SUPERIOR COURT OF CALIFORNIA

COUNTY OF SAN FRANCISCO

DEPARTMENT 304

FRIENDS OF THE EARTH, Plaintiff, v. PACIFIC GAS AND ELECTRIC COMPANY; INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS LOCAL 1245; COALITION OF CALIFORNIA UTILITY EMPLOYEES; and DOES 1-20, Defendants.	Case No. CGC-23-605757 ORDER ON DEFENDANTS' DEMURRERS

The demurrers to the Complaint filed by Defendants Pacific Gas and Electric Company ("PG&E"), International Brotherhood of Electric Workers ("IBEW") Local 1245 and Coalition of California Utility Employees ("CCUE") came on for hearing on August 21, 2023. Having considered the pleadings and papers on file in the action, and the arguments of counsel presented at the hearing, the Court hereby sustains the demurrers without leave to amend.

BACKGROUND

On April 11, 2023, Plaintiff Friends of the Earth ("FOE") filed this action against Defendants. In its brief six-page Complaint, FOE alleges as follows:

In June 2016, FOE and other environmental groups entered a Joint Proposal with Defendants,

which is attached to the Complaint. (Compl. ¶ 14 & Ex. 1.)[1] The subject matter of the Joint Proposal, which FOE refers to as a "Contract," is reflected in its title and opening paragraph: "governing the closure of Diablo Canyon Nuclear Power Plant ('Diablo Canyon') at the expiration of its existing Nuclear Regulatory Commission ('NRC') operating licenses and orderly replacement of Diablo Canyon with a greenhouse gas ('GHG') free portfolio of energy efficiency, renewables and energy storage that includes a 55 percent Renewal Portfolio Standard commitment by 2031." (Ex. 1 at 1.) FOE focuses its Complaint on paragraph 1.1 of the Joint Proposal, which states, "Under the terms of this Joint Proposal, PG&E will retire Diablo Canyon at the expiration of its current NRC operating licenses. The Parties will jointly propose and support the orderly replacement of Diablo Canyon with GHG free resources." (Compl. ¶ 17; Ex. 1 at 3.) PG&E's current NRC licenses are set to expire on November 2, 2024 and August 26, 2025. (Compl. ¶ 18.)

FOE alleges that the California Public Utilities Commission ("CPUC") approved the portions of the Joint Proposal alleged in its Complaint in Decision 818-01-022. (*Id.* ¶ 21.) It contends that the parties' obligations under the Joint Proposal "are still operative, including PG&E's obligation in paragraph 1.1 to 'retire' Diablo Canyon at the expiration of the current NRC licenses. The safe and timely retirement of Diablo Canyon would require PG&E to undertake good faith preparations well in advance of the retirement date, starting no later than now or in the very near future." (*Id.* ¶ 23.) FOE alleges that "PG&E disputes that any obligations under the Contract, including paragraph 1.1, are still operative, and PG&E is not currently undertaking, and is not planning to undertake in the very near future, good faith preparations for the safe retirement of Diablo Canyon at the expiration of the current NRC licenses." (*Id.* ¶ 24.) FOE seeks to state a single cause of action for declaratory relief "with respect to PG&E's obligations under paragraph 1.1 of the Contract." (*Id.* ¶ 29.) In addition to declaratory relief, it also seeks "[p]reliminary and permanent injunctive relief prohibiting PG&E from violating the

[1] The other parties to the Joint Proposal were the Natural Resources Defense Council ("NRDC"), Environment California, and the Alliance for Nuclear Responsibility ("A4NR"). (Ex. 1.) None is a party to the instant action. FOE alleges that NRDC has "disclaim[ed] any interest or rights it may have in the contract at issue." (Compl. ¶ 9 & Ex. 2.) FOE acknowledges that the other two groups declined to participate in this litigation, and "normally would be considered necessary parties," but asserts it has not joined them because they are not indispensable. (*Id.* ¶ 12.)

Contract and requiring PG&E to comply with the Contract." (*Id.* at 6, Prayer for Relief ¶ 2.)[2]

As is explicit in its title, the Joint Proposal was framed as a proposal to be submitted by PG&E to the CPUC for its approval, and the parties' obligations under the Joint Proposal were explicitly conditioned upon CPUC approval. Thus, paragraph 7.1 of the Joint Proposal recites,

> The Parties agree that the Joint Proposal is subject to approval by the CPUC and shall be submitted for approval pursuant to Article 12 (Settlements) of the CPUC's Rules of Practice and Procedure.

Paragraph 7.1 goes on to require PG&E to "file the Joint Proposal Application with the CPUC for approval." (*Id.*) The Joint Proposal recites the parties' agreement to

> (i) support the Joint Proposal Application and the associated settlement agreement and use their best efforts to secure CPUC approval of the Joint Proposal and the associated settlement agreement in their entirety without modification; (ii) recommend that the CPUC approve and adopt this Joint Proposal and the associated settlement in its entirety without change; and (iii) actively and mutually defend the Joint Proposal Application and the associated settlement agreement and the Joint Proposal Application if opposed by any other party.

(*Id.*) A separate provision bound the parties, "if the CPUC fails to adopt this Joint Proposal and the associated settlement agreement in its entirety and without modification," to meet and confer "to discuss whether the Joint Proposal and associated settlement agreement should be renegotiated with alternative terms and resubmitted to the Commission for approval." (*Id.* ¶ 7.2) Likewise, the Joint Proposal states that "PG&E's obligation to withdraw its license renewal application under Section 1.3 shall not become effective or binding until the CPUC's approval of the Joint Proposal Application has become final and non-appealable." (*Id.* ¶ 7.3.)[3] Finally, the Joint Proposal stated,

> If the CPUC rejects the Joint Proposal Application and it or any other entity with the requisite

[2] As discussed below, FOE attempts in its opposition to recharacterize its declaratory relief claims. The Court has considered FOE's opposition as, in effect, an offer of proof to amend its Complaint, but finds that even if it were to be so amended, FOE cannot overcome the preclusive effect of section 1759.

