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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 APPLICATION FOR REHEARING

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THOMAS DEL MONTE APPLICATION FOR REHEARING

Pursuant to Rule 16.1 of the Commission Rules of Practice and Procedure (“Rule” or “Rules”), party Thomas Del Monte (“Del Monte”) respectfully files the following application for rehearing on Commission’s Decision 20-05-019 voted on May 7, 2020, and mailed on May 8, 2020, purporting resolve Investigation 19-06-015 (“OII”) by approval of the Settlement.

Upon rehearing, the Del Monte requests that the \$200 million fine be reinstated as payable in full and that the Tubbs Fire be removed from the scope of the Settlement and the OII be reopened and assigned a new Assigned Commissioner and ALJ to fully investigate PG&E legal and regulatory violations related to the Tubbs Fire. It is requested that the reopened OII include a new discovery period with an assigned supervision of a law and motion ALJ to remedy the denial of discovery on this issue in this proceeding. It is further requested that the newly discovered, unconsidered evidence be admitted and considered that implicates unlawfully unmanaged vegetation contacting PG&E’s distribution lines that ignited the Tubbs Fire. It is finally requested that when or if lawfully considered findings on outstanding issues merit new penalties, including fines, be assessed and imposed upon PG&E as required by law.

I. INTRODUCTION

Given the severity of the tandem failures of both PG&E safety conduct and the Commission’s safety enforcement efforts, a heightened imperative was imparted on this OII to ensure thoroughness of the investigation and the sufficiency of the punitive remedies to deter future widespread ratepayer death and loss. Unfortunately, this OII failed spectacularly to rise to the occasion and instead has set the stage for future death and destruction and once again proved that no matter what PG&E does the Commission will do whatever it takes, including violate the law, constitutional dictates, ethical norms, and Commission precedent to shield the utility from

the requirements of law and justice. This application for rehearing (“AFR”) presents the legal errors committed in the OII and in the Final Decision so that they can be remedied by the Commission in a timely manner.

II. STANDARD OF REVIEW

A. Application for Rehearing and Judicial Review

Rule 16.1(c) requires an application for rehearing to set forth the “grounds on which the applicant considers the order or decision of the Commission to be unlawful or erroneous,” with references to the record or law. Rule 16.1(c) further states “[t]he purpose of an application for rehearing is to alert the Commission to a legal error, so that the Commission may correct it expeditiously.” Pursuant to PUC § 1757(a), a decision or order is unlawful and is subject to judicial intervention where: (1) the Commission has acted without, or in excess of, its powers of jurisdiction; (2) the Commission has not proceeded in the manner required by law; (3) the Commission’s decision is not supported by the findings; (4) the Commission’s findings are not supported by substantial evidence in light of the whole record; (5) the Commission’s decision was procured by fraud or was an abuse of discretion; or (6) the decision violates any right of the petitioner under the United States or California Constitution.¹

If the Commission “fail[s] to comply with required procedures, appl[ies] an incorrect legal standard, or commit[s] some other error of law,” its decision is reversible.² Pursuant to PUC § 1705, Commission decisions “shall contain, separately stated, findings of fact and

¹ Pub. Util. Code § 1757(a).

² *Pedro v. City of Los Angeles* (2014) 229 Cal.App.4th 87, 99.

conclusions of law by the Commission on all issues material to the order or decision.”³ The California Supreme Court has explained that such “[f]indings are essential to ‘afford a rational basis for judicial review and assist the reviewing court to ascertain the principles relied upon by the commission and to determine whether it acted arbitrarily.’”⁴

Substantial evidence is evidence of “ponderable legal significance,”⁵ that is “reasonable in nature, credible, and of solid value such that a reasonable mind might accept it as adequate to support a conclusion.”⁶ It is not synonymous with “any evidence.”⁷ Thus, a Commission decision will not be upheld if it is “devoid of evidentiary support” or “contrary to facts [which are] universally accepted as true.”⁸ Critically, “in light of the whole record,” means the reviewing court “cannot just isolate the evidence supporting the findings and call it a day, thereby disregarding other relevant evidence in the record.”⁹ Instead, the Commission must consider all relevant evidence, which necessarily “involves some weighing of the evidence to fairly estimate its worth.”¹⁰

Judicial review of Commission decisions pursuant to the Public Utilities Code is broader where constitutional issues are presented. “Notwithstanding sections 1757 and 1757.1, in any

³ Pub. Util. Code § 1705.

⁴ *California Manufacturers Assn. v. P.U.C.* (1979) 24 Cal.3d 251, 258-59.

⁵ *People v. Johnson* (1980) 26 Cal.3d 557, 576 (internal citations omitted).

⁶ *S. Coast Framing, Inc. v. Worker’s Compensation Appeal Bd.* (2015) 61 Cal.4th 291, at p. 8 (quotation omitted).

⁷ *Roddenberry v. Roddenberry* (1996) 44 Cal.App.4th 634, 651-52.

⁸ *Larson v. State Pers. Bd.* (1994) 28 Cal.App.4th 265, 273.

⁹ *Util. Reform Network v. P.U.C.* (2014) 223 Cal.App.4th 945, 959 (quotation omitted).

¹⁰ *County of San Diego v. Assessment Appeals Bd. No. 2* (1983) 148 Cal.App.3d 548, 555-58 (Assessment Board erred in determining the correct method of valuation to be the market value approach and then subsequently ignoring all competent evidence presented on market value, making its own determination of value based upon speculation and conjecture).

proceeding wherein the validity of any order or decision is challenged on the ground that it violates any right of the petitioner under the United States Constitution or the California Constitution, the Supreme Court or court of appeal shall exercise independent judgment on the law and the facts, and the findings or conclusions of the commission material to the determination of the constitutional question shall not be final.”¹¹

B. Due Process

Due process requires a fair proceeding whenever an individual is to be deprived of property for a public purpose. Ratepayers’ due process right to safe and effective utility service is a recognized right protected by due process; “Utility service is a necessity of modern life; indeed, the discontinuance of water or heating for even short periods of time may threaten health and safety.”¹² Pursuant to the 14th Amendment, “No state shall ... deprive any person of life, liberty, or property, without due process of law.”¹³ Likewise, under the California Constitution, “A person may not be deprived of life, liberty, or property without due process of law.”¹⁴ A fundamental requirement of due process is “the opportunity to be heard.”¹⁵ “It is an opportunity which must be granted at a meaningful time and in a meaningful manner.”¹⁶

¹¹ Pub. Util. Code, § 1760.

¹² *Memphis Light, Gas Water Div. v. Craft* (1978) 436 U.S. 1, 18.

¹³ U.S. Const., 14th Amend.

¹⁴ Cal. Const., art. I, § 7, subd. (a).

¹⁵ *Grannis v. Ordean* (1914) 234 U.S. 385, 394.

¹⁶ *Armstrong v. Manzo* (1965) 380 U.S. 545, 552.

The United States Supreme Court has long held that due process in proceedings by the Commission requires a fair hearing. In *Railroad Com. of California v. Pacific Gas & Electric Co.*, the Court explained that the requirements of procedural due process are met only where “the rate-making agency of the State gives a fair hearing, receives and considers the competent evidence that is offered, affords opportunity through evidence and argument to challenge the result, and makes its determination upon evidence and not arbitrarily.”¹⁷

The Constitutional guarantee of a fair hearing requires decision-makers to act free of bias. “When...an administrative agency conducts adjudicative proceedings, the constitutional guarantee of due process of law requires a fair tribunal. [Citations omitted] A fair tribunal is one in which the judge or other decision maker is free of bias for or against a party. [Citations omitted].”¹⁸ Further, “[v]iolation of this due process guarantee can be demonstrated not only by proof of actual bias, but also by showing a situation ‘in which experience teaches that the probability of actual bias on the part of the judge or decision maker is too high to be constitutionally tolerable. [Citations omitted].’”¹⁹

Due process and the Public Utilities Code require the Commission to comply with the law and its own rules. The Commission may not “disregard ... express legislative directions to it, or restrictions upon its power found in other provisions of the act or elsewhere in general law.”²⁰ The Public Utilities Code and other express statutory provisions do not represent the only limits

¹⁷ *Railroad Com. of California v. Pacific Gas & Electric Co.* (1938) 302 U.S. 388, 393-394.

¹⁸ See *Morongo Bd. of Msn. Indians v. State W. Resources* (2009) 45 Cal.4th 731.

¹⁹ *Id.* at p. 737.

²⁰ *PG & E Corp. v. Public Utilities Com.* (2004) 118 Cal.App.4th 1174, 1199.)

upon the Commission's authority. Significantly, the Commission must abide by its own rules²¹ and Commission rules and procedures must be consistent with due process.²² As the court recognized in *Southern California Edison Co. v. Public Utilities Commission*, the Commission's failure to follow its own rules in adopting a particular decision constitutes a failure to proceed as required by law, and, if prejudicial, invalidates that decision.²³

In *Edison*, the court concluded the Commission had failed to proceed in the manner required by law when it violated its own rules in administering the proceeding.²⁴ In that proceeding, the Commission instituted a rulemaking proceeding and then, months after issuance of the scoping memo, the ALJ permitted a party to file comments with 400 pages of materials and new proposals.²⁵ The parties objected that the new proposals were beyond the issues identified in the scoping memo, but the ALJ amended the scope of the proceeding to include the new proposals and allowed three additional business days to respond on the merits.²⁶ In annulling the Commission's decision, the *Edison* court noted that the Commission adopted its

²¹ *Southern California Edison Co. v. Public Utilities Commission* (2006) 140 Cal.App.4th 1085, 1106 (“*Edison*”).

²² *Southern California Edison Co. v. Public Utilities Commission*, supra, 140 Cal.App.4th at p. 1085.

²³ *Southern California Edison Co. v. Public Utilities Commission*, supra, 140 Cal.App.4th at pp. 1104, 1106; Pub. Util. Code § 1757, subd. (a)(2).

²⁴ *Southern California Edison Co. v. Public Utilities Commission*, supra, 140 Cal.App.4th at pp. 1091–1092.

²⁵ Id. at pp. 1092–1093, 1105–1106.

²⁶ Id. at p. 1106.

rules pursuant to its rulemaking authority, and these rules have “the force and effect of law.”²⁷ Therefore when the Commission fails to abide by its own rules, it is breaking the law.

Due process also calls for a decision to be based on a record. “[T]he decisionmaker’s conclusion . . . must rest solely on the legal rules and evidence adduced at the hearing. To demonstrate compliance with this elementary requirement, the decision maker should state the reasons for his determination and indicate the evidence he relied on, though his statement need not amount to a full opinion or even formal findings of fact and conclusions of law.”²⁸

Commission decisions must go further: Commission decisions “shall contain, separately stated, findings of fact and conclusions of law by the Commission on all issues material to the order or decision.”²⁹ “Every issue that must be resolved to reach that ultimate finding is ‘material to the order or decision,’ and findings are required of the basic facts upon which the ultimate finding is based. . . . [S]uch findings afford a rational basis for judicial review and assist the reviewing court to ascertain the principles relied upon by the [PUC] and to determine whether it acted arbitrarily, as well as assist parties to know why the case was lost and to prepare for rehearing or review, assist others planning activities involving similar questions, and serve to help the [PUC] avoid careless or arbitrary action.”³⁰

²⁷ Id. at p. 1092 fn3.

²⁸ *Goldberg v. Kelly* (1970) 397 U.S. 254.

²⁹ Pub. Util. Code, § 1705; See also *Clean Energy Fuels Corp. v. Public Utilities Com.* (2014) 227 Cal. App. 4th 641.

³⁰ *Clean Energy Fuels Corp. v. Public Utilities Com.* (2014) 227 Cal. App. 4th 641 quoting *Greyhound Lines, Inc. v. Public Utilities Com.* (1967) 65 Cal.2d 811 (citation omitted.)

III. CHRONOLOGICAL RELEVANT BACKGROUND

On June 27, 2019, the Commission issued an Order Instituting Investigation and Order to Show Cause (“OII”) whereby, upon its own motion, “[a]n investigation is instituted on the Commission’s own motion to evaluate the reports of the Safety and Enforcement Division and the California Department of Forestry and Fire Prevention and to determine whether Pacific Gas and Electric Company (PG&E) violated any provision of the California Public Utilities Code, Commission General Orders or decisions, or other applicable standards, laws, rules or regulations in connection with PG&E’s operation and maintenance of its electric facilities”³¹ related,” to the igniting 15 fires in PG&E service territory in 2017.³² The Commission stated that the OII was issued in *response* to reports issued by SED and CAL FIRE, concluding that PG&E had committed numerous violations resulting in the ignition of 14 fires addressed in the Commission Investigation.³³ Procedurally, the proceeding was defined as both an investigatory proceeding and an adjudicatory proceeding with PG&E named as the respondent. SED was named as a party to this proceeding separate from its advisory role at the commission, as required under law. The Del Monte intervened and was also named as a party to this proceeding.

Strangely, the OII claims to have a scope limited to the fires where PG&E’s equipment was “involved in igniting in its service territory,” yet the OII included the Tubbs Fire as one to be investigated in this formal investigation despite the fact that neither the Commission’s SED or CAL FIRE found any evidence that PG&E started the Tubbs Fire in their investigations. The

³¹ I.19-06-015, OII at p. 20, Ordering Paragraph #1.

³² I.19-06-015, OII at p. 1.

³³ I.19-06-015, OII at pp. 2-3.

Tubbs Fire testimonial incident reports (“SED Tubbs Fire Report” and “CAL FIRE Tubbs Fire Report”) were listed with the other initial fire reports to be evaluated in this proceeding.

The Commission identified two avenues of investigation: 1) whether PG&E should be sanctioned for failing to comply with General Order 95 and Resolution E-4184 as determined in the SED Fire Report; and 2) investigate and address alleged systemic deficiencies in PG&E’s operations and maintenance of its electric facilities and determine whether PG&E’s practices have been unsafe and in violation of PUC § 451 of the Public Utilities Code or other provisions of the law.³⁴ The OII also stated that “If our investigation determines that violations have occurred in any of the above areas, we shall consider the proper penalties for such violations. These penalties may include fines, remedies, and other corrective action.”³⁵

Before moving on from the OII, it is important to note that no scoping memo modified Ordering Paragraph #1’s dictate that both SED and CAL FIRE reports were to be evaluated in this proceeding. Nor did the OII or future scoping memos state that the only evidence upon which violations can be found against PG&E are those provided by SED. Nor did the OII prohibit parties (Del Monte or Respondent PG&E) from defending their interests by challenging the validity of factual assertions made in SED or CAL FIRE’s testimonial reports.

