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BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

Order Instituting Investigation on the Commission's Own Motion into the Maintenance, Operations and Practices of Pacific Gas and Electric Company (U39E) with Respect to its Electric Facilities; and Order to Show Cause Why the Commission Should not Impose Penalties and/or Other Remedies for the Role PG&E's Electrical Facilities had in Igniting Fires in its Service Territory in 2017.	Investigation 19-06-015 (Filed June 27, 2019)

THOMAS DEL MONTE & WILD TREE FOUNDATION JOINT MOTION FOR EVIDENTIARY HEARINGS and TO REOPEN DISCOVERY PERIOD

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BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

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Pursuant to Rule 11.1 and 12.3 of the Rules of Practice and Procedure of the California Public Utilities Commission ("Commission"), Thomas Del Monte ("Del Monte") and Wild Tree Foundation ("Joint Parties") move to request that evidentiary hearings be held to consider material contested issues of fact concerning the proposed settlement agreement that Pacific Gas and Electric Company ("PG&E"), the Safety and Enforcement Division ("SED"), the Office of the Safety Advocate ("OSA"), and the California Coalition of Utilities Employees ("CUE") filed on December 17, 2019 ("Contested Proposed Settlement"). To facilitate hearings, the Joint Parties also move to reopen the discovery period.

The Public Advocates Office at the California Public Utilities Commission ("Cal Advocates") filed a Motion Requesting a Hearing on Contested Settlement on February 12, 2020 ("Cal Advocates' Motion"). The Joint Parties support Cal Advocates' Motion and hereby incorporate by reference the request for hearings on the issues identified therein and the arguments supporting the request. This includes request for hearings on the following issues:

- Whether the stipulated facts support PG&E's failure to admit to a single violation of the Commission's safety rules;
- Whether the System Enhancement Initiatives can be completed for the $50 million provided by the Contested Proposed Settlement Agreement, and the potential cost to customers if their cost exceeds $50 million;
- Whether and to what extent PG&E has funded or will fund the System Enhancement Initiatives prior to the effective date of the Contested Proposed Settlement Agreement, thereby eroding the settlement value of the System Enhancement Initiatives;
- Whether it is reasonable to begin the independent wildfire safety audit of PG&E's overhead distribution and transmission maintenance one year after the effective date of the Contested Proposed Settlement Agreement, given the violations alleged by SED;
- Whether it is reasonable not to modify the Contested Proposed Settlement Agreement to include the City and County of San Francisco's "limited modifications to the settlement to ensure transparency on important issues of public safety;"
- Whether leaving this proceeding open to consider and implement corrections to decrease the risk of future catastrophic wildfires caused by PG&E's electric facilities would jeopardize initiatives such as the root cause analyses; and
- Whether it is reasonable to adopt the Contested Proposed Settlement Agreement when the extent of the known damages continues to evolve.[1]

The Joint Parties file this motion to move for hearings on two addition issues not included in Cal Advocates' Motion:

1. *Whether the Contested Proposed Settlement accounts for all violations perpetrated by PG&E related to the covered fires, whether or not alleged by SED?*

2. *What information is covered by the Contested Proposed Settlement's proposed release of PG&E from liability based upon information that was "known or could have been known" about the covered fires?*

[1] I.19-06-015, *Public Advocates Office at the California Public Utilities Commission Motion Requesting a Hearing on Contested Settlement* (February 12, 2020) at p. 4.

ARGUMENT

The Joint Parties have preserved their right to object to the settlement and right to hearing by timely filing comments contesting the Contested Proposed Settlement[2] that "specify the portions of the settlement that the party opposes, the legal basis of its opposition, and the factual issues that it contests"[3] and in which the Joint Parties requested that evidentiary hearings be held.[4]

Where a settlement is contested, as here, the Commission engages in a closer review of the settlement compared to an all-party settlement:

> … [W]e are within our authority to consider whether it would serve the public interest. Our standard of review, however, is somewhat more stringent. Here we consider whether the settlement taken as a whole is in the public interest. In so doing we consider individual elements of the settlement in order to determine whether the settlement generally balances the various interests at stake as well as to assure that each element is consistent with our policy objectives and the law.[5]

I. EVIDENTIARY HEARING ARE NECESSARY

The two issues the Joint Parties herein move for evidentiary hearings on encompass all fires made part of this proceeding but the Joint Parties specifically assert that there exists material contested issues of fact in regards to the Camp Fire and the Tubbs Fire, as discussed further below. For the Camp Fire, there exists a material contested issue of fact regarding

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[2] I.19-06-015, *Del Monte & Wild Tree Foundation Joint Comments In Opposition of Settlement Agreement* (January 16, 2020).
[3] Commission Rules of Practice and Procedure, Rule 12.2.
[4] I.19-06-015, *Del Monte & Wild Tree Foundation Joint Comments In Opposition of Settlement Agreement* (January 16, 2020) at p. 57.
[5] *Re Natural Gas Procurement and System Reliability Issues*, 54 Cal.P.U.C.2d 337, 343 (CPUC 1994).

potential ongoing violations for the use of C-hooks that do not meet the mandated safety factor. In regards to the information known by SED about the Camp Fire, the Joint Parties, on information and belief, understand SED to be in possession of 1987 PG&E report that documented failure of C-hooks at far less than the rated load ("1987 Report")[6], which only came to light recently as a result of investigative reporting.[7] The 1987 Report and surrounding facts, the details of when and how SED came into this information, and how this information was or was not utilized in SED's investigation present issue of material fact that need to be addressed through evidentiary hearings. A settlement predicated upon a Commission investigation that includes no actual investigation into potential violations which may pose an ongoing risk to public safety is per se against the public interest. A settlement that attempts to bind future Commissions from prosecuting such violations is unconscionable and illegal. Discovery needs to be reopened and hearings held regarding the 1987 Report.

