

**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)

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I.11-11-009  
(Filed November 10, 2011)

(Not Consolidated)

**PACIFIC GAS AND ELECTRIC COMPANY'S RESPONSE  
TO MOTION OF THE CITY OF SAN BRUNO FOR AN  
ORDER TO SHOW CAUSE (RULE 8.3(b)), ETC.**

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Dated: August 12, 2014

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**I. INTRODUCTION**

PG&E takes compliance with the Commission's ex parte rules seriously. San Bruno claims to have uncovered 41 emails involving PG&E that amount to "illegal" violations of the Commission's ex parte rules.<sup>1</sup> We have carefully reviewed San Bruno's motion and studied the

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<sup>1</sup> San Bruno describes these 41 alleged violations as the "total list of violations." Mot. at 3 n.5. Appendix A lists and summarizes each of the alleged violations, numbered as San Bruno did, along with reference to the page in this response where each is discussed.

emails San Bruno identified. There was no violation of the ex parte rules. The emails consist of routine information-sharing between PG&E and its regulator – and none of them reveals any effort to persuade the Commission to do anything with respect to the OIIs.<sup>2</sup>

In some instances, certain comments by PG&E employees lacked the level of professionalism we would expect. While these represent a tiny fraction of the exchanges out of thousands of pages of communications, PG&E truly regrets this and is committed to avoiding such communications in the future. Most relevant to this matter, however, is that these communications do not, in any way, represent a violation of the Commission’s ex parte rules.

San Bruno starts from the faulty premise that the Commissioners are like “judge[s],”<sup>3</sup> tasked only with deciding cases or controversies that appear before them. But the Commissioners have a range of responsibilities; chief among these is not deciding controversies but regulating utilities, a responsibility that transcends formal proceedings. For the Commissioners to do this job, they must have regular and open communication with the utilities they regulate.

The Commission’s ex parte rules are an exception to that otherwise free exchange of information. They only apply to two types of formal proceedings: ratesetting and adjudicatory. And the rules cover only specific communications, containing three elements: (1) substantive communications concerning a formal proceeding; (2) between an interested person and a decisionmaker; and (3) outside a public hearing, workshop, or other forum. Rules of Prac. & Proc., Rule 8.1(c).<sup>4</sup>

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<sup>2</sup> San Bruno’s motion is an adjunct to its contemporaneous motion to recuse President Peevey. San Bruno explicitly links the two motions: “Please see San Bruno’s ‘Motion of the City of San Bruno Seeking the Recusal of Assigned Commissioner Peevey’ incorporated by reference and filed concurrently with this motion.” Mot. at 2 (emphasis added). PG&E responds here only to the motion as it concerns PG&E.

<sup>3</sup> *E.g.*, Mot. at 10.

<sup>4</sup> All citations to “Rule \_\_\_” are to the Commission’s Rules of Practice & Procedure, unless otherwise specified.

The focus of San Bruno's motion is the first of these elements.<sup>5</sup> In deciding what constitutes a "substantive" communication in the context of an adjudicatory proceeding, the Commission has considered three factors: (1) the temporal proximity between the communication and the adjudicatory proceeding to which it allegedly was directed; (2) the overlap of the substantive issues in the communication and the proceeding; and (3) whether the relief requested in the ex parte communication would have a detrimental impact on the parties not privy to the communication. *Utility Consumers' Action Network v. SBC Commc'ns, Inc.*, D.07-07-020, 2007 Cal. PUC LEXIS 311, at \*29-30 ("*SBC Commc'ns, Inc.*").

San Bruno ignores these factors, arguing, in essence, that any time PG&E provided the Commissioners with information about its business, PG&E violated the ex parte rules, regardless of whether the communications occurred during the pendency of a relevant proceeding, advocated a position relevant to that proceeding (or any position at all), or sought any relief whatsoever.

San Bruno addresses only eight of the alleged 41 violations in its motion. Of these, six amount to nothing more than the generalized sharing of published and/or broadly disseminated information with the Commission. These emails do not advocate for anything; as a result, there was no overlap between the emails and the substantive issues in any proceeding, nor did PG&E seek any relief through them. Indeed, most of these emails were sent months before the Commission Staff made its unprecedented recommendation that PG&E be penalized up to one dollar shy of what it could financially bear. These are not prohibited ex parte communications.

With respect to the other two emails discussed by San Bruno in its motion, one concerned the 2013 forward-looking industry safety symposium planned by the Commission, which has never been an issue in any of the OIIs, and the other related to PG&E's public statements regarding the possibility that it would be indicted. San Bruno claims that these are "substantive,"

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<sup>5</sup> There is no dispute here regarding who is a decisionmaker, and PG&E does not contend that these communications occurred in a public hearing, workshop, or other forum.

without discussion. San Bruno makes no effort to explain how these emails related to or requested relief in any of the OIIs. These emails do not violate the Commission's ex parte rules.

The remaining 33 alleged violations – which San Bruno does not address in its motion – are equally meritless. These 33 emails reflect the unremarkable fact that PG&E keeps its regulator apprised of significant developments affecting its utility business. And, once again, most of these emails predate the consideration of penalties in the OII proceedings.

