



Signed and Filed: March 30, 2020

A handwritten signature in cursive script, reading "Dennis Montali", is written over a horizontal line.

DENNIS MONTALI
U.S. Bankruptcy Judge

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA

In re) Bankruptcy Case No. 19-30088-DM
)
PG&E CORPORATION,) Chapter 11
)
- and -) (Lead Case)
)
PACIFIC GAS AND ELECTRIC) (Jointly Administered)
COMPANY,)
)
Debtors.)

_____) Adversary Case No. 19-03061-DM
ANTHONY GANTNER, individually)
and on behalf of all those)
similarly situated,)
)
Plaintiff,)
)
v.)
)
PG&E CORPORATION, a California)
Corporation, and PACIFIC GAS &)
ELECTRIC COMPANY, a California)
Corporation,)
)
Defendants.)

MEMORANDUM DECISION ON DEBTORS' MOTION TO DISMISS AND STRIKE

On February 25, 2020, this court held a hearing on the motion (the "MTD") of defendants and debtors PG&E Corporation

1 and Pacific Gas and Electric Company ("Utility") (collectively,
2 "Debtors") to dismiss and to strike the class action complaint
3 filed against them by plaintiff Anthony Gantner ("Plaintiff"),
4 individually and on behalf of all those similarly situated.
5 Upon due consideration of the MTD (A.P. dkt. 7), Plaintiff's
6 opposition (A.P. dkt. 16), Debtors' reply (A.P. dkt. 18), and
7 the statement (A.P. dkt. 19) filed by the California Public
8 Utilities Commission ("CPUC") in support of the MTD, the court
9 will grant the MTD and dismiss this adversary proceeding without
10 leave to amend, as it is preempted by California Public
11 Utilities Code § 1759.

12 I. INTRODUCTION

13 Plaintiff seeks damages for losses he incurred as a result
14 of certain planned blackouts, otherwise known as public safety
15 power shutoff ("PSPS") events, implemented by PG&E in October
16 and November 2019 to mitigate wildfire danger caused or
17 exacerbated by projected high winds. He seeks class
18 certification for other similarly situated customers or users
19 who lost power during the scheduled PSPSs.

20 In their MTD, Debtors contend that (1) this court lacks
21 subject matter jurisdiction over the claims asserted by
22 Plaintiff (Fed. R. Civ. P. 12(b)(1)) and (2) Plaintiff has
23 failed to state a claim upon which relief can be granted (Fed.
24 R. Civ. P. 12(b)(6))(both made applicable by Fed. R. Bankr. P.
25 7012); and (3) Plaintiff's class claims fail on predominance or
26 ascertainability grounds (Fed. R. Civ. P. 23(a), made applicable
27 by Fed. R. Bankr. P. 7023). Because Plaintiff's claims are
28 preempted by California law and fall exclusively within the

1 regulatory authority of the CPUC, the court will grant the MTD
2 without the necessity of addressing whether the class claims are
3 certifiable under Fed. R. Civ. P. 23(a).

4 II. THE COMPLAINT

5 Plaintiff asserts a single count of negligence against
6 Debtors and seeks damages arising from losses caused by the PSPS
7 events in October and November 2019:

8 Plaintiff and the Class were without power for many
9 days, in some cases up to 17 days total and upwards of
10 10 days in a row. Plaintiff was without power himself
11 for 8-9 days total and up to 5 days in a row. As a
12 result, Plaintiff and the Class suffered various
13 losses including loss of habitability of their
14 dwellings, loss of food items in their refrigerators,
15 expenses for alternate means of lighting and power,
16 such as candles, flashlights, batteries, and gas
17 generators, loss of cell phone connectivity, dangerous
18 dark conditions, lack of running water, and loss of
19 productivity and business.

20 A.P. dkt. 1, ¶ 3. Because of this loss of power, Plaintiff
21 seeks "compensation for [his and other potential class
22 claimants'] losses and also injunctive relief to require
23 [Utility] to properly maintain and inspect its power grid." *Id.*
24 at ¶ 4.

