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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

IN RE: No C-02-1550 VRW  
PACIFIC GAS and ELECTRIC CO, (Bankruptcy Case No 01-30923 DM)  
Appellant, Cross- Chapter 11 Case  
Appellee, Debtor and Debtor in Possession  
Federal ID No 94-0742640 ORDER

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The People of the State of California, the California Public Utilities Commission (CPUC) and the City and County of San Francisco (collectively, objectors) move to dismiss for lack of appellate jurisdiction the appeal of Pacific Gas and Electric Company (PG&E) and its parent company, PG&E Corporation, from the bankruptcy court's order entered on March 18, 2002. Doc #45. PG&E also moves, in the alternative, for leave to file an interlocutory appeal of that order pursuant to 28 USC § 158(a)(3).

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I

On April 6, 2001, PG&E filed a voluntary petition under chapter 11 of title 11 of the United States Code (bankruptcy code) in the United States Bankruptcy Court for the Northern District of California. On December 19, 2001, PG&E and its parent company filed their first amended plan (December plan) of reorganization and their first amended disclosure statement. See RJN, Exhs C and D.

Central to the December plan is the disaggregation of PG&E, which involves the transferring of PG&E's assets to four new companies to be owned by its parent: ETrans, which would contain PG&E's electric transmission assets; GTrans, PG&E's gas transmission assets; Gen, PG&E's generation assets; and the Reorganized PG&E, which would continue in the retail sale and distribution of electricity and gas. As a result of this restructuring, according to PG&E, three of the new entities will no longer be subject to the regulatory jurisdiction of the CPUC. Rather, the entities involved in electric transmission, interstate gas transmission and electric generation will be under the exclusive ratemaking jurisdiction of the Federal Energy Regulatory Jurisdiction (FERC).

The California parties objected to this proposed restructuring, arguing that such restructuring would violate a variety of state laws. Objectors contend, for example, that such disaggregation would violate a law, enacted in January 2001, which imposed a moratorium on the sale of generation facilities by prohibiting an owner of electric generation facilities from disposing of any such facilities until January 1, 2006. Cal Pub

1 Util Code § 377. Objectors also contend that several of the  
2 critical transactions proposed in the December plan would require  
3 state regulators to review and approve them under state health,  
4 safety, welfare and environmental statutes, including the  
5 California Environmental Quality Act (CEQA). Objectors filed  
6 objections to PG&E's disclosure statement, arguing that the plan  
7 (1) impermissibly sought to preempt state and federal law not  
8 subject to preemption and (2) sought declaratory and injunctive  
9 relief against California in violation of principles of sovereign  
10 immunity.

11 In response to these objections, PG&E asserted that all  
12 state--and most if not all other non-bankruptcy--laws are expressly  
13 preempted by section 1123(a)(5) of the bankruptcy code insofar as  
14 they purport to prohibit, veto or nullify transactions necessary to  
15 implement the restructuring proposed in the plan.

16 On February 7, 2002, the bankruptcy court issued its  
17 memorandum decision regarding preemption and sovereign immunity.  
18 RJN, Exh B. In this decision, the bankruptcy court rejected PG&E's  
19 "across-the-board, take-no-prisoners" claim that section 1123(a)(5)  
20 allowed it to "disaggregate with unfettered preemption of any  
21 contrary nonbankruptcy law." Id at 46, 40. The bankruptcy court  
22 did not, however, reject PG&E's plan outright, but directed PG&E to  
23 submit a revised disclosure statement in which it more specifically  
24 describes the laws PG&E seeks to preempt and explains generally the  
25 reasons why PG&E believes it necessary to preempt said laws. The  
26 bankruptcy court, in fact, expressed its "belie[f] that the Plan  
27 could be confirmed if Proponents are able to establish with  
28 particularity the requisite elements of implied preemption;" and

1 noted that "[i]f the Disclosure Statement is amended consistent  
2 with this Memorandum Decision, the court will approve it and let  
3 the Proponents test preemption at confirmation." Id at 3.