With respect to all 41 alleged violations, San Bruno broadly asserts they relate to the Commission's consideration of the potential penalty on PG&E. Beyond this sweeping assertion, San Bruno does not – and cannot – allege any specific nexus or detrimental impact to any of the parties in these proceedings from PG&E's communications. San Bruno's motion does not come close to establishing that any of the information PG&E provided amounts to private, non-public evidence on the penalty issue.

In short, there is nothing illuminating in the emails identified by San Bruno. San Bruno ignores the intent of the Commission's ex parte rules, and would have the Commission adopt a new approach to communications that would stifle its ability to oversee its utilities. San Bruno's motion should be denied.

## **II. SAN BRUNO'S MOTION IGNORES THE REGULATORY CONTEXT**

### **A. The Role Of The Commission And The Utilities It Regulates**

Contrary to San Bruno's argument that communicating with a commissioner is "akin to a judge communicating with the defendant during the pendency of his case on how the defendant can receive a lower sentence,"<sup>6</sup> the Commission does not serve a purely judicial role. Open communication between the Commission and utilities is critical to the Commission's core regulatory mission. For this reason, "[t]he public interest does acknowledge that [a]gency officials may meet with members of the industry both to facilitate settlement and to maintain the agency's knowledge of the industry it regulates[.]" *SBC Commc'ns, Inc.*, 2007 Cal. PUC LEXIS

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<sup>6</sup> Mot. at 10.

311, at \*33 (citation and internal quotation marks omitted). Indeed, “such informal contacts between agencies and the public are the ‘bread and butter’ of the process of administration and are completely appropriate so long as they do not frustrate judicial review or raise serious issues of fairness.” *Id.*

With this in mind, the Commission permits – indeed encourages – open communication with its utilities, with a few exceptions. Those exceptions concern ex parte contacts – communications “that: (1) concern[] any substantive issue in a formal proceeding, (2) take[] place between an interested person and a decisionmaker,<sup>7</sup> and (3) do[] not occur in a public hearing, workshop or other public forum noticed by ruling or order in the proceeding, or on the record of the proceeding.” Rule 8.1(c).

Authority interpreting the ex parte rules is sparse. In one of the only cases to thoroughly discuss the rule, *SBC Commc’ns, Inc.*, cited by San Bruno, the Commission made clear that mere communication between a regulated entity and a decisionmaker is not, by itself, indicative of an ex parte violation.<sup>8</sup> Instead, the Commission looked to the substance of the communications to determine whether they violated the rule. In that case, the communications related to the categorization of the proceeding, a subject the ex parte rules explicitly identify as substantive. *SBC Commc’ns, Inc.*, 2007 Cal. PUC LEXIS 311, at \*29 -30. Other “pertinent facts” included (1) the close proximity in time between the ex parte communication and the pending adjudicatory proceeding; (2) the overlap of substantive issues discussed in the communication

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<sup>7</sup> A “Decisionmaker” includes “any Commissioner, the Chief Administrative Law Judge, any Assistant Chief Administrative Law Judge, the assigned Administrative Law Judge, or the Law and Motion Administrative Law Judge.” Rule 8.1(b). These ex parte prohibitions also apply to communications with Commissioners’ personal advisors. Rule 8.2.

<sup>8</sup> In that case, the Commission found ex parte violations as a result of “an aggressive legal strategy designed to secure the commencement of a rulemaking with the hope that the complaints would ultimately be stayed or dismissed.” *SBC Commc’ns, Inc.*, 2007 Cal. PUC LEXIS 311, at \*19. The ex parte discussions included multiple PowerPoint presentations to commissioners’ advisors advocating the utility’s legal positions and its interpretation of the statute at issue in the case. *Id.* at \*16-22. These facts are far removed from the allegations here.

and the pending adjudication; and (3) whether the relief sought in the ex parte communications would detrimentally impact the parties who were not privy to the communications. *Id.*

As discussed below, the facts here bear no resemblance to *SBC Commc'ns, Inc.*, and the motion fails under all three prongs of that decision.

**B. PG&E's Communications With The Commission Were Appropriately Broader And More Generalized Than The OIIs**

In arguing that PG&E was “prohibited from discussing any subject matter related to the PG&E explosion,”<sup>9</sup> San Bruno’s motion both overstates the scope of the OIIs and ignores the fact that the Commission must continue to oversee PG&E’s operations on a daily basis.

The San Bruno pipeline explosion was a tragedy. It led the Commission to immediately augment its oversight of all aspects of PG&E’s business.<sup>10</sup> How PG&E has responded to the accident remains a matter of urgent public interest and a vital concern to the Commission. The Commission expects to be kept informed of PG&E’s actions and of any significant developments that could affect its gas operations. PG&E’s response extends to virtually all aspects of its operations. It goes far beyond the OII proceedings.

San Bruno’s motion simply ignores all of this. In San Bruno’s view, once the accident occurred and investigations began, the ex parte rules required PG&E to stop communicating with the Commission entirely about PG&E’s gas transmission system, operations and its overall financial health. Under this logic, PG&E could not discuss with the Commission any topic even remotely implicated in any of the pending OIIs, which together encompass every aspect of PG&E’s gas operations and its overall financial health.

