

1 JENNER & BLOCK LLP
2 Reid J. Schar (*pro hac vice*)
3 RSchar@jenner.com
4 353 N. Clark Street
5 Chicago, IL 60654-3456
6 Telephone: +1 312 222 9350
7 Facsimile: +1 312 527 0484

8 CLARENCE DYER & COHEN LLP
9 Kate Dyer (Bar No. 171891)
10 kdyer@clarencedyer.com
11 899 Ellis Street
12 San Francisco, CA 94109-7807
13 Telephone: +1 415 749 1800
14 Facsimile: +1 415 749 1694

15 CRAVATH, SWAINE & MOORE LLP
16 Kevin J. Orsini (*pro hac vice*)
17 korsini@cravath.com
18 825 Eighth Avenue
19 New York, NY 10019
20 Telephone: +1 212 474 1000
21 Facsimile: +1 212 474 3700

22 Attorneys for Defendant PACIFIC GAS AND ELECTRIC
23 COMPANY

24 UNITED STATES DISTRICT COURT
25 NORTHERN DISTRICT OF CALIFORNIA
26 SAN FRANCISCO DIVISION

27 UNITED STATES OF AMERICA,
28
30 Plaintiff,
31
32 v.
33 PACIFIC GAS AND ELECTRIC COMPANY,
34
35 Defendant.

Case No. 14-CR-00175-WHA

**RESPONSE TO ORDER TO SHOW
CAUSE AND FURTHER ORDER
TO SHOW CAUSE**

Judge: Hon. William Alsup

TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

INTRODUCTION1

ARGUMENT.....5

I. THE COURT SHOULD NOT ADOPT THE HIRING CONDITION.5

 A. The Hiring Condition Is Unreasonable Because Current Resource Constraints Are Not Affecting PG&E’s Compliance with Vegetation Management Laws and Its Wildfire Safety Plan.....5

 B. Imposing the Hiring Condition to Increase the Pace of PG&E’s EVM Program Would Be Unreasonable.9

 1. Labor Market Conditions Prevent PG&E From Completing Its Enhanced Vegetation Management Work Faster Than The CPUC-Approved Timeline.10

 2. Requiring PG&E to Develop an Internal Workforce Would Simply Slow Down the Current Pace of Tree Work12

 C. The Hiring Condition Would Impermissibly Interfere with the CPUC’s Ongoing Regulatory Process.....18

 D. The Hiring Condition Is Not Reasonably Related To The Underlying Conviction.....21

II. THE COURT SHOULD NOT IMPOSE THE COMPENSATION CONDITION.....22

 A. The Compensation Condition Would Improperly Conflict With Recent California Law Regulating Utility Incentive Compensation.22

 B. The Proposed Compensation Condition Would Undermine The Bankruptcy Court’s Authority To Approve PG&E’s Incentive Plans During The Chapter 11 Case.....26

 C. The Compensation Condition Is Unreasonable Because It Is Not In The Public Interest.....28

1 Defendant Pacific Gas and Electric Company (“PG&E”) respectfully submits this
2 response to the Court’s January 16 and January 24, 2020 orders to show cause (1) why a further
3 condition of probation should not be imposed “requiring PG&E to hire and train, as part of its
4 own workforce, sufficient crews and equipment to inspect and to trim and remove all vegetation
5 so as to come into compliance with the California Public Resources Code and PG&E’s own
6 wildfire mitigation plan” (“Hiring Condition”); and (2) why a further condition of probation
7 should not be imposed requiring PG&E to “restrict all bonuses and other incentives for
8 supervisors and above *exclusively* to achieving the PG&E Wildfire Mitigation Plan and other
9 safety goals” (“Compensation Condition”).

10 INTRODUCTION

11 The Court should not impose the proposed probation conditions. “The test for
12 validity of probation conditions . . . is whether the conditions are primarily designed to meet the
13 ends of rehabilitation and protection of the public.” *United States v. Terrigno*, 838 F.2d 371, 374
14 (9th Cir. 1988). The conditions must be “reasonably related to th[ose] purposes.” *Id.* “If the
15 impact is substantially greater than is necessary to carry out the purposes, the conditions are
16 impermissible.” *Higdon v. United States*, 627 F.2d 893, 897 (9th Cir. 1980). In addition, under
17 principles of comity, “the federal government has no constitutional authority to interfere with a
18 state’s exercise of its police power,” *United States v. Snyder*, 852 F.2d 471, 475 (9th Cir. 1988),
19 and a “condition of probation may not circumvent another statutory scheme,” *United States v.*
20 *Abushaar*, 761 F.2d 954, 960 (3d Cir. 1985). The proposed probation conditions fail both these
21 tests.

22 *Hiring Condition.* The Hiring Condition is unreasonable. It does not advance any
23 rehabilitative or public interest purpose because it will not have the effect the Court suggests.
24 The Court’s proposed Hiring Condition is based on the mistaken premise that a lack of pre-
25 inspector and tree trimming resources have kept PG&E from complying with state vegetation
26 management laws and the targets in PG&E’s Wildfire Safety Plan. That is incorrect. Any non-
27

1 compliance is not attributable to current resource constraints. PG&E faced an unprecedented
2 volume of tree work in 2019 that could not be fully executed until it had ramped up its contracted
3 vegetation management workforce, which it did by more than tripling that workforce by the end
4 of the year. While the relatively small volume of compliance work that was outstanding at year-
5 end 2019 was impacted by resource delays, much of the outstanding work consisted of trees that
6 had only been recently identified for work; trees that were subject to environmental, permitting
7 and customer refusal issues; or trees that were timely worked but the work is not yet reflected in
8 PG&E's records due to lagging contractor invoicing. With respect to PG&E's Wildfire Safety
9 Plan, PG&E exceeded its Enhanced Vegetation Management ("EVM") program target. The
10 missed Catastrophic Event Memorandum Account ("CEMA")¹ inspection target was a result of
11 scheduling issues that have already been addressed, not manpower issues. The proposed Hiring
12 Condition therefore will not advance PG&E's compliance with state laws concerning vegetation
13 management.

14 The resource constraints that PG&E has cited in the past instead concern the pace
15 at which PG&E can complete the full scope of the EVM work described in its Wildfire Safety
16 Plan. Specifically, the pool of qualified and experienced tree workers available to complete
17 PG&E's EVM work is limited, and thus PG&E estimated that the full scope of its EVM work
18 would take an estimated eight years to complete. That fact was considered and addressed by the
19 CPUC in its approval of PG&E's plan.

20 While PG&E appreciates the Court's desire to find ways to speed up the
21 completion of that work, an order directing PG&E to hire tree trimmers as part of its own
22 workforce would be counterproductive. There is a critical statewide (indeed, nationwide)
23 shortage of qualified and experienced tree workers that the Court's proposed Hiring Condition
24 will not solve. PG&E is working closely with its contractors to obtain additional resources for
25 vegetation management—in fact, PG&E has worked with its contractors to add approximately
26

27 ¹ CEMA comprises PG&E's drought emergency response vegetation management work.

1 4,700 pre-inspectors and tree trimmers throughout 2019. But additional qualified tree workers
2 do not currently exist in California. If the Court were to force PG&E to develop an in-house tree
3 worker team, PG&E would need to hire existing resources away from its own contractors, which
4 would only shift who employs the resources performing work for PG&E, not add to them.
5 Moreover, PG&E has not used internal tree workers for at least four decades. Instead, PG&E,
6 like virtually all large utilities across the country, has contracted with experts in the vegetation
7 management industry to conduct that work. Forcing PG&E to hire an internal workforce would
8 therefore not address any near-term resource constraints because it would take PG&E many
9 years and hundreds of millions of dollars to build the infrastructure, expertise, and management
10 structures to develop the kind of vegetation management workforce that already exists at the
11 vegetation management companies with which it contracts. The middle of California's wildfire
12 emergency is not the time for PG&E to reverse course on the entire structure of its vegetation
13 management work and spend significant time and resources that are better devoted to improving
14 current arrangements and completing other important wildfire mitigation measures.

15 The Hiring Condition also would not help reduce the need for PG&E's Public
16 Safety Power Shutoff ("PSPS") program. PG&E implemented its PSPS program in 2018 in
17 response to a significantly changed wildfire risk, not because it had failed to comply with
18 vegetation management regulations. While its EVM program is an integral part of an overall
19 approach to wildfire mitigation, PG&E's ability to reduce the frequency and impact of PSPS
20 events will depend in substantial part upon system enhancements, such as localized weather
21 forecasts and real-time data, sectionalization of lines, and the use of microgrids. Even with
22 perfect vegetation compliance, PG&E would still need to maintain a PSPS program to address
23 extreme weather and fire danger conditions.

