

**BEFORE THE PUBLIC UTILITIES COMMISSION OF THE
STATE OF CALIFORNIA**

Order Instituting Investigation on the Commission's Own Motion into the Operations and Practices of Pacific Gas and Electric Company to Determine Violations of Public Utilities Code Section 451, General Order 112, and Other Applicable Standards, Laws, Rules and Regulations in Connection with the San Bruno Explosion and Fire on September 9, 2010.

I.12-01-007
(Filed January 12, 2012)
(Not Consolidated)

Order Instituting Investigation on the Commission's Own Motion into the Operations and Practices of Pacific Gas and Electric Company with Respect to Facilities Records for its Natural Gas Transmission System Pipelines.

I.11-02-016
(Filed February 24, 2011)
(Not Consolidated)

Order Instituting Investigation on the Commission's Own Motion into the Operations and Practices of Pacific Gas & Electric Company's Natural Gas Transmission System in Locations with Higher Population Density.

I.11-11-009
(Issued November 10, 2011)
(Not Consolidated)

**RESPONSE OF THE CITY AND COUNTY OF SAN FRANCISCO TO
THE MOTION OF THE CITY OF SAN BRUNO SEEKING THE RECUSAL OF
ASSIGNED COMMISSIONER PEEVEY**

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I. INTRODUCTION

Pursuant to Rule 11.1 of the Commission's Rules of Practice and Procedure, the City and County of San Francisco submits this response to the City of San Bruno's Motion Seeking Recusal of Assigned Commissioner Peevey.¹ San Francisco supports the City of San Bruno's call for the recusal of Commissioner Peevey and the appointment of an independent monitor. The records² identified by the City of San Bruno demonstrate a pervasive history of illegal ex parte communications between PG&E, the respondent in this proceeding, and Commissioner Peevey's office. All of the communications identified occurred during the pendency of one or more investigations where ex parte communications were prohibited. Many of the communications relate to the reasonableness and impact on PG&E of the penalties the Commission could impose in the investigations.³ The public and the parties to the investigations are entitled to a fair and impartial administrative adjudicatory process with the constitutional guarantee of procedural due process. The law is clear that the appropriate remedy for the conduct evidenced by the Commission's own documents is for Commissioner Peevey to be recused from ruling on the investigations.⁴

A. The Records Make Clear That PG&E Has Engaged In Illegal Ex Parte Communications With Commissioner Peevey Regarding the Outcome Of These Investigations

The Commission issued its Order Instituting Investigation 11-02-016⁵ on February 24, 2011. That investigation stated that if PG&E's record keeping practices adversely affected safety, the

¹ This response is made in conjunction with San Francisco's Response to the City of San Bruno's Motion for an Order to Show Cause Why Pacific Gas and Electric Company Should Not Be Held in Violation of Commission Rule of Practice and Procedure 8.3(b) and for Sanctions and Fees.

² San Francisco has filed Motion for Official Notice of the Records Identified in the City of San Bruno's Motions in conjunction with this response.

³ I. 11-02-016, I. 11-11-009, and I.12-01-007.

⁴ Although the City of San Bruno's seeks an Order to Show Cause on Commissioner Peevey's recusal, San Francisco does not believe any additional hearings are necessary. First, it is unclear whether anyone at the Commission could prosecute such an OSC without a conflict of interest. Second, the documents supporting San Bruno's motion are public records and speak for themselves as demonstrated by San Francisco's accompanying motion for official notice.

⁵ Order Instituting Investigation on the Commission's Own Motion into the Operations and Practices of Pacific Gas and Electric Company with Respect to Facilities Records for its Natural Gas Transmission System Pipelines.

