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**VIA ELECTRONIC FILING**

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**Subject: Comments of the Public Advocates Office on Proposed Rulemakings on Process and Investigation Regulations, dated April 27, 2022  
Docket #: 2022-RM**

Dear Director Thomas Jacobs,

The Public Advocates Office at the California Public Utilities Commission (Cal Advocates) submits the following comments on the proposed permanent regulations submitted by the Office of Energy Infrastructure Safety (Energy Safety) regarding its process regulations<sup>1</sup> and investigation regulations.<sup>2</sup> We respectfully urge Energy Safety to adopt the recommendations discussed herein.

## **I. INTRODUCTION**

Pursuant to recently enacted Government Code<sup>3</sup> provisions, Energy Safety submitted to the Office of Administrative Law a Notification of Proposed Emergency Regulatory Action, with proposed process and investigation regulations, on September 3, 2021. Thereafter, the Office of Administrative Law approved and adopted the emergency regulations on September 13, 2021, and readopted the emergency regulations on March 10, 2022, and June 6, 2022 (current regulations).<sup>4</sup> Energy Safety's Emergency Regulatory Action expires on September 13, 2022.

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<sup>1</sup> Cal. Code of Regs., tit. 14, §§ 29100-29200 (Title 14. Natural Resources, Division 17. Office of Energy Infrastructure Safety, Chapter 1. Rules of Practice and Procedure) (process regulations).

<sup>2</sup> Cal. Code of Regs., tit. 14, §§ 29300-29302 (Title 14. Natural Resources, Division 17. Office of Energy Infrastructure Safety, Chapter 2. Investigation and Compliance) (investigation regulations).

<sup>3</sup> Gov. Code §§ 11346.1, 15473(c)(2)(E), and 15475(a).

<sup>4</sup> Cal. Code of Regs., tit. 14, §§ 29100-29200, 29300-29302 (readopted June 6, 2022, effective June 14, 2022).

On April 27, 2022, Energy Safety instituted two new rulemakings. Each rulemaking proposed adoption of *permanent* versions of its regulations - one on its process regulations,<sup>5</sup> and one on its investigation regulations.<sup>6</sup> For each rulemaking, Energy Safety provided notice of the proposed rulemaking,<sup>7</sup> proposed text of the regulations,<sup>8</sup> and an initial statement of reasons supporting the proposed regulations.<sup>2</sup>

Cal Advocates provides comments on the proposed rulemakings and provides recommendations on rulemakings for the future. Cal Advocates' goal is to promote robust and meaningful stakeholder participation in Energy Safety's proceedings. Cal Advocates' recommendations (further discussed in Sections II, III and IV) can be summarized as follows:

**Confidentiality (Process Regulations (Cal. Code Regs., tit. 14, § 29200)):**

- Energy Safety's regulations should distinguish between producers and users of information, including between utilities, government entities, and non-utility entities, in the requirements for confidential treatment of utility-provided information.
- Energy Safety's regulations should provide due process for responding to and making appeals of confidential designations.

**Accessibility (Process Regulations (Cal. Code Regs., tit. 14, § 29100, 29101)):**

- Energy Safety's regulations should limit the burden of complying with accessibility requirements on stakeholders who participate in Energy Safety's proceedings.

**Incident Reporting (Investigation Regulations (Cal. Code Regs., tit. 14, §§ 29300-29302)):**

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<sup>5</sup> State of California, Office of Energy Infrastructure, NOTICE OF PROPOSED RULEMAKING, Cal. Code Regs., tit. 14, §§ 29200, 29201, 29200 - E-Filing, Formatting Requirements, Submission of Confidential Information (filed April 27, 2022) (NOPR - Process Regulations, April 27, 2022).

<sup>6</sup> State of California, Office of Energy Infrastructure, NOTICE OF PROPOSED RULEMAKING, Cal. Code Regs., tit. 14, §§ 29300, 29302 (filed April 27, 2022) (NOPR - Investigation Regulations, April 27, 2022).