San Bruno like ns the Commissioners to judges.<sup>11</sup> But they are not judges. They are regulators. Presiding over adjudicatory proceedings is only one aspect of their role. The

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<sup>9</sup> Mot. at 10.

<sup>10</sup> See, e.g., Res. L-403 (Sept. 24, 2010).

<sup>11</sup> Mot. at 10 (“It is akin to a judge communicating with the defendant during the pendency of his case[.]”).

remainder, and majority, of their role involves broader regulatory duties. San Bruno's expansive interpretation of the ex parte rules would effectively preclude the Commissioners from performing their regulatory function.

Instead of recognizing that the emails in question were part of the overall communications between the company and the Commission, San Bruno characterizes them as "private, non-public, ex parte evidence."<sup>12</sup> Yet, even San Bruno concedes that commissioners are not "barred from reading the newspaper or the financial news."<sup>13</sup> In fact, nearly all of the information San Bruno claims constitutes improper ex parte communications was broadly disseminated, published or about to be published. PG&E's emails did not "advocat[e] PG&E's legal position."<sup>14</sup> They simply provided information relevant to the Commission's general oversight of the company, including PG&E's continued financial health and response to the accident.

### **III. NONE OF SAN BRUNO'S ALLEGATIONS ESTABLISHES A VIOLATION**

San Bruno claims to have uncovered 41 violations of the ex parte rules "during the entire pendency (three years) of the OIIs."<sup>15</sup> Its motion discusses only eight of them. The alleged violations fall into three broad categories: *First*, San Bruno points to six emails<sup>16</sup> that are supposedly directed at the factors the Commission will consider in assessing a penalty against PG&E under Public Utilities Code § 2104.5.<sup>17</sup> But these emails constitute routine sharing of information about PG&E's business. None of the six advocates a position regarding a penalty. And all save one were sent well before PG&E'S financial capacity was identified as an issue in

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<sup>12</sup> Mot. at 4.

<sup>13</sup> Recusal Mot. at 6.

<sup>14</sup> Mot. at 3.

<sup>15</sup> Mot. at 12.

<sup>16</sup> Allegations 3, 9, 17, 22, 26, and 28.

<sup>17</sup> Pub. Util. Code § 2104.5 instructs the Commission, in formulating any penalty, to consider: "the appropriateness of such penalty to the size of the business of the person charged, the gravity of the violation, and the good faith of the person charged in attempting to achieve compliance, after notification of a violation[.]"



September 2012. *Second*, San Bruno identifies two email exchanges in which Commission personnel appear to give PG&E advice regarding matters unrelated to any of the OIIs.<sup>18</sup> These emails were not relevant to any proceeding before the Commission. *Finally*, San Bruno says nothing in support of its remaining 33 alleged violations. With good reason: a review of these 33 emails makes clear that they, too, are routine communications between PG&E and its regulator.

**A. The Vast Majority Of The Alleged Violations Pre-Date The Financial Analysis Phase Of The OIIs**

Most of San Bruno's motion is based on the general allegation that PG&E attempted to improperly influence the Commission's decision regarding potential fines in the OIIs.<sup>19</sup> San Bruno casts every analyst report, media discussion, or press release PG&E shared as an effort by the company to secretly influence the Commission's decision regarding the appropriate penalty.<sup>20</sup> As discussed below, the emails contain no such advocacy. Indeed, San Bruno has not, and cannot, show how any of the emails *in fact influenced* or even *could have influenced* any of the proceedings here. San Bruno's allegations amount to mere speculation. *See Application of Calaveras Tel. Co. et al.*, D.10 -10-036, 2010 Cal. PUC LEXIS 417, at \*41 ("Rehearing Applicants fail to demonstrate how the DRA meeting was pivotal in our determination regarding whether to issue the order to show cause[.]"); *SBC Commc'ns, Inc.*, 2007 Cal. PUC LEXIS 311, at \*29 -30 (stating the Commission considered whether "the relief requested in the ex parte

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<sup>18</sup> Allegations 31 (safety symposium) and 41 (announcement of expected criminal indictment).

<sup>19</sup> *E.g.*, Mot. at 3 -4 ("The presiding [ALJ] considered the penalty phases of the OIIs so critical that evidentiary proceedings were scheduled and held from September 2012 to March, 2013 . . . . Yet during this same time period, PG&E was providing private, non -public, ex parte evidence to President Peevey regarding the exact same subject."). *See also id.* at 10 ("Through sending President Peevey private internal PG&E analyst reports, press releases touting PG&E's progress and accountability, and internal PG&E communications on PG&E's actions post -San Bruno, PG&E is providing off the record evidence of the gravity of the violations, what the fine amount should look like, and trying to prove to President Peevey that it is remedying its behavior.").

<sup>20</sup>*Id.*

communication would have detrimental consequences to parties in the pending adjudication” in assessing alleged ex parte violations).<sup>21</sup>

As a matter of fact, most of the emails relied upon by San Bruno could not have influenced any pending penalty. When it issued the Records OII in February 2011, the Commission expressly *excluded penalties* from its initial scope:

The first phase of the investigation will be limited to (1) whether PG&E’s gas transmission pipeline recordkeeping and its knowledge of its own transmission gas system, and in particular the San Bruno pipeline, was deficient and unsafe, and (2) whether PG&E thereby violated the law and safety standards to which California regulated public utilities are subject.