In regard to the Tubbs Fire, a settlement that claims to cover the Tubbs Fire but that includes no allegations of violations is likewise contrary to the public interest. The Joint Parties assert that this fire should not be a part of the scope of this proceeding and therefore should not be covered by any settlement of this proceeding. ALJ ruling and statements in this proceeding have been inconsistent regarding the treatment of Tubbs in this proceeding and this matter should be conclusively ruled on and Tubbs should be removed from the scope of this proceeding. Del Monte has filed a motion seeking to amend the scoping memo to conclusively remove Tubbs from this proceeding.

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[6] Attachment A: United States District Court, Northern District of California, Case 3:14-cr-00175-WHA, *Response To Follow-Up Questions Re CPUC Report On Camp Fire, Further Questions To Be Answered By PG&E By December 19 And Supplemental Question 6a* (December 19, 2019) at Appendix C.
[7] NBC BayArea, *PG&E Alerted to Risks of Worn Hooks Back in 1987* (December 12, 2019) available at: https://www.nbcbayarea.com/news/local/pge-alerted-to-risk-of-worn-hooks-back-in-1987/2194383/.

But, if the Commission persists in keeping Tubbs within the scope of this proceeding, a record must be developed regarding PG&E violations related to the Tubbs Fire and what is covered by the Contested Proposed Settlement's prohibition on future action against PG&E. SED has not alleged that PG&E perpetrated any violations related to the Tubbs Fire on the grounds that SED has made the factual determination, based upon the California Department of Forestry and Fire Protection Tubbs Fire Investigation Report's[8] ("CalFire Report") conclusion that PG&E equipment did not ignite the fire. SED has also not alleged any violations regarding destruction of evidence even though SED's own report documents that PG&E destroyed evidence.[9] The Contested Proposed Settlement's *Stipulated Facts Relevant to the 2017 Northern California Wildfires and 2018 Camp Fire* includes no stipulated facts regarding the Tubbs Fire and neither SED nor PG&E has put forth any further evidence regarding Tubbs. SED maintains that its determination is correct, even though this determination is contradicted by newly-uncovered, compelling evidence. The physical evidence and video evidence that Del Monte has done his best to investigate and put into the record of this proceeding demonstrate that the Tubbs Fire was ignited as a result of PG&E violating vegetation management requirements for four years, knowingly for one year, proceeding the Tubbs Fire.[10] Although PG&E has done its best to bury the evidence during CAL FIRE's unsuccessful investigation and through this proceeding's formal investigation, it has admitted violating vegetation management requirements in filings in

[8] California Department of Forestry and Fire Protection, Sonoma-Lake Napa Unit, *Tubbs Fire Investigation Report Case No. 17CALNU010045* (October 8, 2017).
[9] CPUC SED, *Tubbs Fire Incident Investigation Report* (May 13, 2019) at p. TUBBS 011.
[10] See I.19-06-015, *Prepared Direct Testimony of Kenneth E. Buske on Behalf of Party Thomas Del Monte*; United States District Court, Northern District of California, Case No. 3:14-cr-00175-WHA, *Supplement To Tubbs Incident Description & Factual Summary* - Exhibit ZZ (December 31, 2018) at p. 3fn1, (Note: This document was served on all parties as part of SED's CAMP fire investigation report.)

its criminal probation case.[11] The facts regarding SED's determination that no violations were identified for the Tubbs Fire and the fact surrounding the ignition of the Tubbs Fire are material contested issues of fact for which a hearing must be held.

A settlement that would bind the hands of future Commissions in regards to PG&E's culpability for the Tubbs Fire is against public interest and would wrongly create a windfall bailout for PG&E on the backs of ratepayers. PG&E has stated in its most recent SEC 10K that "The settlement agreement stipulates that no violations have been identified in the Tubbs fire. As a result of this finding, the settlement agreement does not prevent the Utility from seeking recovery of costs associated with the Tubbs fire through rates."[12] This lays bare PG&E's intent to later seek ratepayer recovery of the Tubbs Fire in dependence upon the Contested Proposed Settlement's prohibitive language against future Commission action. If the Commission approves the Contested Proposed Settlement, its ability to make a reasonableness determination of PG&E's request for ratepayer recovery for Tubbs costs will be wrongly constrained.

1. Whether the Contested Proposed settlement accounts for all violations perpetrated by PG&E related to the covered fires, whether or not alleged by SED?

The Joint Parties assert that there are contested issues of material fact regarding PG&E having committed the following violations, in addition to many others.

