DISTRICT COURT, BOULDER COUNTY, COLORADO 1777 Sixth Street Boulder, CO 80302 DATE FILED: November 22, 2022 4:26 PM CASE NUMBER: 2022CV30195	
Plaintiffs: **GEORGE KUPFNER and LISA KUPFNER, a married couple; ELDORADO ENTERPRISES, INC.; and ELDORADO LIQUOR, INC.; individually and on behalf of all other persons similarly situated,** v. Defendants: **PUBLIC SERVICE COMPANY OF COLORADO d/b/a XCEL ENERGY; and XCEL ENERGY INC.**	▲ COURT USE ONLY ▲ Case Number: **22CV30195** Division: 06 Courtroom: 5B
ORDER REGARDING PUBLIC SERVICE'S MOTION TO DISMISS	

I. INTRODUCTION

On December 30, 2021, a devastating fire thrashed through Boulder County causing extreme damage and destroying more than one thousand structures. Plaintiffs allege that Defendants' powerlines and equipment were a substantial factor in causing the blaze. They bring a class action complaint to assert claims for Inverse Condemnation, Negligence, Premises Liability, Trespass, Public Nuisance, Private Nuisance, and Loss of Consortium.

Public Service Company of Colorado d/b/a Xcel Energy ("PSCo")[1] moves to dismiss all claims.[2] PSCo asserts that the Filed Rate Doctrine precludes Plaintiffs' claims, and that Plaintiffs' Amended Complaint fails to allege sufficient facts to show that it acted negligently or intentionally.

II. THE FILED RATE DOCTRINE DOES NOT PRECLUDE PLAINTIFFS' CLAIMS

PSCo argues that the Filed Rate Doctrine precludes Plaintiffs' claims.

As explained by the Colorado Court of Appeals, Colorado law requires each public utility to file tariffs of:

[1] PSCo utilizes the name of its parent corporation, "Xcel Energy," as its d/b/a. To alleviate potential confusion, the Court adopts Defendants' abbreviations of "PSCo" for the subsidiary Public Service Company of Colorado and "XLE" for the parent Xcel Energy Inc.

[2] This Order does not consider XLE's separate Motion to Dismiss which argues for dismissal due to lack of personal jurisdiction. The Court will resolve that motion separately.

> rates, tolls, rentals, charges, and classifications collected or enforced, or to be collected and enforced, together with all rules, regulations, contracts, privileges, and facilities which in any manner affect or relate to rates, tolls, rentals, classifications, or service.

C.R.S. § 40-3-103 (quoted in Safehouse Progressive All. for Nonviolence, Inc. v. Qwest Corp., 174 P.3d 821, 825 (Colo. App. 2007).) "Where applicable, a filed tariff carries the force of law." Safehouse, 174 P.3d at 826. "Filed tariffs are not limited only to rates." Id.

> Not only is a carrier forbidden from charging rates other than as set out in its filed tariff, but customers are also charged with notice of the terms and rates set out in that filed tariff and may not bring an action against a carrier that would invalidate, alter or add to the terms of the filed tariff.

Id. (quoting Evanns v. AT&T Corp., 229 F.3d 837, 840 (9th Cir. 2000).) Thus, the "rights as defined by the tariff cannot be varied or enlarged by either contract or tort of the carrier." Safehouse, 174 P.3d at 826 (quoting Am. Tel. & Tel. Co. v. Cent. Office Tel., Inc., 524 U.S. 214, 222 (1998).) It follows that "a common law claim that is inconsistent with the terms of a filed tariff is barred [and] if the subject matter of a claim falls within a tariff's scope, then the extent of the carrier's liability may be limited by the tariff." Id. (internal citations omitted).

PSCo argues that its tariffs encompass Plaintiffs' allegations, and thus preclude Plaintiffs' claims. A review of PSCo's statutory delegation and published tariffs, however, reveal that their scope is much more limited.

The General Assembly lists its statutory delegation under Title 40, Article 3 of the Colorado Revised Statutes: "Regulation of Rates and Charges." Section 102 articulates the delegation and is entitled "Regulation of Rates – correction of abuses." It reads:

> The power and authority is hereby vested in the public utilities commission of the state of Colorado and it is hereby made its duty to adopt all **necessary rates, charges, and regulations** to govern and regulate all rates, charges, and tariffs of every public utility of this state to correct abuses; to prevent unjust discriminations and extortions in the rates, charges, and tariffs of such public utilities of this state; to generally supervise and regulate every public utility in this state; and to do all things . . . which are necessary or convenient in the exercise of such power . . .

