No. 21-15571

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ANTHONY GANTNER, individually and on behalf of all those similarly situated,

Plaintiff-Appellant,

v.

PG&E CORPORATION, a California Corporation, and PACIFIC GAS & ELECTRIC COMPANY, a California Corporation

Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of California
No. 4:20-CV-02584-HSG
Hon. Haywood S. Gilliam, Jr.,
[an appeal from Bankruptcy Case No. 19-30088 (DM), Hon Donald Montali]

BRIEF OF AMICUS CURIAE ALICE STEBBINS, EXECUTIVE DIRECTOR EMERITUS OF THE CALIFORNIA PUBLIC UTILITIES COMMISSION IN SUPPORT OF APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

Amicus Curiae Alice Stebbins is an individual with no corporate affiliation and no financial interest, direct or indirect, in the outcome of this case.

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Amicus Alice Stebbins, by and through her counsel of record, and pursuant to Rules of Appellate Procedure 29(a) and 29(e)(4)(E), hereby certifies as follows:

1. All parties have consented to the filing of this amicus brief
2. No party or party's counsel authored this brief in whole or in part;
3. No party or party's counsel contributed money that was intended to fund the preparation or submission of this brief;
4. No person or entity other than Amicus Alice Stebbins and her counsel contributed money that was intended to fund the preparation or submission of this brief.

Dated: July 8, 2021

/s/ Joseph A. Creitz

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IDENTITY AND INTEREST OF AMICUS CURIAE ALICE STEBBINS

Alice Stebbins is an individual, a California resident, and the Executive Director Emeritus of the California Public Utilities Commission ("CPUC"). Ms. Stebbins is a California native with a 34-year-long career in public service, including managerial positions with the California Department of Justice, and Department of Transportation. For the last 19 years, Ms. Stebbins has worked in state agencies that regulate the environment and resource management, including the State Water Resources Control Board and the Air Resources Board. From February 2018, on the heels of the deadly 2017 wildfire season, through September 2020, Ms. Stebbins held the title of Executive Director of the California Public Utilities Commission (CPUC). In that role, Ms. Stebbins managed the operations of the CPUC and its regulated industries, including electricity, natural gas, telecommunications, water, transportation, rail, and enforcement and safety policy, while working with CPUC's Commissioners, setting policy, and directing the operations of the CPUC's 1,400 staff members. Ms. Stebbins has a deep personal historical understanding of the landscape of utility regulation and resource management in the state of California.

When serving as Executive Director, in March 2019, Ms. Stebbins organized and convened the first ever multidisciplinary conference of experts (fire personnel, utilities, technology experts, academics, and engineers), denominated the Wildfire Technology Conference, to identify every possible way that the CPUC and the State of California could assist utilities in preventing wildfires. The commission's fiscal

integrity, and wildfire prevention, were the principal two focuses of Ms. Stebbins tenure at the CPUC.

INTRODUCTION AND SUMMARY OF ARGUMENT

This appeal asks whether PG&E should be liable to its consumers for injuries caused by PG&E's own criminally negligent conduct. It is well- known that PG&E failed to maintain its power grid, resulting in catastrophic wildfires, deaths, and untold costs and suffering. Subsequently, PG&E engaged in Public Safety Power Shutoffs ("PSPSs"), colloquially referred to as "rolling blackouts," or "de-energization," in order to guard against further fires that might otherwise be sparked by PG&E's shoddily maintained grid. While orders of magnitude smaller than the injuries caused by actual fires, the PSPSs also inflicted significant injuries on PG&E's consumers, including the Appellant.

Erroneously, the Bankruptcy Court and the District Court both concluded that this lawsuit would interfere with the regulatory authority of the California Public Utilities Commission ("CPUC"), and therefore was barred by section 1759 of the California Public Utilities Code ("section 1759"). That conclusion was based largely on an amicus brief filed by the CPUC in the bankruptcy proceeding (Bankruptcy Dkt. 19; attached hereto as Appendix A), which asserted that Appellant's Complaint "would interfere with the Commission's regulatory authority." (*Id.* at pp. 2-3).

But the CPUC amicus provided no specifics, no evidence, no reasoning, no explanation, and indeed no basis whatsoever to support its bare conclusion. Counsel for the CPUC appeared at the appeal hearing before the District Court below, and

similarly failed to offer substantiate the position taken in its amicus brief. (*See* 2 ER 145-149).

Indeed, at the prodding of the district court, counsel for the CPUC conceded that CPUC regulation does not give utilities a free pass to act negligently. 2 ER 147:1-6. And counsel for the CPUC further conceded that Appellant could potentially amend his Complaint to state a cause of action that would not implicate the CPUC's regulatory authority or offend section 1759: "I would think there could be a set of circumstances with specific shutdowns and specific power lines, in which you might have a negligence claim that could work." (2 ER 148-149). The bare assertions in the CPUC's amicus are not conclusive or even persuasive without actual proof that the case would actually interfere with its regulatory authority, and in light of CPUC counsel's concessions, the amicus should have been given little weight indeed.

Notably, while the CPUC does regulate the implementation of the PSPSs themselves, the Complaint does not challenge any aspect of that implementation, and the District Court so recognized: "it is significant that Appellant is not suing [PG&E] for improperly deciding to implement the PSPS events, or even for negligence in how Debtors implemented the PSPS events…. 'The Complaint does not allege that the PSPSs were not necessary and appropriate, or that CPUC's approval of its Wildfire Safety Plan was improper, only that the PSPSs would not have been necessary in the first place had PG&E not been negligent.'" (1 ER 8:16-24 (cleaned up)).

Moreover, the CPUC has no jurisdiction or authority over the subject of the instant lawsuit: PG&E's liability to its customers for PG&E's negligence (related to PSPSs or otherwise). The CPUC itself has stated that it is "not the venue" in which to raise PG&E's liability to its customers arising from PSPSs. (2 ER 213; AMJN, Ex. 3 at 60 (CPUC "does not have jurisdiction to award damages to utility customers for losses of, for example, personal property, damage to real estate, last wages, business losses, emotional distress, or personal injury.")). So if CPUC cannot regulate damage payments owed to customers, and the lawsuit does not challenge any aspect of the PSPSs (other than the injuries they cause), then the lawsuit cannot possibly interfere with CPUC's regulation of PG&E generally, or of PSPSs specifically.

Three issues are undisputed: (1) the instant lawsuit does not challenge the necessity, propriety, or manner in which PG&E implements PSPSs, (2) the CPUC concedes that it has no jurisdiction even to consider injuries that PSPSs impose upon PG&E's customers, (3) the CPUC concedes that courts might consider a properly alleged negligence claim arising out of PSPSs. In light of these irrefutable truths, the District Court's conclusion that Appellant's lawsuit impinges upon the CPUC's regulatory authority, and is thus barred by section 1759, is clearly erroneous.

For all the reasons set forth herein, Amicus Curiae Alice Stebbins asks the Court to reverse the decisions of the District Court and the Bankruptcy Court below, and remand the matter for further proceedings.

