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9 **UNITED STATES BANKRUPTCY COURT**
10 **NORTHERN DISTRICT OF CALIFORNIA**
11 **SAN FRANCISCO DIVISION**

12 **In re:**

13 **PG&E CORPORATION**

14 **Debtor.**

15 **Tax I.D. No. 94-3234914**

Case Nos. 19 - ____ (____)
19 - ____ (____)

Adv. Pro. No. 19- ____ (____)

Chapter 11

16 **In re:**

17 **PACIFIC GAS AND ELECTRIC
18 COMPANY**

19 **Debtor.**

20 **TAX I.D. NO. 94-0742640**

21 **PG&E CORPORATION,
22 PACIFIC GAS AND ELECTRIC
23 COMPANY,**

24 **Plaintiffs,**

25 **v.**

26 **FEDERAL ENERGY
27 REGULATORY COMMISSION**

28 **Defendant.**

**DEBTORS' MOTION FOR PRELIMINARY
INJUNCTION AND MEMORANDUM OF
POINTS AND AUTHORITIES IN SUPPORT**

Date:
Time:
Place:

DEBTORS' MOTION FOR
PRELIM. INJUNCTION

1 PG&E Corporation (“**PG&E Corp.**”) and Pacific Gas and Electric Company (the
2 “**Utility**”), as debtors and debtors in possession (collectively, “**PG&E**” or the “**Debtors**”) in the
3 above-captioned chapter 11 cases (the “**Chapter 11 Cases**”), and Plaintiffs in the above-captioned
4 adversary proceeding, hereby move this Court, pursuant to sections 105, 106(a), and 362(a) of title
5 11 of the United States Code (the “**Bankruptcy Code**”), Federal Rule of Civil Procedure 65 and
6 Rule 65-1 of the Bankruptcy Local Rules for the Northern District of California (the “**Bankruptcy**
7 **Local Rules**”), as made applicable in these proceedings pursuant to Rules 7001(7) and 7065 of the
8 Federal Rules of Bankruptcy Procedure (the “**Bankruptcy Rules**”), to (i) issue an order, pursuant
9 to section 362 of the Bankruptcy Code, enforcing the automatic stay as to the FERC Proceedings
10 (defined below), any entity’s attempt to enforce the FERC Order (defined below), and any action
11 by FERC, or any other entity, that would attempt to divest or otherwise nullify or impede this
12 Court’s exclusive authority to approve or deny the Debtors’ requests to assume or reject executory
13 contracts under section 365 of the Bankruptcy Code (collectively, “**FERC Action**”); and (ii) to the
14 extent the automatic stay does not apply, exercise its powers under section 105 of the Bankruptcy
15 Code to preliminarily and permanently enjoin any FERC Action, in order to preserve the
16 Bankruptcy Court’s jurisdiction, as well as to prevent irreparable harm to the debtor’s estates and
17 the reorganizational goals of the Bankruptcy Code.

18 This Motion for Preliminary Injunction is supported by the *Debtors’ Complaint for*
19 *Declaratory Judgment and Preliminary and Permanent Injunctive Relief*, the *Memorandum of*
20 *Points and Authorities in Support of Debtors’ Motion for Preliminary Injunction*, the *Declaration*
21 *of Fong Wan in Support of Debtors’ Motion for Preliminary Injunction*, and the *Debtors’ Request*
22 *for Judicial Notice in Support of Debtors’ Motion for Preliminary Injunction*, as well as
23 supporting documents attached thereto.

24 A proposed form of order granting the relief requested herein is annexed hereto as
25 **Exhibit 1** (the “**Proposed Order**”).
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TABLE OF AUTHORITIES

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10
11
12
13
14
15
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19
20
21
22
23
24
25
26
27
28

Page(s)

Cases

Adams Fruit Co. v. Barrett,
 494 U.S. 638 (1990).....7

In re Ambanc La Mesa Ltd. P’ship,
 115 F.3d 650 (9th Cir. 1997)5

In re AMR Corp.,
 730 F.3d 88 (2d Cir. 2013).....22

Atl. City Elec. Co. v. F.E.R.C.,
 295 F.3d 1 (D.C. Cir. 2002)5, 6

Bank of the West v. Fabtech Indus. (In re Fabtech),
 2010 Bankr. LEXIS 5097 (B.A.P. 9th Cir. July 19, 2010)20

Begier v. Internal Revenue Serv.,
 496 U.S. 53 (1990).....14

In re Bel Air Chateau Hosp., Inc.,
 611 F.2d 1248 (9th Cir. 1979)21

In re Billing Res.,
 2007 Bankr. LEXIS 3789 (Bankr. N.D. Cal. Nov. 2, 2007)..... *passim*

In re Birting Fisheries,
 300 B.R. 489 (B.A.P. 9th Cir. 2003).....18

In re Bulldog Trucking, Inc.,
 150 B.R. 912 (W.D.N.C. 1992)18

Cal. Elec. Oversight Bd. v. Calpine Energy Servs., L.P.,
 114 F.E.R.C. ¶ 61,006 (2006)12

California Electricity Oversight Board v. Calpine Energy Services, L.P.,
 114 FERC ¶ 61,003 (2006)13

In re Calpine,
 337 B.R. 27 (S.D.N.Y. 2006) (Casey, J.).....12, 13

In re Canter,
 299 F.3d 1150 (9th Cir. 2002)18

Celotex Corp. v. Edwards,
 514 U.S. 300 (1995).....17

1 *Chao v. Hospital Staffing Services, Inc.*,
 270 F.3d 374 (6th Cir. 2001)15, 16

2 *In re Charter First Mortg., Inc.*,
 3 42 B.R. 380 (Bankr. D. Or. 1984).....4, 14

4 *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*,
 5 467 U.S. 837 (1984).....6

6 *In re Christensen*,
 167 B.R. 213 (D. Or. 1994)14, 17

7 *Cinicola v. Scharffenberger*,
 8 248 F.3d 110 (3d Cir. 2001).....22

9 *Clipper Exxpress v. Rocky Mountain Motor Tariff Bureau, Inc.*,
 10 690 F.2d 1240 (9th Cir. 1982)15

11 *In re Computer Commc’ns Inc.*,
 824 F.2d 725 (9th Cir. 1987)21

12 *In re CoServ, L.L.C.*,
 13 273 B.R. 487 (Bankr. N.D. Tex. 2002).....5

14 *Crandon v. United States*,
 15 494 U.S. 152 (1990) (Scalia, J., concurring)7

16 *In re Dan Hixson Chevrolet Co.*,
 12 B.R. 917 (Bankr. N.D. Tex. 1981).....17

17 *In re Dingley*,
 18 852 F.3d 1143 (9th Cir. 2017)14, 16, 17

19 *Employment Dev. Dep’t v. Bertuccio*,
 20 2011 U.S. Dist. LEXIS 37244 (N.D. Cal. March 28, 2011).....16

21 *In re Excel Innovations, Inc.*,
 502 F.3d 1086 (9th Cir. 2007)17, 19, 20

22 *First Alliance Mortg. Co. v. First Alliance Mortg. Co.*,
 23 264 B.R. 634 (C.D. Cal. 2001)21

24 *FirstEnergy Sols. Corp. v. Fed. Energy Regulatory Comm’n*,
 25 2018 Bankr. LEXIS 1488 (Bankr. N.D. Ohio May 18, 2018)..... *passim*

26 *Gordon v. New York Stock Exchange, Inc.*,
 422 U.S. 659 (1975).....7

27 *Grays Harbor Cty. Wash. v. IDACORP Inc.*,
 28 379 F.3d 641 (9th Cir. 2004)15, 22

1 *In re Gruntz*,
 202 F. 3d 1074 (9th Cir. 2000)13, 18, 19

2 *In re Holly Marine Towing, Inc.*,
 3 669 F.3d 796 (7th Cir. 2012)5

4 *In re Hunt*,
 5 93 B.R. 484 (Bankr. N.D. Tex. 1988).....18

6 *In re Ionosphere Clubs, Inc.*,
 922 F.2d 984 (2d Cir. 1990).....18

7 *In re Ionosphere Clubs, Inc.*,
 8 98 B.R. 174 (Bankr. S.D.N.Y. 1989).....20

9 *Kern River Gas Transmission Co.*,
 10 101 FERC ¶ 61,374 (2002)12

11 *In re Lazarus Burman Assocs.*,
 161 B.R. 891 (Bankr. E.D.N.Y. 1993).....26

12 *In re Linda Vista Cinemas, L.L.C.*,
 13 2010 Bankr. LEXIS 1743 (Bankr. D. Ariz. May 25, 2010).....20

14 *In re Locke*,
 180 B.R. 245 (Bankr. C.D. Cal. 1995).....23

15 *Lockyer v. Mirant Corp.*,
 16 398 F.3d 1098 (9th Cir. 2005)16

17 *In re Medicar Ambulance Co.*,
 18 166 B.R. 918 (Bankr. N.D. Cal. 1994)14

19 *In re Mirant*,
 378 F.3d 511 (5th Cir. 2004)13, 23, 25

20 *In re Mirant Corp.*,
 21 299 B.R. 152 (Bankr. N.D. Tex. 2003).....18

22 *Montana Consumer Counsel v. F.E.R.C.*,
 23 659 F.3d 910 (9th Cir. 2011)5

24 *NLRB v. Bildisco & Bildisco*,
 465 U.S. 513 (1984).....4

25 *NLRB v. Continental Hagen Corp.*,
 26 932 F.2d 828 (9th Cir. 1991)14

27 *NLRB v. Superior Forwarding, Inc.*,
 762 F.2d 695 (8th Cir. 1985)18

28

1 *In re NRG Energy,*
 2003 U.S. Dist. LEXIS 11111 (S.D.N.Y. June 30, 2003).....3, 12, 22

2 *In re Olson,*
 3 2006 Bankr. LEXIS 4823 (B.A.P. 9th Cir. Nov. 21, 2006).....21

4 *In re Pac. Gas & Elec. Co.,*
 5 2004 U.S. Dist. LEXIS 22023 (N.D. Cal. Sept. 30, 2004)23, 24

6 *In re Pac. Gas & Elec. Co.,*
 263 B.R. 306 (Bankr. N.D. Cal. 2001) (Montali, J.).....18, 19

7 *In re Pac. Gas & Elec. Co.,*
 8 283 B.R. 41 (N.D. Cal. 2002)20

9 *Pac. Gas & Elec. Co. v. California ex rel. California Dep’t of Toxic Substances Control,*
 10 350 F.3d 932 (9th Cir. 2003)20

11 *Penn Terra Ltd. v. Dep’t of Env’tl. Res.,*
 733 F.2d 267 (3d Cir. 1984).....23

12 *In re Phillips,*
 13 2010 U.S. Dist. LEXIS 89834 (W.D. Wash. July 30, 2010)22

14 *In re Poule,*
 15 91 B.R. 83 (B.A.P. 9th Cir. 1988).....14

16 *In re PTI Holding Corp.,*
 346 B.R. 820 (Bankr. D. Nev. 2006)26

17 *In re Richmond Paramedical Servs., Inc.,*
 18 94 B.R. 881 (Bankr. E.D. Va. 1988).....18