24 Finally, the Hiring Condition is also unlawful because it interferes with the expert
25 judgment exercised by other politically accountable actors. The California Legislature and the
26 CPUC have comprehensive regulatory authority over vegetation management compliance and
27 California utilities' wildfire mitigation plans. The CPUC has approved the targets for PG&E's
28

1 2019 EVM and has full authority to address any non-compliance—it also has the expertise to
2 determine how best to increase the vegetation management resources available to PG&E and its
3 contractors. The CPUC considered resource constraints in its review of PG&E’s 2019 Wildfire
4 Safety Plan and its investigation of the 2017 Northern California Wildfires and 2018 Camp Fire.
5 As a result of those proceedings and PG&E’s independent efforts, PG&E is in the process of
6 implementing multiple measures designed to expand the vegetation management labor pool and
7 better utilize existing vegetation management resources, which are discussed in detail below.

8 *Compensation Condition.* The Compensation Condition is also unlawful and
9 conflicts with determinations to be made by the CPUC and with compensation matters that may
10 be brought before the Bankruptcy Court. California recently passed major legislation, AB 1054,
11 that regulates PG&E’s executive compensation and that expressly permits that compensation to
12 be determined by a mix of safety and financial considerations. That decision reflects
13 California’s judgment, amply supported by the legislative record, that PG&E cannot safely
14 provide power unless it is financially stable. The CPUC will hold hearings on February 19 on
15 PG&E’s proposed 2020 executive compensation plan pursuant to that legislation, and PG&E has
16 submitted written testimony to the CPUC describing in detail the complex set of considerations
17 that underlie the proposals, and why the proposals meet AB 1054’s standards. *See* “Pacific Gas
18 and Electric Company Plan of Reorganization OII 2019, Prepared Testimony, Volume 1:
19 Chapter 7, Executive Compensation,” at 7-3 to 7-23 (Jan. 31, 2020), attached as Ex. A to the
20 Declaration of Kate Dyer In Support of PG&E’s Response to Order to Show Cause and Further
21 Order to Show Cause (“Dyer Decl.”) [hereinafter “CPUC Testimony”]. It would be
22 inappropriate for this Court to override those state determinations via a probation condition. The
23 Bankruptcy Court has also previously addressed PG&E’s incentive plans. In particular, the
24 Bankruptcy Court approved PG&E’s 2019 short-term incentive plan, which included safety
25 (65%), financial (25%) and customer (10%)-related goals, as a sound exercise of business
26 judgment, “justified by the facts and circumstances,” and “in the best interests of [PG&E], its
27 estate[], creditors, shareholders and all parties in interest.” Order Pursuant to 11 U.S.C.

1 Code and PG&E’s own wildfire mitigation plan.” Order to Show Cause at 2, *United States v.*
2 *Pac. Gas & Elec. Co.*, No. 14-cr-175 (N.D. Cal. Jan. 16, 2020), ECF No. 1133. Respectfully, the
3 premise of the Court’s Order is mistaken. PG&E would like to clarify the record so that there is
4 no misunderstanding about its current compliance status. PG&E faced resource constraints in
5 2019 as it sought to complete an unprecedented volume of tree work in its routine, CEMA and
6 EVM programs at the same time California faced a critical shortage of qualified and experienced
7 tree workers. Working with its contractors, PG&E responded by more than tripling its pre-
8 inspector and tree trimmer workforce, largely with new pre-inspector hires and by recruiting tree
9 trimmers from out of state. The time to complete this ramp up, along with other external factors
10 (e.g., winter storms) and scheduling changes to prioritize work in the highest fire-threat areas,
11 had the effect of pushing a large volume of PG&E’s tree work toward the end of 2019. Despite
12 these obstacles, PG&E finished 2019 in substantial compliance with state vegetation
13 management laws and the targets in the Wildfire Safety Plan as set forth below. To the extent
14 PG&E has fallen short of perfect compliance, current resource constraints are not the cause.
15 Accordingly, the Hiring Condition serves no rehabilitative or public purpose.

16 *First*, PG&E is already in substantial compliance with vegetation management
17 laws and the vegetation management targets in its Wildfire Safety Plan. PG&E worked over a
18 million trees in 2019, and had not completed work on only 22,000 trees that represent
19 compliance issues because they have been identified as hazard trees or trees with vegetation
20 within the four-foot radial clearance area by year end. (Declaration Regarding Vegetation
21 Management in Support of Response to Order to Show Cause and Further Order to Show Cause,
22 February 12, 2020, (“VM Decl.”) ¶ 3) As explained in its January 15 submission, many of these
23 trees are recently identified trees that have been or will be completed in PG&E’s standard work
24 completion timeframes, while others have been delayed due to environmental and permitting
25
26
27
28

1 requirements and customer refusals.² (PG&E’s Response to Request for Information at 5,
 2 *United States v. Pac. Gas & Elec. Co.*, No. 14-cr-175 (N.D. Cal. Jan. 15, 2020), ECF No. 1132
 3 (“January 15 submission”); *see also* VM Decl. ¶ 4) For the remaining trees that do not fall into
 4 any of these categories, delays were the result of planning and prioritization issues as PG&E
 5 completed an unprecedented volume of tree work in the closing months of 2019. (VM Decl. ¶ 5)
 6 PG&E acknowledges that such issues are unacceptable, but they are better addressed by PG&E’s
 7 continuing efforts to mature its expanded vegetation management operations and improve
 8 oversight and management of PG&E’s current contractor workforce rather than by forcing
 9 PG&E to build an internal tree inspection and trimming workforce from scratch. In 2020, PG&E
 10 has improved its regional Vegetation Management (“VM”) managers’ ability to track
 11 outstanding compliance work and is developing additional checkpoints with contractors as it
 12 prioritizes timely completion of this work. (*Id.*)

13 With respect to PG&E’s Wildfire Safety Plan, PG&E completed work on
 14 approximately 2,500 EVM line miles, thereby *exceeding* its 2019 target of 2,450 miles. (*Id.* ¶ 9)
 15 While PG&E missed its target of 100% completion of its planned CEMA second patrols of
 16 certain line miles for dead, dying or diseased trees³, that was the result of delays in routine
 17 inspections in the first half of the year as PG&E ramped up its pre-inspector workforce, as well
 18 as changes to the schedule for routine inspections to prioritize work in the highest fire-threat
 19 areas. (*Id.* ¶¶ 10-11) PG&E completed virtually all routine inspections by year end, but these
 20 scheduling changes had the cascading effect of pushing a number of CEMA second patrols,
 21 which are typically scheduled to take place approximately six months after a routine inspection,
 22

23 ² As set forth in PG&E’s January 15 submission, because there is a lag between the time tree
 24 work is completed and the time PG&E contractors submit paperwork confirming completion,
 25 PG&E’s records may not yet reflect completion of work for many of the trees recently identified
 for work. PG&E expects that the work on most of those trees was timely completed.

26 ³ PG&E’s routine patrols inspect the lines for dead, dying or diseased trees. PG&E’s CEMA
 27 is therefore a “second patrol” for these same issues that is completed on lines in high fire-threat
 areas.
 28

1 into 2020. (*Id.*) Those issues have been addressed for 2020. (*Id.* ¶ 11) While the failure to meet
2 the CEMA second patrols target is not acceptable, it was the result of scheduling changes, not the
3 availability of pre-inspectors to conduct the patrols. (*Id.*)

4 Contrary to the apparent premise of the Court’s Order, it is also incorrect that
5 PG&E’s PSPS program resulted from any failure by PG&E to comply with California law.
6 PG&E implemented a PSPS program in 2018 in response to dramatically increased wildfire risk
7 due in large part to climate change, which has led to more extreme weather events across a
8 longer and drier fire season. (Declaration Regarding PSPS in Support of Response to Order to
9 Show Cause and Further Order to Show Cause (“PSPS Decl.”) ¶ 2) While the EVM program is
10 an integral part of its overall approach to wildfire mitigation, the primary means of reducing the
11 frequency and impact of PSPS events are the availability of more localized weather forecasts and
12 real-time data, sectionalization of lines to allow de-energization of smaller sections of line, the
13 use of microgrids to power safe-to-energize areas, and targeted system hardening in high fire-risk
14 areas. (*Id.* ¶ 3) Even with these changes, there will remain a risk of vegetation-caused fires in
15 circumstances involving high winds and dry brush—and thus a need for a PSPS program—no
16 matter how much EVM work is completed. (*Id.* ¶ 5) The comments by PG&E’s CEO William
17 Johnson cited by the Court in its order do not concern vegetation management, but instead relate
18 to the amount of time it will take to upgrade the system to allow for more targeted, precise and
19 informed PSPS events. PG&E has already made significant strides in that area and will continue
20 to do so in the coming years. (*Id.* ¶ 4) But again, the need for and challenges associated with
21 PSPS have nothing to do with tree worker availability. (*Id.* ¶ 2)