4 At the end of its order, the bankruptcy court discussed  
5 the options for PG&E if it wished to seek review of the memorandum  
6 decision. See id at 46-48. The bankruptcy court first noted that  
7 if PG&E wished, the bankruptcy court would enter an order  
8 disapproving the disclosure statement. Noting that the denial of  
9 approval of a disclosure statement is interlocutory, the bankruptcy  
10 court stated that PG&E would be required to attempt an appeal of an  
11 interlocutory order, which would rest within the discretion of the  
12 district court or the bankruptcy appellate panel. See id at 47.  
13 The court also stated that, in the alternative, it would "consider  
14 a proper request to certify the order disapproving the Disclosure  
15 Statement under [FRCP] 54(b), made applicable by Fed R Bankr P  
16 7054(a) and Fed R Bankr P 9014." Id.

17 PG&E thereafter pursued all options available for  
18 appellate review. On March 6, 2002, PG&E filed a second amended  
19 plan of reorganization and disclosure statement, which sought to  
20 preempt specified state statutes under the principles of implied  
21 preemption discussed in the memorandum decision. PG&E also filed a  
22 "protective" motion for leave to file an interlocutory appeal under  
23 28 USC § 158(a)(3). Concurrently, PG&E filed a request for final  
24 judgment and/or order regarding the preemption ruling in the  
25 memorandum decision. PG&E asked the bankruptcy court to certify an  
26 order disapproving the disclosure statement on express preemption  
27 grounds for immediate appeal pursuant to FRCP 54(b) or, in the  
28 alternative, for an order disapproving the disclosure statement

1 with findings supporting immediate interlocutory appeal.

2 On March 18, 2002, the bankruptcy court issued an order  
3 and judgment disapproving the disclosure statement and providing  
4 FRCP 54(b) certification, noting:

5 The court has ruled on the issue of express preemption.  
6 Unless reversed on appeal, the law of the case has been  
7 established: there is no express preemption under 11 USC  
§ 1123(a) of all state laws that conflict with the Plan  
or the Debtor's implementation of it if confirmed.

8 RJN, Exh A at 5.

9 PG&E's appeal timely followed. By way of the instant  
10 motion, the court must determine whether it, indeed, has  
11 jurisdiction over this appeal, which requires the court to consider  
12 whether FRCP 54(b) certification was proper.

13  
14 II

15 "[FRCP] 54(b) controls the analysis of finality of  
16 judgments for purposes of appeal in federal civil actions,  
17 including bankruptcy proceedings." Belli v Temkin (In re Belli),  
18 268 BR 851, 855 (BAP 9th Cir 2001). FRCP 54(b), which has been  
19 incorporated into the bankruptcy code by Fed R Bankr P 7054(a),  
20 provides that:

21 When more than one claim for relief is presented in an  
22 action, \* \* \* or when multiple parties are involved, the  
23 court may direct the entry of a final judgment as to one  
24 or more but fewer than all of the claims or parties only  
upon an express determination that there is no just  
reason for delay and upon an express direction for the  
entry of judgment.

25 A FRCP 54(b) certification of a ruling is treated as a  
26 final order, over which appellate jurisdiction in the district  
27 court exists "as of right," pursuant to 28 USC § 158(a)(1).

28 "When considering the wisdom of [FRCP] 54(b)

1 certification in a given case, the trial court must first assess  
2 the finality of the disputed ruling." Speigel v Trustees of Tufts  
3 College, 843 F2d 38, 43 (1st Cir 1988), citing Curtiss-Wright Corp  
4 v General Electric Co, 446 US 1, 7 (1980); United States General,  
5 Inc v Albert, 792 F2d 678, 680-81 (7th Cir 1986); Bank of New York  
6 v Hoyt, 108 FRD 184, 186 (DRI 1985). "As an adjunct to this  
7 inquiry, of course, it must be shown that the ruling, at a bare  
8 minimum, disposes fully 'of at least a single substantive claim.'" Id, quoting, Acha v Beame, 570 F2d 57, 62 (2d Cir 1978). After  
9 making the finality determination, the certifying court must then  
10 determine whether there is any just reason for delay in entering  
11 judgment. The certifying court's finality determination is  
12 generally reviewed de novo, while the weighing of the equities  
13 involved in the "just reason for delay" determination is reviewed  
14 for an abuse of discretion, as long as the certifying court's  
15 reasoning is apparent from the certification opinion. See Speigel,  
16 843 F2d at 44.

