



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

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3 Order Instituting Investigation And Order
4 to Show Cause on the Commission's Own
5 Motion into the Operations and Practices
6 of Pacific Gas and Electric Company with
7 Respect to Facilities Records for its
8 Natural Gas Distribution System
9 Pipelines.

Investigation 14-11-008
(Filed November 20, 2014)

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12 **CITY OF CARMEL-BY-THE-SEA'S REQUEST FOR OFFICIAL NOTICE IN**
13 **SUPPORT OF ITS OPPOSITION TO PACIFIC GAS & ELECTRIC'S MOTION TO**
14 **COMPEL**

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January 19, 2016

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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.

Investigation 14-11-008
(Filed November 20, 2014)

CITY OF CARMEL-BY-THE SEA’S REQUEST FOR OFFICIAL NOTICE IN SUPPORT OF ITS OPPOSITION TO PACIFIC GAS & ELECTRIC COMPANY’S MOTION TO COMPEL DISCOVERY

Pursuant to Rule 13.9 of the California Public Utilities Commission’s (“Commission” or “CPUC”) Rules of Practice and Procedure (“Rules”) and Evidence Code § 452(h) and in accordance with California Rules of Court, Rule 3.1306(c), the City of Carmel-by-the-Sea requests official notice of the following document: The United States of America’s Motion in Limine No. 6 to Admit Evidence of Leslie McNiece filed in the matter of *United States of America v. Pacific Gas and Electric Company*, USDC Case No. CR 14-00175 on January 11, 2016.

Rule 13.9 permits the Commission to take official notice similar to evidence submitted for judicial notice under Evidence Code § 450 *et seq.* Evidence Code § 452(d) permits this Commission to take official notice of federal court records. Further, a request for judicial notice by this Commission should be granted since the City of Carmel-by-the-Sea Carmel gave sufficient notice of the request, through the pleading or otherwise, to enable such adverse party to prepare to meet the request; and has furnished the Commission with sufficient information to enable it to take judicial notice of the matter. (Evidence Code § 453.)

The following document meets the requirements for permissible official notice under Rule 13.9, Evidence Code § § 452 and 453 and California Rules of Court, Rule 3.1306(c). A true and correct copies of the United States Motion In Limine No. 6 is attached as Exhibit A.

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Exhibit A: United States' Motion in Limine No. 6 to Admit Evidence of Leslie
McNiece filed in *USA v. Pacific Gas & Electric Company*, U.S. Northern District of California,
Case No. CR 14-00175 dated January 11, 2016.

Respectfully submitted,

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13 UNITED STATES DISTRICT COURT
14 NORTHERN DISTRICT OF CALIFORNIA
15 SAN FRANCISCO DIVISION

16 UNITED STATES OF AMERICA,
17 Plaintiff,

18 v.

19 PACIFIC GAS AND ELECTRIC COMPANY,
20 Defendant.
21

) Case No. CR 14-00175 TEH

) UNITED STATES' MOTIONS IN LIMINE

) Hearing: February 22, 2016

) Time: 2:30pm

TABLE OF CONTENTS

1

2 Background1

3 Motion in Limine #1 to Permit Jury Viewing of the Exploded Pipe Segment.....1

4 Motion In Limine #2 to Compel the Defense to Provide Reciprocal Discovery Under Rule 16, and to
5 Exclude All Expert Testimony and Affirmative Defenses that Have Not Yet Been Disclosed2

6 Motion In Limine #3 to Restrict Defense Use of Certain PHMSA and NTSB Discovery.....4

7 Motion in Limine #4 to Admit Statements of Party Opponent Pursuant to Fed. R. Evid.
8 801(d)(2)4

9 Motion in Limine #5 to Admit Evidence Regarding Line 1477

10 Motion in Limine #6 to Admit Evidence Regarding Leslie McNiece.....9

11 Motion in Limine #7 to Admit Other Evidence That Is “Inextricably Intertwined” With the
12 Charged Conduct12

13 1. Unindicted Lines12

14 2. The Risk Management Program12

15 3. Unindicted Lines and the Planned Pressure Increase Program.....13

16 4. Unindicted Lines and Unplanned Pressure Increases13

17 5. 2010 San Bruno Orders Instituting Investigations.....13

18 6. NTSB Report14

19 7. Milpitas Terminal.....14

20

21

22 Motion in Limine #8 to Declare Certain Government Witnesses As Hostile, and Permit the
23 Government to Cross Examine Its Own Witnesses14