Fire	Authority	Violation
Camp	PUC §451.	Ongoing failure to replace c-hooks throughout its territory following 1987 PG&E test that demonstrated that c-hooks did not meet safety

[11] *Ibid.*
[12] PG&E, *United States Securities and Exchange Commission Form 10-K* (December 31, 2019) at p. 198, available at: https://www.sec.gov/ix?doc=/Archives/edgar/data/75488/000100498020000009/pcg-20191231.htm .

		factor because they failed at loads less than 50% below design
Tubbs	PRC §4292 (admitted) PUC §451 GO 95 Rule 35	Failure to maintain power pole and power line vegetation clearance. Knowingly failing to address error for approximately one year once discovered – until after the Tubbs Fire.
Tubbs	PUC § 316 GO 95 Rule 19	Evidence destruction and evidence tampering consisting of PG&E's removal, replacement, and closing circuits as if nothing happened on the blown fuses on PG&E pole 773 with failure to report their activities to the CAL FIRE or SED investigators.
Tubbs	PUC § 316	Failure to corporate fully with the Commission in an investigation by failing notify of new evidence being found of the only potential ignition source of the Tubbs Fire while claiming full transparence and good faith.
Tubbs	D.06-04-055 as amended by Resolution E-4184.	Failure to report to the Commission reportable incident event involving "significant public attention or media coverage and are attributable or allegedly attributable to utility facilities."

The Commission is under statutory mandate to "see that the provisions of the Constitution and statutes of this State affecting public utilities, the enforcement of which is not specifically vested in some other officer or tribunal, are enforced and obeyed, and that violations thereof are promptly prosecuted and penalties due the State therefor recovered and collected, and to this end it may sue in the name of the people of the State of California."[13] As the Commission has explained, "It is fundamental to the Commission's exercise of its powers and jurisdiction that the agency take reasonable steps to ensure that the utilities comply with its orders and rules. As part of its enforcement efforts, the Commission has traditionally imposed fines when faced with persuasive evidence of non-compliance."[14]

[13] Pub. Util. Code, § 2101.
[14] D.98-12-075 at p. 6.

The Commission is also charged with investigating utility-caused accidents "directly or indirectly arising from or connected with [public utility's'] maintenance or operation, resulting in loss of life or injury to person or property and requiring, in the judgment of the commission, investigation by it, and may make such order or recommendation with respect thereto as in its judgment seems just and reasonable."[15] The Commission's duty to investigate accidents was codified over 100 years ago and the Commission typically describes the duty as a mandate.[16] SED's failure to allege and refusal to further investigate the above-listed violations, among others, does not mean that PG&E did not commit these violations and does not mean that the Commission is absolved of its duty to enforce state law, to prosecute violations, and to investigate utility-caused accidents. In this proceeding, the Commission correctly opened an investigation and the public is due an actual investigation. The Order Instituting an Investigation states:

> By this order, the California Public Utilities Commission (Commission or CPUC) institutes a formal investigation to determine whether Pacific Gas and Electric Company (PG&E), violated any provision(s) of the California Public Utilities Code (PU Code), Commission General Orders (GO) or decisions, or other applicable rules or requirements pertaining to the maintenance and operation of its electric facilities that were involved in igniting fires in its service territory in 2017 . . . Additionally, this investigation will review systemic concerns, including those identified by SED in the course of its investigations, and determine whether PG&E's practices have been unsafe and in violation of the law.[17]

If the Contested Proposed Settlement is approved, the Commission will have willfully failed its duty under the law and described in the OII, to investigate, prosecute, and enforce violations of rules and laws intended to protect public safety. PG&E's potential ongoing use of C-hooks that its own testing appears to have demonstrated over 30 years ago do not meet

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[15] Pub. Util. Code, § 315.
[16] *Atchison, T. S.F. Ry. v. Div. of Indus. Safety* (1976) 64 Cal.App.3d 188, 191.
[17] I.19-06-015, *Order Instituting Investigation* (June 27, 2019) at pp. 1-2.

required the safety factor and risk failure, and knowing destruction of evidence are precisely the type of "systemic concerns" highlighted in the OII that must be addressed. The Commission must accept evidence regarding violations perpetrated by PG&E but, for reasons unknown, have not been alleged by SED, that pose a continued risk to public safety.

A. Camp Fire

As stated in the Joint Parties Comments in Opposition of Settlement Agreement, "New evidence is still being uncovered demonstrating PG&E's ongoing negligence and mismanagement such as evidence submitted to the court in the probation matter that PG&E was aware since 1987 that C hooks – like the one that failed and caused the Camp Fire – had failed strength tests.[18] In the 1987 Report, PG&E documented the results of strength testing on two C-hooks that were worn and one C-hook that was apparently unused.[19] The results demonstrated that, shockingly, C-hooks are unable to withstand the loads there are rated for of 30,000 lbs, failing at drastically lower loads as low as 6,900 lbs for the unused C-hook. PG&E admitted to the existence of the 1987 Report in a filing in its criminal probation case, only after the 1987 Report was brought to light by an investigative reporter:

> As explained in the report, PG&E's Department of Engineering Research, a predecessor of PG&E's Applied Technology Services department, performed tests on two suspension hooks (described as "J-hooks" in the report [and C-hooks in litigation today]) and attaching plates removed from PG&E's 115 kV Oleum-G Transmission Line (the "Oleum-G Line"). The report noted that "[b]oth of the J-Hooks and their attaching plates had grooves worn in them and there was a concern that they may not be able to hold the weight of insulator strings that are suspended from them." The objective of the report "was to establish the tension required to fail the hook or the attaching plate". The hooks

[18] I.19-06-015, *Joint Parties Comments in Opposition of Settlement Agreement* (January 16, 2020) at p. 19.

