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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 & Electric Company regarding Anti-Smart Meter Consumer Groups.

Investigation 12-04-010
(Filed April 19, 2012)

**JOINT RULING OF ASSIGNED COMMISSIONER AND
ASSIGNED ADMINISTRATIVE LAW JUDGE ON PUBLIC RELEASE OF
STAFF REPORT AND RELATED MOTIONS**

1. Summary

We order the public release of all but a small portion of the staff report on which this investigation relies. Prepared by the Commission's Consumer Protection and Safety Division (CPSD), the staff report describes CPSD's investigation into the activities of William Devereaux (Devereaux), a former employee of Pacific Gas and Electric Company (PG&E), who undertook to infiltrate anti-smart meter consumer advocacy groups. We mark the staff report for identification as Exhibit 1 and receive it in evidence. In reaching these determinations we construe PG&E's motion for a protective order as a motion to seal Exhibit 1, and as so construed, grant that motion in part; we also grant, in part, PG&E's motion to file a supporting declaration under seal.

2. Procedural Background

Ordering Paragraph (OP) 9 of the Commission's Order Instituting Investigation (OII)¹ states that the staff report and its attachments are to be made part of the public record of this investigation, subject to any legally valid claims that portions of the report "should remain unavailable for public review." OP 9 requires PG&E to "file a written motion for a protective order" by May 21, 2012 and to support any claims for continued non-disclosure.

PG&E timely filed a motion; Exhibit A to the motion is a redacted copy of the staff report. EMF Safety Network and The Utility Reform Network (TURN), both non-parties at that time, tendered responses, which the Commission's Docket declined to file, given their non-party status. At the June 25, 2012 prehearing conference (PHC), the assigned administrative law judge (ALJ) granted all written and oral motions for party status and authorized the late-filing of the previously-tendered responses by TURN and EMF Safety Network. The ALJ also entertained oral arguments on PG&E's motion, directed PG&E to file an amended motion, shortened time for responses to it, and set a Law and Motion Hearing for July 13, 2012. PG&E timely-filed an amended motion on July 2, 2012. Exhibit A to the amended motion has fewer redactions than Exhibit A to the motion and reveals information that PG&E agreed to disclose at the PHC. Californians for Renewable Energy (CARE) and Mr. Joshua Hart filed a joint response to PG&E's amended motion.

¹ *Order Instituting Investigation; Notice of Opportunity for Hearing; and Order to Show Cause Why the Commission Should Not Impose Appropriate Fines and Sanctions, Investigation 12-04-010, filed April 19, 2012.*

At the Law and Motion Hearing, the ALJ entertained further argument, directed PG&E to file a second amended motion that included one or more declarations to support facts alleged by counsel, and authorized responses. PG&E timely filed the second amended motion. PG&E concurrently filed a motion to file under seal one of two declarations attached to its second amended motion. No responses to either of these PG&E motions were filed.

3. Exhibit 1 and Exhibit 1-C; PG&E Motion Construed

In keeping with OP 9 of the OII, we mark for identification as Exhibit 1 the CPSD-sponsored staff report, dated February 3, 2012, and receive it in evidence, effective today. The public version of the staff report will include all information that we do not expressly order to be sealed after considering applicable facts and governing law. That analysis and determination follows, below. The unredacted version of the staff report (marked for identification and received in evidence as Exhibit 1-C) will be sealed. At evidentiary hearing, CPSD shall produce the individual(s) responsible for the report and make that person or those persons available for cross-examination by PG&E and any other non-aligned party.

Accordingly, we interpret PG&E's motion, amended motion and second amended motion as requests that the Commission seal specific portions of the staff report. There is no compelling need for the Commission to consider or adopt a protective order to govern discovery here. At the Law and Motion Hearing, PG&E and TURN stated that they already had executed a private non-disclosure agreement, other parties stated that they were willing to do so, and no party except PG&E argued for the Commission's oversight of the discovery process.

We caution all parties, however, that they must comply with the terms of any executed, private non-disclosure agreement. No party may unilaterally release for public review any information that another party discloses to it subject to claims of confidentiality or privilege. Such information must be redacted from the public version of any prepared testimony or cross-examination exhibits, unless and until the assigned ALJ, the assigned Commissioner, or the Commission orders public release of the information.

