BEFORE THE PUBLIC UTILITIES COMMISSION

OF THE STATE OF CALIFORNIA

Order Instituting Rulemaking on the Commission's Own Motion to Adopt New Safety and Reliability Regulations for Natural Gas Transmission and Distribution Pipelines and Related Ratemaking Mechanisms.	R.11-02-019 (Filed February 24, 2011)

COMMENTS OF SOUTHERN CALIFORNIA GAS COMPANY (U 904 G) AND SAN DIEGO GAS & ELECTRIC COMPANY (U 902 M) TO THE WORKSHOP REPORT AND PROPOSED REGULATIONS REGARDING WHISTLEBLOWER PROTECTIONS

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COMMENTS OF SOUTHERN CALIFORNIA GAS COMPANY (U 904 G) AND SAN DIEGO GAS & ELECTRIC COMPANY (U 902 M) TO THE WORKSHOP REPORT AND PROPOSED REGULATIONS REGARDING WHISTLEBLOWER PROTECTIONS

Southern California Gas Company ("SoCalGas") and San Diego Gas & Electric Company ("SDG&E") submit the following comments to the July 23, 2012 Workshop Report And Proposed Regulations Regarding Whistleblower Protections ("Workshop Report"). The purpose of this workshop and subsequent report by the Commission Staff was to assist the Commission in developing a record on whether it is "necessary or practical" for the Commission to "adopt rules to protect utility employees from management retaliation for bringing information to the Commission regarding unreported utility public safety issues."[1] SoCalGas and SDG&E participated in the workshop, along with Pacific Gas and Electric Company, The Utility Reform Network ("TURN"), and the Consumer Protection and Safety Division ("CPSD"). The Utility Workers Union of America ("UWUA"), the party that filed the motion leading to the workshop, did not attend the workshop, send a representative, or submit comments to be discussed during the workshop.

[1] AC Ruling dated March 14, 2012, pp. 6-7.

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I. INTRODUCTION

The English jurist, Lord John Campbell, is often quoted for his astute observation that, "Hard cases … make bad law." It is a reminder that when crafting law, one must not rush to judgment or be hasty to devise a broadly applicable scheme to address a unique and often specific set of bad or unfortunate facts. There is no doubt that the explosion in San Bruno was a terrible tragedy. There is also no doubt that the Commission must take all necessary measures to ensure that the utilities it oversees operate safely. Input from anyone with information should be encouraged. This is why the Commission has a hotline number for anyone to report concerns – any concerns – to the Commission, either by name or anonymously.

SoCalGas and SDG&E agree with this prudence; our companies have used hotlines and other internal reporting channels for years. The fact that these hotlines are infrequently used by utility employees demonstrates the existence of a safety culture where employees feel comfortable bringing safety issues to the attention of management – a safety culture where it is expected that management will welcome employee reports and act upon them. This is the safety culture that SoCalGas and SDG&E embrace, and this is the safety culture we believe the Commission wants the utilities to pursue.

The Workshop Report relies upon one set of bad facts and unsupported assumptions to construct duplicative and unsound regulation: creating an entirely new scheme to investigate individual retaliation claims that the Attorney General's office would otherwise investigate. Encouraging the public or employees of utilities to report potential safety violations will not be enhanced by devising a duplicative and ill-considered scheme to address retaliation.

SoCalGas and SDG&E agree that the Commission's hotline should be more widely published. But, people will not suddenly use the Commission's or the utilities' hotline numbers

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simply because the Commission Staff can investigate retaliation claims. All whistleblower protections do is protect those who are not anonymous. If one considers calling the hotline today but fears retaliation – rationally or not – all one needs to do is remain anonymous. At least one recent study showed that people who say they fear retaliation are ***not*** less inclined to report their concerns.[2/] Conversely, a Nuclear Regulatory Commission study at San Onofre Nuclear Power Plant also showed that having whistleblower protections in place may not alleviate generalized fears of retaliation for filing reports.[3/]

