does not apply to OCTA's project here.

The Utilities insist that section 40162 applies to OCTA because the provisions of the Transit Act "shall be equally applicable to" OCTA. Cal. Pub. Util. Code § 130241. They acknowledge that "the authority shall determine which provisions are applicable to the authority." *Id.* But, on the Utilities' account, the only role of that sentence is to block the application of those provisions that "by their nature may not be capable of being applied to OCTA."

The Utilities' reading is untenable because it effectively erases the last sentence of section 130241, in conflict "with the well-established principle that courts should, if possible, give meaning to every word of a statute and avoid constructions that make any word surplusage." *B.B. v. County of Los Angeles*, 471 P.3d 329, 337 (Cal. 2020). If a provision in the Transit

Act is "not capable" of applying to OCTA, then OCTA has no need to "determine" whether the provision is applicable; the provision would not apply because it could not apply. In the same vein, we struggle to identify any provisions in the Transit Act that "by their nature may not be capable" of applying to OCTA. Under the Utilities' reading, then, the last sentence of the section has no function.

Insisting that their reading does not create this surplusage problem, the Utilities offer section 40161 as an example of a provision in the Transit Act that is not capable of applying to OCTA. Section 40161 authorizes "[t]he district" to "sue and be sued." Cal. Pub. Util. Code § 40161. The Utilities say that OCTA "may not 'sue and be sued' in the name of [the Orange County Transit District]," so section 40161 cannot, by its nature, apply to OCTA. But that provision could apply to OCTA if the "the authority" were substituted for "the district." That is the exact substitution that the Utilities ask us to apply to section 40162.

The Transit Act includes a range of provisions that could, conceivably, apply to OCTA, such as a grant of power to enter into contracts, Cal. Pub. Util. Code § 41065, conflict-of-interest rules, *id.* § 40166, and a grant of eminent-domain authority, *id.* § 40175. If the last sentence of section 130241 adds anything, it must allow OCTA to determine, in its discretion, which provisions of the Transit Act—all of which are *potentially* applicable to OCTA—should in fact apply. OCTA has not chosen to subject itself to section 40162, so the Utilities' arguments about the duties imposed by that section are unavailing.

IV

Finally, OCTA asks that we order an award of pre- and post-judgment interest. We decline to do so. Although its counterclaim asserted an entitlement to pre-judgment interest, OCTA did not mention interest in its motion for summary judgment. The district court did not award pre-judgment interest, and OCTA did not seek reconsideration under Federal Rule of Civil Procedure Rule 59(e). *See Osterneck v. Ernst & Whinney*, 489 U.S. 169, 177 (1989) (explaining that a "postjudgment motion for discretionary prejudgment interest is a Rule 59(e) motion"). More importantly for our purposes, OCTA has not cross-appealed the denial of pre-judgment interest, and we "may not alter a judgment to benefit a nonappealing party." *Lopez v. Garland*, 60 F.4th 1208, 1212 (9th Cir. 2023) (quoting *Greenlaw v. United States*, 554 U.S. 237, 244 (2008)). On the other hand, because we affirm the district court's judgment, post-judgment interest is automatically available to OCTA, and there is no need for us to order it. 28 U.S.C. § 1961(a); Fed. R. App. P. 37(a); *see Waggoner v. R. McGray, Inc.*, 743 F.2d 643, 644 (9th Cir. 1984) ("Interest accrues from the date of a judgment whether or not the judgment expressly includes it . . . .").

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA
SOUTHERN DIVISION

SOUTHERN CALIFORNIA EDISON COMPANY; SOUTHERN CALIFORNIA GAS COMPANY, **Plaintiffs,** **vs.** **ORANGE COUNTY TRANSPORTATION AUTHORITY,** **Defendant.**	**Case No. SA CV 20-02186-DOC-KES** **ORDER GRANTING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT [29] AND DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT [32]** May 3, 2022

Before the Court are Defendant Orange County Transportation Authority's ("Defendant" or "OCTA") Motion for Summary Judgment ("Def. Mot.") (Dkt. 29) and Plaintiffs Southern California Edison Company and Southern California Gas Company's (collectively "Utilities" or "Plaintiffs") Motion for Summary Judgment ("Pl. Mot.") (Dkt. 32). The Court heard oral arguments on April 12, 2022. For the reasons explained below, the Court GRANTS Defendant's Motion and DENIES Plaintiffs' Motion.

