

ALJ/XJV/avs

**PROPOSED DECISION Agenda ID #11979 (Rev. 1)
Adjudicatory
4/4/13 Item 26**

Decision **PROPOSED DECISION OF ALJ VIETH** (Mailed 3/5/2013)

BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

Order Instituting Investigation on the
Commission's Own Motion into the Operations
and Practices of Pacific Gas & Electric Company
regarding Anti-Smart Meter Consumer Groups.

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

**DECISION APPROVING SETTLEMENT,
AS MODIFIED BY SETTLING PARTIES**

DECISION APPROVING SETTLEMENT, AS MODIFIED BY SETTLING PARTIES

1. Summary

We approve a settlement of this investigation offered jointly by three parties: the predecessor of our Safety and Enforcement Division (SED), known as the Consumer Protection and Safety Division, Pacific Gas and Electric Company (PG&E) and The Utility Reform Network. Based on the entirety of the record established to date, and after thorough consideration of the settling parties' arguments and the opposition by EMF Safety Network, Californians for Renewable Energy, Inc., Joshua Hart and Ecological Options Network, we determine that the settlement, as slightly modified by the settling parties in their reply comments, is a reasonable, efficient and timely resolution of this investigation.

As described in greater detail in today's decision, the settlement requires PG&E to do four things: pay \$390,000 to the general fund of the State of California; carry through with improvements to the social media components of its employee policies and with education about those policies; sponsor three regulatory industry trainings, which a third-party will teach; and verify the completion of these things to SED by 2015.

2. Jurisdiction; Burden of Proof; Standard of Proof

The Commission filed this Order Instituting Investigation (OII) on April 19, 2012, thereby formally commencing an investigation into specified matters that concern Pacific Gas and Electric Company (PG&E). The

Commission's jurisdiction to adjudicate this investigation is clear. PG&E is a public utility in California and under Public Utilities Code § 701,¹ which is broadly applicable to every public utility in this state, the Commission "may supervise and regulate ... and do all things ... which are necessary and convenient" in the exercise of its lawful authority over such entities.

The probable cause for this investigation is a February 3, 2012, report (staff report) by the predecessor of the Commission's Safety and Enforcement Division, which at that time was named the Consumer Protection and Safety Division (CPSD). CPSD and the other parties that have intervened against PG&E have the burden of proof and the standard of proof is a preponderance of the evidence. (See *Office of Ratepayer Advocates v. Pacific Bell Telephone Company*, Decision (D.) 01-08-067 at 6.) PG&E has the burden of proof as to its affirmative defenses.

3. Background and Procedural History

The staff report summarizes CPSD's investigation into the activities of William Devereaux (Devereaux), who from October 2009 through October 2010 was the "public face" of PG&E's SmartMeter™ Program. (OII at 2, quoting the staff report, Attachment 2.) Devereaux resigned from PG&E in November 2010, after it was disclosed in the press that he had used a false name to infiltrate online discussion groups hosted by several anti-smart meter activist organizations.

¹ All subsequent statutory references are to the Public Utilities Code unless otherwise indicated.

The OII describes the investigation's scope as follows:

The scope of the issues in this proceeding is preliminarily determined to be whether PG&E violated provisions of the PU [Public Utilities] Code, general orders, decisions, other rules, or requirements identified in this Order, and/or engaging in unreasonable and/or imprudent practices related to these matters, and why the Commission should not impose penalties. This ordering paragraph suffices for the "preliminary scoping memo" required by Rule 7.1(c). (OII at 7.)²

The text of the OII explains the Commission's purpose with greater specificity and states that the investigation seeks to:

- (1) determine whether PG&E violated any provision of the PU [Public Utilities] Code, general orders, other rules, or requirements as a result of the improper activities of William Devereaux or any other PG&E representative regarding anti-smart meter consumer groups;
- (2) determine whether PG&E management was aware of Mr. Devereaux's activities;
- (3) determine the extent of Mr. Devereaux's improper activities regarding anti-smart meter consumer groups.
- (4) determine whether fines and/or other remedial actions should be imposed on PG&E. (OII at 5.)

² The OII refers to Rule 7.1 in the Commission's Rules of Practice and Procedure as are all subsequent references to a Rule or Rule, unless otherwise indicated.

The text of the OII also specifically charges that Devereaux's actions, as detailed in the staff report, violated §451 and that his actions should be deemed the actions of PG&E under § 2109. The OII's Ordering Paragraph 3 provides notice that fines may be imposed under §§ 2107 and 2108.

Following a prehearing conference on June 25, 2012, and after considering the concerns and objectives various parties raised there, the assigned Commissioner issued a scoping memo as required by §1701.2.³ The scoping memo effectively restates the OII's scope in a single place and refines the scope, but does not broaden it. The scoping memo describes the scope as:

- (1) Whether PG&E should be found to have violated §§ 451 and 2109 as a result of the improper activities of Devereaux, or any other PG&E employee or representative, regarding anti-smart meter consumer groups;
- (2) Whether PG&E management was aware of Devereaux's activities, or the activities of any other employee or representative, and if so, whether it took appropriate action once it became aware of those activities;
- (3) The extent of Devereaux's improper activities regarding anti-smart meter consumer groups, and the extent of such activities by any other PG&E employee or representative; and
- (4) Whether fines and/or other remedial actions should be imposed on PG&E, and if so, how any fines should be calculated and/or how other remedies should be determined. (Scoping memo at 3-4.)

³ *Assigned Commissioner's Ruling and Scoping Memo*, July 25, 2012.

