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)

APPLICATION OF PACIFIC GAS AND ELECTRIC COMPANY FOR REHEARING OF DECISION NO. 13-12-053

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Dated: January 23, 2014

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Pursuant to California Public Utilities Code Section 1731(b) and Rule 16.1 of the Rules of Practice and Procedure of the California Public Utilities Commission, Pacific Gas and Electric Company ("PG&E") submits this application for rehearing of Decision No. 13-12-053, mailed on December 24, 2013 ("Decision"). [1] Pursuant to Section 1731(b), the last day on which an application for rehearing of the Decision may be filed is January 23, 2014. This application is timely filed.

The Decision found that PG&E violated Rule 1.1 of the Commission's Rules of Practice and Procedure by failing to immediately disclose to the Commission corrected pipeline specification information and by providing that information to the Commission through an "Errata" filing. [2] *See* Dec. 1. In response to these findings, and after concluding that PG&E's actions represented "continuing violations," the Decision imposed sanctions on PG&E of $14,350,000. *Id.*

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[1] The Decision is cited as "Dec. [page number]."

[2] PG&E originally provided the Supporting Information called for by Ordering Paragraph 4 of D.11-09-006 on October 31 and November 15, 2011.

I. SPECIFICATION OF LEGAL ERRORS.

Rehearing of the Decision is warranted for a number of reasons. The Decision concludes that PG&E violated Rule 1. 1 without making any finding or any proof that PG&E intended to mislead the Commission, as is required by the language of the Rule and a long line of authority from this Commission and other courts. *Infra* Part II. It further holds that the timing of PG&E 's disclosure of the specification information and its filing of an "Errata" constitute "continuing violations" without any evidence of the date on which PG&E's duty to disclose arose and even though the filing of the "Errata" itself was a one -time event with no "continuing" consequences. *Infra* Part III. And, more broadly, the Decision violates PG&E's rights under the Due Process and Excessive Fines Clauses of the California and United States Constitutions, by adjudicating allegations of misconduct of whi ch PG&E was given insufficient advance notice and without adequate proof, and by imposing sanctions that are "grossly disproportionate" to the alleged misconduct. *Infra* Part IV.

These legal errors render the Decision "unlawful [and] erroneous." Cal. Pu b. Utilities Code §§ 1731-1736; Pub. Utilities Comm. R. 16.1 -16.3. The Commission for these reasons should grant rehearing, vacate the Decision and any related orders, and issue a modified decision stating that PG&E is found not to have violated Rule 1.1 and that no sanctions are imposed.

II. THE COMMISSION ERRED IN FINDING VIOLATION S OF RULE 1.1 WITHOUT PROOF THAT P G&E INTENDED TO MISL EAD THE COMMISSION.

The Commission found that PG&E violated Rule 1.1 despite the absence of any proof that PG&E had actually intended to mislead the Commission, either in failing to immediately disclose the corrected pipeline specification information or by providing that information through the "Errata" filing. *See* Dec. 18 n.25, 21. The Commission justified this result by

explaining that, in its view, "there is no 'intent' element to a Rule 1.1 violation, either implicitly or explicitly." *Id.* at 21. That conclusion is incorrect as a matter of law.

Rule 1.1 can only be read as incorporating an intent element. The Rule sta tes that any person who transacts business with the Commission "agrees ... never to mislead the Commission or its staff by an artifice or false statement of fact or law." Pub. Utilities Comm. R. 1.1. The verb "mislead," particularly as used in this conte xt, necessarily implies a purposeful action —one taken with the affirmative intent to "deceive" the Commission. [3] The terms "artifice" and "false" confirm this reading of the Rule, as they necessarily incorporate an element of intentional deception as opposed to, e.g., mere inadvertence. This reading is, indeed, required by a long line of precedent holding that penal statues must be presumed to carry a *mens rea* element[4] and, further, is consistent with numerous cases from this and other jurisdictions interp reting similar provisions.[5] This Commission has itself recognized in numerous prior cases that a party may be found to have violated Rule 1.1 only if it acted with "the requisite state of mind." [6] That state of mind must be, in accord with the Rule's lang uage and its purpose, an intent to mislead the

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[3] *Oxford English Dictionary* (3d ed. 2002) (definition of "mislead"); *see also Flores-Figueroa v. United States*, 556 U.S. 646, 649 -51 (2009) (addressing interpretation of transitive verbs in statutes).

