
Circuit hears challenge to state's wildfire fund

By Gina Kim
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The Legislature's process in passing a wildfire loss funding law was debated before a federal appeals court Monday as circuit judges

asked if a challenge to the setting of utility rates should be heard in state rather than federal court.

The 9th U.S. Circuit Court of Appeals took up oral arguments on a case stemming from a decision made by U.S. Judge James Donato

of the Northern District of California in June. He dismissed a ratepayers' lawsuit challenging the constitutionality of Assembly Bill 1054. That law created a \$21.5 billion fund for utilities to dip into if they are found liable for wildfires that occurred af-

ter 2019. Ratepayers and taxpayers were to foot 513.5 billion of the total.

Two years ago, customers of Pacific Gas & Electric Co. sued the California Public Utilities Commission and several state agencies over the

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enactment of AB 1054. Cannara et al. v. **Dept. of Water Resources** director Karla Nemeth, etd **19-CV-04171** (N.D. Cal., filed July 19, 2019). The ratepayers argued the charge built the fund was imposed **without** proper **evidentiary** hearings and alleged due process and takings violations under the U.S. Constitution.

Donato ruled the **Johnson Act of 1934** precluded a U.S. court from involvement in a rate-setting **decision** by a state agency.

Monday's 9th Circuit panel included Barack Obama-appointed Mary H. Murguia and two Donald Trump appointees, **Ryan D. Nelson** and

Danielle J. Hunsaker. Their questions included whether the decision to impose the 513.5 billion charge was made before any proceeding.

Nelson told the appellant ratepayers' attorney, Michael J. Aguirre of Aguirre & Severson LLP, the Johnson Act precluded any challenge seeking to enjoin utility rate actions.

Aguirre responded the act does not deprive district courts of jurisdiction where lawsuits challenge statutes rather than rate orders. The plaintiffs' issue is the charge was imposed without the public having a chance to see if it was fair, he said.

Nelson asked if rates would be affected if the district court had granted

him his relief and enjoined **AB 1054**.

"No, because it's not a rate," Aguirre said. "A rate is something that you [set] after you come in, examine what the expenditures are going to be, and give everyone a chance to participate and analyze."

Nelson said it seemed the parties were given plenty of chances to present their views to the Public Utilities Commission before the \$13.6 billion charge was imposed.

"Your honor, it was a sham," Aguirre said. "What we're dealing with here are decisions made around the table during those 18 meetings held in secret. As part of the statute you don't have enough time to hold

a reasonable hearing. How can you do discovery and cross-examination in 90 days? That's **impossible** and it wasn't reasonable."

The panel then asked **commission** attorney Christofer C. Nolan whether it mattered that the ratepayers challenged **AB 1054**, which did relate to the commission's rate setting procedure but also had provisions unrelated to rates.

"It seems here that state law didn't require a hearing ... any *hearing*," Murguia remarked. "If the **CPUC** didn't hold oral arguments, would there have been reasonable notice and hearing?"

Nolan replied California law does

not require a hearing before imposing rates and that Aguirre had nine chances to engage with *the commission*.

"I'd say in this case particularly here you talk about California with its wildfire problems, and this is a police power of the **most important kind**," Nolan said. "And this is the Legislature fashioning a response to that, and this is an area where federal intervention would be treading very lightly I'd say."

Gabrielle D. Boutin, on behalf of the state respondents other than the commission, argued the passing of AB 1054 as separate from the rate-setting process. The bill

contemplated a particular rate order and gave the utility commission discretion to issue a rate order if it found it was fair and reasonable, she said.

Hunsaker, who remained quiet for most of the arguments, asked about the alleged harm the ratepayers suffered. It seemed to her the harm was merely that the customers didn't want to pay rates.

"You can't just say it was corruptly enacted," Hunsaker told Aguirre, who answered it wasn't about whether his clients wanted to pay the rates but where the charges came from.

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