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BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA

County of Santa Cruz,

Complainant,

vs.

Pacific Gas and Electric Company (U39E),

Defendant.

Case 21-01-014

ASSIGNED COMMISSIONER'S SCOPING MEMO AND RULING

This scoping memo and ruling sets forth the issues, need for hearing, schedule, category, and other matters necessary to scope this proceeding pursuant to Public Utilities Code Section 1701.1. and Article 7 of the Commission's Rules of Practice and Procedure (Rules).

1. Procedural Background

A complaint was filed by the County of Santa Cruz on January 25, 2021, alleging that Pacific Gas and Electric Company (PG&E) violated numerous state laws and Commission orders when conducting vegetation management activities in response to the CZU August Lightning Complex Fires (CZU fires) in Santa Cruz County. PG&E was granted an extension to file their answer, and PG&E did so on April 29, 2021. PG&E also filed a motion to dismiss the complaint on April 29, 2021, and the County of Santa Cruz filed a response to PG&E's motion to dismiss on May 14, 2021. The response of the County of Santa Cruz also contained a motion to take official notice of certain information previously filed

with the Commission and in the Superior Court of Nevada County. On May 17, 2021, PG&E sought leave to file a reply to the response of the County of Santa Cruz, and did so on May 24, 2021.

The assigned Administrative Law Judges held a prehearing conference (PHC) on May 13, 2021, to address the issues of law and fact, determine the need for hearing, set the schedule for resolving the matter, and address other matters as necessary. After considering the complaint and answer, various motions filed by the parties, related responses, and discussion at the prehearing conference, I have determined the issues and initial schedule of the proceeding to be set forth in this scoping memo.

2. Issues

The issues to be determined or otherwise considered are:

1. Whether PG&E's activities related to its response to the CZU fires violated its obligations under Public Utilities Code Section 451.
2. Whether PG&E's activities related to its response to the CZU fires violated its obligations under Public Utilities Code Section 702.
3. Whether PG&E's activities related to its response to the CZU fires exceeded its mandate or violated its obligations under Rule 35 of the Commission's General Order (GO) 95.
4. Whether PG&E's activities related to its response to the CZU fires exceeded its mandate or violated its obligations under the Commission's GO 165.
5. Whether PG&E's activities related to its response to the CZU fires exceeded its mandate or violated its obligations under Commission Resolution ESRB-4.
6. The appropriate remedy to impose if any exceedances or violations are found.

Notably, this scoping memo and ruling declines to include within the scope of the proceeding the complainant's allegations that PG&E violated several laws and regulations that are not within the Commission's jurisdiction, including:

- Public Resources Code Sections 4571 and 4581
- California Forest Practice Rules (14 Cal. Code of Regs. Section 895, et seq)
- Public Resources Code Sections 4601 and 4602
- Public Resources Code Sections 4292 to 4294
- Public Resources Code Section 4295.5
- Public Resources Code Section 30000, et seq (i.e., the California Coastal Act)
- Santa Cruz County Local Coastal Program
- Central Coast Water Board's Water Quality Control Plan for the Central Coastal Basin
- U.S. Clean Water Act Section 301
- California Water Code Section 13376
- City of Santa Cruz Municipal Code Section 16.05.100(e)
- Civil Code Sections 3479 to 3481
- Penal Code Sections 370 and 372
- Penal Code Section 602
- Health and Safety Code Section 13001

While the Commission has broad authority to regulate public utilities and penalize them for violations of Commission orders or state laws that concern the Commission's oversight of public utilities, courts have not supported the expansion of the Commission's regulatory oversight to those laws that are normally enforced by other state agencies or courts. For example, the Court of Appeal in *Greenlining Institute v. PacBell*, 103 Cal.App.4th 1324 (2002), noted that

the Commission may not impose remedies for violations of law outside of its jurisdiction. While the Commission may and sometimes must *consider* areas of law outside of its jurisdiction in fulfilling its duties,¹ that consideration must be cognate and germane to utility regulation and the application of laws for which the Commission has primary responsibility granted by the Legislature (i.e., the Public Utilities Code).² This scoping memo and ruling finds that the alleged violations of laws outside of the Commission's jurisdiction should not be specifically scoped into this proceeding. The normally responsible agencies (e.g., the California Department of Forestry and Fire Protection),³ or the normally responsible organs of government (e.g., the district attorney for the County of Santa Cruz) should determine if PG&E violated those laws and if so, what penalties should be imposed. This position would seem to be supported by the complainant itself. The resolution by the County of Santa Cruz Board of Supervisors directing the filing of the instant complaint also directed the Chair of the Board of Supervisors to "write letters to the Santa Cruz County District Attorney's Office, California Department of Forestry and Fire Protection, California Coastal Commission and other relevant enforcement agencies encouraging the thorough investigation and, if appropriate, pursuit of criminal

¹ See Decision (D.) 04-06-092.

² See, e.g., D.04-01-040, where the Commission looked to standards outside of its jurisdiction in order to apply portions of the Public Utilities Code.

³ For example, page 3 of the attachment to the complaint is a portion of a Notice of Violation prepared by CALFIRE which states "...I must inform you that continued Timber Operations without the appropriate permits or continued violations of the operational sections of the Forest Practice Rules could result in charges being filed with the District Attorney or Civil action by [CALFIRE]." See also PG&E's motion to dismiss at 16-17, detailing the reasons the Commission does not have jurisdiction over complaints related to alleged violations of the Forest Practice Act.

charges and/or civil penalties related to the findings contained in the various Notices of Violations filed against PG&E.”⁴

Notably, at the PHC the County of Santa Cruz acknowledged that it was not seeking Commission adjudication of alleged violations of laws for which it does not have jurisdiction. Rather, the County of Santa Cruz asserted that it was seeking Commission “guidance” on how PG&E should comply with laws for which the Commission does not have jurisdiction. The Commission declines to do so. As a matter of law, PG&E must comply with all legal obligations that apply to it and its activities. The Commission will not adopt a role of legal counsel for PG&E and provide it with advice on how to comply with its legal obligations outside of the Commission’s jurisdiction. That is a matter for PG&E, its attorneys, and relevant agencies and government organs to determine. The Commission will adjudicate any alleged violations of the laws for which it has jurisdiction, and impose appropriate penalties if warranted.

The facts underlying the various allegations made in the complaint may be identical, and therefore this scoping memo and ruling should not be interpreted to prohibit discovery and adjudication of facts that are relevant to any of the violations included within the scope of this proceeding. For example, if a factual matter would be relevant to a finding related to a violation of GO 95 and a finding related to a violation of Health and Safety Code Section 13001, discovery and adjudication of that factual matter is not prohibited by the removal of Health and Safety Code Section 13001 violations from the scope of this proceeding. Similarly, any findings made by the Commission in this proceeding are without

⁴ Attachment to complaint at 43.

prejudice to any other claims that may be brought against PG&E based on the same facts.

3. Motion to Dismiss

PG&E filed a motion to dismiss the complaint on April 29, 2021. The County of Santa Cruz filed a response on May 14, 2021, and PG&E filed a reply to the response on May 24, 2021.

PG&E's primary argument was that a Commission complaint proceeding was not the appropriate venue to adjudicate issues surrounding PG&E's vegetation management practices. PG&E also argued that the Commission lacked jurisdiction to hear the complaint, that the County of Santa Cruz lacked standing to file the complaint, and that even if jurisdiction and standing existed the complaint itself was not properly pleaded. For these reasons PG&E sought the dismissal of the complaint in its entirety.⁵

The motion to dismiss is denied.

With respect to jurisdiction, PG&E argued that "the Commission does not have jurisdiction to enforce the Forest Practice Act, the Coastal Act, or the Water Code."⁶ This scoping memo and ruling concurs that the Commission does not have jurisdiction over alleged violations of those laws, and as a result does not scope those allegations into the proceeding. However, PG&E did not assert that the Commission lacked jurisdiction to adjudicate alleged violations of laws for which it has primary enforcement responsibility, and which are scoped into this proceeding (i.e., the Public Utilities Code, Commission GOs 95 and 165, and Commission Resolution ESRB-4). Because the Commission may adjudicate

⁵ PG&E's motion to dismiss at 1-2.

⁶ PG&E's motion to dismiss at 4.

alleged violations of laws and orders for which it has jurisdiction, PG&E's jurisdictional argument is without merit given the scope of the proceeding adopted by this scoping memo and ruling. As PG&E's arguments related to standing are dependent on finding that the Commission has jurisdiction to adjudicate alleged violations of laws related to trespass, private nuisance, and Public Resources Code Section 4295.5,⁷ PG&E's standing arguments are moot.

With respect to the alleged violations of laws for which the Commission has jurisdiction, PG&E's motion asserted that those elements of the complaint should be dismissed as the County of Santa Cruz failed to "plead adequate facts to support its claims"⁸ and that "[a]t bottom, the complaint relies entirely on vague and unsupported allegations in [notices of violation] that other agencies and administrative bodies issued."⁹

The Commission must assume facts in the light most favorable to a complainant when considering a motion to dismiss.¹⁰ The County of Santa Cruz has alleged that PG&E has undertaken vegetation management activities that contradict the requirements of Commissions orders and rulings related to vegetation management, and this is all that is necessary for a well-pleaded complaint.¹¹ For example, as stated in the County of Santa Cruz's response to PG&E's motion to dismiss with respect to the alleged violation of Resolution

⁷ PG&E's motion to dismiss at 21.

⁸ PG&E's motion to dismiss at 5.

⁹ PG&E's motion to dismiss at 23.

¹⁰ See *Radiant BMT, LLC, Complainant, vs. Southern California Edison Company (U338E), Defendant*, D.20-12-034.

¹¹ County of Santa Cruz's response to PG&E's motion to dismiss at 6, describing a two-prong test for a well-pleaded complaint being 1) an allegation of an act by a public utility, and 2) a consequent violation of law or Commission order or rule (citing D.17-08-016).

ESRB-4, “[t]he County has adequately pleaded a claim for violation of Resolution ESRB-4, since it has alleged that... PG&E’s [activities] may increase the likelihood of fire. This is adequate to notify PG&E of the details of the claim it must defend, and whether PG&E’s [activities] increased the risk of fire near PG&E’s electrical transmission facilities is an issue of fact that may be explored in discovery and must be reserved for later proceedings.”¹² This scoping memo and ruling concurs and finds that the complaint is well-pleaded given the scope of the proceeding as adopted.

While the factual assertions made by the County of Santa Cruz may be vague, hearsay, or based on information and belief, that is not relevant at this stage of the proceeding. The County of Santa Cruz should be allowed to make its case, including at hearing. The Presiding Officers and the Commission will evaluate the evidence presented in this proceeding and then determine if a violation of applicable law or Commission orders has occurred based on that evidence and arguments made by the parties in briefs. PG&E’s arguments to dismiss the complaint and close the proceeding at this early stage, based on insufficient factual allegations by the complainant, are therefore rejected.

4. Motion to Take Official Notice

As part of its response to PG&E’s motion to dismiss, the County of Santa Cruz requested that the Commission take official notice of certain documents in support of its response:

- Comments of the Joint Local Governments on Administrative Law Judge’s Ruling Requesting Comment on Closing the Proceeding, dated December 11, 2020, Rulemaking (R.) 18-10-007 (Filed October 25, 2018) (hereinafter referred to as “Document 1”)

¹² County of Santa Cruz’s response to PG&E’s motion to dismiss at 9.

- Amicus Curiae Brief of the Public Utilities Commission of the State of California upon Invitation of the Superior Court of the County of Nevada, filed October 6, 2020, Lorraine Reich v. City of Nevada City, et al., Nevada County Superior Court Case No. CU20-084893 (Petition filed September 17, 2020) (hereinafter referred to as “Document 2”)
- Pacific Gas and Electric Company’s Supplemental Memorandum in Support of Dismissal, Relief from Stay, and Restraining Order, filed October 6, 2020, Lorraine Reich v. City of Nevada City, et al., Nevada County Superior Court Case No. CU20-084893 (Petition filed September 17, 2020) (hereinafter referred to as “Document 3”)

Commission Rule of Practice and Procedure 13.1 allows the Commission to take official notice “of such matters as may be judicially noticed by the courts of the State of California pursuant to Evidence Code section 450”.¹³ California Evidence Code Section 452(d) allows courts to take judicial notice of “Records of (1) any court of this state or (2) any court of record of the United States or of any state of the United States.”¹⁴ In the past, the Commission has taken judicial notice of filings in other courts.¹⁵ However, we will not take official notice of the truth of the matters asserted or found in the pleadings.¹⁶

In reviewing the Motion for Official Notice in conjunction with the County of Santa Cruz’s response to the motion to dismiss, the County’s usage of these documents is impermissibly for the truth of the matter asserted. In Footnote 2 of its Response to the Motion to Dismiss, the County presents comments filed in a

¹³ Commission Rule of Practice and Procedure 13.1.

¹⁴ California Evidence Code Section 452(d).

¹⁵ D.13-04-012, 2013 Cal. PUC Lexis 120 at 11-12.

¹⁶ 2016 Cal. PUC Lexis 22 at 23, D.16-01.014.

Commission proceeding by joint local governments.¹⁷ The Response to the Motion to Dismiss alleges that “PG&E’s position on disposal of trees felled pursuant to its vegetation management program is not unique to its activities in Santa Cruz County, and indeed represents a problem in other parts of its service area. See, Complainant’s Request for Official Notice No. 1.”¹⁸ The response points to Document 1 for their allegations that PG&E’s vegetation management program “represents a problem” in other counties, as opposed to the mere existence of the document. Courts may not take judicial notice of the existence of facts asserted in every document of a court file, including pleadings and affidavits – such hearsay allegations are not eligible for judicial notice.¹⁹

The County of Santa Cruz references Document 2, an amicus curiae brief filed by the Commission in a case involving PG&E vegetation management practices in Nevada County,²⁰ to cite to the Commission’s position in that litigation. The cited section, wherein the Commission argued it had sole jurisdiction over the vegetation management issues in question in that case, is provided to support the County of Santa Cruz’s argument that the Commission is the proper venue for the instant case. This also impermissibly references the document for the truth of the matter asserted, that the Commission has proper

¹⁷ County of Santa Cruz Response to Motion to Dismiss at 2, footnote 2, referencing County of Santa Cruz Request for Official Notice, Document 1, Comments of the Joint Local Governments on Administrative Law Judge’s Ruling Requesting Comments on Closing this Proceeding, R.18-10-007.

¹⁸ *Id.*

¹⁹ *Day v. Sharp*, 50 Cal. App. 3d 904, 914-915 (1975).

²⁰ Amicus Curiae Brief of the Public Utilities Commission of the State of California Upon Invitation of the Superior Court of the County of Nevada (Filed October 6, 2020), *Lorraine Reich v. City of Nevada City et. al.* Nevada County Superior Court Case No. CU20-084893 (Petition filed September 17, 2020).

jurisdiction over the vegetation management issues in question. Although judicial notice may be taken of conclusions of law,²¹ pleadings by the Commission in separate litigation with a different set of facts do not meet this standard.

Additionally, the County of Santa Cruz has not established the relevancy of some of these documents. “Any matter to be judicially noticed must be relevant to a material issue.”²² The County of Santa Cruz’s Response to the Motion to Dismiss does not in fact cite to Document 3, a memorandum in support of dismissal in the same case as Document 2.²³ Presumably, it is referenced for the same usage as Document 2, as it also discusses the Commission’s jurisdiction over forest management practices. As noted in its Response to the Request for Official Notice, PG&E has not disputed the Commission’s jurisdiction over Commission General Orders, Rules, or Public Utilities Code Statutes.²⁴ As this matter of law is not under dispute, it is not relevant to a material issue. This provides another reason to deny the Request for Official Notice for Documents 2 and 3.

For the above reasons, we deny the County of Santa Cruz’s Request for Official Notice of Facts, but note that we have elsewhere in this ruling denied PG&E’s Motion to Dismiss, which Santa Cruz filed the Request for Official

²¹ Day v. Sharp, *supra* at 914.

²² Malek Media Group, LLC v. AXQG Corp., 58 Cal. App. 5th 817, 825.

²³ Request for Official Notice No.3, Respondent Pacific Gas and Electric Company’s Supplemental Memorandum in Support of Dismissal, Relief from Stay, and Restraining Order (filed October 6, 2020), *Lorraine Reich v. City of Nevada City, et al.*, Nevada County Superior Court, Case No. CU20-084893.

²⁴ Pacific Gas and Electric Company’s Response to Request for Official Notice of Facts at 4 (filed May 24, 2021), Case 21-01-014.

Notice of Facts in response to. Although we decline to take official notice of the documents at this time, we do not preclude any future usage of these documents in a proper manner.

5. Need for Evidentiary Hearing

Issues #1 through #5 concern contested, material issues of fact.

Accordingly, we will allow parties to present evidence on these issues and evidentiary hearing will be held.

