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)
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REPLY IN RESPONSE TO PACIFIC GAS & ELECTRIC COMPANY'S OPPOSITION TO CITY OF SAN BRUNO'S MOTION FOR AN ORDER TO SHOW CAUSE RE: EX PARTE COMMUNICATIONS AND REQUEST FOR SANCTIONS AND FEES

STEVEN R. MEYERS
BRITT K. STROTTMAN
EMILIE E. DE LA MOTTE
Meyers, Nave, Riback, Silver & Wilson
555 12th Street, Suite 1500
Oakland, CA 94607
Phone: (510) 808-2000
Fax: (510) 444-1108
E-mail: smeyers@meyersnave.com
Attorneys for CITY OF SAN BRUNO

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Pursuant to Rule 11.1(f) of the California Public Utilities Commission's ("Commission" or "CPUC") Rules of Practice and Procedure and Administrative Law Judge Yip-Kikugawa's August 13, 2014 email ruling granting the City of San Bruno's ("San Bruno") request to file a reply, San Bruno respectfully submits this reply to Pacific Gas & Electric Company's ("PG&E") opposition to San Bruno's motion for an Order to Show Cause why PG&E should not be held in violation of Commission Rules of Practice and Procedure Rule 8.3(b) (rule against ex parte communications) and for sanctions and fees.

I. INTRODUCTION

Notwithstanding an express and unequivocal prohibition of ex parte communications in adjudicatory proceedings by statute, rule, and proceeding Scoping Memo Orders, PG&E's

opposition goes into elaborate nuanced detail to show the 41 emails at issue do not violate the ex parte rules. PG&E claims the email exchanges were just part of PG&E's diligent efforts to "keep[ ] its regulator apprised of significant developments affecting its utility business."[1] Curiously, PG&E chooses to communicate these "significant developments" through secret emails with President and Assigned Commissioner Peevey only. If PG&E truly was keeping the CPUC apprised of its business as it asserts, then it would do so through open and proper channels to all Commissioners and the public.[2] In actuality, these emails are nothing less than PG&E whispering into the judge's ear, regardless of whether Assigned Commissioner Peevey is the "judge" in a traditional sense. He is a judge here and now, as PG&E's opposition admits. The information PG&E provides attempts to influence him to "go easy" on PG&E in these adjudicatory proceedings. It does not matter that some of the information exchanged might be "publicly available." It does not matter that the information may also be useful to the CPUC in its broader efforts to regulate PG&E. And it does not matter that PG&E does not consider them advocacy. The thing speaks for itself, why send these secret communications to the Assigned Commissioner if you don't have an ulterior motive.

The bare essence of PG&E's arguments is that their secret communications are routine, the commissioners need "guidance" from the utility, and frankly its much ado about nothing.[3] Beyond insulting the intelligence of the Commissioners themselves and dismissing the capabilities of the staff of the CPUC to provide intellectual support to Commission actions, PG&E insults everyone associated with this tragedy from those immolated in their homes to those who have sought full, public and objective explication of the facts. The arrogance of PG&E is beyond the pale. The rules brook no exceptions, yet PG&E feels the need to engage in highly controversial and legally problematic conduct. PG&E has violated its own corporate standards for ethical conduct, namely "how will this look in the press." [4] The people and the ratepayers should be able to trust the objectivity, skills and abilities of those appointed to serve them alone without the necessity for PG&E whispering in their ears. When the CPUC was

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[1] PG&E Opp at p. 4.

[2] *See e.g.,* PG&E Pipeline Safety Enhancement Plan ("PSEP") compliance report, quarterly filing in Rulemaking 11-02-019, filed April 30, 2014.

[3] *See, San Bruno Calls Commission for Peevey's Dismissal as CPUC President*, California Energy Markets vol. 1294, August 1, 2014, pp. 5-7.

[4] http://www.pgecorp.com/aboutus/corp_gov/coce/our_work_decisions.shtml

created by the voters one hundred years ago, the regulated businesses were so mistrusted that acceptance of a free ride on the railroad by a public official was grounds for immediate removal from office.[5] Have we come that far or have the means of subtle influence changed that much?