I. BACKGROUND

A. Facts[1]

Plaintiffs Southern California Edison Company ("SCE") and Southern California Gas Company ("SCG") are both investor-owned public utilities serving the Southern California area. SCE Joint Stipulation of Undisputed Facts ("SCE Stip.") (Dkt. 24) ¶ 1; SCG Joint Stipulation of Undisputed Facts ("SCG Stip.") (Dkt. 25) ¶ 1.

1. Franchise Agreements with Santa Ana

Both Utilities have operated for almost a century under franchise agreements with the City of Santa Ana "granted under and in accordance with provisions of [the] Franchise Act of 1937," California Public Utilities Code § 6201 *et seq.*

In 1937, SCG and the City of Santa Ana entered into a written Franchise Agreement regarding SCG's provision of gas to the City. SCG Stip. ¶ 3. The Franchise Agreement granted SCG the right "to lay and use pipes and appurtenances for transmitting and distributing gas for any and all purposes under, along, across or upon the streets, of the City, for an indeterminate term or period." *Id.* ¶ 4. The Franchise Agreement defined "lay and use" as "to lay, construct, erect, install, operate, maintain, use, repair, replace, or remove." *Id.* ¶ 5. It defined "Pipes and appurtenances"

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[1] Unless indicated otherwise, to the extent any of these facts are disputed, the Court concludes they are not material to the disposition of the Motions. Further, to the extent the Court relies on evidence to which the parties have objected, the Court has considered and overruled those objections. As to any remaining objections, the Court finds it unnecessary to rule on them because the Court does not rely on the disputed evidence.

as "pipe, pipeline, main, service, trap, vent, manhole, meter, gauge, regulator, valve, conduit, appliance, attachment, appurtenance and any other property located or to be located in, upon, along, across, under or over the streets of the City, and used or useful in the transmitting and/or distribution of gas." *Id.* It defined "streets" as "the public streets, ways, alleys and places as the same now are or may hereafter exist within the City." *Id.*

Similarly, in 1938 SCE and the City of Santa Ana entered into a Franchise Agreement regarding SCE's provision of electricity to the City. SCE Stip. ¶ 3. That Agreement granted SCE the rights "(a) to use, for transmitting and distributing electricity within the City of Santa Ana for any and all purposes not included in said constitutional franchise, all poles, wires, conduits and appurtenances, which are now or may hereafter be lawfully placed on, in or under the streets within said city, and (b) to construct and use in said streets, all poles, wires, conduits and appurtenances necessary or proper for said purposes." *Id.* ¶ 4. The Franchise Agreement with SCE defined "construct and use" as "to lay, construct, erect, install, operate, maintain, use, repair or replace." *Id.* ¶ 5. It defined "poles, wires, conduits and appurtenances" as "poles, towers, crossarms, conduits, cables, wires, service wires, guy-wires, vaults, manholes, appliances, attachments, appurtenances and any other property located, or to be located, in, upon, along, across, under or over the streets of the city and used or useful in the transmitting and/or distributing of electricity and electrical energy." *Id.* It defined "streets" the same as in the SCG Franchise Agreement, as "the public streets, ways, alleys and places as the same now are or may hereafter exist within the City." *Id.*

Pursuant to these Franchise Agreements, SCE and SCG have installed and maintained utility facilities throughout the City of Santa Ana to provide electric and gas service. *Id.* ¶ 8; SCG Stip. ¶ 8. The Utilities have incurred the costs of installing and maintaining those facilities. SCE Stip. ¶ 8; SCG Stip. ¶ 8.