FACTUAL AND PROCEDURAL BACKGROUND

A. PG&E's Criminal Negligence Necessitated Power Outages

Judge Alsup, who presides over PG&E's probation in the criminal proceedings against it, provided the compelling context for the instant suit. PG&E, Judge Alsup wrote,

> though the single largest privately-owned utility in America, cannot safely deliver power to California. This failure is upon us because for years, in order to enlarge dividends, bonuses, and political contributions, PG&E cheated on maintenance of its grid – to the point that the grid became unsafe to operate during [California's] annual high winds….

(2 ER 117). PG&E's criminal negligence is well documented. In 2016, a federal jury convicted PG&E on five felony counts of willful violation of maintenance standards and one felony count of obstructing the government's investigation, with respect to a gas-line explosion in San Bruno, California. (2 ER 118). One year later, PG&E's poorly maintained grid was the culprit in seventeen of twenty-one fires in the Northern California wine country, which killed twenty-two people and destroyed 3,256 structures. (*Id.*).

In November 2019, PG&E's shoddy maintenance of the electrical grid caused the Camp Fire in Butte County, which leveled the town of Paradise, killed eighty-five people, and burned 18,793 structures, representing the deadliest wildfire in California history. (2 ER 119). As a result, in 2020, PG&E admitted that it started the Butte County fire and plead guilty to eighty-four

counts of manslaughter. (*Id.*). As a consequence, PG&E was expected to contribute $13.5 billion to a victim's compensation fund and to pay approximately $4,000,000 in fines and investigative costs. (*Id.*; *see also* Appendix B, Judge Alsup's April 29, 2021 Order cataloging ongoing fires and death caused by PG&E's negligence).

Judge Alsup acknowledged that PG&E's criminal negligence caused – indeed required – PG&E to implement PSPSs in order to prevent further fires in 2019. (2 ER 120). Hundreds of trees fell onto power lines in the 2019 windstorms, 291 of which, PG&E represented, would likely have sparked fires but for the PSPSs. While praising PG&E for preventing more fires, Judge Alsup recognized that the PSPSs were necessitated by PG&E's shoddy and negligent maintenance:

> Shutting off the power in those lines in advance of the windstorms was essential to public safety, and PG&E did so. For this PG&E deserves credit. But at the same time, *those hundreds of fallen limbs and trees also remain proof positive of how unsafe PG&E had allowed its maintenance backlog to become*.

(2 ER 122 (emphasis added)). Judge Alsup clearly understood that the PSPSs were necessitated by PG&E's negligence, writing that Californians would have to tolerate the power outages "until PG&E has come into compliance with state law and the grid is safe to operate in high winds." (2 ER 129). Judge Alsup recognized that the PSPSs were "the lesser of two evils" when compared to deadly wildfires. (*Id.*).

B. The Instant Lawsuit Seeks Compensation for Injuries Flowing From PG&E's Negligence; but Despite it Challenging No Aspect of the PSPSs Themselves, the Courts Below Found Preemption.

Appellant filed the instant lawsuit as a putative class action to recover injuries (such as loss of habitability of deenergized homes, loss of food, loss of productivity) suffered by PG&E's customers because of specific PSPSs that were necessitated by PG&E's negligence. (1 ER 3). The District Court below explicitly recognized that the lawsuit challenged no aspect of the PSPSs themselves – least of all their propriety or necessity. (1 ER 8).

Nonetheless, the District Court gave controlling weight to an amicus brief that the California Public Utilities Commission ("CPUC") filed in the bankruptcy action that made a bare and unsupported assertion of regulatory interference. Thus, both courts below found that the lawsuit was preempted by California Public Utilities Code section 1759, because it somehow interferes with the California Public Utilities Commission's regulation of the time, place, and manner of PSPSs. (1 ER 8, 10).

ARGUMENT

A. Section 1759 Poses No Bar to Suits That, Like the Instant Suit, Create No Interference with CPUC Regulation of Utilities.

Section1759 does not immunize PG&E from liability for its negligence in maintaining the power grid. Section 1759 provides as follows:

> No court of this state … shall have jurisdiction to review, reverse, correct, or annul any order or decision of the commissioner or to suspend or delay the execution or operation therefore, or to enjoin, restrain, or interfere with the commission in the performance of its official duties….

Cal. Pub. Util. Code § 1759. Meanwhile, section 2106 of the California Public Utilities Code specifically allows individuals to sue California utilities such as PG&E for injuries caused by their unlawful conduct and/or negligence.

A defendant asserting preemption shoulders the burden of establishing that preemption applies. *See Chamber of Commerce v. City of Seattle*, 890 F.3d 769, 795 (9th Cir. 2018) (burden to show preemption is on party asserting it). And it requires more than a mere tangential relationship to regulation for preemption to arise: "[i]t has never been the rule in California that the [CPUC] has *exclusive* jurisdiction over any and all matters having any reference to the regulation and supervision of public utilities." *Vila v. Tahoe Southside Water Util.*, 233 Cal. App. 2d 469, 477 (1965) (emphasis in original).

Rather, in order to determine whether such a lawsuit runs afoul of section 1759, courts apply a three-party test: in order to be preempted, (1) the CPUC must have had the authority to adopt a regulatory policy on the subject matter of the

litigation; (2) the CPUC must have exercised that authority, and (3) the lawsuit must somehow hinder or interfere with the CPUC's exercise of its regulatory authority. *Kairy v. SuperShuttle Int'l*, 660 F.3d 1146, 1150 (9th Cir. 2016). Unfortunately, below, both the Bankruptcy Court and the District Court effectively found that (1) and (2) lead to a presumption of (3) – but that is clearly not the appropriate application of the test.

The CPUC's regulation of PG&E encompasses the manner in which the utility implements PSPSs and the factors it should take into account in deciding whether to implement them. (1 ER 6-7). Because the CPUC has authority to regulate PSPSs, the Bankruptcy Court and the District Court both concluded that the first and second prongs of the *Kairy* test were satisfied. (2 ER 7). Because the CPUC has no regulations covering compensation to customers adversely impacted by PSPSs, it is dubious whether the second prong of the test does, indeed, apply.[1] Nonetheless, the parties and the courts focused on the third prong: hinderance or interference.

B. The Instant Lawsuit Compliments the CPUC's Regulation of PG&E.

Respecting the third prong of the *Kairy* test, this instant lawsuit poses no challenge whatsoever to the manner in which PG&E implemented the PSPSs, or to the propriety of the decision to implement them. Nor does it take any issue with the

[1] The District Court found that Appellant conceded that the second prong of the *Kairy* test applied. (1 ER 7 n.5).

factors that PG&E was supposed to consider in deciding to implement them. Rather, it seeks to hold PG&E responsible for the negligence that led to the need to implement the PSPSs in the first place. The District Court so recognized. (1 ER 8). As such, this lawsuit creates no hindrance or interference, but rather complements the CPUC's regulatory scheme. *See, e.g.*, *Hartwell Corp. v. Superior Court (Santamaria)*, 27 Cal. 4th 256, 275 (2002) (recognizing that section 1759 permits lawsuits that are "in aid of, rather than in derogation of," the CPUC's jurisdiction). At no time have PG&E or the CPUC explained how the instant suit functions in derogation of CPUC jurisdiction or regulations.[2]