[3] Numerous other provisions of the Joint Proposal are similarly conditioned upon CPUC approval. ((See, e.g., Ex. 1 ¶ 1.3 ["PG&E will immediately cease any efforts on its part to renew the Diablo Canyon operating licenses and will ask the NRC to suspend consideration of the pending Diablo Canyon license renewal application pending withdrawal with prejudice of the NRC application upon CPUC approval of the Joint Proposal Application."]; *id.* ¶ 2.1 [PG&E will maintain its "voluntary commitment" to 55% RPS "through 2045 or until superseded by action of the legislature or the CPUC"]; *id.* ¶ 2.2.4 [referring to "CPUC Application seeking approval of the Joint Proposal"]; *id.* ¶ 2.5 [resource integration and storage issues "must be reviewed and resolved by the CPUC"]; *id.* ¶ 3.2 ["PG&E will provide a detailed description and cost estimate for the Employee Program for CPUC approval in the Joint Proposal CPUC Application and PG&E's commitment to implement the program is conditioned upon CPUC approval."]; *id.* ¶ 5.1 [PG&E will request CPUC approval of specified ratemaking approach in the Joint Proposal Application].)

> legal authority directs PG&E to pursue Diablo Canyon license renewal at the NRC, PG&E will within 120 days of such final and non-appealable action submit a new release request to the [State Lands Commission] premised on the change in circumstances which will be fully subject to CEQA and the Parties reserve all rights to contest such application.

(*Id.* ¶ 6.1.2.)

Defendants seek judicial notice of extensive administrative materials.[4] As those materials make clear, Plaintiff's Complaint tells only a small part of the story. In August 2016, PG&E filed an Application seeking the CPUC's approval to retire Diablo Canyon and implement the Joint Proposal, which it attached to its Application. (Ex. A.)[5] The scoping memorandum issued by the CPUC regarding the proceedings on the Application stated, among other things, that while PG&E had proposed retiring the two Diablo Canyon units in 2024 and 2025, other parties had proposed both earlier and later retirement dates, and that the CPUC would permit testimony "in support of PG&E's proposed dates, or earlier or later retirement dates, including indefinite dates." (Ex. C at 2.) Numerous groups including FOE submitted comments in support or opposition to the Application. (Exs. B, E at 3-4.) FOE also submitted comments and objections to the administrative law judge's proposed decision, which did not approve the Joint Proposal in its entirety. (Ex. D.)[6]

In January 2018, the CPUC issued Decision 18-01-022, "Decision Approving Retirement of Diablo Canyon Nuclear Power Plant." (Ex. E.) In that decision, the CPUC approved PG&E's proposal to retire Diablo Canyon Unit 1 by 2024 and Unit 2 by 2025. (*Id.* at 59.) At the same time, the CPUC rejected or modified other aspects of the Joint Proposal, including provisions regarding replacement of Diablo Canyon, the employee retention program, and the community impact program. (*Id.* at 59-60.) Thus, the CPUC did not approve the Joint Proposal "in its entirety without change"; rather, it made

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[4] FOE does not oppose Defendants' Joint Request for Judicial Notice, which is granted as to Exhibits A through Q pursuant to Evidence Code §§ 452(a) and 452(c). (See, e.g., *Hartwell Corp. v. Superior Court* (2004) 27 Cal.4th 256, 263 fn. 4 [taking judicial notice of proceedings before the CPUC]; *Goncharov v. Uber Technologies, Inc.* (2018) 19 Cal.App.5th 1157, 1161 fn. 2 [taking judicial notice of 13 documents associated with CPUC rulemaking, including "rulings, submissions, scoping memoranda, and proposed decisions from the ongoing CPUC proceedings"].)

[5] References to lettered exhibits are to the exhibits attached to the Wu Declaration, which are the subject of Defendants' Joint Request for Judicial Notice.

[6] In particular, FOE took issue with the ALJ's recommendation that all decisions regarding replacement procurement be deferred to the CPUC's Integrated Resource Planning (IRP) proceeding, objecting that such a deferral would not "provide enough time to get replacement resources subscribed, contracted and built by the time the Diablo Canyon plant is retired in 2024-2025," resulting in "an unacceptable increase in GHG emissions." (Ex. D at 11.) The CPUC adopted that recommendation in its final Decision. (Ex. E at 21-22, 58 ¶ 2.)

significant changes to its terms. As FOE concedes, however, neither it nor any of the other parties to the Joint Proposal sought to meet and confer or take any of the other actions specified in section 7.2 of the Joint Proposal. (Compl. ¶ 21.)

The CPUC subsequently modified Decision 18-01-022 in November 2018, by issuing Decision 18-11-024. (Ex. F.) That decision addressed intervening legislation (SB 1090), by which the Legislature had directed the CPUC to approve full funding for the community impact mitigation program and the employee retention program proposed in the Application, as well as directing the CPUC to "ensure that integrated resource plans are designed to avoid any increase in emissions of greenhouse gases as a result of the retirement of the Diablo Canyon Units 1 and 2 powerplant." (*Id.* at 3, quoting Pub. Util. Code § 712.7.)