22 *Second*, to the extent the Court’s Order is focused on PG&E’s failure to certify
23 that it is in perfect compliance with vegetation management requirements, PG&E has been
24 candid in its submissions that it will never be in a position to certify perfect compliance. PG&E
25 provides electricity across 70,000 square miles of territory spanning a range of terrains. (VM
26 Decl. ¶ 6) The natural environment in which it operates is dynamic: any number of weather
27 events, animal activities, or human interventions can transform trees from compliant to non-

1 compliant on a daily basis. (*Id.*) Certification of perfect compliance with state-law standards
 2 would require technologically infeasible, round-the-clock surveillance of tens of millions of
 3 trees. (*See* January 15 submission at 3-4; VM Decl. ¶ 6) But as PG&E has previously informed
 4 the Court, it has made extensive efforts to ensure that it is getting as close to that standard as
 5 practicable. It has made, and will continue to make, workforce and process improvements to
 6 enhance the speed, effectiveness, and safety of its wildfire mitigation work. (*See* January 15
 7 submission at 4-8; VM Decl. ¶ 6)

8 **B. Imposing the Hiring Condition to Increase the Pace of PG&E's EVM**
 9 **Program Would Be Unreasonable.**

10 To the extent the Court seeks to increase the pace at which PG&E will complete
 11 its EVM work—in other words, to the extent the Court's concern is with PG&E's CPUC-
 12 approved annual targets themselves, rather than with PG&E's compliance with the annual
 13 targets—imposing the Hiring Condition would still be unreasonable.⁴ That is so for at least two
 14 reasons. *First*, the well-recognized shortage of qualified pre-inspectors and line clearance tree
 15 trimmers in California will prevent PG&E from completing its work on a faster timeline.
 16 Imposing the Hiring Condition will not change these underlying labor market conditions, and in
 17 fact could pose an obstacle to PG&E's compliance, as described below. *Second*, the 2019 targets
 18 have been reviewed and approved by the CPUC, the expert body with authority to impose and
 19 enforce the Wildfire Safety Plan. This Court should not interfere with the CPUC's
 20 determinations.

21 _____
 22 ⁴ As part of its continual assessment of its wildfire mitigation programs, PG&E plans to
 23 conduct EVM on 1,800 distribution line miles in 2020 and beyond based on insights gained from
 24 the 2019 effort. PG&E will refocus some of its resources in 2020 to expand Rights-of-Way and
 25 remove incompatible species around lower voltage transmission lines in order to reduce wildfire
 26 risk and reduce the footprint of future PSPS events by allowing some transmission lines to
 27 remain energized. (PG&E 2020 Wildfire Mitigation Plan, submitted on February 7, 2020, at
 28 Executive Summary-6, *available at* https://www.pge.com/pge_global/common/pdfs/safety/emergency-preparedness/natural-disaster/wildfires/wildfire-mitigation-plan/2020-Wildfire-Safety-Plan.pdf.)

1 1. Labor Market Conditions Prevent PG&E From Completing Its Enhanced
 2 Vegetation Management Work Faster Than The CPUC-Approved
 3 Timeline.

4 The Bureau of Labor Statistics’ most recent data on the entire “Tree Trimmers
 5 and Pruners” occupation (from May 2018) shows nationwide employment of 42,440 and
 6 California-wide employment of 6,840.⁵ But only a small subset of these tree workers have the
 7 necessary experience and certification to work as “line clearance” tree trimmers adjacent to
 8 energized power lines. (VM Decl. ¶ 13) In AB 1054, the California Legislature specifically
 9 found that “[t]here is a nationwide shortage of the qualified utility line workers and qualified line
 10 clearance tree trimmers needed to prevent and respond to wildfires, storms, and other major
 11 events. Because this work is performed on and near high voltage lines and other energized
 12 electrical equipment, these jobs require substantial training and are highly dangerous. Current
 13 efforts to hire enough qualified people to perform these functions have fallen short even though
 14 exceptional compensation packages are being offered.” (2019 Cal. Legis. Serv. ch. 79, § 12(7)
 15 (“A.B. 1054”) (law filed July 12, 2019)).⁶ PG&E’s own experience casting a wide net and
 16 offering substantial financial incentives to hire additional tree personnel in the fall of 2018
 17 identified a maximum of approximately 3,000 qualified tree workers to perform vegetation
 18 management activities around utility lines at that time. (PG&E Amended 2019 Wildfire Safety
 19 Plan, submitted on February 14, 2019 (“WSP”) at 80-81, *available at*
 20 [https://www.pge.com/pge_global/common/pdfs/safety/emergency-preparedness/natural-](https://www.pge.com/pge_global/common/pdfs/safety/emergency-preparedness/natural-disaster/wildfires/Wildfire-Safety-Plan.pdf)
 21 [disaster/wildfires/Wildfire-Safety-Plan.pdf](https://www.pge.com/pge_global/common/pdfs/safety/emergency-preparedness/natural-disaster/wildfires/Wildfire-Safety-Plan.pdf) ; (VM Decl. ¶ 19)).

22
 23
 24 ⁵ U.S. Bureau of Labor Statistics, Occupational Employment and Wages, May 2018, 37-
 25 3013 Tree Trimmers and Pruners, available at
 26 <https://www.bls.gov/oes/2018/may/oes373013.htm>.

27 ⁶ In Senate Bill 247, which was passed three months after AB 1054, the legislature mandated
 28 that qualified line clearance tree workers be paid no less than apprentice electrical utility
 linemen. 2019 Cal. Legis. Serv. ch. 406, § 2(b) (law filed Oct. 2, 2019).

1 It is also important to understand that using qualified tree workers from outside
2 California is extremely difficult. In 2016, in an effort to understand what level of workforce
3 expansion might be possible, PG&E contracted with a vegetation management consultant to
4 perform a market analysis concerning the potential to bring additional qualified personnel into
5 California. (WSP at 83; (VM Decl. ¶ 20)) The few vendors who showed interest in working in
6 California expressed, in aggregate, an ability to mobilize possibly a few hundred qualified
7 personnel to California and generally expressed an interest in only emergency/short-term work,
8 not a willingness to commit long-term to developing a workforce in California (or moving their
9 existing workforce). (*Id.*) In sum, while there are many more tree trimmers and pruners
10 throughout the United States, as of the time PG&E submitted its 2019 Wildfire Safety Plan,
11 third-party and PG&E research had identified no solution for enticing significant numbers of
12 utility-qualified workers to California for a long-term engagement.

13 Despite these limitations, PG&E in 2019 was able to increase its total contracted
14 pre-inspector workforce from 580 to 1,375, largely by onboarding and training new pre-
15 inspectors in cooperation with its contractors.⁷ (VM Decl. ¶ 23) PG&E also expanded its total
16 contracted tree trimmer workforce from 1,400 to 5,437, by working with contractors to identify
17 additional trimmers, largely by recruiting trimmers from outside of California.⁸ (*Id.* ¶ 29) At the
18 CPUC's direction, PG&E is also working with local governments and agencies to explore
19 partnerships to access additional existing vegetation management resources. (*Id.* ¶ 35) PG&E
20

21 ⁷ See *infra* at Part I.B.2.b. for a discussion of PG&E's pre-inspector training program.

22 ⁸ The September 2019 online newsletter of the International Brotherhood of Electric
23 Workers ("IBEW") 1245, PG&E's primary union, reported that in Northern California: "There
24 is absolutely no shortage of work out there right now. All companies are hiring as many people
25 as possible and they need more. There are some yards with fully stocked, brand new trucks just
26 sitting because there are not enough employees to run them. We are constantly receiving phone
27 calls asking if we know anybody that needs a job." Available at
<https://ibew1245.com/2019/10/15/influx-of-new-line-clearance-tree-trimmer-contractors-could-lead-to-interesting-negotiations-la-afluencia-de-nuevos-contratistas-de-poda-de-arboles-para-el-despeje-de-lineas-puede-resultar-en-negoci/>.

