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October 15, 2021

Ms. Caroline Thomas Jacobs
Director, Office of Energy Infrastructure Safety
715 P Street, 20th Floor
Sacramento, California 95814

Re: Pacific Gas and Electric Company's Comments on September 29, 2021 Executive Compensation Guidance Workshop

Dear Ms. Thomas Jacobs:

Pacific Gas and Electric Company ("PG&E") respectfully submits the following comments on certain preliminary proposals made by the Office of Energy Infrastructure Safety ("OEIS") and NorthStar Consulting Group ("NorthStar") during OEIS's September 29, 2021 executive compensation workshop. PG&E's executive compensation structure is an important component of its multi-faceted commitment to safety and operational excellence, and PG&E appreciates the opportunity to comment prior to OEIS's issuance of formal proposals for 2022 executive compensation submission guidance.

Before addressing specific proposals made during the workshop, PG&E offers some general comments about Assembly Bill ("AB") 1054 and the overall scope and tenor of the proposals. AB 1054 requires a utility applying for a safety certification to "provide[] documentation" that the utility has an "executive incentive compensation *structure*" that meets certain broad criteria, such as being "structured to promote safety as a priority and to ensure utility financial stability."[1] The statute does not dictate the many ways in which a utility can satisfy those criteria, nor does it burden OEIS with the job of superintending a utility's executive compensation program—an unrealistic regulatory task. Rather, the statute leaves the responsibility for designing an appropriate program where the law has always placed it: (i) with a board of directors and its independent compensation committee exercising their business judgment within the bounds of their fiduciary duties;[2] (ii) subject to retrospective advisory input

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[1] Pub. Util. Code § 8389(e) (emphasis added).

[2] *See* New York Stock Exchange Listed Company Manual § 303A.05 ("The compensation committee must . . . have direct responsibility to: (A) review and approve corporate goals and objectives relevant to CEO compensation, evaluate the CEO's performance in light of those goals and objectives, and, either as a committee or together with the other independent directors (as directed by the board), determine and approve the CEO's compensation level based on this evaluation; [and] (B) make recommendations to the board with respect to non-CEO executive officer compensation, and incentive compensation and equity-based plans that are subject to board approval . . . .").

from shareholders;[3] and (iii) subject further, in PG&E's case, to "[a]nnual review of awards by an independent consultant."[4] The statute charges OEIS with the more limited role of verifying that a utility's overall "compensation *structure* . . . meets the principles set forth" in the statute.[5] Thus, AB 1054 does not contemplate OEIS providing direction or guidance on the precise weightings of a utility's performance metrics, the factors that go into a compensation committee's exercise of discretion when it comes to payment of incentive compensation, or the like.

Moreover, AB 1054 recognizes that an executive compensation structure not only should promote safety, financial stability, and other important operational objectives, but also must enable a utility to attract and retain the talented executives who are necessary to achieve those goals. Thus, for example, AB 1054 unambiguously permits a sizable portion of a utility's annual executive compensation awards to consist of guaranteed pay instead of at-risk compensation.[6] And in discussing AB 1054 and related requirements placed on PG&E, the California Public Utilities Commission ("CPUC" or "Commission") has stressed the importance of "tak[ing] into account PG&E's need to attract and retain highly qualified executive officers."[7]

PG&E raises these overarching points because several of the proposals during the September 29 workshop—especially from NorthStar—failed to align with the limited scope of AB 1054, the discrete role it assigns to OEIS when it comes to executive compensation, the fact that executive compensation is just one tool in a utility's toolbox when it comes to advancing safety and other priorities, or the fact that attracting and retaining talented executives are fundamental purposes of executive compensation. These foundational points, however, are critical to keep in mind in order to stay true to the letter and intent of AB 1054, to ensure adherence to corporate best practices, and to avoid the proverbial "mission creep" and arguable overreach into areas that are the province of an independent compensation committee exercising business judgment in accordance with its fiduciary duties.

With that said, PG&E comments below on certain specific proposals made during the workshop. PG&E does not comment on all of the proposals—many of which are inextricably entwined with each other, and could have a compounding effect if adopted together. Rather,

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[3] *See* 15 U.S.C. § 78n-1(a)(1), (c) ("Not less frequently than once every 3 years, a proxy or consent or authorization for an annual or other meeting of the shareholders for which the proxy solicitation rules of the [Securities and Exchange] Commission require compensation disclosure shall include a separate resolution subject to shareholder vote to approve the compensation of executives [paid for the prior year, as disclosed in the proxy statement]. . . . [Such] shareholder vote . . . shall not be binding on the issuer or the board of directors of an issuer, and may not be construed . . . as overruling a decision by such issuer or board of directors.").