<sup>7</sup> NOPR - Process Regulations, April 27, 2022; NOPR - Investigation Regulations, April 27, 2022.

<sup>8</sup> State of California, Office of Energy Infrastructure, Text of Regulations, Cal. Code Regs., tit. 14, §§ 29200, 29201, 29200 (filed April 27, 2022) (proposed process regulations); State of California, Office of Energy Infrastructure, Text of Regulations, Cal. Code Regs., tit. 14, §§ 29300, 29302 (filed April 27, 2022) (proposed investigation regulations).

<sup>2</sup> State of California, Office of Energy Infrastructure, Initial Statement of Reasons, Cal. Code Regs., tit. 14, §§ 29200, 29201, 29200 - E-Filing, Formatting Requirements, Submission of Confidential Information (filed April 27, 2022) (Initial Statement - Process Regulations, April 27, 2022); State of California, Office of Energy Infrastructure, Initial Statement of Reasons, Cal. Code Regs., tit. 14, §§ 29300, 29302 (Initial Statement - Investigation Regulations, April 27, 2022).

- Energy Safety should retain the current regulation requiring incident reports within 30 days of ignition,<sup>10</sup> or articulate in its Final Statement of Reasons its reasons for the omission of this section and alternatives it considered.

**Time Periods for Comments:**

- To facilitate meaningful participation, Energy Safety’s regulations should provide for regular time frames for comments on wildfire mitigation plans (WMPs) and other submissions.

**Motions/Proposals Process:**

- Energy Safety’s regulations should allow for a motion process, including motions to compel and for reconsideration of Energy Safety decisions.

**Discovery Process:**

- Energy Safety’s regulations should provide guidelines on discovery response times and an adjudication process for disputes, for all matters and times of the year besides for WMPs and WMP periods.

**Transparency in Policy Discussions:**

- Energy Safety should provide regulations on notice and reporting of private discussions between Energy Safety and stakeholders, on policy matters.

**Public Participation Hearings:**

- Energy Safety should provide regulations that allow an opportunity for public participation hearings on policy matters.

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<sup>10</sup> Cal. Code Regs., tit. 14, § 29301.

## II. PROCESS REGULATIONS

### A. Confidentiality (Section 29200)

Energy Safety's provisions for submitting confidential information (in section 29200 of the Process Regulations), are burdensome and hamper stakeholder engagement. Overall, Cal Advocates recommends that Energy Safety's guidelines for confidentiality mirror those at the California Public Utilities Commission (CPUC), as provided in the CPUC's General Order (GO) 66-D.<sup>11</sup> These guidelines are comprehensive and provide for due process and efficient processing of confidentiality claims. More specifically, we offer the recommendations below.

- 1. Energy Safety's regulations should distinguish between producers and users of information, including between utilities, government entities, and non-utility entities, in its requirements for applying for confidential treatment of information.**

Proposed section 29200(a) of the process regulations requires any person who submits information and intends it to be exempt from public disclosure, to fulfill several requirements. Such requirements include identifying the statutory basis for the exemption claimed, stating the reasons why each exemption claimed applies to the information proposed to be treated as confidential, and attesting and certifying under penalty of perjury that the application for confidential designation is true, correct, and complete to the best of their knowledge.<sup>12</sup> These proposed regulations are similar to the requirements in the current section 29200. However, the current section 29200 distinguishes between "[a]ny private third party"<sup>13</sup> and government entities,<sup>14</sup> while the proposed regulations do not.

The current section 29200(e) notes that when another agency possesses information pertinent "to the responsibilities of [Energy Safety] that has been designated by that agency as confidential under the California Public Records Act or the Freedom of Information Act," Energy Safety may request and the agency shall submit the information to Energy Safety without an application for confidential designation and "[Energy Safety] Office shall designate this information as confidential." The proposed section 29200 omits this provision. As a result, all parties, regardless of whether they are the producer or only a user of the allegedly confidential information – including utilities, any private third parties, and government agencies -- must apply for confidential designation under proposed section 29200(a). Cal Advocates urges Energy Safety to retain and modify the aforementioned provision in current section 29200(e) so that government entities, which often are not producers of allegedly confidential information

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<sup>11</sup> Available at <https://www.cpuc.ca.gov/-/media/cpuc-website/proceedings-and-rulemaking/documents/d2008031.pdf>.