SoCalGas and SDG&E share the Commission's desire to keep California safe. That is why we support (and indeed recommended at the workshop) that Utilities be required to post a notice in company facilities telling employees of the Commission's hotline. The free flow of information to the Commission is enhanced by telling employees that the hotline exists. Information from anyone who knows of potential problems is important and should be encouraged. That is why we developed numerous internal processes to report employee concerns and we believe that they work. But the Commission should remember that most safety issues are addressed on the ground at the earliest possible stage. Few problems are elevated to internal or external hotlines, not because of fear of retaliation, but because of the satisfactory resolution of the safety issue by supervisors or local management.

[2/] The National Institutes of Health recently conducted a study amongst health care professionals to determine if fear of retaliation played a role in diminished reporting of ethical concerns. Despite a surprisingly high response rate to the question about whether participants had some "fear" or retaliation, the study concluded that such fear did not reduce the rate of ethics reporting by participants. *See,* Danis M, et al., "Does fear of retaliation deter requests for ethics consultation?" http://www.ncbi.nlm.nih.gov/pubmed.

[3/] "NRC says 'fear of retaliation' lingers at nuke plant." North County Times, March 02, 2010. The newspaper article cited the NRC's letter to SONGS' Chief Nuclear Officer on March 2, 2010, entitled, "Work Environment Issues at San Onofre Nuclear Generating Station – Chilling Effect." This, despite the fact that the Energy Reorganization Acts whistleblower provision have been in place for many years. Clearly, even the existence of whistleblower protections does not necessarily curb the fears of those employees who fear – even unrealistically – retaliation.

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The Commission should support systems that work and ***not adopt*** a recommendation for a costly and duplicative investigatory scheme outside the expertise of the CPUC. For these reasons, SoCalGas and SDG&E urge the Commission to adopt proposed Subpart G, section 301 of the Proposed Regulation requiring a posted notice, state that retaliation is unlawful, defer the enforcement of potential whistleblower claims to the Attorney General, and decline to adopt proposed Subpart G, section 302 creating a new workplace retaliation investigatory scheme.

II. SOCALGAS AND SDG&E FULLY SUPPORT CONSTRUCTIVE EFFORTS TO ENCOURAGE EMPLOYEES TO RAISE SAFETY CONCERNS AT ANY LEVEL, INTERNALLY OR EXTERNALLY

No utility operating in natural gas wants its employees to conceal safety concerns. No one benefits from such a system; not the public who may unknowingly be in danger, not employees who may work in dangerous environments, and not the utility that suffers long-term harm when its ability to safely serve customers is jeopardized and its integrity called into question. Both SoCalGas and SDG&E promote an environment where any employee can raise safety concerns at any level, in multiple forums, anonymously or not, and certainly without fear of retaliation. A recent survey of 400 union employees working on the companies' pipelines confirms that our employees feel free to raise safety concerns, big or small. Tellingly, not one survey respondent reported a fear of retaliation – something any employee could have done anonymously on the survey forms. Similarly, none of the unions representing the roughly 8,000 unionized workers at SoCalGas and SDG&E raised a single example of either real or perceived retaliation for reporting safety concerns in the UWUA's Motion. Zero union grievances on this issue exist. Nor have employees filed retaliation claims with the Attorney General's office.

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A. Flawed Assumptions Will Steer The Commission In The Wrong Direction

Although making assumptions about the unknown is human nature, there are dangers in relying too heavily on assumptions devoid of investigation, as demonstrated by this passage from Lemony Snicket's, *The Austere Academy*:

> Assumptions are dangerous things to make, and like all dangerous things to make -- bombs, for instance, or strawberry shortcake -- if you make even the tiniest mistake you can find yourself in terrible trouble. *Making assumptions simply means believing things are a certain way with little or no evidence that shows you are correct*, and you can see at once how this can lead to terrible trouble. (emphasis added).

Proposed Regulation 302 chiefly relies upon fundamentally ***flawed assumptions***.