19 *SAS Inst., Inc. v. Iancu,*
 20 138 S. Ct. 1348 (2018).....6

21 *In re Tucson Yellow Cab Co.,*
 27 B.R. 621 (B.A.P. 9th Cir. 1983).....21

22 *In re Universal Life Church, Inc.,*
 23 128 F.3d 1294 (9th Cir. 1997)14, 17

24 *In re Vantage Petroleum Corp.,*
 25 25 B.R. 471 (Bankr. E.D.N.Y. 1982).....18

26 *Wah Chang v. Duke Energy Trading & Mktg., L.L.C.,*
 507 F.3d 1222 (9th Cir. 2007)15

Statutes

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

11 U.S.C. § 105..... *passim*
11 U.S.C. § 105(a) 17
11 U.S.C. § 362(a) 17, 19
11 U.S.C. § 362(b)(4) 13, 14, 16, 18
11 U.S.C. § 362(d)(2) 24
11 U.S.C. § 365..... *passim*
11 U.S.C. § 365(a) *passim*
11 U.S.C. § 365(d)(2) 4, 24
11 U.S.C. § 507..... 16, 25
11 U.S.C. § 541..... 22
11 U.S.C. § 1129..... 5
16 U.S.C. § 824d(a) 5
28 U.S.C. § 151..... 6, 22
28 U.S.C. §§ 157, 1334(e) 21
28 U.S.C. § 157(b)(2)(A), (O), and (G) 15
28 U.S.C. § 157(b)(2)(G)..... 15
28 U.S.C. § 1334..... 6, 15

1 PG&E Corporation (“**PG&E Corp.**”) and Pacific Gas and Electric Company (the “**Utility**”),
2 as debtors and debtors in possession (collectively, “**PG&E**” or the “**Debtors**”) in the above-
3 captioned chapter 11 case (the “**Chapter 11 Cases**”), and as Plaintiffs in the above-captioned
4 adversary proceeding, respectfully submit this memorandum of points and authorities in support of
5 the Debtors’ Motion for Preliminary Injunction (the “**Motion**”). Knowing that the Debtors would be
6 seeking Chapter 11 protection, and presumably seeking to preempt this Court’s determination of its
7 own jurisdiction, various counterparties to wholesale power purchase agreements with PG&E¹
8 initiated proceedings before the Federal Energy Regulatory Commission (“**FERC**”), requesting—on
9 an expedited basis—that FERC enter an order that “if PG&E files for bankruptcy, PG&E may not
10 abrogate, amend, or reject in a bankruptcy proceeding any rates, terms and conditions of its
11 wholesale power purchase agreements subject to the Commission’s jurisdiction without first
12 obtaining approval from the Commission,”² (the “**FERC Proceedings**”). On January 25, 2019,
13 FERC issued an order in NextEra’s FERC Proceeding concluding that “this Commission and the
14 bankruptcy courts have concurrent jurisdiction to review and address the disposition of wholesale
15 power contracts sought to be rejected through bankruptcy” (the “**NextEra Order**”).³ On January 28,
16 2019, FERC issued an order, in a separate proceeding, reaching a substantially similar conclusion⁴
17 (the “**Exelon Order**,” and together with the NextEra Order, the “**FERC Order**”). By this Motion,
18 the Debtors respectfully request that this Court issue an order, pursuant to section 362 of title 11 of
19 the United States Code (the “**Bankruptcy Code**”),⁵ enforcing the automatic stay as to the FERC
20 Proceedings, any entity’s attempt to enforce the FERC Order, and any action by FERC, or any other
21 entity, that would attempt to divest or otherwise nullify or impede this Court’s exclusive authority to
22 approve or deny the Debtors’ requests to assume or reject executory contracts under section 365 of
23

24 ¹ NextEra Energy, Inc. and NextEra Energy Partners, L.P. (collectively, “**NextEra**”), Exelon
25 Corporation (“**Exelon**”) and EDF Renewables, Inc. (“**EDFR**”) (collectively, the “**FERC**
26 **Complainants**”).

27 ² See **Exhibit 1** (NextEra Order) at 1; **Exhibit 2** (Exelon Order) at 1. Unless otherwise noted, all
28 citations to Exhibits refer to attachments to the Debtors’ Request for Judicial Notice.

³ See **Exhibit 1**(NextEra Order) at 14; **Exhibit 2** (Exelon Order) at 12.

⁴ See **Exhibit 2** (Exelon Order) at 12.

⁵ Capitalized terms used in this MPA and not otherwise defined, shall have the meanings ascribed
to them in the Declaration of Jason P. Wells in Support of First Day Motions and Related Relief
(the “**First Day Decl.**”).

1 the Bankruptcy Code (collectively, “**FERC Action**”). To the extent the automatic stay does not
2 apply, the Debtors respectfully request that this Court exercise its powers under section 105 of the
3 Bankruptcy Code to preliminarily and permanently enjoin any FERC Action, in order to preserve the
4 Bankruptcy Court’s jurisdiction, as well as to prevent irreparable harm to the Debtors’ estates and
5 the reorganizational goals of the Bankruptcy Code.

6 PRELIMINARY STATEMENT⁶

7 To be clear, the Debtors have not made any decisions regarding whether to assume or reject
8 contracts in the context of the Chapter 11 cases. Nevertheless, the FERC Order infringes on this
9 Court’s exclusive jurisdiction over property of the Debtors’ estates, including executory contracts.
10 And FERC’s pronouncement of its “concurrent” jurisdiction has already been rejected by one
11 Bankruptcy Court. *See FirstEnergy Sols. Corp. v. Fed. Energy Regulatory Comm’n*, 2018 Bankr.
12 LEXIS 1488, at *47 (Bankr. N.D. Ohio May 18, 2018). There, in asserting its “concurrent”
13 jurisdiction, FERC maintained⁷ that *after* a debtor-in-possession, such as the Debtors here, rejects
14 (with Bankruptcy Court approval) a filed-rate power contract, FERC can conduct a “regulatory
15 review” at the conclusion of which *FERC may demand the Debtors perform the terms of the contract*
16 *anyway*. Moreover, according to FERC, appellate review of its “regulatory review” lies only in the
17 federal courts of appeals. *See FirstEnergy*, 2018 Bankr. LEXIS 1488, at *37. United States
18 Bankruptcy Judge for the Northern District of Ohio Alan Koschik rightfully recognized two things
19 about FERC’s asserted concurrent jurisdiction. *See id.* At best, it is a “costly procedural delay of
20 the final treatment rejection claims will receive in the bankruptcy case.” *Id.* At worst, it is an
21 “inappropriate violation of the Bankruptcy Code’s priority scheme.” *Id.* Accordingly, he held that
22 section 362 automatically stayed the FERC proceedings pending against the *FirstEnergy* debtors.
23 *See id.* at *19–32. And to preserve its exclusive authority over the Debtors’ property, the

24 _____
25 ⁶ Unless otherwise specified, all emphasis is added and internal citations and quotations are
omitted.

26 ⁷ *See Exhibit 1* (NextEra Order) at 14 (“[T]hese agreements are still subject to the Commission’s
27 jurisdiction and the Commission maintains discretion to exercise its authority.”); *Exhibit 2*
28 (Exelon Order) at 12; *see In re NRG Energy*, 2003 U.S. Dist. LEXIS 11111 (S.D.N.Y. June 30,
2003) (Casey, J.) (FERC took same position and required the debtor to continue post-petition
performance under power purchase agreement even though Bankruptcy Court had granted the
debtor’s motion to reject that same agreement).

1 *FirstEnergy* court alternatively held that injunctive relief under section 105 was warranted to
2 *preserve the Bankruptcy Court’s jurisdiction*, as well as to prevent irreparable harm to the debtor’s
3 estates and the reorganizational goals of the Bankruptcy Code—including the power to reject
4 contracts. *See id.* at *32–61. To prevent FERC’s jurisdictional infringement, this Court should
5 reach the same conclusions here. Simply put, Congress has not given FERC a part to play when
6 allowing a debtor to reject contracts in its considered business judgment.

7 *First*, this Court should grant the requested relief to prevent irreparable harm to the Debtors’
8 reorganization. The FERC Order effectively serves to give FERC a veto right over this Court’s
9 section 365 decisions. In so doing, any FERC Action would infringe upon the Debtors’ right to
10 reject, one of the Code’s fundamental tools that “is vital to the basic purpose of a Chapter 11
11 reorganization.” *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 528 (1984) (“rejection can release the
12 [D]ebtor[s]’ estate[s] from burdensome obligations that can impede a successful reorganization.”).
13 This tool is particularly important here because the Debtors’ various executory power purchase
14 agreements or other FERC-regulated agreements (collectively, the “PPAs”)⁸ represent contractual
15 commitments aggregating approximately \$44 billion. Moreover, given the multiple parties with a
16 stake in these Chapter 11 Cases, it is important that the Debtors are able to take a holistic view of
17 deciding whether to assume or reject these contracts. Indeed, the Debtors’ commitments and
18 obligations to their PPA Counterparties are not the only focus of these Chapter 11 Cases. The
19 Debtors must also, among other things, properly address the claims of the victims of the 2017 and
20 2018 Wildfires, as well as work constructively and collaboratively with policy makers, state
21 regulators, and relevant stakeholders to support California’s commitment to clean energy initiatives.
22 The latter requires considering a range of alternatives to provide for the safe delivery of natural gas
23 and electric service for the long-term in an environment that continues to be challenged by climate
24 change.

25 The Debtors’ section 365 rights may play a vital role in the reorganized Debtors’ post-
26 emergence operations and financial profile. But those are decisions the Debtors will need to make,

27 _____
28 ⁸ A list of the PPAs is provided in **Exhibit 1** to the Declaration of Fong Wan in Support of
Debtors’ Motion for Preliminary Injunction, dated January 28, 2019 (the “**Wan Declaration**”).

1 and will make—not prior to the date of filing—but “at any time before the confirmation of the plan.”
2 11 U.S.C. § 365(d)(2). And the Debtors need to make those decisions with the knowledge that once
3 this Court rules on any rejection request, that ruling is final and not subject to second-guessing and
4 potential nullification by FERC.

5 *Second*, this Court should grant the requested relief to preserve the integrity of the
6 Bankruptcy Code. In fact, the FERC Order, if taken to its logical conclusion, could stand in the way
7 of this Court’s ability to confirm a plan of reorganization.⁹ If the FERC Order were enforceable, a
8 select group of the Debtors’ unsecured creditors—the PPA Counterparties—would receive special
9 treatment based on nothing more than FERC’s “discretion.”¹⁰ As the Bankruptcy Court noted in
10 *FirstEnergy*, the practical effect of FERC’s “regulatory review” of this Court’s section 365 decisions
11 would be to create a class of creditors that “stand on a different platform than all other holders of
12 rejection claims against the Debtors.” *See FirstEnergy*, 2018 Bankr. LEXIS 1488, at *29. The
13 FERC Complainants’ windfall, of course, would come directly from general unsecured creditors,
14 including the victims of the 2017 and 2018 Wildfires. Those individuals, however, do not have an
15 administrative agency willing to upend the Bankruptcy Code’s priority scheme in order to enforce
16 their rights. This Court should enjoin any FERC Action to prevent irreparable harm to the Debtor’s
17 estates as well as the public interest in the reorganizational goals of the Bankruptcy Code.