<sup>12</sup> See Proposed Cal. Code Regs., tit. 14, § 29200(a)(1)-(8).

<sup>13</sup> See Current Cal. Code Regs., tit. 14, § 29200(a).

<sup>14</sup> See Current Cal. Code Regs., tit. 14, § 29200(e).

shared with Energy Safety, can submit that information without having to attest to the confidentiality designation.

Current section 29200(e) states that a government agency is not required to submit an application for confidential designation. Nonetheless, Energy Safety has required Cal Advocates to submit an application for confidential designation before accepting Cal Advocates' confidential filing of Comments on Pacific Gas and Electric Company's (PG&E's) quarter four update.<sup>15</sup> This process is unnecessary as well as burdensome.

Under statutory law, Cal Advocates is required to treat as confidential any information so designated, unless the CPUC orders the information be disclosed to the public.<sup>16</sup> Cal Advocates' confidential filing contained information received from and designated by PG&E as confidential. However, Cal Advocates was not the declarant or source of the confidential information and therefore did not have direct knowledge of the claims of confidentiality provided by PG&E. Thus, we were unable to accurately meet the requirements in proposed section 29200(a)(1)-(8). This issue is also applicable for non-utility or non-governmental stakeholders who receive but are not the producers of information that a utility designated as confidential.<sup>17</sup>

Cal Advocates urges Energy Safety to provide a more streamlined process for non-producers of confidential information, to file submissions with information designated by another source as confidential without having to submit an application for confidentiality. While a memorandum of understanding (MOU) may allow Energy Safety and other government agencies to share confidential information with each other,<sup>18</sup> this process does not cover filings in public dockets.

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<sup>15</sup> *Comments of the Public Advocates Office on Pacific Gas and Electric Company's Quarter 4 (Q4) Quarterly Report*, Docket # 2021-QDR, February 15, 2022.

<sup>16</sup> See Public Utilities (P.U.) Code § 583:

No information furnished to the commission by a public utility, or any business which is a subsidiary or affiliate of a public utility, or a corporation which holds a controlling interest in a public utility, except those matters specifically required to be open to public inspection by this part, shall be open to public inspection or made public except on order of the commission, or by the commission or a commissioner in the course of a hearing or proceeding.

<sup>17</sup> The CPUC has its own process of determining whether information is confidential and Cal Advocates could have requested a resolution from the CPUC on the confidentiality claims made by the utility regarding the information it designated as confidential, *see* CPUC GO 66-D, before submitting its application for confidential designation. However, this process would have been too long to get a CPUC resolution ruling on confidentiality within the short timeframe imposed by the deadline for the Energy Safety filing.

<sup>18</sup> *See, e.g.*, Gov. Code § 6254.5(d); Gov. Code § 15476 ("The Public Utilities Commission and the office shall enter into a memorandum of understanding to cooperatively develop consistent approaches and share data related to electric infrastructure safety. The commission and the office shall share results from various safety activities, including relevant inspections and regulatory development."); Initial Statement – Process Regulations, April 27, 2022, pp. 16, 24.

Currently there is no process for any entity, with or without an MOU with Energy Safety, to file confidential documents to Energy Safety's dockets without an application for confidential designation.

Recommendation: Energy Safety should adopt a provision that establishes a streamlined process for confidential designation of information produced by a source other than the user-filer, where the user is relying on the declaration of the producer of information and proponent of confidentiality. For example, Energy Safety could require that the user-filer only need provide a copy of the producer-proponent's declaration as an attachment to the document it wishes to file confidentially on Energy Safety's docket.