The scoping memo declines to incorporate two additional groups of issues: whether remediation should be ordered for invasion of privacy and divulging anti-smart meter campaign strategy; and whether PG&E failed to file ex parte reports in Application (A.) 10-04-018, and if so, the effect of such omission.⁴ The scoping memo determines that these issues are beyond the scope of this investigation, points out that the Commission generally lacks jurisdictional authority to order money damages or other remedies for tortious harm to individuals, and observes that concerns about ex parte communications in A.10-04-018 should be raised in that docket in accordance with procedural options available under the Commission's Rules of Practice and Procedure.

The scoping memo also sets a schedule for distribution of prepared testimony and for evidentiary hearing, though subsequently that schedule was revised. Discovery commenced, a law and motion hearing to resolve confidentiality issues associated with the staff report was set for July 13, 2012, and an e-mail ruling by the Administrative Law Judge (ALJ) on July 26, 2012, extended the dates for distribution of prepared testimony. A joint ruling on July 31, 2012, received the staff report in evidence as Exhibit 1 and ordered limited portions to be placed under seal as Exhibit 1-C.⁵ Thereafter, upon

⁴ Network filed A.10-04-018 on April 6, 2010, seeking modification of two earlier decisions, D.06-07-027 and D.09-12-001, which had approved PG&E's smart meter program. Network sought to modify the decisions to reopen review of smart meters generically and to consider, among other things, the issue of health impacts produced by radio frequency emissions from smart meters. By D.10-12-001, the Commission dismissed Network's application and Network filed for rehearing of that dismissal. The Commission's ultimate decision in the docket, D.12-06-017, modified D.10-12-001 slightly and then denied rehearing.

⁵ *Joint Ruling of Assigned Commissioner and Assigned Administrative Law Judge on Public Release of Staff Report and Related Motions*, July 31, 2012.

receiving e-mail notifications that parties desired to hold a settlement conference and wished to further delay distribution of prepared testimony pending additional discovery, on August 9, 2012, the ALJ suspended the schedule by e-mail ruling.

On November 26, 2012, three parties filed a joint motion for adoption of their settlement: CPSD, PG&E and The Utility Reform Network (TURN). The remaining four parties did not join in the settlement: EMF Safety Network (Network), Californians for Renewable Energy, Inc. (CARE), Joshua Hart (Hart), and Ecological Options Network (EON).

On November 30, 2012, CARE filed two motions. One motion seeks official notice of a superior court complaint filed by Network, Hart, EON and several other named plaintiffs against PG&E and Devereaux on November 5, 2012.⁶ The other motion seeks to suspend this investigation while the superior court action proceeds. On December 26, 2012, Network and jointly, CARE, Hart and EON, filed oppositions to the proposed settlement and CARE, Hart and EON concurrently filed a motion to file parts of their opposition under seal. CPSD, PG&E and TURN filed joint reply comments on January 15, 2013.

On January 24, 2013, the ALJ held a second law and motion hearing. At the hearing, the ALJ directed CARE, Hart and EON to amend their December 6, 2013, motion to clarify what in their opposition they were seeking to file under seal and why that material should be sealed; she also directed them to provide the Docket Office with an unredacted version of the material they sought to file under seal (that is, any text redacted from the public version of

⁶ *Sandra Maurer, et al. v. PG&E et al.*, Superior Court of the City and County of San Francisco, CGC-12-52581, November 5, 2012.

their opposition), consistent with established Commission procedure. By ruling on March 5, 2013, the assigned Commissioner and ALJ ordered the filing under seal of limited portions of the CARE, Hart and EON opposition.

4. Discussion

Below we grant CARE's motion for official notice of the complaint filed against PG&E and Devereaux in the San Francisco superior court; we deny CARE's motion to suspend this investigation; and after reviewing the settlement sponsored by TURN, CPSD and PG&E on the merits, we grant their motion for approval of the settlement and approve the settlement as modified in their joint reply comments. We do this after considering the entirety of the record before us, which includes the three documents attached to the settlement, declarations under penalty of perjury attached to various pleadings, and the like. Though the settlement includes an agreement among the settling parties that the attachments to the settlement should be identified and formally received in evidence (Section 3 of the settlement, titled Record), procedurally that is unnecessary, given the nature of those documents. We have appended the settlement to today's decision as Attachment A.

4.1. Motion for Official Notice of Superior Court Lawsuit; Motion to Suspend Investigation

CARE's unopposed November 30, 2012, motion for official notice asks us to recognize Complaint CGC-12-52581, filed November 5, 2012, in the San Francisco superior court. That complaint seeks damages from PG&E and Devereaux for alleged harm to Network, Hart, EON and several other named plaintiffs who are not parties to this investigation. As CARE argues, Rule 13.9 permits the Commission to take official notice of matters that California courts may judicially notice, pursuant to Evidence Code § 450 et seq. Judicial notice is mandatory in some circumstances and permissive in others. Evidence Code

§ 52(d) permits judicial notice of the “[r]ecords of (1) any court of this state or (2) any court of record of the United States or of any state of the United States.” Thus, we may take official notice of the November 5, 2012, superior court complaint and we do so to inform our review of CARE’s companion motion to suspend this investigation.

That motion, filed concurrently on November 30, 2012, argues that this investigation should be suspended while Complaint CGC-12-52581 proceeds in the San Francisco superior court. CARE contends that because the complaint alleges causes of action under Business and Professions Code § 17200, which CARE states only the courts may enforce, the Commission’s own investigation into alleged violations of the Public Utilities Code cannot proceed. CPSD, which filed an opposition to the motion on December 17, 2012, counters that CARE’s argument is baseless. CPSD is correct that the filing of a complaint in a superior court of this state does not divest this Commission of its lawful jurisdiction under the Public Utilities Code. Section 1759 unequivocally provides:

No court of this state, except the Supreme Court and the court of appeal, to the extent specified in this article, shall have jurisdiction to review, reverse, correct, or annul any order or decision of the commission or to suspend or delay the execution or operation thereof, or to enjoin, restrain, or interfere with the commission in the performance of its official duties, as provided by law and the rules of court.