18 *Third*, FERC Action raises serious constitutional questions. “FERC is a creature of statute,
19 having no constitutional or common law existence or authority, but only those authorities conferred
20 upon it by Congress.” *Atl. City Elec. Co. v. F.E.R.C.*, 295 F.3d 1, 8 (D.C. Cir. 2002). The authority
21 that Congress has conferred on FERC is clear: the Federal Power Act “requires, and charges FERC
22 with ensuring, that ‘[a]ll rates and charges made, demanded, or received’ by power wholesalers be
23 ‘just and reasonable.’” *Montana Consumer Counsel v. F.E.R.C.*, 659 F.3d 910, 914 (9th Cir. 2011)

24
25 ⁹ “The bankruptcy court ha[s] an affirmative duty to ensure that [any debtor-proposed] Plan
26 satisfie[s] all 11 U.S.C. § 1129 requirements for confirmation.” *In re Ambanc La Mesa Ltd.*
27 *P’ship*, 115 F.3d 650, 653 (9th Cir. 1997). One of those requirements mandates compliance with
28 “a priority scheme dictating the order in which various creditors’ claims will be satisfied in the
course of bankruptcy proceedings.” *In re Holly Marine Towing, Inc.*, 669 F.3d 796, 800 (7th
Cir. 2012). That scheme “favors equal (and simultaneous) treatment of equal allowed claims.”
In re CoServ, L.L.C., 273 B.R. 487, 494 (Bankr. N.D. Tex. 2002).

¹⁰ *See Exhibit 1* (NextEra Order) at 14; *Exhibit 2* (Exelon Order) at 12.

1 (citing 16 U.S.C. § 824d(a)) (alteration in original). FERC’s finding that rejection in bankruptcy of
2 an executory contract “alters the essential terms and conditions of the contract and the filed rate” and
3 that “this Commission’s jurisdiction is implicated, and our approval is required,”¹¹ far exceeds this
4 limited authorization. As an Article II agency, the Executive can only confer upon FERC “those
5 authorities conferred upon [the Executive] by Congress.” *Atl. City Elec. Co. v. F.E.R.C.*, 295 F.3d at
6 8. Congress has not conferred upon FERC the power to prohibit a debtor from rejecting wholesale
7 power purchase agreements. And FERC’s decision to do so raises a separation of powers problem:
8 FERC’s Order purports to permit the Executive to take power that it does not have, and where “there
9 is no statute conferring authority, FERC has none.” *Id.*

10 Congress has spoken clearly here. It has bestowed “original and exclusive jurisdiction of all
11 cases under title 11” on Article III federal district courts, notwithstanding “any Act of Congress that
12 confers exclusive jurisdiction on a court or courts other than the district courts.” 28 U.S.C. § 1334.
13 That jurisdiction may be, and here has clearly and unambiguously been, referred to the Bankruptcy
14 Courts as units of the district courts. *See id.* § 151. And under 11 U.S.C. § 365, Congress vested in
15 this Court a broad grant of exclusive power subject to specific limitations and exceptions. *See* 11
16 U.S.C. § 365; *FirstEnergy*, 2018 Bankr. LEXIS 1488, at *44. While the list of specific and express
17 limitations and exceptions is long, it is not one that includes filed-rate contracts nor one that carves
18 out room for FERC Action. *Id.*

19 FERC may suggest that its interpretation of its own governing statute (the FPA) is entitled to
20 deference under *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 865 (1984). The
21 Debtors disagree. A court “owe[s] an agency’s interpretation of the law no deference” where, as
22 here, the “statutory provisions before [it] deliver unmistakable commands.” *SAS Inst., Inc. v. Iancu*,
23 138 S. Ct. 1348, 1358 (2018). FERC has no right to tell this Court which executory contracts the
24 Debtors can and cannot reject and, conversely, the Court has no right to authorize the unilateral
25 modification of rates as that is the province of FERC. There is no conflict between the two.
26 Moreover, FERC is not just seeking to interpret its statute, the Federal Power Act, in isolation; it is
27 seeking to interpret it in a way that limits the Bankruptcy Code. And Congress did not delegate to

28 ¹¹ *See Exhibit 1* (NextEra Order) at 13; *Exhibit 2* (Exelon Order) at 12.

1 FERC the authority to address a statute it does not administer. Indeed, the U.S. Supreme Court has
2 recognized that “reconciliation” of distinct statutory regimes “is a matter for the courts,” not
3 agencies.¹² Otherwise, an agency eager to advance its statutory mission, but without any particular
4 interest or expertise with a second statute, might (as here) seek to diminish the second statute’s scope
5 in favor of a more expansive interpretation of its own—effectively “bootstrap[ing] itself into an
6 area in which it has no jurisdiction.”¹³

7 Indeed, FERC’s position is unsurprising. “Any [government] lawyer advising on whether
8 particular conduct violates [the FPA] will obviously err in the direction of inclusion rather than
9 exclusion—assuming, to be on the safe side, that the statute may cover more than is entirely
10 apparent.” *Crandon v. United States*, 494 U.S. 152, 177–78 (1990) (Scalia, J., concurring). FERC
11 “knows that if it takes an erroneously narrow view of what it can [oversee] the error will likely never
12 be corrected, whereas an erroneously broad view will be corrected by the courts.” *Id.* at 178. This
13 Court should correct FERC’s erroneously broad view of its own jurisdiction, and restrain FERC
14 from interfering with the Debtors’ Chapter 11 Cases and this Court’s jurisdiction over them.
15 Specifically, this Court should hold that, because the Debtors’ PPAs are property of the estates, it
16 enjoys exclusive jurisdiction over them, as well as exclusive jurisdiction over the Debtors’ ability to
17 seek authority to assume or reject executory contracts under section 365. This Court should also
18 hold that FERC Action—including any attempts to enforce the FERC Order—would violate the
19 automatic stay. Finally, to the extent the automatic stay does not apply, this Court should
20 preliminarily and permanently enjoin FERC from engaging in any action or asserting any
21 jurisdiction that would interfere, or otherwise impede or undermine, with the Debtors’ right to seek
22 authority to reject a power contract pursuant to section 365(a).

23 BACKGROUND

24 PG&E Corp. is a holding company whose primary operating subsidiary is the Utility, a
25 public utility operating in northern and central California. *See* Declaration of Jason Wells in Support
26 of Chapter 11 Petition and First Day Motions (the “**Wells Decl.**”) at 7. The Utility provides natural

27 ¹² *Gordon v. New York Stock Exchange, Inc.*, 422 U.S. 659, 685–686 (1975).

28 ¹³ *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 650 (1990).

1 gas and utility services to approximately 16 million customers. *Id.* As of September 18, 2018, the
2 Debtors, on a consolidated basis, had reported book value of assets and liabilities of approximately
3 \$71.4 billion and \$51.7 billion, respectively. *Id.*

4 **A. The Chapter 11 Cases**

5 The Debtors’ decision to seek relief under chapter 11 followed a comprehensive review of a
6 variety of factors and the issues facing the Debtors. *Id.* at 3. It represents the only viable alternative
7 under the stark circumstances with which the Debtors are faced, and is in the best interests of all of
8 the Debtors’ stakeholders, including their millions of customers, employees, wildfire claimants,
9 other creditors, employees, and shareholders. *Id.* The Chapter 11 Cases were necessitated by a
10 confluence of factors resulting from the catastrophic and tragic wildfires that occurred in Northern
11 California in 2017 and 2018, and PG&E’s potential liabilities arising therefrom. *Id.* The multitude
12 of pending claims and lawsuits, and the thousands of additional claims that will be asserted, made it
13 abundantly clear that the Debtors could not continue to address those claims and potential liabilities
14 in the California state court system, continue to deliver safe and reliable service to its 16 million
15 customers, and remain economically viable. *Id.* As noted in the Debtors’ Form 8-K (“**Form 8-K**”)
16 filed on January 14, 2019 with the United States Securities Exchange Commission, the Debtors’
17 potential liability with respect to the 2017 and 2018 Northern California wildfires could exceed \$30
18 billion, without taking into account potential punitive damages, fines and penalties or damages with
19 respect to “future claims.” *Id.* And, under certain circumstances, the Debtors’ potential liability
20 could be substantially greater. *Id.*

21 The Chapter 11 Cases represent the best means to preserve and maximize the value of the
22 Debtors’ business enterprise and are in the best interests of all of their economic stakeholders,
23 including wildfire claimants, the Debtors’ other creditors. *Id.* at 6. Chapter 11 will provide the
24 Debtors and all parties in interest with one forum to comprehensively address and resolve the
25 Debtors’ potential wildfire liabilities in a fair and expeditious manner, and will assure equality of
26 treatment among all similarly-situated creditors of the Debtors—including wildfire claimants,
27 contractual counterparties, debtholders, and others. *Id.* at 6–7. Additionally, the Chapter 11 Cases
28 will assure that the Debtors have the resources—financial and otherwise—to sustain their operations,

1 provide critical utility services safely and reliably, and continue their efforts to rebuild and restore
2 the communities that they serve. *Id.* at 7.

3 **B. The Debtors' FERC-Regulated PPAs**

4 Recent changes in the energy landscape have significantly altered the Debtors' procurement
5 needs going forward. *See* Wan Decl. ¶ 9. Specifically, the Debtors' current electricity supply
6 portfolio, decreasing bundled electric load, *i.e.*, customer demand, and continuing state regulatory
7 oversight now require that the Debtors comprehensively assess how each PPA fits within the
8 Debtors' energy portfolio. *Id.* ¶ 9.

9 As of December 2017, the Debtors' PPAs represent contractual commitments aggregating
10 approximately \$42 billion. *Id.* ¶ 10. As of January 2019, the Utility is a counterparty as buyer
11 under at least (387) PPAs, which involve approximately three hundred fifty (350) counterparties, for
12 a total of approximately 13,668 Megawatts of contracted capacity. *Id.* Many of the Utility's PPAs
13 are long-term contracts to procure renewable energy resources, which the Utility entered into to
14 satisfy renewable energy requirements set by the State of California. *Id.* ¶¶ 11-12. These contracts
15 obligate the Debtors to purchase energy at rates that are significantly higher rates than are currently
16 available to their competitors. *Id.* ¶ 13. Moreover, in recent years, the number of customers
17 receiving electric supply service from the Debtors, and the amount of electricity that the Utility is
18 providing to those customers, has decreased significantly due to multiple factors, including the
19 expansion of Direct Access ("DA") and Community Choice Aggregation ("CCA") providers in
20 California. *Id.* ¶¶ 18-23.

21 Given the fact that many of the Debtors' power supply contracts are at above-market rates,
22 and in light of the decrease in the Debtors' bundled electric load, the Debtors have undertaken
23 significant efforts to reduce their supply portfolio in recent years. *Id.* ¶¶ 15-17. These efforts
24 include the retirement of the Utility's 2,200 Megawatt Diablo Canyon facility at the end of its
25 current operating license, efforts to divest certain hydroelectric facilities in the Utility's portfolio,
26 and entering into contracts to re-sell electricity and other excess capacity products. *Id.*

27 All of the Debtors' major supply portfolio decisions are subject to review by the California
28 Public Utilities Commission ("CPUC"), including through the CPUC's biennial review of the

1 Debtors’ and other investor-owned utilities’ (“IOUs”) procurement plans, as well as via other
2 regular proceedings. *Id.* ¶¶ 24–26. Notably to the Debtors’ assessment of their PPAs, the CPUC
3 recently indicated that it will consider the portfolio optimization activities of California’s IOUs, all
4 of which are losing substantial electric customer load in 2019, including allocation of third-party
5 contracts to DA and CCA providers and auctioning off excess resources. *Id.* ¶ 25.

