**No. S273340**

# IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

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ANTHONY GANTNER, individually and on behalf of all those similarly situated,
*Plaintiff-Petitioner*,

v.

PG&E CORPORATION, a California Corporation, and PACIFIC GAS & ELECTRIC COMPANY, a California Corporation
*Defendants-Respondents*.

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Upon Certification Pursuant to California Rules of Court, Rule 8.548, to Decide a Question of Law Presented in a Matter Pending in the United States Court of Appeals for the Ninth Circuit – Case No. 21-15571

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## PETITIONER'S OPENING BRIEF

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## ISSUES PRESENTED

Pursuant to California Rules of Court, rule 8.548, this Court granted the United States Court of Appeals for the Ninth Circuit's request to answer the following questions:

> (1) Does California Public Utilities Code § 1759 preempt a plaintiff's claim of negligence brought against a utility if the alleged negligent acts were not approved by the California Public Utilities Commission [CPUC], but those acts foreseeably resulted in the utility having to take subsequent action (here, a Public Safety Power Shutoff [PSPS]), pursuant to CPUC guidelines, and that subsequent action caused the plaintiff's alleged injury?
>
> (2) Does PG&E's Electric Rule Number 14 shield PG&E from liability for an interruption in its services that PG&E determines is necessary for the safety of the public at large, even if the need for that interruption arises from PG&E's own negligence?

## INTRODUCTION

Pacific Gas & Electric Company ("PG&E")—a convicted felon who for years failed to properly maintain the grid upon which millions of Californians rely for power—has tried to use the California Public Utilities Commission's (the "CPUC") authority to regulate Power Safety Public Shutoffs (or "PSPSs") as a weapon to inoculate itself from liability for its own negligence. It should not be allowed to succeed.

This case arose after PG&E's negligence forced it to undertake a series of PSPSs in the fall of 2019, causing hundreds of thousands of customers to lose power, in many cases for days or even weeks at a time, and suffer damages as a result. Plaintiff Anthony Gantner alleges that PG&E was forced to implement these blackouts because of its negligent maintenance of its power grid. Consistent with legislative history and legal precedent, this Court should make clear that the CPUC's regulatory authority provides no shield for PG&E's negligence.

PG&E's decades-long failure to properly maintain its grid has led to a situation where it has two choices when weather conditions reach a critical point: do nothing and risk starting wildfires, or shut off the power to hundreds of thousands of homes and businesses. This case will determine whether PG&E, or any regulated power utility in California, can avoid liability for negligently failing to maintain its grid when that negligence forces it to take some action that harms people, such as shutting off the power to California homes and businesses.

The answer must be no. Utilities should not get a free pass for their own negligence. To hold otherwise, as CPUC's former Executive Director Alice Stebbins stated in her Amicus Brief in the Ninth Circuit, would create a perverse incentive for a utility to shirk proper maintenance of its grid. It would be cheaper to simply shut off the power any time the winds pick up, sticking customers with the bill for the utility's negligence. (*See* Brief of Amicus Curiae Alice

Stebbins, 2021 WL 3008125 (C.A.9), at *13 [hereinafter "Stebbins Amicus Br."] in *Gantner v. PG&E* (9th Cir. 2022) 26 F.4th 1085.)

Following proceedings that began in bankruptcy court, the Ninth Circuit certified two questions implicating the extent to which PG&E has free rein to ignore upkeep of its power grid. (*See Gantner*, *supra*, 26 F.4th 1085.) The first question is whether California Public Utilities Code section 1759(a) overrides a plaintiff's private right of action under section 2106.[1] The gravamen of this first question is whether under existing California Supreme Court precedent—mainly, *San Diego Gas & Electric Co. v. Superior Court* (1996) 13 Cal.4th 893 ("*Covalt*") and *Hartwell Corp. v. Superior Court* (2002) 27 Cal.4th 256—Plaintiff's suit hinders or interferes with CPUC authority when, as the Ninth Circuit understood it, there are "two separate sets of conduct at issue:" first, the negligence, and second, the PSPSs. (*Gantner*, *supra*, 26 F.4th at 1090.)

The question, then, is whether Plaintiff's negligence claim somehow interferes with CPUC authority simply because the allegations involve "a link in the causal chain that connects PG&E's alleged negligence to [] damages" where he does not "challenge the manner in which PSPSs were executed." (*Gantner*, *supra*, 26 F.4th at 1089.) While the CPUC regulates PSPSs—or did—this lawsuit does not interfere with CPUC's regulation of those events. Plaintiff does not contend that PG&E was negligent in its decision to implement the PSPSs, or in the manner it implemented them.

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[1] Further statutory references and citations are to the California Public Utilities Code unless otherwise noted.

Thus, any liability PG&E faces for the negligent maintenance of its power grid will not hinder or interfere with the CPUC's regulatory authority—all the more so given that, as of July 1, 2021, the California legislature transferred authority over PSPSs to a separate and distinct agency, the Office of Infrastructure Safety. Section 1759 thus cannot immunize PG&E from liability for its negligence in maintaining the power grid. The Ninth Circuit's first question should be answered with a resounding no.

The second question should also be answered with a no. In an argument that neither the bankruptcy court nor the district court deemed worthy of addressing, PG&E asserted that Electrical Rule Number 14 ("Tariff Rule 14") separately preempts Plaintiff's claim. Because this Court "has never interpreted [Tariff] Rule 14," the Ninth Circuit certified a second question: whether that rule shields PG&E from liability where there is a PSPS "even if the need for that service interruption arises from PG&E's own negligence." (*See Gantner*, *supra*, 26 F.4th at 1087.) It does not.

In the CPUC's own words, Tariff Rule 14 is "wholly unrelated" to PSPSs. (*See* 1-SER-71.) Tariff Rule 14 was put in place at a time when PG&E faced an increasingly deregulated market. It was intended to provide some protection to PG&E if service was interrupted because of newly established competition for providing electrical service. Instead of shielding PG&E from liability for its own negligence, the Tariff Rule's protection only applies if PG&E has exercised "reasonable diligence and care." (*See Tesoro Refining &*

*Marketing Company LLC v. PG&E* (N.D. Cal. 2015) 146 F.Supp.3d 1170, 1187.)

Despite *Tesoro*, PG&E argues that Tariff Rule 14 nevertheless preempts Plaintiff's claim because *Tesoro* dealt with one part of the Tariff Rule while PG&E is now seeking refuge in another part of the Tariff Rule. But the Tariff Rule itself has no such division. To receive protection from liability, the Tariff Rule as a whole requires that PG&E "exercise reasonable diligence and care"—precisely the opposite of what Plaintiff alleges it did here. PG&E therefore cannot use the Tariff Rule to escape liability for the negligent maintenance of its power grid.