4. Declarations in Support of Second Amended Motion

As directed by the ALJ, as part of its second amended motion PG&E offered support for facts previously alleged. This support is in the form of two declarations executed under California law and appended to the motion. The first declaration, executed by Mr. David Bayless, a manager in PG&E's Regulatory Proceedings and Rates Department, is attached to the motion in redacted form; it is the subject of the concurrently filed motion for leave to file under seal. The second declaration, executed by Robert Puts, a manager in PG&E's Corporate Security Department, is attached to the motion in an unredacted form and thus, is wholly public.

The Bayless declaration provides information the ALJ requested at the Law and Motion Hearing. For each non-officer PG&E employee whose name appears in the some part of the staff report or an attachment but has not been publicly released, the declaration provides the employee's title and a job description. The declaration lists eight individuals and states that one is no longer a PG&E employee.

The Puts declaration lists smart meter-related incidents from July 26, 2010 through January 25, 2012, including 30 threats or other actions directed at PG&E employees and non-employee representatives. The declaration states that these incidents were reported to PG&E, that PG&E has investigated or is in the process of investigating each of them, and that the list is intended to be illustrative but not exhaustive or comprehensive.

5. Confidentiality and Privilege Issues

5.1. Undisputed Issues

The following information in Exhibit 1 is no longer subject to claims that it should not be made public and we need not examine the initial basis for redacting the information:²

- Names of CPSD staff, which appear in copies of emails made part of several attachments to the staff report; and
- Names of PG&E officers and their titles, which appear at multiple locations in the staff report and several attachments to it.

The following information *should not* be made public, in order to protect the privacy of individuals who have not authorized public release of the information; no party argues otherwise. We refer, explicitly, to specific redactions in the version of the staff report appended to PG&E's amended motion.

² The transcripts for the June 25, 2012 prehearing conference and the July 13, 2012 law and motion hearing contain statements by counsel for CPSD or PG&E, respectively, waiving assertions that the information is confidential.

- Personal contact information for Mr. Hart, which he declines to waive (Attachment 12, at 2);
- Names of and email addresses for non-party members of the public (Attachment 12, at 4; Attachment 16, redactions in the body of the email; Attachment 19, redactions in the body of the email; Attachment 20, at 1, second and third redactions on that page.

5.2. Disputed Issues

The remaining redactions in the version of the staff report appended to PG&E's motion have not been waived. These redactions fall into two categories: (1) names of PG&E employees other than the corporate officers whose names and titles, as discussed above, PG&E has agreed to release publicly; (2) two documents which PG&E considers to be part of Mr. Devereaux's personnel records.

5.2.1. Applicable Law

Pub. Util. Code § 583, the Commission's General Order 66-C (and other statutes cited there), and various decisions of this Commission govern public disclosure of information furnished to the Commission in the context of a public hearing. Generally, in the absence of an express legal ban or a recognized, contravening harm, Commission policy supports public disclosure, consistent with Article I, § 3 of the California Constitution and with the California Public Records Act (CPRA), codified at Gov. Code §§ 6250-6270. Both the California Constitution and the CPRA expressly recognize the right of individuals in this state to "access to information concerning the conduct of the people's business." (Cal. Const., art. I, § 3(b); Gov. Code § 6250)

The question here is whether another constitutional right, the right to privacy guaranteed by Article I, § 1 of the California Constitution, trumps access. PG&E argues that the names of its non-officer employees and the information it considers to be part of Mr. Devereaux's personnel records should be protected from public disclosure under the constitutional privacy right as well as under specific exemptions in the CPRA.

Though fundamental, the right to individual privacy is not free from all limitations. PG&E acknowledges this but, citing the appellate court decision *Board of Trustees v Superior Court*, 119 Cal. App.3d 516, 525 (1981), contends that the privacy right "may be abridged when, but only when, there is a 'compelling' and opposing state interest." A subsequent decision of the California Supreme Court, *Hill v. National Collegiate Athletic Assn*, 7 Cal.4th 1, 34-35 (1994), reaches a different conclusion: "[W]e decline to hold that every assertion of a privacy interest under article I section 1 must be overcome by a 'compelling interest'."³ The *Hill* balancing test (See Footnote 3) does not impose such a heavy burden.