If, after hearings, the Commission determines that PG&E violated safety law standards with respect to its gas system recordkeeping, ***the Commission will schedule a later phase or phases to determine whether penalties pursuant to Public Utilities Code section 2107 and 2108 are warranted***, and if so the amount appropriate to the facts and the law.

I.11-02-016, 2011 Cal. PUC LEXIS 69, at \*22-23 (emphasis added).

While the Commission has not yet determined that PG&E violated any law, in September 2012 the assigned ALJs established a financial analysis phase common to the three OIIs. CPSD (now SED) first requested to file additional testimony and briefing focusing on “PG&E’s ability to pay fines and/or remedies up to a certain amount without directly or indirectly harming ratepayers,” on September 7, 2012.<sup>22</sup> Until then, no one had made any penalty recommendation

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<sup>21</sup> Cf. also *Mathew Zaheri Corp. v. New Motor Vehicle Bd.*, 55 Cal. App. 4th 1305, 1319-20 (1997) (“The prohibitions against improper ex parte communications are measures imposed to avert [a] due process violation. . . . If the trial court appropriately concludes that the agency did not rely upon the information provided in the ex parte communication, and that the decisionmaker was not guilty of actual misconduct giving rise to a presumption of bias, there is no deprivation of a fair hearing and no denial of due process.”) (citations omitted); *Application of the Exposition Metro Line Constr. Auth.*, D.09-12-015, 2009 Cal. PUC LEXIS 756, at \*36-37, \*39 n.40 (comparing a CPUC decision relating to the Los Angeles Metro Authority’s application for rail crossings to the substance of an ex parte meeting with the Authority to conclude that the meeting did not undermine the adjudicatory proceeding as the information mirrored the “arguments made by [the Authority] during the course of the proceeding”).

<sup>22</sup> See Coordinated Motion of the Consumer Protection and Safety Division for Leave to Serve Additional Prepared Testimony Regarding PG&E’s Financial Resources in Proceedings I.11-02-016, I.11-11-009, and I.12-01-007 at 2.

– let alone one premised on PG&E’s “ability to pay.” Even then, when financial capacity was litigated in March 2013, *there was no dispute as to PG&E’s actual finances* . The difference between CPSD’s witness and PG&E’s was how to interpret the undisputed information and what conclusions to draw about PG&E’s capacity to successfully finance a penalty.<sup>23</sup>

Twenty-seven of the 41 alleged violations (Allegations 1 -27) – including 20 forwarding investment analyst and rating agency reports on PG&E<sup>24</sup> – involve emails that *pre-date the establishment of the financial analysis phase* .<sup>25</sup> In other words, San Bruno spends most of its motion and the vast majority of its alleged violations on its theory that PG&E sought to influence resolution of issues that had not yet been initiated. The rules do not contemplate such a prohibition. *SBC Commc’ns, Inc.*, 2007 Cal. PUC LEXIS 311, at \*29 (noting that the temporal “proximity” between the communication and the “pending adjudication” is a factor in determining the propriety of ex parte contacts).

#### **B. Sharing Routine Financial And Public Information Does Not Violate The Ex Parte Rules**

The emails discussed in San Bruno’s motion exemplify its flawed analysis of the ex parte rules. Not only are many of them far removed in time from the proceeding they are alleged to influence, but nothing in the emails tries to convince the Commission of anything.

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<sup>23</sup> See Joint Ex. 66 (Report of Wells Fargo Securities Responding to Overland Consulting’s August 21, 2012 Report at 14 -28); Joint Ex. 51 (“Financial Analysis of PG&E Corporation at 2 -14); Ex. Joint 53 (Rebuttal by Overland Consulting to Report by Wells Fargo Securities at 4-27).

<sup>24</sup> These are Allegations 1-10, 12-16, 18-21, and 24. In 2013, PG&E provided analyst and rating agency reports to all parties in the OII pursuant to Public Utilities Code Section 583 , nondisclosure agreements and/or a protective order.

<sup>25</sup> San Bruno also alleges an ex parte violation in one instance (Allegation 28) in which PG&E forwarded an email regarding media reports concerning the company’s finances after the establishment of the financial analysis phase. In that email, PG&E forwarded published media reports of its Fourth Quarter earnings call in February 2013. As discussed below, the media reports were publicly -available, and they were based on information that was entered into the record in these proceedings. See Ex. Joint 57 (Q4 2012 earnings call presentation of 2012 results and 2013 guidance); Ex. Joint 58 (excerpt from PG&E 2012 Annual Report).

## 1. The Emails Did Not Advocate Regarding The Size Of A Penalty

San Bruno alleges that PG&E sent two ex parte emails to President Peevey regarding “the appropriateness of the penalty to the size of [PG&E],” a factor to be considered under § 2104.5.<sup>26</sup>

In one of these emails (Allegation 3), dated March 16, 2011, PG&E’s Brian Cherry forwarded President Peevey an internal PG&E summary of a report by the rating agency Standard & Poors, which had modified its financial outlook for PG&E. PG&E’s summary noted S&P’s concerns about federal and state scrutiny of PG&E’s operations, public and regulatory sentiment toward the company, costs associated with the San Bruno accident, and “uncertainty” around potential fines “that CPUC may assess.”