24

25

26

27

28

TABLE OF AUTHORITIES

FEDERAL CASES

1

2

3 *Bourjaily v. United States,*

4 483 U.S. 171 (1987)..... 4

5 *Bradbury v. Phillips Petroleum Co.,*

6 815 F.2d 1356 (10th Cir. 1987) 11

7 *Clemente v. Carnicon-Puerto Rico Mgmt. Associates, L.C.,*

8 52 F.3d 383 (1st Cir. 1995)..... 2

9 *Coalition for a Sustainable Delta v. Fed. Emergency Mgmt. Agency,*

10 812 F. Supp. 2d 1089 (E.D. Cal. 2011)..... 5

11 *Fields v. United States,*

12 164 F.2d 97 (D.C. Cir. 1947)..... 15

13 *Gariepy v. United States,*

14 189 F.2d 459 (6th Cir. 1951) 15

15 *Grimes v. Employers Mut. Liab. Ins. Co. of Wisconsin,*

16 73 F.R.D. 607 (D. Alaska 1977) 6

17 *Hametner v. Villena,*

18 361 F.2d 445 (9th Cir. 1966) 2

19 *Lennartson v. Papa Murphy's Holdings, Inc.,*

20 No. C15-5307 RBL, 2016 WL 51747 (W.D. Wash. Jan. 5, 2016)..... 6

21 *Lerma v. United States.,*

22 387 F.2d 187 (10th Cir. 1968) 15

23 *London Guarantee & Acc. Co. v. Woelfle,*

24 83 F.2d 325 (8th Cir. 1936) 15

25 *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*

26 (*MGM Studios*), 454 F. Supp. 2d 966 (C.D. Cal. 2006) 5, 6

27 *Muehler v. Mena,* 544 U.S. 93 (2005) 8

28 *Rooney v. Sprague Energy Corp.,*

495 F. Supp. 2d 135 (D. Maine 2007) 2

Ross v. Stranger, No. C

11-00094 CW, 2011 WL 1431517 (N.D. Cal. Apr. 14, 2011) 6

Sea-Land Serv., Inc. v. Lozen Int'l, LLC.,

285 F.3d 808 (9th Cir. 2002) 6

Thomas v. Conemaugh Black Lick R.R.,

133 F. Supp. 533 (W.D.PA. 1955)..... 15

1	<i>United States v. Arambula-Ruiz</i> , 987 F.2d 599 (9th Cir. 1993)	9
2		
3	<i>United States v. Ayers</i> , 924 F.2d 1468 (9th Cir. 1991)	8
4	<i>United States v. Bailleaux</i> , 685 F.2d 1105 (9th Cir. 1982)	9
5		
6	<i>United States v. Beckman</i> , 298 F.3d, 788 (9th Cir. 2002)	8
7	<i>United States v. Bernal</i> , 533 Fed. Appx. 795 (9th Cir. July 19, 2013)	2
8		
9	<i>United States v. Burrows</i> , 36 F.3d 875 (9th Cir. 1994)	3
10	<i>United States v. Castillo</i> , 181 F.3d 1129 (9th Cir. 1999)	8
11		
12	<i>United States v. Champion International Corporation</i> , 557 F.2d 1270 (9th Cir. 1977)	16
13	<i>United States v. Collicott</i> , 92 F.3d 973 (9th Cir. 1996)	7
14		
15	<i>United States v. Daly</i> , 974 F.2d 1215 (9th Cir. 1992)	8
16	<i>United States v. Duff</i> , 332 F.2d 702 (6th Cir. 1964)	15
17		
18	<i>United States v. Fernandez</i> , 839 F.2d 639 (9th Cir. 1988)	6
19	<i>United States v. Gray</i> , 199 F.3d 547 (1st Cir. 1999)	2
20		
21	<i>United States v. Harris</i> , 141 F. Supp. 418 (S.D. Cal. 1955)	2
22	<i>United States v. Holsey</i> , 414 F.2d 458 (10th Cir. 1969)	15
23		
24	<i>United States v. Joetzi</i> , 952 F.2d 1090 (9th Cir. 1991)	9
25	<i>United States v. Jones</i> , 982 F.2d 380 (9th Cir. 1992)	8
26		
27	<i>United States v. Karnes</i> , 531 F.2d 214 (4th Cir. 1976)	15
28		

1	<i>United States v. Mack,</i> 164 F.3d 467 (9th Cir.1999)	3
2		
3	<i>United States v. Moore,</i> 735 F.2d 289 (8th Cir. 1984)	8
4	<i>United States v. Moreno,</i> 102 F.3d 994 (9th Cir. 1996)	3
5		
6	<i>United States v. Morgan,</i> 555 F.2d 238 (9th Cir. 1977)	16
7	<i>United States v. Murillo,</i> 255 F.3d 1169 (9th Cir. 2001)	8
8		
9	<i>United States v. Myers,</i> 123 F.3d 350 (6th Cir. 1997)	8
10	<i>United States v. Ortega,</i> 203 F.3d 675 (9th Cir. 2000)	6, 7
11		
12	<i>United States v. Pettiford,</i> 962 F.2d 74 (1st Cir. 1992)	2
13	<i>United States v. Reed,</i> 227 F.3d 763 (7th Cir. 2000)	6
14		
15	<i>United States v. Rrapi,</i> 175 F.3d 742 (9th 1999).....	7
16	<i>United States v. Scroggins,</i> 638 F.3d (8th Cir. 2011)	2
17		
18	<i>United States v. Sioux,</i> 362 F.3d 1241 (9th Cir. 2004)	8
19	<i>United States v. Soliman,</i> 813 F.2d 277 (9th Cir. 1987)	7, 8
20		
21	<i>United States v. Urena,</i> 659 F.3d 903 (9th Cir. 2011)	2, 3
22	<i>United States v. Vizcarra-Martinez,</i> 66 F.3d 1006 (9th Cir. 1995)	7
23		
24	<i>United States v. Williams,</i> 989 F.2d 1061 (9th Cir. 1993)	7, 8
25	<i>Van Westrienen v. Americontinental Collection Corp.,</i> 94 F. Supp. 2d 1087 (D. Or. 2000)	6
26		
27		
28		

RULES

1
2
3
4
5
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11
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Fed. R. Crim. P. 16 2, 3
Fed. R. Evid. 403 9
Fed. R. Evid. 607 15
Fed. R. Evid. 611 15
Fed. R. Evid. 801 4, 6, 16

1 Background

2 On September 9, 2010, a gas line owned and operated by PG&E ruptured, causing a fire that
3 killed 8 people and injured 58 others. Superseding Indictment (“SI”) ¶ 5 (Dkt. 22). The fire damaged
4 108 homes, 38 of which were completely destroyed. *Id.* In July of 2014, a Grand Jury returned a
5 superseding indictment charging PG&E with twenty-seven counts of violating the Pipeline Safety Act,
6 and one count of obstructing the NTSB’s investigation of the explosion and PG&E’s Integrity
7 Management program. The Superseding Indictment also seeks a fine exceeding the statutory maximum
8 for these offenses under the Alternative Fines Act. *Id.* ¶ 76.

9 On December 23, 2015, the Court held that certain Pipeline Safety Act (“PSA”) regulations
10 charged a course of conduct, not specific to a pipeline, thus rendering certain charged counts
11 multiplicitous. Order Granting Defendant’s Motion For Multiplicity (Dkt. 217). As a result, the
12 government will seek to consolidate the alleged criminal activity previously contained in 27 counts of
13 violating the PSA to 12 PSA counts. *Id.*

14 Motion in Limine #1 to Permit Jury Viewing of the Exploded Pipe Segment

15 The government moves to allow the jury to view the pipe, a part of Segment 180. It is
16 impossible to bring this piece of evidence into the Courtroom. The part that exploded out of the ground
17 and flew 100 feet in the air is 28 feet long, 30 inches in diameter, and weighs approximately 3000
18 pounds. The government proposes to bring the pipe on a flatbed truck to a street near the Courthouse, so
19 that the viewing will be controlled, will not cause a significant delay in the trial, and will minimize the
20 inconvenience to the Court and jurors.

