



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

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

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

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

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

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

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

**NOTICE OF *EX PARTE* COMMUNICATIONS
OF THE CITY OF SAN BRUNO**

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September 26, 2014

**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.

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

**NOTICE OF *EX PARTE* COMMUNICATIONS
OF THE CITY OF SAN BRUNO**

Pursuant to Article 8 of the Commission's Rules of Practice and Procedure, and the September 24, 2014 Administrative Law Judges' Ruling Granting Motion for One Day Notice of All Communications with Commissioner Offices and Commission Advisory Staff, the City of San Bruno (San Bruno) files this Notice of *ex parte* communications.

On Tuesday, September 23, 2014, at approximately 4:10 p.m., Britt Strottman, acting as Special Counsel on behalf of San Bruno, e-mailed and mailed a Public Records Act Request to Mr. Fred Harris of the Legal Division at the California Public Utilities Commission. The Public Records Act Request related to Order Instituting Investigation Proceedings I.12.01.007, I.11.02.016, and I.11.11.009. The Public Records Act Request was copied by e-mail and mail to

Karen V. Clopton, Acting General Counsel for the California Public Utilities Commission and Paul Clanon, Executive Director for the California Public Utilities Commission. A copy of the Public Records Act Request is attached, and incorporated herein by reference.

Respectfully Submitted,

/s/ Steven R. Meyers

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September 26, 2014

2336797.1

ATTACHMENT

Public Records Act Request Dated September 23, 2014. From Ms. Britt Strottman to Mr. Fred Harris of Legal Division, Karen V. Clopton, Acting General Counsel and Paul Clanon, Executive Director.



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September 23, 2014

Via E-mail and U.S. Mail

Mr. Fred Harris
Legal Division, Public Records Office
California Public Utilities Commission
505 Van Ness Avenue
San Francisco, California 94102

Re: Public Records Act Request

Dear Mr. Harris:

Pursuant to the California Public Records Act (Gov. Code § 3250 *et seq.*), the City of San Bruno hereby requests copies of the following public records. For definitions and instructions, please refer to the attached Exhibit A.

1. All *Documents* from April 2014 to the present relating to any communications between *CPUC Commissioners* or *CPUC Employees* with *Financial Professionals* of *Financial Institutions* concerning the *Subject Matter* of I.12-01-007, I.11-02-016, and I.11-11-009.
2. All *Documents* from April 2014 to the present relating to any *Meetings* between *CPUC Commissioners* or *CPUC Employees* with *Financial Professionals* of *Financial Institutions* concerning the *Subject Matter* of I.12-01-007, I.11-02-016, and I.11-11-009.
3. All *Documents* from April 2014 to the present relating to any communications between *CPUC Commissioners* or *CPUC Employees* with *PG&E Employees* concerning the *Subject Matter* of I.12-01-007, I.11-02-016, and I.11-11-009.
4. All *Documents* from April 2014 to the present relating to any *Meetings* between *CPUC Commissioners* or *CPUC Employees* with *PG&E Employees* concerning the *Subject Matter* of I.12-01-007, I.11-02-016, and I.11-11-009.
5. All visitor logs from February 24, 2011 to the present.
6. All *Documents* from September 9, 2010 to February 24, 2011 relating to the PG&E explosion in San Bruno between *CPUC Commissioners* or *CPUC Employees* with *PG&E Employees*.

7. All *Documents* from July 28, 2014 to the present relating to any communications between *CPUC Commissioners* or *CPUC Employees* with *PG&E Employees* concerning the “Motion of the City of San Bruno Seeking the Recusal of Assigned Commissioner Peevey” and the “Motion of the City of San Bruno for an Order to Show Cause Why Pacific Gas and Electric Company Should Not be Held in Violation of Commission Rule of Practice and Procedure 8.3(b) (Rule Against Ex Parte Communications) and for Sanctions and Fees” (see Exhibits B and C, respectively).

Should the CPUC elect to withhold any responsive document(s), please describe the document(s) withheld and the reason for the withholding. If the withholding is based on privilege, please specify the applicable privilege you believe applies.

In accordance with Government Code section 6253(c), please respond to this request within ten days. We hope that the CPUC replies within 10 days and produces the above-requested documents in a timely manner in light of and in the spirit of the CPUC’s recent settlement with San Bruno relating to San Bruno’s Public Records Act lawsuit. I am happy to discuss this request further with you and look forward to your response.

Sincerely,



Britt K. Strottman
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Enclosures: Exhibit A – Public Records Act Request Definitions and Instructions
Exhibit B - Motion of the City of San Bruno Seeking the Recusal of Assigned Commissioner Peevey (without exhibits)
Exhibit C - Motion of the City of San Bruno for an Order to Show Cause Why Pacific Gas and Electric Company Should Not be Held in Violation of Commission Rule of Practice and Procedure 8.3(b) (Rule Against Ex Parte Communications) and for Sanctions and Fees (without exhibits)

c: Karen V. Clopton, Acting General Counsel (via U.S. mail and E-mail)
Paul Clanon, Executive Director (via U.S. mail and E-mail)
Connie Jackson, City Manager, San Bruno (via E-mail)
Marc Zafferano, City Attorney, San Bruno (via E-mail)
Steven Meyers, Special Counsel (via E-mail)

EXHIBIT A

EXHIBIT A

CITY OF SAN BRUNO PUBLIC RECORDS ACT REQUEST TO THE CALIFORNIA PUBLIC UTILITIES COMMISSION

DEFINITIONS AND INSTRUCTIONS

- A. "Documents" means all notes, minutes of meetings, calendar entries, documents, summaries, e-mails, e-mail attachments, texts, calendar entries, memoranda, proposals, PowerPoint presentations, memoranda, other briefings, records of follow-up tasks, list of attendees, documentation of notes made on white boards or other records, whatever the format (oral, written, electronic, including twitter, facebook, instant messaging, etc.), whether in draft or final form.
- B. "Meetings" means any appointment, discussion, assembly, luncheon, dinner, phone call or conference, video chat/conference, consultation, or gathering by two or more persons, whether via live talks or phone or video conferencing.
- C. "CPUC" means the California Public Utilities Commission.
- D. "Commissioners" means the specific CPUC Commissioners assigned to I.12-01-007, I.11-02-016, I.11-11-009, Commissioner Peevey and Commissioner Florio and all staff members for each Commissioner from the time the three investigations were opened to the present. Commissioner also includes Commissioners Sandoval, Picker, and Peterman and their respective staff.
- E. "CPUC Employee" or "CPUC Employees" includes, without limitation all employees, management, appointees and executives at the CPUC, the Executive Director, consultants to CPUC, the Safety and Enforcement Division, any in-house attorneys and any outside counsel to the CPUC. "CPUC Employee(s)" specifically includes, without limitation, President Michael Peevey, Commissioner Mike Florio, Executive Director Paul Clanon, and their respective staff members.
- F. "Financial Institution" means any institution in the business of underwriting, distributing and trading utility equity and debt securities, including, without limitation, any such institutions or consultants that presently or previously have performed such services for Pacific Gas and Electric Company or PG&E Corporation.
- G. "Financial Professional" means any entity or consultant in the business of advising concerning underwriting, distribution and trading of utility equity and debt securities, including, without limitation, any such institutions or consultants that presently or previously have performed such services for Pacific Gas and Electric Company or PG&E Corporation.

- H. "PG&E Employee" or "PG&E Employee(s)" includes, without limitation, all employees, management and executives at Pacific Gas and Electric Company and PG&E Corporation, the Board of Directors to Pacific Gas and Electric Company, the Board of Directors to PG&E Corporation, consultants to Pacific Gas and Electric Company, consultants to PG&E Corporation and any in-house attorneys and any outside counsel to Pacific Gas and Electric Company and PG&E Corporation.
- I. "Subject Matter of I.12-01-007, I.11-02-016, and I.11-11-009" means the pending proceedings and issues identified in the Order Instituting Investigation in each proceeding, as further clarified by the Scoping Memorandum issued in each proceeding.