6 Simply put, if the Debtors do not need the power or other capacity products provided under
7 the PPAs to meet customer demand, satisfy, applicable laws, or advance important policy objectives,
8 they may decide that the most prudent avenue is to reject certain PPAs in the exercise of their
9 business judgment. While it is entirely possible that the Debtors ultimately decide to reject none, or
10 a very limited number, of their PPAs, the Debtors will sustain irreparable harm if FERC were to
11 compel a different outcome that which the Debtors, in their business judgment and subject to this
12 Court’s approval, determine is most likely to result in their successful reorganization. *Id.* ¶ 27. For
13 example, if FERC were to compel the Utility to perform under a particular PPA that the Debtors
14 believed—in their business judgment and after assessing their entire, interrelated PPA portfolio,
15 bundled electric load, and regulatory obligations—was not necessary, and the Bankruptcy Court
16 agreed, the impact across the Debtors’ business would be substantial. *Id.*

17 Given the very complicated and extensive nature of the Debtors’ PPA portfolio, as well as
18 the implications for the Debtors’ business and their ongoing regulatory relationship with the
19 CPUC,¹⁴ it is imperative that the Debtors make informed and thoughtful decisions regarding their
20 energy portfolio going forward. Moreover, the CPUC is currently considering a variety of alternate
21 corporate structures for PG&E—*e.g.*, turning the gas and electric divisions into separate companies,
22 creating regional subsidiaries, and dividing PG&E up into multiple smaller utilities operating under a
23

24 ¹⁴ On June 29, 2017, the CPUC opened a proceeding (Rulemaking(R.)17-06-026) to consider
25 alternatives to the amount that CCA and DA customers pay in order to keep remaining utility
26 customers financially unaffected by their departure. The Power Charge Indifference Adjustment
27 (“PCIA”) is the current mechanism used to mitigate the costs of the long-term financial
28 obligations the Debtor incurred on behalf of now-departed customers. While the proceeding
remains open, the CPUC has revised the methodology used to calculate PCIA and
implementation of that methodology may have a significant impact on the Debtors’ evaluation of
the PPAs. *See Decision(D.)18-10-019 Decision Modifying the Power Charge Indifference
Adjustment Methodology* (CPUC Oct. 11, 2018) (**Exhibit 3**).

1 single parent company.¹⁵ If the CPUC decides to pursue any one of these alternatives, both the
2 Debtors and its state regulators will have to make difficult choices, including some that may affect
3 the Debtors' PPA counterparties, in order to successfully reorganize and remain compliant with
4 applicable State procurement requirements. Thus, while the Debtors are not currently seeking
5 authorization to reject any PPAs, their statutory right to do so at the appropriate time should be
6 preserved and protected, as it may be a vital component of the reorganization process. Those rights
7 cannot be undermined by FERC in separate proceedings outside these Chapter 11 Cases. The
8 Debtors, and other stakeholders here, need the certainty of knowing that once this Court makes a
9 decision with respect to any rejection motion the Debtors may file, that decision will not be subject
10 to further proceedings at FERC.

11 C. The Necessity of this Adversary Proceeding

12 On January 25, 2019 FERC issued an order finding that it shares with this Court "concurrent
13 jurisdiction to review and address the disposition of wholesale power contracts sought to be rejected
14 through bankruptcy." See **Exhibit 1** (NextEra Order) at 12.¹⁶ The FERC Order states that this
15 conclusion gives effect to both the FPA and the Bankruptcy Code. *Id.*¹⁷ By FERC's reasoning, "a
16 party to a Commission-jurisdictional wholesale power purchase agreement must obtain approval
17 from both the Commission and the bankruptcy court to modify the filed rate and reject the contract,
18 respectively." *Id.*¹⁸ Presumably, this means that FERC approval is necessary to modify the filed
19 rate and Bankruptcy Court approval is necessary to reject the contract. In FERC's view, rejection of

20 ¹⁵ On December 21, 2018, the CPUC issued a Scoping Memo and Ruling (the "**Scoping Memo**")
21 setting forth the scope to be addressed in the next phase of its ongoing investigation into whether
22 the organizational culture and governance of PG&E prioritizes safety and adequately directs
23 resources to promote accountability and achieve safety goals and standards (the "**Safety Culture**
24 **OIP**"). To address its concerns regarding PG&E's safety culture, the CPUC outlines a number of
25 alternatives, including, but not limited to: (i) replacement of all or part of PG&E's existing
26 boards of directors and corporate management, (ii) separating PG&E's gas and electric
27 distribution and transmission businesses into separate companies, (iii) reorganizing PG&E into
28 regional subsidiaries based on regional distinctions, (iv) constituting PG&E as a publicly owned
utility or utilities, (v) separating PG&E's generation services from its distribution and
transmission services and (vi) conditioning PG&E's return on equity on safety performance. See
Form 8-K; see also Scoping Memo (**Exhibit 4**) at 11–12.

¹⁶ See also **Exhibit 2** (Exelon Order) at 11.

¹⁷ See also **Exhibit 2** (Exelon Order) at 11.

¹⁸ See also **Exhibit 2** (Exelon Order) at 11.

1 a Commission-jurisdictional contract in bankruptcy “alters the essential terms and conditions of the
2 contract and the filed rate,” and FERC’s “approval is required.” *Id.* at 13.¹⁹ In other words,
3 according to FERC, this Court’s judgment is insufficient to render decisions under section 365 with
4 respect to the Debtors’ PPAs.

5 FERC’s view has changed over time. As recently as 2002, FERC recognized that because
6 the contracts it regulates are executory contracts, applicable bankruptcy law affords a debtor “the
7 right to determine, at its sole discretion, whether to reject or [assume]” them. *Kern River Gas*
8 *Transmission Co.*, 101 FERC ¶ 61,374 (2002). In that opinion, FERC mentions that “[o]n February
9 28, 2002, Enron rejected Contract No. 1866, under applicable bankruptcy procedures.” *Id.*

10 The next year, FERC unilaterally ordered a debtor’s post-petition performance under PPAs
11 while the debtor’s motion to reject such contracts was pending. *See NRG Energy*, 2003 U.S. Dist.
12 LEXIS 11111, at *4. Then, after the Bankruptcy Court approved the debtor’s rejection motion under
13 the applicable business judgment standard, FERC, applying a higher standard, issued a second order
14 requiring the debtor to perform despite the Bankruptcy Court’s order. *Id.* at *4–6. FERC issued its
15 second order while the District Court, after withdrawing the reference from the Bankruptcy Court,
16 was considering a motion to enjoin FERC from enforcing its first order. *Id.* at *5–6. Ultimately,
17 because FERC acted first, that District Court held—incorrectly, in the Debtors’ view²⁰—that it
18 lacked jurisdiction to consider the debtor’s motion for a preliminary injunction, thereby completely
19 eviscerating NRG’s section 365 rejection rights. *Id.* at *9–10.

20 A few years later, in *In re Calpine*, the same District Court Judge vacated a temporary
21 restraining order issued by the Bankruptcy Court that had prevented FERC from exercising
22 jurisdiction over certain energy contracts that the debtor sought to reject. *See In re Calpine*, 337
23 B.R. 27, 30–31 (S.D.N.Y. 2006) (Casey, J.). District Court Judge Casey’s decision is curious. Just
24

25 ¹⁹ *See also Exhibit 2* (Exelon Order) at 12.

26 ²⁰ Not only is there nothing in the Code or the FPA that would support FERC’s ability to impede on
27 this Court’s jurisdiction over the PPAs, which are property of the Debtors’ estate, but such a
28 holding would “defeat[] a central goal of the Bankruptcy Code of providing an efficient and
centralized forum” because it would require a debtor to “litigate postpetition performance
obligations in multiple forums” rather than attend to the matters in one court under the auspices
of 11 U.S.C. § 365(a). *See FirstEnergy*, 2018 Bankr. LEXIS 1488, at *57.

1 days earlier FERC had issued an advisory opinion stating: “the Commission is precluded from
2 taking action under the FPA that impacts a debtor’s ability to reject an executory contract.” *Cal.*
3 *Elec. Oversight Bd. v. Calpine Energy Servs., L.P.*, 114 F.E.R.C. ¶ 61,003 (2006). FERC’s opinion
4 adopted the Fifth Circuit’s conclusions from *In re Mirant*, 378 F.3d 511, 522 (5th Cir. 2004).²¹ But,
5 as demonstrated by its position in *FirstEnergy* and the FERC Order, FERC is not adhering to its
6 prior guidance.

7 ARGUMENT

8 **I. THE AUTOMATIC STAY PREVENTS FERC FROM INTERFERING WITH THE** 9 **DEBTORS’ RIGHT TO REJECT EXECUTORY CONTRACTS UNDER** 10 **SECTION 365 OF THE BANKRUPTCY CODE**

11 The FERC Order, the FERC Action, and the FERC Proceedings are subject to the automatic
12 stay. As appropriately recognized in *FirstEnergy*, “any order [FERC] might issue to compel the
13 Debtors’ performance under [the PPAs] would, in substance, be designed to obtain or control the
14 property of the Debtors’ estate and therefore, be void *ab initio*” as a violation of the automatic stay.
15 *FirstEnergy*, 2018 Bankr. LEXIS 1488, at *32. Moreover, any attempt to enforce the FERC Order
16 or to impose additional obligations beyond those required under the Bankruptcy Code would not fall
17 within the governmental unit exception to the automatic stay. *See id.* (because FERC proceeding
18 was “undertaken principally to adjudicate private rights”, it was not excepted from the automatic
19 stay pursuant to 11 U.S.C. § 362(b)(4)).²²

20 The Ninth Circuit applies two complementary tests to determine whether government action
21 falls under the so-called “government regulatory exception” to the automatic stay: the public policy
22 test and the pecuniary purpose test.²³ *See In re Dingley*, 852 F.3d 1143, 1146 (9th Cir. 2017) (citing

23 ²¹ *See also In re Mirant*, 378 F.3d 511, 522 (5th Cir. 2004) (“[I]t is clear that Congress intended
24 § 365(a) to apply to contracts subject to FERC regulation.”).

25 ²² Under clear Ninth Circuit authority, the bankruptcy courts have “final” and “ultimate” authority
26 to determine the scope of the automatic stay, subject to [direct] federal appellate review. *In re*
27 *Gruntz*, 202 F. 3d 1074, 1083, 1087 (9th Cir. 2000).

28 ²³ The pecuniary purpose test has its origin in remarks made by Senator DeConcini and
Representative Edwards during the passage of the Bankruptcy Code. The legislators asserted
that the police-power exception “is intended to be given a narrow construction in order to permit
governmental units to protect the *public health* and *safety* and not to apply to actions by a
governmental unit to protect a pecuniary interest of the debtor or property of the estate.” 1978
U.S.C.C.A.N. 6505, 6513 (statement of Sen. DeConcini); *see* 1978 U.S.C.C.A.N. 6436, 6444–45
(statement of Rep. Edwards). The floor statements Representative Edwards and Senator

1 *NLRB v. Continental Hagen Corp.*, 932 F.2d 828, 833 (9th Cir. 1991)) (implicitly adopting the Sixth
2 and Eighth Circuits’ use of the pecuniary purpose and public policy tests). If government action “is
3 intended *either* to protect the government’s pecuniary interest in the debtor’s property *or* to
4 adjudicate private rights, the government regulatory exemption will *not* apply and the automatic stay
5 will be imposed.” *Dingley*, 852 F.3d at 1147 (citing *In re Universal Life Church, Inc.*, 128 F.3d
6 1294, 1297 (9th Cir. 1997)).

