



FILE
San Francisco County Superior Court

MAY 21 2018

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BY: [Signature] Deputy Clerk

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN FRANCISCO

COORDINATION PROCEEDING
SPECIAL TITLE [RULE 3.550]
California North Bay Fire Cases

Judicial Council Coordination
Proceeding No.: 4955

**ORDER OVERRULING PG&E'S
DEMURRERS**

Three groups of plaintiffs – the Individual Plaintiffs, Public Entity Plaintiffs, and Subrogation Plaintiffs (together, Plaintiffs) –each filed a separate Master Complaint against Defendants PG&E Corporation and Pacific Gas & Electric Company (together PG&E). Each of the Master Complaints contains a cause of action for inverse condemnation. PG&E demurred on the same ground to each of the inverse condemnation claims.

The demurrers essentially argue that inverse condemnation claims must be dismissed unless it is now obvious that PG&E will be able to pass on any damages award by e.g., increasing rates, so as to meet the ‘socialization’ or risk spreading rationale of inverse condemnation.

I heard argument May 15, 2018, and now overrule the demurrer.

1 **Judicial Notice and Evidentiary Objections**

2 PG&E requests judicial notice of five items attached to the Declaration of Keith
3 Eggleton. The requests as to Exhibits A-D are opposed; there are none to Exhibit E.

4 With respect to Exhibit A, the courtesy copy provided is a disc containing some 155
5 hours, 15 minutes, and 25 seconds of sporadic faint electronic sounds. Obviously the provision
6 of the disk was a mistake and the request for notice is denied.

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8 Judicial notice of Exhibits B-D is granted. Evid. Code § 452(c); *Breidert v. Southern*
9 *Pac. Co.*, 61 Cal.2d 659, 661-62 (1964) (taking judicial notice of existence and effect of a PUC
10 decision and plaintiffs' request to the PUC). Notice does not extend to the truth of facts in those
11 documents.

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13 Exhibit E is a Form 10-K in which PG&E represents that PG&E Corporation is a holding
14 company whose primary operating subsidiary is Pacific Gas and Electric Company. Eggleton
15 Decl., Ex. E at 8. The purpose of the request for judicial notice is to establish that this fact is
16 true. *See* Demurrer, 9 n.9. The request for judicial notice itself did not seek notice of the truth of
17 PG&E's representations in the Form 10-K, although it did cite authority to support noticing the
18 truth of PG&E's representations in the Form 10-K if the matter was not disputable. PG&E RJN,
19 3; *Apple Inc. v. Superior Court*, 18 Cal.App.5th 222, 241-42 (2017). Here, the fact that PG&E
20 Corporation is a holding company whose primary operating subsidiary is Pacific Gas and
21 Electric Company does not appear to be disputable, so it is judicially noticed. *Compare*
22 Individual Plaintiffs' Master Complaint ¶ 10 (alleging the same); Public Entity Plaintiffs' Master
23 Complaint ¶ 10 (alleging the same); Subrogation Plaintiffs' Master Complaint ¶ 10 (alleging the
24 same). PG&E has not identified other facts in the document that should be noticed for their
25 truth.
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1 Individual Plaintiffs request judicial notice of four documents, attached to the Declaration
2 of Khaldoun Baghdadi. The requests are unopposed. The requests are granted. Evid. Code §
3 452(c); *Breidert*, 61 Cal.2d at 661-62.
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5 Public Entity Plaintiffs request judicial notice of six documents, attached to the
6 Declaration of John Fiske. The requests are unopposed. With respect to Exhibits 1-3, I grant
7 judicial notice of the fact that the various PUC filings in connection with the applications for
8 rehearing were made on the relevant dates in January 2018 but deny judicial notice of the fact
9 that the decision is not yet final, as that fact is disputed. *Compare* Public Entity Plaintiffs RJN,
10 1-3; Reply, 10-11. For Exhibits 4-6, I grant the unopposed requests. Public Entity Plaintiffs
11 RJN, 3-5; Evid. Code § 452(c).
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13 Subrogation Plaintiffs request judicial notice of four documents, attached to their Request
14 for Judicial Notice. The requests are unopposed. With respect to Exhibits 1-3, I grant judicial
15 notice of the fact that the documents were filed in PUC proceedings but deny judicial notice of
16 the fact that the decision is not yet final as that fact is disputed. *Compare* Subrogation Plaintiffs
17 RJN, 1-3; Reply, 19-11. I also grant judicial notice of Exhibit 4, which is the Subrogation
18 Plaintiffs' Master Complaint in this action. (But I would consider all Master Complaints that are
19 challenged by the present demurrer without the need for a request for judicial notice.)
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22 **Inverse Condemnation**

