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

Order Instituting Investigation And Order to Show Cause 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 Distribution System Pipelines.

I.14-11-008  
(Filed November 20, 2014)

**PACIFIC GAS AND ELECTRIC COMPANY'S  
REPLY IN SUPPORT OF ITS MOTION TO COMPEL DISCOVERY  
FROM INTERVENOR THE CITY OF CARMEL-BY-THE-SEA**

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Dated: January 13, 2016

## **REPLY IN SUPPORT OF MOTION TO COMPEL DISCOVERY FROM CARMEL**

Pacific Gas and Electric Company (“PG&E”) respectfully submits this Reply in support of its Motion to Compel Discovery from Intervenor Carmel-by-the-Sea (“Carmel”). Pursuant to Rule 11.3(f) of the Commission’s Rules of Practice and Procedure, the Honorable ALJ Maribeth Bushey authorized the submission of this Reply via an email to the parties on January 12, 2016. With this Reply, PG&E has submitted a revised proposed ruling for the Court’s consideration.

### **I. INTRODUCTION**

The question presented by this Motion is straightforward: PG&E propounded contention interrogatories, in the form of data requests, asking Carmel to state the facts in Carmel’s possession related to issues that Carmel interjected into this case. As the United States Supreme Court has held, such discovery requests seeking facts do not invade any privilege. *Hickman v. Taylor*, 329 U.S. 495, 513 (1946). Carmel attempts to obscure the issue by repeatedly mischaracterizing PG&E’s requests as seeking its work product. But Carmel’s characterization is belied by the data requests themselves, which show that PG&E is merely seeking the facts underlying Carmel’s allegations, not its attorneys’ thought processes or strategies.<sup>1</sup>

Carmel also argues that the official information privilege would allow it to wield an alleged police investigation into PG&E’s recordkeeping as both a sword and a shield in this proceeding. Among other problems with Carmel’s argument, the application of this privilege must be supported by the public interest, which would not be served by permitting a government entity to make unsubstantiated allegations in a proceeding inquiring into matters affecting public safety, while refusing to disclose any of the underlying facts to the party that must defend against the allegations.

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<sup>1</sup> See Declaration of Marie L. Fiala (“Fiala Decl.”) in Support of Carmel’s Motion to Compel, Exs. B, R.

PG&E therefore respectfully requests a ruling directing Carmel to provide substantive responses to its data requests or, in the alternative, barring Carmel from raising any of these allegations in this proceeding.

## II. ARGUMENT

### A. The Facts Underlying Carmel’s Allegations Are Not Protected Work Product.

The Supreme Court in *Hickman v. Taylor* held that facts, whether learned during a witness interview or otherwise, are not protected attorney work product. *Hickman*, 329 U.S. at 507. Carmel does not attempt to distinguish *Hickman*. Rather, it relies on *Coito v. Superior Court*, 54 Cal. 4th 480 (2012),<sup>2</sup> which addressed a discovery request seeking work product—an audio recording of a witness interview—not the facts learned in the course of that interview. *Id.* at 487, 499–500. *Coito* itself was explicit in stating that the work product protection defined by that decision was no broader than that afforded by *Hickman*. *Coito*, 54 Cal. 4th at 497. The two other cases cited by Carmel are similarly irrelevant, as they also addressed requests for classic attorney work product, not facts related to issues in the case. *Fireman’s Fund Ins. Co. v. Superior Court*, 196 Cal. App. 4th 1263, 1270 (2011); *Rico v. Mitsubishi Motors Corp.*, 42 Cal. 4th 807, 811 (2007).<sup>3</sup>

Because it cannot challenge *Hickman*, Carmel instead mischaracterizes PG&E’s requests as seeking “the thought processes and legal strategies held in their adversary counsel’s head.”<sup>4</sup> But PG&E’s data requests, its meet-and-confer correspondence, and its Motion could not be clearer: PG&E only seeks the “facts related to the statements in” Carmel’s data requests, not its

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<sup>2</sup> Carmel’s Opposition to PG&E’s Motion (“Carmel Opp.”) at 6.

<sup>3</sup> *Id.* at 7.