On September 2, 2022, Governor Newsom signed SB 846 into law. (Ex. G.) The Legislature found as follows:

> Preserving the option of continued operations of the Diablo Canyon powerplant for an additional five years beyond 2025 may be necessary to improve statewide energy system reliability and to reduce the emissions of greenhouse gases while additional renewable energy and zero-carbon resources come online, until those new renewable energy and zero-carbon resources are adequate to meet demand. Accordingly, it is the policy of the Legislature that seeking to extend the Diablo Canyon powerplant's operations for a renewed license term is prudent, cost effective, and in the best interests of all California electricity customers. The Legislature anticipates that this stopgap measure will not be needed for more than five years beyond the current expiration dates.

(Pub. Res. Code § 25548(b); see also Pub. Util. Code § 712.8(q) [similar findings].) Accordingly, the Legislature "invalidated" the ordering paragraphs of the CPUC's Decision 18-01-22 that approved PG&E's proposal to retire Diablo Canyon Unit 1 by 2024 and Unit 2 by 2025 and closed the proceedings on PG&E's Application, and ordered the CPUC to reopen those proceedings. (Pub. Util. Code § 712.8(b)(1),(2).) It further ordered the CPUC to "direct and authorize the operator of the Diablo Canyon Units 1 and 2 [i.e., PG&E] to take all actions that would be necessary to operate the powerplant beyond the current expiration dates, so as to preserve the option of extended operations" for an additional five years, contingent upon continued authorization to operate by the NRC. (*Id.* § 712.8(c)(1)(A).) Finally, it ordered the CPUC to "direct and authorize extended operations at the Diablo Canyon powerplant" until the new retirement dates specified in the legislation (e.g., October 31, 2029 for Unit 1 and October 31,

2030 for Unit 2). (*Id.* § 712.8(b)(2)(A).) While the Legislature also authorized the CPUC to "issue an order that reestablishes the current expiration dates as the retirement date, or that establishes new retirement dates that are earlier than" the five-year extended deadlines, it limited that authorization to four specified contingencies: (1) if the CPUC determines that the costs of plant upgrades, maintenance, or license renewal are "too high to justify incurring" (Pub. Util. Code § 712.8(c)(2)(B)); (2) if the loan SB 846 authorized to fund extended operations is terminated (*id.* § 712.8(c)(2)(C)); (3) if the CPUC determines that new renewable resources "have already been constructed and interconnected by the time of decision" (*id.* § 712.8(c)(2)(D)); and (4) if the NRC does not renew Diablo Canyon's license or renews it for a shorter period. (*Id.* § 712.8(c)(2)(E).) Thus, FOE's description of this legislation as merely "provid[ing] financial incentives for extending Diablo Canyon's tenure beyond the agreed dates of retirement" (Compl. ¶ 24) is incomplete and inaccurate: the Legislature expressly invalidated the CPUC's Decision approving the proposal to retire Diablo Canyon at the expiration of the current NRC licenses, and ordered it to direct and authorize extended operations for an additional five-year term.[7]

In September 2022, in accordance with the Legislature's direction in SB 846, the CPUC reopened proceedings on PG&E's Application. (Exs. H, I.) In December 2022, following the issuance of a proposed decision by an ALJ (Ex. K), the CPUC then issued Decision 22-12-005, "Decision Implementing Senate Bill 846." (Ex. M.) The CPUC declared that the ordering paragraphs of its 2018 Decision which approved retiring Diablo Canyon by 2024 and 2025 and closed the Application are "null and void." (*Id.* at 33.) It further ordered PG&E "to take all of the actions identified in this decision, and any other actions that would be necessary, to operate Diablo Canyon power plant Units 1 and 2 beyond the current federal license expiration dates, so as to preserve the option of extended operations" until 2029 and 2030. (*Id.*) Those actions include those associated with obtaining a new operating license from the NRC, obtaining the applicable approvals and operating permits from the State of California, transitioning Diablo Canyon from existing operations into extended operations, and applying for funding from the U.S. Department of Energy. (*Id.* at 7, 27.) The Decision stated that in light of SB 846, "there are no

[7] Likewise, FOE's repeated contention that SB 846 merely required PG&E to "preserve the option" of a five-year extension of Diablo Canyon's license (e.g., Opposition, 5, 12) ignores the Legislature's express direction to the CPUC to "direct and authorize extended operations at the Diablo Canyon powerplant" for an extended five-year term.

Commission-approved retirement dates for Diablo Canyon Units 1 and 2 at this time," and indicated that consideration of the retirement dates would occur through a separate CPUC decision that will be effective no later than December 31, 2023. (*Id.* at 6.) The CPUC closed the Application, and stated that it would open a new rulemaking on an expedited schedule "in accordance with the range of time-sensitive SB 846-related issues that will need to be monitored, considered, and addressed." (*Id.* at 26.) FOE filed comments supporting closure of the Application and the CPUC's commitment to open a new rulemaking. (Ex. L.)

On January 20, 2023, the CPUC issued an order instituting a rulemaking proceeding "in order to render a decision by the end of calendar year 2023 establishing new retirement dates for Diablo Canyon Nuclear Power Plant Units 1 and 2." (Ex. N at 1.) Consistent with SB 846, the CPUC recognized that it "must direct and authorize extended operations at Diablo Canyon until October 31, 2029 (Unit 1) and October 31, 2030 (Unit 2)" unless any of the statutory conditions for earlier retirement dates is met. (*Id.* at 3.) In March 2023, the NRC granted PG&E approval to continue operating Diablo Canyon until its license renewal application can be determined. (Ex. P.)