[19] Attachment A: United States District Court, Northern District of California, Case 3:14-cr-00175-WHA, *Response To Follow-Up Questions Re Cpuc Report On Camp Fire, Further Questions To Be Answered By Pg&E By December 19 And Supplemental Question 6a* (December 19, 2019) at Appendix C.

had an ultimate strength rating of 30,000 pounds. The testing resulted in the failure of the two worn hooks at 11,500 pounds, the failure of the eye on one of the attaching plates at 19,600 pounds, and the failure of an additional hook that "had no visible grooves or scratching in the surface as the two samples in the original test did" at 6,900 pounds. In other words, the two hooks with wear exhibited greater strength than the unworn hook. The report recommended "that a test be done on some random samples of different manufacturers' hooks from PG&E stores to check their strength against their specifications." PG&E has searched for records relating to any such strength testing during the late 1980s but has not located any such records that have been retained.[20]

The SED Camp Fire report discusses safety factors of C-hooks as follows:

As C-hooks wear down, the load they can support decreases. The failure of the C-hook supporting the transposition jumper on the Incident Tower shows that it could not support the load it was intended to support. A safety factor of less than one means the point has been reached at which the load exceeds the strength of the material. SED determined that PG&E failed to inspect the tower and the C-hook thoroughly to identify the deterioration. According to Rule 44.3, lines or parts thereof must be replaced or reinforced before safety factors have been reduced to less than two-thirds of the safety factor specified in Rule 44.1 which shows safety factors in Table 4. PG&E was required to maintain the safety factor above 1.33, which is two-thirds of 2, at all times. PG&E violated GO 95, Rule 44.3 because it failed to maintain the safety factor of the C-hook above 1.33; in fact, the safety factor was less than one when it failed on November 8, 2018. In addition, PG&E violated GO 95, Rule 31.1, by not maintaining the Incident Tower on the Caribou-Palermo Transmission Line for its intended use to enable the furnishing of safe, proper, and adequate service.[21]

This analysis, and in fact the entire SED Camp Fire report, is entirely silent regarding the 1987 Report. Nonetheless, the explanation regarding safety factors of C-hooks applies equally to all C-hooks. PG&E is required to maintain a safety factor above 1.33 for all C-hooks and has likely failed to do so since 1987. As stated in PG&E's report,[22] the assembly relying on the defective C-hooks was originally rated for 16,000 lbs, meaning the weakest component of the

[20] Attachment A: United States District Court, Northern District of California, Case No. 3:14-cr-00175-WHA, *Response To Follow-Up Questions Re Cpuc Report On Camp Fire, Further Questions To Be Answered By PG&E By December 19 And Supplemental Question 6a* (December 19, 2019) at p. 10.
[21] CPUC SED, *Incident Investigation Report for 2018 Camp Fire* (November 8, 2019) at p. 12.
[22] Attachment A: United States District Court, Northern District of California, Case No. 3:14-cr-00175-WHA, *Response To Follow-Up Questions Re Cpuc Report On Camp Fire, Further Questions To Be Answered By PG&E By December 19 And Supplemental Question 6a* (December 19, 2019) at p. 9.

assembly is rated to fail at 16,000 lbs of load (i.e. the "SUSP. CLAMP"). However, once a sampling of three C-hooks from the field and from PG&E inventory that were rated for 30,000 lbs fails at loads as low as 6,900 lbs, the C-hook becomes the weakest component in the assembly and therefore derates the overall strength rating of the assembly to 6,900 lbs or 43.125% percent of its original rating. Problematically, with such a low sample size of tested C-Hooks and PG&E failing to offer any evidence that anything was done after discovering the C-hook defects and propensity to wear in the way the Camp Fire C-hook wore, there is a high likelihood that there are numerous other defective and overly worn C-hooks that PG&E has put into service and left in service on transmission lines that that, if tested, would fail at far lower than 6,900 lbs and the required 1.33 safety factor.

Following the 1987 Report and for the next 30+ years, up to and including present day, PG&E's statement in its criminal probation filing indicate that it 1.) did not replace C-hooks throughout their territory, especially in areas of high wind and 2.) failed to conduct further testing on C-hook load strength per their own recommendations. The Camp Fire would have not happened but for a broken C-hook and this would have almost certainly been avoided had PG&E responded reasonably to the results of its own tests. The Commission must transparently investigate the potential that transmission lines throughout PG&E's territory pose a risk to public safety by the continued use of C-hooks that do not meet the required safety factor and are at a high risk for failure.