1 believes that the key to addressing California’s vegetation management resource constraints and
 2 expanding the pool of qualified, in-state workers is through wage incentives and expanded
 3 training and certification opportunities. That does not require those workers to become
 4 employees of PG&E.

5 2. Requiring PG&E to Develop an Internal Workforce Would Simply Slow
 6 Down the Current Pace of Tree Work

7 Requiring PG&E to develop its own internal workforce of pre-inspectors and tree
 8 trimmers would not help PG&E accelerate its EVM work; it would slow it down. That is so for
 9 at least two reasons. *First*, the trimming and removal of trees near energized power lines is a
 10 highly specialized and dangerous line of work in which PG&E’s contractors have accrued
 11 decades of experience and invested heavily to develop the requisite infrastructure and training
 12 and management capabilities. It would take years and hundreds of millions of ratepayer dollars
 13 (if not more) for PG&E to develop the infrastructure, workforce and training programs that
 14 PG&E’s contractors already have in place and have refined over time.⁹ The proposed condition
 15

16 ⁹ In an effort to respond to the Court’s questions regarding an era in which PG&E may have
 17 used in-house crews to perform vegetation removal and tree trimming work, PG&E reviewed
 18 relevant historical records and interviewed retired employees who worked on its electric
 19 distribution system in the 1960s, 1970s and 1980s. These inquiries confirmed that, while PG&E
 20 crews might possibly have done some tree trimming work in the post-war period, PG&E has
 21 used contractors to perform this work since at least 1976 and most likely since the 1960s. To the
 22 extent PG&E may have used in-house crews for vegetation management work before 1960, the
 23 company does not have information about how many people were on such crews, if they existed,
 24 or the type of equipment they may have used.

25 At least two filings in California Public Utility Commission (CPUC) proceedings reference
 26 PG&E’s longstanding use of contractors: In 1976, the CPUC issued a General Rate Case
 27 decision which noted that PG&E’s “[t]ree trimming is usually let out on a contract.” (CPUC
 28 Decision 86821 at p. 45, August 24, 1976, attached as Ex. B to Dyer Decl.); and in testimony
 filed in a 1998 CPUC investigation, a witness provided a history of PG&E’s vegetation
 management program, noting that PG&E transitioned to grid-based trimming in the early 1980s -
 - and that all such work was completed by contractors. (Testimony of Robert R. Novembri,
 PG&E’s Response to OII 98-09-007, Chapter 3 at p. 3-32 to 3-33, February, 1999, attached as
 Ex. C to Dyer Decl.) In addition, three retired employees reported that PG&E relied exclusively
 on contractors for tree trimming and removal work during the 1960s and a fourth recalled that

1 is therefore not a solution that would alleviate resource constraints in the near term. Moreover,
 2 even if such a massive and costly undertaking were successful, most new hires would necessarily
 3 come from the existing pool of contract workers who already perform work on PG&E lines. The
 4 end result in the near term would thus be a change in the composition of, but not a material
 5 increase in, the overall resource pool. *Second*, PG&E's efforts to address the shortage of tree
 6 workers are best focused on its ongoing support and funding of programs to train new tree
 7 trimmers and pre-inspectors in cooperation with its contractors, outside stakeholders like
 8 community colleges, labor unions and local governments and agencies, as well as its pre-existing
 9 pilot program to hire a limited internal pre-inspector workforce to evaluate whether those
 10 supplemental personnel can improve quality and efficiency.

11 a. Tree Work Is a Dangerous, Highly Specialized and Resource-
 12 Intensive Field that PG&E's Contractors Are Better Positioned
 13 than PG&E to Handle

14 The upfront investments required to train, equip and deploy a workforce of tree
 15 trimmers large enough to cover PG&E's service area are significant and lengthy. (VM Decl. ¶
 16 32) Tree work—which generally involves tree pruning, tree removal and brush removal—is a
 17 highly dangerous line of work that requires extensive training and on-the-job experience to
 18 perform properly and safely, even without the threats posed by energized powerlines. (*Id.* ¶ 14)
 19 To minimize these risks, federal and California law prescribe comprehensive safety, training and
 20 knowledge requirements for tree workers generally, as well as specific requirements for tree
 21 workers performing work around energized lines, including requirements to possess and know
 22 how to use specialized equipment, to adhere to specific safety procedures and to maintain
 23 minimum approach distances from energized lines. *See* 8 CCR §§ 2940.2, 2950-2951,
 24 3420-3428; 29 C.F.R. §§ 1910.269(a)(2)-(r). Particular kinds of removal and trimming

25
 26 _____
 27 her husband worked for a third-party contractor performing tree trimming for PG&E in the
 28 1950s.

1 operations that involve climbing trees or the use of cranes may require additional levels of
2 training and experience. *See, e.g.*, 8 CCR 3427(a)(1)(B).

3 For decades, PG&E’s contractors have expended significant resources to identify,
4 train, manage, equip and deploy appropriately qualified personnel who can perform tree work
5 safely and meet the line clearance needs of PG&E and other electric utilities. (VM Decl. ¶ 30)
6 Unlike PG&E—which devotes significant resources every year to the ongoing operation and
7 maintenance of electric and gas infrastructure for 16 million Californians—these companies
8 focus almost exclusively on vegetation management. (*Id.*) To comply with the proposed
9 condition, PG&E would have to establish from the ground up what would essentially be a full-
10 service vegetation management business within an electric and gas utility, complete with the
11 infrastructure and specialized equipment required to run that operation—all while simultaneously
12 attending to the many other duties associated with providing safe, reliable and affordable power
13 to millions of customers. (*Id.* ¶ 32) Far from providing additional value or improving safety,
14 that new business-within-a-business would largely duplicate an infrastructure and workforce that
15 PG&E’s vegetation management contractors have spent decades and hundreds of millions of
16 dollars to develop. (*Id.* ¶¶ 30, 33) It is unrealistic to think that PG&E, as a newcomer to the
17 industry, would be able from day one to perform tree work as safely and efficiently as companies
18 that have been performing such work as their core business activity for decades. (*Id.* ¶ 30)

19 PG&E is not unusual in its choice to rely on contractors for this work. As
20 observed in a report commissioned by the Federal Energy Reliability Commission, “[t]he vast
21 majority of work in this multi-billion-dollar-a-year industry is not performed by utility personnel,
22 but rather outsourced to specialized tree and vegetation management contractors”. (CN Utility
23 Consulting, LLC, *Utility Vegetation Management Final Report Commissioned to Support the*
24 *Federal Investigation of the August 14, 2003 Northeast Blackout* (March 2004) at 1, available at
25 <https://www.ferc.gov/industries/electric/indus-act/reliability/blackout/uvm-final-report.pdf>; *see*
26 *also* National Rural Electric Cooperative Association Research Network, *Vegetation*
27 *Management, Project 98-08, Section 7 (The Line Clearance Work Force)* (2000) at 45, available
28

1 at <https://www.tnelectric.org/wp-content/uploads/2016/08/ECI-Veg-Mgt-CRN.pdf> (“Most of the
2 electric utility vegetation management work completed in North America is done on a contract
3 basis”).) The proposed condition would ignore industry best practices and require PG&E to do
4 something that virtually no other major electric utility does, on a compressed timeframe, and on
5 a scale that is unrivaled in the industry. (*Id.* ¶¶ 30-32)

6 In addition, the costs of establishing a full-scale tree trimming service within
7 PG&E would be prohibitive and far outweigh whatever efficiencies might be realized over time.
8 Among other things, PG&E would have to fund training, salaries, benefits, travel expenses and
9 statutorily-required overtime for a workforce of at least 5,000 tree trimmers, plus mechanics to
10 maintain equipment and management, security, administrative and support staff; procure a large
11 fleet of trucks and specialized equipment and tools; secure office space for administrative staff
12 and information technology resources to support their operations; and establish, staff and
13 maintain multiple wood management yards for the storage and disposal of vegetative material.
14 (*Id.* ¶ 32) All of the equipment required for day-to-day operations would immediately begin to
15 depreciate and require ongoing maintenance and replacement, and the anticipated rate of
16 turnover would add to yearly costs. (*Id.*) PG&E conservatively estimates that these costs would
17 run into the hundreds of millions of dollars and could exceed \$1 billion. (*Id.*) It is likely that
18 PG&E’s customers would bear a significant portion of this expense. (*Id.*)

19 Using a contractor-based workforce also provides significant advantages with
20 regard to flexibility and other efficiencies. The use of a contractor workforce that collectively
21 covers all parts of Northern California allows PG&E to quickly and efficiently deploy tree
22 trimmers across its vast service territory, and gives PG&E the flexibility to terminate
23 relationships with contractors whose work does not meet PG&E’s high standards. (*Id.* ¶ 31) The
24 competition among contractors that vie for PG&E’s business also spurs innovation and
25 improvements in efficiency and work quality, to the ultimate benefit of ratepayers. (*Id.*)
26 Industry research has identified these and numerous other benefits to using contractors instead of
27 in-house crews, including greater flexibility in the selection and deployment of crews, stricter
28

1 control over quality and performance standards, and ready access to specialized services,
 2 technical expertise and equipment. (See National Rural Electric Cooperative Association
 3 Research Network, *Vegetation Management ,Project 98-08: Section 7 (The Line Clearance*
 4 *Work Force)* (2000) at 45, available at [https://www.tnelectric.org/wp-](https://www.tnelectric.org/wp-content/uploads/2016/08/ECI-Veg-Mgt-CRN.pdf)
 5 [content/uploads/2016/08/ECI-Veg-Mgt-CRN.pdf](https://www.tnelectric.org/wp-content/uploads/2016/08/ECI-Veg-Mgt-CRN.pdf).)