2. Orange County Streetcar Construction

Several cities in Orange County have planned a 4.15-mile streetcar line that will connect the Santa Ana Regional Transportation Center to downtown Santa Ana and to a new transportation hub in the City of Garden Grove. SCE Stip. ¶ 9. Defendant OCTA is leading the design and construction of the streetcar project and will operate the streetcar once it is constructed. *Id.* ¶¶ 11, 13.

The project entails substantial construction work, and in 2016 OCTA identified locations where construction conflicted with the Utilities' existing infrastructure and facilities. *Id.* ¶¶ 12, 14. The parties came to an agreement on which facilities needed to be relocated and which needed to be protected in place. *Id.* ¶ 15; SCG Stip. ¶ 15.

However, the parties could not agree on which entity should bear the cost of relocating facilities to make way for the streetcar. SCE Stip. ¶ 16; SCG Stip. ¶ 16. To avoid delaying the project, the parties made a preliminary agreement under which OCTA would advance the costs of relocating utility equipment, while reserving its rights to argue that the Utilities should pay. SCE Stip. ¶ 17; SCG Stip. ¶ 17.

To date, OCTA has paid SCE a net total of $8,673,777.99. SCE Stip. ¶¶ 22, 25. OCTA has paid SCG $1,647,445.70, while SCG has expended

approximately $3,898,042.25 of its own capital. SCG Stip. ¶¶ 21, 24.

The parties subsequently brought this suit to determine liability for the costs.

B. Procedural History

On November 13, 2020, Plaintiffs filed a Complaint in this Court (Dkt. 1). Defendant filed its counter-claims on December 9, 2020 (Dkt. 11). On November 19, the parties filed a joint stipulation of undisputed facts for summary judgment (Dkts. 24, 25). On January 14, 2022, Defendant filed its Motion for Summary Judgment (Dkt. 29). Plaintiffs opposed ("Pl. Opp'n") on February 11 (Dkt. 41), and Defendant replied ("Def. Reply") on February 25 (Dkt. 44). Also on January 14, Plaintiffs filed their Motion for Summary Judgment (Dkt. 32). Defendant opposed ("Def. Opp'n") on February 11 (Dkt. 38), and Plaintiffs replied ("Pl. Reply") on February 25 (Dkt. 49). The Court heard oral arguments on April 12, 2022.

II. LEGAL STANDARD

Summary judgment is proper if "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Summary judgment is to be granted cautiously, with due respect for a party's right to have its factually grounded claims and defenses tried to a jury. *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). A court must view the facts and draw inferences in the manner most favorable to the non-moving party. *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1992); *Chevron Corp. v. Pennzoil Co.*, 974 F.2d 1156, 1161 (9th Cir. 1992). The moving party bears the initial burden of demonstrating

the absence of a genuine issue of material fact for trial, but it need not disprove the other party's case. *Celotex*, 477 U.S. at 323. When the non-moving party bears the burden of proving the claim or defense, the moving party can meet its burden by pointing out that the non-moving party has failed to present any genuine issue of material fact as to an essential element of its case. *See Musick v. Burke*, 913 F.2d 1390, 1394 (9th Cir. 1990).

Once the moving party meets its burden, the burden shifts to the opposing party to set out specific material facts showing a genuine issue for trial. *See Liberty Lobby*, 477 U.S. at 248–49. A "material fact" is one which "might affect the outcome of the suit under the governing law . . . ." *Id.* at 248. A party cannot create a genuine issue of material fact simply by making assertions in its legal papers. *S.A. Empresa de Viacao Aerea Rio Grandense v. Walter Kidde & Co., Inc.*, 690 F.2d 1235, 1238 (9th Cir. 1982). Rather, there must be specific, admissible, evidence identifying the basis for the dispute. *See id.* The Court need not "comb the record" looking for other evidence; it is only required to consider evidence set forth in the moving and opposing papers and the portions of the record cited therein. Fed. R. Civ. P. 56(c)(3); *Carmen v. S.F. Unified Sch. Dist.*, 237 F.3d 1026, 1029 (9th Cir. 2001). The Supreme Court has held that "[t]he mere existence of a scintilla of evidence . . . will be insufficient; there must be evidence on which the jury could reasonably find for [the opposing party]." *Liberty Lobby*, 477 U.S. at 252.