At the time of this email only the Records OII had been initiated, and it had been pending for less than a month. The Commission had not yet issued the other two OIIs, and, as discussed above, the Records OII expressly reserved penalty issues for a possible second phase of the proceeding. It was more than 18 months before the ALJs established financial analysis as a phase of the three OIIs. Given this state of facts, Mr. Cherry’s email, which simply forwarded the rating agency’s expression of uncertainty, was not substantive with respect to any pending proceeding. Moreover, neither the PG&E summary nor the underlying report were advocacy directed at an impending penalty. When Mr. Cherry forwarded this information, he said simply, “FYI,” to which President Peevey responded: “Yep. No surprise.”

The second email (Allegation 28) also did not discuss the appropriateness of any penalty to be imposed on PG&E. In that email, dated February 21, 2013, Mr. Cherry forwarded to President Peevey publicly -available media reports “from the Wall Street Journal, Contra Costa Times, and . . . various news outlets”<sup>27</sup> concerning PG&E’s 2012 results and 2013 guidance. The articles reported on the fact that PG&E had just publicly announced a loss in its fourth quarter. The information on which these articles were based was subsequently admitted into

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<sup>26</sup> Mot. at 6.

<sup>27</sup> *Id.*

evidence in these proceedings.<sup>28</sup> The information is directly relevant to the Commission's broader oversight of PG&E because of its impact on the company's ratepayers.<sup>29</sup> None of the articles took any position regarding the appropriateness of any penalty against PG&E or the size of the company. Nor did Mr. Cherry. He only wrote: "Bad day for us today," and nothing more.

San Bruno acknowledges that these two emails are "innocuous" on their face.<sup>30</sup> It contends, however, that there is more to them than meets the eye because the communications concern the "financial health of the corporation."<sup>31</sup> But the Commission recognizes that the utilities' overall financial health is critical to their ability to serve California ratepayers. In the settlement agreement ending PG&E's Chapter 11 bankruptcy, the Commission stated:

***The Commission recognizes that the establishment, maintenance and improvement of Investment Grade Company Credit Ratings is vital for PG&E to be able to continue to provide safe and reliable service to its customers***. The Commission further recognizes that the establishment, maintenance and improvement of PG&E's Investment Grade Company Credit Ratings directly benefits PG&E's ratepayers by reducing PG&E's immediate and future borrowing costs, which, in turn, will allow PG&E to finance its operations and make capital expenditures on its distribution, transmission, and generation assets at lower cost to its ratepayers. In furtherance of these objectives, the Commission agrees to act to facilitate and maintain Investment Grade Company Credit Ratings for PG&E.

*Opinion Modifying the Proposed Settlement Agreement of Pac. Gas & Elec. Co.*, D.03-12-035, 2002 Cal. PUC LEXIS 1051, at \*261-262 (App. C, ¶ 2.g) (emphasis added).

In San Bruno's view, apparently, once the Commission opened any inquiry, PG&E was precluded from sharing with the Commission basic information concerning the company's

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<sup>28</sup> See Ex. Joint 57 (Q4 earnings call presentation of 2012 results and 2013 guidance); Ex. Joint 58 (excerpt from PG&E 2012 Annual Report).

<sup>29</sup> *Opinion Modifying the Proposed Settlement Agreement of Pac. Gas & Elec. Co.*, D.03-12-035, 2002 Cal. PUC LEXIS 1051, at \*261-262 (App. C, ¶ 2.g). See also *id.* at \*14-15.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

finances. This view ignores the Commission’s essential oversight function and its duty to ensure safe, reliable and affordable service for California ratepayers. *Application of So. Cal. Edison Co.*, D.04-07-022, 2004 Cal. PUC LEXIS 325, at \*18 -19 (“We understand that the investment community is vitally interested in the decisions of this Commission. We also recognize that an investor-owned utility’s credit rating and its access to capital are of critical importance to its ability to provide the infrastructure it needs to meet its customer service obligations.”).

**2. The Emails Did Not Advocate Any Position Regarding The Gravity Of Any Violation**

Next, San Bruno alleges one instance in which it claims PG&E improperly communicated regarding the “gravity of the violation,” another factor under § 2104.5.<sup>32</sup> In this email (Allegation 17), dated August 9, 2011, Mr. Cherry forwarded to President Peevey an internal PG&E email from President Chris Johns to the company’s employees. Mr. Cherry forwarded the email without comment, other than to identify Mr. Johns’ comments as being about “the media articles.”

At the time of the email, the Records OII was the only pending proceeding. The Commission had not even established a penalty phase. This email did not reference the Records OII. Nor did it reference PG&E’s records. The email did not, in detail, refute the media reports themselves, instead noting that the company had “provided the reporters with information [and] evidence,” which they chose not to use. Neither the email to employees nor Mr. Cherry’s forwarding of it amounted to a substantive communication regarding the pending Records OII.

**3. The Emails Did Not Advocate Regarding PG&E’s “Good Faith Efforts”**

San Bruno points to three emails it claims constitute ex parte advocacy by PG&E with the Commission regarding its “good faith . . . in attempting to achieve compliance, after notification of a violation,” the third penalty factor under § 2104.5. In the first of these emails

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<sup>32</sup> Mot. at 7.