18 In the Ninth Circuit, "[t]he present trend is toward  
19 greater deference to a \* \* \* court's decision to certify under  
20 [FRCP] 54(b)." Cadillac Fairview v United States, 41 F3d 562, 564  
21 n1 (9th Cir 1994), quoting Texaco, Inc v Ponsoldt, 939 F2d 794, 798  
22 (9th Cir 1991). Moreover, in the bankruptcy context, courts adopt  
23 a pragmatic approach in applying the finality requirement, as "the  
24 idiosyncracies of bankruptcy sometimes make it difficult to discern  
25 whether orders entered in bankruptcy cases are final in the classic  
26 sense \* \* \*." In re Belli, 268 BR at 854, citing Catlin v United  
27 States, 324 US 229, 233 (1945); Elliot v Four Seasons Props, 979  
28 F2d 1358, 1362-64 (9th Cir 1992). Under this pragmatic approach,

1 courts apply the finality requirement of FRCP 54(b) and § 158(a)  
2 with more flexibility. "'Flexible finality' focuses upon whether  
3 the order affects substantive rights and finally determines a  
4 discrete issue." Id, citing Dominguez v Miller, 51 F3d 1502, 1506  
5 (9th Cir 1995); Frontier Props, 979 F2d at 1363; 16 Charles A  
6 Wright et al, Fed Prac & Proc § 3926.2 (1992).

7  
8 III

9 Before the bankruptcy court, PG&E asserted that section  
10 1123(a) of the bankruptcy code expressly preempts any non-  
11 bankruptcy law that may be otherwise applicable to the  
12 implementation of the plan and, particularly, the proposed  
13 restructuring transactions. In PG&E's words:

14 Section 1123(a) of the Bankruptcy Code preempts any  
15 otherwise applicable non-bankruptcy law that may be  
16 contrary to its provisions. Accordingly, a plan may  
17 contain certain provisions that would not normally be  
18 permitted under non-bankruptcy law. For example, section  
19 1123(a)(5) of the Bankruptcy Code authorizes, among other  
20 things, the sale or transfer of assets by [PG&E] without  
21 the consent of the State or the [CPUC].

22 Disclosure Statement (RJN, Exh D) at 4:18-23.

23 PG&E also argued:

24 The preemptive effect of the Confirmation Order extends  
25 to all statutes, rules, orders and decisions of the CPUC  
26 otherwise applicable to the Restructuring Transactions  
27 and the implementation of the Plan. In the Proponents'  
28 view, the Confirmation Order supersedes any statute,  
rule, order or decision that the CPUC might interpret to  
otherwise apply to the Restructuring Transactions and the  
implementation of the Plan whether specified or not.

Id at 129:15-20.

Section 1123 provides:

(a) Notwithstanding any otherwise applicable  
nonbankruptcy law, a plan shall--

1 \* \* \*

2 (5) provide adequate means for the plan's implementation,  
3 such as--

4 \* \* \*

5 (B) transfer of all or any part of the property of  
6 the estate to one or more entities, whether  
7 organized before or after the confirmation of such  
8 plan;

9 Essentially, PG&E's claim is that this language reflects  
10 an express determination by Congress to preempt all state law that  
11 might otherwise apply to the restructuring transactions. Under  
12 this interpretation, among other things, the state law prohibition  
13 of transferring generation assets, expressed in Cal Pub Util Code §  
14 377, would be per se inapplicable to the transferring of PG&E's  
15 generating assets to the new generation entity: Gen. Nor would  
16 authorization by the CPUC of the transfer of generation assets,  
17 pursuant to Cal Pub Util Code § 851, be necessary. Nor would a  
18 CEQA review of the transfer of assets be permitted. In short, if  
19 the confirmation plan were approved, disaggregation and the  
20 creation of the new limited liability companies to operate under  
21 FERC jurisdiction would proceed without any reference to state law  
22 prohibitions and requirements and without the need for the  
23 authorization of state regulators. Once restructured, however, the  
24 four entities would be subject to all applicable ongoing state and  
25 federal regulations.