The Cal Advocates' Motion correctly explains that "The magnitude of the harm caused by PG&E's electrical equipment is a factual question that materially affects the purported

reasonableness of the Proposed Settlement Agreement."[23] The magnitude of PG&E's culpability is likewise a factual question that materially affects the purported reasonableness of the Contested Proposed Settlement agreement. The Contested Proposed Settlement does not take into account, either as an ongoing violation or as a factor in establishing an appropriate penalty, PG&E's reckless and willful behavior in regards to C-hooks and is therefore, against the public interest.

B. Tubbs Fire

Under the Contested Proposed Settlement, full discovery and evidentiary hearings are also needed to establish facts that demonstrate violations perpetrated by PG&E in regard to the Tubbs Fire. The Tubbs Fire was horrifically destructive killing 22 people, burning 36,810 acres, and destroying 5,643 structures. Approval of a settlement that purportedly includes the Tubbs Fire but does not include any violations would be against the public interest. SED has alleged no violations for the Tubbs Fire despite the fact that SED has documented that PG&E destroyed evidence,[24] that PG&E has stated on the record in federal court that it violated vegetation management requirements in regards to the Tubbs Fire, and that evidence put forth by Del Monte in this proceeding establishes clear PG&E culpability for the Tubbs Fire – evidence that PG&E does not contest – and other violations made in PG&E's efforts to cover up their culpability. Instead, SED has relied on the CalFire Tubbs Fire report as the sole evidence that PG&E did not

[23] I.19-05-016, *Motion of the Public Advocates Office Requesting A Hearing on Contested Settlement* (February 12, 2020) at p. 12.
[24] CPUC SED, *Tubbs Fire Incident Investigation Report* (May 13, 2019) at p. TUBBS 011 ("October 11, 2017 1625 hours – Based on PG&E records, a PG&E troubleman who was the first responder on scene found two of three fuses blown at Fuse 773, and per the troubleman, he replaced them.")

ignite the fire. When asked why SED will not consider the evidence and allegations made by Del Monte's expert witness, SED claims that they are not capable of investigating the fire's cause because it must only rely on CalFire for cause and origin of fire determinations.[25] This is problematic because the contested CalFire Tubbs Fire report is 1.) uncorroborated hearsay that cannot be the sole evidence supporting a finding of fact 2.) CalFire does not determine whether or not regulated utilities have violated the Public Utilities Code and Commission rules. Such uncorroborated hearsay evidence cannot be the sole grounds for supporting the findings as stated in the Contested Proposed Settlement, as the Commission has noted: "while hearsay is admissible in our administrative hearings, it cannot be the basis for an evidentiary finding without corroboration where the truth of the out-of-court statements is at issue. (Gov.Code § 11513(d).)"[26]

As explained above, the Commission, not just SED, is tasked with investigating accidents, enforcing laws, and prosecuting violations. In regards to the Tubbs Fire, SED has completely refused to investigate related PG&E violations in this proceeding even in the face of PG&E's admission in its criminal probation case that it did not comply with vegetation

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[25] See I.19-06-015, CPUC SED, *Reply Comments of the Safety and Enforcement Division Regarding Comments on Settlement Agreement* at p. 3; Del Monte, *Motion for Expedited Ruling and Shortened Response*, Exhibit B - SED_001 191106 Responses (November 20, 2019) Del Monte Subset of Additional Questions, Q 9.

[26] D.05-06-033 at p. 53*; see also Util. Reform Network v. Pub. Utilities Comm'n, supra,* 167 Cal. Rptr. 3d at p. 761 quoting *Re Communication TeleSystems International* (1996) 66 C.P.U.C.2d 286, 292, fn. 8.) ("Consequently, hearsay is admissible in Commission proceedings, but it "may not be solely relied upon to support a finding.")

management requirements in the Tubbs Fire origin region for approximately three years prior to the Fire even though the error was discovered one year before the Tubbs Fire.[27]

In a filing in its criminal probation case, PG&E states:

> California Public Resources Code § 4292 requires PG&E to maintain a firebreak of at least ten feet in radius around a utility pole if it is within a State Responsibility Area and has non-exempt equipment installed; a firebreak requires removal of all flammable materials including "ground litter, duff and dead or desiccated vegetation that will allow fire to spread" at ground level. A 2013 map drawn by a contractor mistakenly indicated that the pole with fuse 773 was within a Local Responsibility Area, which does not require a ten-foot firebreak. This mistake was not corrected prior to October 8, 2017, although it was identified in 2016.[28]

In other words, PG&E failed to do any vegetation management activities on the entire property and surrounding area where the Tubbs Fire originated for approximately four years even after PG&E discovered its error a year before the Tubbs Fire broke out. PG&E failed to conduct required vegetation management as required by law, vegetation made contact with PG&E conductors causing arching, and the embers from the contact ignited the Tubbs Fire.

2. What information is covered by SED proposed release of PG&E from liability for information "known or could have been known" about the covered fires?