In April 2023, rather than participate in the ongoing rulemaking proceeding, FOE brought this declaratory relief action. As noted above, in its Complaint FOE seeks declaratory relief "that obligations under the Contract are still operative, including PG&E's obligation in paragraph 1.1 to 'retire' Diablo Canyon at the expiration of the current NRC licenses." (Compl. ¶ 23.) Evidently recognizing the futility of that allegation in light of the CPUC's and the Legislature's express invalidation of the Joint Proposal and the Legislature's direction to the CPUC to "authorize extended operations at the Diablo Canyon powerplant" for an additional five years,[8] FOE attempts in its opposition to salvage its claim for declaratory relief by reframing it to seek a declaration that the Joint Proposal "is not fully extinguished, that PG&E's application for a twenty-year extension [of Diablo Canyon's operating licenses] would breach the Contract, and that PG&E must proceed on parallel tracks and prepare for shutdown in case the approvals do not come through." (Opposition, 9.)

[8] As IBEW and CCUE point out, the relief FOE seeks in its Complaint is precluded by SB 846. A court "may sustain a demurrer to a declaratory relief cause of action when it is clear the plaintiff seeks a declaration of rights to which he or she is not legally entitled." (*Childhelp, Inc. v. City of Los Angeles* (2023) 91 Cal.App.5th 224, 236 (cleaned up).)

Defendants demur to the Complaint on several alternative grounds, including (1) that the Court lacks subject matter jurisdiction under section 1759 of the Public Utilities Code because the action interferes with the CPUC's jurisdiction; (2) the Court should decline jurisdiction under the abstention doctrine; (3) the Court should stay the action under the primary jurisdiction doctrine; (4) Plaintiff failed to exhaust its administrative remedies; (5) the Complaint fails to state facts sufficient to state a cause of action because (a) the CPUC has revoked its approval for retiring Diablo Canyon upon the expiration of its current operating licenses; (b) requiring PG&E to retire Diablo Canyon would be contrary to SB 846; and (c) paragraph 1.1 of the Joint Proposal does not give rise to legally enforceable contractual obligations. Plaintiff opposes the demurrers.[9]

LEGAL STANDARD

A demurrer lies where "the pleading does not state facts sufficient to constitute a cause of action." (Code Civ. Proc. § 430.10(e).) A demurrer admits "all material facts properly pleaded, but not contentious, deductions, or conclusions of fact or law." (*Blank v. Kirwan* (1985) 39 Cal.3d 311, 318.) The complaint is given a reasonable interpretation, reading it as a whole and its parts in their context. (*Id.*) "The courts, however, will not close their eyes to situations where a complaint contains allegations of fact inconsistent with attached documents, or allegations contrary to facts which are judicially noticed. Thus, a pleading valid on its face may nevertheless be subject to demurrer when matters judicially noticed by the court render the complaint meritless." (*Del E. Webb v. Structural Materials Co.* (1981) 123 Cal.App.3d 593, 604 (cleaned up); see also *Linda Vista Village San Diego Homeowners Assn., Inc. v. Tecolote Investors, LLC* (2015) 234 Cal.App.4th 166, 180 [a plaintiff "should not be allowed to bypass a demurrer by suppressing facts which the court will judicially notice" (cleaned up)].) Whether Public Utilities Code section 1759 bars an action in superior court is an issue properly decided on demurrer. (E.g., *San Diego Gas & Electric Co. v. Superior Court* (1996) 13 Cal.4th 893, 912-913 ("*Covalt*"); *Goncharov v. Uber Technologies, Inc.* (2018) 19 Cal.App.5th 1157, 1165.)

[9] The Court has not considered the Declaration of Peter Prows submitted with Plaintiff's opposition, which is not properly before the Court. (See *Moreno v. Sanchez* (2003) 106 Cal.App.4th 1415, 1437 [disregarding as irrelevant declaration submitted in opposition to demurrer]; *Kahn v. Superior Court* (1987) 188 Cal.App.3d 752, 770 fn. 7 ["A declaration filed in opposition to a demurrer is 'a nullity, of no purpose or effect whatever' in consideration of a demurrer."].)

DISCUSSION

I. The Court Lacks Subject Matter Jurisdiction Over This Action.

The primary ground Defendants raise on demurrer is that Public Utilities Code section 1759 deprives this Court of subject matter jurisdiction because Plaintiff's action would impermissibly hinder or interfere with the CPUC's exercise of regulatory authority over the retirement of Diablo Canyon. (PG&E Opening Brief, 14-18; IBEW/CUEE Opening Brief, 12-15.) That ground is dispositive, and requires dismissal of the Complaint.

A. Background Law – Section 1759 And The *Covalt* Doctrine

> The CPUC is a state agency of constitutional origin and possesses broad authority to supervise and regulate every public utility in California. It has the power to do all things, whether specifically designated in the Public Utilities Act or in addition thereto, which are necessary and convenient in the exercise of its jurisdiction over public utilities. Its powers include setting rates, establishing rules, holding hearings, awarding reparation, and establishing its own procedures. The commission's authority has been liberally construed, and includes not only administrative but legislative and judicial powers.

(*Goncharov*, 19 Cal.App.5th at 1168 (cleaned up); accord, *Covalt*, 13 Cal.4th at 914-915; *TruConnect Communications, Inc. v. Maximus, Inc.* (2023) 91 Cal.App.5th 497, 506.)