1. Flawed Assumption #1 – A small number of employees make formal reports internally; therefore, they must fear retaliation.

California's natural gas utilities each submitted evidence documenting the formal reports received by employees internally over a several year period. SoCalGas and SDG&E advised the Commission in May 2012 that employees could make "formal" reports of unsafe conditions to "the Ethics and Compliance Mailbox/Chief Ethics Officer, the Ethics Hotline and/or, if the employee's employment is subject to the terms of a [Collective Bargaining Agreement, the union grievance process in the CBA."[4] The number of formal reports to these sources was low, only 12 such reports between 2007 and 2011.[5] SoCalGas and SDG&E explained the reason for the low number of formal reports of safety concerns:

> "[T]he majority of safety and ethical concerns are raised directly with supervisors and addressed expeditiously."[6]

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[4] SoCalGas/SDG&E Response, dated May 11, 2012, at p. 11. This same statement was discussed during the workshop and no one presented any counter evidence that this assumption was anything other than correct.

[5] *Id.* at 12.

[6] *Id.* at 11.

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Considering all the ways in which employees can raise safety concerns internally, one would expect that calling a hotline would occur rarely. SoCalGas and SDG&E pointed out in its May 2012 report to the Commission that employees can raise safety concerns in any of the following venues: (i) the Ethics Helpline; (ii) safety meetings; (iii) labor/management safety committees; (iv) employee town halls; (v) to safety services staff; (vi) to the Senior Pipeline Safety Advisor; (vii) through the companies' Injury and Illness Prevention Plan; (viii) to Corporate Compliance; (ix) to the Chief Ethics Officers; or (x) to their union.[7/] With **ten** different internal options in addition to direct reports to a supervisor or local management, the only logical assumption on low internal formal reports would be that most employee concerns regarding safety are addressed through less formal means.

Unfortunately, the Proposed Regulation ignores this likely reason for the low number of formalized safety complaints and instead adopts an incorrect and unsupportable assumption that it must be due to a fear of retaliation. There simply is no basis to reach such a conclusion for a number of reasons.

First, the UWUA, the moving party, admitted that its Motion was made only as a "prophylactic, anticipatory measure" and that it was not based on any evidence that any employee ever faced or actually feared retaliation by SoCalGas or SDG&E.[8/] At the Workshop, the UWUA failed to send a single representative where, if the assumption that employees feared retaliation were valid, such evidence could have been presented and discussed. Instead, the UWUA left the record devoid of any facts that any employee has been or actually fears retaliation by SoCalGas or SDG&E *and that such fear is the basis for not reporting safety concerns internally or to the Commission's hotline.*

[7/] SoCalGas/SDG&E Response, dated May 11, 2012, at pp. 4-9.

[8/] UWUA Motion, at p. 3.

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Second, the assumption that a low number of safety reports internally is caused by a fear of retaliation ignores the obvious: employees who work with natural gas face potential safety issues every day and are trained to fix them or notify someone who can *immediately* address the problem. Employees are not going leave a job site with a known safety problem to call a hotline, either internally or externally. It is simply unrealistic and demonstrates a lack of knowledge as to the work of natural gas employees who work under potentially dangerous situations daily. The only circumstance where an employee would consider utilizing a hotline is a situation where the employee cannot fix a safety issue and has raised the concern locally without success.

Thus, a more apt assumption for the low number of formalized reports of safety concerns is that *SoCalGas and SDG&E field employees fix most of the problems they find* or *are satisfied with their supervisors' response when they raise safety concerns*. After all, this is the model – the culture – at SoCalGas and SDG&E: If possible, all problems should be addressed at the local level. The UWUA knows this is the rule since it agreed to the system in every collective bargaining agreement for the past several decades: "The parties encourage the settlement of disputes at the local level between employees and supervisors prior to initiation of formal procedure."[9] When it comes to safety, the same emphasis on raising and addressing concerns locally exists. "Employee participation in safety management through **local** safety committees is strongly encouraged."[10] Any assumption failing to consider this ethos of addressing problems locally first, is unsound.