III. DISCUSSION

A. Takings Clause

Under the Takings Clause of the Fifth Amendment, the government may not take private property for public use "without just compensation." U.S. CONST. amend. V. The "Fifth Amendment's guarantee . . . [is] designed to bar Government from forcing some people alone to bear public burdens, which, in all fairness and justice, should be borne by the public as a whole." *Penn Cent. Transp. Co. v. City of New York*, 438 U.S. 104, 123 (1978) (citation omitted). "In order to state a claim under the Takings Clause, a plaintiff must first demonstrate that he possesses a 'property interest' that is constitutionally protected." *Schneider v. Calif. Dep't of Corrections*, 151 F.3d 1194, 1198 (9th Cir. 1998).

Here, the Utilities argue that OCTA has taken property rights from them and that they are owed just compensation under the Takings Clause. Pl. Mot. at 8. OCTA instead argues that no property has been taken and that the Utilities were obliged to pay to relocate their facilities when they entered into their franchise agreements. Def. Mot. at 10-11.

1. Common law rule

As the Utilities acknowledge, "many government-authorized physical invasions will not amount to takings because they are consistent with longstanding background restrictions on property rights." Pl. Opp'n at 13 (quoting *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2079 (2021)). The Supreme Court has repeatedly recognized one such longstanding restriction: "[u]nder the traditional common law rule, utilities have been required to bear the entire cost of relocating from a public right-of-way whenever

requested to do so by state or local authorities." *Norfolk Redevelopment & Housing Auth. v. Chesapeake & Potomac Tel. Co. of Va.*, 464 U.S. 30, 35 (1983). Under this rule, since the franchise granted to a utility included the requirement of paying to relocate, enforcing that pre-existing requirement cannot constitute a taking.

The common law rule does not apply when a governmental entity requires relocation "not in its governmental capacity—an exertion of the police power—but in its 'proprietary or quasi-private capacity.'" *Los Angeles Gas*, 251 U.S. at 38-39. The Court first considers whether the common law rule applies to the Utilities, and then considers whether OCTA's streetcar project is a governmental or proprietary use.

The Supreme Court has followed the common law rule for over a century. In 1905, the Court held with regards to a streetlight utility that "[t]here was nothing in the grant of the privilege which gave the company the right to any particular location in the streets," and therefore held that the utility was required to relocate within the street at its own expense. *New Orleans Gaslight Co. v. Drainage Comm'n of New Orleans*, 197 U.S. 453, 459 (1905).

The California Supreme Court has applied the same common law rule, noting that "a public utility accepts franchise rights in public streets subject to an implied obligation to relocate its facilities therein at its own expense when necessary to make way for a proper governmental use of the streets." *S. Calif. Gas Co. v. City of Los Angeles*, 50 Cal. 2d 713, 716 (1958) (in bank). As a result, relocating facilities, "which [the utility] impliedly agreed to do when it accepted the franchise . . . [does] not result in a taking or damaging of property." *Pac. Tel. & Tel. Co. v. Redevelopment*

Agency, 75 Cal. App. 3d 957, 964 (1977). For decades, California courts have shown "an almost unanimous refusal to allow utility company franchisees to recover reimbursement for equipment relocation expenses." *Pac. Gas & Electric Co. v. City of San Jose*, 172 Cal. App. 3d 598, 601 (1985).

