

Decision **PROPOSED DECISION OF ALJ YACKNIN** (Mailed 10/16/14)

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

Application of Pacific Gas and Electric Company Proposing Cost of Service and Rates for Gas Transmission and Storage Services for the Period of 2015-2017. (U39G)

Application 13-12-012  
(Filed December 19, 2013)

And Related Matter.

Investigation 14-06-016

**DECISION AFFIRMING LAW AND MOTION JUDGE’S RULING IMPOSING SANCTIONS FOR VIOLATION OF EX PARTE RULES**

**Summary**

This decision affirms the ruling of the Law and Motion Administrative Law Judge imposing sanctions on Pacific Gas and Electric Company for engaging in ex parte communications regarding the assignment of this proceeding to a particular Administrative Law Judge in violation of Rule 8.3(f) and Rule 1.1. of the Commission’s Rules of Practice and Procedure, with minor revisions as discussed herein.

The ruling is attached.

**Background**

On September 15, 2014, Pacific Gas and Electric Company (PG&E) filed its “Notice of Improper Ex Parte Communications” in this proceeding. The PG&E notice attaches e-mails dated from January 9 to January 29, 2014, between PG&E’s Senior Vice-President of Regulatory Affairs Brian Cherry and the advisor

to Commission President Peevey, Carol Brown; between Cherry and Commissioner Florio; and between Cherry and President Peevey regarding the assignment of this proceeding to particular Administrative Law Judges and pressing for the assignment of this proceeding to Judge John S. Wong. In several of the e-mails, Cherry objects to one judge because "I'm not sure we could get someone worse," and to another judge for having "a history of being very hard on us" and having "screwed us royally."

By ruling dated September 17, 2014, the Law and Motion Judge<sup>1</sup> ordered PG&E to appear and show cause why it should not be held in contempt of the Commission and sanctioned for violating Rules 1.1 and 8.3(f) of the Commission's Rules of Practice and Procedure. Rule 1.1 requires, in part, that any person who transacts business with the Commission agrees "to maintain the respect due to the Commission, members of the Commission and its Administrative Law Judges." Rule 8.3(f) expressly provides, "Ex parte communications regarding the assignment of a proceeding to a particular Administrative Law Judge, or reassignment of a proceeding to another Administrative Law Judge, are prohibited." A Law and Motion hearing on the order to show cause was held on October 7, 2014.

By ruling dated October 16, 2014, the Law and Motion Judge found PG&E in contempt for violating Rules 1.1 and 8.3(f), and sanctioned PG&E by banning PG&E from engaging in ex parte communications with Commissioners or their advisors other than all-party meetings, and subject to additional restrictions on

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<sup>1</sup> After consultation with the Acting Chief Judge, and to avoid any appearance of impropriety in its handling, then-assigned Administrative Law Judge Wong referred this matter to Administrative Law Judge Yacknin in her capacity as Law and Motion Administrative Law Judge. (See Rule 11.17.)

communications, regarding this or any other ratesetting or adjudicatory proceeding before the Commission, for a one-year period or until the resolution of this proceeding, whichever is later.

Noting that the serious nature of this matter, as well as the public interest in preserving the integrity of Commission proceedings, presented extraordinary circumstances where a prompt decision is necessary in order to promote substantial justice, the Law and Motion Judge referred her ruling to the Commission for interlocutory review and decision. (See Rule 13.6(c).)

This is that decision.

### **Discussion**

We affirm the Law and Motion Judge's ruling.

There is no dispute that PG&E's e-mail correspondence constituted ex parte communications regarding the assignment of a proceeding to a particular Administrative Law Judge and reassignment of a proceeding to another Administrative Law Judge in violation of Rule 8.3(f). In her ruling, the Law and Motion Judge determined the appropriate sanction for these violations by applying the Commission's established principles used in assessing sanctions as set forth in the Affiliate Rulemaking Decision, Decision (D.) 98-12-075:

- What harm was caused by virtue of the violation?
- What was the utility's conduct in preventing, detecting, correcting, disclosing, and rectifying the violation?
- What amount of fine will achieve the objective of deterrence based on the utility's financial resources?
- What fine or sanction has the Commission imposed under reasonably comparable factual circumstances? And,

- Under the totality of circumstances, and evaluating the harm from the perspective of the public interest, what is the appropriate fine or sanction?

With respect to the harm caused by virtue of the violation, the Law and Motion Judge found the offense to be extremely severe, and we agree. As she noted, the Commission has held that violations which harm the integrity of the regulatory process by “disregarding a statutory or Commission directive, regardless of the effects on the public, will be accorded a high level of severity.” (See D.98-12-075 at 36.) PG&E’s actions severely harmed the integrity of the regulatory process. As the Law and Motion Judge stated in her ruling:

It is not merely the fact that PG&E violated an ex parte rule, although that is serious enough: The very purpose of the ex parte rules is to ensure the integrity of the regulatory process by providing a level playing field and transparency, and PG&E’s illegal ex parte communications thwart these purposes.

But PG&E’s violations of the ban on ex parte communications regarding the assignment of particular judges are particularly egregious because they impugn the character of the Commission’s Administrative Law Judges by suggesting that they are unfair and biased, whether in favor of PG&E or against it, or that they lack judicial independence in the exercise of their role. These are not trivial charges: Pursuant to Government Code § 11475, the Commission’s administrative law judges are subject to most of the Judicial code of Ethics, including Canon 1, “A judge shall uphold the integrity and independence of the judiciary,” and Canon 3, “A judge shall perform the duties of judicial office impartially and diligently.” PG&E’s cavalier insinuations that the Commission’s judges violate the judicial canons disrespects the Commission and its judges in violation of Rule 1.1.

(Application (A.) 13-12-012/Investigation (I.) 14-06-016, Law and Motion Administrative Law Judge’s Ruling, October 16, 2014, at 5-6.)

With respect to PG&E's conduct in preventing, detecting, correcting, disclosing, and rectifying the violation, the Law and Motion Judge noted that PG&E self-initiated the review of years of communications with the Commission that revealed the e-mail communications that are the subject of the order to show cause; it self-reported these violations within less than two months of when it undertook the review; it discharged its Vice President of Regulatory Affairs (who engaged in the improper communications), his supervising Senior Vice President and his associate Vice President of Regulatory Proceedings and Rates; it reconfigured the chain of authority to have that the new Senior Vice President of Regulatory Affairs report directly to PG&E's president; it stated its intention to create the new role of chief regulatory compliance officer to oversee compliance with the ex parte requirements and to have that position report to PG&E's Chief Executive Officer and to the Audit Committee of PG&E Corporation's Board of Directors; it engaged Ken Salazar, an attorney with a resume that includes several state and federal governmental positions, as special counsel on regulatory compliance matters to assist in developing a "best-in-class regulatory compliance model;" and it stated its intention to implement additional, mandatory training for all employees who routinely interact with PG&E's regulators. The Law and Motion Judge found these actions to be "as strong a remedy as the company could take internally," and we agree.

With respect to Commission precedent in sanctioning violations of the ex parte rules, the Law and Motion Judge identified five cases in which the Commission imposed sanctions for ex parte violations:

- Where two utilities in an adjudicatory proceeding violated the ban against ex parte communications by participating in two separate ex parte meetings, each with two Commissioners' advisors, the Commission fined them each \$20,000 per meeting.

(D.07-07-020 as modified by D.08-06-023 [Cox Communications and SBC Communications].)