21 Viewing the pipe will uniquely afford the jury the opportunity to assess the difference between
22 the actual pipe characteristics and those stated in PG&E’s records – specifically, to appreciate that it is
23 immediately obvious that the pipe is welded rather than seamless, and that this weld is incomplete.
24 These differences are significant because pipe characteristics dictate how PG&E was required to assess
25 the pipe’s integrity so as to avoid explosions like the one in San Bruno. It will help the jury understand
26 the enormity of natural gas pressure that was required to blow this pipe out of the ground and up a hill,
27 resulting in deaths, injuries, and property damage – which risk is the very reason the PSA regulations at
28 issue were enacted. And it will make concrete otherwise abstract terminology used in the regulations

1 and described, the government anticipates, by witnesses at trial.

2 The pipe viewing is within this Court's discretion. *See United States v. Gray*, 199 F.3d 547, 548-
3 49 (1st Cir. 1999); *see also United States v. Bernal*, 533 Fed. Appx. 795 (9th Cir. July 19, 2013)
4 (unpublished); *United States v. Scroggins*, 638 F.3d 873 (8th Cir. 2011); *Hametner v. Villena*, 361 F.2d
5 445, 445-46 (9th Cir. 1966). The Court should consider whether the jury view would cause undue delay
6 or inconvenience to the jury, and weigh that against the availability of other evidence that enables the
7 jury to assess the condition or nature of the evidence at issue. *See Bernal*, 533 Fed. Appx. at 796;
8 *Hametner*, 361 F.2d at 446. The existence of photographs, testimony, or diagrams alone does not
9 preclude a jury viewing. *See United States v. Harris*, 141 F. Supp. 418, 419 (S.D. Cal. 1955); *see also*
10 *United States v. Pettiford*, 962 F.2d 74, 76 (1st Cir. 1992) (finding that the court must ascertain whether
11 "the [jury] view would . . . have presented any clearer view of the evidence than was achieved through
12 the use of photographs at trial").

13 Procedurally, counsel should be alerted to the proposed viewing in advance and given the
14 opportunity to be heard; counsel should be present at the view although constraints may be placed on
15 counsel's interaction with the jury during the view; the judge should preside over the view; and the court
16 should fully and accurately record what transpires at the view. *See Rooney v. Sprague Energy Corp.*,
17 495 F. Supp. 2d 135, 138 (D. Maine 2007); *Clemente v. Carnicon-Puerto Rico Mgmt. Associates, L.C.*,
18 52 F.3d 383, 385 (1st Cir. 1995), abrogated by *United States v. Gray*, 199 F.3d 547 (1st Cir. 1999)
19 (viewing is substantive evidence).

20 The jury view should be treated as substantive evidence. *See Gray*, 199 F.3d at 548-49
21 (summarizing legal authorities and holding that that a jury view should be treated as substantive
22 evidence); *Harris*, 141 F. Supp. at 419 (holding site view is evidence).

23 Motion In Limine #2 to Compel the Defense to Provide Reciprocal Discovery Under Rule 16, and to
24 Exclude All Expert Testimony and Affirmative Defenses that Have Not Yet Been Disclosed

25 If the defense intends to put forth evidence at trial, it must to comply with the reciprocal
26 discovery requirements of Federal Rule of Criminal Procedure 16 and Ninth Circuit law. The Court has
27 "unquestioned discretionary power to exclude evidence that should have been produced in reciprocal
28 discovery." *United States v. Urena*, 659 F.3d 903, 908 (9th Cir. 2011) (excluding expert testimony that

1 was not noticed before the pretrial conference). Despite numerous requests starting in April 2014, the
2 government has yet to receive any reciprocal discovery, notification of affirmative defenses, or expert
3 notifications.

4 While the government solely bears the burden of proof in a criminal trial, the defense may
5 choose to put forth an affirmative defense. If the defense wants to put forth an affirmative defense, the
6 defense needs to make a prime facie showing of the evidence it will seek to introduce to prove that
7 affirmative defense, prior to trial. If the defendant fails to present sufficient evidence, the district court
8 may preclude the defendant from presenting the defense at trial, as well any evidence supporting the
9 defense. *See United States v. Moreno*, 102 F.3d 994, 997-99 (9th Cir. 1996) (holding that evidence
10 related to an affirmative defense is not admissible if the defendant fails to make a prima facie case of the
11 defense); *see also United States v. Mack*, 164 F.3d 467, 474 (9th Cir.1999) (defenses of public authority
12 and entrapment by estoppel ruled inadmissible prior to trial); *United States v. Burrows*, 36 F.3d 875 (9th
13 Cir. 1994) (discussing pretrial notice requirements of public authority, insanity, and alibi affirmative
14 defenses).

15 With regard to defense experts, Rule 16 requires that a defendant must provide to the
16 government “a written summary of any testimony that the defendant intends to use under Rules 702,
17 703, or 705 of the Federal Rules of Evidence as evidence at trial” if the defendant requests and receives
18 reciprocal disclosure from the government. Fed. R. Crim. P. 16(b)(1)(C). Although there are no
19 specific timing requirements, “it is expected that the parties will make their requests and disclosures in a
20 timely fashion.” Fed. R. Crim. 16, Adv. Comm. N. to 1993 Amendments. “If a party fails to comply
21 with [Rule 16], the court may . . . prohibit that party from introducing the undisclosed evidence.” Fed.
22 R. Crim. P. 16(d)(2)(C); *see also Urena*, 659 F.3d at 908.