³ *Hill*, which defines the elements of, and defenses to, a cause of action for violation of the right to privacy under the California Constitution, concerned a student athlete's challenge that a drug testing program based on direct-monitoring of urination violated that right. *Hill* holds that "a plaintiff alleging an invasion of privacy in violation of the state constitutional right to privacy must establish each of the following: (1) a legally protected privacy interest; (2) a reasonable expectation of privacy in the circumstances; and (3) conduct by defendant constituting a serious invasion of privacy." (7 Cal.4th at 39) *Hill* states that the first element is question of law, the second and third elements, mixed questions of law and fact. *Hill* explains further that:

A defendant may prevail in a state constitutional privacy case by negating any of the three elements ... or by pleading and proving, as an affirmative defense, that the invasion of privacy is justified because it substantively furthers one or more countervailing interests. The plaintiff, in turn, may

Footnote continued on next page

The CPRA expressly limits public access in certain instances and identifies a number of categories of documents potentially exempt from public disclosure. Many of these categories are designed to protect individual privacy, including those listed in Gov. Code § 6254(c): “Personnel, medical, or similar files, the disclosure of which would constitute an unwarranted invasion of personal privacy.” Under Gov. Code § 6255(a), a public agency may withhold other records not expressly named in the CPRA if it can demonstrate “on the facts of the particular case the public interest served by not disclosing the record clearly outweighs the public interest served by disclosure of the record.”

rebut a defendant’s assertion of countervailing interests by showing there are feasible and effective alternatives to defendant’s conduct which have a lesser impact on privacy interests. Of course, a defendant may also plead and prove other available defenses, e.g. consent, unclean hands, etc., that may be appropriate in view of the nature of the claim and the relief requested. (7 Cal.4th at 40)

The *Hill* Court found that by participating in competitive athletics, plaintiff had a reduced expectation of privacy, that the athletic association was not required to establish that its drug test method was the least invasive method; and that the athletic association had established two countervailing interests, (1) safeguarding the integrity of intercollegiate athletic competition, and (2) protecting the health and safety of student athletes.

A recent decision of the court of appeal, *Marken v. Santa Monica-Malibu Unified School District*, 202 Cal.App.4th 1250 (January, 2012), which contains a thoughtful review of the sometimes competing rights in Article I, §§ 1 and 3, and application of the CPRA, underscores two guiding principles.⁴ First, the exemptions from mandatory disclosure under the CPRA codified in Gov. Code § 6254(c) and other sections “must be narrowly construed” in keeping with the California Constitution’s directive that a “statute ... or other authority ... shall be broadly construed if it furthers the people’s right of access, and narrowly construed if limits the right of access.” (*Marken*, 202 Cal.App.4th at 1262, quoting Cal. Const., art I, § 3, subd. (b)(2); citations to caselaw omitted here.) Second, “[T]he exemptions from disclosure provided by section 6524 are permissive, not mandatory: They allow nondisclosure but do not prohibit disclosure.” (*Marken*, 202 Cal.App.4th at 1262; citations to caselaw omitted here.)

⁴ *Marken* concerned appeal of procedural rulings by the trial court, where a teacher sought to enjoin a school district from disclosing an investigation report and letter of reprimand relating to a student’s complaint of sexual harassment. A parent sought release of the records. *Marken* holds:

In light of the investigator’s factual findings, the District’s conclusion based on those findings that Marken had violated its board policy prohibiting the sexual harassment of students and imposition of discipline; the exemption from mandatory disclosure in section 6254, subdivision (c), is inapplicable; and release of the investigation report and disciplinary record (redacted as directed by the superior court) is required under the CPRA. Under governing case law, summarized above, the public’s interest in disclosure of this information – the public’s right to know – outweighs Marken’s privacy interest in shielding the information from disclosure. (*Marken*, 202 Cal.App.4th at 1276.)