Moreover, Energy Safety should retain and modify section 29200(e) such that it also says "or by another statute," in addition to "California Public Records Act or the Freedom of Information Act," so that it includes other pertinent statutes like P.U. Code section 583 for the case of CPUC and Cal Advocates filers. Energy Safety should also look to create a similar provision for non-government entities that seek to file information provided confidentially by a utility.

**2. Energy Safety's regulations should provide due process for responding to and making appeals of confidential designations.**

Current section 29200, subsection (c), of the process regulations, includes the process for Energy Safety's determinations on applications for confidentiality designation, including timeframes for Energy Safety to notify stakeholders of defects in applications and for applicants to respond to denials. However, neither the current nor the proposed version provides for challenges of confidential designations by other parties.

Recommendation: Energy Safety should include a provision that allows stakeholders to challenge confidential designations made by other stakeholders. This will facilitate engagement of all stakeholders in the proceeding by ensuring that as much pertinent information as possible is available for public review and comment.

Additionally, in the event that any entity (whether Energy Safety or a stakeholder) challenges the confidentiality of information that was originally provided and declared confidential by a utility or another source, the source should be responsible for responding to the challenge.

**B. Accessibility (Sections 29100, 29101)**

Energy Safety's proposed provisions in section 29100 et seq. requiring that all submissions on Energy Safety's e-filing system meet accessibility requirements, are unclear and likely to be unreasonably burdensome. Overall, Cal Advocates recommends that Energy Safety clarify and limit the specific requirements stakeholders must meet for their documents to be accepted onto Energy Safety's dockets. This will serve to encourage participation by members of the public who do not have the resources to comply with rigorous accessibility requirements.

**1. Energy Safety’s regulations should limit the burden of complying with accessibility requirements, on stakeholders who participate in Energy Safety’s proceedings.**

Cal Advocates understands that Energy Safety intends to follow the State of California’s policy of providing accessible electronic documents to members of the public, including those with disabilities.<sup>19</sup> Nevertheless, holding stakeholders to complex, rigorous, and voluminous accessibility standards, including Web Content Accessibility Guidelines (WCAG) 2.0 standards,<sup>20</sup> is unduly burdensome.

Energy Safety states that non-utility entities can comply with these standards by either conforming their electronic filings to these rigorous accessibility standards, or by submitting their filings in hard copy by U.S. mail.<sup>21</sup> However, this is still unduly burdensome and not tenable, for stakeholders that do not have the resources to make their electronic documents compliant with the accessibility requirements.<sup>22</sup> Filing hard-copy documents by U.S. Mail is inefficient, slow, and not beneficial to the goal of making documents accessible, given the availability of word-searchable electronic documents.

Moreover, Energy Safety’s proposed regulations at section 29101 already set forth formatting and word searchable requirements for documents to be accepted onto Energy Safety’s docket system.<sup>23</sup> However, it is unclear whether or not meeting the requirements in section 29101(b)-(e) as well as in Energy Safety’s E-Filing System User’s Guide, is sufficient to meet Energy Safety’s accessibility requirements.

It is notable that another state agency, the CPUC, also aims to comply with the State of California’s policy to provide accessible content to all members of the public.<sup>24</sup> On its website, the CPUC provides guidance and resources for stakeholders to use to for accessibility purposes, including a link to Adobe Acrobat reader.<sup>25</sup> Nowhere does the CPUC require stakeholders who

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<sup>19</sup> See Proposed Cal. Code Regs., tit. 14 § 29100(c) (referring to compliance with Government Code section 7405, which references the Federal Rehabilitation Act of 1973 (Rehabilitation Act)).

<sup>20</sup> See Appendix C to Part 1194 - Functional Performance Criteria and Technical Requirements, 702.10.1 (WCAG 2.0, Web Content Accessibility Guidelines, W3C Recommendation, December 11, 2008); WCAG 2.0, Conformance Requirements, available at <https://www.w3.org/TR/WCAG20/>

<sup>21</sup> See, e.g., Proposed Cal. Code Regs., tit. 14 § 29100(b); Initial Statement of Reasons – Process Regulations, April 27, 2022, p. 24.