23 The government provided tens of thousands of pages of discovery over the course of this case,
24 and noticed its expert witnesses on November 9, 2015. The government has made numerous requests of
25 the defense to produce any and all reciprocal discovery to which the government is entitled under Rule
26 16, including expert witness disclosures. As of the filing of this motion, the government has not
27 received a single page of reciprocal discovery nor has it been provided any notice of expert witnesses or
28 affirmative defenses. Disclosures of experts or affirmative defenses at this late date, in what the defense

1 has repeatedly called the most complex case in this federal district, would not provide the government a
2 fair opportunity to test the merit of the proffered evidence absent significant delay of the trial date.
3 Accordingly, the government asks that the defense be precluded from offering any expert witnesses or
4 relying on any affirmative defenses.

5 Motion In Limine #3 to Restrict Defense Use of Certain PHMSA and NTSB Discovery

6 In its June 29, 2015 discovery order, the Court held that, “at this point in the litigation [meaning
7 the discovery phase], evidence of PHMSA’s statements and actions regarding other operators, and other
8 operators’ interpretations of the regulations, is material to PG&E’s defense, because the clarity of the
9 regulations and the reasonableness of PG&E’s interpretations are still at issue.” (Order at 8-9.) The
10 discovery phase having now concluded, this Court must determine whether evidence supporting the non-
11 defense of “other people were doing it too!” is admissible. That others have committed the same crime
12 is simply not probative of PG&E’s scienter. Such an argument could conceivably have been relevant to
13 a selective prosecution motion, but one was never filed and the time for such motion has long since
14 passed.

15 Motion in Limine #4 to Admit Statements of Party Opponent Pursuant to Fed. R. Evid. 801(d)(2)

16 The United States moves in limine to admit, subject to appropriate authentication, certain
17 categories of evidence as non-hearsay statements of a party opponent. Prior statements made by or on
18 behalf of a defendant are non-hearsay when offered by a party opponent – the government. Fed. R.
19 Evid. 801(d)(2). A statement is considered to be by or on behalf of a defendant if it:

- 20 (A) was made by the [defendant] in an individual or representative capacity;
21 (B) is one the [defendant] manifested that it adopted or believed to be true;
22 (C) was made by a person whom the [defendant] authorized to make a statement on the
23 subject; [or]
24 (D) was made by the [defendant]’s agent or employee on a matter within the scope of that
25 relationship and while it existed.

26 *Id.* The government must prove by a preponderance of the evidence such “preliminary facts” as the
27 existence of an agency relationship or the scope of employment. *Bourjaily v. United States*, 483 U.S.
28 171, 176 (1987).

1 Rule 801(d)(2)(D) includes statements by anyone acting under an agency relationship with
2 PG&E. *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd. (MGM Studios)*, 454 F. Supp. 2d 966,
3 973-74 (C.D. Cal. 2006) (“[A] statement is admissible under Rule 801(d)(2)(D) so long as it is made by
4 an agent within the scope of agency, regardless of the precise contractual relationship between the agent
5 and the party against whom the evidence is offered.”). This would include not only employees, but also
6 contractors, see *id.*, and former employees acting pursuant to a contractual agreement with PG&E. For
7 instance, certain former employees signed separation agreements that contractually obligate them to
8 “cooperate with respect to any claim, litigation or . . . proceeding . . . that relates to or arises from any
9 matter with which [the employee] was involved during his employment with the company, or that
10 concerns any matter of which [the employee] has information or knowledge.” The separation
11 agreements specify that the “duty of cooperation” requires them to meet with PG&E counsel, appear at
12 PG&E’s request as a witness at depositions or trials, and sign declarations or affidavits. Where such a
13 contractual obligation exists, the former employee is an agent within the meaning of Rule 801(d)(2)(D).

14 PG&E’s statements may be admitted even if it is not clear who authored them, as long as it is
15 clear on their face they were prepared on behalf of PG&E. See *MGM Studios*, 454 F. Supp. 2d at 974
16 (admitting business plans and power point presentations that were not attached to emails because
17 “[d]ocuments that bear StreamCast’s trade names, logos, and trademarks are statements by StreamCast
18 itself, and are admissible as admissions by a party-opponent under Rule 801(d)(2)). This includes drafts.
19 *Coalition for a Sustainable Delta v. Fed. Emergency Mgmt. Agency*, 812 F. Supp. 2d 1089, 1095 (E.D.
20 Cal. 2011) (“[D]ocument [containing excerpts of draft biological assessment] is a party admission and
21 separately admissible on that ground under” Rule 801(d)(2).).

22 The statements that the government anticipates offering include:

23 (a) Written and oral statements made and submitted on behalf of PG&E to the Department of
24 Justice, Department of Transportation, PHMSA, NTSB, CPUC, SEC, Interstate Natural Gas Association
25 of America, American Society of Mechanical Engineers, and any other agency or association (including
26 but not limited to policies, reports, presentations, and responses to data requests).

27 (b) Written and oral presentations by PG&E employees to PG&E’s board of directors.

28 ///

1 (c) Statements posted by PG&E on its website. See, e.g., *Ross v. Stranger*, No. C 11-00094
2 CW, 2011 WL 1431517, at *4 (N.D. Cal. Apr. 14, 2011) (content of website, including biographical
3 information about defendant, constitutes non-hearsay admissions under Rule 801(d)(2)); *Van Westrienen*
4 *v. Americontinental Collection Corp.*, 94 F. Supp. 2d 1087, 1109 (D. Or. 2000) (“[R]epresentations
5 made by defendants on the website are admissible as admissions of the party-opponent under FRE
6 801(d)(2)(A).”).

7 (d) Internal PG&E documents. Even if the author is unknown. See *MGM Studios*, 454 F.
8 Supp. 2d at 974.

9 (e) Prior testimony and statements by PG&E current employees and contractually obligated
10 former employees in this case, in the civil PG&E San Bruno Fire cases, or in any other litigation arising
11 out of the San Bruno explosion. See *United States v. Reed*, 227 F.3d 763, 770 (7th Cir. 2000) (admitting
12 entire transcript of defendant’s prior testimony under Rule 801(d)(2)(A)).

