

**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 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**

DENNIS J. HERRERA
City Attorney
THERESA L. MUELLER
AUSTIN M. YANG

Attorneys for:
CITY AND COUNTY OF SAN FRANCISCO
1 Dr. Carlton B. Goodlett Place, Room 234
San Francisco, CA 94102-4682
Telephone: (415) 554-6761
Facsimile: (415) 554-4763
Email: austin.yang@sfgov.org

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 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.¹ The records² identified by the City of San Bruno demonstrate that PG&E has maintained a steady stream of illegal contact with Commissioner Peevey's office despite the clear rules, orders and admonishments that such ex parte communications are prohibited.

II. RESPONSE

A. 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 11-02-016³ on February 24, 2011. That investigation stated that if PG&E's record keeping practices adversely affected safety, the 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."⁴ The Commission stated that these fines could be "significant."⁵ The order categorized the proceeding as adjudicatory, stating that "ex parte communications are prohibited."⁶

On March 16, 2011, PG&E engaged in an illegal ex parte communication. PG&E sent Commissioner Peevey a communication recounting Macquarie's investor meetings with the Commission and PG&E's regulatory department.⁷ The attached Macquarie's report discusses PG&E's

¹ This response is made in conjunction with San Francisco's Response to the City of San Bruno's Motion Seeking the Recusal of Assigned Commissioner Peevey.

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 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.

⁴ Order Instituting Investigation 11-02-016 at p. 11.

⁵ *Id.*

⁶ *Id.* at p. 15.

⁷ Bates stamp CPUC 1416. San Francisco refers to each records by the bates stamp number in the lower left corner of each document. These document were identified as the "41 violations" in footnote 5 of the Motion of the City of San Bruno for an Order to Show Cause Why Pacific Gas and

financial outlook and speculates on the likelihood and reasonableness of a penalty stemming from the Commission's investigation.⁸ The report states "PG&E demonized by media; CPUC seems poised for at least a slap on the wrist... based on pressure to punish"⁹ 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."¹⁰

Later that day, PG&E sent Commissioner Peevey another communication describing a recent S&P ratings downgrade of PG&E.¹¹ 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."¹² There are "concerns around federal/state scrutiny on PG&E operations."¹³ "Public and regulatory sentiment is at its lowest in years" and the "CPUC is under significant political pressure as evidence [sic] by strong language in the recent order. (This creates a high uncertainty around punitive damages/fines that CPUC may assess that S&P imagines to be large and extremely uncertain)."¹⁴ The S&P report specifically mentions that the Commission could fine PG&E as a result of the record keeping investigation.¹⁵ PG&E further responded by joking "some folks here have suggested it may be Tom and my failure to work with regulators....oh well."¹⁶ The damages and fines are a material issue pending in the record keeping investigation. These communications clearly violated the ban on ex parte communications.

The emails from PG&E to Commissioner Peevey addressing fines and penalties continued. On March 18, 2011, PG&E communicated another financial analyst's view of a potential fine stemming from the record keeping investigation. "Wynne now considers it likely that the CPUC will impose a

Electric Company Should Not Be Held in Violation of Commission Rule of Practice and Procedure 8.3(b) and for Sanctions and Fees.

⁸ Bates stamp CPUC 1420.

⁹ Bates stamp CPUC 1418.

¹⁰ Bates stamp CPUC 1420.

¹¹ Bates stamp CPUC 1428.

¹² Bates stamp CPUC 1428.

¹³ Bates stamp CPUC 1428.

¹⁴ Bates stamp CPUC 1428.

¹⁵ 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.")

¹⁶ Bates stamp CPUC 1435.

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.”¹⁷

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.”¹⁸

On November 3, 2011, PG&E communicated that certain financial analysts were predicting “a \$500 million fine as the outcome of the CPUC’s record keeping investigation.”¹⁹

PG&E continued this pattern of conduct even after the Commission opened Investigation 11-11-009²⁰ on November 10, 2011, which explicitly stated that ex parte communications were prohibited.²¹ On December 8, 2011, PG&E sent another communication regarding S&P’s recent downgrade of PG&E.²² The attached S&P report discusses an expected fine of \$400 million as a result of the record keeping investigation.²³

PG&E continued such communications after the Commission opened Investigation 12-01-007 on January 12, 2012,²⁴ and the administrative law judges in all three investigations issued a ruling in May 2013 clarifying that communications between any interested person and decision makers are

¹⁷ Bates stamp CPUC 1439

¹⁸ Bates stamp CPUC 1476-1477.