II. PG&E'S OPPOSITION IS BASED UPON A MYTHOLOGY.

Despite reducing its admission to a footnote, PG&E does not dispute that the subject emails were 1) private communications; and 2) exchanged between an interested party and a decision maker.[6] The CPUC in the Public Records Act litigation characterized the emails as within the scope of the adjudicatory proceedings. The company argues the communications are nonetheless exempt from ex parte rules because they do not concern a "substantive issue" in the three pending Order Instituting Investigation (the "OIIs") proceedings.[7] PG&E's opposition claims its communications were nothing more than "completely appropriate" informal contact between the public utility and its regulating public agency.[8] This position is a mythological construct created by its lawyers to get the Company out of a box of its own making.

A. Myth #1: The communications are not improper ex parte communications because "these emails do not advocate for anything."

PG&E opines that the emails do not concern a substantive issue of the OIIs because they "contain no such advocacy" or " could not have influenced any of the proceedings here."[9] It also argues that an email submitted to Commissioner Peevey with an "FYI" or attachment is not an ex parte communication, because it does not include persuasive language or factual or legal arguments.[10] This argument is a fantasy.

First, the Commission's Rules of Practice and Procedures ("Rules") make clear that San Bruno need only show that the communications were of a "substantive issue" concerning the

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[5] Cal. Const. Art XII, § 7.

[6] PG&E Opp. at p. 3, n. 5.

[7] PG&E Opp. at p. 3; see Commission's Rules of Practice and Procedure, Rule 8.1(c).

[8] PG&E Opp. at p. 5.

[9] PG&E Opp. at p. 8.

[10] PG&E Opp. at pp. 3, 14-15.

proceedings.[11] San Bruno need not prove the private communications actually "advocated" for any particular position. This argument conflicts with the plain language of the Rules.

PG&E's communications do show advocacy. Why send it in the first instance to only the Assigned Commissioner if it has no import? Furthermore, the company has filtered through all the publicly available information, undertaken internal corporate analysis of that information, and decided to forward specific financial data and forecasts with a specific point of view to influence Commissioner Peevey. PG&E's emails ask Commissioners Peevey to consider *this* information, not *that* information through its picking and choosing what information he should consider. What PG&E's fails to understand is that its act of *filtering* the publicly available information concerning PG&E is indeed advocacy.

For example, PG&E forwarded an internal, private PG&E email on May 23, 2011, which discussed a Jefferies report that downgraded PG&E stock to "hold." The email attached the Jefferies report and also discussed that PG&E's stock was down more than its "comparator group." The internal email and the Jefferies report stated part of the downgrade was due to the San Bruno explosion, wherein PG&E could receive fines and penalties even above the levels projected in the Jefferies' model.[12] In another instance, PG&E forwarded "internal thoughts" concerning a Standard & Poor's credit downgrade from "stable" to "negative." The rationale for the rating was because of the uncertainty of the San Bruno proceedings. Per PG&E, "[a]ccording to S&P, [the] San Bruno situation seems to have taken a life of its own" and "CPUC is under significant political pressure…[t]his creates a high uncertainty around punitive damages/fines."[13] In another email dated March 18, 2011, PG&E forwards another private PG&E email, letting the CPUC know that, in PG&E's view, Hugh Wynne of Berstein Research

[11] Rule 8.1(c)(1).

[12] Bates stamp Nos. CPUC001522-1531. All references to Bates stamp documents refer to the documentary evidence submitted with San Bruno's moving papers.

[13] Bates stamp Nos. CPUC001428-1434.

"now considers it likely the CPUC will impose a substantial fine."[14] Sadly, these emails are not unique.[15] PG&E's emails to Commissioner Peevey discuss these very proceedings and how they will negatively impact the company.

As PG&E notes, the majority of information PG&E provides to Commissioner Peevey (only) concerns the financial health of PG&E.[16] A thorough analysis of the email exchanges shows that ALL of the information forwarded to Commissioner Peevey contain negative, bleak, or unimpressive assessments which question the financial health of the company in light of the San Bruno disaster.

