

October 23, 2012

Senator George J. Mitchell
John J. Clarke, Jr.
Charles P. Scheeler
DLA Piper LLP
1251 Avenue of the Americas
New York, New York 10020-1104

Re: DLA Piper Mediation of San Bruno Explosion Cases

Dear Senator Mitchell and Messrs. Clarke and Scheeler:

We, the City of San Bruno, the City and County of San Francisco, The Utility Reform Network, and the California Public Utilities Commission's (CPUC) Division of Ratepayer Advocates, write to express our grave concern regarding DLA Piper attorneys serving as mediators for negotiations related to the San Bruno Explosion-Related Proceedings.¹

As you know, last Thursday, in order to gather information and not for purposes of accepting the CPUC management's unilateral designation of DLA Piper as mediator, we met with Messrs. Clarke and Scheeler to discuss issues related to DLA Piper's role in any potential mediation regarding these proceedings. Those issues included potential conflicts of interest that may call into question DLA Piper's ability to "maintain impartiality toward all participants in the mediation process at all times."²

While we have great respect for you, Senator Mitchell, and for the DLA Piper firm, we were deeply concerned to learn that DLA Piper represents a large insurance carrier that potentially may be required to pay costs incurred by Pacific Gas and Electric Company (PG&E) related to the San Bruno explosion. As the outcome of the four CPUC proceedings could affect PG&E's insurance claims arising from civil litigation, this representation is incompatible with DLA Piper's duty of impartiality as mediator in this matter.

¹ Order Instituting Rulemaking 11-02-019; Order Instituting Investigation 12-01-007; Order Instituting Investigation 11-02-016; Order Instituting Investigation 11-11-009.

² Cal. Rule of Court § 3.855(a).

At last Thursday's meeting, we also learned that DLA Piper attorneys have already received confidential information regarding the negotiation positions of the parties. Your receipt of such highly sensitive confidential information was a breach of the Confidentiality Agreement signed by each of the negotiating parties, including the four undersigned parties, at the start of the negotiations. That Agreement specifically provided that none of the contents of the settlement discussions was to be disclosed to any person outside the negotiations "without the consent of all Parties."³ DLA Piper attorneys are not parties to the negotiation and the four undersigned parties have not consented to allow you to receive confidential settlement information. Consequently, you should neither have been offered, nor should you have accepted,⁴ any information from any party regarding the negotiation positions of the parties. Furthermore, *until we give our consent, you should not accept any additional information from any party that relates to any of the confidential settlement discussions and communications that have occurred to date.*

DLA Piper's representation of an insurance carrier with an interest in the outcome of litigation related to the San Bruno explosion and your receipt of sensitive confidential information in violation of the Confidentiality Agreement raise serious questions about your ability to mediate these negotiations with the unquestioned impartiality that these matters require. As you know, there is extraordinary public interest in these cases, and there has been significant editorial outcry about the fact that you were imposed as mediators without any of the undersigned parties even being consulted.⁵

Senator Mitchell, you have had great success as a mediator and understand better than anyone that the process has the best chance for success if all parties agree in advance both to mediation itself and to the mediator. Speaking plainly, the CPUC management has completely botched any chance of securing public confidence in a DLA Piper mediation by unilaterally imposing DLA Piper as mediator without even

³ Confidentiality Agreement among the City of San Bruno, the City and County of San Francisco, The Utility Reform Network, CPUC Division of Ratepayer Advocates, CPUC Consumer Protection and Safety Division, and PG&E, paragraph 3 (emphasis added).

⁴ We recognize that, had you known about the Confidentiality Agreement, you likely would not have accepted any confidential information without the consent of all parties. This should lead you to ask why you were never informed about such an important agreement.

⁵ See attached editorials: "PUC Shouldn't Need a Mediator to Do Its Job," *Mercury News*, 10/18/12; "California PUC Dodges Its Job," *SF Chronicle*, 10/19/2012; "PG&E Hearings Can't Be Hidden Behind Mediation," *SF Examiner*, 10/21/12.