On August 19, 2019, the PG&E bankruptcy court judge ordered a January 2020 state court trial date to determine whether PG&E’s equipment started the Tubbs Fire upon presentation of evidence that indicated that PG&E equipment did indeed ignite the Tubbs Fire.

³⁴ I.19-06-015, OII at p. 3.

³⁵ I.19-06-015, OII at p. 15.

On August 23, 2019, the Assigned Commissioner issued the first scoping memo and ruling regarding the first set of fires, including the following top three issues for each fire of the proceeding:

1. Did PG&E violate General Order (GO) 95 and/or Resolution E-4148 as identified in the SED Fire Report [and the CAL FIRE Fire Report which the SED is based upon and is appended thereto]?
2. Did PG&E violate any provisions of the Pub. Util. Code, GO, Commission decision, or any other applicable regulations with respect to its maintenance and/or operation of its electric facilities as identified in this investigation?
3. What penalties should be imposed for any proven violation(s) found above pursuant to Pub. Util. Code §§ 701, 2107, and 2108?

Note that Issue #1 involves the determination of whether there is there were violations of a limited set of Government Orders and/or a Commission Resolution and limits those investigations to that identified in the SED Fire Reports (i.e. the non-formal internal Commission investigations). However, Issue #2 expands to a fully jurisdictionally inclusive set of legal authority and expands the factual basis on which any potential violations can be found to that which is uncovered in “this investigation.” Appropriately, Issue #3 involves determining what penalties should be imposed for any proven violation in Issue #1 and #2. Both future amended scoping rulings that added new fires to the proceeding explicitly state that they do not change the issues outlined for the initial set of fires.

On July 26, 2019 NBC BayArea ran a news story entitled, “Experts Cite Video to Question Cal Fire’s Exoneration of PG&E in Tubbs Fire”³⁶ depicting an immense arc flash captured on video in the general area in which was later determined to be the area where Tubbs Fire was ignited.

On September 26, 2019, NBC BayArea reported a new story, *Photos Show PG&E Lines Sparked Tubbs Fire: Expert*, in new photographic evidence regarding the ignition of the Tubbs Fire that showed tree contact with two PG&E power lines.³⁷ This evidence was discovered after CAL FIRE had completed its report that did not find any physical evidence of an ignition source.

On October 4, 2019, a status conference was held during which Del Monte explained to the Presiding Officer and Assigned Commissioner that an all-party settlement was unlikely and that Del Monte was considering filing a motion to remove the Tubbs Fire from this proceeding because the facts related to the Tubbs Fire are in dispute. Upon hearing this, the Presiding Officer responded that the “Tubbs Fire is not part of this OII.”³⁸ Del Monte further explained that the Tubbs Fire was “was investigated [prior to this proceeding], and no violations were found because it was based upon an origin that was different than what people [now] believe it is on.”³⁹ The Presiding Officer then stated, “It’s not within the scope of this proceeding because the OII found, concluded that there were no allegations based on the CAL FIRE findings and

³⁶ NBC BayArea, Experts Cite Video to Question Cal Fire’s Exoneration of PG&E in Tubbs Fire, <https://www.nbcbayarea.com/on-air/as-seen-on/experts-cite-video-question-cal-fire-pge-tubbs-fire/152592/> [as of January 15, 2020].

³⁷ NBC BayArea, Photos Show PG&E Lines Sparked Tubbs Fire: Expert, <https://www.nbcbayarea.com/news/local/photos-show-pge-lines-sparked-tubbs-fire-expert/182112/> [as of January 15, 2020].

³⁸ I.19-06-015, Reporter’s Transcript (October 4, 2019) at p. 13.

³⁹ I.19-06-015, Reporter’s Transcript (October 4, 2019) at p. 13.

SED can address that more if they'd like, but it's outside the scope of this proceeding.”⁴⁰

Assigned Commissioner, who was also presiding over the status conference and sitting next to Presiding Officer during this exchange, did not attempt to correct or clarify any of these statements then or later.

On October 29, 2019, SED’s October 17, 2019 motion to include PG&E violations that caused the 2017 Loco and McCourtney Fires in the scope of the proceeding was granted in an amended scoping memo.

On November 8, 2020, Del Monte served the Presiding Officer and service list the testimony of Kenneth E. Buske, an electrical engineer with over three decades of experience in forensic electrical aspects of fire cause and origin. The expert testimony provided newly discovered evidence regarding the Tubbs Fire origin and cause linking the actual ignition to of the Tubbs Fire to severe arcing burn marks caused by vegetation contact on PG&E wires leading up to a long-unoccupied residential home owned by an elderly woman. This then newly discovered evidence undermined the CAL FIRE investigation that could not find the ignition source and instead blamed an unspecified electrical cause in the elderly woman’s residence on the widely discredited, non-scientific, and illogical method of process of elimination whereby CAL FIRE concluded that the Tubbs Fire was ignited “eliminated all other causes for the Tubbs Fire [that were found in a limited and rushed investigation], with the exception of an electrical caused fire originating from an unknown event affecting privately owned conductor or

⁴⁰ I.19-06-015, Reporter’s Transcript (October 4, 2019) at p. 13.

equipment.” CAL FIRE’s investigation also concluded that there were no violations of Public Resources Code by PG&E.

On November 15, 2019, Del Monte filed a motion to compel and request for ruling seeking to compel discovery from PG&E to confirm and support Del Monte’s Tubbs Fire testimony. In the motion, Del Monte explained that because of the discovery window was now closed, the accelerated schedule of the Proceeding, and PG&E’s refusal to provide any responses to Del Monte’s specific discovery requests, the only appropriate action was to remove the Tubbs Fire from the scope of this proceeding.⁴¹ PG&E claimed that Del Monte’s role in the proceeding did not entitle him to discovery and that the Tubbs Fire was out of scope of the proceeding. Del Monte’s motion to compel requested:

A Ruling by the Commission that the Tubbs Fire and any related potential violations are removed from consideration from this proceeding due to 1) new evidence coming to light calling into question the factual basis for Cal Fires Tubbs Fire investigation conclusions and the validity of SED’s reliance on CAL FIRE’s findings, 2) the new evidence suggesting violations of safety rules and laws, 3) PG&E obstruction of Del Monte’s investigation in the Tubbs Fire by abuse of the Commissions discovery process thereby depriving Del Monte of due process in relation to the Tubbs Fire.⁴²

On November 18, 2019, PG&E served testimony that did not contend any of Del Monte’s allegations on the basis that “Mr. Del Monte’s testimony... relates solely to the Tubbs fire, for which SED did not identify any violations. As such, PG&E does not intend to file witness testimony responding to Mr. Del Monte.”⁴³ It is important to note here that PG&E never made a motion to have this testimony included in the record.

⁴¹ See I.19-06-015, *Del Monte Motion to Compel Pacific Gas and Electric to Respond to Data Requests and Requests for Admission Under Oath* (November 15, 2019) at pp. 11-12.

⁴² I.19-06-015, *Del Monte Motion to Compel*, Attachment A Proposed Ruling, p. 14.

⁴³ I.19-06-015, *PG&E Testimony* (November 18, 2019) at p. 1-4, lines 12-17.

Also on November 18, 2019, unknown persons with apparent knowledge of the details of the ongoing settlement negotiations in this OII violated the settlement requirements under Rule 12.6 by leaking the information to the financial news media that the SED and PG&E had agreed in principle on a settlement fixing the dollar amount at \$1.7 billion.⁴⁴

On November 20, 2019, Del Monte filed a Motion for an Expedited Ruling on the Request for Ruling Removing the Tubbs Fire from this Proceeding and for a Shortened Response Period for the Motion to Compel. This motion reiterated the need to exclude “the Tubbs Fire from being subject to any decisions or settlement agreements associated with this proceeding and that the necessary discovery, testimony, and hearing schedule be allowed to adequately address all General Order (GO) and statutory violations from the remaining 2017 wildfires not subject to grave factual contention,” and that it is “proper to expedite this ruling to avoid legal error through a settlement that memorializes SED’s [Tubbs Fire findings] and ultimately, if approved, the Commission’s willingness to ignore facts implicating to PG&E’s culpability in igniting the second most devastating fire in California’s history and PG&E’s obstruction of SED and the intervenors’ investigatory role in its proceedings.”⁴⁵

On November 20, 2019, PG&E filed a motion to strike Del Monte’s Buske testimony on the Tubbs Fire for being outside the scope of the proceeding. Del Monte filed a rebuttal to this motion, but both motions were ultimately ignored and summarily denied over thirteen weeks

⁴⁴ Bloomberg News, PG&E Nears \$1.7 Billion Settlement in California Fire Penalties (November 18, 2019) available at: <https://www.bloomberg.com/news/articles/2019-11-19/pg-e-nears-1-7-billion-settlement-in-california-fire-penalties>.

⁴⁵ I.19-06-015, I.19-06-015, *Del Monte Motion for Expedited Ruling on the Request for Ruling Removing the Tubbs Fire From the Proceeding and For A Shortened Response Period for the Motion to Compel* (November 20, 2019) at p. 3.

later with all outstanding motions on February 27, 2020, with the issuance of the Presiding Officer's Decision (POD).

On December 5, 2019, the Assigned Commissioner issued a second amended scoping memo and ruling, adding the Camp Fire to the proceeding.

On December 6, 2019, and in order to avoid having to face the jury in Tubbs Fire civil trial, it was made public that PG&E had reached a settlement agreement with wildfire victims, now including Tubbs Fire victims, for \$13.5 billion, adding approximately \$5.00 billion more than PG&E's previous plan of reorganization.⁴⁶

On December 12, 2019, approximately one month after Del Monte filed his motion to compel and request for ruling, the Presiding Officer issued a ruling granting in part, and denying in part Del Monte's motion to compel discovery and request for ruling. The Presiding Officer's ruling did not specifically address Del Monte's request to remove the Tubbs Fire from the scope of the proceeding but stated the following:

Del Monte raises the issue of the validity of the California Department of Forestry and Fire Protection (CAL FIRE)'s investigation into the Tubbs Fire and determination as to the ignition source of the fire. The determination as to the ignition source of the Tubbs Fire is not a matter that will be decided in this proceeding. Therefore, this proceeding is not an appropriate forum to challenge CAL FIRE's origin and cause determination for the Tubbs Fire.⁴⁷

It appeared to Del Monte that only one of two rulings were necessary 1) the Tubbs Fire is ruled out of scope of the proceeding or 2) that in accordance the OII Ordering Paragraph #1 that

⁴⁶ See KSRO, PG&E Reaches \$13.5 Billion Tubbs Fire Settlement (December 6, 2019) available at <https://www.ksro.com/2019/12/06/breaking-pge-reaches-13-5b-tubbs-fire-settlement/> [as of January 15, 2020].

⁴⁷ 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. 4.

the CAL FIRE and SED investigation reports are to be evaluated and in accordance with the August 23, 2019, scoping memo and ruling Issue #2 and Issue #3 that the Tubbs Fire and all fires of the proceeding are open to investigation in this proceeding. Instead, the ruling adopted PG&E's argument that essentially limits the scope of the proceeding to only Issue #1 of the August 23, 2019, scoping memo and ruling, which limits the investigation to the determination of violations of only GO 95 and/or Resolution E-4148 and limited to the fact identified in the SED Fire Report. Apparently, re-adopting the reasoning stated by the Presiding Officer at the October 4, 2019, that the SED's the Tubbs Fire was "not within the scope of this proceeding because the OII found, concluded that there were no allegations based on the CAL FIRE findings and SED can address that more if they'd like, but it's outside the scope of this proceeding."

On December 17, 2019, approximately one month after the details of the settlement were leaked to the financial news media, SED, PG&E, OSA, and CUE moved for approval of a Proposed Settlement. Thomas Del Monte, Wild Tree Foundation, The Utility Reform Network ("TURN"), the Commission's Public Advocates Office ("Cal Advocates"), City and County of San Francisco, Center for Accessible Technology, County of Napa, County of Mendocino, City of Santa Rosa, County of Sonoma, and Institutional Equity Investors did not join and are not parties to the Proposed Settlement.

The Proposed Settlement purports to address violations perpetrated by PG&E that results in the Adobe, Atlas, Cascade, Lobo, McCourtney, Norrbom, Nuns, Oakmont/Pythian, Partrick, Pocket, Point, Potter/Redwood, Sulphur, Youngs/Maccama, and Camp Fires in 2017 and 2018. The Proposed Settlement also purports to address enforcement actions in regard to Tubbs, Cherokee, 37, and LaPorte Fires even though SED does not allege that PG&E committed any violations in regard to these fires.

On January 16, 2020, Thomas Del Monte, Wild Tree Foundation, TURN, and Cal Advocates filed formal opposition to the Proposed Settlement. The parties' joint filing realleges the numerous violations of law and rules uncovered in the proceeding yet not acknowledged or considered by SED on the Tubbs and Camp Fires. The Del Monte's opposition filing included as Exhibits a refiling of Witness Buske's direct testimony regarding the Tubbs Fire and a copy of deposition testimony of CAL FIRE's lead investigator for the Tubbs Fire.

On January 21, 2020, Del Monte emailed the Presiding Officer and service list requesting an update on the evidentiary hearings scheduled in four business days. The request explained that given the contested nature of the proposed settlement that Rule 12.3 required hearings. And reminded the Presiding Officer that "no ruling has been made on PG&E's motion to strike my expert witnesses' testimony on the Tubbs Fire and other matters, so it is also unclear whether I need to schedule and prepare Mr. Buske for cross-examination" and "Therefore, I request clarification on the hearing schedule and what testimony will and will not be subject to cross-examination at the hearing so that the parties can prepare."⁴⁸

Later on January 21, 2020, PG&E replied to the service list email requesting that hearings be canceled.

Subsequently, on January 21, 2020, the Presiding Officer issued an e-mail ruling that "in light of the settlement agreement," the evidentiary hearing and briefing schedule is vacated.⁴⁹ The Presiding Officer ignored Del Monte's request to provide guidance on what was or was not

⁴⁸ I.19-06-015, *E-Mail Ruling Vacating Hearings and Briefing Dates* (January 21, 2020) at p. 6.

⁴⁹ *Id.* at p. 1.

what testimony will and will not be subject to cross-examination – i.e. ignored the request to clarify the scope of the proceeding as it relates to Tubbs.