<sup>22</sup> It is notable that Energy Safety estimated the cost to make documents meet accessibility requirements could cost up to tens of thousands of dollars per year, based on an estimate of \$4-\$6 per page for 10,000 pages per year. See, e.g., Morris Email to Ogren, April 8, 2022.

<sup>23</sup> See Proposed Cal. Code Regs., tit. 14 § 29101(b), (c).

<sup>24</sup> CPUC website, “Accessibility” page available at <https://www.cpuc.ca.gov/about-cpuc/accessibility>

<sup>25</sup> CPUC website, “Accessibility” page available at <https://www.cpuc.ca.gov/about-cpuc/accessibility>

wish to participate in its proceedings to meet all the WCAG 2.0 requirements.<sup>26</sup> It is worth noting that the CPUC has similar formatting requirements as Energy Safety’s section 29101, in its Rules of Practice and Procedure.<sup>27</sup> The CPUC’s approach has been certified as providing sufficient levels of accessibility under WCAG, all without imposing WCAG standards on CPUC stakeholders.<sup>28</sup> Energy Safety can take the same approach and meet its accessibility goals without impeding the ability of stakeholders and members of the public to participate in its proceedings.

Recommendation: Energy Safety should clarify whether meeting the requirements in section 29101(b)-(e) as well as in Energy Safety’s E-Filing System User’s Guide is sufficient to meet Energy Safety’s initiative to provide accessible electronic documents to members of the public. Furthermore, Energy Safety should provide explicit guidelines in the proposed regulations or in its Energy Safety E-Filing System User’s Guide, or both, on all accessibility requirements that electronic documents should meet. Lastly, Energy Safety should *not* require stakeholders to meet the accessibility requirements of WCAG 2.0 in its entirety. To the extent that Energy Safety wishes to meet the full WCAG 2.0 requirements, then it is appropriate for Energy Safety to perform that work once it has accepted the filed documents by participating stakeholders.

### III. INVESTIGATION REGULATIONS

#### A. Incident Reporting (Current Section 29301)

The incident reports section (section 29301) of the current version of the regulations<sup>29</sup> requires reporting of ignitions that a utility or firefighting agency suspects may have been caused by utility equipment. This section is omitted in the proposed version.

The incident reports described in section 29301 would likely contain useful information and section 29301 does not appear to be duplicative of other regulations. In particular, section 29301 requires a preliminary root cause analysis and a description of all actions taken to minimize the recurrence of ignition incidents. This information would help Energy Safety and stakeholders identify emerging or recurring safety hazards, analyze mitigation measures, and develop ideas for effective policies to mitigate wildfire risks.

Recommendation: Energy Safety should retain current section 29301 of the investigation regulations. Alternatively, if it decides to not retain the section, Energy Safety should explain in its Final Statement of Reasons its reasons for omitting this regulation and describe the alternatives it considered.

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<sup>26</sup> CPUC website, “Accessibility” page available at <https://www.cpuc.ca.gov/about-cpuc/accessibility>

<sup>27</sup> See, e.g., Cal. Code Regs., tit. 20, div. 1, Ch.1 (CPUC Rules of Practice and Procedure), Rules 1.5, 1.13.

<sup>28</sup> CPUC website, “Accessibility” page available at <https://www.cpuc.ca.gov/about-cpuc/accessibility>

<sup>29</sup> Current Cal. Code Regs., tit. 14, § 29301.



#### **IV. OTHER REGULATIONS (NOT YET PROPOSED OR ADOPTED)**

Cal Advocates urges Energy Safety to promulgate additional regulations to facilitate and strengthen public participation in the processes of Energy Safety. Cal Advocates notes that the CPUC's Rules of Practice and Procedure may serve as a helpful example of rules on several topics, and that many participants in Energy Safety's proceedings are familiar with the rules for CPUC proceedings.