EXHIBIT B

**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.

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

**MOTION OF THE CITY OF SAN BRUNO SEEKING THE RECUSAL OF ASSIGNED
COMMISSIONER PEEVEY**

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July 28, 2014

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

**MOTION OF THE CITY OF SAN BRUNO SEEKING THE RECUSAL OF ASSIGNED
COMMISSIONER PEEVEY**

Pursuant to Rule 11.1 of the California Public Utilities Commission's ("Commission" or "CPUC") Rules for Practice and Procedure ("Commission Rules"), the City of San Bruno ("San Bruno") respectfully makes this motion for: (1) an Order to Show Cause why Commission President Michael R. Peevey (President Peevey) should not be recused from voting on decisions relating to the Orders Initiating Investigation ("OIs") I.12-01-007, I.11-02-016, and I.11-11-009 (the "Line 132 OIs") and (2) an Order to Show Cause why President Peevey should not be disqualified from serving as the assigned Commissioner in I.12-01-007. President Peevey should be disqualified from serving as the Assigned Commissioner and from voting on any decisions in the Line 132 OIs for three reasons: (1) President Peevey and Pacific Gas and Electric Company (PG&E) violated the Commission rules against ex parte communications on a regular and

systematic basis; (2) the content of the communications between President Peevey and PG&E during the ongoing OIIs demonstrates bias in favor of PG&E; and (3) the conduct of President Peevey and PG&E has denied the parties to these proceedings due process of law by taking relevant evidence outside the record with no opportunity to examine such evidence. The Commission should designate a Commissioner other than President Peevey as the Assigned Commissioner in the Root Cause OII (I.12.01.007), and President Peevey should be recused from voting on any decision that might issue in these proceedings. This motion is filed concurrently with the “MOTION OF THE CITY OF SAN BRUNO FOR AN ORDER TO SHOW CAUSE WHY PACIFIC GAS AND ELECTRIC COMPANY SHOULD NOT BE HELD IN VIOLATION OF COMMISSION RULE OF PRACTICE AND PROCEDURE 8.3(b) (RULE AGAINST EX PARTE COMMUNICATIONS) AND FOR SANCTIONS AND FEES” (requesting an order that PG&E be found in violation of Rule 8.3(b) (rule against ex parte communications in adjudicatory proceedings)). In furtherance of this Motion and in order to insure transparency and objectivity to these proceedings, San Bruno renews its prior requests¹ that the Commission appoint an Independent Monitor to provide oversight function in the fine/penalty portion of this and the related OIIs. San Bruno now asks that an Independent Monitor oversee the proceedings immediately in light of these illegal and unethical communications. Additionally, San Bruno respectfully requests a hearing on the illegal ex parte contacts between PG&E and President Peevey (and his staff).

I. BACKGROUND

A. The Line 132 OIIs

The Commission instituted three formal adjudicatory and prosecutorial investigations into PG&E’s gas operations after a PG&E-installed and operated 30 inch natural gas pipeline exploded in San Bruno killing eight people, injuring sixty-six people, and leveling thirty-eight homes on September 9, 2010. The first Commission-initiated investigation concerns PG&E’s

¹ For example, see “Opening Brief of the City of San Bruno Concerning the Fines and Remedies to be Imposed on Pacific Gas and Electric Company” dated May 6, 2013 at pp. 43-49.

deficient recordkeeping practices and the safety implications of such practices for the utility's gas service and facilities (the "Recordkeeping OII" – filed on February 24, 2011).² The assigned presiding Commissioner in the Recordkeeping OII is Commissioner Florio. The record closed in the Recordkeeping OII in March of 2013. Pre-hearing conferences, oral arguments, and evidentiary hearings were held in the Recordkeeping OII from September 2012 until March 8, 2013.

The second Commission investigation into the explosion of PG&E's Line 132 concerns PG&E's violations of state and federal laws in connection with the utility's operation of pipelines in high population consequence areas (the "HCA OII" – filed on November 10, 2011).³ The assigned presiding Commissioner in the HCA OII is also Commissioner Florio. The record in the HCA OII closed in March of 2013.

The third Commission-initiated investigation into PG&E misconduct is a comprehensive examination of PG&E's violations of federal and state pipeline safety law applicable to its natural gas system (the "Root Cause OII" – filed on January 12, 2012).⁴ In addition to the events of September 9, 2010, the Root Cause OII expressly includes all past operations, practices, and other events or courses of conduct that could have led to or contributed to the explosion of PG&E's Line 132.⁵ The assigned presiding Commissioner in the Root Cause OII is President Peevey.⁶ The record on the Root Cause OII closed in March of 2013. Pre-hearing conferences, oral arguments, and evidentiary hearings were held in the Root Cause OII from September 2012 until March 8, 2013. The Commission has categorized all three Line 132 OIIs as "adjudicatory" pursuant to Rule 7.1(c) of the Commission's Rules.

President Peevey is a "decisionmaker" as that term is construed in Rule 8.1(b). PG&E is

² 1.11-02-016.

³ 1.11-11-009.

⁴ 1.12-01-007.

⁵ 1.12-01-007 at p. 2.

⁶ <http://docs.cpuc.ca.gov/efile/NOTICE/157982.pdf>.

an interested party as that term is construed in Rule 8.1(d). Communication between a decisionmaker and an interested party on substantive adjudicatory matters are forbidden by Rule 8.3(b). During a three year period, there have been at least 41⁷ instances of substantive ex parte communications between PG&E and President Peevey, most of which relate to the financial condition of PG&E and its capacity to absorb fines and penalties which may arise from these OIIs. These communications contained non-public, extra-record evidence not subject to authentication, examination, cross examination or rebuttal by the parties of the assigned ALJs.

B. Description of Ex Parte Communications Between President Peevey, the Assigned “Decisionmaker,” and PG&E “the Defendant”

On May 30, 2013, San Bruno pursuant to state law (California Public Records Act- Gov’t Code sections 6250 et seq.), duly filed with the custodian of records a request for the production of public records relating to the OIIs and particularly requests H, I, L, and M.⁸ On November 19, 2013, San Bruno advised this Commission that in violation of the law, little to no records had been produced, and provided a last chance for the Commission to comply with the law.⁹ On February 3, 2014, upon failure of the Commission to comply with the law, San Bruno filed a complaint and petition for a writ of mandate in the San Francisco Superior Court.¹⁰ During the pendency of this action, the Commission produced approximately 7,000 pages of records responsive to San Bruno’s outstanding and unanswered records requests.

An examination of the public records the CPUC produced as a result of this lawsuit demonstrate that President Peevey and PG&E have actively participated in improper, pervasive, systematic and continuous ex parte communications (“Peevey/PG&E ex parte communications”)

⁷ For the link to the 41 violations, other Peevey/PG&E correspondence, please see <https://meyersnave.sharefile.com/d/s911293af60143399>.

⁸ See Exhibit 1, May 30, 2013 letter; sections D, E, H, I, L, and M.

⁹ See Exhibit 2, November 19, 2013.

¹⁰ *City of San Bruno v. Public Utilities Commission*; CGC-14-537139; San Francisco Superior Court.

over a time period from March 16, 2011 to April 4, 2014 during the pendency of the Line 132 OII proceedings.¹¹ None of these 41 separate communications were proffered to the other parties, introduced into the record, made into the record, made public or noticed as ex parte communications. The record closed in the Line 132 OIIs in March of 2013.

The majority of the communications involve executives of PG&E's Regulatory Relations. In the Peevey/PG&E ex parte communications, PG&E Executives Brian Cherry and Laura Doll are advocating PG&E's legal position and providing evidence outside the record relevant for all of the three elements under Public Utilities Code Section 2104.5 that President Peevey needs to consider when adopting a decision levying the fine and/or penalties against PG&E. Those legal standards and the content of the communications are: (1) the appropriateness of the penalty to the size of the business of the person charged (forwarding President Peevey multiple investment analyst reports and PG&E financial internal analysis that the potential penalties in the OIIs will financially harm PG&E); (2) the gravity of the violation (forwarding Peevey emails from PG&E CEO Tony Earley and others that the violations are not so egregious because PG&E is fixing the system); and (3) the good faith of the person charged in attempting to achieve compliance, after notification of a violation (forwarding a PG&E press release to President Peevey that PG&E settled with the San Bruno victims, internal emails from PG&E CEO Tony Earley that PG&E is taking the necessary steps to fix its system, and forwarding news articles to President Peevey that PG&E is making progress post-San Bruno). The presiding Administrative Law Judges considered these legal standards in the penalty phase of the OIIs so critical that separate evidentiary proceedings were scheduled and held from September 12, 2012 until March 8, 2013, evidence was taken, testimony produced and extensive

¹¹ The Root Cause OII was filed on January 12, 2012, the Recordkeeping OII was filed on February 24, 2011, and the HCA OII was filed on November 10, 2011.

briefing was ordered. Yet during this same period of time PG&E was providing private, non-public, ex parte evidence to President Peevey regarding the exact same subject.

II. DISCUSSION

A. **President Peevey Should be Recused from Serving as the Assigned Commissioner in the Root Cause OII Because he Engaged in Ex Parte Communications With PG&E During the Ongoing OII Proceedings**

No one expects the Commissioners to be sequestered, barred from reading the newspaper or the financial news, but these communications from PG&E's Regulatory Affairs executives to the CPUC exhibit an ingratiating characteristic suggesting toadyism and unfettered access. While the content of these ex parte communications between President Peevey and PG&E may well violate the law, they also demonstrate in their tone, totality, and pervasiveness a relationship between the utility and this Commissioner which is familiar, collegial, and cozy. This is not a single instance of an errant email, nor a misplaced "cc," or a good faith mistake, rather, when taken in its entirety, the email traffic shows that PG&E has unrestricted access to President Peevey and his senior advisors; PG&E's executives feel comfortable enough with President Peevey to email "Mike" on a regular basis; and that President Peevey did nothing whatsoever to discourage, warn, or admonish PG&E from providing him extra record, highly relevant and probative evidence on a consistent basis for three years. The fact that these off the record communications occurred with the defendant and the "judge" in one of the most high-profile and high-stakes investigations that has ever come before the Commission engenders, at least for San Bruno, a total loss of confidence in the regulatory process. It is not enough for PG&E to say: "there was no email conversation with President Peevey"; these were just "for your information"; "we did not attempt to influence the outcome"; or "this is the way we do business". Nonsense, the rules forbid this conduct.¹² It is not enough for President Peevey to

¹² PG&E may argue in its opposition of this motion that the communications relate to the rulemaking proceeding in R.11.02.019, so they are not illegal (although if the communications truly related to the rulemaking proceeding, PG&E still violated the ex parte reporting requirements under Rule 8.4). This hollow defense would be in bad faith at best and goes against the CPUC's very own settlement position with San Bruno in San Bruno's lawsuit against

say, “I didn’t respond”; “I didn’t solicit the emails”; or “I don’t control the email system.” In fact, President Peevey responded to PG&E on three separate occasions and in one instance, actually gave PG&E public relations advice.¹³ As one who holds the public trust, a public officer and fiduciary of the regulatory system, President Peevey had an affirmative duty to stop the communications and disclose to all the parties the content of those communications.¹⁴ As the President of the Commission, the buck stops with President Peevey.