[4] *E.g.*, *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 436 (1978) ("The existence of a *mens rea* is the rule of, rather than the exception to, the principles of Anglo –American criminal jurisprudence."); *see also Staples v. United States*, 511 U.S. 600, 604 -06 (1994); *Morissette v. United States*, 342 U.S. 246, 250 (1952); *United States v. Project on Government Oversight*, 616 F.3d 544, 549 (D.C. Cir. 2010); *United States v. Semenza,* 835 F.2d 223, 224 (9th Cir. 1987).

[5] *See, e.g.*, *Schaefer v. State Bar of California*, 26 Cal. 2d 739, 748 (1945) ("[S]ince it does not appear that petitioner intentionally attempted to mislead the court, we do not believe the incident warrants the imposition of disciplinary punishment."); *In re Att orney C*, 47 P.3d 1167, 1174 (Colo. 2002) (prosecutor's duty to timely disclose exculpatory evidence includes *mens rea* of intent).

[6] *Investigation of All Facilities -Based Cellular Carriers*, D.94 -11-018, 1994 Cal. PUC LEXIS 1090, at *80-82.

Commission.[7] After all, it would hardly make sense to punish a party, particularly with multi-million dollar fines, for "misleading" the Commission—much less through an "artifice" or "false statement"—when the party had no intent to deceive and no knowledge that its conduct was materially misleading.

When the Rule is thus interpreted correctly, it is clear that no violation could be found in this matter. There was no evidence whatsoever that PG&E intended to deceive the Commission, or even recognized that its conduct might possibly have that effect, in not disclosing the corrected pipeline information to the Commission at an earlier time or in providing that information through the "Errata" filing. Quite the contrary, the evidence presented at the hearing showed that PG&E had refrained from disclosing the information in order to verify and ensure its accuracy before presenting it to the Commission and had utilized the "Errata" filing procedure based on a good faith assessment of procedural rules in the absence of a clearly applicable procedural pathway, and long-standing practice in this and other tribunals.[8] There can be no doubt that these purposes were entirely legitimate. In short, PG&E was not found, and could not have been found, to have acted with any intent to deceive the Commission.

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[7] The Commission has on occasion stated that a Rule 1.1 violation may be found when the party acted with "recklessness[ ] or gross negligence." *See id.*; *Application of Pac. Fiber Link, LLC*, D.02-08-063, 2002 Cal. PUC LEXIS 533, at *28-30. These statements are consistent with a requirement of proof of intent to mislead, insofar as "recklessness" and "gross negligence" have long been recognized as proxies for specific intent. *Pac. Fiber Link*, 2002 Cal. PUC LEXIS 533, at *29; *see also In re S. Cal. Edison Co.*, D.04-04-065, 2004 Cal. PUC LEXIS 207, at *53-56; *Application of New Century Telecom, Inc.*, D.06-09-025, 2006 Cal. PUC LEXIS 328, at *26-27.

[8] *See, e.g.*, R.T. 2348-52 (PG&E/Malkin) ("[I]t was not until July 2nd that the gas organization was able to finally resolve that issue and determine that there wasn't the same issue on Line 131."); R.T. 2347-51 (PG&E/Malkin) ("This was, in my experience at the Commission which as I've already described goes back a long ways, this was a completely unique situation.... There wasn't anything that exactly fit. To me, errata is literally a list of errors and corrections, and that is exactly what we submitted."); R.T. 2350:21-25 (PG&E/Malkin) (errata used in rate cases to change numbers); R.T. 2353:11-18 (PG&E/Malkin) (no belief that filing errata on July 3 might cause it to escape Commission's attention or public notice).

Without that finding, no violation of Rule 1.1 exists. The Commission should therefore vacate its Decision and issue a modified decision stating that no violation of Rule 1.1 occurred and therefore no sanctions are imposed.

III. THE COMMISSION ERRED IN FINDING "CONTINUING VIOLATIONS" OF RULE 1.1 WITHOUT PROOF THAT ANY MISCONDUCT WAS CONTINUING.