Commission has an “obligation to consider the imposition of statutory penalties pursuant to Section 2107 of the California Public Utilities Code, and other appropriate relief under the law.”⁶ The Commission stated that these fines could be “significant.”⁷ The order categorized the proceeding as adjudicatory, stating that “ex parte communications are prohibited.”⁸

The documents provided by the City of San Bruno demonstrate repeated communications related to substantive issues in the investigations. On March 16, 2011, PG&E sent Commissioner Peevey an internal PG&E email recounting Macquarie’s investor meetings with the Commission and PG&E’s regulatory department.⁹ The attached Macquarie’s report discusses PG&E’s financial outlook and speculates on the likelihood and reasonableness of a penalty stemming from the Commission’s investigation.¹⁰ The report states “PG&E demonized by media; CPUC seems poised for at least a slap on the wrist... based on pressure to punish”¹¹ and “we believe there is higher risk that the CPUC may be tougher on this utility vs. its peers to the South, at least in the near-term.”¹²

Later that day, PG&E sent Commissioner Peevey another PG&E internal email describing a recent S&P ratings downgrade of PG&E.¹³ The email states that the downgrade is based in part on the pending investigation and resulting fines and penalties. It explains that “According to S&P, San Bruno situation seems to have taken a life of its own.”¹⁴ There are “concerns around federal/state scrutiny on PG&E operations.”¹⁵ “Public and regulatory sentiment is at its lowest in years”; and “CPUC is under significant political pressure as evidence [sic] by strong language in the recent order.

⁶ OII 11-02-016 at p. 11.

⁷ *Id.*

⁸ *Id.* at p. 15

⁹ Bates stamp CPUC 1416. San Francisco refers to each record by the bates stamp number in the lower left hand corner of each document. These documents were identified as the “41 violations” in footnote 7 of the Motion of the City of San Bruno Seeking the Recusal of Assigned Commissioner Peevey.

¹⁰ Bates stamp CPUC 1420.

¹¹ Bates stamp CPUC 1418.

¹² Bates stamp CPUC 1420.

¹³ Bates stamp CPUC 1428.

¹⁴ Bates stamp CPUC 1428.

¹⁵ Bates stamp CPUC 1428.

This creates a high uncertainty around punitive damages/fines that CPUC may assess that S&P imagines to be large and extremely uncertain).”¹⁶ The S&P report specifically mentions that the Commission could fine PG&E as a result of the record keeping investigation.¹⁷

Two days later, PG&E communicated another financial analyst’s view of a potential fine from the Commission. “Wynne now considers it likely that the CPUC will impose a substantial fine, possibly hundreds of millions of dollars, which is not included in the company’s \$200-\$300 million range of estimates and charges related to the San Bruno accident.”¹⁸

On April 18, 2011, PG&E sent an email containing a financial analyst’s dismissive view of alternatives to traditional fines. “Another potential route for penalty could be a reduction in allowed ROE for the gas transmission business although it is still unclear whether a change would be for the entire gas business or just gas new capex. We see this as a slippery slope for the California Commission (CPUC) to change the incentives around running important regulated businesses but nonetheless we have tried to assess the financial exposure for shareholders.”¹⁹

On November 3, 2011, PG&E communicated that financial analysts were predicting “a \$500 million fine as the outcome of the CPUC’s record keeping investigation.”²⁰

PG&E continued this pattern of conduct even after the Commission opened Investigation 11-11-009 on November 10, 2011.²¹ The order instituting that investigation explicitly stated that ex parte communications were prohibited.²² On December 8, 2011, PG&E sent another internal PG&E

¹⁶ Bates stamp CPUC 1428.

¹⁷ Bates stamp CPUC 1432 (“In a Feb. 24 order, the CPUC said it would fine PG&E if its gas transmission pipeline recordkeeping were deficient and unsafe.”).

¹⁸ Bates stamp CPUC 1439.

¹⁹ Bates stamp CPUC 1476-1477.

²⁰ Bates stamp CPUC 1717.

²¹ Order Instituting Investigation on the Commission’s Own Motion into the Operations and Practices of Pacific Gas & Electric Company’s Natural Gas Transmission System in Locations with Higher Population Density.