13 (f) Emails from PG&E employees to other employees or individuals acting on behalf of
14 PG&E regarding matters within the scope of the relationship. See *Sea-Land Serv., Inc. v. Lozen Int’l,*
15 *LLC.*, 285 F.3d 808, 821 (9th Cir. 2002) (emails closing with electronic signature manifesting
16 employment, and forwarded emails manifesting adoption of content, admissible under Rule 801(d)(2)).

17 (g) PG&E’s advertisements, commercials, and statements distributed on television or radio
18 or in print. *Lennartson v. Papa Murphy’s Holdings, Inc.*, No. C15-5307 RBL, 2016 WL 51747, at *5
19 (W.D. Wash. Jan. 5, 2016) (“[A]dvertisements [of defendant Papa Murphy’s] are admissible non-
20 hearsay.”); *Grimes v. Employers Mut. Liab. Ins. Co. of Wisconsin*, 73 F.R.D. 607, 611 (D. Alaska 1977)
21 (television advertisements or “commercials are not hearsay because they are admissions of a party
22 opponent under Rule 801(d)(2)”).

23 While all of the above categories are admissible if offered by the government, PG&E may not
24 elicit its own prior statements; they are inadmissible hearsay. Fed. R. Evid. 801(d)(2); *United States v.*
25 *Ortega*, 203 F.3d 675, 682 (9th Cir. 2000). To hold otherwise would allow a defendant “to place his
26 exculpatory statements ‘before the jury without subjecting [himself] to cross-examination, precisely
27 what the hearsay rule forbids.’” *Ortega*, 203 F.3d at 682 (quoting *United States v. Fernandez*, 839 F.2d
28 639, 640 (9th Cir. 1988)). This is true even if the government has offered other portions of the

1 defendant's statement, and the defendant purports to offer additional portions for context under the rule
2 of completeness, Federal Rule of Evidence 106. The rule of completeness, which applies only to written
3 and recorded statements, does not transform inadmissible hearsay into admissible evidence. *See id.* at
4 682-83; *United States v. Collicott*, 92 F.3d 973, 983 (9th Cir. 1996) (holding that "rule 106 'does not
5 compel admission of otherwise inadmissible hearsay evidence'").

6 Motion in Limine #5 to Admit Evidence Regarding Line 147

7 The United States moves in limine to admit evidence that PG&E delayed reporting its deficient
8 records resulting in a public safety concern to the California Public Utilities Commission ("CPUC") for
9 Line 147. Such evidence of regulatory violations is inextricably intertwined with the charged counts as
10 a course of conduct, in light of the Court's Order on the defendant's motion to dismiss on multiplicity
11 grounds. (Dkt. 217.) This conduct is also admissible "other acts" evidence under Federal Rule of
12 Evidence 404(b).

13 In October 2012, PG&E discovered a leak on Line 147. When the pipe segment was unearthed
14 to repair the leak, PG&E then discovered that its Line 147 records contained faulty information about
15 the pipe segment, such as the wrong seam type, the wrong manufacturer, and the wrong pipe age.
16 Because this information was necessary to determine the maximum allowable operating pressure for
17 Line 147, PG&E had a duty to inform the CPUC that PG&E's records were inaccurate. In the face of
18 this duty, PG&E waited until March 2013 to inform CPUC staff of this discovery, and waited until July
19 2013 to make an official filing of this situation.

20 "Evidence should not be considered 'other crimes' evidence when 'the evidence concerning the
21 ['other'] act and the evidence concerning the crime charged are inextricably intertwined.'" *United*
22 *States v. Williams*, 989 F.2d 1061, 1070 (9th Cir. 1993) (quoting *United States v. Soliman*, 813 F.2d 277,
23 279 (9th Cir. 1987)). "Evidence is 'inextricably intertwined' if it 'constitutes a part of the transaction
24 that serves as a basis for the criminal charge,' or 'was necessary to . . . permit the prosecutor to offer a
25 coherent and comprehensible story regarding the commission of the crime.'" *United States v. Rrapi*,
26 175 F.3d 742, 748-49 (9th 1999) (quoting *United States v. Vizcarra-Martinez*, 66 F.3d 1006, 1012-13
27 (9th Cir. 1995)). "The policies underlying rule 404(b) are inapplicable when offenses committed as part
28 of a 'single criminal episode' become other acts simply because the defendant 'is indicted for less than

1 all of his actions.” *Williams*, 989 F.2d at 1070 (quoting *Soliman*, 813 F.2d at 279). Moreover, actions
2 committed after the time period in the indictment are still admissible to prove intent. *United States v.*
3 *Sioux*, 362 F.3d 1241, 1246 (9th Cir. 2004) (admission of subsequent bad acts); *United States v. Ayers*,
4 924 F.2d 1468, 1473-74 (9th Cir. 1991) (acts committed subsequent to charged conspiracy admissible to
5 prove defendant’s intent during conspiracy). “A jury is entitled to know the circumstances and
6 background of a criminal charge.” *United States v. Daly*, 974 F.2d 1215, 1217 (9th Cir. 1992) (quoting
7 *United States v. Moore*, 735 F.2d 289, 282 (8th Cir. 1984)). “It cannot be expected to make its decision
8 in a void – without knowledge of the time, place, and circumstances of the acts which form the basis of
9 the charge.” *Id.*

10 PG&E’s faulty records and its failure to timely report them is part of the same criminal episode
11 as PG&E’s other record-keeping violations. In this Court’s ruling on the defendant’s motion to dismiss
12 on multiplicity grounds, the Court noted, “the Government will be free to introduce pipeline-specific and
13 segment-specific evidence to prove the ‘course of conduct’ required by each IM regulation.” Order at
14 12. This inaccurate pipeline information, such as the wrong seam type, the wrong manufacturer, and the
15 wrong pipe age, is probative of PG&E’s knowing and willful violations of the charged Pipeline Safety
16 Act regulations, including 49 C.F.R. §§ 517(a), 709(a), 917(a), 917(b), 917(e)(3), 917(e)(4), and 919.