Consistent with this broad grant of authority, "[t]he Legislature has acted to limit judicial review of CPUC actions." (*Goncharov*, 19 Cal.App.5th at 1168.) Public Utilities Code section 1759(a) provides,

> No court of this state, except the Supreme Court and the court of appeal, to the extent specified in this article, shall have jurisdiction to review, reverse, correct, or annul any order or decision of the commission or to suspend or delay the execution or operation thereof, or to enjoin, restrain, or interfere with the commission in the performance of its official duties, as provided by law and the rules of court.[10]

However, this provision "is not intended to, and does not, immunize or insulate a public utility from any and all civil actions brought in superior court." (*People ex rel. Orloff v. Pacific Bell* (2003) 31 Cal.4th 1132, 1144.) The Legislature also enacted section 2106:

> Any public utility which does, causes to be done, or permits any act, matter, or thing prohibited or declared unlawful, or which omits to do any act, matter, or thing required to be done, either by the Constitution, any law of this State, or any order or decision of the commission, shall be liable to the persons or corporations affected thereby for all loss, damages, or injury caused thereby or resulting therefrom. . . . An action to recover for such loss, damage, or injury may be brought in any court of competent jurisdiction by any corporation or person.

[10] Unless otherwise noted, all further statutory citations are to the Public Utilities Code.

In *Covalt*, the California Supreme Court addressed the interplay between these two statutes and reconciled them, reaffirming "the primacy of section 1759 and the correspondingly limited role of section 2106." (*Covalt*, 13 Cal.4th at 917.) The Court declared that "section 1759 prevails over section 2106 unless the superior court action would not interfere with or obstruct the commission in carrying out its own policies." (*Id.* at 944 (cleaned up).) Under the test adopted by the Court in *Covalt*, courts look to three factors: (1) whether the CPUC has authority to adopt regulatory policy on the issue in question; (2) whether the CPUC has exercised that regulatory authority; and (3) whether the superior court action would hinder or interfere with the CPUC's exercise of that regulatory authority. (*Id.* at 923, 926, 935; *Hartwell Corp.*, 27 Cal.4th at 266; *Goncharov*, 19 Cal.App.5th at 1170.)

FOE raises a threshold objection to the application of the three-factor *Covalt* test, insisting that it does not apply to breach of contract or declaratory relief cases. (Opposition, 10.) FOE is mistaken. *Covalt* itself expressly recognized that the same principles necessarily apply to a claim for declaratory relief that, like Plaintiff's action here, would call upon the superior court to determine an issue that is pending before the CPUC or would interfere with its exercise of regulatory authority. Thus, *Covalt* discussed with approval the decision in *Schell v. Southern Cal. Edison Co.* (1988) 204 Cal.App.3d 1039, which held that a cause of action for declaratory relief seeking a ruling whether a person using a recreational vehicle as his residence was a residential customer entitled to residential baseline allocations was barred by section 1759. The Court reasoned that "because it was still an open question in the commission whether the special mobile home rate schedule applied to RV parks, 'for the superior court to undertake to determine this issue would be a usurpation of the PUC's authority.'" (13 Cal.4th at 921-923; see also *Overton v. Uber Technologies, Inc.* (N.D. Cal. 2018) 333 F.Supp.3d 927, 949 [applying *Covalt* and section 1759 to dismiss breach of contract and other claims that would interfere with CPUC's ongoing efforts to determine defendant ridesharing company's regulatory status].)[11] Indeed, that FOE seeks declaratory and injunctive relief against PG&E heightens, rather than diminishes, the concerns

[11] The cases upon which FOE relies for the broad proposition that "contract disputes are issues for a court" both long predated *Covalt*, and in any event are readily distinguishable on their facts, as they involved private business disputes in which the relief sought would not have affected the CPUC or interfered with its authority. (See Opposition, 10, citing *Dillingham v. Schipp* (1957) 154 Cal.App.2d 553 and *Bartlett v. Rogers* (1951) 103 Cal.App.2d 250.)

implicated by section 1759. (See *PegaStaff v. Pacific Gas & Electric Co.* (2015) 239 Cal.App.4th 1303, 1318 ["prospective relief, such as an injunction, may sometimes interfere with the PUC's regulatory authority in ways that damages claims based on past harms would not."].)

For similar reasons, FOE's reliance on *Hartwell* (Opposition, 14-15) is misplaced. *Hartwell* held among other things that section 1759 does not bar superior court actions against defendants not regulated by the CPUC, such as the nonregulated water providers and industrial defendants in that case. (27 Cal.4th at 279-282.) However, this case does not involve a claim brought solely against unregulated private parties, but rather against a regulated public utility, PG&E, arising out of an agreement that was expressly conditioned upon CPUC approval, and that both the CPUC and the Legislature have since invalidated. (See *TruConnect Communications, Inc.*, 91 Cal.App.5th at 508 [rejecting argument that *Hartwell* means that "section 1759 *never* applies to 'private parties that are not regulated public utilities'"; "Unlike here, the CPUC in *Hartwell* had no authority over either the plaintiffs or the nonregulated defendants."].) Further, in *Hartwell*, the Court could see no possibility that a jury's findings on water safety issues against the unregulated parties would interfere with the CPUC's official regulatory duties (27 Cal.4th at 281); here, in contrast, the prospect of such conflicts is obvious: Diablo Canyon can have only one retirement date.

In short, the *Covalt* test applies to FOE's claim. Each of the three prongs of that test is met here.