6 b. PG&E’s Efforts Are Best Focused on Working to Expand the
 7 Underlying Resource Pool and Improving the Quality of Current
 8 Workers

9 PG&E already is engaged in a variety of programs designed to increase the
 10 underlying labor pool and improve the quality and efficiency of its vegetation management work.
 11 These programs have been developed in a careful, considered manner in cooperation with other
 12 stakeholders and experts in the industry, as well as with CPUC guidance. The proposed Hiring
 13 Condition would interfere with these beneficial efforts.

14 Partnerships with Local Governments and Agencies

15 In response to the vegetation management resource constraints PG&E identified
 16 in its Wildfire Safety Plan, the CPUC directed PG&E to investigate partnerships with state and
 17 local governments to identify additional skilled labor available in the near-term and explore other
 18 possibilities such as local training programs to increase the skilled labor pool in the longer-term.
 19 (See Decision on Pacific Gas and Electric Company’s 2019 Wildfire Mitigation Plan Pursuant to
 20 Senate Bill 901, Rulemaking 18-10-007, dated June 4, 2019, at 26, 64.) To date, PG&E has
 21 conducted outreach to local agencies in 23 priority jurisdictions. (VM Decl. ¶ 35) While none
 22 has identified vegetation management resources that would provide a meaningful increase to
 23 PG&E’s current contracted workforce, several have expressed interest in continued
 24 conversations about potential joint efforts. (*Id.*) In addition to continuing conversations with
 25 those local agencies, PG&E is expanding its outreach to additional local agencies in 2020. (*Id.*)

26 Tree Trimmer and Pre-Inspector Training and Certificate Programs

27 The CPUC’s Safety and Enforcement Division (“SED”) in 2019 also evaluated
 28

1 the quality and availability of vegetation management workers as part of its Order Initiating
 2 Investigation concerning the North Bay Fires and Camp Fire (“Wildfires OII”). (*Id.* ¶ 36) As
 3 memorialized in its resolution of the Wildfires OII with the SED and other stakeholders, PG&E
 4 is collaborating with community colleges, vegetation management contractors, the line clearance
 5 trimmer labor union, and other California utilities to establish a Tree Trimmer Training and
 6 Certificate Program and a Pre-Inspector Training and Certificate Program to train tree crew
 7 workers and pre-inspectors in local communities where the need for such workers is greatest.¹⁰
 8 PG&E expects the tree crew program to support a total capacity of up to approximately 2,800
 9 individuals across PG&E’s service territory between program launch and mid-2021 in an effort
 10 to address the current shortage of qualified in-state tree workers. (*Id.* ¶¶ 36-39)

11 PG&E Pre-Inspector Training Programs

12 In 2019, PG&E launched a day-long instructor-led training in safety, patrol
 13 procedures and PG&E standards and rating systems, for all contract pre-inspectors to supplement
 14 training provided by vegetation management companies, and a three-day training program for all
 15 new pre-inspectors performing EVM work. PG&E onboarded and trained approximately 1,700
 16 new vegetation management pre-inspectors hired by its vegetation management contractors
 17 under these programs. (*Id.* ¶¶ 24-26) PG&E is also in the process of developing an eight-
 18 course, comprehensive pre-inspector training program that include web-based training, scenario-
 19 based skills assessments, on-the-job training, and mentoring relationships with experienced pre-
 20 inspectors. (*Id.* ¶ 27) These training programs not only help PG&E address near-term EVM
 21 resource constraints, but also expand the pool of skilled and experienced pre-inspectors available
 22 to PG&E and other California utilities in the future.

23 Pre-inspector Pilot Program

24
 25 ¹⁰ See Joint Motion of Pacific Gas and Electric Company (U 39 E), the Safety and
 26 Enforcement Division of the California Public Utilities Commission, Coalition of California
 27 Utility Employees, and the Office of the Safety Advocate for Approval of Settlement Agreement,
 dated December 17, 2019, at 16-17. The Administrative Law Judge presiding over the Wildfire
 OII is currently reviewing the parties’ settlement agreement for approval.

1 Finally, PG&E has recently reached an agreement with its primary union, IBEW,
2 to conduct a pilot program to evaluate the use of an internal, PG&E pre-inspector workforce.
3 (*Id.* ¶ 28) The purpose of the pilot program is to evaluate whether bringing a portion of the
4 current, contracted pre-inspector workforce in-house will provide for improved long-term
5 retention of pre-inspectors and build efficiencies. (*Id.*) The program is not contemplated to
6 replace PG&E’s large contracted pre-inspector workforce, but, if successful, would allow PG&E
7 to build a skilled, internal pre-inspector workforce to conduct EVM work verification, support
8 regional pre-inspection for all of PG&E’s vegetation management programs, mobilize for
9 emergency and storm response, and be reassigned, as needed, to cover other vegetation
10 management resource needs across PG&E’s service area. (*Id.*) The Court should allow PG&E
11 to evaluate the real-world impacts of an internal pre-inspector workforce through this pilot
12 program rather than forcing it to create a full blown, internal pre-inspector workforce now (and
13 abandon the many benefits of a contracted workforce discussed above) without due consideration
14 of its effect on the quality and economics of PG&E’s vegetation management work.

15 **C. The Hiring Condition Would Impermissibly Interfere with the CPUC’s**
16 **Ongoing Regulatory Process**

17 The proposed Hiring Condition is also unreasonable because it intrudes into a
18 sphere more appropriately left to a publicly accountable and expert state agency. When adopting
19 probation conditions, “the federal government has no constitutional authority to interfere with a
20 state’s exercise of its police power except to the extent the state’s action intrudes on any of the
21 spheres in which the federal government itself enjoys the power to regulate.” *Snyder*, 852 F.2d
22 at 475. The Hiring Condition substitutes the Court’s view of what is needed for safe operation
23 with the expert state agency’s view—an agency that has been singularly focused on this issue for
24 years and that has exercised the state’s police power in an area of core state concern.

25 As explained above, the CPUC considered resource constraints in its review of
26 PG&E’s 2019 Wildfire Safety Plan and its investigation of the 2017 Northern California
27 Wildfires and 2018 Camp Fire. As a result of those proceedings and PG&E’s own, independent
28

1 efforts, PG&E is in the process of implementing multiple measures designed to expand the
2 underlying vegetation management pool and better utilize existing vegetation management
3 resources. These measures are reviewed, approved, supervised, and enforced by the CPUC.
4 This Court should not impose a condition that interferes with that expert exercise of the state's
5 police power.

6 As courts have repeatedly held, “[a] condition of probation may not circumvent
7 another statutory scheme.” *Abushaar*, 761 F.2d at 960; *see also United States v. Jalilian*, 896
8 F.2d 447, 449 (10th Cir. 1990) (vacating condition of probation requiring non-citizen to depart
9 the country because order interfered with “the comprehensive scheme for admission and
10 deportation of aliens in 8 U.S.C. sections 1101-1362” and Congress’s delegation of “primary
11 jurisdiction to the Attorney General”); *United States v. Mercedes-Mercedes*, 851 F.2d 529, 531
12 (1st Cir. 1988) (invalidating probation condition requiring non-citizen to obtain consent of
13 Probation Officer to reenter the country, because such condition “leaves open the theoretical
14 possibility that the probation officer would overrule the immigration authorities” and thereby
15 created a “potential conflict with the immigration laws”); *cf. United States v. Castillo-Burgos*,
16 501 F.2d 217, 220 (9th Cir. 1974) (vacating sentence that mandated deportation at conclusion of
17 the prison term since “[n]owhere in this detailed statutory scheme is there a provision for a court
18 to deport aliens sua sponte”), *abrogated on other grounds by United States v. Rubio-Villareal*,
19 967 F.2d 294 (9th Cir. 1992).