##### **A. Recommended Regulations**

###### **1. Time Periods for Stakeholder Comments**

Standing rules on comment periods provide predictability and fairness to regulatory proceedings. Currently, though, Energy Safety has no rules providing for regular timeframes for commenting on the various types of filings submitted to Energy Safety.

The lack of clear and predictable rules makes advance planning difficult and hampers Cal Advocates' ability to fully engage in the comment process. For example, in summer of 2021, extensive and substantively important errata and revisions of two WMPs were issued, for which there was no advance notice and, therefore, no advance notice of a response timeframe for comments. Energy Safety provided only seven calendar days for comments and six days for reply comments each.<sup>30</sup> This allowed inadequate time for Cal Advocates to provide comprehensive informed input.

Recommendation: Energy Safety should provide for regular time frames for comments and reply comments based on type of document or pleading.<sup>31</sup> To provide predictability, fairness, and meaningful participation by stakeholders, the rules should provide default comment and reply periods for:

- Wildfire mitigation plans (WMPs)
- WMP errata
- WMP revisions
- Quarterly data reports and initiative updates
- Quarterly notification letters
- Draft decisions on WMPs
- Executive compensation submissions
- Safety certification requests
- Motions or proposals.

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<sup>30</sup> See Wildfire Safety Division's Revision Notice for Pacific Gas & Electric Company's 2021 Wildfire Mitigation Plan Update, May 4, 2021; The Wildfire Safety Division Issuance of Revision Notice for Southern California Edison Company's 2021 Wildfire Mitigation Plan Update and Notice of Extension of WSD Determination Per Public Utilities Code 8389.3(a), May 4, 2021.

<sup>31</sup> See, e.g., CPUC Rules of Practice and Procedure, Rules 2.6 (comment period for protests, responses, replies to applications).

Energy Safety should ensure that the comment period for each type of filing is proportionate to the amount of information that stakeholders receive and need to analyze. Additionally, Energy Safety should provide adequate time for stakeholders to conduct discovery, so as to provide informed, substantive recommendations to Energy Safety.

In addition, Energy Safety should allow an opportunity for supplemental comments where a utility submits errata or supplemental information after the normal deadline for comments has passed.

Finally, Energy Safety should specify all timeframes in business days so as to account for holidays. Since many staff in stakeholder organizations take vacations during the end-of-year holidays, any comment period that includes this period should be extended proportionately.<sup>32</sup>

## **2. Motions/Proposal Process**

Currently there is no mechanism for stakeholders to formally raise any issue before Energy Safety, outside of the comments process, or outside of requests for extensions in the WMP review period. This gap hampers due process. A motion process would be helpful to resolve issues that may not fall neatly within the scope of a scheduled set of comments. For example, as discussed earlier, there is no mechanism for stakeholders to submit a motion or proposal to reconsider a confidential designation by another party. Another example is that there is no process to compel a response to a discovery request, if the discovery dispute cannot be informally resolved between the parties. Moreover, there is no process to suggest changes to filing schedules in Energy Safety proceedings, except to the extent that Energy Safety specifically requests input on this issue.

Recommendation: Energy Safety should include regulations that allow for a motion process, including motions to compel, motions for leave to file, and motions for reconsideration.<sup>33</sup> This will promote stakeholder engagement in Energy Safety's proceedings by resolving issues that do not fall within the scope of existing filings.

## **3. Discovery Process**

Currently there are no standing discovery rules at Energy Safety, except for limited guidance in the WMP guidelines that applies during the annual WMP review period.<sup>34</sup> The WMP discovery

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<sup>32</sup> Specifically, the days from Christmas through New Year's Day should be treated as holidays for purposes of calculating comment periods.

<sup>33</sup> See, e.g., CPUC Rules of Practice and Procedure, Rules 11.1 (motions), 11.3 (motion to compel or limit discovery), 6.3 (petition for rulemaking), 14.4 (request for review of presiding officer's decision).

<sup>34</sup> For example, the WMP guidelines provide guidance on posting WMP discovery requests on utility websites, WMP discovery response times of three days, and extension requests for WMP discovery responses beyond the three days absent an agreement by the requesting party for the data request. See Office of Energy Infrastructure Safety, *Final 2022 Wildfire Mitigation Plan (WMP) Update Guidelines*, December 15, 2021, Attachment 5: Guidelines for Submission and Review of 2022 Wildfire Mitigation Plan Updates, pp. 10-11.

guidelines do not provide any mechanism to resolve discovery disputes other than deadline issues. Moreover, Energy Safety has issued no guidance on:

- WMP-related discovery outside of the annual WMP review period
- Discovery on WMP-related filings such as quarterly data reports
- Discovery on safety certifications and related filings

The lack of a process for resolving any discovery disputes, and lack of any enforcement mechanism against unresponsive, incomplete, or untimely discovery responses, has, in some instances, left Cal Advocates with no means of remedying incomplete or tardy responses within the short time periods available for filing comments.<sup>35</sup>

Recommendation: Energy Safety should provide standing rules on discovery between parties, including an adjudication process and forum for resolving discovery disputes, and rules on response times and filing motions for disputes, for all matters and times of the year.<sup>36</sup>

#### 4. Transparency in Policy Discussions

As part of its responsibilities, Energy Safety may meet with individual stakeholders in private discussions, outside of public hearings and the written submission process, on policy issues in particular proceedings or in general. Cal Advocates recommends issuing regulations that provide for public notice and transparency of such private discussions (which may be referred to as “ex parte” communications, meaning “by or for one party”).<sup>37</sup> Encouraging open policy discussions will strengthen Energy Safety’s review process by ensuring a fair process and public record of evidence used for decision-making. Moreover, it will strengthen the evidentiary record by allowing other parties to respond and provide counterarguments or supplemental information.

The California Administrative Procedure Act (APA) defines an ex parte communication as a prohibited communication, direct or indirect, during the pendency of a proceeding, regarding any issue in the proceeding, to the presiding officer of a proceeding, from a party or interested person outside the agency, without notice and opportunity for all parties to participate in the

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<sup>35</sup> While Cal Advocates has statutory discovery authority and the ability to utilize the motion to compel process at the CPUC to compel production, *see* P.U. Code §§ 309.5, 314; CPUC Rule of Practice and Procedure, Rule. 11.3, this is not always an acceptable solution because the process often takes longer than the comment deadlines. In addition, other intervenors do not have the same authority or forum available for resolution of discovery issues.

<sup>36</sup> *See, e.g.*, CPUC Rules of Practice and Procedure, Rules 10.1 (scope of discovery between participants in CPUC proceedings), 11.3 (motion to compel or limit discovery process, including meet and confer process, that CPUC can rule on).

<sup>37</sup> “Ex parte” simply means “on one side only; by or for one party; done for, in behalf of, or on the application of, one party only.” Black’s Law Dictionary. Under the federal Administrative Procedures Act (APA), “ex parte communications” refers to “an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given, but it shall not include requests for status reports on any matter or proceeding covered....” 5 U.S.C. § 551 (14).

communication.<sup>38</sup> Energy Safety should follow the lead of agencies such as the California Energy Commission (CEC), California Air Resources Board (CARB), who follow the California APA, and the Federal Energy Regulatory Commission (FERC), and prohibit ex parte contacts in all contested proceedings.<sup>39</sup>

One of the primary purposes of restrictions on ex parte contacts with decision-makers is to prevent a party from gaining an unfair advantage in a contested matter.<sup>40</sup> By not being subject to scrutiny, ex parte information generally cannot be rebutted or corrected.<sup>41</sup> As a result, an ex parte contact may misinform the decision-making process.<sup>42</sup> Accordingly, Energy Safety should require through its rules that decision-makers avoid ex parte contacts, report such communications when they do occur, and allow other parties a chance to respond. The California APA, followed by CARB and CEC, for example, requires a decision-maker to “disclose the content of the communication on the record and give all parties an opportunity to address it.”<sup>43</sup> This prohibition against undisclosed ex parte communications need not restrict the ability of Energy Safety decision-makers to hold properly noticed meetings which *all* parties can attend.

Finally, Energy Safety’s ex parte rules should provide clear explanations about what types of communications are truly procedural and thus not subject to the ex parte rules, and what communications are substantive and should be subject to ex parte rules.

Recommendation: Energy Safety should follow the majority of California agencies like the CEC and CARB, and the federal FERC by prohibiting ex parte contacts in all contested proceedings. Energy Safety should provide regulations for holding open meetings, and notice of private ex

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<sup>38</sup> Gov. Code § 11430.10(a).

<sup>39</sup> One possible exception to this is legislative rulemaking proceedings where no hearings are held and no individual substantive rights are affected. Deborah Behles, Steven Weissman, *Ex Parte Requirements at The California Public Utility Commission: A Comparative Analysis And Recommended Changes* (Jan. 16, 2015) (Behles, Weissman paper), p. 4. “Contested proceedings” is defined to include, among other things, any matter that requires hearings and affects an individual entity’s substantive rights. Behles, Weissman paper, p. 4

<sup>40</sup> Behles, Weissman paper, p. 4.

<sup>41</sup> Behles, Weissman paper, p. 4 (citing *Professional Air Traffic Controllers Org. v. Federal Labor Relations Auth.*, 685 F.2d 547, 563 (D.C. Cir. 1982); *Portland Audubon Society v. Endangered Species Committee*, 984 F.2d 1534, 1543 (9th Cir. 1993) (listing cases)).

<sup>42</sup> Behles, Weissman paper, p. 4 (citing John Allen, *Combinations of Decision-making Functions, Ex Parte Communications, and Related Biasing Influences: A Process-Value Analysis*, 1993 UTAH LAW REVIEW 1135, 1197 (1993) (“Unchallenged evidence or arguments are more salient, more likely to be recalled by the decision maker, and more likely to carry inordinate weight in the mental process of reaching a final conclusion.”)).

<sup>43</sup> Gov. Code sections 11430.40, 11430.50.

parte discussions between stakeholders and Energy Safety on policy matters, in order to promote transparency and stakeholder engagement in Energy Safety's proceedings.<sup>44</sup>

## 5. Public Participation Hearings

Energy Safety has recently conducted public hearings on the proposed rulemakings where members of the public can participate remotely and provide oral or written comments. Cal Advocates commends Energy Safety for taking this step and urges Energy Safety to continue to hold public participation hearings on all of its important matters, not just the proposed rulemakings. Such public meetings will facilitate engagement, especially from members of the public who are at highest risk of experiencing catastrophic wildfires in their areas, on whom the decisions of Energy Safety will have greatest impact. It is important that these perspectives be heard. All public meetings should have at least one means of remote participation (e.g., phone or videoconference).

Recommendation: Energy Safety should create regulations for public participation hearings on policy and important decisions before Energy Safety.<sup>45</sup> The regulations should provide for adequate notice, timeframes of meetings relative to final decisions, and accessibility (including remote accessibility and possibly alternative in-person locations elsewhere in the state).

## V. CONCLUSION

Cal Advocates respectfully requests that Energy Safety adopt the recommendations discussed herein. For any questions relating to these comments, please contact Henry Burton ([Henry.Burton@cpuc.ca.gov](mailto:Henry.Burton@cpuc.ca.gov)) or myself.

Sincerely,

/s/ CAROLYN CHEN

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<sup>44</sup> See also, e.g., CPUC Rules of Practice and Procedure, Rule 8.2 (notice requirements for all-party or individual meetings with decisionmakers in a particular type of proceeding), 8.4 (notice provisions for meetings with decisionmakers for a particular type of proceeding).

<sup>45</sup> See, e.g., CPUC Rules of Practice and Procedure, Rule 13.1(b) (notice requirements for public participation hearings).