The OII and scoping memo clearly define the focus of this investigation within the context of our jurisdiction to enforce § 451, which applies broadly to public utility charges, service and safety, and to order penalties for established violations under the authority of §§ 2107, 2108 and 2109. CARE’s motion to suspend this investigation should be denied.

4.2. Motion for Approval of Settlement: Standard for Review

By motion filed November 26, 2012, CPSD, PG&E, and TURN seek approval of the settlement filed as an attachment to their motion. Rule 12.1(d) sets forth the standard for approval of settlements and governs our review here. Rule 12(d) provides: “The Commission will not approve settlements, whether contested or uncontested, unless the settlement is reasonable in light of the whole record, consistent with law, and in the public interest.”

Below we review the settlement provisions, and the parties’ arguments in support and in opposition.

4.2.1. Settlement Provisions

Though the settlement is appended to today’s decision, we summarize the material provisions here. Section 1 of the settlement (titled Recitals) begins with the undisputed facts that underlie this investigation:

- Various news media reported, on about November 9, 2010, that Devereaux, who was then Senior Director of PG&E’s SmartMeter™ Program, “used a false name to join some online, e-mail-based list serves that are sponsored by groups that advocate and organize against the use and installation of smart meters”; (Attachment A, Section 1.2)
- PG&E contemporaneously initiated an internal investigation; and
- Devereaux resigned from PG&E, without severance, the next day, November 10, 2010.

However, Section 1 makes clear that the settling parties’ factual agreement reaches no further. While PG&E acknowledges that Devereaux’s “conduct was misleading” and that his “actions were wrong and in violation of PG&E’s internal Code of Conduct and Core Values,” PG&E continues to

maintain “none of its officers or senior management ... were aware of or condoned [Devereaux’s] misconduct ... [and] PG&E did not violate Public Utilities Code §§ 451, 2109, or any other statute, rule or regulation.”

(Attachment A, respectively, Sections 1.10 and 1.11) On the other hand, CPSD and TURN characterize Devereaux’s actions as indicative of “a culture at PG&E that transcends zealousness and borders on outright hostility to those parties that represent views that PG&E does not agree with.” (Attachment A, Section 1.12) PG&E specifically disputes that contention.

Section 1 also describes PG&E’s internal ethics and conflicts policies during the 2009-2010 timeframe (titled Acting with Integrity - Employee Code of Conduct), and the advice available via a PG&E employee hotline (the Ethics & Compliance Hotline), as well as the additional measures PG&E has taken since that time. We discuss these matters further in Section 4.2.3, below.

Section 2 of the settlement (titled Agreement) sets out the four things the settling parties agree that PG&E must do in resolution of this investigation, and in return for a general release:

- Make a “settlement payment” to the state’s General Fund in the amount of \$390,000. (Attachment A, Section 2.2)
- Seek permission “to sponsor three trainings, symposiums or similar events on relevant issues of social media use and proper online protocols to industry groups” at specified annual meetings of the following organizations by the end of 2015: The National Association of Regulatory Utility Commissioners (NARUC) and the Ethics and Compliance Officer Association (ECO). (Attachment A, Section 2.3) The settling parties’ reply comments amend this provision to add that

PG&E would hire “a third-party to actively teach the sponsored social media event.” (Reply at 7.)

- Continue to improve the level of employee education on appropriate use of social media by incorporating PG&E’s newly-developed Social Media Standard messages into its Code of Conduct revisions in 2012 and by “adding a new video vignette addressing social media use into its 2013 Ethics and Compliance Training. (Attachment A, Section 2.3.)
- Confirm completion of each of the three preceding things in compliance letters addressed to CPSD and served on the service list for this OII. The final letter is due by the end of 2015.

As discussed above, the settlement includes the following three documents, attached to it as Exhibits A-C:

- Exhibit A: Acting with Integrity - Employee Code of Conduct. This document, a handbook for all PG&E Corporation employees, consists of some 34 pages plus a preface, updated in March 2012. The preface is titled Message from Tony Early and Chris Johns, who are, respectively, the Chairman, CEO, and President of PG&E Corporation and the President of the utility commonly known and referred to herein as PG&E.
- Exhibit B: Social Media Standard. This seven-page document bears a 2011 copyright. The page 1 summary states that the document “describes conduct expectations for personnel engaging in social media activity” that “identifies the person’s affiliation” with any part of PG&E Corporation, including the utility or “relates in any way to PG&E’s business, employees, customers, suppliers, or competitors” and describes the target audience as “[a]ll PG&E employees and third-party

representatives, such as contractors, consultants and agents ...”

- Exhibit C: FAQs-Responsible Use of Social Media. Though separately attached to the settlement, this three-page document serves as Attachment 1 to the Social Media Standard.

The settlement also contains a number of standard provisions, including the general release (mentioned above) in Section 2.4 and the non-severability clause in Section 5.

4.2.2. Evaluation of the Settlement

We must decide whether the contested settlement, as proposed, meets the requirements established by Rule 12(d). Below we consider, separately, each of the three requirements and then discuss the remedies proposed.

First, is the settlement reasonable in light of the whole record? The record established to date consists of Exhibit 1 and Exhibit 1-C (respectively, the public and confidential versions of the staff report and its 21 attachments) and all the filings in this docket. Thus, the record includes the three attachments to the settlement (PG&E Corporation’s Employee Code of Conduct, its Social Media Standard and the FAQs on responsible social media use), as well as other documents, such as the declarations attached to various pleadings.