This point of view PG&E proffers to Commissioner Peevey is significant. When PG&E forwards yet another negative financial report, PG&E is basically saying: "We are getting hammered. Do something!" Only by suspending reality can PG&E logically argue it is promoting the free flow of ideas with the CPUC. PG&E wants to convince Commissioner Peevey that the company is and will be in bad shape because of the looming CPUC fines. With this point of view, PG&E hopes it can influence Commissioner Peevey to order a lesser fine. Logic produces no other conclusion.

B. Myth #2: The Commissioners cannot properly do their jobs unless they receive secret emails from the utilities about their financial conditions.

Regardless of whether the emails advocate PG&E's position, PG&E states the emails are necessary because: "[t]he Commission expects to be kept informed of PG&E's actions and of any significant developments that could affect its gas operations."[17] PG&E *should* keep the Commission well-informed for safe and effective regulation. But these emails do not serve that function. If PG&E wanted to promote the free flow of ideas between CPUC and PG&E, it

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[14] Bates stamp Nos. CPUC001439-1144.

[15] *See* Bates stamp Nos. CPUC001416-1427, CPUC001446-1468, CPUC001469-87, CPUC001489-1519, CPUC001690-1693, CPUC001717-1742, CPUC00173-1751, CPUC001765-1772.

[16] PG&E Opp. at pp. 10, 16.

[17] PG&E Opp. at p. 6. *See also*, quarterly gas safety compliance reports filed by PG&E with the Commission under the PSEP proceeding Rulemaking 11-02-019.

would not do so through private emails to Commissioner Peevey. Instead, PG&E would logically forward important information to *all* commissioners for their consideration or provide that information though more widely available means for the Commission to properly evaluate. The secret emails sent to Commissioner Peevey by their very nature suggest something improper, for "Mike's" eyes only.[18] San Bruno's Motion for an Order to Show Cause would provide PG&E with an opportunity to demonstrate its "bread and butter" communications both written and oral are not cloaked in inappropriate secrecy, but occur regularly and equally with all commissioners.

This is not the time and place to debate the public policy questions of "regulatory capture."[19] But to argue that a regulated industry needs to "educate" the regulators certainly meets that commonly accepted definition. Please recall that the National Transportation Safety Board specifically found that a contributing cause to the 2010 disaster was the "cozy" relationship between the CPUC and PG&E.[20] Yet the very justifications provided by PG&E to avoid the implications of the ex parte rules evidence a complete ignorance of this NTSB finding and a "business as usual" approach to the regulatory environment.

PG&E argues the CPUC needs these financial forecasts and communications to properly regulate PG&E.[21] PG&E proffers no proof or citation to support the CPUC specifically needs or requires PG&E to send it publicly available financial analyst reports (and PG&E's internal analysis of the same) to oversee the utilities' gas operations as asserted. The CPUC's obligations to oversee public utilities in California is derived from the California Legislature and is codified

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[18] As seen by San Bruno's concurrent motion seeking Commissioner Peevey's recusal, San Bruno believes PG&E strategically sent their private emails for Commissioner Peevey's eyes only because the company believed they could more easily influence him. If PG&E also sent private emails to the other Commissioners regarding same, San Bruno welcomes the opportunity to be proved it wrong.

19 Regulatory capture is "a kind of regular personnel interchange between agency and industry [that] blurs what should be a sharp line between regulator and regulatee, and can compromise independent regulatory judgment. In short, the regulated industries are often in clear control of the regulatory process." Mark Green and Ralph Nader, *Economic Regulation vs. Competition: Uncle Sam the Monopoly Man*, Yale Law Journal 82, no. 5 (April 1973) p. 876.