The Commission also found that both of the asserted Rule 1.1 violations —the failure to immediately disclose the corrected pipeline information and the filing of the "Errata" —were "continuing violations" under California Public Utilities Code § 2108, warranting a cumulative penalty of $50,000 per day. *See* Dec. 15, 18. Those findings are unsupported by the record, and reflect a fundamental misconception of the meaning of "continuing violation" in this context.

A. The Record Does Not And Could Not Support The Commission's Continuing Violation Finding Regarding PG&E's Failure To Disclose.

The Decision finds that PG&E's asserted failure to disclose the corrected pipeline information represented a "continuing violation" of Rule 1.1, from November 16, 2012, through July 3, 2013. *See* Dec. 14-15. That finding cannot stand.

A "continuing violation" can be found, by definition, only when a party can be said to have "continually" violated a legal obligation over a discrete period of time. [9] The party must be found to have breached a legal obligation at a particular time, and then continued to do so until a subsequent time, when either the obligation was met or the harm otherwise disappeared. [10] In other words, a continuing violation finding requires an identifiable starting and end point.

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[9] *See, e.g.*, *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 628-30 (2007); *Flowers v. Carville*, 310 F.3d 1118, 1126 (9th Cir. 2002); *Richards v. CH2M Hill, Inc.*, 26 Cal. 4th 798, 818-23 (2001); *Birschtein v. New United Motor Mfg., Inc.*, 92 Cal. App. 4th 994, 1003-05 (2001); *see also, e.g.*, *Young v. United States*, 727 F.3d 444, 447-48 (5th Cir. 2013); *United States v. Midwest Generation, LLC*, 720 F.3d 644, 646-48 (7th Cir. 2013).

[10] *See, e.g.*, *Flowers*, 310 F.3d at 1126; *Richards*, 26 Cal. 4th at 818-23; *see also Investigation of Qwest Commc'ns Corp.*, 2003 Cal. PUC LEXIS 67, at *20-21 ("The

Neither is present here. Nowhere in the Decision does the C ommission explain when precisely a duty to disclose the corrected pipeline information arose, or when and why PG&E's failure to satisfy that duty had the effect of "misleading" the Commission. *See* Dec. 13 -14. Rather, the Decision simply concludes, withou t explanation, that the violation commenced on November 16, 2012, without any evidence to show why that date (as opposed to any other in the timeframe) was selected. *Id.* at 12 -15, 19. The Decision likewise offers no support for its determination that the violation extended until the filing of the "Errata." *See id.* Indeed, that conclusion is flatly inconsistent with the undisputed fact that PG&E communicated the corrected pipeline information to senior Commission staff in March 2013. *See* Dec. 8. Whethe r or not PG&E also should have made a formal filing with the Commission (an obligation that does not appear in any Commission rules), PG&E clearly was neither withholding the information nor attempting to "mislead" the Commission after the March disclosure . There is thus no basis for concluding either that PG&E's asserted Rule 1.1 violation either started on November 16, 2012, or ended on July 3, 2013, as opposed to any other dates during that period.

The record did not and cannot support a finding that PG &E's asserted failure to disclose the corrected pipeline information constituted a "continuing violation" of Rule 1.1. That finding should be vacated, along with the daily sanctions that accompanied the finding.

B. The Record Does Not And Could Not Support The Commission's Continuing Violation Finding Regarding PG&E's Errata Filing.

The Decision also finds that PG&E's filing of an "Errata," notifying the Commission of the corrected pipeline information, constituted a "continuing violation" of Rule 1.1 from t he date on which the document was filed, on July 3, 2013, through August 30, 2013, when PG&E filed a

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Commission has calculated fines on the basis of Section 2108 in cases where the evidence established that … practices that violated statutory or decisional standards had occurred over a period of time, rather than specific instances of violations.").

verified statement (from one of its executives) setting forth the timeline of events in great detail. *See* Dec. 15-18. That finding also cannot stand.