1. The Line 132 OIIs are Adjudicatory Pursuant to Rule 7.1

The three OIIs are categorized as “adjudicatory” pursuant to Rule 7.1(c) of the CPUC’s Rules of Practice and Procedure. Pursuant to CPUC Rules of Practice and Procedure 8.3, in “any adjudicatory proceeding, ex parte communications are prohibited” with any decisionmaker.¹⁵ Rule 8.1(c) defines “ex parte communication” as any written or oral communication that:

- (1) concerns any substantive issue in a formal proceeding,
- (2) takes place between an interested person and a decisionmaker, and
- (3) does 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.

2. The Peevey/CPUC Communications Take Place Between an Interested Person and a Decisionmaker under Rule 8.1(c)(1)

Under the Rule 8.1(c)(1), an ex parte communication is prohibited between a

the CPUC for Public Records Act violations that led to the disclosure of the Peevey/PG&E ex parte communications. On July 25, 2014, San Bruno and the CPUC entered into a settlement agreement, the settlement agreement expressly stated that the CPUC produced documents (the documents that are the subject of this motion) relating to the “Email communications related to the subject matter of the PG&E/*San Bruno OIIs* between Commissioner Peevey and any employee of Pacific Gas & Electric” (emphasis added). See settlement agreement, Exhibit 3.

¹³ See Exhibit 10.

¹⁴ San Bruno acknowledges that D.08.06.023, at p. 24 found that an ex parte communication “reasonably falls on the entity intending to influence a decisionmaker” and “We continue to reject such efforts to shift or share the burden under the ex parte rules.” However, there needs to be some accountability on a decisionmaker when a defendant in an adjudicatory proceeding systemically and continuously communicates with a decisionmaker in violation of the law. The pattern and practice of regularly violating the rules does impose a burden on the decision-maker. The rule in question (Rule 8.3(b)) doesn’t designate who has the burden, it is an absolute ban.

¹⁵ See also Public Utilities Code §§ 1701.1 to 1701.4.

“decisionmaker” and an “interested party.” President Peevey falls under the definition of “decisionmaker” under Rule 8.1(b). An “interested person” includes “any party to the proceeding or the agents or employees of any party, including persons receiving consideration to represent any of them” and “any person with a financial interest . . . in a matter at issue before the Commission” under Rule 8.1(d). PG&E is clearly an interested party and PG&E is the “defendant”/subject of the investigations under the three OIIs.

3. The Peevey/CPUC Communications Concern Substantive Issues in a Formal Proceeding under Rule 8.1(c)(1)

Under Rule 8.1(c)(1), President Peevey and PG&E are prohibited from communicating on “any substantive issue in a formal proceeding.” Under the law, when determining the amount of the penalty, President Peevey will consider 1) the appropriateness of the penalty to the size of the business of the person charged; 2) the gravity of the violation; and 3) the good faith of the person charged in attempting to achieve compliance, after notification of a violation.¹⁶ The Peevey/PG&E ex parte communications directly relate to subjects germane to three major Line 132 OIIs. Here, the interested party (PG&E) and the decisionmaker (President Peevey) are directly communicating with each other secretly about all three elements President Peevey needs to take into consideration when levying a fine against PG&E under Public Utilities Code Section 2104.5. President Peevey and PG&E are not talking about the weather in these communications, PG&E is presenting its calculated defense in the OIIs through directly communicating with a decisionmaker that will decide its fate. The other parties to the OIIs, the City of San Bruno, The Utility Reform Network, the Office of Ratepayer Advocates, and the City and County of San Francisco didn’t have the same opportunities to present their position off the record because they shouldn’t have those opportunities - it is inequitable and against the law to communicate with a decisionmaker in an adjudicatory proceeding.

There are several examples of the Peevey/PG&E ex parte communications where PG&E and President Peevey are discussing the first element under the law that he has to consider when

¹⁶ Public Utilities Code Section 2104.5.

levying a fine against PG&E: the appropriateness of the penalty to the size of the business of the person charged. For example, Brian Cherry forwards an article from the *Wall Street Journal*, *Contra Costa Times*, and articles from other various news outlets relating to PG&E posting 4th quarter losses dated February 21, 2013. The *Wall Street Journal* article is entitled “PG&E Posts 4th-Quarter Loss, Sees 2013 as ‘Down Year.’” Mr. Cherry forwards the articles to President Peevey with the message: “Bad day for us today.”¹⁷ In another email, Brian Cherry forwards to President Peevey a Standards and Poors credit update and an internal email from PG&E analyzing PG&E’s credit rating on March 16, 2011. President Peevey then replies to Brian Cherry five minutes later: “Yep. No surprise.” Brian Cherry replies back two minutes later: “Some folks here have suggested it may be Tom and my failure to work with regulators....oh well, maybe I should call Brightsource back.”¹⁸ On its face, these emails may appear to be innocuous, however, PG&E is directly communicating with a decisionmaker about the financial health of the corporation that is under investigation in three OIIs – one of the three considerations that must be considered by the decisionmakers in levying a penalty.

There are examples of the Peevey/PG&E communications where PG&E and President Peevey are discussing the second element under the law that Peevey has to consider when levying a fine against PG&E: the gravity of the violation. For example, on August 9, 2011, Brian Cherry forwards an internal PG&E email from PG&E President Chris Johns to PG&E employees to President Peevey with the note: “FYI. Comments by Chris on the media articles.”¹⁹ The internal email from Chris Johns to “Fellow Employees” explains PG&E’s position that a news article inaccurately reported that PG&E “failed to heed warnings about problems with our natural gas transmission system two months before the San Bruno accident” and PG&E’s position that another news article inaccurately reported that “PG&E ignored

¹⁷ See Exhibit 4; Violation 28 (for the list of 41 violations and accompanying email correspondence, see <https://meyersnave.sharefile.com/d/s911293af60143399>).

¹⁸ See Exhibit 5; Violation 3.

¹⁹ See Exhibit 6; Violation 17.

employees' safety concerns and retaliated against employees for raising safety issues." PG&E gets the unfair advantage by arguing its position about the gravity and legitimacy of the violations to the top decisionmaker not in a courtroom, but through off the record and unverified email communications.

There are several examples of the Peevey/PG&E communications where PG&E and President Peevey are discussing the last element under the law that President Peevey has to consider when levying a fine against PG&E: the good faith of the person charged in attempting to achieve compliance, after notification of a violation. On December 13, 2011, Brian Cherry forwards a PG&E press release entitled: "PG&E STATES IT IS LIABLE FOR THE SAN BRUNO PIPELINE ACCIDENT *Utility takes on financial responsibility to compensate victims.*"²⁰ The press release goes on to describe the steps PG&E is taking to "do the right thing in our response to this accident." Brian Cherry forwards the press release with the note: "Mike – FYI. Thought you'd appreciate this." President Peevey responds thirty minutes later: "Very good, Tom told me about (sic) at the lunch today." In another email communication between PG&E and President Peevey, on May 14, 2012, Brian Cherry forwards PG&E CEO Tony Earley and PG&E President Chris Johns' prepared remarks for its annual meeting to President Peevey.²¹ The prepared remarks from PG&E's top two executives outline the steps PG&E has taken, and is going to take, to remedy the violations and make its system safer. Several of these "substantial changes" Mr. Earley and Mr. Johns refer to in their prepared remarks are hotly contested issues of fact and law in the OIIs. San Bruno and the other parties to the proceedings didn't get to cross examine Mr. Earley and Mr. Johns on PG&E's alleged "substantial changes." San Bruno and the other parties didn't get an opportunity to directly communicate with President Peevey on the steps PG&E is taking to fix its system and whether PG&E is in good faith attempting to achieve compliance.

There are two additional violations of the ex parte rules that do not directly relate to the

²⁰ See Exhibit 7; Violation 22.

