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S273340

IN THE SUPREME COURT OF CALIFORNIA

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

v.

PG&E CORPORATION and PACIFIC GAS & ELECTRIC COMPANY,
Defendants and Respondents.

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 STATE COURT OF APPEALS FOR THE NINTH CIRCUIT — CASE NO. 21-15571

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INTRODUCTION

The heightened risk of wildfires in California due to a changing climate has intensified the challenges faced by electric utilities and their regulator, the California Public Utilities Commission. Beginning in 2017, California's hotter, drier weather has fueled catastrophic wildfires across the state that have far exceeded historical activity. For example, in 2020, a staggering four million acres burned in California, with five of the six then-largest wildfires in California's history occurring in that year. While energized powerlines in California (and across the country) have long caused ignitions, mainly due to objects hitting energized lines or component failures, the risks from an ignition caused by electrical lines in California have changed dramatically.

To address the high risk posed by wildfires, the PUC authorizes electric utilities to prospectively de-energize their lines when certain PUC-approved criteria are met. Such de-energizations—called Public Safety Power Shutoffs or PSPS—are a powerful public safety tool that has saved lives and homes. PSPS are particularly effective because they eliminate the risk of ignition at exactly the places and on exactly the days and times when the threat of uncontrolled fire spread is extreme—when vegetation is very dry, the air is very dry and winds are unusually strong.

In authorizing PSPS, the PUC carefully considered the risks that de-energization poses to the public, and in particular to medically vulnerable customers, and balanced those

risks against the risk of harms caused by a wildfire ignition. The PUC determined that power shutoffs are appropriate to protect lives and homes under certain circumstances (namely, during weather that poses extreme wildfire risk) and established mandatory guidelines that utilities must follow in determining whether to use PSPS to ensure that the PUC's careful balancing of interests is implemented.

Plaintiff suggests PSPS events occur exclusively because of an alleged failure by PG&E to maintain its grid. But, in reality, PSPS is a tool that the PUC has authorized for use by *all* major utilities in California (including PacifiCorp, Southern California Edison and SDG&E), and one that is actively used by all of them when parts of their service territory experience a combination of high wind, dry air and parched vegetation. Indeed, following catastrophic wildfires in 2017, the Legislature passed a law that required utilities to submit wildfire mitigation plans that *must include* "[p]rotocols for . . . deenergizing portions of the electrical distribution system that consider the associated impacts on public safety", as well as "protocols related to mitigating the public safety impacts" of de-energization. (Pub. Util. Code § 8386(c)(6).)

Following that law's passage, the PUC reviews the comprehensive wildfire mitigation plans submitted by PG&E and other utilities each year, including their PSPS protocols, to ensure that they are appropriate. The PUC also requires utilities to give a public briefing each year on their PSPS plans for the upcoming wildfire season. Then, during the wildfire

season, after each and every individual PSPS event, utilities must prepare a report for the PUC, which the PUC analyzes to ensure utilities are complying with PUC guidelines. The PUC has repeatedly penalized utilities when it has determined they fell short, including one penalty in excess of $100 million.

In short, the PUC's regulation of PSPS is broad and continuing. And the PUC has overseen a critical and evolving public safety tool in a manner that carefully balances the safety risks and other harms of turning off power against the safety risks of keeping it on.

Public Utilities Code section 1759 ("section 1759") permits the PUC to exercise effectively its broad regulatory power over public utilities by divesting trial courts of jurisdiction over actions that "enjoin, restrain, or interfere with the [PUC] in the performance of its official duties". This Court has held that section 1759 preempts civil lawsuits when a plaintiff seeks to have a court impose civil liability on a defendant for conduct that the PUC authorizes as part of a broad and continuing regulatory program.

Here, Plaintiff's lawsuit, if permitted to proceed, would interfere with the PUC's regulation of PSPS. Plaintiff seeks to hold PG&E liable for billions of dollars in alleged damages (due to things such as customers' distress from fear of the dark, lost food, and the cost of candles and batteries) arising from each and every shutoff that PG&E has undertaken since October 2019, even though he does *not* allege that PG&E's PSPS events violated the PUC's guidelines, and even though he

acknowledges that PG&E's PSPS events were necessary for public safety. Plaintiff also seeks punitive damages and injunctive relief. The specter of massive civil liability imposed on utilities for *complying* with the PUC's guidelines for PSPS would chill and restrict utilities' use of this critical public safety tool, and cause utilities to strike a different balance of interests from the one the PUC has developed and is continuously working to refine. As the PUC has put it, allowing Plaintiff to recover damages here "would frustrate the Commission's efforts to ensure, through its rules and decisions, that utilities are appropriately balancing competing interests". (Br. of *Amicus Curiae* Cal. P.U.C., *Gantner v. PG&E Corp.* (9th Cir., Sept. 1, 2021, No. 21-15571), Dkt. No. 36 [hereinafter "PUC 9th Cir. Br."], at p. 14.)

Plaintiff does not deny the Court's precedents holding that section 1759 bars the imposition of civil liability for PUC-authorized conduct. Instead, he claims that these precedents should not apply to his claim because he alleges that PG&E's negligence in maintaining its grid created the need in the first place for the shutoffs that the PUC authorized. In other words, Plaintiff claims that he can avoid section 1759 preemption and impose civil liability for damages *directly* arising from PUC-authorized conduct by alleging the authorized conduct should have been avoided in the first place.

Plaintiff's argument rests on a mistaken premise. The PUC does not authorize utilities to use PSPS as "a free pass for their own negligence" in maintaining their grids, as Plaintiff

suggests. The PUC has instead authorized PSPS for times when the weather creates extreme wildfire risk. And Plaintiff is clear that he does not allege that PG&E in any way failed to comply with the PUC's mandates about when it is appropriate to interrupt service.

Beyond resting on this incorrect premise, Plaintiff's "causal chain" argument does nothing to change the conclusion that imposing civil liability for conduct authorized by the PUC (here, initiating a PSPS event when it is called for by the PUC's guidelines) interferes with the PUC's authorization of that conduct. As a result, section 1759 bars Plaintiff's claim.

Plaintiff's claim is also independently barred by the plain language of PG&E's Tariff Rule 14, which governs PG&E's provision of service to customers and carries the force of law. On its face, Rule 14 is clear: PG&E may interrupt service to customers without liability when it is necessary for public safety. Because there is no dispute that the service interruptions at issue here were necessary for public safety, Rule 14 bars Plaintiff's claim.

STATEMENT OF THE CASE

A. Factual Background

1. The PUC Closely Regulates Prospective De-Energization, Ensuring that Utilities Comply with Its Careful Balancing of the Interests at Stake.

The PUC regulates PG&E and other electric utilities in California, including those utilities' efforts to enhance public safety and prevent deadly wildfires. (Cal. Const., art. XII,

§§ 1-6; *see also* Pub. Util. Code § 8386.) In doing so, it is the PUC's responsibility to balance the interests of all stakeholders.

This is the case with the PUC's regulation of PSPS, which involves competing interests. (*See* PUC 9th Cir. Br. 13 ("Under California law, it is the job of CPUC to balance the costs and benefits of PSPS events and regulate them accordingly.").) On the one hand, de-energization during extreme weather conditions saves lives and property by reducing the risk of wildfires sparked by electrical equipment. On the other hand, de-energization leaves communities and essential facilities without power, "which brings its own risks and hardships, particularly for vulnerable communities and individuals". (1-SER-281 [Cal. P.U.C. Rulemaking 18-12-005 at 2].)

Since 2008, when SDG&E first applied to the PUC for authorization to use power shutoffs after the Rice, Witch and Guejito wildfires in Southern California killed two people, injured 40 firefighters and destroyed over 1600 structures,[1] the PUC has carefully balanced the interests implicated in its authorization of prospective de-energization and enforcement of its related guidelines. In fact, the PUC initially denied SDG&E's application to implement a power shutoff program precisely because SDG&E failed to show that "shutting off power results in a net reduction in wildfire ignitions during hazardous fire conditions" and "the benefits of SDG&E's Power Shut-Off Plan

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[1] (*See* 1-SER-190 [Cal. P.U.C. Dec. 09-09-030 at 24]; *see also* Resp'ts' Mot. for Judicial Notice, Ex. 1, Application of SDG&E for Review of its Proactive De-Energization Measures and Approval of Proposed Tariff Revisions (U 902-E) (Dec. 22, 2008).)

outweigh the adverse impacts". (1-SER-207 [Cal. P.U.C. Dec. 09-09-030 at 41].)

In 2012, when the PUC revisited SDG&E's application and held that the utility could prospectively de-energize its lines under certain weather conditions, it did so only after carefully balancing the threat of ignition against the serious risks associated with shutting off power. (*See, e.g.*, 1-SER-248–49 [Cal. P.U.C. Dec. 12-04-024 at 7–8] [reviewing concerns from groups regarding harm of power shutoffs on persons with disabilities]; 1-SER-187–89, 1-SER-197–206 [Cal. P.U.C. Dec. 09-09-030 at 21–23, 31–40] [reviewing negative effects of power shutoffs such as loss of communication networks, adverse impact on water supply, costs to prepare for shutoff events, costs incurred during shutoff events, loss of food and medications and loss of economic activity].)

The PUC's regulation of PSPS has grown in the years that followed. Following the catastrophic Thomas and North Bay Fires in 2017, the PUC adopted ESRB-8, affirming that California law "give[s] electric utilities authority to shut off electric power in order to protect public safety. This authority includes shutting off power for the prevention of fires caused by strong winds." (2-ER-210 [ESRB-8 at 2].) In ESRB-8, the PUC recognized that "[d]e-energizing electric facilities during dangerous conditions can save lives and property and can prevent wildfires". (2-ER-209 [ESRB-8 at 1].) ESRB-8 extended the PUC's decision authorizing SDG&E's power shutoff program to all investor-owned utilities and enhanced the PUC's

de-energization policies to provide "guidelines that [investor-owned utilities] must follow" when conducting PSPS events. (2-ER-209, 213 [ESRB-8 at 1, 5].)