The Court should answer both certified questions in the negative and return this case to the federal courts for further proceedings. A contrary ruling would give PG&E carte blanche to shut off the power any time it wants, no matter the reason, no matter whose fault, and no matter how much it harms the public.

## STATEMENT OF THE CASE

### I. PG&E'S NEGLIGENT MAINTENANCE OF ITS POWER GRID INEVITABLY LED TO POWER SHUTOFFS AND CAUSED PLAINTIFF AND THE CLASS'S HARM

In the fall of 2019, PG&E shut off power to roughly 800,000 customers in at least five distinct PSPSs. (4-ER-499-501.) These power outages, necessitated by PG&E's negligent maintenance of its power grid, deprived Plaintiff and the Class of the use of their homes, resulted in spoiled food, caused customers to incur expenses for alternate sources of light and power, disabled cell phone connectivity,

disrupted water supplies, and caused businesses to lose customers and productivity. (4-ER-487, 506-507.)

Over the past 30-plus years, PG&E repeatedly breached its duty to mitigate or eliminate the risk of wildfire by maintaining a reasonably safe power grid. PG&E has been convicted of crimes, fined, and penalized by the courts and the CPUC repeatedly. It made no difference: PG&E continued to show a conscious disregard for the safety and well-being of the public. As explained by Judge Alsup, the federal district court judge who oversaw PG&E's five-year probationary period following its felony conviction for the deadly San Bruno pipeline explosion: "For years, in order to enlarge dividends, bonuses, and political contributions, PG&E cheated on its maintenance of its grid—to the point that the grid became unsafe to operate during our annual high winds, so unsafe that the grid itself failed and ignited many catastrophic wildfires." (2-ER-117.)

PG&E's deep-rooted negligence resulted in the Butte Fire, the Tubbs Fire, the Camp Fire, and the Kincaid Fire, among others. (4-ER-490-491.) Scores of Californians died, and thousands of households and businesses suffered losses, ranging from significant to catastrophic. (4-ER-487, 491, 506-507.)

In an order to show cause regarding PG&E's conditions of probation[2], Judge Alsup recognized that "the number-one cause of

[2] The order proposed "further conditions of probation to require the convicted utility, in deciding which power lines to de-energize during windstorms, to take into account the extent to which power lines have or have not been cleared of hazardous trees and limbs as required by

wildfires ignited by PG&E" is "hazardous trees and limbs that should have, by law, been removed but which loom as threats in windstorms." (*See* 9th Cir. Dkt. No. 12, Ex. 1 at 13.[3]) "PSPS events," the order found, are "necessary because PG&E has failed to clear hazardous trees and limbs, caus[ing] huge disruptions for the public. Businesses suffer and residents who use medical devices go without electricity." (*Id.* at 16.) The court concluded that "[t]he PSPS is the lesser evil and will remain essential until PG&E finally comes into full compliance with respect to removing hazardous trees and limbs and honoring the required clearances." (*Id.*)

## II. THE CPUC'S ROLE

The CPUC is charged with regulating utilities. Specifically, as relevant here, it oversees the manner in which PG&E implements PSPSs and the factors the utility should take into account in deciding whether to implement them. (1 ER 6-7.)

Importantly, the CPUC does not "approve" or "permit" or "authorize" PG&E or any utility to implement any specific PSPSs. That decision is entirely up to the utility. Rather, the CPUC approves guidelines that PG&E and other utilities must use in deciding whether to implement PSPSs. (9th Cir. Dkt. No. 12, Ex. 2 at 4.) These

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California law and the Offender's own Wildfire Mitigation Plan (WMP). This proposal is made to protect the people of California from yet further death and destruction caused by the Offender's continuing failure to operate its power grid safely." (9th Cir. Dkt. No. 12, Ex. 1 at 13 at 1.)

[3] "9th Cir. Dkt. No." references are to the Ninth Circuit's docket in this case, Case No. 21-15571.

guidelines are "designed to maximize the wildfire mitigation benefits of the PSPS option while minimizing the public safety consequences that can follow directly from exercising PSPS as a tool of last resort." (*Id.* at 4.) Accordingly, the CPUC has not, to date, "approved" specific models, methodologies, criteria or assumptions to be used in PSPS decision-making. These matters are the responsibility of utility operators who must, by law, operate their electric systems safely and reliably, subject to the CPUC's regulatory oversight and enforcement." (*Id*.)

While PG&E did not institute a PSPS or have a PSPS program until 2019, the CPUC has been setting PSPS parameters since at least 2008 when San Diego Gas & Electric ("SDG&E") asked that the CPUC consider its proposal to shut off electricity to prevent wildfires and sought to be insulated from liability for doing so. (9th Cir. Dkt. No. 12, Ex. 3 at 9-10 [the "2021 Decision"].) The CPUC did not approve or give SDG&E immunity, noting that any future decision to implement a PSPS must be "based on 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*." (*Id.* at 9-15 [quoting CPUC Decision D.09-09-030 at 2 and 63] [emphasis added].) Notably, costs to the utility are *not* a factor that may be taken into account.

In 2012, the CPUC again addressed PSPSs in the context of all electric utility fire prevention plans. It emphasized that PSPSs should only be used as a last resort, citing section 330(g), which states that

"Reliable electric service is of utmost importance to the safety, health, and welfare of the state's citizenry and economy." (2021 Decision at 15-19 [quoting CPUC Decision D.12-04-024].)

Following the destructive 2017 wildfire season, the CPUC adopted Resolution ESRB-8 in 2018 to, among other things, strengthen customer notification requirements before blackouts and order utilities to develop "de-energization" programs.[4] (2-ER-209-217.) The CPUC approved PG&E's Wildfire Safety Plan in 2019. (3-ER-395-485.) That program set forth certain guidelines and minimum standards for PG&E's implementation of PSPSs. (*Id.*)

Since 2012, the CPUC has required that utilities, like PG&E, first "identify and consider the safety risks to the public from shutting off electric power; and, after the utility identifies and considers these safety risks, then the utility must weigh the risks of a PSPS event against the benefits of initiating a PSPS event." (2021 Decision at 48.) The CPUC reviews whether a utility complies with its directive to "identify, consider, and weigh the safety risks to the public from shutting off electric power against the benefits of initiating a PSPS event." (*Id.* at 49.) The utility's potential liability for damages caused by either a wildfire or a PSPS is not a factor in the calculus: "Under no circumstances may the utilities employ de-energization solely as a means of reducing their own liability risk from utility-infrastructure wildfire ignitions and the utilities must be able to justify why de-

[4] Alice Stebbins, who was the Executive Director of the CPUC at the time and submitted an amicus brief in support of Plaintiff in the Ninth Circuit, signed ESRB-8. (2-ER-217.)

energization was deployed over other possible measures or actions." (3-ER-290.)