20 These problems compound when the statutory scheme reflects an exercise of the
21 state’s core police powers, as is the case here. *See Queenside Hills Realty Co. v. Saxl*, 328
22 U.S. 80, 82-83 (1946) (“Protection of the safety of persons is one of the traditional uses of the
23 police power of the States. . . . It is for the legislature to decide what regulations are needed to
24 reduce fire hazards to the minimum.”); *Comms. Telesystems Int’l v. California Pub. Util.*
25 *Comm’n*, 196 F.3d 1011, 1017 (9th Cir. 1999) (“[T]he regulation of utilities is one of the most
26 important of the functions traditionally associated with the police power of the States.” (quoting
27 *Arkansas Elec. Coop. Corp. v. Arkansas Pub. Serv. Comm.*, 461 U.S. 375, 377 (1983)); *Sable*
28

1 *Comms. of California Inc. v. Pac. Tel. & Tel. Co.*, 890 F.2d 184, 189 n.9 (9th Cir. 1989) (“The
2 CPUC was created by the California Constitution Art. XII, § 22, and California’s police power
3 over public utilities has been vested in it.”). Appellate courts have thus counseled district courts
4 not to impose probation conditions that intrude on a state’s administration of its comprehensive
5 regulatory schemes. *E.g.*, *Snyder*, 852 F.2d at 475 (holding that “federal courts are
6 constitutionally barred from unilaterally ordering suspensions of state drivers’ licenses”); *United*
7 *States v. Sterber*, 846 F.2d 842, 844 (2d Cir. 1988) (holding that a probation condition revoking a
8 pharmacy license “implicates important notions of federalism,” and “question[ing] whether a
9 federal district judge, ‘unguided by Congress except in the most general terms,’ can require a
10 defendant to give up a state-granted professional license, particularly where the state provides a
11 comprehensive regulatory system to handle the professional misconduct of those it licenses”
12 (citation omitted)), *superseded by statute on other grounds*, 18 U.S.C. § 853(a), *as recognized in*
13 *United States v. Singh*, 390 F.3d 168 (2d Cir. 2004); *United States v. Pastore*, 537 F.2d 675, 683
14 (2d Cir. 1976) (rejecting probation condition requiring defendant to resign from state bar because
15 “expulsion from the state bar is a sanction precisely governed by statute and regulation,” and “it
16 would seem preferable not to impose that sanction except by the procedure and for the reasons
17 there prescribed”), *superseded by statute on other grounds as recognized by United States v.*
18 *Singh*, 390 F.3d 168 (2d Cir. 2004); *see also Thomas v. Kadish*, 748 F.2d 276, 278 (5th Cir.
19 1984) (rejecting a plaintiff’s effort to challenge state bar proceedings in district court “in the light
20 of the weight given by the Court to the values . . . that arise out of federal-state comity
21 considerations and the ‘strength of the state interest in regulating the state bar’” (citation
22 omitted)).¹¹ The proposed Hiring Condition—by interfering with and displacing the CPUC’s
23 own regulatory framework—would do exactly what these cases forbid.

24
25 ¹¹ This deference to state expertise is hardly limited to the probation context. For example,
26 the *Burford* absence doctrine counsels deference to state regulatory regimes even when doing
27 so would require courts to forego their own jurisdiction. As the Supreme Court held in the
28 namesake case, “it ‘is in the public interest that federal courts . . . should exercise their

1 **D. The Hiring Condition Is Not Reasonably Related To The Underlying**
 2 **Conviction.**

3 A discretionary condition of probation “must involve only such deprivations of
 4 liberty or property as are *reasonably necessary* to accomplish the purposes of sentencing. If a
 5 condition of probation does not meet these requirements, it is invalid.” *Lorenzini*, 71 F.3d at
 6 1492 (emphasis added) (citation omitted). As noted in previous filings, PG&E was convicted of
 7 obstructing an NTSB investigation and of five violations of the federal Pipeline Safety Act
 8 concerning data gathering and integration and integrity management concerning natural gas
 9 transmission pipelines. *See United States v. Pac. Gas & Elec. Co.*, No. 14-cr-175 (N.D. Cal. Jan.
 10 31, 2017); *see* Response to Order to Show Cause Why PG&E’s Conditions of Probation Should
 11 Not Be Modified at 49, *United States v. Pac. Gas & Elec. Co.*, No. 14-cr-175 (N.D. Cal. Jan. 23,
 12 2019), ECF No. 976. Those convictions concerned PG&E’s natural gas transmission business.
 13 None of them involved any aspect of PG&E’s electric grid operations. In passing the probation
 14 statute, “Congress intended that there be some connection between the proscription to be ordered
 15 by the court and the nature of the crime or the degree of punishment.” *Lorenzini*, 71 F.3d at
 16 1493. Here, there is no reasonable relation between PG&E’s original offenses and probation
 17 conditions relating to its electric distribution business. PG&E recognizes that the Court has
 18 previously imposed conditions related to electricity distribution, despite PG&E’s arguments on
 19 this score, and reiterates it for preservation purposes.

20
 21 _____
 22 discretionary power with proper regard for the rightful independence of state governments in
 23 carrying out their domestic policy.” *Burford v. Sun Oil Co.*, 319 U.S. 315, 318 (1943). This
 24 deference is warranted despite the “virtually unflagging obligation” of federal courts to exercise
 25 their jurisdiction. *Mata v. Lynch*, 135 S. Ct. 2150, 2156 (2015) (citation omitted). If deference
 26 to state agencies is warranted in that context, it is even more warranted in the context of
 27 probation conditions that are a matter of discretion.

28 Likewise, under the doctrine of primary jurisdiction, courts refer questions to an expert
 agency whenever the enforcement of a claim subject to a specific regulatory scheme requires
 resolution of issues that are ‘within the special competence of an administrative body.’” *Davel*
Commc’ns, Inc. v. Qwest Corp., 460 F.3d 1075, 1086 (9th Cir. 2006).

1 **II. THE COURT SHOULD NOT IMPOSE THE COMPENSATION CONDITION.**

2 The Compensation Condition is equally impermissible and unwarranted. That
 3 requirement would require PG&E to “restrict all bonuses and other incentives for supervisors
 4 and above *exclusively* to achieving the PG&E Wildfire Mitigation Plan and other safety goals.”
 5 As with the hiring condition, the subject of compensation has been and continues to be the focus
 6 of state regulatory efforts, including high-profile legislation, and it is a subject that has been and
 7 will continue to be adjudicated in CPUC proceedings. In fact, the CPUC has approved—and
 8 indeed in some cases required—a hybrid approach to incentives that gives predominant weight to
 9 safety, but that also takes into account financial performance. This Court should not impose
 10 conditions that conflict with the considered regulatory decisions of the California legislature and
 11 undermine the authority of the Bankruptcy Court to approve an incentive compensation plan it
 12 would otherwise deem appropriate.

13 Moreover, PG&E’s incentive metrics are already weighted significantly further in
 14 favor of safety compared to the metrics of its peer utilities. PG&E’s recently revised executive
 15 compensation structure leads the industry in this regard. Nor is there any evidence suggesting
 16 that safety outcomes would improve by making safety the sole criterion for the incentive
 17 program, especially given that PG&E already weights safety considerations so heavily. To the
 18 contrary, the hybrid approach previously approved by both California and the Bankruptcy Court
 19 reflects the reality that a financially stable PG&E is better positioned to safely provide power.

20 **A. The Compensation Condition Would Improperly Conflict With Recent**
 21 **California Law Regulating Utility Incentive Compensation.**

22 As explained above, probation conditions are unlawful to the extent they interfere
 23 with valid state regulatory regimes. *See supra* Part I.C. As the Ninth Circuit has held, “where a
 24 state has in place a comprehensive procedure for resolution of the condition probation imposes, it
 25 makes good sense to defer to that established procedure.” *United States v. Lakatos*, 241 F.3d
 26 690, 695 (9th Cir. 2001) (quoting *United States v. A-Abras Inc.*, 185 F.3d 26, 35 (2d Cir. 1999)).
 27
 28

1 The Court’s proposed Compensation Condition runs contrary to California’s chosen method of
2 regulating PG&E’s incentive plans.