²¹ See Exhibit 8; Violation 26.

three elements that CPUC decisionmakers have to consider when levying a fine/penalty, but these two communications are substantive. In one communication, President Peevey's alter ego Chief of Staff Carol Brown is actually giving legal advice to PG&E, presumably about San Bruno's motion to recuse President Peevey and Commissioner Florio from attending the now cancelled Safety Symposium (because it also violated the ex parte rules).²² In the communication, Carol Brown sends an email to PG&E Regulatory Affairs Director Laura Doll informing Ms. Doll that Ms. Brown spoke to the "judge:" – "Talked with the judge – they issued a ruling saying the hearing was moot – I think you have 2 ways of going (you may want to chat with your legal people)" and then Ms. Brown proceeds to lay out the two legal strategies: "Send back a sweet note saying the issue is moot since seminar not going forward (problem – it is not 'cancelled' only postponed) – and then wait for them to throw a fit" and "[a]nswer any simple question you can, and then object to the others as being outside the scope of the 3 OIIs – but offering to meet and confer on the issue – and then schedule a date out a little for the meet-and-confer – then they will file a motion to compel, no need for any expedition of the process – you respond – and a hearing is held in due course." Ms. Brown ends the correspondence with "Happy to chat." Ms. Doll responds eleven minutes later with the note: "Love you. Thanks. Not sure yet!"

In another example, on April 2, 2014, Brian Cherry forwards an internal PG&E email from PG&E CEO Tony Earley and PG&E President Chris Johns regarding the grand jury criminal indictments against PG&E. The underlying internal email explains the charges and PG&E's opinion of the Judge overseeing the case to PG&E's Officers. In response, President Peevey replies: "One comment: PG&E's decision to issue a press release last week anticipating all this only meant that the public got to read two big stories rather than one. I think this was inept."²³ If only San Bruno, the Safety and Enforcement Division (SED), and the other Intervenor in the Line 132 OIIs were able to get legal and public relations advice from the

²² See Exhibit 9; Violation 31.

²³ See Exhibit 10; Violation 41.

President of the Commission and his staff.

There are also unethical communications²⁴ between CPUC's Executive Director Paul Clanon²⁵ and senior executives within PG&E's Department of Regulatory Affairs which fall into five categories²⁶: 1) correspondence from PG&E complaining about Senator Jerry Hill's dissatisfaction with PG&E's recordkeeping practices; 2) analyst reports that the penalties/fine in the investigations will impact the viability of PG&E, 3) SED's (the prosecutor) data requests to PG&E; 4) news articles about the proceedings; and 5) internal PG&E emails forwarded to Executive Director. The tone exchanged between the utility (PG&E) and its regulator (Executive Director Paul Clanon) reveal a level of familiarity and coziness that threatens the very function of the CPUC to provide objective oversight of PG&E. Below is a description of some of the Clanon/PG&E emails:

1. In December 2011, PG&E Regulatory Affairs Director Laura Doll sent Executive Director Paul Clanon a flurry of emails complaining about records requested during the course of the ongoing CPUC investigation of the 2010 PG&E explosion. This correspondence illustrates an improper relationship between utility and regulator when the defendant/PG&E is complaining to the regulator about the regulator's legal requests. Ms. Doll's friendly relationship with Executive Director Clanon is most clearly evident on Dec. 8, 2011, when she complains that she "can't get over the unchecked appetite for global data requests from legal. Its (sic) unmanageable. I mean, records back to the 1920's? Is this what florio (sic) intended? Seriously, is there any procedural opportunity to have other eyes on the scope and nature of these requests? These do nothing to improve safety, and we have already conceded our records suck. I'm being naïve again, right? But thanks for listening. Laura"²⁷

2. In March 2011, then-Assemblyman Jerry Hill sent a letter to Commissioner Michael Peevey, demanding an update on PG&E's progress with regard to producing

²⁴ San Bruno understands that these communications are not violations of the rules against ex parte communications since Executive Director Clanon is not a "decisionmaker" under Rule 8.1(b).

²⁵ As the Executive Director of the Commission, Paul Clanon reports directly to President Peevey.

²⁶ To review Executive Director Clanon/PG&E communications, please see <https://meyersnave.sharefile.com/d/s911293af60143399>.

²⁷ See Exhibit 11.

traceable, verifiable and complete records of natural gas pipelines. The subsequent email thread between Executive Director Clanon and Mr. Cherry regarding Senator Hill's letter is concerning because it appears the state regulator is providing the utility company with advance warning about questions from a state legislator, begging us to question whose interest the regulator is more concerned with protecting. After receiving this letter on March 8, 2011 Executive Director Clanon sent an email to Mr. Cherry to provide an early warning about Senator Hill's letter: "Pls call me about this. Thx." Mr. Cherry then responded to Executive Director Clanon that he had just seen the letter: "Chat later tonight or tomorrow?" Executive Director Clanon responded that he just "wanted to give you (Cherry) some notice that we'd be replying to Hill." At this point, Mr. Cherry said: "Thanks. Can't wait to hear what you will tell him."²⁸

3. In October 2012, Ms. Doll emailed Executive Director Clanon and Terrie Prosper, the CPUC's Director of News and Public Information, to warn them about a possible "protest" by San Bruno residents at an upcoming CPUC hearing related to the San Bruno pipeline explosion. This correspondence seemingly illustrates the budding collaboration between the utility and regulator as both appear to be threatened by public participation in the ongoing penalty proceedings. Three minutes after receiving the email on Oct. 10, 2012, Ms. Prosper responded to Ms. Doll: "Lovely. Thanks for the heads-up!" To which Ms. Doll clarified: "There weren't like 50 people standing and cheering or anything, just ONE person who urged people to get up to SF and put pressure on the CPUC. But it was televised on the public access channel . . ."²⁹

4. On January 11, 2013, Executive Director Clanon sends a note presumably to his staff with the title "PG&E Shareholder Share of post-San Bruno." In the original email Executive Director Clanon tells his CPUC staff: "I told PG&E I've asked you for an analysis, FYI." Then Executive Director Clanon forwards the email to Laura Doll, who then responds: "Thank YOU."³⁰ This begs the question as to why is Executive Director Clanon directing his staff to do a post-San Bruno "shareholder share" analysis solely for PG&E's benefit?

4. The Peevey/CPUC Communications Do Not Occur in a Public Hearing, Workshop, or Other Public Forum Noticed by Ruling or Order in the Proceedings, or on the Record of the Proceeding Rule 8.1(c)(3)

Under the CPUC's own rules, President Peevey and PG&E are prohibited from discussing any subject matter related to the PG&E explosion when it does not occur in a public hearing, workshop, or other public forum noticed by the ruling or order in the proceeding, or on the record in the proceeding. PG&E was able to communicate with the top decisionmaker in this case not in the courtroom and through legal briefs, but through off the record secret email

²⁸ See Exhibit 12.

²⁹ See Exhibit 13.

³⁰ See Exhibit 14.

communications in front of the very decisionmaker that will determine its fate in just a few months. It is akin to a judge communicating with the defendant during the pendency of his case on how the defendant can receive a lower sentence. President Peevey assigned himself as the Commissioner who will oversee and judge the various legal and factual issues that PG&E is addressing in its communications to Peevey. President Peevey is supposed to act as an impartial decisionmaker, not as an advocate or mouthpiece for the defendant, PG&E.

Through sending President Peevey private internal PG&E analyst reports³¹, 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. These communications were not a part of the record in the three OIIs. These communications would not have been admitted into the record because they were not subject to cross examination during the extensive hearings, nor were its contents authenticated. Far from being accepted facts, the information that PG&E is forwarding to President Peevey in the Peevey/PG&E ex parte communications is disputed by San Bruno and the other Intervenors in the Line 132 Proceedings. PG&E gets to do an end-run around.

As well, PG&E cannot claim ignorance of the rules against ex parte communications. We are dealing with a sophisticated and highly regulated utility that is likely before this Commission 24/7/365 on various regulatory matters. It has a Senior Vice President in charge of Regulatory Affairs. It has had Special Counsel in practice before this Commission for 28 years³² with the support of the entire regulatory portion of the in-house legal department. According to the 2012 GO-77 filings PG&E spends over \$100 million dollars per year on lawyers. More

³¹ The analyst reports were privy to only PG&E officers within the company and are privately paid-for communications. They are not public documents.

³² See December 16, 2013 R.01.02.019 OSC hearing transcript at p. 17.

importantly, PG&E was dealing with an issue that directly involved the “most deadly tragedy in California history from public utility operations.”³³

Brian Cherry is also intimately familiar with the rules against ex parte communications. In documents San Bruno received from the CPUC post-litigation, Brian Cherry wrongly accuses San Bruno of violating the rules against ex parte communications to Executive Director Clanon on September 5, 2013: “I hate to be a stickler for details, but if this is going to the service list, it represents a continuing violation of the ex parte rules in an adjudicatory proceeding.”³⁴ Executive Director Clanon responds in another email dated September 11, 2013 relating to San Bruno’s press release distribution list: “We looked on the last one, and it wasn’t sent to the ALJs or advisors/commissioners.”³⁵ Brian Cherry cannot now claim ignorance of the ex parte rules – although contrary to his actual actions, he is a self-professed “stickler for details.”

B. President Peevey Should be Recused from Serving as the Assigned Commissioner in the Root Cause OII Because of Bias

In D.05-06-062, the Commission discussed the legal standards for determining whether a decisionmaker’s impartiality has been so compromised as to warrant recusal from the decisionmaking process in order to preserve parties’ due process rights.³⁶ There are two categories of proceedings for purposes of determining the level of impartiality required of an agency decisionmaker – “quasi-legislative” and “adjudicatory.” A stricter standard of impartiality applies to adjudicatory proceedings; if there is even an “appearance of bias,” then the individual should be disqualified from the decisionmaking process.³⁷ For quasi-legislative proceedings, more is required -- “a decision-maker can be disqualified from voting

³³ D 11-06-017 at p 16.

