

THE
AM LAW LITIGATION DAILYLitigator of the (Past) Week: Cravath Closes
the Door on \$2.5B Suit Against PG&E Over
Emergency Power Shutdowns

By Ross Todd

November 29, 2023

Let me briefly familiarize you with a recent addition to the California lexicon: Public Safety Power Shutoff, or PSPS.

It doesn't quite roll off the tongue quite like "dude" or "gnarly," but the phrase has become synonymous with emergency power shutoffs meant to mitigate the risk of potential of sparking wildfires—an unfortunate part of contemporary California reality regulated by the state's Public Utilities Commission.

The Litigator of the Week for the week prior to Thanksgiving is **Omid Nasab** of **Cravath, Swaine & Moore**, who represented Northern California utility PG&E at the California Supreme Court in a case referred by the Ninth Circuit dealing squarely with PPS. The state's high court found PG&E customers were barred from bringing \$2.5 billion in claims for damages over emergency power shutoffs during the 2019 wildfire season made in compliance with guidelines handed down by the state regulator.

"By seeking liability for PPS events regardless of whether the shutoff decision or implementation was negligent, [this] suit interferes with the PUC's broad supervisory power over how utilities can and should respond to the present threat of catastrophic wildfires," wrote Justice Goodwin Liu for the unanimous court in a decision handed down last week.

Litigation Daily: I know Cravath has represented PG&E in a number of civil wildfire-related matters and in bankruptcy proceedings. How did this relationship with the company come about?



Courtesy photo

Omid Nasab of Cravath, Swaine & Moore.

Omid Nasab: PG&E first reached out to Cravath for representation in connection with the Butte Fire, a wildfire that started in 2015. While the bulk of the work for that wildfire was handled by another firm, Cravath was brought in to serve as trial counsel for any critical bellwether cases that reached trial. Ultimately, those cases resolved before trial, but that work served as the foundation for a much broader relationship between Cravath and PG&E in the ensuing years.

Specifically, in October of 2017, PG&E's service territory was wracked by the Wine Country Fires. These fires were unprecedented in their scope and destructiveness—21 major fires that burned about a quarter-million acres, destroyed nearly 9,000 buildings and, tragically, killed 44 people. The following year, PG&E's

equipment caused the Camp Fire, the most destructive and deadliest wildfire in California's history. A large Cravath team, led by my partner **Kevin Orsini**, represented PG&E as lead trial counsel in hundreds of lawsuits filed against the company arising out of these wildfires. After the Camp Fire, PG&E turned to the bankruptcy process to manage the liabilities, and Cravath, as lead counsel on wildfire-related matters, helped to steer the company through the largest utility bankruptcy in U.S. history.

Cravath continues to represent PG&E on cases relating to wildfires that occurred after PG&E's bankruptcy filing, as well as representing other utilities across the country in wildfire litigation.

Who is on the team that represents PG&E and how have you divided the work?

As noted, over the years there has been a large number of Cravath partners and associates, led by Kevin Orsini, who have represented PG&E on wildfire-related matters. The specific case that led to the California Supreme Court's decision on power shutoffs arose as an adversary proceeding in PG&E's bankruptcy. Kevin asked me to take the lead in the adversary proceeding, and I, along with a group of talented associates, secured a dismissal of the action with prejudice from the bankruptcy court, got that decision affirmed on appeal, and then represented PG&E before the Ninth Circuit and ultimately before the California Supreme Court.

At the California Supreme Court, the Cravath team was complemented with terrific co-counsel, **Robert Wright** and **Jeremy Rosen** from **Horvitz & Levy**. Rob and Jeremy, who have extensive experience before the California Supreme Court, helped tailor the argument that had won in the federal courts for the California Supreme Court, and helped me prep for oral argument with some tough moots.

Every step of the way, we also relied on our partnership with the incredibly talented legal team at PG&E. **Steve Schirle** and **Shari Hollis-Ross** took point on this litigation, and they provided invaluable guidance and support.

For those who don't live in California's wildfire country, what exactly is a Public Safety Power Shutoff?

A Public Safety Power Shutoff is when a utility proactively de-energizes its power lines to prevent its lines from sparking an ignition when such an ignition

could cause a catastrophic wildfire, such as when the weather is predicted to be extremely hot, dry and windy. Proactive de-energizations are one of the responses by utilities in California to the wave of catastrophic wildfires that have affected the state since 2017. Fueled by hotter, drier weather, these wildfires have affected millions of people and caused billions of dollars in damage.

While it may sound like a simple decision to temporarily shut off the power in the face of high-risk weather, in reality it calls for weighing complex tradeoffs, in real time, with inherently uncertain information. Without power, numerous unsafe conditions can occur, as life support systems, traffic signals, water pumps, communication systems, hospitals, police stations and fire stations all depend on electricity. And of course there is economic harm from shutoffs, as the loss of power significantly disrupts the lives of residents and the operations of businesses.