The staff report is comprehensive and well documented. The report establishes the undisputed facts that both underlie this investigation and form the basis for the settlement: that PG&E’s former employee, Devereaux, using a false name, joined the online discussions of several anti-smart meter activist groups and commented on several blogs opposed to smart meters. The declaration of Sandi Maurer, the director of Network and the moderator of its

discussion group, describes the incident that led to the discovery of Devereaux's ruse:

I received a request from Ralph Florea at manosota99@gmail.com to join the CA EMF Safety Network Coalition online discussion list. To ensure privacy, I moderate this group and require all participants to receive my prior approval before accessing the group. On November 4, 2010 I responded to "Ralph" to receive more information regarding his interest in the group. I received a response to this email that uncovered that Ralph was actually William Devereaux. The header of the email indicated Ralph's true identity. (Network opposition, Declaration of Maurer at paragraph 2.)

Though extensive discovery has occurred, everything apart from the undisputed facts remains subject to conjecture according to the settling parties. Their November 26, 2012, joint motion in support of the settlement (joint motion) contends that not only are the facts susceptible to different though plausible interpretations, but the law is also:

This case gives rise to reasonable and opposing interpretations of both fact and law. While a trier of fact might conclude that the alleged violations occurred, it might also conclude that the facts reflect the actions of a rogue employee acting alone and in violation of PG&E's own Code of Conduct, but not in violation of any law, rule or regulation. While each of the Settling Parties believes they would prevail if they were to litigate this matter, the Settling Parties recognize the risks inherent in litigation and, accordingly, have chosen to resolve this matter on reasonable terms that all of the Settling Parties can support. (CPSD, PG&E, TURN joint motion at 5-6., emphasis added.)

Though Network, like the other non-settling parties, subscribes to the theory that Devereaux did not act alone, Network effectively concedes that

the existing factual support for that proposition is less than persuasive. In its December 26, 2012, opposition to the settlement (Network opposition), Network argues that the Commission should hold hearings because doing so would “potentially lead to the discovery of clear evidence of senior PG&E involvement and/or knowledge through cross-examining PG&E’s sponsoring witnesses.” (Network opposition at 4.) While it is true that a hearing may yield unforeseen evidence, speculation that something new might be discovered at hearing is an insufficient reason to hold one. Procedurally, Network appears to mistake evidentiary hearings, which are a resource intensive, costly forum, for a discovery tool. They are not the same, and at the Commission, where parties are given wide latitude to design their own legitimate discovery plans, hearings should not be demanded as a substitute for discovery.

CARE, Hart and EON also argue that we should hold hearings. It is less clear whether they, like Network, hope that hearings will yield new facts to prove their theories or whether they are convinced that the facts already discovered clearly vindicate those theories. However, though they might have used their December 26, 2012, opposition to the settlement (CARE, Hart, EON opposition) as an opportunity to make an pre-trial offer of proof, nothing in that filing or any other filing alters what the other parties concede to be the circumstantial nature of the record developed to date. Neither CARE, Hart, EON, nor any other party, has shown that it holds a proverbial “smoking gun.”

For example, on the issue of whether other PG&E employees (including management) or contractors engaged in deception like Devereaux’s, Network flags PG&E’s use of the public relations firm Edelman in 2010 and characterizes Edelman’s work as “part of an on-going surveillance program” of anti-smart meter groups. (Network opposition at 2.) The other non-settling

parties assert that PG&E's internal investigation shows that "[a]t least 2 officers and 7 employees admitted in their interviews having accessed the SWM [Smart Warrior Marin] group, either at work or at home."⁷ (CARE, Hart, EON opposition, Appendix A at 19.) However, the individual quotes do not prove wrongdoing. Employees report, for example, that they "clicked on a link" or "looked at a site" or "signed up for the google alerts." (*Id.* at 19-20.) Thus, it is uncertain whether the CARE, Hart, EON opposition intends to argue that all monitoring of anti-smart meter groups by PG&E was through surreptitious means or that any kind of monitoring of anti-smart meter groups by PG&E should be found unlawful. We make no findings about Edelman or any PG&E employee, other than Devereaux, on the record before us. Nonetheless, we observe that no party has made a preliminary showing that anyone other than Devereaux used an alias to gain access to any smart meter site. We also observe that access to public sites is an activity that any member of the public may pursue. One need not be a "friend" of an organization to pull up information about it that is publicly available on the internet -- anyone with access to an internet search engine may do that. Likewise, in this country generally anyone may attend a public meeting or other public forum.

⁷ The staff report states:

Mr. Hart started the SmartWarriorMarin group [footnote omitted] in June 2010 as a moderated blog site hosted by Google. On or about September 10, 2010, [footnote omitted] under the pretense of being an activist opposed to smart meters, Mr. Devereaux joined this group to collect intelligence about views regarding smart meters for at least 2 months before he was banned from the group. [footnote omitted.] (Exhibit 1 at 5.)

The non-settling parties have made statements suggesting that some information that Devereaux obtained by ruse was available only from private online discussions. The settling parties' joint reply comments point out that controversies exist about what information was public in the summer and fall of 2010 and what information was completely private. The joint reply comments acknowledge:

PG&E disputes the fundamental premise that most of the communications at issue in the proceeding (and on which the Network and Non-Settling Parties extensively rely in their respective opposition comments) were in fact private and retrievable by Mr. Devereaux only through surreptitious means. (Joint reply comments at 3.)

Further, the declaration of PG&E's employee David Bayless, attached to the joint reply comments, includes information about two contentious events that was found through a public internet search and could be downloaded readily, at least at one time: (1) detailed discussions about smart meter presentations at city council meetings in the cities of Marina and Monterey in the fall of 2010; (2) details (date, time, location) about an anti-smart meter protest planned for October 2010 at PG&E's Rohnert Park installation yard. However, the joint reply comments also note: "[S]ome such content appears to have been removed from service or subjected to enhanced security in the last few months, further complicating any party's burden of proof." (Joint reply comments at 4.) This information suggests that establishing requisite proof at hearing is fraught with risk and that the effort, itself, could likely be quite time consuming.