[20] *See https://www.ntsb.gov/investigations/summary/PAR1101.html*

[21] PG&E Opp. at p. 6.

in the Public Utilities Code. As PG&E points out, the Commission's essential duty is to oversee the safe, reliable, and affordable utility services for California citizens.[22] It does not stand to reason that the CPUC needs PG&E to provide it a Standard & Poor report concerning PG&E's credit rating in order to properly perform its statutory duties in utility oversight. The CPUC has ample sources of data and capable staff to evaluate that data.

The only other instance where the CPUC may require information of PG&E's financial health (outside of these proceedings) would be in a pending ratesetting case. PG&E makes no allegation that exists here. Even if PG&E's communication was for a ratesetting case, ex parte rules would also apply. In ratesetting cases, ex parte communication are prohibited, unless the interested person serves copies of the communication on the same day for all parties for comment.[23] San Bruno does not believe this ex parte notice was provided in any pending ratesetting proceeding to support that no ex parte violations occurred. PG&E is invited to provide evidence that such notice did occur in ratesetting cases to explain its actions. Otherwise, the only logical inference is that these substantive communications are directly related to these pending proceedings in violation of Commission Rules.

San Bruno urges the Commission to consider the City and County of San Francisco's Response to San Bruno's motion, filed August 12, 2014. It provides a clear and concise chronology of the PG&E's emails sent during the course of the pending OII proceedings.[24] The overlap is significant; PG&E communicated to Peevey about the financial market's negative impressions just weeks after the recordkeeping OII began. It is simply absurd to think these emails are merely compliance with CPUC regulation and outside the scope of what is substantively at issue here.

C. Myth #3: The financial condition of PG&E (and its ability to pay fines) was a

[22] PG&E Opp. at p. 13.

[23] Rule 8.3(c).

[24] CCSF brief at 1-4.

"nonissue" in the OII proceedings prior to the so-called "penalty phase."

PG&E dedicated the majority of its opposition by claiming the secret emails could not substantively concern the OII proceedings for ex parte rules to apply because "most of the emails predate the consideration of penalties in these OIIs," though it is undisputed by PG&E that all the emails cited by San Bruno in its Motion occur AFTER the date of the first OII (February 24, 2011).[25] PG&E claims that the Commission entered into a "financial analysis phase" sometime in September 2012.[26] The statute, Rules, and Scoping Memo Orders make no such false distinction between stages of the OII proceedings. According to PG&E, prior to September 2012, private discussions concerning its finances, penalties and fines were fair game.[27] PG&E tellingly cites to NO decision, rule, testimony, or any other communication from CPUC to support its position that fines and penalties were not a substantive issues in these proceedings prior to this unknown "September ruling." [28]

The possibility that PG&E could face a penalty was obvious from the start. There is no distinct "penalty phase" which suddenly triggers the ex parte rules. The recordkeeping OII's February 24, 2011 Scoping Memo states that legal may recommend penalties if violations are found.[29] The November 10, 2011 higher population density Scoping Memo states: "[i]f violations are found, the OII will determine the appropriate penalty or other form of relief."[30] Finally, the Root Cause OII Scoping Memo of January 12, 2012 informs PG&E that "the Commission may exercise its broad authority to impose fines and other remedies.[31] All three

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[25] PG&E Opp. at pp. 3-4, 7-10, 13-14, 16.

[26] PG&E Opp. at pp. 7-8, 9. PG&E's argument is apparently based on a motion by SED to inquire into PG&E's ability to pay fines. (PG&E Opp. at p. 9.) However, its opposition cites to no decision or ruling from the Commission that September 2012 marked a new era in the proceedings concerning PG&E's ability to pay a fine.

[27] PG&E Opp. at pp. 7-8.

[28] *See* PG&E Opp. at pp. 3, 7-8, 9.

[29] February 24, 2011 Scoping Memo in I.11-02-016 at p. 3

[30] November 10, 2011 Scoping Memo in I.11-11-009 at p. 2.