26 As noted, in the February 7 memorandum decision, the  
27 bankruptcy court rejected this interpretation of section 1123(a),  
28 holding that this section did not allow PG&E to "disaggregate with  
unfettered preemption of any contrary nonbankruptcy law." Mem Dec  
(RJN, Exh B) at 40. If this were the extent of the bankruptcy

1 court's ruling, this court's review of the FRCP 54(b) certification  
2 would be simpler, as the court has little doubt that an unqualified  
3 rejection of the preemption provisions of PG&E's plan would present  
4 a final determination of a discrete claim, thereby permitting  
5 appellate review as of right.

6           The bankruptcy court did not, however, finally reject  
7 PG&E's claims that the bankruptcy code preempted state laws  
8 standing as obstacles to the restructuring transactions. Rather,  
9 the bankruptcy court reserved for a future determination whether  
10 PG&E's plan could be confirmed under principles of implied  
11 preemption, principles which will be discussed in further detail  
12 below. The bankruptcy court, in other words, did not foreclose the  
13 possibility that any and all state laws relating to the  
14 restructuring transactions could be preempted, upon an appropriate  
15 showing by PG&E.

16           The existence of this possibility complicates the  
17 analysis for this court because, as the objectors correctly note,  
18 generally the fact that ongoing action in the lower court may  
19 provide the exact relief requested in the appellate court, so that  
20 the need for appellate review would vanish, is treated "as a major  
21 negative in the [FRCP] 54(b) equation." Spiegel, 843 F2d at 45.

22           In a related contention, objectors also assert, with some  
23 persuasiveness, that the theories of express and implied preemption  
24 in this case are not distinctly separate claims, but are merely  
25 "different sides of the same coin," offered as alternate grounds in  
26 support of the same relief and subsumed by a single critical  
27 inquiry, namely: "whether the structure and purpose of the  
28 Bankruptcy Code evince an intent by Congress to displace the laws

1 PG&E claims are preempted." Obj Br at 5. Objectors are correct  
2 that the doctrines of express and implied preemption, at a high  
3 level of generality, are not easily distinguishable as applied to  
4 this case. Objectors are also correct that these theories of  
5 preemption are largely but alternate theories in search of a single  
6 result: preemption. Yet the court concludes that, considered with  
7 the proper degree of specificity, the bankruptcy court's rejection  
8 of PG&E's claim of express preemption presents a final  
9 determination of a discrete claim with definite, pronounced  
10 consequences, including altering and elevating PG&E's burden of  
11 proof, that no just reason for delay is present and that  
12 certification of this decision was, thereby, appropriate pursuant  
13 to FRCP 54(b).

14 By rejecting the claim that Congress expressly provided  
15 for the preemption of any state law otherwise applicable to the  
16 restructuring transactions, the bankruptcy court determined that  
17 applicable state laws could be preempted only if those laws are  
18 preempted by implication; if, in other words, otherwise applicable  
19 state laws "stand[] as an obstacle to the accomplishment and  
20 execution of the full purposes and objectives of Congress." Mem  
21 Dec (RJN, Exh B) at 13, quoting Baker & Drake, Inc v Public Serv  
22 Comm'n, 35 F3d 1348, 1353 (9th Cir 1994). In order to demonstrate  
23 implied preemption, under this standard, PG&E will have to meet an  
24 evidentiary burden not present under its claim of express  
25 preemption. PG&E will have to specify the state laws it believes  
26 are preempted by implication and support its contention that the  
27 execution of the purposes of the bankruptcy code would be hindered  
28 by the operation of those state laws. Under its theory of express

1 preemption of any otherwise applicable state laws, however, PG&E  
2 must neither identify state laws with specificity, nor discuss  
3 those laws with reference to the purposes of the bankruptcy code.