[9] SoCalGas Collective Bargaining Agreement, at p. 135.
[10] SoCalGas Collective Bargaining Agreement, at p. 23 (emphasis added).

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2. **Flawed Assumption #2 – A small number of employees used the Commission's hotline; therefore employees must fear retaliation.**

At the workshop, the Commission Staff stated that one of the driving factors was the small number of utility employees who have used the Commission's hotline, and that the reason for this must be due to a supposed fear of retaliation. There is no evidence behind this hypothesis. As the parties pointed out at the workshop, the lack of calls to the Commission's hotline is more likely a combination of two factors:

- First, as noted above, employees may not feel the need to notify the Commission if their problems are addressed locally and to their satisfaction. Why complain if there is nothing to complain about?
- Second, even if employees wanted to contact the Commission through its hotline, they likely would have no idea the hotline exists. Other agencies have hotlines, like the California Attorney General and the California Labor Commissioner and ***both require a poster*** containing their contact information be posted in company facilities.

We believe that advertising the hotline is a step in the right direction which is why SoCalGas and SDG&E support Proposed Regulation 301. Naturally, this does not mean that the phone will ring off the hook if point number one (*i.e. nothing to complain about*) continues to drive employee decisions about whether to file a formal complaint.

3. **Flawed Assumption #3 – Because employees submit hotline complaints anonymously, it must be due to a fear of retaliation.**

On average, SoCalGas and SDG&E receive about 130 to 150 employee hotline calls annually, ranging from simple complaints about a coworker's strong perfume to an allegation of

theft. In approximately half of all calls, the employee declines to provide his or her name and we label it as "anonymous." Every caller is provided this option at the start of the call. In a call where an employee is reporting that she saw another employee coming to work late and declines to provide her name, it seems unrealistic to assume that the reason for declining to provide a name is out of fear of retaliation. It is more likely that the employee reporting wishes to do her due diligence by making the report, but does not want to get involved enough to be interviewed or spend time with what she may consider additional work. This more logical assumption pertains equally to safety complaints.

Regardless of what is being reported, when given the choice to remain anonymous, people often do. People choose to be anonymous under different circumstances for different reasons. For many, it is easier to be fully honest when anonymous, especially when discussing a topic that is personal or difficult. On the flip side, studies also show that people are more likely to engage in dishonest acts when their identity is disguised.[11] We have learned that not all hotline calls are made in good faith; sometimes employees simply want to get another employee into trouble by making a false accusation and, to do so, the caller remains anonymous. Studies tend to find higher response rates when reporting anonymously is an option.[12] Regardless of whether a hotline caller is acting in good faith or bad faith, SoCalGas and SDG&E believe that anonymity encourages reluctant callers to report their concerns which is why we continue to offer anonymity as an option.

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[11] One psychology study designed to understand the effect of anonymity with human behavior looked at children trick-or-treating and the prevalence of children taking more candy when masked than when not. The study concluded that it is simply easier to act in a bad or unsocial way when one feels anonymous. Diener, E., Fraser, S., Beaman, A., & Kelem, R. (1976). "Effects of deindividuation variables on stealing among Halloween trick-or-treaters. Journal of Personality and Social Psychology," 33, 178-183.

[12] Christopher H. Warner, MD; et al. (2011). "Importance of Anonymity to Encourage Honest Reporting in Mental Health Screening After Combat Deployment." Archives of General Psychiatry, 2011;68(10):1065-1071.

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The reasons people choose to report anonymously are likely individual and varied. The more important point is that having anonymity as an option in internal (and external) reporting processes likely yields additional and better results. The Workshop Report however, draws a negative inference from this fact – one not supported by science or study – that since employees took advantage of the option to remain anonymous it must be out of fear. Thus, relying upon it as the grounds for wide-sweeping regulatory changes makes no sense.