Indeed, courts generally permit civil lawsuits against regulated utilities unless the lawsuit directly and unequivocally challenge or impinge upon regulatory authority. For example, in *Cundiff v. GET California*, 101 Cal. App. 4th 1395 (2002), plaintiffs sued telecom providers for rental fees charged on obsolete equipment. The court of appeal reversed the trial court's section 1759 dismissal, holding that the plaintiffs' challenge to the manner in which the telecoms billed them for rental equipment did not challenge the CPUC's regulations that authorized the defendants to rent the

[2] Contrast Appendix B, Judge Alsup's 2021 order in the PG&E criminal case, in which he specifically adds to the regulatory considerations that PG&E must consider when weighing PSPSs. Yet, neither PG&E nor the CPUC asserted that such direct involvement in the implementation of PSPS regulations produced any interference with the CPUC's regulation of PG&E.

equipment in the first place. *Id.* at 1406. Similarly, in *Cellular Plus v. Superior Court*, 14 Cal. App. 4th 1223, 1245 (1993), the court of appeal allowed plaintiffs to pursue their price-fixing lawsuit under antitrust laws even though the CPUC had regulated the underlying pricing, because the lawsuit didn't challenge the CPUC's right to set the rates, or to alter the rates. *See also, e.g., PegaStaff v. PG&E*, 239 Cal. App. 4th 1303, 1327-28 (2015) (reinstating a suit for damages alleging that minority preferences for vendors disadvantaged non-minority vendors, despite the fact that PG&E there had set up a preference system in order to comply with CPUC orders favoring minority enterprises).

Those cases – both allowed to proceed – strayed far closer to interference with CPUC regulation than does the instant suit. Here, Plaintiffs seek to impose liability for damages that PG&E inflicts on its customers as a direct consequence of its criminally negligent maintenance of its electrical grid. The CPUC concedes that that is an area beyond its regulatory reach. The CPUC has stated that it is "not the venue" in which to raise PG&E's liability to its customers arising from PSPSs. (2 ER 213; AMJN, Ex. 3 at 60 (CPUC "does not have jurisdiction to award damages to utility customers for losses of, for example, personal property, damage to real estate, last wages, business losses, emotional distress, or personal injury.")).[3]

[3] Various CPUC General Orders (for example, Nos. 95 & 165) require PG&E to comply with design standards for its electrical equipment, to ensure that its power lines can withstand high winds, and to inspect its distribution facilities. Cal. Pub. Res.

The CPUC asserts that it does not and cannot regulate damage payments owed to customers. ("[T]his Commission does not have authority to award damages, as requested by Complainant, but only reparations…. Accordingly, Complainant's request in this regard for an award of damages is outside of Commission jurisdiction."); AMJN, Ex. 3 at 60; *see also Mangiaracina v. BNSF Railway*, No. 16-cv-05270-JST, 2019 WL 1975461, *14 (N.D. Cal. March 7, 2019) (CPUC lacks power to adjudicate damages based on past negligence). Likewise, the lawsuit does not challenge any aspect of the PSPSs (other than the injuries they cause). As such, the lawsuit cannot possibly interfere with CPUC's regulation of PG&E – either generally, or of PSPSs specifically. *See, e.g., Nwabueze v. AT&T*, No. C 09-1529-SI, 2011 WL 332473, *16 (N.D. Cal. Jan 29, 2011) ("A lawsuit for damages … would not interfere with any prospective regulatory program" because imposing "liability would not be contrary to any policy adopted by the CPUC or otherwise interfere with the CPUC's regulation.")

Code section 4292 provides that PG&E must "maintain around and adjacent to any pole or tower which supports a switch, fuse, transformer, lightning arrester, line junction, or dead end or corner pole, a firebreak," and Cal. Pub. Res. Code section 4293 requires PG&E to maintain "clearances of four to ten feet for all of its power lines." Plaintiff alleged that PG&E failed to comply with these duties (4-ER-490-501, 505-507). Judge Alsup found likewise. (AMJN Exh 1 at 13, 16.). Neither PG&E nor the CPUC raised section 1759 preemption with regard to these requirements.

Indeed, neither PG&E nor the CPUC presented any evidence below of any purported interference. Both asserted the noncontroversial point – that Appellant concedes – that the CPUC generally regulates PSPSs. But that is not the question posed by the third prong of *Kairy*. While the CPUC filed an amicus brief in support of PG&E's position in the bankruptcy court, it proffered no specifics or evidence— indeed, gave no reason whatsoever— *why* the case interferes with its duties. The CPUC's bare assertions are unpersuasive.

And, notably, the CPUC lacks the power or jurisdiction to order a utility to pay damages to customers for harm caused by PSPSs. As the CPUC itself has stated, it is "not the venue," to consider any "financial liability" to PG&E's customers because of its use of PSPSs. That "venue," and the only venue, is Appellant's is lawsuit. This suggests that neither the second nor the third prong of the *Kairy* test applies here.

C. The District Court's Focus on Disincentivizing PSPSs Was Misplaced.

The District Court seemed to rest its finding of regulatory interference on the speculative supposition that potential civil liability following PSPSs could disincentivize PSPSs, which may be necessary to prevent fires and save lives: "[i]mposing liability on [PG&E] for implementing CPUC-approved PSPS events would force Debtors to choose between incurring potentially limitless negligence liability and protecting public safety in the manner dictated by the appropriate regulatory authority: CPUC." (1 ER 9). There are several problems with the District Court's analysis.

First, PSPSs are already discouraged – they are only warranted under CPUC regulations "as a last resort for wildfire mitigation." (AMJN, Ex. 3 at 27 (the document adjudicating the 2019 PSPSs, uses the phrase "last resort" 67 times); *see also* Appendix B at p. 9 (Judge Alsup writing "The Court agrees that PSPS events should be a last resort.")). The District Court incorrectly inferred that CPUC policy favors PSPSs. But neither the bankruptcy court nor the district court explained how Appellant's lawsuit could interfere with that policy.

Second, the potential cost to PG&E of a PSPS is not an authorized consideration. Rather, PG&E must conduct a "cost-benefit analysis that demonstrates (1) the program will result in a net reduction in wildfire ignitions, and (2) the benefits of the program outweigh any costs, burdens, or risks the program imposes on customers and communities." (AMJN, Ex. 3 at 15 (quoting CPUC Decision D.09-09-030 at 2 and 63)). It would violate CPUC regulations for PG&E to allow potential liability here to sway it from instituting a PSPS as a measure of last resort. If the dismissals are upheld, PG&E is incentivized to continue passing the societal costs of its own criminal negligence onto its customers, reducing its incentive to correct the maintenance problems on the grid that lead to catastrophic fires in the absence of PSPSs. That outcome – not this lawsuit – would contravene the CPUC's regulatory scheme.

Third, the District Court's concern about limitless negligence liability flowing from PSPSs is nonsensical. Judge Alsup has recognized that some PSPSs are

necessitated by PG&E's negligence, while others are not. (*See generally*, Appendix B). Appellant's lawsuit seeks only to impose liability for injuries caused by the former. But fundamentally, the notion that PG&E would choose eschew a PSPS in order to avoid a multi-million dollar class claim for lost groceries (among other things), and choose instead to let wind events cause more deadly fires of the type that have imposed tens of *billions* of dollars of liability upon PG&E, borders on farcical. Ultimately, and hopefully, PG&E will over time bring its grid maintenance into compliance with legal requirements, at which point PSPSs, if any, would no longer flow from PG&E's negligence, and any injuries arising from those PSPSs would fall outside the scope of Appellant's lawsuit.