23 **1. Availability of Inverse Condemnation**

24 As all parties agree, there are two significant cases on the issue of the availability of
25 inverse condemnation. *Barham v. Southern Cal. Edison Co.*, 74 Cal.App.4th 744, 751 (1999);
26 *Pacific Bell Telephone Co. v. Southern California Edison Co.*, 208 Cal.App.4th 1400 (2012).
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1 PG&E's papers are ambiguous as to whether PG&E challenges those cases (i) and desires me to
2 bypass them,¹ or (ii) because they are distinguishable.² At argument PG&E sought to clarify that
3 at least at this trial court level it takes the latter position. By the end of argument, though, it was
4 clear PG&E took the former position. The basic premises of PG&E's challenge is "that inverse
5 condemnation is wholly inapplicable to a privately owned utility whose rates are set by a
6 regulatory body, such as PG&E." Demurrer, 9:6-8.

8 Plaintiffs in an inverse condemnation case must prove that a public entity has taken or
9 damaged their property for a public use. *Barham*, 74 Cal.App.4th at 751. *Barham* held Southern
10 California Edison Company (SCE) was a "public agency" that damaged the plaintiffs' property
11 for a "public use." *Id.* at 751-52. This was so even though SCE was a privately owned public
12 utility. The Court held it still qualified as a pertinent "public entity." *Id.* at 752-53. The Court
13 refused a test that distinguished privately owned utilities as not subject to inverse
14 condemnation—there was "no rational basis" for such a distinction. *Id.*

16 *Barham* was reviewed in *Pacific Bell Telephone Co. v. Southern California Edison Co.*,
17 208 Cal.App.4th 1400 (2012). *Pacific Bell* agreed with *Barham*. *Pacific Bell* emphasized SCE's
18 "monopolistic or quasi-monopolistic authority, deriving directly from its exclusive franchise
19 provided by the state[,] as a basis to distinguish other authority that rejected the application of
20 inverse condemnation liability. *Id.* at 1406. The Court explained that "the government has
21 chosen to grant a franchise and delegate the furnishing of electricity to [SCE] rather than
22 operating the utility itself. Such a delegation does not remove the policy justifications
23 underlying the inverse condemnation liability, that individual property owners should not have to
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27 ¹ PG&E's Memorandum In Support (Demurrer) at 10:22, 16:19- "mistaken assumptions"; 13:20-PG&E asks me to agree with commissioners that appellate authority is in error.

² *Id.* at e.g., 14:22.

1 contribute disproportionately to the risks from public improvements made to benefit the
2 community as a whole.” *Id.* at 1407.

3 PG&E reads the result in these two cases, and their discussion of the cost sharing
4 rationale of inverse condemnation, as simply reflecting the *lack of a record* that the utility would
5 not be able to pass on to the public inverse condemnation damages.³ So it offers evidence here
6 that the California Public Utilities Commissions (PUC) will not “automatically” allow utilities to
7 pass on their damages liability. Demurrer, 10, 13. PG&E’s primary document is a PUC decision
8 stating that inverse condemnation principles are irrelevant to the reasonableness review through
9 which the PUC applies a “prudent manager” standard to assess whether a utility may increase
10 rates to recover damages. Eggleton Decl., Ex. B at 65, 69-73.⁴

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13 Even if PG&E were right that proof that a privately-owned public utility will be unable to
14 recoup its losses through rate increases eviscerates a plaintiff’s right to inverse condemnation, I
15 would overrule the demurrer. Taking the PUC decision at face value, the loss spreading
16 rationale may be satisfied in this case so long as PG&E acted as a “prudent manager.” Whether
17 PG&E acted as a “prudent manager” is disputed—PG&E of course contends it will eventually
18 show that it *met* that standard. I cannot say that as a matter of law that there will be no loss
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22 ³ The fundamental policy “underlying the concept of inverse condemnation is that the costs of a public improvement
23 benefiting the community should be spread among those benefited rather than allocated to a single member of the
24 community.” *Pacific Bell*, supra, 81 Cal.App.4th at 602; see also e.g., *Williams v. Moulton Niguel Water Dist.*, No.
G053002, 2018 WL 2057534, at *6 (Cal. Ct. App. May 3, 2018) (purpose of inverse condemnation to ensure that
individual property owners are not compelled to bear burdens or incur costs that, in fairness and justice, should be
borne by the public at large).