³⁴ See Exhibit 15.

³⁵ See Exhibit 16.

³⁶ D.05-06-062, at pp. 11-16.

upon a ‘clear and convincing showing that the agency member has an unalterably closed mind on matters critical to the disposition of the proceeding.’”³⁸

Under the law, San Bruno does not need to prove bias, but the “appearance of bias” since the Line 132 OIIs are adjudicatory. These communications violated San Bruno’s due process rights for several reasons. President Peevey cannot be an impartial decisionmaker when it comes to how PG&E should be punished for killing 8 people, injuring 66, and destroying a neighborhood when he is allowing PG&E to communicate with him off the record about the very issues he needs to consider in the OIIs. And since these emails were secret, we have no way of knowing how many phone calls, lunches,³⁹ or other in person meetings President Peevey may have had with PG&E.

It is also important to note that if a judge had ex parte contacts with either side of a matter in litigation in a civil matter, the judge would most likely be disqualified from hearing the case upon motion of the aggrieved party even without a showing of bias. We are more than troubled by the tone exchanged between the utility and its regulator, the tone reveals a level of familiarity and coziness that threatens the very function of the CPUC to provide objective oversight of PG&E. The President of the CPUC, Michael Peevey, has demonstrated abject bias and has manipulated the investigatory process rather than protect the people of California. The pervasive nature of these communications clearly supports the suggestion of bias especially in an environment where President Peevey never does anything to stop PG&E from sending him emails on a regular basis.

³⁷ *Id.*, at p. 14.

³⁸ *Id.*

³⁹ Although we do know about one lunch President Peevey presumably had with Tom Botorff, PG&E’s Senior Vice President of Regulatory Affairs, see Exhibit 7.

C. The PG&E-CPUC Illegal Ex Parte Communications is Yet Another Example of the Commission's Ineffective Posture as a Regulator and that Only an Independent Monitor Can Restore Badly Damaged Confidence in PG&E and the Commission

The fact that PG&E and President Peevey regularly communicate with each other in violation of the law is yet another example of the Commission failing to recognize its role as a regulator of the utilities as opposed to a facilitator of the utilities' economic interests. It also adds insult to injury when the Executive Director of the CPUC is actively assisting PG&E in its legal defenses and public relations strategy on a monthly basis for three years, and actually flagging potential problems for PG&E to PG&E. For San Bruno, the Commission's "cozy relationship" with PG&E, and vice versa, was a major contributor to the Line 132 explosion.⁴⁰ This is not just San Bruno's opinion, but the CPUC's and PG&E's cozy, inappropriate relationship was also criticized by the CPUC's internal report, the CPUC's Independent Review Panel and the National Transportation Safety Board (NTSB).

For example, an internal report commissioned by the CPUC revealed and exposed significant problems at the CPUC. Specifically, that the CPUC continues to have a cozy relationship with the utilities it regulates and that it doesn't make safety a priority.⁴¹ The following statements in the report were compelling:

*"An overly-cozy relationship with regulated utilities: Several respondents report that both Commissioners and PUC staff members have close ties to the industries they are supposed to be regulating. This has resulted in a reluctance on the part of the Commissioners and the PUC to impose significant fines and other consequences . . ."*⁴²

*"If we were enforcing the rules we would not have to worry about a safety culture. If we were holding the utilities accountable and doing what we were supposed to be doing, San Bruno would never have happened."*⁴³

"The executive director's aversion to conflict discourages PUC staff from taking on

⁴⁰ See NTSB report at pp. 122, 126; Independent Review Panel Report at pp. 20-21.

⁴¹ See Exhibit 3; CPUC Memorandum dated February 11, 2013.

⁴² *Id.* at p. 14.

⁴³ *Id.* at p. 2.

tough issues.”⁴⁴

*“Some staff believe that it is the PUC’s failure to thoroughly ‘check the boxes’ and enforce existing regulations that is at the root of the safety crisis.”*⁴⁵

Not only do CPUC’s own staff members believe that the CPUC is lax in its oversight and is too cozy with utilities, the NTSB found that CPUC’s lack of oversight was a contributing cause to the explosion: “Also contributing to the explosion was the CPUC’s failure to detect the inadequacies of PG&E’s pipeline integrity management program.”⁴⁶

The NTSB further explained that: “The ineffective enforcement posture of the California Public Utilities Commission permitted PG&E’s organizational failures to continue over many years.”⁴⁷

NTSB Chairman Deborah Hersman further elaborated: “Our investigation revealed that for years, PG&E exploited weaknesses in a lax system of oversight . . . we also identified regulators that placed a blind trust in the companies that they were charged with overseeing to the detriment of public safety.”⁴⁸ The Commission’s blue ribbon panel also found that the CPUC failed to oversee PG&E’s natural gas operations effectively finding that the Commission and PG&E “must confront and change elements of their respective cultures to assure the citizens of California that public safety is the foremost priority.”⁴⁹

The Peevey/CPUC communications are yet another example of the Commission’s ineffective posture as a regulator. An additional email correspondence from former SED Director Jack Hagan demonstrates that fact. In an email dated April 24, 2013 from Ms. Doll to PG&E CEO Tony Earley, Jack Hagan, and other utility executives, Ms. Doll states: “Gentlemen

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ <http://www.nts.gov/doclib/reports/2011/PAR1101.pdf>, at p. xii.

⁴⁷ <http://www.nts.gov/doclib/reports/2011/PAR1101.pdf>, at p. 125.

⁴⁸ <http://www.nts.gov/news/2011/110830.html>.

⁴⁹ Independent Review Panel Report at pp. 8 and 18-22.

You have heard by now that the CPUC has cancelled the Safety Symposium scheduled for May 7 & 8. Just wanted to make sure you also understood that the Monday night dinner at Postrio is cancelled as well.⁵⁰ The former Director of the Safety and Enforcement Division was scheduled to break bread with PG&E's CEO during the same time as the Safety Symposium. This is a clear example of preferential treatment by the CPUC to PG&E. San Bruno has repeatedly urged this Commission to establish an Independent Monitor to oversee PG&E's compliance with the Pipeline Safety Enhancement Plan ("PSEP") and the remedies in the Order Instituting Investigation proceedings ("OII") 1.12.01.007, I.11.02.016, and I.11.11.009 and by this motion and in light of these revelations we renew that request. An Independent Monitor is the only answer to restore badly damaged confidence the PG&E and the Commission.

III. CONCLUSION

At first blush, one reaction to the disclosure of email correspondence between President Peevey and senior executives at PG&E would be to dismiss the violations as inconsequential. President Peevey didn't respond to most, PG&E was in part forwarding third party analyst reports (though which are not public documents), and PG&E executives are regular denizens of the halls at 505 Van Ness Avenue. However, when woven in the context of all that has transpired in the past four years, this is the seedy, unethical underbelly of a regulatory system that is hopelessly broken. When the corporate leviathan casually, regularly, systematically ingratiates itself into the lap of someone who is expected to objectively, fairly and faithfully carry out his oath of office⁵¹ and consider the largest fine ever imposed on an investor-owned public utility in American history, the perspective changes; when senior staff at the CPUC forwards to PG&E correspondence to his subordinates; when the Chief of Staff at the CPUC provides legal guidance to PG&E on how to handle a pending motion; when Commissioners

⁵⁰ See Exhibit 17.

⁵¹ See California Constitution, Article XX, Section 3.

freely and regularly communicate outside the hearing and outside the record, there is an abject failure of due process of law.

Due process has been a part of our legal jurisprudence since 1215 and the Magna Carta. It is the embodiment of fairness, and rule by law, not men. Anything, no matter how trivially it may be described by President Peevey or PG&E, which diminishes the fundamental precept of American justice is to be assiduously avoided and rejected. This Commission and everything it does is at a watershed moment. PG&E didn't kill 8 people alone, it needed an inept and complacent regulator. Ineptitude can be replaced with competency. Bias and prejudice has to be removed root and branch.

San Bruno urges the CPUC to demonstrate to the Intervenors in these proceedings, the residents of San Bruno, and to the public at large that its commitment to accountability is more than mere posturing, and to do so in these cases that are gravely important to the residents of San Bruno and the ratepayers of the State of California. The Commission cannot, and should not, permit PG&E to effectively nullify the due process rights of San Bruno and the other Intervenors in the Line 132 Proceedings by allowing President Peevey to oversee and vote on the OIIs. This is a deadly serious situation as eight dead attest, the lives and property of Californians are at stake, the future of investor owned utilities is at stake, and the credibility of the regulatory mechanisms is at stake. The reputation of the State of California is threatened and it is because of the actions of President Peevey that he must now be removed from a decisionmaker on the ///

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Line 132 OIIs. It is time for the Commission to show resolve and recuse President Peevey as a decisionmaker in the Line 132 OIIs.