- Where one utility violated the ban on ex parte communications after the conduct of a ratesetting deliberative meeting by sending a letter to five Commissioners and six of their advisors (which the Commission counted as 11 violations), and another by leaving a voicemail for a Commissioner's advisor, the Commission fined them \$2,000 and \$1,000, respectively, per violation. (D.02-12-003 [AT&T Communications and WorldCom, Inc].)
- In an adjudicatory proceeding in which a party sent a written ex parte communication to all Commissioners (and concurrently served it on all parties), the Administrative Law Judge chastised the party and no penalty was imposed. (May 3, 2002, Administrative Law Judge's Ruling, I.00-11-052 [Qwest Communications].)
- In a ratesetting proceeding in which the utility failed to report its ex parte communications with each of the Commissioners' energy advisors, the Administrative Law Judge required the utility to file notice of its ex parte communications and to retain an independent firm, at its shareholders' expense, to conduct four training sessions on Rule 1.1 and Article 8 of the Rules of Practice and Procedure, and no penalty was imposed. (February 16, 2012, Joint Assigned Commissioner and Administrative Law Judge's Ruling, A.08-05-022 et al. [Southern California Gas Company].)
- And, in a ratesetting proceeding in which PG&E met with two Commissioners and their advisors without providing the requisite three-day advance notice of the grant of the individual meetings with the Commissioners or post-meeting notices of the ex parte communications, PG&E was required to develop and institute a control system which reflects best practices for compliance with the ex parte rules, and no penalty was imposed. (D.08-01-021 [PG&E].)

In addition, the Law and Motion Judge noted that the Chief Administrative Law Judge imposed enhanced restrictions on ex parte communications in this proceeding,<sup>2</sup> and the assigned Administrative Law Judge imposed reporting requirements on other communications with Commission staff in the Line 132 investigations, in response to PG&E's notice of its January 2014 e-mail communications. (A.13-12-012/I.14-06-016, Chief Administrative Law Judge's Ruling, September 25, 2014; I.12-01-007, I.11-02-016, and I.11-11-009, Administrative Law Judge's Ruling, September 24, 2014.)

With respect to the deterrence value of a sanction, the Law and Motion Judge noted that, pursuant to Pub. Util. Code § 2107, the maximum fine for the 17 identified ex parte violations would be \$850,000.<sup>3</sup> Citing to the Commission's most recent statement on the question, the Law and Motion Judge determined that the deterrence value of a fine of this magnitude is minimal:

In terms of financial resources, PG&E is an extremely large company with ownership equity in the billions. The penalty range of \$500 to \$20,000 per transaction is a small sum for any deterrence value – if deterrence means avoiding the financial harm of the penalty. We could therefore impose the maximum penalty with little likelihood of a discernable financial impact on PG&E." (D.08-01-021 at 14.)

The Law and Motion Judge determined that, in contrast,

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<sup>2</sup> The ruling and this decision do not lift the Chief Administrative Law Judge's ruling.

<sup>3</sup> Pub. Util. Code § 2107 provides that, "*in a case in which a penalty has not otherwise been provided*, [the utility] is subject to a penalty of not less than five hundred dollars (\$500), nor more than fifty thousand dollars (\$50,000) for each offense." (Emphasis added.) We note that Commissioner Peterman's alternate proposed decision on this matter calculates the maximum penalty to be \$1,050,000. While we agree that this is the correct calculation, it does not change our conclusion that the ex parte ban and communications reporting requirement (as revised) are a more appropriate "penalty otherwise provided" than the maximum allowable monetary penalty under the statute.

[I]mposing additional ex parte restrictions should undoubtedly capture PG&E's and other parties' attention: Parties' and especially large utilities' ability to influence decision makers outside of the formal record of a proceeding is invaluable, and depriving a party of the privilege clearly demonstrates zero tolerance of its abuse. (A.13-12-012/I.14-06-016, Law and Motion Administrative Law Judge's Ruling, October 16, 2014, at 13.)

We agree.<sup>4</sup>

With respect to the totality of circumstances, the Law and Motion Judge noted that these violations follow PG&E's previous ex parte violations and its past commitment, in remedy, to develop and implement a "best-in-class regulatory compliance model" for ensuring compliance with the ex parte rules (D.08-01-021, *supra*), to no apparent avail, and that, as noticed in PG&E's October 6, 2014, update, PG&E has engaged in many other ex parte violations over the years. The Law and Motion Judge determined that these circumstances weigh toward significant sanctions beyond those imposed on the "first-time offenders" in Commission precedent.

The Law and Motion Judge considered countervailing circumstances that she deemed to bear on the appropriateness of a monetary sanction. First, she noted the Commission's pending consideration in the Line 132 investigations, I.12-01-007, I.11-02-016, and I.11-11-009, a \$1.4 billion penalty consisting of fines, disallowance and remedies for PG&E's safety violations with respect to its gas operations, and found the maximum penalty here of \$850,000 to be trivial and detracting from the Commission's consideration of a monetary penalty in those

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<sup>4</sup> We also agree that, contrary to the suggestion of The Utility Reform Network, an ex parte communication in violation of an ex parte ban does not give rise to a continuing offense pursuant to Pub. Util. Code §2108.

investigations, where the harm encompasses the loss of eight lives, personal injury, extensive economic losses, and continuing threats to public safety.

Second, the Law and Motion Judge noted that PG&E's violations of the judge-shopping prohibition were aided by a Commissioner's advisor and two Commissioners, two of whom actively engaged in the activity and the other who did not object to it, and determined that, under these circumstances, fining PG&E would appear insincere.

The Law and Motion Judge determined that, under the totality of circumstances, and evaluating the harm from the perspective of the public interest, the appropriate sanction is not to impose monetary penalties, but rather to impose significant restrictions on PG&E's ability to engage in ex parte communications and other communications with the Commission. The Law and Motion Judge ruled that, for a one-year period or until the resolution of this proceeding (whichever is later), PG&E is banned from engaging in ex parte communications with Commissioners or their advisors other than in all-party meetings, and from communicating with Commissioners or their advisors regarding procedural matters, and shall report its communications with Commission advisory staff; the ruling applies to all open Commission proceedings except quasi-legislative proceedings, and is in addition to other restrictions under the Rules of Practice and Procedure.<sup>5</sup> The Law and Motion Judge stated:

This penalty best fits the crime, it is severe in that it deprives PG&E of the incalculable benefits of being able to privately influence Commissioner votes without outside of public meetings, and it

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<sup>5</sup> E.g., Rule 8.3(b) prohibits all ex parte communications in adjudicatory proceedings.

allows PG&E – and, indeed, this Commission as well -- time to re-evaluate the critical importance of the ex parte rules and to promote internal culture change to that effect within our organizations.

I recognize that a ban on otherwise permissible ex parte communications unavoidably deprives Commissioners and their advisors of the benefit of such communications, including those who are in no way implicated in either the violations at issue or those that have since been revealed. However, this drawback is mitigated by allowing PG&E to continue to communicate with commissioners and their advisors in otherwise permissible all-party ex parte meetings. On balance, the critical public interest in restoring the integrity of the Commission’s regulatory process outweighs this limitation.

I also recognize that the effectiveness of this sanction, as with the effectiveness of all of our ex parte rules, ultimately depends on the knowledgeable and good faith efforts of the parties on both sides of the communications, by the communicators to abide by them, and by the recipients of the communications to enforce them. The sanction that I impose is, at least, designed to be simple to follow and for violations to be simple to detect. (A.13-12-012/I.14-06-016, Law and Motion Administrative Law Judge’s Ruling, October 16, 2014, at 16-17.)