[4] Decision Approving Plan of Reorganization, D.20-05-053, at 88 (CPUC June 1, 2020).

[5] Pub. Util. Code § 8389(e)(6)(B) (emphasis added).

[6] *See id.* § 8389(e)(6)(A)(i) (requiring only that a "primary portion of the executive officers' compensation [to be] based on achievement of objective performance metrics").

[7] D.20-05-053 at 89.

PG&E focuses on the specific proposals that PG&E regards as especially important or as particularly beyond the scope of AB 1054 and OEIS's role.

1. <u>OEIS's and NorthStar's Proposals Regarding AB 1054's Definition Of "Executive Officer"</u>

OEIS proposed requiring utilities' executive compensation submissions (i) to specify "[w]hich internal executive officer classifications or positions are subject to the submitted executive compensation structure"; and (ii) to state "[w]hich internal executive officer classifications or positions are not included in the executive compensation structure and explain why they are not included."[8] Relatedly, NorthStar floated a number of ideas regarding who, in its view, it might be beneficial to subject to AB 1054's executive compensation requirements. NorthStar raised, for example, whether the entire "C-suite" (a term it did not define) should be subject to the statute's requirements, and whether if one senior vice president is determined to be an "executive officer" that means that all other senior vice presidents also must be deemed to be executive officers.[9] The Commission, however, repeatedly has made clear that the term "officer" or "executive officer" has a settled meaning that is not open to new or novel interpretations, much less the expansive interpretations suggested by NorthStar.

AB 1054's executive compensation structure requirements apply only to "executive officers, as defined in [Public Utilities Code] Section 451.5."[10] Section 451.5(c) defines "executive officer" to mean "any person who performs policy making functions and is employed by the public utility subject to the approval of the board of directors, and includes the president, secretary, treasurer, and any vice president in charge of a principal business unit, division, or function of the public utility." Section 451.5(c)'s definition closely tracks the definition of "executive officer" found in Securities and Exchange Commission ("SEC") Rule 3b-7, namely, a company's "president, any vice president of the [company] in charge of a principal business unit, division or function (such as sales, administration or finance), any other officer who performs a policy making function or any other person who performs similar policy making functions for the [company]."[11]

The Commission's decisions make clear that § 451.5(c)'s definition of "executive officer" extends no further than Rule 3b-7 executive officers (subject to exceptions expressly set forth in § 451.5(c), such as specification of the utility's corporate secretary and treasurer).[12] In

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[8] Office of Energy Infrastructure Safety, *Executive Compensation Guidance Workshop*, at 9 (Sept. 29, 2021) ("OEIS PowerPoint").

[9] *See* NorthStar Consulting Group, *Executive Compensation Structure Workshop*, at 5 (Sept. 29, 2021) ("NorthStar PowerPoint") ("Question: Who are the executive officers and how does this affect compensation design? . . . All Senior Vice Presidents?").

[10] Pub. Util. Code § 8389(e)(4), (e)(6).

[11] 17 C.F.R. § 240.3b-7.

[12] Section 451.5(c) also adds the requirement that the individual be "employed by the public utility," which forecloses NorthStar's suggestion (*see* NorthStar PowerPoint at 5), that individuals employed solely by utility holding companies might be subject to the statute. *Cf.* Decision on Test Year 2021 General Rate Case for Southern California Edison Company, D.21-08-036, at 420 (CPUC Aug. 20, 2021)

December 2018, the Commission issued Resolution E-4963, which held that the term "officer" in a different section of the Public Utilities Code, § 706, "means those employees of the investor owned utilities in positions with titles of Vice President or above, *consistent with Rule 240.3b-7 of the Securities Exchange Act of 1934*."[13] And in its August 20, 2021 decision in Southern California Edison Company's General Rate Case, the Commission, observing that § 451.5(c)'s definition of "executive office" is "similar to the definition provided in Rule 3b-7," held that it is "reasonable to continue to apply the definition of 'officer' adopted in Resolution E-4963."[14] Accordingly, the Commission held that the term "officers"—and by extension, "executive officers"—extends no further than Rule 3b-7 executive officers (plus, under § 451.5(c), the secretary and treasurer).