Importantly, the CPUC does not and cannot regulate damage payments owed to customers because of a PSPS. In ESRB-8, the CPUC states it "is not the venue" to consider PG&E's "financial liability" to its customers because of PSPSs. (2-ER-213.) In considering what, if anything, to do about PG&E's failure to consider the safety risks of the 2019 PSPSs to its customers, the CPUC reaffirmed that it "does *not* have jurisdiction to award damages to utility customers for losses of, for example, personal property, damage to real estate, lost wages, business losses, emotional distress, or personal injury." (2021 Decision at 60 [emphasis added].)

Effective January 1, 2020, the California legislature mandated the establishment within the CPUC of the "Wildfire Safety Division" to "oversee and enforce electrical corporations' compliance with wildfire safety" and "consult with the Office of Emergency Services in the office's management and response to utility public safety power shutoff events and utility actions for compliance with public safety power shutoff program rules and regulations." (§ 326.) "All functions of the Wildfire Safety Division shall be transferred to the Office of Energy Infrastructure Safety established pursuant to Section 15473 of the Government Code." (§ 326(b).) That transfer was effective July 1, 2021. (*Id.*) California Government Code section 15475 confirms that the Office of Energy Infrastructure Safety is "the successor to" the Wildfire Safety Division and has "all of the duties, powers, and responsibilities" of that Division going forward. (*See also* Cal. Gov.

Code, § 15473.) Thus, the CPUC no longer has authority to regulate PSPSs.

## PROCEDURAL HISTORY

On December 19, 2019, Plaintiff filed his class action complaint as an adversary proceeding in PG&E's bankruptcy case, asserting a single negligence claim against PG&E for its failure to maintain a reasonably safe power grid. (4-ER-486-509.) Plaintiff did not challenge PG&E's right to institute PSPSs, whether they were necessary, or the manner in which it instituted them. Rather, Plaintiff sought compensation for the losses he and hundreds of thousands of other Californians suffered because of the PSPSs, which were made necessary because of PG&E's gross negligence in maintaining its power grid. (4-ER-487, 494-496, 501-503.)

PG&E moved to dismiss the Complaint, arguing, among other things, that section 1759 preempted Plaintiff's claim and that Tariff Rule 14 immunized PG&E from liability. (BR Dkt. No. 7.[5]) In opposition, Plaintiff argued that the case was not barred by section 1759 because it did not interfere with the CPUC's regulatory authority over PSPSs and that Tariff Rule 14 did not immunize PG&E from liability for its own negligence. (BR Dkt. No. 16 at 5-14.) The CPUC filed an amicus brief supporting PG&E's section 1759 argument. (BR Dkt. No. 19.)

[5] "BR Dkt. No." references are to the Bankruptcy Court's docket, Case No. 19-30088 (DM), Adversary Proceeding Case No. 19-03061 (Bankr. N.D. Cal.).

The bankruptcy court granted PG&E's motion on a single ground: "The court is dismissing this adversary proceeding because it is preempted by Public Utilities Code section 1759." (1-ER-24.) Plaintiff appealed. (4-ER-515-517.) The United States District Court for the Northern District of California affirmed. (1-ER-2-11.)

Plaintiff timely appealed the district court's order to the Ninth Circuit. (9th Cir. Dkt. No. 10.) Following briefing and argument—including an amicus brief supporting Plaintiff from Alice Stebbins, the CPUC's former executive director, and an amicus brief supporting PG&E by the CPUC—the Ninth Circuit found that this case presented novel questions about the scope of preemption under California Public Utilities Code section 1759, as well as whether Tariff Rule 14 immunized PG&E. (*See Gantner*, *supra*, 26 F.4th at 1089, 1091.) Because "these questions [] have significant public policy implications for California residents and utilities," that court requested certification of the questions of law set forth above. (*Id.* at 1089.)

## ARGUMENT

### I. SECTION 1759 DOES NOT PREEMPT PLAINTIFF'S NEGLIGENCE CLAIM

The California Public Utilities Code contains two sections governing a litigant's ability to seek relief in a civil action against PG&E. The first is section 2106, which explicitly provides for a private right of action against public utilities:

> Any public utility which does, causes to be done, or permits any act, matter, or thing prohibited or declared unlawful, or which omits to do any act, matter, or thing required

> to be done, either by the Constitution, any law of his State, or any order or decision of the commission, shall be liable to the persons or corporations affected thereby for all loss, damages, or injury caused thereby or resulting therefrom. If the court finds that the act or omission was willful, it may, in addition to the actual damages, award exemplary damages. An action to recover for such loss, damage, or injury may be brought in any court of competent jurisdiction by any corporation or person.

The second is section 1759, which states:

> No court of this state, except the Supreme Court and the court of appeal, to the extent specified in this article, 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.

Section 1759 does not, however, foreclose all claims against regulated utilities simply because they are regulated. "It 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.* (1965) 233 Cal.App.2d 469, 477 [emphasis in original].) The mere fact that this action relates to PSPSs and that the CPUC regulates how PSPSs are implemented does not mean *ipso facto* that this action "interferes" with the CPUC's "performance of its official duties."

This Court developed the pertinent test for section 1759 preemption in *Covalt*, *supra,* 13 Cal.4th 893. The *Covalt* test has three components: "(1) whether the [C]PUC had the authority to adopt a regulatory policy on the subject matter of the litigation; (2) whether [C]PUC has exercised that authority; and (3) whether action in the case before the court would hinder or interfere with [C]PUC's exercise of regulatory authority." (*Kairy v. SuperShuttle Intern.* (9th Cir. 2011) 660 F.3d 1146, 1150.) All three prongs must be met for preemption to apply. Only the third prong is at issue here. (*See Gantner*, *supra*, 26 F.4th at 1090 ["This case thus presents the question whether adjudicating Plaintiff's claim that PG&E negligently maintained its grid would hinder or frustrate CPUC's regulatory authority with respect to PSPSs."].)

As the Ninth Circuit observed, "Plaintiff does not challenge the manner in which the PSPSs were executed but rather argues that they are a link in the causal chain that connects PG&E's alleged negligence to his damages." (*Id.* at 1089.) CPUC's regulatory authority over PSPSs is limited to assessing their implementation and propriety; it has no authority to award damages resulting from PSPSs. The findings required to award tort damages here (*i.e.*, PG&E's failure to maintain the grid, necessitating PSPSs, and causing damages) requires no finding that a PSPS was unnecessary or improperly implemented.