We generally agree, but make the following revisions to the ruling’s ex parte communications ban and communications reporting requirements. First, we allow to PG&E participate in an individual meeting with a decision maker (as defined in Rule 8.1(b)) to the extent that a decision maker’s grant of an individual meeting with another interested person gives rise to this statutory right pursuant to Pub. Util. Code sec. 1701.3(c) and Rule 8.3(c)(2). Second, with respect to the communications reporting requirement, (1) we clarify the term “Commission staff acting in an advisory capacity” to exclude “decision makers” as defined in Rule 8.1(b) and “Commission staff of record” as defined in Rule

8.1(a), (2) we extend the time for reporting communications to three days, (3) we allow PG&E to seek a ruling from the assigned administrative law judge in the applicable proceeding exempting it from the reporting requirement upon a showing that the communications concern issues that are no longer subject to ongoing litigation, and (4) we require PG&E only to serve, but not file, its notices of communications with advisory staff, and (5) we exempt communications regarding PG&E's confidential production of computer model runs using PG&E's results of operations model pursuant to an administrative law judge ruling or Commission order (see, e.g., A.12-11-009, Administrative Law Judge Ruling Adopting Confidential Modeling Procedures, August 16, 2013.)

Finally, with respect to San Bruno and TURN's request for an order directing PG&E to produce the 65,000 e-mails to and from the Commission that PG&E referenced in its September 15, 2014, notice, and to allow parties broad discovery regarding PG&E's communications with the Commission in this and other proceedings, the Law and Motion Judge determined that a Commission proceeding is not the appropriate forum for investigating allegations of wrongful conduct by the Commission, noted that the parties have the right to seek the requested information pursuant to the Public Records Act and to pursue appropriate recourse in other forums, and denied the request. We agree.

The ruling is affirmed with the above-noted revisions.

### **Comments on Proposed Decision**

The proposed decision of the Law and Motion Judge in this matter was mailed to the parties in accordance with Section 311 of the Public Utilities Code and comments were allowed under Rule 14.3 of the Commission's Rules of Practice and Procedure. Comments were filed on November 5, 2014, by PG&E, The Utility Reform Network (TURN), the City of San Bruno (San Bruno), the

Office of Ratepayer Advocates (ORA), and Northern California Generation Coalition, and reply comments were filed on November 10, 2014, by PG&E, TURN, San Bruno and ORA.

PG&E argues that the ex parte ban upheld by the proposed decision commits legal error by depriving PG&E of its rights under Pub. Util. Code Sec. 1701.3(c) which provides that “[i]f an ex parte communication meeting is granted to any party, all other parties shall also be granted individual ex parte meetings of a substantially equal period time.” We agree, and revise the proposed decision to allow PG&E to participate in an individual meeting with a decision maker (as defined in Rule 8.1(b)) to the extent that the decision maker grants an ex parte communication meeting or call to another interested person individually, thereby giving rise to this statutory right.

PG&E does not charge legal error with respect to the proposed decision upholding the requirement that PG&E report all communications with Commission advisory staff, but it submits that it is overly broad and impracticable. We revise the proposed decision as appropriate.

TURN states that the proposed decision errs by finding “that PG&E acted as reasonably as it could” in detecting, correcting, disclosing, and rectifying the violations (Finding of Fact 6) because there is no evidence from a percipient witness as to who else at PG&E (other than those shown on the fact of the e-mails) knew about the matter or when, and the only evidence in this regard is hearsay statements made by PG&E’s counsel as reflected in Finding of Fact 4 (to the effect that PG&E did not discover the ex parte communications until its internal review initiated in response to San Bruno’s July 28, 2014, motion in the Line 132 investigations).

TURN is correct that there is no reliable evidence to address the question of who else at PG&E knew about the violations and when; however, the question is irrelevant. Pursuant to Pub. Util. Code § 2109, the acts of its officer, agent, or employee are PG&E's acts and PG&E is deemed to have had constructive knowledge of them from the time they were done. Accordingly, the proposed decision does not rely on it for purposes of reaching Finding of Fact 6 or any other purpose. However, in order to clarify this point, we modify the proposed decision to delete Finding of Fact 4.

In contrast, Finding of Fact 6 (now renumbered as Finding of Fact 5) does rely upon statement of PG&E's counsel to the effect that PG&E self-initiated the review of the emails, self-reported them, discharged its senior regulatory staff, retained Mr. Salazar, and is undertaking other internal measures such as training and monitoring efforts, as well as the notices of ex parte communications that PG&E filed in this proceeding. Although these statements are hearsay, they do not pose any reasonable subjective concern as to their accuracy, as evidenced by the fact that no party challenges them. It is reasonable to rely on them. However, the Finding of Fact 6 (now 5) overstates PG&E's actions as being "as strong as it could reasonable take internally." PG&E could conceivably take additional internal actions, including other disciplinary steps against remaining staff and officers, than they have, and there is no record basis to deem such potential additional actions as unreasonable. We modify Finding of Fact 6 (now 5) accordingly.

ORA asserts that the proposed decision commits legal error by concluding that a utility should not be fined where it is aided by Commission staff. This assertion misconstrues the ruling and the proposed decision. Pub. Util. Code § 2107 provides that, "in a case in which a penalty has not otherwise been

provided, [the utility] is subject to a penalty of not less than five hundred dollars (\$500), nor more than fifty thousand dollars (\$50,000) for each offense.”

(Emphasis added.) The ruling and the proposed decision determine that, considering the totality of circumstances including the fact that PG&E’s violations were aided by Commissioners and their staff, the ex parte ban and communications reporting requirement are a more appropriate “penalty otherwise provided” than the maximum allowable monetary penalty under the statute.

ORA identifies a typographical error, which we correct.

The remainder of the parties’ comments fails to identify legal error.

Assignment of Proceeding

Carla J. Peterman is the assigned Commissioner and Amy Yip-Kikugawa is the assigned Administrative Law Judge in these proceedings. Hallie Yacknin is the Law and Motion Judge on this Order to Show Cause.

### **Findings of Fact**

1. PG&E engaged in at least 17 ex parte communications with Commissioners or a Commissioner’s advisor regarding the assignment of this proceeding to a particular Administrative Law Judge, as reported in PG&E’s September 14, 2014, Notice of Improper Ex Parte Communications, in violation of Rule 8.3(f).

2. PG&E has engaged in many other ex parte violations over the years, as reported in PG&E’s October 6, 2014, Update Re September 14, 2014, Notice of Improper Ex Parte Communications.

3. These ex parte violations follow PG&E’s previous ex parte violations and its past commitment, in remedy, to develop and implement a “best-in-class

regulatory compliance model” for ensuring compliance with the ex parte rules, as addressed in D.08-01-021.

4. PG&E’s violations severely harmed the integrity of the regulatory process.

5. PG&E has taken and undertaken as strong as actions as it could reasonably take internally in detecting, correcting, disclosing, and rectifying the violations and preventing future violations.

6. The deterrence value of the maximum allowable penalty under Pub. Util. Code § 2107 is minimal.

7. Parties’ and especially large utilities’ ability to influence decision makers outside of the formal record of a proceeding is invaluable, and depriving a party of the privilege clearly demonstrates zero tolerance of its abuse.

8. This matter comes before the Commission as we consider, in the Line 132 investigations, I.12-01-007, I.11-02-016, and I.11-11-009, a \$1.4 billion penalty consisting of fines, disallowance and remedies for PG&E’s safety violations with respect to its gas operations, where the harm encompasses the loss of eight lives, personal injury, extensive economic losses, and continuing threats to public safety.

9. PG&E’s violations of the judge-shopping prohibition were aided by a Commissioner’s advisor and two Commissioners, two of whom actively engaged in the activity and the other who did not object to it.

### **Conclusions of Law**

1. An ex parte communication in violation of an ex parte ban does not give rise to a continuing offense pursuant to Pub. Util. Code §2108.

2. Under the totality of circumstances, and evaluating the harm from the perspective of the public interest, the sanctions imposed by the Law and Motion Judge’s ruling and as modified herein are reasonable and should be affirmed.