The courts below found section 1759 preemption based on analytical frameworks that find no support in the case law, that contradict the evidence and allegations, and that failed to properly analyze the ways in which Appellant's lawsuit compliments (rather than contravenes) the CPUC's regulatory authority. As such, this Court should reverse those decisions and give the Appellant his day in court.

D. The CPUC's Amicus to the Bankruptcy Court (Appendix A) Carries No Weight.

The District Court below gave the CPUC bankruptcy court amicus brief (Appendix A) great deference, akin to that accorded to federal administrative branch agencies under *Auer* or *Chevron*. (1 ER 10); *see also generally, Auer v. Robbins,* 519 U.S. 452 (1997); *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837

(1984). But California courts have been free to reject the CPUC's views of section 1759 preemption when they are unsupported. For example, in *Wilson v. S. California Edison Co., 234 Cal. App. 4th 123 (2015)*, a jury found an electrical utility liable for allowing uncontrolled current from a next-door substation to flow into a customer's home. The utility appealed and the CPUC submitted an amicus brief asserting, much as it did in the instant case, that it had an ongoing regulatory policy and a jury verdict prior to any CPUC finding of misfeasance "would interfere with the Commission's authority to interpret and apply its own orders, decisions, rules and regulations . . ." *Id.* at 148 (quoting the CPUC's brief).

The court of appeal rejected the CPUC's argument, holding that a general regulation on the subject matter of the underlying litigation was not sufficient to implicate section 1759 preemption. In the absence of actual evidence that that the lawsuit would impinge upon specific CPUC actions, "the lawsuit would not interfere with or hinder any supervisory or regulatory policy of the [C]PUC." *Id.* at 151.

The amicus (Appendix A) that formed the basis of the dismissal in the bankruptcy court and the adverse decision in the District Court was entitled to no special deference. The brief lacked any explanation, evidence, or rationale to support its bare assertion that the Appellant's lawsuit interfered with its regulatory authority. Like the court in *Wilson*, the courts below should have rejected it.

Amicus curiae, as Executive Director Emeritus of the CPUC, who was intensely involved in the CPUC's wild-fire mitigation efforts, does not find the

CPUC's assertions to be credible. She urges this Court to reject the CPUC amicus filed below and hold that section 1759 preemption does not apply.

CONCLUSION

For the foregoing reasons, the Court should reverse the decisions below and remand the case for further proceedings.

Dated: July 2, 2021

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 8. Certificate of Compliance for Briefs

9th Cir. Case Number 21-15571

I am the attorney or self-represented party.

This brief contains 3,976 words, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface [14pt. Garamond] comply with Fed. R. App. P. 32(a)(5) and (6).

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Signature */s/ Joseph A. Creitz* **Date** July 2, 2021

APPENDIX A
to the Brief Amicus Curiae of Alice Stebbins:

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UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

In re: **PG&E CORPORATION** **-and-** **PACIFIC GAS AND ELECTRIC COMPANY,** **Debtors.**	Adversary Proceeding No. 19-03061-DM Chapter 11 Case No. 19-30088 (DM) (Lead Case) (Jointly Administered) **BRIEF OF THE CALIFORNIA PUBLIC UTILITIES COMMISSION AS AMICUS CURIAE RESPECTING DEFENDANTS' MOTION TO DISMISS**
ANTHONY GANTNER, individually and on behalf of all those similarly situated **Plaintiff,** **vs.** **PG&E CORPORATION, a California Corporation, and PACIFIC GAS & ELECTRIC COMPANY, a California Corporation,** **Defendants.**	

The California Public Utilities Commission (the "***Commission***") respectfully submits this brief as amicus curiae as of right[1] respecting the motion to dismiss this adversary proceeding (the "***Action***") filed by Defendants (collectively, "***PG&E***"), to the extent that PG&E's motion is based on Section 1759 of the California Public Utilities Code.[2]

Preliminary Statement

Plaintiff's Complaint seeks to bring a putative class action against Pacific Gas and Electric Company (the "***Utility***") and PG&E Corporation. The putative class consists of California residents and business owners whose power was shut off by the Utility during October and November 2019 or whose power is shut off by the Utility during voluntary outages over the course of the litigation. Plaintiff alleges that the Utility's negligence was responsible for the power shutoffs in October and November 2019. Plaintiff asserts a single claim for negligence.

Section 1759 of the California Public Utilities Code bars the assertion of claims under California law that would interfere with the Commission's regulatory authority. In the Commission's view, litigation and adjudication of Plaintiff's claim, as framed by the Complaint,

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[1] Federal Rule of Bankruptcy Procedure 8017(a)(2) authorizes "a state" to file a brief as amicus curiae "without the consent of the parties or leave of court." Section 307 of the California Public Utilities Code authorizes the General Counsel of the Commission to represent and appear for the people of the State of California and the Commission in all actions and proceedings involving any question under the Public Utilities Code or any act or order of the Commission. As this brief addresses a question under section 1759 of the Public Utilities Code and various actions and proceedings of the Commission, this brief is the brief of a state for purposes of Rule 8017(a)(2) and section 307. *See Kairy* v. *Supershuttle Int'l*, No. 10-16150 (9th Cir. Aug. 12, 2011), ECF No. 48 (order holding that the Commission was entitled to file an amicus brief as of right under Fed. R. App. P. 29(a), which contains a provision that is materially identical to Fed. R. Bankr. P. 8017(a)(2), and Cal. Pub. Util. Code § 307). The Commission respectfully submits that it is independently entitled to file this brief as of right under 11 U.S.C. § 1109(b).

As a courtesy, counsel for the Commission sought the consent of the parties to the Action for the filing of this brief, although counsel stated to the parties that in the Commission's view, the Commission is entitled to file this brief as of right. Counsel for PG&E consented to the filing of the brief. Counsel for Plaintiff declined to consent to the filing of the brief unless counsel for Plaintiff was provided with a copy of the brief in advance of filing.

[2] The filing and contents of this amicus brief are not intended as, and should not be construed as, a waiver of any objections or defenses that the State of California, the Commission, or any other agency, unit, or entity of the State of California may have to this Court's jurisdiction over the State of California, the Commission, or such other agency, unit, or entity based upon the Eleventh Amendment to the United States Constitution or related principles of sovereign immunity or otherwise, all of which objections and defenses are hereby reserved.

would interfere with the Commission's regulatory authority. The claim should therefore be dismissed. The Commission expresses no view concerning any other issue raised by the Complaint or the briefing on PG&E's motion.

Background

The Commission is a constitutional agency of the State of California that regulates privately owned electrical corporations and gas corporations. *See* Cal. Const. art. XII; Cal. Pub. Util. Code § 216(a), (b). The Commission regulates the Utility, which is an investor-owned public utility that supplies electricity and natural gas to consumers in northern and central California. *See PegaStaff* v. *Pac. Gas & Elec. Co.*, 239 Cal. App. 4th 1303, 1311 (Ct. App. 1st Dist. 2015).

