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12 UNITED STATES DISTRICT COURT
13 NORTHERN DISTRICT OF CALIFORNIA
14 SAN FRANCISCO DIVISION

15 UNITED STATES OF AMERICA,) CR-14-00175-WHA
16 Plaintiff,)
17 v.) UNITED STATES’S RESPONSE TO COURT’S
ORDER TO SHOW CAUSE [Dkt. 961] AND
18 PACIFIC GAS AND ELECTRIC COMPANY,) REQUEST FOR COMMENT [Dkt. 970]
19 Defendant.)
20)
21)

22 The United States, through Assistant United States Attorneys Hallie Mitchell Hoffman, Philip
23 Kopczynski, and Jeff Schenk, responds to the Court’s order to show cause why PG&E’s conditions of
24 probation should not be modified as stated therein, Dkt. 961, and the Court’s request for comment on the
25 single most recurring cause of the large 2017 and 2018 wildfires attributable to PG&E’s equipment, Dkt.
26 970.

27 I. APPLICABLE LAW

28 Organizational probationers are subject to the same laws that govern individual probationers. 18

1 U.S.C. § 3551(c)(1). When setting the terms of probation for an organizational defendant, just as for an
2 individual defendant, the court may impose any condition that is “reasonably related to the factors set
3 forth in [18 U.S.C. §] 3553(a)(1) and (a)(2),” so long as the condition “involve[s] only such
4 deprivations of liberty or property as are reasonably necessary for the purposes indicated in section
5 3553(a)(2).” 18 U.S.C. § 3563(b)(22). The factors set forth in Section 3553(a)(1) and (2) include,
6 among others, “the nature and circumstances of the offense and the history and characteristics of the
7 defendant,” and “the need for the sentence imposed . . . to reflect the seriousness of the offense, to
8 promote respect for the law, and to provide just punishment for the offense; . . . to afford adequate
9 deterrence to criminal conduct; . . . [and] to protect the public from further crimes of the defendant.” 18
10 U.S.C. § 3553(a)(1)-(2).

11 While a defendant is serving a term of probation, “[t]he court may modify, reduce, or enlarge the
12 conditions . . . at any time . . . , pursuant to the provisions of the Federal Rules of Criminal Procedure
13 relating to the modification of probation and the provisions applicable to the initial setting of the
14 conditions of probation.” 18 U.S.C. § 3563(c); *see also United States v. Bainbridge*, 746 F.3d 943, 946-
15 50 (9th Cir. 2014) (holding that district court may modify conditions of probation without any “change
16 in circumstances”). The Federal Rules of Criminal Procedure provide that “[b]efore modifying the
17 conditions of probation . . . , the court must hold a hearing, at which the person has the right to counsel
18 and an opportunity to make a statement and present any information in mitigation.” Fed. R. Crim. P.
19 32.1(c)(1). A hearing is not required, however, if the defendant waives it. Fed. R. Crim. P. 32.1(c)(2).

20 In addition to Title 18 and the Federal Rules, the United States Sentencing Guidelines
21 (“Guidelines”) address probation for organizational defendants. The Guidelines state that probation is
22 appropriate for organizational defendants in many circumstances, including when “necessary to ensure
23 that changes are made within the organization to reduce the likelihood of future criminal conduct,” and
24 when “necessary to accomplish one or more of the purposes of sentencing set forth in 18 U.S.C.
25 § 3553(a)(2).” U.S.S.G. § 8D1.1(a)(6), (8). The Guidelines further state that “[i]n determining the
26 conditions to be imposed . . . , the court should consider the views of any governmental regulatory body
27 that oversees conduct of the organization relating to the instant offense.” U.S.S.G. § 8D1.4 cmt. 1.