3. A Commission proceeding is not the appropriate forum for investigating allegations of wrongful conduct by the Commission. Parties have the right to seek information regarding such matters pursuant to the Public Records Act and to pursue appropriate recourse in other forums.

4. The Law and Motion Judge's ruling denying San Bruno's and TURN's request for an order directing PG&E to produce the 65,000 e-mails referenced in PG&E's September 15, 2014, notice, and to allow parties broad discovery regarding those and other of PG&E's communications with the Commission should be affirmed.

## O R D E R

### IT IS ORDERED that:

1. The October 16, 2014, ruling of the Law and Motion Judge finding Pacific Gas and Electric Company (PG&E) in contempt of the Commission and imposing sanctions for its violations of Rules 1.1 and 8.3(f), modified as follows, is affirmed. In addition to the ex parte restrictions and requirements of Article 8 of the Rules of Practice and Procedure and any other requirements by Commission order or ruling of an Administrative Law Judge:

a. PG&E is prohibited from engaging in any oral or written ex parte communications with commissioners or their advisors, other than in all-party meetings, in any ratesetting proceeding, except that PG&E is not banned from participating in an individual meeting with a decision maker (as defined in Rule 8.1(b)) to the extent that a decision maker's grant of an individual meeting with another interested person gives rise to this statutory right pursuant to Pub. Util. Code § 1701.3(c) and Rule 8.3(c)(2).

b. PG&E is prohibited from engaging in any communications with commissioners or their advisors that concerns any procedural issue

in a formal adjudicatory or ratesetting proceeding. PG&E may direct any such communications to the assigned Administrative Law Judge or, if none is assigned, to the Chief Administrative Law Judge.

c. PG&E shall report all communications with any Commission staff acting in an advisory capacity, including but not limited to the General Counsel, the Executive Director, Deputy Executive Directors, Division Directors, and advisory staff, regarding any substantive or procedural issue in an open formal adjudicatory or ratesetting proceeding, by serving notice of such communications on the official service list within three days of the communication. "Commission staff acting in an advisory capacity" excludes "decision makers" as defined in Rule 8.1(b) and "Commission staff of record" as defined in Rule 8.1(a).

d. Pacific Gas & Electric Company may seek a ruling from the assigned administrative law judge in the applicable proceeding exempting it from the reporting requirement upon a showing that the communications concern issues that are no longer subject to ongoing litigation.

e. Communications regarding Pacific Gas and Electric Company's confidential production of computer model runs using Pacific Gas and Electric Company's results of operations model pursuant to an Administrative Law Judge ruling or Commission order are not subject to the ex parte communications ban or communications reporting requirement.

f. These restrictions shall be in force for a period of one year or until the resolution of this proceeding, whichever is later.

2. Application 13-12-012 and Investigation 14-06-016 remain open.

This order is effective today.

Dated \_\_\_\_\_, at San Francisco, California.

# **ATTACHMENT**

**LAW AND MOTION JUDGE'S RULING IMPOSING SANCTIONS  
FOR VIOLATION OF EX PARTE RULES**

HSY/jt2 10/16/14

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

Application of Pacific Gas and Electric  
Company Proposing Cost of Service and Rates  
for Gas Transmission and Storage Services for  
the Period of 2015-2017. (U39G)

And Related Matter.

Application 13-12-012  
(Filed December 19, 2013)

Investigation 14-06-016

**LAW AND MOTION JUDGE'S RULING IMPOSING SANCTIONS  
FOR VIOLATION OF EX PARTE RULES**

## Table of Contents

<b><u>Title</u></b>	<b><u>Page</u></b>
LAW AND MOTION JUDGE’S RULING IMPOSING SANCTIONS FOR VIOLATION OF EX PARTE RULES .....	1
Summary .....	2
1. Background.....	2
2. Discussion.....	4
2.1. Harm Caused.....	5
2.2. PG&E’s Conduct .....	7
2.3. Commission Precedent.....	9
2.4. Deterrence .....	11
2.5. Totality of Circumstances .....	14
2.6. Details of Ex parte Restrictions in Sanction of PG&E.....	17
2.6.1. Duration .....	17
2.6.2. Affected Parties .....	17
2.6.3. Scope of Proceedings.....	18
2.6.4. Form of Ex parte Communications .....	19
2.6.5. Restrictions on Procedural Communications .....	19
2.6.6. Reporting of Communications with Commission Advisory Staff .....	20
2.6.7. Other Requests .....	21

**LAW AND MOTION JUDGE'S RULING IMPOSING SANCTIONS  
FOR VIOLATION OF EX PARTE RULES**

**Summary**

Pacific Gas and Electric Company is hereby found to be in contempt of the Commission for engaging in ex parte communications regarding the assignment of this proceeding to a particular Administrative Law Judge in violation of Rules 1.1 and 8.3(f) of the Commission's Rules of Practice and Procedure, and banned from engaging in ex parte communications with Commissioners or their advisors other than all-party meetings, and subject to additional restrictions on communications, regarding this or any other ratesetting or adjudicatory proceeding before the Commission, for a one-year period or until the resolution of this proceeding, whichever is later.

**1. Background**

On September 15, 2014, Pacific Gas and Electric Company (PG&E) filed its "Notice of Improper Ex parte Communications" in this proceeding. The PG&E notice attaches e-mails dated from January 9 to January 29, 2014, between PG&E's Vice President of Regulatory Affairs Brian Cherry and the advisor to Commission President Peevey, Carol Brown; between Cherry and Commissioner Florio; and between Cherry and President Peevey regarding the assignment of this proceeding to particular administrative law judges and pressing for the assignment of this proceeding to Judge John S. Wong. In several of the e-mails, Cherry objects to one judge because "I'm not sure we could get someone worse," and to another judge for having "a history of being very hard on us" and having "screwed us royally."

By my ruling dated September 17, 2014,<sup>6</sup> PG&E was ordered to appear and show cause why it should not be held in contempt of the Commission and sanctioned for violating Rules 1.1 and 8.3(f) of the Commission's Rules of Practice and Procedure. Rule 1.1 requires, in part, that any person who transacts business with the Commission agrees "to maintain the respect due to the Commission, members of the Commission and its administrative law judges." Rule 8.3(f) expressly provides, "Ex parte communications regarding the assignment of a proceeding to a particular Administrative Law Judge, or reassignment of a proceeding to another Administrative Law Judge, are prohibited."

As prescribed by the ruling, PG&E filed a timely response on October 2, 2014. The City of San Bruno (San Bruno), The Utility Reform Network (TURN) and United Energy Trading, LLC (UET) also filed timely responses.

On October 6, 2014, PG&E filed an "Update Re September 14, 2014, Notice of Improper Ex parte Communications." The update reports oral ex parte communications between Cherry and President Peevey that occurred on May 30, 2010, including communications regarding substantive issues in PG&E's 2011 General Rate Case (Application (A.) 09-12-020), PG&E's Application for Approval of 2008 Long-Term Request for Offer Results (A.09-09-021), PG&E's Application for Approval of the Manzana Wind Project (A.09-12-002), and the Energy Efficiency Risk/Reward Incentive Mechanism Rulemaking (Rulemaking (R.) 09-01-019), and, among other matters, communications soliciting PG&E's

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<sup>6</sup> After consultation with the Acting Chief Judge, and to avoid any appearance of impropriety in its handling, then-assigned Administrative Law Judge Wong referred this matter to me in my capacity as Law and Motion Administrative Law Judge. (See Rule 11.17.)

contribution toward fighting a then-pending ballot measure and a 100<sup>th</sup> anniversary celebration for the Commission. The update also reports e-mail ex parte communications between Cherry and Commissioner Florio concerning substantive issues in the Rulemaking on the Commission's Own Motion to Adopt New Safety and Reliability Regulations for Natural Gas Transmission and Distribution Pipelines and Related Ratemaking Mechanisms (R.11-02-019).