4           Accordingly, as part of PG&E's elevated burden of proof,  
5 a demonstration of implied preemption will require PG&E to address  
6 issues that are flatly irrelevant to its express preemption claim.  
7 After identifying the relevant state laws, PG&E will have to  
8 address the purpose of the individual state law to be preempted, so  
9 that the bankruptcy court can apply a "balancing test," in which  
10 federal preemption will be more likely when the challenged state  
11 law involves economic regulation rather than health or safety. See  
12 *id* at 14-15. As the bankruptcy court noted, under such a test, the  
13 state's environmental regulations may well pose a formidable hurdle  
14 to preemption. See *id* at 32-33 n 22 (noting that "preemption is  
15 particularly unlikely for environmental matters"). Under an  
16 implied preemption theory, therefore, PG&E will not only be  
17 required to meet a substantial burden of persuasion for each  
18 individual state law sought to be preempted, but will face a strong  
19 possibility that such burden will not be met for each state law.

20           In order to succeed on a claim of implied preemption,  
21 PG&E will also have to demonstrate that the otherwise applicable  
22 state law stands as "obstacle" to the accomplishment and execution  
23 of the purposes of the bankruptcy code. *Id* at 41. Within this  
24 showing, it appears that the bankruptcy code will require PG&E to  
25 demonstrate that the proposed disaggregation itself is compelled by  
26 economic necessity. See *id* at 31. In other words, the bankruptcy  
27 court will apparently proceed under the theory that state laws are  
28 not preempted as obstacles to accomplishing the purposes of the

1 bankruptcy code, which includes allowing debtors to restructure,  
2 unless those laws must be preempted, that is, unless restructuring  
3 was not feasible in a manner that complied with state law. This  
4 interpretation of the bankruptcy code may well be correct, but it  
5 is in stark contrast to the theory of express preemption argued by  
6 PG&E, with dramatic consequences for PG&E's required showing and  
7 its chance of success.

8           These considerations lead to the conclusion that  
9 disaggregation based on express preemption is a different claim  
10 from disaggregation based on implied preemption. "Different  
11 burdens may imply different 'claims.'" NAACP v American Family  
12 Mutual Insurance Co, 978 F2d 287, 293 (7th Cir 1992). Here, PG&E's  
13 burden under its theory of express preemption is considerably  
14 lighter than its burden of demonstrating implied preemption of each  
15 otherwise applicable law.

16           The difference between the theory of express preemption  
17 advocated by PG&E and the theory of implied preemption accepted by  
18 the bankruptcy court is a product of the bankruptcy court's  
19 determination of the proper construction of the statutory provision  
20 at issue: 28 USC § 1123(a)(5). The bankruptcy court determined  
21 that this section was merely a "directive" to the plan proponent  
22 about what types of things must be part of the proposed plan and  
23 not an "empowering" statute, affirmatively freeing the plan  
24 proponent from state law otherwise applicable to, among other  
25 things, the transfer of property. This statutory determination too  
26 indicates that the bankruptcy court reached a final determination  
27 of a discrete legal claim. As noted, to go forward below PG&E must  
28 operate under a legal theory imposing much different and higher

1 evidentiary and persuasive burdens. On the other hand, if PG&E's  
2 statutory construction is correct, PG&E's December plan, as  
3 proposed, would be confirmable. See 3/18/02 Order (RJN, Exh A) at  
4 3("The court has no doubt \* \* \* that the Plan, dependent upon  
5 express preemption, is confirmable."). Accordingly, the court  
6 shares the bankruptcy court's view that PG&E's express preemption  
7 claim "is as much a claim for relief in the context of a proposed  
8 Chapter 11 reorganization plan as any other 'cause of action' in  
9 traditional litigation seeking relief." Id.

10 The court also determines that the bankruptcy court's  
11 determination that there is no just reason for delay is proper.  
12 The bankruptcy court examined both the "judicial administrative  
13 interests" disfavoring piecemeal appeals and the "equities  
14 involved." Curtiss-Wright Corp, 446 US at 8. The court has  
15 already determined that the bankruptcy court's determination that  
16 the express preemption claim was severable from the other claims  
17 was proper. The court also affirms the bankruptcy court's  
18 determination that potential mootness concerns are overwhelmed by  
19 the equities of this case, which suggest compelling reasons for  
20 advancing the potential resolution of this matter.