The most basic element of a continuing violation finding is, of course, that the violation was "continuing."[11] The violation must be ongoing and recurring over a period of time, as opposed to a specific and discrete breach of a legal obligation.[12] Only when it can be said that the party's ongoing conduct continually gives rise to a new breach, at any given moment, may the violation be deemed "continuing" so as to support cumulative penalties.[13] The mere failure to correct a prior breach, when not accompanied by additional affirmative misconduct, cannot itself constitute a continuing violation.[14]

The filing of the "Errata" cannot be deemed a "continuing violation" under these well-established principles. The Decision states that the "Errata" constituted a breach of Rule 1.1 because, in the Commission's view, it was an unreasonable procedural choice that may have had the effect of misleading the Commission as to the importance of the disclosed information, *see* Dec. 15-18, 27; however, assuming that finding to be correct (which PG&E does not concede, as argued above), any violation was complete upon filing. The Decision identifies no further or continuing misconduct by PG&E, much less any activity affirmatively intended to mislead the

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[11] *See, e.g.*, *Flowers*, 310 F.3d at 1126; *Richards*, 26 Cal. 4th at 814-23; *see also* Cal. Pub. Utilities Code § 2108 ("Every violation … by any corporation or person is a separate and distinct offense, and in case of a continuing violation each day's continuance thereof shall be a separate and distinct offense.").

[12] *See, e.g.*, *Qwest Commc'ns*, 2003 Cal. PUC LEXIS 67, at *20-21.

[13] *See, e.g.*, *id.*

[14] *See, e.g., Ward v. Caulk*, 650 F.2d 1144, 1147 (9th Cir. 1981); *Monolith Portland Midwest Co. v. Kaiser Aluminum & Chemic Corp.*, 407 F.2d 288, 292-93 (9th Cir. 1969); *see also, e.g.*, *Walker v. Sears, Roebuck & Co.*, 853 F.2d 355, 364-65 (5th Cir. 1988); *Beaver v. Tarsadia Hotels*, No. 11-cv-1842, 2012 WL 1564535, at *9 (S.D. Cal. May 2, 2012) (citing *King v. California*, 784 F.2d 910, 914 (9th Cir. 1986)); *First Am. Title Ins. Co. of N.Y. v. Fiserve Fulfillment Servs., Inc.*, No. 06 Civ. 7132, 2008 WL 3833831, at *2 (S.D.N.Y. Aug. 14, 2008).

Commission. *See id.* The only subsequent "violation" identified by the Decision is PG&E's failure to "correct" the error by withdrawing the "Errata." *See id.* Failing to correct a prior breach is, however, insufficient as a matter of law to support a continuing violation finding. *Supra* p. 7. Even if the rule were otherwise, PG&E could not have "corrected" its error by withdrawing the Errata. Withdrawal of the filing would not have corrected any allegedly misleading impressions caused by the document's captioning. In all events, there was no way PG&E could have withdrawn the document after it was rejected by the clerk's office (on August 2, 2012). *See* Dec. 8.

Any violation of Rule 1.1 caused by the Errata filing was thus complete at the time of filing, and could not constitute a "continuing violation." That finding should be vacated, as well as the sanctions attached to the finding.

IV. THE COMMISSION'S DECISION VIOLATES PG&E'S RIGHTS UNDER THE CALIFORNIA AND UNITED STATES CONSTITUTIONS.

Notwithstanding the errors identified above, the Decision suffers from more fundamental flaws. Imposing millions of dollars of fines upon PG&E for disclosure and reporting errors that posed no risk and caused no harm to the public, particularly when PG&E was not provided prior notice of the scope of the Commission's allegations and was denied an opportunity to defend itself, violates PG&E's rights under the Due Process and Excessive Fines Clauses of the California and United States Constitutions. *Infra* pp. 9-12. For this additional and independent reason, the Decision must be vacated.