6. Schedule

The following schedule is adopted here and may be modified by the assigned Administrative Law Judge(s) (ALJ) as required to promote the efficient and fair resolution of the complaint:

Event	Date
Intervenors prepared direct testimony, served	November 19, 2021
Prepared rebuttal testimony, served	December 17, 2021
Status conference & completion of any settlement negotiations	January 2022
Evidentiary hearing, held	Late-January 2022
Opening briefs, filed and served	March 2022
Reply briefs, filed and served [<i>matter submitted</i>]	March 2022
Presiding officer's decision, issued	Q3 2022
Commission decision, issued	Q3 2022

The purpose of the January 2022 status conference is to ascertain whether, pursuant to Rule 13.8(c), the parties stipulate to the receipt of prepared testimony into evidence without direct or cross examination or other need to convene an evidentiary hearing or, in the alternative, the parties' resources, readiness and needs for the effective remote conduct of the evidentiary hearing, including

estimates of time requested for cross-examination and identification of anticipated exhibits.

The proceeding will stand submitted upon the filing of reply briefs, unless the ALJ requires further evidence or argument. Based on the schedule set out above, the proceeding will not be resolved within 12 months as required by Public Utilities Code Section 1701.2(if). This is due to the complexity of the issues in the case, and the substantial discovery that parties will need to conduct well into 2021. Due to the need for an extended timeline for this proceeding, the deadline for the proceeding is extended to December 31, 2022.

7. Alternative Dispute Resolution (ADR) Program and Settlements

The Commission's ADR program offers mediation, early neutral evaluation, and facilitation services, and uses ALJs who have been trained as neutrals. At the parties' request, the assigned ALJ can refer this proceeding to the Commission's ADR Coordinator. Additional ADR information is available on the Commission's website.²⁵

Any settlement between parties, whether regarding all or some of the issues, shall comply with Article 12 of the Rules of Practice and Procedure and shall be served in writing. Such settlements shall include a complete explanation of the settlement and a complete explanation of why it is reasonable in light of the whole record, consistent with the law and in the public interest. The proposing parties bear the burden of proof as to whether the settlement should be adopted by the Commission.

The schedule set forth in this Scoping Memo includes a date for the completion of settlement talks. No later than this date, the parties will submit to

²⁵ See D.07-05-062, Appendix A, § IV.O.

the assigned ALJ a status report of their efforts, identifying agreements reached and unresolved issues requiring hearing. Any settlements between parties, whether regarding all or some of the issues, shall comply with Article 12 of the Rules and shall be served in writing. Such settlements shall include a complete explanation of the settlement and a complete explanation of why it is reasonable in light of the whole record, consistent with the law, and in the public interest. The proposing parties bear the burden of proof as to whether the settlement should be adopted by the Commission.

**8. Category of Proceeding and
Ex Parte Restrictions**

The Commission determined that this is an adjudicatory proceeding. Accordingly, *ex parte* communications are prohibited pursuant to Article 8 of the Rules.

9. Intervenor Compensation

Pursuant to Public Utilities Code Section 1804(a)(1), a customer who intends to seek an award of compensation must have filed and served a notice of intent to claim compensation by June 14, 2021.

10. Response to Public Comments

Parties may, but are not required to, respond to written comments received from the public. Parties may do so by posting such response using the “Add Public Comment” button on the “Public Comment” tab of the online docket card for the proceeding.

11. Public Advisor

Any person interested in participating in this proceeding who is unfamiliar with the Commission’s procedures or has questions about the electronic filing procedures is encouraged to obtain more information at <http://consumers.cpuc.ca.gov/pao/> or contact the Commission’s

Public Advisor at 866-849-8390 or 866-836-7825 (TTY), or send an e-mail to public.advisor@cpuc.ca.gov.

12. Filing, Service, and Service List

The official service list has been created and is on the Commission's website. Parties should confirm that their information on the service list is correct and serve notice of any errors on the Commission's Process office, the service list, and the ALJ. Persons may become a party pursuant to Rule 1.4.

When serving any document, each party must ensure that it is using the current official service list on the Commission's website.

This proceeding will follow the electronic service protocol set forth in Rule 1.10. All parties to this proceeding shall serve documents and pleadings using electronic mail, whenever possible, transmitted no later than 5:00 p.m., on the date scheduled for service to occur. Rule 1.10 requires service on the ALJ of both an electronic and a paper copy of filed or served documents, although this Rule is waived for this proceeding. Only electronic versions of filed or served documents should be served on the ALJs assigned to this proceeding.

When serving documents on Commissioners or their personal advisors, whether or not they are on the official service list, parties must only provide electronic service. Parties must not send hard copies of documents to Commissioners or their personal advisors unless specifically instructed to do so.

Persons who are not parties but wish to receive electronic service of documents filed in the proceeding may contact the Process Office at process_office@cpuc.ca.gov to request addition to the "Information Only" category of the official service list pursuant to Rule 1.9(f).