In 2018, the Legislature passed Senate Bill 901 (Dodd) ("SB 901"), which requires utilities with equipment in areas with significant fire risk to prepare a wildfire mitigation plan that must be reviewed annually for approval by the PUC.[2] Annual wildfire mitigation plans *must include* "[p]rotocols for . . . deenergizing portions of the electrical distribution system that consider the associated impacts on public safety", as well as "protocols related to mitigating the public safety impacts" of de-energization. (Pub. Util. Code § 8386(c)(6).) Those protocols define the circumstances under which de-energization may be required (such as when wind speeds exceed equipment design limits) or is otherwise appropriate. (*See, e.g.*, 1-SER-266 [Cal. P.U.C. Dec. 12-04-024 at 25] [affirming prior determination that SDG&E's "statutory obligation to operate its system safely" required SDG&E to de-energize if strong winds "threaten to topple power lines onto tinder dry brush"].) As a result of SB

[2] Prior to July 2021, the PUC was responsible for conducting the initial review of and approving utilities' wildfire mitigation plans. As of July 2021, the responsibility for the initial review and approval of wildfire mitigation plans has been transferred to the Office of Energy Infrastructure Safety, but that Office's approval of a wildfire mitigation plan must still be ratified by the PUC. (Pub. Util. Code §§ 8385(b), 8386.3(a).)

901, each of California's six major electric utilities has adopted a PSPS program.[3]

Since the passage of SB 901, the PUC has refined its PSPS guidelines and actively policed utility compliance with those guidelines to ensure, among other things, that utilities maintain the PUC's balance of interests in implementing PSPS events. For example, in 2018, the PUC opened an Order Instituting Rulemaking "to examine its rules allowing electric utilities under the Commission's jurisdiction to de-energize power lines in case of dangerous conditions that threaten life or property in California". (1-SER-280 [Cal. P.U.C. Rulemaking 18-12-005 at 1].) In that proceeding, the PUC evaluated whether it should develop "metrics for determining when de-energization is appropriate", the appropriate level of discretion to grant utilities in calling PSPS events and additional guidelines that the PUC should adopt to ensure that impacts to customers are minimized. (1-SER-287 [Cal. P.U.C. Rulemaking 18-12-005 at 8].) In 2020, the PUC adopted updated and additional PSPS guidelines, aimed at further mitigating negative impacts to the public caused by PSPS events and improving "identification, communication, and contact with vulnerable populations". (*Dec. Adopting Phase 2 Updated and Add'l Guidelines for De-Energization of Elec. Facilities to Mitigate Wildfire Risk* (Cal. P.U.C., May 28, 2020), No. 20-05-051 [2020

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[3] (*See* Resp'ts' Mot. for Judicial Notice, Ex. 11, PUC, *Utility Public Safety Power Shutoff Plans (De-Energization)* ["The six electric utilities that provide power in California presented their [PSPS] preparation plans to CPUC staff."].)

WL 3264920, at *6].) In 2021, the PUC announced the latest changes to its PSPS guidelines, focused on improving customer notification and further mitigating adverse impacts of PSPS events. (*Dec. Adopting Phase 3 Revised and Add'l Guidelines and Rules for Pub. Safety Power Shutoffs of Elec. Facilities to Mitigate Wildfire Risk* (Cal. P.U.C., June 24, 2021), No. 21-06-034 [hereinafter "PUC Dec. Adopting Phase 3 Guidelines"] [2021 WL 2852304, at *14].)

And in a decision addressing its investigation into whether California utilities prioritized safety and complied with the PUC's requirements with respect to PSPS events in 2019, the PUC instituted additional changes to its PSPS requirements. (*Dec. Addressing the Late 2019 Pub. Safety Power Shutoffs by Pac. Gas & Elec. Co., S. Cal. Edison Co. and San Diego Gas & Elec. Co.* (Cal. P.U.C., June 3, 2021), No. 21-06-014 [hereinafter "PUC June 2021 Decision"] [2021 WL 2473851].) Among other things, that decision included measures to ensure that utilities "adequately considered" alternatives to de-energization before instituting a PSPS event and "improve transparency in all aspects of utility decision-making related to initiating proactive power shutoffs". (*Id.* at *2, *43.)

The PUC's review of utilities' decisions to implement PSPS events and enforcement of utility compliance with its PSPS guidelines are active and ongoing. Among other reporting requirements, utilities are required, after each PSPS event, to submit a lengthy report to the PUC so that the PUC can review each event for compliance with its guidelines. (*See id.* at *147.)

The PUC solicits public comment and holds public hearings to evaluate utilities' implementation of PSPS events and, if the PUC determines that a utility has failed to adhere to the PSPS guidelines, the PUC assesses penalties or requires the utility to take corrective actions. For example, the PUC held a hearing to address deficiencies in Southern California Edison's 2020 PSPS events and required the utility to submit a corrective action plan with bi-weekly updates.[4] In 2021, the PUC penalized PG&E in the amount of $106 million for violating certain guidelines during the 2019 PSPS events related to website outages and customer notifications.[5] And most recently, the PUC's Safety and Enforcement Division proposed Administrative Enforcement Orders imposing corrective actions and more than $22 million in penalties upon PG&E, Southern California Edison and SDG&E for violations related to their 2020 PSPS events.[6]

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[4] (Resp'ts' Mot. for Judicial Notice, Ex. 4, M. Batjer, letter to K. Payne re 2020 SCE Public Safety Power Shutoff Performance (Jan. 19, 2021).)

[5] (Resp'ts' Mot. for Judicial Notice, Ex. 5, Presiding Officer's Decision on Alleged Violations of Pacific Gas and Electric Company with Respect to Its Implementation of the Fall 2019 Public Safety Power Shutoff Events (Cal. P.U.C., May 26, 2021), p. 2.)

[6] (Resp'ts' Mot. for Judicial Notice, Ex. 9, PUC, Press Release, *CPUC Staff Proposed Utility Penalties for Poor Execution of Certain 2020 PSPS Events* (Cal. P.U.C., June 15, 2022).) Southern California Edison and PG&E have requested hearings to contest the penalties assessed to them.

2. PG&E's PSPS Program

Before the 2019 wildfire season, and pursuant to SB 901, PG&E filed its 2019 Wildfire Safety Plan with the PUC. The PUC approved that Plan after extensive review, which included soliciting and considering public comments. (*See* 3-ER-355 [Cal. P.U.C. Dec. 19-05-37 at 58].)

Under that plan, PG&E looked to a combination of factors when determining whether to de-energize, including: (a) a Red Flag Warning declared by the National Weather Service; (b) low humidity levels; (c) forecasted sustained winds generally above 25 miles per hour and wind gusts in excess of approximately 45 miles per hour; (d) computer-simulated ignition spread and consequence modeling; (e) conditions of dry fuel on the ground and live vegetation; and (f) on-the-ground, real-time wildfire-related information from PG&E's Wildfire Safety Operations Center and field observations from PG&E field crews. (2-SER-433–34 [Wildfire Safety Plan at 97–98].)[7]

[7] Since 2019, PG&E has, in numerous respects, enhanced its PSPS protocols, as set forth in its approved Wildfire Mitigation Plans. For example, starting in 2021, PG&E considers additional criteria related to pending work. (*See* Resp'ts' Mot. for Judicial Notice, Ex. 8, PG&E, *2022 Wildfire Mitigation Plan* (Feb. 25, 2022) [hereinafter "PG&E 2022 Wildfire Mitigation Plan"], pp. 898–905.) PG&E regularly inspects its lines to identify trees that need to be trimmed or electrical components that need maintenance. That work is then "tagged" for completion within a certain time period (*e.g.*, within 24 hours or within three months) by work crews based on the priority of the tag. (*See, e.g.*, *id.* at p. 168.) When fire risk is forecast to be sufficiently elevated, based on the weather in a particular area, PG&E

Leading up to each of the 2019 PSPS events Plaintiff addresses in his complaint (the "2019 PSPS Events"), PG&E forecast high wind speeds, low humidity and critically dry fuel levels.[8] After each of these events, PG&E personnel patrolled the circuit sections that had been de-energized to check for safety concerns before re-energizing. During these patrols, PG&E personnel identified hundreds of instances of vegetation and infrastructure damage and hazard issues, including instances where vegetation was blown by strong winds onto or near de-energized lines, where a fire could have ignited but for de-energization.[9]

Plaintiff suggests that PG&E has used PSPS only because PG&E's alleged negligent maintenance of its grid left it with no other option. (Opening Br. 7–8.) But as the PUC has recognized, electrical equipment can spark a wildfire even when constructed and maintained properly. (1-SER-266 [Cal. P.U.C. Dec. 12-04-024 at 25].) Strong windstorms can snap branches off healthy trees and carry them or other objects (such as debris) into PG&E's lines and cause an ignition. Diablo winds can exceed

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considers whether pending work on high-priority tags can be accelerated in that area prior to the weather event and, if not, PG&E will de-energize to reduce risk. (*Id.* at p. 900.)

[8] (*See, e.g.*, Resp'ts' Mot. for Judicial Notice, Ex. 2, PG&E, *PG&E Public Safety Power Shutoff (PSPS) Report to the CPUC Oct. 26 & 29, 2019 De-Energization Event* (Nov. 18, 2019), p. 6.)

[9] (*See, e.g.*, *id.* at p. 2 [identifying 328 cases of "damages or hazards through patrols" which included "things that could have sparked an ignition if the line was left energized such as a tree limb found suspended in electrical wires"].)

the design limits of PG&E's equipment and cause it to topple—even if that equipment is well-maintained. (*See ibid.* [acknowledging that utility may be required to de-energize to protect public safety when "strong Santa Ana winds threaten to topple power lines onto tinder dry brush"].)

Similarly, electrical equipment owned and maintained by a private homeowner or business—not PG&E—could fail in strong wind conditions and cause a fire. Indeed, the 2017 Tubbs Fire illustrates the public safety benefits of PSPS in such a circumstance. Fueled by a severe windstorm and dry vegetation, the fire—which started before PG&E had a PSPS program—killed 22 people and destroyed about 3,000 homes in Napa and Sonoma counties. CAL FIRE determined that the Tubbs Fire was caused by a failure on a homeowner's private electrical system, *not* PG&E's equipment.[10] A de-energization (had it been available then) would have prevented the fire and saved those 22 lives and 3,000 homes.