²² Order Instituting Investigation 11-11-009 at p. 12.

message regarding S&P's recent downgrade of PG&E.²³ The attached S&P report discusses an expected fine of \$400 million as a result of the record keeping investigation.²⁴

PG&E even continued this pattern of conduct after the Commission opened Investigation 12-01-007 on January 12, 2012,²⁵ and the administrative law judges in all three investigations issued a ruling clarifying that these types of communications are prohibited by the ex parte rules.²⁶ It should have been abundantly clear that ex parte communications on substantive matters, such as potential penalties were prohibited. Yet, on December 6, 2013, PG&E sent Commissioner Peevey a Fitch Ratings report discussing current regulatory proceedings at the Commission, including all three pending investigations.²⁷ This report discusses potential outcomes, and claims that PG&E's earning power would be diminished if the Commission adopted CPSD's recommended penalty.²⁸ It asserts that the Consumer Protection and Safety Division's "recommendation in the penalty phase in the [Commission's] orders instituting investigation ... has, in Fitch's opinion, rekindled investor uncertainty regarding regulation in California."²⁹ These numerous communications remained secret until the City of San Bruno filed a judicial action seeking public records.

Commissioner Peevey received numerous communications containing extra-record evidence and interpretation of the evidence from PG&E. The other parties to the investigations were never made aware of these communications and did not have an opportunity to challenge the evidence or PG&E's arguments. The issues of the size and impact of potential fines and penalties are material to the final outcome of the investigations and the content of these communications is not neutral. They are intended to influence Commissioner Peevey's consideration of the damages, fines and potential

²³ Bates stamp CPUC 1743.

²⁴ Bates stamp CPUC1747.

²⁵ Order Instituting Investigation on the Commission's Own Motion into the Operations and Practices of Pacific Gas and Electric Company to Determine Violations of Public Utilities Code Section 451, General Order 112, and Other Applicable Standards, Laws, Rules and Regulations in Connection with the San Bruno Explosion and Fire on September 9, 2010.

²⁶ May 16, 2013 ALJ Ruling clarifying that an "interested person" includes representatives from ratings agencies, industry analysts or financial institutions who have financial interests in PG&E.

²⁷ Bates stamp CPUC 1992.

²⁸ Bates stamp CPUC 1995.

²⁹ Bates stamp CPUC 1993.

remedies in PG&E's favor. Based on San Francisco's review of the records produced, PG&E presented financial analyses concerning the potential outcome of the pending investigations to Commissioner Peevey no less than 21 times in violation of the ex parte rules. This does not include the many other violations of the ex parte requirements referred to in the City of San Bruno's Motion seeking recusal.

II. RESPONSE

A. Allowing Commissioner Peevey to Participate In Any Decision Making Related to the Investigations Constitutes Legal Error

Commissioner Peevey cannot participate in the decision making process of the pending investigations because it would constitute legal error. The repeated illegal ex parte communications between Commissioner Peevey and PG&E violates the due process rights of the non-PG&E parties.³⁰ Commissioner Peevey's failure to reprimand or dissuade PG&E from communicating about the potential fines and remedies in the investigations creates a strong perception that he is biased in favor of PG&E.³¹ The Commissioner's failure to apply the Commission's ex parte requirements to PG&E also constitutes a failure to proceed in a manner required by law.³² Finally, allowing Commissioner Peevey to participate in adjudication of these investigations despite this pattern of conduct is an abuse of discretion that will taint any order or decision resulting from the investigations.³³ As a result, Commissioner Peevey's participation in any decision making related to the investigations, including the resolution of these motions,³⁴ constitutes legal error.

³⁰ Cal. Pub. Util. Code § 1757(a)(6); *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.* (2006) 40 Cal.4th 1, 5.

³¹ Cal. Pub. Util. Code § 1757(a)(6); *Morongo Band of Mission Indians v. State Water Resources Control Bd.* (2009) 45 Cal.4th 731, 737.

³² Cal. Pub. Util. Code § 1757(a)(2); *Southern Cal. Edison v. Public Utilities Comm'n* (2006) 140 Cal.App.4th 1085, 1105-1106 (Commission must follow its own rules and procedures).

³³ Cal. Pub. Util. Code § 1757(a)(5).

³⁴ Because these motions center around the propriety of Commissioner Peevey's conduct, it is improper for him to participate in the resolution of these motions in any capacity. The motions related to the illegal ex parte communications are: (1) the City of San Bruno's Motion Seeking the Recusal of Assigned Commissioner Peevey, (2) the City of San Bruno's Motion For An Order To Show Cause Why Pacific Gas & Electric Should Not Be Held In Violation Of Rule 8.3(b) and For Sanctions and Fees, and (3) San Francisco's Motion for Official Notice of the Records Identified in the City of San Bruno's Motions.