25 ⁴ The document may be limited to the case then before the PUC, and even there it’s not clear how much weight to be
26 given to the PUC’s statement that “Inverse Condemnation principles” are not relevant to the “prudent manager
27 standard” – the utility itself withdrew testimony on inverse condemnation. Eggleton Decl., Ex. B at 65. As the
paragraph that follows that quote implies, it may be the PUC only meant that it, and not a superior court via some
sort of judgment, would decide how to apply the PUC’s ‘prudent manager’ standard. Evidence that the PUC has not
allowed a different utility to pass on damages liability in a different case is not indisputable proof that the PUC will
not allow PG&E to pass on its damages here.

1 spreading in this case. Cf. *Pacific Bell*, 208 Cal.App.4th at 1407 (noting absence of any
2 evidence that the commission would not allow SCE to pass on its damages liability).

3 But PG&E is not correct to suggest that a lack of proof of cost spreading (or some
4 showing that cost spreading may not be available) is material to the decision, on demurrer,
5 whether inverse condemnation is available. By the end of argument before me, it became clear
6 that PG&E's position was founded on the fact that for privately owned utilities, there is never a
7 guarantee that the regulatory agency will permit cost spreading via e.g. increased rates, whereas
8 with publically owned utilities there is always some tax revenue to fall back on. These facts,
9 PG&E argued, mean that it is never possible for privately owned utilities to be subject to inverse
10 condemnation.
11

12 That position is flatly contradicted by *Pacific Bell*, which upheld an inverse
13 condemnation claim against a privately owned utility. *Pacific Bell* emphasized the fact that SCE
14 operated a state-authorized monopoly or quasi-monopoly. 208 Cal.App.4th at 1406. Even when
15 it noted the "loss spreading" rationale, the Court couched the rationale in terms that emphasized
16 the policy against overburdening individual property owners rather than the policy of socializing
17 the cost. *Id.* at 1407-08. The implication is that the *Pacific Bell* Court would have reached the
18 same result even if there had been evidence that the PUC would bar SCE from passing along its
19 damages liability to its ratepayers.
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22 **2. Whether Application of Inverse Condemnation Violates the Takings
23 Clause**

24 "The Takings Clause of the Fifth Amendment provides: '[N]or shall private property be
25 taken for public use, without just compensation.' The aim of the Clause is to prevent the
26 government 'from forcing some people alone to bear public burdens which, in all fairness and
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1 justice, should be borne by the public as a whole.” *Eastern Enters. v. Apfel*, 524 U.S. 498, 522
2 (1998) (citation omitted).

3 Although PG&E compares inverse condemnation claim to strict liability, it provided no
4 case in which a court invalidated a state law that required an entity that damaged property to pay
5 for that damage in strict liability. Instead, it relies on several regulatory takings cases.
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7 In that context, “a party challenging governmental action as an unconstitutional taking
8 bears a substantial burden. ... [T]he process for evaluating a regulation’s constitutionality
9 involves an examination of the ‘justice and fairness’ of the governmental action. [Citation.] That
10 inquiry, by its nature, does not lend itself to any set formula, [citation], and the determination
11 whether “‘justice and fairness’ require that economic injuries caused by public action [must] be
12 compensated by the government, rather than remain disproportionately concentrated on a few
13 persons,’ is essentially ad hoc and fact intensive, [citation].” *Eastern Enters.*, 524 U.S. at 523
14 (citations omitted). Several factors have particular significance: The economic impact of the
15 regulation, its interference with reasonable investment backed expectations, and the character of
16 the governmental action. *Id.* at 523-24. With respect to public utilities, “[t]he guiding principle
17 has been that the Constitution protects utilities from being limited to a charge for their property
18 serving the public which is so ‘unjust’ as to be confiscatory.” *Duquesne Light Co. v. Barasch*,
19 488 U.S. 299, 307 (1989).
20
21

22 PG&E argues, without authority, that inverse condemnation liability is an
23 unconstitutional taking unless PG&E is guaranteed to recover damages through its rates. Such
24 authority as there is suggests the proper time for PG&E to raise a challenge is if, and when, the
25 PUC denies PG&E’s request to recover any inverse condemnation costs. *Duquesne*, 488 U.S. at
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1 307. PG&E's Takings Clause argument amounts to a challenge to a PUC decision that has not
2 been, and may never be, made.