5.2.2. Non-officer Employee Names

While PG&E employees are not public employees, neither do they work for a typical private sector employer, since PG&E is regulated under the Public Utilities Code as a monopoly provider of natural gas and electricity and, pursuant to § 451, has a statutory obligation to provide reasonable service. Extending a term the OII uses to describe Mr. Devereaux, many other non-officer employees indeed serve as the “public face” of the utility when their jobs require interaction with the public or even require that they appear in public fora as utility spokespersons.

With respect to the eight individuals whose names appear in the Bayless declaration, their job descriptions indicate that seven held/hold management positions with a public-corporate interface and the eighth worked/works directly in a public interface position. Though entry of these names on the PG&E website yields no information (at least for one who has not logged into the website via PG&E protocols), a simple Google search (using each name and “PG&E” as search terms), locates each individual easily. PG&E’s motion fails to establish that these eight individuals actually have a legally protected privacy interest in the association of their names with their PG&E employment. Even if that could be established, the publicly accessible information available about them based on their names and the identity of their employer must greatly reduce any reasonable expectation of privacy. Moreover, the very scope of the OII places scrutiny upon these individuals (whose names appear on internal PG&E emails), since the scope includes whether anyone other than Mr. Devereaux undertook to infiltrate anti-smart meter consumer advocacy groups and whether, once PG&E became aware of Mr. Devereaux’s activities, it

took appropriate action.⁵ PG&E's unsupported assertion that these individuals' names are irrelevant to the investigation is not persuasive.

But for the Puts declaration, which provides evidence of threats, a few actual altercations and the involvement of law enforcement in some situations, we would rule that the names of the eight PG&E non-officer employees should be made public. Instead, in order to protect these individuals from harm stemming from the release of their names in the context of this investigation, we rule that these eight names (listed in Sub-paragraphs a. through h. of Paragraph 3 the Bayless declaration) shall be redacted from the public version of (1) the staff report and all attachments to it and (2) the declaration itself. Titles shall not be redacted. Job descriptions shall not be redacted except for the following: in Sub-paragraphs g. and h. of Paragraph 3 of the Bayless declaration, the names of the counties (but not the word "Counties") shall be redacted from the public version.

5.2.3. Personnel Records

The two documents which PG&E considers to be part of Mr. Devereaux's personnel records are listed in the Index of Attachments to the staff report as: Attachment 2, PG&E's Corporate Security December 17, 2010 investigation memo to Greg Kiraly; and Attachment 5, Mr. Devereaux November 9, 2010, resignation email. Attachment 2 actually consists of two memos, both addressed to Mr. Kiraly; the second memo is dated November 10, 2010. The OII, which unequivocally states that Mr. Devereaux's engaged in certain wrongful activities

⁵ *Assigned Commissioner's Ruling and Scoping Memo*, Filed July 25, 2012, at 3-4.

in his efforts to infiltrate anti-smart meter consumer advocacy groups, includes a brief summary of PG&E's internal review. (OII at 2-3.)

This OII concerns wrongdoing by a former PG&E employee, whose focus was consumer activism against a utility program; once discovered, this matter was widely reported in the media. The adequacy of the investigation, both by our staff and by PG&E, is the object of legitimate public concern. Given the circumstances here, we conclude the Commission must follow the guidance provided by *Marken*. Thus, we conclude that the Gov. Code § 6254(c) exemption from public disclosure is inapplicable and that the two memos should be publicly disclosed after redacting the names of any PG&E non-officer employees mentioned anywhere in them, as well as any internal contact information (e.g. internal telephone numbers).

Attachment 5 consists of an email chain, apparently originated by Mr. Devereaux. We believe the analysis above applies here and reach the same conclusion. The emails should be publicly disclosed after redacting the names of any PG&E non-officer employees mentioned anywhere in them, as well as any internal contact information (e.g. internal telephone and cell phone numbers).