Respectfully Submitted,

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July 28, 2014

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EXHIBIT C

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

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

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

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

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

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

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

**MOTION OF THE CITY OF SAN BRUNO FOR AN ORDER TO SHOW CAUSE WHY
PACIFIC GAS AND ELECTRIC COMPANY SHOULD NOT BE HELD IN VIOLATION
OF COMMISSION RULE OF PRACTICE AND PROCEDURE 8.3(b) (RULE AGAINST
EX PARTE COMMUNICATIONS) AND FOR SANCTIONS AND FEES**

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Rule 8.4	4
Rule 11.1	1

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

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

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

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

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

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

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

**MOTION OF THE CITY OF SAN BRUNO FOR AN ORDER TO SHOW CAUSE WHY
PACIFIC GAS AND ELECTRIC COMPANY SHOULD NOT BE HELD IN VIOLATION
OF COMMISSION RULE OF PRACTICE AND PROCEDURE 8.3(b) (RULE AGAINST
EX PARTE COMMUNICATIONS) AND FOR SANCTIONS AND FEES**

Pursuant to Rule 11.1 of the California Public Utilities Commission's ("Commission" or "CPUC") Rules of Practice and Procedure, the City of San Bruno ("San Bruno") respectfully makes this motion for an Order to Show Cause why Pacific Gas and Electric Company ("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. Additionally, San Bruno respectfully requests a hearing on the illegal ex parte contacts between PG&E and President Peevey (and his staff).

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I. BACKGROUND

A. The Line 132 OIIs

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.

B. Description of Ex Parte Communications Between President Peevey, the Assigned "Decisionmaker," and PG&E "the Defendant"

On May 30, 2013, San Bruno pursuant to state law (California Public Records Act- Gov't Code sections 6250 et seq.) duly filed with the custodian of records a request for the production of public records relating to the OIIs and particularly requests D, E, H, I, L, and M.¹ Failing lawful compliance with the law by the custodian of records, on November 19, 2013, San Bruno advised this Commission that it failed to comply with the Public Records Act, and provided a last chance for the Commission to comply with the law.² On February 3, 2014, upon failure of the Commission to comply with the law, San Bruno filed a complaint and petition for a writ of mandate in the San Francisco Superior Court.³ During the pendency of this Superior Court action, the Commission produced over 2,000 pages of records responsive to the May 30, 2013 records request. On July 10, 2014, the Commission approved a settlement agreement with San Bruno which provides, *inter alia*, for the continued production of responsive public records, certification of those records and a revision of the manner in which the Commission complies with the California Public Records Act. On July 14, 2014, the Commission produced an additional 2,000 pages of responsive documents. On July 18, 2014, the Commission produced 2,900 pages of responsive documents. On July 21, 2014, the Commission produced 464 pages of

¹ See Exhibit 1, May 30, 2013 letter; section H, I, L, and M.

² See Exhibit 2, November 19, 2013.

³ *City of San Bruno v. Public Utilities Commission*; CGC-14-537139; San Francisco Superior Court.

responsive documents.

An examination of the public records produced as a result of this lawsuit demonstrate that President Peevey and PG&E have actively participated in improper, pervasive, systematic and continuous ex parte communications (“Peevey/PG&E ex parte communications”) over a time period from March 16, 2011 to April 4, 2014 during the pendency of the Line 132 OII proceedings.⁴ None of these 41 separate communications were proffered to the other parties, introduced into the record, made public or noticed as an ex parte communication.⁵

The majority of the communications involve Brian Cherry, PG&E’s Vice President of Regulatory Relations. In the Peevey/PG&E ex parte communications, PG&E Regulatory Executive Brian Cherry is advocating PG&E’s legal position and providing evidence outside the record relevant to the three legal standards under Public Utilities Code Section 2104.5 that President Peevey (and the Commission) must consider when adopting a decision levying fines/penalties against PG&E. Those legal standards are: (1) the appropriateness of the penalty to the size of the business of the person charged (forwarding Peevey analyst reports and PG&E internal financial analysis that the potential penalties in the OIIs will harm PG&E);⁶ (2) the gravity of the violation (forwarding Peevey emails from PG&E & CEO Tony Earley and others that the violations are not egregious because PG&E is fixing the system);⁷ and (3) the good faith of the person charged in attempting to achieve compliance, after notification of a violation, shall be considered (forwarding a PG&E press release to President Peevey that PG&E settled with the San Bruno victims, internal emails from PG&E CEO Tony Earley that PG&E is taking the

⁴ The Root Cause OII was filed on January 12, 2012; the Recordkeeping OII was filed on February 24, 2011; and the HCA OII was filed on November 10, 2011.

⁵ For total list of violations and PG&E/Peevey ex parte communications correspondence see <https://meyersnave.sharefile.com/d/s911293af60143399>.

⁶ *Id.*

⁷ *Id.*

necessary steps to fix its system, and forwarding news articles to President Peevey that PG&E is making progress post-San Bruno).⁸

The presiding Administrative Law Judges (ALJs) considered the penalty phase of the OIIs so critical that evidentiary proceedings were scheduled and held from September 2012 to March, 2013, evidence was taken, testimony produced, cross examination of financial witnesses permitted and additional extensive briefing ordered. Yet during this same period of time, PG&E was providing private, non-public, ex parte evidence to President Peevey regarding the exact same subject.

II. DISCUSSION

A. PG&E Violated the Rule Against Ex Parte Communications 41 Times

Not only are the ex parte communications between PG&E and President Peevey on the very subject matter of three ongoing investigations unethical and inappropriate, the communications are a violation of the law and a violation of the CPUC's own rules against ex parte communications. The orders in the three investigations categorized the three OIIs as "adjudicatory" pursuant to Rule 7.1(c) of the CPUC's Rules of Practice and Procedure. Pursuant to CPUC Rules of Practice and Procedure 8.3, in "any adjudicatory proceeding, ex parte communications are prohibited" with any decisionmaker.⁹ Rule 8.1(c) defines "ex parte communication" as any written or oral communication that:

- (1) concerns any substantive issue in a formal proceeding
- (2) takes place between an interested person and a decisionmaker, and
- (3) does 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

PG&E might argue that the communications relate to the rulemaking proceeding in R.11.02.019, so they are not illegal (although if the communications truly related to the rulemaking proceeding, PG&E still violated the ex parte reporting requirements under Rule 8.4).

⁸ *Id.*

⁹ See also Public Utilities Code §§ 1701.1 to 1701.4.

This however belies the CPUC's own categorization of these emails and is contrary to the CPUC's very own settlement position with San Bruno in San Bruno's lawsuit against the CPUC for Public Records Act violations that led to the disclosure of the Peevey/P&G&E ex parte communications. On July 25, 2014, San Bruno and the CPUC entered into a settlement agreement, the settlement agreement expressly stated that the CPUC produced documents (the documents that are the subject of this motion) relating to the "Email communications related to the subject matter of the P&G&E/*San Bruno OIIs* between Commissioner Peevey and any employee of Pacific Gas & Electric"¹⁰ (emphasis added)

It is not enough for P&G&E to say: "there was no conversation, these were just "for your information;" "we did not attempt to influence the outcome;" or "this is the way we do business." Nonsense, the rules forbid this conduct.

1. The Peevey/CPUC Communications Concern Substantive Issues in a Formal Proceeding under Rule 8.1(c)(1)

Under Rule 8.1(c)(1), President Peevey and P&G&E are prohibited from communicating on "any substantive issue in a formal proceeding." Under the law, when determining the amount of the penalty, President Peevey will consider 1) the appropriateness of the penalty to the size of the business of the person charged; 2) the gravity of the violation; and 3) the good faith of the person charged in attempting to achieve compliance, after notification of a violation.¹¹ The Peevey/P&G&E ex parte communications directly relate to subjects germane to three major Line 132 OIIs. Here, the interested party (P&G&E) and the decisionmaker (President Peevey) are directly communicating with each other secretly about all three elements that President Peevey needs to take into consideration when levying the fine against P&G&E under Public Utilities Code Section 2104.5. President Peevey and P&G&E are not talking about the weather in these communications. P&G&E is presenting its calculated defense in the OIIs through directly communicating with a decisionmaker that will decide its fate. The other parties to the OIIs, the

¹⁰ See Exhibit 3.

¹¹ Public Utilities Code Section 2104.5.

City of San Bruno, The Utility Reform Network, the Office of Ratepayer Advocates, and the City and County of San Francisco didn't have the same opportunities to present its position off the record because they shouldn't have those opportunities - it is inequitable and against the law to communicate with a decisionmaker in an adjudicatory proceeding.

There are several examples of the Peevey/PG&E ex parte communications where PG&E and President Peevey are discussing the first element under the law that Peevey has to consider when levying a fine against PG&E: the appropriateness of the penalty to the size of the business of the person charged. For example, Brian Cherry forwards an article from the *Wall Street Journal*, *Contra Costa Times*, and articles from other various news outlets relating to PG&E posting 4th quarter losses dated February 21, 2013. The *Wall Street Journal* article is entitled "PG&E Posts 4th-Quarter Loss, Sees 2013 as 'Down Year.'" Mr. Cherry forwards the articles with the message: "Bad day for us today."¹² In another email, Brian Cherry forwards to President Peevey a Standards and Poors credit update and an internal email from PG&E analyzing PG&E's credit rating on March 16, 2011. President Peevey then replies to Brian Cherry five minutes later: "Yep. No surprise." Brian Cherry replies back two minutes later: "Some folks here have suggested it may be Tom and my failure to work with regulatorsoh well, maybe I should call Brightsource back."¹³ On its face, these emails may appear to be innocuous, however, PG&E is directly communicating with a decisionmaker about the financial health of the corporation that is under investigation in three OIIs – one of the three considerations that must be considered by the decisionmakers in levying a penalty.