Based on this long history, OCTA argues that the Utilities' attempts to avoid payment are "a contention that uniformly has been rejected by federal and state courts for over a century." Def. Mot. at 17. Indeed, these two Utilities have been parties in many cases upholding the common law rule. In 1958, SCG had to relocate gas lines to allow construction of a sewer by the City of Los Angeles. *S. Cal. Gas Co.*, 50 Cal. 2d 713. The in bank California Supreme Court rejected SCG's arguments, noting that its franchise "obligations rest on the paramount right of the people as a whole to use the public streets wherever located." *Id.* at 717. Later that year, SCE was ordered to pay the cost of relocating facilities for Los Angeles County to build a storm drain; the California Supreme Court rejected SCE's argument that it had priority as an earlier user of the streets and found there had not been "an express direction of the Legislature passing the utilities' other common-law obligations over to the tax-payer." *Los Angeles Cty. Flood Control Dist. v. S. Cal. Edison Co.*, 51 Cal. 2d 331, 337, 339 (1958) (internal quotation omitted).

The Utilities point to one key Supreme Court case in which utilities were not required to pay the costs of relocating for a municipal project, *Los Angeles Gas*. Pl. Mot. at 10 (discussing *City of Los Angeles v. Los Angeles Gas & Electric Corp.*, 251 U.S. 32 (1919)). In that case, Los Angeles required a utility to move several wires on a street to allow the city to install its own

lighting system, and the Supreme Court ultimately required the city to pay for relocation. *Los Angeles Gas*, 251 U.S. at 38. The Court considers *Los Angeles Gas* further in the next section.

Just over a year ago, a California appellate court confronted almost identical issues involving these two utilities and found that relocation costs were not a taking. *Riverside Cty. Transp. Comm'n v. S. Calif. Gas Co.*, 54 Cal. App. 5th 823 (2020), *as modified on denial of reh'g* (Sept. 16, 2020), *review denied* (Dec. 16, 2020). The case involved a commuter train extension by the Riverside County Transportation Commission, which is a transportation commission akin to OCTA. The court explained that the common law rule is based in the government's police power, and that "[r]equiring compensation would hamstring the public entity's ability to respond to changing conditions." *Id.* at 857.

Given this substantial precedent, the common law rule applies here if OCTA is acting in "a proper governmental use of the streets" as opposed to in a proprietary manner. *S. Calif. Gas Co.*, 50 Cal. 2d at 716. The Court next considers whether OCTA's streetcar project is a governmental or a proprietary use.

2. Proprietary-governmental distinction

Despite many decades of utility relocation suits, the caselaw is not particularly clear on where to draw the line between 'proprietary' and 'governmental' purposes.

Under the *Riverside County* court's analysis, the governmental-proprietary distinction is destined to disappear. The panel described how the Supreme Court has "abandoned the distinction" between

governmental and proprietary capacities of municipal corporations in several contexts, including the Contracts Clause, Tenth Amendment immunity, and federal tort immunity. *Riverside Cty.*, 54 Cal. App. 5th at 863-64. The panel also noted that several other state supreme courts have abandoned the distinction in the utility relocation context, including Oregon, Colorado, Vermont, and Michigan. *Id.* at 866-69. While the court did not directly abrogate the governmental-proprietary distinction, it read the Supreme Court's holding in *LA Gas* narrowly, explaining, "we read the two prongs as conjunctive: A public entity can require a utility to pay to relocate some of its equipment, even if it is acting in its proprietary capacity; however, it can require the utility to pay to relocate all of its equipment only if it is acting in its governmental capacity." *Id.* at 868.

The *Riverside County* court ultimately held that "[w]hatever local government is authorized to do constitutes a function of government, and when a municipality acts pursuant to granted authority it acts as government and not as a private entrepreneur." *Id.* at 870 (quoting *Ne. Sacramento Cty. Sanitation Dist. v. Northridge Park Cty. Water Dist. of Sacramento Cty.*, 247 Cal. App. 2d 317, 325 (1966)). While the Utilities describe this case as "the panel majority's deeply flawed decision," Pl. Opp'n at 9, even the dissent agreed that "the Commission acted in a governmental manner when it expanded the Metrolink system" because "the Commission was created by the state with the authority to operate the Metrolink," *Riverside Cty.* at 878 (Raphael, J., concurring and dissenting).