The Commission then explained that such executive officers are necessarily a small, high-level group, and that determining who is in that group requires a fact-intensive, officer-by-officer analysis:

> [O]nly VPs that are in charge of a "principal business unit, division or function" or who perform a policy making function are executive officers under Rule 3b-7. The adjective "principal" is a modifier of all of the nouns that follow in the list. By setting forth conditions under which a VP will be considered a Rule 3b-7 officer, it is clear that the Rule did not intend for all VPs to be considered Rule 3b-7 officers. . . . Rule 3b-7 officers are senior-level management, responsible for policy decisions of the company, and directly answerable to the [utility's] Board of Directors because their hiring and firing are determined by the Board.[15]

Accordingly, determining who qualifies as an "executive officer" under AB 1054 is not as simple as looking at an officer's title or level in the corporate hierarchy as NorthStar suggested (with the exception of a utility's president, secretary, and treasurer, as applicable, because those positions are specifically identified in § 451.5(c) as "executive officer" positions). Rather, determining who qualifies as an "executive officer" requires examining the specific facts surrounding an individual officer's duties and actions, and the nature and extent of the "policy making function,"[16] if any, the officer performs.[17] Moreover, "policy making" in this context requires significant policy making functions,[18] including the authority to implement—not merely

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(holding that because "EIX is not an electric corporation," the definition of "officer" in Public Utilities Code § 706 "does not apply to EIX").

[13] Resolution E-4963 at 8, Finding 5 (CPUC Dec. 13, 2018) (emphasis added).

[14] D.21-08-036 at 417 n.1353, 419.

[15] *Id.* at 418-19.

[16] Pub. Util. Code § 451.5(c); 17 C.F.R. 240.3b-7.

[17] *See, e.g.*, *SEC v. Prince*, 942 F. Supp. 2d 108, 133 (D.D.C. 2013) (collecting cases holding that "a court [must] reject reliance on an employee's title and instead . . . perform a fact-intensive analysis of the employee's duties and responsibilities").

[18] *Cf.* 17 C.F.R. § 240.16a-1(f) (note) (providing with respect to a very similar definition of "officer" that "[p]olicy-making function is not intended to include policy-making functions that are not significant").

to influence—such policy decisions. As one court put it: "To decide that [Rule 3b-7] reach[es] individuals involved in discussing company strategy and policy, but who do not have authority to actually implement such policy, would expand the scope [of the rule] far beyond what any court has to date recognized as policy making authority."[19]

In short, when the Legislature used the term "executive officers" in AB 1054 and § 451.5(c), it was not writing on a blank slate. Rather, the Legislature borrowed a term that has a settled meaning in the federal securities laws, and that companies use and apply all the time for purposes of complying with SEC requirements. PG&E urges OEIS to adhere to this established meaning in considering utilities' executive compensation submissions.

2. OEIS's Proposals Regarding AB 1054's "Primary Portion" Requirement

AB 1054 requires "the primary portion of the executive officers' compensation [to be] based on achievement of objective performance metrics."[20] OEIS made two proposals concerning this requirement during the workshop. First, OEIS proposed requiring utilities to certify in their executive compensation submissions that "for all executive officer positions as defined in Section 451.5, a majority of the executive compensation reward, at both the *threshold* and maximum reward levels, is awarded based on the achievement of objective performance metrics."[21] Second, OEIS proposed requiring utilities to state "that compensation associated with a performance metric(s) *will not* be earned if the threshold metric target for that performance metric is not achieved."[22] OEIS suggested that this second proposal was intended to preclude a board of directors or compensation committee from exercising "positive discretion" to pay incentive compensation if the formulaic result of a metric score falls below threshold. PG&E will comment on each of these proposals in turn.

a. The proposal regarding calculating the "primary portion"

PG&E is deeply troubled by OEIS's suggestion that it will assess compliance with the "primary portion" requirement based on incentive compensation at *threshold* levels instead of *target* levels. Assessing compliance based on threshold levels would have no basis in the text of AB 1054, would contravene basic principles of statutory construction and widespread practices in the executive compensation realm, and would force California utilities to drastically alter their executive compensation structures in ways that would undermine the purposes of AB 1054 and hurt California utilities' ability to attract and retain talented executives.

The statute says that the "primary portion of the executive officers' compensation [must be] based on achievement of objective performance metrics" without specifying *at what level* of incentive compensation.[23] The statute cannot mean at *any* level, for that would be an untenable

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[19] *Prince*, 942 F. Supp. 2d at 136.

[20] Pub. Util. Code § 8389(e)(6)(A)(i)(I).

[21] OEIS PowerPoint at 12 (emphasis added).

[22] *Id.* at 13 (emphasis added).