The negligent conduct (grid maintenance) here has nothing to do with PSPS implementation. (*See* Oral Argument in Ninth Circuit Case No. 21-15571 (Jan. 12, 2022) <https://www.ca9.uscourts.gov/

media/video/?20220112/21-15571/> (as of June 28, 2022) at 23:24-23:35 [Judge Friedland: "The fact that it was appropriate to turn off the power to mitigate the risk doesn't tell us that there wasn't a problem earlier about maintaining the grid and causing that problem."].) At most, Plaintiff would need to establish that the PSPSs occurred and were foreseeable in the causal chain—a burden that in no way requires any challenge to any finding or authority to find that PSPSs were implemented properly.

Thus, no judicial finding necessary to award damages for PG&E's negligence would hinder or interfere with the standards and guidelines the CPUC has adopted and approved for PSPSs. Rather, seeking to require PG&E to comply with applicable laws and regulations regarding maintaining the safety of the grid—for instance those codified in Public Utilities Code sections 451 and 8386(a), Public Resources Code sections 4292 and 4293, and CPUC General Orders Nos. 95 & 165—advances the CPUC's policies concerning grid safety and maintenance and has no impact on its PSPS implementation policy.

### A. This Action Does Not Hinder or Interfere with the CPUC's Regulatory Authority Over PSPSs

#### 1. *Covalt* Supports Plaintiff's Claim

In *Covalt*, this Court considered whether section 1759 preempted a nuisance claim based on property damage caused by SDG&E powerlines producing electric and magnetic fields that *the CPUC had found not to be dangerous*. (*Covalt, supra,* (1996) 13 Cal.4th at 917.) The *Covalt* court determined that a damages award in

the nuisance case would be inconsistent with the CPUC's policies because such finding "would be inconsistent with the commission's conclusion." (*Id.* at 939.) Thus, following *Covalt*, a court must determine (1) what a court would have to find to award damages on the claim at issue; and (2) whether those findings would be inconsistent with any commission policy or conclusion.

Here, there is no conflict between a conclusion already reached by the CPUC and any findings needed to sustain liability in this case. To award damages, the factfinder here would have to find: (1) PG&E negligently maintained its power grid; (2) PG&E's negligent maintenance of its power grid caused it to shut off power to Plaintiff and the Class; and (3) PG&E's negligence was a substantial factor in causing Plaintiff's (and the Class's) injuries. (*See* CACI No. 400.) Those findings would not conflict with any CPUC policy or conclusion related to PSPSs. Moreover, because Plaintiff is not challenging PG&E's decisions to implement PSPSs, there is no conflict between a conclusion or policy of the CPUC and the findings Plaintiff would need to win his negligence case.

The Ninth Circuit's decision in *Kairy v. SuperShuttle Intern.* (9th Cir. 2011) 660 F.3d 1146 is instructive. In that case, a former driver sued Supershuttle, a CPUC regulated company, for wages and benefits on the theory that he was misclassified as an independent contractor. (*Id.* at 1149.) Supershuttle moved to dismiss based on section 1759 preemption and the trial court granted the dismissal. The Ninth Circuit reversed, holding that the *Covalt* test's third prong was not satisfied because the employee/independent

contractor determination the court would have to make to decide the case would not hinder or interfere with the CPUC's jurisdiction. (*Id.* at 1156.)

Here, as in *Kairy*, the factfinder would not have to decide anything that conflicts with any CPUC policy or conclusion. Liability in this case does not arise from the PSPSs themselves but from PG&E's negligent failure to maintain its power grid in compliance with state law and CPUC regulations.

### 2. The CPUC's Conclusory Assertion that This Action Interferes with Its Regulatory Authority Carries No Weight

The CPUC's bald assertion here that this action would interfere with its ability to regulate PSPSs does not mean that it does. (*Cf.* Brief of Amicus Curiae the California Public Utilities Commission, 2021 WL 4126909 (C.A.9), at *3 [hereinafter "CPUC Amicus Br."] in *Gantner v. PG&E* (9th Cir. 2022) 26 F.4th 1085 [arguing that section 1759 "bars adjudication of the claim asserted" because the claim would "hinder and interfere" with the Commission's policy to allow PSPSs].)

In PG&E's criminal proceedings, the CPUC outlined its role:

> The CPUC has approved guidelines for electric utilities to use in their PSPS decision-making process, that are designed to maximize the wildfire mitigation benefits of the PSPS option while minimizing the public safety consequences that can follow directly from exercising PSPS as a tool of last resort. Accordingly, the CPUC has not, to date, "approved" specific models, methodologies,

> criteria or assumptions to be used in PSPS decision-making. These matters are the responsibility of utility operators who must, by law, operate their electric systems safely and reliably, subject to the CPUC's regulatory oversight and enforcement.

(9th Cir. Dkt. No. 12, Ex. 2 at 4.)

Put simply, liability in this case does not interfere with those guidelines, regardless of the CPUC's *ipse dixit* that it does. Alice Stebbins—the head of the CPUC during the period at issue in this case—agrees that this case would not interfere with CPUC's regulatory authority. (*See* Stebbins Amicus Br. at 2, 14-15.) And as she further points out, the CPUC provided no specific evidence, reasoning, or explanation to support its assertion that this lawsuit interferes with its regulatory authority; absent such specifics, the CPUC's bare assertion carries no weight. (*Ibid; see also Wilson v. S. California Edison Co.* (2015) 234 Cal.App.4th 123, 151.)

California courts reject the CPUC's view of section 1759 preemption when those views conflict with reality, as is the case here. In *Wilson*, *supra*, 234 Cal.App.4th 123, for example, the utility appealed from a jury verdict awarding tort damages for negligently allowing uncontrolled currents into a customer's home from an electrical substation located next door. The CPUC filed an amicus brief asserting, much like it did here, that it had an ongoing policy and program and that a superior court adjudication prior to a CPUC finding of wrongdoing "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

disagreed, finding no preemption because there was no evidence that the CPUC had investigated or regulated the specific stray voltage issue on which liability hinged. (*Id.* at 151.) So too here. It is for the courts, not the CPUC, to decide preemption.

### 3. Whether PG&E Met the CPUC's Minimum PSPS Standards Is Irrelevant

Whether PG&E met the minimum requirements the CPUC set for PSPSs (it did not) is irrelevant to a determination of liability here.

In *Mata v. PG&E* (2014) 224 Cal.App.4th 309, *as modified on denial of reh'g* (Mar. 26, 2014), heirs of a decedent electrocuted by overhead powerlines while trimming trees brought a negligence action alleging that PG&E failed to exercise due care in maintaining vegetation clearance near the power line. The superior court granted PG&E's motion for summary adjudication on a negligence per se cause of action because PG&E indisputably met its clearance obligations under CPUC General Order No. 95 for that power line. The superior court then granted PG&E's motion to dismiss based on section 1759.