On January 28, 2020, the Presiding Officer issued a ruling and in response to Del Monte's objection under PUC § 311.5(b)(5)⁵⁰ and Rule 12.2⁵¹ to the Docket Office's refusal to accept the Buske direct testimony on the Tubbs Fire as supporting evidence on the record to the Del Monte's January 16 filing objecting to the proposed settlement.⁵² The ruling authorized the Docket Office to accept for filing the Del Monte's January 16 filing, including exhibits.

Given that the issue of the Tubbs Fire's inclusion of this proceeding in doubt and, at that time subject to a two-month-old pending PG&E motion to strike Del Monte's evidence from the evidentiary record, it was inferred that it was that now that the Tubbs Fire evidence now on the Docket Card of the proceeding was only waiting for the Presiding Officer to rule on PG&E's motion to strike the Tubbs Evidence which would require clarifying how it was possible hold an OII that order that the SED and CAL FIRE Reports to be evaluated and to resolved PG&E's

⁵⁰ PUC § 311.5(b)(5) states: "The commission shall publish and maintain the following documents on the Internet: **(5)** A docket card that lists, by title and date of filing or issuance, all documents filed and all decisions or rulings issued in those proceedings, including the public versions of **all prepared oral and written testimony** and advice letter filings, protests, and responses. The commission shall maintain the docket card until final disposition, including disposition of any judicial appeals, of the corresponding proceedings. [emphasis added in original objection]"

⁵¹ See Exhibit A of I.19-06-015, *Response of Thomas Del Monte and Wild Tree Foundation to PG&E's Appeal of Presiding Officer's Decision and Objections to Introduction of Extra-Record Evidence After the Evidentiary Record is Closed* (April 9, 2020) at pp. 17-18 (stating in part, "according to Rule 12.2, comments that assert hearings are required by law must cite and specifically the material contested facts that would require a hearing. Without allowing Attachment C [Buske direct testimony on Tubbs] there is nothing in the record or a publicly available version of the testimony that can be cited or specified diminishing the value of the filed joint comments.")

⁵² I.19-06-015, *E-Mail Ruling Authorizing the Commission's Docket Office to Accept for Filing the January 16, 2020 Comments of Thomas Del Monte and the Wild Tree Foundation*, (January 28, 2020)

regulatory liability for the in-scope fires when the Presiding Officer on December 12, 2019 ruled that CAL FIRE's testimony clearing PG&E of igniting the Tubbs Fire could not be challenged by Buske Tubbs Fire testimony that presents newly discovered evidence not considered by SED or CAL FIRE that also triggered PG&E's Tubbs Fire civil case's December 2019 settlement involving over \$13 billion in payments to Tubbs Fire and other PG&E fire victims.

On February 12, 2020, Cal Advocates filed its *Motion Requesting A Hearing on Contested Settlement*.

On February 24, 2020, the ALJ denied Thomas Del Monte's Motion for Official Notice in Support of Motion to Compel and Direct Testimony of Party Thomas Del Monte.

On February 25, 2020, Thomas Del Monte and Wild Tree Foundation filed *Joint Motion for Evidentiary Hearings and To Reopen Discovery Period*. This motion was ignored by the Presiding Officer and the motion and later summarily denied by the POD.⁵³

On February 25, 2020, Thomas Del Monte filed a Motion to Strike the CAL FIRE and SED Reports Related to The Tubbs Fire on multiple substantive and procedural grounds. This Motion was ignored by Presiding Officer and later summarily denied by the POD.⁵⁴

On February 27, 2020, Del Monte made yet another plea to Presiding Officer for instructions on how to submit the Buske testimony and other evidence into the record sending the following email:

Your Honor,

⁵³ I.19-06-015, POD at p. 76, Ordering Paragraph 4. This Order was later adopted without modification in the Final Decision at p.84, Ordering Paragraph 5.

⁵⁴ I.19-06-015, POD at p. 76, Ordering Paragraph 4. This Order was later adopted without modification in the Final Decision at p.84, Ordering Paragraph 5.

This is only my second proceeding at the Commission in which I have been an active party, so please forgive that I do not already know the answer to this procedural question. Settling Parties have requested that the Commission approve the Contested Proposed Settlement Agreement on an expedited basis, or by the end of February 2020. Opposing Parties have made respective requests that taken together seek more opportunity to develop the record whether through evidentiary hearings or a second/extended phase of the proceeding, or similar.

Because there has not yet been a ruling on whether there will be evidentiary hearings and we are nearing the end of February, I am writing to understand whether and when there will be an opportunity to offer exhibits into evidence should evidentiary hearings not be held. Further, what procedures would the parties need to follow in order to do so?

Please do not consider this clarification question as an abandonment of motions made for or the arguments made in

Thank you,
Thomas Del Monte

Later on February 27, 2020, the Presiding Officer responded to Del Monte's email refusing to provide any guidance on how parties are to submit evidence into the record, stating:

Mr. Del Monte,

The Commission's rules and procedures for hearings, testimony, etc. are set forth in its Rules of Practice and Procedure. I cannot provide you with legal advice.

All pending motions will be adjudicated in a timely manner.

Sophia J. Park
Administrative Law Judge
California Public Utilities Commission
Sophia.Park@cpuc.ca.gov

Later still on February 27, 2020, and within a few hours of the Presiding Officer's email reply, the Presiding Officer's issued the POD which including the claim that Del Monte's Tubbs Fire testimony "was never offered into evidence, and therefore, has not been admitted into the

evidentiary record of this proceeding” and approved a settlement that eliminates all potential future regulatory violations for the Tubbs Fire based on evidence that SED knew *or could* have known related to the Tubb Fire including Del Monte’s evidence.

On March 10, 2020, Del Monte filed a Rule 13.14 motion *Thomas Del Monte Motion to Reopen Record and Submit Into Evidence Previously Filed Evidence*. The motion sought to open the record which closed and does not allow inclusion or consideration of post-decision evidence or arguments without the party wishing to submit the evidence *both* submitting a Rule 13.14(b) motion and demonstrating good cause.⁵⁵

On March 25, 2020, the Public Advocates Office filed a motion in support of Del Monte’s motion to reopen the record, pointed out several violations of due process, and further requested clarification as to what was and what was not in the evidentiary record.

On March 27, 2020, the Del Monte filed an appeal of the POD jointly with Wild Tree Foundation. There was no consideration of the appeal or mention of it in the Final Decision. The arguments within it remained valid even after the Decision Different applied the Assigned Commissioner’s modifications.

On April 2, 2020, the Del Monte filed jointly with Wild Tree Foundation *Joint Opposition to Pacific Gas and Electric Company’s Motion Requesting Other Relief Regarding the Presiding Officer’s Decision*.

On April 9, 2020, the Del Monte filed jointly with Wild Tree Foundation two filings. The filings included *Thomas Del Monte & Wild Tree Foundation Joint Opposition to Commissioner*

⁵⁵ See for e.g., Decision 18-06-036 (denying consideration of new evidence and new argument from being considered on the grounds that party did not file a Rule 13.14 motion).

Rechtschaffen's Request for Review of the Presiding Officer's Decision Approving Proposed Settlement Agreement with Modifications; and Response to PG&E Appeal of Presiding Officer's Decision and Objections to Introduce Extra-Record Evidence After Evidentiary Record is Closed. These filings pointed out and objected to, amongst other legal errors, that the Decision Different and the Request for Review's scheme to permanently suspend POD's \$200 million fine and relief in the handling of tax savings were based upon new arguments and evidence made post-evidentiary record closure in PG&E's appeal. The new evidence and arguments were even quoted in the Decision Different first draft and related to PG&E's bankruptcy financing were financing arrangements and referencing evidence it had *served* but never motioned for inclusion in the record. PG&E never filed a Rule 13.14.

On April 20, 2020, the Assigned Commissioner Rechtschaffen issued an updated Decision Different Approving Proposed Settlement Agreement with Modifications as to be the final decision of the Commission.

On April 30, 2020, the Del Monte filed jointly with Wild Tree Foundation *Thomas Del Monte & Wild Tree Foundation Joint Opposition to Commissioner Rechtschaffen's Decision Different.*

On May 7, 2020, at the Commission's voting meeting, the Commission approved Commissioner Rechtschaffen's Decision Different, making it the Final Decision. The Final Decision added denial of Del Monte's Rule 13.14 motion, *Thomas Del Monte Motion to Reopen Record and Submit Into Evidence Previously Filed Evidence.* The Assigned Commissioner went on to confirm his Decision Different's modifications were in direct response to PG&E's extra-record evidence and arguments. The Assigned Commissioner stated in part, "in response to [PG&E's] appeal and subsequent filings, I initiated two processes. One a request for review and

then, the second, a decision different... and in particular I recommended two changes to judge Park's POD. First, with respect to the \$200 million fine... PG&E raised a credible threat that paying the fine from sources other than the Wildfire Victims Trust could jeopardize the funding commitments that it had received and needs to exit bankruptcy... I recommended that payment of the fine be permanently suspended."

IV. DISCUSSION – THE COMMISSION ERRED BY FAILING TO ACT IN A MANNER REQUIRED BY LAW IN SEVERAL WAYS AND INSTANCES AND VIOLATED DEL MONTE'S DUE PROCESS RIGHTS

A. The Issuance Of A "Suspended" Fine Is Not Permitted By Law Under The Public Utilities Code §§ 2014, 2101, 2106.

By approving the Assigned Commissioner's scheme to evade statutory requirements to issue fines against utilities by creating the concept of an ex-ante "suspended" fine, the Commission violates Public Utilities Code non-discretionary dictates regarding fines. For instance, in applying this scheme, the Commission has violated the requirements of PUC § 2101 that mandates that the Commission enforce state law, prosecute violations, and recover and collect penalties due to the State; PUC § 2014 which requires that fines collected and deposited into the General Fund; and PUC § 2106 requirement that no recovery for public utility-caused damages shall in any manner affect a recovery by the State of penalties assessed pursuant to the Public Utilities Code.

Assessing a fine that will intentionally never be imposed (i.e. collected), on the one hand, is no different than assessing no fine at all and there is no evidence or legal authority to support assessing no fine for dozens of violations of law where over 100 people died as the direct result of utility malfeasance over many years. On the other hand, assessing a fine that will be intentionally not collected sends the worst possible and opposite message intended to

wrongdoers that, even after the Commission has conducted the analysis required by law and determined that a fine is warranted, with some cunning, your company won't have to pay.

The Public Utilities Code establishes minimum and maximum fine amounts for violations such as those alleged by SED and the Del Monte and Wild Tree Foundation⁵⁶ with each day that such a violation occurs considered a separate offense with a cumulative fine.⁵⁷ PUC § 2104 requires that “All fines and penalties recovered by the state in any action, together with the costs thereof, shall be paid into the State Treasury to the credit of the General Fund.”⁵⁸ The Code does not allow for “suspended” fines, and in fact, demands that the fine be paid into the State Treasury, the Final Decision does not establish any legal basis for such a result. The establishment of a requirement that a “penalty of not less than...” a certain amount makes clear that the legislature intended to limit the authority and discretion of the Commission from being too lenient below that amount. The Assigned Commissioner's adopted scheme results in the Commission prejudicially acting outside its authority and not as required by law. Further, once assessed, a fine belongs to the People of California, and should the Commission intentionally permit the fine to remain unpaid, the Commission would be acting outside of its power in and making a gift of public funds creating further standing for Del Monte. Such an action would also be a violation of the Commission's statutory mandate to ensure that laws regulating utilities are

⁵⁶ Pub. Util. Code, § 2107.

⁵⁷ Pub. Util. Code, § 2108.

⁵⁸ Pub. Util. Code, § 2104.

enforced and obeyed, and violations are promptly prosecuted and “penalties due the State therefor recovered and collected.”⁵⁹

Moreover, pursuant to PUC § 1701.2, subdivision (j), “A respondent that is a public utility regulated under a rate of return or rate of margin regulatory structure or that has gross annual revenues of more than one hundred million dollars (\$100,000,000) generated within California is presumed to be able to pay potential penalties, fines, or restitution that may be ordered by the commission”⁶⁰ and is thus ineligible for a Commission determination that “the respondent lacks, or may lack, the ability to pay potential penalties, fines, or restitution that may be ordered by the commission.”⁶¹ In other words, PG&E is presumed able to pay and has provided no evidence in the record to overcome this presumption.

While it is clear that from PUC § 1701.2(1) that the Commission *may* make a determination that “the respondent lacks, or may lack, the ability to pay potential penalties, fines, or restitution that may be ordered by the commission” that does not absolve the Commission’s decision providing relief for such fine from the requirement that all Commission decisions “shall be supported by findings of fact on all issues material to the decision, and the findings of fact shall be based on the record developed by [Presiding Officer who is charged by Rule 13.2 in taking the evidence in the proceeding].” The Assigned Commissioner acted without authority and in violation of when it modified the Presiding Officer’s Findings of Fact #11 in the POD that

⁵⁹ Pub. Util. Code, § 2101.

⁶⁰ Pub. Util. Code, § 1701.2, subd. (j)(4).

⁶¹ Pub. Util. Code, § 1701.2, subd. (j)(1).

reads, “The extent of PG&E’s ability to pay a larger penalty or a fine to the General Fund is unknown based on the record”⁶² to “The extent of PG&E’s ability to pay a larger penalty is unknown based on the record.”⁶³ The Presiding Officer was clear that the record did not support a determination that PG&E was unable to pay the \$200 million fine. The evidentiary record was closed upon the Presiding Officer’s issuance of the POD. Under Rule 13.2, the Presiding Officer role is assigned be the *either* the Assigned Commissioner *or* the assigned Administrative Law Judge. The Assigned Commissioner cannot unilaterally modify the evidentiary record in a manner the violates the Commission's own rules.

B. The Final Decision Approved a Settlement that Fails to Meet the Required Standards for Settlement Approval.

The Commission can only approve settlements that are “reasonable in light of the whole record, consistent with law, and in the public interest.”⁶⁴ The Commission may reject a proposed settlement whenever it determines that the settlement is not in the public interest.⁶⁵ This is regardless of whether or not a settlement is contested.⁶⁶

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

⁶² POD at p. 68.

⁶³ Decision Different at p. 76.

⁶⁴ Rule 12.1, subd. (d).

⁶⁵ Rule 12.4.