3 Last year, California enacted AB 1054. This bill began as a narrow proposal in
4 the California Assembly in February 2019 to appoint an internal auditor for the CPUC. *See* 2019
5 Cal. A.B. 1054 (introduced Feb. 21, 2019). But, over the course of the spring and summer,
6 legislators came together, compromised, and, after multiple amendments, transformed AB 1054
7 into a comprehensive response to “[t]he increased risk of catastrophic wildfires” in the state.
8 2019 Cal. Legis. Serv. ch. 79, § 1(a)(1) (law filed July 12, 2019). As part of this comprehensive
9 reform, AB 1054 specifically addresses the issue of electrical utility compensation. *Id.* § 21
10 (codified as amended at Cal. Pub. Util. Code § 8389). It also delegates to the CPUC the power
11 to approve executive incentive plans, within the guided discretion provided by statutory
12 standards. *Id.* § 21(e)(4). Such approval is required for the CPUC to issue a safety certification,
13 without which an electric utility will have difficulty recovering costs from the State when
14 wildfires occur. *Id.* §§ 6(c), 21(e)(4). The proposed incentives condition conflicts with that
15 legislation in two ways.

16 *First*, AB 1054 requires a utility’s executive compensation structure to promote
17 both safety *and* financial stability. The law provides that to obtain a safety certification, a utility
18 must show, among other things, that it has “established an executive compensation structure
19 approved by the [Wildfire] [D]ivision [that is] structured to promote safety as a priority and to
20 ensure public safety *and utility financial stability*” Cal. Pub. Util. Code § 8389(e)(4)
21 (emphasis added). It also requires that electric utilities “establish[] a compensation structure for
22 any new or amended contracts for executive officers.” *Id.* § 8389(e)(6)(A). The “primary
23 portion” of that structure must be “based on achievement of objective performance metrics,” but
24 the law also requires that the structure “provide[] a significant portion of compensation . . . based
25 on the electrical corporation’s long-term performance *and value*,” while minimizing indirect
26 compensation “that is not aligned with *shareholder and taxpayer interest* in the electrical
27 corporation.” *Id.* § 8389(e)(6)(A)(i)(I), (iii)-(iv) (emphases added). As part of the CPUC’s
28

1 oversight authority, the law does give the CPUC discretion to approve a 100% safety-related
2 overlay that denies all incentive compensation in the event of a significant safety issue such as a
3 catastrophic wildfire. *Id.* § 8389(e)(4) (stating that incentive structure “may include tying 100
4 percent of incentive compensation to safety performance and denying all compensation in the
5 event the electrical corporation causes a catastrophic wildfire that results in one or more
6 fatalities”). But the balance of the statute makes clear that financial performance cannot be
7 ignored entirely.

8 AB 1054’s hybrid criteria thus reflect the judgment, supported by the legislative
9 record, that PG&E is best-positioned to provide safe and reliable power if it is financially stable
10 itself. *See, e.g.*, 2019 Cal. Legis. Serv. ch. 79, § 2(c) (“The state has a substantial interest that its
11 electrical corporations are operating in a safe and reliable manner and have access to capital at
12 reasonable cost to make safety investments.”); *Wildfires and Climate Change: California’s*
13 *Energy Future: A Report from Governor Newsom’s Strike Force* at 3 (Apr. 12, 2019) [hereinafter
14 “Strike Force Report”] (“Utilities rely on credit to finance ongoing infrastructure investments,
15 including fire mitigation. As utilities’ credit ratings deteriorate, their borrowing costs increase
16 and those costs for capital necessary to make essential safety improvements are passed directly to
17 customers. These downgrades, and the prospect of additional utility bankruptcy filings, directly
18 impact Californians’ access to safe, reliable and affordable electricity.”); *id.* at 28 (“California
19 residents and businesses require a safe and reliable electrical system, the achievement of which
20 requires ongoing investment in new equipment, systems, and workforce.”).

21 The Court’s proposed condition, by contrast, would require tying 100% of
22 incentive compensation to safety metrics and would bar any reliance on the financial
23 performance metrics that California law expressly contemplates. The Compensation Condition
24 would effectively enact an earlier, rejected version of AB 1054, which required “an executive
25 incentive compensation plan linked to safety performance metrics” with no mention of financial
26 stability, 2019 Cal. A.B. 1054, § 25(e)(5) (as amended June 27, 2019), rather than the final law’s
27
28

1 dual focus on safety and financial health. The proposed Compensation Condition thus conflicts
2 with California law and upsets the bargain struck by California’s legislature.

3 *Second*, the Compensation Condition would go substantially further than AB
4 1054 by mandating an incentive structure for all supervisors below the executive level. Between
5 the Senate-amended version of the bill on June 27 and the final bill signed into law in mid-July,
6 the Legislature changed the focus of, and elaborated in great detail on, the incentive requirements
7 for executives that would be required to obtain a safety certification. *Compare* 2019 Cal. A.B.
8 1054, § 25(e)(5) (as amended June 27, 2019), *with* 2019 Cal. Legis. Serv. ch. 79, § 21(e)(4),
9 (e)(6). Throughout those amendments, however, California left decisions about non-executives
10 to the discretion of the utilities— and, in PG&E’s case, that of the bankruptcy court with respect
11 to pre-emergence incentive plans. The Compensation Condition, which would fix the incentive
12 criteria for thousands of PG&E supervisors, conflicts with that legislative judgment.

13 Nor, for that matter, has California finished regulating in this area. PG&E has
14 been participating in ongoing negotiations with the CPUC and the Governor’s Office regarding
15 incentive plans, and the CPUC will begin hearing testimony regarding PG&E’s 2020 executive
16 compensation plan on February 19. PG&E has already submitted written testimony explaining
17 its proposed incentive plans and the decision-making that underlay the proposals. *See* CPUC
18 Testimony at 7-3 to 7-19 (explaining that “PG&E’s performance-based compensation structure
19 aligns with customer welfare overall—including safety as its most critical element—but the
20 structure does so without sacrificing reliability and affordability”). The Bankruptcy Code and
21 AB 1054 provide room for the CPUC (as well as the Bankruptcy Court, discussed immediately
22 below) to engage in any necessary iterative process to ensure that PG&E’s incentive plans follow
23 the best interests of the interested bankruptcy parties and satisfy the strictures of California law,
24 and applicable bankruptcy law. The proposed Compensation Condition would replace this
25 system of guided discretion to consider costs and benefits with a rigid “safety-only” rule. This
26 Court should not preempt the expert and accountable state decisions-makers to which California
27 has chosen to delegate the responsibility of approving PG&E’s incentive compensation plans.

1 **B. The Proposed Compensation Condition Would Undermine The Bankruptcy**
2 **Court’s Authority To Approve PG&E’s Incentive Plans During The Chapter**
3 **11 Case.**

4 In addition to conflicting with California’s legislative determinations, the
5 proposed Compensation Condition would undermine the Bankruptcy Court’s discretion to
6 approve pre-emergence incentive plans. *See Abushaar*, 761 F.2d at 960 (probation conditions
7 should not conflict with other federal prerogatives). As the January 24 Order to Show Cause
8 recounts, Judge Montali has previously addressed the issue of incentive compensation in
9 PG&E’s chapter 11 case. He has issued orders approving (or disapproving) employee incentive
10 plans and has assessed whether those plans represent a reasonable exercise of PG&E’s business
11 judgment.

12 As background, the Bankruptcy Court has addressed PG&E’s 2019 employee
13 incentive plans over the course of last year. As the Bankruptcy Court noted, PG&E “face[s]
14 suffocating pressures from [its] creditor committees, regulatory agencies, various other creditor
15 groups, the general public, and governmental agencies to” meet two separate but intertwined
16 goals: to “improve substantially [its] safety practices and [to] successfully reorganize.” Order
17 Denying Motion to Approve KEIP at 6, *In re PG&E Corp.*, No. 19-30088 (Bankr. N.D. Cal.
18 Aug. 30, 2019), ECF No. 3773 [hereinafter “Order on KEIP”]. Those political and financial
19 pressures are compounded by time pressure—the California Legislature is pushing PG&E “to
20 exit bankruptcy by June 30, 2020.” *Id.*

21 Against this backdrop, the Bankruptcy Court approved, “in the best interests of . .
22 . all parties in interest,” an incentive plan for a significant portion of the company’s employees
23 that took into account safety, financial and customer performance criteria. *See* STIP Order at 1-
24 2. In so doing, Judge Montali ultimately approved metrics that were more focused on safety and
25 less focused on financial performance compared to those in an earlier proposed plan, but that
26 were also not 100% focused on safety, as some participants in the proceeding had urged. *See id.*
27 at 1. Specifically, the STIP Order approved an incentive plan for non-executives that
28

1 “increase[ed] the weighting for the safety metrics ... from 50% to 65% (with a corresponding
2 15% reduction in the Financial Performance weighting, from 40% to 25%)”. *Id.* at 2.