[23] Pub. Util. Code § 8389(e)(6)(A)(i)(I).

interpretation. For example, it is possible for a utility to fail to achieve threshold levels of performance on all but one metric, such that incentive pay could end up being only a tiny fraction of overall compensation. That possibility does not mean that the utility's executive compensation structure fails the "primary portion" requirement; the very nature of performance-based incentive compensation is that it does not get paid or gets paid at reduced levels if the utility performs poorly on its metrics, which, mathematically, will always cause the percentage of guaranteed compensation to increase, potentially in excess of 50% of total compensation. That does not evince statutory non-compliance; to the contrary, that is what is *supposed* to happen. Because the statute does not envision assessing compliance with the "primary portion" requirement at *any* possible level of incentive compensation, yet the statute does not specify a particular benchmark, one must use ordinary canons of statutory interpretation to identify the proper benchmark.

"It is a settled principle of statutory construction that a Legislature in legislating with regard to an industry or an activity must be regarded as having had in mind the actual conditions to which the act will apply; that is, the customs and usages of such industry or activity."[24] Thus, when the Legislature imposed the "primary portion" requirement without specifying a benchmark, the Legislature is presumed to have incorporated industry norms and understandings of how incentive compensation is established and measured. And it is axiomatic that the standard benchmark is target, rather than threshold; industry literature makes this clear.[25] Notably, when companies report in their proxy statements the *ex ante* value of incentive compensation awards (*i.e.*, the value of the awards at the time of grant, rather than at the time of actual payouts following the performance period), companies report the values at target levels.[26]

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[24] *Wolski v. Fremont Inv. & Loan*, 127 Cal. App. 4th 347, 353 (2005) (quoting *Irvine Co. v. California Emp. Com.*, 27 Cal. 2d 570, 581 (1946)).

[25] *See, e.g.*, Willis Towers Watson, *Principles and Elements of Effective Executive Compensation Design*, at 47 (Feb. 2021) ("The proportion of Total Rewards allocated to *target* or expected levels of variable compensation should increase with each executive level within the organization.") (emphasis added); Willis Towers Watson, *CEO Pay at S&P 1500 Companies: 2020 Trends in Pay Levels and Practices*, at 2 (Aug. 2020) (noting a "6.0% increase in *target* total pay" for chief executive officers, and that "62% of *target* pay value is performance-based") (emphasis added); Aon, *2020 Pay Trends: First Look at CEO Compensation* (Aug. 2020) (analyzing trends in executive compensation by evaluating "median *target* bonus opportunities," without reference to threshold levels of incentive compensation) (emphasis added); Meridian Compensation Partners, LLC, *Best Practices in Benchmarking*, at 1 (Nov. 2011) (discussing looking at "market values based on *targeted* pay opportunity or realized compensation," not threshold levels of compensation, when benchmarking executive compensation across comparator firms) (emphasis added).

[26] *See, e.g.*, PG&E Corporation and PG&E 2021 Joint Proxy Statement at 43 (reporting on "2020 NEO *Target* Direct Compensation Mix") (emphasis added); *id.* at 44 ("[I]n 2020 an average of 61 percent of NEO *target* compensation was at-risk. . . . Equity-based compensation . . . accounted for an average of 47 percent of NEO *target* compensation in 2020.") (emphasis added); *id.* at 46 ("[The] [c]ompensation structure emphasizes at-risk, performance-based variable pay, making up an average of 61 percent of NEO *target* compensation in 2020.") (emphasis added).

That companies use target as the benchmark reflects the fact that, in general, "[o]n average and over time, companies tend to pay out near target."[27] Further, as PG&E previously explained in sworn testimony, it is the target level of incentive compensation, not a lesser level, that is designed to provide a *market-competitive level* of compensation opportunity so that a company can remain competitive when trying to attract and retain talented executives:

> [E]xecutive incentive compensation does not constitute a "bonus," as persons unfamiliar with executive compensation sometimes characterize it; rather, *incentive compensation at target levels is necessary to ensure that executives earn a market-competitive level of compensation*. Thus, incentive compensation is an important part of PG&E's ability to compete in the marketplace for talented executives.[28]

Requiring California utilities to comply with the "primary portion" requirement at threshold levels of incentive compensation would require drastic changes to their executive compensation structures that would hurt their ability to compete for talent and undermine the purposes of AB 1054. Given that PG&E (like the other California utilities) has been structuring its executive compensation to ensure compliance with the "primary portion" requirement at *target* levels,[29] shifting to compliance at *threshold* levels would require:

(i) Materially reducing base salaries—the singular fixed component of pay—which would substantially impair California utilities' ability to recruit and retain the talented executives who are necessary to promote safety and other priorities;

(ii) Dramatically increasing incentive compensation, which would turn AB 1054 on its head by giving utility executives the windfall of significantly greater overall compensation; and/or

(iii) Reducing the spread between threshold and target payout levels, which would go a long way towards abolishing the concept of "threshold" altogether, would fail to provide for a meaningful range of outcomes, and would fail to provide incentives to achieve the significant incremental operational improvement that historically has been necessary to move from threshold to target payout levels.