The law and motion hearing on this matter was held on October 7, 2014.

## 2. Discussion

The ruling ordering PG&E appear and show cause identified PG&E's January 2014 e-mails and associated oral communications concerning the assignment of an Administrative Law Judge to this proceeding.<sup>7</sup> There is no dispute that PG&E's e-mail correspondence constituted ex parte communications regarding the assignment of a proceeding to a particular Administrative Law Judge and reassignment of a proceeding to another Administrative Law Judge in violation of Rule 8.3(f).<sup>8</sup> As for determining the appropriate sanction for these violations, I apply the Commission's established principles used in assessing sanctions as set forth in the Affiliate Rulemaking Decision, Decision (D.) 98-12-075:

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<sup>7</sup> While the evidence that PG&E provided regarding additional ex parte violations informs this matter, due process restricts the Commission from imposing sanctions at this juncture for violations that were not noticed in the order to show cause. See, e.g., 2014 California Rules of Court, Rule 2.30(c), "[...] The court on its own motion may issue an order to show cause that must (1) state the applicable rule that has been violated, (2) *describe the specific conduct that appears to have violated the rule*, and (3) direct the attorney, law firm, party, witness, or other person to show cause why sanctions should not be imposed against them for violation of the rule." (Emphasis added.) While the California Rules of Court do not govern, they are instructive.

<sup>8</sup> TURN and San Bruno count 17 separate ex parte communications, as do I.

- What harm was caused by virtue of the violation?
- What was the utility's conduct in preventing, detecting, correcting, disclosing, and rectifying the violation?
- What amount of fine will achieve the objective of deterrence based on the utility's financial resources?
- What fine or sanction has the Commission imposed under reasonably comparable factual circumstances? And,
- Under the totality of circumstances, and evaluating the harm from the perspective of the public interest, what is the appropriate fine or sanction?

### **2.1. Harm Caused**

Violations which harm the integrity of the regulatory process by “disregarding a statutory or Commission directive, regardless of the effects on the public, will be accorded a high level of severity.” (See D.98-12-075 at 36.) PG&E's actions severely harmed the integrity of the regulatory process.

It is not merely the fact that PG&E violated an ex parte rule, although that is serious enough: The very purpose of the ex parte rules is to ensure the integrity of the regulatory process by providing a level playing field and transparency, and PG&E's illegal ex parte communications thwart these purposes.

However, while other illegal ex parte communications taint the regulatory process by improperly influencing an individual commissioner or by influencing an individual commissioner without affording other parties notice and opportunity to do the same, ex parte “judge-shopping” compromises the

integrity of the entire record of a proceeding.<sup>9</sup> Administrative Law Judges are charged with the responsibility for developing the record of the proceeding. The insinuation that an Administrative Law Judge might be assigned to a particular proceeding by virtue of being biased or lacking judicial independence poisons the entire record.

Furthermore, PG&E's ex parte communications in this matter show disrespect for the Commission and its judges. Pursuant to Government Code § 11475, and unique among the Commission and its staff, the Commission's Administrative Law Judges are subject to the California Code of Judicial Ethics and, among other things, required to uphold the integrity and independence of the judiciary, and to perform our duties impartially.<sup>10</sup> PG&E's cavalier insinuations that the Commission's judges fail to uphold the judicial canons is abhorrent and disrespectful in violation of Rule 1.1.<sup>11</sup> Finally, PG&E's assumption that it can successfully judge-shop insinuates that the Commission has little regard for due process or fair hearing.

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<sup>9</sup> Parties have the right to formally move, by filed motion on the record of the proceeding, for reassignment of an Administrative Law Judge on peremptory challenge. Rule 9.2.

<sup>10</sup> See, e.g., Canon 1, "A judge shall uphold the integrity and independence of the judiciary," and Canon 3, "A judge shall perform the duties of judicial office impartially and diligently."

<sup>11</sup> Rule 1.1. Ethics. Any person who signs a pleading or brief, enters an appearance, offers testimony at a hearing, or transacts business with the Commission, by such act represents that he or she is authorized to do so and agrees to comply with the laws of this State; *to maintain the respect due to the Commission, members of the Commission and its Administrative Law Judges*; and never to mislead the Commission or its staff by an artifice or false statement of fact or law. (CCR, Title 20, Ch. 1, Section 1.1, emphasis added.)

## 2.2. PG&E's Conduct

The Commission has held that:

A penalty must take into account the scope of a utility's investigatory efforts, level of self-reporting and cooperation, and corrective measures, to avoid the unintended consequence of discouraging such behavior in the future, for the utility being penalized as well as other utilities. We expect and demand cooperation and will reward it appropriately. (D.08-09-038 at 108.)

PG&E maintains that it voluntarily undertook a self-initiated review of years of communication with the Commission and, upon encountering the e-mails that are the subject of the order to show cause, it self-reported these violations and took swift action to make significant changes that are designed to prevent this from ever happening again: First, it discharged its Vice President of Regulatory Affairs (who engaged in the improper communications), his supervising Senior Vice President of Regulatory Affairs, and his associate Vice President of Regulatory Proceedings and Rates. Second, it named a new Senior Vice President of Regulatory Affairs and reconfigured the chain of authority to have that person report directly to PG&E's president. Third, PG&E intends to create the new role of chief regulatory compliance officer, whose mandate will be to help oversee compliance with all requirements governing PG&E's interactions with the CPUC; the position will report to PG&E's Chief Executive Officer and to the Audit Committee of PG&E Corporation's Board of Directors. Fourth, PG&E engaged Ken Salazar, an attorney with a resume that includes several state and federal governmental positions, as special counsel on regulatory compliance matters to assist in developing a "best-in-class regulatory compliance model." Fifth, PG&E intends to implement additional, mandatory training for all employees who routinely interact with PG&E's regulators. It

would appear that, as PG&E's counsel stated (with regard to the discharge of the three employees), these actions are "as strong a remedy as the company could take internally." (RT 686.)

TURN takes exception to PG&E's characterization of its response as swift: TURN contends that PG&E did not reveal its improper judge-shopping communications immediately as they claim:

You don't take these steps: You dismiss three officers; you hire Ken Salazar; you do all these other things in a manner of moments after discovering, whatever that means, these e-mails. They took their time; they got their ducks in a row; they figured out how to hire Ken Salazar, who is going to provide them political cover for all of this. And then they decided to let the rest of us in on their secret. That is what happened here. That is not acting swiftly. That is making sure you get your damage control. You consider all the PR. You get that all squared away, and then you let us know. That is not swift. That is putting the company's interest ahead of the public interest. (Reporters' Transcript (RT) Volume 11 at 732-733.)

TURN's point is well-taken, particularly here in the context of judge-shopping in an open proceeding, where earlier reporting would have allowed the Commission to take action sooner with respect to the reassignment of the Administrative Law Judge.

On the other hand, PG&E reported the communications on September 15, 2014, and explains that it did not discover them until its internal review of more than 65,000 communications with the Commission since early 2010, which PG&E states it undertook in response to San Bruno's July 28, 2014, motion in the Line 132 investigations (Investigation (I.) 12-01-007, I.11-02-016, and I.11-11-009) alleging that PG&E had violated the ex parte rules with respect to e-mails which

San Bruno had obtained through a Public Records Act request.<sup>12</sup> (RT at 700.) The two-month period that PG&E took to discover, evaluate and ultimately report its discovery does not demonstrate undue delay.