The court of appeal reversed. It found that the CPUC had established rules for minimum clearance, but this did not mean that PG&E was relieved "of its obligation to exercise reasonable care to avoid causing harm to others, or relieved of its responsibility for failing to do so." (*Mata*, *supra*, 224 Cal.App.4th at 318; *see also Nevis v. PG&E* (1954) 43 Cal.2d. 626, 630 ["Compliance with the general orders of the [CPUC] does not establish as a matter of law due care by the power company, but merely relieves it 'of the charge of

negligence per se.'"]; *PegaStaff v. PG&E* (2015) 239 Cal.App.4th 1303, 1320 ["merely meeting [minimum] requirements does not necessarily insulate a utility from a superior court suit."].)

Here, PG&E's compliance (or not) with PSPS regulations is simply irrelevant to the section 1759 preemption question because Plaintiff plainly alleges that PG&E did not meet minimum safety standards in maintaining its grid—that is the negligence alleged.

#### 4. The CPUC's 2021 Decision and Legislative Divestment of Authority Dictate that This Action Does Not and Cannot Interfere with the CPUC's Regulatory Authority

On June 7, 2021, the CPUC issued a "Decision Addressing the Late 2019 Public Safety Power Shutoffs by Pacific Gas and Electric Company [and other utilities] to Mitigate the Risk of Wildfire Caused by Utility Infrastructure." (*See* 2021 Decision.) That Decision addressed the implementation of the PSPSs and whether PG&E considered appropriate factors in deciding to institute them, but did not address whether PG&E's negligence caused it to shut off the power, or whether it should be liable if that were the case. Indeed, the 2021 Decision explicitly noted that the CPUC lacked jurisdiction to do so. (*Id*. at 60.)

To the extent any California agency might revisit the 2019 PSPSs after the CPUC's 2021 Decision, that agency would be the Office of Energy Infrastructure Safety, not the CPUC. (*See* § 326 [transferring regulatory authority over wildfire safety matters including PSPSs from the Wildfire Safety Division within the CPUC

to the newly created Office of Energy Infrastructure Safety, a division of the California Natural Resources Agency, an entirely different department of government from the CPUC, as of July 1, 2021]; Cal. Gov. Code § 15475 [confirming that the Office of Energy Infrastructure Safety is the successor to the Wildfire Safety Division and has all duties previously assigned to it].) Section 1759 does not apply to that Office so no preemption exists no matter what it might decide to do. And because section 1759 preemption rests on whether the action would interfere with the CPUC's prospective regulation, not past events, no interference is possible. (*United Energy Trading, LLC v. PG&E* (N.D. Cal. 2015) 146 F.Supp.3d 1122, 1138 [no section 1759 preemption because "a lawsuit for past damages would not interfere with the CPUC's ongoing, *prospective* regulation of the relevant industry"] [emphasis in original].) Tellingly, neither PG&E nor the CPUC addressed Government Code section 15475 in any of the federal court proceedings.

### B. This Action Reinforces and Complements the CPUC's Regulatory Authority

#### 1. That This Action Seeks Damages the CPUC Cannot Award Supports Plaintiff's Claim

The nature of the relief sought is relevant to whether an action would hinder or interfere with the CPUC's exercise of regulatory authority. (*See PegaStaff v. PG&E* (2015) 239 Cal.App.4th 1303, 1318.) "If the nature of the relief sought . . . fall[s] outside the [C]PUC's constitutional and statutory powers, the claim will not be barred by section 1759." (*Ibid*; *see also Mangiaracina v. BNSF*

*Railway Company* (N.D. Cal., Mar. 7, 2019) No. 16-CV-05270-JST, 2019 WL 1975461, at *14 ["the Court finds further support [for its denial of defendant's motion to dismiss based on section 1759] in the fact that Plaintiffs seek damages based on past negligence, which the CPUC lacks the power to adjudicate."].)

The CPUC acknowledges that it lacks the authority to award, or to order a utility to pay, tort damages, which is what Plaintiff seeks. (2-ER-201 ["[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."]; 2021 Decision at 60; 2-ER-192-193; *Mangiaracina*, *supra*, 2019 WL 1975461, at *14 [CPUC lacks power to adjudicate damages based on past negligence].) This alone means that there should be no section 1759 preemption. (*PegaStaff*, *supra*, 239 Cal.App.4th at 1318.)

### 2. *Hartwell* and Its Progeny Support Plaintiff's Claim

In *Hartwell Corp. v. Superior Court* (2002) 27 Cal.4th 256, this Court clarified the line between cases that interfere with the CPUC's regulatory authority and those that do not. Plaintiffs there challenged both the adequacy of federal and state drinking water standards and the utilities' compliance with those standards, seeking damages and injunctive relief. (*Id.* at 276, 279.) The utilities demurred, citing section 1759, a trial court granted that motion, and the court of appeal affirmed. (*Id.* at 263-64.)

But this Court reversed in part. The Court held that because the CPUC exercised its jurisdiction to regulate drinking water quality, the plaintiffs' challenge to the *adequacy* of those standards was preempted. Plaintiffs' damage claims alleging that the *utilities failed to meet those standards*, in contrast, were not preempted because a "jury award based on a finding that a public water utility violated [the] standards would not interfere with the [C]PUC regulatory policy requiring water utility compliance with those standards." (*Id*. at 276.)

In so holding, the Court articulated an additional basis to affirm a court's jurisdiction over a utility's actions:

> An award of damages is barred by section 1759 if it would be contrary to a policy adopted by the [CPUC] and would interfere with its regulation of public utilities. On the other hand, superior courts are not precluded from acting in aid of, rather than in derogation of, the [CPUC's] jurisdiction.

(*Id.* at 275 [internal citation omitted].) This Court explained that "a court has jurisdiction to enforce a [utility's] legal obligation to comply with [CPUC] standards and policies and to award damages for violations" and allowed plaintiffs to pursue a damages claims based on a theory that the utility failed to meet those standards. (*Id.* at 275-76.)

Under *Hartwell*, Plaintiff's claim should survive. First, as noted above, a damages award is not contrary to any CPUC policy concerning PSPSs or powerline safety. PG&E's negligence here is failing to safely maintain its power grid. It is consistent with and complements the CPUC's safety policies and regulations to hold

PG&E liable for damages it causes as a result. Doing so does not hinder CPUC's PSPS policies.