17 The evidence is also admissible under Rule 404(b), which allows “[e]vidence of a crime, wrong,
18 or other act” to prove “motive, opportunity, intent, preparation, plan, knowledge, identity, absence of
19 mistake, or lack of accident.” Fed. R. Evid. 404(b). “Rule 404(b) is a rule of inclusion. [U]nless the
20 evidence of other acts only tends to prove propensity, it is admissible.” *United States v. Castillo*, 181
21 F.3d 1129, 1134 (9th Cir. 1999) (internal citation omitted). “Other acts evidence is admissible under
22 Rule 404(b) if it (1) tends to prove a material point in issue; (2) is not too remote in time; (3) is proven
23 with evidence sufficient to show that the act was committed; and (4) if admitted to prove intent, is
24 similar to the offense charged.” *United States v. Beckman*, 298 F.3d 788 794 (9th Cir. 2002) (citing
25 *United States v. Murillo*, 255 F.3d 1169, 1175 (9th Cir. 2001), overruled on other grounds, *Muehler v.*
26 *Mena*, 544 U.S. 93 (2005). Prior acts are admissible “so long as the acts tended to make the existence of
27 [the defendant’s] knowledge or intent more probable than it would be without the evidence.” *United*
28 *States v. Jones*, 982 F.2d 380, 382 (9th Cir. 1992); see also *United States v. Myers*, 123 F.3d 350, 363

1 (6th Cir. 1997) (“[W]here there is thrust upon the government, either by virtue of the defense raised by
2 the defendant or by virtue of the elements of the crime charged, the affirmative duty to prove that the
3 underlying prohibited act was done with a specific criminal intent, other acts evidence may be
4 introduced under Rule 404(b)”).

5 To establish a criminal violation of the charged Pipeline Safety Act regulations, the government
6 must prove that PG&E’s violation was knowing and willful. PG&E’s delayed reporting of a known
7 safety violation, in addition to its faulty records concerning Line 147, is probative of PG&E’s
8 knowledge of its recordkeeping deficiencies, and its willfulness in failing to address them. It strongly
9 tends to show that PG&E’s deficiencies resulted not from accident or mistake, but rather from
10 affirmative choices not to act.

11 Nor should Line 147 evidence be excluded under Rule 403. Rule 403 requires exclusion only
12 when the relevant evidence is “substantially outweighed by the danger of unfair prejudice.” Fed. R.
13 Evid. 403. “[T]he greater the degree of probativeness possessed by the evidence, the greater the showing
14 of unfair prejudice that will be required to exclude the evidence.” *United States v. Bailleaux*, 685 F.2d
15 1105, 1111 (9th Cir. 1982), *modified on other grounds by Huddleston v. United States*, 485 U.S. 681
16 (1988). Rule 403 does not preclude evidence that prejudices the defendant’s case – it only precludes
17 evidence that unfairly prejudices the defendant’s case. *See United States v. Joetzki*, 952 F.2d 1090, 1094
18 (9th Cir. 1991) (evidence unfairly prejudicial only “if it has an undue tendency to suggest a decision on
19 an improper basis such as emotion or character rather than evidence presented on the crime charged”);
20 *Bailleaux*, 685 F.2d at 1111 n.2 (“As used in Rule 403, ‘unfair prejudice’ means that the evidence not
21 only has a significant impact on the defendant’s case, . . . but that its admission results in some
22 unfairness to the defendant from its non-probative aspect”). Moreover, potentially unfair prejudice to
23 the defendant (to the extent any exists) can be eliminated or mitigated through a limiting instruction to
24 the jury. *See, e.g., United States v. Arambula-Ruiz*, 987 F.2d 599, 604 (9th Cir. 1993). As there is no
25 risk this evidence will unfairly prejudice the jury, it should not be excluded under Rule 403.

26 Motion in Limine #6 to Admit Evidence Regarding Leslie McNiece

27 The United States moves in limine to admit as inextricably intertwined and under Rule 404(b)
28 evidence concerning a former employee, Leslie McNiece. McNiece was hired in 2012 for the purpose

1 of building a department to address PG&E's recordkeeping deficiencies identified after the San Bruno
2 explosion. McNiece will testify that during the course of her employment with PG&E, she found
3 recordkeeping deficiencies, experienced pushback from management during her attempts to address
4 PG&E's recordkeeping deficiencies, and was ultimately laid off in 2014. As one example, McNiece
5 will testify that in or about May 2013, she found outside of her office door a box of original pipeline
6 records, including for Line 132, with a Post-It note attached. The note read words to the effect of, "I'd
7 rather give this to you than Gas Ops." Also, McNiece will testify that in or around September 2013, she
8 found original pipeline survey sheets for Line 132. She found these maps discarded in a dumpster
9 outside of PG&E's Gas Operations facility in Walnut Creek.

10 Some portions of the McNiece testimony are admissible as inextricably intertwined with the
11 charged offenses, while others are admissible under Rule 404(b). First, McNiece's testimony regarding
12 the purpose for which she believes she was hired, along with her personal observations regarding the
13 state of PG&E's recordkeeping, are relevant, direct evidence of PG&E's knowledge regarding the
14 inadequate state of its pipeline records. For instance, McNiece will testify that during her recruitment by
15 PG&E she discussed PG&E's recordkeeping deficiencies with current PG&E employees, such as Sandy
16 Hartman and Chris Johns. McNiece will testify that the reason she was hired by PG&E in April 2012
17 was to "clean up" their recordkeeping mess. McNiece will testify that the department she was hired to
18 start was called Information Management Compliance. The purpose of this department, according to
19 McNiece, was to address recordkeeping issues identified in a report called the Duller-North Report. All
20 of this evidence is inextricably intertwined with the charged offenses, as it is probative of PG&E's
21 course of conduct in violation of Pipeline Safety regulations.