PG&E, along with every other PUC-regulated electric utility in California, uses PSPS as a wildfire mitigation tool under the guidance and oversight of the PUC.[11] PG&E does so to save lives and homes.

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[10] (*See Investigation Report* (Cal. Dep't of Forestry and Fire Protection Sonoma-Lake Napa Unit, Oct. 8, 2017), pp. 76–78, at http://s1.q4cdn.com/880135780/files/doc_downloads/2019/05/TUBBS-LE80_Redacted.pdf.)

[11] (*See* Resp'ts' Mot. for Judicial Notice, Ex. 6, PUC, Press Release, *CPUC to Hold Public Briefings on Utility Readiness for 2021 Public Safety Power Shutoffs* (Cal. P.U.C., July 15, 2021).)

B. PROCEDURAL HISTORY

1. Plaintiff's Complaint Seeks to Impose Liability for PUC-Authorized PSPS Events.

Plaintiff filed his complaint by initiating an adversary proceeding in PG&E's Chapter 11 proceedings. (4-ER-486.) Plaintiff claims that he and members of the putative class suffered, as a direct result of losing electric service during the 2019 PSPS Events, financial hardships, property damage, loss of earnings and profits and emotional distress. (*See* 4-ER-487 [Compl. ¶ 3].) Notably, Plaintiff does not allege that PG&E was negligent in the way it implemented the 2019 PSPS Events or that PG&E violated the PUC's PSPS guidelines or its own PSPS criteria in implementing those PSPSs. (*See* 1-SER-89 [Pl.'s Response to PUC *Amicus* Br. at 3] ["[T]he Complaint does not allege that the shutoffs should not have been done or that they violated Commission policies."]; 1-SER-13 [Pl.'s District Court Opening Br. at 4] ["[T]he Complaint does not contend that PG&E should not have implemented the PSPSs at issue, or that it implemented them improperly . . . "].) Rather, Plaintiff vaguely alleges that the 2019 PSPS Events, as well as every subsequent PSPS event, were necessitated by PG&E's alleged historical negligent maintenance. (*See* 4-ER-487 [Compl. ¶ 2].) Plaintiff does this without identifying the specific circuits or lines that were de-energized in those PSPS events or describing how PG&E's alleged negligent maintenance of those circuits or lines made the PSPS events necessary.

Plaintiff sought to certify a class including "[a]ll California residents and business owners who had their power shutoff by PG&E during the [2019 PSPS Events] and any subsequent voluntary Outages PG&E imposes on its customers during the course of litigation". (4-ER-503 [Compl. ¶ 85].) That is, Plaintiff seeks damages for *each and every PSPS event that PG&E has conducted since October 2019*, regardless of whether each such event complied with PUC guidelines and was "justified in the moment". (1-SER-108 [Pl.'s Opp'n to Mot. to Dismiss at 4].) Plaintiff demands special and general damages of at least $2.5 billion, injunctive relief and punitive and exemplary damages. (4-ER-508 [Compl. at 23].)

2. The Lower Courts Dismiss Plaintiff's Complaint.

PG&E moved to dismiss Plaintiff's Complaint, including on the ground that section 1759 preempts the action. The Bankruptcy Court granted PG&E's motion, holding that litigating Plaintiff's claim would hinder and interfere with the enforcement of the PUC's guidelines approving PSPS events, particularly because Plaintiff did not allege damages from PG&E carrying out its PSPS events unreasonably or in contravention of PUC guidelines. (1-ER-21–22 [Bankr. Decision at 8–9].)

On appeal, the District Court affirmed the Bankruptcy Court's dismissal of the complaint on the basis that Plaintiff's action is preempted by section 1759 because it "interfere[s] with the CPUC's PSPS policies and its 'broad and continuing supervisory [and] regulatory program'". (1-ER-10 [Dist. Ct. Order at 9].) The District Court found that the

"CPUC's regulatory policies, as reflected in [its PSPS] guidelines and the approval of the Wildfire Safety Plan, authorize [PG&E] to decide that a PSPS is warranted under certain circumstances" and that "[i]mposing liability on [PG&E] for implementing CPUC-approved PSPS events would force [PG&E] 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 [Dist. Ct. Order at 8].) The District Court observed that "[u]nder California law, it is the job of the CPUC to balance the costs and benefits of PSPS events and regulate them accordingly. And it is not the job of the courts to regulate PSPS events through ad hoc imposition of negligence liability." (1-ER-10 [Dist. Ct. Order at 9].)

Plaintiff appealed to the U.S. Court of Appeals for the Ninth Circuit. (4-ER-510.)

3. The PUC Submits *Amicus Curiae* Briefs in Support of PG&E's Position.

In both the Bankruptcy Court and the Ninth Circuit, the PUC submitted an *amicus curiae* brief setting out its view that "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". (1-SER-97 [Br. *Amicus Curiae* Cal. P.U.C., *Gantner v. PG&E Corp.* (N.D. Cal., Mar. 4, 2020, No. 19-03061), Dkt. No. 19 [hereinafter "PUC Br."] at 7).)

The PUC stated that the policies reflected in its guidelines and Wildfire Safety Plan approval "expressly authorize the Utility to decide that a public safety power shutoff is warranted under certain circumstances". (*Id.*) But the Complaint "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 . . . [and] resulted from the Utility's underlying failure to comply with any particular mandate". (*Ibid.*) Allowing Plaintiff's lawsuit to proceed "for the purpose of imposing potentially billions of dollars of additional liability on PG&E . . . for PG&E's decisions to call PSPS events 'would interfere with the CPUC's' carefully calibrated policy decisions" regarding PSPS, including decisions aimed at ensuring "the correct balance is struck between the public harms caused by PSPS events, and the threats to public safety of not prospectively de-energizing power lines under conditions when fire risk is extremely high". (PUC 9th Cir. Br. 13–14.) Therefore, the PUC concluded, allowing Plaintiff's claim for damages "would frustrate the Commission's efforts to ensure, through its rules and decisions, that utilities are appropriately balancing competing interests". (*Id.* at 14.)

4. The Ninth Circuit Certifies Questions to this Court.

The Ninth Circuit certified the following questions to this Court:

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, but those acts foreseeably resulted in the utility having to take subsequent action (here, a Public Safety Power Shutoff), 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?

ARGUMENT

A. SECTION 1759 PREEMPTS PLAINTIFF'S COMPLAINT.

1. Plaintiff's Complaint Is Preempted by Section 1759 Because It Seeks to Impose Liability on PG&E for Conduct that the PUC Has Authorized.

Under this Court's precedent in *Covalt* and *Hartwell*, section 1759 preempts a claim if it seeks to impose damages for conduct authorized by the PUC. (*San Diego Gas & Elec. Co. v. Superior Ct.* (*Covalt*) (1996) 13 Cal. 4th 893, 935–43; *Hartwell Corp. v. Superior Court* (2002) 27 Cal. 4th 256, 276.) As discussed below, if Plaintiff's claim is allowed to proceed, it would eviscerate section 1759 and open the door for judicial rulings that are inconsistent with PUC decisions and regulatory actions, which is precisely what section 1759 is intended to prevent.

a. Under this Court's Precedent, Section 1759 Preempts Civil Actions that Seek Damages for Actions Authorized by the PUC.

California Public Utility Code § 2106 ("section 2106") and section 1759 govern civil actions for conduct regulated by the PUC. Section 2106 permits civil courts to hear actions and award damages arising from a utility's violation of PUC regulations and standards:

> 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 this 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.

(Pub. Util. Code § 2106.)

Section 1759, however, divests trial courts of subject matter jurisdiction over any matter that would reverse or annul a specific PUC order, or that "would simply have the effect of undermining a general supervisory or regulatory policy of the commission, *i.e.* when it would 'hinder' or 'frustrate' or 'interfere with' or 'obstruct' that policy". (*Covalt*, *supra*, 13 Cal. 4th at p. 918.) Section 1759 provides:

> 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.

(Pub. Util. Code § 1759.)

Section 1759 protects the broad regulatory authority that the Constitution grants the PUC. (*See* Cal. Const., art. XII, §§ 1–6.) As this Court recognized in *Covalt*, the "'commission is a state agency of constitutional origin with far-reaching duties, functions and powers.'" (*Covalt*, *supra*, 13 Cal. 4th at p. 914 [citations omitted].) The PUC's "'authority has been liberally construed' and includes not only administrative but also legislative and judicial powers". (*Id*. at p. 915 [citations omitted].) In light of this broad authority conferred by the Constitution, the Legislature provided for "narrow" judicial review of PUC decisions. (*Ibid.* [citing Pub. Util. Code § 1756].) That narrow review is limited in scope and may occur only in this Court or the Court of Appeal—not the lower courts or federal courts. (Pub. Util. Code §§ 1756, 1757, 1758, 1760.) Having thus limited judicial review of the PUC's decisions to the appellate courts, "the Legislature then made it clear in section 1759 . . . that no other court has jurisdiction either to review or suspend the commission's decisions or to enjoin or otherwise 'interfere' with the commission's performance of its duties". (*Covalt*, *supra*, 13 Cal. 4th at p. 916 [citing Pub. Util. Code § 1759].)