A. The Commission's De-Energization Guidelines

Electric utilities that are regulated by the Commission may shut off power in circumstances defined by the California Public Utilities Code and the Commission's decisions. *See* Cal. Pub. Util. Code §§ 399.2(a), 451.

In April 2012, the Commission promulgated de-energization guidelines that permitted San Diego Gas & Electric Company to shut off power when strong winds, heat events, and other conditions made a power shutoff "necessary to protect public safety." Decision Granting Petition to Modify Decision 09-09-030 and Adopting Fire Safety Requirements for San Diego Gas & Electric Company, Decision 12-04-024, at 25 (Cal. P.U.C. Apr. 19, 2012), *available at* Adv. Pro. ECF No. 8-3. In July 2018, the Commission adopted Resolution ESRB-8, which, among other things, extended those guidelines to all investor-owned utilities, including the Utility. *See* Resolution Extending De-Energization Reasonableness, Notification, Mitigation, and Reporting Requirements in Decision 12-04-024 to All Electric Investor Owned Utilities ("Resolution ESRB-8"), 2018 WL 3584003, at *1 (Cal. P.U.C. July 12, 2018), *available at* Adv. Pro. ECF No. 8-5, at 1. The Commission may review any decision by a utility to shut off power for reasonableness.

In December 2018, the Commission opened a rulemaking to further examine the de-energization policies and guidelines adopted in Decision 12-04-024 and Resolution ESRB-8.

That rulemaking is focused on establishing guidelines and protocols concerning when a utility should conduct a public safety power shutoff. *See* Order Instituting Rulemaking to Examine Electric Utility De-Energization of Power Lines in Dangerous Conditions, 2018 WL 6830158 (Cal. P.U.C. Dec. 13, 2018), *available at* Adv. Pro. ECF No. 8-6.

B. The Commission's Approval of the Utility's 2019 Wildfire Safety Plan

On September 21, 2018, the Governor of California signed SB-901 into law. Act of Sept. 21, 2018, ch. 626, 2018 Cal. Legis. Serv. 1 (West). Among other things, SB-901 added several new provisions to section 8386 of the California Public Utilities Code. *Id.* § 38, 2018 Cal. Legis. Serv. at 30. Those new provisions require California utilities to prepare and submit "Wildfire Mitigation Plans" to the Commission. Cal. Pub. Util. Code § 8386(b). Wildfire Mitigation Plans must contain, among other things, "[p]rotocols for . . . deenergizing portions of the electrical distribution system that consider the associated impacts on public safety." *Id.* § 8386(c)(6).

On February 6, 2019, the Utility filed its 2019 Wildfire Safety Plan with the Commission.[3] The Utility's 2019 Wildfire Safety Plan specified factors that the Utility considers in deciding whether to conduct a public safety power shutoff.[4] The Commission approved the Utility's 2019 Wildfire Safety Plan on June 4, 2019. *See* Decision on Pacific Gas and Electric Company's 2019 Wildfire Mitigation Plan, Decision 19-05-037, 2019 WL 2474177 (Cal. P.U.C. June 4, 2019), *available at* Adv. Pro. ECF No. 8-9.

C. The Commission's Investigations into the Compliance of California's Utilities with the Commission's Regulations and Requirements with Respect to Public Safety Power Shutoffs

On November 12, 2019, the Commission ordered the Utility to show cause why the Commission should not sanction the Utility for its failure to communicate with its customers properly during public safety power shutoffs in October and November 2019. *See* Assigned Commissioner and Assigned Administrative Law Judge's Ruling Directing Pacific Gas and

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[3] *See* Pacific Gas and Electric Company Amended 2019 Wildfire Safety Plan, *available at* https://www.pge.com/pge_global/common/pdfs/safety/emergency-preparedness/natural-disaster/wildfires/Wildfire-Safety-Plan.pdf.

[4] *Id.* § 4.6.1.

Electric Company to Show Cause, Rulemaking 18-12-005 (Cal. P.U.C. Nov. 12, 2019), *available at* Adv. Pro. ECF No. 8-17. That investigation remains ongoing.

The next day, the Commission instituted a new investigation to determine whether California's utilities prioritized safety and complied with the Commission's regulations and requirements with respect to their public safety power shutoffs in late 2019. *See* Order Instituting Investigation on the Commission's Own Motion on the Late 2019 Public Safety Power Shutoff Events, 2019 WL 6179011 (Cal. P.U.C. Nov. 13, 2019), *available at* Adv. Pro. ECF No. 8-16. That investigation remains ongoing. The Commission may consider taking action if it finds that violations of statutes, its decisions, or its general orders have been committed and if it finds that action is necessary to enforce compliance. *Id.* at *4.

D. This Action

Plaintiff in this Action seeks to impose liability on the Utility based on five public safety power shutoffs that, according to the Complaint, the Utility initiated on or about October 9, 23, 26, and 29, 2019, and November 20, 2019. Compl. ¶¶ 63, 69-78. Plaintiff alleges that these power shutoffs affected customers in "over 35 counties" in California. *Id.* ¶ 64.

The Complaint defines the proposed class to include "[a]ll California residents and business owners who had their power shutoff by PG&E during the October 9, October 23 October 26, October 28 [*sic*], or November 20, 2019 Outages and any subsequent voluntary Outages PG&E imposes on its customers during the course of litigation," except for certain persons with ties to the Utility or the Court. *Id.* ¶ 85. The Complaint asserts a single claim for negligence. *Id.* ¶¶ 95-106.

The Complaint does not allege that the Utility, in deciding to conduct the public safety power shutoffs at issue, failed to comply with the Commission's guidelines in this area or with the Utility's 2019 Wildfire Safety Plan. The Complaint instead generally alleges that the Utility's negligent design and maintenance of its facilities for many years resulted in the need for the public safety power shutoffs "in the first place." Plaintiff's Opposition to Debtors' Motion to Dismiss and Motion to Strike 2, Adv. Pro. ECF No. 16; *see* Compl. ¶¶ 27-48. The Complaint cites provisions of California statutory law and an order by the Commission that impose certain

mandates on the Utility. Compl. ¶¶ 14-18 (citing Cal. Pub. Util. Code § 451, Cal. Pub. Res. Code §§ 492, 493, and Cal. P.U.C. General Order 165). The Complaint, however, does not allege that any particular failure to comply with any particular mandate resulted in any particular public safety power shutoff. *See* Compl. ¶ 98. Instead, the Complaint broadly alleges the following theory of liability:

> In brief, instead of addressing its crumbling infrastructure to protect against wildfires, PG&E has decided to mitigate that risk by shifting its duty to provide safe power onto its customers to live without power for days or weeks at a time so it can avoid another catastrophic wildfire and the attendant liabilities which come with it. Years of corporate greed and criminal negligence have caught up to PG&E but that does not entitle it to pass the cost of its negligence onto its consumers who did nothing but pay their bills and expect to be able to turn their lights on so they can live their lives to conduct their businesses.

Id. ¶ 79.

Argument

Section 1759 of the California Public Utilities Code Bars Plaintiff's Claim

Section 1759 of the California Public Utilities Code provides: "No court of this state, except the Supreme Court and the court of appeal . . . shall have jurisdiction to review, reverse, correct, or annul any order or decision of the commission or to suspend or delay the execution or operation thereof, or to enjoin, restrain, or interfere with the commission in the performance of its official duties, as provided by law and the rules of court." Cal. Pub. Util. Code § 1759(a).