1. Due Process Requires that Commissioner Peevey Not Participate In Any Decision Making Related to the Natural Gas Pipeline Investigations

Commissioner Peevey's continued participation in the investigations will violate the non-PG&E parties' constitutional right to due process.³⁵ When an administrative agency conducts adjudicative proceedings, the constitutional guarantee of due process of law requires a fair tribunal.³⁶ Further, "the undeniable public interest in fair hearings in the administrative adjudication arena, militate[s] in favor of assuring that such hearings are fair."³⁷ "Due process in an administrative hearing also demands an appearance of fairness and the absence of even a probability of outside influence on the adjudication."³⁸

Secret ex parte communications between a party and a decision maker violate the most basic precepts of fairness.³⁹ When one party has off-the-record substantive communications with a decision maker and submits extra-evidence reports on a material issue in the case while the case is still pending, it deprives the other parties of the constitutional right to due process and a fair trial.⁴⁰ Failure to prevent these type of illegal ex parte communications can constitute misconduct sufficient to overturn an administrative adjudication for denial of a fair hearing.⁴¹ Essentially,

"[a]dministrative tribunals which are required to make a determination after a hearing cannot act upon their own information, and nothing can be considered as evidence that was not introduced at a hearing of which the parties had notice or at which they were present. [Citations.] The fact that there may be substantial and properly introduced evidence which supports the board's ruling is immaterial." (citations) **"A contrary conclusion would be tantamount to requiring a hearing in form but not in substance, for the right of a hearing before an administrative tribunal would be meaningless if the tribunal**

³⁵ Cal. Pub. Util. Code § 1757(a)(6).

³⁶ *Withrow v. Larkin* (1975) 421 U.S. 35, 46.

³⁷ *Nightlife Partners v. City of Beverly Hills* (2003) 108 Cal.App.4th 81, 90.

³⁸ *Morongo Band of Mission Indians v. State Water Resources Control Bd.* (2009) 45 Cal.4th 731, 737.

³⁹ *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.* (2006) 40 Cal.4th 1, 5 ("One fairness principle directs that in adjudicative matters, one adversary should not be permitted to bend the ear of the ultimate decision maker or the decision maker's advisors in private.").

⁴⁰ *Id.* at 7.

⁴¹ *Id.* at 16.

were permitted to base its determination upon information received without the knowledge of the parties.⁴²

As the many records conclusively show, PG&E, the respondent in the natural gas pipeline investigations, and Commissioner Peevey, a decision maker, have had many secret communications relating to the fine and remedies in these investigations. Those communications concerned material issues in a pending investigation, occurring in a non-public forum. Some communications related to PG&E's view that it was being unfairly villanized.⁴³ Other communications discussed the potential fines and remedies forthcoming in these investigations and the reasonableness of such proposals.⁴⁴ One analyst even opined on the reasonableness of the Commission's regulation in California in light of the potential fines resulting from these investigations.⁴⁵

There is no doubt that these communications are prohibited ex parte communications. As the May 16, 2013 ALJ Ruling stated "the amount of the penalties the Commission may impose in the Pipeline Investigations is a substantive issue. Therefore, an improper ex parte communication would have occurred if the size of the fine or other penalties the Commission may impose in these proceedings were discussed."⁴⁶ This is exactly what transpired between PG&E and Commissioner Peevey. Despite the fact that the ALJs made clear that "improper *ex parte* communications jeopardize the integrity of the proceedings,"⁴⁷ PG&E continued its illegal communications. These illegal ex parte contacts violate the due process rights of the non-PG&E parties to the natural gas pipeline

⁴² *Rondon v. Alcoholic Beverage Control Appeals Bd.* (2007) 151 Cal.App.4th 1274, 1290 (emphasis added).

⁴³ Bates stamp CPUC 1420.