¹⁹ Bates stamp CPUC 1717

²⁰ 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.

²¹ Order Instituting Investigation 11-11-009 at p. 12.

²² Bates stamp CPUC 1743.

²³ Bates stamp CPUC1747.

²⁴ 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.

prohibited by the ex parte rules.²⁵ Even if PG&E’s experienced regulatory affairs staff were somehow unaware of the Commission’s long-standing Rule of Practice and Procedure banning ex parte communications in adjudicatory proceedings, the three orders instituting investigations and the ALJ ruling should have made it abundantly clear to PG&E 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.²⁶ This report discusses potential outcomes, and claims that PG&E’s earning power would be diminished if the Commission adopted CPSD’s recommended penalty.²⁷ 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.”²⁸

These numerous communications remained secret until the City of San Bruno filed a judicial action seeking public records. PG&E repeatedly violated the ban on ex parte communications by submitting extra-record evidence and arguments on substantive issues in the proceedings. It is reasonable to infer that these communications were made with the intent of influencing the final outcome of the natural gas pipeline investigations. These communications provide sufficient evidence for the Commission to issue an order to show cause as to why PG&E should not be sanctioned for violating the ex parte rules and the ALJ’s May 16, 2013 Ruling. Based on San Francisco’s review of the records produced, at least 21 of these communications concerned financial analysis regarding the potential outcome of the pending investigations.

²⁵ 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.

²⁶ Bates stamp CPUC 1992.

²⁷ Bates stamp CPUC 1995.

²⁸ Bates stamp CPUC 1993.

B. PG&E's Secret Communications Violate the Prohibition on Ex Parte Communications.

Article 8 of the Commission's Rules of Practice and Procedure define an ex parte communication as 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.²⁹ "In any adjudicatory proceeding, ex parte communications are prohibited."³⁰ These rules apply with equal force to communications with commissioner advisors.³¹ Each of the orders instituting the investigations also made these prohibitions explicit.³²

There is no doubt that the communications concerning the reasonableness of potential fines and penalties constitute 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."³³ This is exactly what transpired at least 21 times between PG&E and Commissioner Peevey. The communications occurred between PG&E, the respondent in the natural gas pipeline investigations, and Commissioner Peevey and Commissioner Peevey's advisor, both of whom are decision makers under the Commission rules. These communications were not made in public. They were emails sent directly to the decision maker without any notice to the other parties in the proceedings.

These numerous communications constitute unlawful secret attempts by PG&E to influence decision makers on the appropriate fines and remedies in these investigations. Each and every one of these emails constitutes a violation of the ban on ex parte communications and the Commission must appropriately sanction the offending party.

²⁹ Commission Rule of Practice and Procedure 8.1(c).

³⁰ Commission Rule of Practice and Procedure 8.3(b).

³¹ Commission Rule of Practice and Procedure 8.2.

³² 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.

³³ May 16, 2013 ALJ Ruling Clarifying Ex Parte Reporting Requirements at p. 3.

C. The Ex Parte Communications Undermine The Administrative Adjudicatory Process in a Manner that Warrants Sanctions

These ex parte violations are not simple technical violations of the Commission rules. The communications were unlawful attempts by PG&E to influence the adjudicatory process. As the ALJs noted, “improper *ex parte* communications jeopardize the integrity of the proceedings.”³⁴ These communications undermine “the undeniable public interest in fair hearings in the administrative adjudication arena.”³⁵ Indeed, “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.”³⁶

The purpose of the ex parte prohibition is to ensure that decision makers consider only the evidence and arguments properly before them. By communicating with Commissioner Peevey and his advisor on substantive issues in the natural gas pipeline investigations, PG&E improperly communicated facts and arguments outside of the evidentiary record of the investigations. The additional facts and arguments taint the proceeding and undermine the public confidence in the Commission. There is more than sufficient evidence for the Commission to issue an Order to Show Cause requiring PG&E to explain why it should not be punished for these on-going ex parte violations.

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³⁴ *Id.* at p. 4.

³⁵ *Nightlife Partners v. City of Beverly Hills* (2003) 108 Cal.App.4th 81, 90.

³⁶ *Morongo Band of Mission Indians v. State Water Resources Control Bd.* (2009) 45 Cal.4th 731, 737.