Under the decision of the Supreme Court of California in *San Diego Gas & Electric Co.* v. *Superior Court (Covalt)*, 13 Cal. 4th 893, 923, 926, 935 (1986), section 1759 bars the assertion of a claim under California law if (1) the Commission has the authority to adopt a regulatory policy concerning the subject matter of the claim; (2) the Commission has exercised that authority; and (3) litigation and adjudication of the claim would hinder or interfere with the relevant policy or policies adopted by the Commission. In the Commission's view, Plaintiff's claim, as framed in the Complaint, is barred by the three-part test announced in *Covalt*.

First, the parties to this Action agree that the Commission has authority under California law to regulate public safety power shutoffs. *See* Debtors' Motion to Dismiss and Motion to

Strike 13, Adv. Pro. ECF No. 7; Plaintiff's Opposition to Debtors' Motion to Dismiss and Motion to Strike 7, Adv. Pro. ECF No. 16.

Second, at the time of the wildfires in October and November 2019, the Commission had exercised that authority by adopting guidelines governing, among other subjects, the circumstances in which an investor-owned utility may conduct a public safety power shutoff. *See* Decision Granting Petition to Modify Decision 09-09-030 and Adopting Fire Safety Requirements for San Diego Gas & Electric Company, Decision 12-04-024 (Cal. P.U.C. Apr. 19, 2012), *available at* Adv. Pro. ECF No. 8-3; Resolution ESRB-8, 2018 WL 3584003 (Cal. P.U.C. July 12, 2018), *available at* Adv. Pro. ECF No. 8-5. The Commission had also exercised that authority by approving the Utility's 2019 Wildfire Safety Plan. *See supra*, p. 4. The Commission continues to exercise that authority through the ongoing rulemakings and investigations described above. *See supra*, p. 4-5.

Third, the Commission believes that litigation and adjudication of Plaintiff's claim, as framed by the Complaint, would hinder and interfere with enforcement of the Commission's guidelines concerning public safety power shutoffs and the Commission's approval of the Utility's 2019 Wildfire Safety Plan. The policies reflected in those guidelines and that approval expressly authorize the Utility to decide that a public safety power shutoff is warranted under certain circumstances. The Complaint, however, seeks to impose liability on the Utility for exactly such decisions, without alleging that any particular decision by the Utility to conduct a public safety power shutoff violated the Commission's policies concerning such shutoffs, and without alleging that any particular decision by the Utility to conduct a public safety power shutoff resulted from the Utility's underlying failure to comply with any particular mandate. The Complaint appears to rest on the theory that in light of the Utility's alleged generalized failure to maintain its infrastructure, any decision by the Utility to conduct a public safety power shutoff—in the recent past or future—necessarily gives rise to a claim against the Utility for negligence. Judicial adoption of such a theory would hinder and interfere with the Commission's considered

policy to allow utilities to conduct public safety power shutoffs in the interests of public safety pursuant to guidelines established by the Commission.[5]

Conclusion

PG&E's motion to dismiss, to the extent that motion is based on section 1759 of the California Public Utilities Code, should be granted.

Dated: March 4, 2020

Respectfully submitted,

CALIFORNIA PUBLIC UTILITIES COMMISSION

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[5] The Commission's position with respect to section 1759 is based on, and limited to, the allegations in the Complaint before the Court.

Appendix B
to the Brief Amicus Curiae of Alice Stebbins

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA,

Plaintiff,

v.

PACIFIC GAS AND ELECTRIC COMPANY,

Defendant.

No. CR 14-0175 WHA

ORDER RESOLVING PROPOSED CONDITIONS OF PROBATION RE PSPS CRITERIA

In this criminal probation of California's largest utility, this filing recommends that in deciding which power circuits to leave on and which to turn off during windstorms in the wildfire season, the convicted utility should take into account, among other factors it already considers, the extent to which trees and limbs bordering specific circuits remain in violation of California law and/or its own wildfire mitigation plan. For the reasons stated below, however, the Court will not impose the proposed conditions of probation numbers 11 and 12 and will leave to the utility the decision on the extent to which it will adopt the recommendation.

* * *

In our most recent wildfire season, a windstorm blew a tall gray pine onto a PG&E distribution line in Shasta County, pushing the power conductors together, thereby unleashing a bolt of electricity, and thus igniting what became known as the Zogg Fire. A mother and her daughter burned to death in their car, trying to escape the wildfire. Another woman died alone,

also trying to escape, and a man succumbed to burns he suffered while defending his home from the blaze.

Two years earlier, PG&E, through its contractor, had marked the gray pine as a hazard and slated it for removal. Standing more than 100 feet tall, the gray pine leaned at more than twenty degrees from vertical, looming downhill over PG&E's Girvan Circuit, the distribution line in question. It remained obvious that if it fell in the direction of the lean, it would fall on the power line. Gray pines, it was further known, have shallow root systems and topple more easily than trees with tap roots. And, this particular tree, although it had a healthy canopy, had a severe, tall scar at its base. The contractor was correct to mark the tree for removal. PG&E, however, did not remove it. Two years went by. In a windstorm in September 2020, as stated, the gray pine blew onto the circuit, ignited the Zogg Fire, and four people died. Two hundred four structures were lost.

To prevent such wildfires, Section 4293 of the California Public Resources Code has long required utilities to remove such trees and to keep clearance around its lines. When power lines are pushed together by the trees or limbs, the resulting bolt of electricity sends molten metal to the dry grass below. Especially during a windstorm but at any time in our dry season, this will very likely result in a wildfire. We have seen this exact scenario dozens of times in PG&E's territory.

The Zogg Fire was the most recent in a long line of disastrous wildfires started by PG&E's violations of Section 4293, all as laid out in the Order to Show Cause Re Conditions of Probation dated December 29, 2020, the order initiating this chapter in our probation proceedings, all arising out of PG&E's felony convictions due to the San Bruno gas explosion. Some of the Wine Country Fires in 2017 and the Camp Fire in 2018 became tragic examples. In those, 107 victims were burned to death and 22,060 structures were destroyed.

Also, as laid out in the December 29 order, the root cause is that over many years PG&E robbed its tree clearance budget — why is not now pertinent but it's obvious it was to enhance the bottom line. As a result, we now find ourselves with a power grid overgrown with hazard trees ready to strike onto PG&E's lines during windstorms, spelling wildfire disaster in our dry

season. During this federal criminal probation, PG&E has begun to set this right by investing larger sums in "vegetation management." But it will take close to a decade for PG&E to clear the backlog and to reach compliance. Meanwhile, as a last resort and interim stop-gap, the Court recommended in the wake of the Camp Fire, and PG&E has since adopted, a protocol to de-energize selected circuits during severe windstorms. In this way, when trees and limbs crash onto the de-energized lines, there will be no power to spark a wildfire. This protocol became PG&E's Public Safety Power Shutoff program or PSPS.