None of this would be consistent with AB 1054, with its focus on promoting safety and financial stability, or with the Commission's admonition that executive compensation requirements must "take into account PG&E's need to attract and retain highly qualified executive officers."[30]

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[27] Meridian Compensation Partners, LLC, *Annual Incentive Basics*, at 1 (Dec. 2015).

[28] Declaration of John Lowe, attached as Appendix D to PG&E's Post-Hearing Brief and Comments on Assigned Commissioner's Proposals, filed Mar. 13, 2020 in I.19-09-019, at ¶ 5 (footnote omitted; emphasis added).

[29] *See* PG&E's Supplemental Tier 1 Advice Letter No. 4419-G/6157-E-A, at 2 & nn.3-4 (filed with the CPUC on Apr. 30, 2021).

[30] D.20-05-053 at 89.

Measuring compliance with the "primary portion" requirement at threshold levels instead of target levels also would contravene the Commission's decision in PG&E's Plan of Reorganization Order Instituting Investigation (the "POR OII"), which requires only that "[g]uaranteed cash compensation as a percentage of total compensation . . . *not exceed* industry norms."[31] Measuring compliance at threshold levels would countermand this requirement by requiring that guaranteed cash compensation as a percentage of total compensation be *substantially lower* than industry norms—thereby impairing PG&E's ability to recruit and retain talented executives.

In short, assessing the "primary portion" requirement based on threshold levels of incentive compensation would have no basis in the statute, would contravene legislative intent and widespread executive compensation practices, and would otherwise be problematic. OEIS should eschew this approach.

b. The proposal to preempt a board's or compensation committee's exercise of positive discretion

Requiring executive compensation submissions to state "that compensation associated with a performance metric(s) will not be earned if the threshold metric target for that performance metric is not achieved,"[32] is also problematic. Such a requirement would be wholly untethered to the text of AB 1054, which says nothing about giving OEIS oversight of a board or independent compensation committee's use of discretion in the exercise of its business judgment. Moreover, the requirement would be problematic from the standpoint of both fairness and ensuring that an incentive compensation program is effective at promoting safety and other priorities.

At PG&E, failure to achieve a minimum, acceptable level of performance on a particular metric results in no payout on that metric. But PG&E Corporation's independent People and Compensation Committee ("Committee") has discretion to adjust the formulaic results of one or more metric scores if doing so is appropriate based on the facts and circumstances. As PG&E has noted in numerous public filings, the Committee frequently has exercised "negative discretion" to reduce metric scores under PG&E's Short-Term Incentive Plan ("STIP") and/or Long-Term Incentive Plan ("LTIP"), including as recently as early 2021 when payouts for the one-year performance period under the 2020 STIP and performance share payouts for the three-year performance period under the 2018 LTIP were materially reduced.[33] The Committee's ability to exercise negative discretion ensures that incentive compensation that is otherwise payable based on metric results is not paid if it would be inappropriate to do so under the totality of the circumstances.

By the same token, it is equally important that the Committee be able to exercise "positive discretion" to ensure that incentive compensation that otherwise would *not* be payable

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[31] *Id.* at 88 (emphasis added).

[32] OEIS PowerPoint at 13.

[33] *See* PG&E's Tier 1 Advice Letter No. 4419-G/6157-E, at 4-5 (filed with the CPUC on Apr. 9, 2021).

is paid if the Committee determines, in the exercise of its business judgment and within the bounds of its fiduciary duties, that it would be appropriate to pay such compensation in the circumstances. For example, one of PG&E's metrics in its 2021 STIP program design is "Large Overpressure Events Rate," which uses threshold, target, and maximum performance milestones relating to gas overpressure events.[34] If PG&E fails to hit threshold because of an event beyond its control (*e.g.*, a severe and widespread earthquake), an exercise of positive discretion may be appropriate so that executive officers are not penalized based on such an event, and instead can still earn fair compensation. As PG&E previously has explained:

> [A]n executive compensation concept called "line of sight" . . . stresses the importance of an executive being able to see a clear link between the executive's efforts on the job and the achievement of incentive compensation performance metrics, and a clear link between achievement of performance metrics and payment of incentive compensation. If "line of sight" is unclear or subject to breakage in ways that are perceived as outside the executive's control, then incentive compensation loses its incentive effect and can lose its value as a recruitment/retention tool, and thereby fail to promote the activities it is meant to promote.[35]

Ensuring that a utility can exercise not only "negative discretion," but also "positive discretion," based on the facts and circumstances helps ensure that executive compensation programs remain fair and that they adequately promote safety and other priorities. Removing such discretion—which would be the effect of OEIS's proposal, at least with respect to a metric score below threshold—would have the opposite effect. Although the PG&E Corporation People and Compensation Committee has not exercised positive discretion anytime in recent memory, PG&E believes it important that the Committee retain the ability to exercise such discretion if warranted in the exercise of its business judgment. PG&E urges OEIS not to adopt any proposal that would curtail this ability (which, as noted, would be beyond OEIS's statutory mandate in any event).