25 The complaint (as well as the opposition to the MTD)
26 emphasize that Plaintiff and the potential class members are not
27 suing the Utility for imposing the blackouts or PSPS events. In
28 fact, Plaintiff alleges no negligence in the implementation of
the five blackouts that were a result of the PSPSs. Instead, he
faults the Utility for failing to maintain its transmission
system in such a manner that no such blackouts would be
necessary. For example, paragraphs 10-62 of the complaint

1 allege and describe the Utility's "abominable" safety record,
2 its "criminally negligent maintenance of its power lines," its
3 failure to safely design, operate and maintain the power system,
4 and its "corporate culture" that purportedly resulted in
5 "numerous and increasingly deadly fires." Plaintiff was not a
6 victim of these fires. Rather, he alleges that he was a victim
7 of the subsequent, post-petition PSPSs, which he contends were
8 necessary because of the Utility's prior failures to safely
9 maintain its power system. *Id.* at ¶¶ 63-79. As Plaintiff
10 acknowledges in his opposition to the MTD:

11 Plaintiff here does not allege that PG&E, in deciding
12 to conduct the public safety power shutoffs at issue,
13 failed to comply its 2019 Wildfire Safety Plan or with
14 the CPUC's guidelines. Rather, Plaintiff generally
15 alleges that the Utility's negligent design and
16 maintenance of its facilities for many years resulted
17 in the need for the public safety power shutoffs "in
18 the first place."

19 See Opposition, A.P. dkt. 16 at 16, lines 14-16.¹

20 Plaintiff repeats this contention several times in his
21 Opposition: "The Complaint does not allege that the PSPSs were
22 not necessary and appropriate, or that CPUC's approval of its
23 Wildfire Safety Plan was improper, only that the PSPSs would not
24 have been necessary in the first place had PG&E not been
25 negligent" (Opposition, A.P. dkt. 16 at 8, lines 5-7) and "this
26 case is not about whether the shutoffs were appropriate or how
27

28 ¹ As explained below, this concession is fatal, because without
asserting negligence by PG&E in implementing the PSPSs,
Plaintiff cannot invoke Pub. Util. Code 2106, which imposes
liability on utilities for their actions or inactions causing
loss, damages or injury.

1 PG&E handled them, it is about *why* they had to be done in the
2 first place." *Id.* at 16, lines 15-16 (emphasis in original).

3 III. DISCUSSION

4 A. *The Utility's Authority to Implement The PSPS Events*

5 Under governing California law, electric utilities that are
6 regulated by the CPUC may shut off power in circumstances
7 defined by the Public Utilities Code and the CPUC's decisions.
8 See Cal. Pub. Util. Code §§ 399.2(a), 451. In April 2012, the
9 CPUC promulgated de-energization guidelines that permitted San
10 Diego Gas & Electric Company to shut off power when strong
11 winds, heat events, and other conditions made a power shutoff
12 "necessary to protect public safety." See Decision Granting
13 Petition to Modify Decision 09-09-030 and Adopting Fire Safety
14 Requirements for San Diego Gas & Electric Company, Decision 12-
15 04-024, at 25 (Cal. P.U.C. Apr. 19, 2012) (the "Fire Safety
16 Ruling") (A.P. dkt. 8-3 at ECF pg. 27).

17 In July 2018, the CPUC adopted Resolution ESRB-8 extending
18 the guidelines set forth in the Fire Safety Ruling to all
19 investor-owned utilities, including PG&E. See Resolution
20 Extending De-Energization Reasonableness, Notification,
21 Mitigation, and Reporting Requirements in Decision 12-04-024 to
22 All Electric Investor Owned Utilities ("Resolution ESRB-8"),
23 2018 WL 3584003, at *1 (Cal. P.U.C. July 12, 2018) (A.P. dkt. 8-
24 5). The CPUC may review for reasonableness any decision by a
25 utility to shut off power pursuant to the Fire Safety Ruling and
26 Resolution ESRB-8. *Id.* at A.P. dkt. 8-5 at 5.