The CPUC considered the first element of the law when determining the penalty ("the appropriateness of the penalty to the size of the business of the person charged") so important, the CPUC held separate evidentiary hearings for two days: March 4, 2013 and March 5, 2013. Both Safety and Enforcement Division (SED) and PG&E's expert witnesses (Overland

¹² See Exhibit 4; Violation 28 (for the list of 41 violations and accompanying email correspondence, see <https://meyersnave.sharefile.com/d/s911293af60143399>).

¹³ See Violation 5; Violation 3.

Consulting and Wells Fargo, respectively) issued expert reports and were cross examined by the parties. However, during this time period of the hearings and the issuance of the experts' reports, Mr. Cherry was secretly forwarding off the record financial analyst reports to President Peevey.

There are examples of the Peevey/PG&E communications where PG&E and President Peevey are discussing the second element under the law that Peevey has to consider when levying a fine against PG&E: the gravity of the violation. For example, on August 9, 2011, Brian Cherry forwards an internal PG&E email from PG&E President Chris Johns to PG&E employees to President Peevey with the note: "FYI. Comments by Chris on the media articles."¹⁴ The internal email from Chris Johns to "Fellow Employees" explains PG&E's position that a news article inaccurately reported that PG&E "failed to heed warnings about problems with our natural gas transmission system two months before the San Bruno accident" and PG&E's position that another news article inaccurately reported that "PG&E ignored employees' safety concerns and retaliated against employees for raising safety issues." PG&E gets the unfair advantage by arguing it's position about the gravity and legitimacy of the violations to the top decisionmaker not in a courtroom, but through off the record and unverified email communications.

There are several examples of the Peevey/PG&E communications where PG&E and President Peevey are discussing the last element under the law that Peevey has to consider when levying a fine against PG&E: the good faith of the person charged in attempting to achieve compliance, after notification of a violation. On June 1, 2011, Meredith Allen of PG&E forwards a PG&E "open letter of apology" from Interim Chairman and CEO Lee Cox and PG&E President Chris Johns to President Peevey with the note: "The attached open letter of apology will run tomorrow in all major newspapers in PG&E's service territory." The letter of apology outlines the "many steps to make PG&E's operations as safe as you rightly expect them to be."¹⁵

¹⁴ See Exhibit 6; Violation 17.

¹⁵ See Exhibit 7; Violation 9.

On December 13, 2011, Brian Cherry forwards a PG&E press release entitled: “PG&E STATES IT IS LIABLE FOR THE SAN BRUNO PIPELINE ACCIDENT *Utility takes on financial responsibility to compensate victims.*”¹⁶ The press release goes on to describe the steps PG&E is taking to “do the right thing in our response to this accident.” Brian Cherry forwards the press release with the note: “Mike – FYI. Thought you’d appreciate this.” President Peevey responds thirty minutes later: “Very good. Tom told me about (sic) at the lunch today.” In another email communication between PG&E and President Peevey, on May 14, 2012, Brian Cherry forwards PG&E CEO Tony Earley and PG&E President Chris Johns’ prepared remarks for its annual meeting to President Peevey.¹⁷ The prepared remarks from PG&E’s top two executives outline the steps PG&E has taken, and is going to take, to remedy the violations and make its system safer. Several of these “substantial changes” Mr. Earley and Mr. Johns refer to in their prepared remarks, are hotly contested issues of fact and law in the OIIs. San Bruno and the other parties to the proceedings, didn’t get to cross examine Mr. Earley and Mr. Johns on PG&E’s alleged “substantial changes.” San Bruno and the other parties didn’t get an opportunity to directly communicate with President Peevey on the steps PG&E is taking to fix its system and whether PG&E is in good faith attempting to achieve compliance.

There are two additional violations of the ex parte rules that do not directly relate to the three elements that CPUC decisionmakers have to consider when levying a fine/penalty, but these two communications are substantive. In one communication, President Peevey’s alter ego Chief of Staff Carol Brown, is actually giving legal advice to PG&E, presumably about San Bruno’s motion to recuse President Peevey and Commissioner Florio from attending the now cancelled Safety Symposium (because it also violated the ex parte rules).¹⁸ In the communication entitled “nice seeing you,” Ms. Brown sends an email to PG&E Regulatory Affairs Director Laura Doll informing Ms. Doll that Ms. Brown spoke to the “judge:” – “Talked

¹⁶ See Exhibit 8; Violation 22.

¹⁷ See Exhibit 9; Violation 26.

¹⁸ See Exhibit 10; Violation 31.

with the judge – they issued a ruling saying the hearing was moot – I think you have 2 ways of going (you may want to chat with your legal people)” and then Ms. Brown proceeds to lay out the two legal strategies: “Send back a sweet note saying the issue is moot since seminar not going forward (problem – it is not ‘cancelled’ only postponed) – and then wait for them to throw a fit” and “[a]nswer any simple question you can, and then object to the others as being outside the scope of the 3 OIIs – but offering to meet and confer on the issue – and schedule a date out a little for the meet-and-confer – then they will file a motion to compel, no need for any expedition of the process – you respond – and a hearing is held in due course.” Ms. Brown ends the correspondence with “Happy to chat.” Ms. Doll responds eleven minutes later with the note: “Love you. Thanks. Not sure yet!”

In another example, on April 2, 2014, Brian Cherry forwards an internal PG&E email from PG&E CEO Tony Earley and PG&E President Chris Johns regarding the grand jury criminal indictments against PG&E.¹⁹ The underlying internal email explains the charges and PG&E’s opinion of the Judge overseeing the case to PG&E’s Officers. In response, President Peevey replies: “One comment: PG&E’s decision to issue a press release last week anticipating all this only meant that the public got to read two big stories rather than one. I think this was inept.” If only San Bruno, SED, and the other Intervenors in the Line 132 OIIs were able to get legal and public relations advice from the President of the Commission and his staff.

2. The Peevey/CPUC Communications Take Place Between an Interested Person and a Decisionmaker under Rule 8.1(c)(1)

Under the Rule 8.1(c)(2), an ex parte communication has to take place between a “decisionmaker” and an “interested party.” President Peevey falls under the definition of “decisionmaker” under Rule 8.1(b). An “interested person” includes “any party to the proceeding or the agents or employees of any party, including persons receiving consideration to represent any of them” and “any person with a financial interest . . . in a matter at issue before the Commission” under Rule 8.1(d). PG&E is clearly an interested party and PG&E is the

¹⁹ See Exhibit 11; Violation 41.

“defendant”/subject of the investigations under the three OIIs.

3. The Peevey/CPUC Communications Do Not Occur in a Public Hearing, Workshop, or Other Public Forum Noticed by Ruling or Order in the Proceedings, or on the Record of the Proceeding Rule 8.1(c)(3)

Under the CPUC’s very own rules, President Peevey and PG&E are prohibited from discussing any subject matter related to the PG&E explosion when it does not occur in a public hearing, workshop, or other public forum noticed by the ruling or order in the proceeding, or on the record in the proceeding. PG&E was able to communicate with the top decisionmaker in this case not in the courtroom and through legal briefs, but through off the record, secret email communications in front of the very decisionmaker that will determine its fate in just a few months. It is akin to a judge communicating with the defendant during the pendency of his case on how the defendant can receive a lower sentence. President Peevey assigned himself as the Commissioner who will oversee and judge the various legal and factual issues that PG&E is addressing in its communications to Peevey. President Peevey is supposed to act as an impartial decisionmaker, not as an advocate or mouthpiece for the defendant, PG&E.

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. These communications were not a part of the record in the three OIIs. These communications would not have been admitted into the record because they were not subject to cross examination during the extensive hearings, nor were their contents authenticated. Far from being accepted facts, the information that PG&E is forwarding to President Peevey in the Peevey/PG&E ex parte communications is disputed by San Bruno and the other Intervenors in the Line 132 Proceedings. PG&E gets to do an end-run around the very strict rules in place and supply President Peevey with emails, press releases, and analyst reports to advocate for its

position.

As well, PG&E cannot claim ignorance of the rules against ex parte communications. We are dealing with a sophisticated and highly regulated utility that is likely before this Commission 24/7/365 on various regulatory matters. It has a Senior Vice President in charge of Regulatory Affairs. It has Special Counsel in practice before this Commission for 28 years²⁰ with the support of the entire regulatory portion of the in-house legal department. According to the 2012 GO-77 filings, PG&E spends over \$100 million dollars per year on lawyers. More importantly, PG&E was dealing with an issue that directly involved the “most deadly tragedy in California history from public utility operations.”²¹

Brian Cherry is also intimately familiar with the rules against ex parte communications. In documents San Bruno received from the CPUC post-litigation, Brian Cherry wrongly accuses San Bruno of violating the rules against ex parte communications to Paul Clanon on September 5, 2013: “I hate to be a stickler for details, but if this is going to the service list, it represents a continuing violation of the ex parte rules in an adjudicatory proceeding.”²² Paul Clanon responds in another email dated September 11, 2013 relating to San Bruno’s press release distribution list: “We looked on the last one, and it wasn’t sent to the ALJs or advisors/commissioners.”²³ Brian Cherry cannot now claim ignorance of the ex parte rules – although contrary to his actual actions, he is a self-professed “stickler for the details.”