C.R.S. § 40-3-102 (emphasis added).

Consistent with this delegation, PSCo has published Tariffs that govern the matters delegated to it by the General Assembly. An overview of the Electric Tariff Index[3] shows its clear

[3] These are listed under PSCo's "Electric Rate Book." See https://www.xcelenergy.com/company/rates_and_regulations/rates/rate_books

focus as pricing and delivery of services. For instance, the major sub-headings include "Electric Sales Rates," "Electric Sales Service Rates," "Rules and Regulations," and "Small Power Production and Cogeneration."

PSCo focuses its motion on the tariffs listed under its Rules and Regulations. But the topics there likewise are limited in scope to matters such as "General Service Provisions," "Deposits and Refunds," "Monthly Bills and Payment Options," "Discontinuance and Restoration of Service," "Access and Resale of Electric Energy," and "Residential Service."

In its reply, PSCo recites selected portions of Tariff R8 (General Statement) and Tariff R150 (Standards) to argue a purpose broader than sales and delivery. (Reply at 3). But the context PSCo removed from its quotations clarifies the limitations themselves. For instance, PSCo cites Tariff Sheet R8 to argue that it governs Plaintiffs' claims because PSCo is "subject to the Electric Installation Standards, the National Electrical Safety Code, and the Commission Rules." (Id.) Yet a full reading of the General Statement clarifies its focus:

> The following Rules and Regulations, filed with the Commission as a part of this Electric Tariff of the Company, set forth the terms and conditions **under which electric service is supplied** and govern all classes of service in all the territory served by the Company. The Rules and Regulations are subject to termination, change, or modification, in whole or in part, at any time as provided by the Commission Rules.
>
> **Service furnished by the Company** is also subject to the Electric Installation Standards, the National Electrical Safety Code, and the Commission Rules.

(Tariff Sheet R8 (emphasis added).)

The same holds true regarding PSCo's quotation of Tariff Sheet No. 150. (Reply at 3). There, PSCo quotes that it is obligated to standards that are distinct from common law because it must "construct, operate, and maintain its electric system . . . in accordance with the provisions of the [NESC] and the Commission Rules." (Reply at 3). The full section again narrows the Tariff's scope:

> ELECTRIC SYSTEM OPERATION AND MAINTENANCE
> The Company will construct, operate, and maintain its electric system in such manner as **to furnish good, safe, adequate, and continuous electric service** in accordance with the provisions of the National Electrical Safety Code and the Commission Rules.

(Tariff Sheet R150 (emphasis added).)

In short, the Tariffs govern service and pricing. They do not govern general common law or other statutory duties that corporations and individuals owe to one another outside that scope, such as duties of reasonable care in maintenance of their equipment.

Plaintiffs' claims do not involve disruption of service or a challenge to their rates. The claims are not inconsistent with the Tariffs, and they are not governed by them. Shoemaker v. Mountain States Tel. & Tel. Co., 559 P.2d 721, 723 (Colo. App. 1976).

Consequently, PSCo's argument fails.

III. PLAINTIFFS SUFFICIENTLY ALLEGE THEIR CLAIMS FOR RELIEF

A. Standard of Review

The purpose of a motion to dismiss for failure to state a claim is to test the formal sufficiency of the complaint. Dorman v. Petrol Aspen, Inc., 914 P.2d 909, 911 (Colo. 1996). To survive a Rule 12(b)(5) motion, the complaint must plead sufficient facts, taken as true and in the light most favorable to the plaintiff, to state a claim for relief that is plausible on its face. Warne v. Hall, 373 P.3d 588 (Colo. 2016) (embracing the plausibility standard in Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007) and Ashcroft v. Iqbal, 556 U.S. 662 (2009)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Iqbal, 556 U.S. at 677. That said, "[s]pecific facts are not necessary; the statement need only give the defendant fair notice of what the . . . claim is and the ground upon which it rests"; the 12(b)(5) standard does not "require that the complaint include all facts necessary to carry the plaintiff's burden." Khalik v. United Air Lines, 671 F.3d 1188, 1192 (10th Cir. 2012). However, "mere 'labels and conclusions' and 'a formulaic recitation of the elements of a cause of action' will not suffice." Id. at 1191 (quoting Twombly, 550 U.S. at 555). "Where a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief." Iqbal, 556 U.S. at 678 (internal quotations and citations omitted).