The California Supreme Court has noted that "[t]he distinction between 'governmental function' and

'proprietary function' is a sort of abstraction difficult to make meaningful in a day when municipalities continually find new ways to exercise police power in their effort to cope with the pressing needs of their citizens." *Pacific Tel. & Tel. Co.*, 75 Cal. App. 3d at 968. But since the United States and California Supreme Courts have not expressly abrogated the governmental-proprietary distinction in the utility relocation context, the Court proceeds to analyze the situation here using that distinction. Courts have suggested several related tests, which the Court considers in turn.

As one test, the Supreme Court suggested in 1905 that a governmental purpose was "a necessary public use" involving "regulations as might be required in the interest of the public health and welfare." *New Orleans Gaslight Co.*, 197 U.S. at 461 (holding construction of sewage system was governmental); *see also Los Angeles Cty. Flood Control Dist.*, 51 Cal. 2d at 331 (holding storm drain project was governmental). Similarly, the Court in *Los Angeles Gas* suggested that a "real 'public necessity' arising from consideration of public health, peace or safety" was required for a governmental purpose. *Los Angeles Gas*, 251 U.S. at 38 (holding construction of a competing streetlamp system was not governmental).

The Utilities here argue that there is no public health or safety "imperiled" by the absence of a streetcar. Pl. Mot. at 3. In response, OCTA argues that the California Legislature has made numerous findings that construction of mass transit systems is necessary to address Southern California's "increasing mobility requirements" and provide "adequate public transportation to all citizens, including those immobilized by poverty, age, physical handicaps, or other reasons."

Def. Opp'n at 17 (quoting CAL. PUB. UTILS. CODE §§ 130001(a), (e)). The Legislature also noted the importance of mass transit to "reduce the consumption of scarce and expensive energy fuels, and reduce the levels of automobile-related air pollution," which OCTA argues mitigates "climate change[,] . . . the most pressing environmental and health issue of our time." CAL. PUB. UTILS. CODE § 130001(b); Def. Reply at 18. OCTA further noted in the hearing that this first leg of the streetcar will help reduce car usage between two existing mass transit hubs, and that further legs will provide additional benefits. As the Supreme Court has held, "the police power of a state embraces regulations designed to promote the public convenience or the general prosperity, as well as regulations designed to promote the public health, the public morals, or the public safety." *Chicago B & Q Railway Co. v. People of the State of Illinois*, 200 U.S. 561, 592 (1906). The Court defers to and agrees with the Legislature's finding that increasing transit improves public safety by increasing mobility and improves public health by decreasing pollution.

As another test, the *Riverside County* court of appeals considered "whether the public bodies are engaged in activity that is (1) essential or necessary for the government to perform, or (2) traditional for the government to perform." *Riverside Cty.*, 54 Cal. App. 5th at 867 (quoting *Vermont Gas Systems, Inc. v. City of Burlington*, 153 Vt. 210, 213 (1989)). While the *Riverside* court found those considerations "unworkable," the Court finds them useful to consider here. As discussed above, the Legislature created OCTA to fill a perceived need for mass transit systems. *See* Def. Reply at 15. And as OCTA argues, mass transit projects are almost exclusively a government function, and operate at a loss using heavy government subsidies. *Id.*

at 16; Def. Mot. at 39. Under this test, the streetcar is a governmental function.

Under a third test, some courts have considered whether there is statutory authority for the government entity to use the streets in the contested manner. *See* Def. Reply at 14. In fact, SCE argued this point in 1958, claiming that the Los Angeles County Flood Control District had not been delegated the state's police power. *Los Angeles Cty. Flood Control Dist.*, 51 Cal. 2d at 335-36. But in that case, the California Supreme Court held that a statute authorizing the District to "construct, maintain and operate" the storm drains at issue was an delegation of police power. *Id.* at 336. Analogously here, OCTA was given a grant of legislative authority to construct light rail systems. *See* CAL. PUB. UTILS. CODE § 130001; Pl. Mot. at 5 (acknowledging that the Legislature established OCTA to "construct and operate transit projects."). While the Utilities point to California cases holding transit projects to be proprietary, Pl. Opp'n at 21, those cases were in the California Environmental Quality Act context, not the Takings Clause.