7 **A. FERC Action Fails the Public Policy Test**

8 The public policy test distinguishes between government actions that effectuate public policy
9 and those that adjudicate private rights; only the former are exempt from the automatic stay under
10 section 362(b)(4). *See Continental Hagen Corp.*, 932 F.2d at 833.²⁴ In other words, a governmental
11 unit “cannot escape the automatic stay” by adjudicating the private rights of its citizens “under the
12 guise of public protection.” *In re Medicar Ambulance Co.*, 166 B.R. 918, 926 (Bankr. N.D. Cal.
13 1994) (suspension of Medicare payments was not exempt from the automatic stay under either test);
14 *see also In re Christensen*, 167 B.R. 213, 216 (D. Or. 1994) (state construction board was subject to
15 automatic stay because the “immediate purpose” of the board’s action “was to assist a private citizen
16 recover [*sic*] a pre-petition obligation of the debtor”).²⁵ Because the FERC Order and any FERC

17 DeConcini are considered “persuasive evidence of congressional intent.” *See Begier v. Internal*
18 *Revenue Serv.*, 496 U.S. 53, 64 n.5 (1990).

19 ²⁴ *See also In re Poule*, 91 B.R. 83, 86–87 (B.A.P. 9th Cir. 1988) (“Where the agency’s action
20 affects only the parties immediately involved in the proceeding, it is exercising a judicial
21 function and the debtor is entitled to the same protection from the automatic stay as if the
22 proceeding were being conducted in a judicial forum.”) (unlike civil penalties, order directing
debtor to pay contracting party was “not within the ambit of section 362(b)(4)” and was
“therefore void”) (citing *In re Charter First Mortg., Inc.*, 42 B.R. 380, 383–84 (Bankr. D. Or.
1984) (proceedings to determine restitution for debtor’s consumer protection violations were not
excepted from automatic stay)).

23 ²⁵ *See also Clipper Express v. Rocky Mountain Motor Tariff Bureau, Inc.*, 690 F.2d 1240, 1250–
24 51, 1254, 1266–77 (9th Cir. 1982) (permitting relief that was “not a question of a challenge to
25 the legality of a rate approved by the ICC,” “would not disturb any uniform rates; [and] would do
26 nothing to ICC-approved rate structure.”); *Wah Chang v. Duke Energy Trading & Mktg., L.L.C.*,
27 507 F.3d 1222, 1227 (9th Cir. 2007) (construing *Clipper Express*, 690 F.2d 1240 (9th Cir.
1982) as “a case allowing relief where sham protests were filed with an agency in order to delay
28 rate requests by the plaintiff, but neither the rates ultimately adopted by the agency nor its own
procedures were in question.”); *Grays Harbor Cty. Wash. v. IDACORP Inc.*, 379 F.3d 641, 652
(9th Cir. 2004) (“A complaint that merely seeks declaratory relief as to contract formation issues
would not necessarily intrude upon the rate-setting jurisdiction of FERC.”); *id.* at 653 (J.
Callahan, dissenting) (“It is true that claims that are strictly contractual in nature are not
preempted by the FPA.”).

1 Action primarily implicate private contractual rights against the Debtors, they are not exempt from
2 the automatic stay.

3 In addressing section 362’s scope, the Bankruptcy Court in *FirstEnergy* held that the
4 automatic stay bars FERC from “taking any action or asserting any jurisdiction that would interfere
5 with a debtor’s right to seek authority to reject a power contract pursuant to Section 365(a).”

6 *FirstEnergy*, 2018 Bankr. LEXIS 1488, at *18–19.²⁶ Specifically:

7 FERC is not free, notwithstanding the fact that in other contexts it
8 exercises regulatory power, to prevent a chapter 11 debtor-in-
9 possession who has successfully rejected a power contract from
10 avoiding performance under the contract and reducing its financial
11 exposure for the breach of contract to an allowed prepetition
12 bankruptcy claim.²⁷

13 *Id.* In reaching its decision, the Bankruptcy Court relied on the “controlling authority” governing the
14 interpretation of the police and regulatory power exception to the automatic stay: *Chao v. Hospital*
15 *Staffing Services, Inc.*, 270 F.3d 374 (6th Cir. 2001). In *Chao*, the Sixth Circuit recognized that
16 when government “action incidentally serves public interests but more substantially adjudicates
17 private rights, courts should regard that suit as outside the police power exception, particularly when
18 a successful suit would result in a pecuniary advantage to certain private parties vis-à-vis other
19 creditors of the estate, contrary to the Bankruptcy Code’s priorities.” *Id.* at 390. Notably, courts in
20 the Ninth Circuit have repeatedly cited *Chao* with approval.²⁸

21 Relying on *Chao*, *FirstEnergy* held that the “primary impact” of FERC’s asserted

22 ²⁶ Bankruptcy Judge Koschik held that he had jurisdiction over the debtors’ adversary proceeding
23 against FERC under 28 U.S.C. § 1334 and the applicable standing order of reference. *See*
24 *FirstEnergy*, 2018 Bankr. LEXIS 1488, at *6. Further, it was a core proceeding pursuant to 28
25 U.S.C. § 157(b)(2)(A), (O), and (G). *See id.* (“[T]his proceeding directly implicates the scope of
26 the automatic stay and the Court’s enforcement of that stay and, therefore, is a core proceeding
27 pursuant to 28 U.S.C. § 157(b)(2)(G) as well.”). FERC has no colorable reason to challenge this
28 Court’s jurisdiction here.

²⁷ The court had not yet considered the merits of the debtors’ rejection motions. *See FirstEnergy*,
2018 Bankr. LEXIS 1488, at *15. Here, no rejection motion is pending.

²⁸ *See Lockyer v. Mirant Corp.*, 398 F.3d 1098, 1109 (9th Cir. 2005) (“A suit does not satisfy the
public purpose test if it is brought primarily to advantage discrete and identifiable individuals or
entities rather than some broader segment of the public.”) (citing *Chao*, 270 F.3d at 378);
Employment Dev. Dep’t v. Bertuccio, 2011 U.S. Dist. LEXIS 37244, at *20–21 (N.D. Cal. March
28, 2011) (affirming bankruptcy court’s determination that state agencies’ actions did not satisfy
the public policy test) (citing *Chao*, 270 F.3d at 389).

1 “concurrent” jurisdiction “w[ould] be a pecuniary advantage to those counterparties relative to other
2 similarly situated creditors.” *FirstEnergy*, 2018 Bankr. LEXIS 1488, at *29. Specifically, should
3 any entity attempt to enforce the FERC Order, and FERC compel performance, it would elevate the
4 PPA Counterparties’ claims to administrative expense status. Doing so would advantage those
5 counterparties vis-à-vis other prepetition creditors, including all creditors holding valid claims based
6 on the 2017 and 2018 Wildfires. Such a result makes no sense and would violate the Bankruptcy
7 Code’s priority scheme under section 507. *See id.* at *30; *see also Chao*, 270 F.3d at 389
8 (government action to enforce a contractual obligation is an extreme example of conduct not exempt
9 from the automatic stay). Therefore, this Court should hold that, because any FERC Action would
10 principally adjudicate private rights between the Debtors and their contractual counterparties, the
11 automatic stay prohibits any FERC Action. *See FirstEnergy*, 2018 Bankr. LEXIS 1488, at *32.

12 **B. Any FERC Action Also Fails the Pecuniary Interest Test**

13 Because any FERC Action fails the public policy test, this Court need not consider the
14 pecuniary interest test. Indeed, both *FirstEnergy* and *Chao* held that the automatic stay applied,
15 even if the government’s actions did not serve the government’s direct pecuniary interest. *See Chao*,
16 270 F.3d at 388–89; *FirstEnergy*, 2018 Bankr. LEXIS 1488, at *28–29. Similarly, in its most recent
17 decision discussing section 362(b)(4), the Ninth Circuit observed that the automatic stay *applies* if
18 the government’s action is intended *either* to protect the government’s pecuniary interest in the
19 debtor’s property *or* to adjudicate private rights. *See Dingley*, 852 F.3d at 1147.

20 In any event, FERC Action fails the pecuniary interest test, too. The pecuniary interest test
21 asks “whether the government action relates primarily to the protection of the government’s
22 pecuniary interest in the debtor’s property or to matters of public safety and welfare.” *Dingley*, 852
23 F.3d at 1146 (citing *Universal Life Church*, 128 F.3d at 1297). Here, only the PPA counterparties
24 have a pecuniary interest in the Debtors’ continued purchase of their energy; FERC does not.
25 Moreover, FERC’s purported “concurrent” jurisdiction does not relate to any matters of public *safety*
26 *or welfare*. Directing continued performance under a PPA between private parties is not necessary
27 to avoid harming individuals or to ensure the health and safety of the public at large. This Court
28 should look to the immediate purpose and effect of the FERC Order—usurping this Court’s

1 jurisdiction in order to define private contractual rights—and hold that the automatic stay applies to
2 the FERC Order and any FERC Action. *See In re Christensen*, 167 B.R. at 216 (finding it was “not
3 enough” that a state board’s “general purpose was to further consumer protection,” because the
4 “immediate purpose” was to assist a private citizen in a dispute against the debtor); *In re Dan Hixson*
5 *Chevrolet Co.*, 12 B.R. 917, 920 (Bankr. N.D. Tex. 1981) (administrative proceedings regarding
6 franchise agreement were automatically stayed because the agency was acting in a quasi-judicial
7 capacity).

8 **II. ALTERNATIVELY, THIS COURT SHOULD PROTECT ITS OWN JURISDICTION**
9 **OVER THE PROPERTY OF THE DEBTORS’ ESTATES AND THE**
10 **AUTHORIZATION OF REJECTION DECISIONS BY ENJOINING FERC**

11 **A. This Court Has the Authority to Enjoin FERC Under Section 105**

12 Congress granted comprehensive jurisdiction to the Bankruptcy Courts so that they can deal
13 efficiently and expeditiously with all matters connected to the bankruptcy estate. *See Celotex Corp.*
14 *v. Edwards*, 514 U.S. 300, 308 (1995). And Section 105(a) of the Bankruptcy Code authorizes this
15 Court to “issue any order, process or judgment that is necessary or appropriate to carry out the
16 provisions of this title.” 11 U.S.C. § 105(a). Thus, the Ninth Circuit has held that protecting a
17 Bankruptcy Court’s comprehensive jurisdiction over the estate when it might otherwise be
18 threatened is an appropriate use of section 105 of the Bankruptcy Code. *See In re Excel Innovations,*
19 *Inc.*, 502 F.3d 1086, 1093 (9th Cir. 2007) (“Section 105(a) gives the bankruptcy courts the power to
20 stay actions that are not subject to the 11 U.S.C. § 362(a) automatic stay but threaten the integrity of
21 a bankrupt’s estate.”); *In re Canter*, 299 F.3d 1150, 1155 (9th Cir. 2002) (same); *In re Gruntz*, 202
22 F.3d 1074, 1086–87 (9th Cir. 2000) (same); *see also In re Birthing Fisheries*, 300 B.R. 489, 497
23 (B.A.P. 9th Cir. 2003) (“Under Section 105, the bankruptcy court can issue an injunction to restrain
24 activities that threaten the reorganization process or *impair the court’s jurisdiction with respect to*
25 *the case before it.*”). And its sister circuits follow suit. *See, e.g., In re Ionosphere Clubs, Inc.*, 922
26 F.2d 984, 995 (2d Cir. 1990) (“[Section] 105, like [section] 362, is a means by which the bankruptcy
27 court can protect its jurisdiction.”); *NLRB v. Superior Forwarding, Inc.*, 762 F.2d 695, 698 (8th Cir.
28 1985) (“[W]e hold that the bankruptcy court has the discretion and authority to enjoin federal
regulatory proceedings under § 105 when those proceedings would threaten the debtor’s estate, and

1 when the court has jurisdiction over a petition in bankruptcy.”).