B. **Retaliation For Making A Complaint To A Government Agency Already Is Unlawful in California; A New Regulation From the Commission Does Not Make it Doubly Unlawful.**

Clearly, the Commission must be vigilant in ensuring that utilities operate safely and in compliance with the law. Focusing efforts to ensure employees know about the Commission's hotline (which also permits anonymous reporting) is the right direction. However, the business of jumping into the realm of employment retaliation claims is unwise.

One major concern raised in the workshop was who would handle workplace retaliation investigations at the Commission since no one there currently has the expertise needed to handle employment claims. The Commission does not currently employ labor and employment specialists. As pointed out at the workshop, a claim of retaliation is distinct from the underlying claim that serves as the basis for the claim of retaliation. For example, in a sexual harassment case, if an employee alleges sexual harassment and an investigation by the Equal Employment Opportunity Commission reveals no harassment occurred, a later act of retaliation against the employee for making the initial complaint is still unlawful. If this were not the case, employees would be discouraged from complaining of harassment because if they could not prove their harassment case, they could be victims of retaliation without any available remedy.

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Another concern raised is one of funds; how will the Commission fund this proposed new program, hire the required new staff, and provide necessary training to ensure the Commission Staff can properly handle employee retaliation claims that would otherwise be handled by the Attorney General's office?

The Commission need not become a "Jack of All Trades" to ensure that employees report suspected safety violations without government protection in the event they suffer reprisal for their reporting activity. The California Attorney General already does what the Commission Staff now proposes. The California Whistleblower Act, enforced by the Attorney General, provides that:

> (a) An employer may not make, adopt, or enforce any rule, regulation, or policy preventing an employee from disclosing information to a government or law enforcement agency, where the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or a violation or noncompliance with a state or federal rule or regulation.
>
> (b) An employer may not retaliate against an employee for disclosing information to a government or law enforcement agency, where the employee has reasonable cause to believe that the information discloses a violation of state or federal statute, or a violation or noncompliance with a state or federal rule or regulation.[13]

Pursuant to the Whistleblower Act, the California Attorney General must maintain a whistleblower hotline to receive calls from aggrieved persons. All calls received by the Attorney General must be referred to the appropriate government authority for review and investigation.[14] Employers must post a notice regarding "employees' rights and responsibilities under the whistleblower laws, including the telephone number of the whistleblower hotline described in

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[13] Cal. Lab. Code § 1102.5 (a)-(b) (emphasis added).
[14] Cal. Lab. Code § 1102.7.

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Section 1102.7."[15] An employer who violates California's whistleblower protection law is "guilty of a misdemeanor" and an individual is subject to up to one year in jail and a $1,000 fine. Corporations may be fined up to $5,000, plus an additional civil penalty of up to $10,000 per violation.[16] Finally, the law permits employees to recover damages from the employer for any injury resulting from a violation of the statute.[17]

Deferring retaliation issues to the Attorney General while focusing on utility safety complaints, and any necessary follow-up, makes sense. This system of agencies sharing competencies is why we established different agencies for overseeing public utilities and to address employee claims. Proposed Regulation 302 ignores the fact that agencies have different competencies.

The Commission should focus on its core mission: "serve[] the public interest by protecting consumers and ensuring the provision of safe, reliable utility service and infrastructure at reasonable rates … ."[18] Trying to duplicate the efforts of other agencies, like the Attorney General, does nothing to enhance this mission. Instead, it distracts the Commission and dilutes its resources.

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[15] Cal. Lab. Code § 1102.8.

[16] Cal. Lab. Code § 1102.5 and § 1103.

[17] Cal. Lab. Code § 1105. An aggrieved employee must file a claim with the California Labor Commissioner within six (6) months of the alleged violation. Cal. Lab. Code § 98.7. In C*ampbell v. Regents of the Univ. of Cal.*, 35 Cal. 4th 311, 333-4 (2005), the California Supreme Court held that a litigant seeking damages under section 1102.5 is required to exhaust administrative remedies before the Labor Commissioner prior to bringing suit. The exhaustion of administrative remedies rule is "well established in California jurisprudence." *Campbell*, p. 321. "'[T]he rule is that where an administrative remedy is provided by statute, relief must be sought from the administrative body and this remedy exhausted before the courts will act.'" *Id.*

[18] CPUC Mission Statement. http://www.cpuc.ca.gov/PUC/aboutus/pucmission.htm.