What was at stake for PG&E in this particular appeal?

This appeal concerned a number of power shutoffs that PG&E engaged in during October of 2019. Responding to severe windstorms at the peak of wildfire season that year, PG&E engaged in large power shutoffs that de-energized millions of residents of Northern California, with many residents de-energized for several days. The plaintiff in this appeal did not dispute that the power shutoffs were necessary for public safety or that they complied with the guidelines for power shutoffs set forth by PG&E's regulator, the California Public Utilities Commission (CPUC). But, on behalf of a putative class, the plaintiff nonetheless sought compensation for the losses of each de-energized customer, which amounted to an alleged \$2.5 billion, on the theory that the need for the shutoffs could have been averted if PG&E had done a better job of maintaining its grid. The court's ruling foreclosed this broad theory of liability on the ground that it interfered with the CPUC's regulations on when to conduct proactive shutoffs.

Notably, in the years since 2019, PG&E has invested in grid hardening and other measures to greatly reduce the need for safety shutoffs and make them shorter. In the last two years, the number of people in PG&E's service territory that have been affected by a shutoff is a small fraction of those that were affected in 2019.

With this decision in hand, is there anything in particular from the oral argument back in September that sticks out to you?

The court's decision stresses the importance of protecting the authority of the CPUC to regulate utility matters that concern public safety, and it specifically calls out the CPUC's support of PG&E's arguments as bolstering the court's ruling in favor of PG&E. That makes me feel good about our decision to cede some of PG&E's time at oral argument to the CPUC, which appeared as *amicus curiae*, so that the court could hear directly from the CPUC's counsel, **Can-dace Morey**, on why the plaintiff's theories of liability posed a threat to the CPUC's regulation of Public Safety Power Shutoffs. Ms. Morey explained that putting billions of dollars of potential class action liability into play when a utility weighed whether to conduct a safety shutoff would inject considerations into such decisions that the CPUC did not want to be a part of a utility's calculus, which corroborated one of our key arguments in the case.

Southern California Edison and San Diego Gas & Electric filed amicus briefs here. What can they and PG&E take from this decision?

The California Supreme Court held that assessment of a utility's compliance with the CPUC's standards in deciding to implement a PSPS event is within the exclusive jurisdiction of the CPUC to decide. In other words, when a utility in California makes a decision to engage in a proactive de-energization to protect public safety, it can focus on complying with its regulator's guidance on when, how and why such shutoffs should be performed, without worrying about that decision being second-guessed down the road by class action lawsuits that seek to apply different standards.

Last week's decision explicitly leaves open the possibility for "a narrowly tailored suit based on allegations that a utility acted negligently and in violation of PUC guidelines in its decision to implement PSPS events or the implementation of those events." How does the threat of a suit such as that compare to what PG&E faced here?

In the current lawsuit, the plaintiff advanced a theory of liability that encompassed every customer that

had been de-energized by PG&E in 2019. This scope not only spanned multiple different power shutoff events, but each event covered dozens or hundreds of distinct circuits covering different areas. The plaintiff sought to penalize PG&E for all shutoffs regardless of whether they complied with the CPUC's guidelines, which led to the large \$2.5 billion in alleged damages. The court squarely rejected this theory of liability. The court's opinion does not directly address whether a more "narrowly tailored" lawsuit could be crafted that would avoid preemption. But the court's opinion does set forth numerous preemption considerations when it comes to the CPUC's intense oversight of this public safety tool that will still be implicated even with a more tailored set of allegations.

Any future lawsuits will also face different facts. As noted, since 2019, PG&E has invested in grid hardening and other steps to reduce wildfire risk and the need for safety shutoffs, including an unprecedented initiative to underground power lines. The shutoffs in recent years have been far smaller and shorter than those in earlier years.

Cravath has landed wildfire-related work for other utilities across the country since taking on the PG&E assignment, right? How is a firm whose litigators are located across the country from wildfire country in the Western U.S. equipped to handle these assignments?

Yes, Cravath has been retained to handle wildfire-related work for other utilities. For example, our firm is currently representing Xcel Energy in connection with the destructive 2021 Marshall Fire that burned in Boulder County, Colorado.

While based in New York, Cravath litigators have long been retained to address our clients' most critical and complex cases regardless of the location, and we have decades of experience handling cases across the country. What matters in these situations is not our home base, but rather the level of skill, experience and effort we are able to bring to bear on these matters.

What will you remember most about handling this matter and getting this result?

Working with the broader PG&E and Cravath teams to help secure a result that will promote public safety.

CRAVATH, SWAINE & MOORE LLP