In Decision (D.) 07-07-020, the Commission found that merely attending a meeting can violate the ex parte rules.²⁴ In D.07-07-020, a meeting was held between representatives of two

²⁰ See December 16, 2013 R.01.02.019 OSC hearing transcript at p. 17.

²¹ D.11-06-017 at p. 16.

²² See Exhibit 12.

²³ See Exhibit 13.

²⁴ <http://docs.cpuc.ca.gov/PublishedDocs/WORDPDF/FINALDECISION/70330.PDF>.

telecommunications utilities and the Commissioners' advisors on the topic of access to 911 emergency services under Public Utilities Code Section 2883. The topic of 911 access had been raised in two CPUC proceedings at the time, a rulemaking and adjudicatory compliant involving violations of Section 2883. The Commission found that the two telecommunication utilities violated the rule against ex parte communications in the adjudicatory cases and issued a \$40,000 penalty on both companies.²⁵

Decision 08-06-023 denied rehearing of D.07-07-020 and upheld the decision that the communication violated the rule against ex parte communications.²⁶ The decision listed circumstances for parties to consider when identifying ex parte communications:

1. The temporal proximity between an ex parte communication and a relevant adjudicatory proceeding;
2. The degree of overlap between the issues and parties; and
3. The potential that relief sought via the ex parte communication could detrimentally impact parties in a related adjudicatory case.²⁷

When applying the first consideration, it is important to note the peculiar timing of the Peevey/PG&E communications. The three investigations have not yet been adjudicated and will not until sometime until 2015. The prosecutor, SED, and the Intervenors, including San Bruno, have filed its final briefs on the parties' position on the violations, fines, and remedies in three investigations. Of course, there is "temporal proximity between an ex parte communication and a relevant adjudicatory proceeding" – PG&E is communicating with the top decisionmaker during the entire pendency (three years) of the OIIs. To the second consideration, "degree of overlap between the issues and parties" is also apparent – every email that Brian Cherry sends to President Peevey relates to the Line 132 OIIs. There are endless arguments relating to the third consideration: "potential that relief sought via the ex parte communication could detrimentally

²⁵ Interestingly, President Peevey was the only Commissioner that dissented to the Decision in the Revised Proposed Interim Decision on Alleged Ex Parte Violations.

²⁶ <http://docs.cpuc.ca.gov/PublishedDocs/WORDPDF/FINALDECISION/84123.PDF>.

²⁷ *Id.*, at p. 20.

impact parties in a related adjudicatory case” – PG&E had unfair advantage by arguing its position about the gravity and legitimacy of the violations to the top decisionmaker not in a courtroom, but through off the record and unverified email communications.

4. The Commission Clearly Articulated That Discussions Between Financial Industry Representatives and the Commission Concerning the Line 132 OIIs are Improper Ex Parte Communications

On May 14, 2013, the Officer of Ratepayer Advocates²⁸ filed a motion for clarification in the Line 132 OIIs requesting “clarification of the Commission’s *ex parte* rules with regard to communications between financial industry representatives and Commissioners’ offices.”²⁹ In a ruling dated May 16, 2013, Administrative Law Judges Mark Wetzell and Amy Yip-Kikugawa (ALJs) granted ORA’s motion for clarification. In the ruling, the ALJs clarified that interested persons may include representatives of ratings agencies, industry analysts or financial institutions who have financial interests in PG&E.³⁰ The ALJs also found that the “amount of penalties the Commission may impose” in the Line 132 OIIs is a “substantive issue.”³¹ Therefore, improper *ex parte* communications occurred if decisionmakers and financial institution representatives discussed the “size of the fine or other penalties the Commission may impose in these proceedings.”³²

The ruling further directed that interested persons who have engaged in unreported or improper *ex parte* communications shall within 10 business days file notices of prior *ex parte* communications.³³ The ruling also found that interested persons who report *ex parte*

²⁸ Formerly named the “Division of Ratepayer Advocates.”

²⁹ See Exhibit 14.

³⁰ See Exhibit 15.

³¹ *Id.* at p. 3.

³² *Id.*

³³ *Id.* at p. 4.

communications will not be subject to sanctions for the noticed violation.³⁴ The ruling found that interested persons who fail to comply with reporting violations may be subject to fines pursuant to Public Utilities Code Section 2111.³⁵

The ALJs' ruling is not limited to financial industry representatives, the ruling specifically refers to "interested persons," which obviously includes PG&E. Not only did PG&E violate the rules against ex parte communications, PG&E violated the ALJs' May 16, 2013 unambiguous ruling that finds that interested persons shall within 10 days of a violation, report ex parte communications. The language relating to sanctions isn't limited to financial industry representatives, it includes "interested persons." Under this ruling, PG&E had until May 26, 2013 to report its various violations of the ex parte rules in the Peevey/PG&E communications, but failed to do so. Instead of taking the opportunity to report the ex parte communications, PG&E disregarded this ruling. Taking each violation and multiplying it each day from May 26, 2013 until July 28, 2014, there are thousands of violations. PG&E's numerous violations of the ALJs' ruling should be taken into consideration when calculating the total amount of sanctions and fees.

It also bears highlighting that PG&E is just not forwarding inconsequential analyst reports to the Assigned Commissioner, President Peevey. The analyst reports contain information about the penalties and financial impact to PG&E in the Line 132 OIIs. The fact that the ALJs had highlighted the sensitivity of contacts from financial analysts should have served as a further warning to PG&E that it had done something very wrong.

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³⁴ *Id.*

³⁵ *Id.*

III. CONCLUSION

In conclusion, in the seminal decision where the Commission sanctioned a telecommunications company for violating the ex parte rules as cited *supra*, the Commission cited to Stanford Professor Asimow³⁶ who aptly and succinctly stated the rationale for the prohibition against ex parte communications:

The rationale for a prohibition on ex parte contact is familiar to all lawyers: it is deeply offensive in an adversarial system that any litigant should have an opportunity to influence the decision-maker outside the presence of opposing parties. The parties may spend weeks or months conducting a detailed adjudicatory hearing and an administrative law judge may prepare a painstakingly detailed proposed decision. Yet all this can be set at naught by a few well chosen words whispered into the ear of an agency head or the agency head's adviser. Ex parte contacts frustrate judicial review since the decisive facts and arguments may not be in the record or the decision. Finally, ex parte contacts contribute to an attitude of cynicism in the minds of the public that adjudicatory decisions are based more on politics and undue influence than on law and discretion exercised in the public interest.

The Peevey/PG&E communications are more than just words “whispered in the ear of agency head,” they demonstrate in their tone, totality, and pervasiveness a relationship between the utility and this Commissioner which is familiar, collegial, and cozy. This is not a single instance of an errant email, nor a misplaced “cc,” or a good faith mistake, rather, when taken in its entirety, the email traffic shows that PG&E has unfettered access to President Peevey. PG&E's executives feel comfortable enough with President Peevey to email “Mike” on a regular basis, and that President Peevey did nothing to discourage, warn, or admonish PG&E from providing him on extra record, highly relevant and probative evidence on a consistent basis for three years. The fact that these off the record communications occurred with the defendant and

³⁶ From “Revised Proposed Interim Decision on Alleged Ex Parte Violations”; D.07.07.020 dated 7/12/07; originally cited from M. Asimow, *Toward a New California Administrative Procedure Act: Adjudication Fundamentals*, 39 UCLA L. REV. 1067, 1127-28 (1992).

the “judge” in one of the most high-profile and high-stakes investigations that has ever come before the Commission engenders, at least for San Bruno, a total loss of confidence in the regulatory process.

Not only does San Bruno believe that the CPUC is lax in its oversight and was a contributing cause to the explosion, the National Transportation Safety Board found that CPUC’s lack of oversight was a contributing cause to the explosion: “Also contributing to the explosion was the CPUC’s failure to detect the inadequacies of PG&E’s pipeline integrity management program.”³⁷ The NTSB further explained that: “The ineffective enforcement posture of the California Public Utilities Commission permitted PG&E’s organizational failures to continue over many years.”³⁸ NTSB Chairman Deborah Hersman further elaborated: “Our investigation revealed that for years, PG&E exploited weaknesses in a lax system of oversight . . . we also identified regulators that placed a blind trust in the companies that they were charged with overseeing to the detriment of public safety.”³⁹

San Bruno urges the CPUC to demonstrate to the Intervenors in these proceedings, the residents of San Bruno, and to the public at large that its commitment to accountability is more

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³⁷ <http://www.nts.gov/doclib/reports/2011/PAR1101.pdf>, at p. xii.

³⁸ <http://www.nts.gov/doclib/reports/2011/PAR1101.pdf>, at p. 125.

³⁹ <http://www.nts.gov/news/2011/110830.html>.

than mere posturing and sanction PG&E for 41 blatant violations of the CPUC's rules against ex parte communications.

Respectfully Submitted,

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