⁶⁶ Rule 12.1, subd. (d).

proceedings.”⁶⁷ Furthermore, adoption of settlement “does not constitute approval of, or precedent regarding, any principle or issue in the proceeding or in any future proceeding.”⁶⁸

Where a settlement is contested, as here, the Commission engages in a closer review of the settlement compared to an all-party settlement. “Central to our analysis here, where the proposed settlement is contested, is the relevant objections or concerns of opposing parties and the question of whether the settlement agreement provides a negotiated resolution of all the disputed issues.”⁶⁹ In reviewing any settlement proposed in this proceeding, the Commission should look to relevant precedents relating to contested settlements affecting a broad public interest.⁷⁰ The Commission has long relied upon the factors used by the courts in approving class action settlements in reviewing settlements that affect a broad public interest such as effective deterrence of utility misbehavior in matters of safety that affect the safety of the lives and property of ratepayers.⁷¹

The standard used by the courts in their review of proposed settlements is whether the class action settlement is fundamentally fair, adequate, and reasonable. [Citations omitted.] The burden of proving that the settlement is fair is on the proponents of the settlement. [Citations omitted.] In order to determine whether the settlement is fair, adequate, and reasonable, the court will balance various factors which may include . . . : the strength of applicant’s case; the risk, expense, complexity, and likely duration of further litigation; the amount offered in settlement; the extent to which discovery has been completed so that the opposing parties can gauge the strength and weakness of all parties; the stage of the proceedings; the experience and views of counsel; the presence of

⁶⁷ Rule 12.1, subd. (a).

⁶⁸ Rule 12.5.

⁶⁹ D.16-12-065 at p. 7.

⁷⁰ D.09-12-045 at p. 33.

⁷¹ D.88-12-083; D.09-12-045; D.16-12-065.

a governmental participant; and the reaction of class members to the proposed settlement. [Citations omitted.]

In addition, other factors to consider are whether the settlement negotiations were at arm's length and without collusion; whether the major issues are addressed in the settlement; whether segments of the class are treated differently in the settlement; and the adequacy of representation. [Citations omitted.]⁷²

In this case, neither the nor Settlement nor the Final Decision provides a negotiated resolution of all the disputed issues nor consider the objections to Section § (IV)(D) attempt to resolve the Tubbs Fire, which either outside the scope of this proceeding or was improperly held outside of the consideration in this proceeding. PG&E violations related to the Tubbs Fire as alleged by the Del Monte were not addressed. The Final Decision does consider the relevant objections of opposing parties regarding the lack of a fine and specious value of the “financial obligations” and seeks to impose a fine, increase the amount of the financial obligations, and return tax benefits to ratepayers. Del Monte does not believe that even the POD's \$200 million the fine is sufficient in light of weaknesses alleged disallowances with doubtful recoverability financial obligations. The Final Decision's nullification of the fine and does not address the POD's initial reasons for why the fine was required in the first place. The POD reasons that fine is necessary because it is required under law, necessary to serve as a deterrent, and necessary ensure there was enough penalty in light of the likelihood that a large portion of the

72 D.09-12-045 at 33-35, quoting D.88-12-083.

disallowances claimed to be a penalty by the Settling Parties could ultimately be ruled as not recoverable in the first place.⁷³

Nonetheless, the proponents of the Settlement had failed to prove that the settlement is fundamentally fair, adequate, and reasonable, and the Final Decision is inconsistent with the class action factors enumerated in Commission precedent. Most notably, the Final Decision does not take into account the extent to which discovery has been completed or the stage of the proceedings. There is also an issue of whether the settlement negotiations involved collusion. Prior to the Contested Settlement being made public, someone with knowledge of the settlement negotiations violated confidentiality and leaked details regarding the settlement to the media.⁷⁴ This leak improperly added pressure to the Commission to “make true” that which was leaked.

There was also evidence of potential improper collusion between SED and other Settling Parties in SED’s refusal to amend or abandon its Tubbs Fire Report after learning that, *during the pendency of this proceeding*, CAL FIRE changed its conclusion regarding the Tubbs Fire ignition source conforming to Del Monte’s evidence that demonstrated that vegetation contact with PG&E lines ignited the fire. On August 13, 2019, and after SED had finalized its Tubbs Report May 13, 2019 and submitted as testimony in this OIL, SED investigator Ivan Garcia stated in a “The tap line from Pole 2 to 10 is where CAL FIRE found the where the Tubbs Fire originated

⁷³ I.19-06-015, POD at pp. 35-39.

⁷⁴ Bloomberg News, PG&E Nears \$1.7 Billion Settlement in California Fire Penalties (November 18, 2019) available at: <https://www.bloomberg.com/news/articles/2019-11-19/pg-e-nears-1-7-billion-settlement-in-california-fire-penalties>.

from [sic].”⁷⁵ The tap line that Mr. Garcia’s identifies as where the CAL FIRE found where Tubbs Fire originated CAL FIRE is the exact tap line that Del Monte’s witness, Ken Buske, later presented images of and concluded to be the source of ignition for the Tubbs Fire. The CAL FIRE Tubbs Fire Report that SED’s testimony relies on concludes that an unknown electrical source in a private residential circuit started the Tubbs Fire. SED’s attorney refused to respond when asked for clarification by Del Monte. Because the potential for this behavior to amount fraud in covering up the negligent homicide of over twenty ratepayers and potential violations of candor to toward the tribunal upon re-endorsing the testimony, if true, this highlights the importance of evidentiary hearings when material facts are in dispute and allowing cross-examination.

SED response to Del Monte and Wild Tree Foundation’s joint appeal argues that Del Monte is in error in stating that the class-action factors in determining the reasonableness of the settlement agreement are appropriate in this proceeding when it affects issues of significant public interest.⁷⁶ SED argues instead that the class action factors not appropriate in adjudicatory in the enforcement of safety laws because, apparently, public safety laws do not address an issue of broad public interest.⁷⁷ SED’s dangerous position here provides more evidence of improper

⁷⁵ 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). For copy of Mr. Garcia’s report see of I.19-06-015, Del Monte, *Thomas Del Monte & Wild Tree Foundation Joint Motion for Evidentiary Proceedings and to Reopen the Discovery Period* (February 25, 2020) at Attachment B, also available at <https://docs.cpuc.ca.gov/PublishedDocs/Efile/G000/M327/K725/327725623.PDF>.

⁷⁶ I.19-06-015, *Response of the Safety and Enforcement Division to Thomas Del Monte and Wild Tree Foundation Appeal* (April 9, 2020) at pp. 8-9.

⁷⁷ *Id.*

collusive settlement in that SED takes the position that the public's interest in safe utilities and effective application of safety laws by utility regulators does not merit consideration of class action factors to assess the public interest, but instead only the interests of the Settling Parties or respondent's interests matter.

Further, SED's position is simply wrong. It is fundamental class action factors is that in a tribunal charged with adjudicating contested matters which affect the rights, property, or safety of non-settling parties or the public is that the tribunal must ensure that the record is sufficiently developed to allow the tribunal to pass informed and objective judgment. In words of the United States Supreme Court in a highly analogous situation involving the duty of a bankruptcy court to evaluate the fairness and reasonableness of a settlement agreement between a subset of the parties as part of a bankruptcy plan of reorganization, the Court states,

The fact that courts do not ordinarily scrutinize the merits of compromises involved in suits between individual litigants cannot affect the duty of a bankruptcy court to determine that a proposed compromise forming part of a reorganization plan is fair and equitable [Citations omitted].⁷⁸

There can be no informed and independent judgment as to whether a proposed compromise is fair and equitable until the bankruptcy judge has apprised himself of all facts necessary for an intelligent and objective opinion of the probabilities of ultimate success should the claim be litigated. Further, the judge should form an educated estimate of the complexity, expense, and likely duration of such litigation, the possible difficulties of collecting on any judgment which might be obtained, and all other factors relevant to a full and fair assessment of the wisdom of the proposed compromise.⁷⁹

⁷⁸ *Protective Committee v. Anderson* (1968) 390 U.S. 414, 424.

⁷⁹ *Protective Committee v. Anderson* (1968) 390 U.S. 414, 424-25.

This precedent is instructive here in two ways evaluating the merits of the Final Decision. First, and most obviously, it teaches that when a tribunal has a duty determine the fairness and reasonableness of a contested settlement, the interests of settling parties in successfully emerging from a reorganization bankruptcy “cannot affect the duty” of the tribunal in evaluating the fairness and reasonableness. Second, the Court makes clear that in order for a tribunal to make the determination as to whether a settlement is fair or reasonable according to the applicable standard, the tribunal must be sufficiently apprised of the relevant facts for an intelligent, objective determination. In the Final Decision, the Commission’s denied evidentiary hearings in the face of contested material facts, even acknowledged that arguments and evidence was served and filed in this proceeding that argued that the second most destructive fire in California history that killed over twenty people, the Tubbs Fire, was in dispute but it was reasonable to exclude the evidence from the record and multiple instances of argument in other filings and approve a settlement based upon the Tubbs Fire testimony that vindicates PG&E’s role in starting the fire, relieves PG&E of any potential future regulatory penalty should it be later admitted or learned that Del Monte’s Tubbs Fire testimony was correct, and excludes the Tubbs Fire from further Root Cause Analysis being applied to all other fires.

The denial of Del Monte’s proper motion to reopen the record and accept his evidence and argument on the Tubbs Fire, while accepting PG&E’s extra-record evidence and argument filed *after* Del Monte’s motion to serve as the basis for the modification schemes in the Decision Different demonstrates improper influence of the external bankruptcy proceeding, unwillingness to apprise itself of all facts necessary for an intelligent and objective decision., and prejudicial bias against the Del Monte and the ratepayer customers his positions represent.

C. The Final Decision Erred in Approving a Settlement Agreement that Resolves PG&E's Regulatory Liability for Matters Improperly Held Outside the Scope of this Proceeding.

Rule 12.1 of the Commission's Rules of Practice and Procedure states, in pertinent part:

Resolution 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

The Presiding Officer clarified that the scope of this proceeding does not include "the ignition source of the Tubbs Fire."⁸⁰ The Presiding Officer explained, "Therefore, this proceeding is not an appropriate forum to challenge CAL FIRE's origin and cause determination for the Tubbs Fire."⁸¹ If the Tubbs Fire is not in the scope of this proceeding, the Settling Parties cannot settle the issues raised by Del Monte's evidence related to the origin and cause of the fire and the corresponding violations of law and rules that applied to the evidence.

Section § (IV)(D) of the Settlement is explicitly designed to forever shield PG&E from any and all regulatory liability now and in the future for any legal violations related to the Tubbs Fire that was known or could have been known by SED at the time of settlement. This Section § (IV)(D) impermissibly seeks to make moot the evidence that Del Monte presented and even calls out the evidence by name of the Tubbs Fire civil case that PG&E settled with Tubbs Fire victims on the eve of trial. Section § (IV)(D) reads:

⁸⁰ 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* (Dec. 12, 2019) at 4.

⁸¹ *Id.*

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.

The Final Decision’s approval of such a deal impermissibly extends the resolution outside of the OII’s scope. Even if the Commission were to reverse the ruling by the Presiding Officer excluding the Tubbs Fire from consideration in this proceeding, the Settlement cannot resolve the claims Del Monte. The Settlement simply does not consider those claims and the record is insufficient to permit the Commission to evaluate the extent to which the resolution of Del Monte and Wild Tree Foundation’s claims regarding the Tubbs Fire. The Commission would need to promote the development of the record in this proceeding to support the investigation of these claims, findings of fact, and conclusions of law regarding violations, and the determination of appropriate remedies. This cannot be done without a rehearing.

D. The Commission Has Failed Its Legal Duty To Investigate Accidents And Ensure That State Law Is Enforce And Obeyed Through Appropriate Prosecution Of Violations

In approving the Final Decision and closing the proceeding, the Commission has failed to comply with its legal duties to investigate accidents and prosecute violations of the law by public utilities. While the Commission “may” do all thing necessary to supervise and regulate public utilities, it “shall” enforce laws governing public utilities. 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.”⁸² The Code further provides for the Commission to request the assistance of the Attorney General or relevant district attorney in any investigation, hearing, or trial and to “institute and prosecute actions or proceedings for the enforcement of the provisions of the Constitution and statutes of this State affecting public utilities and for the punishment of all violations thereof.”⁸³

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.”⁸⁴

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

⁸² Pub. Util. Code § 2101.

⁸³ Cal. Pub. Util. Code § 2101.

⁸⁴ D.98-12-075 at p. 6.

judgment seems just and reasonable.”⁸⁵ The Commission’s duty to investigate accidents was codified over 100 years ago⁸⁶ and the Commission typically describes the duty as a mandate.

E. The Commission as Failed to Administer the Proceeding in a Way Consisted with the Law and Del Monte’s Due Process Rights

1. Evidentiary Hearings were Required but Denied

Cal Advocates filed a Motion Requesting a Hearing on Contested Settlement on February 12, 2020 (“Cal Advocates’ Motion”). The Del Monte filed jointly with Wild Tree Foundation supported Cal Advocates’ 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.⁸⁷

⁸⁵ Pub. Util. Code § 315

⁸⁶ *Atchison, T. S.F. Ry. v. Div. of Indus. Safety* (1976) 64 Cal.App.3d 188, 191.

⁸⁷ 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.

Del Monte filed jointly with Wild Tree Foundation a *Joint Motion for Evidentiary Hearings and to Reopen Discovery Period* on February 25, 2020 requesting hearings on two addition issues not included in Cal Advocates' Motion:

4. Whether the Contested Proposed Settlement accounts for all violations perpetrated by PG&E related to the covered fires, whether or not alleged by SED?
5. 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?

Both motions for evidentiary hearings were not considered and summarily denied in the POD.⁸⁸ As described in the Del Monte and Wild Tree Foundation's *Joint Motion for Evidentiary Hearings and to Reopen Discovery Period*, Del Monte made the requisite showing that there were contested issues of material fact for which evidentiary hearings were needed. The Presiding Officer erred in thwarting discovery, denying evidentiary hearings, and otherwise acting so as to prevent the development of a record in the proceeding sufficiently complete to properly discharge the Commission's duty to make a determination as to the reasonableness of the Settlement.

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. Del Monte and

⁸⁸ I.19-06-015, POD at p. 76, Ordering Paragraph 4.

Wild Tree Foundation and the TURN⁸⁹ and Cal Advocates Office⁹⁰ asserted instances 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. The Presiding Officer's ruling on Del Monte's motion to compel and statements made at the October 4, 2019 status conference are inconsistent with the treatment of Tubbs Fire liability in the approved Settlement.

So long as it was in scope, a record should have been 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's⁹¹ conclusion that PG&E equipment did not ignite the fire. SED has also not alleged any violations regarding the destruction of evidence even though SED's own report documents that PG&E destroyed evidence.⁹² 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

⁸⁹ I.19-06-015, TURN, *Reply Comments of the Utility Reform Network Opposing the Proposed Settlement* (January 31, 2020) at pp 2-7.