C. In Order To "Find" A Utility Has Retaliated Against An Employee, The Commission Must Investigate Retaliation Claims; The Proposed Regulation Is Silent On This New Investigatory Scheme

The devil is truly in the detail. Although it might appear that Proposed Regulation 302 only narrowly proscribes retaliation, in actuality, it imposes upon the Commission an obligation to engage in fact-finding – *i.e.*, investigations into alleged retaliation claims. The Commission Staff proposes the Commission adopt the following new regulation:

> **302 The Utility Has No Right to Retaliate Against an Employee For Notifying the California Public Utilities Commission**
>
> 302.1 In addition to other statutes, which provide remedies for retaliation against Whistleblowers (e.g., the California Whistleblower Act, California Labor Code § 1102.5), or any other remedy an employee may have in a court, the Commission prohibits California natural gas utilities from retaliating against any employee, who reports, in good faith, unsafe conditions to the Commission. *For purposes of this regulation, the Commission retains the option to impose penalties and any other remedies provided under the California Public Utilities Code for any natural gas utility, which the Commission finds violates this regulation.*[19]

The only way the Commission could "*find*" that a utility has violated its new non-retaliation rule would be for the Commission Staff to investigate retaliation claims; but are they prepared and professionally competent to conduct employment law investigations?

1. Retaliation Claims Are Unique Employment Claims With A Well-Developed And Complicated Set of Established Principles

Retaliation claims in the workplace are complicated employment claims to investigate and to reach conclusions. As the California Supreme Court noted:

> Retaliation claims are inherently fact-specific, and the impact of an employer's action in a particular case must be evaluated in context. Accordingly, although an adverse employment action must

[19] Proposed Regulation, at p. 9 (emphasis added).

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> materially affect the terms, conditions, or privileges of employment to be actionable, the determination of whether a particular action or course of conduct rises to the level of actionable conduct should take into account the unique circumstances of the affected employee as well as the workplace context of the claim.

Yanowitz v. L'Oreal USA, Inc., 36 Cal. 4th 1028, 1052 (2005).

In the typical model, an employee suffers an adverse employment action at some point in time and alleges that the action was not for good cause, but actually in retaliation for some prior protected activity. "To establish a *prima facie* case of retaliation, a plaintiff must show that [1] he engaged in a protected activity, [2] that he was subjected to adverse employment action by his employer, and [3] that there was a causal link between the two." *Sada v. Robert F. Kennedy Medical Center*, 56 Cal. App.4th 138 (1997). Once an employee establishes a prima facie case, the employer is required to offer a legitimate, non-retaliatory reason for the adverse employment action. *Yanowitz,* 36 Cal. 4th at 1042. If the employer produces a legitimate reason for the adverse employment action, the presumption of retaliation drops out of the picture, and the burden shifts back to the employee to prove intentional retaliation." *Id.* What is or is not considered a "protected activity" is often the subject of litigation. For example, under the Fair Employment and Housing Act ("FEHA"), a "protected activity" is defined as (1) opposing practices prohibited by the FEHA or (2) filing a complaint under the FEHA. Government Code § 12940(h). Courts also find that an adverse employment action must be "material" in order for a *prima facie* case of retaliation to exist. *Id.* at 1052. Courts also look at the temporal proximity between the protected activity and the adverse employment action to determine whether causation can be proved. *Holman v. Altana Pharma US, Inc*., 186 Cal. App. 4th 262, 275 (2010). The theory here being that an employer is not likely to wait around for years biding its time before engaging in a planned retaliation. These are only a few of the principles involved in

investigating and determining whether retaliation exists or whether an adverse employment action was legitimate.