Second, the CPUC's PSPS policy permits utilities to enact PSPSs "as a last resort for wildfire mitigation." (2021 Decision at 27.) Liability in this case cannot possibly interfere with that policy. In *Vila v. Tahoe Southside Water Utility* (1965) 233 Cal.App.2d 469, 479, the case on which *Hartwell* relies, the court found no preemption because the action, premised on a violation of a CPUC regulation, would aid rather than degrade the CPUC's regulatory authority.

*Cundiff v. GTE California* (2002) 101 Cal.App.4th 1395 follows this line of authority. There, plaintiffs sued phone utilities for charging rental fees for nonexistent or obsolete phones. (*Id.* at 1400-02.) The court of appeal reversed the granting of a demurrer on section 1759 grounds based on interference with the CPUC's billing regulations because plaintiffs were not challenging the CPUC's decision to allow defendants to rent phones, but how defendants billed them under the regulations. (*Id.* at 1406.)

That court relied on *Cellular Plus v. Superior Court* (1993) 14 Cal.App.4th 1224. There, the court allowed an antitrust action for price-fixing against cell phone companies despite the CPUC's regulation of pricing because plaintiffs did not challenge the CPUC's right to set rates for cellular service or have the commission change its rates. (*Id.* at 1245; *see also Cundiff v. GTE California, Inc.* (2002) 101 Cal.App.4th 1395, 1407.)

This action aligns with all those cases. Plaintiff is not challenging either the CPUC's authority to regulate PG&E's PSPSs or

its authority to regulate PG&E's maintenance of its grid. Nor is Plaintiff seeking to change those regulations. Plaintiff simply seeks to hold PG&E liable for damages foreseeably arising from its negligence. In fact, this action "actually furthers policies of [the CPUC]" because it incentivizes PG&E to provide safe and reliable electricity to its customers. (*Cundiff*, *supra*, 101 Cal.App.4th at 1408; *see also Nwabueze v. AT&T* (N.D. Cal. Jan. 29, 2011) No. C-09-1529-SI, 2011 WL 332473, at *16 ["A lawsuit for damages . . . would not interfere with any prospective regulatory program" since "a finding of liability would not be contrary to any policy adopted by the CPUC or otherwise interfere with the CPUC's regulation."].)

*PegaStaff v. PG&E* (2015) 239 Cal.App.4th 1303 further illustrates the distinction between actions hindering the exercise of the CPUC's authority (which are barred) and those complementing it (which are not). In *PegaStaff*, a non-minority run staffing agency sued PG&E and others, alleging that PG&E's new tier structure (which rewarded minority enterprises over others in response to new Public Utilities Code sections and a CPUC general order designed to encourage the use of minority enterprises) negatively affected its business and discriminated against it. The trial court granted PG&E's motion for judgment on the pleadings, holding that section 1759 precluded jurisdiction. The court of appeal reversed. (*Id.* at 1310.)

Even though the plaintiff alleged that PG&E set up its preference system to comply with CPUC rules, the court of appeal concluded that PG&E's tier system was not necessary to comply with those rules, and that the CPUC had not authorized or permitted

PG&E's conduct. Thus, an award of damages or injunctive relief would enforce, not obstruct, the CPUC regulation. (*Id.* at 1327-28) [citing *Hartwell*, *supra*, 27 Cal.4th at 275].)

The facts here are even stronger than the cases cited above. Plaintiff's negligence claim is based on PG&E repeatedly violating its duty of care to its customers and, in the process, violating Public Utilities Code sections 451 and 8386(a); Public Resources Code sections 4292 and 4293; and CPUC General Orders Nos. 95 & 165—culminating in it shutting off power to hundreds of thousands of customers. (4-ER-489-490, 492-498, 505-506.) The CPUC did not specifically authorize PG&E to violate these statutes or orders.

Nor does it matter that it was PG&E's "subsequent action (here, a Public Safety Power Shutoff [PSPS])," that caused Plaintiff's injury. (*Gantner*, *supra*, 26 F.4th at 1087.) As Plaintiff alleges, and as Judge Alsup has found, it was utterly foreseeable that PG&E's failure to maintain its grid would lead to PSPSs. (*See*, *e.g.*, Final Comments of District Court Upon Expiration of PG&E's Probation, *United States v. PG&E,* N.D. Cal. Case No. 3:14-cr-00175-WHA, Dkt. No. 1559 at 5 (Jan. 19, 2022) ["If PG&E were in full compliance with California's Public Resource Code with respect to hazard tree removal and vegetation clearance maintenance, then the need for any PSPS would be vastly reduced, and almost all meters could continue to turn in safety."].)

Plaintiff has sufficiently alleged that PG&E's negligence was a substantial factor in causing Plaintiff's harm, and that PG&E's "subsequent action" was foreseeable. Under foundational tort law

principles, that is all that is required. (*See*, *e.g.*, CACI No. 430 ["A substantial factor in causing harm is a factor that a reasonable person would consider to have contributed to the harm. It must be more than a remote or trivial factor. It does not have to be the only cause of the harm."]; CACI No. 431 ["A person's negligence may combine with another factor to cause harm . . . . [Defendant] cannot avoid responsibility just because some other person, condition, or event was also a substantial factor in causing [plaintiff]'s harm."]; *Cabral v. Ralphs Grocery Co.* (2011) 51 Cal.4th 764, 779 ["[T]he question of 'the closeness of the connection between the defendant's conduct and the injury suffered' [citation] is strongly related to the question of foreseeability itself."].)

## II. TARIFF RULE 14 DOES NOT IMMUNIZE PG&E FROM ITS OWN NEGLIGENCE

The second question the Ninth Circuit certified should also be answered with an emphatic no. Tariff Rule 14 does not shield PG&E from liability for an interruption in its services that PG&E determines is necessary for the safety of the public at large where the need for that interruption arises from PG&E's own negligence.

The CPUC and the principal case addressing Tariff Rule 14, *Tesoro Refining & Marketing Company LLC v. PG&E* (N.D. Cal. 2015) 146 F.Supp.3d 1170, 1187, have both stated that Tariff Rule 14 is not intended to absolve PG&E of liability for its own negligence. Tariff Rule 14 only provides PG&E immunity for power outages when it exercises "reasonable diligence and care"—something it did not do here. (*Tesoro*, *supra*, 146 F.Supp.3d at 1184; *accord* CPUC

Decision D.09-09-030 [CPUC stating that "PG&E's Tariff Rule 14 stems from D.97-10-087, which concerned the interruption of energy supplied by energy marketers to direct access customers" and is "wholly unrelated" to SDG&E's desire to insulate itself from liability for public safety power shutoffs].) The *Tesoro* court and the CPUC are right: Tariff Rule 14 does not immunize PG&E for its own negligence.