In light of the broad supervisory and regulatory authority of the PUC, civil actions under section 2106 are "limited to those situations in which an award of damages would not hinder or frustrate the commission's declared supervisory or regulatory policies". (*Waters v. Pac. Tel. Co.* (1974) 12 Cal. 3d 1,

4; *see also Covalt*, *supra*, 13 Cal. 4th at pp. 916–17.) In the event of a conflict between sections 1759 and 2106, this Court has unequivocally held that section 2106 must give way to and be limited by section 1759: "[I]n order to resolve the potential conflict between sections 1759 and 2106, the latter section must be construed as *limited* to those situations in which an award of damages would not hinder or frustrate the commission's declared supervisory and regulatory policies." (*Covalt*, *supra*, 13 Cal. 4th at pp. 917–18 [citing *Waters*, *supra*, 12 Cal. 3d at p. 4].) That is, section 1759 has "primacy" and the role of section 2106 is "correspondingly limited". (*Id.* at p. 917.)[12]

In *Covalt*, this Court held that a lower court does not have jurisdiction over a civil action where: (1) the PUC has the authority to regulate the conduct at issue; (2) the PUC has exercised that authority; and (3) the action would hinder or

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[12] This limitation on the public's ability to sue for authorized conduct is not unique to the PUC's regulation of utilities. Civil Code Section 3482, for example, bars nuisance lawsuits where the complained-of conduct is expressly authorized. (*Varjabedian v. City of Madera* (1977) 20 Cal. 3d 285, 291.) Accordingly, courts have found that lawsuits may not proceed where plaintiffs allege that a defendant's authorized conduct was performed in a way that constitutes a nuisance. (*See, e.g.*, *3500 Sepulveda, LLC v. Macy's West Stores, Inc.* (9th Cir. 2020) 980 F.3d 1317, 1325 ["Plaintiffs do not point to any specific offensive conduct or manner that was not authorized by the City. Accordingly, Plaintiffs have not raised triable issues of fact regarding the nuisance claim."]; *Farmers Ins. Exchange v. State of Cal.* (1985) 175 Cal. App. 3d 494, 503 ["In our case the nuisance complained of . . . was precisely what was authorized by the various statutes outlined in section I. Civil Code section 3482 is therefore fully exculpatory."].)

interfere with PUC policies. (*Covalt*, *supra*, 13 Cal. 4th at pp. 923, 926, 935.) Here, it is undisputed that the PUC has the authority to regulate PSPS and has exercised that authority. Thus, the only *Covalt* factor in dispute is whether Plaintiff's action would hinder or interfere with the PUC's policies. (Opening Br. 20 ["Only the third prong is at issue here."].)

This Court has held that an action seeking to impose liability for utility conduct that is authorized by the PUC meets the third prong of the *Covalt* test and improperly interferes with the PUC's regulatory authority. For example, in *Covalt*, the plaintiffs sought damages relating to electric and magnetic fields emanating from powerlines, which the plaintiffs claimed emitted high and unreasonably dangerous levels of electromagnetic radiation that the defendant utility had failed to mitigate. At the time, "the question whether powerline electric and magnetic fields pose a danger to health had become a matter of some public concern and a source of growing controversy in the scientific community". (*Covalt*, *supra*, 13 Cal. 4th at p. 908.) The PUC investigated the health effects of electrical magnetic fields and concluded that regulated utilities did not need to take action to reduce field levels from existing powerlines. (*Id.* at pp. 926–35.) This Court held that the plaintiffs' nuisance claim was preempted because it sought to impose civil liability for conduct that the PUC had authorized, namely *not* mitigating electromagnetic radiation from existing powerlines. (*Id.* at p. 950.)

Later, in *Hartwell Corporation v. Superior Court*, this Court reinforced the rule that civil liability may not be imposed

on a utility for PUC-authorized conduct. There, the plaintiffs claimed that the defendant utilities negligently provided unsafe drinking water. (*Hartwell*, *supra*, 27 Cal. 4th at pp. 260–62.) This Court held that, notwithstanding the negligence allegations, where the utility provided water that met the PUC's water quality thresholds, section 1759 preempted the action. (*Id.* at p. 276 ["An award of damages on the theory that the public utilities provided unhealthy water, even if that water actually met DHS and PUC standards, would interfere with a 'broad and continuing supervisory or regulatory program' of the PUC." (quoting *Covalt*, *supra*, 13 Cal. 4th at p. 919)].) In other words, given that the PUC determined that a certain level of contamination in drinking water was acceptable, a plaintiff could not undermine that determination by seeking to impose civil liability through the courts on a utility that had contaminants in the water below the level the PUC set, regardless of allegations that the water was contaminated negligently. (*Ibid.*)

At the same time, this Court also held that the plaintiffs' claims for damages arising from the utilities' alleged *exceedances* of the PUC's water-quality thresholds were *not* preempted under section 1759. (*Id.*) The PUC had not authorized utilities to distribute water with contamination at those levels, and therefore civil liability for those claims would *assist* in, rather than interfere with, enforcing the PUC's regulations. (*Id.* at p. 277.)

Since *Hartwell*, other courts have held that claims that seek to impose liability for PUC-authorized conduct are

preempted. (*See, e.g.*, *Cooney v. Cal. Pub. Utils. Comm'n* (N.D. Cal., July 15, 2014, No. C 12-6466 CW), 2014 WL 3531270, at *3 [holding action was preempted where plaintiff claimed harm caused by equipment that the PUC authorized utilities to use]; *Sarale v. Pac. Gas & Elec. Co.* (2010) 189 Cal. App. 4th 225, 242–43 [holding that "trial courts lack jurisdiction to adjudicate claims that a power utility has engaged in excessive trimming or unreasonable vegetation management when the utility has acted under guidelines or rules set forth by the commission"].)

b. If Allowed to Proceed, Plaintiff's Lawsuit Would Interfere with the PUC's Regulation of PSPS.

Like the claims this Court found preempted in *Covalt* and *Hartwell*, Plaintiff's complaint, if allowed to go forward, would interfere with the PUC's regulatory authority. Plaintiff's complaint threatens to interfere with the PUC's careful balancing of interests in connection with its broad and continuing regulation of PSPS, and with the PUC's work to reduce, over time, the impacts of PSPS on California residents.

The PUC authorized PSPS events after extensive investigations into the need for power shutoffs for public safety and a careful weighing of the risks and interests involved. The PUC evaluated the risk of wildfires, alternative mitigation strategies (such as adjustments to protective devices on a utility's electrical system, vegetation management and "inspection and monitoring during the extreme fire risk conditions"), meteorological data and measures to mitigate the impacts on customers and communities subject to de-energization. (1-SER-

285–86 [Cal. P.U.C. Rulemaking 18-12-005 at 5–6].) The PUC also acknowledged that de-energization would have significant adverse impacts on individuals and communities. (1-SER-281 [Cal P.U.C. Rulemaking 18-12-005 at 2].) After weighing all of these factors based on expert analysis, the PUC authorized PSPS under limited circumstances. (*See, e.g.*, 2-ER-211–15 [ESRB-8 at 3–7].) The PUC's authorization of power shutoffs and approval of PG&E's PSPS protocols that call for de-energization when there are hot, gusty winds and tinder dry vegetation reflect a policy judgment that PSPS events under those conditions are warranted.

Plaintiff's action threatens to upend the PUC's careful balancing of interests by imposing civil liability for conduct the PUC has undisputedly authorized. As *Covalt* and *Hartwell* teach, that is interference. (*Hartwell*, *supra*, 27 Cal. 4th at pp. 275-76; *Covalt*, *supra*, 13 Cal. 4th at p. 950.)

Currently, utilities can rely on the PUC's guidelines and their approved wildfire mitigation plans to determine when power should be shut off and when it should be kept on. Plaintiff concedes in this case that PG&E followed these guidelines on when and how to shut off power, but nevertheless seeks to impose liability. If Plaintiff were to prevail in his effort to litigate civil liability claims for every customer subject to every PSPS event since October 2019 regardless of whether customers were de-energized in accordance with PUC guidelines, this would interfere with the PUC's regulation of PSPS because utilities would have another interest they would need to consider—

negligence liability imposed by civil courts for engaging in PUC-authorized conduct. (1-ER-9 [Dist. Ct. Order at 8].) As Judge Gilliam correctly observed in deciding that Plaintiff's claim is preempted by section 1759, "[i]mposing liability on [PG&E] for implementing CPUC-approved PSPS events would force [PG&E] 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 [Dist. Ct. Order at 8].)

Indeed, there is no limiting principle to Plaintiff's claim. In this case, Plaintiff alleges damages of $2.5 billion for PSPS events in 2019 alone, and also seeks punitive and exemplary damages and injunctive relief because of vaguely alleged past conduct by PG&E. (4-ER-487, 4-ER-508 [Compl. at 1, 23].) If he prevailed, similar claims likely would be brought any time a utility implemented a PSPS event.

Moreover, adjudicating these claims would force courts to second-guess the PUC's policy decision to authorize shutoffs under particular circumstances. PG&E's 2019 Wildfire Safety Plan did not provide that PG&E would consider allegedly negligent past upkeep of its lines as a factor in deciding whether to de-energize. (*See* 2-SER-433–34 [Wildfire Safety Plan at 97–98] [describing factors PG&E considered in deciding whether to conduct PSPS].) And Plaintiff does not allege that PG&E failed to adhere to its approved PSPS protocols, or in any way violated the PUC's PSPS guidelines. (*See* Opening Br. 9 ["Plaintiff does not contend that PG&E was negligent in its decision to

implement the PSPSs, or in the manner it implemented them."].) Yet Plaintiff wants jurors—who lack the PUC's deep technical expertise and its processes to gather and consider public feedback, and who would be applying general negligence standards rather than the PUC's guidelines and decisions—to find that PG&E's alleged historical negligence caused the power shutoffs, and therefore that the shutoffs should *not* have happened, despite the PUC's authorization. This is plainly interference with the PUC's decision to authorize PSPS events that were implemented in accordance with its guidelines and PG&E's Wildfire Safety Plan, and it invites inconsistent and conflicting findings.