⁴⁴ Bates stamp CPUC 1428 (large and extremely uncertain fines warrant credit downgrade), 1439 ("substantial fine, possibly hundreds of millions of dollars"), CPUC 1451-1452 (discussing potential \$500 million fine for the record keeping investigation alone), CPUC 1476-1477 ("Another potential route for penalty could be a reduction in allowed ROE for the gas transmission business although it is still unclear whether a change would be for the entire gas business or just gas new capex. We see this as a slippery slope for the California Commission (CPUC) to change the incentives around running important regulated businesses but nonetheless we have tried to assess the financial exposure for shareholders."), CPUC 1489, CPUC 1522, CPUC 1532, CPUC 1534, CPUC 1555, CPUC 1558, CPUC 1571, CPUC 1623, CPUC 1641, CPUC 1689, CPUC 1694, CPUC 1695, CPUC 1704.

⁴⁵ Bates stamp CPUC 1992-1995.

⁴⁶ May 16, 2013 ALJ Ruling Clarifying Ex Parte Reporting Requirements at p. 3.

⁴⁷ *Id.* at p. 4.

investigations. Commissioner Peevey's participation in the natural gas pipeline investigation will undermine any potential for a fair adjudicatory process.

2. There Is An Unacceptable Probability That Commissioner Peevey Is Biased In Favor of PG&E

The pattern of conduct also raises a high probability that Commissioner's Peevey is biased in favor of PG&E, rendering him incapable of participating in the natural gas pipeline investigations. A fair tribunal means that the decision maker is free of bias for or against a party.⁴⁸ In addition, “[v]iolation of this due process guarantee can be demonstrated not only by proof of actual bias, but also by showing a situation ‘in which experience teaches that the probability of actual bias on the part of the judge or decisionmaker is too high to be constitutionally tolerable.’”⁴⁹

Here, Commissioner Peevey entertained over 20 illegal ex parte communications related to the fines and remedies in the proceeding. He did nothing to stop or dissuade PG&E from submitting extra-record evidence. The non-PG&E parties were not made aware of PG&E's off-the-record communications and did not have an equal opportunity to rebut the evidence or arguments made in the illegal ex parte communications. The probability of bias is increased by the number of violations. This was not an isolated instance, but a pattern of conduct where a Commissioner received regular secret correspondence from the respondent to a pending investigation but did nothing to dissuade the respondent from doing so. This is a situation where the probability of bias is too high to allow Commissioner Peevey to participate in any decision making related to the natural gas pipeline investigations.

Even for the communications which may not be per se violations of the ex parte rule, the familiar nature and extent of the repeated contacts create an unacceptable risk of bias. This broader pattern of conduct established by the entirety of the “41 violations” create an impermissible risk and appearance of bias in favor of PG&E. In sum, the appearance and high probability of bias argues in favor of requiring Commissioner Peevey's recusal from these cases.

⁴⁸ *Morongo Band of Mission Indians v. State Water Resources Control Bd.* (2009) 45 Cal.4th 731, 737, citing see *Haas v. County of San Bernardino* (2002) 27 Cal.4th 1017, 1025, (“When due process requires a hearing, the adjudicator must be impartial.”).

⁴⁹ *Morongo Band of Mission Indians v. State Water Resources Control Bd.* (2009) 45 Cal.4th 731, 737 quoting *Withrow v. Larkin* (1975) 421 U.S. 35, 47.

3. The Commission's Failure to Follow Its Own Rules Constitutes A Failure to Proceed In A Manner Required by Law

Failure to enforce the rule prohibiting ex parte communications constitutes a failure to proceed in a manner required by law.⁵⁰ In order to ensure a fair hearing, the Commission must enforce its Rules of Practice and Procedure. Article 8 of the Commission's Rules of Practice and Procedure are clear. An ex parte communication is one that: (1) concerns any substantive issue in a formal proceeding, (2) takes place between an interested person and a decision maker, and (3) does not occur in a public forum.⁵¹ "In any adjudicatory proceeding, ex parte communications are prohibited."⁵² These rules apply with equal force to communications with commissioner advisors.⁵³ Each of the orders instituting the investigations also made these prohibitions explicit.⁵⁴

Here, PG&E has engaged in persistent and pervasive violations of the prohibition on ex parte communications. Commissioner Peevey never directed PG&E to cease or even report these communications, even after the May 16, 2013 ALJ Ruling. The purpose of the ex parte prohibition is to ensure that decision makers consider only the evidence and arguments properly before them. Allowing a commissioner who has considered extra-record evidence submitted by one party directly relevant to material issues in the case to participate in the adjudication of the investigations undermines the purpose of the ban on ex parte communications. The pattern of conduct reflected in the public record demonstrates a failure by the Commission to comply with its own rules. The Commission's failure to abide by its own rules of practice and procedure constitutes a failure to proceed in a manner required by law.⁵⁵

⁵⁰ Cal. Pub. Util. Code § 1757(a)(2).