On the issue of what action PG&E took after learning about Devereaux's duplicity, the record includes a variety of information.

Attachment 2 to the staff report is a memorandum summarizing the initial, internal investigation PG&E undertook after the various media news stories broke. All material information in the report is public, pursuant to the July 31, 2012 Assigned Commissioner/ALJ joint ruling. The record also includes PG&E Corporation's extensive Employee Code of Conduct, which existed before 2010, the expanded written guidance on use of social media, which PG&E prepared for inclusion in the Employee Code of Conduct in 2012, and reference to the new video vignette on social media use, which PG&E plans to introduce into its Ethics and Compliance Training in 2013. The settling parties' joint motion highlights these documents as illustrative of PG&E's positive actions to strengthen and ensure the effective communication of its corporate policies on use of social media. The joint motion also highlights the Chairman's Ethics Council, which PG&E established in 2012. The joint motion describes the purpose of Council:

to provide a new forum to discuss ethical behavior throughout the company as PG&E works to rebuild trust with our customers and communities. The Council is comprised of a cross-functional group of employees (bargaining and non-bargaining unit) and leadership who work together to explore business ethics and conduct at PG&E. (Joint motion at 7.)

Finally, there is absolutely no reason to hold hearings on issues that the OII and scoping memo do not raise. Though the focus of this investigation is PG&E and its employees and contractors, CARE, Hart and EON theorize that Commission staff were somehow part of a broader conspiracy against anti-smart meter activists. While we are uncertain, it appears this theory may have its origin in the initial, inadvertent redaction of CPSD staff names from e-mails attached to the staff report, even though at the prehearing conference CPSD

readily agreed that those names should be public. The theory seems to have been reinforced because the name of the current director of our Policy and Planning Division, who in 2010 was not a member of Commission management, received an e-mail Devereaux forwarded about the Marina city council meeting (discussed above) and responded to that e-mail with an inquiry about PG&E's smart meter program. CARE, Hart and EON copied this e-mail into their opposition, along with the charge that "[i]t can reasonably be stated that top CPUC staff - in addition to PG&E executives - had knowledge of Mr. Devereaux's deceit, but did nothing to report it or prevent it." (CARE, Hart, EON opposition at 9.)

We find these accusations about our staff to be inappropriate and highly distasteful. To be sure, the Policy and Planning Division prepared a paper on smart meters for us, but we often ask our staff to prepare papers on controversial subjects and, moreover, staff who are not subject to the ex parte rules codified at §§ 1701.1 et seq. may speak freely with utility staff, other stakeholders in our process, as well as the general public.⁸ Non-settling parties' linkage is meaningless.

We have already seen that information about the Marina council meetings was not limited to private access sources; since at least some information was publicly available, CARE, Hart and EON ascribe too much import to the purported leak to staff. Further, the theory these non-settling parties' argue seems to suggest that anyone who happens to receive an e-mail

⁸ During the course of its investigation, CPSD staff contacted staff at Network, as well as Joshua Hart. Those communications are documented in attachments to the staff report.

containing information surreptitiously obtained would always know that. Most inexplicably, the theory seems to presuppose that Commission staff have much control over the source or content of unsolicited e-mail sent to them from outside the Commission if it is not stopped by spam or malware detectors first. Gertrude Stein's famous remark seems apt here: "There is no there there."

To be sure, while this subject is entirely outside the scope of this Commission-ordered investigation, if probable cause existed for the Commission to investigate allegations of improper staff action, we would do so.

Second, is the settlement consistent with law? If this investigation were litigated further, the parties would need to brief – and the Commission would need to determine -- the applicability of § 451 to the facts established. The settling parties offer their settlement as a compromise that bridges their different views on whether the only conduct that is undisputed at present – Devereaux's use of a false name to gain access to several private discussion groups – violates § 451. The undisputed facts here present a case of first impression for the Commission since the extensive case law on § 451 does not address social media use at all, let alone for the purposes Devereaux deployed it.⁹ Section 451 broadly governs public utility rates, service and safety; in relevant part, the statute provides:

All charges demanded or received by any public utility
... for any product or commodity furnished or to be
furnished or any service rendered or to be rendered
shall be just and reasonable. Every unjust or

⁹ See for example, *OII into Cingular Wireless*, D.04-09-062, which reviews Commission decisions interpreting § 451's reasonable service mandate in the context of information provided, or not provided, to consumers in various contexts. (D.04-09-062 at 49.)

unreasonable charge demanded or received for such product or commodity or service is unlawful.

Every public utility shall furnish and maintain such adequate, efficient, just, and reasonable service, instrumentalities, equipment, and facilities ... as are necessary to promote the safety, health, comfort, and convenience of its patrons, employees, and the public.

All rules made by public utility affecting or pertaining to its charges or service to the public shall be just and reasonable.

The staff report alleges that when “Devereaux lied about his identity to infiltrate online smart meter discussion groups in order to spy on their activities and discredit their views,” his actions violated § 451. (Joint reply comments at 4.) Though PG&E admits Devereaux’s actions violated PG&E’s employee code of conduct, PG&E disputes the applicability of § 451 and contends that “imposition of penalties under § 451 for a rogue employee’s use of a false online alias would represent an unprecedented expansion” of the statute. (*Id.*)

The joint reply comments specifically assert that CPSD, TURN and PG&E negotiated their settlement in part based on what they characterize as “reasonable and opposing interpretations of law” and concluded “this proceeding is not a necessary or appropriate case with which to test the jurisdictional boundaries of § 451.” (*Id.*)

None of the non-settling parties expressly challenges the settlement as contrary to law. CARE, Hart and EON contend that the settlement fails to address all of their legal allegations and we discuss this in the context of a public interest assessment, below, together with their argument that inclusion of a general release clause (Section 2.4) somehow binds non-settling parties.