Plaintiff's action would also interfere with the PUC's oversight more generally of utilities' wildfire mitigation investments. In addition to promulgating and enforcing PSPS guidelines, the PUC supervises utilities' efforts to lessen the impacts of PSPS, both through stronger mitigation programs and through longer-term changes to grid infrastructure (such as covered conductors and buried lines) to reduce the need for PSPS over time. Indeed, when it first approved the use of PSPS by all regulated California electric utilities, the PUC specifically instructed utilities to "continue to strengthen their infrastructure to minimize the need for and size of de-energization events". (3-ER-290 [Cal. P.U.C. Rulemaking 18-12-005 at 68].) Allowing civil suits from multitudes of customers seeking damages on an *ad hoc* basis would compel utilities to target investments in a manner that reduces potential civil liability rather than based on

the priorities the PUC established. For example, the PUC asks utilities to prioritize mitigations for critical care facilities and medically vulnerable customers, and utilities have responded with a host of programs for these customers, including enhanced notifications, no-cost back-up generators and free transportation to hotels with electric service. (*See* PUC June 2021 Decision, *supra*, 2021 WL 2473851, at *101–02, 175–76; PUC Dec. Adopting Phase 3 Guidelines, *supra*, 2021 WL 2852304, at *84.) The civil court system, however, may place higher value on harms suffered by other customers who are de-energized, such as growers of wine grapes that are allegedly delayed in harvesting their grapes, like Plaintiff. (4-ER-502 [Compl. ¶ 83].) Allowing civil courts to impose liability for following the PUC's lead on where and how to mitigate and reduce PSPS would interfere with the PUC's expert regulation of important public safety decisions.[13]

[13] Plaintiff argues that his action does not interfere with the PUC's regulation of PSPS because its adjudication does not require a factual finding that would contradict a finding or policy of the PUC. (Opening Br. 22–23.) But as this Court's precedents make clear, it is not merely a contradictory factual finding that preempts a lawsuit; rather, a lawsuit is preempted if it interferes with the PUC's regulatory work, including by seeking to impose liability for an action that the PUC has permitted as part of a broad and continuing regulatory program. (*Hartwell*, *supra*, 27 Cal. 4th at pp. 275-76; *Covalt*, *supra*, 13 Cal. 4th at p. 950.)

c. Plaintiff's Lawsuit Threatens to Vitiate Section 1759.

Plaintiff asserts that his lawsuit does not hinder or interfere with the PUC's regulatory authority because Plaintiff does not dispute that PG&E complied with the PUC's PSPS guidelines, but rather seeks to impose liability on PG&E "for the negligent maintenance of its power grid" and the 2019 PSPS Events are simply a link in the causal chain leading to Plaintiff's alleged harm. (Opening Br. 10.) This argument fails.

As an initial matter, Plaintiff's argument rests on an incorrect premise. The PUC does not authorize utilities to shut off power to avoid maintaining their grids, and Plaintiff has pointed to nothing suggesting that that underlies the PUC's authorization of PSPS and the approval of each utility's wildfire mitigation plans. The PUC requires PSPS to be a "last resort" to address wildfire risk during extreme weather, a requirement that is enforced through the PUC's multi-year efforts to set PSPS guidelines, approve or ratify the Office of Energy Infrastructure Safety's approval of utilities' wildfire mitigation plans and their included PSPS protocols, seek and expertly assess comments from the public impacted by PSPS, review PSPS events against PUC guidelines and the utilities' protocols, and assess penalties and issue orders for corrective actions when needed. (3-ER-290 [Cal. P.U.C. Rulemaking 18-12-005 at 68]; *see also*, *supra*, Statement of the Case, section A.1.) "Under no circumstances may the utilities employ de-energization solely as a means of reducing their own liability risk from utility-infrastructure

wildfire ignitions". (3-ER-290 [Cal. P.U.C. Rulemaking 18-12-005 at 68].)

Beyond resting on a faulty premise as to why and when the PUC authorizes PSPS, Plaintiff's argument about negligent upkeep does not negate his lawsuit's interference with the PUC's regulation of PSPS. *All* of Plaintiff's alleged damages—which include damages from loss of cell phone connectivity, loss of food items, the temporary loss of use of his home office, and a delay in harvesting wine grapes—were allegedly caused *directly* by the interruption of electric service during PSPS events. (4-ER-502–03 [Compl. ¶¶ 82–84].) That is the harm at issue, and it flows immediately from PUC-authorized activity—the interruption of electric service at times of extreme wildfire risk.

If this Court were to adopt Plaintiff's "causal chain" theory, it would eviscerate section 1759. It would allow plaintiffs to avoid section 1759 preemption merely by alleging that a utility's negligence, at some point in the past, caused the utility to take the PUC-authorized actions. This would undermine the Legislature's intent to protect the PUC's broad regulatory power.

Applying Plaintiff's position to the facts of *Hartwell* illustrates this point. In *Hartwell*, this Court found that the plaintiffs' action for damages caused by PUC-authorized levels of water contaminants would hinder or interfere with the PUC's regulation of those contaminants. (*Hartwell*, *supra*, 27 Cal. 4th at pp. 275–76.) Under Plaintiff's theory, the plaintiffs in

Hartwell could have avoided section 1759 preemption simply by alleging that the defendants' negligent maintenance of their treatment facilities caused the contaminants in the water in the first place. According to Plaintiff's logic, such a suit should be allowed to proceed, even though that allegation would not change the key fact that the contaminants at issue were within levels *authorized* by the PUC. This result urged by Plaintiff would "plainly undermine the commission's policy by holding [utilities] liable for . . . doing what the commission has repeatedly determined" that electric utilities are permitted to do. (*Covalt*, *supra*, 13 Cal. 4th at p. 950.)

d. The PUC's View that Plaintiff's Lawsuit Hinders and Interferes with Its Regulatory Authority Is Entitled to Significant Weight.

In this action, the PUC twice has taken the unequivocal position that Plaintiff's claim is preempted by section 1759. This view is entitled to significant weight.

In determining whether an action would hinder or interfere with the PUC's authority, this Court has encouraged courts where appropriate "to solicit the views of the [PUC] regarding whether the action is likely to interfere with the [PUC's] performance of its duties". (*People ex rel. Orloff v. Pac. Bell* (2003) 31 Cal. 4th 1132, 1155 fn. 12; *see also Koponen v. Pac. Gas & Elec. Co.* (2008) 165 Cal. App. 4th 345, 356 ["Our conclusion on this point is supported by the commission itself, which filed an amicus curiae brief at our request."].) Indeed, before the PUC filed its *amicus* brief in the Bankruptcy Court,

Plaintiff highlighted the probative value of a statement by the PUC. (1-SER-106 [Pl.'s Opp'n to Mot. to Dismiss at 2] ["Significantly, the CPUC itself has not indicated in any way that this action would interfere with its regulatory authority."].) Plaintiff changed his opinion of the significance of the PUC's view only after the PUC expressed the view that his action should be barred.

In its *amicus* briefs filed with both the Bankruptcy Court and the Ninth Circuit, the PUC expressly stated that allowing Plaintiff's action to proceed would interfere with its authority. The PUC explained that the policies reflected in ESRB-8 and the PUC's approval of PG&E's Wildfire Safety Plan "expressly authorize the Utility to decide that a public safety power shutoff is warranted under certain circumstances."[14]

[14] Plaintiff asserts that "the CPUC does not 'approve' or 'permit' or 'authorize' PG&E or any utility to implement any specific PSPSs". (Opening Br. 13.) But as the PUC has recognized, "[i]t is not possible to anticipate every emergency situation where power may be shut off for safety reasons and then specify the exact notice and mitigation measures that should be implemented in each situation". (1-SER-251 [Cal. P.U.C. Dec. 12-04-024 at 10].) Thus, the PUC has established a regulatory framework in which the PUC, *ex ante*, promulgates guidelines utilities must adhere to in implementing PSPS events, reviews utilities' PSPS criteria set forth in their wildfire mitigation plans, and holds public hearings on that criteria. (PUC 9th Cir. Br. 4 ["In June 2019, the Commission approved PG&E's 2019 Wildfire Safety Plan, which addressed factors PG&E considers in deciding whether to declare and implement PSPS events."]; 4-ER-428 [Cal. P.U.C. Dec. 19-05-037 at 31].) The PUC also requires utilities to submit pre-season reports that describe, among other things, efforts being taken by the utilities to decrease the scope and risks

(1-SER-97 [PUC Br. at 7].) Because Plaintiff "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 PSPS resulted from the Utility's underlying failure to comply with any particular mandate*", judicial adoption of Plaintiff's 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". (1-SER-97-98 [CPUC Br. at 7-8] [emphasis added].) The PUC's position should weigh heavily in informing the Court's view of the effect of Plaintiff's claim on the PUC's PSPS regulation.

Plaintiff's effort to deflect the import of the PUC's position by citing *Wilson v. Southern California Edison Company* (2015) 234 Cal. App. 4th 123 is unsuccessful. There, a Court of Appeal panel found no evidence that the PUC was regulating the issue of "stray voltage", on which liability depended. (*See Wilson*, *supra*, 234 Cal. App. 4th at p. 151 [stating that there was an "absence of any indication that the PUC has investigated or regulated the issue of stray voltage"].) Here, by contrast, there

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involved with de-energizations. (*See* PUC Dec. Adopting Phase 3 Guidelines, *supra*, 2021 WL 2852304, at *85.) Then, following each and every PSPS event, the PUC's Safety and Enforcement Division reviews reports submitted by the utilities to determine whether the PSPS events complied with the PUC's guidelines and the criteria set forth in the utility's PUC-approved wildfire mitigation plan. (*See id.* at *83–84.)

is overwhelming, undisputed evidence that the PUC actively and comprehensively investigates and regulates PSPS—a critical public safety program.

Nor can Plaintiff detract from the PUC's position by pointing to the *amicus* brief previously submitted by Alice Stebbins, a former executive director of the PUC. Simply put, Ms. Stebbins is not employed by the PUC and she does not speak for the PUC. Indeed, it was during Ms. Stebbin's tenure as Executive Director that the PUC submitted its *amicus* brief in the Bankruptcy Court *agreeing* fully with PG&E's position that Plaintiff's complaint, if allowed to proceed, would hinder or interfere with the PUC's regulatory authority. It was only after Ms. Stebbins was terminated from her position with the PUC that she apparently adopted the contrary position.[15]

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[15] Ms. Stebbins served as the PUC's Executive Director from February 2018 to September 2020. (Stebbins *Amicus* Br., *Gantner v. PG&E Corp.* (9th Cir., July 8, 2021, No. 21-15571), Dkt. No. 23, at vii.) On August 31, 2020, the PUC announced that it had voted to dismiss Ms. Stebbins effective September 4, 2020, after an audit revealed she engaged in wrongful conduct. (*California Agency Says Fired Director Made Unethical Hires*, AP News (Aug. 31, 2020), at https://apnews.com/article/8c6e3d6f011f7c225fd81430d66d38d1.) Ms. Stebbins filed her *amicus* brief in the Ninth Circuit nearly a year later, on July 8, 2021, and after filing a wrongful termination lawsuit against the PUC. (*See Stebbins v. Cal. Pub. Util. Comm'n* (Cal. Sup. Ct. Dec. 4, 2020) No. 8148.)