5.2.4. Preparation of Public Version of Documents

CPSD, the sponsor of the Exhibit 1, shall prepare a revised, public version of the staff report, consistent with this ruling, and shall serve it on the service list by August 17, 2012. Because PG&E is the party who has claimed that the information released by this ruling should not be publicly disclosed, we direct CPSD to meet and confer with PG&E prior to finalization of the revised, public version of the report. We order this meeting so that PG&E can be assured, prior to public disclosure of Exhibit 1, that all information we have placed under seal is properly redacted from the public version.

PG&E shall prepare a revised public version of the Bayless declaration consistent with this ruling, shall append it to a cover sheet entitled "Response to Joint Ruling of Assigned Commissioner and Assigned Administrative Law Judge on Public Release of Staff Report and Related Motions" and by August 17, 2012, shall file and serve the document on the service list.

IT IS RULED that:

1. The staff report sponsored by the Commission's Consumer Protection and Safety Division (CPSD), dated February 3, 2012, is marked for identification as Exhibit 1 and is received in evidence, effective today; this public version of the staff report will include all information that Ruling Paragraph 3 does not expressly order to be sealed. The unredacted version of the staff report is marked for identification and received in evidence under seal, effective today, as Exhibit 1-C. At evidentiary hearing, CPSD shall produce the individual(s) responsible for the report and make that person or those persons available for cross-examination by Pacific Gas and Electric Company and any other non-aligned party.

2. The *Second Amended Motion of Pacific Gas and Electric Company for Protective Order*, filed July 19, 2012, is construed as a motion to seal Exhibit 1, and as so construed, is granted in part, to the extent consistent with Ruling Paragraph 3.

3. The following portions of Exhibit 1 shall be redacted and shall not be publicly disclosed:

- (a) Personal contact information for Mr. Joshua Hart (Attachment 12, at 2);
- (b) Names of and email addresses for non-party members of the public (Attachment 12, at 4; Attachment 16, body of that email; Attachment 19, body of that email);

- (c) The names of the eight non-officer employees listed in the Declaration of David Bayless attached to the *Second Amended Motion of Pacific Gas and Electric Company for Protective Order* (wherever these names appear in Exhibit 1 and/or any attachments to it);
- (d) The names of any Pacific Gas and Electric Company (PG&E) non-officer employees mentioned anywhere in Attachment 2 to Exhibit 1, as well as any internal contact information (e.g. internal telephone numbers).
- (e) The names of any PG&E non-officer employees mentioned anywhere in Attachment 5 to Exhibit 1, as well as any internal contact information (e.g. internal telephone numbers and cell phone numbers).

4. *Pacific Gas and Electric Company's Motion for Leave to File Confidential Personal Information Under Seal*, filed July 19, 2012, is granted in part, to the extent consistent with Ruling Paragraph 5.

5. The following portions of the Declaration of David Bayless attached to the *Second Amended Motion of Pacific Gas and Electric Company for Protective Order* shall be redacted and shall not be publicly disclosed:

- (a) The names of the eight non-officer employees listed in Sub-paragraphs a. through h. of Paragraph 3 the Declaration
- (b) The names of the counties (but not the word "Counties") in Sub-paragraphs g. and h. of Paragraph 3 of the Declaration.

6. The information placed under seal, pursuant to Ruling Paragraphs 2, 3, 4, and 5 should be granted permanent protection unless the assigned Commissioner, the assigned Administrative Law Judge (ALJ), the ALJ serving as the Law and Motion Judge, or the Commission subsequently orders its release, following notice and opportunity to be heard.

7. The Consumer Protection and Safety Division shall prepare a revised, public version of Exhibit 1 consistent with this ruling, and shall serve it on the service list by August 17, 2012, after meeting with Pacific Gas and Electric Company as provided in the body of this ruling.

8. Pacific Gas and Electric Company shall prepare a revised public version of the Declaration David Bayless consistent with this ruling, shall append it to a cover sheet entitled "*Response to Joint Ruling of Assigned Commissioner and Assigned Administrative Law Judge on Public Release of Staff Report and Related Motions*" and by August 17, 2012, shall file and serve the document on the service list.

Dated July 31, 2012, at San Francisco, California.

 /s/ JEAN VIETH
 JeanVieth
Administrative Law Judge

 /s/ MICHEL PETER FLORIO
 Michel Peter Florio
Assigned Commissioner