(Allegation 9), dated June 1, 2011 at approximately 5:45 pm, PG&E’s Meredith Allen forwarded to President Peevey an “open letter of apology” from PG&E’s President and Acting Chairman and CEO set to run in several newspapers the next morning. Again, at the time of this email, only the Records OII was pending, no violations had been found, and the Commission had not set a penalty phase. San Bruno does not allege how the letter – made public the following day – concerned the Records OII or PG&E’s efforts at compliance with respect to the topics of that proceeding. In fact, although the letter describes several improvements PG&E had made following the San Bruno accident, including changing top leadership, it does not so much as mention records.

The second of these (Allegation 22) is a December 13, 2011 PG&E press release – which had already been publicly released – forwarded by Mr. Cherry to President Peevey announcing PG&E’s admission of liability in the pending civil actions. The admission had been made in open court earlier that day. Again, the email was sent well before the ALJs established the financial analysis phase and before the San Bruno OII had even been instituted. Nothing in the press release concerned PG&E’s efforts to “obtain compliance” with state regulations after being notified of a violation. The press release does not mention PG&E’s records (the subject of the Records OII) or class location (the subject of the Class Location OII).

Last in this group (Allegation 26) is a May 14, 2012 email in which Mr. Cherry forwarded President Peevey a copy of prepared remarks by PG&E senior executives at that day’s annual shareholder meeting. The meeting had already taken place, and was attended by and reported upon by the media.<sup>33</sup> To the extent San Bruno or any other party took issue with these public comments, it had the opportunity to publicly respond to them. Moreover, the comments by the PG&E executives concerned the company’s entire utilities business – electric as well as gas – information that is highly relevant to the Commission’s mission as PG&E’s regulator.

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<sup>33</sup> See, e.g., *PG&E Earns \$260M Last Quarter, Shareholders Meeting Met By Protests*, CBS Local San Francisco (May 14, 2012), <http://sanfrancisco.cbslocal.com/2012/05/14/pge-earns-260m-last-quarter-shareholders-meeting-met-by-protests/>.

The common thread running through all of the communications discussed above is that none constitutes legal advocacy relating to the substantive issues in any of the OIIs, the defining characteristic of an ex parte communication under Rule 8. *See SBC Commc'ns, Inc.*, 2007 Cal. PUC LEXIS 311, at \*29-30 (stating that the Commission considers whether “the relief requested in the ex parte communication would have detrimental consequences to parties in the pending adjudication”). PG&E sought no relief from the Commission in these communications. These emails did not violate the ex parte rules.

**C. Emails Regarding A Cancelled Safety Symposium And A PG&E Press Release Were Not “Substantive” Communications Concerning A Pending Proceeding**

San Bruno next discusses two email exchanges that it characterizes as “substantive,” without further elaboration. The first (Allegation 31) is an April 25, 2013 email exchange between PG&E’s Laura Doll and Carol Brown, President Peevey’s chief of staff. The day before this exchange, the Commission postponed indefinitely an industry safety symposium that would have been attended by, among others, commissioners and major California gas operators. Since the event was to take place in San Francisco, PG&E worked extensively with the Commission on the logistics of the event. In Ms. Brown’s email, she suggested to Ms. Doll how to respond to inquiries regarding the symposium in light of the postponement. None of the discussion in these emails concerned the substance of any pending proceeding.

Likewise, the second of these emails (Allegation 41) is an April 2, 2014 email exchange between President Peevey and Mr. Cherry, in which they discussed an internal email from Mr. Johns to PG&E employees summarizing the recent indictment of the company. President Peevey wrote that “PG&E’s decision to issue a press release last week . . . only meant that the public got to read two big stories rather than one. I think this was inept.” About this alleged ex parte communication, San Bruno notes: “If only San Bruno, SED, and other Intervenors . . . were able to get legal and public relations advice” from President Peevey. San Bruno does not even try to



explain how these comments were “substantive” or concerned any of the OIIs. They were not and did not.

**D. The 33 Emails San Bruno Did Not Discuss Are Not Ex Parte Violations**

The 33 remaining “violations” are those that San Bruno alludes to, but does not discuss in, or even attach to, its motion. These fare no better.

To find the documents associated with these 33 alleged violations (Allegations 1 -2, 4-8, 10-16, 18-21, 23-25, 27, 29-30, and 32-40), one has to copy a link in a footnote to San Bruno’s motion and go through a process of downloading more than 70MB of material from San Bruno’s lawyer’s website. For good reason San Bruno did not make it easy to find these documents. Once downloaded, it is apparent there is far less here than meets the eye and far less than San Bruno would have the public and the Commission believe.

More than half of the 33 remaining alleged violations consist of emails from 2011 in which Mr. Cherry forwarded to the Commission investment analyst reports regarding PG&E and others.<sup>34</sup> Several reports included the analysts reporting on their meetings *with the Commission*.<sup>35</sup> Presumably, San Bruno contends that this financial information was intended to influence the penalty phase here, consistent with the arguments in its motion, although PG&E, the Commission, and the public are left to guess. As discussed above, however, these communications came well before the ALJs established the financial analysis phase. In any event, none of the forwarded reports took a position regarding the appropriate penalty against PG&E. The forwarding of this information was consistent with the Commission’s public statements that PG&E’s financial condition is central to the company’s ability to provide service to its customers. In short, these communications were not substantive, did not concern a pending proceeding, and thus were not violations of the Commission’s ex parte rules.