⁹⁰ I.19-06-015, PAO, *Comments of the Public Advocates Office Contesting the Proposed Settlement* (January 16, 2020) at p. 25.

⁹¹ California Department of Forestry and Fire Protection, Sonoma-Lake Napa Unit, Tubbs Fire Investigation Report Case No. 17CALNU010045 (October 8, 2017).

⁹² CPUC SED, Tubbs Fire Incident Investigation Report (May 13, 2019) at p. TUBBS 011.

evidence that Del Monte did their 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, preceding the Tubbs Fire.⁹³ PG&E admitted violating vegetation management requirements in filings in its criminal probation case.⁹⁴ 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.

2. Del Monte was Materially Prejudiced the Presiding Officer Denying Motion to Compel on Tubbs Matters

Del Monte notified the Presiding Officer and Assigned Commissioner of the error regarding the treatment of the Tubbs Fire in regards to the scope and the prejudice it was causing through a motion to compel and request for ruling to remove the Tubbs Fire from this proceeding.⁹⁵ In denying in all material ways Del Monte's November 15, 2019 Motion to Compel and Request for Ruling, the Presiding Officer (now ALJ Park) adopted PG&E's flawed

⁹³ See *Rebuttal to PG&E's Motion to Strike Prepared Direct Testimony of Kenneth E. Buske on Behalf of Party Thomas Del Monte* (December 11, 2019), available as Attachment A to *Thomas Del Monte & Wild Tree Foundation Joint Comments in Opposition of Settlement Agreement* (January 16, 2020); 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. 3 fn1, (Note: This document was served on all parties as part of SED's CAMP fire investigation report and accepted into the record.)

⁹⁴ *Id.*

⁹⁵ See I.19-06-015, *Del Monte Motion to Compel Pacific Gas and Electric to Respond to Data Requests and Requests for Admission Under Oath* (November 15, 2019).

reasoning. The Presiding Officer acknowledged in a footnote⁹⁶ that indeed the Scoping Memo includes the Tubbs Fire to be addressed in the proceeding but still ruled as follows:

Del Monte raises the issue of the validity of the California Department of Forestry and Fire Protection (CAL FIRE)'s investigation into the Tubbs Fire and determination as to the ignition source of the fire. The determination as to the ignition source of the Tubbs Fire is not a matter that will be decided in this proceeding. Therefore, this proceeding is not an appropriate forum to challenge CAL FIRE's origin and cause determination for the Tubbs Fire.⁹⁷

The Presiding Officer's ruling both ensured that any facts demonstrating that PG&E did start the Tubbs Fire or that PG&E violated the law or rules related to the Tubbs Fire could not be learned through discovery. Only facts that conformed to the CAL FIRE and SED Tubbs Fire Reports would be considered in scope of this proceeding. In effect the ruling purposefully insulated SED's Tubbs Fire "no violations" allegations from examination ordered in Ordering Paragraph 1 of the OII, making this proceeding a sham as it relates to the Tubbs Fire. Approving the POD or any settlement agreement disposing of PG&E's Tubbs Fire regulatory liability would be a reversible legal error.

This ruling also ruled that Del Monte generally had the right to discovery at the time Del Monte served PG&E his data requests in contrast to PG&E's claim that Del Monte's role in the proceeding did not afford him discovery rights. However, the ruling provided no remedy to the harm done by PG&E's bad faith objections and delay tactics that successfully pushed the Tubbs

⁹⁶ I.19-06-015, *Assigned ALJ's Ruling Granting in Part, and Denying in Part the Motion of Thomas Del Monte to Compel Discovery* at p. 4, fn 6.

⁹⁷ *Id.*

Fire issue until well past the discovery window on the Tubbs Fire and the deadline for intervenors to file testimony.

The POD makes clear that the Presiding Officer and Assigned Commissioner will go to acrobatic lengths to attempt to justify both denying Del Monte's request to remove the Tubbs Fire from the proceeding and not compel PG&E to produce responses to Del Monte's Tubbs Fire related data requests. For instances, in the POD the Presiding Officer avoids considering the evidence Del Monte filed with the following reasoning, "[Del Monte] failed to explain why the information requested in the underlying data requests [related to the Tubbs Fire] was relevant 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."⁹⁸ This justification is not only logically flawed but also simply not true.

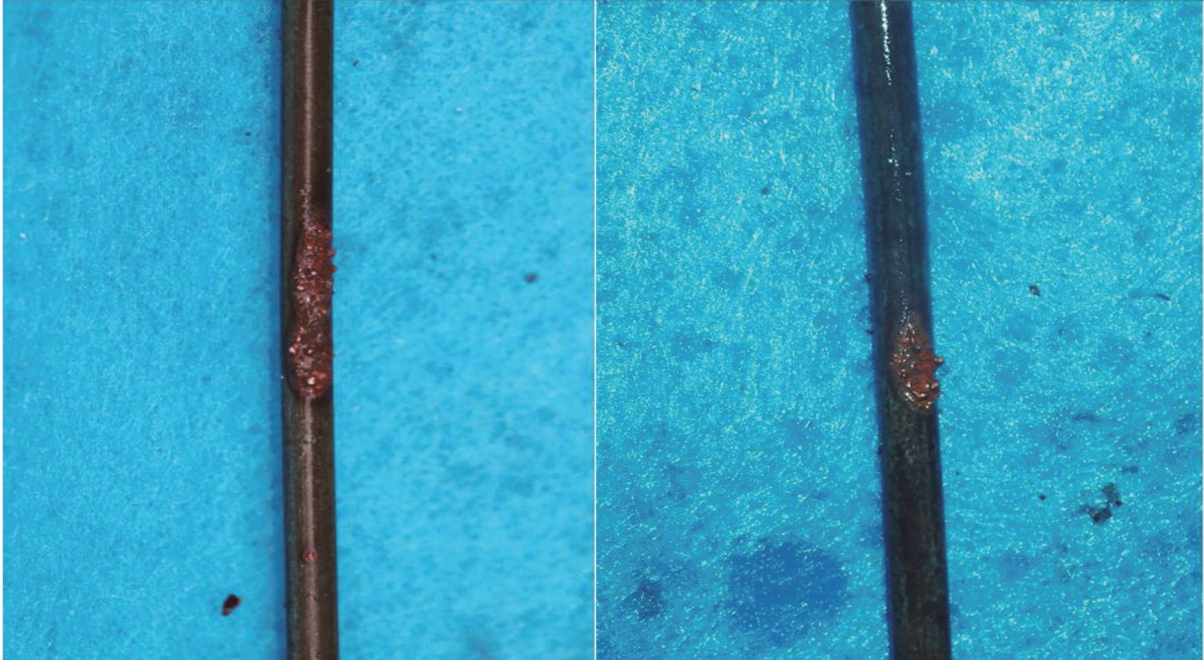
Below follows examples of data request questions that were included in Del Monte's motion to compel and are followed by the justifications Del Monte provided in the motion to compel.

Del Monte Data Request Set 2, Question 4:⁹⁹ Referencing the NBC News online article dated September 26, 2019 and available at the link: <https://www.nbcbayarea.com/investigations/Photos-Show-PGE-Lines-Sparked-Tubbs-Fire-Expert-561487651.html>, please provide the following documents and information:

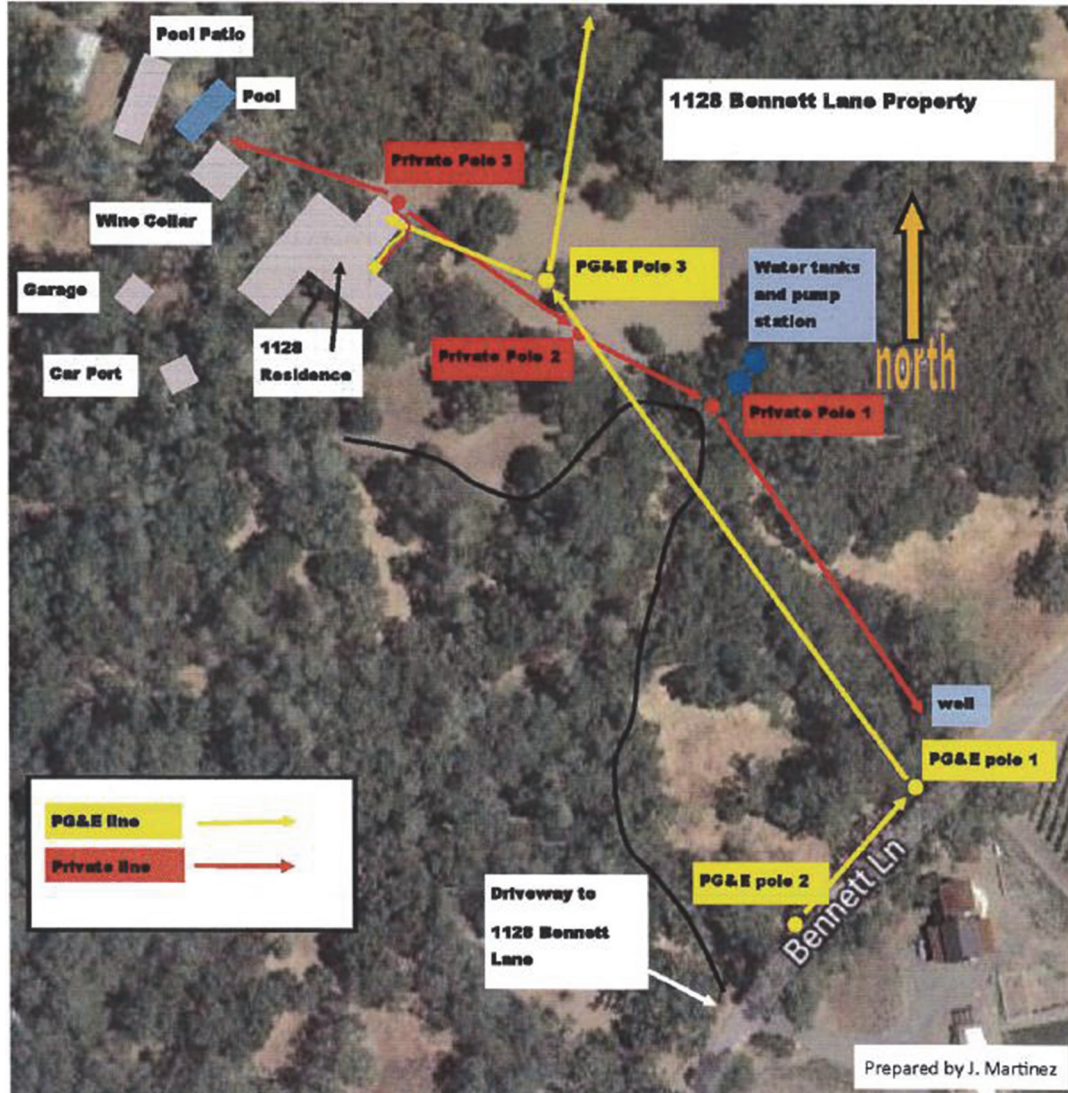
⁹⁸ I.19-06-015, POD at p. 57, fn 123.

⁹⁹ Available in I.19-06-015, Del Monte Motion to Compel Pacific Gas and Electric to Respond to Data Requests and Requests for Admission Under Oath (November 15, 2019) at Exhibit E pp. 3-5.

- (a) All documents relating to or mentioning the arcing marks discussed in this news piece—spanning roughly between 0:25 – 0:39 timestamps. For reference, intervenor obtained photos are provided below. PG&E is hereby requested to reply with PG&E’s own photos if PG&E challenges the authenticity of the provided photos.



- (b) Identify the owner of the wires referenced in the NBC investigative report.
- (c) Identify in the map below where each arcing mark was located when discovered.
Please use similarly sized arrows as already in the map and separate arrows for each arcing mark.



- (d) Identify which electrical phase(s) (A, B, or C) to which each wire containing arcing marks corresponds, consistent with the phase designations used in the SCADA data referenced above.
- (e) Identify the dates in which the arcing marks were discovered.
- (f) Identify each person present onsite when the arcing marks were discovered and involved in investigating the arching marks after discovery. Please include the party with which each person is affiliated.
- (g) Identify the date on which the new evidence was reported to the CPUC.
- (h) Identify the date on which the arching evidence was reported to CalFIRE.

- (i) Identify the CalFIRE person the new arcing evidence was reported and by which PG&E employee.
- (j) Please provide a copy of all communications between PG&E and the CPUC personnel concerning the arcing evidence.
- (k) Identify where the physical wire sections showing arcing witness marks are currently located and all chain of custody records.
- (l) Please provide all vegetation management records regarding the conductor span between PG&E Pole 1 and PG&E Pole 3 as named in the above map.

Del Monte Data Request Set 2, Data Request 5:¹⁰⁰ Please identify the person at PG&E who is responsible for reporting material evidence discovered by PG&E to the Commission pursuant to GO 95, Rule 19 and Cal. Pub. Util. Code § 316. If the person in question at or near the time of discovery above arcing evidence is no longer with PG&E, please still name them and also name the new PG&E employee responsible.

Example justifications for the above data requests provided in Del Monte's motion to compel:

Del Monte has served and filed expert witness testimony presenting new evidence that points compellingly to PG&E owned power line wires being the cause of the Tubbs Fire and potential unlawful patterns of behavior by PG&E in relation to safety rules. Del Monte has good reason to believe that any deficiency in the testimony provided would have been remedied through discovery had PG&E not refused to respond to discovery on the grounds of Tubbs Fire being outside the scope of this proceeding. To the conclusion that the Tubbs Fire cannot be fairly considered in this proceeding, it does not matter whether PG&E's reliance on the ALJ's statements on the Tubbs Fire being outside the scope of this proceeding was feigned in bad faith or just mistaken, Del Monte was denied his right to due process in this proceeding when PG&E refused to provide responses on that basis [emphasis added].¹⁰¹

¹⁰⁰ Available in I.19-06-015, *Del Monte Motion to Compel Pacific Gas and Electric to Respond to Data Requests and Requests for Admission Under Oath* (November 15, 2019) at Exhibit E p. 6.

¹⁰¹ I.19-06-015, *Del Monte Motion to Compel Pacific Gas and Electric to Respond to Data Requests and Requests for Admission Under Oath* (November 15, 2019) at pp. 11-12.