2 Therefore, even assuming the government regulatory exception to the automatic stay were
3 applicable, this Court has the power and jurisdiction to enjoin federal agencies, like FERC.²⁹ See
4 *FirstEnergy*, 2018 Bankr. LEXIS 1488, at *34 (enjoining FERC under section 105 to the extent the
5 automatic stay did not apply); *In re Mirant Corp.*, 299 B.R. 152 (Bankr. N.D. Tex. 2003) (same).³⁰
6 To prevent irreparable harm to the Debtors’ reorganization efforts, preserve this Court’s jurisdiction
7 over the chapter 11 estate, and protect the integrity of the Bankruptcy Code, this Court should enjoin
8 any FERC Action, any attempt to enforce the FERC Order, and any attempt to prosecute the claims
9 in the FERC Proceedings that would require the Debtors to seek FERC approval to reject executory
10 contracts under Section 365 or that would impose any form of liability upon them for not doing so.
11 Specifically, this Court should enjoin FERC from attempting to exercise “concurrent” jurisdiction
12 over the Debtors’ and this Court’s section 365 decisions.³¹

13 **B. The Requirements for Injunctive Relief Under Section 105 Plainly Exist Here**

14 In the Ninth Circuit, the “usual preliminary injunction standard applies to stays of
15 proceedings” not covered by section 362(a), with one caveat. *Excel*, 502 F.3d at 1094–96. In the
16 bankruptcy context, rather than considering whether the moving party has demonstrated likelihood
17 of success on the merits, “a bankruptcy court must consider whether the debtor has a reasonable

18 ²⁹ See *In re Pac. Gas & Elec. Co.*, 263 B.R. 306, 321 (Bankr. N.D. Cal. 2001) (Montali, J.) (“There
19 is a procedural avenue to forfend [government] actions that are not subject to the automatic stay
20 but that threaten the bankruptcy estate: a request for an injunction under 11 U.S.C. § 105. The
21 bankruptcy court’s injunctive power is not limited by the delineated exceptions to the automatic
22 stay.”).

23 ³⁰ See also *In re Billing Res.*, 2007 Bankr. LEXIS 3789, at *31–32 (Bankr. N.D. Cal. Nov. 2, 2007)
24 (“[T]his Court has the legal authority to enjoin prosecution of governmental actions against a
25 debtor that falls within the regulatory and police powers exception of Bankruptcy Code section
26 362(b)(4).”) (enjoining Federal Trade Commission); *In re Bulldog Trucking, Inc.*, 150 B.R. 912,
27 916 (W.D.N.C. 1992) (enjoining Interstate Commerce Commission); *In re Hunt*, 93 B.R. 484,
28 491–98 (Bankr. N.D. Tex. 1988) (enjoining Commodities Futures Trading Commission); *In re*
Richmond Paramedical Servs., Inc., 94 B.R. 881, 882 (Bankr. E.D. Va. 1988) (enjoining
Department of Health and Human Services); *In re Vantage Petroleum Corp.*, 25 B.R. 471, 477
(Bankr. E.D.N.Y. 1982) (enjoining Department of Energy).

³¹ This Court also has the “final” and “ultimate” authority to determine the scope and applicability
of the automatic stay. *In re Gruntz*, *supra*, 202 F.3d at 1083, 1087. In *Gruntz*, an *en banc*
decision, the Court of Appeals reasoned that because proceedings “to terminate, annul or
modify” the stay are “core” functions of the bankruptcy courts within their exclusive jurisdiction,
bankruptcy courts also have the implied power to enjoin interference with their jurisdiction to
make determinations regarding the stay. *Id.*

1 likelihood of a successful reorganization, the relative hardship of the parties, and any public interest
2 concerns if relevant.” *Excel*, 502 F.3d at 1096; *see Billing Res.*, 2007 Bankr. LEXIS 3789, at *27
3 (adopting *Excel* standard to enjoin the Federal Trade Commission).³² To balance the hardships
4 between the parties, a Bankruptcy Court “must identify the harms which a preliminary injunction
5 might cause to the defendants and weigh these against the plaintiff’s threatened injury.” *In re Billing*
6 *Res.*, 2007 Bankr. LEXIS 3789, at *33. Here, each factor weighs decidedly in favor of enjoining
7 FERC.

8 *I. The Debtors Have a Reasonable Likelihood of a Successful Reorganization*³³

9 In the Ninth Circuit, a debtor seeking an injunction “must show a reasonable likelihood of a
10 successful reorganization.” *Excel*, 502 F.3d at 1095. To do so, the debtor must show that it has
11 engaged in activities geared towards reorganization, describe what those “activities are [and explain]
12 how [those activities] could meaningfully contribute to [the debtor’s prospects] for reorganization.”
13 *Id.* at 1097. This is not a “high burden,” and does not require the debtor to produce a specific plan of
14 reorganization or speculate as to the likelihood of that plan’s confirmation. *See Bank of the West v.*
15 *Fabtech Indus. (In re Fabtech)*, 2010 Bankr. LEXIS 5097, at *12 (B.A.P. 9th Cir. July 19, 2010)
16 (citing *Excel*, 502 F.3d at 1097). Indeed, “[a]t this early stage of [a] Debtor’s bankruptcy case,” the
17 debtor is often in “clear pursuit of several viable avenues of possible reorganization,” *see Billing*
18 *Res.*, 2007 Bankr. LEXIS 3789, at *30 (Bankr. N.D. Cal. Nov. 2, 2007). This is unsurprising given
19 “[t]he paramount policy and goal of Chapter 11, to which all other bankruptcy policies are
20 subordinated, is the rehabilitation of the debtor.” *In re Pac. Gas & Elec. Co.*, 283 B.R. 41, 59 (N.D.
21 Cal. 2002) (citing *In re Ionosphere Clubs, Inc.*, 98 B.R. 174, 176 (Bankr. S.D.N.Y. 1989)) (alteration

22
23 ³² *See also In re TK Holdings Inc.*, Adv. Pro. No. 17–50880, Hr’g Tr. (**Exhibit 5**) at 25:21–24
24 (Bankr. D. Del. Aug. 16, 2017) (“I start with the likelihood of success. Case law here teaches
25 that the proper focus is on the debtors’ prospects for a successful reorganization and whether the
conduct to be enjoined threatens that reorganization.”) (enjoining actions brought by the States of
Hawaii and New Mexico and the Government of the U.S. Virgin Islands).

26 ³³ As this Court has observed, the likelihood of success prong can be “difficult” to apply in the
27 reorganization context. *In re Pac. Gas & Elec. Co.*, 263 B.R. 306, 322 (Bankr. N.D. Cal. 2001)
28 (Montali, J.). Some courts, like *FirstEnergy*, ask whether the debtor is reasonably likely to
succeed in the adversary proceeding. *See FirstEnergy*, 2018 Bankr. LEXIS 1488, at *34–53
(applying Sixth Circuit law). *But see Excel*, 502 F.3d at 1095–96 (doing so would “collapse the
traditionally distinct merits and hardship prongs into a single hardship inquiry”).

1 in original), rev'd on other grounds sub nom. *Pac. Gas & Elec. Co. v. California ex rel. California*
2 *Dep't of Toxic Substances Control*, 350 F.3d 932 (9th Cir. 2003). And the equities “favor[] the
3 debtor at the beginnings of a case.” *In re Linda Vista Cinemas, L.L.C.*, 2010 Bankr. LEXIS 1743, at
4 *5–6 (Bankr. D. Ariz. May 25, 2010).

5 Although the Debtors' Chapter 11 cases are newly filed, the Debtors have already made
6 “tangible progress” towards reorganization. *See id.* For example, they have secured \$5.5 billion in
7 DIP financing that will allow them to continue to operate as they reorganize, and will ensure the
8 continual income of significant cash flow from a customer base that in some instances has no other
9 option but to rely upon the Debtors for critical services, such as electricity and natural gas. *See In re*
10 *Billing Res.*, 2007 Bankr. LEXIS 3789, at *30 (noting that a debtor's “projections of positive cash
11 flow” support a finding that the debtor has “met its burden of showing a reasonable likelihood of a
12 successful reorganization”). Indeed, as a utility, the Debtors effectively must reorganize for the
13 benefit of both the community and the people that they serve. To that end, the Debtors' efforts are
14 entitled to significant deference “at this very early stage of the proceedings,” and effectively
15 demonstrate a reasonable likelihood of successful reorganization. *See Linda Vista Cinemas*, 2010
16 Bankr. LEXIS 1743, at *5.

17 2. *Absent an Injunction, the Debtors Will Suffer Irreparable Harm*

18 Bankruptcy Courts may enjoin governmental units where their actions will “threaten” the
19 assets of the estate. *See First Alliance Mortg. Co. v. First Alliance Mortg. Co.*, 264 B.R. 634, 652
20 (C.D. Cal. 2001) (“*FAMCO*”)³⁴ (citing *In re Bel Air Chateau Hosp., Inc.*, 611 F.2d 1248, 1251 (9th
21 Cir. 1979); *In re Tucson Yellow Cab Co.*, 27 B.R. 621, 623 (B.A.P. 9th Cir. 1983)). Specifically,
22 courts have concluded that a debtor is likely to suffer irreparable harm where governmental action
23 threatens: (i) the Bankruptcy Court's exclusive jurisdiction over the *res* of the estate, or (ii) the
24 integrity of the bankruptcy process. *See In re Billings Res.*, 2007 Bankr. LEXIS 3789, at *32 (citing
25 *FAMCO*, 264 B.R. at 655). The FERC Order does both, and thus it irreparably harms the Debtors.

26
27 ³⁴ *See FAMCO*, 264 B.R. at 653 & 654 n.20 (“[T]he general standard for enjoining a regulatory or
28 police powers action under § 105 is closely tied to the irreparable injury prong of the test for
injunctive relief. . . . [T]here is no ‘special’ or ‘heightened’ standard for issuance of § 105
injunctions against governmental units.”).

1 In addition, if the Debtors’ determine that any of the PPAs should be rejected, and this Court were to
2 agree, then those determinations will factor into the Debtors’ plan of reorganization. However,
3 under FERC’s analysis, those determinations would not be final and would need to await FERC’s
4 decision, applying different standards for consideration and with potentially opposite results.³⁵ Such
5 uncertainty with respect to the treatment of executory contracts is precisely what the Bankruptcy
6 Code seeks to avoid.

7 a. FERC Action Threatens this Court’s Exclusive Jurisdiction

8 Only this Court may authorize the Debtors’ assumption and rejection decisions. See 11
9 U.S.C. § 365(a). Further, because the PPAs are executory contracts, and are property of the estate,
10 this Court’s jurisdiction over them is exclusive. See 28 U.S.C. §§ 157, 1334(e).³⁶ This Court should
11 enjoin any FERC Action, including the FERC Order, to avoid the irreparable harm that would
12 necessarily befall the Debtors if they must also seek FERC’s permission to reject any of their PPAs
13 and if FERC were to take steps to strip or otherwise undermine this Court’s exclusive jurisdiction
14 over the PPAs pursuant to the FERC Order.