2. Plaintiff's Other Arguments Do Not Save His Lawsuit from Preemption.

Plaintiff's other arguments in support of his position that his complaint is not preempted lack merit.

a. Plaintiff's Cited Authority Does Not Save His Complaint from Preemption.

In arguing that his claim does not trigger section 1759 preemption, Plaintiff cites to decisions where the harm at issue arose directly from conduct that was prohibited, whereas here, the alleged harm arises directly from conduct the PUC has authorized.

In *Cundiff v. GTE Cal. Inc.*, the alleged harm was caused by deceptive billing practices that deceived the plaintiffs into "unknowingly paying rent month after month, year after year for telephones they do not use". (*Cundiff v. GTE Cal. Inc.* (2002) 101 Cal. App. 4th 1395, 1406.) The action was not preempted because the allegedly deceptive manner in which defendants billed these customers was not authorized by the PUC. (*Id.* at pp. 1407–08, 1411.)

In *Cellular Plus v. Superior Court*, the plaintiffs alleged they were harmed because two cellular telephone companies engaged in price fixing. (*Cellular Plus v. Superior Court* (1993) 14 Cal. App. 4th 1224, 1229.) Because the PUC had not authorized price fixing, the court ruled that section 1759 did not preclude the plaintiffs' antitrust suit. (*Id.* at p. 1246.)

In *Nwabueze v. AT&T*, the plaintiffs alleged they were harmed by defendants "cramming"—the practice of placing

unauthorized charges from third-party merchants on consumers' telephone bills. (*Nwabueze v. AT&T* (N.D. Cal. Jan. 29, 2011) 2011 WL 332473, at *1.) The court determined that the PUC had not authorized the cramming practices that allegedly harmed the plaintiffs. (*Id.* at *16.)

In *PegaStaff v. Pacific Gas & Electric Company*, the court held that a program that gave preferential treatment to minority enterprises was *prohibited* by the PUC because "utilities are not authorized or permitted to give preferential treatment to minority enterprises" and "[t]here can be no doubt that the tier system as described in PegaStaff's [complaint] is a preferential system". (*PegaStaff v. Pac. Gas & Elec. Co.* (2015) 239 Cal. App. 4th 1303, 1326.)

In *Mata v. Pacific Gas & Electric Company*, the plaintiff sought damages for an alleged failure to exercise reasonable care in determining what amount of tree trimming beyond the PUC's minimum requirements was safe. (*Mata v. Pac. Gas & Elec. Co.* (2014) 224 Cal. App. 4th 309, 316–17.) The court found no interference with PUC authority because the applicable PUC regulations, while setting *minimum* clearances (*e.g.*, four feet of clearance around conductors), also require utilities to do *more* if circumstances warrant (*e.g.*, removing a branch that is more than four feet away but poses a hazard to the line). (*Id.* at p. 318.) Thus, the court found that plaintiffs were seeking to impose liability for conduct that, if proven true, would have only violated PUC regulations. (*Id.* at p. 320.)

And in *Vila v. Tahoe Southside Water Utility*, the court found the action was not preempted because, as Plaintiff acknowledges (*see* Opening Br. 30), it was premised entirely on a utility's violation of its tariff. (*Vila v. Tahoe Southside Water Utility* (1965) 233 Cal. App. 2d 469, 479.)

In contrast to these cases, all of Plaintiff's alleged damages here arise directly from conduct that is undisputedly authorized and heavily regulated by the PUC—power shutoffs for public safety. And Plaintiff is clear that he does not allege that PG&E failed to comply with the PUC's PSPS guidelines. (*See* Opening Br. 9 ["Plaintiff does not contend that PG&E was negligent in its decision to implement the PSPSs, or in the manner it implemented them."].) Thus, this Court's decisions in *Covalt* and *Hartwell* are the on-point precedents, and as set forth above they support a finding that Plaintiff's action is preempted by section 1759.[16] [17]

[16] The *Kairy* decision cited by Plaintiff is not instructive. (Opening Br. 22.) The plaintiff's lawsuit concerned whether certain airport shuttle drivers were independent contractors or employees under the California Labor Code. (*Kairy v. SuperShuttle Intern'l* (9th Cir. 2011) 660 F.3d 1146, 1148.) The PUC took the position that it had "not exercised authority over the employment classification of shuttle van drivers". (*Id.* at pp. 1152–53 [ellipses omitted].) The Ninth Circuit accepted the PUC's view, and accordingly found no interference. (*Id.* at p. 1153.) Here, on the other hand, it is undisputed that the PUC regulates PSPS events as part of a broad and continuing supervisory and regulatory program.

[17] Plaintiff's reliance on statements made by Judge Alsup also does not save his claim. (*See* Opening Br. 32.) Judge Alsup oversaw PG&E's probation arising from the 2010 San Bruno Gas

Nor is the analysis changed because Plaintiff invokes section 2106, alleging that PG&E violated the Public Utilities Code by negligently maintaining its system and that this violation was in the "causal chain" leading to his alleged harm. As this Court recognized in *Waters*, and re-affirmed in *Covalt* and *Hartwell*, a plaintiff may not pursue a lawsuit alleging a violation of PUC requirements pursuant to section 2106 when that lawsuit would interfere with a broad and continuing regulatory program of the PUC. (*See Waters*, *supra*, 12 Cal. 3d at pp. 4–5.) In such cases, this Court has been clear: section 1759 has primacy and section 2106 takes a backseat. (*Ibid.*)

b. *A Finding that Plaintiff's Lawsuit Is Preempted Would Not Give PG&E a "Free Pass" to Avoid Grid Enhancement.*

Plaintiff argues that ruling in PG&E's favor would give PG&E a "free pass" when it comes to maintaining its grid by allowing PG&E to just keep cutting service to avoid liability for wildfires. That is demonstrably incorrect. In approving the use of PSPS, the PUC noted that "although de-energization is a valuable tool to promote the public safety, . . . the utilities should continue to strengthen their infrastructure to minimize the need

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explosion. Upon the expiration of that probation, Judge Alsup issued his final observations, making high-level comments that the need for PSPS would have been reduced had PG&E properly maintained its system. (*See ibid.*) PG&E respectfully disagrees with Judge Alsup's comments, but they are immaterial to the issues here. His comments do not change the fact that Plaintiff seeks to hold PG&E responsible for damages that were caused directly by PSPS events that were authorized by the PUC.

for and size of de-energization events". (3-ER-290 [Cal. P.U.C. Rulemaking 18-12-005 at 68].)

Under the PUC's supervision and mandates, PG&E has done precisely that. PG&E has improved its PSPS program and significantly reduced the scope and impacts of its PSPS events. An experienced PG&E team of meteorological experts uses cutting-edge weather models to forecast risk across PG&E's service territory on a 2-km by 2-km level, a significant technological improvement from prior models used in 2019 and before that relied on a 3-km by 3-km grid.[18] The risk models PG&E uses to scope PSPS events are now bolstered by over 1350 advanced weather stations PG&E has strategically installed across its service territory, over half of which have been installed since 2019.[19] PG&E has also installed 1247 sectionalizers since 2019 to allow it to de-energize areas of high risk without de-energizing customers in low-risk areas, and has installed industrial-grade back-up generators at numerous substations to keep those communities energized even if the transmission lines feeding the substations are de-energized.[20] And 555 new high-

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[18] (Resp'ts' Mot. for Judicial Notice, Ex. 8, PG&E 2022 Wildfire Mitigation Plan, at 319; 2-SER-424 [PG&E Amended 2019 Wildfire Safety Plan at 88].)

[19] (Resp'ts' Mot. for Judicial Notice, Ex. 10, PG&E, *Public Safety Power Shutoff (PSPS), Cal. P.U.C. Public Briefing* (Aug. 2, 2022), [hereinafter "PG&E PSPS Briefing"], at 6; Resp'ts' Mot. for Judicial Notice, Ex. 3, PG&E, *2020 Wildfire Mitigation Plan Report Updated* (Feb. 28, 2020), 5-59.)

[20] (Resp'ts' Mot. for Judicial Notice, Ex. 10, PG&E PSPS Briefing, at 6.)

definition cameras and a large fleet of helicopters allow PG&E to monitor conditions and re-energize lines as quickly as possible after PSPS events.[21] Numerous other technological improvements have focused on increasing the accuracy of customer notifications and providing additional services to vulnerable customers.[22]

These steps have had concrete and measurable results. The PSPS events in 2019 de-energized over two million customers.[23] In 2020, this number reduced to approximately 650,000 customers.[24] And in 2021, aided by early rainfall, only approximately 80,000 customers were impacted.[25]

Thus, far from using PSPS as a "free pass" to "inoculate" itself from liability, (Opening Br. 7–8), PG&E has been adhering to the PUC's requirement to reduce PSPS over time through multi-year investments in technology and equipment.

Plaintiff's unsupported statement that PSPS creates a "perverse incentive for a utility to shirk" spending on wildfire mitigation is similarly wrong. (Opening Br. 8.) The PUC does not regulate PSPS in such a manner, as discussed above, and

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[21] (*Id.*; Resp'ts' Mot. for Judicial Notice, Ex. 8, PG&E 2022 Wildfire Mitigation Plan, at 806–07, 918.)

[22] (Resp'ts' Mot. for Judicial Notice, Ex. 10, PG&E PSPS Briefing, at 5.)

[23] (*Id.*)

[24] (*Id.*)

[25] (*Id.*)

assesses penalties and orders corrective actions if PSPS events are used in any unauthorized manner.

Notably, since 2018, when PG&E first started using PSPS, its investment in its wildfire mitigation programs has increased significantly every year. In 2022 alone, PG&E plans to spend over $5.9 billion on wildfire mitigation, a 23% increase from 2021 ($4.8 billion), and a 34% increase from 2020 ($4.5 billion).[26] PSPS, as permitted by the PUC's guidelines, is not about avoiding investments in wildfire prevention.

c. The PUC Continues to Exercise Regulatory Authority Over PSPS and that Authority Preempts Plaintiff's Lawsuit.