Section (IV)(D) of the Contested Proposed Settlement is designed to shield PG&E from any liability now and in the future for violations related to any of the numerous fires this proceeding is supposed to address.[29] Section (IV)(D) reads:

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[27] United States District Court, Northern District of California, Case No. 3:14-cr-00175-WHA, *Supplement To Tubbs Incident Description & Factual Summary* - Exhibit ZZ (December 31, 2018) at p. 3fn1.
[28] *Ibid.*
[29] I.19-06-015, *Thomas Del Monte & Wild Tree Foundation Joint Comments in Opposition of Settlement Agreement* (January 16, 2020) at pp. 35-36; *Comments of the Public Advocates Office Contesting the Proposed Settlement* (January 16, 2020) at pp. 20, 24-25; *Reply Comments of the Utility Reform Network Opposing the Proposed Settlement* (January 31, 2020) at pp. 2-7.

> SED agrees to release and refrain from instituting, directing, or maintaining any violations or enforcement proceedings against PG&E related to the 2017 Northern California Wildfires and 2018 Camp Fire based on the information: (a) known, or that could have been known, to SED at the time that SED executes this Settlement Agreement, or (b) substantially similar to the facts alleged in the SED Fire Reports. This information will include any reports or findings made by the California Department of Forestry and Fire Protection ("CAL FIRE") and information produced in *In re PG&E Corp. & Pacific Gas and Electric Company*, U.S.D.C., 3:19-cv-05257-JD and in *California North Bay Fire Cases*, Cal. Super., No. CJC17004955.

If the Contested Proposed Settlement was approved, this clause would unlawfully bind future Commissions. This problem is compounded by the fact that SED has entirely ignored the issue of system-wide, unsafe C-hooks and has refused to fully investigate the Tubbs Fire. As discussed briefly below, the clause is itself reason alone for the Commission to reject the Contested Proposed Settlement as contrary to law and against the public interest. Additionally, Section (IV)(D) establishes a need for evidentiary hearings to elucidate what precisely SED knew or could have known about the C-hooks and about the Tubbs Fire.

A. Settlement Agreements Cannot Bind the Commission

The Public Utilities Code, the courts, Commission Rules, and Commission precedent make it clear that a past Commission cannot bind future Commissions, particularly in regard to ratemaking. The law is especially clear that settlement agreements cannot bind future Commissions. In order to ensure that rates remain just and reasonable and that the Commission has the ability to fix any unlawful rates, Public Utilities Code section 1708 provides clear authority for the Commission to change its mind: "The commission may at any time, upon notice to the parties, and with opportunity to be heard as provided in the case of complaints, rescind, alter, or amend any order or decision made by it. Any order rescinding, altering, or amending a

prior order or decision shall, when served upon the parties, have the same effect as an original order or decision."[30]

In the fixing of rates, the Commission exercises its legislative powers and "no legislative body can limit or restrict its own power or that of subsequent legislatures, and that the act of one legislature does not bind its successors."[31] The Commission must be able to make changes to its prior decisions as a function of its status as a legislative body. As explained by the Commission:

> The Public Utilities Code strengthens the proposition that we cannot bind future Commissions. Section 1708 provides: "The commission may at any time . . . rescind, alter, or amend any order or decision made by it." Section 457 permits utilities to enter into an agreement for a fixed period for the automatic adjustment of charges for electricity with the caveat "Nothing in this section shall prevent the commission from revoking its approval at any time and fixing other rates and charges. . ." Finally, Section 451 provides that "All charges demanded or received by any public utility. . . shall be just and reasonable" and Section 728 provides that if the Commission finds rates are unreasonable, "the commission shall. . . fix . . . the just, reasonable . . . rates . . . to be thereafter observed and in force."[32] As the Commission has more recently explained, "We are not bound by prior determinations if the facts or circumstances warrant a different outcome."[33]

The Commission is not bound by settlement agreements, as laid out in Commission Rules and demonstrated by the settlement agreement concerning Diablo Canyon. Rule 12.1 is clear that the settlement "[r]esolution shall be limited to the issues in that proceeding and shall not extend to substantive issues which may come before the Commission in other or future proceedings."[34] Furthermore, adoption of a settlement "does not constitute approval of, or precedent regarding,

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[30] Pub. Util. Code, §1708.
[31] D.88-12-083 at p. 92 citing to *Thompson v. Board of Trustees* (1904) 144 Cal. 281, 283; *McNeil v. City of South Pasadena* (1913) 166 Cal. 153, 155-156; *In re Collie* (1952) 38 Cal. 2d 396, 398; *City and County of San Francisco v. Cooper* (1975) 13 Cal. 3d 898, 929; *Campen v. Greiner* (1971) 15 Cal. App. 3d 836, 843; *City and County of San Francisco v. Patterson* (1988) 202 Cal. App. 3d 95, 105.
[32] See D.88-12-083 at pp. 95-96.
[33] D.18-03-012 at p. 9.
[34] Commission Rules of Practice and Procedure, Rule 12.1, subd. (a).

any principle or issue in the proceeding or in any future proceeding."[35] For example, in its initial 1988 approval of the Diablo Canyon settlement, the Commission explained, "We have engaged in this extended analysis of our power - or lack of power - to approve settlements and to bind future Commissions both to answer the opponents of the settlement who argue that we have no authority to approve the settlement and to remind the proponents that the terms of the settlement are not set in concrete."[36] The Commission explains that terms of settlement are not set in stone because the Commission itself cannot be bound by settlement agreements because they constitute an agreement between parties, not between the Commission and parties. The Commission approves the settlement with the caveat that, "*To the extent permitted by law*, the Commission intends that this decision be binding upon future Commissions."[37] Nine years later, the Commission deemed the Diablo Canyon settlement no longer in effect and thus not binding on the Commission, even though it had originally been written as a 26 year settlement. The Commission explained:

> In our original decision approving the Diablo Canyon settlement we were careful to point out that in approving the settlement we could not bind future Commissions nor could we bind the Legislature. (30 CPUC 2d 189, 223.) The question before us now is whether any portion of the settlement, as modified, remains in effect given the strictures of AB 1890, our Policy Decision, and this decision. We conclude that the entire Diablo Canyon settlement, as modified, is of no force and effect, having been supplanted by AB 1890, our Policy Decision, and this decision.[38]

In this case, Section (IV)(D) would serve to bind the future Commission in precisely the way that the Code, Commission Rules and Commission prohibit. The Contested Proposed Settlement is precisely the situation for which such a prohibition exists – this is a settlement that would purport

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[35] Commission Rules of Practice and Procedure, Rule 12.5.
[36] D.88-12-083 at p. 97 available at 1988 Cal. PUC LEXIS 886, 97, 30 CPUC2d 189, 99 P.U.R.4th 141.
[37] *Id*. at p. 96.
[38] D. 97-05-088 at p. 101 available at 1997 Cal. PUC LEXIS 453, 101, 72 CPUC2d 560, 178 P.U.R.4th 1.

to address the most destructive failure of a public utility to protect public safety in the history of, at the very least, California, and likely the entire country through a sweetheart deal with a $0 fine agreed to over the objection of all non-PG&E cohort parties in a matter of months in total opposition to all requirements and precedent regarding the setting of fines for violations and contradiction to credible and compelling evidence of further violations. To approve such a deal with a clause that permits any further action by the Commission on such a wide range of disasters and violations would be nothing short of unconscionable.

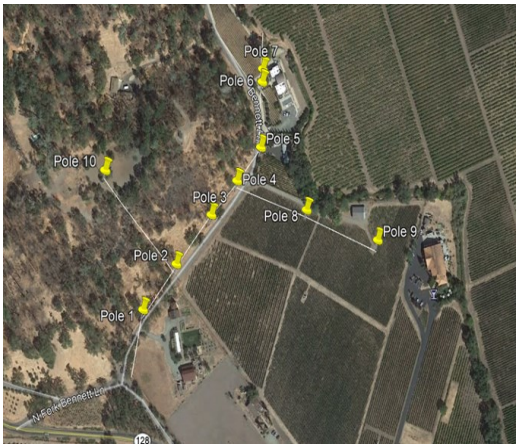
B. Hearings are Needed to Establish the Bounds of the Contested Proposed Settlement's Section (IV)(D)

The Contested Proposed Settlement should not be approved based upon Section (IV)(D)'s attempt to bind future Commissions. But, if the Contested Proposed Settlement is not dismissed on these grounds, hearings are necessary to establish what SED knew and knows regarding PG&E's 1987 C-hook test results report; the Tubbs Fire ignition; PG&E failure to maintain required firebreak at the Tubbs Fire ignition source; and PG&E destruction of evidence following the Tubbs Fire. This should include evidence that is not public but for which SED knows are could have known about that has been submitted in United States District Court, Northern District of California, Case No. 3:14-cr-00175-WHA (criminal probation); United States District Court, Northern District of California, Case No. 3:19-cv-05257-JD (bankruptcy); Superior Court of California, County of San Francisco, Case No. CJC17004955 (California North Bay Fire cases), as well as other relevant court cases.

Further, the urgent need for evidentiary hearings to address the material contested issues of fact regarding how SED will interpret its obligations if the Commission approves the

Contested Proposed Settlement is highlighted by SED's own statements. Written statements made by SED investigator, Ivan Garcia, in his August 13, 2019 Tubbs Fire ESRB Site Visit Observation indicate that CalFire has already*, during the pendency of this proceeding,* internally changed its conclusion[39] as to the cause and origin of the Tubbs Fire. Its conclusion now align with the evidence submitted by Del Monte's expert witness testimony implicating PG&E conductors as the true cause of the Tubbs Fire. Garcia states, "The tap line from Pole 2 to 10 is where CAL FIRE found the where the Tubbs Fire originated from [sic]."[40] In Figure 1 from the

Figure 1: "View of the Scene" Diagram from SED's Ivan Garcia's August 13, 2019 Tubbs Fire ESRB Site Visit Observation Report.



ESRB Site Visit Observation Report, the conductors from Pole 2 to 10 are the same PG&E conductors that Del Monte's expert witness Ken Buske testified to as having been found to have arching burn marks that indicate vegetation to conductor contact.

Given the seriousness of the potential impropriety of SED's continued reliance on CalFire's Tubbs Fire investigation's public conclusions while having secret, non-public knowledge that CalFire had actually reversed its conclusions in light of the new evidence, due

[39] See I.19-06-015, *Thomas Del Monte & Wild Tree Foundation Joint Comments in Opposition of Settlement Agreement* (January 16, 2020)at 48-49, citing Ivan Garcia's August 13, 2019 Tubbs Fire ESRB Site Visit Observation Report.
[40] Attachment B: CPUC SED, *Tubbs Fire ESRB Site Visit Observation Report* (August 13, 2019).

process requires that there be evidentiary hearings to determine what SED knew or could have known on December 18, 2019 when SED's director, Lee Palmer, executed the Contested Settlement Agreement.