A. The Decision Violates The Due Process Clause.

Due process requires, at its most basic, that a party be given fair notice of allegations of misconduct prior to any adjudica tory hearing.[15] The party must be informed of "the precise nature of the charges," and must be provided a full "opportunity to be heard in [its own] defense—a right to [its] day in court."[16] Whether the charges are initiated by indictment, complaint, or (as here) an order to show cause, the initiating document must describe the alleged misconduct with sufficient specificity to allow the party to challenge those allegations at a hearing.[17]

That essential requirement was not satisfied here. The order to show cause in this matter gave notice of two specific alleged violations of Rule 1.1: (i) whether PG&E attempted to mislead the Commission by titling its disclosure filing as an "Errata" and (ii) whether PG&E attempted to mislead the Commission by timing its filing on July 3, 2013, "the day before a summer holiday weekend."[18] Nothing in the order indicates that the Commission also alleged, or would consider, whether PG&E had separately violated Rule 1.1 by failing to disclose the corrected pipeline specificati on information after it was first discovered.[19] Nor does anything in the order indicate that PG&E might face continuing violation sanctions based on any breach of

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[15] *In re Ruffalo* , 390 U.S. 544, 550 -52 (1968); *In re Oliver* , 333 U.S. 257, 273 (1948); *see also* *Salkin v. Cal. Dental Ass'n* , 176 Cal. App. 3d 1118, 1121 -22 (1986) (citing *Hackethal v. Cal. Med. Ass'n* 138 Cal. App. 3d 435, 442 (1982)).

[16] *Id.*; *see also* *Pinsker v. Pac. Coast Soc'y of Orthodontists* , 12 Cal. 3d 541, 555 -56 (1974) ("A basic ingredient of the 'fair procedure' required under the common law is that an individual who will be adversely affected by a decision be afforded some meaningful opportunity to be heard in his defense.").

[17] California courts have specifically condemned the late assertion of new charges in administrative enforcement proceedings. *See, e.g., Smith v. State Bd. of Pharmacy*, 37 Cal. App. 4th 229, 242 (1995.

[18] *See* Ruling Directing PG&E To Show Cause 4, Rulemaking 11-02-019 (Aug. 19, 2013).

[19] *See id.*

disclosure or filing obligations.[20] Under these circumstances, due process precludes any finding that PG&E violated Rule 1.1 by failing to disclose the pipeline information at an earlier time, or the imposition of fines for any "continuing violation."

The conduct of the hearing on the order to show cause reflects and confirms the limited nature of the Commission's allegations. The only party to present evidence at that hearing was PG&E, and all of the evidence that was offered related to the narrow issues described above, concerning the titling and timing of the Errata filing.[21] There was no evidence concerning when PG&E's alleged obligation to disclose the pipeline specification information may have arisen, and no evidence regarding PG&E's intent or state of mind in not disclosing the information earlier. There was thus no basis for the Commission to find, or even to consider, whether PG&E's failure to disclose the information at any earlier time violated Rule 1.1. Indeed, the evidence was insufficient even to support a finding of a violation on the narrow issues outlined in the order to show cause: uncontradicted testimony offered at the hearing established that the timing of the filing was not intended to mislead the Commission and that the use of the term "Errata," even if incorrect as a matter of procedure, represented the good faith judgment of PG&E's counsel as to the proper procedural title for the filing.[22]

Quite simply, PG&E was not provided advance notice of the range of charges against it, and the evidence presented at the hearing was not in any event sufficient to establish any violation of Rule 1.1, whether on the broader (uncharged) allegations concerning the failure to disclose or on the narrow (charged) allegations concerning the titling and timing of the Errata filing. Under these circumstances, due process —as well as well-established principles of

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[20] *See id.*

[21] R.T. 2342.

[22] R.T. 2350-51 (PG&E/Malkin).

administrative law —preclude any finding of a violation and require that the Commission's Decision be vacated.

B. The Decision Violates The Excessive Fines Clause.

The Excessive Fines Clauses of the California and United States Constitut ions prohibit the imposition of fines that are "grossly disproportional" to the underlying violation. [23] Relevant factors in assessing whether a fine is "grossly disproportional" include (i) the extent of the harm caused, (ii) the gravity of the offense rel ative to the fine, (iii) the relationship of the violation to other illegal activity, and (iv) the availability of other penalties and the maximum penalties which could have been imposed. [24] Of perhaps greater importance, however, is the disparity between t he fine and any actual damages resulting from the underlying offense: when the amount of the fine is many multiples greater than actual damages, the penalty is more likely unconstitutional.[25]

The fines imposed by the Decision far exceed constitutional bo unds. They are the largest fines ever imposed by the Commission for a violation of Rule 1.1; indeed, they are higher than any fine ever imposed by *any* court for a violation of a rule of this type, so far as research

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[23] *United States v. Bajakajian*, 524 U.S. 321, 328 (1998) (citing *Austin v. United States*, 509 U.S. 602, 609-10 (1993)); *see also People v. Dillon*, 34 Cal. 3d 441, 478 -79 (1983) (citing *In re Lynch*, 8 Cal. 3d 410, 424 (1972)).