PG&E rolled out its PSPS program during the 2019 wildfire season during which PG&E conducted eight PSPS events. *Significantly, that year saw no wildfires caused by PG&E distribution lines, a vast improvement over both 2017 and 2018*. We know for sure that the PSPS events saved us from many wildfires because of the hundreds of trees that were blown down onto the (thankfully) de-energized lines. But, due to criticism in 2019 over the inconvenience and hardship of PSPS events, PG&E revised its criteria in the 2020 wildfire season in order "to be more targeted." This led to fewer PSPS events, six to be exact, but it also led to the Zogg Fire.

In the days leading up to the windstorm, PG&E went through its PSPS decision-making process to determine which distribution lines, *i.e.*, circuits, in Shasta County (and elsewhere) to de-energize. Significantly, in making those circuit-by-circuit decisions, we now know PG&E did *not* consider in any way the extent to which any particular circuit remained threatened (or not) by hazard trees and limbs, the number one cause of fires ignited by PG&E distribution lines. For example, it did not consider its own wildfire risk assessment priority ranking for any circuit. And, it did not consider in any way the gray pine looming at a steep angle over the Girvan Circuit. So, PG&E left it on — with fatal consequences.

These details emerged from inquiries made by the Court in the wake of the Zogg Fire, whereupon an order on December 29 ordered PG&E to show cause why its PSPS criteria should not be adjusted to take into account the extent to which hazard trees remained along various rights of way in the high-risk fire zones. Specifically, that order proposed the following new condition of probation and asked all parties to respond (Dkt. No. 1277 at 16):

> Proposed Condition 11: In determining which distribution lines in Tier 2 or Tier 3 to de-energize during a PSPS, PG&E must take into account all information in its possession and in the possession of its contractors and subcontractors concerning the extent to which trees and/or limbs bordering those lines remain in violation of Public Resources Code Section 4293, GO 95, FERC FAC-003-4, and/or its own wildfire mitigation plan.
>
> Proposed Condition 12: To the extent that such information shows that such trees and limbs present a safety hazard in the event of a windstorm, PG&E must make a specific determination with respect to that distribution line and it must de-energize it unless PG&E finds in writing that there are specific reasons to believe that no safety issue exists.

Tiers 2 and 3 are the highest wildfire risk areas, typically in foothill counties covered with chaparral. PG&E purportedly accepted these new conditions but on the condition that it would, in effect, get full credit for considering *all* information yet it would only have to consider a *sliver* of the information available to it, as indicated by the bolded additions (Dkt. No. 1279 at 4, 6):

> Proposed Condition 11: In determining which distribution lines in Tier 2 or Tier 3 to de-energize during a PSPS, PG&E must take into account all information in its possession and in the possession of its contractors and subcontractors concerning the extent to which trees and/or limbs bordering those lines remain in violation of Public Resources Code Section 4293, GO 95, FERC FAC-003-4, and/or its own wildfire mitigation plan. **In determining which distribution lines to de-energize during a PSPS event, PG&E will implement this condition by July 1, 2021, by considering the existence of all outstanding vegetation management work tagged "Priority 1" or "Priority 2" within PG&E's service territory that is subject to potential de-energizations.**
>
> Proposed Condition 12: To the extent that such information shows that such trees and limbs present a safety hazard in the event of a windstorm, PG&E must make a specific determination with respect to that distribution line and it must de-energize it unless PG&E finds in writing that there are specific reasons to believe that no safety issue exists. **PG&E will implement this condition by July 1, 2021, by developing a methodology to de-energize line segments in areas subject to potential de-energizations that have outstanding Priority 1 or Priority 2 vegetation management work when forecast conditions are above specified fire-risk thresholds, absent a documented determination that de-energization is not warranted.**

While these counter-proposals seemed to step in the right direction, they would *not*, as we eventually learned, have prevented the Zogg Fire. They would not have required de-energization of the Girvan Circuit because the gray pine in question was not a Priority 1 or Priority 2 work order under PG&E's system. Nor was any other tree along the Girvan Circuit. So, PG&E's counter-proposal would have made no difference. Those four victims would have been burned to death anyway.

Trying to find a compromise, the Court offered on February 4 to accept PG&E's counter-proposal, provided that PG&E would further consider the density of trees tall enough to fall on each circuit (Dkt. No. 1294) (additions in bold):

> Proposed Condition 11: In determining which distribution lines in Tier 2 or Tier 3 to de-energize during a PSPS, PG&E must take into account all information in its possession and in the possession of its contractors and subcontractors concerning the extent to which trees and/or limbs are at risk of falling on those lines in a windstorm. In determining which distribution lines to de-energize during a PSPS event, PG&E will implement this condition by July 1, 2021, by considering the existence of all outstanding vegetation management work tagged "Priority 1" or "Priority 2" within PG&E's service territory that is subject to potential de-energizations. **PG&E shall also consider the approximate number of trees tall enough to fall on the line irrespective of the health of the tree and irrespective of whether the tree stands outside or inside prescribed clearances. The latter may be done by simply rating the total approximate number of such tall trees along a line as "None," "Few," "Average" or "Many," and by treating the "Many" category as posing a greater risk than the "Average" category and the "Average" category as posing a greater risk than the "Few" category and so on.**
>
> Proposed Condition 12: To the extent that such information shows that such trees and limbs present a safety hazard in the event of a windstorm, PG&E must make a specific determination with respect to that distribution line and it must de-energize it unless PG&E finds in writing that there are specific reasons to believe that no safety issue exists. PG&E will implement this condition by July 1, 2021.

In response, PG&E stated that it had developed a model using LiDAR data measuring actual tree height along all PG&E lines based on helicopter flyovers during the last two years. These data and model allowed PG&E to see and measure the actual height of any and all trees

to calculate whether they could strike a power line if they fell. The number of such "strike trees" along a circuit could be counted and, in turn, all circuits could be rated by risk based on the number of such strike trees. Strike trees in this model counted both healthy and unhealthy trees, both hazard and non-hazard, on the theory that even healthy non-hazard trees, in PG&E's experience, could blow over in a windstorm and strike lines. By this method, the Girvan Circuit would have been ranked in the top 24 percent of risk, so PG&E proposed to use the top thirty percent as a cutoff. This approach would have prevented the Zogg Fire because it would have de-energized the Girvan Circuit.

At our recent hearing, PG&E stated that it wanted to adopt this modification to its PSPS decision-making approach. PG&E Attorney Kevin Orsini stated, "The company believes that this is the right approach . . . . We share the Court's goal and [*sic*] expanding the program . . . and not waiting until 2022 to do that" (Tr. 31:10–14).

By contrast, however, letters from commissioners of the California Public Utilities Commission (CPUC) and from the California Governor's Office of Emergency Management vigorously opposed PG&E's safety consideration of strike trees, saying it was an unvetted approach and likely to lead to many more PSPS events and thus more public inconvenience and hardship. They insisted that PSPS events should be a "last resort." They asked the Court not to impose it.

How did these agencies acquire this fear of marked increase in PSPS events? Earlier in March, we now know, PG&E handed these agencies an internal "study" that seemed to indicate a large number of additional PSPS events would flow from the strike-tree proposal. That provoked the CPUC commissioners to express alarm about "doubling" the number of PSPS events (Dkt. No. 1349). The Court then asked for the study.