Third, is the settlement in the public interest? The settling parties' argument for approval of their settlement begins with this introductory statement:

The Settlement reflects the shared belief among CPSD, PG&E and TURN that it is a fair resolution of all issues in this Order Instituting Investigation ... and that their resources are better devoted to matters other than litigating this case. (Joint motion at 1.)

The settling parties note that when examining the factors the Commission must consider as it reviews a settlement under Rule 12.1(d),

[t]he Commission also takes into consideration a long-standing policy favoring settlements. This policy reduces litigation expenses, conserves scarce Commission resources and allows parties to craft their own solutions reducing the risk of unacceptable outcomes if litigated. (*Application of California-American Water Company*, D.10-06-038 at 36-37, citing D.05-03-022.)

Multiple decisions articulate this principal in slightly different words. Put more simply and directly, for example: "There is a strong public policy favoring the settlement of disputes to avoid costly and protracted litigation." (*Application of Pacific Gas and Electric Co.*, D.10-11-011 at 33, citing D.88-12-083, 30 CPUC2d 189, 221.)

CARE, Hart and EON object that the settlement fails to address their allegations that the conduct at issue includes violations of California Penal Code § 631, California Business and Professions Code § 17500 or other privacy-specific laws, all of which they have advanced in their superior court complaint against PG&E. They also object that including a general release provision in the settlement has the effect of precluding them from pursuing their superior court complaint. Finally, they also challenge the July 31, 2012 Assigned

Commissioner/ALJ joint ruling, which ordered that the names of a handful of non-officer level PG&E employees should be redacted from the public version of attachments to the staff report, given credible evidence of some threats against PG&E employees. All three objections are ill taken.

With respect to the first, the position taken by CARE, Hart and EON is confusing and at least partially contradictory. Their opposition appears to fault the settlement for not including relief under statutes outside the Public Utilities Code, appears to suggest that TURN's support for the settlement means little because TURN "has not claimed any damages" and then, actually recognizes that the courts are indeed the appropriate forum for litigation of that sort because "[i]nvasion of the right of privacy can be the basis for a lawsuit for damages in a court of law only [not before the Commission]." (CARE, Hart, EON opposition at 2.) With respect to the second objection, these non-settling parties either misread the settlement or misunderstand the governing law. Quite simply, CPSD, PG&E and TURN may not unilaterally extend their release to others who do not agree to it and they have not attempted to do so. The success of the superior court action filed by three of the non-setting parties is a matter for that court to determine. Regarding the third objection, while much of the evidence presented to the assigned Commissioner and ALJ concerned apparently peaceful protests, some evidence concerned threats of physical harm. The assigned Commissioner and ALJ could reasonably determine that their ruling was prudent given the facts before them and we will not reconsider their ruling.

Are the Remedies Appropriate? As outlined in greater detail above, the settlement requires PG&E to do four things: pay \$390,000 to the general fund; carry through with improvements to the social media components of its employee policies and education on those policies; sponsor three regulatory

industry trainings; and verify to CPSD (now SED) completion of these things by 2015.

For the non-settling parties, calculation of the civil penalty is a particularly contentious issue and they offer different calculation methods that result in different penalty ranges, though they all contend that \$390,000 is too low. Network's range is \$235,000 to \$9.42 million (they argue that the low end is unreasonable) and the range for the other non-settling parties is \$9.42 million to \$42 million. Network and the other non-settling parties all claim to be applying §§ 2107 and 2108, which they deem to mandate a higher penalty.

Section 2107, as effective in 2010 (the statute was amended effective January 1, 2012), provides in relevant part:

Any public utility which violates or fails to comply with any provision ... of this part [of the Public Utilities Code] ... in a case in which a penalty has not otherwise been provided, is subject to a penalty of not less than ... \$500, nor more than ... \$20,000 for each offense. (Stats. 1993, ch 222, § 1 (SB 485).)

Section 2108 provides in relevant part:

Every violation of the provisions of this part [of the Public Utilities Code] ... by any corporation or person is a separate or distinct offense, and in case of a continuing violation each day continuance thereof shall be a separate and distinct offense.

Network claims the record establishes at least 417 clear violations of the Public Utilities Code by Devereaux. Network defines a violation as "any email obtained from an anti-smart meter group that was then distributed by Mr. Devereaux" and explains that "one private email sent to two recipients would be considered two violations." (Network opposition, Declaration of Maurer at paragraph 5.) CARE, Hart and EON use a different measure than the

number of forwards; they appear to use the total number of e-mails/private posts for several private "listservs" between July and November 2010, which they calculate as 2101 messages. They reach their high-end calculation by counting 2101 violations, apparently on the assumption that Devereaux viewed or could have viewed each of the messages.

Both analyses suffer from several flaws. For one thing, they presume that the record available to us indisputably establishes that Devereaux's conduct violated § 451. However, this is a matter on which the settling parties have reached no consensus and, more importantly, one for which no clear Commission precedent exists. Additionally, the analyses presume that if the Commission were to determine Devereaux's conduct violated § 451, the Commission necessarily would quantify that violation by counting, as an individual offense, every e-mail he forwarded to someone else, or alternatively, every e-mail he could conceivably have viewed by reason of his illicit access. This is far from certain – as the Commission might find that violations should be quantified by some other measure, depending upon how persuasive it deemed the proffered evidence. Even if the Commission were persuaded that a quantification of offenses should be linked in some way to a particular e-mail count, the non-settling parties would have to persuasively establish those counts. This is all highly speculative.