The Utilities point to *Los Angeles Gas* as showing that any "interference" with their facilities is a taking that must be compensated. Pl. Mot. at 11 (quoting *Los Angeles Gas*, 251 U.S. at 36). But while the *Los Angeles Gas* Court noted that the city had made "no attempt . . . at absolute displacement" of the utility's facilities, it explained that "the only question is whether the city may as a matter of public right and without compensation clear a space for the instrumentalities of its system by removing or relocating the instrumentalities of other systems." *Id.* at 36-37. In effect, the city was moving an existing lighting system so that it could build its own, which OCTA describes as the city

acting as a market participant. Def. Reply at 11. OCTA argues that this competitive reading of "instrumentalities of its systems" is necessary, or else all government construction would be "instrumentalities" of some system and the common law rule would be eviscerated. *Id.* The Court's explanation fits with this reading: it described the situation as "a proposed uncompensated taking or disturbance of what belongs to one lighting system in order to make way for another. And this the Fourteenth Amendment forbids." *Los Angeles Gas*, 251 U.S. at 40. As OCTA notes, not only is it not creating its own electric and gas system, but its streetcar will use SCE's electric system to operate. Def. Mot. at 20.

Under all of these tests, OCTA's streetcar project is a governmental, not proprietary use of city streets. Accordingly, as a matter of law the Utilities must pay to relocate their facilities under the common law rule.

B. Public Utilities Code § 40162

The Court next considers whether California statutory law shifts the obligation to pay from the Utilities to OCTA. California Public Utilities Code § 40162 states in relevant part:

> The district may exercise the right of eminent domain to take any property necessary or convenient to the exercise of the powers granted in this part. The district in exercising such power shall, in addition to the damage for the taking, injury or destruction of property, also pay the cost of removal, reconstruction or relocation of any structure, railway, mains, pipes, conduits, cables or poles of any public utility which is required to be moved to a new location.

CAL. PUB. UTILS. CODE § 40162. As the Utilities note, the statute mandates compensation more broadly than that required under the Takings Clause. Pl. Mot. at 29.

While the code section explicitly applies only to the Orange County Transportation District, "[a]ll the provisions of the Orange County Transit District Act of 1965 . . . regarding the powers and functions of the Orange County Transit District shall be equally applicable to the Orange County Transportation Authority." CAL. PUB. UTILS. CODE § 130241. The Utilities argue that because OCTA invoked the District's powers to acquire, construct, and control transit facilities under Public Utilities Code § 40180, "OCTA also must honor its attendant or correlative obligations under Section 40162 and compensate the utilities for their relocation costs." Pl. Mot. at 33. But the statute's language makes clear that all of its provisions are not applicable simply because one is invoked, and § 130241 states that "[t]he authority shall determine which provisions are applicable to the authority." CAL. PUB. UTILS. CODE § 130241. Under the clear language of the code, the provisions of the Orange County Transit District Act apply to OCTA only when OCTA determines that they apply. Here, OCTA has made no such determination.

For completeness, the Court considers whether § 40162 would apply in this case, assuming *arguendo* that OCTA had made the determination that the section applied to it. The Utilities argue that payment is required here by analogizing to § 30631 of the Public Utilities Code, which requires the Los Angeles County Metropolitan Transportation Authority to "reimburse" utilities for any facilities that must be relocated due to a transit project. CAL. PUB. UTILS. CODE

§ 30631(b); *see* Pl. Mot. at 30-32. But while the Utilities discuss court findings of "compelling policy reasons for requiring state-created transportation agencies to reimburse utilities for the costs of utility relocations," Pl. Mot. at 31, they do not address the key distinction: § 30631 explicitly requires reimbursement in all circumstances, while § 40162 does so only in the eminent domain context. This is especially troubling given the Utilities' note that "every word and every provision [of a statute] is to be given effect." Pl. Mot. at 30 (quoting *Nielsen v. Preap*, 139 S. Ct. 954, 969 (2019)). But as OCTA argues, the Utilities ignore the clear language of § 40162, which specifies that it applies to OCTA "in exercising" its eminent domain power. Def. Opp'n at 22. Given the Legislature adopted § 30631 the year before § 40162, it is clear that the Legislature knew how to exclude the eminent domain requirement if it wanted to. OCTA must therefore be engaging in its eminent domain power for reimbursement to be required by statute.