In its filing dated March 23, PG&E produced its LiDAR "Sensitivity Study," the estimate given to the CPUC. In it, PG&E described the impact of the new PSPS criteria over a ten-year hypothetical retrospective (Dkt. No. 1358-1). PG&E used its LiDAR strike-tree data in combination with now-current PSPS criteria (examining extreme wind, heat, and fuel moisture factors) to estimate how many PSPS events *would have occurred* between 2010 and 2020

using PG&E now-current criteria plus the strike-tree criteria. The study also estimated how many PSPS events would have occurred in that ten-year period under PG&E's now-current PSPS criteria (without the strike-tree criteria). The comparison showed that hypothetical PSPS events would have increased by 55 percent with the strike-tree criteria (Dkt. No. 1358-1).

We held a hearing on March 23 and explored these concerns and heard the CPUC's specifics. In response, the Court requested that PG&E perform a real-life comparison: how would the *actual* PSPS events in 2019 and 2020 have changed had the proposed conditions of probation been in effect? PG&E produced a 2019 comparison on March 29 (Dkt. No. 1369-1). *The estimate showed that PSPS events in 2019 would have decreased, not increased, from eight to five.* The average customer impact (in both hours and numbers) would also have *decreased*.

With respect to 2020, PG&E stalled and said it would produce the 2020 numbers only if requested again. The Court then repeated its request for the 2020 figures. PG&E filed that estimate on April 16 (Dkt. No. 1377). *The analysis showed that the number of actual PSPS events in 2020 would not have changed at all had the proposed conditions been in effect.* Only twelve percent more customers would have been affected, meaning the PSPS events would have caused twelve percent more customers, including those served by the Girvan Circuit, to lose power.

It now seems obvious that PG&E used some sleight-of-hand to promote the incorrect impression that the additional criteria — Priority 1 and 2 tags plus strike tree rankings — would make a substantial difference in public safety whereas, in truth, they would have *reduced* the number of PSPS events in 2019 and would have left the 2020 number unchanged (though they would have de-energized the Girvan Circuit). Remembering that 2019 was the only year in which the PSPS program succeeded in stopping wildfires caused by PG&E distribution lines, it would be *a step backward* to bless PG&E's criteria.

Another reason the Court is reluctant to adopt these conditions is that the Priority 1 and Priority 2 criteria have turned out to be the sleeves out of PG&E's vest. PG&E has now admitted that the number of Priority 1 and Priority 2 tags would be very few because PG&E

expects to clear them all in the run-ups to future PSPS events. Such tags, therefore, would rarely lead to any further circuits being de-energized. (Priority 1 and Priority 2 tags constitute only a small fraction of all hazards. The gray pine looming over the Girvan Line, for example, was *not* a Priority 1 or Priority 2 tag.)

To finalize the criteria proposed by PG&E in the form of a federal court order would give PG&E a "Get-Out-of-Jail-Free" card, a card it could and would play in every civil lawsuit and criminal prosecution arising out of future wildfires based on PG&E's failure to de-energize at-risk circuits. It would smile and say, "We did what the judge and the CPUC said to do and they said that considering the sliver of information would count as considering all information."

A final reason is that the CPUC and the Governor's Office have opposed the proposed changes, curiously out of fear that they will lead to more PSPS events. Out of deference to these authorities, the Court will simply state its recommendation but not impose any version of the conditions. A related complication is that PG&E's most recent counter-proposal involving strike-tree count was expressly contingent on obtaining eventual CPUC approval, but in response, the CPUC stated that it does not and will not bless such specific criteria and, instead, as a matter of practice, leaves the selection of criteria to the utility. So, PG&E's latest version would be impossible to implement.

Accordingly, the Court will *not* impose Proposed Conditions 11 and 12. Instead, the Court will and hereby does recommend that PG&E do the following:

> In determining which distribution lines in Tier 2 or Tier 3 to de-energize during a PSPS, PG&E should take into account all information in its possession and in the possession of its contractors or subcontractors concerning the extent to which trees and/or limbs bordering those lines remain in violation of Public Resources Code Section 4293, GO95, FERC PAC-003-4 and/or its own wildfire mitigation plan.
>
> To the extent that such information shows that such trees and/or limbs present a safety hazard in the event of a windstorm, PG&E should make a specific determination with respect to that distribution line and it should de-energize it unless PG&E finds in writing that there are specific overriding public safety needs to leave the lines energized.

For example, that a circuit is in compliance with all vegetation clearance laws militates in favor of leaving the power on in that circuit. Conversely, that a circuit has not been cleared in years and is out of compliance militates in favor of turning the power off in that circuit. Of course, all the other factors should be considered as well but in some cases this difference would be and should be decisive. These are recommendations, not orders, but are recommendations informed by years of studying the problem while trying to rehabilitate the offender and to protect California from further crimes and wildfires by the offender.

To the extent that PG&E chooses to honor the Court's recommendation, it should not pretend that using its "Priority 1" and "Priority 2" plus its "Strike Tree" criterion, although steps in the right direction, would satisfy the recommendation or constitute taking into account "all" information available to it. PG&E has much more information available to it pertaining to wildfire risks specific to each circuit. PG&E, for example, has ranked each circuit in terms of priority for "vegetation management." And, it knows or should know the extent to which its circuits have been cleared. PG&E should know the true safety status of every one of its circuits.

The Court agrees that PSPS events should be a last resort. Due to PG&E's neglect over many years, however, our power grid remains overgrown with hazard trees poised to strike during windstorms and unleash catastrophic wildfires. So our backs remain against the wall and last resorts are necessary. In deciding which circuits to leave on and which to turn off during windstorms in the wildfire season, it would be reckless not to take into account, in addition to factors otherwise considered, the extent to which a circuit has been cleared of hazard trees versus not cleared, keeping in mind that hazard trees falling on the lines in windstorms has been the number one cause of wildfires started by PG&E distribution lines. And, when deciding whether to leave a borderline circuit on versus off, public safety should always take priority over inconvenience and hardship, it being preferable to lose power than to lose lives. Again, the above are recommendations, not orders.

By **JULY 1, 2021**, PG&E shall file herein a statement setting forth its 2021 PSPS criteria and stating the extent to which it has and has not adopted the above recommendations.

Within **TWENTY-EIGHT DAYS** after each PSPS event in the 2021 Wildfire Season, PG&E shall also file a public report herein stating:

(i) How many circuits were turned off in the PSPS;

(ii) How many of such circuits had limbs and/or trees blown or fallen onto the lines (as determined in the post-storm inspection);

(iii) How many of such strikes would, in the judgment of PG&E, have started a fire (regardless of size) had the circuit been energized at the time of the strike;

(iv) How many circuits left energized had limbs and/or trees blown or fallen onto the lines by the storm without causing a fire; and

(v) How many circuits left energized with strikes that in fact resulted in fires (regardless of size).

The above five categories should each be further broken down by those circuits that were in substantial compliance with Section 4293 as well as PG&E's Wildfire Mitigation Plan versus those circuits that were not at the time of the PSPS event. The purpose of this information is to assist in post-mortem analysis of how to improve the PSPS process by better selecting which circuits to leave on and which to leave off. The order to show cause dated December 29, 2020, is otherwise **DISCHARGED**. This paragraph is the only court order in this document, everything else being a recommendation or explanation.

Dated: April 29, 2021.

WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE