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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)

**WILD TREE FOUNDATION
APPLICATION FOR REHEARING**

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APPLICATION FOR REHEARING**

Pursuant to Rule 16.1 of the Commission Rules of Practice and Procedure, Wild Tree Foundation ("Wild Tree") respectfully files this application for rehearing on D.20-05-019, issued May 8, 2020 in Investigation 19-06-015 approving a modified, contested settlement agreement.

INTRODUCTION

When the Commission approved the Decision, which reduced fines and penalties by 26% and assessed no collectable fine, the Commission explained its actions as follows: "PG&E raised a credible threat that paying fines from sources other than the victims' trust could jeopardize the funding commitments that it had received and that it needs to exit bankruptcy. So given the unique circumstances of the bankruptcy PG&E needs to exit bankruptcy by June 30th for wildfire victims to receive benefits of the trust, assuming it is approved by federal bankruptcy process,

Wild Tree Application for Rehearing

and also the need for PG&E to exit bankruptcy by June 30th in order to gain access to the State wildfire liability fund, I recommend that payment of the fine be permanently suspended.”¹

This statement gets at the heart of the many legal errors that were committed in the approval of the Decision. PG&E is entirely lacking in credibility and the Commission demonstrated bias in relying upon unproven speculations made following the close of the record and based upon extra-record evidence by an entity that just pled guilty to its second felony for the manslaughter of 84 people and is on criminal probation for, among other things, purposely misleading a regulatory body in an investigation. Commission decisions cannot be premised on threats, which is precisely what occurred in this case. In doing so, the Commission failed to proceed in a manner required by law and acted in excess of its jurisdiction, issued a decision that is contrary to the record, and violated due process guarantees of a fair tribunal free of bias.

STANDARD OF REVIEW

I. 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

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rehearing is to alert the Commission to a legal error, so that the Commission may correct it expeditiously.” Pursuant to Public Utilities Code² section 1757, a decision is unlawful and is subject to judicial review 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.³

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.⁴ Pursuant to section 1705, 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.”⁵ 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.’”⁶

Substantial evidence is evidence of “ponderable legal significance,”⁷ that is “reasonable in nature, credible, and of solid value such that a reasonable mind might accept it as adequate to

² Hereinafter, all Code section references are to the Public Utilities Code unless otherwise specified.

³ Pub. Util. Code § 1757(a).

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

⁵ Pub. Util. Code § 1705.

⁶ *California Manufacturers Assn. v. P.U.C.* (1979) 24 Cal.3d 251, 258-59.

⁷ *People v. Johnson* (1980) 26 Cal.3d 557, 576 (internal citations omitted).

support a conclusion.”⁸ It is not synonymous with “any evidence.”⁹ 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.”¹⁰ 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.”¹¹ Instead, the Commission must consider all relevant evidence, which necessarily “involves some weighing of the evidence to fairly estimate its worth.”¹²

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 proceeding wherein the validity of any order or decision is challenged on the ground that it violates any right of 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.”¹³

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

⁹ *Roddenberry v. Roddenberry* (1996) 44 Cal.App.4th 634, 651-52.

¹⁰ *Larson v. State Pers. Bd.* (1994) 28 Cal.App.4th 265, 273.

¹¹ *Util. Reform Network v. P.U.C.* (2014) 223 Cal.App.4th 945, 959 (quotation omitted).

¹² *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).

¹³ Pub. Util. Code, § 1760.

II. 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."¹⁴ Pursuant to the 14th Amendment, "No state shall ... deprive any person of life, liberty, or property, without due process of law."¹⁵ Likewise, under the California Constitution, "A person may not be deprived of life, liberty, or property without due process of law."¹⁶ A fundamental requirement of due process is "the opportunity to be heard."¹⁷ "It is an opportunity which must be granted at a meaningful time and in a meaningful manner."¹⁸

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

¹⁴ *Memphis Light, Gas Water Div. v. Craft* (1978) 436 U.S. 1, 18.

¹⁵ U.S. Const., 14th Amend.

¹⁶ Cal. Const., art. I, § 7, subd. (a).

¹⁷ *Grannis v. Ordean* (1914) 234 U.S. 385, 394.

¹⁸ *Armstrong v. Manzo* (1965) 380 U.S. 545, 552.

evidence that is offered, affords opportunity through evidence and argument to challenge the result, and makes its determination upon evidence and not arbitrarily.”¹⁹

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].”²⁰ 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].’”²¹

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.”²² The Public Utilities Code and other express statutory provisions do not represent the only limits upon the Commission's authority. Significantly, the Commission must abide by its own

¹⁹ *Railroad Com. of California v. Pacific Gas & Electric Co.* (1938) 302 U.S. 388, 393-394.

²⁰ See *Morongo Bd. of Msn. Indians v. State W. Resources* (2009) 45 Cal.4th 731.

²¹ *Id.* at p. 737.

²² *PG & E Corp. v. Public Utilities Com.* (2004) 118 Cal.App.4th 1174, 1199.)

rules²³ and Commission rules and procedures must be consistent with due process.²⁴ 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.²⁵

In *Edison*, the court concluded the Commission had failed to proceed in the manner required by law when it violated its own rules.²⁶ In that case, 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.²⁷ 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.²⁸ In annulling the Commission's decision, the *Edison* court noted that the Commission adopted its rules pursuant to its rulemaking authority and these rules have “the force and effect of law.”²⁹

²³ *Southern California Edison Co. v. Public Utilities Commission* (2006) 140 Cal.App.4th 1085, 1106 (“*Edison*”).

²⁴

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

²⁵ *Southern California Edison Co. v. Public Utilities Commission*, supra, 140 Cal.App.4th at pp. 1104, 1106; Pub. Util. Code § 1757, subd. (a)(2).

²⁶ *Southern California Edison Co. v. Public Utilities Commission*, supra, 140 Cal.App.4th at pp. 1091–1092.

²⁷ Id. at pp. 1092–1093, 1105–1106.

²⁸ Id. at p. 1106.

²⁹ Id. at p. 1092fn3.