<sup>4</sup> *Id.* at 4.

lawyers' thinking.<sup>5</sup> Since facts alone are not work product, *Hickman*, 329 U.S. at 508, 511, no balancing test needs to be conducted to decide the discovery question.

Carmel also claims that it is entitled to withhold these facts because PG&E could discover them on its own.<sup>6</sup> That assertion is irrelevant to whether Carmel is entitled to withhold them from discovery as attorney work product, *Hickman*, 329 U.S. at 509, and Carmel has cited no support for this proposition. In any event, Carmel is wrong that PG&E could discover this information through employee interviews. Ms. Banach is not an employee, and Carmel has stated that the “factual bases” for its allegations are “not limited to” its communications with Ms. Banach, without identifying any of its other sources.<sup>7</sup>

PG&E has diligently investigated Carmel's allegations—interviewing numerous employees, including the two employees named in Carmel's data requests, and extensively reviewing records—and found no evidence supporting them.<sup>8</sup> Accordingly, PG&E needs whatever facts Carmel has in support of these allegations so that it can prepare for any showing Carmel may attempt to make at the hearing next week, and also to determine whether anything improper might have occurred and respond appropriately.

**B. The Official Information Privilege Does Not Apply.**

For the official information privilege to apply, Carmel must first establish that the information PG&E seeks was “acquired in confidence by a public official.” Cal. Evid. Code §

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<sup>5</sup> See, e.g., Motion at 6, 9.

<sup>6</sup> Carmel Opp. at 5.

<sup>7</sup> Fiala Decl., Ex. S. Carmel also inaccurately claims that PG&E has interviewed Ms. Banach “in this matter.” Carmel Opp. at 2. Not only was the testimony by Ms. Banach that Carmel cites submitted in a separate proceeding, it was prepared nearly two years before the events alleged in Carmel's data requests supposedly took place. *Id.* at 2 n. 5.

<sup>8</sup> Carmel accuses PG&E of omitting the names of two employees identified in Carmel's data requests “in a calculated maneuver to distort the issues at play.” Carmel Opp. at 3. This accusation is false. PG&E omitted its employees' names from the briefing in an attempt to protect their privacy. The names themselves are irrelevant, and PG&E would gain no advantage from concealing them.

1040(a). Carmel attempts to satisfy this requirement by asserting that Carmel’s police chief “participated” in an interview of Ms. Banach conducted by Meyers Nave pursuant to a subpoena. (Carmel Opp. at 9.) Carmel cannot cloak facts in the official information privilege merely by having a police officer attend the interview of a witness pursuant to a subpoena, which, under California law, should have been served on all the parties to this proceeding—something Carmel admits it did not do.<sup>9</sup> In addition, for the official information privilege to apply, the public interest must weigh against disclosure. Cal. Evid. Code § 1040(b). In this case, the public interest is not served by allowing Carmel to selectively pick only those facts from a supposedly confidential investigation that it wishes to inject into this proceeding, while shielding from discovery those facts PG&E needs to defend itself.<sup>10</sup>

### **III. CONCLUSION**

For all these reasons, PG&E respectfully requests that ALJ Bushey adopt the revised proposed ruling filed with this Reply, which directs Carmel to provide responses to Questions 13 through 23 in PG&E’s third sets of data requests or precludes Carmel from raising any of its allegations in this proceeding.

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<sup>9</sup> Fiala Decl., Ex. N at Response 8(a).

<sup>10</sup> Carmel also argues, wrongly, that PG&E must show that it does not have the means to obtain this information through some other source in order to overcome the official information privilege. Carmel Opp. at 9–10. No such requirement appears in the California Evidence Code or was imposed by either of the cases cited by Carmel. In fact, those cases undermine Carmel’s privilege assertion. In *People v. Superior Court*, 19 Cal. App. 3d 522 (1971), the court of appeal held that a criminal defendant had the right to see the diary entries of police officers for whom he had acted as an informant, despite the prosecution’s assertion of the official information privilege. *Id.* at 533–34. And in *Marylander v. Superior Court*, 81 Cal. App. 4th 1119 (2000), the trial court committed reversible error when it denied a motion to compel production of government documents after failing to consider the public interest in disclosure. *Id.* at 1128–29.

Respectfully submitted,

*/s/ Elizabeth Collier*

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