### **2.3. Commission Precedent**

Commission precedent in sanctioning ex parte violations has been to impose relatively minor fines, or none at all in favor of requiring training on ethics and the Commission's ex parte rules or a mere admonishment. Where two utilities in an adjudicatory proceeding violated the ban against ex parte communications by participating in two separate ex parte meetings, each with two Commissioners' advisors, the Commission fined them each \$20,000 per meeting. (D.07-07-020 as modified by D.08-06-023 [Cox Communications and SBC Communications].) Where one utility violated the ban on ex parte communications after the conduct of a ratesetting deliberative meeting by sending a letter to five Commissioners and six of their advisors (which the Commission counted as 11 violations), and another by leaving a voicemail for a Commissioner's advisor, the Commission fined them \$2,000 and \$1,000,

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<sup>12</sup> See July 28, 2014, Motion of the City of San Bruno For An Order To Show Cause Why Pacific Gas And Electric Company Should Not Be Held In Violation of Commission Rule of Practice And Procedure 8.3(b) (Rule Against Ex parte Communications) and for Sanctions and Fees, I.12-01-007, I.11-02-016, and I.11-11-009.

By request filed October 2, 2014, in this proceeding, San Bruno requests official notice of D.13-12-053; the Presiding Officer's Decision in I.11-02-016; the Presiding Officers' Decision in I.12-01-007, I.11-02-016, and I.11-11-009; San Bruno's July 28, 2014 motion in I.12-01-007, I.11-02-016, and I.11-11-009; San Bruno's January 17, 2014, filing in I.11-11-009; *In the Matter of Alleged Violations of Pub. Serv. Law Section 15 by Nat'l Grid*, 12-M-0366, 2012 WL 3637631 (Aug. 21, 2012); and the September 24, 2014, Administrative Law Judge Ruling in I.12-01-007, I.11-02-016, and I.11-11-009. The request is granted, except that official notice of San Bruno's motions and the Presiding Officers' Decisions (which have been appealed and, accordingly, do not have the effect of law), is limited to the existence of such court records but not the truth of the arguments and disputed facts contained in them.

respectively, per violation. (D.02-12-003 [AT&T Communications and WorldCom, Inc.].) In an adjudicatory proceeding in which a party sent a written ex parte communication to all Commissioners (and concurrently served it on all parties), the Administrative Law Judge chastised the party and no penalty was imposed. (May 3, 2002, Administrative Law Judge's Ruling, I.00-11-052 [Qwest Communications].) In a ratesetting proceeding in which the utility failed to report its ex parte communications with each of the Commissioners' energy advisors, the Administrative Law Judge required the utility to file notice of its ex parte communications and to retain an independent firm, at its shareholders' expense, to conduct four training sessions on Rule 1.1 and Article 8 of the Rules of Practice and Procedure, and no penalty was imposed. (February 16, 2012, Joint Assigned Commissioner and Administrative Law Judge's Ruling, A.08-05-022 et al. [Southern California Gas Company].) And, in a ratesetting proceeding in which PG&E met with two Commissioners and their advisors without providing the requisite three-day advance notice of the grant of the individual meetings with the Commissioners or post-meeting notices of the ex parte communications, PG&E was required to develop and institute a control system which reflects best practices for compliance with the ex parte rules, and no penalty was imposed. (D.08-01-021 [PG&E].)

In addition, there is ample Commission precedent for imposing enhanced restrictions on ex parte and other communications in response to actual or alleged ex parte violations. (See, e.g., September 25, 2014, Ruling Granting Motion for a Ruling Suspending the Procedural Schedule and Other Relief and Imposing an Ex parte Communications Ban, A.13-12-012/I.14-06-016, and September 24, 2014, Administrative Law Judges' Ruling Granting Motion for One Day Notice of All Communications, I.12-01-007, I.11-02-016, and I.11-11-009.)

TURN proposes that, in addition to any monetary fines and other sanctions that may be imposed, the Commission require PG&E to refund the \$21.5 million of Regulatory Relations costs approved for 2014 in its 2014 General Rate Case decision, D.14-08-032. TURN does not cite to any precedent for imposing such sanction for violations of the ex parte rules, and I am not aware of any.

#### **2.4. Deterrence**

Pub. Util. Code § 2107 provides that, in a case in which a penalty has not otherwise been provided, a public utility is subject to a penalty of not less than \$500 and not more than \$50,000 for each offense. Thus, the maximum fine for the 17 identified ex parte violations would be \$850,000. Given PG&E's financial resources, the deterrence value of this fine is minimal.

As the Commission previously remarked when it declined to impose a fine for PG&E's prior ex parte violation,

In terms of financial resources, PG&E is an extremely large company with ownership equity in the billions. The penalty range of \$500 to \$20,000 per transaction<sup>13</sup> is a small sum for any deterrence value – if deterrence means avoiding the financial harm of the penalty. We could therefore impose the maximum penalty with little likelihood of a discernable financial impact on PG&E. (D.08-01-021 at 14.)

San Bruno and UET share the Commission's observation. As San Bruno states:

Punishment of wrongdoing serves as a means to deter future bad acts, but this concept has long been a challenge when the wrongdoer is a corporation: a legal fiction, who has "no soul to be damned, and

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<sup>13</sup> Pub. Util. Code § 2107 has since been amended to increase the maximum fine to \$50,000 per transaction.

no body to be kicked.” A wrist slap of monetary sanction is what PG&E expects; it wants to pay the anticipated Commission’s fine, move ahead with its request to increase rates for consumers, and continue with its business as usual. (San Bruno response at 1, citation omitted.)

And, as UET states:

Indeed, a rational decision-maker in PG&E’s position might logically choose to risk imposition of a \$12 million fine in order to secure an additional \$4 billion in revenue, especially given that such fines represent less than 15% of a single month’s profit. (UET response at 9.)

TURN responds that, “[o]nce the sanctions reach a level that becomes material, even a large company like PG&E, they have to report the prospect of those sanctions to their investors through the Securities and Exchange Commission. And I strongly believe that those sanctions get their attention.” (RT at 728.) TURN contends that PG&E’s “concealment” of these improper communications was a continuing violation such that each day since the communications and ending with the filing of the PG&E notice on September 15, 2014, constitutes as separate and distinct offense pursuant to Pub. Util. Code § 2108; on this basis TURN counts 4,080 offenses and calculates a maximum fine of \$204 million for the identified ex parte violations. As precedent for calculating the fine in this manner, TURN cites to D.13-12-053, in which the Commission imposed a monetary fine as sanction for PG&E’s failure to promptly correct misstatements in a filing before the Commission, and calculated the fine based on the number of days between PG&E’s discovery of its misstatement and its reporting of it to the Commission.

The factual circumstances of D.13-12-053 are not reasonably comparable to the circumstances of this order to show cause. The violation at issue in that

matter was not an ex parte violation. Rather, it concerned the utility's (PG&E) failure to promptly and transparently correct its material misstatements regarding the features of its pipeline Line 147, which supported a Maximum Allowable Operating Pressure of 365 pounds per square inch gauge (psig), as approved in Decision (D.) 11-12-048, when the features only support 330 psig. The harm of such violation was not only to the integrity of the regulatory process, but to the public's safety.<sup>14</sup> Thus, Commission precedent does not support the imposition of monetary fines for PG&E's ex parte violations sanctions of the magnitude necessary to create any significant deterrence.

TURN (supported by the Office of Ratepayer Advocates) and San Bruno propose various non-monetary sanctions, particularly in the form of bans on otherwise permitted ex parte communications, as well as reporting requirements for non-ex parte communications. While some of the particulars proposed by the parties are extraneous, imposing additional ex parte restrictions should undoubtedly capture PG&E's and other parties' attention: Parties' and especially large utilities' ability to influence decision makers outside of the formal record of a proceeding is invaluable, and depriving a party of the privilege clearly demonstrates zero tolerance of its abuse.

