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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

UNITED STATES OF AMERICA, Plaintiff, v. PACIFIC GAS AND ELECTRIC COMPANY, Defendant.	Case No. 14-CR-00175-WHA **RESPONSE TO REQUEST FOR BRIEFING ON STATUTORY LIMIT TO TERM OF PROBATION AND ON PUBLIC DISCLOSURE OF MONITOR REPORTS** Judge: Hon. William Alsup Date: April 16, 2019

Defendant Pacific Gas and Electric Company ("PG&E") respectfully submits this memorandum in response to the Court's April 2, 2019 Minute Order directing the parties to submit briefing on (i) whether the Court can extend PG&E's term of probation in light of the Court's finding of a violation and (ii) whether the federal monitor reports should be made public at this time. With respect to the first issue, the Court has already imposed the five-year statutory maximum probation period on PG&E, and that term cannot be extended further. With respect to the second issue, revealing the Monitor's reports to the public could impede the Monitor's work by discouraging candor; instead, the Court should adhere to its previous determination to release a final public report following a process by which the Monitor and PG&E can protect confidential information.

I. The Court Cannot Extend PG&E's Probation Term Beyond The Five-Year Maximum Already Imposed

The Court has asked whether it can extend the term of PG&E's probation in light of the Court's finding of a violation. Based on statute, PG&E's probation cannot be extended beyond the statutory maximum already imposed. "[T]he authorized term[] of probation" is "for a felony, not less than one nor more than five years." 18 U.S.C. § 3561(c)(1). Because the five-year maximum sentence of probation has already been imposed, the Court is prohibited by statute from further extending PG&E's probation.

The five-year limit on probation has been a feature of the Probation Act since 1925. "[T]he Supreme Court, in an early decision interpreting the Probation Act, read [its] five-year proviso as if it contained the word total: 'The only limitation, and this applies to both the grant and modification of it, is that the total period of probation shall not exceed five years.'" *United States v. Albano*, 698 F.2d 144, 147 (2d Cir. 1983) (quoting *Burns v. United States*, 287 U.S. 216, 221 (1932)); *see also United States v. McCrae*, 714 F.2d 83, 86 (9th Cir. 1983) ("[P]robation may be extended up to the five year limit when probation is later revoked."); *Thurman v. United States*, 423 F.2d 988, 990 (9th Cir. 1970) ("If execution of a sentence is to be suspended and a defendant placed on probation, the maximum permissible term of probation is five years.").

The Comprehensive Crime Control Act of 1984, which amended the probation statute, did not affect that five-year limit: "[T]he new legislation enacted the same requirement that the term of probation

should not last more than five years." *United States v. Fryar*, 920 F.3d 252, 257 (5th Cir. 1990); *see also United States v. Mele*, 117 F.3d 73, 75 (2d Cir. 1997) ("[T]his amendment was intended to clarify the prior law, not change it."); *United States v. Yancey*, 827 F.2d 83, 88 (7th Cir. 1987) ("[T]he legislature did not, in enacting the new legislation, believe it inconsistent to limit the term to five years, while allowing revocation at any time before the term of probation expires.").

Nothing in the probation statute empowers a court to impose a probation period extending beyond the maximum term of five years, even when a defendant has committed a probation violation. The statute concerning the extension of a term of probation, 18 U.S.C. § 3564(d), which a court may order following a finding of a probation violation, *id.* § 3565(a)(1), permits an extension only "if less than the maximum authorized term was previously imposed." *Id.* § 3564(d). Thus, if the maximum authorized term of probation was imposed initially—as it was here—a court may not further extend the term of probation. Indeed, in the one case we have located in which the district court did impose an additional term of probation on a defendant who had already received the five-year maximum, the government conceded error on appeal. The Second Circuit reversed and remanded with an instruction to remove the additional two years from the district court's judgment. As the government had acknowledged, "to the extent the judgment extend[ed] Jones's probation by two years, it [was] illegal." *United States v. Jones*, 182 F.3d 901, 1999 WL 385739, at *1 (2d Cir. 1999) (table).

Furthermore, even where the maximum authorized term was *not* previously imposed, an extension must be made "pursuant to the provisions applicable to the initial setting of the term of probation." 18 U.S.C. § 3564(d). And those provisions, as discussed above, state that the maximum term of probation for a felony is five years. *Id.* § 3561(c)(1). Thus, the total term of probation, including any extension, may not exceed five years. *See United States v. Eidson*, 31 F. App'x 153 (5th Cir. 2001) (holding that when the initial sentence imposed three years of probation, the court was authorized "to extend . . . probation another two years"); *United States v. Fuentes-Mendoza*, 56 F.3d 1113, 1115 (9th Cir. 1995) (interpreting a similarly worded provision concerning the extension of a term of supervised release and holding that "if less than the maximum authorized term of supervised release was initially imposed, a defendant's supervised release term can later be extended *up to the maximum originally allowable term*. We do not read it to allow an

extension beyond the originally allowable maximum." (emphasis in original)); *United States v. Tham*, 884 F.2d 1262, 1264 (9th Cir. 1989) (Even where probation is revoked and a new term of probation imposed, "the period of probation may not exceed five years.").