⁵¹ Commission Rule of Practice and Procedure 8.1(c).

⁵² Commission Rule of Practice and Procedure 8.3(b).

⁵³ Commission Rule of Practice and Procedure 8.2.

⁵⁴ Order Instituting Investigation 11-02-016 at p. 15; Order Instituting Investigation 11-11-009 at p. 12; Order Instituting Investigation 12-01-007 at p. 12.

⁵⁵ *Southern Cal. Edison v. Public Utilities Comm'n* (2006) 140 Cal.App.4th 1085, 1105-1106.

B. Recusal Is The Only Appropriate Remedy

Put plainly, a party “*is entitled to a neutral and detached judge in the first instance.*”⁵⁶ Once the illegal communications have been made, “the party faced with such a communication need not prove that it was considered; conversely, the agency engaging in *ex parte* discussions cannot raise as a shield that the advice was not considered.”⁵⁷ It is no defense to state that the decision maker did not invite or consider the *ex parte* communications. “Whether the decision maker considered the reports of hearing is in any event beside the point.”⁵⁸

Further, the fact that similar financial analysis may have been properly introduced into the record as part of the hearings on potential fines does not remedy the fact that unlawful contact have occurred.⁵⁹ A decision maker who has received such illegal *ex parte* communications from a party must recuse him or herself or risk undermining the entire administrative process.

Finally, the possibility of subsequent independent review does not excuse unlawful conduct. For example, administrative remedies at Commission, such as an application for rehearing, and legal remedies do not cure the violations of due process, bias or failure to proceed in a manner required by law. Assurances that Commissioner Peevey can decide these cases in an unbiased manner are undermined by these communications and “the requirement of due process of law in judicial procedure is not satisfied by the argument that men of the highest honor and the greatest self-sacrifice could carry it on without danger of injustice.”⁶⁰ Thus, the Commission cannot simply assume that its members are capable of performing the public’s business despite repeated violations of the Commission’s own rules for ethical conduct. If *ex parte* violations have occurred or there is a high probability of bias then decision maker must be recused and offending party must be sanctioned. The totality of the circumstances here demonstrates flagrant disregard for due process and Commission rules in this

⁵⁶ *Haas v. County of San Bernardino* (2002) 27 Cal.4th 1017 (emphasis in the original), quoting *Ward v. Village of Monroe* (1972) 409 U.S. 57, 61-62.

⁵⁷ *Department of Alcoholic Beverage Control v. Alcoholic Beverage Control Appeals Bd.* (2006) 40 Cal.4th 1, 16.

⁵⁸ *Id.*

⁵⁹ *Rondon v. Alcoholic Beverage Control Appeals Bd.* (2007) 151 Cal.App.4th 1274, 1290 (“The fact that there may be substantial and properly introduced evidence which supports the board's ruling is immaterial.”).

⁶⁰ *Haas v. County of San Bernardino* (2002) 27 Cal.4th 1017, 1025-26.

administrative adjudication. The only remedy is to recuse Commissioner Peevey from any decision making related to these investigations.

C. San Francisco Supports Appointing An Independent Monitor

This latest incident is further proof that an independent monitor is necessary. The public can have no confidence that the Commission is exercising its constitutionally required oversight of the utilities or that PG&E is being held accountable and that it is performing the most pressing remedial work to ensure the public safety.

III. CONCLUSION

In order to preserve the due process rights of the parties and to ensure that the investigations proceed in a manner require by law, the Commission must recuse Commissioner Peevey from consideration of any aspects of the investigations.

Dated: August 12, 2014

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