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<sup>34</sup> Allegations 1-2, 4-8, 10, 12-16, 18-21, and 24.

<sup>35</sup> See, e.g., Allegations 1, 5, 10, and 19.

In two other allegations, Mr. Cherry forwarded a copy of a rating agency report on California regulation entitled “California Regulation: Uncertain Outlook; Balanced Regulatory Environment Likely to Continue Despite Recent Uncertainty,” covering all major utilities and issues (Allegation 33), which did not contain specific financial information about PG&E, and a published Politico article regarding PG&E (Allegation 27).<sup>36</sup> Neither of these took a position regarding any penalty against PG&E.

Six of San Bruno’s additional alleged violations are instances in which PG&E simply gave the Commission notice of an upcoming significant public action. For example, PG&E forwarded the public statement it was making on the issuance of the report of the Commission’s Independent Review Panel (Allegation 11), that it expected to be indicted (Allegations 36–39), and that it had been indicted (Allegation 40). These emails do not concern pending proceedings, and, in any event, merely gave the Commission notice of significant developments for the company – which shortly became public.

Four more of these additional alleged violations (Allegations 29–30 and 34–35) consist of emails between PG&E and President Peevey’s advisor regarding procedural matters, which are expressly permitted by the Commission’s ex parte rules. Rule 8.1(c).

One email is to the Commission’s Executive Director with a copy to President Peevey (Allegation 23) forwarding a copy of Senator Feinstein’s letter to the Secretary of Energy asking for a nationwide review of pipeline safety. The letter and the email forwarding it have nothing to do with the OIIs, and do not mention PG&E or the Commission.

Another alleged violation (Allegation 25) is a January 31, 2012 email forwarding PG&E’s summary and an analyst report on the CPSD penalty citation to PG&E for missed gas distribution leak surveys. The citation related to PG&E’s gas distribution system, not the gas transmission system that is the subject of the OIIs.

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<sup>36</sup> Even San Bruno concedes that Commissioners are not “barred from reading the newspaper or the financial news.” Recusal Mot. at 6.

The final remaining alleged violation (Allegation 32) is an email Mr. Cherry forwarded to President Peevey’s advisor with a copy of the public version of PG&E’s filed consolidated opening brief on remedies in these proceedings – a brief President Peevey’s office would have received in the ordinary course.

San Bruno does not offer any support for its assertion that these communications violate the Commission’s ex parte rules. Upon review, it is clear why they do not; they do not have any.

**E. The Commission’s Settlement With The City of San Bruno Is Not An Admission Of Ex Parte Violations**

San Bruno throws in an argument that “CPUC’s own characterization” of these emails as being responsive to a request for “[e]mail communications related to the subject matter of the PG&E/*San Bruno* OIIs”<sup>37</sup> proves that they are improper substantive ex parte violations in the three OIIs.<sup>38</sup> But the Settlement Agreement; Recital 4, specifically states: “It is understood that this settlement and the execution of this Agreement by the PARTIES is **not** an admission of any liability whatsoever for any wrongdoing with respect to each other, but is in compromise of a disputed claim.”<sup>39</sup> The fact that the Commission agreed to publicly disclose these records to resolve litigation does not mean they were ex parte violations. They plainly were not.

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<sup>37</sup> Mot. at 5 (emphasis in original).

<sup>38</sup> *Id.* The Release and Settlement Agreement is Exhibit 3 to San Bruno’s motion.

<sup>39</sup> Mot., Ex. 3 at 2 (emphasis in original).

**IV. CONCLUSION**

San Bruno has failed to identify any ex parte violations among the 41 emails it has identified. The ex parte rules do not require that PG&E stop communicating with the Commission about its gas transmission system or its finances except through formal pleadings. Nor do the ex parte rules require the Commission to cease oversight of PG&E except through formal proceedings or at the lower staff level. The Commission should deny San Bruno's motion.