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 decisionmaker 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.”³⁰

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.”³¹ “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.”³²

³⁰ *Goldberg v. Kelly* (1970) 397 U.S. 254.

³¹ Pub. Util. Code, § 1705; See also *Clean Energy Fuels Corp. v. Public Utilities Com.* (2014) 227 Cal. App. 4th 641.

³² *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.)

ARGUMENT

I. IN APPROVING THE USE OF A “SUSPENDED” FINE, THE COMMISSION VIOLATED THE DUE PROCESS GUARANTEES OF THE UNITED STATES AND CALIFORNIA CONSTITUTIONS AND PUBLIC UTILITIES CODE SECTION 1757, SUBDIVISIONS (4) AND (6) THAT COMMISSION DECISIONS BE MADE FREE OF BIAS AND BE BASED UPON SUBSTANTIAL EVIDENCE IN LIGHT OF THE WHOLE RECORD AND FAILED TO ACT IN A MANNER REQUIRED BY LAW AND ACTED IN EXCESS OF ITS POWER IN VIOLATION OF PUBLIC UTILITIES CODE SECTION 1757, SUBDIVISION (A) (1) AND (2)

In the Decision, the Commission provides substantial explanation and analysis as to why, pursuant to the applicable law, PG&E should be assessed a fine but then, then fails to assess a fine. The Decision provides no authority supporting the imposition of a “suspended” fine which appears to be a device invented for the sole purpose of creating an exception for PG&E in the Decision. Wild Tree is not aware of any time in the Commission’s history where it has ordered a suspended fine and Commissioner Rechtschaffen describes this action as a “departure from a normal penalty rule.”³³

Assessing a fine that will intentionally not be collected is, on one hand, 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 a utility’s criminal actions. On the other hand, assessing a fine that will be intentionally not collected sends the worst possible message to wrongdoers that, even after the Commission has conducted the

³³ CPUC, Business Meeting Recording (May 7, 2020) at 2:09:00, available at: http://www.adminmonitor.com/ca/cpuc/voting_meeting/20200507/.

analysis required by law and determined that a fine is warranted, with some cunning, your company won't have to pay. PG&E intentionally baked a poison pill into its Proposed Reorganization Plan, Tort RSA, and Backstop Commitment Letter and, in issuing the Decision, the Commission swallowed it whole.

1. The Commission Engaged in Bias when it Approved a “Suspended” Fine

The Commission violated due process when it issued a decision that demonstrates actual bias for PG&E and against ratepayers. The Decision fails to offer any evidence or legal argument whatsoever refuting the evidence and legal analysis presented by the Joint Parties and in the POD that a fine must be assessed. In fact, the Decision essentially repeats the argument presented in the POD that a fine is necessary but then provides for a “suspended” fine based upon supposed “unique and unprecedented circumstances and to ensure that payment of the fine does not reduce the funds available to satisfy the claims of wildfire victims.”³⁴ Reliance on these “unique” factors, which are nothing more than unproven speculation made by PG&E in comments following the close of the record in this proceeding, violates the due process rights of ratepayers to a Commission decision free of bias and based upon substantial evidence in the light of the whole record.

³⁴ Decision at p. 50.

In the POD, the Presiding Officer provided substantial evidence and legal analysis supporting the conclusion of law that “it is neither consistent with Commission precedent nor in the public interest for this investigation to conclude without the assessment of a fine.”³⁵ The Decision repeats this phrase and likewise concludes that a fine is necessary:

Upon review of the facts of this case, the Commission finds that it is neither consistent with Commission precedent nor in the public interest for this investigation to conclude without the assessment of a fine. There is no question that PG&E’s electric facilities played a role in the 2017 and 2018 fires. PG&E faces a total of 45 alleged violations concerning these fires and does not contest 14 of these violations.¹⁰⁹ Given the severity of the allegations, the assessment of no fine is not within a reasonable range of potentially litigated outcomes.

Of the settled penalty amount of \$1.675 billion, \$1.625 billion are in the form of disallowances. However, as discussed above, disallowances are not the same as a fine. Fines convey the strongest societal opprobrium for wrongdoing and are thus the most potent tool for purposes of penalizing and deterring unlawful conduct.

Notably, all of the prior Commission decisions cited as precedent by the Settling Parties included a fine payable to the General Fund. In D.15-04-024, the Commission imposed a mix of fines, penalties, and other remedies in connection with the San Bruno proceedings. On its decision to impose a fine, the Commission explained: “we recognize both the statutory tool for penalties (i.e., fines to the state General Fund) and the Commission’s long-standing policy and practice of imposing fines on [utilities] as a means of penalizing and deterring, and therefore require PG&E to pay \$300 million of the total penalties and remedies in the form of a fine to the state General Fund.”

The Commission has explained that “[s]ome California utilities are among the largest corporations in the United States and others are extremely modest, one-person operations. What is accounting rounding error to one company is annual revenue to another. The Commission intends to adjust fine levels to achieve the objective of deterrence, without becoming excessive, based on each utility’s financial resources.” As noted by Cal Advocates, PG&E is one of the largest combined natural gas and electric energy companies in the United States. PG&E’s last authorized total revenue requirement for 2019 was \$18.184 billion.

With the modifications adopted by this decision, the total penalties to be imposed on PG&E is \$2.137 billion. In recognition of the number and severity of the allegations that are at issue in this investigation, the lives lost and homes destroyed, PG&E’s size, and the

³⁵ POD at p. 45.

Commission's long-standing policy and practice of imposing fines on utilities as a means of penalizing and deterring future misconduct, the Commission finds that, of the \$2.137 billion in penalties, it is reasonable to impose a fine of \$200 million.³⁶

In total opposition to the preceding analysis that establishes that a fine is warranted, the Commission, in just five sentences, concludes that "permanent suspension of the fine is warranted."³⁷

Commissioner Rechtschaffen's request for review proposed that the Commission impose the \$200 million fine without any restriction as to the source of funds but permanently suspend the fine due to: "the unique situation of PG&E's bankruptcy, its indebtedness to hundreds of wildfire claimants for loss of life and property, and the current upheaval in the financial markets." (Commissioner Rechtschaffen's Request for Review at 2-3.) The Settling Parties have indicated that they do not oppose this modification to the POD. (PG&E Response to Request for Review at 3; SED Response to Request for Review at 2; CUE Response to Request for Review at 2.)

Despite its size, PG&E's ability to raise capital as part of its PoR is not unlimited. The record reflects that PG&E already has wildfire-related liabilities totaling \$25.5 billion. (Joint Motion at 38-39.) Moreover, the company is required to resolve its bankruptcy proceeding at a time when there is a great deal of uncertainty with respect to the financial markets. Although the Commission finds that a fine should be imposed for the reasons discussed above, the Commission finds that permanent suspension of the fine is warranted in light of these unique and unprecedented circumstances and to ensure that payment of the fine does not reduce the funds available to satisfy the claims of wildfire victims.

The Decision cites solely to Commissioner Rechtschaffen's Request for Review as grounds for this conclusion. In turn, the Request for Review for review cites solely to PG&E's March 2020

³⁶ Decision at pp. 48-49 (citations omitted).

³⁷ Ibid.

filings in this proceeding. The Request for Review addresses the matter of a fine, in its entirety, as follows:

PG&E asserts that imposition of the \$200 million fine jeopardizes confirmation of the Plan of Reorganization in its pending bankruptcy case. It explains that confirmation is dependent on the “Backstop Commitment Letters” where parties agree to purchase \$9 billion in equity; but if PG&E agrees to pay the \$200 million fine from funds that are not otherwise available to compensate wildfire claimants, the parties have a right to terminate this backstop financing commitment.

However, because payment of the \$200 million fine from other sources could jeopardize PG&E’s financing commitments and exit from bankruptcy, I request review to consider suspending the cash fine permanently, so there is no requirement for payment of the fine. More specifically, the settlement should include imposition of a \$200 million cash fine without any restriction as to the source of funds but should expressly state that the obligation to pay the fine is permanently suspended. This is appropriate due to the unique situation of PG&E’s bankruptcy, its indebtedness to hundreds of wildfire claimants for loss of life and property, and the current upheaval in the financial markets.³⁸

The Request for Review’s contentions that the fine should not be collected is based solely on PG&E’s unproven speculations questionably supported by extra-record evidence such as the Backstop Commitment Letters and PG&E’s served, but not filed, prepared testimony regarding ability to pay. The Decision’s entire justification for creating a suspended fine mechanism for PG&E is thus based entirely upon unproven speculations based upon extra-record evidence of an entity that just pled guilty to its second felony for the manslaughter of 84 people and is on criminal probation for, among other things, purposely misleading a regulatory body in an investigation.

³⁸ Request for Review at pp. 2-3.

The Request for Review’s discussion of the POD’s \$200 million fine is not supported by any evidence in the record whatsoever and provides only one sentence of flawed legal analysis. The Decision likewise provides no such evidence and does not expand upon the Request for Review’s flawed analysis. Unsubstantiated speculations made by PG&E only questionably supported by documents and testimony not on the record in this proceeding is not evidence and reliance on such material demonstrates bias. As discussed further below, the justification for the proposal of a suspended fine is contrary to the Public Utilities Code and all precedent regarding the assessment of penalties for violations of the law. The argument in the Request for Review regarding fines should not have been only accorded little weight but should have been disregarded entirely because the Commission does not have the discretion to act contrary to statutory mandate and must abide by its own rules³⁹ and must base decisions upon substantial evidence in the record.

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.⁴⁰ Furthermore, Commission decisions “must rest solely on the legal rules and evidence adduced at the hearing.”⁴¹ Specifically in regards to decisions in adjudicatory proceeding, “The

³⁹ *Southern California Edison Co. v. Public Utilities Commission* (2006)140 Cal.App.4th 1085, 1106 (“*Edison*”).

⁴⁰ *Southern California Edison Co. v. Public Utilities Commission*, supra, 140 Cal.App.4th at pp. 1104, 1106; Pub. Util. Code, § 1757, subd. (a)(2).

⁴¹ *Goldberg v. Kelly* (1970) 397 U.S. 254.

commission's decision 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 the assigned commissioner or the administrative law judge.”⁴²

In approving the Decision, the Commission violated not only the requirements that decisions be based upon the record but also the due process rights of ratepayers to have Commission decisions be made 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].”⁴³ 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].”⁴⁴

In relying upon unproven speculations of PG&E never made a part of the record in the proceeding in issuing a decision that does not assess a collectable fine and/or allows shareholders tax benefits from penalties assessed, the Commission demonstrated actual bias in favor of PG&E. At the very least, such action would demonstrate the probability of actual bias too high to be constitutionally tolerable. The Commission likewise demonstrated bias by relying upon newly created factors proposed in the Request for Review to justify PG&E being excused from

⁴² Pub. Util. Code, § 1701.2, subd. (e).

⁴³ See *Morongo Bd. of Msn. Indians v. State W. Resources* (2009) 45 Cal.4th 731.

⁴⁴ *Id.* at p. 737.

paying a fine. The Request for Review states that a “suspended” fine “is appropriate due to the unique situation of PG&E’s bankruptcy, its indebtedness to hundreds of wildfire claimants for loss of life and property, and the current upheaval in the financial markets.”⁴⁵ This assertion, backed by no legal authority or evidence in the record, is a thinly disguised attempt at arguing that PG&E cannot afford to pay a fine. As described further below, reliance on such factors would create special, ad hoc exceptions for PG&E completely contrary to clear statutory and precedential requirements regarding the imposition of fines.

A. The Decision Should not Have Relied upon “Unique” Situation of PG&E’s Bankruptcy and the current upheaval in the financial markets to Allow PG&E to Escape Payment of a Duly Ordered Fine

Despite attempts to evade the use of the term “ability to pay” in regards to the suspended fine, the Decision unquestionably relies upon the bankruptcy and “current upheaval in the financial markets” as supposed factors that establish that PG&E cannot pay any fine. Neither of these are factors that have any bearing on the assessment of a fine or penalty or its amount or ability of PG&E to pay and the conclusion that PG&E cannot pay based upon these factors is directly contrary to the record in this proceeding. The Commission should not have relied upon the supposed “unique” circumstances of a voluntarily filed bankruptcy and the state of the world’s economy as justification for allowing PG&E to not pay a fine despite the fact that PG&E had not overcome the statutory presumption that it has the ability to pay fines and the

⁴⁵ Request for Review at p. 3.

Commission acted in excess of its powers, contrary to the law, and in violation of due process in doing so.

PG&E is presumed by law to be able to pay fines and has not, in any way, proven itself unable to pay fines and penalties in this proceeding. The Decision does not address section 1701.2's presumption of an ability to pay despite Wild Tree having raised this issue in opposition to the proposed decision.⁴⁶ Pursuant to section 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"⁴⁷ 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."⁴⁸ In other words, PG&E is presumed able to pay and provided no evidence to overcome this presumption. The Decision does not properly address failure to pay, much less demonstrate that PG&E has overcome the statutory presumption established in 1701.2 that PG&E can afford to pay fines.

The POD correctly found that:

While PG&E's pending Chapter 11 bankruptcy proceedings may be a factor that impacts PG&E's ability to pay a fine and justifies a departure from precedent, there is insufficient information in the record of this proceeding regarding the extent to which it impacts

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⁴⁷ Pub. Util. Code, § 1701.2, subd. (j)(4).

⁴⁸ Pub. Util. Code, § 1701.2, subd. (j)(1).

PG&E's ability to pay a fine. A claim that PG&E is unable to pay any fine is doubtful and not supported by the record.⁴⁹

Paradoxically, the Decision makes the following finding of fact, "the extent of PG&E's ability to pay a larger penalty is unknown based on the record"⁵⁰ yet also determines that somehow PG&E can't pay a \$200 million fine. The Decision states:

The fact that PG&E is currently in bankruptcy proceedings is a factor the Commission must consider in assessing the financial resources of the utility that may weigh in favor of a lower penalty than ordinarily would be warranted. However, the Settling Parties do not provide sufficient information regarding the bankruptcy or PG&E's plan of reorganization that would enable the Commission to assess whether the amount and structure of the financial obligations imposed by the settlement agreement are the limit of a reasonable penalty for punishing and deterring the conduct at issue without being excessive in light of PG&E's financial resources. Information regarding the bankruptcy plan of reorganization is provided in only very general terms and the extent of PG&E's ability to pay a larger penalty is not clear from the record.⁵¹

The Decision explicitly states that the Settling Parties have not proven inability to pay, yet the Decision relies upon an inability to pay as grounds to suspend the fine. Per the words of the Decision, the issuance of a suspended fine is not based upon the record because it is actually contrary to the record. In an apparent attempt to secure a results-oriented decision despite the fact that a fine is warranted and that PG&E has not overcome the presumption that it is able to pay fines, the Decision attempts to provide an ad hoc justification for permitting PG&E to dodge a fine by relying upon specious "unique circumstances." Such advocacy on behalf of PG&E shows bias in violation of due process rights of ratepayers to a fair tribunal.

⁴⁹ POD at p. 46 with further discussion at pp. 45-47.

⁵⁰ Decision at p. 75 (Finding of Fact #11).

⁵¹ Decision at p. 26.

There is no unique situation in regard to PG&E’s bankruptcy that in any way calls for it to dodge paying a fine. PG&E voluntarily sought bankruptcy protection to undermine its victims’ ability to fully recover damages and to otherwise limit, as much as possible, costs it would have to pay associated with the death and destruction it has wrought. That bankruptcy has been ongoing for over a year and PG&E purposefully included “fines and penalties” in the definition of Wildfire Victim Claims in its December 12, 2020 reorganization plan⁵² and December 6, 2019 Tort Claimants Restructuring Support Agreement (“Tort RSA”).⁵³ Yet, PG&E remained silent for months until its recent appeal filed March 18, 2020 regarding its claims that it considers the definition to create a conflict between the Commission’s legal duty to enforce violations and assess fines and penalties and wildfire victims recovery of damages. Notably, even while arguing against the imposition of a fine in its Response to Opposition to the Proposed Settlement Agreement filed January 31, 2020, PG&E said nothing about the fact that it considers a Commission fine effectively pre-empted by its Backstop Commitments terms and

⁵² 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> .

⁵³ 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>.

that it interprets the definition of Wildfire Victim Claim to mean that a Commission fine would have to be paid out of victim funds.

PG&E appears to have successfully manipulated this process by intentionally dragging its feet and then springing new arguments at the very last moment possible as the AB 1054 June 2020 deadline loomed. The Commission ran roughshod over due process in this proceeding by delaying any action in the proceeding for months to hold out for a settlement, refusing to hold hearings on either the case in chief or contested settlement, prejudicially applying a changing proceeding scope, and prejudicially refusing to develop a full record.⁵⁴ Unfortunately, the Commission played right into PG&E's hands and ordered a suspended fine.

B. 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

⁵⁴ See I.19-06-015, *Thomas Del Monte And Wild Tree Foundation Appeal Of Presiding Officer's Decision Approving Settlement Agreement With Modifications* (March 26, 2020).

undertaken, the prior history of violations, the gravity of the violation, and the degree of culpability.”⁵⁵ 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” and “in determining the penalty amounts:”⁵⁶ 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 Joint Parties’ Opposition to the Proposed Settlement Agreement.⁵⁷ 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.⁵⁸

⁵⁵ Pub. Util. Code, § 1702.5.

⁵⁶ 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.

⁵⁷ 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.

⁵⁸ 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)

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 decades. This establishes the high severity and gravity of PG&E's offenses and culpable conduct of the utility. The Commission should not have relied upon the high level of death and destruction caused by PG&E as a justification for allowing PG&E to not pay a fine and it acted in excess of its powers, contrary to the law, and in violation of due process in doing so. The Decision has thus rewritten the law in a gross contortion to give PG&E a pass it does not deserve.

C. 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.⁵⁹ 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

⁵⁹ The Joint Parties note that they are not attempting to bring in extra-record evidence of their own in regards to the Equity Backstop Commitment Letter, Tort RSA, and proposed reorganization plans. The Joint Parties are attempting herein, to the best of their 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 to highlight the clear omissions that PG&E has made in presenting its unproven speculations as fact.

provides that the agreement can be modified and/or clauses can be waived with agreement of the majority of the Backstop Parties.⁶⁰ 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 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.”⁶¹ PG&E 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.

⁶⁰ 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> .

⁶¹ 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.

D. Not Fining PG&E Based upon Terms PG&E Wrote into Its Own Proposals and Agreements is Unconscionable and Illegal

The Decision states, “the Commission finds that permanent suspension of the fine is warranted in light of these unique and unprecedented circumstances and to ensure that payment of the fine does not reduce the funds available to satisfy the claims of wildfire victims.”⁶² This finding assumes that a fine would reduce funds available for wildfire victims. This is an assumption contrary to known facts based solely upon PG&E’s unproven assertions made following the close of the record. The Commission has show bias in favor of PG&E in relying upon PG&E’s unproven assertions that are not part of the record and has thus violated due process and requirement that decisions be based upon the evidence in the record.

PG&E’s interpretation of the Fire Victim Claims as defined in the Tort RSA⁶³ and its proposed reorganization plan⁶⁴ to include Commission fines is contradicted by other parties to the Tort RSA (“Tort Claimants”), *the Commission’s own legal staff and outside legal counsel*, and the Bankruptcy Court. The Tort Claimants and the Commission disagreed with PG&E’s interpretation that a Commission fine can be included as part of the Fire Victim Claims. Prior to the approval of the Decision, the Bankruptcy Court ruled, over PG&E’s objection, that the fine

⁶² Decision at p. 50.

⁶³ 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* (December 9, 2019) at Exhibit A - *Tort Claimants RSA*.

⁶⁴ I.19-09-016, *PG&E Notice Of Amended Plan Of Reorganization* (December 13, 2019) at Exhibit A – *Plan of Reorganization*; I.19-09-016, *PG&E Notice Of Amended Plan Of Reorganization* (February 3, 2020) at Exhibit A – *Amended Plan*.

assessed by Butte County for PG&E’s manslaughter of at least 84 people cannot be included as part of the Fire Victims Claim. 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.”⁶⁵

Fire Victim Claims is defined in the Tort RSA and PG&E’s proposed reorganization plan as including fines or penalties arising out of the Fires,⁶⁶ as proposed by PG&E. PG&E also wrote the terms of the Backstop Commitment Letters that it now claims prohibits any Commission fine. 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, 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, 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

⁶⁵ D.98-12-075 at p. 155.

⁶⁶ 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 42 for more details.

impermissibly impair the Commission’s exercise of its regulatory authority. . . 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.⁶⁷

The Decision critically omits any reference to the approximately \$4 million in criminal fines and costs PG&E 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 also tried to claim 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, explains what was 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. . .⁶⁸

⁶⁷ 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>.

⁶⁸ 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> .

Prior to the approval of the Decision, as noted in *Thomas Del Monte & Wild Tree Foundation Joint Opposition To Commissioner Rechtschaffen's Decision Different*⁶⁹, the Bankruptcy Court judge prevented PG&E's machinations to try and force wildfire victims to pay its criminal fine and penalties for victimizing them and ordered that the fine and penalty would be paid by other funds that PG&E had identified⁷⁰:

First, this court has no intention of allowing any criminal fines or penalties to be paid out of the funds intended for fire victims, or from the Fire Victim Trust, directly or indirectly. . . Some things not only have to be right, but they have to look right. Telling fire victims that their money will be used to pay criminal fines and penalties does not look right even if digging through the RSA or the Plan would lead to that literal result. Nor does saying to people who lost their homes and their loved ones that \$4 million is "de minimis." This not only looks wrong, it *is* wrong.⁷¹

In this case, it would look and is wrong for PG&E to dodge a deserved Commission fine because the Commission relied upon the PG&E's threat that fire victims should have to pay for any Commission fine. PG&E figured out how a way to pay the criminal fines and penalties without apparently risking its 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

⁶⁹ I.19-06-015, *Thomas Del Monte & Wild Tree Foundation Joint Opposition To Commissioner Rechtschaffen's Decision Different* (April 30, 2020.)

⁷⁰ N.D. Cal. Bankr. Case no. 19-30088, *Order Pursuant To 11 U.S.C. §§ 105(A) And 363(B) And Fed. R. Bankr. P. 9019 Approving (I) Debtors' Agreement And Settlement With People Of The State Of California And (Ii) Granting Related Relief* (April 16, 2020), available at: <https://restructuring.primeclerk.com/pge/Home-DownloadPDF?id1=MzU3Mjc&id2=0>.

⁷¹ N.D. Cal. Bankr. Case no. 19-30088, *Tentative Ruling Regarding Motion To Approve Settlement* (April 10, 2020) available at: <https://restructuring.primeclerk.com/pge/Home-DownloadPDF?id1=MzUxNTE&id2=0>.

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:

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. . .

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.⁷²

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.

The finding in the Decision that it must suspend the fine to "ensure that payment of the fine does not reduce the funds available to satisfy the claims of wildfire victims" despite the fact that there is no evidence whatsoever that this would be the case with the exception of assertions made by PG&E following the close of the record in the proceeding demonstrates an unconstitutional bias in favor of PG&E and such a finding is contrary to the record.

⁷² 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]* at p. 3.

2. The Issuance Of A “Suspended” Fine Is Not Permitted By Law And The Failure Of The Commission To Collect A Duly Ordered Fine Violates The Public Utilities Code

By approving a “suspended” fine, whereby PG&E would be assessed a fine that the Commission will intentionally not collect, the Commission has violated the requirements of the section 2014 that fines be deposited with the General Fund; section 2101 mandate that the Commission enforce state law, prosecute violations, and recover and collect penalties due to the State; and section 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.

The Public Utilities Code establishes fine amounts for violations⁷³ with each day that such a violation occurs considered a separate offense with cumulative fine.⁷⁴ Section 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.”⁷⁵ The Code does not allow for “suspended” fines and the Decision does not establish any legal basis for such a result. 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 derelict in its duty to collect and deposit the fine in the General Fund. Such an action would also be a violation of the Commission’s statutory mandate to ensure that laws regulating utilities are enforced and obeyed

⁷³ Pub. Util. Code, § 2107.

⁷⁴ Pub. Util. Code, § 2108.

⁷⁵ Pub. Util. Code, § 2104.

and violations are promptly prosecuted and “penalties due the State therefor recovered and collected.”⁷⁶

The use of a suspended fine in these circumstances, whereby the Commission assessed no collectable fine based upon PG&E intentionally designing its reorganization plan so that fire victim damages would be reduced by a Commission fine or so that a Commission fine would be precluded, is in violation of the Section 2106. Section 2106 provides for “an action to recover for such loss, damage, or injury may be brought in any court of competent jurisdiction by any corporation or person” for recovery of damages incurred by regulated utilities with the limitation that “No recovery [for damages caused by a public utility] shall in any manner affect a recovery by the State of the penalties provided in this part or the exercise by the commission of its power to punish for contempt.”⁷⁷

In this case, when PG&E voluntarily filed for bankruptcy protection, it deprived victims of their right pursuant to section 2106 to pursue damages in the normal course by filing suit in state court. PG&E thereby forced wildfire victim under the jurisdiction of the federal bankruptcy court and then proposed a reorganization plan and a settlement for claims for damages pursuant to section 2106 that includes terms that not only affect, but according to PG&E, would preempt any recovery by the State of the penalties assessed under the Public Utilities Code. This is precisely what is prohibited in section 2106.

⁷⁶ Pub. Util. Code, § 2101.

⁷⁷ Pub. Util. Code, § 2106.

PG&E’s attempt to con its way out of paying a fine, even one that is far less than it should be, is despicable and illegal. As our courts have explained:

The California Supreme Court, however, “has recognized that a plaintiff’s attempt to obtain relief under section 2106 may have the effect of interfering with the commission’s regulation of utilities.” (citations omitted) . . . the Supreme Court stated section 2106 “must be construed as limited to those situations in which an award of damages would not hinder or frustrate the commission’s declared supervisory and regulatory policies.” (citations omitted) The court expanded upon this concept . . . “an action for damages against a public utility pursuant to section 2106 is barred by section 1759 not only when an award of damages would directly contravene a specific order or decision of the commission, i.e., when it would ‘reverse, correct, or annul’ that order or decision, but also when an award of damages would simply have the effect of undermining a general supervisory or regulatory policy of the commission, i.e., when it would ‘hinder’ or ‘frustrate’ or ‘interfere with’ or ‘obstruct’ that policy.”(citations omitted.)⁷⁸

PG&E’s attempt to manipulate this process to avoid paying a fine duly assessed by the Commission under its mandate to enforce state law and prosecute violations on the grounds that it would interfere with payments for damages is in conflict with section 2106. The Decision thereby has “the effect of undermining a general supervisory or regulatory policy of the commission” by hindering, frustrating, interfering with and obstructing Commission policy in regards to enforcement and the Commission thus failed to proceed in a manner required by law.

⁷⁸ *Goncharov v. Uber Technologies, Inc.* (2018) 19 Cal.App.5th 1157, 1169–1170.

II. THE DECISION APPROVED A MODIFIED SETTLEMENT THAT FAILS TO MEET THE STANDARDS FOR SETTLEMENT APPROVAL AS DETERMINED IN THE PUBLIC UTILITIES CODE AND COMMISSION PRECEDENT

The Commission can only approve settlements that are “reasonable in light of the whole record, consistent with law, and in the public interest.”⁷⁹ The Commission may reject a proposed settlement whenever it determines that the settlement is not in the public interest.⁸⁰ This is regardless of whether or not a settlement is contested.⁸¹

The settlement “[r]esolution shall be limited to the issues in that proceeding and shall not extend to substantive issues which may come before the Commission in other or future proceedings.”⁸² Furthermore, adoption of settlement “does not constitute approval of, or precedent regarding, any principle or issue in the proceeding or in any future proceeding.”⁸³

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.”⁸⁴ In reviewing any settlement proposed in this proceeding, the Commission

⁷⁹ Rule 12.1, subd. (d).

⁸⁰ Rule 12.4.

⁸¹ Rule 12.1, subd. (d).

⁸² Rule 12.1, subd. (a).

⁸³ Rule 12.5.

⁸⁴ D.16-12-065 at p. 7.

should look to relevant precedents relating to contested settlements affecting a broad public interest.⁸⁵ 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 all customers of a utility.⁸⁶

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 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.]⁸⁷

In this case, the modified settlement approved in the Decision did not provide a negotiated resolution of all the disputed issues - neither consider the objections to Section (IV)(D) attempt to bind future Commissions, PG&E violations related to the Tubbs Fire, or the full scope of PG&E violations related to the Camp Fire.

85 D.09-12-045 at p. 33.

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

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

The proponents of settlement failed to prove that the settlement is fundamentally fair, adequate and reasonable, and the Decision does not account for the class action factors enumerated in Commission precedent. Most notably, the Decision does not take into account the extent to which discovery has been completed or the stage of the proceedings. As discussed herein, there was no discovery regarding the Camp Fire and the proceeding was stalled by the ALJ prior to evidentiary hearings or legal briefings. 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.⁸⁸

The settlement at issue is flawed in many of the same respects that a settlement the Commission denied as not meeting the standard for contested settlements:

While we encourage parties to pursue settlement as a potential alternative to protracted disputes, we find that the outcome of this settlement process did not produce a genuine resolution of the issues. Rather than being the product of an arms-length process, the Settlement Agreement appears to represent a consensus among like-minded thinkers. Indeed, we are hard pressed to find any concessions given up in exchange for the settlement terms by any signatory to the agreement. This is particularly problematic where, as is the case here, the Settlement Agreement sponsors do not represent all affected interests, and the Settlement Agreement lacks the support of any of the parties that are ratepayer advocates. We therefore conclude that the Settlement Agreement does not meet the standard for contested settlements set forth in D.09-12-045.⁶¹

In this case, settlement lacked the support of any parties that are ratepayer advocates or any parties that represent the people and environment that was harmed by the fires that PG&E

⁸⁸ 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>.

was responsible for starting. The settlement also likewise appears to represent a consensus among like-minded parties and will not produce a genuine resolution of the issues.

III. IN ITS TREATMENT OF THE CAMP FIRE, THE COMMISSION FAILED TO PROCEED IN A MANNER REQUIRED BY LAW AND DID NOT PROVIDE FOR A FAIR HEARING

1. 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 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.”⁸⁹ 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

⁸⁹ Pub. Util. Code § 2101.

“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.”⁹⁰

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.”⁹¹

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.”⁹² The Commission’s duty to investigate accidents was codified over 100 years ago⁹³ and the Commission typically describes the duty as a mandate.

⁹⁰ Cal. Pub. Util. Code § 2101.

⁹¹ D.98-12-075 at p. 6.

⁹² Pub. Util. Code § 315

⁹³ *Atchison, T. S.F. Ry. v. Div. of Indus. Safety* (1976) 64 Cal.App.3d 188, 191.

2. Evidentiary Hearing on the Proposed Settlement Were Necessary to Address Material Issues of Contested Fact Regarding the Camp Fire and Potential Ongoing Violations

For the Camp Fire, there exists a material contested issue of fact regarding potential ongoing violations for the use of C-hooks that do not meet the mandated safety factor. In regards to the information known by SED about the Camp Fire, Wild Tree, on information and belief, understand SED to be in possession of 1987 PG&E report that documented failure of C-hooks at far less than the rated load (“1987 Report”)⁹⁴, which only came to light recently as a result of investigative reporting.⁹⁵ The 1987 Report and surrounding facts, the details of when and how SED came into this information, and how this information was or was not utilized in SED’s investigation present issue of material fact that need to be addressed through evidentiary hearings. A settlement predicated upon a Commission investigation that includes no actual investigation into potential violations which may pose an ongoing risk to public safety is per se against the public interest. A settlement that attempts to bind future Commissions from prosecuting such violations is unconscionable and illegal. Discovery should have been reopened and hearings held regarding the 1987 Report.

⁹⁴ 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.

⁹⁵ NBC BayArea, PG&E Alerted to Risks of Worn Hooks Back in 1987 (December 12, 2019) available at: <https://www.nbcbayarea.com/news/local/pge-alerted-to-risk-of-worn-hooks-back-in-1987/2194383/>.

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.”⁹⁶ 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.”⁹⁷

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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

⁹⁶ Pub. Util. Code, § 2101.

⁹⁷ D.98-12-075 at p. 6.

⁹⁸ Pub. Util. Code, § 315.

⁹⁹ *Atchison, T. S.F. Ry. v. Div. of Indus. Safety* (1976) 64 Cal.App.3d 188, 191.

investigate utility-caused accidents. In this proceeding, the Commission correctly opened an investigation and the public is due an actual investigation. The Order Instituting an Investigation states:

By this order, the California Public Utilities Commission (Commission or CPUC) institutes a formal investigation to determine whether Pacific Gas and Electric Company (PG&E), violated any provision(s) of the California Public Utilities Code (PU Code), Commission General Orders (GO) or decisions, or other applicable rules or requirements pertaining to the maintenance and operation of its electric facilities that were involved in igniting fires in its service territory in 2017 . . . Additionally, this investigation will review systemic concerns, including those identified by SED in the course of its investigations, and determine whether PG&E’s practices have been unsafe and in violation of the law.¹⁰⁰

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.

As stated in the Joint Parties Comments in Opposition of Settlement Agreement, “New evidence is still being uncovered demonstrating PG&E’s ongoing negligence and mismanagement such as evidence submitted to the court in the probation matter that PG&E was aware since 1987 that C hooks – like the one that failed and caused the Camp Fire – had failed

¹⁰⁰ I.19-06-015, *Order Instituting Investigation* (June 27, 2019) at pp. 1-2.

strength tests.¹⁰¹ 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.¹⁰² 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.¹⁰³

¹⁰¹ I.19-06-015, *Joint Parties Comments in Opposition of Settlement Agreement* (January 16, 2020) at p. 19.

¹⁰² 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.

¹⁰³ 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.¹⁰⁴

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,¹⁰⁵ 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-

¹⁰⁴ CPUC SED, Incident Investigation Report for 2018 Camp Fire (November 8, 2019) at p. 12.

¹⁰⁵ 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."¹⁰⁶ 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

¹⁰⁶ 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.

3. Ratepayer Advocates Were Denied a Fair Hearing

The Presiding Officer failed to proceed in a manner required by law and denied ratepayers a fair hearing when she amended the scope to include the Camp Fire after she had closed the discovery window and with no opportunity for party input. This failure was compounded by the denial of Appellants Motion for Evidentiary Hearings on the Proposed Settlement and to Reopen the Discovery Period even though Appellants credibly alleged contested issues of material fact regarding the Camp Fire.

In this case, SED filed a motion to amend the scope to include the Camp Fire on November 26, 2020, just before the Thanksgiving holiday and just after the scheduled close of discovery. The motion included a 696-page SED report on the Camp Fire that parties had not seen at any point prior. Just five business days later on December 5, 2019, and prior to the 15 days parties have per the Commission Rules to respond to motions and prior to any parties filing any responses to the motion, the motion was granted and the scope was amended to include the Camp Fire. Less than two weeks later on December 17, 2019, PG&E and SED filed for approval of their Proposed Settlement which included the Camp Fire. The scheduled hearing was subsequently vacated and Appellant's Joint Motion for Evidentiary Hearings and to Reopen the Discovery Period was denied.