3. <u>OEIS's Proposal Regarding AB 1054's Requirement for "Indirect or Ancillary Compensation That Is Not Aligned With Shareholder and Taxpayer Interest"</u>

AB 1054 requires "[m]inimization or elimination of indirect or ancillary compensation that is not aligned with shareholder and taxpayer interest in the electrical corporation" (which PG&E interprets to mean corporate perquisites and the like, to the extent such perquisites are not aligned with shareholder and taxpayer interest).[36] Related to this requirement, OEIS proposed during the workshop to "[r]equire that all executive compensation structure submissions include a listing of compensation that is not direct monetary or stock-related compensation, the

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[34] *See* PG&E's Jan. 15, 2021 Letter to Wildfire Safety Division at 4-6, A-3; PG&E's Mar. 2, 2021 Letter to Wildfire Safety Division at 2, A-3.

[35] Declaration of John Lowe, attached as Appendix D to PG&E's Post-Hearing Brief and Comments on Assigned Commissioner's Proposals, filed Mar. 13, 2020 in I.19-09-019, at ¶ 7.

[36] Pub. Util. Code § 8389(e)(6)(A)(iv).

percentage of the total compensation, who is awarded that compensation, and the basis upon which that compensation is awarded."[37]

PG&E finds this proposal to be vague, but beyond that, PG&E has burden concerns. PG&E already compiles and discloses information about corporate perquisites and the like for its named executive officers in its annual joint proxy statements.[38] PG&E's disclosures are detailed and voluminous, and include the following mandatory elements as specified by SEC regulations: ". . . (iii) Each element of compensation; (iv) Why the [company] chooses to pay each element; (v) How the [company] determines the amount (and, where applicable, the formula) for each element of pay; [and] (vi) How each compensation element and the [company's] decisions regarding that element fit into the [company's] overall compensation objectives and affect decisions regarding other elements."[39] PG&E does not object to including the same information about corporate perquisites in its executive compensation submissions to OEIS, but due to burden concerns, urges OEIS to take that information as already compiled without requiring additional analysis or data points, or different timing.

To the extent PG&E has AB 1054 executive officers who are not subject to the proxy disclosure rules (*e.g.*, the corporate secretary under § 451.5(c)), PG&E believes that OEIS should permit the filing of such information confidentially due to employee privacy concerns. These individuals accepted their executive officer positions without any pre-existing requirement that fine details of their compensation be publicized. Accordingly, these executive officers have a protectable privacy interest in such information, and it would be inappropriate to require its public disclosure.[40]

4. <u>NorthStar's Proposals for Detailing Board or Compensation Committee Discretion</u>

NorthStar proposed that utilities' executive compensation submissions include "[d]etails on use of discretion—upward and downward," including information on "[m]issed safety targets," "[m]anagement/Board adjustments to individual targets," and "[m]anagement/Board adjustments to individual employee compensation."[41] This is beyond the scope of AB 1054 and is otherwise inappropriate.

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[37] OEIS PowerPoint at 21.

[38] *See, e.g.*, PG&E Corporation's and PG&E's 2021 Joint Proxy Statement at 37-87.

[39] 17 C.F.R. § 229.402(b).

[40] *See, e.g.*, *Sacramento Cty. Employees' Ret. Sys. v. Superior Ct.*, 195 Cal. App. 4th 440, 468 (2011) ("Californians enjoy a right to privacy in their private financial affairs."); *see also Int'l Fed'n of Pro. & Tech. Engineers, Loc. 21, AFL-CIO v. Superior Ct.*, 42 Cal. 4th 319, 331 (2007) (holding that government employees did not have a reasonable expectation of privacy in their salary information because the law long had provided that "the name of every public officer and employee, as well as the amount of his salary, is a matter of public record"—while observing that "the privacy expectation regarding income earned in the *private* sector" is "significantly" greater) (emphasis added).

[41] NorthStar PowerPoint at 7.

First, as noted, AB 1054 does not charge OEIS with superintending a utility's executive compensation program as a general matter. And the statute certainly does not task OEIS with evaluating or second-guessing a board's or independent compensation committee's exercise of discretion as part of its business judgment, whether generally or with regard to "individual employee compensation" (which raises potential employee privacy concerns).[42] Rather, AB 1054 charges OEIS with determining whether a utility's executive compensation "*structure*" complies with certain enumerated requirements.[43] NorthStar's proposal ventures far beyond OEIS's limited mandate to evaluate the overall structure, and therefore is inappropriate.