22 Second, McNiece will also testify that after drafting a new recordkeeping policy and presenting
23 this policy to her management, PG&E President Chris Johns told her that PG&E would not approve that
24 policy. Johns stated that if this policy was approved, PG&E would be immediately out of compliance.
25 McNiece will also testify about the pushback she received throughout her tenure at PG&E. McNiece
26 will describe the opposition she faced when she tried to remedy PG&E's recordkeeping deficiencies,
27 instances when she received specific instructions to destroy documents, such as from Sumeet Singh, and
28 the financially-motivated pushback she received when she attempted to organize PG&E records or move

1 them from a storage facility called Iron Mountain. This “pushback” evidence is direct evidence of
2 PG&E violations of recordkeeping regulations, and explains how PG&E did not genuinely attempt to
3 address its known recordkeeping deficiencies. The pushback McNiece faced hindered her ability to
4 address PG&E’s deficient records, and therefore is inextricably intertwined, direct evidence of PG&E’s
5 knowledge of its recordkeeping deficiencies.

6 Third, McNiece’s discovery of original pipeline survey sheets of Line 132, containing
7 handwritten notes, in a dumpster is also inextricably intertwined with the charged offenses. One of the
8 Line 132 discarded survey sheets noted: “leak info not in GIS.” This notation was dated 12/8/2003.
9 This map and the accompanying notation are probative of several relevant facts: that PG&E’s GIS
10 system was deficient, that PG&E was aware of this deficiency, and that by discarding this original map,
11 PG&E was failing to maintain records, as required, for the life of a pipe. Moreover, that PG&E did not
12 maintain records of the 1988 seam leak on Line 132 is specifically charged in Count Four of the
13 Superseding Indictment. PG&E has repeatedly claimed to regulators, politicians, and the press that it
14 was unaware of this seam leak and found records of leak only after the explosion. The dumpster map
15 demonstrates that PG&E was on notice that the information concerning the leak was not incorporated
16 into its records system.

17 Finally, McNiece’s discovery of the box of documents outside of her office is admissible under
18 Rule 404(b). This “other act” evidence is relevant to show that PG&E acted with the specific intent to
19 violate the charged pipeline regulations. McNiece’s testimony regarding the box of Line 132 documents
20 tends to show that PG&E engaged in a pattern of poor recordkeeping conduct, so much so that an
21 employee only “trusted” giving McNiece the records. Such evidence disproving mistake or accident and
22 instead proving a pattern of conduct is proper 404(b) evidence in the context of a corporate defendant.
23 *Bradbury v. Phillips Petroleum Co.*, 815 F.2d 1356, 1364 (10th Cir. 1987).

24 There is little risk that the jury will be unfairly prejudiced by this McNiece’s testimony. Any
25 claim that a jury may unfairly draw conclusions regarding the widespread versus isolated nature of this
26 witness’s experiences at PG&E does not weigh against admissibility, and can be addressed through
27 cross examination and argument of counsel.

28

1 Motion in Limine #7 to Admit Other Evidence That Is “Inextricably Intertwined”
2 With the Charged Conduct

3 The court should admit the following seven categories of inextricably-intertwined evidence.
4 They are part of a single criminal episode and necessary to enable the prosecutor to tell a coherent and
5 comprehensive story regarding PG&E’s crimes.

6 1. Unindicted Lines

7 PG&E failed to incorporate pipe specification data on other transmission lines beyond lines
8 charged in the Superseding Indictment. This data includes critical information regarding pipe
9 specifications, class location data, strength test pressure records, “as-builts,” and manufacturing records,
10 as reflected in PG&E’s Audit Change Log produced to the CPUC in the Record Keeping Orders
11 Instituting Investigations. This relevant evidence is admissible because it is part of the same criminal
12 episode. In this Court’s ruling on the defendant’s motion to dismiss on multiplicity grounds, the Court
13 noted, “...the Government will be free to introduce pipeline-specific and segment-specific evidence to
14 prove the “course of conduct” required by each IM regulation.” Order at 12. After dismissing the
15 multiplicitous counts, the Court found the proper unit of prosecution under the Pipeline Safety Act was a
16 course of conduct. Therefore, unincorporated and unmaintained pipeline data, regardless of the line, is
17 relevant proof of PG&E course of knowing and willful conduct to violate the Pipeline Safety Act.
18 Lastly, data relating to indicted and unindicted lines both appear on the same exhibits. As it is all
19 relevant course of conduct evidence, the Court should find this evidence admissible.

20 2. The Risk Management Program

21 In 2000, PG&E transferred 212 miles of old transmission pipe from its Gas Pipeline
22 Replacement Program (GPRP) into the Risk Management Program (RMP). The GPRP was a program
23 designed to replace old pipe which did not meet current standards. Many of the overpressurized
24 segments charged in the indictment were scheduled to have been replaced under the GPRP. However,
25 due to cost reasons, PG&E then chose not to replace them under RMP. This evidence is inextricably-
26 intertwined because it demonstrates that PG&E was aware that the pipe, in Lines 109, 132, 153, and
27 107, was old. This is relevant and significant because pipe age is a vital characteristic that must be
28 considered when determining if a threat exists and if it does, whether the threat has become activated.

1 3. Unindicted Lines and the Planned Pressure Increase Program

2 PG&E's planned pressure increase program was a policy designed to circumvent costly
3 assessments of its aging gas transmission system as charged in the Superseding Indictment. The
4 government seeks to introduce evidence that there were other pipelines, beyond those charged in the
5 Superseding Indictment, where PG&E increased the pressure over the maximum allowable pressure of
6 the pipelines. These other pipelines include: Lines 50A, 118A, 142S, and 114. In light of the Court's
7 recent ruling about the regulations charging a course of conduct rather than a violation per line, this
8 evidence is direct evidence of the course of conduct charged in counts 5, 9, 7 and 19.

9 4. Unindicted Lines and Unplanned Pressure Increases

10 PG&E became aware that on occasion certain transmission lines experienced unplanned pressure
11 increases. On these occasions, the pressure of the pipelines exceeded federal limits. The government
12 seeks to introduce evidence that on the following additional pipelines, beyond those charged in the
13 Superseding Indictment – where the pressure on the pipeline went above the pressure at which the
14 pipeline was allowed to operate under federal regulations – PG&E chose to preform ECDA instead of
15 the proper assessment method required under federal law. These other pipelines include: Lines 50A,
16 108, 111A, 177B, and 197B.