On the record available to us, CPSD, PG&E and TURN argue that \$390,000 is a reasonable amount. They claim:

While it is true that PG&E is a large company with significant financial resources, given the facts of the case, the proposed penalty constitutes a significant fine that will serve as an effective general deterrent. This is particularly true in light of PG&E's view that there is a lack of any evidence that PG&E's management had

actual knowledge of Mr. Devereaux's actions.
(Joint motion at 7.)

Were PG&E's view on that point to prevail, and were it likewise to prevail on its view that Devereaux's actions, though wrong, did not constitute a violation of § 451, then one conceivable outcome is that the Commission would order no penalty under § 2107. Thus, though CARE, Hart and EON contend that \$390,000 is "grossly disproportionate to the fine that the Commission would likely impose" after hearing, that suggests an over-reliance on their own convictions, given the record available to us at present. (CARE, Hart, EON opposition at 12.)

Network does not challenge the merits of PG&E's agreement to sponsor three regulatory education programs on social media use, but does question whether PG&E should actively teach those programs; CARE, Hart and EON echo Network. In their joint reply comments, CPSD, PG&E and TURN agree that the settlement should be modified to provide that PG&E will contract with a third-party to teach the programs.

Finally, Network argues that "the settlement should at least include a public acknowledgement of [Devereaux's] wrongful acts and public apology to Network and the other victims." (Network opposition at 6.) Network and the other non-settling parties reasonably feel wronged by Devereaux's illicit access to their private online discussions and his confrontational participation, under a false name, in some of those discussions. Network and the other non-settling parties also express resentment that Devereaux maligned anti-smart meter activists as "insurgents" in e-mails he authored and we appreciate that these feelings are strongly felt. (Network opposition, Declaration of Maurer, paragraph 6.)

We observe, however, that Network and the other non-settling parties have got part of what they seek, since the settlement, which is a public document, expressly recognizes that Devereaux's conduct was wrong:

PG&E acknowledges that Mr. Devereaux was a Senior Director at PG&E from March 16, 2009 to November 10, 2010. PG&E further acknowledges his conduct was misleading, and that those actions were wrong and in violation of PG&E's internal Code of Conduct and Core Values. (Attachment A, Section 1.10.)

Prior to filing its comments on the proposed decision on March 14, 2013, PG&E had not offered a public apology as far as we are aware. Though PG&E might have done so in the earlier joint reply comments, those comments only agree that PG&E will not actually teach the regulatory programs on social media use. The proposed decision states,

We will not direct PG&E to apologize, as a forced apology is an empty one. But we observe that this seems a missed opportunity for PG&E to effectuate the Message from Tony Earley and Chris Johns that serves as a preface to the updated Employee Code of Conduct. We appreciate that the smart meter program continues to be contentious and that the non-settling parties, here, are among those who are presently suing PG&E in superior court. But having acknowledged that Devereaux's conduct was misleading and wrong, the absence of an apology is disappointing.

Little more than a week after the Commission filed the proposed decision, PG&E filed comments that state:

PG&E wishes to address this omission, and reiterates that Mr. Devereaux's conduct was wrong, in violation of our internal Code of Conduct and not in keeping with our values. We do not condone or tolerate that type of activity by any of our employees, and we

apologize sincerely to all of those affected by this regrettable incident. (PG&E comments on proposed decision at 1.)

4.2.3. Conclusion

The staff report documents an extensive investigation of the factual issues and we note that it was only after this investigation that CPSD, PG&E and TURN reached the settlement described herein. Based on the staff report and the rest of the record available to us, we are persuaded that the settling parties have carefully assessed the strengths and weaknesses of their respective burdens of proof. Their stated rationale for settlement recognizes that investigation and proof are not synonymous

Therefore, we determine that the settlement, as modified by the joint reply comments, should be approved. We conclude that the civil penalty, the requirements to finalize revisions to the employee conduct and policies manuals and to heighten employee training on social media use, and the requirement to fund the specified regulatory trainings on social media use, constitute a reasonable, efficient and timely resolution of this investigation.

5. Category and Need for hearing

The OII categorized this Investigation as adjudicatory as defined in Rule 1.3(a) and anticipated that this proceeding would require evidentiary hearings. Given the settlement and the nature of the record developed to date, it can be seen with reasonable certainty that the public interest does not require hearings. Therefore, the hearing determination is changed to state that no evidentiary hearings are necessary.

6. Comments on Proposed Decision

The proposed decision of the ALJ in this matter was mailed to the parties in accordance with § 311 and comments were allowed under Rule 14.3.

Comments were filed on March 14, 2013, by PG&E and on March 25 by Network and jointly, by CARE, Hart and EON; on April 2, 2013, PG&E filed reply comments. We have revised the proposed decision to correct typographical errors, to remove the reference to CARE as plaintiff in the superior court action (CARE is not a plaintiff), to recognize PG&E's apology and to improve clarity in a few instances. In other respects, we make no changes.

Network zealously argues that this investigation demands hearings but, in the final analysis, cannot show legal error in today's decision. Like its briefs, Network's comments attempt, unpersuasively, to distinguish *Investigation into the Operations and Practices of Qwest Communications Corporation (Qwest)*, D.06-10-027, from this investigation. In *Qwest* the Commission determined to approve a settlement endorsed by some parties, but not all, in part because the hearings a non-settling party sought would have expanded the scope, requiring extensive and expensive litigation that likely would have been unresolved at the Commission for many more months. At issue were allegations that in the course of laying its fiber optic network in two counties, Qwest had failed to follow accepted protocols applicable to discovery of Native American cultural resources in construction sites. The Commission reasoned that the settlement, which included payment of \$150,000 to the state general fund and a total of \$30,000 to one or more organizations that promote Native American cultural awareness, was in the public interest "notwithstanding the relatively modest sums Qwest has agreed to pay." (*Qwest* at 31.) While the material facts of the two investigations differ, in *Qwest* as here, the extent of wrongdoing remained disputed and was deemed to be extremely difficult of proof. While Network is correct that, unlike in *Qwest*, the non-settling parties here do not seek to expand the scope, we do not see how that is determinative, given both the proof problem

and the fundamental dispute over the applicability of § 451. Network reiterates that it should be permitted to present at hearing the “overwhelming circumstantial evidence of senior PG&E involvement in the case.” (Network comments on proposed decision at 4.) We have carefully considered all of the record available to us; in our view, what we have seen is far from “overwhelming” and, coupled with the other issues discussed previously, that is the problem.