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<sup>14</sup> Even if we were to invoke D.13-12-053 for the proposition that fines for ex parte violations should be calculated on a continuing basis, it does not support counting each day since the communications as a separate offense. D.13-12-053 counted as offenses only the days since PG&E's discovery that its original statements were mistaken. Here, PG&E discovered its illegal communications after it undertook its internal review prompted by the July 28, 2014, San Bruno motion. Counting each of the 49 days since that date as a separate offense yields 833 violations, yielding a maximum fine of \$41.65 million.

## 2.5. Totality of Circumstances

There are several factors in addition to those discussed above that unavoidably inform this matter.

As to PG&E's conduct, first, these violations follow PG&E's previous ex parte violations and its past commitment, in remedy, to develop and implement a "best-in-class regulatory compliance model" for ensuring compliance with the ex parte rules (D.08-01-021, supra), to no apparent avail. Furthermore, as PG&E acknowledged in its September 15, 2014, notice, there were likely oral communications concerning the same topic that occurred during the same time period as the judge-shopping e-mails. Finally, as noticed in PG&E's October 6, 2014, update, PG&E has engaged in many other ex parte violations over the years: The May 2010 oral ex parte communications between Cherry and President Peevey appear to have violated Rule 8.3(c)(2), which requires three-day advance notice of the grant of an individual ex parte meeting and equal opportunity for other parties to engage in such communications, and Rule 8.4, which requires that the content of ex parte communications be reported within three days of their occurrence; and the December 2013 e-mail ex parte communications between Cherry and Commissioner Florio appear to have violated Rule 8.3(c)(3), which requires written ex parte communications to be concurrently served on the proceeding's official service list, as well as Rule 8.4's reporting requirements. These circumstances weigh toward significant sanctions beyond those imposed on the "first-time offenders" in Commission precedent.

Then, there are factors that bear on the appropriateness of a monetary sanction: First, this matter comes before us even as the Commission is considering, in the Line 132 investigations, I.12-01-007, I.11-02-016, and I.11-11-009, a \$1.4 billion penalty consisting of fines, disallowance and remedies

for PG&E's safety violations with respect to its gas operations. A key issue in those investigations is PG&E's financial ability to withstand a fine of the magnitude under consideration. (See I.12-01-007, I.11-02-016, and I.11-11-009, September 2, 2014, Presiding Officers' Decision on fines and remedies to be imposed on Pacific Gas and Electric Company for specific violations in connection with the operation and practices of its natural gas transmission system pipelines, Section 5.3.) By comparison, the maximum penalty here of \$850,000 is almost trivial, and it detracts from the Commission's consideration of a monetary penalty in those investigations, where the harm encompasses the loss of eight lives, personal injury, extensive economic losses, and continuing threats to public safety.

Equally compelling is the very regrettable fact that PG&E's violations of the judge-shopping prohibition were aided by a Commissioner's advisor and two Commissioners, two of whom actively engaged in the activity and the other who did not object to it. Under these circumstances, fining PG&E would appear insincere.

San Bruno and TURN allege that other communications that have been disclosed provide evidence of an inappropriate relationship between PG&E and the Commission beyond judge-shopping and violations of the ex parte rules, and seek an order that PG&E produce the 65,000 e-mails that is identified in its internal review of communications with the Commission since early 2010. Otherwise, TURN bluntly states, "it looks like the Commission is hiding something that it does not want the public to know" (TURN response at 8) and, "Well, there's a restriction on -- frankly, there's a restriction in the law on public corruption, your Honor. And public corruption involves quid pro quo giving away ratepayer money or promising ratepayer money in exchange for getting

promises from a utility to do what a regulator wants. [...] And both parties are subject to whatever appropriate sanctions should follow from engaging in that behavior” (RT at 726-727). These are serious allegations, and they deserve serious attention by the Commission. However, the investigation of the Commission’s own conduct is beyond the scope of this order to show cause, my authority as Administrative Law Judge, and this proceeding. They do not factor in the totality of circumstances.

Under the totality of circumstances, and evaluating the harm from the perspective of the public interest, the appropriate sanction is not to impose a monetary fine. Rather, it is appropriate to impose significant restrictions on PG&E’s ability to engage in ex parte communications and other communications with the Commission: For a one-year period or until the resolution of this proceeding (whichever is later), PG&E is banned from engaging in ex parte communications with Commissioners or their advisors other than in all-party meetings, and from communicating with Commissioners or their advisors regarding procedural matters, and shall report its communications with Commission advisory staff, as discussed more fully below. This penalty best fits the crime, it is severe in that it deprives PG&E of the incalculable benefits of being able to privately influence Commissioner votes outside of public meetings, and it allows PG&E – and, indeed, the Commission as well -- time to re-evaluate the critical importance of the ex parte rules and to promote internal culture change to that effect within our organizations.

I recognize that a ban on otherwise permissible ex parte communications unavoidably deprives Commissioners and their advisors of the benefit of such communications, including those who are in no way implicated in either the violations at issue or those that have since been revealed. However, this

drawback is mitigated by allowing PG&E to continue to communicate with Commissioners and their advisors in otherwise permissible all-party ex parte meetings. On balance, the critical public interest in restoring the integrity of the Commission's regulatory process outweighs this limitation.

I also recognize that the effectiveness of this sanction, as with the effectiveness of all of our ex parte rules, ultimately depends on the knowledgeable and good faith efforts of the parties on both sides of the communications, by the communicators to abide by them, and by the recipients of the communications to enforce them. The sanction that I impose is, at least, designed to be simple to follow and for violations to be simple to detect.

I address the parameters of this sanction below.

## **2.6. Details of Ex parte Restrictions in Sanction of PG&E**

### **2.6.1. Duration**

The restrictions are imposed for a one-year period or until the resolution<sup>15</sup> of this proceeding, whichever is later. While a one-year period may otherwise be reasonable, it is not certain that this proceeding will conclude within that time. As most ex parte communications occur near the close of a proceeding when a proposed decision is pending, it is appropriate to ensure that this sanction has practical effect in this proceeding where PG&E engaged in its judge-shopping violations.

### **2.6.2. Affected Parties**

The restrictions apply to PG&E.

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<sup>15</sup> Consistent with Rule 8.3(g), the requirements of this ruling shall apply until (1) the date when the Commission serves the decision finally resolving any application for rehearing, or (2) where the period to apply for rehearing has expired and no application for rehearing has been filed.

San Bruno proposes a ban on ex parte communications for all parties, not just PG&E. I reject that proposal. Our ex parte rules are the product of Senate Bill 960 (Stats. 1999, Ch. 1005, Sec. 55.), which was developed with the broad participation of this Commission, regulated utilities, ratepayer groups, and other interested entities, and I do not presume to overhaul them by way of a ruling sanctioning PG&E. In any event, the bad behavior at issue in this matter is PG&E's, and banning other parties from engaging in otherwise permissible ex parte communications would not serve to either punish or rehabilitate PG&E's conduct.

### **2.6.3. Scope of Proceedings**

The restrictions apply to all open formal adjudicatory and ratesetting proceedings.

TURN proposes that a ban on PG&E's ex parte communications extend to quasi-legislative proceedings as well.<sup>16</sup> I reject that proposal. Pursuant to Pub. Util. Code § 1701.4(b) and Rule 8.3(a), which govern ex parte restrictions in quasi-legislative proceedings, ex parte communications are permitted without restriction. As it is not possible to violate this ex parte rule, banning such communications is unreasonable.