17 Whether planned or unplanned, PG&E over pressurized its pipelines, was aware of these
18 instances of over pressurization, was aware that over pressurizations activated manufacturing threats,
19 was aware that activated manufacturing threats required it to perform pipeline assessments, and
20 intentionally selected improper assessment methods. Again, in light of the Court's recent ruling about
21 the regulations charging a course of conduct rather than a violation per line, this evidence is direct
22 evidence of the course of conduct charged in counts 5, 9, 7 and 19.

23 5. 2010 San Bruno Orders Instituting Investigations

24 The government seeks to introduce evidence concerning the 2010 San Bruno pipeline explosion.
25 First, the government seeks to introduce evidence that the CPUC assessed PG&E with a \$1.6 billion
26 penalty for "unsafe operation of its gas transmission system." This penalty was a result of the following
27 three Orders Instituting Investigations (OII):

- 28 • Investigation 12-01-007: Violations of Public Utility Code 451, General Order 112 and

1 other applicable standards, laws, rules and regulations in connection with the San Bruno
2 explosion and fire on September 9th, 2010.

- 3 • Investigation 11-11-009: Practices of PG&E's natural gas transmission pipeline system
4 in locations with high population density.
- 5 • Investigation 11-02-016: Practices of PG&E with respect to facilities records for its
6 natural gas transmission system pipelines.

6 6. NTSB Report

7 Following the NTSB's pipeline accident investigation and report, the NTSB concluded that
8 PG&E's practices and procedures regarding its San Bruno emergency response were deficient. As with
9 the fine, the NTSB's conclusions are part of the coherent and comprehensible story.

10 7. Milpitas Terminal

11 Finally, on the day of the San Bruno explosion, PG&E employees were working on their
12 Uninterruptable Power Supply (UPS) at Milpitas Terminal. During this work, equipment failed and gas
13 surged up Line 132. The NTSB investigation identified several deficiencies in the work clearance
14 process used for the Milpitas Terminal electrical work.

15 The preceding three categories of relevant evidence (categories 5, 6, and 7) are intertwined with
16 the government's evidence that PG&E intentionally obstructed the NTSB's investigation into the cause
17 of the San Bruno explosion. The explosion in San Bruno not only led to the NTSB investigation, but
18 also initiated this federal criminal investigation. Evidence regarding the explosion, the NTSB's and
19 CPUC's investigations and findings concerning the explosion, as well as the events leading up to the
20 explosion (i.e. the Milpitas station) are an essential part of the government's story of this investigation.
21 This evidence provides justification not only for the existence of the Pipeline Safety Act, but also strict
22 adherence to its regulations.

23 Motion in Limine #8 to Declare Certain Government Witnesses As Hostile, and
24 Permit the Government to Cross Examine Its Own Witnesses

25 The United States respectfully submits this motion in limine to declare certain government
26 witnesses as hostile, and therefore permit the government to cross examine its own witnesses. The
27 Court should declare that witnesses currently employed by PG&E or employed by a PG&E contractor
28 are hostile. Not only have many of these witnesses refused to meet with the United States prior to trial,

1 but also they have a financial interest in the outcome of this trial. Additionally, the corporate defendant
2 has offered to pay for counsel for its current and former employees. While this action is proper grounds
3 for a bias inquiry by the government, it is also likely to invite hostility to the government and
4 concomitant allegiance to the company. Since these witnesses are currently employed by the defendant
5 or by a contractor of the defendant, the financial interests of these witnesses converge with those of the
6 defendant.

7 Decisions regarding the mode and order of interrogating witnesses, and the use of leading
8 questions, are committed to the discretion of the trial judge by Federal Rule of Evidence 611. “The
9 matter clearly falls within the area of control by the judge over the mode and order of interrogation and
10 presentation and accordingly is phrased in words of suggestion rather than command.” Fed. R. Evid.
11 611(c), Adv. Comm. N. The Court, in the exercise of its sound discretion, may permit a party to cross
12 examine its own witness upon an adequate showing of surprise, or that the witness is hostile to the party
13 calling him or unwilling to testify. *See generally United States v. Karnes*, 531 F.2d 214, 217 (4th Cir.
14 1976); *United States v. Holsey*, 414 F.2d 458, 461 (10th Cir. 1969). “The credibility of a witness may
15 be attacked by any party, including the party calling him.” Fed. R. Evid. 607.

16 Witness hostility comes in many forms. The trial court is in the best position to determine
17 whether a witness is hostile, and great latitude should be used. *Lerma v. United States*, 387 F.2d 187
18 (10th Cir. 1968). Sometimes hostility is characterized by witness demeanor. *Thomas v. Conemaugh*
19 *Black Lick R.R.*, 133 F. Supp. 533 (W.D. Pa. 1955). Sometimes hostility is characterized by a witness’s
20 reluctance to testify and role in the offense. *United States v. Duff*, 332 F.2d 702 (6th Cir. 1964).
21 Sometimes hostility is characterized by a witness’s adverse interests. *London Guarantee & Acc. Co. v.*
22 *Woelfle*, 83 F.2d 325 (8th Cir. 1936). Government witnesses that are currently employed by the
23 defendant have interests that are adverse to the government, and may be declared hostile. *Garipey v.*
24 *United States*, 189 F.2d 459, 464 (6th Cir. 1951) (defendant’s employee declared hostile); *Fields v.*
25 *United States*, 164 F.2d 97, 100 (D.C. Cir. 1947) (defendant’s business associate declared hostile).

26 The government expects that many of its witnesses who are current PG&E employees will
27 minimize their knowledge of corporate affairs and even testify differently than they did in the Grand
28 Jury in an effort to defend their employer and protect their financial interests. Should a trial witness

1 testify inconsistently with that witness's testimony in the Grand Jury, the United States will seek to
2 introduce the Grand Jury testimony as substantive evidence. Fed. R. Evid. 801(d)(1)(A). *See United*
3 *States v. Champion International Corporation*, 557 F.2d 1270 (9th Cir. 1977); *United States v. Morgan*,
4 555 F.2d 238 (9th Cir. 1977). For these reasons, the government requests permission to treat them as
5 hostile.

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Dated: January 11, 2016

Respectfully submitted,

BRIAN J. STRETCH
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/s/

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