15 Specifically, an injunction is necessary to avoid the situation that arose in *NRG Energy*.
16 There, unencumbered by any court-ordered injunction, FERC compelled the debtor’s post-petition
17 performance under an executory power agreement the debtor sought to reject. See *NRG Energy*,

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19 ³⁵ See, e.g., *In re FirstEnergy Sols. Corp.*, Adv. Pro. No. 18-05021-AMK, Hr’g Tr. (Bankr. N.D.
20 Ohio June 26, 2018) (**Exhibit 6**) at 83:16–87:17 (“[T]he Court is now prepared to conclude that
21 the bankruptcy business judgment standard is what applies to these contested matters. . . . The
22 Court rejects any standard importing public interest principles from the Federal Power Act as
23 FERC might otherwise consider in a different context.”).

24 ³⁶ See also General Order No. 24, *Order Referring Bankruptcy Cases and Proceedings to*
25 *Bankruptcy Judges and Authorizing Bankruptcy Appeals to be Decided by the Ninth Circuit*
26 *Bankruptcy Appellate Panel* (Feb. 22, 2016); *In re Olson*, 2006 Bankr. LEXIS 4823, at *17
27 (B.A.P. 9th Cir. Nov. 21, 2006) (a debtor’s interest in executory contracts “falls within the
28 definition of property of the estate”) (citing *In re Computer Commc’ns Inc.*, 824 F.2d 725, 730
(9th Cir. 1987)); *In re Phillips*, 2010 U.S. Dist. LEXIS 89834, at *9–11 & n.1 (W.D. Wash. July
30, 2010) (even a rejected executory contract “remains property of the estate, but it is
unenforceable against the estate”) (collecting cases); *In re AMR Corp.*, 730 F.3d 88, 102 (2d Cir.
2013) (contract rights are property of the estate); *Cinicola v. Scharffenberger*, 248 F.3d 110, 124
(3d Cir. 2001) (executory contracts constitute property of the estate under § 541 of the
Bankruptcy Code); *Grays Harbor*, 379 F.3d at 652 (9th Cir. 2004) (“A complaint that merely
seeks declaratory relief as to contract formation issues would not necessarily intrude upon the
rate-setting jurisdiction of FERC.”); *id.* at 653 (J. Callahan, dissenting) (“It is true that claims
that are strictly contractual in nature are not preempted by the FPA.”).

1 2003 U.S. Dist. LEXIS 11111, at *3–5. Then, after the Bankruptcy Court granted the debtor’s
2 motion to reject the contract, FERC—still not subject to any injunction—entered a second order
3 requiring the debtor to perform under the *rejected* contract, disregarding and effectively negating the
4 Bankruptcy Court’s order. *Id.* at *6–7. In so doing, FERC claimed to divest both the District Court
5 *and* the Bankruptcy Court³⁷ of subject-matter jurisdiction. *Id.* at *12.

6 While the Debtors disagree that the FERC Order or any FERC Action can operate to divest
7 this Court of its exclusive jurisdiction over the Debtors’ property—indeed such action by FERC
8 would violate the automatic stay—the entire issue can be easily avoided. This Court should enjoin
9 any attempt by FERC to exercise its “concurrent” jurisdiction because it threatens this Court’s
10 comprehensive jurisdiction over the administration of the estate. For example, assume this Court
11 declines to enter an injunction. Then, the Debtors subsequently move to reject an executory PPA,
12 which this Court grants after applying the business judgment standard. Further assume that FERC
13 exercises its purported “discretion” to conduct a “regulatory review” of this Court’s decision. In so
14 doing, FERC would likely impose the *Mobile-Sierra* doctrine, which would mean that this Court’s
15 decision would remain valid if, and only if, FERC determines that the filed rate seriously harms the
16 public interest. This is not *concurrent*—*i.e.*, operating or occurring at the same time—jurisdiction.
17 FERC’s Order demotes this Court to an advisory role so that FERC can apply a standard of review
18 (that is nowhere to be found in the Bankruptcy Code) to a subset of the Debtors’ executory contracts.

19 It is understandable that FERC desires “concurrent” jurisdiction. It is even understandable
20 that FERC would attempt to assert jurisdiction by proclamation—no one else has any interest in
21 doing it for them. But only Congress can confer jurisdiction upon FERC. And Congress has never
22 given FERC the authority to review this Court’s section 365 decisions. In fact, in light of the
23 numerous specific exceptions to the general section 365 authority to reject contracts that Congress
24 chose to include in the Bankruptcy Code, “including those for other contracts subject to extensive
25 regulation, and the absence of any exception for contracts subject to FERC jurisdiction, it is clear
26 that Congress intended § 365(a) to apply to contracts subject to FERC regulation.” *FirstEnergy*,
27 2018 Bankr. LEXIS 1488, at *41 (citing *Mirant*, 378 F.3d at 522). The Fifth Circuit decided *Mirant*

28 ³⁷ Bankruptcy courts are defined as a unit of the District Court. *See* 28 U.S.C. § 151.

1 in August 2004. In the subsequent fourteen-year period, Congress has done nothing to correct the
2 Fifth Circuit’s interpretation of the interaction between the FPA and the Bankruptcy Code.

3 b. FERC Action Threatens the Integrity of the Bankruptcy Code

4 FERC Action and the FERC Order threaten the integrity of the Bankruptcy Code in two
5 ways. First, it would repeal, by administrative fiat, section 365 of the Bankruptcy Code. Second, it
6 would advantage a FERC-selected group of PPA counterparties vis-à-vis the Debtors other
7 creditors—including, notably, those who have lost their homes and lives to the 2017 and 2018
8 Wildfires. Such action “run[s] so contrary to the policy of the Bankruptcy Code that it should not be
9 permitted.” *See Penn Terra Ltd. v. Dep’t of Envtl. Res.*, 733 F.2d 267, 273 (3d Cir. 1984).

10 The rejection doctrine was created to enable bankruptcy estate fiduciaries to free the estates
11 under their control from the onerous obligations of executory contracts and leases. *See In re Locke*,
12 180 B.R. 245, 260 (Bankr. C.D. Cal. 1995). Thus, to promote a successful reorganization, section
13 365 of the Bankruptcy Code grants a debtor the option to assume or reject executory contracts. *In re*
14 *Pac. Gas & Elec. Co.*, 2004 U.S. Dist. LEXIS 22023, at *21 (N.D. Cal. Sept. 30, 2004). Section
15 365, therefore, is a fundamental debtor right to which neither the Debtors’ contractual counterparties
16 nor FERC are entitled. But a debtor may only exercise these rights with the approval of the
17 Bankruptcy Court. *See id.* Under FERC’s theory of concurrent jurisdiction, however, the Debtors
18 could meet all of the requirements to reject an executory contract under section 365, as well as
19 prevailing Ninth Circuit law, but for certain contracts that would be insufficient. Because it
20 conflates rejection, *i.e.*, breach, with unilateral abrogation and modification, FERC would impose a
21 higher burden than the Bankruptcy Code requires. This amounts to an administrative repeal of
22 section 365 by creating a statutory exception that was never enacted by Congress.

23 Furthermore, under section 365(d)(2) of the Bankruptcy Code, the Debtors may seek
24 authority to exercise their rejection rights at any point before confirmation of the chapter 11 plan.
25 *See* 11 U.S.C. § 362(d)(2). If either FERC or one of the Debtors’ contractual counterparties believes
26 that affording the Debtors their Congressionally-allotted timeframe creates “some manifest
27 unfairness,” its remedy “lies *not* in seizing an undue advantage over other creditors but in a petition
28 to compel [assumption or rejection] under 11 U.S.C. § 365(d)(2).” *Pac. Gas & Elec. Co.*, 2004 U.S.

1 Dist. LEXIS 22023, at *22. Because the automatic stay prohibits PPA counterparties, like all other
2 contractual counterparties, from bringing or prosecuting an action to seize an undue advantage over
3 other similarly situated creditors, PPA counterparties must therefore either await the Debtors’
4 assumption or rejection decision or move to compel election.

5 Here, however, the FERC Complainants initiated the FERC Proceedings in the hopes that
6 FERC would act before the Debtors filed their Chapter 11 petitions and section 362 took effect,
7 which FERC did. Seemingly, the FERC Complainants’ (and other PPA Counterparties’) next step
8 would be to leverage FERC’s asserted “concurrent” jurisdiction into a result that would *require* the
9 unequal treatment of general unsecured creditors. The FERC Complainants seek full value for the
10 Debtors’ obligations to them, even if it means disadvantaging individual victims of the 2017 and
11 2018 Wildfires. Failure to enjoin FERC from exercising its asserted “concurrent” jurisdiction would
12 give PPA counterparties an unfair benefit—unavailable to any of the Debtors’ other contract
13 counterparties, or other creditors—that would upset the priority scheme set forth in section 507 of
14 the Bankruptcy Code.

15 3. *Injunctive Relief Would Harm Neither FERC Nor the PPA Counterparties*

16 Should this Court issue an injunction, FERC would not be harmed at all. A preliminary
17 injunction would not require this Court to modify a filed-rate contract in derogation of FERC’s
18 exclusive jurisdiction over such matters. *See FirstEnergy*, 2018 Bankr. LEXIS 1488, at *57. Nor
19 would a potential future rejection. In *FirstEnergy*, the Bankruptcy Court held that “rejection,
20 including the attendant cessation of performance, does not intrude on FERC’s jurisdiction over filed
21 rates.” *Id.* at *50–51 (imagining consequences of a solvent entity’s failure to perform before filing
22 for bankruptcy, and concluding “[r]ejection has exactly the same effect (breach) and the same result
23 (a claim against the estate)”). In so ruling, the court echoed the Fifth Circuit’s *Mirant* opinion and
24 found that rejection of a filed-rate contract was *not* a collateral attack on the filed rate. *See id.* at *51
25 (citing *Mirant*, 378 F.3d at 522 (“A motion to reject an executory power contract is not a collateral
26 attack upon that contract’s filed rate because that rate is given *full effect* when determining the
27 breach of contract damages resulting from the rejection.”)). Rather, as the Bankruptcy Court held in
28 *FirstEnergy*, any rejection of FERC-regulated contracts would actually vindicate the FERC-

1 approved rates set forth in the PPAs by allowing damages *at* those filed rates through the claims
2 process. *Id.* at *57. In any event, injunctive relief would avoid a lengthy proceeding that is “likely
3 void *ab initio*.” *Id.*

4 Nor would an injunction harm the Debtors’ PPA counterparties. Holding that the Debtors
5 retain the ability to seek authorization to reject contracts that the Bankruptcy Code allows the
6 Debtors to reject “cannot be a cognizable substantial harm.” *Id.* at *58. Counterparties will be
7 allowed to challenge any rejection motion that may be filed at the appropriate time and, if
8 unsuccessful, will be entitled to allowed claims based on applicable non-bankruptcy law for
9 prepetition breach of contract damages. *Id.* at *52. The financial disappointment—which is
10 hypothetical at this point—that their claims may not be paid in full will be fairly shared with all
11 other unsecured creditors, as contemplated under the Bankruptcy Code. *Id.*³⁸ Absent an injunction,
12 however, FERC would be free to essentially pick winners and losers from among the Debtors’
13 creditors, contrary to the statutory scheme of the Bankruptcy Code.