TURN explains its reasoning that, even if communications concerning quasi-legislative proceedings do not violate ex parte rules, they may violate laws against public corruption. As discussed previously, allegations and remedies for

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<sup>16</sup> Pursuant to Pub. Util. Code §§ 1701.1 et seq., ex parte communications are banned in proceedings that have been categorized as "adjudicatory," they are permitted with certain restrictions and reporting requirements in proceedings that have been categorized as "ratesetting," and they are permitted without restriction or reporting requirement in proceedings that have been categorized as "quasi-legislative."

alleged wrongful conduct by the Commission is beyond the scope of this order to show cause, my authority as Administrative Law Judge, and this proceeding. (RT at 726-727.)

#### **2.6.4. Form of Ex parte Communications**

The ban on ex parte communications extends to oral and written ex parte communications with Commissioners and their advisors. PG&E is permitted to participate in otherwise permissible all-party meetings.

San Bruno proposes that the ex parte ban extend to such all-party meetings. I reject that proposal. All-party meetings afford transparency and a level playing field. In addition, allowing PG&E to engage in them mitigates the detriment to Commissioners and their advisors of being deprived of the benefit of individual ex parte communications that are otherwise allowed by statute and rule.

Granted, Rule 8.3(c)(3)'s requirement that written ex parte communications be concurrently served on the official service list affords the same transparency as an all-party meeting. However, PG&E's evidence shows repeated failure to concurrently serve or otherwise report its written ex parte communications. Furthermore, unlike the all-party meetings requirement, the concurrent service requirement for written communications is not self-enforcing.

#### **2.6.5. Restrictions on Procedural Communications**

TURN and San Bruno propose that PG&E be required to provide one-day notice of any communications regarding Commission proceedings that PG&E considers to fall outside of the definition of "ex parte communication," including communications that PG&E deems to be nonsubstantive procedural communications. I adopt a variation on this proposal.

As parties' use of the term reflects, there appears to be confusion as to whether a procedural communications constitutes an ex parte communication. While Rule 8.1(c) clarifies that procedural "inquiries" as to the schedule, location, or format for hearing, filing dates, identify of parties and other such nonsubstantive information are not ex parte communications, it may be difficult for parties to discern between a procedural "inquiry" that merely seeks information and a procedural request for Commission action that is substantive in nature. In any event, to the extent that procedural communications are nonsubstantive, there is no cause to direct them to Commissioners or their advisors; the Commission's administrative law judges are best suited to address them and are trained and experienced in fielding procedural requests and adept at discerning when they rise to the level of ex parte communications that require notice and reporting. In order to avoid PG&E's inadvertent but inappropriate ex parte communications regarding procedural matters, PG&E is prohibited from engaging in procedural communications with Commissioners and their advisors during the pendency of this sanction. PG&E may direct any such communications to the assigned Administrative Law Judge or, if none is assigned, to the Chief Administrative Law Judge.

#### **2.6.6. Reporting of Communications with Commission Advisory Staff**

TURN and San Bruno propose that PG&E be required to provide one-day notice of any communications regarding pending issues in open proceedings with the Commission's advisory staff including the General Counsel, the Executive Director, Deputy Executive Director and Division Directors, and all advisory staff, as was ordered by the Administrative Law Judge in the Line 132 investigations. (September 24, 2014, Administrative Law Judge's Ruling,

I.12-01-007, I.11-02-016, and I.11-11-009.) In that ruling, the Administrative Law Judge states that the disclosures of judge-shopping in PG&E's September 15, 2014, Notice in this case highlight the need for additional safeguards to ensure the integrity of those investigations. This safeguard is likewise appropriate in this proceeding that was directly affected by PG&E's judge-shopping, as well as all proceedings within the scope of this sanction. It is adopted.

### **2.6.7. Other Requests**

TURN (and perhaps implicitly San Bruno) also proposes that PG&E be required to report communications regarding its gas transmission or storage operations and communications regarding its financial condition, regardless of whether PG&E deems them to be related to a particular proceeding. The question of whether the communications regarding a utility's financial condition and condition of its system are ex parte communications is at issue in San Bruno's July 28, 2014, motion now pending before the Administrative Law Judges in I.12-01-007, I.11-02-016, and I.11-11-009, and I will not prejudge it by ruling on it here. TURN may resubmit its proposal after that motion matter is resolved.

San Bruno proposes that, in addition to other sanctions that may be imposed, the Commission ban PG&E from funding California Funding for the Environment and the Economy (CFEE). San Bruno notes that CFEE pays for government officials' travel to "fancy international conferences in attractive international destinations," and contends that this feeds PG&E's "cozy, informal relationship with the CPUC." (San Bruno response at 9.) San Bruno does not identify any law that PG&E violates by virtue of its funding of CFEE, and its proposal raises, at first blush, significant First Amendment issues. The record does not support San Bruno's proposal.

San Bruno proposes that, in addition to other sanctions that may be imposed, the Commission order PG&E to provide ethical training to its employees and executives, as well as to Commissioners and their staff; San Bruno recommends that both trainings be conducted by an outside consultant specializing in ethics, and also that PG&E be ordered to hire an independent ethics monitor to ensure compliance with Rule 1.1 and the ex parte rules. I am not persuaded of the benefit or appropriateness of this proposal. First of all, the ex parte rules are not complicated, and neither are the ethical considerations of due process, transparency and level playing field in government, and the obligation to avoid breaking the law. As for training for the Commission and its advisors, the Commission has ample in-house expertise on these issues and does not require an outside independent consultant to advise it on its own regulations.

UET proposes that the Commission dismiss this application, and require PG&E to re-file and go through the process that the case should have gone through from the beginning. (RT at 734.) This proposal serves no apparent purpose, and I reject it.

Finally, San Bruno and TURN seek an order directing PG&E to produce the 65,000 e-mails to and from the Commission that PG&E referenced in its September 15, 2014, notice, and to allow parties broad discovery regarding PG&E's communications with the Commission in this and other proceedings. As discussed previously, the apparent purpose for this request is to allow the parties and the public to investigate the Commission's conduct. I reiterate that, while these allegations deserve serious attention by the Commission, a Commission proceeding is not the appropriate forum for investigating such allegations. The

parties have the right to seek the requested information pursuant to the Public Records Act and to pursue appropriate recourse in other forums.

Therefore, **IT IS RULED** that: In addition to the ex parte restrictions and requirements of Article 8 of the Rules of Practice and Procedure and any other requirements by Commission order or ruling of an Administrative Law Judge:

1. PG&E is prohibited from engaging in any oral or written ex parte communications with commissioners or their advisors, other than in all-party meetings, in any ratesetting proceeding.
2. PG&E is prohibited from engaging in any communications with commissioners or their advisors that concerns any procedural issue in a formal adjudicatory or ratesetting proceeding. PG&E may direct any such communications to the assigned Administrative Law Judge or, if none is assigned, to the Chief Administrative Law Judge.
3. PG&E shall report all communications with any Commission staff acting in an advisory capacity, including but not limited to the General Counsel, the Executive Director, Deputy Executive Directors, Division Directors, and advisory staff, regarding any substantive or procedural issue in an open formal adjudicatory or ratesetting proceeding, consistent with the reporting requirements of Rule 8.4, except that such notice shall be filed within one working day of the communication.
4. These restrictions shall be in force for a period of one year or until the resolution of this proceeding, whichever is later.
5. San Bruno and TURN's request for an order directing PG&E to produce the 65,000 e-mails referenced in PG&E's September 15, 2014, notice, and allowing

parties broad discovery regarding PG&E's communications with the Commission in this and other proceedings is denied.

6. This ruling is effective immediately.

Dated October 16, 2014, at San Francisco, California.

/s/ HALLIE YACKNIN

Hallie Yacknin  
Law and Motion  
Administrative Law Judge