28 Consistent with these provisions, the Ninth Circuit has long held that, within certain limitations,

1 “the trial judge has very broad discretion in fixing the terms and conditions of probation.” *United States*
2 *v. Consuelo-Gonzalez*, 521 F.2d 259, 262 (9th Cir. 1975) (en banc). The Ninth Circuit reviews a district
3 court’s modification of conditions of probation for abuse of discretion. *United States v. Nixon*, 839 F.3d
4 885, 887 (9th Cir. 2016). A condition of probation “need not relate to the offense of conviction, as long
5 as it satisfies one of the . . . goals” set forth in Section 3553(a)(1) and (2). *United States v. Weber*, 451
6 F.3d 552, 558 (9th Cir. 2006); *accord United States v. Stoterau*, 524 F.3d 988, 1008 (9th Cir. 2008).¹
7 Moreover, the statutory requirement that a condition of probation be reasonably related to the Section
8 3553(a) factors is “a very flexible standard.” *United States v. Gementera*, 379 F.3d 596, 603 (9th Cir.
9 2004) (internal quotation marks and citations omitted). “[E]ven very broad conditions are reasonable if
10 they are intended to promote the probationer’s rehabilitation and to protect the public.” *United States v.*
11 *Bee*, 162 F.3d 1232, 1236 (9th Cir. 1998). In addition, a condition may have a proper rehabilitative
12 purpose even if it is aimed at conduct that does not rise to the level of a criminal offense. *See United*
13 *States v. LaCoste*, 821 F.3d 1187, 1192 (9th Cir. 2016). The Ninth Circuit has affirmed conditions of
14 probation that restrict or interfere with the probationer’s vocation so long as the condition is reasonably
15 necessary to achieve a proper purpose, such as protection of the public. *See United States v. Clark*, 195
16 F.3d 446, 452 (9th Cir. 1999); *United States v. Nu-Triumph, Inc.*, 500 F.2d 594, 596 (9th Cir. 1974).

17 Specific to organizational defendants, the Ninth Circuit “has recognized that special problems are
18 inherent in the criminal punishment of corporations.” *United States v. Blue Mountain Bottling Co. of*
19 *Walla Walla*, 929 F.2d 526, 528 (9th Cir. 1991). One such problem is that “because corporations cannot
20 be sentenced to prison time, sentences between corporate and individual defendants may be disparate.”
21 *Id.* According to the Ninth Circuit, “‘creative terms of probation’ may be required to rectify this
22 disparity while seeing that the punishment of criminals is effected.” *Id.* (quoting *United States v.*
23 *Mitsubishi Int’l Corp.*, 677 F.2d 785, 787 (9th Cir. 1982)).

24 While regularly reaffirming that district courts “enjoy broad discretion in fashioning the
25 conditions needed for successful supervision of a defendant,” and that district courts’ choices will
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27 ¹ *Weber* and *Stoterau* concerned supervised release but the analysis of probation and supervised
28 release is largely the same. *Compare* 18 U.S.C. § 3563 *with* 18 U.S.C. § 3583; *see also, e.g., Gagnon v.*
Scarpelli, 411 U.S. 778, 782 (1973); *United States v. Kincaid*, 379 F.3d 813, 817 n.2 (9th Cir. 2004) (en
banc).

1 receive “substantial deference,” the Ninth Circuit has insisted that conditions of supervision find support
2 in the record, and that the conditions be no broader than reasonably necessary. *See LaCoste*, 821 F.3d at
3 1190. In *LaCoste*, for example, the Ninth Circuit vacated a condition of supervised release prohibiting a
4 defendant from using the internet without the prior approval of his probation officer, where the record
5 revealed only that the defendant had used the internet to post disparaging comments about some of his
6 fraud victims. *Id.* at 1191. In *United States v. Collins*, 684 F.3d 873 (9th Cir. 2012), the Ninth Circuit
7 vacated a condition restricting where the defendant could reside, although state law already imposed a
8 similar restriction on the defendant, because the condition was a “serious restriction” that lacked
9 “sufficient explanation,” and because the district court failed “to analyze the appropriateness of [the
10 residency restriction] pursuant to the required federal sentencing factors, notwithstanding any related
11 state law restrictions.” *Id.* at 890-92. Meanwhile, in *United States v. Watson*, 582 F.3d 974 (9th Cir.
12 2009), which was an appeal from a judgment of this Court, the Ninth Circuit upheld a condition
13 prohibiting the defendant from entering San Francisco without the permission of his probation officer,
14 because, after “a careful examination of the justifying factors,” the Ninth Circuit found sufficient
15 support for this condition in the record. *Id.* at 983.

16 II. THE UNITED STATES’S VIEW ON THE PROPOSED CONDITIONS OF 17 PROBATION

18 This Court has proposed three new conditions to PG&E’s probation. Order to Show Cause, Dkt.
19 961 at 2-4. First, the Court proposes that it will require PG&E to re-inspect its entire electrical grid and
20 remove or trim certain trees and branches, identify and fix certain conductors, identify and fix certain
21 poles, transformers, fuses and other connectors, and identify and fix other conditions. Second, the Court
22 proposes to require PG&E to document the foregoing inspections and work done. Finally, the Court
23 proposes to allow PG&E to supply electricity only through those parts of its grid it has determined to be
24 safe.