2. The Proposed Regulation Is A Minefield Of Uncertainty

In light of the legal framework to analyze retaliation claims, the Proposed Regulation suffers from a serious lack of specificity. The following are some of the scores of unanswered questions raised by the Commission Staff's proposal:

- What is the statute of limitations for bringing a retaliation claim to the Commission?
- How will an anonymous reporter be treated if an employee raises a later claim of retaliation? The employer, after all, must be given a chance to respond to that employee's claim by proving its adverse employment action was legitimate and non-retaliatory.
- Will the Commission take affidavits of alleged retaliation victims and when and how will those be provided to the employer?
- Will an alleged victim of retaliation be placed under oath when making her claim?
- Will an alleged victim of retaliation be entitled to her own counsel during the investigation? What about non-party representatives, like a shop steward from a union?
- Will the Commission award attorneys' fees to prevailing parties? What will the Commission deem a "prevailing party"?
- What are the time frames for a retaliation investigation? How long for the initial investigation of the employee's claim? How long will the employer have to respond to the allegations?

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- Will the employer be permitted to submit a position statement? Will employer witnesses be required to provide affidavits?

- How much information will be provided to the employer in order to allow it to defend against the allegation? Obvious due process considerations abound if the Commission withholds information about the complainant and her evidence.

- Typically, agencies that investigate employee claims have both an enforcement division (the prosecutors) and an adjudicatory division (the judges). These two divisions are separate and independent to ensure impartiality. Will the Commission's own staff be the enforcement side? Will a separate division of administrative law judges be established to hear the evidence? There are significant impartiality problems should the Commission be the adjudicator when its own staff is the prosecutor.

- What appeals process will exist? Typically, agencies use neutral administrative law judges and appeals are to neutral boards, then to an appellate court.

- What happens if the Commission's decision conflicts with another court, agency, or arbitrator's decision regarding the same issue of retaliation (which clearly can be brought in multiple forums)? For example, if a court finds an employee was terminated for a legitimate, non-retaliatory basis, but the Commission found the opposite. Would the utility have any recourse with the Commission, including recoupment of any imposed penalty?

- What "penalties and other remedies" will the Commission impose if it finds a violation? Generally, courts, arbitrators, and agencies have been granted the authority to address retaliation through "make-whole" remedies, like back pay, front pay, and/or reinstatement. Does the Commission believe it has the authority to grant this

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type of relief? If not and only fines against the utility exist, the employee cannot be made whole for retaliation and will therefore be required to use other avenues for redress. Thus, the Commission will be a less attractive avenue for employee claims of retaliation. Indeed, any good attorney representing an employee would steer the employee away from the Commission as an option to address her retaliation claims if the Commission could only partially address the claim or only penalize the employer with a fine.

These questions demonstrate enormous gaps in the Proposed Regulation. Unless they are filled, it is too vague to be implemented and its own uncertainty will breed a host of new problems for the Commission. Adopting new problems to solve will not enable the Commission to confidently solve the challenges it currently faces and those safety concerns to arise in the future.

III. THE COMMISSION SHOULD CONSIDER AN ALTERNATIVE APPROACH TO WHISTLEBLOWER ISSUES

Federal agencies, like the Nuclear Regulatory Commission ("NRC"), support whistleblower protections by simply stating retaliation is unlawful without deciding the retaliation claims themselves.[20] Section 210(a) of the Energy Reorganization Act of 1974, as

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[20] Interestingly, and proof that the underlying assumptions in the Workshop Report are flawed regarding the impact of whistleblower rules on employee reporting, a 2010 study by the NRC at the San Onofre Nuclear Power plant found that workers fear retaliation for reporting safety concerns. "NRC says 'fear of retaliation' lingers at nuke plant." North County Times, March 02, 2010. Yet, the Energy Reorganization Act has been in place since 1974 and its whistleblower provision added thereafter. Clearly, even the existence of whistleblower protections does not curb the fears of those employees who fear – even unrealistically – retaliation.