PG&E [has a] legal duty to report later finding burn marks which is evidence of tree contact approximate thirty-five feet downstream of PG&E blown fuses on PG&E wires which also happen to feed the private electrical system that CalFire blames to have ignited the fire without finding an ignition source. Tree contact with wires is a violation of Commission safety rules_[emphasis added].¹⁰²

SED's voluntary blind spot to the grave deficiencies of CalFire Tubbs Fire investigation conclusions is no excuse for SED's continued endorsement of SED findings based on CalFire's widely discredited [report]. The telltale ignition source – that CalFire could not – find has been found on PG&E power lines, the arcing and subsequent ignition is caught on tape, the evidence has been made public (not by Del Monte) in the media, PG&E did not report this new evidence to SED despite knowing of it several months before SED finished their investigation report, and there is evidence of PG&E's practice removing and destroying evidence in Tubbs Fire incident and others in this OII. The situation regarding Tubbs represents a ticking timebomb of public embarrassment and outrage for the Commission if the Commission allows any weight to be given to the Cal Fire or SED's Tubbs report [emphasis added].¹⁰³

As identified in the above-referenced justifications, Del Monte had submitted expert testimonial evidence in this proceeding implicating PG&E equipment in both igniting the Tubbs Fire and potential unlawful safety practices. The Presiding Officer even recognizes that this evidence had been submitted in the very same ruling on the motion to compel, so it is unreasonable to assume that it was not understood that the above data request was about that incident. This confirms that the Presiding Officer's ruling not only shielded CAL FIRE's factual findings from review in this proceeding but also shielded SED's "no-violations" conclusions from rebuttal.

The second example data request was justified by Del Monte's reference that the legal duty for PG&E to report the evidence new evidence undermines earlier statements to the

¹⁰² I.19-06-015, *Del Monte Motion to Compel Pacific Gas and Electric to Respond to Data Requests and Requests for Admission Under Oath* (November 15, 2019) at 5.

¹⁰³ *Id.* at 5-6.

Commission or when a media story, like the referenced NBC BayArea news story that triggers the requirement to report to the Commission under Resolution E-4184 explaining the incident described in the media report. PG&E failed to report this and the person responsible, Meredith Allen, was ironically one of the chief negotiators negotiating this proceeding's settlement agreement designed to bury the truth about Tubbs Fire while being personally in violation of the Commission's candor rules.

Finally, the Presiding Officer's justification for denying Del Monte's motion to compel answers to Tubbs Fire questions is an example of the fallacy of circular reasoning and is per se invalid. The Presiding Officer's ruling in the motion to compel excluding the alleged Tubbs Fire facts from consideration in this proceeding makes it impossible to provide the allegedly missing justification the Presiding Officer claims was necessary to compel PG&E to answer. That is, the Presiding Officer's reasoning ensures that any data requests for evidence to demonstrate that PG&E ignited the Tubbs Fire and rebut SED's "no-violations" findings would be impossible to justify because this proceeding is "not an appropriate forum to challenge" CAL FIRE's and SED's Tubbs Fire findings. Even if the Presiding Officer did not rule that the Tubbs Fire facts and whether PG&E violated law and Commission rules related to the Tubbs Fire were outside the scope of this proceeding, the Presiding Officer's justification is still false because Del Monte did provide sufficient explanation to warrant compelling PG&E to answer Del Monte's Tubbs Fire data requests.

For the above reasons, the Presiding Officer was in error in denying Del Monte's motion to compel and shielding CAL FIRE and SED's findings and conclusions from investigation and evaluation in this proceeding.

3. The Settlement Was Impermissibly Incomplete in that it Failed to Account for All PG&E Violations Alleged in the Proceeding Related to the Covered Fires

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 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 cooperate 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 transparency 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.”¹⁰⁴ 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.”¹⁰⁵

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.”¹⁰⁶ The Commission’s duty to investigate accidents was codified over 100 years ago and the Commission typically describes the duty as a mandate.¹⁰⁷

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

¹⁰⁴ Pub. Util. Code, § 2101.

¹⁰⁵ D.98-12-075 at p. 6.

¹⁰⁶ Pub. Util. Code, § 315.

¹⁰⁷ *Atchison, T. S.F. Ry. v. Div. of Indus. Safety* (1976) 64 Cal.App.3d 188, 191.

investigation and the public is due an objective and fair 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.¹⁰⁸

If the Contested Proposed Settlement or POD 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 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 Del Monte and Wild Tree's *Joint Parties Foundation's Comments in Opposition of Settlement Agreement*, "[n]ew 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

¹⁰⁸ I.19-06-015, *Order Instituting Investigation* (June 27, 2019) at pp. 1-2.

caused the Camp Fire – had failed strength tests.¹⁰⁹ 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.¹¹⁰ 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 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.¹¹¹

¹⁰⁹ I.19-06-015, Del Monte, *Joint Parties Comments in Opposition of Settlement Agreement* (January 16, 2020) at p. 19.

¹¹⁰ 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.

¹¹¹ 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.

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.¹¹²

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,¹¹³ the assembly relying on the defective C-hooks was originally rated for 16,000 lbs, meaning the weakest component of the 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-

¹¹² CPUC SED, Incident Investigation Report for 2018 Camp Fire (November 8, 2019) at p. 12.

¹¹³ 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.

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."¹¹⁴ 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

¹¹⁴ I.19-06-015, Motion of the Public Advocates Office Requesting A Hearing on Contested Settlement (February 12, 2020) at p. 12.

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,¹¹⁵ 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 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

¹¹⁵ 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.")

cause because it must only rely on CalFire for cause and origin of fire determinations.¹¹⁶ While it is tru

The Presiding Officer has This convenient distinction of 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).)”¹¹⁷

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

¹¹⁶ 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.

¹¹⁷ 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.¹¹⁸

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 2016.¹¹⁹

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.

4. The Presiding Officer Failed to Hear the Case in the Manner Described in the Scoping Memo

Cal. Pub. Util. Code § 1701.2(b) requires that "the assigned commissioner or the assigned administrative law judge shall hear the case in the manner described in the scoping memo. The scoping memo shall designate whether the assigned commissioner or the assigned administrative

¹¹⁸ 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.

¹¹⁹ Ibid.

law judge shall preside in the case.” There were three scoping memo versions issued in this proceeding; all three stipulate that hearings are required.

With less than a week to go before the scheduled hearings were to take place, Del Monte emailed the Presiding Officer requesting clarification as to whether hearings would be held the. Del Monte also reminded the Presiding Officer that hearings are required under Rule 12.3 *Hearings Where Contested* when there despite settlement between some parties there are material contested issues of fact and that,

[N]o ruling has been made on PG&E's motion to strike my expert witnesses' testimony on the Tubbs Fire [materially contested facts] and other matters, so it is also unclear whether I need to schedule and prepare Mr. Buske for cross-examination. Therefore, I request clarification on the hearing schedule and what testimony will and will not be subject to cross-examination at the hearing so that the parties can prepare.¹²⁰

To provide context, at this time of Del Monte’s email there was numerous outstanding motions and requests for clarification as to whether the Tubbs Fire was in the proceeding, and only a non-ambiguous determination on those issues would afford the parties the proper notice to allow them to be heard in a meaningful way on that issue. This issue is discussed below further in relation to how all ratepayer advocates where denied a fair hearing. Within this context and despite Rule 12.3, the Presiding Officer instead ruled that, in “light of the [contested] settlement agreement,”¹²¹ the scheduled evidentiary hearings are vacated. Subsequently, Cal Advocates and Del Monte filed jointly with Wild Tree Foundation filed separate motions for hearings each describing the multiple remaining material questions of fact (and material procedural questions).

¹²⁰ I.19-06-015, *E-Mail Ruling Vacating Hearings and Briefing Dates* (January 21, 2020) at p. 6.

¹²¹ *Id* at p. 3.

Apparently, the Presiding Officer presumed that scoping memo authorized her to cancel hearing despite Rule 12.3 and there being material questions of fact when only *certain parties* have reached an otherwise contested settlement agreement. This is an error law brought about by an error in interpretation.

While the three scoping memos do discuss the possibility of cancelation of hearings if *the parties* are able reach settlement, they do not state that despite remaining material issues of fact hearings are longer necessary if only a subset of parties which the scoping memo deems procedurally more important than the other parties are able to reach a settlement. In fact, the initial scoping memo actually indicated that the Rule 12.3 requiring hearings when it ruled that “PG&E has identified what it believes to be material facts in dispute, therefore at this time we determine that evidentiary hearings will be necessary.”¹²² Neither of the future scoping memo iterations give notice that Rule 12.3 will no longer apply. Even the scoping memos explicitly stated hearings could be canceled despite remaining material issues of contested fact as the Presiding Officer’s interpretation has it, the Assigned Commissioner in authoring the scoping memo does not have the authority to prescribe procedural paths that violate the Commission’s Rules of Practice and Procedure. As the court recognized in *Southern California Edison Co. v. Public Utilities Commission*, the Commission's failure to follow its own rules in adopting a particular decision constitutes a failure to proceed as required by law, and, if prejudicial, invalidates that decision.¹²³ And even if a scoping memo *could* force a proceeding to deviate

¹²² I.19-06-015, *Assigned Commissioner’s Scoping Memo and Ruling* (August 23, 2019) at p.

¹²³ *Southern California Edison Co. v. Public Utilities Commission*, supra, 140 Cal.App.4th at pp. 1104, 1106; Pub. Util. Code, § 1757, subd. (a)(2).

from the Commission's Rules of Practice and Procedure it would require notice to the parties to comply with due process, and the parties were not given notice that the Commission Rules of Practice and Procedure did not apply in this proceeding.

The Del Monte and non-settling parties were prejudiced by ruling to vacate the hearing schedule followed by a surprise issuance¹²⁴ of POD without notice that the proceeding the proceeding was changed from evidentiary hearings to what could only charitably called a decision on pleadings of the Settling Parties, not all the parties. Del Monte was also denied the right to cross-examine witnesses sponsoring contested material facts necessary to understand for the Commission to be able to fulfill its duty to determine whether the contested settlement was indeed in the public's interest, fair and reasonable. As Cal Advocates' motion for hearings correctly explains 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."¹²⁵ For example, without hearings the Commission was denied materially relevant information such as the new evidence regarding the Tubbs Fire that contradicted SED and CAL FIRE demonstrating that PG&E's equipment ignited the fire after contact with vegetation PG&E negligently maintained.

While the Final Decision superficially recognizes that when determining the reasonableness of a settlement's proposed outcome, the severity of the offences must be considered and that "most severe violations are those that caused actual physical harm to people

¹²⁴ The Presiding Officer failed to ever rule on all scoping matters on the Tubbs Fire.

¹²⁵ I.19-05-016, *Motion of the Public Advocates Office Requesting A Hearing on Contested Settlement* (February 12, 2020) at p. 12

or property, with violations that threatened such harm closely following,” and that “A high level of severity is also accorded to the disregard of a statutory or Commission directive, regardless of the effect on the public, since such compliance is absolutely necessary to the proper functioning of the regulatory process.”¹²⁶ However, the Final Decision chose to ignore the fact that the Del Monte filed jointly with Wild Tree Foundation also made allegations against PG&E based upon both evidence filed by SED, evidence from PG&E criminal probation proceedings where PG&E admitted violations of vegetation management laws in the exact area where the Tubbs Fire ignited, and expert testimony submitted by the Del Monte. By doing so, the Final Decision impermissibly invalidated the statutory right of interested parties to intervene in Commission proceedings to ensure fair and lawful Commission proceedings.

5. Impermissible Bias is Also Demonstrated by the Presiding Officer and Assigned Commissioner in the Handling of Taking Evidence.

a) *PG&E’s November 18, 2019 Testimony was Never Offered into Evidence and Therefore Cannot be Considered*

On November 18, 2019, PG&E *served* expansive prepared testimony addressing numerous issues in this proceeding.¹²⁷ The PG&E Appeal cites to this evidence on several occasions in support of its contention that the Commission should vacate the POD’s modifications of the Proposed Settlement.¹²⁸ As explained by the Presiding Officer’s footnote 122 of the POD,¹²⁹ in this proceeding prepared testimony that was not offered into evidence by

¹²⁶ Decision Different at p. 20 (citing D.98-12-075 at 36).

¹²⁷ The testimony was served with no indication it was being offered into evidence.

¹²⁸ PG&E Appeal at pp. 20, 25, 28, 30-32, 37-38.

¹²⁹ POD at p. 56, fn 122.

specific motion in accordance with Rule 13.8 motion is excluded from the evidentiary record of this proceeding and would not be considered when applying the more stringent review required¹³⁰ when considering the reasonableness of a contested proposed settlement.

Importantly, PG&E never offered the testimony into evidence as required by Rule 13.8.

Consequently, the Del Monte was not given notice that PG&E's testimony was to be included in the record or that Del Monte was not given the opportunity to cross-examine PG&E's witnesses' in hearings or even provide reply testimony. It is an important to recognize that the POD conspicuously identifies the fact that PG&E's November 18, 2019 prepared testimony was only *served* but not filed¹³¹ and the POD tellingly avoided any reference to prepared testimony in its analysis of the reasonableness of the Proposed Settlement.

While it may seem fundamentally unfair in a system of purported justice to block timely served testimony from inclusion the evidentiary record, especially when there the right to evidentiary hearings in adjudicatory proceedings were denied.¹³² However, that is how the Presiding Officer and Assigned Commissioner administered this proceeding and according to the Presiding Officer and Assigned Commissioner there is no time to go back for justice. The Public Advocates Office ("PAO") seems to have said it best in its March 24, 2020 filing in support of *Thomas Del Monte Motion to Reopen the Record and Accept into Evidence Previously Filed and*

¹³⁰ D.09-12-045 at p. 33.

¹³¹ POD at p. 6.

¹³² See *E-mail Ruling Vacating Hearing and Briefing Dates* (January 21, 2020) at pp. 6 then 4-5 then 3. Review in the page order provided to follow the exchange between two parties and the Presiding Officer.

Timely Served Testimonial Evidence and requesting clarification on the illusive understanding of what actually is or is not in the record. PAO states:

Despite the unprecedented loss of life and billions of dollars in damage to property caused by the devastating wildfires ignited by PG&E facilities, this proceeding has followed an accelerated schedule in order to allow PG&E to participate in the Wildfire Fund established by Assembly Bill (AB) 1054. By both word and deed, the Commission has made clear its belief that the substantive due process rights of the parties are subservient to its desire to have PG&E timely emerge from its self-inflicted bankruptcy. [internal citations omitted]¹³³

Therefore, without reopening the evidentiary record, PG&E's November 18, 2019 prepared testimony must be stricken from whatever record has been compiled in this proceeding and cannot be relied upon explicitly or implicitly by the Commissioner without either reopening the closed evidentiary record or holding hearings. Unfortunately, Assigned Commissioner Rechtschaffen has already demonstrated legal error in his reliance PG&E's extra-record evidence including, but not limited to, PG&E's November 18, 2019 prepared testimony and new argument from PG&E's appeal.