Respectfully submitted,

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By: /s/ Joseph M. Malkin

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Dated: August 12, 2014

**APPENDIX A – SAN BRUNO’S ALLEGED VIOLATIONS**

<b>No.</b>	<b>Date</b>	<b>Description of Document</b>	<b>Location in PG&amp;E’s Response Where Discussed</b>
1	3/16/2011	Email forwarding PG&E summary with attached investment analyst report <sup>40</sup>	pp. 10, 16.
2 (Ex. 5)	3/16/2011	Email forwarding PG&E summary of S&P rating action & attached S&P report	pp. 10, 16.
3 (Ex. 5)	3/16/2011	Email forwarding PG&E summary of S&P rating action & attached S&P report	pp. 7-8, 10, 11-12.
4	3/18/2011	Email forwarding PG&E summary with attached investment analyst report	pp. 10, 16.
5	4/12/2011	Email forwarding PG&E summary with attached investment analyst reports	pp. 10, 16.
6	4/18/2011	Email forwarding PG&E summary with attached investment analyst report upgrading PG&E stock	pp. 10, 16.
7	5/5/2011	Email forwarding PG&E summary with attached investment analyst reports on 2011 Q1 earnings & approved GRC decision	pp. 10, 16.
8	5/23/2011	Emailing forwarding PG&E summary with attached investment analyst report downgrading PG&E stock	pp. 10, 16.
9 (Ex. 7)	6/1/2011	Emailing forwarding PG&E’s apology for San Bruno accident to be published in newspapers the following day	pp. 7-8, 10, 13-14.
10	6/2/2011	Email forwarding PG&E summary with attached investment analyst report	pp. 10, 16.
11	6/9/2011	Emailing forwarding PG&E’s public statement on the Independent Review Panel (IRP) report	pp. 10, 16-17.
12	6/10/2011	Emailing forwarding PG&E summary with attached investment analyst reports on the IRP report	pp. 10, 16.
13	6/24/2011	Email forwarding PG&E summary with attached investment analyst reports	pp. 10, 16.
14	7/6/2011	Email forwarding PG&E summary with attached investment analyst reports	pp. 10, 16.
15	7/26/2011	Email forwarding PG&E summary with attached investment analyst report on the utility industry nationwide	pp. 10, 16.
16	7/28/2011	Emailing forwarding PG&E summary with attached Fitch ratings press release affirming PG&E’s rating but changing the outlook to negative from stable	pp. 10, 16.

<sup>40</sup> Unless otherwise stated, all the emails identified by San Bruno were sent to President Peevey.

<b>No.</b>	<b>Date</b>	<b>Description of Document</b>	<b>Location in PG&amp;E's Response Where Discussed</b>
17 (Ex. 6)	8/9/2011	Emailing forwarding C. Johns email message to PG&E employees concerning two newspaper articles about PG&E's gas transmission system	pp. 7-8, 10, 13.
18	8/30/2011	Email forwarding PG&E summary with attached investment analyst reports on PSEP proposed decision	pp. 10, 16.
19	9/19/2011	Email forwarding PG&E summary with attached investment analyst report	pp. 10, 16.
20	11/4/2011	Email forwarding PG&E summary with attached investment analyst reports	pp. 10, 16.
21	12/8/2011	Email forwarding PG&E summary with attached S&P ratings report	pp. 10, 16.
22 (Ex. 8)	12/13/2011	Email forwarding PG&E's press release acknowledging liability for the San Bruno accident	pp. 7-8, 10, 14.
23	12/14/2011	Email forwarding Sen. Feinstein's letter to Secretary of Energy asking for nationwide review of pipeline safety	pp. 10, 16-17.
24	12/19/2011	Email forwarding PG&E summary with attached Fitch Ratings downgrade	pp. 10, 16.
25	1/31/2012	Email forwarding PG&E summary with attached Citi investment analyst report on CPSD penalty citation to PG&E for missed gas distribution leak surveys	pp. 10, 16-17.
26 (Ex. 9)	5/14/2012	Email forwarding prepared remarks at annual meeting of PG&E CEO & President addressing gas & electric operations	pp. 7-8, 10, 14.
27	7/20/2012	Email forwarding published article from Politico	pp. 10, 16-17.
28 (Ex. 4)	2/21/2013	Email forwarding published articles on PG&E's 2012 Q4 earnings & 2013 guidance	pp. 7-8, 11-12.
29	4/9/2013	Email to commissioner's advisor forwarding emails re extension of briefing schedule on fines & remedies	pp. 16-17.
30	4/26/2013	Additional email with commissioner's advisor re extension of briefing schedule on fines & remedies	pp. 16-17.
31 (Ex. 10)	4/25/2013	Email with commissioner's advisor re process for addressing discovery issue	pp. 8, 15.
32	5/24/2013	Email to commissioner's advisor enclosing public version of PG&E's consolidated remedies brief	pp. 16-17.
33	12/6/2013	Email forwarding Fitch Ratings report, "California Regulation: Uncertain Outlook; Balanced Regulatory Environment Likely to Continue Despite Recent Uncertainty," covering all major utilities and issues	pp. 16-17.

<b>No.</b>	<b>Date</b>	<b>Description of Document</b>	<b>Location in PG&amp;E's Response Where Discussed</b>
34	1/1/2014	Email to commissioner's advisor requesting "procedural insight" into timing of presiding officers' decisions	pp. 16-17.
35	1/1/2014	Email from commissioner's advisor responding re timing	pp. 16-17.
36	3/27/2014	Email forwarding PG&E CEO message to employees re filing of 8-K & expected criminal indictment	pp. 16-17.
37	3/27/2014	Email forwarding PG&E press release re expected criminal indictment	pp. 16-17.
38	4/1/2014	Email forwarding PG&E CEO note to employees re criminal indictment	pp. 16-17.
39	4/1/2014	Email forwarding PG&E news release re criminal indictment	pp. 16-17.
40	4/2/2014	Email forwarding note with additional discussion re criminal indictment	pp. 16-17.
41 (Ex. 11)	4/2/2014	Email to commissioner's advisor forwarding email with note with additional discussion re criminal indictment	pp. 8, 15.