3 Conversely, Judge Montali later rejected an incentive proposal for a limited group
4 of PG&E’s most senior executives that would have provided from \$5.5-16.4 million in
5 compensation, also based on metrics weighted at 65% safety, 10% customer satisfaction, and
6 25% financial performance. *See* Mot. of Debtors Pursuant to 11 U.S.C. §§ 105(a), 363(b), and
7 503(c) for Entry of an Order (I) Approving Debtors’ Incentive Program for Certain Key
8 Employees and (II) Granting Related Relief at 12-13, *In re PG&E Corp.*, No. 19-30088 (Bankr.
9 N.D. Cal. June 19, 2019), ECF No. 2664; Order on KEIP at 6 (denying proposed incentive plan
10 for certain of PG&E’s most senior executives because they should be focused on “improving
11 Debtors’ safety record” without needing additional financial incentives). Judge Montali
12 suggested that an incentive plan based entirely on safety metrics might be appropriate with
13 respect to this limited group, Order on KEIP at 6-7, thereby demonstrating the Bankruptcy Court
14 is well-positioned to consider such a plan where circumstances so warrant.

15 By requiring the exclusion of all non-safety metrics, the Court’s Compensation
16 Condition usurps the discretion of the Bankruptcy Court. Judge Montali has applied a nuanced
17 approach in his consideration of PG&E’s 2019 plans. Rather than constrain Judge Montali in the
18 event he is called upon to assess PG&E’s compensation plans for 2020, this Court should allow
19 the Bankruptcy Court to pass judgment on PG&E’s plans with the benefit of submissions from
20 all interested estate stakeholders. *In re Gruntz*, 202 F.3d 1074, 1080 (9th Cir. 2000) (en banc)
21 (“Congress intended to grant comprehensive jurisdiction to the bankruptcy courts so that they
22 might deal efficiently and expeditiously with all matters connected with the bankruptcy estate.”
23 (quoting *Celotex Corp. v. Edwards*, 514 U.S. 300, 308 (1995)).

24 Accordingly, this Court should not impose a condition that conflicts with or
25 constrains the Bankruptcy Court’s review of PG&E’s employee compensation arrangements.
26
27
28

1 **C. The Compensation Condition Is Unreasonable Because It Is Not In The**
 2 **Public Interest.**

3 Even apart from the findings of state and federal actors, the Compensation
 4 Condition is not reasonably necessary. *Lorenzini*, 71 F.3d at 1492. PG&E already weighs safety
 5 more heavily in its incentive program than its peer utilities do, and for good reason. *See* CPUC
 6 Testimony, at 7-9 (“The STIP’s emphasis on customer and workforce welfare (especially public
 7 safety) tied to outcome-based metrics represents industry leadership: Based on our analysis of 19
 8 other utilities, only 20 percent use customer/public safety metrics, and only one uses such a
 9 metric that is outcome-based.”); Reply Mem. of Points and Authorities in Further Support of
 10 Corrected Mot. of Debtors Pursuant to 11 U.S.C. §§ 105(a), 363, and 503(c) for Entry of an
 11 Order (I) Approving Short-Term Incentive Plan and (II) Granting Related Relief at 19, *In re*
 12 *PG&E Corp.*, No. 19-30088 (Bankr. N.D. Cal. Apr. 3, 2019), ECF No. 1226 (noting that
 13 PG&E’s proposed safety weighting “is considerably higher than typical of the utility industry”
 14 (quoting Assessment of Pacific Gas and Electric Corporation and Pacific Gas and Electric
 15 Company’s Safety Culture (“NorthStar Report”) at I-6, VII-12)); Transcript of April 9, 2019
 16 Proceedings Before the Hon. Dennis Montali at 88, *In re PG&E Corp.*, No. 19-30088 (Bankr.
 17 N.D. Cal. Apr. 10, 2019), ECF No. 1325 (statement of Mr. Bray, Unsecured Creditors
 18 Committee) (“If you look at the peer groups for this industry and this company, they have similar
 19 structures. [PG&E’s] safety metric is much higher than theirs are, if the Court approves the
 20 stipulation . . .”).

21 There is no evidence suggesting that making safety performance the *exclusive*
 22 criterion rather than the *most important* criterion (as PG&E does) improves safety outcomes.
 23 Moreover, PG&E is unaware of any utility that gives no weight to financial performance in its
 24 incentive calculations. *See* Corrected Decl. of Douglas J. Friske in Support of Mot. of Debtors
 25 Pursuant to 11 U.S.C. §§ 105(a), 363, and 503(c) for Entry of an Order (I) Approving Short-
 26 Term Incentive Plan and (II) Granting Related Relief at 8, *In re PG&E Corp.*, No. 19-30088
 27
 28

1 (Bankr. N.D. Cal. Mar. 8, 2019), ECF No. 807 (“Financial performance measures were used at
2 100% of the Debtors’ peer companies.”).

3 Indeed, as explained above, PG&E’s ability to safely provide power is in large
4 part predicated on its financial stability, particularly in the context of the company’s bankruptcy.
5 As PG&E has explained in its CPUC testimony on this subject, including a financial metric
6 “promotes safety, . . . in that strong public safety performance is essential to financial stability
7 (as evidenced by the current Chapter 11 proceedings and the substantial decline in the price of
8 PG&E Corporation common stock since the 2017 and 2018 wildfires).” CPUC Testimony at 7-
9 14. In this way, “tying 100 percent of incentive compensation to safety metrics would not
10 adequately align with PG&E’s *overall* mission of providing safe, reliable, affordable, and clean
11 energy to its customers.” *Id.* at 7-21. In fact, an exclusive focus on safety may even *harm*
12 PG&E’s mission to provide safe and reliable electricity to Californians. *See id.* at 7-9 (“[W]ith
13 an overly narrow or exclusive focus on safety, PSPS could be routinely implemented—and
14 although that might ensure wildfire safety, it could cause hardships to PG&E’s customers,
15 especially its most vulnerable customers.”).¹²

16 This Court should not impose conditions that lack an evidentiary foundation in the
17 record, and that are potentially counter-productive. Probation conditions “must involve only
18 such deprivations of liberty or property as are reasonably necessary to accomplish the purposes
19 of sentencing.” *Lorenzini*, 71 F.3d at 1492. Conditions that “unnecessarily restrict otherwise
20 lawful activities . . . are impermissible.” *Terrigno*, 838 F.2d at 374. No record before the Court
21 justifies limiting all supervisors to “safety-only” incentive plans. Indeed, quite the opposite.
22 Judge Montali’s words in approving the 2019 STIP and its hybrid criteria are just as relevant to
23 this Court’s proposed condition:

24 [W]e’re talking about people that work at the nuclear power plant, people
25 working in the corporate offices, people dealing with customer complaints, people
26 that are fixing lines in Berkeley and in San Francisco and in many other parts of

26 ¹² The Compensation Condition is also not reasonably related to the underlying conviction
27 for the reasons explained *supra*. *See* Part I.D.

1 northern California that are not at all fire hazard areas, hopefully. And so to
2 suddenly decide, because of a tragedy of such magnitude, therefore thousands of
3 employees should not have the kind of compensation arrangement that has been a
4 consistent pattern in this company seems to be the wrong way to deal with the
5 problem.

6 Transcript of Arp. 23, 2019 Proceedings Before the Hon. Dennis Montali at 75, *In re PG&E*
7 *Corp.*, No. 19-30088 (Bankr. N.D. Cal. Apr. 24, 2019), ECF No. 1663.
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 Dated: February 12, 2020

Respectfully Submitted,

2 JENNER & BLOCK LLP

3
4 By: /s/ Reid J. Schar
5 Reid J. Schar (*pro hac vice*)

6 CRAVATH, SWAINE & MOORE LLP

7
8 By: /s/ Kevin J. Orsini
9 Kevin J. Orsini (*pro hac vice*)

10 CLARENCE DYER & COHEN LLP

11
12 By: /s/ Kate Dyer
13 Kate Dyer (Bar No. 171891)

14
15 Attorneys for Defendant PACIFIC GAS
16 AND ELECTRIC COMPANY