27 Pursuant to its rulemaking authority, the CPUC established
28 guidelines and protocols governing a decision by a utility to

1 conduct a PSPS. See Order Instituting Rulemaking to Examine
2 Electric Utility De-Energization of Power Lines in Dangerous
3 Conditions, 2018 WL 6830158 (Cal. P.U.C. Dec. 13, 2018) (A.P.
4 dkt. 8-6). The CPUC may review any decision by a utility to shut
5 off power for reasonableness. *Id.*

6 In September 2018, the California Legislature added several
7 new provisions to the Public Utilities Code requiring California
8 utilities to prepare and submit "Wildfire Mitigation Plans" to
9 the CPUC. Cal. Pub. Util. Code § 8386(b). The Wildfire
10 Mitigation Plans must contain, among other things, "[p]rotocols
11 for . . . deenergizing portions of the electrical distribution
12 system that consider the associated impacts on public safety."
13 Cal. Pub. Util. Code § 8386(c)(6).

14 On February 6, 2019, PG&E filed its 2019 Wildfire Safety
15 Plan, specifying factors that it considers in deciding whether
16 to conduct a PSPS. The CPUC considered and ultimately approved
17 PG&E's 2019 Wildfire Safety Plan. See CPUC's Decision on
18 Pacific Gas and Electric Company's 2019 Wildfire Mitigation Plan
19 Pursuant to Senate Bill 901 issued on June 4, 2019 (A.P. dkt. 8-
20 9).

21 During the 2019 wildfire season, PG&E executed four PSPS
22 events in October and one in November. On November 12, 2019,
23 the CPUC ordered PG&E to show cause why it should not be
24 sanctioned for its failure to communicate with its customers
25 properly during these PSPS events. See Assigned Commissioner and
26 Assigned Administrative Law Judge's Ruling Directing [PG&E] to
27
28

1 Show Cause, Rulemaking 18-12-005 (Cal. P.U.C. Nov. 12, 2019) at
2 A.P. dkt. 8-17. That investigation is ongoing.

3 The following day, the CPUC instituted a new investigation
4 to determine whether California's utilities prioritized safety
5 and complied with the CPUC's regulations and requirements with
6 respect to their PSPS events in late 2019. See Order Instituting
7 Investigation on the Commission's Own Motion on the Late 2019
8 Public Safety Power Shutoff Events, 2019 WL 6179011 (Cal. P.U.C.
9 Nov. 13, 2019) at A.P. dkt. 8-16. That investigation is ongoing.
10 The CPUC may take further action if it finds that violations of
11 statutes, its decisions, or its general orders have been
12 committed and if it finds that an action is necessary to enforce
13 compliance. *Id.*

14 *B. CPUC's Exclusive Jurisdiction Over PSPS Events*

15 Both the Debtors and the CPUC assert that litigation and
16 adjudication relating to PSPS events fall within the CPUC's
17 exclusive regulatory powers. Section 1759 of the Public
18 Utilities Code provides that no court of this state except the
19 Supreme Court or court of appeal

20 shall have jurisdiction to review, reverse, correct,
21 or annul any order or decision of the commission or to
22 suspend or delay the execution or operation thereof,
23 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.

24 Cal. Pub. Util. Code § 1759(a).

25 In *San Diego Gas & Electric Co. v. Superior Court*
26 ("*Covalt*"), 13 Cal. 4th 893, 923, 926, 935 (1986), the
27 California Supreme Court held that section 1759 bars the
28

1 assertion of a claim if (1) the CPUC has the authority to adopt
2 a regulatory policy concerning the subject matter of the claim;
3 (2) the CPUC has exercised that authority; and (3) litigation
4 and adjudication of the claim would hinder or interfere with the
5 relevant policy or policies adopted by the CPUC. In his
6 opposition, Plaintiff concedes that the first two elements have
7 been satisfied here, acknowledging that the CPUC "has authority
8 to regulate and supervise the safety of public utility
9 operations, including PSPSs" and "has exercised that authority
10 in the realm of PSPSs[.]" See Opposition, A.P. dkt. 16 at 13,
11 lines 17-20.

12 Plaintiff, however, disputes that the third *Covalt* factor
13 is applicable, contending that this adversary proceeding would
14 not hinder or interfere with CPUC's exercise of its regulatory
15 authority. The CPUC disagrees, asserting that litigation of
16 Plaintiff's claims would indeed "hinder and interfere with
17 enforcement of [its] guidelines concerning public safety power
18 shutoffs[.]" See CPUC Brief at A.P. dkt. 19, at 7. Even though
19 Plaintiff does not specifically allege negligence by the Utility
20 in executing the blackouts, but instead bases his liability
21 claim on the theory that such PSPS events were caused by
22 Utility's generalized failure to maintain its infrastructure,
23 the CPUC contends that imposing liability on PG&E for damages
24 arising out of 2019 PSPS events would effectively usurp the
25 CPUC's regulatory to determine when shutoffs are appropriate for
26 public safety and would further interfere with the CPUC's
27 supervision of such PSPS events.