B. The CPUC Has The Authority To Adopt A Regulatory Policy Governing The Retirement of Diablo Canyon.

FOE makes no effort to argue the first prong is not met here. There can be no legitimate question that the CPUC has the authority to adopt regulatory policy governing the subject matter of the Joint Proposal, including the timeline for the retirement of Diablo Canyon. By entering into the Joint Proposal, which was expressly subject to approval by the CPUC, and by participating in the proceedings on PG&E's Application, FOE and the other parties expressly conceded as much. SB 846 reflects the same understanding on the part of the Legislature, which conferred express statutory authority on the CPUC to "direct and authorize [PG&E] to take all actions that would be necessary to operate the powerplant beyond the current expiration dates." (Pub. Util. Code § 712.8(c)(1)(A).) And, as FOE concedes, SB 846 requires the CPUC to make a determination on new retirement dates by the end of 2023. (Opposition, 8-

9.) The CPUC has initiated a rulemaking proceeding to address precisely that subject. Thus, the issues presented by FOE's claim are policy matters that fall squarely within the CPUC's authority.[12]

C. The CPUC Has Exercised Its Regulatory Authority In Refusing To Approve The Joint Proposal And In Ongoing Rulemaking Proceedings.

Nor does FOE show that the CPUC has not exercised its regulatory authority over the subject matter of the Joint Proposal. It is undisputed that the CPUC conducted a complex, multi-year administrative proceeding on PG&E's Application for approval of the Joint Proposal, resulting initially in Decision 18-01-022, approving the Joint Proposal to the extent it called for PG&E to retire Diablo Canyon on the expiration of its current licenses, but rejecting or modifying it in other respects; in a subsequent order modifying that Decision; and, following the enactment of SB 846, culminating in Decision 22-12-005 invalidating the portion of the Joint Proposal providing for the retirement of Diablo Canyon in 2024 and 2025,[13] and in an order instituting a rulemaking proceeding to establish new retirement dates for Diablo Canyon. Thus, the CPUC unquestionably has exercised its regulatory authority covering the subject matter of FOE's Complaint, including Diablo Canyon's retirement date and the Joint Proposal itself.

FOE insists that the CPUC "is not considering the Contract, a twenty-year extension, or what will happen if PG&E does not get all its approvals." (Opposition, 12.) All that is required to satisfy the second prong of the *Covalt* test, however, is that the CPUC has "exercised [its] authority" with respect to "the subject matter of the litigation." (*TruConnect Communications, Inc.*, 91 Cal.App.5th at 507; see, e.g., *PegaStaff,* 239 Cal.App.5th at 1323-1326 [prong two is satisfied by "PUC's exercise of its authority

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[12] FOE expressly recognized as much in the Joint Proposal itself. (See Compl. Ex. 1 ¶ D ["The Parties recognize that the three tranches of resource procurement proposed in this Joint Proposal are not intended to specify everything that will be needed to ensure the orderly replacement of Diablo Canyon with GHG free resources, which is the Parties' shared commitment. The full solution will emerge over the 2024-2045 period, in consultation with many parties and with the oversight of the CPUC, the California Independent System Operator ('CAISO'), the California Energy Commission ('CEC'), the California Air Resources Board, the Governor, and the Legislature. Additional procurement beyond that specified in the three tranches will be needed on a system wide basis to replace the output of Diablo Canyon and the Parties envision that this issue will primarily be addressed through the CPUC's IRP process."].)

[13] FOE's contention that "PUC has not regulated the Contract" and "has said nothing about the Contract" (Opposition, 12, 14) is inexplicable. The CPUC explicitly addressed the Joint Proposal, which was attached to PG&E's Application, in its Decisions (e.g., Ex. E at 3, Ex. F at 2). And, as directed by the Legislature, the CPUC invalidated its prior approval of the Joint Proposal that Diablo Canyon be retired at the expiration of its existing licenses, declaring that approval "null and void."

to regulate utility minority enterprise diversity programs"].) Far from "side issues" (Opposition, 12), FOE's concerns regarding license renewal and shutdown preparation fall squarely within the CPUC's exercise of regulatory authority over the retirement of Diablo Canyon.

D. Plaintiff's Action Would Hinder Or Interfere With The CPUC's Exercise Of Regulatory Authority.

Under the third prong of the *Covalt* test, superior court lawsuits are barred by section 1759 "not only when an award of damages would directly contravene a specific order or decision of the commission, i.e., when it would 'reverse, correct, or annul' that order or decision, but also when an award of damages would simply have the effect of undermining a general supervisory or regulatory policy of the commission, i.e., when it would 'hinder' or 'frustrate' or 'interfere with' or 'obstruct' that policy." (*Covalt*, 13 Cal.4th at 918.) "The PUC has exclusive jurisdiction over the regulation and control of utilities, and once it has assumed jurisdiction, it cannot be hampered, interfered with, or second-guessed by a concurrent superior court action addressing the same issue." (*Id.* at 918 fn. 20 (cleaned up).)

Here, as discussed above, it is inescapable that Plaintiff's action would hinder or interfere with the CPUC's exercise of its regulatory authority over the retirement of Diablo Canyon. First, FOE's Complaint expressly seeks relief—a declaration "that obligations under the Contract are still operative, including PG&E's obligation in paragraph 1.1 to 'retire' Diablo Canyon at the expiration of the current NRC licenses" (Compl. ¶ 23)—that cannot be reconciled with the CPUC's invalidation of its prior approval of that aspect of the Joint Proposal, not to mention its express direction to PG&E "to take . . . any . . . actions that would be necessary . . . to operate Diablo Canyon power plant Units 1 and 2 beyond the current federal license expiration dates."[14] In other words, the CPUC has authorized and directed PG&E to act contrary to paragraph 1.1 of the Joint Proposal. A declaration from this Court that PG&E must nevertheless proceed with the retirement of Diablo Canyon plainly would interfere with the CPUC's order. Under the circumstances, FOE's contention that "there is no risk of conflicting determinations" (Opposition, 13) is risible. (Compare, e.g., *TruConnect Communications, Inc.*, 91 Cal.App.5th at 514 [concluding that "section 1759 does not bar TruConnect's lawsuit since any recovery by TruConnect