Nor may a court circumvent the five-year limit on probation by resentencing a defendant to consecutive probation terms, each for a different offense of conviction. The statute is clear that "[m]ultiple terms of probation, whether imposed at the same time or at different times, run concurrently with each other." 18 U.S.C. § 3564(b); *see also United States v. Hughes*, 964 F.2d 536, 538 n.1 (6th Cir. 1992) (noting that the probation statute "prohibits consecutive terms of probation totaling more than five years on separate counts of one indictment"); *United States v. Deffes*, 874 F.2d 1501, 1502 (11th Cir. 1989) ("It seems clear that" the probation statute "prohibits a district court from imposing consecutive terms of probation totaling more than five years on separate counts of one indictment."). Indeed, "[a] term of probation" even "runs concurrently with any Federal, State, or local term of probation, supervised release, or parole for another offense to which the defendant is subject or becomes subject during the term of probation." *Id.*

Accordingly, PG&E's probation cannot be extended beyond the statutory maximum already imposed.

II. Making The Monitor's Interim Reports Publicly Available Could Impair The Monitor's Ability To Meet The Goals Set Forth In The Monitor Order

PG&E defers to the Monitor on this issue but believes that public disclosure of the Monitor's interim reports could impair the efficacy of the monitorship by increasing the risk that PG&E employees will not report adverse issues or concerns to the Monitor, and not provide full and candid responses to the Monitor's inquiries. PG&E actively encourages its employees to provide unvarnished information to the Monitor team and to engage with them openly and transparently but recognizes that there may be a chilling effect if employees fear that information they provide to the Monitor will soon become public. Employee candor is foundational to the Monitor's ability to timely detect and fully understand issues that arise or are being investigated. And it is critically important to PG&E, in turn, that the Monitor obtain truthful, complete and candid information. PG&E is trying to become a company where every employee feels

empowered and obligated to speak up regarding safety concerns, and PG&E believes the Monitor's analyses and insights will help PG&E become safer and improve its culture and operations.

PG&E believes the appropriate time for public disclosure is as this Court originally determined: in the Monitor's final written report. That process ensures that the Monitor's ongoing work will not be compromised, and it is consistent with the government's past support for the confidentiality of monitor reports in order to promote candor and accuracy in employee reporting. *See, e.g.*, Letter in Support of the United States' Motion for Leave to File Monitor's Report Under Seal, at 8-12, attached hereto as Exhibit A [hereinafter *DOJ HSBC Letter*]; Mot. Summ. J. by U.S. Dep't of Justice, Decl. of Tarek J. Helou, ¶¶ 13-17, attached hereto as Exhibit B [hereinafter *Helou Declaration*].[1] The Department of Justice's rationale applies here with equal force. In those cases, as here, the Monitor "relies on the full, open and candid cooperation of [monitored] employees"—employees who "might well become concerned that they would suffer negative repercussions from their statements, or information they have provided, being made public." *DOJ HSBC Letter* at 9-10 (quoting Aff. of Michael G. Cherkasky, ¶ 11, attached hereto as Exhibit C). Given the media attention surrounding PG&E, employees may be less candid with the Monitor if they fear they will be publicly identified. Making public interim reports could have a chilling effect even if the Monitor does not use names in his reports or makes targeted redactions, as employees may reasonably fear that sufficient details will be included to ultimately identify individual employees.

The reporting regime set forth in this Court's January 26, 2017 order has three phases: first, an initial report "to PG&E, the Probation Officer, the USAO, and the Board of Directors of PG&E" containing the Monitor's preliminary assessments and recommendations, as well as a proposed budget and the steps necessary to conduct an effective review; second, a series of reports every six months containing the monitor's updated assessments and recommendations, provided to the same recipients; and third, "a final

[1] For example, in *100Reporters LLC v. U.S. Dep't of Justice*, 248 F. Supp. 3d 115 (D.D.C. 2017), the government argued in connection with the Siemens monitorship that making such reports public would discourage candor and voluntary disclosure of misconduct by employees, would deter other companies from agreeing to monitorships in the future, and would provide a road map to the monitor's methods and strategy, enabling other companies under monitorship to circumvent their respective monitor's efforts. *See Helou Declaration*.

written report for public release setting forth the Monitor's assessment of the monitorship and PG&E's compliance with the goals of the monitorship." Order at 8-9, ECF No. 916. For the final written report, the order permits the Monitor to "take whatever steps the Monitor deems appropriate to protect the confidentiality of individuals, if any, mentioned in the final written report." *Id.* at 9. This regime was carefully constructed to encourage sincere cooperation with the Monitor during the monitorship while providing the public with information after the conclusion of the monitorship.

In the interest of promoting a successful monitorship, the Court should adhere to the reporting process set forth in the Court's January 26, 2017 Order.

III. Conclusion

For the foregoing reasons, the Court should decline to extend PG&E's term of probation beyond the statutory maximum and should decline to make the Monitor's reports public.

Respectfully Submitted,

Dated: April 16, 2019

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