6. The Presiding Officer Erred in Failing to Grant Del Monte's Motion to Strike SED and CAL FIRE's Tubbs Fire Testimonial Reports

Del Monte initially argued several times that Tubbs Fire was appropriately in scope for investigation in this proceeding as identified in Issues #1-3 spelled out in the Assigned Commissioner's initial scoping memo and ruling. However after the Presiding Officer ruled that the scope of this proceeding does not include "the ignition source of the Tubbs Fire"¹³⁴ and

¹³³ *Response of the Public Advocates Office to Thomas Del Monte Motion to Reopen the Record and Accept into Evidence Testimonial Evidence* (March 24, 2020) at p. 3.

¹³⁴ 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. 4.

explained that “Therefore, this proceeding is not an appropriate forum to challenge CAL FIRE’s origin and cause determination for the Tubbs Fire,”¹³⁵ This ruling shielded a contested material matter of fact from investigation and consideration in this proceeding. Without being able to contest the matter of where and how the Tubbs Fire started, violations of law and safety rules cannot be alleged. Therefore, denial of Del Monte’s motion to strike SED’s and CAL FIRE’s Tubbs Fire Reports demonstrates further improper abuse of discretion in accepting SED and CAL FIRE’s contested testimony and evidence.¹³⁶ Del Monte’s stated several separate and distinct legal bases on why SED’s and CAL FIRE’s Tubbs Fire evidence both *may* and *shall* be excluded under the law. Del Monte’s motion to strike was uncontested by any party. Commission Rule 13.6(b) requires that “[w]hen objections are made to the admission or exclusion of evidence, the grounds relied upon shall be stated briefly.” Instead of briefly stating the basis for why Del Monte’s legal objections were invalid, the POD, Decision Different, and Final Decision simply ignore that existence of Del Monte’s timely motion to strike, not mentioning it at all in the procedural history or otherwise. This failure to address as required under Rule 13.6(b) is an abuse of discretion, is inconsistent with the law, and deprives the public and future appellate judges the record necessary to determine whether the objecting party’s substantive rights were preserved under Rule 13.6(a) and due process.

¹³⁵ Id.

¹³⁶ See generally, I.19-06-015, Motion by Thomas Del Monte to Strike the Cal Fire and SED Reports Related to the Tubbs Fire (February 24, 2020).

F. The Commission Committed Additional Constitutional Violations Involved Reopening the Record for PG&E but Not Del Monte.

As discussed in detail in the Del Monte’s appeal filed jointly with Wild Tree Foundation, the Del Monte’s due process rights would have already been violated by any Commission decision approving any version of the Settlement that resolves PG&E’s regulatory liability for violation of law or rules in igniting the Tubbs Fire.¹³⁷ The Commission compounded and expanded this error by reopening the proceeding record to accept PG&E’s extra-record evidence while simultaneously denying Del Monte’s properly motioned and supported request.

1. Indebtedness to hundreds of wildfire claimants for loss of life and property is not a mitigating factor in regards to the fine PG&E should pay

“Indebtedness to hundreds of wildfire claimants for loss of life and property” is not a mitigating factor that calls for PG&E to avoid paying a fine. In fact, this is actually an existing factor that is to be considered in determining assessment of fines and penalties that, in this case, demonstrates that a severe fine should be assessed. The Public Utilities Code sets out general criteria to be considered in the prosecution of violations and determination of fines: “When considering the issuance of citations and assessment of penalties, the commission staff shall take into account voluntary reporting of potential violations, voluntary removal or resolution efforts undertaken, the prior history of violations, the gravity of the violation, and the degree of culpability.”¹³⁸ D.98-12-075 and D.16-09-055 provides the following criteria upon which “Staff shall consider and weigh the following criteria to determine whether or not to issue a citation”

¹³⁷ See *Del Monte Wild Tree Foundation Appeal* (March 27, 2020) at pp. 9-28.

¹³⁸ Pub. Util. Code, § 1702.5.

and “in determining the penalty amounts:”¹³⁹ Severity or gravity of the offense; Conduct of the utility; Financial resources of the utility, including the size of the business; Totality of the circumstances; The role of precedent. These factors are discussed in more detail in the Del Monte’s jointly filed Opposition to the Proposed Settlement Agreement.¹⁴⁰ In D.98-12-075, the Commission explains that the issuance of fines is an integral part of Commissions enforcement actions. As the Commission explains:

The purpose of a fine is to go beyond restitution to the victim and to effectively deter further violations by this perpetrator or others. For this reason, fines are paid to the State of California, rather than to victims. Effective deterrence creates an incentive for public utilities to avoid violations. Deterrence is particularly important against violations which could result in public harm, and particularly against those where severe consequences could result. To capture these ideas, the two general factors used by the Commission in setting fines are: (1) severity of the offense and (2) conduct of the utility. These help guide the Commission in setting fines which are proportionate to the violation.¹⁴¹

It goes without saying, in addition to fines being paid to the State, not victims, they are also not to be paid by victims, as PG&E would have it. The fact that there are so many claimants for loss of life and property by no means serves to mitigate PG&E’s role thereby calling for a lower or no fine. There are so many claimants because PG&E acts and omissions were responsible for setting fire after fire over a two-year period after it neglected its infrastructure for

¹³⁹ D.16-09-055 at Appendix A Citation Rules - Procedures and Appeal Process Applicable to Gas Corporations and Electrical Corporations Facility Violations, Attachment 1 to Citation Rules.

¹⁴⁰ I.19-06-015, *Del Monte & Wild Tree Foundation Joint Comments In Opposition of Settlement Agreement* (January 16, 2020) at pp. 12-15. These factors are also further defined in Attachment 1 to D.16-09-055, which is an excerpt from Decision 98-12-075, 84 CPUC2d at 155, 193-195.

¹⁴¹ D.98-12-075 at p. 155, See Also D. 16-09-055 at Appendix A Citation Rules - Procedures and Appeal Process Applicable to Gas Corporations and Electrical Corporations Facility Violations, Attachment 1 to Citation Rules)

decades. This establishes the high severity and gravity of PG&E's offenses and culpable conduct of the utility. The Commission should not rely upon the high level of death and destruction caused by PG&E as a justification for allowing PG&E to not pay a fine. This would be an attempt to rewrite the law in a gross contortion to give PG&E a pass it does not deserve.

2. PG&E Speculations Are Not Evidence

Even if there was evidence on the record in this proceeding regarding the bankruptcy case that could be credibly relied upon, PG&E's assertions regarding the claimed right of the Backstop Parties to terminate financing are mere speculation.¹⁴² Nowhere in the record has there been any evidence put forth that the Backstop Party financiers will terminate financing commitments should the Commission assess a fine. The Equity Backstop Commitment Letter provides that the agreement can be modified and/or clauses can be waived with agreement of the majority of the Backstop Parties.¹⁴³ As The Utility Reform Network has explained, "PG&E projects that it will raise \$59 billion in financing in order to emerge from bankruptcy; a \$264 million increase in cash payments represents a mere 0.45% of that total. If this negligible

¹⁴² Del Monte notes that he is not attempting to bring in extra-record evidence of their own in regard to the Equity Backstop Commitment Letter, Tort RSA, and proposed reorganization plans. The Del Monte is attempting herein, to the best of his abilities, only to counter the unproven speculations made by PG&E based upon these document in its appeal relied upon in the Request for Review and Decision Different and to highlight the clear omissions that PG&E has made in presenting its unproven speculations as fact.

¹⁴³ N.D. Cal. Bankr. Case no. 19-30088, *Amended Motion Debtors' Second Amended Motion for Entry of Orders (I) Approving Terms of, and Debtors' Entry into and Performance Under, Equity Backstop Commitment Letters, (II) Approving Terms of, and Debtors' Entry into and Performance Under, Debt Financing Commitment Letters, and (III) Authorizing Incurrence, Payment, and Allowance of Related Fee and/or Premiums, Indemnities, Costs and Expenses as Administrative Expense Claims (RE: related document(s)4446 Motion Miscellaneous Relief filed by Debtor PG&E Corporation). Filed by Debtor PG&E Corporation (Attachments: # 1 Exhibit A # 2 Exhibit B # 3 Exhibit C # 4 Exhibit D # 5 Exhibit E)* (March 3, 2020) at Exhibit C, *Equity Backstop Commitment Letter*, available at: <https://restructuring.primeclerk.com/pge/Home-DownloadPDF?id1=MzMzNDEx&id2=0> .

increase is what puts the utility's financial future into question, then PG&E has not accurately reflected the financial stability of its Plan of Reorganization to its investors or to the Commission."¹⁴⁴ PG&E has presented no evidence and there is no reason to assume that financiers would back out due to a .45% change. PG&E has not presented any evidence that any financiers will terminate financing commitments based upon the Commission assessing a fine and PG&E has not stated that it has approached financiers regarding an amendment or waiver that would address the negligible change in total cost.

3. Not Fining PG&E Based upon Terms PG&E Wrote into Its Own Proposals and Agreements Would be Unconscionable and Illegal

PG&E's interpretation of the Fire Victim Claims as defined in the Tort RSA¹⁴⁵ and its proposed reorganization plan¹⁴⁶ to include Commission fines is contradicted by the other parties to the Tort RSA, represented by the Official Committee of the Tort Claimants, and the Commission's legal staff and outside legal counsel. The Tort Claimants and the Commission

¹⁴⁴ I.19-06-015, *Response Of The Utility Reform Network To Pacific Gas And Electric Company's Motion Requesting Other Relief Regarding Presiding Officer's Decision Approving Settlement Agreement With Modifications* (April 2, 2020) at p. 13.

¹⁴⁵ N.D. Cal. Bankr. Case no. 19-30088, *Motion to Approve Document Debtors Motion Pursuant to 11 U.S.C. sections 363(b) and 105(a) and Fed. R. Bankr. P. 6004 and 9019 for Entry of an Order (I) Authorizing the Debtors and TCC to Enter Into Restructuring Support Agreement With the TCC, Consenting Fire Claimant Professionals, and Shareholder Proponents and (II) Granting Related Relief Filed by Debtor PG&E Corporation* (December 9, 2019) at Exhibit A - *Tort Claimants RSA*, available at: <https://restructuring.primeclerk.com/pge/Home-DownloadPDF?id1=MzEzMDEw&id2=0> .

¹⁴⁶ This language first appeared in the December 12, 2019 version of PG&E's Plan of Reorganization available at: I.19-09-016, *PG&E Notice Of Amended Plan Of Reorganization* (December 13, 2019) at Exhibit A – *Plan of Reorganization*, available at: <http://docs.cpuc.ca.gov/PublishedDocs/Efile/G000/M322/K209/322209174.PDF>. The language has been retained in subsequent versions with the most recent version available at: I.19-09-016, *PG&E Notice Of Amended Plan Of Reorganization* (February 3, 2020) at Exhibit A – *Amended Plan*, available at: <http://docs.cpuc.ca.gov/PublishedDocs/Efile/G000/M328/K286/328286977.PDF> .

disagree with PG&E’s interpretation that a Commission fine can be included as part of the Fire Victim Claims. Furthermore, as explained in more detail below, if PG&E’s interpretation was correct that the Commission cannot impose a fine because of terms it wrote into its own settlements with victims and in its proposed reorganization plan, then its actions violate the PUC § 2106 requirement that recovery for claims of damages caused by a public utility shall not affect a recovery by the State of the penalties for violations of state law. Of course, PG&E’s argument that fire victims should be forced to pay for any Commission fines is unconscionable and is clearly against the public policy that “the purpose of a [Commission] fine is to go beyond restitution to the victim and to effectively deter further violations by this perpetrator or others.”¹⁴⁷

Fire Claims is defined in the Tort RSA and PG&E’s proposed reorganization plan as: “any Claim against the Debtors in any way arising out of the Fires, including, but not limited to, any Claim resulting from the Fires for . . . (j) fines or penalties . . .”¹⁴⁸ PG&E proposed these Reorganization Plan and Tort RSA terms that it asserts operate to lump Commission fines in with Fire Victim Claims and wrote the terms of the Backstop Commitment Letters that it now claims prohibits any Commission fine for the widespread death and destruction it has caused. Under no circumstances should PG&E have premised the Plan, settlement agreements, or any financing agreements upon the Commission not assessing a fine. As explained further below,

¹⁴⁷ D.98-12-075 at p. 155.

¹⁴⁸ Tort RSA at *Summary of Terms Relevant to Treatment of Non-Subrogation Wildfire Claims* December 6, 2019; PG&E *Plan of Reorganization* at section 1.74 (December 12, 2019 version) and section 1.75 (February 3, 2020 version) – see footnote 41 for more details.

taking such action before a settlement was approved in a final Commission decision was not only wildly presumptuous, it was in violation of the Public Utilities Code. In fact, the Commission itself, through its legal staff and outside counsel, has filed an objection in the bankruptcy court proactively seeking to change the aspect of the bankruptcy plan that includes Commission fines as part of Fire Victim Claims. The Commission writes:

Therefore, in the event of acceptance of the Decision and definitive resolution of the Wildfires OII, the Commission will hold non-contingent, liquidated claims against the Utility that will require modification to the Plan; as currently drafted, such claims would be misclassified and mistreated as Fire Victim Claims. If the Plan is not modified, treatment of the proposed fine would be antithetical to its very purpose and would impermissibly impair the Commission's exercise of its regulatory authority. As the Commission's presiding officer explains, "[t]he purpose of a fine is to go beyond restitution to the victim and to effectively deter further violations by this perpetrator or others." (Decision at 34 (citing *Re Standards of Conduct Governing Relationships Between Energy Utilities and Their Affiliates*, D.98-12-075, 84 Cal. P.U.C. 2d 155 (Dec. 17, 1988)). Moreover, "[d]eterrence is particularly important against violations which could result in public harm, and particularly against those where severe consequences could result." (Id.) Accordingly, liability for fines should not be delegated by the Utility to other entities, particularly not a trust fund established to compensate victims of the same conduct that gave rise to the fines in the first place. (Cf. Cal. Pub. Util. Code. § 451 (requiring that all requested charges are "just and reasonable" in order to be recovered in rates); Decision at 34–35 (observing that disallowances can only be effective as a penalty where shareholders are required to absorb costs "that would otherwise be paid by ratepayers").¹⁴⁹

The Final Decision Commission is not consisted with the Commission's the Commission's own position in in the parallel federal bankruptcy proceedings. It is unreasonable to assume that

¹⁴⁹ N.D. Cal. Bankr. Case no. 19-30088, *Limited Objection And Reservation Of Rights By California Public Utilities Commission Regarding The Debtors' Proposed Disclosure Statement And Solicitation Procedures Motion* (March 6, 2020) at p. 8, available at: <https://restructuring.primeclerk.com/pge/Home-DownloadPDF?id1=MzM1MjU0&id2=0> .

assessing a “permanently suspended” fine, generates the necessary apprehension of repeated penalty imposition for future PG&E decision makers to create actual deterrence.