However, fear of retaliation may not impact the number of hotline calls anyway. Fear of retaliation is not an uncommon human concern. The National Institutes of Health recently conducted a study amongst health care professionals to determine if fear of retaliation played a role in diminished reporting of ethical concerns. Although only a small number of the 1,215 study participants claimed any personal experience with retaliation (2.8%), 30% considered it a realistic fear and 50% perceived retaliation as not a problem. Despite a surprisingly high response rate to the question about whether participants had some "fear" or retaliation, the study concluded that <u>such fear did not reduce the rate of ethics reporting by participants</u>. *See,* Danis M, t al., "Does fear of retaliation deter requests for ethics consultation?" http://www.ncbi.nlm.nih.gov/pubmed.

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amended, 42 U.S.C. § 5851(a), makes it unlawful for an employer in the nuclear industry to "discharge any employee or otherwise discriminate against any employee with respect to his compensation, terms, conditions, or privileges of employment because the employee . . .

> (1) commenced, caused to be commenced, or is about to commence or cause to be commenced a proceeding under this chapter or the Atomic Energy Act of 1954, as amended, or a proceeding for the administration or enforcement of any requirement imposed under this chapter or the Atomic Energy Act of 1954, as amended;
>
> (2) testified or is about to testify in any such proceeding or;
>
> (3) assisted or participated or is about to assist or participate in any manner in such a proceeding . . . or in any other action to carry out the purposes of this chapter or the Atomic Energy Act of 1954, as amended."

Unlike what the Commission Staff is proposing here, under federal law, the retaliation portion of the investigation is handled by the U.S. Department of Labor which has expertise in employee claims. Thus, the NRC can focus on the underlying safety complaint. *English v. General Elec. Co*., 496 U.S. 72, 76 (1990) ("If an employee believes that he has been discharged or otherwise discriminated against in violation of the statute, he may file a complaint with the Secretary of Labor within 30 days after the violation occurs.")[21/] The statute places the investigation, determination, and enforcement of the retaliation issue in the hands of the Department of Labor, which has the necessary expertise and ability to award appropriate remedies, like reinstatement. The Department of Labor uses the same retaliation investigation process for NRC whistleblower claims as it does for other agencies that also generally prohibit retaliation.

[21/] Recent amendments to the law permit the filing of a complaint within 180 days after the date of the alleged discriminatory act. 42 U.S.C. § 5851(b).

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The Commission should do the same. SoCalGas and SDG&E suggest the Commission adopt the notice posting provision of Subpart G, section 301 of the Proposed Regulation requiring a posted notice. In addition, SoCalGas and SDG&E suggest the Commission adopt the following general rule:

> "All utilities regulated by the California Public Utilities Commission are prohibited from retaliating against any employee who makes a good faith report of unsafe conditions to the Commission and the Commission shall refer all claims of retaliation in violation of this rule to the California Attorney General's whistleblower hotline for investigation and enforcement. The Commission may impose penalties for substantiated safety violations."[22]

Subpart G, section 302 creating a new whistleblower investigatory scheme and unnecessary *and vague* penalties should be rejected in its entirety.

IV. CONCLUSION

SoCalGas and SDG&E are proud of their strong safety record, which could only have been achieved through the dedication of our ethical and safety-focused workforce. We believe the strong ethical and safety values of our employees are best fostered and maintained through a comprehensive approach to ethics and safety that appropriately encourages open and informal discussions between employees and their immediate supervisors. We further believe the fact that we have few formal complaints to report in response to the Commission's queries is evidence of the success of our informal programs. We believe that encouraging employees to report safety

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[22] It is unclear why the Commission would limit any non-retaliation provision to natural gas utilities since any of the utilities regulated by the Commission ought to adhere to the same rule. As such, the proposed rule stated here broadly applies to any utility overseen by the CPUC.

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concerns is a top priority, but we urge the Commission to adopt a sensible solution based upon solid assumptions.

Respectfully submitted,

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