[24] *United States v. 3814 NW Thurman St., Portland, Or.* , 164 F.3d 1191, 1197 -98 (9th Cir. 1999); *see also Mendez Matos v. Municipality of Guaynabo*, 557 F.3d 36, 52-56 (1st Cir. 2009); *Jurinko v. Medical Protective Co.* , 305 Fed. Appx. 13, 25 -30 (3d Cir. 2008); *Bridgeport Music Inc. v. Justin Combs Pub.*, 507 F.3d 470, 486-90 (6th Cir. 2007).

[25] *See, e.g.*, *United States ex rel. Bunk v. Birkart Globistics GmbH & Co.* , 2012 WL 488256, at *5 (E.D. Va. Feb. 14, 2012), *cited in Collins v. SEC*, 736 F.3d 521, 527 (D.C. Cir. 2013); *see also People ex rel. Lockyer v. R.J. Reynolds Tobacco Co.* , 37 Cal. 4th 707, 728 (2005) (the "touchstone of the constitutional inquiry under th e Excessive Fines Clause is the principle of proportionality"); *People v. Urbano*, 128 Cal. App. 4th 396, 406 (2005) (quoting *Bajakajian*, 524 U.S. at 334).

discloses.[26] They represent the maximum penalty permitted under California law,[27] and yet they were imposed for reporting and filing errors that posed no actual risk to public safety and caused no actual harm —and indeed were not shown to have actually misled the Commission or have had any practi cal effect whatsoever. *See* Dec. 12-18, 27.[28] And any "damages" that might be attributed to the violations, presumably related to the costs associated with additional Commission proceedings, would be many orders of magnitude less than the nearly $15 milli on penalty against PG&E.

None of the relevant factors, in short, supports the validity of the fines imposed by the Decision in this case. Those fines were thus "grossly disproportionate" to the underlying violations, and unconstitutional under the Exces sive Fines Clause of the California and United States Constitutions, and must now be vacated.

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[26] *See, e.g.*, *Application of Pac. Fiber Link, L.L.C.*, D.02-08-063, 2002 Cal. PUC LEXIS 533, at *26-30 (no Rule 1 violation or fine where a simplified registration process was used instead of an application when requesting certain environmental approvals from the Commission); *Marin Telemanagement Corp. v. Pac. Bell* , D.95 -01-044, 1995 Cal. PUC LEXIS 43, at *31 -34 (incomplete application for certificate of public convenience warranted fine of $10,000 for "flagrant refusal to comply with Rule 1"); *Investigation into all Facilities -Based Cellular Carriers*, D.94-11-018, 1994 Cal. PUC LEXIS 1090, at *1-2 (fine of $2,000 for violation of Rule 1 where telephone company made an incorrect filing and omitted two of the three permits it had promised in an earlier filing); *see also Investigation of Buzz Telecom, Cor. Minimum Telephone Service Standards* , Case No. 06 -1443-TP-UNC, 2007 Ohio PUC LEXIS 664, at *23 (no violation or fine for incomplete or incorrect submission in response to a Commission staff request for information).

[27] Cal. Pub. Util. Code §§ 2107-2108.

[28] Indeed, as discussed above, the fines were actually *above* the maximum permitted under California law, as the evidence presented could not support a finding of a violation —much less continuing violations—of Rule 1.1. *Supra* Parts II-III.

CONCLUSION

For the foregoing reasons, the Commission should grant PG&E's application for rehearing, vacate Decision No. 13 -12-053, and issue a modified decisi on holding that PG&E cannot be found to have violated Rule 1.1 and that no sanctions should be imposed.

Respectfully submitted,

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Dated: January 23, 2014