Plaintiff's various arguments regarding the scope of the PUC's authority over PSPS are meritless.

First, contrary to Plaintiff's assertion, the PUC continues to actively regulate PSPS. California Assembly Bills 111 and 1054 provided for the creation of the Office of Energy Infrastructure Safety within the California Natural Resources Agency. The functions of the Wildfire Safety Division of the PUC were transferred there in July 2021 (well *after* the filing of this lawsuit and the 2019 PSPS Events). (Gov't Code § 15475.) Those functions include the initial review and approval or rejection of a utility's wildfire mitigation plan. But the law is clear that the PUC retains jurisdiction to ratify the decisions made by that office, including that office's decisions to approve,

[26] (Resp'ts' Mot. for Judicial Notice, Ex. 8, PG&E 2022 Wildfire Mitigation Plan, Table 3.1-1.)

modify or reject a utility's wildfire mitigation plan. (Pub. Util. Code § 8386.3(a); *see also* Resp'ts' Mot. for Judicial Notice, Ex. 7, PUC Res. WSD-020 (Cal. P.U.C. Aug. 19, 2021) [ratifying Office of Energy Infrastructure Safety's decision approving Southern California Edison's 2021 wildfire mitigation plan].) Thus, contrary to Plaintiff's erroneous assertion, the PUC continues to approve a utility's wildfire mitigation plan (including its PSPS protocol). (*See* Pub. Util. Code § 8386.3 ["After approval by the division, the commission shall ratify the action of the division."]; PUC 9th Cir. Br. 10 ["[T]he ultimate approval (or rejection) of a utility's Wildfire Mitigation Plan is an act of the Commission, and is enforceable as an order of the Commission."].) The PUC also continues to promulgate PSPS guidelines and to enforce utility compliance with those guidelines. The PUC's Safety and Enforcement Division monitors utility compliance with PSPS guidelines by reviewing reports filed by the utilities after each PSPS event. (PUC Dec. Adopting Phase 3 Guidelines, *supra*, 2021 WL 2852304, at *83–84; PUC 9th Cir. Br. 18–19.) As recently as June 2022, the PUC's Safety and Enforcement Division proposed Administrative Enforcement Orders which, if finalized following any applicable hearings, will impose various corrective actions and assess penalties of $12 million on PG&E and $10 million on Southern California Edison for PSPS violations.[27]

[27] (Resp'ts' Mot. for Judicial Notice, Ex. 9, PUC, Press Release, *CPUC Staff Proposed Utility Penalties for Poor Execution of Certain 2020 PSPS Events* (Cal. P.U.C., June 15, 2022).)

Second, Plaintiff asserts that the PUC's lack of jurisdiction to award compensatory damages "alone" means that his action is not preempted. (Opening Br. 28.) That position is flatly contradicted by this Court's precedent in *Covalt* and *Hartwell*, where the Court found preemption despite the PUC's longstanding inability to award damages. The test is whether "an award of damages would . . . have the effect of undermining a general supervisory or regulatory policy of the commission". (*Covalt*, *supra*, 13 Cal. 4th at p. 918; *see also Hartwell*, *supra*, 27 Cal. 4th at p. 276 ["An award of damages on the theory that the public utilities provided unhealthy water, even if the water met [regulator's] standard, 'would plainly undermine the commission's policy'" and "such damages actions are barred."]; *Cooney*, *supra*, 2014 WL 3531270, at *3 [holding that an action was preempted where plaintiff claimed damages for harm caused by equipment that PUC authorized utilities to use].) Where, as here, awarding civil damages would impose liability for conduct the PUC has authorized, the action interferes with the PUC's policies and is preempted, regardless of the PUC's inability to award damages. (*Covalt*, *supra*, 13 Cal. 4th at p. 950; *Hartwell*, *supra*, 27 Cal. 4th at pp. 275–76; *Sarale*, *supra*, 189 Cal. App. 4th at pp. 242–43.) And while Plaintiff may be unable to obtain damages from the PUC, there is no dispute that the PUC has broad powers to regulate PSPS, including the authority to award reparations, impose corrective actions and assess penalties, and take other enforcement action. (Cal. Const., art. XII, §§ 2, 4, 6; *see also S. Cal. Pub. Power Auth. v. S. Cal. Gas Co. (U904E)* (Cal.

P.U.C., Feb. 12, 2020), No. 18-12-004 [2020 WL 823381, at *8–9]; Pub. Util. Code §§ 734, 2107 [setting out the PUC's authority to award reparations and assess penalties].)[28]

Third, Plaintiff's claim that the PUC's June 2021 Decision addressing the 2019 PSPS Events supports his position because, in that decision, the PUC "did not address whether PG&E's negligence caused it to shut off the power" is wrong. (Opening Br. 26.) The June 2021 PUC decision is part of the PUC's ongoing regulation of PSPS. The decision established new go-forward requirements for all California utilities when conducting PSPS events and ordered utilities to forgo in the future collecting certain rates from customers tied to sales not realized because of PSPS events. (*See* PUC June 2021 Decision, *supra*, 2021 WL 2473851, at *36–38.) The decision also addressed the implementation of the PSPSs and whether PG&E considered appropriate factors in deciding to implement them. (*See, e.g.*, *id.* at *48–71.) The fact that the PUC did not address Plaintiff's peculiar theory of civil liability is unsurprising, as that was not the purpose of the PUC's decision, and does not control the preemption analysis.

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[28] Likewise, the PUC's statement in the June 2021 Decision that it "does not have jurisdiction to award damages to utility customers" arising from PSPSs is not dispositive of whether Plaintiff's action interferes with the PUC's regulatory authority over PSPS events. (PUC June 2021 Decision, *supra*, 2021 WL 2473851, at *36.) Nevertheless, in that Decision, the PUC did consider and exercise its ability to impose other monetary remedies, like penalties and downward rate adjustments, in response to utilities' violations of certain PSPS guidelines and reporting requirements. (*See, e.g.*, *id.* at *36–38.)

B. PG&E'S TARIFF RULE 14 PROVIDES AN ALTERNATIVE GROUND TO BAR PLAINTIFF'S CLAIM.

For the reasons discussed above, Plaintiff's action is preempted under section 1759, and that is all that is necessary to bar Plaintiff's complaint and to resolve Plaintiff's appeal to the Ninth Circuit. But Plaintiff's complaint is also barred for the independent reason that PG&E's Tariff Rule 14—which has the force and effect of law—precludes liability to customers for service interruptions when such interruptions are necessary to protect public safety. Because it is undisputed that the 2019 PSPS Events were necessary to protect public safety, Rule 14 squarely bars Plaintiff's claim.

1. This Court Should Apply Standard Principles of Statutory Interpretation in Evaluating Rule 14.

In its order certifying questions to this Court, the Ninth Circuit noted that it was unclear whether this Court would adopt a contract-law approach to interpreting Rule 14 or whether it would apply standard principles of statutory construction. (*Gantner v. PG&E Corp.* (9th Cir. 2022) 26 F.4th 1085, 1091–92.) The latter provide the appropriate review.

As a regulated utility company, PG&E is required to and has filed tariffs establishing rules pertaining to its rates and service to customers. It is well established that utility tariffs "have the force and effect of a statute". (*Dyke Water Co. v. Pub. Utils. Comm'n* (1961) 56 Cal. 2d 105, 107; *accord Dollar-A-Day Rent-A-Car Sys. v. Pac. Tel. & Tel. Co.* (1972) 26 Cal. App. 3d 454, 457.) It follows, then, that this Court should interpret PG&E's

tariff rules by applying standard principles of statutory construction.

This Court has previously recognized that "general principles which might govern disputes between private parties are not necessarily applicable to disputes with regulated utilities". (*Waters, supra*, 12 Cal. 3d at p. 10.) "The law, not a contract between the parties, prescribes the classifications, rates and liabilities attendant [to the subject of a tariff]." (*Trammell v. W. Union Tel. Co.* (1976) 57 Cal. App. 3d 538, 550.) Therefore, rules of statutory construction—not contract law—provide the better framework for analyzing tariff rules.

Most other jurisdictions also apply principles of statutory construction in reviewing tariffs. (*See, e.g.*, *CenterPoint Energy Res. Corp. v. Ramirez* (Tex. 2022) 640 S.W.3d 205, 216 & fn. 63 [applying principles of statutory interpretation in reviewing language of tariff]; *In re Verizon New England, Inc.* (N.H. 2009) 972 A.2d 996, 998 ["Because a tariff has the same force and effect as a statute, we interpret a tariff in the same manner that we interpret a statute."]; *U.S. W. Commc'ns, Inc. v. City of Longmont* (Colo. App. 1995) 924 P.2d 1071, 1079 ["[S]tandard principles of statutory construction apply to the interpretation of the tariff."], *aff'd*, (Colo. 1997) 948 P.2d 509; *S.W. Bell Tel. Co. v. State Corp. Comm. of State of Kan.* (Kan. 1983) 664 P.2d 798, 801 [noting that "authorities from other states are generally in accord" with interpreting tariffs under the same rules as statutes].)

2. Rule 14's Plain Language Precludes Liability on Plaintiff's Claim.

Applying canons of statutory construction to Rule 14, the Court first looks to the "plain, commonsense meaning of the language" of the tariff. (*Riverside Cnty. Sheriff's Dep't v. Stiglitz* (2014) 60 Cal. 4th 624, 630.) "If the language . . . is not ambiguous, the plain meaning controls". (*Ste. Marie v. Riverside Cnty. Regional Park & Open-Space Dist.* (2009) 46 Cal. 4th 282, 288.)