Mercury News editorial: PUC shouldn't need a mediator to do its job

Mercury News Editorial

Posted: 10/18/2012 04:23:51 PM PDT

Updated: 10/18/2012 06:49:24 PM PDT

Garbage in, garbage out. That's what Californians have come to expect from the state Public Utilities Commission's utter failure to regulate PG&E. This week just brought further confirmation.

With perhaps as much as \$5 billion in ratepayer money at stake, the PUC, in an outrageous backroom deal, first ended public hearings and then announced it had appointed former U.S. Sen. George Mitchell to mediate private talks over how much the utility should pay toward preventing another San Bruno tragedy. Guess all that public scrutiny was getting a little uncomfortable.

We've said it before, we'll say it again: PUC board President Michael Peevey has to go. His cozy relationship with PG&E puts the PUC in the untenable position of being unable to do its job.

The PUC announced the Mitchell appointment Monday. Handled differently, this might have been OK. Mitchell is widely respected for his negotiating skills. But get this: Mitchell's firm previously worked for Southern California Edison, the utility Peevey once headed.

That roar you hear is the last remnant of trust in the PUC going up in flames, like the several city blocks of San Bruno that were incinerated, along with eight people, in 2010 when a PG&E pipeline exploded.

A blue-ribbon panel last year blistered both PG&E and the PUC's culture and practices, demanding that they "confront and change elements of their respective cultures to assure the citizens of California that public safety is the foremost priority." Another wasted report sitting on a shelf, apparently.

Assemblyman Jerry Hill, whose district includes San Bruno, and Mark Toney, the executive director of The Utility Reform Network (TURN), are outraged. So is San Bruno Mayor Jim Ruane. As an injured party in the conflict, San Bruno should have had a say in whether to hire a mediator and, if so, whom. Why not, for example, someone like former state Sen. Byron Sher, the longtime Stanford law professor whose expertise on energy issues is widely respected? There are any number of similarly qualified Northern Californians.

The need for public trust in these proceedings is paramount. PG&E's attorneys are arguing that its captive customers should pay for 85 percent of the safety work that's now needed because the utility skimmed on it earlier to drive up profits. It's the PUC's job to decide how the whopping \$5 billion bill will be split between shareholders and ratepayers. Getting Mitchell to take the fall won't work.

The PUC should reopen hearings, with all the involved parties, to decide in public whether a mediator is needed and if so, who it should be.

And, as we've been saying for the past 15 months, Gov. Jerry Brown really needs to get Peevey's resignation.

California PUC dodges its job

Updated 7:19 p.m., Friday, October 19, 2012



Rene Morales and Assemblyman Jerry Hill after speaking at the Public Utilities Commission meeting.

Photo: Lea Suzuki, The Chronicle / SF

State regulators have found a way to make the San Bruno pipeline nightmare even worse. After halting public comment on looming fines, the [Public Utilities Commission](#) wants to farm the dispute out to a private mediator - a decision that's left the public in the lurch.

This move essentially caps public input and awareness of an important process. It relieves the state PUC of its direct responsibility to set fines that could range beyond \$2 billion. It underscores once again the agency's inept handling of the pipeline explosion.

The decision to go to a mediator comes with qualifiers. The mediator will be a giant, worldwide law firm, [DLA Piper](#), whose chairman emeritus is former Sen. [George Mitchell](#). His public service is exemplary: 15 years in the Senate, four years fashioning peace in Northern Ireland, a report on steroids in baseball that led to tougher testing, and two years as President [Obama's](#) Mideast peace envoy.

It's a glittering resume, but [Mitchell's](#) remarkable accomplishments aren't the point. By taking the unusual course of hiring a mediator, the PUC is admitting it doesn't have the credibility to handle the job itself. It's giving up on its basic duty to sanction dangerous pipeline operations.

There are other problems. The hiring of Mitchell's firm was done with the assent of Pacific Gas and Electric Co., which negligently operated the pipeline. But other parties such as the cities of San Bruno and San Francisco and consumer watchdogs were left out. It was a one-sided decision that ignored the very people harmed by the explosion. In addition DLA Piper has worked on other PUC-regulated utilities, links that cast doubt on its independence.