The joint comments of CARE, Hart and EON also largely repeat arguments in their briefs. New, however, is the rather novel but unpersuasive argument that approval of the settlement does not conserve resources because it effectively requires non-settling parties to pursue in superior court their damage claims and the theories on which damages are based. The Commission has extremely limited authority to award damages and the scoping memo apprised the parties of that reality early on. Superior court is precisely where these theories must be litigated, if they are going to be pursued.

7. Assignment of Proceeding

Michel Peter Florio is the assigned Commissioner and Jean Vieth is the assigned Administrative Law Judge in this proceeding.

Findings of Fact

1. CARE’s November 30, 2012, unopposed motion for official notice seeks official notice of a complaint against PG&E and Devereaux for damages that Network, Hart, EON and other named plaintiffs filed November 5, 2012, in the San Francisco superior court.

2. The material, undisputed facts are these: various news media reported, on about November 9, 2010, that Devereaux, who was then Senior Director of PG&E’s SmartMeter™ Program, used a false name to join some online,

e-mail-based “listservs” sponsored by groups that advocate and organize against the use and installation of smart meters; PG&E contemporaneously initiated an internal investigation; and Devereaux resigned from PG&E, without severance, the next day, November 10, 2010. There is no consensus among the parties on any other facts.

3. PG&E acknowledges that Devereaux’s actions were wrong and apologizes for his actions.

4. The settlement executed by CPSD, PG&E and TURN, as modified in their joint reply comments, requires PG&E to do four things: pay \$390,000 to the general fund of the State of California; carry through with improvements to the social media components of its employee policies and with employee education about those policies; sponsor three regulatory industry trainings, which a third-party will teach; and verify the completion of these things to SED by 2015.

5. The record established to date consists of Exhibit 1 and Exhibit 1-C and all the filings in this docket, including the three attachments to the settlement and the declarations attached to various pleadings. The record on the issues before the Commission consists, at most, of circumstantial evidence.

6. No party has made a preliminary showing that anyone other than Devereaux used an alias to gain access to any smart meter website.

7. There is no evidence of a Commission staff conspiracy against anti-smart meter groups.

8. The Bayless declaration, attached to the joint reply comments, includes information about two contentious events that was found through a public internet search and could be downloaded readily, at least at one time (the Marina/Monterey council meetings and the protest planned for PG&E’s Rohnert Park installation yard).

9. If PG&E were to prevail on its affirmative defense that Devereaux acted alone and that his actions, though wrong, did not constitute a violation of § 451, then one conceivable outcome is that the Commission would order no penalty under § 2107.

Conclusions of Law

1. The Commission has jurisdiction to adjudicate this investigation under § 701 and the standard of proof is the preponderance of the evidence.

2. The OII and scoping memo clearly define the focus of this investigation within the context of the Commission's jurisdiction to enforce § 451, which applies broadly to public utility charges, service and safety, and to order penalties for established violations under the authority of §§ 2107, 2108 and 2109.

3. CARE's November 30, 2012, unopposed motion for official notice may be granted since Evidence Code § 452(d) permits judicial notice of the records of any court of this state.

4. CARE's November 30, 2012, motion to suspend this investigation while its superior court action proceeds should be denied since pursuant to § 1759, the filing of a complaint in a superior court of this state does not divest this Commission of its lawful jurisdiction.

5. The July 31, 2012 Assigned Commissioner/ALJ joint ruling, which ordered that the names of a handful of non-officer level PG&E employees should be redacted from the public version of attachments to the staff report given credible evidence of some threats against PG&E employees, should not be revisited.

6. The undisputed facts present a case of first impression for the Commission since the extensive case law on § 451 does not address social media use at all, let alone for the purposes Devereaux deployed it.

7. Following upon extensive discovery that produces inconclusive results, speculation that something new might be discovered at hearing is an insufficient reason to hold a hearing, which is resource intensive (both costly and time consuming for the Commission and all parties). There is absolutely no reason to hold hearings on issues that the OII and scoping memo do not raise.

8. The settlement's general release applies only to the settling parties.

9. The settlement, as modified by CPSD, PG&E and TURN in their joint reply comments, meets the requirements of Rule 12.1(d).

10. Evidentiary hearings are not necessary.

11. The settlement, as modified by CPSD, PG&E and TURN in their joint reply comments, should be approved.

12. This decision should be effective immediately to provide certainty to the parties, permit PG&E to effectuate the terms of the settlement promptly and to ensure the timely resolution of this investigation.

O R D E R

IT IS ORDERED that:

1. The settlement of the Consumer Protection and Safety Division (the predecessor of the Safety and Enforcement Division), Pacific Gas and Electric Company and The Utility Reform Network is approved, as modified by these three parties in their *Joint Reply Comments*, filed on January 15, 2013.

2. The unopposed November 30, 2012, motion filed by Californians for Renewable Energy, Inc. for official notice of Complaint CGC-12-52581, filed November 5, 2012, in the Superior Court of the City and County of San Francisco, is granted.

3. The November 30, 2012, motion filed by Californians for Renewable Energy, Inc. for suspension of this investigation is denied.

4. The hearing determination is changed to no evidentiary hearings necessary.

5. Investigation 12-04-010 is closed.

This order is effective today.

Dated _____, at San Francisco, California.

ATTACHMENT A