1 The Complaint appears to rest on the theory that in
2 light of the Utility's alleged generalized failure to
3 maintain its infrastructure, any decision by the
4 Utility to conduct a public safety power shutoff— in
5 the recent past or future—necessarily gives rise to a
6 claim against the Utility for negligence. Judicial
7 adoption of such a theory would hinder and interfere
8 with the [CPUC's] considered policy to allow utilities
9 to conduct public safety power shutoffs in the
10 interests of public safety pursuant to guidelines
11 established by the [CPUC].

12 CPUC Brief at A.P. dkt. 19 at 7-8 (emphasis added).

13 The court agrees that Plaintiff's assertion of damages
14 arising out of a PSPS event is precluded by Public Utilities
15 Code section 1759, even if his negligence claim is based on
16 conduct pre-dating the PSPS events and possibly contributing to
17 the necessity of the PSPS events. Any such claim interferes
18 with the CPUC's exclusive regulatory authority over such
19 shutoffs. As the court observed at the hearing on the MTD,
20 Plaintiff has not alleged that Debtor exceeded the authority
21 vested in it by the CPUC when it executed the PSPS events, and
22 thus any damages incurred by parties as a result of these events
23 must be addressed by the CPUC and not this court.

24 Finally, Plaintiff attempts to avoid application of Public
25 Utilities Code section 1759 and *Covalt* by alleging that the PSPS
26 events were necessitated by pre-existing conditions caused by
27 the Utility's purported inadequate maintenance of equipment and
28 inadequate attention to conditions that could cause wildfires.
As the CPUC noted in its response, however, before the wildfires
in October and November 2019, it had already exercised its
authority to regulate the PSPSs by adopting its guidelines

1 governing the circumstances in which an investor-owned utility
2 can conduct them. The CPUC continues to exercise that authority
3 through ongoing rulemaking and investigations. Therefore, any
4 claim for damages caused by PSPS events approved by the CPUC,
5 even if based on in pre-existing events that may or may not have
6 contributed to the necessity of the PSPS events, would interfere
7 with the CPUC's policy-making decisions.

8 In any event, the proximate causal connection between the
9 harms suffered by Plaintiff during the blackouts (loss of
10 habitability of his dwelling, loss of cell phone connectivity)
11 and the conditions pre-dating those blackouts is too remote to
12 defeat the MTD, given that such PSPS events can be necessitated
13 by high winds even when equipment is adequately maintained.

14 In conclusion, by asserting that inadequate maintenance led
15 to the PSPSs, Plaintiff is usurping and interfering with the
16 CPUC's authority in approving such PSPS events.² For that
17 reason, the court is granting the MTD.

18 _____
19 ² In his opposition to the MTD, Plaintiff argues

20 To say that just because the Commission provides
21 regulatory guidance on PSPSs, PG&E cannot be liable
22 for its negligence resulting in the need for a PSPS,
23 is akin to saying that PG&E should not be liable for
24 negligently causing the San Bruno explosion or the
25 wildfires just because the Commission regulates
26 aspects of PG&E's conduct related to those disasters.
27 And it does not take that position.

28 First, the damages asserted by the victims of the San Bruno
explosion and the various wildfires did not arise out of conduct
approved by the CPUC in its regulatory capacity. Second, the
CPUC did authorize the process by which PG&E conducted the
PSPSs. Finally, the losses and damages asserted by the San Bruno

1 IV. CONCLUSION

2 The court is dismissing this adversary proceeding because
3 it is preempted by Public Utilities Code section 1759. Counsel
4 for Debtors should upload an order granting the MTD for the
5 reasons set forth in this memorandum decision and file a
6 separate proof of service indicating that compliance with B.L.R.
7 9021-1(c).

8 **END OF MEMORANDUM**
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27 explosion victims and the wildfire victims were directly related
28 and causally connected to the Utility's alleged misconduct.