PG&E’s Appeal critically omits any reference to the approximately \$5 million in criminal fines and costs criminal fine it has agreed to pay after recently pleading guilty in Butte County to 84 counts of involuntary manslaughter for some of the deaths it caused in the Camp Fire. PG&E claimed that, in that case, criminal fines and penalties were covered under Fire Victim Claims but that it would not jeopardize its reorganization by having funds from another settlement be moved to the Fire Victim Trust to pay for the criminal penalties. The Tort Claimants, in an objection to PG&E’s scheme filed with the bankruptcy court explain what has been proposed:

In the Motion, the Debtors take the position that any criminal fines, penalties, or restitution orders arising out of the Butte County Agreement would be paid from the fire victims’ money in the Fire Victim Trust. Motion at 3. If upheld, this contention would mean that the survivors and heirs of the 84 people killed by PG&E in the Camp Fire, as well as the tens of thousands of victims who lost their homes as a result of the fire started by PG&E, would end up paying for PG&E’s criminal fines, penalties and investigation costs for killing their loved ones and burning their homes. . .

After numerous objections and concerns were raised, including from the TCC and the District Attorney, on March 30, 2020, PG&E issued a press release stating that the \$4 million fine would be paid from the Fire Victim Trust from “income earned on the distribution to be made to the subrogation claimants under the Plan.”² As explained below, this solution does not resolve the TCC’s objection to the Motion. The Debtors’ solution maintains the Debtors’ interpretation, and not the TCC’s interpretation, of “Fire Claim” in the TCC RSA [Dkt. No. 5038-1 at 42] to include criminal fines and penalties.¹⁵⁰

¹⁵⁰ N.D. Cal. Bankr. Case no. 19-30088, *Limited Objection And Reservation Of Rights Of The Official Committee Of Tort Claimants To Motion Of Debtors For Entry Of An Order Approving (I) Agreement And Settlement With People Of The State Of California And (Ii) Granting Related Relief* [Dkt. No. 6418] (April 7, 2020) at pp. 2-3 available at: <https://restructuring.primeclerk.com/pge/Home-DownloadPDF?id1=MzQ4NDEy&id2=0> .

Del Monte does not take a position on whether or not PG&E's plan to move money around in this fashion is appropriate. But, PG&E's machinations in regards to the criminal fine do demonstrate that PG&E has figured out how a way to pay this penalty without apparently risking it financiers terminating the Backstop Commitments although it implicitly claims in this proceeding that it could not do such a thing for a Commission fine. Additionally, the Tort Claimants have objected to PG&E's interpretation of the Tort RSA to include criminal fines and penalties. The reasoning provided by the Tort Claimant's in objecting to PG&E's attempt to funnel assets through the Fire Victim Trust equally applies to Commission fines and penalties:

PG&E's solution is an artifice used only to establish a precedent that criminal fines may be paid from the Fire Victim Trust. This settlement ruling should not be used to establish precedent on the meaning of Fire Claims in the TCC RSA, and this settlement should not address that issue if it can be resolved another way. . .

The TCC contends that restitution, fines and penalties in the definition of "Fire Claim" in the TCC RSA and any similar inclusion in the definition "Fire Victim Claims" in the Plan, includes only civil restitution, fines and penalties recoverable by the individual victims and not criminal restitution, fines and penalties under California law for the following reasons. . .

Further, the type of civil claims enumerated in the RSA mirror the language for civil claims in the California Public Utilities Code ("CPUC"). The definition of "Fire Claim" in the TCC RSA includes various types of civil claims, both under statute and common law, and, with the exception of "punitive and exemplary damages" all are of a compensatory nature. CPUC § 2104 permits the Public Utilities Commission to recover "penalties and fines" in accordance with the Civil Code. CPUC § 2601 also allows for a civil punitive remedy.¹⁵¹

¹⁵¹ *Id.* at p. 3.

As herein described, the definition of Fire Victim Claim must be interpreted as limited to “civil restitution, fines and penalties recoverable by the individual victims” not by the State because any other interpretation would be entirely unworkable and in conflict with the Public Utilities Code as addressed above.

4. The Presiding Officer Treated the Tubbs Fire as Both in the Proceeding to Vindicate PG&E but Out of Scope of the Proceeding when Challenged.

The Presiding Officers unquestionably failed to proceed in a manner required by law when they treated the Tubbs Fire as both in and out of scope, depending on the ruling at hand, to the prejudice of the Del Monte. Ordering Paragraph 1 of the OII expressly states that the Tubbs Fires is to be a part of the investigation. Yet, when notified that the that the factual basis for SED’s conclusions about the Tubbs Fire was contested with new evidence, the Presiding Officers intervened mid-proceeding to effectively remove the Tubbs Fire from the scope of the proceeding. Two Presiding Officers separately made statements and rulings on the record interpreting the scope of this proceeding to exclude the Tubbs Fire from the scope of this proceeding, which materially prejudiced Del Monte’s ability to conduct discovery and to be meaningfully heard on the matters in this proceeding. Yet, the Presiding Officer argued in the POD that the Tubbs Fire was never out of scope. This is necessary to justify the POD’s approval of a settlement that relies upon there being no violations prosecuted for the Tubbs Fire even though parties were deprived of their right to conduct discovery and put evidence into the record regarding PG&E’s violations the of law, GO 95, and Resolution E-4184.¹⁵²

¹⁵² Discussion of the Presiding Officers’ statements and rulings excluding the Tubbs Fire from consideration are discussed in detail below.

This flip-flopping deprived Del Monte of notice of what is and what it not to be adjudicated in this proceeding and of the ability to thereby meaningfully participate. Del Monte and other ratepayer advocates were thereby deprived a fair tribunal. In light of the contradictory statements and ruling made in the proceeding regarding the scope, approval of a settlement that includes the Tubbs Fire creates reversible legal error.

The first error was made at the October 4, 2019 status conference. During that conference, Del Monte explained to The Presiding Officer and Assigned Commissioner Rechtschaffen that an all-party settlement was unlikely and that Del Monte was considering filing a motion to remove the Tubbs Fire from this proceeding because the facts related to the Tubbs Fire are in dispute. Upon hearing this, The Presiding Officer responded that the “Tubbs Fire is not part of this OII.”¹⁵³ Del Monte further explained that the Tubbs Fire was “was investigated [prior to this proceeding], and no violations were found because it was based upon an origin that was different than what people [now] believe it is on.”¹⁵⁴ The Presiding Officer then stated, “It's not within the scope of this proceeding because the OII found, concluded that there were no allegations based on the CAL FIRE findings and SED can address that more if they'd like, but it's outside the scope of this proceeding.”¹⁵⁵ Assigned Commissioner Rechtschaffen, who was also presiding over the status conference and sitting next to The Presiding Officer during this exchange, did not attempt to correct or clarify any of these statements then or later. At the time, PG&E was already making bad faith objections to Del

¹⁵³ I.19-06-015, Reporter's Transcript (October 4, 2019) at p. 13.

¹⁵⁴ I.19-06-015, Reporter's Transcript (October 4, 2019) at p. 13.

¹⁵⁵ I.19-06-015, Reporter's Transcript (October 4, 2019) at p. 13.

Monte's data requests like claiming that Del Monte's "role in the proceeding" did not entitle him make specific data requests.¹⁵⁶ After the Presiding Officer's statements, PG&E seized upon this pronouncement and updated its data request objections related to the Tubbs Fire to include the objection that it was not in scope.¹⁵⁷ The Presiding Officer's statements solidified PG&E's Tubbs Fire strategy of claiming that while the Tubbs Fire is technically within scope of the proceeding, the "ALJ's statement clarifies that the Tubbs facts are **not** in dispute for purposes of this OII [emphasis PG&E's]."¹⁵⁸ The Commission cannot approve a settlement that disposes of the liability for an unlawful act in a proceeding when the Presiding Officer has unlawfully taken Official Notice as to the truth of the contested "fact" that the unlawful act never happened.

5. The Final Decision Unlawfully Disposes PG&E's Liability for Violations Related to the Tubbs Fire, of which the Fundamental Factual Basis was Improperly Held Outside of the Scope of this Proceeding.

Rule 12.1 of the Commission's Rules of Practice and Procedure states, in pertinent part:

Resolution [contained within settlements] 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.¹⁵⁹

¹⁵⁶ See I.19-06-015, *Del Monte Motion to Compel Pacific Gas and Electric to Respond to Data Requests and Requests for Admission Under Oath* (November 15, 2019) at p. 9; see also and compare Exhibit B to Exhibit C.

¹⁵⁷ Compare Exhibit B and Exhibit C in I.19-06-015, *Del Monte Motion to Compel Pacific Gas and Electric to Respond to Data Requests and Requests for Admission Under Oath* (November 15, 2019).

¹⁵⁸ See I.19-06-015, *Pacific Gas and Electric Company's (U39E) Response to Thomas Del Monte's Motion to Compel and Request for Removal* (November 22, 2019) at p. 5.

¹⁵⁹ I.19-06-015, *Settlement Agreement* at p.1.

The settlement agreement approved in the Final Decision states in relevant part that Parties to the Settlement “agree to settle, resolve and dispose of all claims...related to” the “37, Adobe, Atlas, Camp, Cascade, Cherokee, La Porte, Lobo, McCourtney, Norrbom, Nuns, Oakmont/Pythian, Partrick, Pocket, Point, Potter/Redwood, Sulphur, Tubbs, and Youngs Fires (the “2017 Northern California Wildfires and 2018 Camp Fire”).”¹⁶⁰ As explained in the Settlement, the Settlement sets forth the terms of the “complete and final resolution of all claims made by SED and all defenses raised by PG&E in this proceeding” and notes that the other settling parties, PG&E, CUE, and OSA, “brought no claims in this proceeding.”¹⁶¹ However, the Settlement improperly reaches further in Section § IV.D providing as follows:

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. CJC17004955.¹⁶²

Del Monte/WTF assert facts that challenge the results of CAL FIRE’s investigation and also identify potential violations related to the Tubbs Fire, some of which could persist even if the Commission were to find PG&E did not ignite the Tubbs Fire.¹⁶³ Furthermore, Del Monte/WTF assert that SED was “made aware of the deficiencies of CAL FIRE’s

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¹⁶¹ I.19-06-015, *Settlement Agreement* at p. 1.

¹⁶² I.19-06-015, *Settlement Agreement* at p. 6, Section IV.D.

¹⁶³ I.19-06-015, *Joint Comments in Opposition of Settlement* (January 16, 2020) at pp. 34-36.

investigations,” and, per Section § IV.D of the Settlement, has unreasonably given up the opportunity to do “a complete investigation into PG&E’s role in causing Tubbs and in destroying evidence,”¹⁶⁴ including confirmation from PG&E at least as of January 7, 2020 and over a month after the settlement agreement terms had been leaked to Bloomberg News¹⁶⁵ that SED has not made any informal or formal discovery requests regarding the Tubbs Fire during this proceeding.¹⁶⁶

Cal Advocates highlights the questions of fact raised in the testimony of Del Monte witness Kenneth Buske (Attachment C to the Del Monte/WTF Opening Comments) and “recommends that the Commission not limit its discretion to consider violations or enforcement proceedings regarding the Tubbs Fire.”¹⁶⁷

Whether the Tubbs Fire was appropriately considered in this proceeding was a highly contentious issue in this proceeding inconsistently applied creating material error regardless of which interpretation of the Tubbs Fire. The Presiding Officers by decree and ruling adopted PG&E’s and the Settling Parties’ position where this proceeding’s scope is limited to the facts and violations asserted by SED in its Tubbs Fire Incident Report. and Assigned Commissioner (PG&E during the proceeding, PG&E took the position that only the contradictory interpretations can be made; where p as the title of proceeding suggests,

¹⁶⁴ I.19-06-015, *Joint Comments in Opposition of Settlement* (January 16, 2020) at pp. 35-36.

¹⁶⁵ Bloomberg, PG&E Nears \$1.7 Billion Settlement In California Fire Penalties, Published on November 18, 2019. Website: <https://www.bloomberg.com/news/articles/2019-11-19/pg-e-nears-1-7-billion-settlement-in-california-fire-penalties>

¹⁶⁶ I.19-06-015, *Joint Comments in Opposition of Settlement* (January 16, 2020) at p. 1, fn. 1.

¹⁶⁷ I.19-06-015, *Comments of the Public Advocates Office Contesting the Proposed Settlement* (January 16, 2020) at p. 25.

As described further below, Del Monte made the requisite showing that there were contested issues of material fact that would materially affect the Commission's ability to make the required determination of what was or was not a reasonable settlement in light of the record. The Presiding Officer erred in thwarting discovery, denying evidentiary hearings, and otherwise acting so as to prevent the development of a record in the proceeding.

G. Ignoring Del Monte and Wild Tree Foundation's Timely Filed Joint Appeal While Inappropriately Accommodating PG&E's Appeal Demonstrates Unlawful Bias by the Commission.

The Del Monte timely jointly filed with Wild Tree Foundation *Thomas Del Monte and Wild Tree Foundation Appeal of the Presiding Officer's Decision Approving Settlement Agreement with Modifications* which presented numerous legal errors committed by the Presiding Officer and Assigned Commissioner in the administration of this proceeding.¹⁶⁸ The Final Decision which was issued over a month after the Del Monte's appeal was filed and yet still failed to even acknowledge the appeal's existence by ruling or by update of the procedural history. The positions contained within the Del Monte's joint appeal remained germane to issues within the Final Decision. By ignoring Del Monte's appeal while hearing PG&E's, the Commission violated Del Monte's due process right to be heard in a meaningful time and manner.

¹⁶⁸ See I.19-06-015, *Thomas Del Monte and Wild Tree Foundation Appeal of Presiding Officer's Decision Approving Settlement Agreement with Modifications* (March 27, 2020).

V. **CONCLUSION**

For the reasons stated above, the Del Monte files this application for rehearing of Decision 20-05-019.

Respectfully Submitted,

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