A commonsense reading of PG&E's Rule 14 shows that the Rule establishes PG&E's obligation to provide reliable electric service and the limits on that obligation. Paragraph 1 explains PG&E's general obligation: "PG&E will exercise reasonable diligence and care to furnish and deliver a continuous and sufficient supply of electrical energy to the customer, but does not guarantee continuity or sufficiency of supply." (2-SER-320 [Tariff Rule 14 Sheet 1].) That paragraph then provides that PG&E is not liable for interruptions to service that are beyond its control. (*Ibid.* ["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."].) Several of the paragraphs that follow further limit PG&E's general obligation to use reasonable diligence and care to provide uninterrupted service.
Paragraph 2 provides that "PG&E shall be the sole judge of whether it is operationally able to receive or deliver electric

energy through its electric distribution system." (*Ibid.*) Paragraph 3 limits PG&E's liability when service is interrupted due to Independent System Operator grid supply deficiencies or certain transmission-related constraints. (*Ibid.*) Paragraph 4 (at issue here) says that PG&E may interrupt service without liability to customers when necessary for public safety:

> 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 . . . .

(*Ibid.*) And Paragraph 5 states that PG&E has the right to temporarily suspend service "[w]hen PG&E deems it necessary to make repairs or improvements to its system". (2-SER-321 [Tariff Rule 14 Sheet 2].)[29] Each of these paragraphs describes circumstances in which PG&E is not liable for service interruptions and limits the general obligation, set forth in Paragraph 1, to exercise reasonable care and diligence to provide reliable service.

In light of this structure, a plain reading of Rule 14 provides that the decision to interrupt service cannot trigger liability to the customer when it is necessary for public safety. It is undisputed that the PSPS events at issue are "service

[29] The remainder of Rule 14 addresses measures that PG&E will take in the event of a supply shortage and other load reduction provisions. (*See* 2-SER-321–26 [Tariff Rule 14 Sheets 2–7].)

interruptions" that PG&E determined were necessary for the safety of the public at large. (1-SER-119 [Pl.'s Opp'n to Mot. to Dismiss at 15 fn. 6 ("the Complaint does not dispute that PG&E's PSPSs were necessary for safety purposes . . .")].) Accordingly, Rule 14 bars liability to Plaintiff for losses arising from the 2019 PSPS Events.

Reading the plain language of Rule 14 to preclude PG&E's liability on Plaintiff's claim is also reasonable in light of the regulatory framework in which tariff rules are adopted. Tariff provisions limiting a utility's liability, like Rule 14, "are an inherent part of the established rates" and "are binding on the public generally". (*Trammell*, *supra*, 57 Cal. App. 3d at p. 551.) This is because a public utility is "regulated and limited" not just with respect to the rates that it can charge its customers, but also "as to its liabilities". (*Waters*, *supra*, 12 Cal. 3d at p. 7 [citation omitted].) Due to this regulatory control, a public utility's "liability is and should be defined and limited". (*Ibid.* [citation omitted].)[30]

Plaintiff's efforts to deny the plain text of Rule 14 are unavailing. *First*, Plaintiff's argument regarding the timing of Rule 14's approval does not hold water. Plaintiff is correct that Rule 14 was written before the specific type of service interruption at issue here—PSPS events—was contemplated.

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[30] To the extent Plaintiff believes Rule 14's limitation on PG&E's liability is unreasonable, he must take that up with the PUC, not the courts. (*See Waters*, *supra*, 12 Cal. 3d at p. 7 ["[T]he question of reasonableness should first be directed to the commission, not the trial courts."].)

And Plaintiff is correct that the PUC first approved Paragraph 4 of Rule 14 in 1997 in connection with the PUC's direct access program. But that direct access program was suspended in 2001, (*In re Pac. Gas & Elec. Co.* (Cal. P.U.C., Sept. 20, 2001), No. 01-09-060 [2001 WL 1288525]; Pub. Util. Code § 365.1(a)), and later underwent numerous changes (*see, e.g.*, *Dec. Regarding Increased Limits for Direct Access Transactions* (Cal. P.U.C., Mar. 11, 2010), No. 10-03-022 [2010 WL 1130020] [adopting process for customers to submit notice of intent to sign up for direct access]; *Dec. Adopting Process Improvements for Administering Enrollments of Direct Access Rights* (Cal. P.U.C., Dec. 20, 2012), No. 12-12-026 [2012 WL 6759966] [adopting process improvements for administering enrollment in direct access program].) Nevertheless, Paragraph 4 of Rule 14 continues in effect today. More fundamentally, the fact that Rule 14 predates PG&E's PSPS policy does not nullify its plain text meaning, which is *directly* applicable. PSPS events are service interruptions necessary for public safety and thus squarely fall within the purview of Rule 14.

Second, Plaintiff misconstrues the comments made by the PUC when it denied SDG&E's request to add similar language to its tariff. In that decision, which preceded the PUC's authorization of PSPS, the PUC did not merely deny SDG&E's request to add language to its Rule 14; it denied SDG&E's application to implement a Power Shut-Off Plan altogether. (1-SER-223 [Cal. P.U.C. Dec. 09-09-030 at 57].) This was because SDG&E had not shown that the public safety

benefits of shutting off power outweighed the costs, burdens and risks that would be imposed on customers and communities. (*Ibid.*) Because the PUC denied SDG&E's request for authority to implement its Power Shut-Off Plan, it also denied the utility's proposed revisions to its Rule 14. (1-SER-231 [Cal. P.U.C. Dec. 09-09-030 at 65].)

The PUC considered SDG&E's proposed revision to its Rule 14 as related to its request to implement the Power Shut-Off Plan. In doing so, the PUC noted that PG&E's Rule 14 was not approved in connection with any PSPS application by PG&E, and therefore did not constitute a "reasonable precedent" for approving similar language by SDG&E *as a mechanism for implementing a power shut-off program*. (1-SER-235 [Cal. P.U.C. Dec. 09-09-030 at 69] ["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*." (emphasis added)].) But PG&E is not looking to its Rule 14 for authorization to implement a PSPS program; the PUC already (separately) authorized such a program. More importantly, the PUC's statement regarding PG&E's Rule 14 in the context of SDG&E's request does not defeat the Rule's plain language, which plainly states that PG&E may shut off power without liability to its customers when necessary for public safety, as Plaintiff concedes was the case here.

Third, Plaintiff's reliance on a statement that purportedly shows the PUC's position that Rule 14 does not limit

PG&E's liability in cases of negligence is unavailing. The statement that Plaintiff cites was made in a report by Telecommunications Division staff making recommendations to better protect telecommunications customers in connection with fees charged by cell phone service providers. (*See* 1-SER-69 [citing App.'s Appen., *Gantner v. PG&E Corp.* (N.D. Cal., June 5, 2020, No. 4:20-cv-02584), Dkt. No. 7-1 [hereinafter "App.'s Appendix"], at AA1078].) Staff presented arguments for and against the elimination of a liability limitation "from all carriers not subject to rate regulation". (App.'s Appendix at AA1077–78.) That Staff (serving in a division not tasked with regulating PG&E's provision of electric service) was not evaluating Rule 14 or its scope.

Fourth, Plaintiff's argument that this Court should rely on the federal district court opinion in *Tesoro Refining & Marketing Company v. Pacific Gas & Electric Company* is unpersuasive.[31] In *Tesoro*, the court held that a different provision of Rule 14 did not limit PG&E's liability for certain transmission-related outages. (*Tesoro Refining & Marketing Co. v. Pac. Gas & Elec. Co.* (N.D. Cal. 2015) 146 F. Supp. 3d 1170, 1187.) *Tesoro* is inapplicable here.

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[31] Plaintiff also cites to *Langley v. PG&E* (1953) 41 Cal. 2d 655 in support of his argument that Rule 14 does not limit PG&E's liability for the de-energizations at issue. (Opening Br. 36 fn.6.) But, as Plaintiff acknowledges, that case was decided prior to the addition of Paragraph 4 to Rule 14. (*See ibid.*) Thus, *Langley* provides no support for Plaintiff's position.

At issue in *Tesoro* was Paragraph 3 of Rule 14, which provides in pertinent part that "PG&E shall not be liable . . . for damages or losses resulting from interruption due to transmission constraint, allocation of transmission or intertie capacity, *or other transmission related outage*". (*Id.* at p. 1176 [emphasis added].) The court rejected the argument that the phrase "other transmission related outage" absolved PG&E for all transmission outages, regardless of whether they were caused by PG&E's negligence. (*Id.* at p. 1186.) That holding rested on reading the clause "or other transmission related outage" to mean outages caused by factors outside of PG&E's control, in part because the other examples of transmission outages specifically listed in that provision address matters *outside* of PG&E's control (*i.e.*, "interruption due to transmission constraint, allocation of transmission or intertie capacity"). (*Id.* at pp. 1184–85 ["The broad reading that PG&E proposes . . . is incongruent in comparison to the more specific limitations of liability discussed above . . . ."].)

In contrast, Paragraph 4 of Rule 14 addresses different circumstances, under which PG&E is not liable for interruptions in service. Unlike Paragraph 3, Paragraph 4 is not limited to specific transmission-related outages beyond PG&E's control. Instead, Paragraph 4 limits PG&E's liability for outages related to safety issues and emergencies, including maintenance and repairs on its distribution lines, emergencies affecting PG&E's grid and the safety of customers, employees and the public at large. (2-SER-320 [Tariff Rule 14 Sheet 1].)

Paragraph 4 is not, as Plaintiff argues, "simply a subset" of the transmission outages described in Paragraph 3. (*See* Opening Br. 38–39.) For example, Paragraph 4 allows PG&E to interrupt service when necessary to make repairs to PG&E's distribution systems—which is plainly distinct from outages related to PG&E's transmission system. (2-SER-320 [Tariff Rule 14 Sheet 1].)

In sum, the plain language of Rule 14 provides that PG&E's general obligation to use reasonable care and diligence to provide reliable service is limited—and PG&E is not liable to customers—when shutting off power is necessary for public safety. The 2019 PSPS Events undisputedly fall within that category, and thus Rule 14 bars Plaintiff's claim.

CONCLUSION

For the foregoing reasons, both questions that the Ninth Circuit certified to this Court should be answered affirmatively.

August 31, 2022

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August 31, 2022

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CERTIFICATE OF SERVICE

Gantner v. PG&E Corporation

Supreme Court Case No. S273340

STATE OF NEW YORK, COUNTY OF NEW YORK

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/s/ Melissa Syring

Melissa Syring

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Supreme Court Case No. S273340

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STATE OF CALIFORNIA
Supreme Court of California

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8/31/2022

Date

/s/Robert Zwillich

Signature

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