25 While the United States shares the Court’s interest in imposing conditions of probation aimed at
26 ensuring that the inhabitants of the Northern District are protected from the death and destruction caused
27 by wildfires, on this record, the United States is not in a position to address the feasibility of
28 implementing the conditions and the chance that they will effectuate that goal. As a threshold matter,

1 the government does not believe the record supports imposition of the proposed conditions as they are
2 currently drafted. Moreover, as drafted, the Court's proposed conditions may overlap with state and
3 federal regulations (*e.g.*, the Federal Power Act and the California Public Utilities Code) and touch on
4 the province of state and federal regulators (*e.g.*, California Public Utilities Commission (CPUC) and the
5 Federal Energy Regulatory Commission). PG&E's efforts to comply with the proposed conditions
6 could also implicate additional regulations and agencies, such as the Endangered Species Act, the
7 Bureau of Land Management, and the U.S. Department of the Interior.

8 Because of the complexity of the regulatory scheme involved in electric transmission and
9 distribution lines, the government recommends that the Court request that the Monitor review and
10 evaluate the proposed probation conditions.

11 The Monitor is in a unique position to perform this work. According to the Monitor's recent
12 submission to the Court, the Monitor has already begun to assess PG&E's current and future vegetation
13 management programs, and its pole and equipment inspection and maintenance programs. Dkt. 958 at
14 2. The Monitor's work, thus far, has focused on PG&E's electric distribution systems, but the Court
15 also could order the Monitor to oversee PG&E's electric transmission system. Furthermore, the Monitor
16 believes certain agencies, such as the California Department of Forestry and Fire Prevention ("Cal Fire")
17 and the CPUC, will make specific recommendations, requirements, and changes to PG&E's electric
18 operations. *Id.* Once these recommendations are made, the Monitor will evaluate and assess how
19 PG&E incorporates and complies with them. *Id.* This relevant experience places the Monitor in the best
20 position to determine whether wildfires can be prevented by fixing gaps in the currently regulatory
21 scheme, or by improving PG&E's compliance with current regulations. If the Monitor believes new
22 probation conditions are appropriate, then the Monitor can draft these conditions after consulting with
23 federal and state regulatory agencies, and thereby ensure that they are properly tailored to remedy
24 specific harm without conflicting with existing regulations.

25 In sum, the United States recommends that the Monitor review the Court's proposed probation
26 conditions, consult with relevant agencies, and draft a final set of workable probation conditions that
27 achieve the Court's goals while minimizing enforcement challenges.

1 III. TENTATIVE FINDING REGARDING CAUSE OF WILDFIRES ATTRIBUTABLE TO
2 PG&E'S EQUIPMENT

3 On January 17, 2019, this Court issued a tentative finding concerning the "single most recurring
4 cause of the 2017 and 2018 large wildfires attributable to PG&E's equipment." Request for Comment,
5 Dkt. 970. The Court tentatively found that the single most recurring cause was that PG&E's distribution
6 lines have been susceptible "to trees or limbs falling onto the lines during high-wind events." *Id.*

7 In reviewing the materials PG&E submitted to the Court, including Docket No. 956, the
8 government believes that the Court's finding is accurate as to more than half of the large 2017 and 2018
9 wildfires. However, the government's conclusion is based solely on the documents PG&E submitted to
10 the Court. The government is only aware of completed and public Cal Fire investigation reports as to
11 the La Porte, Nuns, Redwood, Thirty Seven, Cherokee, and Cascade fires. The government has
12 reviewed redacted versions of these reports, but it would require experts to assist it in drawing
13 conclusions concerning causation.

14 In any event, the government submits that the Monitor would be in the best position to review
15 available, relevant information concerning causation. While the Monitor has not attempted to determine
16 causation, his team includes subject matter experts. Dkt. 958. For our purposes, PG&E's role in
17 causing the wildfires is relevant not only to determine whether it has violated its terms of probation, but
18 also to prevent future harm. To address causation, the Court should employ the Monitor's subject matter
19 experts. These experts can help answer the question of whether the 2017 and 2018 wildfires were
20 caused because PG&E did not comply with existing, sufficient regulations (suggesting that additional
21 probation conditions are probably not necessary) or because existing regulations do not sufficiently
22 mitigate fire danger caused by PG&E's electric grid (suggesting that additional probation conditions – or
23 simply additional regulations – are necessary).

1 DATED: January 23, 2019

Respectfully submitted,

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4
5 /s/
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