[14] Despite that allegation, which is the only specific allegation in FOE's claim for declaratory relief, FOE insists that "the shutdown dates . . . is not what this case is about." (Opposition, 19.) Nonsense.

would not conflict with a previous CPUC order and would not interfere with the Commission's ongoing regulation of the LifeLine program."].)[15]

Second, such a declaration would also interfere with the CPUC's ongoing rulemaking proceeding regarding the extension of operations at Diablo Canyon, which will address the very issues FOE raises, including the duration of any license extension, PG&E's preparation for shutdown of the nuclear power plant, and the energy resources that will be necessary to replace it. Where, as here, judicial relief is sought that would potentially conflict or interfere with ongoing regulatory proceedings, the concerns underlying section 1759 and the *Covalt* test are at their zenith. In *Schell*, for example, the declaratory relief sought by the plaintiff related to issues (whether the rate schedules for mobile home parks applied to RV parks) that "were then pending in proceedings before the commission." (*Covalt*, 13 Cal.4th at 922.) Thus, the superior court action was barred by section 1759 because it would have "interfered with an ongoing commission inquiry into a matter of regulatory policy." (*Id.* at 921; see also *Goncharov*, 19 Cal.App.5th at 1170-1173 [where plaintiffs' claims implicated Uber's status and what regulations should apply, which was an "express focus of the CPUC's formal Rulemaking," claim was barred by *Covalt* and section 1759]; accord, *Rosen v. Uber Technologies, Inc.* (N.D. Cal. 2016) 164 F.Supp.3d 1165, 1174-1177 ["Plaintiff's claims are barred not because they challenge the validity of the CPUC's regulations themselves, but rather because they interfere with the CPUC's ongoing process of determining which regulations Uber and other new TNCs must follow"].)[16]

The bottom line is this: FOE's action, if allowed to proceed, poses the risk that this Court will be asked to issue orders inconsistent with those that the CPUC has already issued or may issue in the

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[15] FOE apparently contends that the Joint Proposal would allow PG&E to seek a five-year license extension, but somehow estops it from advocating for a lengthier license extension. (Opposition, 9, 12.) Even if the Joint Proposal were not defunct, and even if the language of the Joint Proposal somehow supported that contention—neither is the case—FOE is free to make that argument to the CPUC.

[16] FOE's other authorities do not support its position. (Opposition, 11-15.) *PegaStaff*, on which it primarily relies, merely stands for the proposition that "a claim concerning subjects over which the PUC lacks regulatory authority does not meet the third prong" because "there can be no interference with authority the PUC does not have." (239 Cal.App.4th at 1319.) Thus, in *PegaStaff*, the court held that a temporary staffing agency's suit against PG&E for implementing a tier system preferential to minority enterprises was not barred by section 1759 because PG&E was not authorized or permitted to give preferential treatment to minority enterprises, and thus the suit would "enforce, not obstruct, the PUC regulation." (*Id.* at 1327.) Here, in contrast, an order setting a retirement date for Diablo Canyon, or requiring PG&E to adopt a shutdown plan for the plant, threatens directly to interfere with the CPUC's authority over the same topics.

pending rulemaking proceeding—the very result that section 1759 is intended to prevent. (See *Sarale v. Pacific Gas & Electric Co.* (2010) 189 Cal.App.4th 225, 231 ["Section 1759 safeguards the commission's ability to implement statewide safety protocols from being undermined by an unworkable patchwork of conflicting determinations regarding what constitutes necessary or proper management of power lines. In short, challenges to PG&E's tree trimming as unreasonable, unnecessary, or excessive lie within the exclusive jurisdiction of the commission to decide."].)

II. In The Alternative, Judicial Abstention Is Warranted.

Because section 1759 and the *Covalt* doctrine are dispositive, the Court need not reach any of the other alternative grounds asserted by Defendants on demurrer. Even if the Court had subject matter jurisdiction over Plaintiff's action (or some aspect of it), however, it would exercise its discretion to dismiss the action under the judicial abstention doctrine. A brief discussion will suffice.

"Because the remedies of declaratory judgment, injunction, and restitution are equitable in nature, courts have the discretion to abstain from employing them." (*Willard v. AT&T Communications of California, Inc.* (2012) 204 Cal.App.4th 53, 59 [holding that trial court acted within its discretion in applying doctrine of judicial abstention to decline to decide the merits of telephone service subscribers' claims challenging certain fee charged by telephone company, since the dispute centered on whether the fee was too high and should be regulated, and the CPUC had examined the matter and concluded that price regulation of the fee was unwarranted].)

"As a general matter, a trial court may abstain from adjudicating a suit that seeks equitable remedies if granting the requested relief would require a trial court to assume the functions of an administrative agency, or to interfere with the functions of an administrative agency." (*Arce v. Kaiser Foundation Health Plan, Inc.* (2010) 181 Cal.App.4th 471, 496 (cleaned up). "A court also may abstain when the lawsuit involves determining complex economic policy, which is best handled by the Legislature or an administrative agency." (*Id.* (cleaned up).) In addition, "judicial abstention may be appropriate in cases where granting injunctive relief would be unnecessarily burdensome for the trial court to monitor and enforce given the availability of more effective means of redress." (*Id.* (cleaned up).)