21 As the bankruptcy court noted:

22 This is a Chapter 11 case of enormous significance to  
23 thousands of creditors owed billions of dollars. It is  
24 clearly one of the largest bankruptcies in United States  
25 history, and definitely the largest involving a public  
26 utility. An attempt by a utility to free itself from  
27 state regulation to the extent contemplated by the Plan  
28 is virtually without precedent. Further, PG&E expects to  
pay creditors in full with interest, but already this  
case is nearly a year old and further delay should be  
avoided. Creditors have a real economic interest in a  
speedy resolution of this case. If a court on appeal  
believes that express preemption is available here, the  
rule of law should be settled forthwith.



1 review by circuit courts of certain interlocutory district court  
2 orders. See, e g, In re Belli, 268 BR at 858. Section 1292(b)  
3 provides, in relevant part:

4 When a district judge \* \* \* shall be of the opinion that  
5 such order involves a controlling question of law as to  
6 which there is substantial ground for difference of  
7 opinion and that an immediate appeal from the order may  
8 materially advance the ultimate termination of the  
9 litigation, he shall so state in writing in such order.

10 Pursuant to this standard, "[g]ranted leave is  
11 appropriate if the order involves a controlling question of law  
12 where there is substantial ground for difference of opinion and  
13 when the appeal is in the interest of judicial economy because an  
14 immediate appeal may materially advance the ultimate termination of  
15 the litigation." Kashani v Fulton, 190 BR 875, 882 (BAP 9th Cir  
16 1995). As discussed above, PG&E's appeal presents a controlling  
17 issue of law. Among other things, the bankruptcy court has  
18 expressed its opinion that if PG&E's theory of express preemption  
19 is correct, the December plan would be confirmable as a matter of  
20 law. See 3/18/02 Order (RJC, Exh A) at 3. Moreover, as also  
21 discussed above, resolving this issue expeditiously advances the  
22 interest of judicial economy and, particularly if the appeal is  
23 resolved in PG&E's favor, will hasten the resolution of PG&E's  
24 chapter 11 case, to the benefit of creditors and debtor alike.

25 Objectors contend that there is no substantial ground for  
26 difference of opinion on the merits of PG&E's express preemption  
27 claim. Objectors, of course, are confident in their position, but  
28 the court is not persuaded that this position is beyond substantial  
dispute. Indeed, a preliminary review of the arguments on the  
merits indicates that the case most directly on point, Public

1 Service Co of New Hampshire v New Hampshire (PSNH), 108 BR 854  
2 (Bankr DNH 1989), accepted in large part the theory of express  
3 preemption asserted by PG&E below. The bankruptcy court declined  
4 to follow PSNH, relying instead on the Ninth Circuit's decision in  
5 Baker & Drake v Public Serv Comm'n, 35 F3d 1348 (9th Cir 1994), but  
6 it does not appear that a theory of express preemption, pursuant to  
7 section 1123(a), was advanced in that case. See id at 1353 ("Baker  
8 claims that the Bankruptcy Act impliedly preempts Nevada's  
9 regulation of taxi services")(emphasis added).

10 Accordingly, the court determines that there does appear  
11 to be substantial difference of opinion on the controlling issue of  
12 law raised by PG&E. As resolution of PG&E's express preemption  
13 claim will substantially advance the ultimate termination of PG&E's  
14 bankruptcy case, the court determines that, in the event the  
15 bankruptcy court's FRCP 54(b) certification was error, the court  
16 would exercise its discretion to grant leave to hear this appeal.

17  
18 v

19 In sum, objectors' motion to dismiss for lack of  
20 jurisdiction (Doc #45) is DENIED. A hearing on PG&E's appeal is  
21 hereby SET for a hearing date on August 14, 2002, at 10:00 am.

22  
23 IT IS SO ORDERED.

24  
25  
26 \_\_\_\_\_  
VAUGHN R WALKER  
United States District Judge