As described further below, Appellants’ Motion for Evidentiary Hearings included evidence from PG&E’s own filing in its criminal probation case regarding c-hooks like that which failed outside of Paradise, causing the Camp Fire. Appellants called upon the Commission to “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.”¹⁰⁷ Such an investigation may very well reveal that PG&E has violated and continues to violation Public Utilities Code section 451 for its ongoing failure to replace c-hooks throughout its territory following 1987 PG&E testing that demonstrated that c-hooks did not meet safety factor because they failed at loads less than 50% below design.¹⁰⁸

Instead of undertaking any investigation, reopening the discovery period, or scheduling evidentiary hearings, the Presiding Officer closed all doors to any action regarding the Camp Fire and filed the POD. The Camp Fire is the single most destruction fire in the history of California both in terms of loss of structures (18,804) and deaths (135 and still counting¹⁰⁹). PG&E’s level of culpability in causing this fire is unmatched. This proceeding is entitled Order Instituting Investigation on the Commission’s Own Motion into the Maintenance, Operations and

¹⁰⁷ *Thomas Del Monte & Wild Tree Foundation Joint Opposition Comments in Opposition of Settlement Agreement* (January 16, 2020) at p. 11.

¹⁰⁸ *Thomas Del Monte & Wild Tree Foundation Joint Opposition Comments in Opposition of Settlement Agreement* (January 16, 2020) at p. 6

¹⁰⁹ Chico Enterprise Record, Families mourn indirect, ‘forgotten’ deaths from Camp Fire - At least 50 indirect deaths appear in vetted claims against PG&E (February 11, 2020), available at: <https://www.chicoer.com/2020/02/11/families-mourn-indirect-forgotten-deaths-from-camp-fire/>.

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.

The Camp Fire was ignited by PG&E in 2018. The Camp Fire has no business being in this proceeding under any circumstances but certainly not under the rushed, careless, and prejudicial circumstances in which it was brought into the scope of this proceeding. The total lack of effort the Commission has put forth in investigating the cause of the Camp Fire, in prosecuting violations that resulted in the ignition of the Camp Fire, and in ensuring that the safety fails that resulted in the fire are not repeated elsewhere is an insult to the many victims.

The approval of the modified settlement in the Decision that includes the Camp Fire under these conditions constitutes prejudicial reversible error. The circumstances are analogous, but far worse, than those in Edison, whereby the court found reversible error and annulled the Commission decision as a result. In Edison the ALJ amended a scoping memo after a party filed 400 pages of documents supporting a new proposal and after providing parties a very short window to respond. The Court explained:

Three business days was insufficient time for the parties to comment on the issues raised by the proposals, including issues of public policy, economic effects, legal implications, and effective administration and implementation of the proposed new rules. The PUC's failure to comply with its own rules concerning the scope of issues to be addressed in the proceeding therefore was prejudicial.

In summary, the prevailing wage proposal was beyond the scope of issues identified in the scoping memo, the PUC violated its own rules by considering the new issue, and three business days was insufficient time for the parties to respond to the new proposals.

We therefore conclude that the PUC failed to proceed in the manner required by law (Pub. Util. Code, § 1757.1, subd. (a)) and that the failure was prejudicial.¹¹⁰

In this case, the Presiding Officer amended the scoping memo to include not just a new issue but an entirely new fire in a different year with a laundry list of new alleged violations and a 696-page report without providing any opportunity for party comment. Even worse, the Presiding Officer intentionally foreclosed on parties' due process rights to respond to the motion by ruling before the time for responses closed. Finally, the Presiding Officer intentionally slammed the door on parties' efforts to address the new scoped issue through discovery and evidentiary hearings, despite Appellants bringing the highly credible source of PG&E's own filing made in federal court in its criminal probation case to the attention of the Presiding Officer.

IV. PERMITTING PG&E SHAREHOLDERS TO BENEFIT FINANCIALLY FROM IMPOSITION OF PENALTIES IS CONTRARY TO LAW

The Decision reduced have the fines and penalties proposed in the POD reduced by more than 28%. This very large proposed change is not actually premised on any

¹¹⁰ *Southern California Edison Co. v. Public Utilities Com.* (2006) 140 Cal.App.4th 1085, 1106.

grounds upon which the POD errs in its determination that PG&E shareholders should not financially benefit from tax benefits. Instead, the Decision proposed that the Commission split the baby, just to be cautious. The Decision states the following:

While it is arguable that the normalization rule cited by PG&E only applies to tax deductions for accelerated depreciation and does not prohibit returning tax benefits calculated in the same manner as the ordinary depreciation to ratepayers, this change would err on the side of caution and remove the tax benefit provision with respect to all the tax benefits associated with capital expenditures.¹¹¹

Erring on the side of caution is not a legal standard by which Commission action can stand and does not justify substantially decreasing the penalties assessed. The Decision Different has presented no evidence or legal argument that there would be any issues with normalization rules but still proposes a gift to shareholder.

There is no issue that there will be any violation of tax laws. What is proposed in the POD is a settlement that PG&E can take or leave. The Commission would not be forcing PG&E to do anything in regard to how it files its taxes or complies with tax laws. As a condition of settlement, PG&E would simply be required to provide ratepayers the value of tax benefits after such benefits are received as a result of the very favorable settlement terms that allow for write off of unrecoverable costs.

There will be a major issue if shareholders are allowed to profit off of supposed penalties for such grievous and harmful wrongdoing. Not only would it be morally bankrupt, it would completely undermine any value to the “financial obligations.” As the Joint Parties have argued extensively, the financial obligations are, for the most part, meaningless because it amounts to no

¹¹¹ Decision at p. 4.

more than PG&E writing offs costs they would not be able to recover anyhow. But, if PG&E was then allowed to profit from the write-offs, the entire purpose of assessing penalties and fines would be utterly obviated. It is critical that the POD's treatment of tax benefits stands or the Commission will fully and totally have failed its obligation to enforce state laws and prosecute violations.

CONCLUSION

For the reasons stated above, Wild Tree Foundation urges the Commission to recognize that the modified settlement approved in the Decision is contrary to the law, not in the public interest, and not reasonable in light of the record and was approved in violation of due process and the Public Utilities Code and grant this application for rehearing.

Respectfully Submitted,

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