Courts have applied the doctrine in a variety of comparable situations. (See, e.g., *Hambrick v. Healthcare Partners Medical Group, Inc.* (2015) 238 Cal.App.4th 124, 152 [in action against professional medical corporation and related entities for operating as a health care service plan without obtaining the required regulatory license, trial court properly abstained, where court would be required to determine complex economic policy within the context of the managed health care system, a task properly left to the responsible administrative agency]; *Center for Biological Diversity, Inc. v. FPL Group, Inc.* (2008) 166 Cal.App.4th 1349, 1371-1372 [court would abstain from allowing plaintiffs to sue windfarm operators for breach of the public trust "in deference to the regulatory oversight being provided by public authorities"]; *Alvarado v. Selma Convalescent Hospital* (2007) 153 Cal.App.4th 1292, 1296 [in class action seeking injunctive relief to require the owners and operators of skilled nursing and intermediate care facilities to comply with certain requirements in the Health and Safety Code, the trial court properly sustained defendants' demurrer without leave to amend on the basis of the judicial abstention doctrine, since granting injunctive relief "would place a tremendous burden on the trial court to undertake a classwide regulatory function and manage a long-term monitoring process to ensure compliance" with the statute].)

As discussed, FOE's request for declaratory and injunctive relief as to PG&E's purported obligations under the Joint Proposal with respect to the retirement of Diablo Canyon necessarily would require the Court to assume or interfere with the CPUC's regulatory jurisdiction over the same topics, and would enmesh the Court in complex questions of energy, economic, and environmental policy that are best handled by the CPUC as well as other responsible regulatory agencies. Thus, "[i]ntervention by the courts . . . not only would threaten duplication of effort and inconsistency of results, but would require the courts to perform an ongoing regulatory role as technology evolves and conditions change. All of these factors call for abstention." (*Center for Biological Diversity, Inc.*, 166 Cal.App.4th at 1371.)

III. Plaintiff's Request For Leave To Amend Is Unavailing.

At the hearing, Plaintiff sought leave to amend to add three allegations: (1) that the Joint Proposal remains in effect and precludes PG&E from seeking a twenty-year extension of its current operating licenses for Diablo Canyon, or any extension beyond the additional five years authorized by the Legislature and the CPUC; (2) that the Joint Proposal imposes an obligation on PG&E to take all steps

necessary to shut down Diablo Canyon by the current expiration date of those licenses, should the NRC decline to extend their term; and (3) that the Joint Proposal may impose other, unspecified continuing obligations on PG&E that fall outside the CPUC's jurisdiction. Asked to identify such obligations, however, Plaintiff was unable to identify any, but stated only that it "expects there will be more" that it could uncover after conducting discovery. These proffered amendments are insufficient to meet Plaintiff's burden to show a reasonable possibility of overcoming either of the foregoing dispositive grounds for demurrer.

As to the first, it is undisputed that the CPUC and the Legislature both disapproved the key term of the Joint Proposal that Plaintiff seeks to enforce: that "PG&E will retire Diablo Canyon at the expiration of its current NRC operating licenses." Indeed, under compulsion of the Legislature's enactment of SB 846 and invalidation of the CPUC's Decision approving the retirement date provision of the Joint Proposal, the CPUC expressly found its prior order approving that provision "null and void," and it opened a rulemaking proceeding with the stated objective of establishing new retirement dates for the power plant. Plaintiff's assertion that the Joint Proposal is "ambiguous" as to whether the Joint Proposal imposes any continuing obligations on PG&E under those circumstances is, to put it charitably, dubious. Regardless, for this Court to entertain a claim for declaratory relief as to when PG&E is contractually obligated to retire Diablo Canyon would directly interfere with the CPUC's jurisdiction to determine that precise question. The same is true of the second proposed amendment, which relates to the measures to be taken by PG&E to prepare the plant for shut down—a quintessential subject for technical expertise that falls squarely within the CPUC's wheelhouse. Finally, Plaintiff's speculation that it may be able to discover some other basis for proceeding is plainly deficient under the standard governing proposed amendments.

The burden is on the plaintiff to show a reasonable possibility that the defect in the complaint can be cured by amendment. (*Aguilera v. Heiman* (2009) 174 Cal.App.4th 590, 595.) "The onus is on the plaintiff to articulate the specific ways to cure the identified defect, and absent such an articulation, a trial or appellate court may grant leave to amend only if a potentially effective amendment is both apparent and consistent with the plaintiff's theory of the case." (*Shaeffer v. Califia Farms, LLC* (2020) 44

Cal.App.5th 1125, 1145 (cleaned up); see also *Murphy v. Twitter, Inc.* (2021) 60 Cal.App.5th 12, 42 ["Where the [plaintiff] offers no allegations to support the possibility of amendment and no legal authority showing the viability of new causes of action, there is no basis for finding the trial court abused its discretion when it sustained the demurrer without leave to amend." (cleaned up)].) Plaintiff's proffered amendments do not remotely meet its burden under this standard, and consequently cannot save the Complaint.

CONCLUSION

For the foregoing reasons, Defendants' demurrers to the Complaint are sustained without leave to amend.

IT IS SO ORDERED.

Dated: August 22 2023

Ethan P. Schulman
Judge of the Superior Court

CERTIFICATE OF ELECTRONIC SERVICE
(CCP 1010.6(6) & CRC 2.251)

I, Ericka Larnauti, a Deputy Clerk of the Superior Court of the County of San Francisco, certify that I am not a party to the within action.

On August 23, 2023, I electronically served the attached document via File & ServeXpress on the recipients designated on the Transaction Receipt located on the File & ServeXpress website.

Dated: August 23, 2023

Brandon E. Riley, Clerk

By: _____
Ericka Larnauti, Deputy Clerk