The Utilities next argue that relocating facilities for the streetcar "necessarily entails an exercise of OCTA's eminent-domain powers," and argue that to hold otherwise would allow OCTA to "evade its obligation to compensate" the Utilities "merely by opting not to initiate an eminent domain proceeding." Pl. Mot. at 27, 29-30. However, the California Supreme Court has held that eminent domain does not apply "where the agency's action does not result in a constitutionally compensable taking or damaging of property," and that relocation does "not result in a taking or damaging of the utility's franchise rights." *Los Angeles Cty. Flood Control Dist.*, 51 Cal. 2d at 336. As such, "the required relocation cannot form the basis for an action in inverse condemnation" or eminent domain. *Pac. Tel. & Tel. Co.*, 75 Cal. App. 3d at 964. Here, no

property is being taken and no property rights damaged; as discussed above with respect to the Takings Clause, requiring relocation under the Utilities' franchises is not a violation of their property rights. Accordingly, § 40162 does not apply to the circumstances in this case, and as a matter of law OCTA is not required to pay for relocation under that code section.

Finally, the Utilities raise an equitable argument that it would be unfair to "forc[e] the utilities and their ratepayers—who are located throughout southern and central California in 15 counties (for SCE) and 12 counties (for SCG)—to pay for a 4.15-mile streetcar line in one city of one county." Pl. Mot. at 32. However, the Utilities are not required to pass on this relatively minor cost to ratepayers; last year alone, SCE made almost one billion dollars in profit. EDISON INT'L & S. CAL. EDISON, 2021 ANNUAL REPORT at a (2022), www.edison.com/content/dam/eix/documents/investors/sec-filings-financials/2021-eix-sce-annual-report.pdf.

This equitable argument cannot overcome a century of Supreme Court jurisprudence and the clear language of California statute. Since there is no genuine issue of material fact, the Court holds as a matter of law that the Utilities are liable for their relocation costs as a result of the streetcar project.

IV. DISPOSITION

For the foregoing reasons, the Court GRANTS Defendant's Motion for Summary Judgment and DENIES Plaintiffs' Motion for Summary Judgment.

The parties have agreed that there are no remaining issues in this case, so the matter is hereby administratively closed and all pending dates vacated.

DATED: May 3, 2022

/s/ David O. Carter
DAVID O. CARTER
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

SOUTHERN CALIFORNIA EDISON COMPANY, a California public utility corporation; SOUTHERN CALIFORNIA GAS COMPANY, a California public utility corporation, Plaintiffs-counter-defendants-Appellants, v. ORANGE COUNTY TRANSPORTATION AUTHORITY, a public corporation, Defendant-counter-claimant-Appellee.	No. 22-55498 D.C. Nos. 8:20-cv-02186-DOC-KES 8:20-cv-02187-DOC-KES Central District of California, Santa Ana ORDER Aug. 19, 2024

Before: MILLER and MENDOZA, Circuit Judges, and MOSKOWITZ,* District Judge.

The American Gas Association's motion for leave to file an amicus brief, Dkt. 40, is GRANTED.

The panel has unanimously voted to deny appellants' petition for rehearing. Judge Miller and Judge

* The Honorable Barry Ted Moskowitz, United States District Judge for the Southern District of California, sitting by designation.

Mendoza have voted to deny the petition for rehearing en banc, and Judge Moskowitz so recommends. The full court has been advised of the petition for rehearing en banc, and no judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petitions for rehearing and rehearing en banc are DENIED.