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4 Anyway, given the fact intensive inquiry involved, the issue cannot be resolved on
5 demurrer. The economic impact of the regulation is unknown until damages are fixed. PG&E's
6 investment backed expectations are not in evidence. The Takings Clause analysis is fact
7 intensive, and so not for a demurrer. Compare *Duquesne*, 388 U.S. at 310-16 (performing a
8 Takings Clause analysis in the context of a utility).

9
10 **3. Whether Application of Inverse Condemnation Violates Substantive
Due Process**

11 "The Due Process Clause of the Fourteenth Amendment prohibits the imposition of
12 grossly excessive or arbitrary punishments on a tortfeasor." *State Farm Mut. Auto Ins. Co. v.*
13 *Campbell*, 538 U.S. 408, 416 (2003) (discussing constitutional limitations on punitive damages).
14 PG&E argues that imposing inverse condemnation liability on a public utility that is not
15 guaranteed to recover its costs through automatic rate recovery because (1) such a scenario is
16 contrary to the loss spreading rationale that supports a claim for inverse condemnation; and (2)
17 such an imposition is unnecessary because PG&E is subject to general tort liability. Demurrer,
18 20-21.

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20 It is not arbitrary or irrational to require a privately owned public utility, which has been
21 granted a monopoly or quasi-monopoly status by the state and which is authorized to pass on its
22 costs to its ratepayers upon satisfying a prudent manager standard, to pay property owners for the
23 damages caused by its instrumentalities. This scenario is consistent with the policy articulated in
24 *Pacific Bell*. See *Pacific Bell*, 208 Cal.App.4th at 1406-08. At best, PG&E raises the possibility
25 that it may not be able to spread the losses. But is not arbitrary or irrational to deny PG&E the
26 opportunity to spread its losses where it fails to satisfy a prudent manager standard.
27

1 **PG&E Corporation's Holding Company Status**

2 PG&E argues that PG&E Corporation cannot be a liable for inverse condemnation
3 because it is a holding company. Demurrer, 17 n.9. PG&E supports the argument with a cryptic
4 citation to *Barham*. *Id.* PG&E seems to suggest that, as a holding company, PG&E Corporation
5 did not own, control, operate, or manage any electric plant for compensation within the state of
6 California. *Barham*, 74 Cal.App.4th at 752. This inference is contrary to the allegations in the
7 demurrer, and so not here cognizable. Individual Plaintiffs' Master Complaint ¶ 11; Public
8 Entity Plaintiffs' Master Complaint ¶ 11; Subrogation Plaintiffs' Master Complaint ¶ 11.
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12 **Conclusion**

13 The demurrers are overruled.

14 PG&E asked me to certify the inverse condemnation issue to the Court of Appeal under
15 C.C.P. § 166.1. To be sure the issue is of great interest, but that is not the test. I decline to
16 certify because there is little I can add that the appellate court cannot discern from a petition for a
17 writ. There may be a 'controlling issue of law' but only as to one cause of action---the case must
18 proceed on the other claims, with much the same discovery, whether inverse condemnation is
19 involved or not.⁵
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25 ⁵ To delve a bit into the practicalities: If the PUC's "prudence" standard is roughly equivalent to negligence, then
26 (A) if PG&E was prudent (and not negligent) it will pay damages as inverse condemnation, but not for negligence
27 (tort) liability; (B) if it was not prudent, and if PG&E is right that it cannot be liable for inverse condemnation (since
damages cannot be passed on via rate hikes), then it will still pay damages as a function of tort liability. The
practical difference between PG&E being right and wrong on the legal issue decided in this order pertains,
primarily, to the settlement value of the cases to the extent that evidence of PG&E's negligence is not clear.

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The two principal cases I and the parties have discussed, *Pacific Bell* and *Barham*, do not suggest a reasonable, contrary view of the law. If there is such a contrary view, it will be that of an appellate opinion yet to come, and my views are not material.

PG&E must answer the pending complaints not later than June 11, 2018.

Dated: May 21, 2018



Curtis E.A. Karnow
Judge Of The Superior Court

CERTIFICATE OF ELECTRONIC SERVICE
(CCP 1010.6(6) & CRC 2.260(g))

I, DANIAL LEMIRE, a Deputy Clerk of the Superior Court of the County of San Francisco, certify that I am not a party to the within action.

On **MAY 21 2018**, I electronically served THE ATTACHED DOCUMENT via File & ServeXpress on the recipients designated on the Transaction Receipt located on the File & ServeXpress website.

Dated: **MAY 21 2018**

T. Michael Yuen, Clerk

By:



DANIAL LEMIRE, Deputy Clerk