"In deciding whether to dismiss, the court may consider only the facts alleged in the pleadings, documents attached as exhibits or incorporated by reference in the pleadings, and matters of which the court may take judicial notice." Walker v. Van Laningham, 148 P.3d 391, 397 (Colo. App. 2006). A "motion to dismiss is properly granted when the plaintiff's factual allegations cannot support a claim as a matter of law." BRW Inc. v. Dufficy & Sons, Inc., 99 P.3d 66, 71 (Colo. 2004).

B. Negligence-Based Claims

PSCo first alleges that Plaintiffs fail to state a claim regarding their Second (negligence), Third (premises liability), Fifth (public nuisance)[4] and Sixth (private nuisance) claims for relief. It contends that Plaintiffs have failed to allege negligent conduct,[5] thus requiring dismissal.

The Court determines that Plaintiffs have sufficiently alleged negligence. Among the allegations in their Amended Complaint, Plaintiffs have alleged:

- "a fire . . . started near Marshall Road in Boulder, Colorado on the morning of December 30, 2021 [and] Defendants' powerlines and energy utility equipment were a substantial factor in the case, origin and continuance of the deadly Marshall Fire." (Am. C. ¶ 1).

- "Strong winds carried sparks from an Xcel powerline that started a ground fire in the Eldorado Springs-Marshall Mesa neighborhood." (Id. ¶ 2).

- "a witness videotaped sparks flying out of a malfunctioning powerline near the Shell gas station on 1805 South Foothills Highway in the Eldorado Springs neighborhood of Boulder, Colorado. The sparks from the powerline ignited a ground fire that came to be known as the 'Marshall Fire.'" (Id. ¶ 14).

- "Defendant Xcel at all times owned and operated the powerlines and utility equipment adjacent to Highway 93 near Marshall Road in Boulder, Colorado." (Id. ¶ 15).

- "Xcel spokesperson, Michelle Aguayo acknowledged that wires could have touched and arced. Arcing is the electrical breakdown of a gas, which often occurs when an electric current is exposed to air between two conductors, causing a prolonged surge of electricity and heat that can reach temperatures of up to 35,000 degrees Fahrenheit." (Id. ¶ 16).

- "In the past, arcing events in Xcel equipment caused fires. For example, in March of 2018, arcing events caused Xcel power poles to catch fire on twelve separate occasions in the same night." (Id.)

- "In October of 2003, strong winds caused a tree to fall into a utility pole that Xcel owned and operated. That fire came to be known as the 'Overland Fire' and it destroyed twelve homes in Boulder." (Id. ¶ 17).

- "Then, in October of 2007, Xcel equipment started the deadly Cabin Creek Fire that killed five employees and injured three other people." (Id. ¶ 18).

[4] PSCo refers to Plaintiffs' nuisance claims as "negligent nuisance." Because Plaintiffs may satisfy their nuisance claim through the mens rea of negligence, the Court evaluates Plaintiffs' claims as to whether they satisfy that threshold.

[5] For purposes of analysis, the Court accepts PSCo's proposition that each relies on Plaintiffs' ability to establish negligence.

- "On December 30, 2021, sparks from an Xcel powerline caused the most destructive wildfire in Colorado history to spread." (Id. ¶ 19).

PSCo contends that these allegations fail to show the precise negligent *conduct* in which PSCo engaged that would result in its liability. But Plaintiffs must only establish a claim for relief that is plausible on its face. Warne v. Hall, 373 P.3d 588 (Colo. 2016) (embracing the plausibility standard in Bell Atlantic Corp. v. Twombly, 550 U.S. 544 (2007) and Ashcroft v. Iqbal, 556 U.S. 662 (2009)). And, "[a] claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Iqbal, 556 U.S. at 677.

Plaintiffs here establish a plausible and reasonable inference that Defendants' powerlines, known to contain potential for fire danger, arced and thereby caused the Marshall Fire. They further allege that better maintenance or construction could have prevented the arcing or reduced the Marshall Fire's impact. (Am. C. ¶ 39, 44). To be certain, PSCo contests many of these alleged facts. (See, e.g., PSCo Mot. to Dismiss at 11 (arguing "the demonstrable inaccuracy of that factual allegation . . .") But the question before the Court is whether Plaintiffs' Amended Complaint establishes a plausible claim for negligence-based relief. Because it does, PSCo's motion fails regarding Plaintiffs' Second, Third, Fifth and Sixth claims for relief.

C. Plaintiffs' Trespass Claim Survives

PSCo next argues that Plaintiffs' trespass claim fails because they have not sufficiently alleged an intentional act by PSCo.