This decision process makes it clear what has happened. The PUC, with its credibility already in shambles from its inept oversight of the pipeline, rushed to find a prominent outsider to shoulder the burden. A code of silence was invoked to contain word of the decision until it took place. The state agency can now sit back, bask in the glow of distinguished statesman, and let the outside mediator do the heavy lifting.

It's been nearly two years since the disaster killed eight and destroyed 38 homes in a San Bruno neighborhood that believed an underground gas line was operated safely and overseen by a dutiful state agency.

Clearly it's time to end the inquiry and move forward. Earlier this month the PUC shut down public hearings and moved to closed-door negotiations due to run until Nov. 1. That decision was bad enough since it closed off outside observation.

At issue now are fines that may range from \$200 million to \$2.5 billion, a gulf that illustrates how far apart the many sides are. In addition, PG&E wants rate increases to pay for pipeline upgrades elsewhere in its network.

It's the PUC's job to take on this work and to make its decisions in public. It's doubly important to do this in a way that convinces a skeptical public that vigilant and fair-minded regulators are at work. The record shows that the agency is falling far short of its duty.

Read more: <http://www.sfgate.com/opinion/editorials/article/California-PUC-dodges-its-job-3965615.php#ixzz2A95DbzjH>



PG&E hearings can't be hidden behind mediation

By: [SF Examiner Editorial](#) | 10/21/12 8:20 PM

SF Examiner Editorial

Regulatory agencies established to watch over public utilities often become too close with the companies they oversee. The latest example of such cozy relations involves the ongoing investigations into the deadly San Bruno blast and the conduct of the power company behind that tragedy, PG&E.

On the evening of Sept. 9, 2010, a PG&E natural-gas transmission line exploded. The blast and subsequent conflagration killed eight people and destroyed dozens of homes. A blue-ribbon task force eventually blamed the utility for the blast, and the California Public Utilities Commission — the regulatory body that oversees such utilities — launched a series of investigative hearings into the blast, PG&E's record keeping and the way the company labels its gas lines.

Then the commission turned its back on the public and the idea of openness. First, its Consumer Protection Safety Division, in coordination with PG&E, asked judges to halt these public hearings. That request was granted by an administrative law judge Oct. 12. Then, a few days later, the CPUC announced that it had appointed former U.S. Sen. George Mitchell to mediate between PG&E and various other parties about potential fines against the utility.

In and of itself, the selection of the distinguished Mitchell could have been a decent choice, given that his negotiating skills include such monumental accomplishments as negotiating the peace treaty in Northern Ireland.

But the parties to these negotiations — including San Bruno, San Francisco and The Utility Reform Network — had no say in the mediator's appointment. And some of these parties have pointed out that Mitchell is the chairman of DLA Piper, a law firm that represents Southern California Edison, the Los Angeles-area power company and a company that CPUC President Michael Peevey once headed.

In a letter to the commission, San Bruno, San Francisco, The Utility Reform Network and the state's own Division of Ratepayer Advocates all have called for Mitchell to be removed as negotiator. We agree with their assessment.

While Mitchell's selection might well have been appropriate if handled in an above-board manner, it's hard to accomplish the goals of mediation if more than half the parties to the proceedings are not treated with respect.

It also is unclear why the CPUC's public hearings were halted in the first place, as the negotiations didn't appear to be deadlocked — a time when a mediator is typically called in. And consider that some of these hearings were designed to review the transparency of PG&E's record keeping and pipeline labeling. Conducting a hearing about openness behind closed doors is counterintuitive and wrongheaded.

What the public needs is for the commission to set aside its cozy relationship with PG&E and to investigate the San Bruno blast in a fair and transparent manner. If the commission continues to operate in this manner, perhaps the next hearing should occur in Sacramento and consider the performance of the agency itself. The people deserve a watchdog from the CPUC, but recent events suggest that too often they have a lapdog.

Read more at the San Francisco Examiner:

<http://www.sfexaminer.com/opinion/editorials/2012/10/pge-hearings-can-t-be-hidden-behind-mediation#ixzz2A95yOrcP>