II. DISCOVERY PERIOD MUST BE REOPENED

The Joint Parties hereby move for the discovery period to be reopened. Rule 12.3 states, "If a hearing is set, it will be scheduled as soon after the close of the comment period as reasonably possible. Discovery will be permitted and should be well underway prior to the close of the comment period." The Joint Parties are not presently able to conduct discovery pursuant to this proceeding's schedule. As discussed in detail above, new information has come to light for which Joint Parties need to be able to conduct discovery so as to be able to put documentary evidence on the record.

The discovery period must also be reopened because PG&E's bad faith efforts in regard to discovery prevented parties from obtaining material evidence. On September 24, 2019, Del Monte filed Data Request Question 2 seeking the following: "As soon as practicable or within 10 business days from this request, please provide copy of all delivered or pending responses to discovery requests related to all fires in 2017 and 2018 within PG&E's service territory that were investigated by SED and which were subject to a discovery request in any pending, ongoing, or closed proceeding or legal suit." This data request squarely covers the information in the cases cited by Section (IV)(D) - United States District Court, Northern District of California, Case No. 3:19-cv-05257-JD (bankruptcy); Superior Court of California, County of San Francisco, Case No. CJC17004955 (California North Bay Fire cases, including Tubbs). Yet, PG&E refused to provide any responses to any of Del Monte's specific Data Requests, including Question 2, and

made the specific objection that, "PG&E objects to this Request to the extent it seeks information outside the scope of this proceeding. PG&E further objects to this Request on the grounds that it is overbroad, unduly burdensome, and harassing, and seeks information not reasonably related to Mr. Del Monte's role in this proceeding." The relevance of the Del Monte's discovery request had been unquestionably demonstrated by the language of Section (IV)(D).

As Del Monte claimed in his November 18, 2019 Motion to Compel, PG&E's refusal to produce the requested material demonstrated bad faith on PG&E's part in order to obstruct Del Monte's right to conduct discovery. While the ALJ's December 12, 2019 ruling[41] overruled PG&E's absurd contention that Del Monte was not entitled to make discovery requests himself, the ruling offered no reasonable remedies for the harm PG&E's bad faith tactics and therefore prevented Del Monte from receiving the information he was due. Instead, Del Monte's Data Request Question 2 was ruled to not have sufficiently evident of "relevan[ce] to matters that are within the scope of this proceeding, and admissible in evidence or reasonably calculated to lead to the discovery of admissible evidence."[42] Normally, the remedy for such a ruling would be to propound amended data requests consistent with the ruling. However, the ALJ's ruling was not issued until nearly two months after this proceeding's October 18, 2019 discovery cutoff date[43] and contained no remedy to the problems outlined in the Del Monte's motion to compel. Therefore, a new discovery period must be opened prior to evidentiary hearing so that the information that was or could have been known to SED in these proceedings can be determined.

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[41] I.19-06-015, *Assigned Administrative Law Judge's Ruling Granting in Part, and Denying in Part, the Motion of Thomas Del Monte to Compel Discovery* (December 12, 2019) at p. 2, fn 3.
[42] I.19-06-015, *Assigned Administrative Law Judge's Ruling Granting in Part, and Denying in Part, the Motion of Thomas Del Monte to Compel Discovery* (December 12, 2019) at p. 3.
[43] I.19-06-015, *Assigned Commissioner's Scoping Memo and Ruling* (August 23, 2019) at p. 6.

CONCLUSION

For the reasons outlined in Cal Advocates' Motion, hearings should be granted on the following material contested issues of fact: whether stipulated facts support PG&E's failure to admit to a single violation of the Commission's safety rules; whether the System Enhancement Initiatives can be completed for $50 million and the potential cost to customers if their cost exceeds $50 million; whether and to what extent PG&E has funded or will fund the System Enhancement Initiatives prior to the effective date of the Contested Proposed Settlement Agreement; whether it is reasonable to begin the independent wildfire safety audit of PG&E's overhead distribution and transmission maintenance one year after the effective date of the Contested Proposed Settlement Agreement; whether it is reasonable not to modify the Contested Proposed Settlement Agreement to include the City and County of San Francisco's "limited modifications to the settlement to ensure transparency on important issues of public safety;" whether leaving this proceeding open to consider and implement corrections to decrease the risk of future catastrophic wildfires caused by PG&E's electric facilities would jeopardize initiatives such as the root cause analyses; and whether it is reasonable to adopt the Contested Proposed Settlement Agreement when the extent of the known damages continues to evolve.

Furthermore, for all the foregoing reasons, the discovery period should be reopened and hearings should also be granted on the following material contested issues of fact: whether the Contested Proposed Settlement accounts for all violations perpetrated by PG&E related to the covered fires, whether or not alleged by SED; and what information is covered by the Contested Proposed Settlement's proposed release of PG&E from liability based upon information that was "known or could have been known" about the covered fires.

(signature page follows)

Respectfully submitted,

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