"The elements for the tort of trespass are a physical intrusion upon the property of another without the proper permission from the person legally entitled to possession of that property." Hoery v. United States, 64 P.3d 214, 217 (Colo. 2003) (citing Pub. Serv. Co. v. Van Wyk, 27 P.3d 377, 389 (Colo. 2001).) The intrusion,

> can occur when an actor intentionally enters land possessed by someone else, or when an actor causes something else to enter the land. For instance, an "actor, without himself entering the land, may invade another's interest in its exclusive possession by ... placing a thing either on or beneath the surface of the land."

Hoery, 64 P.3d at 217 (quoting Restatement (Second) of Torts §§ 158(a) cmt. i, 159(1) (1965).) As applicable here, a "landowner who sets in motion a force which, in the usual course of events, will damage property of another is guilty of a trespass on such property." Id. (citing Miller v. Carnation Co., 516 P.2d 661, 664 (Colo. App. 1973).) "It is enough that an act is done with knowledge that it will to a substantial certainty result in the entry of the foreign matter." Restatement (Second) of Torts § 158(a) cmt. i, (quoted in Hoery, 64 P.3d at 218).

Plaintiffs contend that they "establish Defendant's deliberate refusal to design, operate, and maintain its equipment in a reasonably safe manner, despite its actual knowledge of the high risk

of fire, and thereby establish its intent to cause a trespass and/or unreasonable interference with the use of Plaintiffs' property." (Resp. at 11).

Plaintiffs have stated a plausible inference that Defendants' alleged lack of maintenance and precaution yielded a "substantial certainty" that, in the usual course of events, a fire would enter Plaintiffs' land. Defendants' motion is denied as to Claim Four of Trespass.

D. Plaintiffs Have Sufficiently Alleged Their Inverse Condemnation Claim

Finally, PSCo argues that Plaintiffs' inverse condemnation claim fails because they did not sufficiently allege PSCo's intent to take property. (Mot. to Dismiss at 15). Again, the Court disagrees.

"Inverse condemnation is the 'taking,' without compensation, of private property for public or private use by a governmental or public entity which has refused to exercise its eminent domain power." Van Wyk, 27 P.3d at 386. "[A] taking is effected by a legal interference with the physical use, possession, enjoyment, or disposition of property, or by acts which translate to a governmental entity's exercise of dominion and control." Id. at 387.

> To establish a claim for inverse condemnation under the Colorado Constitution, a property owner must show that (1) there has been a taking or damaging of a property interest; (2) for a public purpose; (3) without just compensation; (4) by a governmental or public entity that has the power of eminent domain, but which has refused to exercise that power.

Scott v. Cnty. of Custer, 178 P.3d 1240, 1244 (Colo. App. 2007).

> Generally, a taking of property occurs when the entity clothed with the power of eminent domain substantially deprives a property owner of the use and enjoyment of that property. However, a taking cannot result from simple negligence by a governmental entity. For a governmental action to result in a taking, the consequence of the action which is alleged to be a taking must be at least a direct, natural or probable result of that action.
>
> Therefore, the taking must be a reasonably foreseeable consequence of an authorized action. In other words, the government must have the intent to take the property or to do an act which has the natural consequence of taking the property.

Id. at 1244 (internal quotations and citations omitted). Plaintiffs must therefore allege that Defendants (1) acted with intent; or (2) the action or decision has the natural, direct, foreseeable, or probable consequence of taking the property.

> In summary, based on the disjunctive nature of the *Trinity* test language, the case law supporting the supreme court's use of that language in *Trinity,* and the context provided by *Portsmouth, Ridge Line,* and *Fowler I,* . . . the *Trinity* test provides two alternative grounds under which a property owner may establish a takings claim. Under the first prong, the specific intent prong, a property owner may establish a takings claim by proving that a governmental entity had "the intent to take the property." Under the second prong, the causation prong, a property owner may establish a takings claim by proving that a governmental invasion had the "natural consequence of taking the property.

Scott v. Cnty. of Custer, 178 P.3d 1240, 1243–46 (Colo. App. 2007)

Here, as described above supra § III.B., Plaintiffs have articulated a plausible theory that satisfies the causation prong: that PSCo's maintenance and management gave rise to a natural, foreseeable consequence of taking the property. (See also, Am. Compl. ¶ 39, 40).

Plaintiffs also have sufficiently alleged their inverse condemnation claim.

IV. CONCLUSION

For the reasons discussed above, PSCo's Motion to Dismiss is Denied.

Done in Golden, Colorado this 22nd day of November, 2022.

BY THE COURT:

Christopher C. Zenisek
District Court Judge