[31] January 12, 2013 Scoping Memo in I.12-01-007 at p. 3.

memos expressly state that ex parte communications are prohibited. [32]

PG&E cannot reasonably claim it was entitled to privately communicate with Commissioner Peevey concerning the proposed fines' financial impact prior to the cases' "penalty phase." For example, on November 4, 2011, PG&E forward an internal PG&E email concerning its impressions of its quarterly earnings release and its lower than expected outlook. The email mentioned that "the [Bank of America] and Deutsche [Bank] both assume a $500 million fine as an outcome of the CPUC's recordkeeping investigation and incorporate it into their estimates."[33] This email proves that PG&E was already contemplating significant fines in one of the three OIIs back in November 2011. PG&E already knew large fines were a significant "substantive issue" (enough to hurt its quarterly profits). Thus, PG&E must have known the ex parte rules concerning such discussion applied, but chose to ignore them.

By that same logic, PG&E argues it can indirectly advocate for a lower fine so long as the Commission has not yet ruled on the existence of a violation. In support, PG&E cites to the Record keeping Scoping Memo wherein it states the Commission will schedule hearings to determine whether penalties are warranted, only after it is determined PG&E violated safety law standards.[34] By this same logic, a corporation can email to a judge "FYI" financial information which supports its difficulty to pay punitive damages, even though the judge has not yet ruled on the corporation's underlying liability. Likewise, a criminal defendant in a capital case is entitled to email the judge publicly available studies on the error rate in death penalty cases, so long as the jury has not yet ruled on the man's guilt. In both scenarios, the information was publicly available. The sender is not inserting any argument or influence in the message. However, there is no question these hypothetical communications are improper, even though the court had yet to rule on the underlying guilt or liability. PG&E believes it is subject to a different set of rules.

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[32] February 24, 2011 Scoping Memo in I.11-02-016 at p. 6; November 10, 2011 Scoping Memo in I.11-11-009 at p. 8; January 12, 2013 Scoping Memo in I.12-01-007 at p. 9.

[33] Bates stamped Nos. CPCU001717-1742. *See also* emails discussed under "myth #1" which also show PG&E discussing fines with Commissioner Peevey as far back as March 2011.

[34] PG&E Opp. at p. 9; see also February 24, 2011 Scoping Memo in I.11-02-016 at p. 6.

PG&E is not above the law and its actions should not be tolerated by the Commission.

If PG&E had any confusion regarding when the ex parte rules began and prohibited its access to Commissioner Peevey, the Commission's May 16, 2013 ruling defining ex parte communications in these proceedings clarified the issue.[35] This decision determined without limitation that ex parte communications concerning the amount of penalties the Commission may impose was a substantive issue in these proceedings, which included communications from financial institutions.[36] This ruling provided no "phases" of the proceeding in which the ex parte rules did not apply. The ruling even gave PG&E a *carte blanche* to report these very ex parte emails at issue with impunity, although no report was filed. [37] PG&E's opposition does not dispute or nor discuss the scope of this decision and its determination that the ex parte rules governing fines and penalties apply throughout the proceedings.[38]

D. Myth #4: Even if the information might be ex parte communications, it ceases to be so when the information might be helpful for the communication in its broader regulatory duties.

This myth is also pervasive in PG&E's opposition. PG&E claims that the information, while arguably ex parte communications, cannot be considered such because it was "appropriately broader and more generalized than the OIIs." [39] Subjecting these private emails to ex parte rules would, PG&E argues, "effectively preclude the Commissioners from performing their regulatory function."[40]

Really, the Commission cannot do its job without private emails from PG&E? If not in the context of an adjudication over the death of eight people, PG&E's argument would be comedic.

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[35] See Exhibit 14 to moving papers.

[36] Id.

[37] Id.

[38] *See generally,* PG&E Opp.

[39] PG&E's Opp. at p. 6.

[40] PG&E's Opp. at p. 7.

The Commission's Rules state the ex parte prohibition apply where there is "**any** substantive communications in a formal proceeding."[41] It need not be the most important issue in the proceeding, but "any" communication of substance. As the emails has repeatedly shown, they largely discuss the negative financial effect the proceedings have on the company. These communications might not be the paramount issue of pipeline safety, but they certainly fall within the realm of "any substantive issue" for the Rules to apply.