### A. Tariff Rule 14 Does Not Apply to PSPS Liability

As an initial matter, Tariff Rule 14 does not apply to PSPS liability. Tariff Rule 14 was approved in 1997 in connection with direct access deregulation and is "wholly unrelated" to PSPS liability. (*See* 1-SER-71.) It is irrelevant to the issues of this case.

The direct access legislation (Public Utilities Code, § 330 *et seq*.) that precipitated PG&E's amendment to Tariff Rule 14 made PG&E one of many bidders on a wholesale energy market in its own service area, such that the degree to which it controlled power supplied within those areas diminished. (*Tesoro*, *supra*, 146 F.Supp.3d at 1184 [citing section 330 and CPUC Decision 95-12-063, 64 CPUC 2d 1 (1995)].) The output of energy was no longer dependent on PG&E alone. It therefore makes sense that PG&E would want to establish (and the CPUC would approve) that, barring its own negligence, PG&E may interrupt its service deliveries to its customers and electric service providers ("ESPs") for safety reasons. It makes no sense, however, that the CPUC would allow PG&E to insulate itself from liability for its own negligence simply because ESPs were allowed to compete with PG&E.

Indeed, the direct access legislation expresses the contrary goal of ensuring reliable electric services. (*See, e.g.,* § 330(g) ["Reliable electric service is of utmost importance to the safety, health, and welfare of the state's citizenry and economy."]; (h) ["It is important that sufficient supplies of electric generation will be available to maintain the reliable service to the citizens and businesses of the state."]; and (i) ["Reliable electric service depends on conscientious inspection and maintenance of transmission and distribution systems"].)

### B. The CPUC Correctly Held that Tariff Rule 14 Did Not Absolve PG&E of Negligence Liability

The CPUC considered the very question of whether PG&E's Tariff Rule 14 absolves it from liability for PSPSs and decided that it does not. In CPUC Decision D.09-09-030, SDG&E requested authority to amend its Tariff Rule 14 to include the statement that SDG&E may shut off power "without liability to its customers." The CPUC declined, noting that PG&E's language "was approved in 1997 as part of the Commission's direct access program" and that different context "concerned the interruption of energy supplied by energy marketers to direct access customers," not PSPSs, which are "wholly unrelated." The Commission found "*no evidence* that PG&E's Tariff Rule 14 was filed to implement a power shut-off program like the one proposed by SDG&E." (CPUC Decision D.09-09-030 at 68 [emphasis added].) It then concluded: "PG&E's Tariff Rule 14 was filed to implement direct access and, therefore*, does not constitute a reasonable precedent for* revising SDG&E's Tariff Rule 14 for *the*

*purpose of implementing a power shut-off program*." (*Id.* at 69 [emphasis added].)

Consistent with this position, the CPUC stated after Tariff Rule 14 became effective: "PG&E is only protected from damages that are beyond its control; however, it is responsible for reasonable damages resulting from its negligence." (1-SER-69.) And, revealingly, in its Advice Letter supporting Tariff Rule 14, PG&E did not say anything about insulating itself from negligence liability; rather, PG&E stated: "This filing will not increase any rate or charge, cause the withdrawal of service, or conflict with any rate schedule or rule."[6] (BR Dkt. No. 16 at 25.)

Tariff rules from other public utility providers likewise do not provide for those utilities to escape liability for their own negligence. (BR Dkt. No. 16 at 22 ["SCE will not be liable for interruption or shortage of supply, nor for any loss or damage occasioned thereby, if such interruption or shortage results from any cause not within its control;" "The utility will not be liable for interruption or shortage or insufficiency of supply, or any loss or damage occasioned thereby, if same is caused by inevitable accident, act of God, fire, strikes, riots, war or any other cause not within its control."].)

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[6] PG&E was *not* exempt from negligence actions for failing to provide power prior to Tariff Rule 14 being amended. (*See, e.g., Langley v. PG&E.* (1953) 41 Cal.2d 655, 660-61 [interpreting previous version of Tariff Rule 14 and holding that "[i]n no way, however do [the provisions] abrogate the defendant's general duty to exercise reasonable care in operating its system to avoid unreasonable risks of harm to the persons and property of its customers"].)

### C. *Tesoro* Correctly Held that Tariff Rule 14 Did Not Absolve PG&E of Negligence Liability

*Tesoro* applied the same logic as the CPUC to find that Tariff Rule 14 does not immunize PG&E for its own negligence. There, the plaintiff, a refinery, sued PG&E for damages resulting from PG&E's negligently caused power outage. (*Tesoro*, *supra*, 146 F.Supp.3d 1170.) PG&E argued that certain liability limitation language in Tariff Rule 14 immunized it from negligence liability. The court held that it did not, finding that the purpose of Tariff Rule 14's liability limitation was related to deregulation/access, not to PG&E's own negligence. (*Id*. at 1185.) There is no doubt, then, that Tariff Rule 14 does not immunize PG&E for its own negligence.

PG&E nevertheless argued in this action that part of Tariff Rule 14 gives it "sole" authority to engage in power shutoffs for public safety. (*See* 9th Cir. Dkt. No. 28 at 48.) In short, PG&E claims that a portion of the Tariff Rule conveys immunity for negligence even where the rest of the Tariff Rule does not. Because *Tesoro* addressed what PG&E calls paragraph three, while what they call paragraph four is at issue here, *Tesoro*, PG&E claims, does not apply. But that portion of Tariff Rule 14 is not a separate provision.

Tariff Rule 14 states, in pertinent part (emphasis added):

> [first paragraph] *PG&E will exercise reasonable diligence and care*[7] *to furnish*

[7] This "reasonable diligence and care" standard is essentially a negligence standard and in accord with Public Utilities Code section 451: "Every public utility shall furnish and maintain such adequate, efficient, just, and reasonable service . . . to promote the safety, health, comfort, and convenience of its patrons, employees, and the public."

> *and deliver a continuous and sufficient supply of electric energy to the customer*, but does not guarantee continuity or sufficiency of supply. PG&E will not be liable for interruption or shortage or insufficiency of supply, or any loss or damage of any kind of character occasioned thereby, if same is caused by inevitable accident, act of God, fire, strikes, riots, war, *or any other cause except that arising from its failure to exercise reasonable diligence***.**
>
> . . .
>
> [third paragraph] Under no circumstances shall PG&E be liable to its customers or their agents for any local or system deficiencies in supply stemming from inadequate power bids or power deliveries over the Independent System Operator (ISO) grid. Similarly, PG&E shall not be liable to any customer, or electric service provider, for damages or losses resulting from interruption due to transmission constraint, allocation of transmission or intertie capacity, *or other transmission related outage, planned or unplanned*.
>
> [fourth paragraph] PG&E specifically maintains the right to interrupt its service deliveries, without liability to the Customers or electric service providers (ESPs) affected, when, in PG&E's sole opinion, such interruption is necessary for reasons including, but not limited to, the following: 1. Safety of a customer, a PG&E employee, or the public at large. . . .