14 4. *Public Policy Favors Issuing the Injunction*

15 In the context of a chapter 11 case, the public interest is served by “promoting a successful
16 reorganization.” *Id.* at *58 (citing *In re Lazarus Burman Assocs.*, 161 B.R. 891, 901 (Bankr.
17 E.D.N.Y. 1993)); *see In re Billing Res.*, 2007 Bankr. LEXIS 3789, at *43; *see also In re PTI Holding*
18 *Corp.*, 346 B.R. 820, 832 (Bankr. D. Nev. 2006) (“The public interest in successful reorganizations
19 is significant.”). Here, preventing FERC from exercising “concurrent” jurisdiction will serve that
20 interest and further assure that FERC does not have the ability to prioritize certain claimants over
21 those that are similarly situated.

22 **CONCLUSION**

23 For the foregoing reasons, this Court should grant the Motion and prevent FERC from
24 exercising its asserted “concurrent” jurisdiction.

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26
27 ³⁸ *See FirstEnergy*, 2018 Bankr. LEXIS 1488, at *52 (“The economic disappointment a power
28 contract counterparty experiences in a debtor-party’s bankruptcy case cannot be avoided by
invoking the Federal Power Act and the filed rate doctrine any more than the disappointment of
any other general unsecured creditor can be avoided by invoking the law of contract or tort.”).

1 Dated: January 29, 2019

WEIL, GOTSHAL & MANGES LLP

KELLER & BENVENUTTI LLP

4 By: /s/ Peter J. Benvenuti
Peter J. Benvenuti
Proposed Attorneys for Debtors
and Debtors in Possession

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EXHIBIT 1

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**UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION**

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18 **In re:**

PG&E CORPORATION

Debtor.

Tax I.D. No. 94-3234914

Case Nos. 19 - ____ (____)
19 - ____ (____)

Adv. Pro. No. 19- ____ (____)

Chapter 11

22 **In re:**

**PACIFIC GAS AND ELECTRIC
COMPANY**

Debtor.

TAX I.D. NO. 94-0742640

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[PROPOSED] ORDER ON MOTION
FOR PRELIM. INJUNCTION

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**PG&E CORPORATION,
PACIFIC GAS AND ELECTRIC
COMPANY,**

Plaintiffs,

v.

**FEDERAL ENERGY
REGULATORY COMMISSION**

Defendant.

**[PROPOSED] ORDER ON DEBTORS' MOTION
FOR PRELIMINARY INJUNCTION**

Weil, Gotshal & Manges LLP
767 Fifth Avenue
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**[PROPOSED] ORDER ON MOTION
FOR PRELIM. INJUNCTION**

1 The Debtors' Motion for Preliminary Injunction (the "**Motion**"), brought by Plaintiffs
2 PG&E Corporation ("**PG&E Corp.**") and Pacific Gas and Electric Company (the "**Utility**"), as
3 debtors and debtors in possession (collectively, "**PG&E**" or the "**Debtors**"), came on for hearing
4 on [February __, 2019], on shortened notice. Appearances of counsel were as stated in the record.

5 By the Motion, the Debtors seek an injunction prohibiting defendant Federal Energy
6 Regulatory Commission ("**Defendant**" or "**FERC**") from (a) conducting or continuing to conduct
7 proceedings involving the Debtors, or either of them, that have as their purpose or effect any current
8 or future limitation on the Debtors' ability to reject, with this Court's authorization, wholesale
9 executory energy contracts ("**PPAs**", as defined below), or (b) asserting jurisdiction over such
10 contracts or their potential future rejection in a manner that interferes with this Court's exclusive
11 jurisdiction over such matters.

12 The Court has considered the Debtors' Complaint for Declaratory Judgment and
13 Preliminary and Permanent Injunctive Relief (the "**Complaint**"), the Declaration of Fong Wan in
14 Support of Debtors' Motion for Preliminary Injunction (the "**Wan Declaration**"), the Memorandum
15 of Points and Authorities in Support of Debtors' Motion for Preliminary Injunction (the
16 "**Memorandum in Support**"), and the pleadings and other papers filed by Defendant, other
17 evidence as reflected in the record, and the arguments of counsel, and based thereon the Court finds
18 and concludes as follows:

19 Findings of Fact and Conclusions of Law

20 A. This Court has jurisdiction over this adversary proceeding and the Chapter 11 Cases
21 to which it is related, and has jurisdiction to consider the Motion and the relief requested therein
22 pursuant to 28 U.S.C. §§ 157 and 1334, and the Order Referring Bankruptcy Cases and Proceedings
23 to Bankruptcy Judges, General Order 24 and Rule 5011-1(a) of the Bankruptcy Local Rules; and
24 consideration of the Motion and the requested relief are a core proceeding pursuant to 28 U.S.C.
25 § 157(b).

26 B. Venue in this Court is proper pursuant to 28 U.S.C. §§ 1408 and 1409.
27

1 C. Beginning on January 18, 2019, several counterparties to wholesale power purchase
2 agreements with the Debtors initiated proceedings before FERC requesting—on an expedited basis—
3 that FERC order that “if it files a petition for bankruptcy, PG&E may not abrogate, amend or reject in
4 bankruptcy any of the rates, terms and conditions of its wholesale power purchase agreements subject
5 to [FERC]’s jurisdiction without first obtaining approval from [FERC]” (the “**FERC Proceedings**”).

6 D. On January 25, 2019, FERC issued an order concluding that “this Commission and the
7 bankruptcy courts have concurrent jurisdiction to review and address the disposition of wholesale
8 power contracts sought to be rejected through bankruptcy,” (the “**NextEra Order**”). On January 28,
9 2019, FERC issued an order, in a separate proceeding, reaching a substantially similar conclusion (the
10 “**Exelon Order**,” and together with the NextEra Order, the “**FERC Order**”).

11 E. Notice of the Motion and of the hearing thereon was shortened for cause shown
12 pursuant to order of this Court entered [January __, 2019], notice was properly given to the Defendant
13 as shown by the proof of service on file herein, and notice of the hearing on the Motion was fair,
14 reasonable and appropriate in the circumstances.

15 F. This Court is authorized to grant the injunctive and other relief requested by the Debtors
16 under sections 105, 106(a) and 362(a) of title 11 of the United States Code (the “**Bankruptcy Code**”),
17 Federal Rule of Civil Procedure 65 and Rule 65-1 the Civil Local Rules for the United States District
18 Court for the Northern District of California (the “**Civil Local Rules**”), as made applicable in these
19 proceedings pursuant to Rules 7001(7) and 7065 of the Federal Rules of Bankruptcy Procedure (the
20 “**Bankruptcy Rules**”), and 1001-2(a) of the Bankruptcy Local Rules for the United States District
21 Court for the Northern District of California (the “**Bankruptcy Local Rules**”).

22 G. The automatic stay of Bankruptcy Code § 362(a) applies to, and restrains the
23 continuation or prosecution of, any action or proceeding involving the Debtors, or either of them, that
24 has as its purpose or effect any current or future limitation on the Debtors’ ability to reject, with this
25 Court’s authorization, any one or more of the PPAs,

26 H. No exception to the automatic stay, specifically including the “police powers”
27 exception provided in Bankruptcy Code §362(b)(4), is applicable here.

1 I. The Debtors have demonstrated that they have a likelihood of success on their claims
2 that the Debtors are likely to reorganize successfully.

3 J. The injunctive relief sought by the Motion is necessary to prevent irreparable harm to
4 the Debtors' estates; and to protect the reorganizational goals of the Bankruptcy Code.

5 K. The balance of hardships weighs heavily in favor of granting the injunctive relief
6 requested by the Debtors; FERC would not suffer any hardship or injury from the granting of such
7 relief; and PPA contract counterparties, while not parties to this adversary proceeding, would likewise
8 suffer no injury because their attempts to prosecute claims involving the Debtors before FERC are
9 unquestionably already stayed by the automatic stay.

10 L. Granting the relief requested is in the public interest, because it will further the purposes
11 and objectives of achieving an efficient reorganization of the Debtors and the fair and equitable
12 treatment of their creditors consistent with the requirements of the Bankruptcy Code, and will avoid
13 unnecessary and expensive duplication of proceedings with the risk of inconsistent results.

14 M. The Court adopts as part of its findings of fact and conclusions of law the additional
15 statement of reasons for granting this relief made by the Court on the record at the conclusion of the
16 hearing.

17 Accordingly, for good cause,

18 **IT IS HEREBY ORDERED THAT:**

- 19 1. The Motion is granted as provided herein.
- 20 2. As of the Petition Date, section 362 of the Bankruptcy Code automatically stayed the
21 FERC Proceedings; therefore the FERC Proceedings, and any and all deadlines in
22 them, are suspended, and the time for the Debtors to take any act or exercise any right
23 in those proceedings is tolled unless and until applicable relief from the automatic stay
24 is granted by order of this Court.
- 25 3. Under section 362 of the Bankruptcy Code, any entity's attempt to enforce the FERC
26 Order violates the automatic stay.
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4. Under section 362 of the Bankruptcy Code, any action by FERC, or any other entity, that would attempt to divest or otherwise nullify or impede this Court’s exclusive authority to approve or deny the Debtors’ requests to assume or reject executory contracts under section 365 of the Bankruptcy Code violates the automatic stay.
5. If or to the extent that the automatic stay does not apply:
 - a. the FERC Proceedings, including any and all upcoming deadlines in those proceedings, are preliminarily enjoined under section 105 of the Bankruptcy Code with the same effect and to the same extent as would be the case if the automatic stay did apply, including as set forth in paragraphs 2, 3, and 4 immediately above;
 - b. any entity’s attempt to enforce the FERC Order is preliminarily enjoined under section 105 of the Bankruptcy Code; and
 - c. any action by FERC, or any other entity, that would attempt to divest or otherwise nullify or impede this Court’s exclusive authority to approve or deny the Debtors’ requests to assume or reject executory contracts under section 365 is preliminarily enjoined under section 105 of the Bankruptcy Code.
6. The Debtors shall serve this Order, as well as all supporting pleadings and papers, on FERC, its counsel, and on the federal government as required by Federal Rules of Civil Procedure 4 and 5, made applicable in these proceedings pursuant to Bankruptcy Rule 7004, by _____, 2019 at ____:____ am/pm (Prevailing Pacific Time).
7. The Debtors are authorized to take all steps necessary or appropriate to carry out this Order.
8. Nothing contained in this Order or in the Motion is intended to be or shall be construed as (a) a determination as to the validity of any claim against the Debtors, (b) a limitation on the Debtors’ or any appropriate party in interest’s rights to dispute any claim, or

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(c) an approval or assumption of any agreement, contract, program, policy, or lease under section 365 of the Bankruptcy Code.

9. Notwithstanding entry of this Order, nothing herein shall create, nor is intended to create, any rights in favor of or enhance the status of any claim held by, any party.

10. This Order shall be immediately effective and enforceable upon its entry.

11. This Court shall retain jurisdiction to hear and determine all matters arising from or related to the implementation, interpretation, or enforcement of this Order.

12. This Order is effective as of ___:___ am/pm (Prevailing Pacific Time) on _____, 2019.

** END OF ORDER **