PG&E incorrectly assumes the CPUC cannot conduct its regulatory duties mandated by the Legislature unless PG&E tells it what to do through private emails. If none of these 41 emails were ever exchanged (and PG&E abided by the Rules), the CPUC would still be able to perform its statutory duties and regulate the utilities it oversees. PG&E certainly has proper – and public – channels to which it can openly communicate with the Commission to apprise it of its business.

E. Myth # 5: PG&E's conduct was not as egregious as the ex parte communications in the *SBC* case, so it does not violate ex parte rules.

Both parties cite to Decision (D.07-07-020) in *Utility Consumers' Action Network v. SBC Comm. Inc.* 2007 WL 2119027 as instructive for our analysis here. PG&E contends the facts here "bear no resemblance" to the *SBC* case where sanctions were found. [42] In *SBC,* the telephone utility company held secret meetings with commissioner staff where PowerPoint presentations were made to support a re-categorization of pending adjudicatory proceedings.[43] That does not mean PG&E's actions do not also violate the ex parte rules. In its sanctions ruling dismissing SBC's argument, the Commission admonished that "major utilities are far from powerless in getting their views communicated to the Commissioners and their advisors."[44] The court provided examples how SBC could have properly provided the same information to the

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[41] Rule 8.1(c).

[42] PG&E's Opp. at p. 6.

[43] *SBC Comm.,* 3119027 at *28-30.

[44] *Id.*

Commission, such as hearings, public meetings, workshops, notice of all counsel, file a motion, or urging the Commission to institute a new rulemaking proceeding.[45] In the Commission's view, the nature of the communication – a private meeting – made the decision easy to determine that SBC's intent was to influence the Commission concerning pending proceedings. "There is nothing inherently wrong with such formal advocacy to achieve a desired outcome, assuming it is done forthrightfully."[46]

No one disputes PG&E has a right to advocate that it should receive a lower penalty if held liable. PG&E's advocacy, however like SBC's, was not done in a forthright manner. The company has many open and proper means to communicate with the CPUC to advocate its position. The other parties were in the dark concerning PG&E's private dialogue with Commissioner Peevey concerning the effect the fines would have on the company.

III. CONCLUSION

Four years into the investigation of the horrors of September 9, 2010 and PG&E's sole official admission to this Commission is that it botched a work clearance and missed a required drug test. Thus, it is not surprising that faced with a charge that it engaged in ex parte communication in violation of the statute, Rules, and Scoping Memo Orders for these OIIs that it dissembles and equivocates. PG&E still believes it is above the law and, as the big fish in the California public utilities pond, it need not play by the rules. It patronizes the Commission, the staff of the Commission and the public by suggesting that the Commission doesn't know anything and can't do its job competently without guidance and insight from the regulated. Further, PG&E asserts such guidance is more effective if it's in secret. It insults the Commissioners who did *not* receive secret information from PG&E. Even more absurd, is the notion that financial forecasts and analysis showing a significant credit hit to the company from the OIIs is not substantive information until the Commission has found that violations have occurred. This is like saying "never mind."

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[45] *Id.*

[46] *Id.*

San Bruno has conclusively shown that this attitude has caused 41 violations of this Commission's ex parte rules. Compliance with ex parte rules are an important cornerstone of due process in our adversarial legal system and must be taken seriously. Given the facts presented, San Bruno respectfully request this Commission grant San Bruno's motion for an order to show cause on why PG&E should not be held in violation of the Commission's own ex part rules. San Bruno also respectfully asks that this order also provide that PG&E should be sanctioned and pay San Bruno's attorney's fees should the Commission determine violations occurred.

Respectfully Submitted,

/s/ Steven R. Meyers

Steven R. Meyers
Britt K. Strottman
Emilie de la Motte
Meyers, Nave, Riback, Silver & Wilson
555 12th Street, Suite 1500
Oakland, CA 94607
Phone: (510) 808-2000
Fax: (510) 444-1108
E-mail: smeyers@meyersnave.com
Attorneys for CITY OF SAN BRUNO

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