The fourth paragraph—on which PG&E solely relied in previous briefing—is simply a subset of the "outage, planned or unplanned"

language in the third paragraph, providing some examples of when it can shut off power. The phrase "maintains the right," which starts the fourth paragraph, makes plain that there is no new or additional immunity bestowed on PG&E by virtue of this paragraph.

The liability waiver language in the third paragraph is also much broader than the language in the fourth paragraph such that the *Tesoro* court's rejection of a liability waiver when analyzing the third paragraph necessarily dictates that no waiver was intended or approved by the fourth paragraph. The "under no circumstances" language at the beginning of the third paragraph is broader than the language in the fourth paragraph and encompasses a situation in which "in PG&E's sole opinion" paragraph three occurs, while the "maintains the right" language in the fourth paragraph is a necessary limitation on what is to follow. Tariff Rule 14 thus does not absolve PG&E of liability for its own negligence in connection with an "outage, planned or unplanned." (*Tesoro*, *supra*, 146 F.Supp.3d at 1176 [citation omitted].[8])

[8] In holding that PG&E was not shielded from its own negligence, *Tesoro* noted that while "it is not clear from the face of the rule whether the third paragraph is an exception of the general policy that PG&E is liable for damages arising from its own negligence," the court concluded that, "*[b]ased on the context as a whole"* of Tariff Rule 14, "the CPUC did not intend to shield PG&E from the sort of negligence that occurred here." (*Tesoro*, *supra*, 146 F.Supp.3d at 1184 [emphasis added].)

### D. The Only Reasonable Understanding of Tariff Rule 14 Precludes Immunity for PG&E's Negligence

Against this backdrop, the Ninth Circuit stated that both Plaintiff and PG&E have "reasonable interpretations" of Tariff Rule 14. (*See Gantner*, *supra*, 26 F.4th at 1091.) Because, according to the Ninth Circuit, this Court has never ruled that a canon of construction under which any ambiguity must be read against the drafter should also apply against a tariff that has "the force and effect of a statute," there is a possibility that this Court may defer to PG&E's supposedly reasonable interpretation of Tariff Rule 14. (*See ibid* [citing *Dyke Water Co. v. Public Utilities Commission* (1961) 56 Cal.2d 105].) But, notably, the Ninth Circuit never suggests that another canon of statutory construction, when applied to Tariff Rule 14, could ever be read to favor immunizing PG&E, instead merely noting that this Court had not yet "adopted the canon that ambiguities in a tariff rule must be resolved against the utility." (*See id*. at 1091-92.[9]) As the above

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[9] Even *Waters v. Pacific Telephone Co.* (1974) 12 Cal.3d 1, which the Ninth Circuit quoted when noting that it is unclear whether "general principles" of statutory construction are applicable "to disputes with regulated entities," did so only in the context where a "judicial construction" would "undermine[]" "commission-approved tariff schedules." (*Id*. at 10.) And, as the court noted in *Pink Dot, Inc. v. Teleport Communications Group* (2001) 89 Cal.App.4th 407, 414, *Waters* predates "the PUC's 1970 opinion in *Re Telephone Corporations,* which required exposure to liability for any willful misconduct, fraud or violations of law by the utility." *Waters*, then, is not an invitation to discard statutory construction for tariff rules, but rather a reminder—and a dated one at that—that the judiciary should not undercut regulatory authority. Here, however, where it is

analysis indicates, neither the history of Tariff Rule 14 nor a plain reading of it provide any support for such a position.

Nor is there any reason why the canon of construction that would disfavor PG&E as the drafter should not apply, as the court of appeal found in *Pink Dot, Inc. v. Teleport Communications Group* (2001) 89 Cal.App.4th 407. In *Pink Dot*, a customer sued a telecommunications company for, among other things, gross negligence related to the use of caller identification. The defendant filed a tariff with the CPUC that included a clause limiting its liability for damages its conduct caused, but failed to include a specific limitation for the causes of action at issue in the case.

The court held that the defendant "cannot eliminate its liability for willful misconduct, fraud or violations of law by merely omitting the acknowledgment of such liability from its tariff." (*Pink Dot*, *supra*, 89 Cal.App.4th at 414.) In so finding, the court of appeal stated that "even if such broad and unfocused exculpatory language in Teleport's tariff could be so construed, the rule has been stated many times that if there is an ambiguity in a *tariff* any doubt in its interpretation is to be resolved in favor of the [nondrafter and against the utility]." (*Id.* at 415 [citing Cal. Civ. Code, § 1654 and collecting cases] [internal quotation omitted and emphasis added].) So, too, here.

Even if the Court were to decide that the ordinary rules of statutory construction did not apply to Tariff Rule 14, it is still clear

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consistent with CPUC authority and public safety to ensure that PG&E cannot escape liability for its negligence, no such concern exists.

that a tariff PG&E wrote to ensure that it was able to participate in a marketplace as it deregulated should not immunize PG&E for its own negligence in a "wholly unrelated" context—negligence that necessitated later PSPSs. The logic of *Pink Dot* and the precedents on which it relies are unassailable.

A regulated entity should not be permitted to draft an ambiguous tariff rule and then rely on that very ambiguity to obtain more favorable terms. PG&E drafted Tariff Rule 14. To the extent the Court thinks Tariff Rule 14 is at all ambiguous (which Plaintiff does not), PG&E should not get the benefit of the doubt. "Not only is this simply an application of the general rule as to construction of written contracts and instruments, but . . . it is particularly useful in application to tariffs." (*Transmix Corp. v. Southern Pac. Co.* (1960) 187 Cal.App.2d 257, 268 [internal citation omitted].) "Since the tariff is written by the carrier, all ambiguities or reasonable doubts as to its meaning must be resolved against the carrier." (*Id*.)

## CONCLUSION

For the foregoing reasons, Plaintiff Anthony Gantner submits that both questions the Ninth Circuit certified to the California Supreme Court should be answered in the negative.

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Dated: July 1, 2022

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Dated: July 1, 2022 HAUSFELD LLP

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I, the undersigned, certify and declare that I served the following document(s) described as:

**PETITIONERS' OPENING BRIEF**

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Executed this 1st day of July 2022 in San Francisco, California.

By: /s/ Tae H. Kim
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**STATE OF CALIFORNIA**
Supreme Court of California

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