Second, NorthStar's proposal ignores timing issues. Utilities make their executive compensation submissions to OEIS near the *beginning* of the year, and thus, near the *beginning* of the applicable performance period (be it an annual performance period under a short-term incentive plan, or a multi-year performance period beginning at the same time under a long-term incentive plan). Utilities therefore make their submissions *before* a board or compensation committee has occasion to determine whether to exercise discretion to adjust the formulaic results of metric scores—because results have not been achieved yet. Accordingly, NorthStar seems to be proposing that utilities either (i) submit information that does not yet exist; or (ii) submit information about the exercise of discretion relating to the *prior* year, which has nothing to do with whether a utility's executive structure in the *current* year satisfies the statutory criteria, and nothing to do with OEIS's statutory task of assessing the *current* structure.[44]

Third, SEC regulations already require utilities to report on material exercises of discretion in the executive compensation context. Specifically, 17 C.F.R. § 229.402(b) requires proxy statements to explain "all material elements of the [company's] compensation of the named executive officers," and notes that such explanation may include "whether discretion can be or has been exercised (either to award compensation absent attainment of the relevant performance goal(s) or to reduce or increase the size of any award or payout), identifying any particular exercise of discretion, and stating whether it applied to one or more specified named executive officers or to all compensation subject to the relevant performance goal(s)."[45] Moreover, the Commission's decision in PG&E's POR OII requires PG&E to provide "[a]nnual reporting of awards to the CPUC through a Tier 1 advice letter compliance filing,"[46] and PG&E has included information regarding the exercier of discretion.[47]

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[42] *Id.*

[43] Pub. Util. Code § 8389(e)(4), (e)(6) (emphasis added).

[44] *Cf.* NorthStar PowerPoint at 8 (proposing to require "[p]rior year . . . reporting," including "[p]rior year targets and actual performance").

[45] *See also* PG&E Corporation's and PG&E's 2021 Joint Proxy Statement at 40, 57 (describing exercise of "negative discretion").

[46] D.20-05-053 at 88.

[47] *See* PG&E's Tier 1 Advice Letter No. 4419-G/6157-E, at 4-5 (filed with the CPUC on Apr. 9, 2021).

To the extent NorthStar has something more expansive in mind—such as itemization of every factor considered as part of an exercise of discretion—that would be invasive of the board or compensation committee process, and also impractical. By definition, an exercise of discretion is based on the totality of the circumstances, and detailed granularity often is not feasible. For example, different board or compensation committee members may have entirely different reasons for voting in favor of a particular exercise of discretion. In fact, as to PG&E, the Commission already has ordered that there shall be a presumption that a material portion of executive incentive compensation shall be withheld if PG&E is the ignition source of a catastrophic wildfire, with PG&E "mak[ing] the initial determination as to whether PG&E has caused a catastrophic event that warrants reduction or elimination of incentive compensation."[48] Notably, the Commission did *not* see fit to require PG&E to articulate every factor underlying such a determination. NorthStar's proposal, however, would require utilities to provide such information not only in the context of discretion exercised following a catastrophic wildfire, but any time an independent compensation committee exercises discretion on any metric for any reason. This is far beyond OEIS's statutory role. NorthStar's proposal should be rejected.

5. <u>NorthStar's Proposals Regarding Reporting of Historical Metric Performance for "Trending" Purposes and To See if Metrics Are "Helping"</u>

NorthStar proposed during the workshop to require utilities to submit historical metric performance data for "trending" purposes,[49] or as NorthStar elsewhere put it, to see if the metrics are "helping." Again, this misapprehends the nature of OEIS's statutory charge in the executive compensation context, which is not to oversee utility safety as a general matter, superintend a utility's executive compensation program, determine whether safety or other goals might be better advanced by substituting one metric for another, or the like. Rather, OEIS's role is to "determine[] [whether] the *structure* meets the principles set forth" in the statute.[50]

Moreover, NorthStar's proposal, if adopted, would be problematic because submitting raw quantitative data divorced from the *qualitative* context that informs the business judgment underlying metric-setting would be foreordained to lead to misplaced arguments and wrong conclusions. To illustrate, in PG&E's 2021 STIP, the target milestone for the "DCPP [Diablo Canyon Power Plant] Reliability and Safety Indicator" metric is below actual performance in each of the last five years. Assessing PG&E's current target against historical performance might create the misimpression that PG&E set a target that was unduly easy to attain. But in reality, there is a good reason: PG&E's "Diablo Canyon Unit 2 . . . experienced four outages between July 2020 and February 24, 2021, each due or related to malfunctions,"[51] such that a target milestone that is at or above historical performance would not realistically be attainable in 2021 and therefore would not have a meaningful incentive effect. Simply looking at raw historical data, therefore, would be bound to result in wrong impressions. Nor would the problem be solved by requiring utilities to provide detailed explanations for why they set the

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[48] D.20-05-053 at 88, 92.

[49] NorthStar PowerPoint at 8 (emphasis added).

[50] Pub. Util. Code § 8389(e)(6)(B).

[51] PG&E Corporation and PG&E Form 10-K for the Fiscal Year Ending Dec. 31, 2020 at 52.

milestones where they did; not only is there nothing in AB 1054 that requires such information, but such determinations can be extraordinarily complex, involving, among other things, competing priorities, limited resources, a divergence of opinions, healthy debate, and, ultimately, exercises of business judgment.

Moreover, historical performance on metrics often says very little about whether the metrics are appropriate or effective; there are many drivers of performance, and an incentive created by a metric can be just one piece of a complex puzzle. Whether performance has improved, deteriorated, or remained the same over time therefore often says little or nothing about whether, in NorthStar's words, a metric is "helping." Indeed, even if performance is deteriorating, the metric may still be "helping" by keeping performance higher than it otherwise would be. NorthStar's proposal should be rejected.

6. NorthStar's Proposal Regarding Metric Weightings

NorthStar proposed to prescribe "additional requirements regarding short-term incentive metrics, weightings, and targets," including "[c]ategory and individual metric weighting requirements" such as "no metric less than 5% weighting."[52] NorthStar was correct to describe these as "additional requirements," because they are nowhere found in AB 1054. Rather, as noted, AB 1054 leaves the responsibility for designing an appropriate executive compensation program with a utility's board and independent compensation committee, subject to retrospective shareholder advisory input[53] (and in PG&E's case, "[a]nnual review of awards by an independent consultant").[54] Because NorthStar's proposal has no statutory basis, and because it would curtail the board's and compensation committee's authority and obligation to exercise their business judgment when it comes to appropriate program design, the proposal should be rejected.

7. NorthStar's Procedural Proposals

NorthStar proposed that utilities make their executive compensation submissions in March, with those submissions kicking off a lengthy and elaborate process of discovery and briefing consisting of: (i) a first round of data requests served three weeks after the submissions; (ii) responses two weeks later; (iii) a second round of data requests two weeks after that; (iv) responses two weeks later; (v) stakeholder comments on executive compensation submissions filed four weeks after that (presumably with an opportunity for utilities to submit reply comments); and (vi) finally, decisions from OEIS on executive compensation approval requests after the briefing is over. NorthStar acknowledged that this process would take "four months," *i.e.*, until at least July every year.

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[52] NorthStar PowerPoint at 9.

[53] *See supra*, nn.2-3.

[54] D.20-05-053 at 88.

This is far afield of anything contemplated by AB 1054. Further, months of burdensome process prior to a decision would be impractical, and would undercut the purpose of an incentive compensation program.

PG&E's executive compensation structure is designed to promote achievement of key objectives, including, most critically, workforce safety, "public safety and utility financial stability."[55] If PG&E's incentive compensation program is to be effective in promoting these outcomes throughout the year, the program must be settled *early* in the year—incentives that are not in place, that are in an uncertain holding pattern, or that might be revoked many months after being implemented as a result of OEIS action would lose their incentive effect. PG&E therefore agrees that executive compensation submissions should be made early, but believes that any stakeholder comments and replies thereto should be submitted promptly (without the delay occasioned by data requests, much less two rounds of them), with OEIS acting on the executive compensation approval requests swiftly thereafter. To the extent OEIS believes that changes are necessary, PG&E respectfully submits that that typically will be more appropriate for limited guidance for the following year, so as not to upend the structure in the subject year provided that the broad criteria of the statute are satisfied,

Because NorthStar's proposal has no basis in AB 1054, and because it would undercut the purpose of an incentive compensation program, it should be rejected.

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PG&E's executive compensation structure is an important part of its commitment to safety, to its customers, and to having the best executive team possible to deliver for PG&E's stakeholders and the communities it serves. PG&E thanks OEIS for holding the September 29, 2021 workshop, and for allowing PG&E the opportunity to comment on it. If PG&E can provide further information, please do not hesitate to contact me.

Sincerely,

/s/ Lisa Laanisto

Director, Compensation
San Francisco, California 94105

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[55] Pub. Util. Code § 8389(e)(4).